University of Hawai‘i Law Review

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We strive to view issues pertinent to Hawai‘i through a broader global lens. We balance provocative articles on contemporary legal issues with practical articles that are in the vanguard of legal change in Hawai‘i and internationally, particularly on such topics as military law, sustainability, property law, and native rights.

Kūlia mākou e kilo i nā nīnau i pili iā Hawai‘i me ke kuana‘ike laulā. Ho‘okomo mākou i nā ‘atikala e ulu ai i ka hoi e pili ana i nā nīnau kū kānāwai o kēia wā a me nā ‘atikala waiwai e ho‘ololi ana i nā mea kū kānāwai ma Hawai‘i a ma nā ‘āina ‘ē, me ke kālele ‘ana i nā kumuhana like ‘ole e like me nā kānāwai pū‘ali koa, ka mālama ‘āina, nā kānāwai ona ‘āina, a nā pono o nā po‘e ‘ōiwi.

Translation by Pauahi Ho‘okano

University of Hawai‘i Law Review

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Preface

Suhyeon Burns and Sarah Anne Mau*

On March 10, 2023, the University of Hawai‘i Law Review hosted a Symposium entitled *Honoring Women in the Law: a Critical Inquiry Into Women's Rights in the Past, Present, and Future*. We were joined by an impressive group of scholars, distinguished jurists, attorneys, business and community leaders, and students, with over 100 guests in attendance.

This past year has brought unprecedented challenges for women's rights in the United States. Last summer, on June 24, 2022, we woke up to the disturbing news that the Supreme Court overturned *Roe v. Wade*.[1] This sent a shock throughout the nation, a decision that both "dismantled 50 years of legal protection,"[2] and "relegated the most intensely personal decision someone can make to the whims of politicians and ideologues — attacking the essential freedoms of millions of Americans[.]"[3]

It is for these reasons, among others – like having many female members on our board – that we ultimately selected this topic and chose to address this issue that impacts not only us, our law school, and our legal community, but an issue that impacts our entire nation. And, by somewhat of a coincidence, our Symposium took place a couple of days after International Women's Day (during Women's History Month) – a perfect opportunity to recognize and celebrate the significant contributions that women in law have made in a variety of fields.

There are many individuals and organizations who played an essential role in making this Symposium and Issue a success. First, we extend our deepest appreciation to each and every panelist[4] and moderator[5] for so generously giving their valuable time and expertise to engage in this critical

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* Editors-in-Chief, University of Hawai‘i Law Review, Volume 45 (2022-2023).

[1] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[2] Patty Housman, *Roe v Wade Overturned: What It Means, What's Next*, AM. UNIV. (Jun. 29, 2022), https://www.american.edu/cas/news/roe-v-wade-overturned-what-it-means-whats-next.cfm.

[3] @BarackObama, TWITTER (June 24, 2022, 4:26 AM), https://twitter.com/BarackObama/status/1540340642848690176?lang=en.

[4] Panel 1 (Women and Gender Minorities in Legal Practice): Professor Maxine Burkett, U.S. Attorney Clare Connors, Leinā‘ala Ley, Ann Teranishi, Mia Yamamoto; Panel 2 (Women in the State and Federal Judiciary): Judge Jeannette Castagnetti, Chief Judge Lisa Ginoza, Judge Susan Oki Mollway, Chief Justice Mark Recktenwald; Panel 3 (The Impact of *Dobbs v. Jackson Women's Health Organization* and Reproductive Rights in Hawai‘i): Kaliko‘onālani Fernandes, Wookie Kim, Nadine Ortega, Professor Carole Petersen; Panel 4 (The Legacy of Patsy T. Mink and Title IX): Representative Linda Ichiyama, Judge Leslie Kobayashi, Justice Sabrina McKenna, Marilyn Moniz.

[5] Courtney Choy (Panel 1), Professor Miyoko Pettit-Toledo (Panel 2), and Keoni Williams (Panel 4). (Panel 3 was moderated by Suhyeon Burns and Sarah Anne Mau.)

conversation, several of whom also contributed written pieces to this Symposium Issue.[6] We are also very grateful for our generous sponsors[7] for making it possible to host Law Review's first in-person reception in several years, and for making it a memorable one.

We also express our gratitude to: our wonderful advisors Associate Dean Nicholas Mirkay and Professor Justin Levinson, for their continued support and institutional insights; Dean Camille Nelson, for her visionary leadership and support of Volume 45's many new initiatives; Professor Miyoko Pettit-Toledo, for her invaluable guidance with Symposium planning; Julie Suenaga, for her administrative assistance and outstanding support behind the scenes; and finally, our editorial board and staff writers who worked tirelessly to ensure the quality of our journal – it is everyone's collective efforts that made this all possible.

As a law review, it is part of our mission to engage with – and to strive to contribute to – the national discourse on emerging legal issues. It was our intention that this Symposium spur a critical conversation about the role of women in law, similar to how we hope that this Issue will spark a conversation about the evolving issues surrounding the shifting legal landscape surrounding civil rights. Thank you for being a part of this ongoing conversation. Please enjoy this special Issue.

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[6] *See* Carole J. Petersen, *Women's Right to Equality and Reproductive Autonomy: The Impact of* Dobbs v. Jackson Women's Health Organization, 45 U. HAW. L. REV. 305 (2023); Miyoko T. Pettit-Toledo, *Collective Memory and Intersectional Identities: Healing Unique Sexual Violence Harms Against Women of Color Past, Present and Future*, 45 U. HAW. L. REV. 346 (2023); Sabrina Shizue McKenna, *Transgender Women in College Athletics: The Next Era of Title IX*, 45 U. HAW. L. REV. 403 (2023).

[7] The Jon Van Dyke Institute (and its founders Professor Sherry Broder and former Associate Dean Carol Mon Lee), University of Hawai'i at Mānoa's Student Activity and Program Fee Board, and the Office of Student Equity, Excellence and Diversity.

Welcome Remarks

Camille A. Nelson*

Good morning!

On behalf of the University of Hawai‘i William S. Richardson School of Law, it is my great pleasure to welcome you. I recognize that everyone is very busy, so we are delighted that you are prioritizing the very important conversations that will be central to our Law Review's Spring Symposium, entitled "*Honoring Women in the Law and a Critical Inquiry Into Women's Rights in the Past, Present, and Future*."

I want to extend a heartfelt welcome to the members of the audience. Practitioners, scholars, students, faculty, staff, members of the local legal community, and those Zoom-ing in from near and far: thank you for joining us and being present for this timely and relevant event.

This program is exceptional! What will be discussed during this symposium remains critical to the rights of many people, most notably the rights of women and gender minorities, and the many members of our communities who also navigate intersectional identities. *Honoring Women in the Law and a Critical Inquiry Into Women's Rights in the Past, Present, and Future* is aptly titled and seeks to honor where we are coming from, as well as to anticipate and navigate where we *are* – or *ought* to be – headed.

For instance, last summer, the United States Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*[1] sent shockwaves throughout the nation, and internationally, when it overturned *Roe v. Wade*,[2] dismantling "50 years of legal protection and pav[ing] the way for individual states to curtail or outright ban abortion rights."[3]

It was this decision, and its lingering and anticipated impacts, that inspired the University of Hawai‘i Law Review to prepare today's program. The Law Review editors and leaders have worked hard and with great forethought. I

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* Dean and Professor of Law, University of Hawai‘i at Mānoa, William S. Richardson School of Law. I wish to thank Volume 45 of the University of Hawai‘i Law Review for the opportunity to give these remarks at the Law Review's Spring Symposium, entitled: "*Honoring Women in the Law and a Critical Inquiry Into Women's Rights in the Past, Present, and Future*." The symposium was timely, relevant, and inspiring.

[1] 142 S.Ct. 2228, 2234 (2022).

[2] 410 U.S. 113 (1973).

[3] Patty Housman, *Roe v Wade Overturned: What It Means, What's Next*, AM. UNIV. (Jun. 29, 2022), https://www.american.edu/cas/news/roe-v-wade-overturned-what-it-means-whats-next.cfm.

am grateful for their comprehensive and thoughtful planning which has resulted in what I know will be an exceptional program.

There is an ongoing need for students to be involved in the transformative work that is the work of inclusive social justice. It is important that we work across differences and disagreements in ways that advance and enhance positive societal change, including by engaging with academic scholarship and discourse as we are doing here today. It bodes well for our collective futures that our students have so professionally and positively chosen to tackle some of the most challenging and important issues of this era.

I am inspired by their commitment, their bravery, and their light. I know you will join me in thanking them for gathering us here today.

I am grateful for your dedication to the issues at the core of today's symposium. I know that you will have an engaging and inspiring day.

Thank you and have a good day.

I will now turn the microphone over to our wonderful students.

Diversity, Equity, and Inclusion in the Hawai‘i State Judiciary

Chief Justice Mark E. Recktenwald, Mikaela L. Ediger, & Lisa T.K.O. Lum*

Good morning and aloha. Thank you all for being here today, and mahalo to Law Review editors-in-chief, Suhyeon Burns and Sarah Anne Mau, for organizing this event. Thanks also to Professor Miyoko Pettit-Toledo for inviting me to speak today. I am honored to discuss the topic of women in the state and federal judiciary with Judges Mollway, Ginoza, and Castagnetti.

Women face unique challenges navigating the legal profession, where they have historically been under-represented. Each of my co-panelists has overcome these challenges, and each has taken a unique pathway on the way to the state and federal bench. It's exciting to hear their perspectives and learn how we can create more inclusive spaces in our profession and within the court system. I would also like to acknowledge my colleague, Justice Paula Nakayama, who will receive a tribute in the Law Review's special symposium issue.[1] Her final oral argument as an associate justice just took place. When Justice Nakayama was appointed in 1993, she was only the second woman to serve on our court, the first woman of color, and the first woman to be appointed in 26 years. In her three decades of jurisprudence, she authored over two hundred majority opinions and over one hundred separate opinions. Her time on the court will leave an indelible legacy.

While I don't have the lived experience of the remarkable women on this panel, I hope to contribute to today's discussion by providing some context about the Hawai‘i Judiciary's efforts to ensure diversity, equity, and inclusion ("DEI") in our courts. I'll talk about our history, where we are today, and our current initiatives to make DEI a core part of our identity as an institution. If we remain committed to DEI work, I am confident that we can make our judiciary more fair, equitable, and representative.

DEI is fundamental to the fair administration of justice and to the legal profession as a whole. National statistics show that women are under-

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* These remarks were given by Chief Justice Mark E. Recktenwald of the Hawai‘i Supreme Court as part of a panel discussion at the University of Hawai‘i Law Review's Symposium, *Honoring Women in the Law and a Critical Inquiry Into Women's Rights in the Past, Present, and Future*, held on Friday, March 10, 2023.

[1] Isaac H. Moriwake, *Hawai‘i's Lady of Justice: The Trail-Blazing and Record-Setting Judicial Career of Justice Paula A. Nakayama*, 45 U. HAW. L. REV. 272 (2023).

represented at the leadership and decision-making levels of the legal profession. Women make up 55% of law students, and 40% of attorneys in law firms.[2] But when it comes to the top echelon of legal jobs, the proportion of women drops sharply. Nationwide, *less than 25%* of equity partners are women,[3] and only 35% of general counsels in Fortune 1000 companies are women.[4] The judiciary in the United States fares a bit better, but is still far from equitable. Nationwide, *only 34% of state court judges*,[5] and *37% of active federal court judges*, are women.[6]

Women face obstacles that may cause them to hold back or to drop out of the legal workforce. Sexual harassment, discrimination, unyielding family leave policies, and implicit gender biases disproportionately impact women and gender minorities. Hawaiʻi is not immune to these challenges. In the wake of the #MeToo movement, Hawaiʻi Women Lawyers conducted a survey of its members, asking them about their experiences of sexual harassment in their careers.[7] Sixty percent of the women attorneys surveyed reported being sexually harassed at some time during their career.[8] According to the ABA, harassment is a major factor causing talented women lawyers to leave the profession.[9]

The under-representation of women at the top levels of courts, companies, and firms has far-reaching effects. If young women in the profession do not see other women in these types of jobs, they are more likely to self-select out of competition for these roles. And, an organization is only as inclusive as

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[2] *Women in the Legal Profession*, AM. BAR ASS'N *https://www.abalegalprofile.com/women.php#:~:text=Women%20make%20up%20a%20majority,male%20students%20was%20in%202014* (last visited Apr. 14, 2023); Jacqueline Bell, *These Firms Have the Most Women in Equity Partnerships*, LAW360 (Aug. 23, 2022, 11:02 AM), https://www.law360.com/articles/1517077.

[3] Bell, *supra* note 3.

[4] Hugo Guzman, *Women, Minority GCs Saw Sharp Increases in Fortune 1000 Representation in 2021*, ALM (Oct. 19, 2022, 9:01 AM), https://www.law.com/corpcounsel/2022/10/19/women-minority-gcs-saw-sharp-increases-in-fortune-1000-representation-in-2021/.

[5] *2023 US State Court Women Judges*, NAT'L ASS'N OF WOMEN JUDGES, https://www.nawj.org/statistics/2023-us-state-court-women-judges (last visited Apr. 14, 2023).

[6] Candice Norwood & Jasmine Mithani, *Two Years In, Biden Has Prioritized Nominating Women of Color as Judges*, THE 19TH (Jan. 26, 2023, 11:10 AM), https://19thnews.org/2023/01/biden-reshaping-federal-judiciary-appointments/.

[7] Kimi Ide-Foster & Michi Momose, *Sexual Harassment in the Hawaii Legal Community*, 22 HAW. BAR J. 16 (2018) at 16–17.

[8] *Id.* at 17.

[9] *Id.* at 19.

its leadership envisions it to be. If women and other diverse individuals are not among the leadership, that organization is less likely to adopt policies that account for the needs of diverse individuals and that promote equity among different groups.

Throughout the history of our judiciary, a number of extraordinary women fought their way through headwinds to serve as the first women judges of our state. According to the judiciary archives, the first woman judge was Queen Kekāuluohi, who served as Kuhina Nui under Kamehameha III and sat on the high court with him.[10] The Kuhina Nui position is unique to Hawai'i and held equal authority to the king in all matters of governance, including dispensation of justice, negotiation of treaties, and land distribution. From 1892 to 1907, Emma Ka'ilikapuolono Metcalf Beckley Nakuina served as Commissioner of Private Ways and Water Rights for the District of Kona, Hawai'i.[11] Although she did the work of a judge, she never held the formal title. In the Territory of Hawai'i, Carrick Hume Buck was appointed to the Fifth Circuit Court on Kaua'i in 1934 by President Franklin D. Roosevelt and served until 1958.[12] A true trailblazer, Rhoda Valentine Lewis, was appointed the first female associate justice of the Supreme Court of Hawai'i in 1959 and served until 1967.[13] From 1967 to 1970, our bench was comprised entirely of men. It is sobering to think that was only 53 years ago. That period ended when Judge Betty Vitousek was appointed to the Family Court of the First Circuit in 1970. As Judge Mollway and Valerie Smith Boyd noted in their biographical account of Judge Vitousek, her trademarks were "compassion and courtesy," and she applied those principles both in deciding difficult family court cases and in working to improve the operation of the family court.[14] Marie Milks joined Judge Vitousek in 1980, becoming a district court judge.[15] She would later serve two ten-year terms as a circuit court judge before retiring in 2004. In the 1990s, Governor Waihe'e made a concerted effort to appoint women judges. Riki May Amano, Karen Blondin,

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[10] *Kekāuluohi*, STATE OF HAW. DEP'T OF ACCT. & GEN. SERVS., https://ags.hawaii.gov/archives/online-exhibitions/centennial-exhibit/kekauluohi/ (last visited Apr. 10, 2023).

[11] Agnes C. Conrad, *Other Women in the Law Before Statehood*, *in* CALLED FROM WITHIN: EARLY WOMEN LAWYERS OF HAWAI'I, 323, 330–31 (Mari Matsuda ed., 1992).

[12] *See* Margaret Silverman Ehkle, *Carrick Hume Buck*, *in* CALLED FROM WITHIN: EARLY WOMEN LAWYERS OF HAWAI'I, 52, 59, 71 (Mari Matsuda ed., 1992).

[13] Judith R. Hughes, *Rhoda Lewis*, *in* CALLED FROM WITHIN: EARLY WOMEN LAWYERS OF HAWAI'I, 105, 108, 123 (Mari Matsuda ed., 1992).

[14] Susan Oki Mollway & Valerie Smith Boyd, *Betty Morrison Vitousek*, *in* CALLED FROM WITHIN: EARLY WOMEN LAWYERS OF HAWAI'I, 191, 191 (Mari Matsuda ed., 1992).

[15] *HWL History*, HAW. WOMEN LAWS., http://www.hawaiiwomenlawyers.org/history.html (last visited Apr. 14, 2023).

Virginia Lea Crandall, Eden Elizabeth Hifo, Colleen Hirai, Victoria Marks, Gail Nakatani, Sandra Simms, Frances Wong, Corinne Watanabe, and my colleague Paula Nakayama, all joined our bench in the 1990s. We owe a great debt to all of these trailblazing women, whose courage and leadership made our judiciary more representative and more fair.

The history of our judiciary makes it clear how critical DEI is to the fair administration of justice. Since the 1990s, we have continued working to ensure our judicial selection process is fair and results in qualified judges who also reflect the diversity of the communities they serve. I am proud to share that, thanks to the judiciary's efforts over the last five decades, we have come a long way from our all-male bench in 1970. Currently, 49% of our full-time judges are women. This places the Hawaiʻi State Judiciary among the top state courts for gender representativeness among judges and justices, and well above the national average (34%).[16]

The Hawaiʻi State Judiciary now strives to integrate DEI into everything we do as a fundamental core value. A focus on DEI adds voices that may not have otherwise been heard, enhances debate, improves decision-making, and enriches our culture. DEI efforts can also have positive effects on court operations by increasing access to justice and minimizing disproportionate impacts to court users. We still have a long way to go, but we have implemented many significant initiatives to ensure that women and other marginalized groups are not only represented within our judiciary, but welcomed – so that they feel a true sense of belonging within our institution. We aim to create a culture of inclusivity throughout our state courts that exemplifies the diversity of Hawaiʻi while working to eliminate systemic inequities within the justice system.

I would like to highlight a few areas where we are actively incorporating DEI principles into judiciary operations and culture: our merit-based judicial selection process, mandatory implicit bias training programs, our DEI Working Group, and our emphasis on ʻōlelo Hawaiʻi.

Here in Hawaiʻi, our merit-based judicial selection system has been at the forefront of the effort to ensure that we have a strong, independent, and diverse judiciary.[17] Among other things, merit-based systems are superior for developing a more diverse judiciary. Data from the American Judicature Society has indicated that merit selection and direct appointment systems do

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[16] *See 2023 US State Court Women Judges*, *supra* note 6.

[17] *See Report of the AJS Special Committee on Judicial Independence and Accountability II February 21, 2017*, 21 HAW. BAR J. 13, 13 (2017) ("The Special Committee finds that the current system of judicial selection and retention has promoted the fair and impartial administration of justice through an independent judiciary.").

a better job of securing more gender and racial diversity in state appellate-level judgeships than competitive elections.[18] I strongly believe that diversity not only builds trust and confidence in the judiciary, it also leads to more informed decision-making.

One important aspect of our system in Hawai'i is that our constitution gives me, as chief justice, the responsibility to appoint district and family court judges.[19] I take that responsibility very seriously, and carefully review the applicants who are recommended to me by the Judicial Selection Commission (JSC). I solicit public comment, and interview each applicant at length. There is no one path to becoming a judge. We are looking for people who can understand the law, apply it, and explain it. People who will work hard and prepare thoroughly; who have integrity, good judgment, and compassion.

Trial experience is helpful for handling a high-pressure courtroom and a high volume of cases, but it is not the only path. For example, I have appointed people who had practiced primarily in administrative proceedings, mediation, or other non-trial forums.

Many of the people whom I appoint have demonstrated their sincere commitment to public service by volunteering at legal services providers or at self-help centers, or working pro bono throughout their careers. I welcome all applications, and evaluate each holistically. As of the date of this Symposium, I have appointed 31 women and 26 men to the bench in our district and district family courts.

I would like to thank the key players in our merit-based system: the JSC, and the Senate which votes to confirm the nominees selected by me and the Governor. But our judicial selection system is only part of the story. Transparency is also critical. Gathering and sharing information on the demographics of our judiciary keeps us accountable to our vision of a bench that truly represents the rich diversity of our state. We have made judicial demographic information available on our website,[20] and we have committed to updating these statistics on a regular basis so that any interested person can access them.[21] This transparency is part of our commitment to integrate DEI

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[18] *See* Malia Reddick et al., *Racial and Gender Diversity on State Courts*, 48 JUDGES' J. 28, 30–32 (2009).

[19] *See* HAW. CONST. art. VI, § 3.

[20] *See Diversity in the Judiciary*, HAW. STATE. JUDICIARY (May 25, 2022), https://www.courts.state.hi.us/wp-content/uploads/2022/06/Judicial-Diversity-Data.pdf.

[21] As one observer has noted when assessing the priorities of CEOs: "You are what you measure." *See* Dan Ariely, *You Are What You Measure*, HARV. BUS. REV. (June 2010), https://hbr.org/2010/06/column-you-are-what-you-measure. We have found that the process of collecting these statistics has encouraged us to think more critically about our

into our identity as an organization. I also regularly reach out to specialty bar groups in our community to learn about their experiences with the courts, ensure diverse perspectives are represented, and demystify the judicial selection process. One sign of the progress we have made: of the applicants for the two upcoming associate justice vacancies on the Hawaiʻi Supreme Court, more than half are women (9 of 13).[22] The same is true of the applicants for the vacant ICA associate judge position (5 of 8).[23]

In addition to our commitment to DEI, we encourage and support the outstanding work of key stakeholders. The William S. Richardson School of Law was recently recognized as one of the most diverse law schools in the nation, receiving an A+ rating in both 2020 and 2022.[24] Congratulations to Dean Nelson and the entire law school community on this accomplishment. I am so grateful for her commitment to developing diverse pipelines into the profession. These meaningful changes upstream will be impactful and shape the future of a more inclusive legal workforce. Hawaiʻi Women Lawyers is working on launching a new "judicial pipeline" program this year, with the overall goal of increasing the number of qualified female lawyers who apply for judgeships in Hawaiʻi. The program would pair potential applicants with an experienced mentor who can provide guidance on the judicial application

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efforts. We also learned that several other states, including New York and California, collect and publish demographic information about their judges. We believe that gathering this data on a regular basis will quantify our progress over time and motivate us to continually improve. To that end, since we launched our first judicial demographic survey in the fall of 2021, we have refined our survey instrument further to be even more inclusive. The revised survey questions and format were customized to meet the needs of our state and incorporate recommended best practices in an evolving area. *See* Yuvraj Joshi, DIVERSITY COUNTS: WHY STATES SHOULD MEASURE THE DIVERSITY OF THEIR JUDGES AND HOW THEY CAN DO IT (Lambda Legal & The American Constitution Society eds., 2017) (mapping out best practices for collection and release of judicial diversity data); MEASURING SEX, GENDER IDENTITY, AND SEXUAL ORIENTATION (Nancy Bates, Marshall Chin & Tara Becker eds., 2022) (examining the measurement of sex, gender identity, and sexual orientation and making recommendations for measures that can be used in surveys and research in a variety of settings).

[22] *See Request for Public Comments - Applicants for Two (2) Associate Justice, Supreme Court, State of Hawaiʻi (Release Date: 02/10/2023)*, HAW. STATE. JUDICIARY (Feb. 10, 2023), https://www.courts.state.hi.us/jsc/2023/02/request-for-public-comments-applicants-for-two-2-associate-justice-supreme-court-state-of-hawaii-release-date-02-10-2023.

[23] *See Request for Public Comments - Applicants for Associate Judge, Intermediate Court of Appeals, State of Hawaiʻi (Release Date: 11/04/2022)*, HAW. STATE. JUDICIARY (Nov. 4, 2022), https://www.courts.state.hi.us/uncategorized/2022/11/request-for-public-comments-applicants-for-associate-judge-intermediate-court-of-appeals-state-of-hawaii-release-date-11-04-2022.

[24] Julia Brunette, *Most Diverse Law Schools*, PRELAW, Winter 2023, at 26.

process, pre- and post-application planning, and interviews. For years, many of our women judges have served as informal mentors for other women seeking to join the bench. Justice Sabrina McKenna has been a great advocate and supporter for women who are considering applying for judicial vacancies, as was the late Judge Darolyn Lendio Heim. Mentorship programs can help women navigate the judicial selection process and prevent them from self-selecting out of career opportunities because they feel underqualified or do not know anyone in those types of careers. Though this initiative is still in the planning stages, we are wholeheartedly in support and look forward to seeing how it will develop.

We also have initiatives geared toward mitigating the effects of implicit bias against women and other groups. Implicit bias training is a helpful tool in counteracting social and cultural messages that may lead us to unconsciously associate negative traits with particular groups. The judiciary requires *all* of our employees and judges to complete implicit bias training every two years.

We are also confronting the systemic bias in our justice system. In the wake of George Floyd's murder, we held a racial equity webinar series throughout 2021 (sponsored by the Committee on Equality and Access to the Courts, the Judiciary History Center, and the Hawai'i State Bar Association's Civic Education Committee).[25] Over five hundred people participated in these webinars which addressed topics ranging from "Black Lives Matter and the Hawai'i Experience" to "Civil Rights and Access to Justice." We continue to develop strategies to support vibrant discussion and action to address systemic injustice.

We recognize that the work of cultivating DEI in our judiciary is never really done. We need to actively monitor the impact of our own initiatives and incorporate new ideas and practices that prove successful in other contexts. To that end, we created a DEI Working Group, a truly grass-roots effort comprised of employees from across the state. The DEI Working Group has been working together to facilitate active discussion surrounding DEI, and provide educational opportunities about relevant issues to our staff and judges. I am deeply grateful to the founding members of this working group, including Ian Tapu and Jennifer Woo, for their work generating momentum for DEI initiatives. Training topics have included making spaces more inclusive for under-represented sexual and gender identities,

[25] *See* Anita Horschneider, *Hawaii Judiciary Launches Virtual Series on Racial Inequity* (Jan. 15 2021), https://www.civilbeat.org/2021/01/hawaii-judiciary-launches-virtual-series-on-racial-inequity/.

Micronesian culture, microaggressions, and most recently intergenerational understanding in the workplace.

We have also made significant progress in supporting the use of ʻōlelo Hawaiʻi in our courts. After an incident in 2019 in which a party to the case was not able to communicate with the court in ʻōlelo Hawaiʻi, we adopted a policy that a Hawaiian language interpreter would be provided whenever reasonably possible. Our Judiciary History Center subsequently developed Hawaiian language training for judiciary employees (500 have participated), and recently the Legislature funded a Hawaiian language coordinator for the judiciary. We are proud to have Johanna Chock-Tam in this role. We are committed to ensuring that ʻōlelo Hawaiʻi thrives in the judiciary, as a means to honor the language's status as an official language of the state and to provide ʻōlelo Hawaiʻi speakers the vehicle of their language to express themselves in ways that English does not.

You may ask: what does having a Hawaiian language interpreter, or sponsoring webinars on racial injustice, have to do with gender equity? There are two connections that are most relevant. The first is that women of color face particularly high barriers in the legal profession, so anything we can do to focus attention on these obstacles and find ways to eliminate them makes a difference. And second, these initiatives reflect the depth of our commitment to ensuring diversity, equity, and inclusion throughout our organization. If women see us walk the walk time and again, even in contexts that may not seem directly relevant to them, it builds trust and credibility. It may encourage them to apply for judicial positions and build on the legacy of the accomplished women on this panel.

In conclusion, thank you for the opportunity to reflect on women in the Hawaiʻi State Judiciary and on our DEI initiatives. This is difficult work, but it is necessary in order to make sure that women are equitably treated in our courts and in our communities. If we commit to integrating DEI principles into our very identity as an organization, we can ensure our judiciary reflects the vibrant diversity of our community. We will then be a stronger organization, and even more capable of fulfilling our mission of providing justice for all.

The Lady of Justice of Hawai‘i: The Trail-Blazing and Record-Setting Judicial Career of Justice Paula A. Nakayama

Isaac H. Moriwake*

I. INTRODUCTION

A symposium and special law review edition on women and the law in Hawai‘i would not be complete without a comment on Justice Paula A. Nakayama, who is retiring this year after serving thirty years on the Hawai‘i Supreme Court. The question and challenge, though, is how to do "justice" to her career within the available time and page limits. How do you survey a three-decade body of work, spanning hundreds of opinions across every field of law in the state? How do you summarize her significance in the history of the law and the highest court of Hawai‘i?

Proper treatment of this subject deserves much more in-depth analysis than this single comment can cover, along with more time to absorb and appreciate the full historical arc than this early snapshot can capture. But for now, the best way I can come up with to encapsulate Justice Nakayama's unique judicial career is an analogy to baseball Hall of Famers. This analogy may seem quaint or obscure to some, although Justice Nakayama may be able to appreciate it given our shared interest in "America's pastime."

In my fan-level estimation, baseball's Hall of Fame includes three general categories of legendary players and careers. Most Hall members stand out for the longevity of their careers and sheer volume of their statistical records, some of which may never be broken. Hank Aaron, who hit a record number of home runs over a long 23-season career, and Nolan Ryan, who rang up a record number of strikeouts over a record 27-year career, are foremost examples.[1] Other members may not have had as lengthy careers, but reached

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Justice Nakayama and her judicial assistant Lois Choy helped immensely in coming up with an informal list of memorable cases, which initially focused the field and opened a way

a peak level of excellence and iconic greatness. Sandy Koufax, the ace pitcher for the Dodgers in the ‘60s, and Kirby Puckett, the cornerstone of the Twins in the late ‘80s and early ‘90s, are most often cited as examples in this vein. Then, among all these legends, a few Hall of Famers rise above as pioneers and even symbols for the sport and beyond. Babe Ruth. Jackie Robinson. Roberto Clemente. And soon Ichirō (a shoo-in when eligible in 2025, and also one of Justice Nakayama's favorite players).

Justice Nakayama includes all these elements in a single, and singular, judicial career. Her thirty years on the Hawai‘i Supreme Court is an all-time record that may never be matched. Her volume of output over those years also stands among the most prolific in the court's history. By an unofficial count via Westlaw searches, her body of work during that time includes 217 reported decisions and over 100 dissents and concurrences. She has authored three of the fifteen most-cited cases in Hawai‘i.[2]

Justice Nakayama also reached peak heights of accomplishment in producing historic and iconic judicial precedents defining the law of Hawai‘i and upholding the role of Hawai‘i's courts. While these landmark cases span many fields, she left her most influential and indelible mark on Hawai‘i water law. The *Waiāhole* case,[3] in particular, is recognized nationally and beyond as a leading precedent on the public trust doctrine, the fundamental legal principle that natural resources are held and protected as a trust for present and future generations.[4]

Finally, Justice Nakayama is a pioneer not only in her judicial rulings, but also as a role model who led the way for more diverse representation on the judicial bench. She was only the second woman to sit on the Hawai‘i

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forward. Justice Nakayama also offered brief yet key feedback on an early draft and in several follow-up conversations. But the decisions on which cases and themes to highlight were all mine, without direction or dictation from Justice Nakayama. And of course any mistakes are all my own as well.

[1] *See Hank Aaron*, NATIONAL BASEBALL HALL OF FAME, https://baseballhall.org/hall-of-famers/aaron-hank; *Nolan Ryan*, NATIONAL BASEBALL HALL OF FAME, https://baseballhall.org/hall-of-famers/ryan-nolan (last visited Mar. 26, 2023). For career summaries of baseball Hall of Famers, *see* https://baseballhall.org; for complete career statistics, see https://www.baseball-reference.com.

[2] According to an unofficial count via Westlaw searches, Justice Nakayama's three most-cited cases are, in order: *Best Place, Waiāhole*, and *Kawamata Farms*—each of which are further discussed *infra in* Parts II.B, II.E, and II.C, respectively.

[3] *In re* Waiāhole Ditch Combined Contested Case Hr'g (*Waiāhole*), 94 Hawai‘i 97, 9 P.3d 409 (2000).

[4] *See* discussion *infra* Part II.E.

Supreme Court under statehood, and the first woman of color.[5] Nationwide, she was one of the first women of color, and the second Asian American woman, to be appointed to an American appellate court of last resort.[6]

Since ancient times, the Lady of Justice, a woman holding a scale and sword and sometimes wearing a blindfold, has stood as a symbol of the law. Yet only in the last several decades have women been accepted onto appellate courts in positions to determine and uphold the law. Justice Nakayama led the way in breaking that barrier for Hawai'i and the nation. Over her precedent- and record-setting judicial career, in all the ways described above, she has earned the recognition as "Hawai'i's Lady of Justice."

This comment will dare the attempt to do justice to this legacy. First, after a brief introductory background, it surveys a selection of Justice Nakayama's most significant precedential opinions, generally organized by chronology and subject matter.[7] Next, it reviews several of her notable dissents, as well as her role as a lead dissenter in the debate over the review of plain error on appeal.[8]

Finally, I take the liberty of summarizing some overall themes in Justice Nakayama's career and jurisprudence.[9] This synthesis includes highlighting her role as both a "trailblazer" and a "marathon runner" in the history of the Hawai'i Supreme Court. It concludes with gleaning three interrelated principles in her jurisprudence: (1) a mindset of pragmatism; (2) a faith in

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[5] Justice Rhoda Lewis was appointed to the Hawai'i Supreme Court in 1959 by Governor Quinn and served until her term expired in 1967. *See* Judith R. Hughes, *Rhoda Lewis*, *in* CALLED FROM WITHIN: EARLY WOMAN LAWYERS OF HAWAI'I 108, 123 (Mari Matsuda ed., 1992). Justice Nakayama was appointed in 1993, making her the second woman, and first woman of color, to sit on the court during statehood. *See* Lynda Arakawa, *Top Jurists Represent Diverse Backgrounds*, HONOLULU ADVERTISER (Nov. 23, 2003), http://the.honoluluadvertiser.com/article/2003/Nov/23/ln/ln09a.html.

The original Supreme Court established by the Kingdom of Hawai'i's first constitution in 1840 included a woman, Kekāuluohi, who sat on the court as kuhina nui (premier) along with King Kamehameha III, as well as four chiefs elected by the representative body. *See* Walter F. Frear, *The Evolution of the Hawaiian Judiciary*, 7 PAPERS OF THE HAWAIIAN HIST. SOC'Y 1, 7–9 (1894), https://evols.library.manoa.hawaii.edu/server/api/core/bitstreams/7c65c546-98d8-443f-bbb3-e0d7c661de1b/content; NATIVE HAWAIIAN LAW: A TREATISE 12 (Melody Kapilialoha MacKenzie et al. eds., 2015).

[6] *See* Walter J. Walsh, *Speaking Truth to Power: The Jurisprudence of Julia Cooper Mack*, 40 HOW. L.J. 291, 297–99 (1997). Justice Nakayama was the eighth woman of color to join an American court of last resort (including the District of Columbia Court of Appeals). *See id.* Justice Joyce L. Kennard, appointed to the California Supreme Court in 1989, was the first woman of Asian ancestry. *See id.* at 299.

[7] *See* discussion *infra* Part II.

[8] *See* discussion *infra* Part III.

[9] *See* discussion *infra* Part IV.

the legal process; and (3) a respect for the rule of law. My hope is that this comment will help illuminate Justice Nakayama's role as a pioneering role model for women in the law and an icon in the history of Hawai'i's highest court.

II. A LONG ROAD WITH MANY MILESTONES: JUSTICE NAKAYAMA'S PROMINENT DECISIONS

Through the course of her thirty-year career on the Hawai'i Supreme Court, Justice Nakayama heard close to 6,700 appeals and authored more than 200 reported decisions.[10] The following part begins with a brief background, then reviews about a dozen of Justice Nakayama's most significant decisions.

A. *Prelude to the Hawai'i Supreme Court, then a Big Entrance in* Baehr

Justice Nakayama was appointed to the Hawai'i Supreme Court in 1993 by Governor Waihe'e.[11] Previously in her career, she had served as a deputy prosecuting attorney in Honolulu, then joined the prominent plaintiffs' law firm of Shim, Tam and Kirimitsu, where she made partner.[12] She was then appointed as a trial judge at the circuit court in 1992, where she served for a year before being called to the supreme court.[13] When appointed three decades ago, Justice Nakayama was the second woman to sit on the state supreme court, and the first in twenty-six years.[14]

Just several weeks after she took office on April 22, 1993, Justice Nakayama wasted no time in making a mark on the court and the law. In the historic *Baehr* case on marriage equality, she joined Justice Levinson and Chief Justice Moon to form a three-justice majority in support of Justice Levinson's opinion that restrictions against same-sex marriage were

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[10] For total cases heard, *see* WESTLAW, https://1.next.westlaw.com/ (type "Cases heard by Nakayama, Paula A" into the search bar); for total reported decisions, *see id.* (type "AU(Nakayama)" into the search bar; then under "Filters" tab, click "Reported Status"; then click the checkbox for "Reported") (last visited Mar. 26, 2023). Her work on the court also included deciding countless motions during the many years she served as the justice responsible for handling procedural motions for the court. *See* Arakawa, *supra* note 5 (reporting Justice Nakayama's reputation as "a master of procedure").

[11] *See id.*

[12] Associate Justice Paula A. Nakayama, HAW. STATE JUDICIARY, https://www.courts.state.hi.us/courts/supreme/justices/associate_justice_paula_a_nakayama (last visited Mar. 26, 2023).

[13] *See id.*

[14] *See id.*; Arakawa, *supra* note 5.

presumptively unconstitutional.[15] The court had previously split in its ruling, with Levinson and Moon forming only a plurality, Intermediate Court of Appeals ("ICA") Chief Judge Burns concurring in the remand but maintaining that constitutional protections would apply only if sexual orientation was proven to be "biologically fated," and ICA Judge Heen and Justice Hayashi dissenting.[16] The State then moved for reconsideration, and Justice Nakayama, who replaced the retired Justice Hayashi, joined the plurality in denying reconsideration on May 27, 1993.[17] This turned *Baehr* into a majority decision and controlling law, fully placing the burden on the State to justify its discrimination against same-sex marriage under a strict scrutiny standard.

Justice Nakayama's swing vote in *Baehr* produced the nation's first court precedent protecting marriage equality.[18] The ruling sparked a political backlash that resulted in a state constitutional amendment overriding the supreme court's decision.[19] But it also inaugurated a broader legal movement that eventually led, twenty-two years later, to the U.S. Supreme Court recognizing the right to same-sex marriage in the *Obergefell v. Hodges* case—in which the Court cited *Baehr* as the first court decision in the historical timeline.[20]

B. *Insurance Law Foundations in* Best Place *and* Finley

One of Justice Nakayama's early signature decisions (also her most-cited case in Westlaw) came in 1996, in *Best Place, Inc. v. Penn America Insurance Co*.[21] The decision established, for the first time in Hawai'i, a tort cause of action against insurers for bad faith. It recognized a "legal duty, implied in a first- and third-party insurance contract,[22] that the insurer must

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[15] Baehr v. Lewin, 74 Haw. 530, 645–46, 852 P.2d 44, 74–75 (1993).

[16] *See id.* at 535, 852 P.2d at 48 (detailing the lineup of court members and their positions); *id.* at 586–87, 852 P.2d at 69–70 (Burns, J., concurring); *see also* Andrew Koppelman, *Why Discrimination Against Lesbians and Gays Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 204–07 (1994) (explaining the procedural twists in the appeal).

[17] *See Baehr*, 74 Haw. at 645, 852 P.2d at 74.

[18] *See* Michael D. Sant'Ambrogio & Sylvia A. Law, Baehr v. Lewin *and the Long Road to Marriage Equality*, 33 U. HAW. L. REV. 705, 712 (2011) ("This was the first time that any court, let alone the highest court of a state, held that a state must justify its reasons for denying marriage to same-sex couples. It was a watershed case.").

[19] *See id.* at 716–18.

[20] *See* 576 U.S. 644, 662 (2015) (citing *Baehr*, 74 Haw. 530, 852 P.2d 44).

[21] 82 Hawai'i 120, 920 P.2d 334 (1996).

[22] In "first-party" contracts, the insurance pays claims to the insured, whereas in "third-party" contracts, the insurer defends against third-party claims against the insured. *Id.* at 124 n.4, 920 P.2d at 338 n.4. While *Best Place* involved a first-party claim, the supreme court

act in good faith in dealing with its insured, and a breach of that duty of good faith gives rise to an independent tort cause of action."[23] An insurer breaches the duty whether or not it pays the claim, "when its conduct damages the very protection or security which the insured sought to gain by buying insurance."[24]

In adopting this cause of action in Hawai'i, Justice Nakayama's *Best Place* opinion recognized the "special relationship between insurer and insured," as well as "the adhesionary aspects of an insurance contract."[25] The tort of bad faith "will provide the necessary compensation to the insured for all damage suffered as a result of insurer misconduct. Without the threat of a tort action, insurance companies have little incentive to promptly pay proceeds rightfully due to their insureds, as they stand to lose very little by delaying payment."[26]

Best Place has been recognized as a milestone opinion that Justice Nakayama "can chalk up in her hall of fame."[27] It continues to stand as a reminder and motivation for insurance companies in how they conduct their business.

Several years later, in 1998, Justice Nakayama authored another foundational decision in insurance law in *Finley v. Home Insurance Co.*, which addressed the insurer's and its appointed counsel's duties in defending the insured against third-party claims.[28] Acknowledging the inherent conflict in the tripartite relationship between the insurer, insured, and insurance defense counsel, the *Finley* decision ruled that the insured did not have an automatic right to demand alternate counsel besides the insurer's appointed counsel.[29] Instead, it adopted the "modern" approach of declaring that "retained counsel *solely* represents the insured when a conflict arises between the interests of the insurer and the insured."[30]

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declined to distinguish between first-party and third-party contracts and held that the duty of good faith applies in both contexts. *Id.* at 129–32, 920 P.2d at 343–46.

[23] *Id.* at 132, 920 P.2d at 346.

[24] *Id.* (quoting Rawlings v. Apodaca, 726 P.2d 565, 573 (Ariz. 1986)).

[25] *Id.*

[26] *Id.*

[27] Arakawa, *supra* note 5 (quoting former Justice Robert Klein).

[28] 90 Hawai'i 25, 975 P.2d 1145 (1998).

[29] *Id.* at 31–32, 975 P.2d at 1151–52.

[30] *Id.* at 32–33, 975 P.2d at 1152–53. At least during the time *Finley* was decided, commentators described this approach as the "minority view" among the courts to decide the issue. *See, e.g.*, Allison M. Mizuo, Finley v. Home Insurance Co.: *Hawai'i's Answer to the Troubling Tripartite Problem*, 22 U. HAW. L. REV. 675, 682–83 (2000).

At the same time, *Finley* set forth scrupulous standards of conduct for retained counsel[31] and an "enhanced" obligation of good faith and standards of conduct for the insurer.[32] It also signaled the availability of various remedies against any misconduct, including: (1) malpractice actions against the attorney; (2) bad faith actions against the insurer; and (3) estoppel against the insurer denying coverage—which the court "believe[d] . . . are adequate deterrence against misconduct and safeguard the interests of the insured."[33]

Justice Nakayama's *Finley* decision thus further elaborated on the insurer's duty of good faith and clarified Hawai'i's approach to the tricky tripartite relationship in insurance defense. Veteran practitioners indicated that "attorneys welcomed Finley because it answered the fundamental question: 'Who do I work for?'"[34] Another commentator concluded that the decision "arguably constitutes the better solution for practical reasons."[35]

C. *Another Early Big Case in* Kawamata Farms

In 1997, Justice Nakayama issued her decision in *Kawamata Farms, Inc. v. United Agri Products*, another of her most-cited cases.[36] The case involved a complex litigation battle over products liability claims against manufacturers and suppliers of pesticides.[37] While the decision covered many issues, the rulings on judicial process and sanctions stand out in particular.

Throughout the litigation, the defendant DuPont had engaged in a pattern of discovery abuse, which Justice Nakayama's opinion described as "blatant," "inexcusable," "very disturbing," and possibly fatal to the opposing parties' case—"which is a result that we will not tolerate in the courts of Hawai'i."[38] Recognizing the court's inherent authority to curb abuses and impose sanctions, the decision upheld the severe sanctions the

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[31] 90 Hawai'i at 33, 975 P.2d at 1153.

[32] *Id.* at 36–37, 975 P.2d at 1156–57.

[33] *Id.* at 35–37, 975 P.2d at 1155–57. This framework that *Finley* established met an early test in Delmonte v. State Farm Fire and Casualty Co., 90 Hawai'i 39, 975 P.2d 1159 (1999), which Justice Nakayama issued about a month after *Finley*. Her decision in *Delmonte* confirmed that an insurer's attempted interference with counsel's representation of the insured gave rise to potential malpractice and bad faith claims, as contemplated under *Finley*. *See Delmonte*, 90 Hawai'i at 54–56, 975 P.2d at 1174–76.

[34] Hazel Beh et al., *Key Issues in Hawai'i Insurance Law Answered by the Moon Court*, 33 U. HAW. L. REV. 779, 833 (2011).

[35] Mizuo, *supra* note 30, at 677.

[36] 86 Hawai'i 214, 948 P.2d 1055 (1997).

[37] *See id.* at 222, 948 P.2d at 1063.

[38] *Id.* at 249, 251, 948 P.2d at 1090, 1092.

trial court levied against DuPont, including a $1.5 million fine, the lifting of protective order over documents, and attorneys' fees and costs.[39]

The decision also upheld additional sanctions the trial court imposed on DuPont based on even more fraud and misconduct uncovered after judgment was entered.[40] Specifically departing from federal court case law that Rule 60 of the rules of civil procedure does not allow additional relief other than setting aside a judgment, *Kawamata Farms* set new precedent allowing affirmative relief under Hawaiʻi's Rule 60 because "it would be unfair to allow DuPont to escape accountability . . . simply by virtue of the fact that the Plaintiffs had the good fortune to somehow overcome DuPont's discovery fraud and obtain a favorable jury verdict."[41] In sum, *Kawamata Farms* was an early example of an overall theme during Justice Nakayama's career of respect for the judicial process and court discretion, including the authority to impose sanctions.

D. Kahana Sunset *and Other Environmental Law Cases*

Also in 1997, Justice Nakayama authored a seminal decision on the state environmental review law (called the Hawaiʻi Environmental Policy Act or HEPA) in *Kahana Sunset Owners Association v. County of Maui*.[42] The decision required a residential development to comply with the initial step of preparing an environmental assessment to determine if a more detailed environmental impact statement would be required.[43] The project triggered HEPA review because it used state lands for the installation of a drainage line for the subdivision.[44] In rejecting the county's various arguments seeking to minimize or avoid HEPA's applicability, Justice Nakayama's opinion clarified and bolstered the law's purpose of "broad-reaching dissemination of proposed projects so that the public may be allowed an opportunity to comment and the agency will have the necessary information to understand the potential environmental ramifications of their decisions."[45]

The opinion, for example, ruled that the exclusion of the project from HEPA review under a county-adopted exemption for "drains within streets and highways" was inconsistent with the law's purpose of exempting "only

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[39] *Id.* at 247–51, 948 P.2d at 1088–92.
[40] *Id.* at 254–59, 948 P.2d at 1095–1100.
[41] *Id.* at 257, 948 P.2d at 1098.
[42] 86 Hawaiʻi 66, 947 P.2d 378 (1997).
[43] *Id.* at 70–73, 947 P.2d at 382–85.
[44] *Id.* at 71, 947 P.2d at 383.
[45] *Id.* at 72, 947 P.2d at 384.

very minor projects."[46] It also made clear that the scope of environmental review encompassed the entire project and not just the drainage line, and that limiting review only to the piece of the project on state land "would be improper segmentation of the project."[47] These rulings laid a critical foundation for the operation of the HEPA law going forward and avoided creating a loophole that would have vastly constricted the law's scope and effect. *Kahana Sunset* has been recognized as a "blockbuster" environmental law precedent for its "ringing endorsement of the [HEPA] process and citizen participation."[48]

In other decisions Justice Nakayama authored in the environmental and land use field, she similarly looked to uphold the overall purpose of the laws to protect the environment. In *Morgan v. Planning Department*, for example, her opinion recognized a county planning commission's inherent authority under the Coastal Zone Management Act ("CZMA") to reconsider and modify its past decisions and require remediation of a harmful seawall.[49] The decision focused on the purpose of the law as its guiding star, emphasizing the CZMA's "regulatory scheme to protect the environment and natural resources of Hawai'i's shoreline areas," and upholding the agency's inherent powers based on "the supervisory nature of the Planning Commission's authority, the CZMA's express mandate, the public's interest, and Hawai'i's public trust doctrine."[50]

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[46] *Id.* at 71–72, 947 P.2d at 383–84.

[47] *Id.* at 74, 947 P.2d at 386.

[48] Denise E. Antolini, *The Moon Court's Environmental Review Jurisprudence: Throwing Open the Courthouse Doors to Beneficial Public Participation*, 33 U. HAW. L. REV. 581, 593 (2011).

[49] 104 Hawai'i 173, 86 P.3d 982 (2004).

[50] *Id.* at 186, 184, 86 P.3d at 995, 993. Likewise, Justice Nakayama's majority decision in Ho'omoana Foundation v. Land Use Commission, which she issued just a month before her retirement, highlighted the state land use law's "overarching purpose . . . to protect and conserve natural resources and foster intelligent, effective, and orderly land allocation and development," in interpreting the law to disallow the use of a special permit procedure to allow a proposed overnight campground development that was otherwise prohibited in the agricultural district. Ho'omoana Found. v. Land Use Comm'n, No. SCWC-17-0000181, 2023 WL 2455253, at *7 (Haw. Mar. 10, 2023) (citation and internal quotation marks omitted). Her decision also overruled Maha'ulepu v. Land Use Commission, 71 Haw. 332, 790 P.2d 906 (1990)—a long-standing (predating even Justice Nakayama's time on the court) yet controversial ruling that had allowed golf courses on agricultural land via special permits—"[b]ecause *Maha'ulepu* failed to engage with the plain language of [the law's prohibitions], ignored principles of statutory interpretation, and failed to effectuate the purpose of the statutory scheme." *Id.* at *9.

E. Waiāhole *and Its Lineage of Modern Water Rights Cases*

Justice Nakayama may be best known today, and remembered generations hence, for her decisions on Hawai‘i water law.[51] Starting with the *Waiāhole* case in 2000,[52] she authored four of the landmark decisions in this field, accounting for most of the major water cases in the modern era under the constitutional amendments enshrining the public trust doctrine in 1978 and the legislative enactment of the Water Code and establishment of the state water commission in 1987.

Justice Nakayama's first *Waiāhole* decision is the longest opinion in Hawai‘i Supreme Court history,[53] a product of the epic scale of the case and its complex and consequential issues concerning the allocation of stream flows historically diverted for plantation agriculture.[54] *Waiāhole* was a perfect storm case, amassing twenty-five parties including a who's who of large landowner and governmental powers, and combining all the legal developments dating back to the supreme court's water rulings under Chief Justice Richardson, which had sparked decades of legal and political battles and inspired the enactments of the constitutional amendments and Code.[55] The case was also highly political because of the institutional interests, charged historical context, and overall stakes involved.[56]

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[51] Arakawa, *supra* note 5 (explaining that Justice Nakayama "is recognized in the legal community largely for writing the 2000 majority opinion" in the *Waiāhole* case).

[52] *In re* Waiāhole Ditch Combined Contested Case Hr'g, 94 Hawai‘i 97, 9 P.3d 409 (2000). Although the *Waiāhole* case spanned many years and included multiple appellate decisions, this comment generally uses "*Waiāhole*" to refer to the original 2000 decision, unless otherwise indicated.

[53] The decision was a 166-page slip opinion and comprises 97 pages in the West reporters. *See* Arakawa, *supra* note 5. According to Westlaw, almost 200 cases and over 300 law review articles have cited the opinion. *See* WESTLAW, https://1.next.westlaw.com/ (type "9 P.3d 409" into the search bar; then click on "Citing References" in menu bar; then view "Content types") (last visited Mar. 26, 2023).

[54] *See generally* D. Kapua‘ala Sproat & Isaac H. Moriwake, *Ke Kalo Pa‘a O Waiāhole: Use of the Public Trust as a Tool for Environmental Advocacy*, *in* CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT 247, 251–60 (Clifford Rechtschaffen & Denise Antolini eds., 2007) [hereinafter Sproat & Moriwake] (reviewing the history and background of water and law in Hawai‘i and the *Waiāhole* case specifically).

[55] *See id.* at 255–60.

[56] *See* D. Kapua‘ala Sproat, *Where Justice Flows Like Water: The Moon Court's Role in Illuminating Hawai‘i Water Law*, 33 U. HAW. L. REV. 537, 577–78 (2011) (explaining the political pressures surrounding the case).

Waiāhole compiled a comprehensive framework of the precedents and principles on the public trust doctrine into the most definitive declaration of the doctrine in the nation.[57] The decision held that the public trust is a constitutional mandate that applies to "all water resources, unlimited by any surface-ground distinction," and "exists independently" of statutory enactments.[58] In defining the substance of the public trust, it recognized both the "continuing authority" and "affirmative duty" of the state to protect public rights in water resources.[59] Further, it made clear that the public trust requires more than mere "balancing" and, instead, establishes a "presumption" in favor of public uses like resource protection and the exercise of Native Hawaiian rights.[60] Thus, private commercial water uses bear a "higher level of scrutiny," and private diverters bear the burden of justifying their diversions in light of the public trust.[61]

The *Waiāhole* decision upheld the regulatory regime of the water commission against attacks by private diverters and other government agencies, but vacated the commission's decision for failing to protect and restore stream flows as the law required.[62] Two sample excerpts from Justice Nakayama's multi-layered opinion may offer some insight on her outlook as the author. First, in its opening section addressing due process issues, the opinion denounced the intense political pressure brought against the commission by the attorney general and governor at a critical late stage of the proceedings,[63] maintaining that "the conduct of the public officials in this case did nothing to improve public confidence in government and the administration of justice in this state."[64]

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[57] Sproat & Moriwake, *supra* note 54, at 261 (explaining that *Waiāhole*'s discussion of the public trust "incorporates elements from Hawai'i law and prominent cases from other jurisdictions, concerning all kinds of natural resources, and weaves them into a comprehensive declaration of the doctrine").

[58] *Waiāhole*, 94 Hawai'i 97, 135, 132, 9 P.3d 409, 447, 444 (2000).

[59] *Id.* at 141, 9 P.3d at 453.

[60] *See id.* at 142, 9 P.3d at 454. *See generally id.* at 136–38, 9 P.3d 448–50 (discussing the protected uses or purposes under the public trust).

[61] *Id.* at 142, 9 P.3d at 454.

[62] *See id.* at 189–90, 9 P.3d at 501–02.

[63] After the commission issued its proposed decision, the attorney general fired the deputy attorney general representing the commission, then personally appeared before the commission to support the interests of private diverters; meanwhile, the governor publicly criticized the commission's proposed decision for inadequately accommodating those interests. The commission's final decision then increased the amount of permitted diversions. *See id.* at 113, 123–27, 9 P.3d at 425, 435–39.

[64] *Id.* at 127, 9 P.3d at 439.

Second, in its concluding footnote responding to the lone dissenter's criticism of the court's rulings on the public trust, the opinion stated:

> [W]e simply reaffirm the basic, modest principle that use of the precious water resources of our state must ultimately proceed with due regard for certain enduring public rights . . . . Inattention to this principle may have brought short-term convenience to some in the past. But the constitutional framers and legislature understood, and others concerned about the proper functioning of our democratic system and the continued vitality of our island environment and community may also appreciate, that we can ill-afford to continue down this garden path this late in the day.[65]

In her subsequent water law decisions, Justice Nakayama continued to elaborate on the state's duties to protect public trust water resources. In 2004, the *Waiāhole* case returned to the court after the commission had generally doubled down on its original decision.[66] Justice Nakayama's second *Waiāhole* decision dispelled any anticipation that the court was limited to only one reversal in a big case and, again, sent the case back to the commission to get it right, with some pointed guidance in its rulings.[67] In 2007, her decision in the *Kukui* case vacated a groundwater permit to the large landowner and developer Molokai Ranch, reinforcing the principle that the permit applicant bears the burden to show its water extraction will not harm Native Hawaiian rights, and ruling that the commission's reliance on a lack of evidence of such harm to justify the permit "erroneously shifted the burden of proof" to the cultural practitioners.[68] Finally, her decision in the *Nā Wai ʻEhā* case in 2012 invalidated the commission's decision to leave

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[65] *Id.* at 190 n.108, 9 P.3d at 502 n.108.

[66] *In re* Waiāhole Ditch Combined Contested Case Hr'g, 105 Hawai'i 1, 93 P.3d 643 (2004).

[67] *See id.* at 16, 93 P.3d at 658 (admonishing that the commission's "analysis should have ceased when [the applicant] failed to meet its burden" of proving the lack of practicable alternative water sources); *id.* at 20, 93 P.3d at 662 (rejecting the commission's attempt to dismiss the use of alternative sources on the ground that reduced ditch flow would accelerate deterioration of the ditch, and concluding with the rejoinder: "At such point where the [commission] is approving water use applications to divert windward stream water, of which there is no alternative source, for the purpose of maintaining ditch flow, the [commission] should, instead, consider whether the ditch is necessary at all.").

[68] *In re* Kukui (Molokai), Inc., 116 Hawai'i 481, 507–10, 174 P.3d 320, 346–49 (2007).

"The Four Waters" of Maui largely drained dry by plantation diversions,[69] which led to a settlement that restored initial continual flows to all those rivers and streams for the first time in 150 years.[70]

Justice Nakayama's first *Waiāhole* decision twenty-three years ago recognized that "much more work lies in the critical years ahead if the Commission is to realize its constitutionally and statutorily mandated purpose."[71] Justice Nakayama's and the court's resolve in holding the water commission to its legal duties, despite the political pressures often surrounding water disputes, has been critical in steering the agency forward during these formative years for its public trust mission.

F. *Major Rulings on Native Hawaiian Rights*

Justice Nakayama also contributed significantly to the court's ongoing development of Native Hawaiian law. She joined several of the court's landmark decisions in this field, including the *PASH* case (1995) affirming traditional and customary Native Hawaiian rights,[72] the *Ka Pa'akai* case (2000) establishing a three-part framework for protecting such rights,[73] and the *OHA* case (2009) involving "ceded lands" claims.[74] Justice Nakayama's *Waiāhole* decision also advanced Native Hawaiian rights in upholding the protection of Native water rights as an "original intent" and "specific objective" of the public trust and recognizing the exercise of these rights as a protected "public trust purpose."[75] And her decision in the *Nā Wai 'Ehā* case applied the *Ka Pa'akai* framework in invalidating the commission's decision in that case.[76]

Justice Nakayama's opinion for the 3-2 majority in the *State v. Pratt* case in 2012 navigated the fraught zone of collision between Native Hawaiian

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[69] *In re* Waihe'e River & Waiehu, 'Īao, & Waikapū Streams Contested Case Hr'g (*Nā Wai 'Ehā*), 128 Hawai'i 228, 287 P.3d 129 (2012).

[70] *See* Isaac Moriwake, *Turning the Tide of History: Maui Waters Flow Again After 150 Years*, EARTHJUSTICE (Oct. 13, 2014), https://earthjustice.org/blog/2014-october/turning-the-tide-of-history-for-maui-s-four-great-waters.

[71] 94 Hawai'i 97, 189, 9 P.3d 409, 501 (2000).

[72] Pub. Access Shoreline Haw. v. Haw. Plan. Comm'n (*PASH*), 79 Hawai'i 425, 903 P.2d 1246 (1995).

[73] Ka Pa'akai O Ka 'Aina v. Land Use Comm'n (*Ka Pa'akai*), 94 Hawai'i 31, 7 P.3d 1068 (2000).

[74] Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp., 117 Hawai'i 174, 177 P.3d 884 (2008), *rev'd and remanded sub nom.* Hawaii v. Off. of Hawaiian Affs., 556 U.S. 163 (2009).

[75] 94 Hawai'i 97, 137, 9 P.3d 409, 449 (2000).

[76] *See In re* Waihe'e River & Waiehu, 'Īao, & Waikapū Streams Contested Case Hr'g, 128 Hawai'i 228, 247–49, 287 P.3d 129, 148–50 (2012).

rights and criminal law.[77] At issue was a Native cultural practitioner convicted for residing in the state "wilderness park" in Kalalau Valley without a permit.[78] All four of the lower court judges—the trial judge, and each of the ICA panel judges who split three ways—proffered a different balancing test.[79] One of the ICA judges required the defendant to show the unreasonableness of the regulation, another required the defendant to show the reasonableness of his conduct, and Chief Judge Nakamura placed the burden on the prosecution to show that the defendant's actions caused actual harm.[80]

The *Pratt* majority opinion declined Chief Judge Nakamura's test as "too narrow" because "by definition, one person could never cause that harm" of overcrowding, yet user permits are "a common and effective government tool . . . to control against overuse of a limited resource."[81] The decision also rejected the other tests, including the supreme court minority's position that practitioners must show their practice is "reasonable."[82] Instead, it adopted a "totality of the circumstances" approach based on a reading of the court's precedent "underscoring the importance of the court's careful judgment in resolving cases involving traditional and customary native Hawaiian rights."[83] Thus, in this case where opinions splintered every which way, Justice Nakayama's single-vote majority decision charted a middle path deliberately maintaining "flexibility,"[84] and perhaps leaving further insights in this area for another day.

In *Kalima v. State*, Justice Nakayama shone a ray of light in the decades-long litigation storm over the injustices and mismanagement of the Hawaiian Home Lands Trust.[85] *Kalima* is a class action for individual breach of trust claims by beneficiaries waitlisted for homestead awards.[86] Justice Nakayama

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[77] *See* 127 Hawai'i 206, 277 P.3d 300 (2012).

[78] *See id.* at 207–08, 277 P.3d at 301–02.

[79] *See id.* at 216, 277 P.3d at 310.

[80] *See id.*

[81] *Id.* at 216–17, 277 P.3d at 310–11.

[82] *See id.* at 217, 277 P.3d at 311; *id.* at 219, 277 P.3d at 313 (Acoba, J. concurring and dissenting).

[83] *Id.* at 217–18, 277 P.3d at 311–12.

[84] *See id.* at 217, 277 P.3d at 311.

[85] *See* 148 Hawai'i 129, 468 P.3d 143 (2020). *See generally* Troy J.H. Andrade, *Belated Justice: The Failures and Promise of the Hawaiian Homes Commission Act*, 46 AM. INDIAN L. REV. 1 (2022) (reviewing the century-long history of injustice under the HHCA).

[86] Andrade, *supra* note 85, at 38–44 (reviewing the decades-long and still-pending individual claims resolution process).

joined the supreme court's first decision in the case in 2006, which allowed the plaintiffs to pursue their claims for compensation.[87] When the case finally returned to the supreme court in 2020, Justice Nakayama, the only remaining justice who ruled on the initial 2006 appeal, delivered the court's second decision in the case.

Justice Nakayama's *Kalima* opinion chastised the State for its history of "misappropriating home lands for non-beneficiary use, failing to restore the lands or compensate the trust, and failing to keep adequate records," while all the while placing trust beneficiaries *not* on homestead lots, but on an ever-growing waitlist.[88] Based on the "interests of justice and the extent of the State's wrongful conduct," the decision liberally construed the relief available to "afford a fair remedy to the beneficiaries who have for decades been deprived of the opportunity to lease their native land from the State."[89]

Specifically, *Kalima* rejected the State's challenge of the trial court's decision to calculate damages based on the fair market rental value ("FMRV") of comparable land, instead of the State's proposal to limit plaintiffs to the actual amounts they could prove they spent on renting alternate land.[90] Justice Nakayama's opinion maintained that the State, by "mismanaging the Trust, failing to keep adequate records, and continuing to litigate this case for decades, is responsible for creating a situation in which it will be difficult to accurately assess damages."[91] Thus, since these difficulties were "compounded by the failures of the wrongdoer," and the beneficiaries "are not at fault for the time that has passed or the State's failure to administer the Trust," *Kalima* held that "every trust beneficiary is entitled to damages" under the FMRV model and shifted the burden onto the State to prove any reduction in damages.[92]

G. *A Check on the Legislature in* League of Women Voters

Justice Nakayama also stood strong in her 3-2 majority opinion in the *League of Women Voters v. State* case in 2021, which struck down the legislature's "gut and replace" practice of deleting a bill's contents and dropping in a different bill's contents at a late hour in the legislative process.[93] The court was treading on touchy ground in this case, particularly in a politically charged environment where the legislature was imposing

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[87] Kalima v. State, 111 Hawai'i 84, 137 P.3d 990 (2006).
[88] 148 Hawai'i at 147, 468 P.3d at 161.
[89] *Id.* at 133, 142, 468 P.3d at 147, 156.
[90] *Id.* at 142–45, 468 P.3d at 156–59.
[91] *Id.* at 147, 468 P.3d at 161.
[92] *Id.* at 142, 147, 468 P.3d at 156, 161.
[93] 150 Hawai'i 182, 499 P.3d 382 (2021).

"inordinate and unprecedented pressure" against the judiciary aimed at influencing outcomes in various legal controversies, including litigation over properly funding the Department of Hawaiian Home Lands.[94] In *League of Women Voters*, the State insisted the court should stay out of the legislature's procedural business, and the legislature also weighed in as amicus curiae.[95]

Justice Nakayama's majority decision held that gut and replace violated the constitutional requirement of three readings to pass a bill.[96] The decision recognized the key purposes of the three-readings requirement of enabling "deliberate and careful consideration of legislation and a process in which legislators have the opportunity for a full and open debate and interested persons have notice of proposed legislation and are able to provide input."[97] Gut and replace was "antithetical" to this intent: "Rather than encouraging public participation in the legislative process, gut and replace discourages public confidence and participation."[98] In reaching this ruling, Justice Nakayama also recognized citizens' standing to enforce the law, as well as the court's responsibility to uphold the constitution.[99] In one of her last momentous rulings in her career, she did not shrink from that judicial duty.

III. JUSTICE NAKAYAMA IN DISSENT

Justice Nakayama also authored around 100 dissents, about half the number of her majority opinions. The following part highlights several of her notable dissents. It also includes a summary of her role as a lead dissenter on the issue of addressing "plain error" not raised by parties below or on appeal.

A. *A Story About "Stories" in* Hiner

In the 1999 case of *Hiner v. Hoffman*, a 3-2 majority voided a restrictive covenant limiting homes in a subdivision to "two stories in height" and ruled that the language was ambiguous and unenforceable against a three-story house because it failed to define height in feet and inches.[100] In a spirited dissent, Justice Nakayama took the majority to task for "labor[ing] to create

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[94] Andrade, *supra* note 85, at 50–53 (reviewing the background and public criticism of the legislature's assault against the judiciary).

[95] *See* 150 Hawai'i at 191, 499 P.3d at 391.

[96] *Id.* at 189, 499 P.3d at 389.

[97] *Id.* at 205, 499 P.3d at 405.

[98] *Id.*

[99] *Id.* at 189–91, 499 P.3d at 389–91.

[100] 90 Hawai'i 188, 977 P.2d 878 (1999).

ambiguity," which "does not merely rewrite the covenant, it eviscerates it."[101] She further criticized the decision for "encouraging uncertainty, litigation, opportunistic non-compliance, and 'un-neighborly' relations in general," and elevating the "policy favoring the unrestricted use of property" over the common interest and rights of neighbors.[102]

Subsequent reactions and commentary questioned the majority's ruling and vindicated Justice Nakayama's dissent.[103] A year after the *Hiner* decision, the new Restatement (Third) of Servitudes was issued, which abandoned the "archaic rules" of strictly construing covenants and adopted a "modern approach" toward upholding them based on an understanding of a reasonable purchaser.[104] As a professor and Restatement reporter explained, "[t]he court's job should be to make these covenants work."[105]

B. *Select Dissents in Criminal Law*

Justice Nakayama wrote many of her dissents in the criminal law field. In the 1996 case of *State v. Arceo*, the court vacated the conviction of a father accused of repeated acts of sexually assaulting his six-year-old son because the trial court failed either to require the prosecution's election of a specific act for each count, or to give a specific unanimity instruction on each count.[106] Dissenting alone, Justice Nakayama objected to the majority addressing the issue as plain error and maintained that because the defendant categorically denied all the incidents, the issue boiled down to credibility alone, so the lack of a specific unanimity instruction was harmless.[107] She agreed with the majority that the existing offense of sexual assault was not a "continuing offense," but urged the legislature to add such an offense to the statute "to cure the problems inherent in the criminal prosecution of sexual abuse cases involving a minor of tender years who is unable to specifically recall dates, instances or circumstances surrounding the abuse."[108] She maintained, "I believe that a child's inability to specifically remember every detail and date of an alleged assault should not form a basis on which to insulate a defendant from conviction."[109]

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[101] *Id.* at 196, 198, 977 P.2d at 886, 888 (Nakayama, J., dissenting).

[102] *Id.* at 198–99, 977 P.2d at 888–89.

[103] *See, e.g.*, Tannaz Simyar, Hiner v. Hoffman*: An Analysis of the Hawai'i Supreme Court's Decision and Its Impact on Hawai'i's Common Interest Communities*, 26 U. HAW. L. REV. 177, 185–86 (2003) (reviewing the criticisms of the *Hiner* decision).

[104] *Id.* at 194–99; *see* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES (2000).

[105] Simyar, *supra* note 103, at 202.

[106] 84 Hawai'i 1, 928 P.2d 843 (1996).

[107] *Id.* at 37–38, 928 P.2d at 879–80 (Nakayama, J., dissenting).

[108] *Id.* at 38, 928 P.2d at 880.

[109] *Id.* at 39, 928 P.2d at 881.

The legislature quickly followed up the next year and enacted a continuing sexual assault of a minor offense, citing and agreeing with Justice Nakayama by name in the act's preamble.[110] But in 2003, the issue returned to the court in *State v. Rabago*, in which a 3-2 majority vacated the convictions for continuing sexual assault of two girls for lack of an *Arceo* instruction and struck down the statute as an unconstitutional violation of due process because multiple acts of sexual assault are "by nature, separate and discrete" and not continuous.[111] Again, Justice Nakayama dissented, criticizing the majority for disregarding the legislature's intent and "exceptionally clear language."[112] She also rejected the due process argument as "utterly without merit" in the context of continuing offense statutes, which seek a balance in avoiding the difficulties in prosecuting "resident child molesters," while also protecting defendants by allowing them to be charged with only one count rather than multiple counts.[113] This issue was finally resolved in 2006 by a state constitutional amendment empowering the legislature to define a "continuing course of conduct" and the jury unanimity requirement for "continuous sexual assault crimes against minors younger than fourteen years of age"[114]—effectively overturning *Rabago*.

In *State v. Baker*, the court, in a 3-1-1 split decision, vacated a conviction for a brutal sexual assault and beating of a runaway girl, ruling that the defendant's confession was rendered involuntary by a coercive interrogation.[115] In her solo dissent, Justice Nakayama gave an unflinching account of the "brutal and callous" nature of the attack and the victim's injuries and thoroughly disagreed that the police interview—which was recorded, lasted less than an hour, and used recognized interrogation methods—was coercive.[116] In her view, the majority's expectation for "how a police detective should interview a suspect distorts the reality of human conversation" and "sanitizes police interrogations to the point that they are largely useless."[117]

In contrast to these previous cases, Justice Nakayama's solo dissent in the *State v. Deedy* case diverged with the majority in favoring the rights of the

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[110] *See* Act of July 7, 1997, § 1, 1997 Haw. Sess. Laws 1191, 1192–93.
[111] State v. Rabago, 103 Hawaiʻi 236, 253, 81 P.3d 1151, 1168 (2003).
[112] *Id.* at 256–57, 81 P.3d at 1171–72 (Nakayama, J., dissenting).
[113] *Id.* at 261–62, 81 P.3d at 1176–77.
[114] HAW. CONST. art. I, § 25; *see also* Haw. Rev. Stat. § 707-733.6 (enacted offense).
[115] *See* 147 Hawaiʻi 413, 465 P.3d 860 (2020).
[116] *Id.* at 440–55, 465 P.3d at 887–902 (Nakayama, J., dissenting).
[117] *Id.* at 441, 453, 465 P.3d at 888, 900.

defendant.[118] *Deedy* was a notorious, highly publicized case of a white off-duty federal agent fatally shooting a Hawaiian man in a Waikīkī fast-food restaurant.[119] After a first trial for murder resulted in a deadlock and a second trial resulted in an acquittal on the murder charge and a deadlock on lesser offenses, the prosecution sought to bring a third trial on the remaining offenses.[120] While the majority ruled that double jeopardy did not bar a third prosecution, Justice Nakayama disagreed, calling it "patently unfair."[121] Highlighting that the prosecution chose to focus on the murder charge and exclude the lesser charges, she opined that the State should not be allowed to flip its position and get "a free do-over, in which the State may change its mind and adopt a brand new trial strategy after it was unsuccessful in its previous attempts."[122] Subsequent events on the legal front supported Justice Nakayama's perspective. In a separate habeas corpus action, the federal courts ruled that double jeopardy barred a retrial on manslaughter,[123] and the prosecution ultimately decided to drop the remaining assault charges.[124]

In the recent case of *State v. Obrero*, the court made waves and news in a 3-1-1 majority decision that a statute required the prosecution of felonies to be initiated via a grand jury indictment and not a court probable cause finding after a preliminary hearing, even though a constitutional amendment specifically allowed the latter procedure.[125] In her separate concurrence and dissent, Justice Nakayama agreed with the sole dissenter that the constitutional provision trumped the statute, but agreed with the majority in the result of barring use of the preliminary hearing procedure in this case.[126] Reminiscent of her outlook in *Deedy*, she opined that the constitution did not allow the prosecution to take two bites of the apple by running to court after

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[118] *See* 141 Hawai'i 208, 407 P.3d 164 (2017).

[119] *See* Jonathan Y. Okamura, *Race and/or Ethnicity in Hawai'i: What's the Difference and What Difference Does It Make?*, *in* BEYOND ETHNICITY: NEW POLITICS OF RACE IN HAWAI'I 94, 105 (Camilla Fojas et al. eds., 2018) (explaining how the incident "resonates with much larger and more significant historical and contemporary conflicts between Native Hawaiians and U.S. settler colonialism and its primarily White representatives").

[120] *See Deedy*, 141 Hawai'i at 234, 407 P.3d at 190 (Nakayama, J., dissenting).

[121] *Id.*

[122] *Id.* at 235–36, 239, 407 P.3d at 191–92, 195.

[123] Deedy v. Suzuki, 788 F. App'x. 549 (9th Cir. 2019).

[124] *Bar-Hopping Federal Agent Won't Face Third Trial in Fatal, Off-Duty Hawaii Shooting*, NBC NEWS (Nov. 15, 2021, 4:23 PM), https://www.nbcnews.com/news/us-news/bar-hopping-federal-agent-wont-face-third-trial-fatal-duty-hawaii-shoo-rcna5666.

[125] *See* 151 Hawai'i 472, 517 P.3d 755 (2022).

[126] *Id.* at 483, 517 P.3d at 766 (Nakayama, J., concurring and dissenting).

it was denied by the grand jury, but rather required it "to use one procedure or the other—not both—to initiate a prosecution."[127]

C. *A Line of Dissents on Plain Error Review*

Throughout her judicial career, Justice Nakayama carried the banner as a lead dissenter in the court's debate on the plain error doctrine, standing by her view of the court's limited role in addressing issues not raised by attorneys below and/or on appeal. In her very first dissent in the *Montalvo v. Lapez* case in 1994, she sharply objected to a reversal of a civil jury verdict where "the error was caused by a party's self-interested tactical maneuvering," given that "rewarding a party for its gamesmanship . . . has a far more deleterious and lasting impact on the public's confidence in the system than does forcing a party to live with the results of the trial errors that its machinations caused."[128] In her *Arceo* dissent in 1996, she likewise cautioned that the court should not "be so quick to reward a defendant for inviting error" and expressed concerns that the plain error standard "has eroded in recent years."[129] This and other dissents in the criminal law context fueled a testy public spat among the legal community over some of the court's rulings during this period.[130]

As the years continued, Justice Nakayama maintained her strong voice in support of judicial restraint in raising plain error. Collectively, her dissents compile a voluminous body of reasoning and rhetoric on the downsides of permissive plain error review. For example: it "punishes competent counsel" and "erode[s] our bedrock adversarial principles of justice along with our respect and justified expectations for counsel as officers of the court."[131] It deprives the trial court "the opportunity to consider and resolve" objections and allows counsel to pursue a strategy of "'sandbagging' the court . . . and belatedly raising the error only if the case does not conclude in his favor."[132]

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[127] *Id.* at 485, 517 P.3d at 768.

[128] 77 Hawai'i 282, 305, 884 Hawai'i 345, 368 (1994) (Nakayama, J., concurring and dissenting).

[129] State v. Arceo, 84 Hawai'i 1, 38, 928 P.2d 843, 880 (1996) (Nakayama, J., dissenting).

[130] *See* Peter Carlisle & Mark Bennett, *Plain Error? The Hawaii Supreme Court's Approach to Criminal Law*, 2 HAW. B.J. 6 (1998); Earle A. Partington et al., *Plain Nonsense! Misrepresentations and Omissions in Carlisle's and Bennett's Article Plain Error?*, 2 HAW. B.J. 32 (1998).

[131] State v. Nichols, 111 Hawai'i 327, 346–47, 141 P.3d 974, 993–94 (2006) (Nakayama, J., concurring and dissenting).

[132] State v. Miller, 122 Hawai'i 92, 135, 223 P.3d 157, 200 (2010) (Nakayama, J., dissenting).

It "condone[s] a course of conduct that encourages clever trial tactics and gamesmanship by counsel at the expense of protecting and preserving her client's constitutional rights."[133] It enlists the trial court to "serve as a quasi-agent for the defense counsel" and "restrict[s] the defendant's ability to successfully present his or her strategic defense."[134] It "intrude[s] upon defendants' exclusive purview in presenting their defenses" and "places an impractical burden upon the trial courts and is potentially highly prejudicial to defendants."[135] And it "further erodes the relationship between an attorney and her client, imposes unreasonable duties upon the court, and intrudes upon the adversarial nature of the trial process."[136]

It remains to be seen whether and to what extent this debate over plain error will be carried forward after Justice Nakayama's departure. While Justice Nakayama's views on plain error were consistently in the minority during her time on the court, her dissents nonetheless fostered an open, public discourse on the issue. The legislature, for its part, proposed various bills seeking to restrict the appellate courts' powers to render *sua sponte* decisions,[137] and in 2022, the supreme court adopted an amendment to the appellate procedure rules providing that, if the appellate court "contemplates basing the disposition of the case wholly or in part upon an issue of plain error not raised by the parties through briefing, it shall not affirm, reverse, or vacate the case without allowing the parties the opportunity to brief the potential plain-error issue prior to disposition."[138]

IV. THEMES AND PRINCIPLES IN JUSTICE NAKAYAMA'S CAREER AND JURISPRUDENCE

Looking back on the thirty years of Justice Nakayama's judicial career, several themes and principles emerge. For one, she was a trailblazer in both her rulings on the law and her representation of broader diversity on higher courts. And just as fundamentally, she was a marathon runner in both the

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[133] State v. Murray, 116 Hawai'i 3, 23, 169 P.3d 955, 975 (2007) (Nakayama, J., dissenting).

[134] State v. Stenger, 122 Hawai'i 271, 307–08, 226 P.3d 441, 477–78 (2010) (Nakayama, J., dissenting).

[135] State v. Adviento, 132 Hawai'i 123, 165, 319 P.3d 1131, 1173 (2014) (Nakayama, J., dissenting).

[136] State v. Ui, 142 Hawai'i 287, 303, 418 P.3d 628, 644 (2018) (Nakayama, J., dissenting).

[137] *See, e.g.*, H.B. 2548, 30th Leg. (Haw. 2020) (proposing to prohibit the appellate courts from disposing "a matter on grounds other than those raised by the parties," unless the parties "are provided the opportunity to brief the court and present oral argument on the matter").

[138] HAW. R. APP. P. Rule 28(b)(4).

length of her tenure and the steady progress she maintained in her hundreds of opinions over the years.

A. *Trailblazer*

Every one of Justice Nakayama's major precedential decisions surveyed above, by their nature, broke ground and illuminated paths forward for Hawaiʻi law. Her deciding vote in *Baehr* produced the nation's first legal precedent protecting marriage equality.[139] *Best Place* cut through the previous tentative and mixed signals in Hawaiʻi case law and definitively declared the tort of insurance bad faith.[140] *Kahana Sunset* solidified the foundational purpose and operation of the environmental review law.[141] *League of Women Voters* took a true and bold stand for public accountability in the legislative process, and for the role of the courts in our democracy.[142]

Justice Nakayama's 2000 *Waiāhole* decision, in particular, is "widely regarded as the cornerstone of Hawaiʻi's modern public trust doctrine."[143] It has also has been held up for its "influential effect,"[144] and as a "model" for

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[139] *See* Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993); *supra* notes 15–20 and accompanying text.

[140] *See* Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawaiʻi 120, 920 P.2d 334 (1996); *supra* notes 21–27 and accompanying text; Beh, *supra* note 34, at 810 (indicating that prior to *Best Place*, state court decisions had conveyed "mixed signals" on the issue, and federal courts considering insurance issues under diversity jurisdiction had "consistently held that Hawaiʻi law did not recognize the tort of insurance bad faith").

[141] *See* Kahana Sunset Owners Ass'n v. County of Maui, 86 Hawaiʻi 66, 947 P.2d 378 (1997); *supra* notes 42–48 and accompanying text.

[142] *See* League of Women Voters v. State, 150 Hawaiʻi 182, 499 P.3d 382 (2021); *supra* notes 93–99 and accompanying text.

[143] Ana Ching, *Charting the Boundaries of Hawai'i's Extensive Public Trust Doctrine Post*-Waiāhole Ditch, 52 ENV'T. L. 115, 115 (2022); *see In re* Waiāhole Ditch Combined Contested Case Hr'g, 94 Hawaiʻi 97, 9 P.3d 409 (2000); *supra* notes 51–65 and accompanying text.

[144] *See, e.g.*, MICHAEL C. BLUMM & MARY CHRISTINA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW 199 n.1 (2d ed. 2015) ("*Waiāhole Ditch* is a landmark public trust opinion that has had an influential effect on the modern development of public trust law."); Denise E. Antolini, *Water Rights and Responsibilities in the Twenty-First Century: A Foreword to the Proceedings of the 2001 Symposium on Managing Hawai'i's Public Trust Doctrine*, 24 U. HAW. L. REV. 1, 3 (2001) (observing that "Hawaiʻi's approach can assist others on the U.S. mainland and around the globe who are also facing the imminent and urgent need to act early rather than react to water conflict"); Keala C. Ede, *He Kānāwai Pono no ka Wai (A Just Law for Water): The Application and Implications of the Public Trust Doctrine in In re* Water Use Permit

other jurisdictions.[145] *Waiāhole* "built upon the tradition and law of Hawai'i and the continental United States, including the landmark California Mono Lake case," and "established a new legal milestone in the history of water law in Hawai'i and the entire nation."[146] Further, in recognizing the protection of Native rights as an "original intent" of the trust,[147] *Waiāhole* took a historic "first step toward explicitly integrating indigenous peoples' environmental interests into the public trust calculus and, indeed, into a more encompassing conception of environmental justice."[148] In an era of ever-escalating environmental and environmental justice crises, I believe the significance of Justice Nakayama's *Waiāhole* opinion will only loom larger over time.[149]

Justice Nakayama was also a pioneer on the appellate bench. When appointed three decades ago in 1993, she was only the second woman in the history of the Hawai'i state supreme court, and the first woman of color.[150] She was the eighth woman of color and the second Asian American woman on any highest appeals court in the nation.[151] As Justice Nakayama explained, her career path "involved a lot of hard work," but also coincided with "a time when citizens were beginning to realize that the judiciary should look like the people who are subject to their decisions," and "many [people], including women's groups, encouraged the governor to appoint women to the

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Applications, 29 ECOLOGY L.Q. 283, 314 (2002) (recognizing the "great potential for the decision to influence other jurisdictions").

[145] *See, e.g.*, Timothy M. Mulvaney, *Instream Flows and the Public Trust*, 22 TUL. ENV'T L.J. 315, 336, 319–20 (2009) (recommending *Waiāhole* as a "model" and "foundation for a conceptual framework" for the operation of the public trust doctrine in other states).

[146] Sproat & Moriwake, *supra* note 54, at 248. Jan Stevens, who worked on the Mono Lake case for the California Attorney General's office, explained that *Waiāhole* "has been the keynote in unifying the traditional native law with the common law and with state constitutional and statutory law. It's probably the best single opinion that brings all those things together." *Court's Waiāhole Decision 'Inspiring,' Says Public Trust Expert Jan Stevens*, ENV'T HAW. (Feb. 8, 2002), https://www.environment-hawaii.org/?p=3091.

[147] *Waiāhole*, 94 Hawai'i 97, 137, 9 P.3d 409, 449 (2000).

[148] Eric K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311, 358–59 (2001).

[149] *See Waiāhole*, 94 Hawai'i at 135, 9 P.3d at 447 (recognizing that "[t]he public trust, by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances"); Rachel M. Pemberton & Michael C. Blumm, *Emerging Best Practices in International Atmospheric Trust Case Law*, 2022 UTAH L. REV. 941, 950–65 (2022) (citing *Waiāhole* in reviewing the legal grounds for recognizing the atmosphere as a public trust resource).

[150] *See* Arakawa, *supra* note 5; Walsh, *supra* note 6, at 299, 302.

[151] *See* Walsh, *supra* note 6, at 298–99.

bench."[152] She thus recognized she was "at a right place and at a time when people were beginning to accept women as judges."[153]

Like many pioneers, she felt both the honor and burden of being on the vanguard for women's representation on courts. In her words:

> No matter what your gender is, being on the [Hawaiʻi] Supreme Court is an honor and a privilege. Now, throughout my time on the bench I have experienced incidents of discrimination that are dismaying. For instance, when I was at a justices' reception, someone handed me his dirty dishes because he assumed I was wait help. Or when I was going through customs and was asked what my occupation was, and I responded I was a judge, the man asked if I judged horses or flowers. So I think in some respects it was more difficult for men to accept me as a judge . . . which in turn made it difficult for me.[154]

Justice Nakayama bore these extra burdens in breaking the biases and barriers in the traditionally white- and male-dominated legal profession and judge position.

Given this history and context, I am taking care not to ascribe certain aspects of Justice Nakayama's judicial decisions and philosophy to her gender. Just as it was wrong to presume *what* women judge (e.g., horses and flowers), it would be wrong to presume *how* women judge.

In any event, I need not go out on a limb in noticing that Justice Nakayama's opinions have highlighted the perspectives of women and children in distinctive ways in relation to her other, mostly male colleagues. In *Arceo*, she was the sole dissenter on the court, voicing concerns about the inherent difficulties in prosecuting sexual offenses against children who are

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[152] Center for Civic Education, *How Did You Become a Justice on the Hawai'i Supreme Court: Justice Paula Nakayama, Part 1*, YOUTUBE (May 25, 2022), https://www.youtube.com/watch?v=dIm4tFpOOxM.

[153] *See id.*

[154] Center for Civic Education, *One of the First Women on the Hawai'i Supreme Court: Justice Paula Nakayama, Part 2*, YOUTUBE (May 26, 2022), https://www.youtube.com/watch?v=rBdmVL5JZFs.

unable to recall dates and details, and calling for a legislative solution.[155] And in *Rabago*, she was the lead dissenter seeking to uphold that solution.[156]

In *Baker*, Justice Nakayama took care to detail the horrific injuries and indignities suffered, humanizing the otherwise faceless and nameless victim.[157] She also fired a pointed response to the majority's rationale that the detective's conversational tack of stereotyping women as "more promiscuous" and "flirt[y] . . . when they're on alcohol" and men as "programmed to procreate" rendered the confession coercive, calling it "absurd" to conclude that such a statement "constitute[d] an official state position discriminating against women."[158] In her view, vacating convictions of "a man who brutalized and sexually assaulted a runaway teenage girl based, in part, on a detective's statement stereotyping women makes a mockery of the actual struggles women face in our society."[159]

Several other cases illustrate additional examples. In her solo dissent in *State v. Maelega*, Justice Nakayama disagreed with the majority vacating the conviction of a man accused of killing his wife for suspected infidelity, based on potential ambiguity in the jury instructions on the defense of extreme mental and emotional distress.[160] She believed the jury well understood its role in this case, in which "the old way of thinking of women as chattel met head-on with the present day acknowledgment of women as having the right to personal autonomy."[161] In *State v. Bruce*, a sex trafficking case, Justice Nakayama authored a unanimous opinion reversing the ICA's decision to vacate for prosecutorial misconduct based on the statements during closing argument: "she's not a piece of property . . . she's somebody's daughter, she's somebody's friend, she's a mother, she's a woman, she is a person."[162] Viewing the statement in context rather than in a vacuum, her opinion explained that the statement was relevant to the central issue of prostituting women and treating them as property.[163]

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[155] *See* State v. Arceo, 84 Hawai'i 1, 34, 928 P.2d 843, 876 (1996) (Nakayama, J., dissenting); *supra* notes 106–09 and accompanying text.

[156] *See* State v. Rabago, 103 Hawai'i 236, 254, 81 P.3d 1151, 1169 (2003) (Nakayama, J., dissenting); *supra* notes 111–14 and accompanying text.

[157] *See* State v. Baker, 147 Hawai'i 413, 440, 465 P.3d 860, 887 (2020) (Nakayama, J., dissenting); *supra* notes 115–17 and accompanying text.

[158] *Baker*, 147 Hawai'i at 451–53, 465 P.3d at 898–900 (Nakayama, J., dissenting).

[159] *Id.* at 453, 465 P.3d at 900.

[160] *See* 80 Hawai'i 172, 184–86, 907 P.2d 758, 770–72 (1995) (Nakayama, J., concurring and dissenting).

[161] *Id.* at 186, 907 P.2d at 772.

[162] 141 Hawai'i 397, 408, 441 P.3d 300, 311 (2017).

[163] *See id.*

To round out these examples, I will note one more case, *Child Support Enforcement Agency v. Doe*,[164] which Justice Nakayama included on an informal list of her memorable decisions.[165] In *Doe*, she authored the court's opinion affirming an order requiring a father to pay child support, and rejecting his arguments that this obligation violated his rights to equal protection, privacy in "procreational autonomy," as well as freedom from "compulsory service" because he "would be forced to get a part-time job" while in school.[166] The opinion gave the young man the judicial equivalent of a parental scolding, explaining that he "elected a course of conduct inconsistent with the exercise of his right *not* to beget a child," and that "[t]he reproductive consequences of his actions were imposed by the operation of nature, not statute."[167] The court also found the appeal frivolous, where the "allegedly penurious father, unable to afford $50 per month to support his child, commanded his attorney to doggedly pursue an appeal with no chance of success, file numerous pointless motions, and force the state to expend large amounts of taxpayers' money to defend the child support regime from meritless attacks."[168]

Again, I do not wish to suggest or speculate whether Justice Nakayama reached these rulings or made these statements because she is a woman. At the same time, we need not ignore the philosophy and reality that judges are not robots, but humans who bring their life perspectives and experiences to their decisions.[169] Could Justice Nakayama's outlook as a woman, and in particular a woman who overcame historic barriers in her profession, have influenced or inspired her to raise perspectives of women in ways and words not seen as often from her colleagues, thus broadening the aperture of the court's deliberations and discourse? You can be the judge.

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[164] 109 Hawai'i 240, 125 P.3d 461 (2005).

[165] E-mail from Lois Choy, Judicial Assistant, Haw. Sup. Ct., to author (Dec. 19, 2022) (on file with author).

[166] 109 Hawai'i at 242, 125 P.3d at 463.

[167] *Id.* at 248, 125 P.3d at 469 (emphasis added).

[168] *Id.* at 254, 125 P.3d at 475.

[169] *See* Tomiko Brown-Nagin, *Identity Matters: The Case of Judge Constance Baker Motley*, 117 COLUM. L. REV. 1691, 1722 (2017) (citing studies showing that the gender of jurists can affect judicial outcomes in cases involving sexual harassment or sex discrimination); *but see id.* at 1734 (concluding that although Judge Constance Baker Motley, the first African American woman appointed as a federal judge, was a "judicial pioneer, she tended not to be a judicial entrepreneur," and "she did not view herself as a representative of her race or her gender").

B. *Marathon Runner*

Justice Nakayama made history as not just a trailblazer, but also a marathon runner: a justice who (together with her career-long judicial assistant Lois Choy)[170] set an all-time record for length of tenure and service on the Hawai'i Supreme Court that may never be broken.[171] For perspective, Justice Nakayama's thirty years in office spans around half of the total years that Hawai'i has been a state. Six different governors were in office during her time on the court.

Justice Nakayama's career progressed from the prosecutor's office to private practice to the judiciary on a relative "fast track" of fourteen years, and she joined the supreme court at a "notably young" age of thirty-nine.[172] Thus, absent an equally unique and rapid career track (or a constitutional amendment of the mandatory retirement age for judges),[173] no one may ever have a chance to pass her record.

Justice's Nakayama's total number of opinions, including 217 majority opinions and over 100 separate opinions, also ranks among the most prolific of all Hawai'i appellate judges in history. Like her years of service, such numbers of opinions will also be hard to reach going forward since the volume of cases that the supreme court handles has decreased after the court converted to a limited jurisdiction system of hearing mostly discretionary appeals.[174]

Spanning decades of decisions during the time when the supreme court handled most of the appeals, the breadth of Justice Nakayama's work, like much of the court's work in general, mostly deals with the everyday nuts and

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[170] Any tribute to the longevity of Justice Nakayama's career would be woefully remiss not to include mention of Lois Choy, who began working with Justice Nakayama in private practice, then accompanied her to the circuit court and supreme court, where she continued as Justice's Nakayama's right-hand woman throughout her entire tenure. Clerks and staff came and went; justices were appointed and retired; but Justice Nakayama and Lois were the duo who were the constant throughout.

[171] In the history of Hawai'i's highest court, the justice who comes the closest to Justice Nakayama's length of tenure is Albert Judd, who sat on the court for twenty-six years from 1874 to 1900. *See Hawai'i Legal History: Justices*, LAW-HAWAI'I.LIBGUIDES.COM, https://law-hawaii.libguides.com/hawaiilegalhistory/justices (last updated Feb. 15, 2021); *List of Justices of the Supreme Court of Hawai'i*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_justices_of_the_Supreme_Court_of_Hawaii (last updated Mar. 24, 2023).

[172] Arakawa, *supra* note 5.

[173] *See* HAW. CONST. art. VI, § 3 (requiring that justices and judges retire at the age of seventy).

[174] *See* Act of July 10, 2004, §§ 55, 57, 2004 Haw. Sess. Laws 919, 938–40 (codified at HAW. REV. STAT. §§ 602-5, -57).

bolts of the legal practice, while occasionally standing out in a milestone decision that builds on precedent and breaks new ground. In this sense of maintaining and advancing steady progress over the long haul, the analogy to a marathon runner is also apt.

As further discussed below, an overall review of the long and steady marathon course of Justice Nakayama's career suggests several interrelated and overlapping principles. First, a mindset grounded in pragmatism. Second, a faith in the legal process and the role of attorneys and judges. And third and final, a respect for the rule of law.

1. *Mindset of Pragmatism*

Judges tend to be a pragmatic lot generally, but Justice Nakayama specifically developed such a record and reputation as a jurist. Her *Best Place* decision, for example, adopted a reasonableness standard for the tort of bad faith,[175] which was described as "a middle-ground choice."[176] The *Finley* decision was similarly described as "practical" in how it avoided the additional complications and costs of requiring the insurer to pay for two different counsel for the insured.[177] In choosing this path, *Finley* declined a more purist view of automatically requiring independent counsel (or cynical view of necessarily mistrusting retained counsel) and instead insisted that retained counsel must serve the insured alone.[178]

Likewise, in the environmental and land and water resources cases, Justice Nakayama kept faithful focus on the overarching purposes of the regulatory schemes and avoided or rejected interpretations that would defeat those purposes or handcuff the agencies called to fulfill them. Thus, in *Kahana Sunset*, she read the environmental review requirements to uphold their purpose of informing agency decisions and enabling public participation.[179] In *Morgan*, she upheld the county's continuing authority to regulate

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[175] *See* Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawaiʻi 120, 132–33, 920 P.2d 334, 346–47 (1996).

[176] Beh, *supra* note 34, at 811.

[177] Mizuo, *supra* note 30, at 677; *see* Finley v. Home Ins. Co., 90 Hawaiʻi 25, 975 P.2d 1145 (1998).

[178] *See supra* notes 28–35 and accompanying text.

[179] *See* Kahana Sunset Owners Ass'n v. County of Maui, 86 Hawai'i 66, 947 P.2d 378 (1997); *supra* notes 42–48 and accompanying text; Antolini, *supra* note 48, at 593 (explaining how *Kahana Sunset* upheld the law even though the development had already received permit approval, thus affirming that "[t]he public participation requirements trumped economic considerations").

seawalls.[180] In *Waiāhole*, she repeatedly rejected technical readings of the Water Code that would have undercut the commission's authority, maintaining that "these provisions should not be construed so rigidly as to create an absurdity, or worse yet, to circumvent the Commission's constitutional and statutory obligations."[181] And, of even more fundamental importance to the integrity of the public trust over water resources, she rejected arguments seeking to exclude ground water from the scope of the trust, seeing "little sense in adhering to artificial distinctions neither recognized by the ancient [Hawaiian] system nor borne out in the present practical realities of this state."[182]

Justice Nakayama's pragmatism particularly shone through in her dissents, in which she often criticized the disconnect between the majority's rulings and practical reality. In *Hiner*, she chastised the majority for finding ambiguity in the words "two stories in height" in the abstract, when in actuality the house at issue was three stories and impaired neighbors' viewplanes.[183] In *Arceo* and *Rabago*, she recognized the practical plight of child sexual assault survivors.[184] And in *Baker*, she decried the majority's "sanitize[d]" view of police interrogations for "distort[ing] the reality of human conversation."[185] In short, Justice Nakayama's jurisprudence consistently seemed to keep in mind how the court's rulings would work in practice, for those implementing or experiencing the law on the ground.

2. *Faith in the Legal Process*

Interwoven with the previous principle, Justice Nakayama's jurisprudence also conveyed an abiding faith and trust in the legal process and the instrumental roles and responsibilities of counsel and the court in making this process work. *Finley* is a classic example: in "balancing the respective pros and cons of suggested solutions" to the inherent conflict in insurance defense, her opinion opted to "leave the resolution of the conflict to the integrity of

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[180] *See* Morgan v. Planning Dep't, 104 Hawai'i 173, 86 P.3d 982 (2004); *supra* notes 49–50 and accompanying text.

[181] *In re* Waiāhole Ditch Combined Contested Case Hr'g, 94 Hawai'i 97, 173, 9 P.3d 409, 485 (2000).

[182] *Id.* at 135, 9 P.3d at 447.

[183] *See* Hiner v. Hoffman, 90 Hawai'i 188, 197–98, 977 P.2d 878, 887–88 (1999) (Nakayama, J., dissenting); *supra* notes 100–05 and accompanying text.

[184] *See* State v. Arceo, 84 Hawai'i 1, 34, 928 P.2d 843, 876 (1996) (Nakayama, J., dissenting); State v. Rabago, 103 Hawai'i 236, 254, 81 P.3d 1151, 1169 (2003) (Nakayama, J., dissenting); *supra* notes 106–14 and accompanying text.

[185] State v. Baker, 147 Hawai'i 413, 453, 441, 465 P.3d 860, 900, 888 (2020) (Nakayama, J., dissenting).

retained defense counsel."[186] In her words, "When retained counsel, experienced in the handling of insurance defense matters, is allowed full rein to exercise professional judgment, the interests of the insured will be adequately safeguarded."[187] As legal experts explained, *Finley* "rejected the cynical view that appointed defense counsel lacks the inherent ability to place the insured's interests above the attorney's own interest in future employment by the insurer" and conveyed a "trust and confidence in the integrity and ethics of the Hawaiʻi bar."[188]

Of course, such trust was not simply given on naive faith. Justice Nakayama also showed she understood the need to encourage attorneys to do the right thing. *Finley* articulated strict standards for attorney conduct, along with the threat of malpractice remedies.[189] Along similar lines, Justice Nakayama did not hesitate to uphold sanctions against wayward parties or attorneys, as in *Kawamata Farms*,[190] or impose such sanctions herself, as in the *Doe* child support case.[191]

Justice Nakayama also respected the role of judges, including at the trial courts. *Kawamata Farms* is a representative example, where she affirmed the trial court's overall conduct of the complex litigation process despite noting various specific errors that almost inevitably arise through the course of such extensive proceedings.[192] Similarly, Justice Nakayama's rulings reviewing agency decisions reflect a respect for the agencies' regulatory roles.[193] Cases like *Waiāhole* impart an overall theme of affirming the agency's broad public trust mandate and empowering and encouraging the agency to fulfill its mission, even where it may have fallen short in its specific decisions.[194]

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[186] Finley v. Home Ins. Co., 90 Hawaiʻi 25, 31–32, 975 P.2d 1145, 1151–52 (1998).

[187] *Id.* at 34, 975 P.2d at 1154.

[188] Beh, *supra* note 34, at 794.

[189] *See supra* notes 31–33 and accompanying text.

[190] *See* Kawamata Farms, Inc. v. United Agri Products, 86 Hawaiʻi 214, 948 P.2d 1055 (1997); *supra* notes 38–41 and accompanying text.

[191] *See* Child Support Enf't Agency v. Doe, 109 Hawaiʻi 240, 125 P.3d 461 (2005); *supra* notes 164–68 and accompanying text.

[192] *See, e.g.*, *Kawamata Farms*, 86 Hawaiʻi at 243–47, 948 P.2d at 1084–88.

[193] *See supra* notes 179–82 and accompanying text.

[194] *See In re* Waiāhole Ditch Combined Contested Case Hr'g, 94 Hawaiʻi 97, 9 P.3d 409 (2000); *Proceedings of the 2001 Symposium on Managing Hawai'i's Public Trust Doctrine*, 24 U. HAW. L. REV. 21, 60 (2001) (commentary from Professor Joseph Sax explaining that judicial affirmation of the public trust doctrine in a decision like *Waiāhole* "energizes administrative agencies to act").

Faith in the legal process lies at the root of Justice Nakayama's prolific opinions on the plain error doctrine.[195] They emphasize the role and responsibility of counsel to drive the truth-seeking process in the adversarial system, while refusing to condone incompetent practice or unethical tactics, which "erode[] our bedrock adversarial principles of justice along with our respect and justified expectations for counsel as officers of the court."[196] As these dissents suggest, when the process and its constituent roles break down, faith in the process can devolve into cynicism and mistrust. In this regard, although Justice Nakayama is known for her pragmatism as discussed above, her faith in the process, and insistence that it be followed and allowed to work, may also be viewed as a form of principled idealism.

3. *Respect for the Rule of Law*

Justice Nakayama related that "the nicest thing" anyone said about her career was, "Thank you for following the rule of law."[197] That also happens to be "the most important thing" we look for from judges. It is, indeed, the foundation and faith on which the judiciary and legal system rests.

Respect for the rule of law runs as a common thread through Justice Nakayama's jurisprudence. Her decisions span all kinds of cases, big and small, across the gamut of legal fields. In general, they reflect a moderate, middle-ground philosophy not particularly inclined to exert judicial authority or imprint a judicial personality. But the decisions consistently reveal—particularly in the landmark cases in which the court was at the center of deciding major controversies—a bottom-line commitment to upholding the rule of law and the court's independent role in our democracy.

Justice Nakayama's dissents, as discussed, stood by her vision of the rule of law prescribing the roles of attorneys, the trial court, and the appellate court in the legal system. Her numerous dissents indicated she was not afraid to stand independently—and even alone, as in the *Arceo* and *Deedy* cases.[198]

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[195] *See* discussion *supra* Part III.C.

[196] State v. Nichols, 111 Hawai'i 327, 347, 141 P.3d 974, 994 (2006) (Nakayama, J., concurring and dissenting); *see supra* notes 131–36 and accompanying text.

[197] Telephone Interview with Paula A. Nakayama, Assoc. Just., Haw. Sup. Ct. (Dec. 2022).

[198] *See* State v. Arceo, 84 Hawai'i 1, 34, 928 P.2d 843, 876 (1996) (Nakayama, J., dissenting); State v. Deedy, 141 Hawai'i 208, 234, 407 P.3d 164, 190 (2017) (Nakayama, J., dissenting); *supra* notes 106–09, 118–24 and accompanying text.

On the flip side, Justice Nakayama's record indicates that, once the court established legal precedent over her dissent, she would follow it in later cases. For example, Justice Nakayama dissented to the majority decision in Tax Foundation of Hawai'i v. State, 144 Hawai'i 175, 439 P.3d 127 (2019), which expanded standing to seek declaratory relief in court. But she later applied the *Tax Foundation* precedent to recognize plaintiffs' standing in the

And as her *Deedy* dissent confirmed, she was also unafraid to stand for principles that would produce unpopular results in controversial cases.[199]

Indeed, it was often in the most controversial cases in which Justice Nakayama took the strongest and steadiest stands. The *Baehr* decision turned on her single vote as a new incoming justice.[200] In the *Kalima* case, she took the State to task for decades of mismanagement of Hawaiian Homelands and held it financially accountable.[201] In *League of Women Voters*, she struck down the legislature's gut-and-replace practice, based on democratic principles and the resolve that the "power to interpret the Hawaiʻi Constitution still lies with the judiciary."[202]

Finally, in *Waiāhole*, Justice Nakayama embraced the responsibility of deciding a case of "unprecedented size, duration, and complexity,"[203] in a historic tug-of-war over humanity's most precious resource. She corrected the commission for not fulfilling its responsibility as trustee over water resources not just once, but twice in that case, as well as in numerous subsequent cases on other islands.[204] Reaffirming and building on the history and precedent of Hawaiʻi and its highest court going back to the Chief Justice Richardson era and originally the Hawaiian Kingdom,[205] Justice Nakayama's *Waiāhole* decision set out to give meaning and substance to the constitutional public trust so as not to "render the public trust meaningless," but to "reaffirm the basic, modest principle" of protecting "certain enduring public rights."[206] Further, in rebuking the political pressures and machinations that "strongly

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League of Women Voters case. *See* League of Women Voters v. State, 150 Hawaiʻi 182, 189–91, 499 P.3d 382, 389–91 (2021); *supra* notes 93–99 and accompanying text. Such respect for precedent also accords with an overall respect for the rule of law.

[199] *See supra* notes 118–24 and accompanying text.

[200] *See* Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993); *supra* notes 15–20 and accompanying text.

[201] *See* Kalima v. State, 148 Hawaiʻi 129, 468 P.3d 143 (2020); *supra* notes 85–92 and accompanying text.

[202] *League of Women Voters*, 150 Hawaiʻi at 206, 499 P.3d at 406; s*ee supra* notes 93–99 and accompanying text.

[203] *In re* Waiāhole Ditch Combined Contested Case Hr'g, 94 Hawaiʻi 97, 110, 9 P.3d 409, 422 (2000).

[204] *See supra* notes 62–71 and accompanying text.

[205] *See, e.g.*, *Waiāhole*, 94 Hawaiʻi at 127–30, 9 P.3d at 439–442. *See* Sproat, *supra* note 56, at 547, 559–60 (discussing how *Waiāhole* "solidified" and "built on" the legal foundation laid by the Richardson court and "resolved the vast majority of questions about the state of water law in Hawaiʻi").

[206] 94 Hawaiʻi at 190 n.108, 9 P.3d at 502 n.108.

suggest[ed] that improper considerations tipped the scales in this difficult and hotly disputed case,"[207] her *Waiāhole* decision assured that "in spite of, or even because of, such adverse political circumstances, principle, not popularity, would rule the day."[208] In the end, "[s]uch affirmation of *the rule of law* was as important as the legal rules themselves."[209]

V. CONCLUSION

In 2021, three decades after Justice Nakayama made history in joining the Hawai'i Supreme Court, women became a majority of the ICA for the first time in that court's history. Soon enough, the supreme court may reach that milestone.

As Justice Nakayama recognized, progress in our society opened the door for her judicial career. And vice versa: her career enabled and embodied that progress. This change began with her historic step for more diverse representation on the court. But over thirty precedent- and record-setting years, the change she helped bring encompassed much more. As a role model, through the broader perspectives she added to the court, and in her jurisprudence, Justice Nakayama forever changed the law in Hawai'i and the his/herstory of Hawai'i's highest court.[210]

Justice Nakayama believed it to be a "higher calling" and "an honor and privilege to be allowed to serve my fellow citizens, and I never forget that."[211] She in turn will be long remembered for her decades of dedicated service toward this higher purpose. To the "Lady of Justice of Hawai'i," the people of Hawai'i owe our thanks.

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[207] *Id.* at 127, 9 P.3d at 439; *see supra* note 63.

[208] Sproat & Moriwake, *supra* note 54, at 279.

[209] *Id.* (emphasis added).

[210] Center for Civic Education, *Why Should Young People Consider Public Service: Justice Paula Nakayama, Part 3*, YOUTUBE (May 27, 2022), https://www.youtube.com/watch?v=W-SlJzkAlu4 (explaining that, as a public servant, "you can effect change from within, and it can be very, very gratifying").

[211] *Id.*

Women's Right to Equality and Reproductive Autonomy: The Impact of *Dobbs v. Jackson Women's Health Organization*

Carole J. Petersen*

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I. INTRODUCTION

The United Nations Working Group on the Issue of Discrimination Against Women in Law and Practice views the right to reproductive autonomy as essential to women's equality.[1] The UN Committee on the Elimination of Discrimination Against Women (established by the Convention on the Elimination of All Forms of Discrimination Against Women[2]) also emphasizes the importance of reproductive autonomy and the gender-specific health risks of enforced pregnancy and childbirth.[3] Many international courts and treaty-monitoring bodies have also issued decisions recognizing that denial of abortion care violates a woman's human rights, particularly when a pregnancy threatens her life or health, or resulted from rape or incest.[4] Comparative studies of national laws further demonstrate that

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[1] Human Rights Council, Report of the Working Group on the Issue of Discrimination Against Women in Law and Practice, ¶ 35, U.N. Doc. A/HRC/38/46 (May 14, 2018), https://digitallibrary.un.org/record/1637427?ln=en.

[2] G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (Dec. 18, 1979) [hereinafter CEDAW]. The United States signed the CEDAW on July 17, 1980 but the U.S. Senate has not given its consent to ratify it. Melanne Verveer & Rangita de Silva de Alwis, *Why Ratifying the Convention on the Elimination of Discrimination Against Women (CEDAW) is Good for America's Domestic Policy*, GEORGETOWN UNIV. INST. FOR WOMEN, PEACE & SEC. (Feb. 18, 2021), https://giwps.georgetown.edu/why-ratifying-the-convention-on-the-elimination-of-discrimination-against-women-cedaw-is-good-for-americas-domestic-policy/. However, as a signatory, the United States is obligated to "refrain from acts which would defeat the object and purpose" of the treaty while preparing for ratification. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). This is a principle of customary international law, codified in the Vienna Convention on the Law of Treaties, art 18. *See id.*

[3] Committee on the Elimination of Discrimination Against Women, General Recommendation No. 24: Article 12 of the Convention on the Elimination of All Forms of Discrimination Against Women—Women and Health, 20th Sess., 1999, U.N. Doc. A/54/38/Rev.1, at ¶31(c) (1999).

[4] *See* U.N. Office of the High Commissioner for Human Rights, Information Series on Sexual and Reproductive Health and Rights: Abortion (2020), https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_WEB.pdf; Johanna B. Fine, Katherine Mayhall, & Lilian Sepúlveda, *The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally*,

the global trend is towards liberalization.[5] Even jurisdictions that still formally prohibit abortion often provide broad exceptions – not only for the life of the woman but also for situations in which the pregnancy would likely damage her physical or mental health, or the well-being of her family.[6]

Yet, sections of the United States are rapidly moving in the opposite direction. In *Dobbs v. Jackson Women's Health Organization*,[7] the United States Supreme Court upheld (by a vote of 6 to 3) a Mississippi statute prohibiting abortion after the fifteenth week of pregnancy. The Court had originally granted certiorari to decide the limited question of whether all pre-viability bans on elective abortions are unconstitutional and Chief Justice Roberts (who concurred in the judgment but did not join the majority opinion) argued that the Court should confine itself to that limited question.[8] Nonetheless, the Supreme Court went further and decided (by a vote of 5 to 4) to overrule *Roe v. Wade*[9] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[10] As of January 2023, twenty-four states had either prohibited abortion in most circumstances or were in the process of doing so.[11] Meanwhile, other states (and also the federal government) have responded to *Dobbs* by reaffirming or strengthening legal protections for reproductive autonomy. There are also competing lawsuits pending in the federal courts concerning mifepristone, a drug commonly used for early abortions: one seeks a nationwide ban on the drug while the other seeks to

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HEALTH & HUM. RTS. L. J. (June 2, 2017), https://www.hhrjournal.org/2017/06/the-role-of-international-human-rights-norms-in-the-liberalization-of-abortion-laws-globally/.

[5] Women and Foreign Policy Program Staff, *Abortion Law: Global Comparisons*, COUNCIL ON FOREIGN RELS. (last updated June 24, 2022), https://www.cfr.org/article/abortion-law-global-comparisons.

[6] *E.g.*, Abortion Act 1967 ch. 87 (UK), https://www.legislation.gov.uk/ukpga/1967/87/data.pdf.

[7] 142 S. Ct. 2228 (2022).

[8] *Id.* at 2314 (Roberts, C.J., concurring) (arguing that the Court should uphold the Mississippi statute by adopting a narrowed reading of the Court's prior decisions and "leave for another day" the broader question of whether there is any right to abortion under the federal Constitution).

[9] 410 U.S. 113 (1973).

[10] 505 U.S. 833 (1992); *Dobbs*, 142 S. Ct. at 2242.

[11] Elizabeth Nash & Isabel Guarnieri, *Six Months After Roe: 24 US States Have Banned Abortion or Are Likely to Do So: A Roundup*, GUTTMACHER INST. (Jan. 10, 2023), https://www.guttmacher.org/2023/01/six-months-post-roe-24-us-states-have-banned-abortion-or-are-likely-do-so-roundup?utm_source=Guttmacher+Email+Alerts&utm_campaign=7cad5c6af6-24states&utm_medium=email&utm_term=0_-7cad5c6af6-%5BLIST_EMAIL_ID%5D; *see also Tracking the States Where Abortion is Now Banned*, N.Y. TIMES (Jan. 6, 2023, 10:30 AM), https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html.

make it more accessible.[12] Thus, the decision in *Dobbs* has set the stage for new conflicts, at least some of which will likely work their way to the Supreme Court.

While individuals of all gender identities can become pregnant, this Article focuses on the impact of *Dobbs* on women's right to equality, as restrictions on abortion disproportionately affect women and perpetuate stereotypes of their role in society. Part II of the Article begins by reviewing the approach taken in *Roe*, which analyzed abortion from the perspective of a gender-neutral right to privacy, part of the liberty that is protected by the Due Process Clause. In *Casey*, the Supreme Court dispensed with the trimester framework, but upheld *Roe's* "essential holding" (the right to terminate a pregnancy pre-viability). *Casey* also arguably broadened the jurisprudential foundations for a right to abortion, reflecting the intertwining rights of liberty and equality. This interpretative approach to the Fourteenth Amendment's Due Process Clause – sometimes referred to as "equal dignity"[13] – was further developed in the cases of *Lawrence v. Texas*,[14] *United States v. Windsor*,[15] and *Obergefell v. Hodges*,[16] which confirmed the rights of LGBT citizens to equal citizenship. Yet, the concept of equal dignity was never as robustly applied in cases relating to women's right to access abortion. Moreover, the Supreme Court never expressly overruled *Washington v. Glucksberg*[17] or *Geduldig v. Aiello*,[18] cases that would come back to haunt advocates for reproductive autonomy.

Part III of the Article then analyzes the likely impact of *Dobbs* on constitutional interpretation in the federal courts. In addition to resurrecting *Glucksberg* and its rigid test for unenumerated rights, Justice Alito's majority opinion takes a very narrow view of American history, ignoring the reproductive autonomy that women originally exercised and the discriminatory motives underlying the campaign to criminalize abortion at

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[12] Spencer Kimball, *Dueling Court Cases in Washington State and Texas Could Determine Legality of Abortion Pill*, CNBC, https://www.cnbc.com/2023/03/29/abortion-pill-dueling-court-cases-could-determine-legality-of-mifepristone.html.

[13] Laurence H. Tribe, *Equal Dignity, Speaking its Name*, 129 HARV. L. REV. F. 16, 22 (2015).

[14] 539 U.S. 558 (2003).

[15] 570 U.S. 744 (2013).

[16] 576 U.S. 644 (2015).

[17] 521 U.S. 702 (1997) (holding that the state of Washington's prohibition on causing or aiding a suicide did not violate the 14th Amendment and setting forth a rigid test for unenumerated rights, which is discussed *infra*).

[18] 417 U.S. 484 (1974) (holding that a state-operated disability income protection plan could exclude a normal pregnancy without violating the Equal Protection Clause).

the state level in the 1800s. While the majority opinion expressly states that it has no impact beyond the right to abortion, it is difficult to reconcile the approach taken in *Dobbs* with other case law on substantive due process, particularly recent cases protecting the rights of the LGBT community. Justice Alito also failed to acknowledge the relationship between a right to reproductive autonomy and the Equal Protection Clause. Ultimately, this could undermine equal protection jurisprudence in areas other than abortion.

Part IV considers the impact of *Dobbs* from a more pragmatic perspective. Contrary to the expectations of many in the anti-abortion movement, *Dobbs* is unlikely to substantially decrease the number of abortions in the United States. This is partly because advocates for reproductive autonomy are employing new strategies, including law reform and litigation at the state level. Women in restrictive states are also finding ways to get around the new bans, as abortion pills can be obtained from other states and, if necessary, from foreign countries. But the inequality that has long existed in reproductive health care will be further exacerbated by *Dobbs*. Women of color, women who live with disabilities, and women who live in poverty will suffer disproportionately, partly because they will have greater difficulty obtaining abortion pills from outside their states, but also because they have higher rates of maternal mortality and are more likely to be targeted for investigation and prosecution if they "self-manage" an abortion. The question is how legislators and policy makers will grapple, if at all, with those systemic inequalities. Part V thus briefly concludes with some recommendations for legislation at the state level.

II. REPRODUCTIVE AUTONOMY – AT THE NEXUS OF PRIVACY, LIBERTY AND EQUALITY?

A. The Relationship Between Gender Equality and Reproductive Autonomy

When arguing for a right to reproductive autonomy (whether in the courts or in legislative bodies) advocates around the world have relied on a range of legal principles, including: the right to bodily integrity, the right to privacy, the right to liberty and individual self-determination, and the right to be free from torture and inhumane treatment. On the surface, these are gender-neutral rights that can be claimed by any individual. However, reproductive autonomy can also be analyzed from a feminist perspective, thereby invoking the more recently developed principles of gender equality and equal

protection of the law.[19] Because women bear a disproportionate share of the burdens of childcare, the violation of their right to liberty caused by forced motherhood will generally continue for many years.[20] Adoption does not cure these violations, partly because women who are denied abortions rarely opt for adoption.[21] Moreover, adoption cannot relieve the substantial pain, risks, and burdens that result from involuntary pregnancy and childbirth. For some women, denial of abortion care has proven fatal.[22] In the United States, approximately 700 women die every year due to pregnancy-related complications, and the mortality rate is particularly high for women of color.[23] The reproductive justice movement draws attention to these persistent inequalities, recognizing that the ability of women to make meaningful choices is shaped by intersecting forms of discrimination, including not only gender discrimination but also racism, classism, and heterosexism.[24] The reproductive justice movement is also much broader than the right to choose abortion; it also advocates for the human right to have children and the right to raise them in safe and sustainable communities.[25]

In addition to the discriminatory *impact*, feminist scholars have also critiqued the discriminatory *origins* of restrictions on reproductive autonomy. Under this analysis, a government's decision to restrict access to contraception or abortion reflects men's desire to exercise power over

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[19] *See, e.g.*, Reva B. Siegel, Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression, 56 EMORY L. J. 815, 817–22 (2007).

[20] *See id.* at 826–27.

[21] Gretchen Sisson, Lauren Ralph, Heather Gould & Diana Greene Foster, Adoption Decision Making Among Women Seeking Abortion, 27 WOMEN'S HEALTH ISSUES 1, 1–2 (2017), https://www.researchgate.net/publication/313127526_Adoption_Decision_Making_among_Women_Seeking_Abortion.

[22] *See, e.g.*, Joe Parkins Daniels et al., Killed by Abortion Laws: Five Women Whose Stories we must Never Forget, GUARDIAN (May 7, 2022, 7:00 AM), https://www.theguardian.com/global-development/2022/may/07/killed-by-abortion-laws-five-women-whose-stories-we-must-never-forget; Megan Specia, How Savita Halappanavar's Death Spurred Ireland's Abortion Rights Campaign, N.Y. TIMES (May 27, 2018), https://www.nytimes.com/2018/05/27/world/europe/savita-halappanavar-ireland-abortion.html.

[23] Latoya Hill, Samantha Artigua, & Usha Ranji, *Racial Disparities in Maternal and Infant Health: Current Status and Efforts to Address Them*, KAISER FAM. FOUND. (Nov. 1, 2022), https://www.kff.org/racial-equity-and-health-policy/issue-brief/racial-disparities-in-maternal-and-infant-health-current-status-and-efforts-to-address-them/#.

[24] LORETTA ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION 9–17 (1987).

[25] *Id*.

women and to keep them in their traditional roles as mothers and wives.[26] It also reflects a fundamental distrust of women's ability to make important decisions. As Catharine MacKinnon argued, the issue is not simply whether a fetus is a form of life; rather, the issue is: "Why should women not make life or death decisions?"[27] The feminist case for reproductive autonomy thus critiques the male-dominated social structure as a whole. In contrast, the principles of bodily integrity, liberty, and privacy pose no obvious threat to the traditional unequal balance of power between men and women within the family. Indeed, by resisting public intervention into the "private sphere" of family life, undue emphasis on the right to privacy may, at times, help to perpetuate gender discrimination.[28] The Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") attempts to address this concern by obligating state parties to redress inequality within the family[29] (rather than simply in aspects of public life) and to ensure that women enjoy an equal right "to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights."[30]

B. Roe v. Wade *and the Gender-Neutral Right to Privacy*

The United States Supreme Court's early jurisprudence on reproductive autonomy was primarily based on a gender-neutral right to privacy, part of the liberty guaranteed by the Fourteenth Amendment's Due Process Clause. In 1965, in *Griswold v. Connecticut,* the Court struck down a statute prohibiting the use of contraceptives on the ground that it violated the right to marital privacy.[31] Seven years later, in *Eisenstadt v. Baird*, the Court clarified that this is an individual right and struck down a statute preventing unmarried individuals from obtaining contraception.[32] In addition to the right to privacy, the Court also held that the statutory distinction between married

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[26] CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93–102 (1987).

[27] *Id*. at 94.

[28] *Id*. at 101. For a summary of responses to this argument in the context of access to abortion *see*, for example, ANITA L. ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 54–81 (1988) and Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J. L. & PUB. POL'Y 419, 438–39 (1995).

[29] CEDAW, *supra* note 2, at Arts. 5, 12, 16.

[30] *Id.* at Art. 16 § 1(e).

[31] 381 U.S. 479 (1965).

[32] 405 U.S. 438, 445–46 (1972).

and unmarried people violated the Equal Protection Clause.[33] But the Court did not point out the inherent *gender inequality* of the law, although an involuntary pregnancy caused by a ban on contraception could certainly be analyzed as a sex-specific burden imposed by the state.[34]

Roe v. Wade was decided one year later, in 1973.[35] The plaintiffs in *Roe* and the companion case (*Doe v. Bolton*[36]) did not argue that the statutes constituted discrimination on the basis of sex. At that time, the Supreme Court had only just begun to recognize how sex-based statutes can violate the Equal Protection Clause.[37] Thus, it is not surprising that the litigants would pursue a more conservative strategy, arguing that the Texas and Georgia statutes violated the right to privacy and the doctor-patient relationship.[38] Justice Blackmun's opinion in *Roe* did acknowledge the significant physical and psychological burdens of pregnancy, childbirth, and motherhood.[39] However, he did not emphasize the sex-specific nature of an involuntary pregnancy.[40] Rather, he focused on the private nature of the medical decision and the right of the doctor to determine, in consultation with his patient, whether a pregnancy should be terminated.[41]

The Court has missed other opportunities to recognize the sex-based nature of laws and government policies that affect pregnant women. For example, in 1974, in *Geduldig v. Aiello,* the Court held that a state-operated disability income protection plan could exclude normal pregnancy without violating the Equal Protection Clause.[42] The dissenting opinion of Justice Brennan (joined by Justices Marshall and Douglas) pointed out that the state had singled out "for less favorable treatment a gender-linked disability peculiar to women" and thus created a "double standard" for disability compensation.[43] The dissent argued that "[s]uch dissimilar treatment of men

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[33] *Id.* at 447–48.

[34] *See, e.g.*, Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 978 (1984).

[35] 410 U.S. 113 (1973).

[36] *See generally id.*; *Bolton*, 410 U.S. 179 (1973) (challenging a Georgia statute that permitted abortion only when the pregnancy threatened the life or health of the woman or resulted from rape and in cases of fetal impairment).

[37] Reed v. Reed, 404 U.S. 71, 76 (1971).

[38] *See, e.g.*, *Roe*, 410 U.S. at 116.

[39] *Id.* at 153.

[40] *See generally id.*

[41] *See id.* at 154.

[42] 417 U.S. 484 (1974). The Court made a similar ruling in the context of interpreting Title VII but Congress then overruled the Court by amending Title VII to state explicitly that classification on the basis of pregnancy constitutes a sex-based classification.

[43] *Id.* at 501.

and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination."[44]

Geduldig was widely criticized[45] and the lower federal courts initially sought to blunt its impact by distinguishing cases arising under Title VII.[46] When the Supreme Court insisted on applying the logic of *Geduldig* to Title VII,[47] Congress did not hesitate to overrule it by enacting the Pregnancy Discrimination Act 1978.[48] Even in the context of constitutional interpretation, it is arguable that *Geduldig* has been superseded by subsequent case law, including *United States v. Virginia*[49] (in which the Supreme Court applied heightened scrutiny to sex-based state action) and *Nevada Department of Human Resources v. Hibbs* (in which the Court held that Congress could use its powers under the Equal Protection Clause to enact the Family and Medical Leave Act and remedy inequality in maternity and paternity leave policies).[50] But *Geduldig* was never expressly overruled (and, as discussed below, was cited by Justice Alito in *Dobbs*).[51]

Over the years, many constitutional law experts have also critiqued the Court's general failure to analyze reproductive autonomy through the lens of women's right to equality. For example, Ruth Bader Ginsburg observed (well before she was elevated to the Supreme Court) that the Court's position in *Roe* was weakened "by the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective."[52] The privacy analysis has also been blamed for decisions upholding statutes that prohibit public funding for abortions (although it is

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[44] *Id.*

[45] *See, e.g.*, Law, *supra* note 34, at 982–83, 1037; Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 442–43, 451 (2007).

[46] Shannon E. Liss, *The Constitutionality of Pregnancy Discrimination: The Lingering Effects of* Geduldig *and Suggestions for its Reversal*, 23 REV. L. & SOC. CHANGE 59 (1997).

[47] *See generally* General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

[48] Pub. L. No. 95-555, § 1, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e), https://www.govinfo.gov/content/pkg/STATUTE-92/pdf/STATUTE-92-Pg2076.pdf#page=1.

[49] 518 U.S. 515 (1996).

[50] 538 U.S. 721 (2003).

[51] *See* discussion *infra* Part III.

[52] Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 386 (1985). Ginsburg and certain other commentators also believed that *Roe* "ventured too far" by announcing the trimester framework, *id.* at 381–82., an issue that is not analyzed in this article. The alternative would have been to simply strike down the Texas and Georgia statutes and let state legislators figure out how to comply with the ruling.

not at all clear that those cases would have come out differently had *Roe* been decided on Equal Protection grounds).[53] Of course, the anti-abortion movement did not confine itself to restricting public funding for abortion. Rather, it devised numerous strategies to overrule *Roe*, including articles attacking the constitutional analysis and the scope of the judgment, an unsuccessful campaign to amend the Constitution to expressly protect the unborn, and a far more successful campaign to work for the appointment of Supreme Court justices who were expected to disagree with *Roe* (even if they were careful not to say so explicitly in Senate confirmation hearings).[54]

The impact of these multiple strategies was felt as early as 1989 when the Court upheld, by a 5 to 4 vote, a Missouri statute that was clearly intended to make it difficult to obtain a legal abortion.[55] The provisions upheld by the Court included a statutory preamble that declared that life begins at conception, a restriction on abortions in public facilities, and a requirement that a number of tests of fetal viability be performed if the pregnancy was twenty or more weeks.[56] Although only Justice Scalia expressly stated that he would overrule *Roe*, the decision in *Webster* created significant uncertainty regarding *Roe's* precedential weight.[57] It also gave conservative states an incentive to continue to enact and enforce a variety of burdensome regulations, often adopted in the name of ensuring "informed" consent or to require that the parents or spouse of the pregnant woman be notified.[58] The uncertainty regarding the status of Roe increased with the retirements of two

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[53] This is partly because U.S. constitutional law emphasizes formal (as opposed to substantive) equality. Thus, even if a legal right to terminate one's pregnancy had been grounded in the Equal Protection Clause, it is unlikely that the Court would have required the government to subsidize abortions. *See* Anita L. Allen, *The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution*, 18 HARV. J. L. & PUB. POL'Y 419, 452 (1995).

[54] *See, e.g.*, Lexi Lonas, *What the Conservative Justices Said About* Roe v. Wade *During Confirmation Hearings*, HILL (May 3, 2022), https://thehill.com/regulation/court-battles/3475490-what-the-conservative-justices-said-about-roe-v-wade-during-confirmation-hearings/.

[55] *See generally* Webster v. Reprod. Health Servs., 492 U.S. 490 (1989).

[56] *Id.* at 501.

[57] Justice O'Connor suggested a new interpretation of *Roe*, that it required only that states do not impose an "undue burden" on women's right to choose abortion. *Webster*, 492 U.S. at 530. But she also noted that she found the trimester framework problematic and that "there will be time enough to reexamine" *Roe*. *Id.* at 526. The trimester framework was ultimately discarded in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

[58] Martha M. Ezzard, *State Constitutional Privacy Rights Post Webster—Broader Protection Against Abortion Restrictions?*, 67 DENV. U. L. REV. 401, 401–02 (1990) (summarizing state statutes enacted as a result of the decision in *Webster*).

of the four dissenters in Webster: Justice Brennan (in 1990) and Justice Marshall (1991). This enabled President Bush to nominate Justice David Souter and Justice Clarence Thomas. The two nominees managed not to reveal their views on abortion during their confirmation hearings, leading to substantial speculation on whether Roe would survive.[59]

C. Casey *and the Concept of Equal Dignity*

In 1992, the Court had to examine one of the statutes enacted in the aftermath of *Webster*, the Pennsylvania Abortion Control Act of 1982.[60] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[61] only two justices (Blackmun and Stevens, who had also dissented in *Webster*) expressed wholehearted support for *Roe*. But three additional justices (O'Connor, Kennedy and Souter) voted to reaffirm *Roe's* "essential holding," which they described as the "recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State."[62] The plurality's decision was partly based on the force of stare decisis.[63] But the justices also arguably put the right to abortion on a firmer constitutional foundation, by emphasizing the link between reproductive autonomy and women's full citizenship.[64] The opinion emphasized that every woman has a right to liberty and to reject, if she so chooses, the traditional role of wife and mother.[65] As the plurality stated:

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[59] Frederic J. Frommer, *When Two Liberal Judges Nearly Doomed Roe v. Wade—By Retiring*, WASHINGTON POST (June 6, 2022), https://www.washingtonpost.com/history/2022/06/06/thurgood-marshall-william-brennan-roe/.

[60] 18 PA. CONS. STAT. §§ 3205 (requiring that a woman seeking an abortion give her informed consent prior to the procedure, and specifying that she be provided with certain information at least 24 hours before the abortion is performed); 3206 (mandating the informed consent of one parent for a minor to obtain an abortion but providing a judicial bypass procedure); 3209 (mandating that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband); 3203 (defining a "medical emergency" that will excuse compliance with the foregoing requirements); and 3207(b), 3214(a), and 3214(f) (imposing reporting requirements on abortion providers).

[61] 505 U.S. 833 (1992).

[62] *Id.* at 846.

[63] *Id.* at 845–46.

[64] *Id.* at 856 (noting that "the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives").

[65] *Id.* at 856–57.

> [T]he liberty of the woman is at stake in a sense unique to the human condition . . . [h]er suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture.[66]

This language implicitly recognized the sex-based nature of a statutory restriction on abortion.

The justices also struck down what was arguably the most offensive restriction in Pennsylvania's Abortion Control Act – the spousal notification requirement.[67] In addition to acknowledging the many reasons why a woman might not wish to notify her husband (such as situations of domestic violence), the plurality concluded that the requirement was inconsistent with women's right to equality:

> Section 3209 embodies a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution. Women do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family.[68]

In essence, the plurality stated that the scope of women's right to liberty under the Due Process Clause must be ascertained in line with their current status under the Constitution (which is, of course, much different than when the Due Process Clause was adopted in 1868). Justices Stevens and Blackmun were even more explicit regarding the connection between gender equality and reproductive autonomy.[69] Stevens described *Roe* as "an integral

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[66] *Id.* at 852.

[67] The court below (the Court of Appeals for the Third Circuit) had also struck down the spousal notification requirement. It is noteworthy, however, that one judge in the three-judge panel had dissented from that part of the judgment—Samuel Alito. In a dissenting opinion, then Judge Alito stated, "The Pennsylvania legislature could have rationally believed that some married women are initially inclined to obtain an abortion without their husbands' knowledge because of perceived problems—such as economic constraints, future plans, or the husbands' previously expressed opposition—that may be obviated by discussion prior to the abortion." Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 726 (3d Cir. 1991) (Alito, J., concurring in part and dissenting in part).

[68] *Casey*, 505 U.S. at 898.

[69] *Id.* at 912, 927–28 (Blackmun and Stevens, JJ., concurring).

part of a correct understanding of both the concept of liberty and the basic equality of men and women."[70] Blackmun cited numerous academic sources supporting the proposition that a right to equality includes access to legal abortion.[71] And this time, Blackmun expressly invoked the Equal Protection Clause:

> By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the "natural" status and incidents of motherhood—appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause. . . . The joint opinion recognizes that these assumptions about women's place in society "are no longer consistent with our understanding of the family, the individual, or the Constitution."[72]

Although the plurality's opinion was not as explicit about the relevance of the Equal Protection Clause, Professor Emeritus Laurence Tribe would later cite *Casey* as an early example of the nexus between the right to liberty and the right to equality.[73] This concept – often referred to as "equal dignity" – was further developed by Justice Kennedy in *Lawrence v. Texas*,[74] *United States v. Windsor*,[75] and *Obergefell v. Hodges.*[76] In essence, Justice Kennedy synthesized the rights to liberty and equality and applied the anti-subordination principle, arguing that if the rights protected by the Fourteenth Amendment "were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."[77] Under this approach, in order to fulfill

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[70] *Id.* at 912.

[71] *Id.* at 928, n.4 (stating that a "growing number of commentators are recognizing this point" and citing articles by such scholars as Laurence Tribe, Reva Siegel, and Cass Sunstein).

[72] *Id.* at 928–29 (internal citations omitted).

[73] Tribe, *supra* note 13, at 22 (citing *Casey*, 505 U.S. at 851).

[74] 539 U.S. 558, 567 (2003).

[75] 570 U.S. 744, 770 (2013).

[76] 576 U.S. 644, 674 (2015).

[77] *Id.* at 671.

the promise of the Fourteenth Amendment, the Court must apply the Due Process Clause alongside the Equal Protection Clause and draw on our contemporary understanding of the oppressive nature of longstanding laws and policies.

This interpretative approach enabled Justice Kennedy to avoid applying *Washington v. Glucksberg*,[78] where the Court had stated that an unenumerated right is only protected under the Due Process Clause if it is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[79] In *Obergefell*, Kennedy simply stated that such a narrow test for unenumerated rights would be "inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy."[80] Rather, the Court would embrace the more flexible approach articulated by Justice Harlan in *Poe v. Ullman*,[81] which had also been applied in both *Griswold* and *Casey*.

The concept of equal dignity has been rightly applauded as an essential step in affirming the equal citizenship of gay and lesbian individuals.[82] But, as Justice Ginsburg observed, it was not as robustly applied in cases asserting women's rights.[83] This was particularly true with respect to abortion, perhaps because the anti-abortion movement has been actively promoting its own competing narratives of dignity and equality.[84] This can be seen in the "fetal personhood" campaign[85] and in literature claiming (falsely) that a fetus experiences pain as early as the first trimester.[86] The anti-abortion movement

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[78] 521 U.S. 702 (1997) (holding that the state of Washington's prohibition on causing or aiding a suicide did not violate the 14th Amendment).

[79] *Id.* at 721. *Glucksberg* also required a "careful description" of the asserted right. *Id.* at 724.

[80] 576 U.S. 644, 671 (2015).

[81] Griswold v Connecticut, 381 U.S. 479, 484 (citing *Poe*, 367 U.S. 497, 516–22 (1961) (Harlan, J., dissenting)); Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 847 (citing *Poe*, 367 U.S. at 541 (Harlan, J., dissenting)).

[82] Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147 (2015).

[83] Adam Liptak, *Justices' Rulings Advance Gays; Women Less So*, N.Y. TIMES (Aug. 14, 2014), https://www.nytimes.com/2014/08/05/us/as-gays-prevail-in-supreme-court-women-see-setbacks.html.

[84] Jeannie Suk Gersen, *How Fetal Personhood Emerged as the Next Stage of the Abortion Wars*, NEW YORKER (June 5, 2019), https://www.newyorker.com/news/our-columnists/how-fetal-personhood-emerged-as-the-next-stage-of-the-abortion-wars.

[85] *Id.*

[86] *See Facts are Important: Gestational Development and Capacity for Pain*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, https://www.acog.org/advocacy/facts-are-important/gestational-development-capacity-for-pain (noting that: "peer-reviewed studies on the matter have consistently reached the conclusion that abortion before [24 weeks] does not

has also portrayed abortion as a form of discrimination, implying that it is often sought due to the sex, race, or disability of the fetus.[87] This strategy included a campaign to persuade the American public that sex-selective abortion is rampant in the United States,[88] although it is actually very rare.[89] Indeed, the movement has characterized abortion as a form of eugenics, although that term would normally be reserved for state policies rather than an individual woman's decision to terminate a pregnancy.[90] Justice Thomas has repeated these claims many times, arguing that the Court should pay more attention to the eugenic potential of abortion.[91]

These competing narratives may have made it difficult for Justice Kennedy – who is known to be very conflicted on abortion – to fully apply his "equal dignity" framework to women's right to abortion.[92] The Court's decision in

result in the perception of pain in a fetus"). *See also CDC's Abortion Surveillance System FAQs*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/reproductivehealth/data_stats/abortion.htm (reporting that less than one percent of abortions are performed at or beyond 21 weeks' gestation).

[87] *See* Carole J. Petersen, *Reproductive Autonomy and Laws Prohibiting "Discriminatory" Abortions: Constitutional and Ethical Challenges*, 96 U. DET. MERCY L. REV. 605, 608–09 (2019); *Reproductive Justice, Public Policy, and Abortion on the Basis of Fetal Impairment: Lessons from International Human Rights Law and the Potential Impact of the Convention on the Rights of Persons with Disabilities*, 28 J. L. & HEALTH 121, 127–28 (2015).

[88] *See, e.g.*, Steven W. Mosher, *President's Page: Let Us Ban Sex–Selective Abortions*, POPULATION RSCH. INST. (Mar. 1, 2007), https://www.pop.org/presidents-page-let-us-ban-sex-selective-abortions/.

[89] The anti-abortion movement sometimes points to the lower birth rate of female than male babies in certain ethnic communities in the United States. However, such statistics do not necessarily evidence sex-selective abortion as fertility clinics offer prospective parents means to influence the sex of their future child, including "sperm sorting" and artificial insemination. Sex-selection can also be achieved through pre-implantation diagnosis of fertilized eggs. *See, e.g.*, Brian Citro, Jeff Gilson, Sital Kalantry & Kelsey Stricker, *Replacing Myths with Facts: Sex-Selective Abortion Laws in the United States*, U. CHI. L. SCH. INT'L HUM. RTS. CLINIC, JUNE 2014, at 7, https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2536&context=facpub.

[90] *See* Petersen, *supra* note 87, at 608–19.

[91] Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1783–93 (2019) (Thomas, J., concurring). For critique, *see generally* Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025 (2021); Petersen, *supra* note 87.

[92] Charlotte Alter, *Here's What Justice Kennedy Thinks About Abortion*, TIME (Mar. 2, 2016), https://time.com/4243675/heres-what-justice-kennedy-thinks-about-abortion/.

Gonzales v. Carhart[93] (decided after *Lawrence* but before *Windsor* and *Obergefell*) is a good example. The case concerned a federal law prohibiting "intact dilation and extraction,"[94] one of two surgical methods applied in the very small percentage of abortions performed after the first trimester (usually due to a fetal disability or a serious health problem of the woman).[95] The federal statute contained a very limited exception for situations when the procedure was necessary to preserve the woman's life.[96] But it contained no exception for situations in which a doctor determined that the procedure was necessary to preserve a woman's health (e.g. to prevent damage to her uterus).[97] A very similar law, enacted by Nebraska, had been struck down by the Court in 2000.[98] But Justice Kennedy dissented from that decision and, in 2007, he provided the fifth vote to uphold the federal equivalent of Nebraska's ban.[99] He also wrote the majority opinion, which ignores women's rights to liberty, dignity, or equality.[100] Rather, Justice Kennedy took the position that *Casey* allows the state to regulate the medical profession and simply accepted Congress' findings that a "moral, medical, and ethical consensus exists" that the procedure is brutal, inhumane, and never medically necessary.[101] He also repeated paternalistic assumptions about women who have abortions, implying that they do not really understand what they are agreeing to and that abortion injures a woman's mental health.[102] Although the government had not even argued this point, Justice Kennedy further suggested that a ban on this method of abortion might be justified by the government's interest in protecting women from making a decision that they would regret:

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[93] 550 U.S. 124 (2007).

[94] *Id.* at 124. Congress used the term "partial birth abortion" (although that is not the medical term for the procedure). *See* Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (2003).

[95] Stephen T. Chasen, et al., *Dilation and Evacuation at 20 Weeks: Comparison of Operative Techniques* 190 AM. J. OBSTETRICS & GYNECOLOGY 1180, 1180–83 (2004), https://www.ajog.org/article/S0002-9378(03)02176-8/fulltext#secd42855620e378 (noting that some doctors believe that an intact dilation and evacuation pose less risk of certain complications, such as perforating the woman's bladder).

[96] *Gonzales*, 550 U.S. at 141.

[97] *Id.* at 143.

[98] Stenberg v. Carhart, 530 U.S. 914 (2000).

[99] *Id.* at 656–79 (Kennedy, J., dissenting); *Gonzales*, 550 U.S. at 130.

[100] *Gonzales*, 550 U.S. at 131.

[101] *Id.* at 141.

[102] Linda Greenhouse, *Adjudging a Moral Harm to Women from Abortions*, N.Y. TIMES (Apr. 20, 2007), https://www.nytimes.com/2007/04/20/us/20assess.html.

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.[103]

As Justice Ginsburg pointed out in her dissent, Justice Kennedy's reasoning was overtly discriminatory and reflected "the ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited."[104] Although purporting to apply the "undue burden" standard, the case marked a sharp departure from the approach taken in *Casey*, which had insisted on women's equal citizenship and their right to exercise decisional autonomy.[105] It was also very difficult to reconcile *Gonzales v. Carhart* with the Court's 2000 decision in *Stenberg v. Carhart*,[106] creating the impression that the Court was not really committed to its prior decisions.[107]

In 2016, the Court's decision in *Whole Woman's Health v. Hellerstedt* briefly reassured supporters of reproductive autonomy.[108] In that case, the majority applied the "undue burden" standard in a meaningful way, holding that legislation that unduly burdened abortion providers without significant health benefits violated the standard in *Casey*.[109] Some commentators predicted that activists would be able to use the case to challenge other

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[103] *Gonzales*, 550 U.S. at 159 (citations omitted); *see also* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey *and* Carhart, 117 YALE L. J. 1694 (2008).

[104] *Gonzales*, 550 U.S. at 185 (Ginsburg, J., dissenting).

[105] Kenneth L. Karst, *Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 130–33 (2007).

[106] *Compare Gonzales*, 550 U.S. 124 (2007) *with Stenberg*, 530 U.S. 914 (2000).

[107] *See After* Gonzales v. Carhart*: The Future of Abortion Jurisprudence*, PEW RSCH. CTR. (June 14, 2007) (quoting remarks of Eve Gartner, Senior Attorney for Planned Parenthood of America), https://www.pewresearch.org/religion/2007/06/14/after-gonzales-v-carhart-the-future-of-abortion-jurisprudence/.

[108] 579 U.S. 582 (2016).

[109] *Id.*

"TRAP" laws[110] across the country.[111] But that optimism faded quickly after the unexpected election of Donald Trump in November 2016.[112] President Trump managed to appoint three new justices to the Supreme Court—almost unthinkable for a one-term President.[113] Suddenly, the possibility of overruling *Roe* and *Casey* became a reality. The next two sections of the article analyze that new reality, beginning with the impact of *Dobbs* on the Court's approach to constitutional interpretation.

III. THE IMPACT OF DOBBS ON CONSTITUTIONAL INTERPRETATION

A. Revival of the Glucksberg Test and Selective Use of History

When *Obergefell* was decided, it appeared that the Supreme Court had abandoned the *Glucksberg* test for unenumerated rights in favor of the more open-ended common law approach advocated by Justice Harlan's dissent in *Poe v. Ullman*.[114] Indeed, Chief Justice Roberts complained, in his dissenting opinion in *Obergefell*, that the majority had effectively done so.[115] Laurence Tribe also believed that *Obergefell* had "definitively replaced" the rigid formulaic test of *Glucksberg*.[116]

But the *Glucksberg* test came roaring back in *Dobbs*. Justice Alito's opinion states, without any qualification, that an unenumerated right is only protected by the Due Process Clause if it is "deeply rooted in this Nation's

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[110] TRAP is an abbreviation for "Targeted Regulation of Abortion Providers," an umbrella term used to refer to state laws that imposed far more regulations on abortions than on other procedures posing similar or greater medical risks. Although enacted in the name of protecting women's health, the motivation was to force abortion clinics to close. As a result, access to abortion was already very uneven in the United States and depended largely on whether one lived in a conservative or liberal state. *See generally* Jessie Hill, *The Geography of Abortion Rights*, 109 GEO. L. J. 1081 (2021).

[111] *See, e.g.*, Erika Hanson, *Lighting the Way Towards Liberty: The Right to Abortion after* Obergefell *and* Whole Woman's Health, 45 HASTINGS CONST. L. Q. 93 (2017).

[112] *See* Ariana de Vogue, *How Trump's Election Reignites the Abortion Wars*, CNN POL. (Dec. 14, 2016, 8:39 AM), https://www.cnn.com/2016/12/14/politics/trump-abortion-supreme-court/index.html.

[113] *See* Frank Bruni, Opinion, *The Special Hell of Trump's Supreme Court Appointment: With a Nonexistent Mandate, He does Extraordinary Damage*, N.Y. TIMES (Sept. 22, 2020), https://www.nytimes.com/2020/09/22/opinion/trump-supreme-court-appointment.html.

[114] *See* Poe v. Ullman, 367 U.S. 497, 522–56 (1961) (Harlan, J., dissenting); *see generally* Yoshino, *supra* note 82, at 149 (outlining the Court's contrasting approaches to substantive due process); Ronald Turner, *W(h)ither* Glucksberg*?*, 15 DUKE J. CONST L. & PUB. POL'Y 183 (2020) (examining differing interpretations of substantive due process post-*Obergefell*).

[115] 576 U.S. 644, 702–03 (2015) (Roberts, C.J., dissenting) (describing *Glucksberg* as the "leading modern case setting the bounds of substantive due process").

[116] Tribe, *supra* note 13, at 16.

history and tradition" and "implicit in the concept of ordered liberty."[117] He then applied that test to the question of abortion and embarked on a lengthy discussion of the history of abortion legislation, concluding that when the Due Process Clause was adopted, three-quarters of the states prohibited abortion at all stages of pregnancy.[118] This was designed to demonstrate that Justice Blackmun's survey of early American history in *Roe* – which had not revealed a tradition of criminalizing abortion prior to "quickening" – was egregiously wrong, and that the right to abortion recognized in *Roe* could not possibly meet the *Glucksberg* test.

However, Justice Alito's historical survey has also been strongly criticized by historians, partly because he did not acknowledge the reproductive autonomy that American women originally exercised, but also because he did not take into account the motives for the anti-abortion statutes that were enacted in the 1800s, or the extent to which they were enforced.[119] Justice Alito is correct that no legal treatise from the early American period proclaimed that women had a "right" to terminate a pregnancy.[120] But at that time the state simply was not involved in matters of pregnancy, childbirth, and abortion. These matters were managed almost entirely by women, as part of a social and community-oriented model overseen by midwives.[121] During

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[117] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

[118] *Id.* at 2242–43.

[119] *See, e.g.*, Leslie J. Reagan, *What Alito Gets Wrong About the History of Abortion in America*, POLITICO (June 2, 2022, 4:30 AM), https://www.politico.com/news/magazine/2022/06/02/alitos-anti-roe-argument-wrong-00036174 (explaining how the 19th century laws Justice Alito cited in his leaked *Dobbs* draft opinion produced a public health disaster); Maurizio Valsania, *How Alito Cherrypicked History in* Dobbs, COUNTERPUNCH (July 8, 2022), https://www.counterpunch.org/2022/07/08/how-alito-cherrypicked-history-in-dobbs-when-the-us-constitution-was-ratified-women-had-much-more-autonomy-over-abortion-decisions-than-during-19th-century/ (criticizing Justice Alito's "selective foray[] into history" in *Dobbs* that failed to consider how the nineteenth century saw a decrease in the trust in, and power of, women).

[120] Jennifer Schuessler, *The Fight Over Abortion History*, N.Y. TIMES (May 4, 2022), https://www.nytimes.com/2022/05/04/arts/roe-v-wade-abortion-history.html.

[121] Ranana Dine, *Scarlet Letters: Getting the History of Abortion and Contraception* Right, CTR. AM. PROGRESS (Aug. 8, 2013), https://www.americanprogress.org/article/scarlet-letters-getting-the-history-of-abortion-and-contraception-right/ ("Colonial women procured pre-quickening abortions mainly with the help of other women in their communities; skilled midwives knew which herbs could cause a woman to abort, and early American medical books even gave instructions for . . . inducing an abortion."); *see also* Reva B. Siegel, *Reasoning*

that time period, women commonly consumed herbs to terminate an early pregnancy (a process referred to as "restoring the menses" rather than as an abortion).[122] As historian Leslie Reagan summarized, "[i]n early America as in early modern England, abortion before 'quickening' was legal under common law and widely accepted in practice."[123] The time of quickening (when the pregnant person begins to perceive fetal movement) was a subjective standard determined by the woman rather than the state. But it would normally occur between sixteen and twenty weeks into a pregnancy.[124]

The legal framework only began to change in the nineteenth century, largely due to the efforts of the American Medical Association (AMA), which was founded in 1847.[125] The campaign to prohibit abortion was led by Dr. Horatio Storer, who is often described as the "father" of American Gynecology.[126] Storer's campaign was supported by the AMA and motivated in part by doctors' desire to consolidate their control over reproductive health care and discredit their chief competitors – traditional female midwives and homeopaths.[127] The legislative campaign against abortion was also inspired by both sexism and racism. Storer and his supporters made a concerted effort to demonstrate a link between abortion and the declining birthrate among Protestant women, arguing that these women were shirking their natural duties and that immigrant families, many of them Catholic, would soon outnumber native-born white Yankees.[128] Justice Alito was made aware of this history but he dismissed it because the statements documenting the

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from the Body: An Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 STAN. L. REV. 261, 300 (1992).

[122] Reagan, *supra* note 119.

[123] *Id.*; *see also* Aaron Tang, *After* Dobbs*: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. (forthcoming 2023) (noting that no American state originally banned abortion prior to quickening).

[124] *See Quickening*, CLEVELAND CLINIC (Apr. 22, 2022), https://my.clevelandclinic.org/health/symptoms/22829-quickening-in-pregnancy (defining "quickening" as the time when the pregnant person begins to perceive fetal movements, which normally occurs between 16 and 20 weeks).

[125] *See Abortion is Central to the History of Reproductive Health Care in America*, PLANNED PARENTHOOD ACTION FUND, https://www.plannedparenthoodaction.org/issues/abortion/abortion-central-history-reproductive-health-care-america (last visited Feb. 7, 2023).

[126] Dine, *supra* note 121 ("[A] coalition of male doctors backed by the American Medical Association, the Catholic Church, and the sensationalist newspapers began to campaign for the criminalization of abortion.").

[127] Siegel, *supra* note 121, at 282–85.

[128] *See id.* at 297–300; Brief for American Historical Association et al. as Amici Curiae Supporting Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), at 20–21 [hereinafter Brief for American Historical Association].

discriminatory motives were made by anti-abortion campaigners rather than by the legislators themselves.[129] Of course, women did not have the right to vote in the 1800s and were thus powerless to oppose the doctors' crusade to restrict their liberty.[130] But that did not matter to Justice Alito because he is not interested in interpreting the Due Process Clause in a manner that provides "equal liberty" to groups that were subordinated.[131] He is simply interested in ascertaining whether a right to abortion was part of the nation's history and traditions in 1868. This is why he took pains to include a very long Appendix of state statutes from the 1800s, which purports to demonstrate that the vast majority of states had prohibited abortion at all stages of pregnancy by 1868.[132]

It should be noted that Justice Alito's interpretation of the legislation enacted in the nineteenth century has been disputed. For example, Professor Aaron Tang has argued that only sixteen of the states included in Appendix A to the *Dobbs* opinion prohibited abortion prior to quickening.[133] Historians have also observed that prosecutions were rare and that ordinary citizens continued to believe in the common law position – that a woman should not be punished for terminating her own pregnancy prior to quickening.[134] As noted by the American Historical Association and the Organization of American Historians,

> Even where states prohibited abortion, common-law reasoning resonated in public opinion, deeply affecting the practice of abortion. These historical findings confirm that *Roe*'s central conclusion was correct: American history and

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[129] *Dobbs*, 142 S. Ct. at 2256 (citing the Brief for American Historical Association et al. as Amici Curiae but asking, rhetorically, "[a]re we to believe that the hundreds of lawmakers whose votes were needed to enact these laws were motivated by hostility to Catholics and women?").

[130] *See id.* at 2324–25 (Breyer, Sotomayor & Kagan, JJ., dissenting) ("Those responsible for the original Constitution, including the Fourteenth Amendment [ratified in 1868] did not perceive women as equals, and did not recognize women's rights.").

[131] *See id.* at 2247–48 ("[W]e must guard against the natural human tendency to confuse what [the Fourteenth Amendment] protects with our own ardent views about the liberty that Americans should enjoy . . . . Instead, guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty, we must ask what the *Fourteenth Amendment* means by the term 'liberty.'").

[132] *See id.* at 2248–53; *see also* Appendix A.

[133] Tang, *supra* note 123 (concluding that by 1868 only 16 of the 37 states had departed from the settled understanding that abortion was lawful prior to quickening).

[134] Brief for American Historical Association, *supra* note 128, at 28–30.

> traditions from the founding to the post-Civil War years included a woman's ability to make decisions regarding abortion, as far as allowed by the common law.[135]

In light of Justice Alito's rigid application of the *Glucksberg* test and his failure to consider the fact that women were not equal citizens when the nineteenth century statutes prohibiting abortion were enacted, it would appear that *Dobbs* has unraveled the "double helix" of liberty and equality that characterized Justice Kennedy's opinions in *Lawrence* and *Obergefell*.[136] Justices Breyer, Sotomayor, and Kagan made this point in their joint dissent, noting that the majority opinion treats liberty and equality as inhabiting "hermetically sealed containers" that do not work together.[137] Under Alito's approach, the Due Process Clause need not be interpreted in a manner that gives "equal dignity" to those who were not enjoying equal citizenship in 1868.[138] Thus, if the white men who actually drafted the Due Process Clause would not have recognized a constitutional right of women to reproductive autonomy then neither will the Supreme Court.[139]

B. The Broader Impact of Dobbs *on Substantive Due Process and Equal Protection*

The approach taken in *Dobbs* calls into question other unenumerated rights that the Court has recognized, including the right to use contraception, the right to same-sex intimacy, and the right to same-sex marriage. Justice Thomas' separate concurring opinion was brutally honest about this, as he expressly called for reconsidering "all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."[140] In contrast, Justice Alito's opinion (which Thomas joined) insisted that the decision was confined only to the issue of abortion and would have no impact on these

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[135] *Id.* at 30.

[136] *See* Tribe, *supra* note 13, at 20 (assessing how Justice Kennedy's *Obergefell* opinion synthesized dignity to encompass liberty and equality, creating a "double helix" where equal protection and substantive due process are intertwined).

[137] *Dobbs*, 142 S. Ct. at 2329 (Breyer, Sotomayor & Kagan, JJ., dissenting).

[138] *See id.* at 2333 (Breyer, Sotomary & Kagan, JJ., dissenting) ("[T]he majority's opinion has all the flaws its method would suggest. Because laws in 1868 deprived women of any control over their bodies, the majority approves States doing so today.").

[139] *Id.* at 2247–48 ("Historical inquiries of this nature are essential whenever we are asked to recognize a new component of the 'liberty' protected by the Due Process clause because the term 'liberty' alone provides little guidance."); *see also* Terry Day & Danielle Weatherby, *The* Dobbs *Effect: Abortion Rights in the Rear-View Mirror and the Civil Rights Crisis That Lies Ahead*, 64 WM. & MARY L. REV. 1, 11–12 (2022) (discussing the hypocrisy and inconsistency of Justice Alito's "history and tradition" analysis).

[140] *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring).

other precedents.[141] However, it is certainly difficult to reconcile those cases with the majority's application of *Glucksberg* and its reading of the "history and traditions" of the nation.

Justice Alito's opinion distinguishes *Roe* and *Casey* from other leading cases on substantive due process simply by insisting that abortion is "fundamentally different" because it destroys a fetus, what he frequently refers to as "an unborn human being."[142] That distinction may be persuasive if one is only comparing *Roe* and *Casey* to *Lawrence*, *Windsor*, and *Obergefell.*[143] However, it is more difficult to distinguish a right to abortion from a right to use contraception, especially as some religious groups describe common contraceptive methods (such as IUDs and Plan B) as "abortion-inducing."[144] Indeed, this claim was actually repeated by Justice Kavanaugh in his confirmation hearing.[145] It is also noteworthy that the model law drafted for the National Right to Life Committee (immediately after the *Dobbs* decision) seeks to protect the "unborn" from the moment of fertilization.[146] Thus, it is entirely possible that some states will enact statutes

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[141] *Id.* at 2258.

[142] *Id.* at 2242–43 (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[143] *Compare* Roe v. Wade, 410 U.S. 113 (1973) *and* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) *with* Lawrence v. Texas, 539 U.S. 558 (2003) *and* United States v. Windsor, 570 U.S. 744 (2013) *and* Obergefell v. Hodges, 576 U.S. 644 (2015). The stare decisis argument for upholding *Lawrence* and *Obergefell* would also be very strong because intimate relations and family units have been formed in reliance on these cases. *See, e.g.*, Nancy J. Knauer, *Implications of* Obergefell *for Same-Sex Marriage, Divorce, and Parental Rights*, *in* LGBTQ DIVORCE AND RELATIONSHIP DISSOLUTION: PSYCHOLOGICAL AND LEGAL PERSPECTIVES AND IMPLICATIONS FOR PRACTICE 23 (Abbie E. Goldberg & Adam P. Romero eds., 2019).

[144] Pam Belluck, *Science does not Support Claims that Contraceptives are "Abortion-Inducing,"* N.Y. TIMES (Sept. 7, 2018), https://www.nytimes.com/2018/09/07/health/kavanaugh-abortion-inducing-contraceptives.html.

[145] *Id.*

[146] *See National Right to Life Committee Proposes Legislation to Protect the Unborn Post* Roe, NAT'L RIGHT TO LIFE (June 15, 2022), https://www.nrlc.org/communications/national-right-to-life-committee-proposes-legislation-to-protect-the-unborn-post-roe/. For the text of the model law, *see* Memorandum from James Bopp, Jr. et al., to Nat'l Right to Life Comm., et al. (June 15, 2022), https://www.nrlc.org/wp-content/uploads/NRLC-Post-Roe-Model-Abortion-Law-FINAL-1.pdf. In contrast, the position of the American College of Obstetricians and Gynecologists is that pregnancy does not begin until implantation in the lining of a woman's uterus, which may be several days after fertilization. *See* Rachel Benson Gold, *The Implications of Defining When a Woman is Pregnant*, GUTTMACHER POL'Y REV. (May 9, 2005),

prohibiting popular methods of contraception, particularly those that act, in whole or in part, by preventing implantation.[147]

Given the Court's insistence on a strict application of the *Glucksberg* test, some scholars have argued that the Equal Protection Clause could offer an independent basis for holding that women have a constitutional right to access abortion or contraception.[148] Although the parties did not brief this argument, it was analyzed in an amicus brief authored by three equal protection scholars.[149] In essence they argued: (1) that laws regulating pregnancy are sex-based classifications that should be subjected to heightened scrutiny; (2) that Mississippi's stated justifications for banning abortion reflect sex-role stereotypes; and (3) that Mississippi deliberately chose not to adopt less discriminatory and less coercive (but more effective) means of achieving its stated goals of protecting women's health and fetal life.[150]

There is plenty of data to support the third part of this argument: the maternal mortality rates in Mississippi are alarmingly high and the state has repeatedly refused federal aid and other less coercive alternatives that could promote women's health and fetal life.[151] But those arguments were of no interest to Justice Alito. He cited the amicus brief only for the limited purpose of rejecting its first premise – that laws regulating pregnancy and access to abortion are "sex-based" classifications.[152] Despite the strong critique that *Geduldig* has attracted over the years (and the subsequent case law that has arguably superseded it), Justice Alito cited *Geduldig* for the principle that the regulation of a medical procedure that only one sex can undergo will not trigger heightened scrutiny *unless* it is a mere pretext, designed to affect invidious discrimination.[153] Of course, this does not preclude making an

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https://www.guttmacher.org/gpr/2005/05/implications-defining-when-woman-pregnant.

[147] *See* Melissa Murray, *How the Right to Birth Control Could be Undone,* N.Y. TIMES (May 23, 2022), https://www.nytimes.com/2022/05/23/opinion/birth-control-abortion-roe-v-wade.html.

[148] Brief of Equal Protection Constitutional Law Scholars Serena Mayeri, Melissa Murray & Reva Siegel as Amici Curiae Supporting Respondents at 1, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 228 (2022) (No. 19-1392).

[149] *Id.*

[150] *Id.* at 1–5.

[151] *Id.* at 21–29.

[152] *Dobbs*, 142 S. Ct. at 2245.

[153] The brief cited United States v. Virginia, 518 U.S. 515 (1996), and Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003), arguing that the combined effect of the two cases was to establish that laws regulating pregnancy are sex-based classifications that can violate the Equal Protection Clause (thus abrogating Geduldig v. Aiello, 417 U.S. 484 (1974)).

equal protection argument at the state level, whether in legislative and policy debates or in litigation challenging state abortion laws.[154] But for now it will be very difficult to persuade a federal judge that a law restricting access to abortion violates the Equal Protection Clause.

Justice Alito also made one additional point in the majority opinion, which was not directly responsive to the Equal Protection argument, but should set off alarm bells. Justice Alito claimed that women "are not without electoral or political power" and observed that "the percentage of women who register to vote and cast ballots is consistently higher than the percentage of men who do so."[155] Thus, the five justices who joined the majority opinion in *Dobbs* apparently believe that women can now exercise equal political power by "influencing public opinion, lobbying legislators, voting, and running for office."[156] As Marc Spindelman has observed, this comment may be constitutionally significant well beyond the abortion issue.[157] It may set the stage for a future declaration from the Supreme Court that women are not a "discrete and insular minority" entitled to judicial protection under the Equal Protection Clause.[158] In fact, while women voters may outnumber male voters, that has not translated into equal political or economic power. Women still hold a minority of seats in state legislatures and in Congress,[159] and Black women are particularly underrepresented, despite their increased activism.[160]

The majority opinion in *Dobbs* seems to assume that each state legislature will find its own democratic solution to the question of abortion and that the Supreme Court will no longer be troubled by future disputes concerning

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[154] *See, e.g.*, Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in* Dobbs *and Beyond: How States Protect Life Inside and Outside the Abortion Context*, 43 COLUM. J. OF GENDER & L. (forthcoming 2023) (manuscript at 67–68), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4115569.

[155] *Dobbs*, 142 S. Ct. at 2277.

[156] *Id.*

[157] Marc Spindelman, Dobbs' *Other Dangers:* Dobbs *and Women's Constitutional Sex Equality Rights*, NAT'L L. J. (Aug. 1, 2022).

[158] *Id.* (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

[159] *See Women in State Legislatures 2023*, CTR. FOR AM. WOMEN & POL., https://cawp.rutgers.edu/facts/levels-office/state-legislature/women-state-legislatures-2023 (last visited Feb. 11, 2023); *Women in the U.S. Congress 2023*, CTR. FOR AM. WOMEN & POL., https://cawp.rutgers.edu/facts/levels-office/congress/women-us-congress-2023 (last visited Feb. 11, 2023).

[160] *Reading Higher: Black Women in American Politics 2021*, CTR. FOR AM. WOMEN&POL. 1, 3, https://cawp.rutgers.edu/sites/default/files/resources/black_women_in_politics_2021.pdf (last visited Feb. 11, 2023).

abortion. The separate concurring opinion of Justice Kavanaugh expresses similar optimism regarding the ability of states to resolve conflicts, repeatedly insisting that the federal Constitution is simply "neutral" on abortion and that the Court must also be "scrupulously neutral."[161] However, for those who lost their right to reproductive autonomy, *Dobbs* does not feel neutral at all. Moreover, anti-abortion activists are not content with the Court's decision to allow each state to determine the legality of abortion. Rather, they have continued to advocate for a national ban on abortion and for recognition of "fetal personhood" at the federal level, insisting that the word "person" in the Fourteenth Amendment should be interpreted to include the unborn.[162] *Dobbs* has thus opened the door for new disputes, both between states with radically different positions on the question of abortion and between state and federal law.[163] The next section of the Article explores a few of those potential conflicts and the intersectional nature of the discrimination that will be exacerbated by *Dobbs*.

IV. COPING WITH *DOBBS:* NEW STRATEGIES, NEW CONFLICTS, AND PERSISTENT INEQUALITY

A. Alternative Strategies for Securing Access to Abortion

Many women have not been affected by *Dobbs* because they are protected by their state's legal framework.[164] There is some truth in Justice Alito's comments regarding American women's growing political power. Indeed, pro-choice organizations have surprised many politicians with their ability to mobilize support at the state level. Kansas provides a striking example because it is normally a solid Republican state; yet voters rejected, by a significant margin, a proposed constitutional amendment to remove the right to abortion.[165] Similarly, in Michigan (a true "swing state"), voters approved

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[161] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2305 (Kavanaugh, J., concurring).

[162] S*ee, e.g. John Finnis and Robert P. George*, Equal Protection and the Unborn Child: A Dobbs Brief, 45 Harvard. J. L. AND POLICY 928 (2022); AND SAMIRA ASMA-SADEQUE, SUPREME COURT DECLINES TO TAKE UP FETAL PERSONHOOD CASE, THE GUARDIAN (OCTOBER 11, 2022), HTTPS://WWW.THEGUARDIAN.COM/WORLD/2022/OCT/11/US-SUPREME-COURT-FETAL-PERSONHOOD-APPEAL-CASE.

[163] For a prediction of the conflicts that will likely arise, *see* David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023).

[164] *Interactive Map: US Abortion Policies and Access After* Roe, GUTTMACHER INST. (Feb., 6, 2023), https://states.guttmacher.org/policies/?gclid=EAIaIQobChMIld_dkKfS_AIVKBStBh2gBA1cEAAYASAAEgKeg_D_BwE.

[165] *Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment*, NPR (Aug. 3, 2022), https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-

an amendment to the state constitution to protect women's right to reproductive freedom, including access to abortion.[166] Supporters of reproductive autonomy in Michigan had a strong incentive to vote for the amendment because they feared that a 1931 state statute banning abortion (which was still on the books) might be enforced in the post-*Dobbs* era.[167]

States with liberal abortion laws are also reviewing their statutes and considering how to better protect reproductive autonomy. Hawai'i is a good example: the state legalized abortion in 1970 (before *Roe v. Wade* was decided) and it certainly will not criminalize abortion now.[168] But in the aftermath of *Dobbs*, legislators who support reproductive freedom began

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amendment. The amendment had been proposed as a way to override the 2019 decision, by the Supreme Court of Kansas, holding that the Kansas Constitution Bill of Rights protects the right to bodily autonomy, including the right to determine whether to continue a pregnancy. *Id.*

[166] Alice Miranda Ollstein, *Michigan Votes to Put Abortion Rights into State Constitution*, POLITICO (Nov. 9, 2022), https://www.politico.com/news/2022/11/09/michigan-abortion-amendment-results-2022-00064778. For the full text of the amendment to Michigan's state constitution, see *State Candidates and Proposals*, MICH. DEP'T STATE, at 22-3, https://www.michigan.gov/sos/elections/upcoming-election-information/voters/candidatesproposals. California and Vermont have also approved constitutional amendments protecting the right to abortion. *Abortion Policy in the Absence of* Roe, GUTTMACHER INST. (Feb. 1, 2023), https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe. In contrast, the constitutions of four states expressly either provide that there is no right to abortion or restrict public funding for abortion. *See id.*

[167] In August 2022, Michigan's Governor obtained a preliminary injunction against enforcement of the 1931 anti-abortion statute. Governor Gretchen Whitmer, *Whitmer Statement on Winning a Preliminary Injunction Against Extreme 1931 Law Banning Abortion* (Aug. 19, 2022), https://www.michigan.gov/whitmer/news/press-releases/2022/08/19/whitmer-statement-on-winning-a-preliminary-injunction-against-extreme-1931-law-banning-abortion. The case was still pending in November 2022 but was dismissed on January 20, 2023 by Michigan's Supreme Court on the ground of mootness (as the amendment to the state constitution invalidated the statute). *See* Rick Pluta, *MI Supreme Court Dismisses Whitmer Abortion Rights Case*, NPR (Jan. 21, 2023), https://www.michiganradio.org/criminal-justice-legal-system/2023-01-21/mi-supreme-court-dismisses-whitmer-abortion-right-case.

[168] Although certain conservative legislators have introduced bills to prohibit abortion in Hawai'i, they have no chance of being enacted as the Democratic Party controls both houses of the legislature. *See Hawaii Party Control, 1992–2023*, BALLOTPEDIA, https://ballotpedia.org/Party_control_of_Hawaii_state_government (last visited Feb. 11, 2023).

drafting bills to update Hawai'i's statutory framework.[169] The first of these bills was enacted in March 2023 and was immediately signed by Hawai'i Governor Josh Green.[170] The legislation expressly permits medication abortion to be conducted outside of licensed hospitals, physicians' offices, and clinics and clarifies that minors do not need to obtain parental consent to obtain abortion care. The legislation also prohibits recognition and enforcement of other states' laws that impose civil or criminal liability relating to the provision of reproductive health care services.[171] In addition, Hawai'i legislators have proposed a constitutional amendment to entrench the right to access contraception and abortion care.[172]

In states with less supportive legislatures, advocates for reproductive autonomy are litigating in the state courts, a strategy that began even before *Dobbs*.[173] As of February 1, 2023, a total of 36 cases had been filed challenging abortion bans in 21 states, of which 27 were still pending at either the trial or appellate levels.[174] Some of these cases have been decided, in whole or in part, on the basis of women's right to equality.[175] State courts can also interpret privacy clauses in state constitutions through the lens of gender equality. For example, in January 2023, the Supreme Court of South Carolina

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[169] *See, e.g.*, S.B. 890, 2023 Leg., 32d Sess. (Haw. 2023), https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=SB&billnumber=890&year=2023 (confirming the right to obtain an abortion and the right of physicians, advanced practice registered nurses and other health care providers to provide abortion care via telehealth).

[170] Ben Angarone, *Abortion Protections will be Expanded in Hawaii Under New Law*, HONOLULU CIV. BEAT (Mar. 22, 2023), https://www.civilbeat.org/beat/abortion-protections-will-be-expanded-in-hawaii-under-new-law/.

[171] S.B. 1, 2023 Leg., 32d Sess. (Haw. 2023), https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=SB&billnumber=1&year=2023.

[172] *See* S.B. 1167, 2023 Leg., 32d Sess. (Haw. 2023), https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=SB&billnumber=1167&year=2023 (proposing that the voters be asked the following question: "Shall the Constitution be amended to state that no law shall be enacted that denies or interferes with an individual's reproductive freedom in their most intimate decisions, including the fundamental right to abortion and contraceptives?").

[173] *State Constitutions and Abortion Rights: Building Protections for Reproductive Autonomy*, CTR. FOR REPRODUCTIVE RTS., https://reproductiverights.org/state-constitutions-abortion-rights/ (last visited Feb. 11, 2023).

[174] *State Court Abortion Litigation Tracker*, BRENNAN CTR. FOR JUST. (Feb. 1, 2023), https://www.brennancenter.org/our-work/research-reports/state-court-abortion-litigation-tracker.

[175] *State Constitutions and Abortion Rights: Building Protections for Reproductive Autonomy*, *supra* note 173 (discussing cases decided in Alaska, Arizona, California, Iowa, and New Jersey).

held that the state's Fetal Heartbeat and Protection from Abortion Act (which would have prohibited abortion even before many women realize they are pregnant) violated the right to privacy in South Carolina's Constitution.[176] Concerns for gender equality clearly influenced the majority's interpretation of the privacy clause.[177] The state had argued that the privacy right should be interpreted narrowly because the drafting history revealed that the committee that proposed it (in the 1960s) was primarily concerned with electronic surveillance.[178] But Judge Kaye Hearn, who wrote the majority opinion, rejected that argument, in part because of South Carolina's abysmal history with respect to gender equality.[179] She noted that the state did not ratify the Nineteenth Amendment (giving women the right to vote) until 1969 and that it was, therefore, not surprising that women's right to bodily autonomy was not "uppermost in the minds" of the men who proposed the right to privacy.[180] But she emphasized that the thought processes of those men could not limit the scope of South Carolina's right to privacy today.[181] The majority then applied an approach to interpretation that is comparable to that taken by Justice Kennedy in *Obergefell* and *Lawrence* (and cited both cases).[182] It also cited judgements from other states that have interpreted right to privacy clauses to protect a woman's right to abortion.[183]

Women in states that ban abortion are also finding ways to get around the laws. As noted earlier, more than 90% of U.S. abortions occur in the first trimester, when medication abortion is generally safe and effective.[184] In the United States, a medication abortion typically involves taking two drugs: mifepristone (which blocks a hormone necessary for a pregnancy to progress) followed by misoprostol (which triggers uterine contractions and can be used

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[176] Planned Parenthood S. Atl. v. South Carolina, No. 28127, 2023 WL 107972, at *12 (S.C. Jan. 5, 2023).

[177] *See generally id.*

[178] *See id.* at *5, *35.

[179] *See id.* at *35–36.

[180] *Id.* at *5.

[181] *Id.*

[182] *Id.* at *18 (citing Obergefell v. Hodges, 576 U.S. 644 (2015) and Lawrence v. Texas, 539 U.S. 558 (2003)).

[183] *Planned Parenthood S. Atl.*, 2023 WL 107972, at *18.

[184] *See* Jeff Diamant & Besheer Mohamed, *What the Data Says About Abortion in the U.S.*, PEW RSCH. CTR. (Jan. 11, 2023), https://www.pewresearch.org/fact-tank/2023/01/11/what-the-data-says-about-abortion-in-the-u-s-2/.

as an abortifacient on its own if mifepristone is not available).[185] When taken together, the two drugs mimic what happens during a miscarriage.[186] Although the United States Federal Drug Administration (FDA) has only approved this regime for abortion care up through ten weeks' gestation, many women have successfully used this method later in pregnancy.[187] Studies also show that women who have used abortion pills are highly satisfied and that complications are rare.[188] As a result, the World Health Organization (WHO) has published guidelines for "self-managed abortion," a term used for an abortion that involves no individualized medical counseling (not even a telemedicine appointment) but rather is managed entirely by the pregnant person, perhaps with support from a friend or relative.[189]

Indeed, some researchers have argued that abortion pills should be available on an "over-the-counter" basis, without the need for a prescription.[190] Although the FDA has taken a more conservative approach (subjecting mifepristone to a strict risk evaluation and mitigation strategy (REMS)), it has gradually reduced the restrictions.[191] Prior to the COVID-19 pandemic, the FDA required women to obtain abortion pills directly from a doctor, following a pregnancy test, pelvic examination and/or an ultrasound.[192] However, many countries (including the United States) relaxed

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[185] *See* Sarah Zhang, *The Abortion Pill can be Used Later than the FDA Says*, ATLANTIC (June 29, 2022), https://www.theatlantic.com/health/archive/2022/06/how-late-can-you-take-abortion-pill/661437/.

[186] *See id.*

[187] *See id.*; Nathalie Kapp et al., *Medical Abortion at 13 or More Weeks Gestation Provided Through Telemedicine: A Retrospective Review of Services*, 3 CONTRACEPTION X 1 (Jan. 25, 2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7881210/.

[188] Zhang, *supra* note 185.

[189] WHO Recommendations on Self-Care Intervention: Self-Management of Medical Abortion, 2022 Update, WORLD HEALTH ORG. (Sept. 21, 2022), https://www.who.int/publications/i/item/WHO-SRH-22.1.

[190] *See, e.g.*, Antonia M. Biggs et al., *Comprehension of an Over-the-Counter Drug Facts Label Prototype for a Mifepristone and Misoprostol Medication Abortion Product*, 139 OBSTETRICS & GYNECOLOGY 1111, 1112 (2022), https://journals.lww.com/greenjournal/Fulltext/2022/06000/Comprehension_of_an_Over_the_Counter_Drug_Facts.17.aspx.

[191] *See, e.g.*, *The FDA Finalizes Rule Expanding the Availability of Abortion Pills*, NPR (Jan. 3, 2023, 11:04 PM), https://www.npr.org/2023/01/03/1146860433/the-fda-finalizes-rule-expanding-the-availability-of-abortion-pills.

[192] Amrutha Ramaswamy et al., *Medication Abortion and Telemedicine: Innovations and Barriers During the COVID-19 Emergency*, Kaiser Fam. Found. (June 16, 2021), https://www.kff.org/policy-watch/medication-abortion-telemedicine-innovations-and-barriers-during-the-covid-19-emergency/; Mohana Ravindranath & Alice Miranda Ollstein, *Abortion Clinics Expanding Virtual Options During Pandemic*, POLITICO (Apr. 23, 2020,

restrictions on telemedicine abortion during the pandemic and learned that it is a very safe and effective method of terminating an early pregnancy.[193] In early 2021, the FDA reversed a Trump administration policy and lifted the federal restriction on dispensing abortion pills by mail.[194] Although this decision was initially announced as a temporary measure, it was later made permanent.[195] More recently, the FDA released new guidance allowing retail pharmacies to provide abortion medications.[196] Walgreens and CVS have already announced that they plan to offer the medication in states where abortion is still legal.[197]

B. Conflicts Between State and Federal Law and Likely Interstate Conflicts

Anti-abortion activists have challenged the FDA's decisions regarding abortion medications, going so far as to file a lawsuit seeking to invalidate the FDA's original approval of mifepristone in 2000.[198] The case lacks merit and, if successful, could have serious negative consequences for public health

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10:53 AM), https://www.politico.com/news/2020/04/23/abortion-clinics-expanding-virtual-options-during-pandemic-203768.

[193] Patty Skuster, Jina Dhillon & Jessica Li, *Easing of Regulatory Barriers to Telemedicine Abortion in Response to COVID-19*, 2 FRONTIERS GLOB. WOMEN'S HEALTH, Nov. 2021, at 4, https://www.frontiersin.org/articles/10.3389/fgwh.2021.705611/full.

[194] Pam Belluck, *F.D.A. Will Allow Abortion Pills by Mail During the Pandemic*, N.Y. TIMES (Apr. 4, 2021), https://www.nytimes.com/2021/04/13/health/covid-abortion-pills-mailed.html.

[195] Pam Belluck, *F.D.A. Will Permanently Allow Abortion Pills by Mail*, N.Y. TIMES (Dec. 16, 2021), https://www.nytimes.com/2021/12/16/health/abortion-pills-fda.html.

[196] U.S. Food & Drug Admin., Information About Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation (2023) [hereinafter Information About Mifepristone], https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/information-about-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation.

[197] Pam Belluck, *CVS and Walgreens Plan to Offer Abortion Pills Where Abortion is Legal*, N.Y. TIMES (Jan. 5, 2023), https://www.nytimes.com/2023/01/05/health/abortion-pills-cvs-walgreens.html.

[198] *See, e.g.*, Celine Castronuovo, *FDA Defends Abortion Pill Approval in Response to Texas Lawsuit* (Jan. 18, 2023), https://news.bloomberglaw.com/health-law-and-business/fda-defends-abortion-pill-approval-in-response-to-texas-lawsuit; *see generally* Complaint, Alliance for Hippocratic Med. v. U.S. Food & Drug Admin., No. 2:22-cv-00223-Z (N.D. Tex. Nov. 18, 2022) (filed by anti-abortion organizations and pending in the Federal District Court for Northern Texas); Brief in Opposition, Alliance for Hippocratic Med. v. U.S. Food & Drug Admin., No. 2:22-cv-00223-Z (N.D. Tex. Jan. 13, 2023).

generally.[199] It may initially succeed simply because it was filed in Amarillo, Texas and will be decided by District Court Judge Matthew Kacsmaryk, who strongly opposes abortion and has been a reliable judge for conservative causes.[200] But the case cannot eliminate medication abortions because the misoprostol-only method is also very effective. Although it has more side-effects than the two-drug regime, abortion providers are already preparing for that possibility.[201]

Meanwhile, the attorneys general of twelve liberal states have filed a competing lawsuit against the FDA, arguing that it has been too strict in its regulation of mifepristone. They have asked a federal judge in the Eastern District of Washington State to declare that the approval of mifepristone in 2000 was lawful and to invalidate the mifepristone REMS and enjoin the FDA from taking any action to remove mifepristone from the market or reduce its availability.[202] Of course, if two federal district courts issue conflicting rulings, then the FDA would have a strong argument for simply maintaining the existing regulatory framework while the cases work their way up the chain of appeal.[203] State-level restrictions on abortion medication have also been challenged. For example, GenBioPro (which developed a generic version of mifepristone) has filed a case against West Virginia's anti-abortion legislation, arguing that the state law is preempted by federal law

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[199] Patricia J. Zettler, Eli Y. Adashi & I. Glenn Cohen, *Alliance for Hippocratic Medicine v. FDA* – Dobbs's *Collateral Consequences for Pharmaceutical Regulation*, NEW ENG. J. MED. (Feb. 23, 2023), https://www.nejm.org/doi/full/10.1056/NEJMp2301813 (noting that the lawsuit could "chill pharmaceutical research by creating uncertainty about the meaning of FDA approval and the regulatory environment in which any approved product would be marketed"); *see also* David S. Cohen, Greer Donley & Rachel Rebouché, *Abortion Pills*, 76 STAN. L. REV. (forthcoming 2024) (manuscript at 12–16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335735.

[200] Caroline Kitchener & Ann E. Marimo, *The Texas Judge Who Could Take Down the Abortion Pill*, WASH. POST (Feb. 25, 2023), https://www.washingtonpost.com/politics/2023/02/25/texas-judge-abortion-pill-decision/.

[201] Sarah McCammon, *Why an Ulcer Drug Could Be the Last Option for Many Abortion Patients*, NPR (Feb. 24. 2023), https://www.npr.org/2023/02/24/1159075709/abortion-drug-mifepristone-misoprotol-texas-case.

[202] *See generally* Complaint, Washington v. U.S. Food & Drug Admin., No. 1:23-cv-03026 (E.D. Wash. Feb. 23, 2023), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/Mifepristone%20Complaint.pdf.

[203] Pam Belluck, *12 States Sue F.D.A. Seeking Removal of Special Restrictions on Abortion Pill*, N.Y. TIMES (Feb. 24, 2023), https://www.nytimes.com/2023/02/24/health/abortion-pills-fda-lawsuit.html.

and that it is unconstitutional for a state to try to bar access to a medication that has been approved by the federal government.[204]

Even in states that currently ban abortion, pregnant persons are finding ways to obtain abortion pills – by traveling to a state where abortion is legal, by using a mail forwarding service, or by simply ordering the medications from a foreign provider.[205] For a woman who has access to the internet, there are many websites to guide them through the process, including Plan C,[206] Women on the Web,[207] and Aid Access.[208] The ready supply of pills from overseas makes it unlikely that the number of abortions in the United States will decrease significantly for women in early pregnancy.[209] The anti-abortion movement is trying to counter this trend by warning women about the dangers of "chemical abortion."[210] But women who are active users of the internet will quickly learn that those claims are spurious and that medication abortion is almost always safe in early pregnancy.[211] Even mainstream medical organizations (such as Doctors Without Borders) have posted advice to this effect, including very accessible videos and answers to common questions about how to take the medication.[212]

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[204] Pam Belluck, *New Lawsuit Challenges State Bans on Abortion Pills*, N.Y. TIMES (Jan. 25, 2023), https://www.nytimes.com/2023/01/25/health/abortion-pills-ban-genbiopro.html; *see generally* Complaint, Genbiopro, Inc. v. Sorsaia, No. 2:23-cv-11111 (Jan. 25, 2023), https://democracyforward.org/wp-content/uploads/2023/01/33-0-Complaint.pdf.

[205] Emily Bazalon, *Risking Everything to Offer Abortions Across State Lines*, N.Y. TIMES (Oct. 4, 2022), https://www.nytimes.com/2022/10/04/magazine/abortion-interstate-travel-post-roe.html; David Leonhardt & Ian Prasad Philbrick, *The Next Abortion Fight: Mailing Pills*, N.Y. TIMES (July 28, 2022), https://www.nytimes.com/2022/07/25/briefing/abortion-pills-mail-roe-v-wade.html.

[206] *A Safe at Home Abortion is Here*, PLAN C, https://www.plancpills.org/ (last visited Feb. 12, 2023).

[207] *Abortion Pill Access by Mail*, WOMEN ON WEB, https://www.womenonweb.org/en/ (last visited Feb. 12, 2023).

[208] *Order Abortion Pills Online*, AIDACESS, https://aidaccess.org/en/ (last visited Feb. 12, 2023).

[209] Aatish Bhatia, Claire Cain Miller, & Margot Sanger-Katz, *A Surge of Overseas Abortion Pills Blunted the Effect of State Abortion Laws*, N.Y. TIMES (Nov. 1, 2022), https://www.nytimes.com/2022/11/01/upshot/abortion-pills-mail-overseas.html.

[210] *Important Truths Women are Not Told About Chemical Abortions*, OPTIONS NOW (Apr. 28, 2020), https://optionsnow.org/truths-about-chemical-abortions/.

[211] *Medication Abortion*, GUTTMACHER INST. (Feb. 1, 2021), https://www.guttmacher.org/evidence-you-can-use/medication-abortion.

[212] *How to Ensure a Safe Abortion with Pills*, DRS. WITHOUT BORDERS (Sept. 28, 2021), https://www.doctorswithoutborders.org/latest/how-ensure-safe-abortion-pills.

The United States Department of Justice has facilitated this flow of abortion medications by issuing a legal opinion[213] for the United States Postal Service on the application of the Comstock Act. The memo confirms that the mailing of abortion pills to a state that restricts access to abortion is not a sufficient basis for the Postal Service to refuse to deliver the package.[214] Restrictive states are not happy about this, but there is little that they can do to change the situation as long as Democrats control the Senate and the White House. Traditionally, anti-abortion states have targeted the doctors and clinics that provide abortions. However, if states cannot prevent women from obtaining pills and cannot locate a "provider" to prosecute, then some states may resort to prosecuting women who obtain and use abortion pills.[215]

Anti-abortion states are also challenging the July 2022 Guidance Document regarding the enforcement of the federal Emergency Medical Treatment and Active Labor Act (EMTALA), which applies to every hospital that has an emergency department and participates in Medicare.[216] The Guidance Document interprets the EMTALA as providing that if a physician believes that a pregnant patient is experiencing an emergency medical condition and that an abortion is the stabilizing treatment necessary to resolve that condition then the physician must provide that treatment.[217] The Guidance expressly states that the EMTALA preempts state abortion restrictions to the extent that they conflict with the EMTALA. On this basis, the federal government obtained a preliminary injunction blocking enforcement of Idaho's ban on abortion, which lacks an explicit exemption for the provision of emergency care.[218]

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[213] For the text of the legal opinion (dated December 2022), *see* Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions, 46 Op. O.L.C. (2022), https://www.justice.gov/olc/opinion/file/1560596/download.

[214] *Id.*

[215] *See, e.g.*, Nathaniel Weixel, *Alabama AG Says Women Could be Prosecuted for Taking Abortion Pills*, HILL (Jan. 11, 2023, 4:13 PM), https://thehill.com/policy/healthcare/3809346-alabama-ag-says-women-could-be-prosecuted-for-taking-abortion-pills/.

[216] *See* Emergency Medical Treatment and Active Labor Act (EMTALA), CTR. FOR MEDICARE & MEDICAID SERVS. (Dec. 5, 2022) [hereinafter EMTALA Guidance Document], https://www.cms.gov/regulations-and-guidance/legislation/emtala (for text of the EMTALA and Guidance Document); *but see* EMTALA Emergency Abortion Care Litigation: Overview and Initial Observations (Part II of II), CONGRESSIONAL RSCH. SERV. (Nov. 1, 2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10851 (for an overview of the litigation challenging the Guidance Document).

[217] EMTALA Guidance Document, *supra* note 216, at 4.

[218] U.S. v. Idaho, No. 1:22-cv-00329-BLW, 2022 WL 3692618, at *10 (D. Idaho Aug. 24, 2022) (holding that the statute obstructed EMTALA's purpose because it provided only an affirmative defense and not an express exception for emergency care). As of this writing,

Disputes are also likely to arise between states. Many liberal states have adopted laws and executive orders designed to shield abortion providers and patients from out-of-state prosecutions and lawsuits.[219] Hawai'i is just one example of the many states in which governors pledged not to cooperate with restrictive states' enforcement measures.[220] As noted above, the Hawai'i State Legislature recently codified this policy.[221] One purpose of the legislation is to protect against the possibility that anti-abortion states may attempt to enforce their bans on abortion extraterritorially (e.g. by prosecuting women who cross state lines to obtain an abortion or by authorizing private citizens to file lawsuits against physicians who perform abortions or prescribe pills for patients who live in states where abortion is banned).[222] The shield provisions adopted in Hawai'i and other states typically provide that a state will not cooperate with subpoenas, summons,

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Idaho's motion for reconsideration of the preliminary injunction was still pending. For a record of the docket, *see* United States v. Idaho, No. 1:22-cv-00329-BLW (D. Idaho Aug. 2, 2022), https://clearinghouse.net/case/43417/?docket_page=2#docket.

[219] Elizabeth Nash & Peter Ephross, *State Policy Trends 2022: In a Devastating Year, US Supreme Court's Decision to Overturn Roe Leads to Bans, Confusion and Chaos*, GUTTMACHER INST. (Dec. 19, 2022), https://www.guttmacher.org/2022/12/state-policy-trends-2022-devastating-year-us-supreme-courts-decision-overturn-roe-leads (noting that fourteen states had adopted measures to shield abortion providers and patients from investigation by officials in states that ban abortion).

[220] Cassie Ordonio, *Abortion In Hawaii: Ige Orders Legal Safeguards for Women Traveling from Other States*, CIV. BEAT (Oct. 11, 2022), https://www.civilbeat.org/2022/10/abortion-in-hawaii-ige-orders-legal-safeguards-for-women-traveling-from-other-states/ (quoting then-Governor Ige as stating, "We will not cooperate with any other state that tries to prosecute women who receive an abortion in Hawaii, and we will not cooperate with any other state that tries to sanction medical professionals who provide abortion in Hawaii"). *See also State Leaders Take Bold Action to Protect Abortion Access Following the Overturning of* Roe, PLANNED PARENTHOOD (July 21, 2022), https://www.plannedparenthoodaction.org/pressroom/state-leaders-take-bold-action-to-protect-abortion-access-following-the-overturning-of-roe.

[221] *See, e.g.*, S.B. 1, 32d Leg., Reg. Sess. (Haw. 2023), https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=SB&billnumber=1&year=2023 (declaring certain anti-abortion laws of other states to be "contrary to the public policy" and prohibiting the State of Hawai'i from assisting in enforcement of certain civil and criminal actions from another state); S.B. 604, 32d Leg., Reg. Sess. (Haw. 2023), https://www.capitol.hawaii.gov/session/measure_indiv.aspx?billtype=SB&billnumber=604&year=2023 (prohibiting state officials from providing any assistance to another state's civil, criminal, or disciplinary proceedings arising from the provision of reproductive health care).

[222] S.B. 1; S.B. 604.

or extradition requests from other states if they are related to the provision of reproductive health care.[223] The case law is very unsettled in this area and the shield laws raise important legal questions. As one article asked, "[I]f Illinois refuses to extradite an abortion provider to Kentucky, will Kentucky retaliate and refuse to extradite a gun dealer to Illinois?"[224] Thus, the shield provisions could intensify interstate conflict in fields well beyond abortion. The shield provisions also raise important constitutional issues. For example, California enacted a law barring enforcement of judgments obtained under Texas Senate Bill 8 (which bans abortion at six weeks of pregnancy and authorizes private lawsuits as a means of enforcement).[225] It is perfectly understandable that California would not want its doctors to face crippling liability because they provided abortion care (or prescribed abortion pills) to patients in Texas. But California's law could be challenged under the Full Faith and Credit Clause of Article IV, "rais[ing] a wealth of questions about conflict of laws, interstate relations, horizontal federalism, and the federal Constitution."[226]

Of course, if the Republican Party were to gain control of both houses of Congress and the White House, then it might try to ban the distribution of abortion pills or even to enact a nationwide ban on abortion.[227] But the strong negative reaction to Senator Lindsey Graham's proposed bill (for a national ban on abortion after fifteen weeks), demonstrates the political costs of taking

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[223] *See* H.B. 4664, 102nd Gen. Assemb., (Ill. 2023), https://ilga.gov/legislation/102/HB/PDF/10200HB4664lv.pdf. Even before *Dobbs*, Illinois typically provided abortion care to 10,000 out-of-state patients each year; that number is expected to increase to over 45,000 per year as a result of the *Dobbs* decision. *See* Andy Grimm, *What's Next After Supreme Court's* Dobbs *Ruling?*, CHI. SUN TIMES (June 24, 2022, 5:54 AM), https://chicago.suntimes.com/2022/6/24/23180802/abortion-rights-supreme-court-dobbs-illinois-whats-next.

[224] David S. Cohen et al., *supra* note 163, at 52.

[225] CAL. HEALTH & SAFETY CODE § 123467.5; TEX. HEALTH & SAFETY CODE § 171.208(a)(2). Texas S.B. 8 went into force even before *Dobbs* was decided because it was deliberately drafted to be enforceable without any state action and relies entirely on private lawsuits. Plaintiffs are incentivized by the possibility of a $10,000 reward and do not have to pay the doctor's legal fees, even if the lawsuit is unsuccessful.

[226] Diego A. Zambrano, Mariah Mastrodimos & Sergio Valente, *The Full Faith and Credit Clause and the Puzzle of Abortion Laws*, (Oct. 4, 2022) (manuscript at 2); U.S. CONST. art. IV §, 1.

[227] Melanie Zanona & Manu Raju, *House Republicans Eye 15-week Abortion Ban after Roe Ruling*, CNN (June 24, 2022, 4:27 PM), https://www.cnn.com/2022/06/24/politicis/republican-reaction-abortion-congress/index.html. For analysis of the extent to which Congress has authority to regulate abortion, *see* CONG. RSCH. SERVS., LSB10787, CONGRESSIONAL AUTH. TO REGULATE ABORTION (July 8, 2022).

such a position.[228] Moreover, even if a national ban were enacted, foreign providers would still send abortion pills to the United States and it would be very difficult for law enforcement to detect those packages. Even countries with very strict national bans have a high rate of medication abortion because it is so easy to obtain the pills, either through the international mail or by purchasing them on the street.[229]

C. Increased Inequality and Maternal Mortality

Unfortunately, the widespread availability of abortion pills will not enable all women to blunt the impact of *Dobbs*. Most abortions in the United States are obtained by women living in poverty or very close to poverty.[230] Many of these women will not have access to the internet (or a credit card or other electronic means of purchasing pills). Thus, they may resort to black market pills, which may not be as safe and effective. If they require follow-up care (for example, if the medication abortion is incomplete or bleeding does not stop when expected) then they may place themselves at risk of prosecution. When abortion pills are taken orally, the abortion is generally indistinguishable from a spontaneous miscarriage.[231] But a doctor who is suspicious may report the woman to the authorities. Once alerted, police may subject her to rigorous questioning and try to gather digital evidence (e.g. text messages) to prove that she purchased abortion pills.[232]

One thing is certain: the people who will be targeted for this type of investigation will be women living at or near the poverty line, and women of color. Even before *Dobbs* was decided, police, prosecutors, and other state actors often targeted pregnant women and women who experienced pregnancy loss.[233] The National Advocates for Pregnant Women has tracked

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[228] Annie Karni, *Graham Proposes 15-Week Abortion Ban, Splitting Republicans*, N.Y. TIMES (Sept. 13, 2022), https://www.nytimes.com/2022/09/13/us/politics/lindsey-graham-abortion.html.

[229] *See* Michelle Oberman, *What Will and Won't Happen when Abortion is Banned*, 9 J. L. & BIOSCIENCES 1, 7 (2022), https://academic.oup.com/jlb/article/9/1/lsac011/6575467.

[230] *See id.* at 4 nn.11–13.

[231] *Are There Other Ways to Use Misoprostol?*, WOMEN ON WEB, https://www.womenonweb.org/en/page/985/are-there-other-ways-to-use-the-misoprostol (last visited Feb. 12, 2023).

[232] Bobby Allyn, *Where Abortion is Banned, Someone's Phone Activity Could Be Used As Criminal Evidence*, NPR (June 30, 2022), https://www.npr.org/2022/06/30/1109051837/where-abortion-is-banned-someones-phone-activity-could-be-used-as-criminal-evide.

[233] Oberman, *supra* note 229, at 15–16.

1,600 such cases since 1973 and found that the victims of this abuse were "overwhelmingly low income, and disproportionately Black and Brown."[234] A similar pattern will occur if local law officials decide to enforce the new abortion bans against women who terminate their own pregnancies or are merely suspected of doing so. The state will "target the most marginalized, vulnerable members of society – those whom prosecutors view, or at least believe others will be willing to view, not as victims but rather, as villains."[235]

Rigorous enforcement of state bans on abortion will also disproportionately impact women living with disabilities and women who require surgical abortion care. Abortion pills will not resolve an ectopic pregnancy, which can be life-threatening if not promptly treated.[236] Some women also cannot take abortion medications due to underlying health conditions (such as long-term steroid use, adrenal problems, or bleeding disorders).[237] Other women will not know that they require an abortion until it is too late in the pregnancy for a medication abortion. Depending on a woman's physical condition and financial resources, it may not be possible for her to travel to another state to obtain a legal surgical abortion. Thus, it is not surprising that researchers predict a substantial increase in maternal deaths due to abortion bans.[238] Black women will suffer disproportionately, as they have much higher rates of maternal mortality. [239]

Texas has a particularly high rate of maternal mortality among Black women.[240] It also provides a snapshot of what is likely to occur in states that have banned abortion because a novel Texas anti-abortion statute (based upon private enforcement rather than state enforcement) came into force

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[234] Brief of National Advocates for Pregnant Women et al. as Amici Curiae Supporting Respondents, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4441207, at *6–7.

[235] Oberman, *supra* note 229, at 17.

[236] *See* Neha Singh et al., *Ectopic Pregnancy and Unsupervised Abortion Pills: The Hidden Truth*, 11 INT'L J. REPRODUCTION, CONTRACEPTION, OBSTETRICS & GYNECOLOGY 469, 471–72 (2022).

[237] *See* INFORMATION ABOUT MIFEPRISTONE, *supra* note 196, ¶ 3.

[238] Nicole Mueksch, *Abortion Bans to Increase Maternal Mortality Even More, Study Shows*, CU BOULDER TODAY (June 30, 2022), https://www.colorado.edu/today/2022/06/30/abortion-bans-increase-maternal-mortality-even-more-study-shows.

[239] *Id.*; *see also* Amy Roeder, *America is Failing its Black Mothers*, HARV. PUB. HEALTH (2019), https://www.hsph.harvard.edu/magazine/magazine_article/america-is-failing-its-black-mothers/ (reporting that maternal mortality rates have risen substantially in the United States and are markedly higher for Black women).

[240] *See* Eleanor Klibanoff, *Why are Pregnancy and Childbirth Killing so Many Black Women in Texas?*, TEX. TRIB. (Dec. 17, 2022), https://www.texastribune.org/2022/12/17/texas-maternal-mortality-black-women/.

some months before *Dobbs* was decided.[241] The law incentivizes private citizens to enforce the ban by promising them a $10,000 cash bounty if they succeed in suing a doctor, abortion provider, or anyone else who has helped a person to obtain an illegal abortion.[242] Even if a defendant wins the lawsuit, the defendant would still have to pay their own legal fees, which can be substantial.[243] After *Dobbs* was decided, Texas law also criminalized abortion in almost all circumstances, meaning doctors can be sentenced to life imprisonment if they are successfully prosecuted for performing an illegal abortion.[244] Not surprisingly, Texas doctors, and the nurses who assist them, are now afraid to provide timely abortion care, even when a woman needs a surgical abortion to preserve her life or her health.[245] Several women have now reported that they have not been able to obtain medically necessary abortions on a timely basis in Texas.[246] One woman had to travel ten hours to another state to obtain a life-saving abortion.[247] Another woman developed life-threatening sepsis because doctors determined that they could not legally terminate her pregnancy, even though her water had broken at eighteen weeks and the doctors knew that she would inevitably miscarry.[248] Instead,

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[241] For the complex history of Texas' abortion statutes (both pre-*Dobbs* and post-*Dobbs*) *see History of Abortion Laws*, TEX. STATE L. LIBR., https://guides.sll.texas.gov/abortion-laws/history-of-abortion-laws (last accessed Feb. 12, 2023).

[242] TEX. HEALTH & SAFETY CODE ANN. § 171.018 (West 2003); *see also* Emma Bowman, *As States Ban Abortion, the Texas Bounty Law Offers a Way to Survive Legal Challenges*, NPR (July 11, 2022, 5:00 AM), https://www.npr.org/2022/07/11/1107741175/texas-abortion-bounty-law#:~:text=The%20law%20makes%20no%20exceptions,%2410%2C000%20in%20damages%20from%20defendants.

[243] *Id.*

[244] TEX. HEALTH & SAFETY CODE ANN. §§ 170A.002, 170A.004 (West 2022); *Trigger Laws*, TEX. STATE L. LIBR., https://guides.sll.texas.gov/abortion-laws/trigger-laws (last updated Jan. 5, 2023, 1:33 PM).

[245] Carrie Feibel, *Because of Texas' Abortion Law, Her Wanted Pregnancy Became a Medical Nightmare*, NPR (July 26, 2022, 5:04 AM), https://www.npr.org/sections/health-shots/2022/07/26/1111280165/because-of-texas-abortion-law-her-wanted-pregnancy-became-a-medical-nightmare.

[246] *Id.*

[247] *See, e.g.*, Elizabeth Cohen & Danielle Herman, *Why a Woman's Doctor Warned Her Not to Get Pregnant in Texas*, CNN (Sept. 10, 2022, 8:12 PM), https://www.cnn.com/2022/09/09/health/abortion-restrictions-texas/index.html.

[248] Elizabeth Cohen & John Bonifield, *Texas Woman Almost Dies Because She Couldn't Get an Abortion*, CNN HEALTH (Nov. 16, 2022, 9:44 PM), https://www.cnn.com/2022/11/16/health/abortion-texas-

she was told to go home and "wait it out" while she and her husband watched for signs of infection; yet despite their attention to any indications of sepsis, her infection developed so suddenly and rapidly that it almost killed her.[249]

In theory, Texas law allows an abortion when it is necessary to preserve a pregnant person's life. But the law is drafted so strictly that doctors do not feel legally safe until a woman is in a true state of emergency.[250] At that point she will have suffered enormously and may have been exposed to significant health risks.[251] There will be tragedies unless legislators can be persuaded to add compassionate exceptions to abortion bans, including language that gives doctors the necessary confidence that they will not be prosecuted by the state or sued by a vigilante.

V. CONCLUSION

Dobbs clearly did not take the issue of abortion entirely out of the federal courts. It has simply created new conflicts, at least some of which may eventually work their way to the Supreme Court. It is, however, clear that the current majority on the Court will not be receptive to arguments grounding a woman's right to reproductive autonomy in the federal Constitution. Thus, advocates for reproductive autonomy must rely primarily on state courts, state constitutions, and the ordinary political process. But these avenues may be more productive than previously expected. It is particularly encouraging that so many voters have supported access to abortion, not only in liberal states like California, but also in a conservative state (Kansas) and a swing state (Michigan). These successes have already inspired activists in many other states to campaign for amendments to state constitutions.[252]

Even in states that have anti-abortion majorities, there may be opportunities to lobby for legislation to reduce the negative – and highly discriminatory – impact of *Dobbs*. If those who claim to be "pro-life" are

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sepsis/index.html#:~:text=Texas%20law%20allows%20for%20abortion,of%20a%20major%20bodily%20function.%E2%80%9D.

[249] *Id.*

[250] Eleanor Klibanoff, *Doctors Report Compromising Care Out of Fear of Texas Abortion Law*, TEX. TRIB. (June 23, 2022, 5:00 PM), https://www.texastribune.org/2022/06/23/texas-abortion-law-doctors-delay-care/.

[251] *See* Whitney Arey et al., *A Preview of the Dangerous Future of Abortion Bans—Texas Senate Bill 8*, 387 NEW ENG. J. MED. 388–90 (Aug. 4, 2022), https://www.nejm.org/doi/full/10.1056/NEJMp2207423.

[252] Adam Edelman, *Abortion Rights Groups Look to Build on Their Victories with New Ballot Measures*, NBC NEWS (Dec. 22, 2022, 2:00 AM), https://www.nbcnews.com/politics/politics-news/abortion-rights-groups-look-new-ballot-measures-2023-2024-rcna61317 (reporting that efforts are underway to enshrine a right to abortion in the state constitutions of ten states).

serious about their mission then they should be willing to agree to additional funding for maternal health and for clearly-worded exceptions for situations in which a pregnancy threatens a woman's physical or mental health. The Republican Party is well aware of the role that *Dobbs* played in the midterm elections in 2022, and some Republican candidates have already modified their public positions on abortion in anticipation of the 2024 elections.[253] This may provide an opportunity to negotiate statutory language that pregnant women (and those who care for them) can rely upon. There are many examples around the world that legislators could borrow from, including the United Kingdom's Abortion Act 1967.[254] It provides a broad range of compassionate exceptions to the general ban on abortion and gives doctors the discretion to determine when those exceptions have been met. In the early 1990s, when I first began to research comparative legal frameworks, I criticized the British model because it is inherently patronizing and does not recognize any *right* to reproductive autonomy.[255] But years later, I have come to appreciate its practical benefits, particularly the fact that the British National Health Service (NHS) pays for abortions, just like other forms of health care.[256] In the short term, the British model may represent the best "worst-case scenario" for women living in the most conservative parts of post-*Roe* America. In the longer term, the United States hopefully will become more supportive of women's right to equal citizenship and rejoin the global movement for reproductive autonomy, reproductive health and reproductive justice.[257]

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[253] *See* Julia Manchester, *Republicans Rethink Abortion Strategy After Bruising Midterms*, HILL (Dec. 29, 2022, 6:00 AM), https://thehill.com/homenews/campaign/3786449-republicans-rethink-abortion-strategy-after-bruising-midterms/.

[254] Abortion Act 1967 ch. 87 (U.K.), https://www.legislation.gov.uk/ukpga/1967/87/data.pdf.

[255] Carole J. Petersen, *Reproduction and Family Planning: Individual Right or Public Policy?*, *in* HONG KONG, CHINA AND 1997: ESSAYS IN LEGAL THEORY, 261, 274–77 (Raymond Wacks ed., 1993).

[256] *See Overview: Abortion*, NAT'L HEALTH SERV. (Apr. 24, 2020), https://www.nhs.uk/conditions/abortion/ (noting that women can obtain abortion care privately or through the National Health Service).

[257] *See generally* Lynn M. Morgan, *Global Reproductive Governance after* Dobbs, 122 CUR. HIST. 22 (2023).

Collective Memory and Intersectional Identities: Healing Unique Sexual Violence Harms Against Women of Color Past, Present and Future

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ABSTRACT

For at least the last decade, at the urging of gender scholars and advocates, reconciliation initiatives started to recognize specialized harms of sexual violence against women and began to tailor redress to address these harms. Yet, although a step in the right direction, even those forward-looking redress initiatives did not specifically and forthrightly recognize unique sexual violence harms to women of color. This Article builds on this developing intersectional race-gender redress analysis with its focus on sexual violence by illuminating an important next step: recognition, through storytelling and collective memory, of sexual violence injustices against women of color. The collective memory of injustice is an important prelude to reconciliation initiatives. In the context of sexual violence against women of color, the shaping of an individual's and group's narrative and public image of the harms are vital to moving forward, especially as related to truth commission investigations and hearings. Where women of color who suffered sexual violence (and other forms of gender-based harms) are often silenced or largely rendered invisible in the redress process, voicing both individual and collective experiences of such harms may be an important step forward in healing such unique harms.

Yet in many transitional justice initiatives, those willing to come forward are frequently narrowly cast or categorized as "victims," often in the context as witnesses in criminal prosecutions or for the purpose of determining legal eligibility for monetary reparations. However, recent studies reveal that women of color who have suffered sexual violence harms experience multiple, intersectional identities—as victims, survivors, political activists,

fighters and much more. And many of them have expressed that they wish to be remembered that way—as more than just "victims"—in reparative justice initiatives and beyond. Through a mini case study of the experiences of Toufah Jallow, the Gambian woman who is credited with inspiring the #MeToo movement in Africa, this Article begins to illuminate what more is needed for comprehensive and enduring social healing through justice for both individual women of color and the polity itself. The time is now to listen to these women of color with empathy and understanding. The time is now to strive for more genuine and comprehensive social healing through justice.

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To all victims whose rapists are not presidents.
To all survivors who have paid for survival with silence.
May the whispers of our mothers, their mothers and
the mothers before them rise in our throats.
I hope we find safety in speaking together.
-Toufah Jallow[1]

I. INTRODUCTION

In 2019, #IAmToufah sparked transformative social change in West Africa and beyond.[2] For the first time, Fatou Jallow, known as Toufah, spoke out publicly in detail about her horrific rape by Yahya Jammeh, The Gambia's former president and dictator,[3] which occurred just after winning a national

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*Assistant Professor of Law, William S. Richardson School of Law, University of Hawai'i at Mānoa. J.D. 2015, William S. Richardson School of Law, University of Hawai'i at Mānoa. This Article is dedicated to Toufah Jallow and the women of The Gambia, and to all women—many of whom may feel unheard, overlooked, invisible or forgotten—who have endured unimaginable pain but who have demonstrated considerable courage, strength and sacrifice. My hope is that this Article, in a small modest way, opens the door just a bit wider to empower women of color who have suffered sexual violence injustices to use their individual and collective voices and to share their stories as a means of advancing social healing. I am especially grateful to Eric K. Yamamoto for his invaluable guidance, mentorship and inspiration, for his extraordinary scholarship and advocacy, and for his insightful comments on this Article. Many thanks to Susan Serrano and Randle DeFalco for their generous feedback on earlier drafts; to Andrea Freeman, Richard Chen and Troy Andrade for their mentorship and encouragement; to Dean Camille Nelson for her guidance and support; and to Elizabeth "Kalei" Akau for her excellent research assistance. I am also grateful to Oladeji Tiamiyu for sharing a bit about his experiences working with The Gambia's Truth, Reconciliation and Reparations Commission, which inspired me to further research and write about The Gambia's transitional justice initiatives as part of this Article. A special thank you to the editors and staff of the University of Hawai'i Law Review for their invitation to contribute to this special symposium issue and for their superb editorial assistance.

[1] TOUFAH JALLOW WITH KIM PITTAWAY, TOUFAH: THE WOMAN WHO INSPIRED AN AFRICAN #METOO MOVEMENT (2021) (dedication page to memoir).

[2] *Id.* at 3–4, 242–43, 271.

[3] For a more detailed history of The Gambia, including the twenty-year-long dictatorship under Yahya Jammeh, *see*, for example, PA NDERRY M'BAI, THE GAMBIA: THE UNTOLD DICTATOR YAHYA JAMMEH'S STORY (2012) (highlighting the human rights atrocities and disregard for the rule of law in The Gambia under Yahya Jammeh's rule); THE GAMBIA IN TRANSITION: TOWARDS A NEW CONSTITUTIONAL ORDER (Satang Nabaneh, Adem Abebe & Gaye Sowe eds., 2022) (assessing the national reconciliation efforts in The Gambia post-

talent competition and university scholarship at the age of eighteen, and after rejecting Jammeh's marriage proposal to pursue her studies.[4] Fearing for her life after Jammeh had drugged and violently raped her, and worried about the persecution of her family, Toufah abruptly fled The Gambia on her own and became a refugee in Canada.[5] She lived quietly in physical exile and in silence until Jammeh fell from power in 2017.[6] But even after she was able to return to The Gambia, she expressed feeling an "emotional exile"—"exiled to the land of statistics" with other Gambian victims of sexual assault.[7] Then, she decided to tell her story and speak out.[8] She "refuse[d] to be invisible" any longer.[9] As she put it, "In the end the silence is as uncomfortable and more damaging than the consequences of speaking."[10]

Against the backdrop of a patriarchal African Muslim culture marked by polygamous marriages, where there was no word for rape in her native Fula language[11]—in her words, a "culture where you have to keep secrets" and "believe that women should be quiet"—Toufah remarkably ended her silence and told her story.[12] In 2019, she first spoke out at a global press conference in The Gambia, then submitted her experience for inclusion in a Human Rights Watch report, and later testified publicly before The Gambia's Truth,

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Yahya Jammeh's rule in the context of constitution making). It is beyond the scope of this Article to explore the various transitional justice dimensions for present-day The Gambia.

[4] JALLOW, *supra* note 1, at 24, 37, 43–45, 207.

[5] Toufah detailed her experience and journey during this period in her memoir, co-written with journalist Kim Pittaway. *See generally id.*

[6] *Id.* at 48, 57, 94–95, 179.

[7] *Id.* at 192–93.

[8] *Id.* at 207.

[9] *Id.* at 211–12.

[10] Dionne Searcey, *A Beauty Queen Accuses Former Gambian President of Rape: 'I Literally Stumbled Out of There'*, N.Y. TIMES (June 25, 2019) [hereinafter Searcey, *A Beauty Queen Accuses Former Gambian President of Rape*], https://www.nytimes.com/2019/06/25/world/africa/fatou-jallow-yahya-jammeh-gambia.html.

[11] JALLOW, *supra* note 1, at 43–44 ("There is no word for rape in the Fula language. This isn't because it doesn't happen. It's because we are supposed to believe it is so rare that no word is necessary for it. If it does happen, we are not supposed to speak of it."); *see also id.* at 76 ("We were talking in my language, and I tried to find a word that would express what had happened. 'He violated me,' I said, though the word I used in our language was closer to 'he troubled me.' It was as if we were speaking in code, all these not-quite-right words offering what looked like protection but was really a cloak of shame worn by the victim rather than the rapist.").

[12] Louise Hunt, *#IamToufah: Breaking the Silence on Sexual Assault in Gambia*, ALJAZEERA (Nov. 12, 2019), https://www.aljazeera.com/features/2019/11/12/iamtoufah-breaking-the-silence-on-sexual-assault-in-gambia; *see also* Searcey, *A Beauty Queen Accuses Former Gambian President of Rape*, *supra* note 10.

Reconciliation and Reparations Commission (TRRC).[13] Since then, she has told her story to international audiences and advocated for the criminal prosecution of Jammeh, reparations, and greater financial support and social resources for sexual violence victims.[14] As she was speaking out in some of these different forums, she called on women to share their stories on social media using #IAmToufah, lending her name in hopes of helping others, who perhaps could not (yet) attach their names or faces in telling their stories of sexual violence, "find a way to speak, to be visible, to claim our stories, our lives, our strength."[15] #IAmToufah later became the rallying cry and slogan for the first women's march in The Gambia that same year.[16]

Toufah's story is astounding in many respects. On the one hand, interest in and visibility to her experience and story is due in large part to the global status of her rapist, a former dictator.[17] On the other hand, what is not always highlighted in media accounts is her strong desire to be recognized not just as a victim but also as a survivor, feminist, advocate, fighter, leader and human rights activist—without the stigma, marginalization, fear or shame often attached to sexual violence victims.[18] As she discussed at a panel before an international audience, "[o]ur intersectionality matters."[19] She urged panel attendees and the international community to "work side by side with us [victims of sexual violence], empowering us as activists, fighters and advocates for ourselves and others."[20]

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[13] JALLOW, *supra* note 1, at 219–20, 252–69; *Gambia: Women Accuse Ex-President of Sexual Violence*, HUM. RTS. WATCH (June 26, 2019, 6:00 AM), https://www.hrw.org/news/2019/06/26/gambia-women-accuse-ex-president-sexual-violence.

[14] JALLOW, *supra* note 1, at 244, 268; *see also* Carley Petesch, *Gambian Toufah Jallow Tells of Surviving Rape by Dictator*, AP NEWS (Oct. 17, 2021) [hereinafter Petesch, *Gambian Toufah Jallow Tells of Surviving Rape by Dictator*], https://apnews.com/article/gambia-toufah-jallow-metoo-sexual-assault-survivor-aa57d8062771a103c0e7dd010baa636a.

[15] JALLOW, *supra* note 1, at 236, 239.

[16] *Id.* at 242–43.

[17] *See id.* at 248–50.

[18] *See id.* at 277.

[19] *Id.* For some sociologists, intersectionality is an analytical tool to investigate "how intersecting power relations influence social relations across diverse societies as well as individual experiences in everyday life" where social categories such as race, gender, sexuality, class and ability are viewed as interrelated and mutually shaping one another. PATRICIA HILL COLLINS & SIRMA BILGE, INTERSECTIONALITY 2 (2d ed. 2020) [hereinafter COLLINS & BILGE, INTERSECTIONALITY]; *see also infra* note 33.

[20] JALLOW, *supra* note 1, at 277.

This call by Toufah has recently been echoed by other women of color who suffered from sexual violence atrocities and who have spoken out.[21] Recent redress efforts reveal that women of color who have faced sexual violence injustices, when provided with the opportunity to speak and tell their stories, want to be remembered as more than just "victims."[22] For example, in Nepal, several women, who were at the center of political action, wanted recognition for their role in bringing about systemic changes as part of the Maoist movement.[23] In The Gambia, where sexual violence "was used to silence women and restrict their political participation," several women testified "that they were physically abused for supporting the opposition and engaging in politics, which is considered an activity for men only."[24] In the Central African Republic, similar to Toufah's efforts, another woman underscored her identity as a survivor and a leader, not just as a victim: "I am not only a survivor – I am now also a leader. I want to lend a hand to those who are victims so that they become survivors. I call on all survivors to speak out."[25]

Despite salutary advancements in understanding and recognizing sexual violence against women of color as uniquely redress-worthy, the dominant discourse continues to narrowly cast or categorize women of color as "victims."[26] Or, worse, certain societal circumstances continue to render

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[21] It is beyond the scope of this Article to explore these global examples more fully. Further in-depth research and analysis on this subject would be useful.

[22] Virginie Ladisch, *Victims, Survivors, and Agents of Change: Reparations for Sexual and Gender-Based Violations*, INT'L CTR. FOR TRANSITIONAL JUST. (Aug. 1, 2022) [hereinafter Ladisch, *Victims, Survivors, and Agents of Change*], https://www.ictj.org/latest-news/victims-survivors-and-agents-change-reparations-sexual-and-gender-based-violations; *see also* Jo-Anne Wemmers, Isabelle Parent & Marika Lachance Quirion, *Restoring Victims' Confidence: Victim-Centered Restorative Practices*, INT'L REV. VICTIMOLOGY 1, 14 (2022) (noting that "[v]ictimization is disempowering" and suggesting, through the results of their study, that "the disempowerment experienced by victims may be why RP [restorative practices], which offer agency to victims, are beneficial," especially to advancing healing and allowing women who suffered sexual violence to find and express their voice).

[23] Ladisch, *Victims, Survivors, and Agents of Change*, *supra* note 22.

[24] *Id.*

[25] *"We Break the Silence to Help Survivors of Sexual Violence in Our Fight for Justice"*, GLOBAL SURVIVORS FUND (June 20, 2022), https://www.globalsurvivorsfund.org/media/webreaksilence (quoting Miryam who now serves as the General Secretary of the Movement of Survivors in Central African Republic (MOSUCA)).

[26] *See, e.g.*, Miyoko T. Pettit, *Who Is Worthy of Redress?: Recognizing Sexual Violence Injustice Against Women of Color as Uniquely Redress-Worthy—Illuminated by a Case Study on Kenya's Mau Mau Women and Their Unique Harms*, 30 BERKELEY J. GENDER, L. & JUST. 268 (2015) [hereinafter Pettit, *Who Is Worthy of Redress?*] (employing a particularized

them and their stories entirely invisible.[27] A counternarrative—collective memories of sexual violence injustices by women of color—is needed.[28]

Through a brief examination of Toufah Jallow's experience and story—relying primarily on her recently published memoir and media accounts—this Article begins to imagine alternatives for recognition of sexual violence harms against women of color in the redress process. The examination of Toufah's story loosely reveals an ongoing sense that women of color's voices, and thus their stories, remain silenced, invisible or overlooked in reconciliation initiatives.[29] Why, despite salutary steps taken to address these unique harms, are their voices and stories still missing from redress conversations? In light of this, and amidst a palpable sense that more is needed for comprehensive and enduring social healing, what more can we do to *recognize* these unique sexual violence harms against women of color? And how might we begin to break down unproductive discursive strategies and stock stories underlying the dominant narratives to create room for women of color's intersectional identities as part of the redress process?

This Article responds, in broad sketches, to these pressing questions. It builds upon extensive prior inquiries into women's harms during mass

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intersectional race-gender redress analysis for Kenya's Mau Mau women and their unique sexual violence harms); Michele Park Sonen, *Healing Multidimensional Wounds of Injustice Intersectionality and the Korean "Comfort Women"*, 22 BERKELEY LA RAZA L.J. 269, 298 (2012) [hereinafter Sonen, *Healing Multidimensional Wounds of Injustice Intersectionality*] (employing an intersectional race-gender redress analysis for Korean "comfort women" and observing that the model victim narrative precluded genuine social healing); Eric K. Yamamoto & Michele Park Sonen, *Reparations Law: Redress Bias?*, in IMPLICIT RACIAL BIAS ACROSS THE LAW 245 (Justin D. Levinson & Robert J. Smith eds., 2012) [hereinafter Yamamoto & Sonen, *Reparations Law: Redress Bias?*] (calling for intersectional race-gender sensitive redress to account for implicit redress bias, noting that many redress policymakers and frontline advocates seem to treat women of color's unique harms as less worthy of repair).

[27] *See infra* Section IV (discussing generally race-gender intersectional redress and a recent focus on sexual violence).

[28] *See infra* Sections V.D (proposing counternarratives focused on intersectional identities) and VI.C (recognizing dominant narratives and the need for counternarratives in the context of the mini case study on Toufah Jallow and The Gambia).

[29] There are many other examples and case studies, across continents and different racial classifications, of women of color's voices and stories being silenced, invisible or left out entirely from redress processes and historical records. *See, e.g.*, Katrina Anderson, *Turning Reconciliation on Its Head: Responding to Sexual Violence Under the Khmer Rouge*, 3 SEATTLE J. SOC. JUST. 785, 788 (2005) (describing the story of Tang Kim, a Khmer Rouge rape survivor, and recognizing that "silence can no longer be the appropriate response" to Cambodia's history of sexual crimes).

atrocities and systemic violence.[30] It begins to modestly add to the vast literature on the collective memory of injustice "as a prelude to reparatory justice initiatives."[31] It questions the different multiple roles of women of color who faced sexual violence during hostilities and mass injustices and

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[30] *See, e.g.*, WHAT HAPPENED TO THE WOMEN? GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS (Ruth Rubio-Marín ed., 2006) [hereinafter RUBIO-MARÍN, WHAT HAPPENED TO THE WOMEN?] (collecting case studies examining how governments in new or reforming democracies could repair particular forms of gendered harms suffered by their populations during periods of political violence by integrating gender concerns into state-sponsored reparations efforts); Yamamoto & Sonen, *Reparations Law: Redress Bias?*, *supra* note 26, at 246–61 (highlighting the implicit biases against women of color in redress initiatives and examining the South African Truth and Reconciliation Commission, Tuskegee Syphilis Experiment, and Mayan women in Guatemala as case studies); Colleen Duggan, Claudia Paz y Paz Bailey & Julie Guillerot, *Reparations for Sexual and Reproductive Violence: Prospects for Achieving Gender Justice in Guatemala and Peru*, 2 INT'L J. TRANSITIONAL JUST. 192, 199–213 (2008) [hereinafter Duggan, Paz y Paz Bailey & Guillerot, *Reparations for Sexual and Reproductive Violence*] (examining case studies of sexual and reproductive violence against women in Guatemala and Peru and exploring prospects for redress to victims in each country).

[31] *See, e.g.*, Susan K. Serrano, *Collective Memory and the Persistence of Injustice: From Hawai'i's Plantations to Congress—Puerto Ricans' Claims to Membership in the Polity*, 20 S. CAL. REV. L. & SOC. JUST. 353, 359 (2011) [hereinafter Serrano, *Collective Memory and the Persistence of Injustice*] (discussing how Hawaiian sugar cane plantation owners furthered a collective memory of racialization of Puerto Ricans, erecting a threshold barrier for Puerto Rican justice advocates); Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1756–77 (2000) [hereinafter Hom & Yamamoto, *Collective Memory, History, and Social Justice*] (analyzing the dynamics of collective memory in framing justice grievances and claims); Troy J. H. Andrade, *Hawai'i '78: Collective Memory and the Untold Legal History of Reparative Action for Kānaka Maoli*, 24 U. PENN. J.L. & SOC. CHANGE 85, 131–45 (2021) [hereinafter Andrade, *Hawai'i '78*] (examining the constant negotiation of history, mobilization and power of collective memory that lawmakers wield to advance or stall justice initiatives for Native Hawaiians); Rachel López, *The (Re)Collection of Memory After Mass Atrocity and the Dilemma for Transitional Justice*, 47 N.Y.U. J. INT'L L. & POL. 799 (2015) [hereinafter López, *The (Re)Collection of Memory*] (setting forth a taxonomy of collective memory theory, examining the tension between justice and collective memory, and considering how collective memory would further certain transitional justice goals if group memories are incorporated in judicial proceedings seeking to address mass atrocities); Jody Lyneé Madeira, *When It's So Hard to Relate: Can Legal Systems Mitigate the Trauma of Victim-Offender Relationships?*, 46 HOUS. L. REV. 401, 418–30 (2009) [hereinafter Madeira, *When It's So Hard to Relate*] (analyzing how understandings of dramatic, tragic deaths are formed collectively through interpersonal discussion and media coverage); MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 13–24 (1997) (exploring how collective memory is formed and shaped after mass atrocities, including through criminal prosecutions).

their "present-day [justice] struggles over collective memory."[32] Employing an intersectionality framework,[33] importantly, it broadly suggests that women of color who suffered from sexual violence might be remembered as victims, survivors, political activists, fighters and much more as part of present-day collective memories.[34] And, finally, this Article roughly outlines how women of color—especially their unique voices—should be taken into consideration at the initial design and investigative stages, as well as the implementation phases, in order to strive for more enduring and comprehensive social healing.[35] In doing so, it bridges the gap between theory and practice. It reinforces conceptual notions that reconciliation measures, especially *recognition* of harms, must go beyond the "common-sense" or dominant narratives[36] while uplifting the practical sense that they should also "serve as a catalyst for long-term transformation of gender norms and practices to advance gender equality and inclusion."[37]

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[32] *See* Hom & Yamamoto, *Collective Memory, History, and Social Justice*, *supra* note 31, at 1771.

[33] "Intersectionality theory refers to the conceptual underpinnings whereby scholars challenge the dominant ways of thinking about discrimination. These mainly feminist scholars propose that multiple perspectives better account for the complex experiences of subordinated groups, especially women of color." Pettit, *Who Is Worthy of Redress?*, *supra* note 26, at 276 n.36; *see also infra* Section V.D & note 192 and accompanying text; Robert S. Chang & Jerome McCristal Culp, Jr., *After Intersectionality*, 71 U. MO. KAN. CITY L. REV. 485 (2002); Mary Jo Wiggins, *Foreword: The Future of Intersectionality and Critical Race Feminism*, 11 J. CONTEMP. LEGAL ISSUES 677 (2001); Adrien Katherine Wing, *Brief Reflections Toward a Multiplicative Theory and Praxis of Being*, 6 BERKELEY WOMEN'S L.J. 181 (1990–91).

[34] *See* Ladisch, *Victims, Survivors, and Agents of Change*, *supra* note 22 ("This begins by making space for the multiple roles women experience in periods of conflict or political violence, whether that be as victims, survivors, or fighters on behalf of a cause.").

[35] *See* Eric K. Yamamoto, Miyoko Pettit-Toledo & Sarah Sheffield, *Bridging the Chasm: Reconciliation's Needed Implementation Fourth Step*, 15 SEATTLE J. SOC. JUST. 109, 116–18 (2016) [hereinafter Yamamoto, Pettit-Toledo & Sheffield, *Bridging the Chasm*] (recognizing that while a truth commission's findings and recommendations are a key piece to the reconciliation process, many policymakers, scholars and advocates search and call for "remaking a key part of the prevailing reconciliation template," which would entail "a new, formalized fourth step in the truth and reconciliation process"—"an Assessment, Implementation, and Oversight Task Force").

[36] *See* KAREN ENGLE, THE GRIP OF SEXUAL VIOLENCE IN CONFLICT: FEMINIST INTERVENTIONS IN INTERNATIONAL LAW 7 (2020) [hereinafter ENGLE, THE GRIP OF SEXUAL VIOLENCE]; *see also infra* Sections V.B (outlining some of the dominant narratives focused on the "innocent victim" and the "perpetrator") and V.C (presenting some critiques of the dominant narratives).

[37] *See* Ladisch, *Victims, Survivors, and Agents of Change*, *supra* note 22.

To begin this examination, then, a very brief historical backdrop of the growing recognition of sexual violence against women over the past few decades is helpful.

II. HISTORICAL BACKGROUND: SEXUAL VIOLENCE INJUSTICES

The 1990s marked the growing recognition of sexual violence against women during conflict as crimes against humanity and serious violations of human rights.[38] The International Criminal Tribunal for the Former Yugoslavia spotlighted rapes against women during the conflict that gripped the former Yugoslavia.[39] The International Criminal Tribunal for Rwanda then developed further understandings of rape and sexual violence as forms of genocide.[40] Since those landmark court decisions, "sexual violence in conflict," "sexual and reproductive violence" (SRV)[41] and "conflict-related

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[38] *See* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 6–8 (2001) [hereinafter MINOW, BETWEEN VENGEANCE AND FORGIVENESS]; ENGLE, THE GRIP OF SEXUAL VIOLENCE, *supra* note 36, at 1; Christine Gibbons, Note, *CEDAW, the Islamic State, and Conflict-Related Sexual Violence*, 51 VAND. J. TRANSNAT'L L. 1423, 1429–37 (2018) (providing a historical overview of sexual violence and international law and the emergence of women's rights as an international priority in the 1990s).

[39] ENGLE, THE GRIP OF SEXUAL VIOLENCE, *supra* note 36, at 80–81; *see also* Kirsten Campbell, *Gender Justice Beyond the Tribunals: From Criminal Accountability to Transformative Justice*, 110 AM. J. INT'L L. UNBOUND 227, 227 (2016) (describing the legacies of gender justice at the International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda and arguing for broader "transformative" gender justice beyond international tribunals). *But see* Margaret Urban Walker, *Transformative Reparations? A Critical Look at a Current Trend in Thinking About Gender-Just Reparations*, 10 INT'L J. TRANSITIONAL JUST. 108 (2016) (offering a critique of the concept of "transformative"—as opposed to corrective or restorative—justice in the context of gender-just reparations).

[40] ENGLE, THE GRIP OF SEXUAL VIOLENCE, *supra* note 36, at 101; *see also* Heidy Rombouts, *Women and Reparations in Rwanda: A Long Path to Travel*, *in* RUBIO-MARÍN, WHAT HAPPENED TO THE WOMEN?, *supra* note 30, at 197, 221 [hereinafter Rombouts, *Women and Reparations in Rwanda*] (noting the salutary steps from the International Criminal Tribunal for Rwanda while also recognizing the shortcomings of other courts in addressing sexual violence in Rwanda).

[41] *See* Duggan, Paz y Paz Bailey & Guillerot, *Reparations for Sexual and Reproductive Violence*, *supra* note 30, at 194 (generally describing sexual and reproductive violence against women and noting that it is "understood to include practices such as sexual slavery, forced marriage, forced pregnancy/abortion/sterilization, rape, sexual torture/mutilation and sexual humiliation").

sexual violence" (CRSV)[42] emerged as catchwords drawing the attention of international institutions.[43]

At the turn of the century, in 2000, another monumental shift occurred with the United Nations Security Council Resolution 1325 on Women, Peace and Security ("UNSCR 1325").[44] That resolution sought to recognize the "unique impact of conflict on women and the need to increase women's participation in conflict resolution, peacebuilding, and peacekeeping."[45] More specifically, the resolution expressed "concern that civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict, including as refugees and internally

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[42] "CRSV is defined by the United Nations as rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilisation, forced marriage, and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict." GLOBAL SURVIVORS FUND, GLOBAL REPARATIONS STUDY EXECUTIVE SUMMARY REPORT OF PRELIMINARY FINDINGS 4 (Sept. 27, 2021) [hereinafter 2021 GLOBAL REPARATIONS STUDY SUMMARY REPORT OF PRELIMINARY FINDINGS], https://static1.squarespace.com/static/5ff7d9f4dd4cdc650b24f9a4/t/61558febcd56d515c8012904/1632997364374/2021+09+27+GSF+Report_UNGA_Preliminary_Findings.pdf; *see also* Shirambere Philippe Tunamsifu, *The Right to Justice: A Challenge for Survivors of Conflict-Related Sexual Violence in the Eastern Democratic Republic of the Congo*, 15 AFR. HUM. RTS. L.J. 473, 476–81 (2015) (providing an overview of CRSV globally and in the DRC). GBV or "gender-based violence" refers to "harmful acts directed at an individual based on their gender" that is "rooted in gender inequality, the abuse of power and harmful norms." *Gender-Based Violence*, UNHCR: THE UN REFUGEE AGENCY, https://www.unhcr.org/gender-based-violence.html (last visited Mar. 11, 2023). GBV can include "sexual, physical, mental and economic harm inflicted in public or in private" and can take many forms, including sexual violence. *Id.* While this Article limits its focus to cisgender women, due in large part to the prevalence of sexual violence against this particular group, I acknowledge that this historical and legal depiction may too narrowly cast understandings of sexual violence during periods of conflict. For a discussion on expanded understandings of sexual violence during conflict, which may include men, transgender women, and intersex/non-binary/third-gender individuals, see, for example, David Eichert, *Expanding the Gender of Genocidal Sexual Violence: Towards the Inclusion of Men, Transgender Women, and People Outside the Binary*, 25 UCLA J. INT'L L. & FOREIGN AFF. 157 (2021); Lisa Davis, *Reimagining Justice for Gender-Based Crimes at the Margins: New Legal Strategies for Prosecuting ISIS Crimes Against Women and LGBTIQ Persons*, 24 WM. & MARY J. WOMEN & L. 513 (2018).

[43] *See* ENGLE, THE GRIP OF SEXUAL VIOLENCE, *supra* note 36, at 1.

[44] *See* Kelli Muddell, *An Overlooked Aspect of Sexual and Gender-Based Violence*, INT'L CTR. FOR TRANSITIONAL JUST. (Oct. 30, 2018) [hereinafter Muddell, *An Overlooked Aspect of Sexual and Gender-Based Violence*], https://www.ictj.org/news/overlooked-aspect-sexual-and-gender-based-violence; *see also* S.C. Res. 1325 (Oct. 31, 2000).

[45] Muddell, *An Overlooked Aspect of Sexual and Gender-Based Violence*, *supra* note 44.

displaced persons, and increasingly are targeted by combatants and armed elements."[46] It further called on "all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including, inter alia: (a) The special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction."[47]

With the celebration of the eighteenth anniversary of the resolution in 2018, many applauded advancements in adopting national action plans for the implementation of UNSCR 1325 in over seventy-five countries.[48] However, others cautioned too much optimism in this limited progress considering the use of sexual and gender-based violence in ongoing conflicts, such as the Syrian and Rohingya crises.[49]

Beyond international criminal courts[50] and UN resolutions, redress scholars and reparative justice advocates called for more comprehensive and enduring gender-sensitive redress.[51] Recognizing that sexual violence against women has sometimes been narrowly focused on punitive or retributive forms of justice, human rights advocates, feminists, gender and redress scholars, victims' groups, women's rights groups, journalists, policymakers and government officials called for tailored redress for

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[46] S.C. Res. 1325 (Oct. 31, 2000).

[47] *Id.* ¶ 8.

[48] *See* Muddell, *An Overlooked Aspect of Sexual and Gender-Based Violence*, *supra* note 44.

[49] *See id.*

[50] *See generally* INT'L CRIM. CT., OFF. OF THE PROSECUTOR, POLICY ON THE CRIME OF GENDER PERSECUTION (Dec. 7, 2022), https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-07-Policy-on-the-Crime-of-Gender-Persecution.pdf (setting forth an official policy in furtherance of "accountability for, and the prevention of, gender persecution"); Anne-Marie de Brouwer, *Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families*, 20 LEIDEN J. INT'L L. 207 (2007) (examining sexual violence victims' claims for reparations under supranational criminal law at the International Criminal Court and at the Trust Fund for Victims and their families).

[51] *See* RUBIO-MARÍN, WHAT HAPPENED TO THE WOMEN?, *supra* note 30, at 22 ("The transitional justice debate has been overwhelmingly more about what to do against perpetrators than about what to do for victims, in spite of the increasing awareness of the limits of criminal justice in scenarios of massive and systematic violations of human rights."). It is beyond the scope of this Article to more fully discuss gender-sensitive redress theory. For a brief overview of the emergence of gender-sensitive redress theory, see Pettit, *Who Is Worthy of Redress?*, *supra* note 26, at 293–300. For more recent scholarship on gender-sensitive redress from a socio-historical and socio-legal perspective, see, for example, Natalia Gerodetti, *Whose Reparation Claims Count? Gender, History and (In)Justice*, 42 AUSTL. FEMINIST L.J. 97 (2016).

gendered harms, including reparations for sexual violence.[52] Studies of truth commissions and reparations in South Africa, Guatemala, Peru, Rwanda, Sierra Leone and Timor-Leste were some of the first examples to demonstrate the potential of gender-tailored redress.[53] Those studies, however, also identified shortcomings and potential solutions.[54]

In 2023, sexual violence injustices are now part of the mainstream consciousness—whether in international court settings, in United Nations Security Council Resolutions, or in truth commissions and reparative justice initiatives.[55] Yet, there is a strong, palpable sense that still more is needed for enduring and comprehensive social healing of these sexual violence injustices for individuals and the polity itself.[56] Professor Eric Yamamoto's *social healing through justice* framework provides a critical lens and analytical toolkit for shaping, assessing and retooling these on-the-ground initiatives, including those involving sexual violence against women of color.[57] The next section, from a high-level view, discusses Yamamoto's

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[52] *See, e.g.*, Colleen Duggan & Adila Abusharaf, *Reparations of Sexual Violence in Democratic Transitions: The Search for Gender Justice*, *in* THE HANDBOOK OF REPARATIONS 623, 626–28 (Pablo de Greiff ed., 2006) (noting the absence of gender-sensitive redress and finding that justice continues to fail victims of gender-based violence—once during the underlying harm and again during the aftermath of violence); RUBIO-MARÍN, WHAT HAPPENED TO THE WOMEN?, *supra* note 30, at 27 (encouraging "conceptualizing forms of redress tailored to women" and calling for gender-conscious redress); Kirsten Campbell, *Building National and Regional Accountability for Conflict Related Sexual Violence: From Prosecutions in the Former Yugoslavia to the African Court of Justice and Human and Peoples' Rights*, 7 INT'L HUM. RTS. L. REV. 201, 217–23 (2018) (arguing for a "gender justice framework").

[53] *See generally* RUBIO-MARÍN, WHAT HAPPENED TO THE WOMEN?, *supra* note 30.

[54] *See generally id.*

[55] *See generally* Fionnuala Ní Aoláin, Catherine O'Rourke & Aisling Swaine, *Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice*, 28 HARV. HUM. RTS. J. 97 (2015) (providing an overview of progressive normative advances, identifying conceptual and practical gaps in the legal and policy frameworks for reparations for CRSV and challenges in the implementation of gender-sensitive reparations, and proposing guiding principles to advance transformative justice for victims of sexually violent harms).

[56] *See, e.g.*, Sabine Freizer, *Reparations After Conflict Related Sexual Violence: The Long Road in the Western Balkans*, 27 SEC. & HUM. RTS. 14, 16 (2016) (noting that "[i]ncreased awareness of CRSV has yet to be translated into the implementation of quick, effective, transformative, and comprehensive reparation programs for survivors" and providing an update on reparation systems in the Western Balkans, especially Bosnia-Herzegovina, Croatia and Kosovo).

[57] *See* ERIC K. YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE: UNITED STATES, SOUTH KOREA AND THE JEJU 4.3 TRAGEDY 72–73 (2021) [hereinafter

social healing through justice framework. It sets the stage to assist with a more critical examination of Toufah's sexual violence injustice story as part of The Gambia's transitional justice initiatives.

III. SOCIAL HEALING THROUGH JUSTICE

The *social healing through justice* framework aims to provide those on the social justice frontlines with concrete ways to approach and heal historic injustices for individuals and larger communities.[58] Drawing upon multidisciplinary fields, such as law (including human rights emphases on prevention and reparative justice), economics, theology, social psychology, political theory and indigenous conflict resolution, *social healing through justice* seeks to bring all stakeholders, including those who perpetrated harms, those harmed, and at times bystanders, to the reconciliation table.[59] Importantly, it strives to meaningfully restructure social, economic, political and even spiritual relationships to ensure a collective sense of justice done—not through words but actions.[60] Indeed, this multidimensional framework, which is often linked to transitional justice but with a broader reach,[61]

YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE]. *See also* Eric K. Yamamoto, Miyoko Pettit & Sara Lee, *Unfinished Business: A Joint South Korea and United States Jeju 4.3 Tragedy Task Force to Further Implement Recommendations and Foster Comprehensive and Enduring Social Healing Through Justice*, 15 ASIAN-PAC. L. & POL'Y J. 1, 7–24 (2014) [hereinafter Yamamoto, Pettit & Lee, *Unfinished Business*]; ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST–CIVIL RIGHTS AMERICA 172–73 (1999) [hereinafter YAMAMOTO, INTERRACIAL JUSTICE]; Eric K. Yamamoto & Ashley Kaiao Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5, 28–42 (2009) [hereinafter Yamamoto & Obrey, *Reframing Redress*].

[58] Yamamoto & Obrey, *Reframing Redress*, *supra* note 57, at 20 ("[T]he language of redress is shifting away from reparations and towards social healing, or what is often broadly termed reconciliation.").

[59] *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 57, at 9, 47.

[60] *See id.* at 25–26, 47–48.

[61] "Transitional justice refers to how societies respond to the legacies of massive and serious human rights violations . . . [and] asks some of the most difficult questions in law, politics, and the social sciences and grapples with innumerable dilemmas." *What Is Transitional Justice?*, INT'L CTR. FOR TRANSITIONAL JUST., https://www.ictj.org/what-transitional-justice (last visited Jan. 3, 2023); *see also* JAMIE ROWEN, SEARCHING FOR TRUTH IN THE TRANSITIONAL JUSTICE MOVEMENT 3 (2017) (arguing that transitional justice is best understood as "an idea—meaning a thought, a plan, or a suggestion—about how to redress mass, often state-sponsored, violence and ensure democratic social and political change" and noting that the "idea encompasses an identifiable vocabulary with words such as truth and reconciliation" and has "an associated set of interventions including tribunals, truth commissions, and reparations programs").

engages "individuals, communities, justice organizations, students, lawyers, businesses, therapists, clergy, scholars, journalists, policymakers and government officials in a dynamic process of *recognition*, *responsibility*, *reconstruction*, and *reparation*."[62] With these 4Rs, the *social healing through justice* inquiry assists in shaping, implementing, assessing and recalibrating on-the-ground reconciliation initiatives.[63]

Recognition asks stakeholders to "acknowledge and empathize with the anger, suffering and hopes of those harmed, focusing on 'victims' but also with an eye on 'perpetrators.'"[64] As the first point of inquiry, it acknowledges the full range of harms and underlying causes.[65] It "addresses the social psychological by examining the historical, cultural and structural context of past and continuing suffering."[66] It encompasses, in part, a "critical sociolegal inquiry" that "interrogate[s] critically" the "structural/discursive aspects" of widespread historic injustice.[67] This inquiry also involves the examination of "stock stories that groups . . . tell to explain the conflict and justify the groups' responses," the "agendas and reactions of those in power," and the mechanisms that maintain power structures.[68] For Yamamoto, empathy is at the heart of *recognition* as "[m]embers of each group work to understand the woundedness of the other groups' members" and "gain an appreciation for [their] struggles and hopes."[69] This Article focuses on this first of the 4Rs—*recognition*—as a foundational piece to the other 4Rs.

Building upon this first inquiry, *responsibility* then requires stakeholders to assess group power dynamics in acknowledging the harms and accepting responsibility for their role in repairing inflicted harms.[70] More specifically, *responsibility* necessitates participation by those directly involved in the injustice, those benefiting from the harms, and those participating in the

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[62] *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 57, at 25–26.

[63] *See id.* at 46, 72 (noting that the 4Rs serve as the "shorthand for the analytical inquiries generated by a *social healing through justice* framework").

[64] *See id.* at 74.

[65] *See id.*

[66] Yamamoto, Pettit & Lee, *Unfinished Business*, *supra* note 57, at 20.

[67] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 57, at 74.

[68] *Id.*

[69] YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 57, at 176.

[70] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 57, at 79.

polity that caused the harms—particularly those complicit in the abuse of power.[71]

In some situations, Yamamoto suggests, *recognition* coupled with *responsibility* may be enough for all involved to acknowledge certain types of harms.[72] For many, however, the words underlying *recognition* and *responsibility* are not enough.[73] More often, with the backdrop of complex historical injustices marked by complicated economic, legal, social and political circumstances, *reconstruction* and *reparation* are key to enduring and comprehensive social healing.[74]

Reconstruction goes beyond just words into the realm of reparative actions.[75] Building upon the first two inquiries, *reconstruction* includes concrete actions that "promote individual and community healing by rebuilding relationships and remaking institutions."[76] Importantly, these concrete actions involve institutional restructuring to avoid the repetition of historical injustice.[77] Thus, apologies, educational programs, memorials, museums and other actions to remember and recognize the harm and to underscore lessons learned comprise *reconstruction*.[78]

The final of the 4Rs—*reparation*—focuses on repairing the damage to material conditions of individual and communal life and on repairing the psychological damage.[79] While many often narrowly cast *reparation* as monetary payments to individuals, it more broadly encompasses concepts of economic justice for the community as a whole.[80] Significantly, *reparation* marks the transformation necessary to unite communities to allow them to move forward with their lives—"enabling those harmed to live with, but not in, history."[81]

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[71] *Id.*

[72] *See id.* at 74.

[73] *See id.*

[74] *See id.*

[75] *See id.*

[76] *Id.* at 82.

[77] *Id.*

[78] *Id.* at 83–84.

[79] *Id.* at 86.

[80] *Id.* at 87; *see also* Eric K. Yamamoto & Brian Mackintosh, *Redress and the Salience of Economic Justice*, 4 F. PUB. POL'Y 1, 13 (2010) [hereinafter Yamamoto & MacKintosh, *Redress and the Salience of Economic Justice*] (recognizing that "[c]apacity-building for those most harmed through individual payments and economic restructuring and development—economic justice—may well be a key to a personal and public sense of 'reconciliation achieved'").

[81] Yamamoto, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 57, at 86–87.

At bottom, these 4Rs engage stakeholders at the reconciliation table to lead toward genuine social healing.[82] Employing the *social healing through justice* framework allows those on the justice frontlines to identify gaps and opportunities for more enduring and comprehensive social healing.[83] In this Article, employing the framework demonstrates the power of *recognition* of the unique sexual violence harms of women of color at the intersection of race and gender. And it allows us to assess the significant steps forward—and notable shortcomings—of current ongoing redress initiatives for women of color, like Toufah Jallow and The Gambia's TRRC.[84] The next section further contextualizes the power of the *recognition* inquiry by specifically considering how a refined intersectional race-gender redress analysis is crucial as a first step in achieving comprehensive, systemic and enduring *social healing through justice*.

IV. RACE-GENDER INTERSECTIONAL REDRESS: SEXUAL VIOLENCE

Although important steps in the right direction, even forward-looking gender-sensitive redress initiatives (discussed above) failed to specifically and forthrightly recognize the unique sexual violence harms against women of color.[85] Race and gender situate women of color at the bottom of the social hierarchy, making them particularly vulnerable to sexual violence as part of mass historic injustices and later often rendering their unique injuries nearly invisible in the redress process.[86] For example, some redress initiatives—although perhaps unintentional—slighted African American enslaved women,[87] Guatemalan indigenous women,[88] Korean military sex slaves[89] and

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[82] *Id.* at 91.

[83] *Id.*

[84] *See infra* Section VI (presenting a mini case study on Toufah Jallow and The Gambia).

[85] *See generally* Yamamoto & Sonen, *Reparations Law: Redress Bias?*, *supra* note 26 (calling for intersectional race-gender sensitive redress to account for implicit redress bias); Sonen, *Healing Multidimensional Wounds of Injustice Intersectionality*, *supra* note 26 (employing an intersectional race-gender redress analysis for Korean "comfort women"). It is beyond the scope of this Article to more fully detail intersectional race-gender redress initiatives. For a short discussion of these cutting-edge approaches, *see* Pettit, *Who Is Worthy of Redress?*, *supra* note 26, at 300–03.

[86] Pettit, *Who Is Worthy of Redress?*, *supra* note 26, at 300–03.

[87] Yamamoto & Sonen, *Reparations Law: Redress Bias?*, *supra* note 26, at 255–59.

[88] *See id.* at 255–56; *see also* Pettit, *Who Is Worthy of Redress?*, *supra* note 26, at 304.

[89] *See generally* Sonen, *Healing Multidimensional Wounds of Injustice Intersectionality*, *supra* note 26; Pettit, *Who Is Worthy of Redress?*, *supra* note 26, at 305.

Jeju women[90] by overlooking their unique sexual violence harms.[91] Scholars therefore called for a particularized intersectional race-gender redress analysis,[92] and later specifically a focus on one understanding of gender as it intersects with race: sexual violence.[93] For example, I specifically employed this particularized intersectional race-gender redress framework with a focus on sexual violence to illuminate implicit redress bias in the case of Kenyan Mau Mau women.[94] And in employing a *recognition* inquiry, I explored what was missing in Mau Mau redress initiatives at the time.[95]

Since calls for this particularized race-gender redress analysis in the early to mid-2010s, it has become evident that the tightening of the gender analysis has served two important functions. First, it acknowledged that sexual violence is unique "because in many ways it is both horrific at the time it occurs and in its aftermath."[96] Second, it sought to "unveil and make explicit any implicit intersectional redress bias" to recognize sexual violence against women of color as especially unique and worthy of redress.[97] Overall, this modest refinement of the intersectional race-gender analysis—with the focus on sexual violence—has been significant to "begin changing societal notions about who is worthy of redress."[98]

Yet, despite this important progress in highlighting unique sexual violence harms to women of color through these modest theoretical expansions, many of those on the justice frontlines, especially those harmed, still feel silenced, invisible, devalued and overlooked. This leaves scholars, justice advocates, victims and other stakeholders questioning: what more can be done? This Article, in broad brush strokes, looks to collective memory as a means of

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[90] *See* Pettit, *Who Is Worthy of Redress?*, *supra* note 26, at 305–06; *see also* Yamamoto, Pettit & Lee, *Unfinished Business*, *supra* note 57, at 5.

[91] *See generally* Pettit, *Who Is Worthy of Redress?*, *supra* note 26.

[92] *See* Yamamoto & Sonen, *Reparations Law: Redress Bias?*, *supra* note 26, at 255–57; *see also supra* note 85.

[93] *See, e.g.*, Pettit, *Who Is Worthy of Redress?*, *supra note* 26, at 302–03.

[94] *See id.* at 308–22.

[95] *See id.* at 313–22.

[96] *Id.* at 277.

[97] *Id.*

[98] *Id.*; *see also* Lisa Davis, *Dusting Off the Law Books: Recognizing Gender Persecution in Conflicts and Atrocities*, 20 NW. J. HUM. RTS. 1, 2–27 (2021) (discussing gender persecution in the international criminal law and human rights context, and specifically focusing on discrimination at the nexus of sexual violence and gender-based violence; recognizing the work of feminists to increase awareness of sexual violence in its various forms; calling for another shift in the discourse to be more inclusive; and urging further recognition of the crime of gender persecution to "bring justice to a more inclusive group of survivors and victims who have never in history received full recognition").

recognizing sexual violence injustice against women of color through storytelling as an important next step in ongoing redress initiatives. Accordingly, the next section generally presents the contours of the theory of collective memory as a precondition to reparative justice.

V. COLLECTIVE MEMORY: VICTIMS, SURVIVORS, POLITICAL ACTIVISTS, FIGHTERS AND MORE

A. Collective Memory of Injustice

Despite salutary steps forward in gender-redress initiatives—especially at the intersection of race and gender—sexual violence is still often narrowly cast as an individual harm.[99] One that is perpetrated by an oppressor against a victim.[100] Yet sexual violence during conflict is often leveled on the masses.[101] Group pain emerges through these experiences.[102] But frequently the stigma and shame associated with sexual violence harms—and the shifting ideological, cultural and social circumstances—lead to silencing.[103] Forever—or at least immediately following the harms.[104] This, at least, is one of the current dominant narratives of sexual violence harms generally (as detailed in more depth below).[105]

When accounts of these unique sexual violence harms and significant related historical injustice events surface, they are not always aligned with this dominant narrative.[106] Additionally, they are not often defined broadly as injustices.[107] Rather, they are frequently narrowly cast with a focus on criminal legal doctrines and definitions—with a narrow focus on deterrence and punishment.[108] For Yamamoto, "[t]hat framing, while legally apt, narrows public imagination and debate."[109] As Professor Susan Serrano

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[99] *See generally* Engle, The Grip of Sexual Violence, *supra* note 36.

[100] *See id.* at 10–12.

[101] *See id.* at 1–2.

[102] *See generally* Yamamoto, Healing the Persisting Wounds of Historic Injustice, *supra* note 57.

[103] *See generally* Engle, The Grip of Sexual Violence, *supra* note 36; Yamamoto & Sonen, *Reparations Law: Redress Bias?*, *supra* note 26; Pettit, *Who Is Worthy of Redress?*, *supra* note 26.

[104] *See infra* Section VI.

[105] *See infra* Sections V.B and V.C.

[106] *See infra* Sections V.B and V.C.

[107] *See infra* Sections V.B and V.C.

[108] *See infra* Sections V.B and V.C.

[109] Hom & Yamamoto, *Collective Memory, History, and Social Justice*, *supra* note 31, at 1757.

underscores, "[w]ho tells the definitive history of group injustice—and how that history is framed—is vital to shaping a group's narrative and public image."[110] For many women of color who have suffered sexual violence during conflict, there is a "need to create a new memory beyond the excruciating story of personal loss and suffering—a memory that include[s] a sense of social justice and . . . accountability."[111]

Framing these sexual violence injustices, then, is about "social memory."[112] Memories of struggles of historical injustice—and present-day reconciliation initiatives—are inextricably linked to historical narratives.[113] In addition to framing injustices through a narrow, lawyerly, criminal justice lens, Yamamoto calls on people on the justice frontlines to dig into both the documentary archives and "the archives of mind, spirit, and culture—then and now."[114] To Yamamoto, "[s]ocial understandings of historical injustice are largely constructed in the present. Those understandings are rooted less in backward-looking searches for 'what happened' than in the present-day dynamics of collective memory."[115]

Drawing on multidisciplinary insights, Yamamoto posits that group memories are constructed within the larger context of injustice and reparation and of daily cultural practices and major events.[116] "Collective memories can therefore differ depending on locale, group experiences, and cultural norms."[117] They become, then, a "struggle over supremacy of world views, of colliding ideologies."[118] That is, those fashioning reconciliation initiatives

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[110] Serrano, *Collective Memory and the Persistence of Injustice*, *supra* note 31, at 359 (emphasis omitted).

[111] Hom & Yamamoto, *Collective Memory, History, and Social Justice*, *supra* note 31, at 1759.

[112] *Id.* at 1756.

[113] *See* Andrade, *Hawai'i '78*, *supra* note 31, at 89 ("History is always inseparable from the law.").

[114] Hom & Yamamoto, *Collective Memory, History, and Social Justice*, *supra* note 31, at 1764.

[115] *Id.* at 1757.

[116] *Id.* at 1758, 1764 ("Collective memory not only vivifies a group's past, it also reconstructs it and thereby situates a group in relation to others in a power hierarchy.").

[117] *Id.* at 1764. There is an extensive, well-developed, multidisciplinary body of research and study on collective memory. It is beyond the scope of this Article to detail the sociological, psychoanalytic and critical historical literatures on which this discussion of collective memory is based. However, for an apt summary of the origins of collective memory, see, for example, Andrade, *Hawai'i '78*, *supra* note 31, at 90–96. In addition to an apt summary of the origins of collective memory, for a "taxonomy of the diverse types of collective memory," see López, *The (Re)Collection of Memory*, *supra* note 31, at 806–12.

[118] Hom & Yamamoto, *Collective Memory, History, and Social Justice*, *supra* note 31, at 1764.

and implementing reparative measures—including those harmed, lawyers, politicians, journalists, justice workers and scholars—"possess often unacknowledged power" in helping to shape collective memories of injustice.[119] That power lies, Yamamoto contends, in "the potential for constructing collective memories of injustice as a basis for redress" or "for shaking (or salving) the psyche of a people."[120] The social group memory is thus "collective" because "it emerges from interactions among people, institutions, media, and other cultural forms."[121] It is "built and continually altered."[122] Indeed, as Yamamoto argues, "[h]ow a community frames past events and connects them to current conditions often determines the power of justice claims or of opposition to them."[123]

Many legal and critical race theory scholars, to date, have focused on the construction of collective memory in the context of domestic court opinions and the role of judges in that process.[124] Professor Troy Andrade extended the application of collective memory to Hawai'i's political history, specifically by "linking collective memory with policy-making and legislation."[125] Likewise, Professor Rachel López extended and explored

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[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.* at 1771.

[124] *See, e.g.*, *id.* at 1766 (examining the significance of collective memory, and the "fierce battle over conflicting histories," in the context of the United States Supreme Court case, *Rice v. Cayetano*, 528 U.S. 495 (2000), which "invalidated a limitation by which only Native Hawaiians were allowed to vote for trustees to the state's Office of Hawaiian Affairs," and thus had "far-reaching effects on civil rights, human rights, and native sovereignty"); Serrano, *Collective Memory and the Persistence of Injustice*, *supra* note 31, at 360 (exploring the "collective memory embedded in the legal text" of the decision, *Igartúa de la Rosa v. United States*, 417 F.3d 145 (1st Cir. 2005), holding that "Puerto Ricans have no constitutional or international law right to vote in U.S. presidential elections," and discussing how the case uncovered "one story of racialization that helped to shape the modern-day collective memory of Puerto Ricans").

[125] *See* Andrade, *Hawai'i '78*, *supra* note 31, at 88 (examining "the strategic and selective reliance on collective memory in legal contexts" through a case study of the creation and story of the Office of Hawaiian Affairs). More recently, Professors Melody Kapilialoha MacKenzie and D. Kapua'ala Sproat applied the collective memory framework to critique a historically flawed law review article by a highly renowned jurist about Native Hawaiian claims to lands. *See* Melody Kapilialoha MacKenzie & D. Kapua'ala Sproat, *A Collective Memory of Injustice: Reclaiming Hawai'i's Crown Lands Trust in Response to Judge James S. Burns*, 39 U. HAW. L. REV. 481, 499–533 (2017).

concepts of collective memory to international court settings.[126] Other legal scholarship on collective memory emanates from this "transitional justice" context, or rather from situations where there are "legal responses to regime change or democratization in formerly unjust societies."[127] This Article proposes a modest, and notably explicit, extension of the application and concept of collective memory to truth and reconciliation commission investigations and related hearings,[128] which have become notable sites of collective memories of injustice.[129] Sometimes later reparations lawsuits and related court opinions, or apologies by a particular government or group, further develop or alter those collective memories.[130] Indeed, "justice claims . . . begin with back-and-forth struggles over the creation of public or collective memory. Those struggles are a fight over who will tell the

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[126] López, *The (Re)Collection of Memory*, *supra* note 31, at 801 (urging "a fundamental reconceptualization of the law's preference for individual memory in the context of transitional justice" and arguing that the "inclusion of collective memory will facilitate a better understanding of the collective harms that characterize mass atrocities," which in turn "will better serve the distinct goals of transitional justice, including reconciliation, the creation of a historical record, nation-building, and legal reform"). *See also* OSIEL, *supra* note 31, at 6 (considering the role of trials of mass atrocities in creating collective memory).

[127] *See* Andrade, *Hawai'i '78*, *supra* note 31, at 91 (quoting Ariela Gross, *The Constitution of History and Memory*, *in* LAW AND THE HUMANITIES: AN INTRODUCTION 431 (Austin Sarat, Matthew Anderson & Catherine O. Frank eds., 2010)); MINOW, BETWEEN VENGEANCE AND FORGIVENESS, *supra* note 38, at 61 (describing how truth commissions and other rituals provide the memory work that helps the healing process).

[128] Other scholars have recognized the role of truth commissions in facilitating the creation of "grand narratives" or collective memory, but this Article is the first to explicitly note truth commissions as sites of creating (or reconstructing) collective memories of mass historic injustices, and specifically in the context of sexual violence against women of color. *See, e.g.*, Nneoma V. Nwogu, *When and Why It Started: Deconstructing Victim-Centered Truth Commissions in the Context of Ethnicity-Based Conflict*, 4 INT'L J. TRANSITIONAL JUST. 275, 283–89 (2010) ("Furthermore, the memory-making aspect of truth commissions, if guided by the normalization of social relations by which both victims and perpetrators are seen as parties with an equal stake in the development of their society's future, is more likely to generate a democratizing truth.").

[129] It is beyond the scope of this Article to further explore truth commissions as sites of collective memory formation, but it is an important area for further research and analysis.

[130] *See* López, *The (Re)Collection of Memory*, *supra* note 31, at 813 (observing that, although "scholars across many disciplines that have theorized about the relationship between collective memory and justice tend to agree that legal proceedings play a role in strengthening a shared understanding of the past, which in turn facilitates reconciliation and societal healing," "the delay of justice after mass atrocity means that collective memory forms in the absence of official legal proceedings" and that "[w]hen justice finally comes, it is often disruptive to this pre-existing collective memory"); Madeira, *When It's So Hard to Relate*, *supra* note 31, at 425–26 (suggesting that the process of storytelling during legal proceedings facilitates a shared understanding of the past and healing of individuals and group relations).

dominant story of injustice (or absence thereof) and how that story will be shaped."[131] As Serrano importantly recognizes, "the collective memory of injustice [i]s a prelude to reparatory justice initiatives."[132] It is also an integral, ongoing part of the ever-shifting landscape of reconciliation initiatives.[133]

For Yamamoto, one key part to collective memories of injustice are narrative structures.[134] This concept is especially salient in the context of transitional justice initiatives and truth commission hearings, which are often marked by unique social and cultural circumstances.[135] According to Yamamoto, influential narratives function in two key ways: (1) giving the "language, ideas and images . . . to 'comprehend' the past"; and (2) framing "the relationship of the past to the present" in a way that "shapes the past in light of how we see (or want to see) ourselves and others in the present."[136] When language, ideas or concepts are lacking (or missing entirely), or excluded from conversations and societal norms of a particular culture, this makes the remembering and recounting of unique sexual violence harms

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[131] Eric K. Yamamoto & Catherine Corpus Betts, *Disfiguring Civil Rights to Deny Indigenous Hawaiian Self-Determination: The Story of* Rice v. Cayetano, *in* RACE LAW STORIES 563 (Rachel F. Moran & Devon W. Carbado eds., 2008).

[132] Serrano, *Collective Memory and the Persistence of Injustice*, *supra* note 31, at 359; *see also* López, *The (Re)Collection of Memory*, *supra* note 31, at 802 ("This process of developing collective memory allows victims to heal and start to rebuild their lives.").

[133] *See* López, *The (Re)Collection of Memory*, *supra* note 31, at 805 (noting that the "inclusion of collective memory could aid international bodies to prescribe more appropriate remedies aimed at addressing collective harm," such as by "illuminat[ing] the need for reparations intended to redress injuries to communities or measures intended to address the root causes of systematic violence, such as legal reform and educational initiatives").

[134] *See* Hom & Yamamoto, *Collective Memory, History, and Social Justice*, *supra* note 31, at 1761–62. A related key part to building collective memories of sexual violence injustice is to "respond to gross historical distortions." *Id.* at 1763. As Serrano puts it, "[m]ore than a simple backward-looking recitation of historical 'facts,' the framing of group memories of injustice thus involves active construction in the present." Serrano, *Collective Memory and the Persistence of Injustice*, *supra* note 31, at 359 (citing Hom & Yamamoto, *Collective Memory, History, and Social Justice*, *supra* note 31, at 1757).

[135] *See generally* Yamamoto, Pettit-Toledo & Sheffield, *Bridging the Chasm*, *supra* note 35 (describing the prevailing reconciliation template and basic structure, including truth seeking, criminal prosecution/amnesty, and reconstruction and reparation, and proposing a new fourth step for assessment, implementation and oversight to account for realpolitik influences and evolving circumstances).

[136] Hom & Yamamoto, *Collective Memory, History, and Social Justice*, *supra* note 31, at 1762.

more difficult.[137] And, at the same time, it highlights the significance of narrative structures in forming collective memories.[138] Thus, developing these narrative structures is foundational to constituting collective memories.

As Serrano highlights, "Collective memories are formed and transformed through cultural media, such as news accounts, books, and government reports."[139] Racial and sexist depictions—either through their historical and present-day forms—sometimes serve as foundations for collective memory.[140] For women of color, at the intersection of race and gender, such racialized, sexist depictions contribute to certain collective memories as inferior, unworthy, non-political persons at the bottom of the social and redress hierarchies.[141] That memory, at times, has been inscribed in and reproduced through law and media to reinforce present-day biases.[142]

Thus, redress for sexual violence harms against women of color—with its attendant legal claims in both the criminal and civil contexts—is really an opening to struggles over collective memory of the specific sexual violence harms suffered, the nature of the wider conflict in which these harms occurred, and the broader structural social, political and economic conditions in which the sexual violence arose.[143] And these struggles over collective memories create (or close) openings for justice claims, including calls for criminal prosecutions, apologies, education, memorials and even monetary reparations.

As described further below, this Article begins to roughly uncover one aspect of these struggles over collective memory that help to shape modern-day collective memories of women of color who suffered sexual violence harms during conflict. That is, developing a counternarrative describing the intersectional identities of women of color as victims, survivors, political

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[137] *See supra* note 11 and accompanying text (discussing the lack of a word for rape in the Fula language); *see also infra* notes 304–07 and accompanying text (discussing use of the #IAmToufah hashtag).

[138] *See* Hom & Yamamoto, *Collective Memory, History, and Social Justice*, *supra* note 31, at 1761–62.

[139] Serrano, *Collective Memory and the Persistence of Injustice*, *supra* note 31, at 365.

[140] It is outside the scope of this Article to expand on these examples. For a concise summary of the theory of "racial formation" to help illuminate and explain examples of historical racial depictions at the turn of the twentieth century, *see id.* at 365–70.

[141] *See generally* Pettit, *Who Is Worthy of Redress?*, *supra* note 26.

[142] *See, e.g.*, *infra* Section VI.

[143] Rombouts, *Women and Reparations in Rwanda*, *supra* note 40, at 221 ("[T]here is the question of whether an individual court approach to reparation for sexual violence is likely to respond properly to the widespread and systematic character of the crimes and the large numbers of victims involved.").

activists, fighters and much more.[144] That group "social memory," in part, bears on present-day reconciliation initiatives, including certain justice claims and responses to them.[145] However, to better understand the importance of developing these counternarratives, a general overview of the dominant discourse of sexual violence injustices is helpful.[146]

B. Dominant Narratives: The Innocent Victim and The Perpetrator

As discussed above, since at least the 1990s, heightened international attention turned to sexual violence during conflict.[147] Human rights and feminist legal and political discourses emphasized sexual violence.[148] As a result, certain dominant narratives emerged.[149] From one perspective,[150]

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[144] *See* López, *The (Re)Collection of Memory*, *supra* note 31, at 839 ("Collective memory provides us with a context through which to make sense of our own personal experiences and confers legitimacy to our individual interpretation of events.").

[145] It is beyond the scope of this Article to explore how collective memory may present certain drawbacks, particularly in the context of women of color who suffered sexual violence injustices. For a brief overview of how collective memory may present certain "significant drawbacks," *see* López, *The (Re)Collection of Memory*, *supra* note 31, at 845–46 (detailing the psychological phenomenon of "collaborative inhibition" and the potential for "social contagion" and calling for certain procedural protections in criminal proceedings to guard against these potential pitfalls in collective memory).

[146] It is beyond the scope of this Article to carefully parse out the various, nuanced dominant discourses and narratives. However, this Article attempts to broadly sketch out at least one perspective of some of the underlying "common-sense" narratives by looking to the recent scholarship of feminist and human rights scholar, Professor Karen Engle. *See generally* ENGLE, THE GRIP OF SEXUAL VIOLENCE, *supra* note 36.

[147] *See supra* Section II.

[148] *See generally* ENGLE, THE GRIP OF SEXUAL VIOLENCE, *supra* note 36; RUBIO-MARÍN, WHAT HAPPENED TO THE WOMEN?, *supra* note 30.

[149] *See, e.g.*, ENGLE, THE GRIP OF SEXUAL VIOLENCE, *supra* note 36.

[150] Due to scope limitations, this Article focuses on only one scholar's perspective on the dominant narratives. However, there may be other perspectives (or critiques) that would add another important dimension to this discussion and would serve as another valuable avenue for further research and scholarship. For example, Professor Doris Buss argues that the "hypervisibility" of certain sexual violence crimes, such as rape, not only makes invisible the larger context and causes of the Rwandan conflict, but that it makes invisible individual stories of rape, especially of Hutu women, that do not fit the mold. *See* Doris E. Buss, *Rethinking "Rape as a Weapon of War"*, 17 FEMINIST LEGAL STUD. 145,154–55 (2009). Notably, the scholarly perspective on the dominant narrative offered in this Article is that of a Western and Global North feminist and human rights scholar. Considerations and perspectives from the Global South or from African Muslim scholars and advocates are important, especially in the context of Toufah's story, but those are beyond the scope of this Article but ripe for future research and scholarship.

Professor Karen Engle refers to these dominant narratives as the "common-sense narratives," which she draws from media and "spaces concerned with international human rights, military intervention, international criminal law, and international peace and security."[151] In "unpacking" these narratives, she unsettles and challenges dominant human rights and feminist legal and political discourses about sexual violence during conflict.[152] Some of those critiques are discussed below following the outline of the "common-sense narratives."

In identifying the dominant narratives relating to sexual violence during conflict, Engle recognizes the problematic, yet powerful, rhetoric of rape and sexual violence as "the worst crimes" and "fate[s] worse than death."[153] By elevating this rhetoric that rape and sexual violence "cause the ultimate harm," Engle contends, "understandings of victims as forever condemned by those actions to shame and stigmatization" are inevitably reinforced.[154] The message—centered around mid-twentieth century notions of a women's honor as a binding force in a community—is that such anger, shame and victimization "tear communities apart,"[155] "destroy[ing] families and communities."[156] As Engle describes, "Rape presumably works as a tool of war because it can cause targeted groups to turn on their own members who are victims of sexual violence."[157] For Engle, these depictions of a woman's loss of honor, then, become apparent in modern-day media focused on the "staying power of shame and stigma" for individuals and communities as the predominant harms of rape.[158]

Another commanding, long-standing narrative is that "perpetrators of sexual violence are monstrous men" and their "victims are innocent," or rather not responsible for any of the harm.[159] According to Engle, this view relies on two assumptions about women during war: (1) they are nearly always the victims or potential victims; and (2) they are innocent insofar as they do not perpetuate sexual violence and "rarely play any political or military role in war."[160] This narrative, as Engle points out, becomes problematic as it incorrectly limits the role of women, excluding them from

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[151] ENGLE, THE GRIP OF SEXUAL VIOLENCE, *supra* note 36, at 7.
[152] *See generally id.*
[153] *Id.*
[154] *Id.*
[155] *Id.* at 8.
[156] *Id.* at 9.
[157] *Id.* at 8.
[158] *Id.*
[159] *Id.* at 10.
[160] *Id.*

political roles or as perpetrators of violence, especially during times of war.[161] Moreover, it diminishes women's sexual agency by reinforcing the idea that women are the "most vulnerable and violated" victims.[162]

A related influential narrative, which Engle identifies, centers around the notion that domestic or international criminal law will end sexual violence in conflict.[163] Put another way, "[c]riminal punishment will 'bring those responsible to justice.'"[164] But as Engle recognizes, this narrative leaves no room for the "banality of evil."[165] Or, as Professor Randle DeFalco illuminates, the "aesthetic bias" of the "spectacular" crimes of rape and sexual violence as mass atrocities lead to the invisibility or backgrounding of other atrocity crimes against women that are committed on "large-scale" and "seemingly ordinary, even banal, means."[166]

According to Engle, the final powerful narrative, linked to the others, is this: "sexual violence prevents peace," or stated differently, "sexual violence makes wars 'last longer.'"[167] The concept, as Engle posits, "suggests that if incarceration can deter sexual violence and lock away the shame and anger, peace will ensue."[168] But, to Engle, this is doubly problematic insofar as criminal punishment (as a deterrence) does not necessarily end sexual violence and ending sexual violence does not necessarily lead to sustainable or lasting peace.[169]

With some of these dominant narratives in mind, critiques emerge.[170] But so does this important question: in light of these narratives and related

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[161] *Id.* at 11.

[162] *Id.*

[163] *Id.* at 12–13.

[164] *Id.* at 13.

[165] *Id.*

[166] *See generally* RANDLE C. DEFALCO, INVISIBLE ATROCITIES: THE AESTHETIC BIASES OF INTERNATIONAL CRIMINAL JUSTICE (2022) [hereinafter DEFALCO, INVISIBLE ATROCITIES] (exploring the implications of international criminal law's aesthetic biases that recognize the wrongfulness of visible atrocities while obscuring the severity of other forms of violence committed through unspectacular, seemingly ordinary means).

[167] ENGLE, THE GRIP OF SEXUAL VIOLENCE, *supra* note 36, at 15.

[168] *Id.*

[169] *Id.*

[170] It is beyond the scope of this Article to explore the various, nuanced critiques of all the dominant narratives. Accordingly, the Article considers only a few aspects of the critiques set forth by Professor Karen Engle based in large part on the dominant narratives that she herself identifies. Additional consideration of other views of the dominant narratives, and related critiques, would be a fruitful possibility for future research.

critiques, what are we to do about it—in concept and in practice? The next two sections attempt, in broad strokes, to address this important question.

C. Critiques of the Dominant Narratives

By heeding significant attention to sexual violence in conflict in international activism, in one of the first recent critiques of the legal and political discourse, Engle contends that other ways in which women experience gendered, structural, ethnic and class-based violence have been obscured, diminished and rendered invisible.[171] Engle's focus on the ways in which sexual violence against women is perceived—thereby shaping "particular imaginaries" on a global scale—reveals distorted understandings of gender, sex, sexuality and race/ethnicity.[172] Just as the aesthetic biases of mass atrocities, as DeFalco puts it, unveil the foregrounding of particular scenarios of (sexual) violence against women.[173] Stated another way, the "common-sense" views of sexual violence as the dominant narratives reinforce these aesthetic biases and the backgrounding or complete erasure of other types of violence against women.[174] Regardless of how it is stated, Engle and DeFalco (and others)[175] seem to agree on this central critique: these flaws and aesthetic biases undermine the legal legitimacy of international institutions themselves and the legal framework of human rights.[176]

On one level, then, Engle's critique is not only about the atrocities of sexual violence against women during conflict; it is also about how the dominant discourse has evolved around such atrocities—in helpful and harmful ways.[177] For example, her careful chronicling of the "common-sense" view and disruption of it illuminates ways in which structural-bias feminism may have helped the retrenchment of certain negative images of sex and sexuality and "problematic understandings of gender,

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[171] ENGLE, THE GRIP OF SEXUAL VIOLENCE, *supra* note 36, at 1.

[172] *Id.*

[173] *See generally* DEFALCO, INVISIBLE ATROCITIES, *supra* note 166.

[174] *See id.* at 59–62, 215–27 (examining how the "atrocity" aesthetic in international criminal law obscures (and eventually erases) less visible atrocities and discussing the broader effects of aesthetic bias in transitional justice, historical memory and peacebuilding contexts).

[175] Other scholars may similarly take issue with the legal legitimacy of international institutions, especially international criminal courts. It is beyond the scope of this Article to delve into these other critiques, although this is a noteworthy path for further research and examination in the context of sexual violence atrocities.

[176] *See generally* ENGLE, THE GRIP OF SEXUAL VIOLENCE, *supra* note 36; DEFALCO, INVISIBLE ATROCITIES, *supra* note 166.

[177] *See generally* ENGLE, THE GRIP OF SEXUAL VIOLENCE, *supra* note 36.

[race/]ethnicity, and war and peace."[178] In Engle's view, "[a] recurring theme . . . has been that feminist successes in bringing international institutional attention to sexual violence . . . have cemented and even amplified some of the very imaginaries about rape and sexual violence that nearly all feminists originally hoped to dispel."[179] Another dominant theme is that "feminists, however unwittingly, have participated in the continuation of the common-sense view that rape is a fate worse than death."[180]

On another level, though, Engle's critique cuts through the discursive debates and questions the practical roles of the international criminal tribunals and other international institutions as the preferred response to sexual violence in conflict.[181] For example, she challenges the heavy reliance on international criminal institutions—with their focus on the "incarceration of individual monsters," deterrence and subsequent peace—to end sexual violence in conflict.[182] As Engle aptly points out, these criminal punishment mechanisms transfer "energy and resources . . . away from other social, political, and economic interventions—including through the law—that might better address the structural causes of violence."[183]

In addressing the first dominant narrative identified (that rape is a "fate worse than death"), for example, Engle argues that by placing such a strong emphasis on individual and communal shame emanating from "rape culture," it "takes for granted shame culture, especially in the predominantly Muslim and African communities."[184] In response to this "common-sense" narrative, she proposes some alternative ways to think about and address shame by drawing on literary examples.[185] She points to one instance in which "women who have been raped during conflict see the rape or their responses to it as part of their political or military struggle, or treat it as but one facet of their wartime experiences."[186] In this manner, Engle calls for a "discursive and doctrinal shift away from the assumption that sexual violence is inherently

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[178] *Id.* at 2.

[179] *Id.* at 152.

[180] *Id.*

[181] *See id.* at 14–15.

[182] *Id.* Professor DeFalco's framework of invisible atrocities underscores Engle's points about the limitations and legitimacy of international criminal tribunals as the primary means of addressing sexual violence harms. *See generally* DEFALCO, INVISIBLE ATROCITIES, *supra* note 166.

[183] ENGLE, THE GRIP OF SEXUAL VIOLENCE, *supra* note 36, at 14–15.

[184] *Id.* at 9.

[185] *Id.* at 9–10, 151–72.

[186] *Id.* at 10.

shameful to individuals and communities."[187] Stated differently, and from Yamamoto's perspective, she calls for a rejection of the dominant (at times harmful) narratives, including persisting stock stories, and for a reframing of collective memories.[188] To do so, however, requires navigating "sharply dissonant versions of history" and "colliding ideologies, or desired world views."[189]

At bottom, Engle's identification of "the rise of a form of structural-bias feminism that ascribes women's oppression to their sexual subordination" links to prior concerns about race-gender redress bias relating to the unique sexual violence harms of women of color.[190] Yet Engle's critiques do not necessarily offer corresponding, practical workable strategies or solutions for shifting the discourse, healing wounds, distributing resources and reordering institutions. Nonetheless, her critiques lay an important foundation for examining practical solutions and opens a path for such an assessment using the *social healing through justice* framework.

Taking all of this into consideration, while redress biases tend to render the voices and stories of women of color who suffered sexual violence on the sidelines and in the background, the persisting questions—linked to on-the-ground justice struggles—continue to emerge: what more can be done? And what's next? The next section briefly suggests a possible next step in a practical path forward as to how counternarratives of intersectional identities might support reframing collective memories to counter some of these biases. It then considers how this may play out in the context of Toufah's story and The Gambia's reconciliation initiatives.

D. Counternarratives Focused on Intersectional Identities

Recognition of women of color's intersectionality is crucial to the construction of present-day collective memories of historic mass injustices. As one potential response to the critiques,[191] creating an opening for counternarratives (to the current dominant narratives) focused on the intersectional identities of women of color who suffered sexual violence injustices would be an important next step forward towards more

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[187] *Id.*

[188] *See id.*; Hom & Yamamoto, *Collective Memory, History, and Social Justice*, *supra* note 31, at 1776–77.

[189] Hom & Yamamoto, *Collective Memory, History, and Social Justice*, *supra* note 31, at 1776.

[190] *See* ENGLE, THE GRIP OF SEXUAL VIOLENCE, *supra* note 36, at 16.

[191] This section modestly sketches out this concept. More in-depth analysis is beyond the scope of this Article but ripe for further research and analysis.

comprehensive and enduring social healing.[192] Those counternarratives would emerge through storytelling—either informally or in more formal settings such as truth commission hearings.[193] And such storytelling could be done publicly or anonymously to protect the identities of certain women of color based on shifting political, legal, social and economic circumstances.[194] In the context of healing unique sexual violence harms against women of color, integrating the present-day voices of these women of color to tell their stories of the injustices suffered—both at the individual level but also at the communal level—might help to further heal physical, emotional, spiritual and communal wounds.[195] As the International Center for Transitional Justice (ICTJ) recently acknowledged, by "making space for

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[192] Professor Kimberlé Crenshaw is often credited with coining the term "intersectionality" and introducing intersectionality theory to the mainstream as a challenge to the "uncritical and disturbing acceptance of dominant ways of thinking about discrimination." *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139, 150 (1989); *see also* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–45 (1991) (exploring the race and gender dimensions of violence against women of color as frequently the product of "intersecting patterns of racism and sexism" and how these intersectional experiences tend to lack representation in either feminist or antiracist discourse, and emphasizing that the focus on intersections of race and gender underscore "the need to account for multiple grounds of identity when considering how the social world is constructed"); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (arguing that white feminist scholars sometimes adopt gender essentialist views that ignore the unique experiences of women of color); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 8 (1989) (urging advocates to embrace "consciousness of the experience of life under patriarchy and racial hierarchy").

[193] *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 57, at 198–203.

[194] "[U]nderstanding the political and cultural dynamics and strategic import of collective memory for justice claims . . . is an integral part, though only one part" of comprehensive and enduring social healing through justice. Hom & Yamamoto, *Collective Memory, History, and Social Justice*, *supra* note 31, at 1777. "Victims must weigh the risk of coming forward to access reparations with the possible backlash they could face if their community discovers why they are receiving reparations. As a result, many victims—which include women and girls, but also men and boys—stay silent." Ladisch, *Victims, Survivors, and Agents of Change*, *supra* note 22.

[195] *See* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 57, at 64–66 (2021) (noting that one of the principles underlying the *social healing through justice* framework is healing the individual and collective simultaneously on both levels).

the multiple roles women experience in periods of conflict or political violence, whether that be as victims, survivors, or fighters on behalf of a cause," we can begin changing traditional notions about gender and race and help "assert women's roles as political actors and active members of society."[196]

Intersectionality, then, serves as an analytical tool of critical inquiry and praxis to better grapple with current dominant understandings narrowly casting women of color as "victims"[197] or attaching notions of fear, stigma and shame to them.[198] It also presents ways to foster "more expansive understandings of collective identities and political action" as well as more "complex understandings of individual identities."[199] Importantly, intersectionality assists in "reconceptualizing individual identity and subjectivity."[200]

Central to the focus on the intersectional identities of women of color is not only their individual identities based on their gender or race/ethnicity but also how they express their political identities as victims, survivors, advocates, fighters, political activists and much more. That is, their individual identities are "intersecting and performative," shifting the "meaning of identity from something one *has* to something one *does*" all

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[196] Ladisch, *Victims, Survivors, and Agents of Change*, *supra* note 22.

[197] *See generally* Huma Saeed, *Victims and Victimhood: Individuals of Inaction or Active Agents of Change? Reflections on Fieldwork in Afghanistan*, 10 INT'L J. TRANSITIONAL JUST. 168 (2016) (exploring how "victims" and "victimhood" are complex, subjective, political, multi-layered terms "whose meaning seems to lie in the eye of the beholder"); Tshepo Madlingozi, *On Transitional Justice Entrepreneurs and the Production of Victims*, 2 J. HUM. RTS. PRAC. 208 (2010) [hereinafter Madlingozi, *On Transitional Justice Entrepreneurs and the Production of Victims*] (observing "how, and what kind of, victims are 'produced' by the transitional justice industry" and urging a "shift from dependency to agency, that is, victims having greater control over their encounters with expert-others and not allowing themselves and/or their stories to be used as fodder to sustain the industry and its entrepreneurs").

[198] COLLINS & BILGE, INTERSECTIONALITY, *supra* note 19, at 3, 37–39. It is beyond the scope of this Article to analyze and discuss the concept and theory of intersectionality in depth, for which there is extensive literature and scholarship. This section broadly presents certain concepts of intersectionality, from a socio-legal perspective, for purposes of this Article. Other legal scholars have also urged for the adoption of an intersectional approach to transitional justice. *See, e.g.*, Ronli Sifris & Maria Tanyag, *Intersectionality, Transitional Justice, and the Case of Internally Displaced Moro Women in the Philippines*, 41 HUM. RTS. Q. 399, 412–419 (2019) (generally discussing the value of adopting an intersectional lens when considering sexual and gender-based violence during armed conflicts, particularly in the context of Moro women in the Philippines).

[199] COLLINS & BILGE, INTERSECTIONALITY, *supra* note 19, at 166–67.

[200] *Id.* at 167.

within different power structures and social constructs.[201] Stuart Hall sums up this tension and sense of shifting intersectional individual identities as follows:

> Identity is not a set of fixed attributes, the unchanging essence of the inner self, but a constantly shifting process of *positioning*. We tend to think of identity as taking us back to our roots, the part of us which remains essentially the same across time. In fact, identity is always a never-completed *process* of becoming – a process of shifting *identifications*, rather than a singular, complete, finished state of being.[202]

For sociology professors, Patricia Hill Collins and Sirma Bilge, how individuals express their multiple individual identities may vary across different situations as "[s]ocial context matters in how people use identity to create space for personal freedom."[203] As they recognize, "For many individuals, this focus on the social construction of intersecting identities that can be differentially performed from one setting to the next has been a space of individual empowerment."[204] This holds true for women of color who suffered from sexual violence injustices across different forums such as when they may identify as "victims" during criminal prosecutions and to qualify for reparations, as "survivors" in media accounts, as "fighters" and "political activists" when framing their experiences before truth and reconciliation commissions, or as "advocates" when engaging in movements for broader social change on local, national and international stages. That is, intersectionality provides one possible alternative for expressing sexual violence survivors' complex identities and providing an opening to tell their stories as a means of empowerment. It also presents an opportunity for a restructuring of social and redress hierarchies—by importantly negating the sense that "being a 'raped woman' becomes one's 'sole identity.'"[205]

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[201] *Id.*

[202] *Id.* (quoting STUART HALL, FAMILIAR STRANGER: A LIFE BETWEEN TWO ISLANDS 16 (2017)).

[203] *Id.* at 179.

[204] *Id.* at 167.

[205] "As Nusreta Sivac, a former Bosnian judge who was detained and raped in the Omarska camp, puts it in the epigraph above, being a 'raped woman' becomes one's 'sole identity.'" ENGLE, THE GRIP OF SEXUAL VIOLENCE, *supra* note 36, at 152 (citing CALLING THE GHOSTS: A STORY ABOUT RAPE, WAR, AND WOMEN (Women Make Movies, 1996)).

More broadly, these intersectional individual identities provide space for the formation of collective identities—or counternarratives of collective memory based on sexual violence injustices against women of color. Through the construction of these collective memories, stories of sexual violence injustice are better contextualized in the broader historic injustice.[206] And through stories elevating intersectional identities of women of color,[207] it ensures "that we define complex experiences as closely to their full complexity as possible and that we do not ignore voices at the margin," as Professor Trina Grillo urges.[208]

Toufah Jallow's experience illuminates how storytelling and the construction of collective memories through counternarratives provide a key justice opening for more enduring social healing. The next section broadly examines her story as a mini case study and reveals the potential power of *recognition* of sexual violence injustice against women of color through the construction of individual and collective memory of Gambian women's intersectional identities, particularly as political actors and active members of society. A brief background of The Gambia's TRRC sets the stage for this examination.

VI. TOUFAH JALLOW AND THE GAMBIA: A MINI CASE STUDY

A. Brief Background of The Gambia's TRRC

In 2017, The Gambia's former President Yahya Jammeh and his dictatorship's culture of fear and misinformation came to an end when he fled abroad after losing the presidential election to current President Adama Barrow.[209] For over two decades, Gambian citizens faced atrocities and human rights violations perpetrated under Jammeh's reign, including, among

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[206] For example, as part of the Guatemala conflict, "[t]here were also 'selective rapes' of women accused of being guerrillas, social leaders, union leaders, or family members of disappeared victims." Claudia Paz y Paz Bailey, *Guatemala: Gender and Reparations for Human Rights Violations*, *in* RUBIO-MARÍN, WHAT HAPPENED TO THE WOMEN?, *supra* note 30, at 98.

[207] *See* Madlingozi, *On Transitional Justice Entrepreneurs and the Production of Victims*, *supra* note 197, at 226 (urging that "responsibility to the story" of victims should be, perhaps principally, about "redistribution of resources and power," and in order to do that, "we need to dismantle the trusteeship and reproduction of colonial relations").

[208] Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 22 (1995).

[209] For additional context of this authoritarian regime and next steps to ensure the protection of democratic ideals and constitutional order, *see generally* THE GAMBIA IN TRANSITION: TOWARDS A NEW CONSTITUTIONAL ORDER (Satang Nabaneh, Adem Abebe & Gaye Sowe eds., 2022).

other things, the unjustified detention and imprisonment of dissidents,[210] extrajudicial murders, beatings, and torture, literal witch hunts of women,[211] threats to behead homosexuals,[212] the forced experimentation of Jammeh's experimental herbal "miracle cure" for AIDS patients[213] and sexual violence and coercion of women as his "protocol girls," or "women assembled by his associates to serve him sexually."[214] During this tumultuous period, many Gambians fled the country, often seeking work in Europe, but Jammeh's "death squad," a paramilitary force known as the "Junglers," tortured and executed at least fifty-four migrants in 2005.[215]

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[210] Jammeh was known to jail dissidents and to call journalists the "illegitimate sons of Africa." Julie Turkewitz, *Now Streaming on YouTube: Confessions from a Presidential Hit Squad in Gambia*, N.Y. TIMES (Aug. 31, 2019) [hereinafter Turkewitz, *Confessions from a Presidential Hit Squad in Gambia*], https://www.nytimes.com/2019/08/31/world/africa/gambia-truth-commission-yahya-jammeh.html.

[211] *See* Julie Turkewitz, *Women in Gambia Describe Torture After Ex-President Called Them Witches*, N.Y. TIMES (Nov. 13, 2019) [hereinafter Turkewitz, *Women in Gambia Describe Torture*], https://www.nytimes.com/2019/11/12/world/africa/gambia-witch-hunt-testimony.html.

[212] Dionne Searcey & Jaime Yaya Barry, *Gambian Minister Calls on All Women with Accusations Against Ex-President to Come Forward*, N.Y. TIMES (June 26, 2019) [hereinafter Searcey & Barry, *Gambian Minister Calls on All Women with Accusations Against Ex-President to Come Forward*], https://www.nytimes.com/2019/06/26/world/africa/gambia-president-rape-accusation.html.

[213] Dionne Searcey & Jaime Yaya Barry, *'Gambia Is Back Again,' but Its New Leader Is Still in Senegal*, N.Y. TIMES (Jan. 22, 2017) [hereinafter Searcey & Barry, *'Gambia Is Back Again'*], https://www.nytimes.com/2017/01/22/world/africa/gambia-president-adama-barrow-yahya-jammeh.html.

[214] Emma Teitel, *I Am Toufah: The Toronto Woman Who Stood Up to a Dictator and Launched a West African MeToo Movement*, TORONTO STAR (Jan. 30, 2022) [hereinafter Teitel, *I Am Toufah*], https://www.thestar.com/news/canada/2022/01/30/i-am-toufah-the-toronto-woman-who-stood-up-to-a-dictator-and-launched-a-west-african-metoo-movement.html; *see also* Turkewitz, *Women in Gambia Describe Torture*, *supra* note 211; *More Revelations About President Jammeh's Sex Exploits of Young Gambian Girl*, FATU NETWORK (Oct. 19, 2015), https://www.fatunetwork.net/more-revelations-about-president-jammehs-sex-exploits-of-young-gambian-girl/ (describing Fatu Radio's documentation of the experiences of girls (mainly teenagers) who were employed as "Protocol Officers attached to the Office of the President who openly accused the President of sexually exploiting them" and describing the "in-depth investigative report which documented how virgin girls [we]re lured into sexual relationship with the President where they [we]re dis-virgined and their blood used for rituals").

[215] Saikou Jammeh & Ruth Maclean, *Mass Grave of Alleged Victims of Former President Jammeh Found in The Gambia*, GUARDIAN (May 16, 2018, 2:00 AM),

The Gambia, a West African nation with a population of about two and a half million and a weak economy often plaguing its people, faced a reckoning of this horrific regime and resolved to never let this happen again.[216] Under the current President Adama Barrow, a Truth, Reconciliation and Reparations Commission (TRRC) was established in 2017 to "nurture national reconciliation and healing" and to create a historical record of the atrocities under Jammeh's regime.[217] The official objectives of the TRRC included creating an "impartial historical record of violations and abuses of human rights from July 1994 to January 2017" in order to "promote healing and reconciliation," "respond to the needs of the victims," "address impunity" and "prevent a repeat of the violations and abuses suffered by making recommendations for the establishment of appropriate preventative mechanisms including institutional and legal reforms."[218] Other objectives included establishing and revealing what happened to "disappeared victims," providing victims with "an opportunity to relate their own accounts of the violations and abuses suffered," and granting reparations to victims in certain cases.[219]

Significantly and laudably, the TRRC Act of 2017 specifically mandated "a child and gender sensitive approach in conducting its investigations in cases of children and women."[220] Indeed, there was a special committee on "Child Protection and Sexual and Gender Based Violence," which could invite specialists or experts to meetings and was required to make recommendations to the TRRC for approval.[221] For sexual violence cases, the TRRC also had the discretion to allow victims to testify privately *in camera* or publicly.[222]

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https://www.theguardian.com/global-development/2018/may/16/mass-grave-victims-alleged-massacre-gambia.

[216] Abdul-Jalilu Ateku, *How The Gambia Is Going About Its Search for Truth and Reconciliation*, CONVERSATION (Mar. 27, 2019, 9:30 AM), https://theconversation.com/how-the-gambia-is-going-about-its-search-for-truth-and-reconciliation-114203.

[217] Searcey, *A Beauty Queen Accuses Former Gambian President of Rape*, *supra* note 10; *see* Searcey & Barry, *'Gambia Is Back Again'*, *supra* note 213.

[218] Truth, Reconciliation and Reparations Commission Act, 2017, § 13 (Gam.).

[219] *Id.* §§ 13, 20.

[220] *Id.* § 14(2).

[221] *Id.* § 18.

[222] *Id.* § 16(4)(b). For example, Justice Rapid Response, a civic society organization, deployed experts, including a sexual and gender-based violence expert. *The Gambia: Truth and Reconciliation Report Paves the Way for Prosecutions*, JUST. RAPID RESPONSE (Mar. 14, 2022) [hereinafter JUST. RAPID RESPONSE, *TRRC Paves the Way for Prosecutions*], https://www.justicerapidresponse.org/the-gambia-truth-and-reconciliation-report-paves-the-way-for-prosecutions/.

TRRC hearings began in January 2019 and concluded in May 2021, which featured more than 400 witnesses, including over 51 women.[223] Witnesses included both those accused of human rights violations as well as victims of abuse.[224] These public TRRC hearings were streamed live by widespread television and radio stations and Facebook—all accessible to young and old alike on their cell phones—such that *The New York Times* described the TRRC as "the most accessible truth commission in history."[225]

Although not part of the TRRC public hearings, and instead as part of the truth commission's outreach efforts, "a series of women-only listening circles brought victims together to share privately their traumatic experiences and encourage them to speak out."[226] According to *The New York Times*, "Gambia's reconciliation process ha[d] put a special focus on women who endured beatings or sexual violence by Mr. Jammeh's security officers, or who were impoverished after their husbands were locked up."[227] Significantly, as part of the TRRC public hearings and the official record, Toufah Jallow became the first woman to speak out publicly and on the record about her rape by the former dictator.[228]

Yet despite these commendable efforts to tailor redress based on gender, many Gambian women, justice advocates and scholars are still calling for

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[223] 1 TRUTH, RECONCILIATION & REPARATIONS COMM'N, FINAL REPORT: COMPENDIUM ON FINDINGS AND RECOMMENDATIONS xv (2018–2021), https://www.justiceinfo.net/wp-content/uploads/Volume-1-Compendium-Part-A.pdf; TRUTH, RECONCILIATION & REPARATIONS COMM'N, INTERIM REPORT 13 (2018–2019) [hereinafter TRRC, INTERIM REPORT], https://static1.squarespace.com/static/5a7c2ca18a02c7a46149331c/t/5eab360f11f74c62aa3b849f/1588278803832/TRRC-INTERIM-REPORT-Logo-Final.pdf; JUST. RAPID RESPONSE, *TRRC Paves the Way for Prosecutions*, *supra* note 222.

[224] *See* Searcey, *A Beauty Queen Accuses Former Gambian President of Rape*, *supra* note 10.

[225] TRRC, INTERIM REPORT, *supra* note 223, at 13; Turkewitz, *Confessions from a Presidential Hit Squad in Gambia*, *supra* note 210.

[226] Searcey, *A Beauty Queen Accuses Former Gambian President of Rape*, *supra* note 10; *see infra* notes 328–31 and accompanying text (describing in more detail these women-only listening circles).

[227] Searcey, *A Beauty Queen Accuses Former Gambian President of Rape*, *supra* note 10.

[228] *See* Searcey & Barry, *Gambian Minister Calls on All Women with Accusations Against Ex-President to Come Forward*, *supra* note 212; Searcey, *A Beauty Queen Accuses Former Gambian President of Rape*, *supra* note 10.

more.[229] The next few sections identify what is missing from the TRRC[230] and Gambian transitional justice initiatives then and now, and how counternarratives through storytelling focused on women's intersectional identities may help to break down unproductive stereotypes and discursive strategies intended to maintain certain power and social structures.

B. Recognition of Sexual Violence Injustices: What's Missing from the TRRC and The Gambia's Reconciliation Initiatives

Recognition "acknowledges that people suffer simultaneously as individuals and as a part of communities, often because of their identity as a member of a targeted or disfavored social group."[231] It also encompasses recognizing at least two kinds of wounds: "[o]ne kind of wound is the immediate harm – the anger, hurt and material loss resulting from disabling group constraints" and "[a] second, more pervasive kind of wound is the pain buried in collective memories of group exclusion or subjugation."[232] Accordingly, "groups must first empathize, not sympathize; listen, not analyze; acknowledge, not blame."[233]

1. Recognition of Past Sexual Violence Harms

Mutual engagement in *recognition* is therefore an important starting point.[234] For Toufah Jallow and other Gambian women who suffered sexual violence abuses, recognition includes all participants first acknowledging that rape was a common experience under Jammeh's authoritarian regime but is largely minimized or treated differently in truth commission proceedings than other types of harms, such as extrajudicial killings and torture.[235]

Both Toufah and human rights lawyer Marion Volkmann expressed concern about the TRRC's approach to sexual and gender-based violence, despite its seemingly well-intentioned framing of gender-redress

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[229] *See* Yamamoto, Pettit-Toledo & Sheffield, *Bridging the Chasm*, *supra* note 35, at 140–41, 160–78 (discussing how structuring the truth-seeking and recognition aspects of truth and reconciliation commissions and redress initiatives are crucial, as well as how a TRC's findings are handled and recommendations are implemented).

[230] *See id.* at 134–41 (noting how there are often gaps in the redress process toward genuine social healing and how often more needs to be done to uplift the process).

[231] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 57, at 73.

[232] *Id.* at 74.

[233] *Id.* at 75.

[234] *Id.* at 73.

[235] *See id.* at 74 ("*[R]ecognition* asks participants in the social healing process to acknowledge and empathize with the anger, suffering and hopes of those harmed, focusing on 'victims' but also with an eye on 'perpetrators.'").

sensitivities.[236] For example, they recognized that "[w]hen [the TRRC] published a list of 'themes' or crimes they would be addressing, they used the word 'alleged' only in connection to sexual assault, never for the killings, torture and illegal detentions, or even the literal witch hunt against sorcerers Jammeh ordered in retribution for the death of his aunt."[237] They also noted that, in non-sexual violence investigations, witnesses were encouraged to name the abusers whereas, with the exception of sexual assault crimes by Jammeh, witnesses were told that they could only refer to the perpetrators by number, not by name.[238] By apparently designing the hearings process relating to sexual violence injustices in this way, the TRRC seemingly sought to protect the perpetrators' identities from the public, which in many ways seemed unjust and reflected certain redress biases.[239]

This approach, in part, left many with the sense that "sexual violence remained a kind of side note, an after-thought, to the investigation into Jammeh and his regime."[240] Re-inflicting the still open wounds, in January 2020, an expert witness at the TRRC testified about the overall impact of Jammeh's regime on The Gambia.[241] To Toufah, this testimony reflected, in many ways, the shortcomings of the TRRC with respect to the recognition of sexual violence harms.

> While he briefly mentioned that Jammeh had raped many women, he went on to say that "Jammeh should be credited for having promoted many women to important positions of power." . . . It was as if he believed Jammeh's rapes were erased by promoting a handful of women within his government. And the larger issue, of how Jammeh's behaviour created a climate that permitted other men to rape and discouraged their victims from reporting, was almost completely ignored. Rapes by soldiers were glossed over, rapes of women prisoners at the notorious Mile Two Central Prison were unacknowledged, gang rapes by men in uniform were hinted at with no follow-up questions asked.[242]

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[236] JALLOW, *supra* note 1, at 252.
[237] *Id.*
[238] *Id.*
[239] *See id.*
[240] *Id.* at 281.
[241] *Id.*
[242] *Id.*

Recognition encompasses realizing that Gambian women endured these forms of rape as well as other horrific forms of sexual violence, including sexual slavery, which often left deep lasting wounds.[243] Notably, these shocking forms of sexual violence were apparently aimed specifically at certain groups of women in The Gambia, but not other white or African women. They were also apparently aimed at marginalized populations or those opposed to Jammeh's ruling party.[244] According to a recent Global Reparations Study (in collaboration with the International Center for Transitional Justice), "[w]omen were particularly susceptible to forms of sexual and gender-based violence in association with other crimes, and were targeted for breaching gender norms by stepping into traditionally masculine roles, including activism and politics."[245] This occurred, in large part, due to "[a] culture of oppression, silence, and deeply entrenched patriarchy."[246]

Toufah Jallow was the first to speak out and insert her story into the conversation and foster social group memory.[247] Under oath, before the TRRC, she "g[a]ve rape a face in The Gambia" as a visible survivor, sending the message that if other women had also been raped that looked like her, they could also survive it too.[248] Although suffering from the sexual violence abuses herself, Toufah empathized with other sexual violence survivors and uncovered for some "the pain buried in collective memories of group exclusion and subjugation."[249] By attaching her name to her story, rather than remaining anonymous, she allowed herself, along with many others, the opportunity for storytelling.[250] She also created an opening for some women to realize that they were survivors of sexual violence because, as she notes, many were not even aware of the abuses given that violence against women

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[243] *See generally* REPARATIONS FOR SURVIVORS OF CONFLICT-RELATED SEXUAL VIOLENCE, COUNTRY BRIEFING: THE GAMBIA (June 2022) [hereinafter REPARATIONS FOR SURVIVORS OF CONFLICT-RELATED SEXUAL VIOLENCE: THE GAMBIA], https://static1.squarespace.com/static/5ff7d9f4dd4cdc650b24f9a4/t/63577a5d3017d770b8a4f3c8/1666677344018/GSF_Country_Sheet_The_Gambia_EN_June2022_WEB.pdf (recognizing the harm caused to survivors, families and communities as a result of conflict-related sexual violence under President Yahya Jammeh's dictatorship).

[244] *Id.* at 2.

[245] *Id.*

[246] *Id.*

[247] JALLOW, *supra* note 1, at 212.

[248] *Id.*

[249] *See id.* at 211, 241–44*;* YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 57, at 74.

[250] *See* JALLOW, *supra* note 1, at 212–13; YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 57, at 75–78.

had been somewhat normalized historically in The Gambia.[251] While an important step in *recognition*, her efforts are limited by the lack of participation from *all* participants, especially Jammeh and government officials who facilitated the sexual violence abuses, such as his cousin Jimbee, those who continue to support Jammeh in his exile and others who benefitted under Jammeh's regime.[252] They are also undermined by the above-referenced aspects of the TRRC's approach to sexual violence abuses during the hearings.

Recognizing and preserving the voices of Gambian sexual violence survivors, like Toufah's, is essential to promoting more complex understandings of the breadth and depth of their historic sexual violence harms under Jammeh's rule. After Toufah publicly testified before the TRRC, Abubacarr M. Tambadou, The Gambia's attorney general and minister of justice, called on other women who were sexually abused to come forward: "It is only through speaking up and exposing such despicable acts, especially by those in positions of power, can we effectively combat the scourge and menace of sexual violence against women and girls in our society."[253] Beyond government calls to support survivors to speak out, the Gambian government might also endeavor to document their personalized stories of loss and later rejuvenation through widely publicized collective records. They might also devote resources for public education and curriculum development. Further, the Gambian government might also support additional popular and scholarly research, publications and presentations (art, documentaries, conferences) about Gambian women's sexual violence harms and current healing efforts.[254] Specifically, for example, they might support Toufah's film documentary efforts to memorialize and record the voices and stories of other Gambian women survivors,[255] as well as her dream to convene a conference featuring linguists

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[251] *See* REPARATIONS FOR SURVIVORS OF CONFLICT-RELATED SEXUAL VIOLENCE: THE GAMBIA, *supra* note 243, at 2; JALLOW, *supra* note 1, at 268, 295–99.

[252] *See* JALLOW, *supra* note 1, at 252; YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, *supra* note 57, at 74.

[253] Searcey & Barry, *Gambian Minister Calls on All Women with Accusations Against Ex-President to Come Forward*, *supra* note 212.

[254] *See* Pettit, *Who Is Worthy of Redress?*, *supra* note 26, at 316.

[255] Toufah, recognizing society's tendency to identify and narrowly define survivors of sexual violence as "victims of rape," has embarked on filming a documentary called *Justifying Survival*, which interviews survivors who tell their stories on camera "not just about what happened to them, but who they are, what they like, what their jobs are." Teitel, *I Am Toufah*, *supra* note 214. In this way, these women of color are empowered to tell their own stories

and scholars to establish a new vocabulary in the various common languages to come up with words like "rape" to further narratives of sexual violence injustice in The Gambia.[256] Due to the potentially limited resources of the Gambian government, and against the backdrop of the country's weak economy, international human rights supporters, researchers, institutions and scholars might contribute to the realization of these government-led efforts.[257] In these ways, the Gambian government and its populace might begin to acknowledge that those previously in power apparently targeted certain women because of their perceived racial and gender inferiority—and because of their roles as political actors and activists resisting the primarily African Muslim patriarchal culture.

Recognition of the broadscale sexual violence injustices is still largely absent, despite the TRRC's notable steps to include gender-sensitive approaches in the truth commission process.[258] While some Gambian women testified before the TRRC and many participated in the women's circles, the commonly cited number of sexual violence survivors is identified as twenty-five (25) survivors, whereas a recent study suggested that the estimated real number is closer to seventy-seven (77) with numbers likely to be significantly higher.[259] Accordingly, there is a sense that, even

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and define their own intersectional identities in ways that are fair "to them and their children." *Id.*

[256] Toufah expressed what she believed would be laudable next steps to address healing sexual violence wounds:

> Public education to introduce language about rape and rape culture and the idea that women had a right to say no, as well as showing how women's lives are affected by casually sexist attitudes and actions. Programs for young women to help them develop their voices and dreams. Opportunities for survivors to speak about their experiences. Proposals for changes to legislation. A shelter for women and their children to escape and heal from trauma and violence. All were essential. I knew from my own experience that simply focusing on one aspect—telling young women they can be what they want to be, say no if they want to say no—was actually dangerous if those shiny ideals weren't backed up with practical supports, effective laws and societal structures to hold abusers accountable.

JALLOW, *supra* note 1, at 280.

[257] *See* Pettit, *Who Is Worthy of Redress?*, *supra* note 26, at 316.

[258] *See* Yamamoto, Pettit-Toledo & Sheffield, *Bridging the Chasm*, *supra* note 35, at 176 (observing that "evolving social norms also shape implementation" and that "[i]ncreasing attention to gender, sexual orientation, race, and indigeneity encourages marginalized groups to advocate for heightened recognition and tailored remedies").

[259] REPARATIONS FOR SURVIVORS OF CONFLICT-RELATED SEXUAL VIOLENCE: THE GAMBIA, *supra* note 243, at 1.

after extensive TRRC hearings and proceedings, sexual violence under Jammeh's regime has been, and continues to be, severely underreported.[260] Mutual storytelling and listening, then, remain critical to moving forward.

But in addition to these steps as part of the *recognition* inquiry, full disclosure of the extent of the sexual violence harms, including those extending into the present day, is crucial.[261] A close look at the unique persisting sexual violence harms follows.

2. Recognition of Persisting Harms

Recognition of lingering, present-day harms requires an understanding that historic sexual violence harms have severe and lasting consequences.[262] In certain cultural and social circumstances, past sexual violence harms hold significant present-day importance on what women of color can (or cannot) do with respect to marital relations, employment and other aspects of their lives within their community's social hierarchy.[263] Many aspects of these continuing harms, however, remain unacknowledged in current redress efforts.

A recent study revealed that victims report "long-lasting psychological, social, physical, and economic consequences," including stigma that has forced them to self-isolate in their communities.[264] Many expressed facing "ridicule, exclusion, and a loss of respect and dignity" and reported having suicidal thoughts due to their persisting trauma.[265] Still others spoke of damaged familial relations due in part to shame and stigma.[266] As one survivor stated, "The most embarrassing thing is the stigma and discrimination I face in the society, which is an unbearable pain honestly.

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[260] *Id.* at 2.

[261] *See* Yamamoto, Pettit-Toledo & Sheffield, *Bridging the Chasm*, *supra* note 35, at 177 (acknowledging that realpolitik shifts and evolving conditions may require refashioning truth commission processes and recommendations "all toward the goal of recalibrating and reinvigorating the original reconciliation commitment").

[262] *See* Pettit, *Who Is Worthy of Redress?*, *supra* note 26, at 317–19.

[263] *See id.*

[264] REPARATIONS FOR SURVIVORS OF CONFLICT-RELATED SEXUAL VIOLENCE: THE GAMBIA, *supra* note 243, at 3.

[265] *Id.*

[266] *See id.*

There are certain pains that an individual might go through that make you prefer to die than bear the shame."[267]

For Toufah, after her TRRC testimony, she realized firsthand through calls to her mother and family that many from the "older generation that never spoke openly about sexual violence . . . viewed it as shameful for the victim to acknowledge."[268] Indeed, according to Toufah, their calls emphasized her "victimization more than [her] survival" as they often gave her mother "the kind of condolences expressed after a death."[269] To Toufah, this demonstrated the limitations for women of color who suffered sexual violence harms to speak openly about their experiences.[270]

Some of these emotional, psychological and physical harms have resulted in economic injustice.[271] As many survivors were left with "overlapping and persistent physical injuries and complications,"[272] they often lost their jobs, which led to living in poverty unable to care for their families.[273] As a result, many cannot afford basic needs, such as housing, food, education or even medical care, which further strains individuals, families and the larger community.[274] This has impacted the next generation, who often leave their educational studies to work in order to generate income to support their families.[275] The Covid-19 pandemic further exacerbated these precarious socioeconomic conditions.[276] Moreover, as the study recognized, "[h]arms caused to survivors are compounded by a lack of rehabilitation program[]s or spaces to share their feelings or demands."[277]

Complete recognition of this collective trauma and persisting long-term damage to individual women, their communities and their descendants is still

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[267] *Id.* This quotation echoes the "common-sense" discourse and dominant narratives relating to rape and sexual violence during conflict, as articulated by Professor Karen Engle. *See supra* Section V.B.

[268] JALLOW, *supra* note 1, at 230.

[269] *Id.*

[270] *Id.* Toufah's experience is reminiscent of the dominant, "common-sense" discourse discussed above in Section V.B.

[271] *See generally* Yamamoto & Mackintosh, *Redress and the Salience of Economic Injustice*, *supra* note 80.

[272] REPARATIONS FOR SURVIVORS OF CONFLICT-RELATED SEXUAL VIOLENCE: THE GAMBIA, *supra* note 243, at 3 ("Survivors report high blood pressure, overall pain throughout their bodies, including abdominal pains, urinary difficulties, and for some, disrupted HIV treatment.").

[273] *Id.*

[274] *Id.*

[275] *Id.*

[276] *Id.*

[277] *Id.*

needed. A handful of notable civil society organizations, such as the Victims Center, the Women Association for Victims Empowerment, and Women in Liberation and Leadership, have contributed to documenting these individual and collective experiences, among other salutary initiatives.[278] However, without key support from the Gambian government, along with international human rights supporters, researchers and scholars, the scope and pervasiveness of Gambian women's continuing sexual violence harms remain underreported and efforts to redress these harms remain severely limited. By involving all participants involved in the initial injustice and in continuing injustices, the Gambian government, populace and larger diaspora, as well as the international community, might explicitly acknowledge the unique ways that Gambian women continue to suffer on multiple, complex levels.

C. Recognition of Dominant Narratives and Need for Counternarratives

Although *recognition*, through empathy, listening and acknowledgment of past and persisting harms, is a necessary next step in the redress process, perhaps more significant, and related to this aspect of *recognition*, is "identifying the justice grievance," or rather "the larger framing and the details of the historical injustice as well as the present-day claims for rectification."[279] As Yamamoto observes, "[t]hese sometimes directly, sometimes covertly communicated grievances are rooted not only in suffering around a singular event but also in collective perceptions of how one's own group has been historically wronged by another group with great power."[280] An assessment of the justice grievance encompasses "an examination of multiple accounts of events, consequences and social and political forces at play" as well as an inquiry "into the agendas and motivations of those making the claims of injustice and of those apparently inflicting the harms."[281]

Importantly, identifying the justice grievance in this way means "critically unraveling 'stock stories' about events and group cultural attributes that ostensibly legitimated past abuses and that heighten current tensions."[282] "Stock stories are narratives shaped and told by groups (especially

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[278] *Id.* at 4.

[279] YAMAMOTO, HEALING THE PERSISTING WOUNDS OF HISTORIC INJUSTICE, supra note 57, at 75.

[280] *Id.*

[281] *Id.* at 76.

[282] *Id.*

governments) to justify abuse of others . . . or, alternatively, to portray victim status and enhance the validity of redress claims."[283] According to Yamamoto, these stock stories or dominant narratives "are often a conglomeration of selective historical recollections, partial information about events and socioeconomic conditions—infused with speculation and falsehoods and grounded in self-interest."[284]

Addressing and unraveling these stock stories are particularly important in the context of sexual violence against women of color—especially in the case of The Gambia's largely African Muslim patriarchal culture. Often the dominant narratives are "social constructions – cultural depictions, communicated through media, schools, families, churches, artists, businesses, judges, lawyers, government officials and more."[285] Such cultural depictions tend to "generate social identities and attribute cultural characteristics to group membership."[286] Those attributed cultural characteristics then "influence the dynamics of group interactions by providing the lens through which others initially see and then evaluate all group members."[287] The "interrogation of stock stories" or dominant cultural narratives thus importantly "aims to reveal what was then, and is now, really going on."[288] By doing so, we may "remake stock stories into narratives that more accurately reflect actual events and the perspectives of those harmed."[289] That is, this part of the *recognition* inquiry "aims for a newly framed collective memory of the injustice as a foundation for collaborative efforts to repair the damage."[290]

1. Construction of Collective Memories of Sexual Violence Injustices

The Gambia, marked primarily by African Muslim patriarchal culture, reflects retrenched cultural norms that "often state that men are aggressive, controlling and dominant, while women are docile, subservient, and rely on men for provision."[291] The Gambia's social norms and history of conflict

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[283] *Id.*

[284] *Id.*

[285] *Id.* at 77.

[286] *Id.*

[287] *Id.*

[288] *Id.* at 78.

[289] *Id.*

[290] *Id. See generally* López, *The (Re)collection of Memory*, *supra* note 31; Hom & Yamamoto, *Collective Memory, History, and Social Justice*, *supra* note 31.

[291] INST. FOR HUM. RTS. & DEV. IN AFRICA (IHRDA) & THE GAMBIA CTR. FOR VICTIMS OF HUM. RTS. VIOLATIONS, SEXUAL AND GENDER-BASED VIOLENCE IN THE GAMBIA: A HANDBOOK (INCLUDING STORIES OF SURVIVORS) 14 (2020), https://victimscentergm.org/wp-content/uploads/2020/07/Handbook-on-SGBV-in-The-Gambia-FINAL.pdf.

and political unrest further serve as a backdrop for sexual violence harms against Gambian women.[292] From the perspective of on-the-ground human rights organizations and victims' support groups, these norms "can foster a culture of outright abuse, such as rape," among other forms of violence against women.[293] Thus, in many ways, the dominant narratives in The Gambia "portray women as victims and men as perpetrators."[294] What is clear, then, is that deploying these cultural, racial and gender stereotypes to justify rape and sexual violence against Gambian women under Jammeh's regime allowed both those at the top, including the former dictator, and those under his regime to perpetrate widespread sexual violence against Gambian women.

In the case of Toufah, based on these retrenched gender, racial and cultural stereotypes often portrayed and reinforced in the media, many Gambian citizens and those in the diaspora initially portrayed her as a "whore" and said Jammeh "would never be tempted by someone like [her]."[295] According to Toufah, many in The Gambia and its diaspora "believed the worst" about her after she rejected Jammeh's marriage proposal and fled to Canada.[296] In her own words, these widespread norms contributed to her silence and made it difficult to initially speak out,

> My culture—like so many patriarchal cultures around the world—left no space to imagine I might have other reasons to flee. And I had no way to safely speak out to counter the image of me that bloomed in the soil of misogyny, fertilized with rumour. It didn't escape my notice that these were judgments made about me even though I hadn't publicly accused him of rape. I couldn't imagine what backlash I'd face if I told the truth.[297]

But in her estimation, "in silencing women to preserve our own comfort, to protect our families from shame is a misguided effort to protect our family dignity, we are condemning our sisters, our mothers, our cousins to being forever broken, forever hidden, forever traumatized."[298]

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[292] *Id.*
[293] *Id.*
[294] *Id.* at 15.
[295] JALLOW, *supra* note 1, at 86.
[296] *Id.*
[297] *Id.* at 86–87.
[298] *Id.* at 234.

Only after she testified for five hours before the TRRC and after she unearthed the truth of what had happened did counternarratives emerge of her unjustified, unspeakable rape and of widespread sexual violence.[299] As Toufah wrote in her memoir, "The other women's stories bore similarities to mine."[300] Media reports and the Human Rights Watch report, as well as limited efforts by the TRRC, helped to reframe the seemingly legitimate abuse and violence as severe human rights violations.[301] The organization of the women's march and use of the hashtag #IAmToufah further helped to reframe the discussion and contribute to the construction of altered collective memories.[302] These were significant advancements, yet, as reflected in the discussion above, much more is still needed at this level.

Despite these significant steps forward, without either a formal apology or acknowledgment of the need for further justice through reparation or criminal prosecutions of perpetrators, recognition is incomplete.[303] Moreover, despite these admirable steps forward, little to no attention was given to the formation of collective memories around these women's intersectional identities.

2. Development of Collective Memories Focused on Intersectional Identities

Toufah's truth told under oath before the TRRC, to the media and to international audiences is stunning. In these settings—but notably not in a courtroom—she was able to use her own voice to share her story. By doing so, she started to construct a counternarrative about who she was and how the sexual violence harms were perpetrated against her in Gambian society. And in many ways, she provided a means to help the broader community of Gambian women to construct collective memories of their own individual and group sexual and gender-based violence experiences.

For example, #IAmToufah illustrates on-the-ground efforts to construct collective memories of women of color who had suffered from sexual violence under a repressive government regime in The Gambia.[304] With no

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[299] *Id.* at 271.

[300] *Id.* at 209.

[301] *See, e.g.*, *id.* at 219–22, 254–69 (detailing efforts by these organizations, from Toufah's perspective, to reframe the conversation to be rooted in human rights violations).

[302] *See id.* at 271 (describing the women's march and use of the hashtag).

[303] *See* Yamamoto, Pettit-Toledo & Sheffield, *Bridging the Chasm*, *supra* note 35, at 128–38 (providing examples of reconciliation initiatives stalled and criticized and illustrations of "unfinished business" in truth and reconciliation commission initiatives).

[304] *See* JALLOW, *supra* note 1, at 242–44 (describing the widespread use of the hashtag #IAmToufah among Gambian women survivors of sexual violence).

linguistic structure to describe rape or sexual violence,[305] #IAmToufah provided a narrative structure to comprehend sexual violence harms to women of color while also framing those past harms to the present through storytelling and the representation of strength, voice and visibility in Toufah, the twenty-three-year-old rape victim, survivor and activist.[306] As one media news outlet described, "if [Yahya Jammeh] never comes to justice [due to questions of political will], there is some justice in this: a woman whose name evokes his brutality is seeing to it that other women's names and stories remain their own."[307]

Indeed, through broader media reports, presentations to international audiences, her TRRC testimony and her more recent memoir, Toufah has been leading the way in reframing and altering collective memories—not only about her detailed rape but also about the reactions to her storytelling that reflect deeply ingrained cultural, racial and gender stereotypes. For example, immediately after testifying to the TRRC, an Imam[308] approached her to commend her on her bravery and suggested that she was worthy of being his son's wife as a means of celebrating her.[309] To Toufah, however, this underscored "how far we had to go in order for my worth, for any woman's worth, to be seen as residing in her *self*, not in her role as a wife or prospective wife, or as a mother, a daughter or daughter-in-law."[310] Put another way, in Toufah's words, "[i]f a woman's value, a woman's autonomy, her right to be free from assault, is dependent on her relationships as a mother, wife, sister or daughter to the men in her life, it means she is only as human as the strength of her relationships to the men around her—that women are only conditionally human."[311] These views may be considered somewhat radical to those in The Gambia, but they exposed the underlying discursive strategies and stock stories that contributed to the underlying injustice and reflected what is still needed to recognize the value

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[305] Petesch, *Gambian Toufah Jallow Tells Story of Surviving Rape by Dictator*, *supra* note 14 (Toufah explaining that speaking about sex and sexuality is "just not done" and that people use phrases like "somebody fell on me" to describe rape in her native Fula language); *see also supra* notes 11 & 256 and accompanying text.

[306] *See* JALLOW, *supra* note 1, at 271 (exploring the impact of the #IAmToufah movement in The Gambia).

[307] Teitel, *I Am Toufah*, *supra* note 214.

[308] An *Imam* is the prayer leader of a mosque. *Imam*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/imam (last updated Mar. 8, 2023).

[309] JALLOW, *supra* note 1, at 269.

[310] *Id.*

[311] *Id.*

of women of color in society: listening to them, working with them and empowering them through their intersectional identities.

Notably, for survivors interviewed as part of the Global Reparations Study, there was an emphasis on the fact that survivors are not a "homogenous group" as "each of them has a distinct set of needs based on intersecting factors and vulnerabilities."[312] Rooted in African matriarchal histories, including strong examples of leadership and strength against colonial forces and against a strong Muslim African patriarchy,[313] Gambian women, in particular, reflect complex identities as "activists, fighters and advocates" for themselves and others.[314] As Toufah herself has recognized, there is a far-reaching matriarchal history of African women to "draw on for examples of female leadership and strength."[315] As one example, she describes women traders known as Signarés who used family networks in The Gambia and Senegal to facilitate the transfer and sale of products at home and abroad.[316] As another example, she refers to Phillis Wheatley, who was born in The Gambia before being enslaved and making her way to become one of the most celebrated poets in eighteenth-century North America.[317]

Apart from these specific individual examples, more broadly as a collective group, Gambian women have a long history of organizing themselves (and others) to advance their unique economic, social and political interests.[318] These particularized interests often emphasize health

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[312] 2021 GLOBAL REPARATIONS STUDY SUMMARY REPORT OF PRELIMINARY FINDINGS, *supra* note 42, at 7.

[313] *See* JALLOW, *supra* note 1, at 281, 295, 297.

[314] *See id.* at 277. Although The Gambia is a small West African country with a population of approximately 2.64 million, this Article focuses on the rich history and context of Gambian women to illustrate and uplift just one example of the many complex intersectional identities among women of color as "activists, fighters and advocates." *See id.* Additional examples or illustrations are beyond the scope of this Article but ripe for further inquiry.

[315] *See* JALLOW, *supra* note 1, at 295 (citing to examples of her mother and grandmothers, pop culture examples like Nakia from the movie *Black Panther*, based in part on the Agoji, the all-women army in the African Kingdom of Dahomey and others).

[316] *Id.* at 296; *see* Cymone Fourshey, *Women in The Gambia*, OXFORD RSCH. ENCYC. AFR. HIST., Mar. 9, 2019, at 7–8 [hereinafter Fourshey, *Women in The Gambia*] (explaining the crucial role Senegambian Signarés played in Portuguese and later French, Dutch and British trade with West Africa from the sixteenth through nineteenth centuries).

[317] JALLOW, *supra* note 1, at 296; *see generally* VINCENT CARRETTA, PHILLIS WHEATLEY: BIOGRAPHY OF A GENIUS IN BONDAGE (2011) (recognizing Phillis Wheatley "as a heroic figure in an age of heroes" in the first full-length biography of her).

[318] *See generally* Fatou Janneh, *Women's Struggles Through Collective Action in The Gambia, 1950s to 1970*, 21 AFR. STUD. Q. 1 (Aug. 2022) [hereinafter Janneh, *Women's Struggle Through Collective Action in The Gambia*] (discussing the history of collective

care, social welfare and education and reflect their "struggle to gain 'voice.'"[319] At the margins of society, particularly under British colonial rule, and faced historically with a weak economy, poor infrastructure and massive illiteracy, among other things, many Gambian women often resorted to using collective action through women's grassroots organizations—particularly *kafoolu* in rural and peri-urban areas[320] and *kompins* in urban settings.[321] Through these groups, Gambian women sought to overcome barriers and to promote their key economic, social and political interests.[322]

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organizing among women during British colonial rule and leading up to The Gambia's independence in the 1960s); Fatou Janneh, Kafoolu and Kompins: Women's Grassroots Movements in Post-Colonial Gambia (Dec. 2021) (Master of Arts Thesis, College of Arts and Sciences of Ohio University) (on file with the OhioLINK Electronic Theses & Dissertation Center) (examining Gambian women's collective organizing after independence through oral interviews, archival documents, newspapers and government publications).

[319] *See 'Gambian Women Deserve More Leadership Roles in Politics' – Gender Activist*, PANAPRESS NEWS AGENCY (Nov. 22, 2020, 7:14 PM), https://www.panapress.com/%EF%BF%BDGambian-Women-deserve-more-lead-a_630669267-lang2-free_news.html [hereinafter PANAPRESS NEWS AGENCY, *'Gambian Women Deserve More Leadership Roles in Politics'*] (quoting the Secretary General of the Community for Democracies, Thomas E. Garrett, who argued that "women leaders prioritized policies that emphasized health care, social welfare and education" and, noting that "women participants [in politics] would help transform The Gambia into a full-fledged democracy," who also said that "[s]tates where women hold more political power are less likely to go to war and less likely to commit human rights abuses"). A detailed, careful history of collective organizing among Gambian women is beyond the scope of this Article. These examples are for illustrative purposes only. For more in-depth accounts, *see* Janneh, *Women's Struggles Through Collective Action in The Gambia*, *supra* note 318 (collecting sources of scholarship on prominent Gambian women of Bathurst and women farmers' socio-economic contributions in agriculture) and the sources in Fourshey, *Women in The Gambia*, *supra* note 316, at 7–8 (providing a brief sampling of African women who shaped The Gambia River territories over the last six centuries).

[320] *Kafoo* (plural *kafoolu*) means "traditional associations" in the Gambian language, Mandinka. Janneh, *Women's Struggles Through Collective Action in The Gambia*, *supra* note 318, at 14 n.3. According to scholar Fatou Janneh, although there is a "long-standing history of women's network in rural Gambia," there is little evidence as to exactly when *kafoolu* were created. *Id.* at 5.

[321] *Kompins* refer to "associations/organizations" in the Gambian language, Wolof. Janneh, *Women's Struggles through Collective Action in The Gambia*, *supra* note 318, at 14 n.3. "Both *kafoolu* and *kompins* constitute different ethnolinguistic references of The Gambia." *Id.* Scholar Fatou Janneh distinguishes *kompins* from *kafoolu* based on their origins and pre- or post-colonial roots, but importantly, she notes that they have "bec[o]me intertwined with the purpose of enhancing women's economic and social freedom." *Id.* at 5.

[322] *See id.*

As Gambian scholar Fatou Janneh put it, "Despite the hostility of the colonial environment, women contested and negotiated with the system that gagged them."[323] Beginning with the passage of universal adult suffrage in the mid-twentieth century, and on the path to independence and decolonization, key women journalists and political leaders led the way forward for Gambian society, in conjunction with women's grassroots organizations and others.[324] Many educated or elite women gathered through *kompins* to engage in education, health, entertainment and humanitarian activities.[325] Still other women *kafoolu* members largely became breadwinners as farmers and food producers, whose collective action bolstered socio-economic opportunities and contributed to the Gambian economy.[326] Yet, despite these collective efforts to shape Gambian society and politics, and despite significant efforts to advance women's rights and goals for the benefit of all, Gambian women today still often find themselves at the margins of relevant positions in government, business and decision-making.[327]

In recent years, though, a group of women who cannot bear children or whose children died at an early age—known as *kaneleng*—have carried on the rich legacy of women's collective action in The Gambia. They seek to advance storytelling and empowerment of women victims to make "transitional justice processes more accessible and inclusive."[328] Due to the high value placed on fertility and childbearing in Gambian culture, *kaneleng* often suffer social exclusion yet are free to engage in "taboo" matters, such as discussing sexual and gender-based violence, that are otherwise left out of

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[323] *Id.*

[324] *Id.* at 8–9 (describing the resistance of women journalists, Marion Foon, Cecilia Moore and Harriet Camara against colonial anti-press laws, and their promotion of women's issues, along with the key roles of Hannah Forster, a wealth entrepreneur and one of the country's first women political activists, and of Rachel Palmer, the only women to attend the London Constitutional Conference of 1961).

[325] *Id.* at 3–4. For example, the Women's Contemporary Society and Gambia Women's Federation encouraged parents to enroll their daughters in school and organized a "baby award" annually and offered incentives to mothers of the healthiest babies to promote proper sanitation and hygiene. *Id.* at 4 ("By advocating for mass education for girls, [*kompins*] were the vanguard of a struggle for social change and the dismantling of gender barriers.").

[326] *Id.* at 6. Organizations such as the Ndemban Garden Association and The Gambia Women Farmers' Association were involved in food production, engaging in horticultural ventures and breeding livestock for provincial markets. *Id.*

[327] *See* PANAPRESS NEWS AGENCY, *'Gambian Women Deserve More Leadership Roles in Politics' – Gender Activist*, *supra* note 319.

[328] *Traditional Communicators, Women Lead the Way for Justice in The Gambia*, INT'L CTR. FOR TRANSITIONAL JUST. (Jan. 31, 2019), https://www.ictj.org/news/traditional-communicators-women-lead-way-justice-gambia.

public discourse.[329] Following the fall of the Jammeh dictatorship, *kaneleng* women led support groups using traditional song, story and rituals to educate their communities and to promote social healing.[330] Known as traditional communicators who have a broad reach, particularly to rural communities, *kaneleng* women, by sharing their own experiences, created a safe space for others to share their stories. In doing so, they laid a "powerful foundation for deeper work with the women victims across the country."[331] And they themselves have demonstrated the power of their own intersectional identities as Gambian women.

There are many other specific examples of contemporary strong African Black women in The Gambia. For example, Toufah cites to "female school principals, doctors, lawyers, activists, businesswomen and artists such as educators Dr. Isatou Touray and Harriet Margaret Ndow; Jaha Dukureh, a Nobel Peace Prize nominee for her work to combat female genital mutilation; and environmentalist Isatou Ceesay."[332] Toufah's name is now added to that growing list of women who have made their mark in Gambian history. In many ways, Toufah herself "performed" her intersectional identity as a Black Gambian woman resisting traditional Muslim African patriarchal norms—which otherwise likely would have relegated her to the confines of the home and the duties of child-rearing—by first rejecting Jammeh's marriage proposal in pursuit of higher education abroad, and by later combatting attempts to silence her by speaking out and telling her story. And, today, she continues to demonstrate the complex, multidimensional aspects of her identity—as an activist, survivor, social worker, teacher, advocate, leader and much more. All while furthering many of the social, economic and political interests of Gambian women dating back at least a century. She continues to tell her full story—carrying on the long legacy of Gambian Black women struggling to gain and express their voices. Through "performing" and "demonstrating" her intersectional identities, she has influenced, and continues to shape, Gambian women's desired society and communities, individually on her own and more broadly through collective action with other Gambian women, including younger generations of Gambian teenagers. Although she, too, was a victim of Jammeh and his oppressive regime, she shall forever be remembered as much more than that. And she

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[329] *Id.*
[330] *Id.*
[331] *Id.*
[332] JALLOW, *supra* note 1, at 295.

is leading the way and creating a justice opening for many Gambian women, collectively, to be remembered more than that too.

By focusing on these intersectional identities through storytelling, Gambian women—through the truth-seeking and recognition process in redress initiatives—have embarked on a groundbreaking path of challenging the dominant, "common-sense" narratives, focusing on the full humanity of their conditions, and changing cultural and social norms about their place and roles in society. By overcoming these barriers and breaking their silence in telling their stories, they are challenging power and structural constraints that previously relegated them to the bottom of the social and redress hierarchies. Although much more is still needed to ensure full recognition of their complex sexual violence harms, then and now, storytelling through their complex, multi-layered identities directly responds to stigmatization and social exclusion. Importantly, storytelling has a "cathartic [healing] impact of being able to come together with other survivors to share experiences and rebuild together."[333]

Recognition, then, may be more fully achieved by listening to these women of color's voices, in their own words and languages, and allowing them to fully express all facets of their intersectional identities. All participants in the redress process—and those beyond it in the international community—should strive to support this by finding safe spaces and openings for this mutual engagement and sharing of stories.

VII. CONCLUSION: LOOKING AHEAD TO INCLUDE MORE WOMEN OF COLOR'S VOICES

The Global Reparations Study, through its innovative, path-breaking on-the-ground study, has found that "it is possible for survivors to make their voices heard" and "doing so is not only paramount in providing appropriate recommendations for the design and implementation of meaningful survivor-centric reparations, but also has a reparative value in itself."[334] As the International Center for Transitional Justice (ICTJ) Program Officer for Uganda recognized, "Victims know what they need in order for their lives to be transformed, therefore they have to be full and equal participants in any of these processes."[335] That is, simply including their voices during truth commission investigations, hearings and proceedings is not enough. Their

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[333] 2021 GLOBAL REPARATIONS STUDY SUMMARY REPORT OF PRELIMINARY FINDINGS, *supra* note 42, at 7.

[334] *Id.* at 5.

[335] *New Study Calls for Reparations for Victims of Conflict-Related Sexual Violence in Uganda*, INT'L CTR. FOR TRANSITIONAL JUST. (Oct. 17, 2022), https://www.ictj.org/latest-news/new-study-calls-reparations-victims-conflict-related-sexual-violence-uganda.

voices, influence and value should be taken into account at the earliest opportunity, particularly in the design and shaping of redress initiatives, first for truth commission-related matters, and later in the implementation and assessment of recommendations and reparations.[336] Meaningful participation by women, beyond just a "seat at the table," is paramount.[337] This is significant not only in endeavoring to achieve genuine social healing but also to ensure that women of color come forward to tell their stories. As the ICTJ has recognized, "[e]fforts to increase the participation of women in post-conflict measures have taught us that if the most marginalized are not taken into consideration in design and implementation, they will not feel safe enough to come forward."[338] Moreover, case studies from Colombia, Guatemala, Sri Lanka, The Gambia and Tunisia strongly suggest that "more inclusion of women leads eventually to more inclusion for everyone."[339]

This Article broadly sketched out possible avenues to address the past and persisting sexual violence wounds of women of color. Such possible

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[336] *See* Yamamoto, Pettit-Toledo & Sheffield, *Bridging the Chasm*, *supra* note 35, at 165, 177 (proposing a new fourth step for assessment, implementation and oversight in reconciliation initiatives, which may include retooling the prevailing theoretical reconciliation framework to "better account for practical on-the-ground realities"); Lisa Davis, *Third Party at the Table: Afro-Colombian Women's Struggle for Peace and Inclusion*, 4 COLUM. HUM. RTS. L. REV. ONLINE 363 (2020) (underscoring the historic achievements of the 2016 Peace Accord between the Colombian government and the Revolutionary Armed Forces of Colombia (FARC) for its recognition of women, LGBTIQ persons, Afro-Colombians and Indigenous Peoples as victims, emphasis on gender justice and women's participation and acknowledgment of discriminatory violence at the intersection of race, ethnicity and gender, but discussing the real consequences of the lack of full, genuine and comprehensive implementation of the Peace Accord).

[337] UN WOMEN & UNDP, WOMEN'S MEANINGFUL PARTICIPATION IN TRANSITIONAL JUSTICE: ADVANCING GENDER EQUALITY AND BUILDING SUSTAINABLE PEACE 4–5 (Mar. 2022) [hereinafter UN WOMEN & UNDP, WOMEN'S MEANINGFUL PARTICIPATION IN TRANSITIONAL JUSTICE], https://www.unwomen.org/sites/default/files/2022-03/Research-paper-Womens-meaningful-participation-in-transitional-justice-en.pdf; *see* Madlingozi, *On Transitional Justice Entrepreneurs and the Production of Victims*, *supra* note 197, at 226 ("Indeed, the victim *can* speak and do much more.").

[338] Kelli Muddell, *An Overlooked Aspect of Sexual and Gender-Based Violence*, *supra* note 44.

[339] UN WOMEN & UNDP, WOMEN'S MEANINGFUL PARTICIPATION IN TRANSITIONAL JUSTICE, *supra* note 337, at 4; *see also* Melanne Verveer, *Foreword* to ROSLYN WARREN ET AL., GEORGETOWN INST. WOMEN, PEACE & SEC., INCLUSIVE JUSTICE: HOW WOMEN SHAPE TRANSITIONAL JUSTICE IN TUNISIA AND COLOMBIA (2017), https://giwps.georgetown.edu/resource/inclusive-justice/ ("In order to create solutions that benefit the whole of society, women's voices must be heard.").

pathways forward include, importantly, recognizing these women's unique sexual violence harms during the redress process through the construction of collective memories by way of storytelling. By creating justice openings for these women to use their voices and tell their stories—including from the vantage point of their various intersectional identities—more comprehensive and enduring social healing may follow. This Article suggests that by recognizing and creating safe spaces for these women of color to develop their individual and collective memories of the harms perpetrated, particularly through truth and reconciliation commission investigations and hearings, we may begin to counter the dominant, traditional narratives of sexual violence atrocities against women during conflict. In doing so, this Article underscores the need for more complex, nuanced, multi-layered counternarratives reflecting that women of color are not only "victims," but also survivors, fighters, advocates, political activists and much more. Through a mini case study of Toufah Jallow's experience and The Gambia's TRRC, it is evident that more is needed for comprehensive and enduring social healing through justice. Foundational to that genuine social healing is women of color's voices and their involvement at all stages. As one survivor of sexual violence put it, "We who are affected must be involved in all decisions and we must also speak out together. Our slogan is 'Nothing without us', nothing without the victims, you cannot speak for us anymore."[340] Now is the time to listen to them with empathy and understanding. Now is the time to strive for more genuine *social healing through justice*.

[340] 2021 GLOBAL REPARATIONS STUDY SUMMARY REPORT OF PRELIMINARY FINDINGS, *supra* note 42, at 2.

Transgender Women in College Athletics: The Next Era of Title IX

Sabrina Shizue McKenna*

On June 23, 1972, the transformational law commonly referred to as "Title IX" was passed, which provided:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.][1]

Just over fifty years have passed since the enactment of Title IX, a law that impacts many areas of educational institutional governance to this day. This article addresses one area receiving significant public attention: the participation of transgender women in athletics, specifically the participation of transgender women in college athletics. Part I provides a general background of this transformative law.[2] Part II touches on Title IX's general

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[1] Patsy Takemoto Mink Equal Opportunity in Education Act, Pub. L. No. 92-318, 86 Stat. 235 (codified as amended at 20 U.S.C. § 1681–1688).

[2] Although this article focuses on women in college athletics, with which many people associate Title IX, the most important impact of Title IX has likely been in academic opportunity. Sabrina McKenna & Jennifer Rose, *Fifty Years of Title IX*, 26 HAW. BAR J. 4, 10 (2022). For example, "[i]n 1972, the year of Title IX's passage, only 7% of all U.S. law school graduates and only 9% of all U.S. medical school graduates were women," and now women earn nearly half of all degrees in both areas. *Id.* at 10–11; *Title IX Fact Sheet*, SHAPE AMERICA, https://convention.shapeamerica.org/Document_manager/events/pesportweek/2022/Title-IX-Fact-Sheet-Secondary.pdf (last visited Feb. 19, 2023). Now, over 53% of both U.S. law and medical school students are women. *Women in the Legal Profession*, AM. BAR. ASS'N (2022), https://www.abalegalprofile.com/women.php#anchor3; Table B-3: Total U.S. MD-Granting Medical School Enrollment by Race/Ethnicity (Alone) and Gender, 2018-2019 through 2022-2023, ASS'N OF AM. MED. COLLS. 1 (Nov. 4, 2022), https://www.aamc.org/media/6116/download?attachment. And now, more than 50% of U.S. higher education degrees are awarded to women. Richard Fry, *Women Now Outnumber Men in the U.S. College-Educated Labor Force*, PEW RSCH. CTR. (Sept. 26, 2022), https://www.pewresearch.org/fact-tank/2022/09/26/women-now-outnumber-men-in-the-u-s-

historical impact on university athletics. Part III concludes with additional perspectives.

I. TITLE IX BACKGROUND

In 1948, Hawai'i Representative Patsy Takemoto Mink was denied admission to every medical school to which she had applied because she was a woman.[3] She then became one of two women in her class at the University of Chicago Law School, from which she graduated in 1951.[4]

Representative Mink is recognized as a major sponsor of the actual text of Title IX.[5] As Congresswoman Mink explained, and consistent with the original draft of Title IX, the law was initially intended to end gender discrimination when applying to college.[6] Title VI of the Civil Rights Act of 1964 ("the Act") prohibited discrimination in federally-assisted programs – including education programs – on the basis of race, color, and national origin, but not on the basis of sex.[7] Additionally, Title VII of the Act prohibited discrimination in employment based on race, color, sex, national origin, or religion, but did not do so for non-employment aspects of educational institutions.[8] Initial drafts of Title IX sought to expand non-discrimination protections of the Act to prohibit sex discrimination in higher

college-educated-labor-force/. As a result of such opportunities, as of 2021, 37% of U.S. attorneys and 47% of Hawai'i attorneys were women. *See* AM. BAR. ASS'N, PROFILE OF THE LEGAL PROFESSION 2021 17 (2021), https://www.americanbar.org/content/dam/aba/administrative/news/2021/0721/polp.pdf; HAW. STATE BAR. ASS'N, 2021 BAR STATISTICS & SUMMARIES 1–2 (2021), https://hsba.org/images/hsba/Misc/2021_Bar_Statistics_and_Summaries.pdf.

[3] McKenna & Rose, *supra* note 2, at 6; Judy Tzu-Chun Wu & Gwendolyn Mink, *How Patsy Takemoto Mink, the First Woman of Color in Congress, Helped Craft Title IX*, TIME (June 1, 2022 9:29 AM), https://time.com/6174298/patsy-takemoto-mink-title-ix/; *see* Kerri Lee Alexander, *Patsy Mink*, NAT'LWOMEN'S HIST. MUSEUM (2019), https://www.womenshistory.org/education-resources/biographies/patsy-mink.

[4] McKenna & Rose, *supra* note 2, at 6; D'Angelo Law, *Women Who Made Legal History: Patsy Mink*, UNIV. OF CHI. LIBR. (Mar. 31, 2021), https://www.lib.uchicago.edu/about/news/women-who-made-legal-history-patsy-mink/.

[5] McKenna & Rose, *supra* note 2, at 6; *see* Alexander, *supra* note 3.

[6] McKenna & Rose, *supra* note 2, at 6; Danna Bell, *Patsy Takemoto Mink's Title IX Legacy*, LIBR. OF CONG. (June 23, 2020), https://blogs.loc.gov/teachers/2022/06/patsy-takemoto-minks-title-ix-legacy/.

[7] McKenna & Rose, *supra* note 2, at 6; *Education and Title VI*, U.S. DEPT. OF EDUC. (Jan. 10, 2020), https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html.

[8] McKenna & Rose, *supra* note 2, at 6.

education.[9] The language of the law as enacted, however, is not restricted to academics, as it includes "any education program or activity."

Title IX applies to schools, local and state educational agencies, and other institutions that receive federal financial assistance from the federal government.[10] Such institutions must operate their educational programs and activities free of discrimination based on sex.[11] "Title IX applies to all aspects of education, both in and out of the classroom."[12] It protects students and employees of educational institutions, whether they are born male, female, or intersex.[13] Title IX impacts broad areas of educational institutional governance, including recruitment, admissions, and counseling; financial assistance; science, technology, engineering, and mathematics (STEM) education; career and technical education; athletics; sex-based harassment, which encompasses sexual assault and other forms of sexual violence; treatment of pregnant and parenting students; treatment of LGBTQI+ students; discipline; single-sex education; and employment.[14]

II. TITLE IX AND ATHLETICS

Before Title IX's enactment, Representative Mink had communicated with Dr. Donnis Thompson of the University of Hawai'i at Manoa ("UH") regarding the lack of athletic opportunities for women at UH and in United States universities in general.[15] In the fall of 1972, after Title IX's enactment, Dr. Thompson was appointed the first UH women's athletics director and was given a $5,000 budget for the 1972–73 school year.[16] With this, Dr.

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[9] McKenna & Rose, *supra* note 2, at 6 (citing Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments That Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 326–27 (2012)).

[10] McKenna & Rose, *supra* note 2, at 6; *Fast Facts: Title IX*, NAT'L CTR. FOR EDUC. STAT. (2022), https://nces.ed.gov/fastfacts/display.asp?id=93.

[11] McKenna & Rose, *supra* note 2, at 6; *see Fast Facts: Title IX*, *supra* note 10.

[12] McKenna & Rose, *supra* note 2, at 6; *see Title IX Legal Manual*, U.S. DEP'T. OF JUST. (Aug. 12, 2021), https://www.justice.gov/crt/title-ix.

[13] McKenna & Rose, *supra* note 2, at 6–7; *see Fast Facts: Title IX*, *supra* note 10.

[14] McKenna & Rose, *supra* note 2, at 7; *see Fast Facts: Title IX*, *supra* note 10.

[15] McKenna & Rose, *supra* note 2, at 7. Dr. Thompson had been recruited by UH to coach its inaugural women's track and field team in 1961. *Id.*; *see* Kim Baxter, *Rainbow Wahine Mark 40 Years Since Title IX*, MĀLAMALAMA (Oct. 26, 2011), http://www.hawaii.edu/malamalama/2011/10/title-ix/. When Dr. Thompson left Hawai'i to pursue a doctoral degree, the track and field program folded, and when Title IX was signed into law in the summer of 1972, there were no women's athletics teams at UH. McKenna & Rose, *supra* note 2, at 7.

[16] McKenna & Rose, *supra* note 2, at 7; *A Lasting Legacy*, ESPN HONOLULU (Sept. 20, 2020), https://www.espnhonolulu.com/2020/09/22/a-lasting-legacy/. As of 1972, athletic

Thompson began the UH women's athletics program with women's volleyball and track and field teams.[17]

However, Congress had yet to focus on the possible application of Title IX to athletics.[18] Soon after the law's passage, members of Congress sought to exclude athletics from Title IX's scope due to concerns regarding the law's impact on men's athletics programs, especially revenue-producing programs.[19] On May 20, 1974, Senator John Tower of Texas proposed an amendment to exempt revenue-producing sports from Title IX;[20] this "Tower Amendment" was rejected.[21] Instead, an amendment introduced by Senator Jacob Javits of New York passed, which directed the U.S. Department of Health, Education, and Welfare (HEW), to issue regulations that contained, "with respect to intercollegiate athletic activities, reasonable provisions considering the nature of particular sports."[22]

Hence, in 1975, HEW promulgated Title IX regulations governing athletics requiring "that education institutions (1) offer male and female students equal opportunities to participate in sports; (2) allocate athletic scholarship dollars equitably; and (3) treat male and female students equitably in all aspects of athletics, including with regard to equipment and supplies; locker rooms, facilities, and practice areas; scheduling of games and practices; medical and training services; publicity; and assignment and compensation of coaches."[23] In 1979, HEW issued a Policy Interpretation on

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opportunities for high school girls in Hawai'i were also quite limited. McKenna & Rose, *supra* note 2, at 7. Although team competition and state championships existed in 1972 for high school girls volleyball and track and field, there were no high school girls' basketball and softball leagues and championships until 1977. *Id.* There is now a state corollary to Title IX for public high school athletics, which does not provide a private right of action. *See* HAW. REV. STAT. § 302A-461 (2020); McKenna & Rose, *supra* note 2, at 9.

[17] McKenna & Rose, *supra* note 2, at 7–8; *see A Lasting Legacy*, *supra* note 16. UH Manoa now also has women's teams in basketball, beach volleyball, cross country, golf, sailing, soccer, softball, swimming and diving, tennis, and water polo. McKenna & Rose, *supra* note 2, at 9; *Sports*, UNIV. OF HAW. AT MĀNOA ATHLETICS, https://hawaiiathletics.com/index.aspx.

[18] McKenna & Rose, *supra* note 2, at 8; *see* Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies are Required to Ensure Equality of Opportunity*, 14 MARQ. SPORTS L. REV. 11, 19 (2003).

[19] McKenna & Rose, *supra* note 2, at 8; *see* Samuels & Galles, *supra* note 18, at 19–21.

[20] "Tower Amendment" to Title IX: Hearings Before the Subcomm. on Educ. of the S. Comm. on Labor & Public Welfare, 94th Cong. (Sept. 16–18, 1975), https://files.eric.ed.gov/fulltext/ED136136.pdf (printed proceedings and testimonies in support and opposition).

[21] McKenna & Rose, *supra* note 2, at 8; *see* Samuels & Galles, *supra* note 18, at 40.

[22] McKenna & Rose, *supra* note 2, at 8; *see* Samuels & Galles, *supra* note 18, at 19, 40.

[23] McKenna & Rose, *supra* note 2, at 8; *see* Samuels & Galles, *supra* note 18, at 13.

Title IX, establishing a three-prong test to determine whether educational institutions' opportunities offered to male and female athletes were equal.[24] After the Department of Education, through its Office for Civil Rights, took over monitoring of Title IX compliance,[25] the three-prong test has been "clarified" several times, with varying impacts.[26]

The United States Supreme Court's opinion in *Grove City College v. Bell* significantly restricted the application of Title IX to athletics.[27] Grove City College, a private college, had refused federal financial assistance but had students who received Basic Educational Opportunity Grants ("BEOGs").[28] The Court held that because some of the college's students received BEOGs, institution-wide coverage was not triggered under Title IX.[29] In 1988, however, Congress passed the Civil Rights Restoration Act of 1987[30] over President Reagan's veto, abrogating *Grove City*'s holding.[31] It provided that if an educational institution receives federal funds, all of its programs and activities must comply with Title IX.[32]

In 1992, the Court expanded the potential impact of Title IX in *Franklin v. Gwinnett County Public Schools*, holding that a damages remedy is

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[24] McKenna & Rose, *supra* note 2, at 8; A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71418 (Dec. 11, 1979) (codified at 45 C.F.R. § 86). HEW considered the following factors to determine if an institution provided equal opportunity: 1) compliance in financial assistance (scholarships) based on athletic ability; 2) compliance in other program areas (equipment, supplies, game and practice times, etc.); and 3) compliance in meeting the interests and abilities of male and female students. S*ee* Samuels & Galles, *supra* note 17, at 14–15.

[25] Establishment of Title and Chapters, 45 Fed. Reg. 30802 (May 9, 1980) (codified at 34 C.F.R. Chs. I–VIII) (establishing the Department of Education as a new executive department and transferring functions from other departments, including the Office for Civil Rights).

[26] McKenna & Rose, *supra* note 1, at 8–9; *see* 34 C.F.R. § 106.41; *see generally History of Title IX*, WOMEN'S SPORTS FOUND. (Aug. 13, 2019), https://www.womenssportsfoundation.org/advocacy/history-of-title-ix/ (listing and summarizing the most important dates in the progressive history of Title IX, including the numerous instances where the three-part test has been clarified).

[27] *See* 465 U.S. 555, 570–75 (1984).

[28] *Id.* at 559.

[29] *Id.* at 570–75.

[30] 20 U.S.C. § 1687.

[31] McKenna & Rose, *supra* note 2, at 9; *see* Samuels & Galles, *supra* note 18, at 23, 40.

[32] 20 U.S.C. § 1687(2)(A); McKenna & Rose, *supra* note 2, at 9; Samuels & Galles, *supra* note 18, at 23; see also Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 465–66 (1999) (acknowledging that Grove City College's holding regarding institution-wide coverage is superseded by the new statute).

available for an action to enforce Title IX.[33] Although Title VII limits compensatory and punitive damages awards to a maximum of $300,000 for employers with more than 500 employees, Title IX sets no damages limit.[34]

III. WOMEN IN COLLEGE ATHLETICS: THE NEXT ERA OF TITLE IX

Title IX had, and continues to have, an undeniable impact on women's participation in college athletics.[35] Issues such as the difference in men's and women's basketball weight rooms during the 2021 NCAA basketball tournament continue to arise.[36] Nevertheless, there can be no dispute that college women now have athletic opportunities that simply did not exist before Title IX. For example, even by 2012, "[m]ore than 190,000 women were competing in intercollegiate sports—six times as many as in 1972."[37] Yet, as discussed in the Conclusion section, resources for women in college athletics have not achieved true equality.

Title IX's applicability to transgender women in college athletics has recently received significant attention.[38] In June of 2022, the Biden administration proposed new Title IX regulations that would "provide greater clarity regarding the scope of sex discrimination, including recipients' obligations not to discriminate based on . . . gender identity."[39] The proposed regulations reinforce the jurisdiction of Title IX over collegiate "programs or activities."[40] These include college athletic programs. They further clarify that "sex discrimination includes discrimination on the basis of . . . gender

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[33] 503 U.S. 60, 76 (1992).

[34] McKenna & Rose, *supra* note 2, at 9; *Remedies for Employment Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N., https://www.eeoc.gov/remedies-employment-discrimination. A 2007 lawsuit brought by Punahou graduate and former Fresno State volleyball coach Lindy Vivas (one of several women coaches fired by that university in 2004) set the record for a Title IX damages award at the time with a $5.85 million jury award. McKenna & Rose, *supra* note 2, at 9; *Hall of Fame: Linda Vivas (1975)*, PUNAHOU, https://www.punahou.edu/hall-of-fame-detail?pk=1115288.

[35] McKenna & Rose, *supra* note 2, at 9–10.

[36] *Id.*

[37] *Id.* "In 1972, there were just over 300,000 women and girls playing college and high school sports in the United States. Female athletes only received 2 percent of college athletic budgets, while athletic scholarships for women virtually nonexistent." Sarah Pruitt, *How Title IX Transformed Women's Sports*, HISTORY (June 11, 2021), https://www.history.com/news/title-nine-womens-sports#. Before 1972, only one in 27 girls played sports; by 2016, participation had increased to twenty percent. *See id.*

[38] McKenna & Rose, *supra* note 2, at 10; *see History of Title IX*, *supra* note 26.

[39] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41390 (July 12, 2022) (to be codified at 34 C.F.R. § 106).

[40] *Id.* at 41401.

identity."[41] The final revised regulations have yet to be promulgated. If promulgated as drafted, the regulations would appear to prohibit discrimination against the participation of transgender women in college athletics.

Even without the regulations, however, Title IX clearly prohibits discrimination "on the basis of sex." According to the United States Courts of Appeals for the Fourth Circuit in *Grimm v. Gloucester County School Board*:

> After the Supreme Court's recent decision in *Bostock v. Clayton County*, —— U.S. ——, 140 S. Ct. 1731, 207 L.Ed.2d 218 (2020), we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him "on the basis of sex." Although *Bostoc*k interprets Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1), it guides our evaluation of claims under Title IX. *See Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007); *cf. Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258, 129 S.Ct. 788, 172 L.Ed.2d 582 (2009) ("Congress modeled Title IX after Title VI . . . and passed Title IX with the explicit understanding that it would be interpreted as Title VI was." (citation omitted)).
>
> In *Bostock*, the Supreme Court held that discrimination against a person for being transgender is discrimination "on the basis of sex." As the Supreme Court noted, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostoc*k, 140 S. Ct. at 1741. That is because the discriminator is necessarily referring to the individual's sex to determine incongruence between sex and gender, making sex a but-for cause for the discriminator's actions. *See id.* at 1741–42. As explained above in the equal protection discussion, the Board could not exclude Grimm from the boys bathrooms without referencing his "biological gender" under the policy, which it has defined as the sex marker on his birth certificate. Even if the Board's primary motivation in implementing or applying the policy was to exclude Grimm because he is transgender, his sex remains a but-for cause for the Board's

[41] *Id.* at 41391.

> actions. Therefore, the Board's policy excluded Grimm from the boys restrooms "on the basis of sex."[42]

Thus, *Grimm* indicates that just as for Title VII employment, Title IX's prohibition of discrimination "on the basis of sex" would prohibit discrimination against transgender women.[43]

On the other hand, addressing a challenge to high school binary bathrooms on various bases, including Title IX, the United States Court of Appeals for the Eleventh Circuit in *Adams v. School Board of St. Johns County*, posits that "Title IX, unlike Title VII, includes express statutory and regulatory carve-outs for differentiating between the sexes when it comes to separate living and bathroom facilities, among others."[44] The Eleventh Circuit cites to one such carve-out within 20 U.S.C. § 1686, which allows educational institutions to "maintain separate living facilities for the different sexes."[45] The court further cites to Title IX regulation 34 C.F.R. 106.33, which allows "'separate toilet, locker room, and shower facilities on the basis of sex,' so long as the facilities 'provided for students of one sex [are] comparable to such facilities provided for students of the other sex[.]'"[46] Thus, it appears some courts could opine that Title IX regulations could carve out discrimination against transgender women in athletics.

It has yet to be determined what the final Biden administration Title IX regulations will say with respect to the participation of transgender women in college athletics. In the meantime, in January 2022, the NCAA Board of Governors updated the transgender student-athlete participation policy governing college sports.[47] According to the NCAA, "the new policy aligns transgender student-athlete participation with the Olympic Movement[]."[48] The Olympic Movement uses a "sport by sport approach," and according to the NCAA, "[t]he resulting sport-by-sport approach preserves opportunity for transgender student-athletes while balancing fairness, inclusion and

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[42] 972 F.3d 586, 616–17 (4th Cir. 2020).

[43] *See id.*

[44] 57 F.4th 791, 811 (11th. Cir. 2022).

[45] *Id.*

[46] *Id.*

[47] *Transgender Student-Athlete Participation Policy*, NCAA SPORT SCIENCE INST. (Jan. 27, 2022), https://www.ncaa.org/sports/2022/1/27/transgender-participation-policy.aspx [hereinafter *Participation Policy*].

[48] *Id.* (citing *IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations*, INT'L OLYMPIC COMM., (NOV. 2021) https://stillmed.olympics.com/media/Documents/News/2021/11/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf).

safety for all who compete."[49] It has yet to be determined whether the revised NCAA policy will comply with the yet-to-be-determined final Biden administration Title IX regulations.

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[49] *See Participation Policy*, *supra* note 44. According to the NCAA:

> Like the U.S. Olympic and Paralympic Committee, the updated NCAA policy calls for transgender student-athlete participation for each sport to be determined by the policy for the national governing body of that sport. If there is no NGB policy for a sport, it would then be determined by the policy for that sport's international federation. If there is no international federation policy, it would be determined by policy criteria (PDF) (https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf) previously established by the International Olympic Committee. Sport-specific polices are subject to ongoing review and recommendation by the NCAA Committee on Competitive Safeguards and Medical Aspects of Sports to the Board of Governors.
>
> The policy is effective immediately, with three phases of implementation.
>
> Phase One – 2022 winter and spring championships
>
> For participation in 2022 winter and spring championships, transgender student-athletes must provide documentation to the CSMAS within four weeks before the selections date for their championship.
>
> The documentation must demonstrate compliance with the 2010 NCAA policy (PDF) (https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/INC_TransgenderStudentAthleteParticipationPolicy.pdf), which calls for one year of testosterone suppression treatment. It should also document a one-time serum testosterone level that falls below the maximum allowable level for the sport in which the student-athlete is competing within four weeks of championship selections for that sport. This means that student-athletes who have already fulfilled the 2010 NCAA policy need only provide one validated serum testosterone level in this time frame.
>
> Transgender student-athletes who are participating in regular season competition (including conference championships) for the remainder of academic year 2022 remain subject to the 2010 NCAA policy only.
>
> Phase Two – 2022-23 and 2023-24 regular season and championships
>
> Beginning Aug. 1, 2022, participation in NCAA sports requires transgender student-athletes to provide documentation that meets the above criteria for the 2010 NCAA policy (PDF) (https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/INC_TransgenderStudentAthleteParticipationPolicy.pdf), plus meet the sport standard for documented testosterone levels at the beginning of their competition season and again six months later. This means that student-athletes who have already been competing do not need to demonstrate the newly

IV. CONCLUSION

The first fifty years of Title IX have seen the law's maturation, but the law's potential impact has yet to be fully realized. One area of Title IX receiving significant attention is how it will finally address the participation of transgender athletes in collegiate sports. The Department of Education's final regulations will likely be issued this year.

Opponents of participation by transgender athletes in college athletics opine specifically that transgender women have an unfair advantage, but it appears that the science regarding this contention is still unclear.[50] Because

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> adapted sport-specific testosterone levels for the entire prior year if they are not available.
>
> For participation in NCAA championships, transgender athletes must additionally provide documentation of testosterone levels to the CSMAS with laboratory work completed within four weeks of the championship selections.
>
> Phase Three – 2024-25 full implementation
>
> Beginning Aug. 1, 2024, participation in NCAA sports requires transgender student-athletes to provide documentation that meets the sport-specific standard submitted twice annually (once at the beginning of competition season and the second six months following) for one year. This process will continue annually for eligible student-athletes.
>
> For participation in NCAA championships, transgender athletes must additionally provide documentation of testosterone levels to the CSMAS with laboratory work completed within four weeks of the championship selections.
>
> Additional flexibility
>
> The Board of Governors urged the divisions to allow for additional, future eligibility if a transgender student-athlete loses eligibility based on the policy change, provided they meet the newly adopted standards.
>
> The NCAA's Office of Inclusion and Sport Science Institute also released the Gender Identity and Student-Athlete Participation Summit Final Report (PDF) (https://s3.amazonaws.com/ncaaorg/about/ncaa/Report_from_Transgender_Student-Athlete_Participation_Summit.pdf)
>
> The report assists ongoing membership efforts to support an inclusive environment that promotes and develops the mental and physical health of transgender and non-binary student-athletes in collegiate sport. The foundational principles in this report will be developed further in conjunction with the Committee to Promote Cultural Diversity and Equity, CSMAS and other core membership committees that address gender identity.

[50] *Compare* Io Dodds, *Critics Accuse Trans Swimming Star Lia Thomas of Having an Unfair Advantage. The Data Tells a Different Story*, INDEPENDENT (May 31, 2022, 4:27 PM), https://www.independent.co.uk/news/world/americas/lia-thomas-trans-swimmer-ron-desantis-b2091218.html?amp (reporting that Ms. Thomas's, a trans woman, swim times were on par for cis women swimmers); *and* Chase Strangio & Gabriel Arkles, *Four Myths About*

there are various pending and impending lawsuits on the issue, the author will not state an opinion on whether the denial of participation of transgender women in college athletics constitutes a current Title IX violation.[51] As a former women's college athlete, however, the author played with or against many women who were naturally taller, faster, and stronger. Common sense suggests that denying athletic participation opportunities to youth would be detrimental to the physical and mental health of transgender women.[52]

Finally, according to the Human Rights Campaign:

> Despite what legislatures and anti-trans activists would have you believe, transgender inclusion in sports is not a threat to women's sports. Instead, the biggest threat is schools themselves, which are underfunding womens' sports relative to mens' to the tune of millions of dollars.

Trans Athletes, Debunked, ACLU (Apr. 30, 2020), https://www.aclu.org/news/lgbtq-rights/four-myths-about-trans-athletes-debunked (stating that trans athletes do not have an unfair advantage in sports and quoting Dr. Joshua D. Safer, who stated that "[a] person's genetic make-up and internal and external reproductive anatomy are not useful indicators of athletic performance") *with* Dan Avery, *Trans Women Retain Athletic Edge After a Year of Hormone Therapy, Study Finds*, NBC NEWS (Jan. 4, 2021, 11:30 PM), https://www.nbcnews.com/feature/nbc-out/trans-women-retain-athletic-edge-after-year-hormone-therapy-study-n1252764 (reporting a study that found trans women retain an athletic edge after one year of hormone therapy).

[51] Rule 2.10(a) of the Hawai'i Revised Code of Judicial Conduct provides:

> Rule 2.10. JUDICIAL STATEMENTS ON PENDING AND IMPENDING CASES
>
> (a) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending* or impending* in any court or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

[52] *See generally 2022 National Survey on LGBTQ Youth Mental Health*, THE TREVOR PROJECT (2022), https://www.thetrevorproject.org/survey-2022/#intro (finding that 45% of LGBTQ youth seriously considered suicide in the past year, including more than half of transgender and nonbinary youth and 1 in 3 cisgender youth, 14% of LGBTQ youth attempted suicide in the past year, including nearly 1 in 5 transgender and nonbinary youth and 1 in 10 cisgender youth.; LGBTQ youth who found their school to be LGBTQ-affirming reported lower rates of attempting suicide; and LGBTQ youth who live in a community that is accepting of LGBTQ people reported significantly lower rates of attempting suicide than those who do not).

As we approach the 50th anniversary of Title IX, a recent report by USA Today revealed that colleges and universities have yet to live up to its promise.

> • Examining expenditures on travel, equipment, and recruiting for six sports with comparable men's and women's teams (basketball; softball and baseball; swimming and diving; soccer; golf; and tennis) at 107 public colleges and universities in Division 1

Across the six sports assessed, schools spent an estimated 71 cents on women's sports for every $1 spent on men's sports.

> • All in, schools spent approximately $125 million more on men's sports than women's sports
>
> • Were expenditures on football to be included, the disparity would be far greater, with schools spending over $1 billion on men's sports ($1.16 billion to be exact), over twice that of what they spent on women's sports ($576 million)[53]

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[53] *See The Real Threat to Women's Sports Isn't Transgender Athletes - It's Underfunding and Lack of Resources*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/the-real-threat-to-womens-sports-isnt-transgender-athletes-its-underfunding-and-lack-of-resources.

According to the HRC:

> Schools spent substantially more on men's sports than women's sports in all three categories assessed
>
> • Travel: 40% more for men than women ($77 million additional)
>
> • Equipment: 40% more for men than women ($26 million additional)
>
> • Recruiting: 51% more for men than women ($22 million additional)

In 4 out of the 6 sports, schools spent millions more on women's sports than men's sports, with the biggest disparity seen in basketball.

> • Overall, schools spent $0.63 cents on women's basketball for every $1 spent on men's basketball.
>
> • In the area of recruitment alone, schools spent 72% more on recruiting male basketball players than female basketball players
>
> • This was seen even in schools where women's basketball is a powerhouse –
>
> • For example, the University of Connecticut spent approximately $1.2 million more on their men's basketball team than their women's

Thus, increasing funding for women's collegiate athletics would provide greater opportunities for all women to participate in collegiate athletic programs. The next fifty years of Title IX have begun. Let the Patsy T. Mink Equal Opportunity in Education Act achieve its full potential.

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basketball team, despite U Conn being home to the most successful women's basketball team in the country

In the 15 states which have passed or have pending anti-transgender sports bills, and which had data included in the USA Today report, schools spent an additional $64 million on men's than women's sports – or approximately $0.70 on women's sports for every $1 spent on men's sports

Using the US Department of Education Equity in Athletics database, which tracks expenditures and revenue for all sports at 2,072 schools from all divisions and all 50 states, the same trends emerge:

Across all programs, schools spent over $3.9 billion more on men's sports than women's sports in the 2018-19 athletic season–translating to approximately $0.55 cents on women's sports for every $1 spent on men's sports

- Men's sports = $8,682,160,677
- Women's sports = $4,747,061,487

Among basketball programs, schools spent an additional $732.7 million on men's basketball than women's basketball

- 4 of the top 10 states with the largest disparities in funding between mens' and womens' basketball are states which recently passed anti-transgender sports legislation, or which has such a law pending.