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PREFACE

by Dalia Fuleihan

It is with great excitement that I write this preface to our re-launch issue of the NLG Review! After a year-long hiatus, my colleagues on the Editorial Board and I are thrilled to be with you once again. The past year and a half have been tumultuous to say the least. We have had to endure the fear, uncertainty, and loss brought on by the COVID-19 pandemic coupled with widespread social upheaval. The events of the last year and a half have emphasized the inequalities and injustices that plague society, not only in the United States, but worldwide.

As wealthy western countries hoarded vaccines and inoculated their populations, most of the world desperately waits their turn. In the aftermath of the murder of George Floyd, we saw the momentous outpouring of support for Black lives across the country while simultaneously witnessing the brutally violent government crackdown on Black Lives Matter protests. In complete contrast, when hordes of white supremacists stormed the capital in an attempt to violently overthrow the government, the law enforcement response was nonexistent to the point of suggesting cooperation. And most recently, the shameful acquittal of Kyle Rittenhouse for the shootings of two people during the protests against the killing of Jacob Blake. This issue of the Review brings you three exceptional articles that discuss the themes of inequality, racial justice, and the devastating effects of western imperialism—themes with which this past year's upheaval have forced us to reckon.

In *Perpetual War in Paradise*, Andrew Reid reviews Dr. Keanu Sai's book *Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*. Reid discussed the bloody history of the American conquest of the Kingdom of Hawaii in the late nineteenth century, the complete lack of legal foundation for the United States' continued occupation, and documents the movement to restore independent rule to Hawaii—a movement which continues to this day. Reid's review comes at a particularly relevant time as the Kingdom of Hawaii recently filed a complaint in federal court challenging the United States' unlawful occupation, and the NLG International Committee, along with partner organizations, filed an amicus brief in support of the Kingdom of Hawaii.¹ At such a time, Sai's book laying out the legal argument for Hawaiian independence is of particular importance.

In her article *Ready for the Phone Booth: Strategizing Movement Lawyering for Local Climate Justice Policy*, Mary Claire Kelly argues for

1 *Hawaiian Kingdom v. Biden*, 2021 WL 4956507 (D. Haw. Sep. 30, 2021).

the implementation of movement lawyering practices in the climate justice movement. Kelly demonstrates the importance of using movement lawyering to facilitate the ongoing involvement of affected communities in advocating for and forming climate justice policies. As Kelly explains, marginalized communities—especially low-income, indigenous, and communities of color—are disproportionately affected by climate change and pollution. It is our responsibility as individuals with unique access to the systems of power to use our influence and abilities to center the voices of these communities so they can take their rightful place leading advocacy and formation for the policies that their communities need.

In the last article of this issue, *How to Suppress Student Speech: The Harvard Law School Playbook*, Amanda Chan meticulously documents the concentrated and systematic effort of Harvard Law School to prevent students—especially students of color—from expressing political speech on campus. Ever since the Reclaim movement occupied Belinda Hall in 2015, the Harvard Law School administration has been tireless in their efforts to discourage and suppress student speech that sheds light on the institution's racist history and its central role in preserving the racist systems that plague our society today. Chan's article provides a useful case study that mirrors the dynamics between those with power and those pushing for change at institutions and in communities across the globe.

As we hope for an end to the pandemic in the near future and reflect on the social injustices the pandemic has forced to the forefront of our collective consciousness, these wonderful articles provide thoughtful analyses some of the movements for justice in our communities and provide useful insights into our path forward towards a more just world.

**PERPETUAL WAR IN PARADISE:
ILLEGAL OCCUPATION, HUMANITARIAN LAW,
AND LIBERATION OF THE HAWAIIAN KINGDOM**

by Andrew B. Reid¹

Book Review: The Royal Commission of Inquiry, *Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom*
(Hawaiian Kingdom, 2020) (Edited by Dr. David Keanu Sai)

He who is engaged in war derives all of his right from the justice of the cause. The unjust adversary who attacks or threatens him, -- who withholds what belongs to him, -- in a word, who does him an injury Whoever therefore takes up arms without just cause, can absolutely have no right whatsoever: every act of hostility that he commits is an act of injustice.

He is chargeable with all the evils, all the horrors of the war, ... he is guilty of a crime against mankind in general, whose peace he disturbs, and to whom he sets a pernicious example. ...

He who does injury is bound to repair the damage, or to make adequate satisfaction if the evil be irreparable ...

The restitution of conquests, of prisoners, and of all property that still exists in a recoverable state, admits no doubt when the injustice of the war is acknowledged.

If the people do not voluntarily submit, the state of war still subsists.

Emer D. Vattel (1758)²

¹ © Andrew B. Reid, 2021

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² LAW OF NATIONS (1758) (B. Kapossy and R. Whatmore, ed. 2008 (Liberty Fund, Indianapolis)), Book III, Chapter XI, page 586 (“Of the Sovereign who wages an unjust

In the late 19th Century, the islands of Hawai‘i³ (called the Sandwich Islands by explorer James Cook) were the territory of an internationally recognized nation-state, the Hawaiian Kingdom, governed by its Constitution of 1864. It was the first non-European indigenous state whose independence was recognized by the major powers, including by the United States formally in 1849. It exchanged consulates with other nations and between 1848 and 1887 entered into numerous treaties with the nations of Europe, Japan, Russia, and the United States,⁴ its chief trading partner.⁵

On January 16, 1893, the United States landed marines from the USS Boston onto the territory of the Hawaiian Kingdom and participated with some 1,500 armed non-Hawaiian mercenaries in the illegal overthrow of the Kingdom’s monarch, Queen Lili‘uokalani, in the installation of a “Provisional Government of Hawaii,” and in the U.S. occupation of the islands as a “protectorate.”

Now, to avoid any collision of armed forces and perhaps the loss of life, I do, under this protest, and impelled by such force,

War”) and Chapter XIII, page 199 (“Of Acquisitions of War, and particularly of Conquests”).

3 The term “Hawai‘i” refers to the islands while the term “Hawaii” refers to the State of Hawaii of the islands. US National Park Service, *Pacific Island Network: Geographic Names, Appendix F*, 3, <https://irma.nps.gov/DataStore/DownloadFile/575333#:~:text=The%20name%20of%20the%20state,same%20name%20is%20Hawai'i>.

4 The United States and the Hawaiian Kingdom entered into multiple treaties and agreements to govern commerce and navigation between the two nations, including those from 1826, 1842, 1849, 1875, and 1887. See Office of the Historian, *A Guide to the United States’ History of Recognition, Diplomatic, and Consular Relations by Country, Since 1776: Hawaii*, <https://history.state.gov/countries/hawaii#:~:text=On%20December%20%20%202020%2C%201849%2C%20the,Secretary%20of%20State%20John%20M>); (last accessed Nov. 12, 2021); see also,

Pub. L. 103-150, 107 Stat 1510, S.J. Res. 19 (1993). The 1849 Treaty of Washington, D.C. is found in the Appendix of the Royal Commission of Inquiry’s book reviewed here, DAVID KEANU SAI, ED., *INVESTIGATING WAR CRIMES AND HUMAN RIGHTS VIOLATIONS COMMITTED IN THE HAWAIIAN KINGDOM* (Hawaiian Kingdom, 2020), 350 (hereinafter “*INVESTIGATING WAR CRIMES*”). Article I of the Treaty provided: “There shall be perpetual peace and amity between the United States and the King of the Hawaiian Islands, His heirs and His successors.” Article X provided for the exchange of “consuls, vice-consuls, and commercial agents, of their own appointment, who shall enjoy the same privileges and powers with those of the most favored nations....”

5 See generally, RALPH S. KIKOKIHONA, *THE HAWAIIAN KINGDOM*, Vol. 2, 1854-1874, TWENTY CRITICAL YEARS (1953); *INVESTIGATING WAR CRIMES*, *supra* note 4, at Appendix, 236-310.

yield my authority until such time as the Government of the United States shall, upon facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands.

Queen Lili‘uokalani (1893)⁶

U.S. President Grover Cleveland appointed a Special Commissioner to investigate. Upon receiving the Special Commissioner’s report, Secretary of State Walter Gresham notified President Cleveland that:

The Government of Hawaii surrendered its authority under threat of war; until such time as the Government of the United States ...should reinstate the constitutional sovereign

*Should not the great wrong done to a feeble but independent State by an abuse of the authority of the United States be undone by restoring the legitimate government? Anything short of that will not, I respectfully submit, satisfy the demands of justice.*⁷

President Cleveland in response recalled the U.S. Minister to the Kingdom, ordered the resignation of the U.S. military commander of the forces, and sent a lengthy Message to Congress reiterating that “Hawaii was taken possession of by the United States ...wholly without justification”⁸ through an “armed invasion by the United States”⁹ in “an act of war,”¹⁰ that Queen Liliuokalani abdicated her authority under duress and protest, and that “[b]y an act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress, the Government of a feeble but friendly and confiding people has been overthrown.”¹¹ President Cleveland concluded, “if a feeble but friendly state is in danger of being robbed of its independence and sovereignty by a misuse of the name and power of the United States, the United States cannot fail to vindicate its honor

⁶ Queen Lili‘uokalani, *Statement to James H. Blount*, BLOUNT REPORT (1893), <http://libweb.hawaii.edu/digicoll/annexation/protest/liliu1.php> (last visited Nov. 12, 2021).

⁷ United States House of Representatives, 53rd Congress, *Executive Documents on Affairs in Hawai‘i: 1894-95*, 462-63 (1895).

⁸ Grover Cleveland, *December 18, 1893 Message Regarding Hawaiian Annexation*, MILLER CENTER, <https://millercenter.org/the-presidency/presidential-speeches/december-18-1893-message-regarding-hawaiian-annexation> (last visited Nov. 12, 2021).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

and its sense of justice by an earnest effort to make all possible reparation. These principles apply to the present case with irresistible force when the special conditions of the Queen's surrender of her sovereignty are recalled."¹²

A few weeks later, President Cleveland delivered his 1893 State of the Union Address to Congress acknowledging:

*beyond all question that the constitutional Government of Hawaii had been subverted with the active aid of our representative to that Government and through the intimidation caused by the presence of an armed naval force of the United States, which was landed for that purpose at the instance of our minister. Upon the facts developed it seemed to me the only honorable course for our Government to pursue was to undo the wrong that had been done by those representing us and to restore as far as practicable the status existing at the time of our forcible intervention.*¹³

That same day, an Executive agreement was reached with Queen Lili'uokalani for the end of the occupation and her restoration to the throne. President Cleveland so notified Congress, but Congress by resolution was able to prevent the fulfillment of the agreement. It held up the agreement between sovereigns until 1897 when President Cleveland was replaced by William McKinley. The following year arguably as a defense against Japanese Pacific expansionism, Congress passed, and President McKinley, signed a joint resolution, the Newlands Resolution, annexing Hawai'i into the United States as a territory. The resolution unilaterally abrogated all treaties the United States had signed with the Hawaiian Kingdom.¹⁴ Hawaii was then admitted into the United States in 1959 as the 50th state without any input from Native Hawaiians.¹⁵

¹² *Id.*

¹³ President Grover Cleveland, *President of the United States, State of the Union (1893)*, <http://www.let.rug.nl/usa/presidents/grover-cleveland/state-of-the-union-1893.php> (last visited Nov. 12, 2021).

¹⁴ 2nd Sess., 55th Cong., July 7, 1898; 30 Stat. at L. 750.

¹⁵ A detailed discussion by Dr. Sai of the background and context of the US invasion and annexation of the Hawaiian Islands is contained in Chapter 1 of *INVESTIGATING WAR CRIMES*, *supra* note 4, at 57-94, 104; *see also*, David Keanu Sai, *A Slippery Path Towards Hawaiian Indigeneity: An Analysis and Comparison Between Hawaiian State Sovereignty and Hawaiian Indigeneity and Its Use and Practice in Hawai'i Today*, 10 J. L. & Soc. CHALLENGES 68 (Fall 2008) (noting that the executive agreement may qualify as a treaty); RUTH I. HAZLITT, *AMERICAN IMPERIALISM AND THE ANNEXATION OF HAWAII*, (1933), *available at* <https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=2532&context=etd> (last

On November 23, 1993 – the 100th Anniversary of the “illegal overthrow” of the Hawaiian Kingdom – Congress passed, and President Bill Clinton signed, the Apology Resolution.¹⁶ By the Resolution, the United States formally apologized to Native Hawaiians for the overthrow of the Kingdom of Hawaii. It acknowledged the independence of the Kingdom of Hawaii as an independent state with full diplomatic recognition at the time of the overthrow. The Resolution confessed that the United States had engaged in a wrongful “conspiracy to overthrow the Government of Hawaii” and “invade the sovereign Hawaiian nation in an ‘act of war’ on January 16, 1893,” wrongfully imprisoning and forcing Queen Lili‘uokalani to abdicate her throne.¹⁷

Relying on the Apology Resolution, Native Hawaiians and the Office of Hawaiian Affairs brought an action to halt the alienation of lands from a public land trust established for Native Hawaiians.¹⁸ Upon reaching the Supreme Court of Hawai‘i, the Court vacated an adverse ruling by a lower court and ruled that the Apology Resolution could support a claim for the return of ceded lands to native Hawaiians.¹⁹ The ruling clouded the titles to much of the private land of Hawai‘i. The State of Hawai‘i appealed to the U.S. Supreme Court which, in *Hawaii v. Office of Hawaiian Affairs*, reversed the Hawaiian Supreme Court’s decision and held that the Resolution had no binding legal effect upon the United States or the State of Hawaii – nor conveyed any rights upon native Hawaiian claims.²⁰

The citizens of the Hawaiian Kingdom have not gone quietly into the night. After the U.S. invasion in 1893, the Provisional Government was pressured by Japan, the United Kingdom, and President Cleveland to return Queen Lili‘uokalani to power.²¹ In 1895, while the Queen was still under house arrest, her loyalists attempted an unsuccessful counter-rebellion. She and some of her jailed supporters were tried by a military tribunal of the Provisional Government and convicted of treason. She was sentenced to life imprisonment and her supporters, including two Hawaiian princes, were sentenced to death. The Queen, under this extreme pressure, agreed to abdicate

visited Nov. 12, 2021).

16 Pub. L. 103-105, 107 Stat 1510, S.J. Res. 19.

17 *Id.*

18 *Hawaii v. Office of Hawaiian Affairs*, 117 Haw. 174, 177 P.3d 884 (2008).

19 *Id.*

20 *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009).

21 Report Committee Foreign Relations, United States Senate, Accompanying Testimony, Executive Documents transmitted Congress January 1, 1893, March 10, 1891, at 2144 (known as “Black Week”).

her throne, in part, to save the lives of her supporters.²²

The resistance of the Hawaiian people to the illegal invasion, occupation, and annexation of their territory by the United States has never ceased. Shortly after the *coup de main*, Ka Hui Hawaii Aloha Aina (The Hawaiian Patriotic League) was formed by Native Hawaiian political leaders, including Joseph Nawahi, to promote Hawaiian patriotism and independence and oppose the overthrow and annexation of Hawaii to the United States.²³ In 1897, Native Hawaiians organized a massive petition drive to protest the annexation plans. Ninety-five percent of the Native population signed the petition which caused the annexation treaty to fail in the U.S. Senate.²⁴ A grassroots political and cultural campaign to establish an autonomous or independent nation or kingdom for Hawaiians continues to this day.²⁵ Two early advocates of Hawaiian sovereignty are the Ohana Council and the Nation of Hawai‘i, led by Dennis Pu‘uhonua “Bumpy” Kanahele. He and others in 1987 occupied the Makapu‘u Lighthouse “reclaiming” the land as theirs.²⁶ In 1993, he and some 300 members of the Nation of Hawai‘i occupied and extended their claim to Kaupo Beach.²⁷ They established a village called Pu‘uhonua o Waimanalo (“Refuge of Waimanalo”) as a Native Hawaiian community in 1994 through an agreement with the State of Hawai‘i.²⁸ The following year the Nation of Hawai‘i gave sanctuary to Nathan Brown, a Native Hawaiian

22 LILIUOKALANI, HAWAII’S STORY BY HAWAII’S QUEEN LILIUOKALANI, (1898).

23 *INVESTIGATING WAR CRIMES*, *supra* note 4, at 81-84.

24 NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM (2004).

25 AMANDA PACHECO, PAST, PRESENT, AND POLITICS: A LOOK AT THE NATIVE HAWAIIAN SOVEREIGNTY MOVEMENT (2005), available at, <https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/2262/Amanda%20Pacheco.pdf?sequence=1&isAllowed=y> (last visited Nov. 12, 2021).

26 Hawaii, *On this Day in 1987: Hawaiians Occupy Empty Makapu‘u Houses*, <https://www.nationofhawaii.org/news/on-this-day-in-1987-hawaiians-occupy-empty-makapuu-houses/> (last visited Nov. 12, 2021) (“This is not a protest. We have filed a deed claiming the land and are just returning home”). International law scholar Francis Boyle of the University of Illinois College of Law provided expert testimony in defense of the actions of Bumpy Kanahele. Francis Anthony Boyle, *Restoration of Independent Nation State of Hawaii Under International Law*, 7 ST. THOMAS L. REV. 723 (Summer, 1995); FRANCIS A. BOYLE, RESTORING THE KINGDOM OF HAWAII: THE KANAKA MAOLI ROUTE TO INDEPENDENCE (2014); HAUNAI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII (1999) (regarding Ka Lahui Hawaii).

27 Thomas Alex Tizon, *Fight for sovereignty gains ground in Hawai‘i*, SEATTLE TIMES (July 30, 2005), <https://www.seattletimes.com/nation-world/fight-for-sovereignty-gains-ground-in-hawaii/>.

28 *Hawaiian Cultural Village and Traditional Lo‘I Kalo Agricultural Restoration Project*, Nation of Hawai‘i, <https://www.hawaii-nation.org/puuhonua.html> (last visited Nov. 12, 2021).

activist who had refused to pay federal taxes in protest against the U.S. presence in Hawai‘i.²⁹ Ka Lāhui and Ka Pākaukau were also formed in the late 1980s as grassroots organizations advocating for Hawaiian sovereignty and independence from the United States. In 1993, Ka Lāhui led 10,000 people on a march to the Queen’s palace on the 100th anniversary of her overthrow. That same year, Ka Pākaukau convened the Ka Ho‘okolokolonui Kānaka Maoli (the “People’s International Tribunal Hawai‘i”) to put the U.S. Government on trial for the theft of Hawaii’s sovereignty and for additional related violations of international law.³⁰ Others advocating for Hawaiian independence include Nou Ke Akua Ke Aupuni O Hawai‘i (The Kingdom of Hawai‘i), attorney Poka Laenui (Hayden Burgess) of the Institute for the Advancement of Hawaiian affairs, and the “Hawaiian Kingdom Government” led by Mahealani Kahau.³¹ Liberation and the restoration of governance by a nation and peoples after over 100 years of continuing illegal occupation wrongful annexation by a superior power is an understandably messy process. However, this does not diminish the legitimacy of these many separate efforts and factions within the Hawaiian liberation and nationalist movements. Rather, it not only exposes the harms to the peoples and their nation caused by the illegal occupation but evidences the continuing vitality of the struggle and the resilience, will, and strength of the Hawaiian people.

Standing out among these many efforts to defeat the prolonged U.S. occupation of the Hawaiian Islands and restore Hawaiian governance are those of Dr. Keanu Sai and the Hawaiian Kingdom. Sai served in the U.S. Military as an artilleryman during the Gulf War when Iraq illegally invaded and occupied Kuwait, installed a puppet government, and then attempted to annex Kuwait into Iraq in violation of the Hague and Geneva Conventions. He noticed a familiar pattern: “The parallels were unbelievable, and I quickly saw Hawai‘i’s situation.”³²

29 Leila Fujimori, *Fugitive tax protestor is nabbed*, STAR BULLETIN (March 8, 2003), <http://archives.starbulletin.com/2003/03/08/news/story4.html>.

30 ‘*The Eyes of the Land*’ Nā Maka o ka Āina, Hawaiian Voice, <https://www.hawaiianvoice.com/products-page/history-and-sovereignty/the-tribunal/> (last visited Nov. 12, 2021).

31 NOELANI GOODYEAR-KA’OPUA, *A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY* (2014); MARIA ELLIOT, *WE THE PEOPLE OF KE AUPUNI O HAWAII*, available at <http://www.hawaiiankingdom.net/> (last visited Nov. 12, 2021). Leon Sui, The Minister of Foreign Affairs for the Kingdom of Hawai‘i published the booklet: *The Basis for the Restoration of the Hawaiian Kingdom* (2015).

32 Axel Beers, *Hawai‘i: The Fake State – Dr. David Keanu Sai Talks to the Maui County Council About the Ongoing American Occupation of the Hawaiian Kingdom*, MAUI TIME (May 24, 2019), <https://mauitime.com/news/politics/hawaii-the-fake-state-dr-david-keanu-sai-talks-to-the-maui-county-council-about-the-ongoing-american-occupation-of->

After completing his service and returning to Hawai‘i, Sai dived into intensive research of the history and law relating to the U.S. armed invasion, occupation, forced royal abdication, and annexation of the Hawaiian Islands.³³ He found that, as a matter of international law, Hawaii was a nation under prolonged occupation pursuant to an unjust war and not part of the United States, and that, despite the occupation and forced royal abdication, the Hawaiian Kingdom and its laws continued to and still exist. “Overthrowing the government does not equate to an overthrow of the Hawaiian Kingdom as an independent state.”³⁴

Sai entered the graduate programs at the University of Hawai‘i, Manoa, and obtained M.A. and Ph.D. degrees in Political Science focusing his studies on the prolonged illegal occupation of the Hawaiian Kingdom by the United States. In 2008, he submitted his doctoral dissertation, “The American Occupation of the Hawaiian Kingdom: Beginning the Transition From Occupied to Restored State.”³⁵ He is now on the faculty of the University of Hawai‘i where he teaches classes on the Hawaiian Kingdom.

Dr. Sai recognized that, as an existing independent state, the Hawaiian Kingdom remains governed by its own Constitution and laws that were in existence at the time of the U.S. invasion and occupation despite the Hawaiian government’s demise in 1895. In 1995, 100 years after the Queen’s forced abdication, Dr. Sai, with others, formed an entity under the Hawaiian Kingdom’s 1880 Co-Partnership Act to challenge the validity of real property titles issued by the occupying United States. They used this as an act necessitating the “reestablishment” of the Hawaiian Kingdom government under the 1864 Hawaiian Constitution, particularly Article 33 which provides for the establishment of a “regency” during the absence of the monarch.³⁶ They

the-hawaiian-kingdom/; *INVESTIGATING WAR CRIMES*, *supra* note 4, at 14.

33 Beers, *supra* note 32.

34 *Id.*

35 David Keanu Sai, *The American Occupation of the Hawaiian Kingdom: Transition from Occupied to Restored State* (December 2008) (unpublished Ph.D. dissertation, University of Hawai‘i), available at [https://www.hawaiiankingdom.org/pdf/Dissertation\(Sai\).pdf](https://www.hawaiiankingdom.org/pdf/Dissertation(Sai).pdf) (last visited Nov. 12, 2021).

36 There might be an issue over the reliance of Dr. Sai and the Hawaiian Kingdom Council of Regency on the 1864 Constitution in that the Kingdom adopted another Constitution in 1887 under the reign of King [Kalākaua](#) in an effort to avoid, or prepare for, threats from the outside. The 1887 document was drafted not by the Hawaiian Kingdom but by anti-monarchists to strip the Hawaiian monarchy of much of its authority, initiating a transfer of power to American, European and native Hawaiian elites and investors. It became known as the Bayonet Constitution for the use of the armed militia of those elites

formed the Hawaiian Kingdom Trust Company to serve as a provisional surrogate for the absentee Hawaiian government, proclaimed in 1996, and appointed acting officers as a Council of Regency under the Constitution until a meeting of the Legislative Assembly and the re-establishment of the Hawaiian Kingdom's government could occur. Dr. Sai assumed the positions of acting Minister of the Interior, Minister of Foreign Affairs *ad interim*, and chairman of the Hawaiian Kingdom Council of Regency.³⁷

The Council of Regency took on the tasks of (1) verification of the Hawaiian Kingdom as an independent state and subject of international law; (2) exposure of Hawaiian Islands statehood within the framework of international law and the laws of occupation; and (3) restoration of the Hawaiian Kingdom as an independent state and a subject of international law.³⁸

In August 1999, a complaint was filed with the Permanent Court of Arbitration, The Hague, against the Hawaiian Kingdom in order to obtain a ruling recognizing the Hawaiian Kingdom as an independent state obligated to defend its subjects from the law of the occupying power, the United States. Following arguments by Dr. Sai as Agent for the Hawaiian Kingdom's Council of Regency, the Permanent Court of Arbitration accepted the complaint as a dispute between a State and a private party thereby treating the Hawaiian Kingdom as an independent state subject to international law, and the Council of Regency as the interim government of the Hawaiian Kingdom.³⁹ However, the action was dismissed by the Court ruling that the United States was an indispensable party to the claims.⁴⁰

In July 2001, the Hawaiian Kingdom by Agent Sai acting pursuant to

to intimidate and force King [Kalākau](#) to sign it or be deposed. *INVESTIGATING WAR CRIMES*, *supra* note 4, at 79-81. In fact, it appears that it was the expressions of Queen Lili'uokalani of her intent to repeal the 1887 Constitution that triggered the mercenary and U.S. invasion and takeover of the Kingdom in 1893. See KIKOKIHONA, *supra* note 5; LILIUOKALANI, *supra* note 22; David W. Forbes, HAWAIIAN NATIONAL BIBLIOGRAPHY, 1780-1900 (2003), 232-233; ANNE FEDER LEE, THE HAWAII STATE CONSTITUTION: A REFERENCE GUIDE (1993), 4-5. The circumstances surrounding the adoption of the 1887 Constitution may justify assertions of its invalidity and the reliance upon the 1864 Constitution.

37 *INVESTIGATING WAR CRIMES*, *supra* note 4, at 18-22, 55; see also Hawaiian Kingdom, <https://www.hawaiiankingdom.org/govt-reestablished.shtml> (last visited Nov. 12, 2021).

38 Beers, *supra* note 32.

39 *INVESTIGATING WAR CRIMES*, *supra* note 4, at 24; Lance Paul Larsen v. Hawaiian Kingdom, <https://www.alohaquest.com/arbitration/log.htm> (last visited Nov. 12, 2021).

40 *INVESTIGATING WAR CRIMES*, *supra* note 4, at 25-27; see also Bernard H. Oxman (ed.), *Lance Paul Larsen v. The Hawaiian Kingdom*, 95 AM. J. INT'L L. 927 (2001).

Article 35(2) of the U.N. Charter filed a complaint with the United Nations Security Council against the United States asserting violations of the Laws of War, the 1859 Hawaiian-U.S. Treaty, Article 43 of the 1907 Hague Conventions IV and V (on the law of occupation), and Article 19, section 3(a) of the Draft Articles of State Responsibility.⁴¹ The complaint requested an Article 36(1) investigation into the Hawaiian Kingdom question and recommendation of appropriate procedures or methods of adjustment.⁴² In August 2012, Agent Sai for the Hawaiian Kingdom and acting under Article 35(2) of the U.N. Charter as a non-Member State filed a Protest and Demand with the United Nations General Assembly challenging the “prolonged and illegal” occupation of the Hawaiian Islands by the United States.⁴³ The U.N. Protest and Demand asserts further claims against those States who had signed treaties with the Hawaiian Kingdom and against all 173 member States of the United Nations to compel them to act in conformity with the U.N. Charter and their international obligations, including the duty of all States to bring an end to the United States’ serious breaches of humanitarian and human rights law and *jus cogens* norms.⁴⁴

Over the past 25 plus years, the Hawaiian Kingdom and Dr. Sai have been building support for their effort to end the U.S. occupation of the Ha-

41 *Hawaiian Kingdom v. United States of America*, United Nations Security Council (2001), available at

https://www.hawaiiankingdom.org/pdf/Hawaiian_UN_Complaint.pdf (last visited Nov. 12, 2021); United Nations, *Charter of the United Nations*, 24 October 1945, 1 U.N.T.S. XVI, art. 35(2); International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, art. 43; International Conferences (The Hague), *Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, 18 October 1907; International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, art. 19, sec. 3.

42 *Id.*

43 *Protest and Demand by The Hawaiian Kingdom for Serious Breaches of Obligations under Preemptory Norms of General International Law Committed by The United States of America, etc.*, UN General Assembly, available at https://www.hawaiiankingdom.org/pdf/UN_Protest.pdf (last visited Nov. 12, 2021).

44 *Id.*; see also *INVESTIGATING WAR CRIMES*, *supra* note 4, at 15-17 (discussing war crimes as *jus cogens* norms); Valentina Azarova, *Israel’s Unlawfully Prolonged Occupation: Consequences Under an Integrated Legal Framework*, European Council on Foreign Relations, 11-13 (June 2017), available at https://www.ecfr.eu/page/-/ISRAELS_UN-LAWFULLY_PROLONGED_OCCUPATION_ECFR216.pdf (last visited Nov. 12, 2021); Valentina Azarova, *From Discretion to Necessity: Third State Responsibility for Israel’s Control of Stay and Entry into Palestinian Territory*, 6 J. OF HUM. RTS. PRAC. 327-55 (No. 2, 2014).

waiian Islands.⁴⁵ Significantly, Dr. Alfred-Maurice de Zayas, a former senior lawyer and then an independent expert with the Office of the United Nations High Commissioner for Human Rights and the Chief of Petitions and former Secretary of the United Nations Human Rights Committee, opined in a 2018 communication to the State of Hawai‘i Judiciary that:

...the lawful political status of the Hawaiian Islands is that of a sovereign nation-state in continuity; but a nation-state that is under a strange form of occupation by the United States resulting from an illegal military occupation and a fraudulent annexation. As such, international laws (the Hague and Geneva Conventions) require that governance and legal matters within the occupied territory of the Hawaiian Islands must be administered by the application of the laws of the occupied state (in this case, the Hawaiian Kingdom), not the domestic laws of the occupier (the United States).⁴⁶

Many others within the international community have informally and formally acknowledged the prolonged occupation and annexation of the Hawaiian Islands by the United States as in violation of international law.⁴⁷

The Hawaiian Kingdom and its officers and supporters have also sought to force the issue in the courts of the State of Hawai‘i, its counties, and U.S. federal court. In *State of Larsen v. Hawaii*,⁴⁸ and *State of Hawaii v. Armitage*,⁴⁹ for example, criminal defendants challenged the jurisdiction of the State of Hawai‘i over them by contending, under international law, that the Hawaiian Kingdom still existed as an independent sovereign. While dismissing those challenges, the state courts did acknowledge that were the defendants able to provide a sufficient factual basis for the existence of the Hawaiian Kingdom they “may be able to argue that the courts of the State of Hawai‘i lack jurisdiction over him or her.”⁵⁰ In 2018, the Hawaiian Kingdom Council of Regency filed in the U.S. District Court for the District of Colum-

45 *INVESTIGATING WAR CRIMES*, *supra* note 4, at 28-29, 32-34.

46 *Id.*, at 33.

47 *Id.*, at 28-29, 32-35; S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. (1994); Boyle, 7 ST. THOMAS L. REV. 723, *supra* note 26; BOYLE, RESTORING THE KINGDOM OF HAWAII, *supra* note 26; *see also* *INVESTIGATING WAR CRIMES*, *supra* note 4, at 33 (Zayas letter to UN).

48 77 Haw. 219, 220, 883 P.2d 641, 642 (1994).

49 132 Haw. 36, 57, 319 P.3d 1044 (2014).

50 *Id.*

bia a mandamus action against President Donald Trump seeking to enjoin the President from acting in derogation of the Hague Convention IV, the Geneva Convention IV, international humanitarian laws, and customary international law.⁵¹ The federal court refused to hear the claims ruling that the international law did not create a right of action and that the matter was subject to the “political question doctrine.”⁵² Undeterred, the Hawaiian Kingdom, on May 20, 2021, filed a complaint with the U.S. District Court for the District of Hawai’i asserting claims against President Biden, Biden Administration officials, the Governor of Hawai’i, Hawai’i state and county officials, and various diplomatic representatives of numerous countries.⁵³ The complaint challenges the U.S. military occupation of Hawai’i and seeking formal legal recognition of the continued existence and sovereign authority of the Hawaiian Kingdom under international humanitarian and treaty law and the Supremacy Clause of the U.S. Constitution and the enforcement of the Hawaiian Constitution of 1864 and the laws of the Hawaiian Kingdom.⁵⁴ That matter is pending before the federal District Court.

This immense 25-year effort of Dr. Sai and the Council of Regency to end the illegal U.S. occupation of the Hawaiian Islands, and the law supporting it, is compiled in the Hawaiian Kingdom Royal Commission of Inquiry’s book, *Investigating War Crimes and Human Rights Violations Committed in the Hawaiian Kingdom (“Investigating War Crimes”)* published this year and edited by Dr. Sai. The book is supplemented with an Appendix containing relevant law of the Hawaiian Kingdom, including its 1864 Constitution, many of the various treaties between the Hawaiian Kingdom and other nations of the world, including the 1849 Treaty with the United States, various

constituting documents and declarations of the interim Hawaiian Kingdom, and the key relevant conventions of international law, the Hague Convention IV of 1907 (on the laws and customs of war) and the Geneva Convention IV of 1949 (on the protection of civilians in time of war).

Investigating War Crimes makes both a compelling and exhaustive factual and legal argument for the liberation of the Hawaiian Kingdom from prolonged illegal U.S. occupation. In contrast to many other liberation struggles, the existence of the occupied State as a recognized nation-state at the

⁵¹ *Sai v. Trump*, 325 F.Supp.3d 68 (D.D.C. 2018); *INVESTIGATING WAR CRIMES*, *supra* note 4, at 40-42.

⁵² *Id.*

⁵³ *Hawaiian Kingdom v. Joseph Robinette Biden, Jr.*, United States District Court for the District of Hawai’i (Case No. 21-cv-00243).

⁵⁴ *Id.*

time of occupation is factually and legally beyond question – as admitted to by the United States in its Apology Resolution and the many treaties and agreements it entered into with the Hawaiian Kingdom.⁵⁵ Likewise, the illegality of the invasion, occupation, and annexation of the Hawaiian Islands, and the overthrow of the Hawaiian Kingdom’s monarchy, by the United States is factually and legally beyond question – as admitted to by the U.S. Apology Resolution.⁵⁶ There can be no question that the invasion, occupation, and annexation of the Hawaiian Islands was an unjust and illegal act of war by the United States against the Hawaiian Kingdom. Again, that fact and conclusion of law is openly and candidly admitted by the United States both contemporaneously in 1893 and 100 years later in the U.S. Apology Resolution.⁵⁷

Perhaps daunted by the immensity of the national liberation struggle but more likely as an effort to preserve the survival of Native Hawaiians and their culture, or to preserve the State of Hawai‘i, some Hawaiians have considered taking advantage of the domestic and international laws that provide some protection to Native nations and peoples also occupied by the United States. Beginning in 2000, Hawaiian Senator Daniel Akaka annually submitted to Congress various bills to establish U.S. federal recognitions of Native Hawaiians similar to “Indian tribes.” The bills have been opposed for many reasons, including by those who see the bills as race-based and unconstitutional⁵⁸ and by Native Hawaiian sovereignty activists who believe it blocks their attempts to establish Hawaiian independence from the United States.⁵⁹ In 2015, the U.S. Department of the Interior announced the creation of a Native Hawaiian Roll Commission and a procedure to recognize a Native Hawaiian government and the adoption of a Native Hawaiian constitution. The effort was dropped after the collection of Native Hawaiian names for the Roll was halted by an interim order by U.S. Supreme Court Justice Anthony

55 Contrast this, for example, with the historical context of the struggle of the Palestinian people for liberation from occupation by Israel where the Palestine Declaration of Independence was not issued until 1988 and the State of Palestine still lacks recognition from many other states and full state status within the United Nations.

56 Compare this, for example, with the US invasion and occupation of Japan and the replacement of its government following the Second World War in response to Japan’s attack upon the United States.

57 This can be contrasted with occupation by settler colonialism which, if not pursuant to war, would not necessarily be subject to the laws of war, humanitarian law, but rather to the principles of human rights law. Both international legal regimes consider the concepts of wrongful occupation and the collective right of peoples to self-determination, but within different legal contexts.

58 See *Rice v. Cayetano*, 528 U.S. 495, 120 S.Ct. 1044, 145 L.Ed.2d 1007 (2000).

59 *Akaka Bill*, <https://www.congress.gov/bill/111th-congress/house-bill/2314> (last visited Nov. 12, 2021).

Kennedy.”⁶⁰ Justice Kennedy had previously held in *Rice v. Cayetano* regarding Native Hawaiian ancestry voting privileges that “ancestry can be a proxy for race.”⁶¹

Many of those involved in the Hawaiian liberation movement also recognize that Native peoples subject to domestic federal (colonial) Indian law and to the international law of indigenous peoples suffer from additional barriers to their liberation from U.S. occupation.⁶² Federal Indian law still follows the Nineteenth Century colonial and racial *sua generis* doctrines of discovery, U.S. trust authority, and U.S. plenary power and colonial rule over Native nations and peoples which were established by the Marshall Trilogy.⁶³ Under these fundamental colonial doctrines, current today, Native nations as a matter of law are considered “domestic, dependent, nations” possessed under the colonial doctrine of discovery of only a right to occupy, not own, their lands and territory, and are considered to be a “savage,” “uncivilized,” peoples incapable of handling their own affairs and therefore in need a guardian (the United States) with plenary authority over them, including the right to abrogate treaties at will and with impunity.⁶⁴

In contrast, the Hawaiian Kingdom possesses major historic and legal advantages over Native nations in that the Hawaiian Islands separated from the mainland by an ocean have never been subjected to the colonial claim of a “right of discovery” by the United States or its predecessor colonial powers that was imposed on Native territories to justify settler colonialism. Therefore, the Hawaiian Kingdom remained an independent sovereign fully possessed of its territory and lands at the time of the U.S. invasion. The claims of the peoples of the Hawaiian Islands for liberation from U.S. occupation as incident to war are not complicated by arguments of occupation under the doctrine of discovery and settler colonialism. The former is generally governed by humanitarian law while the latter is largely governed by the collective right of peoples to self-determination under international human rights law.⁶⁵ It postures the discussion of the Hawaiian liberation as a “political question,” a dispute between nations, rather than a liberation from collective

60 *Rice*, 528 U.S. at 514; *Makekau v. Hawaii*, 2017 WL 2450159 (D.Haw. 2017).

61 *Rice*, 528 U.S. at 514.

62 *See Sai*, *supra* note 15.

63 *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nations v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

64 *Id.*; *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

65 *See* S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES (2009); U.N. Declaration on the Rights of Indigenous Peoples, A/RES/61/295 (2007); *INVESTIGATING WAR CRIMES*, *supra* note 4, at 212-214.

racial and ethnic oppression by a colonial power.⁶⁶ Unlike indigenous nations and peoples, perhaps due to the Hawaiian Islands' escape from being subjected to a colonial doctrine of discovery, the Hawaiian people were not held, factually or as a matter of law, to be savages or heathens incapable of owning property or organizing as a nation-state and a member of the community of nations.⁶⁷

Similarly, colonial rule and racial and ethnic discrimination have permeated and still infest the law of nations, international law, and even human rights law. In *Cayuga Indians (Great Britain) v. United States* (1926),⁶⁸ a UN arbitral tribunal opined that an "[Indian] tribe is not a legal unit under international law. ... So far as an Indian tribe exists as a legal unit, it is by virtue of the domestic law of the sovereign nation within whose territory the tribe occupies the land, and so far only as that law recognizes it." As late as 1989, the International Law Organization's seminal Indigenous and Tribal Peoples Convention provided: "The use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law."⁶⁹

U.N. General Assembly Resolution 1514 (1960), "Declaration on the granting of independence to colonial countries and peoples," after condemning and directing all States to immediately eliminate "all forms and manifestations" of colonialism, sanctified the "territorial integrity" of countries to excuse its application to indigenous peoples and nations found within the territories of colonial powers⁷⁰ – ignoring the fact that by definition it was the colonizing power that invaded and breached the territorial integrity of the pre-existing indigenous nations. This colonizing concept has been referred to as the "blue water rule" or the "salt water thesis" which asserts that to be eligible for decolonization, the presence of "blue water" between the colony and the colonizing country or a discrete set of boundaries would be needed.⁷¹ It emerged after Belgium attempted to move the United States to decolonize Native nations and peoples. This same colonial escape provision was inserted

66 See, e.g., *Early Warning and Urgent Action Procedure*, U.N. Comm. on the Elimination of Racial Discrimination [CERD], *Decision I* (68); U.N. Doc. CERD/C/USA/DEC/1 (April 11, 2006); *Mabo v. Queensland (No. 1)*, 166 C.L.R. 186 (H.C.A. 1988).

67 This "race" versus "political status" distinction was the logic used by the United States Supreme Court per Chief Justice Roger Taney in its notorious *Dred Scott* decision. *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1856).

68 6 R.I.A.A. 173.

69 C169, 27 June 1989, Art. 1, Sec. 3.

70 A/res 1514 (XV) of 14 December 1960, par. 6.

71 U.N.G.A. Resolution 637 (VII) of 16 December 1952.

into the recent United Nations Declaration on the Rights of Indigenous Peoples (2007) despite other provisions that declared that “Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity,” and that “Indigenous peoples have the right to self-determination [which] by virtue of that they freely determine their political status...”⁷² Given the location of the Hawaiian Islands, it would appear that this colonial blue or salt water rule could not be applied to the Hawaiian Kingdom in contrast to the situation of the Native nations and peoples found within the arbitrary colonial boundaries of the United States.

Thus, even under international human rights law and despite the rights of self-determination⁷³ and freedom from racial or ethnic discrimination⁷⁴ having the status of customary international law or *jus cogens* norms, indigenous peoples have remained saddled with a colonial past and a less-than-equal or less-full right to self-determination or freedom from discrimination. It is not surprising then that Hawaiians engaged in the struggle for the liberation of their island kingdom from U.S. occupation have sought to distinguish their situation from that of the colonial occupation of indigenous nations and peoples.⁷⁵ With the U.S. admissions of unjust war and illegal occupation and annexation in its formal Apology Resolution, the peoples of Hawai‘i already stand on third base with home plate in sight. There is no statute of limitations on gross violations of humanitarian or human rights law. The primary question, then, is whether the prolonged, 125-year occupation and annexation can negate the legitimate claims of the Hawaiian peoples for liberation and independence from the United States. It is an issue of State continuity.

The Hawaiian Kingdom Royal Commission of Inquiry’s book, *Investigating War Crimes*, attacks this question head on. Initially, in Chapter 1, Dr. Sai establishes the continuing existence, vitality, and applicability of the domestic law of the Hawaiian peoples expressed primarily in the 1864 Hawaiian Constitution.⁷⁶ Next, in Chapter 2, he elaborates upon the legal

72 A/RES/61/295, art. 2, art. 3, and art. 46.

73 See, e.g., Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, International Court of Justice (Advisory Opinion), 25 February 2019, at 294-334 (Separate Opinion of J. Robinson).

74 See RESTATEMENT OF THE LAW, FOURTH: FOREIGN RELATIONS LAW OF THE UNITED STATES, §702; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1971)* I.C.J. REP. 16, at 57.

75 Sai, *supra* note 15; *INVESTIGATING WAR CRIMES*, *supra* note 4, at 212-214.

76 *INVESTIGATING WAR CRIMES*, *supra* note 4, at 57-94; see also Matthew Craven,

consequences of the U.S. “belligerent” occupation of the Hawaiian Islands pursuant to an unjust and illegal war. Under the laws of war, these include U.S. obligations under *jus in bello* which governs the way in which warfare is conducted including the occupation of another nation pursuant to an armed conflict or war (the law of belligerent or military occupation). International humanitarian law (“IHL”), found principally in the 1907 Hague Conventions IV and V, and the 1949 Geneva Convention V, is synonymous with *jus in bello* and seeks to minimize suffering in armed conflicts, notably protecting and assisting all victims of armed conflict to the greatest extent possible. It applies irrespective of the reasons for the conflict, of whether not the war as a just one (*jus ad bellum*).⁷⁷ Significant to this discussion, Dr. Sai notes the duty under IHL of third state neutrality, which obligates states not parties to the conflict to prevent with the means at their disposal continuing violations by a belligerent state such as through the recognition of a puppet regime, like the 1893 Provisional Government and the so-called Republic of Hawai‘i, unlawfully created by an act of war.

Dr. Sai then turns to and establishes the obligation of the occupying state, the United States, under IHL to administer the law of the occupied state, the Hawaiian Kingdom. Related to the occupation, he also covers numerous impacts, some amounting to war crimes or human rights violations against the Hawaiian people, that are incident to the U.S. occupation and further violations of IHL. While formally admitting and apologizing to the Hawaiian people for its unjust war and illegal occupation and annexation of the Islands, it is clear that the United States holds the position that its violations of the laws of war and its possession of and sovereignty over the Islands have been cured and settled by the passage of time and that it is too late to turn back the clock. It is one thing to demonstrate the IHL obligations of the United States following its occupation of the Hawaiian Islands but another to establish that such obligations have continued to today, some 125 years later.

The issue of the State continuity of the Hawaiian Kingdom from 1983 to 2020 as a matter of law is addressed by Dr. Matthew Craven in Chapter 3 of *Investigating War Crimes*.⁷⁸ Dr. Craven is a professor of international law former Dean of the Faculty of Law and Social Sciences at the SOAS University of London. He is the Director of the Centre for the Study of Colonialism,

Continuity of the Hawaiian Kingdom (July 12, 2002), available at https://hawaiiankingdom.org/pdf/Continuity_Hawn_Kingdom.pdf (last visited Nov. 12, 2021).

⁷⁷ *INVESTIGATING WAR CRIMES*, *supra* note 4, at 97-121; *see also* Steven R. Ratner, *Foreign Occupation and International Territorial Administration: The Challenges of Convergence*, 61 *EUROPEAN J. OF INT’L L.* 695 (no. 4, 2005).

⁷⁸ *Id.* at 125-49.

Empire and International Law. On the issue of State continuity, Dr. Craven notes that the determination of this question as to Hawai‘i implicates as a matter of international law U.S. sovereignty over the Hawaiian Islands and the Hawaiian population, the existence in the Hawaiian people of the right to self-determination in a manner prescribed by international law, the current validity and effectiveness of the treaties made between the United States and the Hawaiian Kingdom, and the ownership of State property. As summarized by Dr. Craven:

*If the State concerned retains its identity it can be considered to ‘continue’ and vice versa. Discontinuity, by contrast, supposes that the identity of the State has been lost or fundamentally altered such that it has ceased to exist as an independent state and that, as a consequence, rights of sovereignty in relation to territory and population have been assumed by another ‘successor’ state (to the extent provided by the rules of succession).*⁷⁹

He notes that under the law of State continuity, there is a presumption of continuity that places the burden upon the United States to make a valid demonstration of legal title, or sovereignty. “The survival of the Hawaiian Kingdom is, it seems, premised upon the legal ineffectiveness of present or past US claims to sovereignty over the Islands.”⁸⁰ That will depend upon the establishment of two legal facts: that the Hawaiian Kingdom existed as a recognized entity for the purposes of international law prior to the US invasion, and that intervening events have not been such as to deprive it of that status.⁸¹

On the first essential legal fact, after examining the pre-invasion history of the Hawaiian Kingdom, Dr. Craven was able to conclude that “[t]here is no doubt that, according to any relevant criteria (whether current or historical), the Hawaiian Kingdom was regarded as an independent State under the terms of international law for some significant period of time prior to 1893”⁸² On the second and obviously more difficult legal fact, Dr. Craven examined the legitimacy of the intervening event, the U.S. invasion, occupation, and annexation of the Islands. The determination of this legal fact turns upon the grounds the United States would likely assert to justify its possession of and sovereignty over the Islands: the original acquisition of the Islands in 1898 by cession from the Provisional Government or annexation;

79 *Id.* at 126.

80 *Id.* at 128-29.

81 *Id.* at 129.

82 *Id.* at 131.

the confirmation of the exercise of U.S. sovereignty over the Islands by plebiscite in 1959; and, the continuous and effective display of U.S. sovereignty since 1898 to the present day (acquisitive prescription in the form of adverse possession).⁸³

After examining the history of the U.S. acquisition of the Islands, on the cession of the Islands to the United States by the Provisional Government Dr. Craven could find no support for an argument by the United States that the cession was legitimate as the Provisional Government, being an illegal body engaged in an unlawful scheme with the United States, lacked the required competence to cede the Islands to the United States.⁸⁴ He reasoned that, due to the intervening possession of the Islands by the Provisional Government, the facts did not support an argument of forcible annexation by the United States as it was not at war with the Provisional Government. Further, the United States was prohibited by the Treaty of 1849 from unilaterally annexing the Islands, but could do so only by a treaty of cession with the Hawaiian Kingdom.⁸⁵ Dr. Craven next applied international law concepts of belligerent occupation and peaceful occupation (occupation *pacifica*) to the facts of the U.S. occupation and noted that under the law of the time, now expressed in Article 47 of the 1949 Geneva Convention, the United States as a belligerent occupying power could not have acquired sovereignty over the Hawaiian Islands in 1898.⁸⁶

In 1945, pursuant to Article 73 of the U.N. Charter, Hawai‘i was listed as a Non-Self-Governing Territory administered by the United States. Dr. Craven related that the U.N. Charter made the principle of self-determination applicable to all such territories, including Hawai‘i.⁸⁷ He then examined the 1959 Plebiscite (on the admission of Hawai‘i into the Union as a state) to determine whether or not it was an effective exercise of self-determination by the Hawaiian people. Dr. Craven noted that the Plebiscite failed to distinguish between citizens of the Hawaiian Kingdom in 1898 and those colonial residents that arrived on the Islands after annexation and that the Plebiscite failed to provide a proper choice between integration or independence, both of which made the Plebiscite fatally defective as a proper expression of self-

83 *Id.* at 135.

84 *Id.* at 138-39.

85 *Id.* at 140.

86 *Id.* at 141-42.

87 *Id.* at 143-44. There has been a proposal that Hawai‘i be re-inscribed on the UN’s list of non-self-governing territories as a solution to the existing dispute. Ramon Lopez-Reyes, *The Re-Inscription of Hawaii on the United Nations’ List of Non-Self-Governing Territories*, 28 PEACE RESEARCH 71-96 (no. 3, August 1996).

determination.⁸⁸

Finally, on the issue of whether the United States could acquire the Hawaiian Islands by “effective occupation” or adverse prescription, assuming that was a recognized method under international law of acquiring territory and sovereignty, Dr. Craven raised the defense that protesting in any way that might be reasonably required under the circumstances should effectively defeat a claim of prescription. He cited the Queen’s “vociferous” protestations at the time and on subsequent occasions. He further highlighted a general rule of law, acquiescence on the part of the occupied State is the “essence” of the prescriptive process. Because the monarchy was overthrown, such acquiescence thereafter was an impossibility as no government existed. The United States by the Apology Resolution itself formally acknowledged that the Hawaiian people never directly relinquished their claims to inherent sovereignty over the Islands as a peoples.⁸⁹

Having established State continuity as a matter of fact and international law, *Investigating War Crimes* makes a compelling claim for the present existence of the State, the Hawaiian Kingdom, the survival of its laws, and the currently and continuing illegal occupation of the Hawaiian Islands by the United States.

Occupations pursuant to unjust wars generate not only violations of international humanitarian law but usually by the nature of such wars specific war crimes as well. Dr. Sai lists many crimes and the elements to prove each as they relate to the prolonged illegal occupation of the Hawaiian Islands by the United States.⁹⁰ In Chapter 4 of *Investigating War Crimes*, Dr. William Schabas examines war crimes and the international law that governs them, primarily Hague Convention II (1899), Hague Convention IV (1907), and Geneva Convention IV (1949). Dr. Schabas is a professor of international and human rights law at Middlesex University in London, at Leiden University,

⁸⁸ *INVESTIGATING WAR CRIMES*, *supra* note 4, at 142-46.

⁸⁹ *Id.* at 146-48. Under IHL, military occupation was to be temporary and justified by military necessity. A prolonged occupation without a showing of military necessity is, by definition, a violation of IHL. *See* Yutaka Arai-Takahashi, *Unearthing the Problemized Terrain of Prolonged Occupation*, 52 *ISR. L. REV.* 1, 52 (no. 2, 2019); Azarova, 3, 5, *supra* note 44.; Valentina Azarova, *Towards a Counter-Hegemonic Law of Occupation: The Regulation of Predatory Interstate Acts in Contemporary International Law*, 20 *YEARBOOK ON INT’L HUMANITARIAN L.* 113-160 (2017); Michael Bothe, *Expert Opinion Relating to the Conduct of Prolonged Occupation in the Occupied Palestinian Territory*, Norwegian Refugee Council (June, 2017), <https://www.nrc.no/resources/legal-opinions/expert-opinion-relating-to-the-conduct-of-prolonged-occupation-in-the-occupied-palestinian-territory/>.

⁹⁰ *INVESTIGATING WAR CRIMES*, *supra* note 4, at 49-51.

and the National University of Ireland (emeritus). He is the honorary chairman of the Irish Centre for Human Rights, the recipient of many other honors, and the author of more than twenty books dealing in whole or part with international human rights law.

Dr. Schabas restricted his discussion to the nature of war crimes and to crimes that currently exist (i.e., continuing or more recent crimes) opining that war crimes that may have been committed by individuals at the time the U.S. occupation of the Hawaiian Islands began cannot today be prosecuted. The crimes considered by Dr. Schabas include usurpation of sovereignty, compulsory enlistment of soldiers among the inhabitants of the occupied territories (the crime of denationalization), pillage, confiscation and destruction of property, exaction of illegitimate or exorbitant contributions (such as through the occupying powers collection of taxes, dues, tolls, etc.), deprivation of fair and regular trial, unlawful deportation or transfer of civilians from the occupied territory, and unlawful transfer of populations to the occupied territory.⁹¹ He does not analyze or relate any specific acts or persons arising out of the U.S. invasion and occupation of the Hawaiian Islands, apparently leaving that to the Royal Commission of Inquiry and a future international criminal tribunal.⁹² However, the discussion is valuable in understanding how war crimes arise out of occupation and may survive or subsequently occur despite prolonged occupation and even annexation.

In the final chapter of *Investigating War Crimes*, Chapter 5, Dr. Federico Lenzerini examines in great detail international human rights law and self-determination as it may relate to the U.S. invasion and occupation of the Hawaiian Islands and its overthrow of the monarchy.⁹³ Dr. Lenzerini is a professor of public international law, European Union law and international

91 *Id.* at 155-67.

92 “The purpose of the Royal Commission shall be to investigate the consequences of the United States’ belligerent occupation, including with regard to international law, humanitarian law and human rights, and the allegations of war crimes committed in that context.” *INVESTIGATING WAR CRIMES*, *supra* note 4, at 8. These investigations are to be done by reports of the RCI. At this particular stage, the RCI has completed three “preliminary reports” regarding “international law, humanitarian law and human rights.” The first preliminary report addresses how the RCI will conclude whether the elements of war crimes have been met by a war criminal and the charge of *dolus directus* in the first degree or second degree, and *dolus directus eventualis*. The second preliminary report addresses the authority of the Council of Regency and its formation of the Royal Commission of Inquiry. And the third preliminary report addresses the legal status of land titles throughout the islands. Reports of particular war crimes committed will follow along with its recommendations for indictments. See Hawaii, <https://hawaiiankingdom.org/royal-commission.shtml> (last visited Nov. 12, 2021).

93 *INVESTIGATING WAR CRIMES*, *supra* note 4, at 173-216.

human rights law at the University of Siena (Italy) and of intercultural human rights at the St. Thomas University School of Law (USA). He is a UNESCO consultant and has been the Rapporteur of the International Law Association on the rights of indigenous peoples. He is the author of several books on human rights, culture, and reparations.

Although the primary focus of the Royal Commission of Inquiry is the use of the law of war, international humanitarian law, to compel the end of U.S. occupation and the restoration of the Hawaiian Kingdom and sovereignty over the islands of Hawai‘i, the facts surrounding the invasion and prolonged and continuing occupation of the Hawaiian Islands along with the overthrow of the monarchy do implicate a great number of human rights violations some of which are detailed by Dr. Lenzerini in Chapter 5. Dr. Lenzerini first provides a general discussion of the development and scope of human rights law manifested in the U.N. Charter, the *Universal Declaration on Human Rights* (1948), and other human rights treaties including the *International Convention on Civil and Political Rights* (1966), and the *International Covenant on Economic, Social, and Cultural Rights* (1966), the *American Declaration on the Rights and Duties of Man* (1948), and the *American Convention on Human Rights*.⁹⁴ He notes that fundamental human rights may rise to the level of a *jus cogens* norm, a preemptory norm from which no State may deviate or to an *ergo omnes* obligation that requires State action.⁹⁵ Dr. Lenzerini further elaborates on the applicability of human rights protections and obligations during armed conflict and belligerent occupation.⁹⁶

Obviously under a belligerent occupation, whether viewed in the context of humanitarian law principles or those within a human rights framework, the primary fundamental right violated is the collective right of peoples to self-determination, their right to freely determine their own destiny as a peoples, particularly in political terms. Dr. Lenzerini expounds on the history and source of this right as well as its nature and scope before applying it to the situation at hand.⁹⁷ He emphasizes that the “kind” of self-determination that has been developed to apply to indigenous peoples under colonialism

94 *Id.* at 174-180, 182-209.

95 *Id.* at 180; *see also* Yael Ronen, *Illegal Occupation and Its Consequences*, 41 ISR. L. REV. 201 (2008);

96 *INVESTIGATING WAR CRIMES*, *supra* note 4, at 199-206; Waseem Almad Qureshi, *Untangling the Complicated Relationship Between International Humanitarian Law and Human Rights Law in Armed Conflict*, 6 J. OF L. & INT’L AFFAIRS 205 (No. 1, 2018).

97 *INVESTIGATING WAR CRIMES*, *supra* note 4, at 209-212; *see also* Aeyal M. Gross, *Human Proportions: Are Human Rights the Emperor’s New Clothes of the International Law of Occupation?* 18 EUROPEAN J. OF INT’L LAW 1 (no. 1, 2007).

is different from that which should apply in this situation regarding the self-determination of the Hawaiian peoples who have been occupied outside the colonial context.⁹⁸

On the existence and applicability of the right to self-determination of peoples at the time of the U.S. occupation in 1893, prior to the development of modern human rights law, Dr. Lenzerini reviewed the domestic and international law and practices of the Hawaiian Kingdom and found that “the Hawaiian people was exercising its right to self-determination before this right was recognized in international law” and concluded that “the idea of self-determination was well-entrenched in the understanding of international and international relations by the Hawaiian Kingdom well before it was accepted as a rule of international law” entitling the Hawaiian people the right to exercise it now.⁹⁹ He further remarked that the right to self-determination is a “right of continuing character” and that to the extent that the Hawaiian Kingdom may be considered as being subjected to a foreign occupation, “the Hawaiian people retains its rights to self-determination, as established by customary international law ...”¹⁰⁰

The struggle for liberation from occupation and oppression by a superior power of course does not come without great sacrifice by those who engage in it. The liberators or patriots are often branded and treated as criminals, revolutionaries, secessionists, traitors, or, when employing arms or violence, enemy combatants or terrorists.¹⁰¹ The same can be said for the Hawaiian nationalists resisting the prolonged occupation of the Hawaiian Islands by the United States. As previously mentioned, in 1895, while the Queen was still under house arrest, her loyalists attempted an unsuccessful counter-rebellion from which she and some of her jailed supporters were tried by a military

98 *INVESTIGATING WAR CRIMES*, *supra* note 4, at 214.

99 *Id.* at 214-15.

100 *Id.* at 215; see also Salvatore Fabio Nicolosi, *The Law of Military Occupation and the Role of De Jure and De Facto Sovereignty*, POLISH YEARBOOK OF INT’L L. 165 (2011) (distinguishing between *de jure* and *de facto* sovereignty during military occupation with a focus on the right of self-determination); ANAYA, *supra* note 47.

101 See, e.g., Effects and effectiveness of law enforcement intelligence measures to counter homegrown terrorism: A case study on the *Fuerzas Armadas de Liberacion Nacional* (FALN), Final Report to the Science and Technology Directorate, U.S. Department of Homeland Security (2012), available at https://www.dhs.gov/sites/default/files/publications/OPSR_TP_START_Countermeasures-Case-Study-of-LE-Countermeasures-Against-FALN-Report_1208-508.pdf; MICHAEL D. CLODFELTER, *THE DAKOTA WAR: THE UNITED STATES ARMY VERSUS THE SIOUX, 1862-1865* (2006); Olivia B. Wazman, *The U.S. Government Had Nelson Mandela on Terrorist Watch Lists Until 2008. Here’s Why*, TIME MAGAZINE (July 18, 2018).

tribunal of the Provisional Government, convicted of treason, and sentenced to life imprisonment and death. In 1996, Bumpy Kanahele was convicted of interfering with U.S. marshals seeking to apprehend Native Hawaiian sovereignty activist Nathan Brown within their Native community and was sentenced to four months in prison.¹⁰² Brown was also convicted for his refusal to pay taxes to the occupying power, the United States, and sentenced to over 7 years of imprisonment.¹⁰³ Lance Larson was jailed for 30 days, 7 days in solitary confinement, after challenging the legitimacy of the State of Hawaii and its jurisdiction over him.¹⁰⁴ Dr. Sai has also been targeted and attacked for his assertions of Hawaiian Kingdom sovereignty.¹⁰⁵

Investigating War Crimes lays out a persuasive argument for the liberation of the Hawaiian Islands from U.S. occupation despite its annexation and the passage of time. One of the fathers of international law, Emer D. Vattel, remarked: “If the people do not voluntarily submit, the state of war still subsists.” This book and the efforts of the Hawaiian Kingdom Council of Regency and its Royal Commission of Inquiry are part of that continuing resistance of the Hawaiian peoples to illegal occupation of their Islands by the United States. The war in Afghanistan may not be the longest war in U.S. history as it may be eclipsed by the Hundred Years War Against the Hawaiian Kingdom. The Royal Commission of Inquiry in its book convincingly demonstrates the continuity of the Hawaiian Kingdom as a nation-state under international law. It is a worthwhile read for anyone interested in Hawai‘i, in the law of occupation and the rights of those under prolonged occupation, or in the liberation of nations and peoples and restorative justice. It is also a large step along the long road of the Hawaiian Kingdom and its people to free themselves from under the rule of the United States and to restore their independence and full sovereignty as a peoples and nation-state within the international community.

102 Linda Hosek, ‘Bumpy’ Kanahele gets Minimum Term, HONOLULU STAR TRIBUNE (Feb. 3, 1998), http://hawaii-nation.org/political_prisoner.html.

103 *Activist gets Extra Prison Time*, STARBULLETIN (March 20, 2004) <http://archives.starbulletin.com/2004/03/20/news/story9.html>.

104 *INVESTIGATING WAR CRIMES*, *supra* note 4, at 4; *Lance Paul Larsen v. Hawaiian Kingdom*, <https://www.alohaquest.com/arbitration/log.htm>; *State v. Larsen*, 77 Haw. 219, 220, 883 P.2d 641, 642 (1994).

105 See Andrew Walden, *Sovereignty Mortgage Scammer Keanu Sai at it again from Legislators, Maui Council, University* (July 17, 2011), <http://www.hawaiiexpress.com/ArticlesMain/tabid/56/ID/4684/Sovereignty-Mortgage-Scammer-Keanu-Sai-at-it-again-with-help-from-Legislators-Maui-Council-University.aspx>.

**“READY FOR THE PHONE BOOTH”:
STRATEGIZING MOVEMENT LAWYERING FOR LOCAL
CLIMATE JUSTICE POLICY**

by Mary Claire Kelly¹

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I. INTRODUCTION

I wrote this article in quarantine, while the nation was under the first national lockdown due to the COVID-19 pandemic. I wrote this article during briefs bursts of productivity, which spiked through the monotony of scrolling Twitter for memes and bad news. I wrote this article as hospitals overflowed with the sick, as hastily dug graves swallowed the dead, as the government allowed the dried-up economy to starve the newly unemployed to feed the rich. I wrote this article in the first person because it did not feel appropriate to write it without placing it in its proper context: Within a fast-moving disaster that arose from, and crashed back into, the slower-moving crises of inequality and climate change that characterize our modern political economy.

This article is about lawyering with humility, trust, and honesty; so, I felt that I should not write this article with the pretense of objectivity — particularly during such a significant moment in time. Although I am mixed race, I am white-presenting in a profession in which 85 percent of practitioners are white.² I have health insurance, food, and stable housing. Like most current and future attorneys who create, interpret, and enforce this country’s laws, I

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² American Bar Association, *Profile of the Legal Profession 2021*, 13 (2021), <https://www.americanbar.org/content/dam/aba/administrative/news/2021/0721/polp.pdf>.

have been well-insulated from the unjust systems of poverty, incarceration, and extraction that those laws uphold.

That is unlikely to be true for the communities that I went to law school to serve: low-income communities, Black communities, and communities of color — the same communities that have been disproportionately hurt and killed by COVID-19.³ Maps showing majority-minority areas, low-income areas, and areas without convenient access to vital public infrastructure like hospitals looked familiar to researchers studying the initial spread and impact of the pandemic.⁴ Also familiar are maps of communities close to environmental hazards that can cause air pollution, water contamination, and excessive heat, exposure to which can increase a person's risk of preexisting conditions and therefore their vulnerability to a contagion like COVID-19. As seen in New Orleans during Hurricane Katrina, Houston during Hurricane Harvey, Chicago during the 1995 heatwave, and countless other localities in countless numbers of fatal disasters — “geography [is] linked to destiny.”⁵

“Environmental justice communities”⁶ are those communities whose residents are geographically destined to be more vulnerable to environmental hazards because of systemic racism, income disparities, and language isolation. These communities are frequently denied the power to influence the policies that will determine their future, and to demand reparations for policies that have harmed them in the past. That power, when achieved, has historically been hard-won through grassroots organizing and movement-building. Such organizing has pushed policymakers and other powerful figures to action on ending legal Jim Crow segregation, penalizing polluters for poisoning neighborhoods, and other protective policy measures. Community organizers subscribe to the theory that “social justice can be achieved only when marginalized communities most affected by a problem are actively engaged and have a voice in making decisions and devising solutions that affect them.”⁷

3 See CDC, *Demographic Trends of COVID-19 Cases and Deaths in the US Reported to CDC*, <https://covid.cdc.gov/covid-data-tracker/#demographics> (last visited Nov. 7, 2021).

4 Rachel Ramirez, *How Vulnerable is Your Community to Coronavirus? These New Maps Reveal a Familiar Pattern*, GRIST (April 2, 2020), <https://grist.org/justice/how-vulnerable-is-your-community-to-coronavirus-these-new-maps-reveal-a-familiar-pattern/> (last visited Nov. 7, 2021).

5 Eric Klinenberg, *Denaturalizing Disaster: A Social Autopsy of the 1995 Chicago Heat Wave*, 28 THEORY & SOCIETY 239, 250 (Apr. 1999), available at <https://www.jstor.org/stable/3108472>.

6 I draw this definition from the state of Massachusetts' definition, see *Environmental Justice Populations in Massachusetts*, <https://www.mass.gov/info-details/environmental-justice-communities-in-massachusetts> (last visited Nov. 7, 2021).

7 Betty Hung, *Law and Organizing From the Perspective of Organizers: Finding A*

Along with affected community members and organizers, social justice movements often include attorneys as the third leg of a “triad of actors,” but relationships between these groups can be prone to tension.⁸ When public interest attorneys – who are likely to share some of the privileges catalogued above – get involved in social movements, power imbalances can lead to conflict. Differences in education levels, race, income, and appearance may make it difficult to create trusting relationships. Organizers and community members have also found it difficult to work with public interest attorneys who prioritize legal action above other movement strategies more accessible to the community.⁹ A legal-centered approach changes the voice of the movement from the megaphone on the street to the brief in the courtroom and can thus constrain and dilute momentum.

The movement lawyering model of public interest legal advocacy is a theory of social change that addresses those power imbalances by prioritizing the experiences and expertise of affected community members.¹⁰ Under the movement lawyering model, lawyers are accountable to the group — not the other way around. Movement lawyers use “integrated advocacy strategies, inside and outside of formal lawmaking spaces” to “build the power of those groups to produce or oppose social change goals that they define.”¹¹ Movement lawyers recognize that legal action and policy changes are helpful tools to a social movement, rather than end goals. Legal professionals abiding by this theory have helped social justice movements push for healthier living environments, better workplace protections, and decarceration efforts.

As hard as environmental justice communities have had to push for recognition of their rights in the recent era of neoliberal economics and decentralization,¹² climate change will only intensify and increase the obstacles. Climate change raises all the stakes: It will intensify environmental hazards, exacerbate resource scarcity, and encourage gentrification and displacement. Because climate change is not a tangible, immediate hazard, organizing locally to protect environmental justice communities from suffering *Shared Theory of Social Change*, 1 L.A. PUB. INT. L.J. 4, 20 (2008).

8 *Id.* at 23.

9 *See id.* at 19.

10 “Movement lawyering” can also be referred to as “community lawyering” and “law and organizing.”

11 Susan D. Carle & Scott L. Cummings, *A Reflection on the Ethics Of Movement Lawyering*, 31 GEO. J. LEGAL ETHICS 447, 452 (2018).

12 *See, e.g.,* Klinenberg, *supra* note 4, at 256-259 (“The second cause of the local government’s failure, and also the mechanism that facilitates the rise of this new philosophy for urban governance, is the radical decentralization, fragmentation, and privatization of the social-service programs and downsized public agencies that they [sic] city has preserved.”).

its worst harms requires incorporating climate change into existing advocacy efforts for environmental, housing, and economic justice.

Attorneys acting in solidarity with those movements must adjust their tactics as well. Instead of distinguishing “climate justice” into yet another subgenre of public interest law, lawyers should view “climate justice” as a further evolution of the ongoing fight for all people to be able to live in a healthy environment in which they can thrive. Movement lawyers working for climate justice are not recreating the wheel; they can and should tackle the threat posed by climate change with the resources and techniques that have evolved through the interconnected movements for environmental, housing, and economic justice. On a local level, this work means bringing the experiences and expertise of advocates in those movements together to the field of climate resiliency policy.

In this article, I focus primarily on metropolitan Boston, an area with a deep history of housing and environmental justice movements that is actively planning for the effects of rising tides on property. I begin this article by explaining grassroots climate justice. Then, I analyze the movement lawyering theory of praxis and the challenges of applying it to climate justice. I then discuss movement lawyering strategies for assisting environmental justice communities that are pushing for climate justice on a local policy level, and I analyze challenges specific to that genre of lawyering. Finally, I conclude by summarizing my key findings and next steps for researching and implementing those findings.

I do not here claim to have developed a survey of all movement lawyering practices advancing climate justice on the local level. Instead, my goal is simple: to explore and define an area of law that is growing in necessity, but still absent from the typical law school curriculum. Climate change will only grow more pressing in coming years, and it will not affect all members of our dramatically unequal society in equal proportion.

Climate change has been accelerated by the same extractive economic practices that have made some people wealthy and powerful at the expense of others for centuries. Lawyers can help prevent the consequences from falling on those who have been hurt by this system, and they can do so in a way that empowers, rather than patronizes, them. I am writing this article because that is the kind of attorney I strive to be. The kind that follows the lesson of Luke Cole, as explained in a tribute to the famed environmental justice attorney written after his death: “[E]nvironmental justice isn’t about law anyway; it’s about power.”¹³

13 Laurence Lewis, *Remembering Luke Cole, Pioneer of Environmental Justice*

II. CLIMATE JUSTICE: ANOTHER TRIBUTARY OF THE MOVEMENT FOR SOCIAL JUSTICE

After decades of disinformation campaigns funded by polluting industries, politicians and pundits have, in public discourse, labelled climate change an “existential threat.”¹⁴ The term “existential threat” denotes an immediate level of severity, gravity, and danger. Climate change is indeed severe, serious, and dangerous, but it does not threaten all lives equally. It represents yet another challenge in which powerful interests have, through both action and inaction, rendered low-income communities and communities of color uniquely vulnerable to the negative effects of a rapidly warming climate.

In international migration and national security contexts, climate change is referred to as a “threat multiplier” because the environmental stress caused by a changing climate will aggravate already existing social conditions.¹⁵ As Elizabeth Marino writes in her anthropological case study of the Alaskan Kivalina tribe – which has been attempting to relocate for decades because of rising floodwaters – disasters do not happen merely because of heavy rain, hotter weather, or more violent storms: “The physical environment and social systems act in tandem as mechanisms for disaster. Disasters are produced when a hazard meets with a vulnerable population and produces negative outcomes and social dysfunction.”¹⁶ On international, domestic, and local levels, the communities that will continue to be hurt by climate change first and worst are those whose existences are threatened daily with other, more normalized ills: poverty, pollution, homelessness, and other systemic injustices that plague communities along racial and socioeconomic lines.

“Climate justice” describes the movement to prevent the burdens of a changing climate from disproportionately falling on those communities.¹⁷ As

Law, DAILY KOS (June 20, 2010), <https://www.dailykos.com/stories/2010/06/20/876375/-Remembering-Luke-Cole-pioneer-of-environmental-justice-law>.

14 Kelsey Piper, *Is Climate Change an “Existential Threat” — or Just a Catastrophic One?*, VOX (June 28, 2019), <https://www.vox.com/future-perfect/2019/6/13/18660548/climate-change-human-civilization-existential-risk>.

15 Julia Toscano, *Climate Change Displacement and Forced Migration: An International Crisis*, 6 ARIZ. J. ENVTL. L. & POL’Y 457, 460-61 (Nov. 23, 2015).

16 ELIZABETH MARINO, *FIERCE CLIMATE, SACRED GROUND* 28 (2015), Kindle Edition.

17 See Daisy Simmons, *What is ‘Climate Justice’?*, YALE CLIMATE CONNECTIONS (July 29, 2020), <https://yaleclimateconnections.org/2020/07/what-is-climate-justice/> (last visited Nov. 8, 2021) (explaining that “climate justice” is a term, and more than that a movement, that acknowledges climate change can have differing social, economic, public health, and other adverse impacts on underprivileged populations. Advocates for climate

Sofia Owen, an attorney with Alternatives for Community and Environment (“ACE”), explained, climate justice also requires tying the injustices of the past and present to the injustices of the future — acknowledging “the legacy of our legal systems being rooted in white supremacy and systemic racism in terms of which housing is where and what has been built.”¹⁸ Advocacy groups can demand climate justice, and they can also use the term as a frame through which to view the unprecedented impacts of climate change. For example, the United Nations’ sustainable development goals describe climate justice as “[looking] at the climate crisis through a human rights lens and on the belief that by working together we can create a better future for present and future generations.”¹⁹ For the purpose of this article, climate justice is a lens through which policy-makers, activists, and other change agents can view plans for the future of their communities, and it is also a demand that those plans result in a more equitable future.

Like in other social justice movements, affected communities can build their strategies around demanding climate justice on the streets, through the media, and in the courts. Movement leaders will typically plan to wage their battle in multiple arenas, because a protest, newspaper article, new law, or lawsuit is usually a means to the goal of the organization, not an end in itself. “These organizers and grassroots leaders do not think in terms of policy: They think in terms of power. Power, in this context, means the ability to shape the world.”²⁰

Governments are the primary targets for climate justice activists because governments have the most power to shape how societies react and prepare for climate change. As sociologist Eric Klinenberg wrote in his “social autopsy” of the 1995 heat wave in Chicago, governments,

with their unmatched resources and capacity to coordinate large-scale initiatives, will do more than any other institution to shape our response to the climate crisis. . . . They can help develop robust social infrastructure in vulnerable neighborhoods, promoting health and ex-

justice are striving to have these inequities addressed head-on through long-term mitigation and adaptation strategies.”),

18 Interview with Sofia Owen and Davis Noiles, Alternatives for Community and Environment Office (Feb. 26, 2020), on file with author.

19 *Climate Justice*, UNITED NATIONS: SUSTAINABLE DEVELOPMENT BLOG (May 2019), <https://www.un.org/sustainabledevelopment/blog/2019/05/climate-justice/> (last visited Nov. 8, 2021).

20 Alexi Nunn Freeman & Jim Freeman, *It’s About Power, Not Policy: Movement Lawyering for Largescale Social Change*, 23 CLINICAL L. REV. 147, 150 (2016).

tending life both every day and in disasters, or they can confine their heat-emergency plans to phone calls and home visits when the flood waters come or the temperature spikes.²¹

Organizing around climate justice can be difficult because climate change is not an immediate, tangible threat. For activists in communities that are facing daily emergencies like hunger, evictions, mass incarceration, and deportations, climate change can seem like a monster that looms in the future, not one that demands action now. As Esme Caramello, faculty director of Harvard's Legal Aid Bureau, explained, "it's not that [climate change] is not visible, but it's not a crisis point. It's not having a negative direct impact on individuals at enough of a level to motivate them to drop other things that are having a day-to-day impact." Climate justice demands action on a problem that most people will experience as an invisible factor in slowly shifting environmental systems and worsening disasters, not as a crisis in itself.²²

For example, "climate gentrification" is the theory that climate change will exacerbate trends in the real estate market that lead to people being displaced, because property that is more vulnerable to climate events like flooding will lose value.²³ David Noiles, director of the Roxbury Environmental Empowerment Project ("REEP"), explained the apparent lack of immediacy compared to other pressing problems as a difficulty in organizing youth activists around climate justice issues like this: "[It] makes climate gentrification seem like: What are you talking about? . . . I've already been displaced before that."²⁴ He said the local organizing work he has been doing with REEP since he was a teenager in the 1990s is just one iteration of a long history of justice movements, which includes the civil rights movement: "to me, it's the same movement just with a different name."²⁵

21 ERIC KLINENBERG, *HEAT WAVE: A SOCIAL AUTOPSY OF DISASTER IN CHICAGO* 35 (2d ed. 2015), accessed via Rokuten Kobo.

22 See Justin Worland, *Can Hurricane Ida Move Public Opinion on Climate Change?*, TIME (Sept. 2, 2021), <https://time.com/6094338/hurricane-ida-public-opinion-climate-change/> (last accessed Nov. 7, 2021) ("researchers who study public perception of climate change say climate change barely registers during an extreme weather event for the average American. Most people are likely to view a big storm as just another in a long string of them. In fact, the historical record over the past few decades shows little shift in national public opinion on climate change driven by the increased frequency of hurricanes, droughts and wildfires that we might have expected to turn the tide.").

23 See generally Jesse M Keenan, et al., *Climate Gentrification: From Theory to Empiricism in Miami-Dade County, Florida*, 13 ENVIRON. RES. LETT., article 054001 (2018), available at <https://doi.org/10.1088/1748-9326/aabb32>.

24 Owen & Noiles, *supra* note 17.

25 *Id.*

In that work, Noiles has worked with attorney Sofia Owen of ACE. Owens explained that in her experience of environmental justice activism, “It’s hard to parse out what is a climate issue and what is an [environmental justice] issue when it’s all interconnected and when everything in your life is impacted by environmental issues.”²⁶ Owen said she sees climate justice as a “rebranding” of previous social justice movements led by black, brown, and indigenous activists: a “buzzword for funders [and] big organizations that are white-led and not grounded in the grassroots.”²⁷

In *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement*, Luke Cole and Sheila Foster similarly describe the environmental justice movement as a river, with many different local organizing efforts and social justice movements feeding into it as tributaries. According to Cole and Foster, these tributaries are united by three characteristics: “motives, background, and perspective.”²⁸

With respect to motives, grassroots activists are often fighting for their health and homes [...] Second, with respect to background, grassroots environmentalists are largely, though not entirely, poor or working-class people. Many are people of color who come from communities that are disenfranchised from most major societal institutions [...] The third trait, perspective, is an outgrowth of the first two. Most environmental justice activists have a social justice orientation, seeing environmental degradation as just one of many ways their communities are under attack. [...] many view the need for broader, structural reforms as a way to alleviate many of the problems, including environmental degradation, that their communities endure.²⁹

Climate justice requires participants and protagonists in social justice movements to strategize based on how the changing planet will escalate the economic, environmental, and housing justice battles they are already fighting. Climate change will widen resource scarcity, intensify environmental

26 *Id.*

27 *Id.*

28 LUKE COLE & SHEILA FOSTER, *FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT* 32 (2001).

29 *Id.* at 32-33.

hazards and disaster events, and lead to further displacement of communities due to those economic and environmental pressures. This crisis is rooted in the same extractive systems that have created and continued what Klinenberg calls “the everyday crisis, the slow death, the normalization of collective insecurity in the most impoverished and stigmatized neighborhoods.”³⁰ As social movements incorporate climate justice frameworks into their advocacy, movement lawyers can use their policy and legal strategizing experience to empower activists and further the organization’s goals.

III. THE ROLE OF THE MOVEMENT LAWYER

When researching local movement lawyering, I first stopped by the office of ACE, an environmental justice community organization in Roxbury, Massachusetts, for a meeting with staff attorney Sofia Owen. Instead of the brief one-on-one interview I expected, my visit turned into an hour-long conversation with Owen, Noiles, and other people who stopped in and out of the office. Surrounded by flyers of past and future demonstrations, we discussed the relationships and tensions that often form between well-meaning individuals with similar goals in the social justice sphere.

Noiles has organized youth in the Roxbury neighborhood of Boston around environmental justice issues since he was a high schooler himself. When asked about the role of lawyers in the movement, he had one piece of advice:

Always be ready for the phone booth. . . . Since you have the [legal] training, you have the superman costume on underneath the suit and tie. . . . Sometimes you’re going to have to keep that shit under wraps and be here for the community, but the community is going to need you to be Superman at some point for us. . . . We need you to be Clark Kent sometimes [too].³¹

Noiles’ advice vividly explains the dual role of the movement lawyer, as both a professionally trained advocate and a movement participant. To be effective advocates, movement lawyers must be able to navigate both power centers and community centers with respect, trust, and honesty, and to build bridges between those spaces when appropriate and necessary. They must view the activists with whom they work as equals to whom they are account-

30 Klinenberg, *supra* note 4, at 283.

31 Owen & Noiles, *supra* note 17.

able, not as clients who need a lawyer to swoop in and save them: “People are not simply ‘clients’ or ‘members’ to be organized, but rather individuals with their own histories and hopes for achieving a measure of justice.”³² In social justice movements, lawyers may have the superpower of a legal license, but “in these narratives, groups or coalitions are the protagonists.”³³

The attorneys with whom I spoke named “humility” as one of the most important practices of an effective movement lawyer — an attribute not traditionally emphasized in the law school curriculum. Humility is important for individuals with the privilege of a legal education because social justice movements are, or should be, democratic in structure and philosophy, which means that they are, or should be, led by those most directly impacted by the problem. While a J.D. degree, a tailored suit, and a professional network may confer authority outside of the movement space, an essential piece of movement advocacy is checking elitism at the door of the interpersonal organizing space. In an essay about common conflicts between attorneys, activists, and affected community members in shared movements, lawyer Betty Hung explained the tensions that often arise when well-meaning, educated attorneys enter the organizing space:

The universal concept underlying almost every social justice movement is the innate value and worth of every human being. Given the structural inequalities and daunting challenges that we face, it is often difficult not to perpetuate the very types of hierarchies and oppressions we fight against, especially when winning seems so crucial.³⁴

Like other movement attorneys, Hung notes that the practice requires lawyers to be steadfast in recognizing that their legal skills contribute to a means, not an end, to the goals of the affected community members. Whether or not to include lawyers in the movement is a “utilitarian” decision by the protagonists of the movement, depending on whether they see a legal strategy as a force that will advance their goals or a sideshow that will distract from the main focus or drain momentum.³⁵ According to the organizers with whom Hung spoke, “rather than building the power of marginalized communities,

32 Hung, *supra* note 6, at 27.

33 Jennifer Gordon, *The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CALIF. L. REV. 2133, 2135 (2007).

34 Hung, *supra* note 6, at 30.

35 *Id.* at 11.

lawyers tend to create dependency on lawyers and legal strategies without altering structural inequalities and the status quo.”³⁶ In order to empower disempowered individuals, movement lawyers must know when to put on their metaphorical capes, as Noiles said, and also when others are best suited for saving the day.

Movement protagonists identified to Hung seven legal strategies as key to advancing their causes: “affirmative litigation; legislative advocacy; community legal education; strategic counseling and advice; defensive litigation; direct legal services; and legal drafting of agreements or legislation.”³⁷ These strategies are tools for which lawyers have special expertise, tools that can be brought into use when the movement needs them. Conversely, those tools also need the power conferred by a movement to effectively push for social justice, because “even the most progressive policies are little more than words on a page to their communities if the underlying power dynamics are not altered.”³⁸

Community involvement in clearly legal actions is important for building power as well as for adhering to movement ethics. Community involvement is the arsenal that allows movement attorneys to “walk into that room with the wealthiest and most politically powerful citizens and have their arguments and policy proposals prevail. Not because of the strength of their argument or their ideas; but because they represent a mighty, grassroots-led movement that the existing power structures can no longer ignore.”³⁹ Grassroots support is a social justice movement’s “one clear comparative advantage” over an opponent with more influence and money, so that support is an “essential” ingredient, not an accessory, in an effective legal strategy.⁴⁰ As Cole explained in the context of popular participation in the Environmental Impact Review process,

officials are far more likely to review an application carefully, and document its potential impacts adequately, if they know the community is actively involved in the permitting process. Bureaucrats in state and local environmental agencies respond to pressure, and when deciding between the desires of a community and those of a company, they will usually favor the

36 *Id.* at 6.

37 *Id.* at 9.

38 Freeman & Freeman, *supra* note 19, at 159.

39 *Id.* at 166.

40 *Id.* at 159.

interest putting the most pressure on them.⁴¹

Cole described three possible models to categorize the role of the attorney in environmental justice movements: the professional model, the participatory model, and the power model. The professional model is the traditional role of an attorney as a representative of the movement, with the attorney making decisions on behalf of their client. “Most environmental justice activists should agree that the professional model is a waste of time from the perspective of the community.”⁴² While this model has resulted in significant changes in law, Cole explained that it reinforces the power imbalances that lead to a community’s disenfranchisement in the first place: “By teaching communities that they have no role in solving the problems which affect them, the professional model reinforces powerlessness and is thus antithetical to environmental justice.”⁴³

Instead, Cole argues that legal advocacy for movements is only effective for environmental justice when lawyers use a combination of the participatory and power models. The participatory model describes a lawyer’s role as facilitating community involvement in the process by which decision-makers determine outcomes. For example, lawyers can help community members interpret dense policy, inform them about upcoming steps in a policy’s development, and involve community members in the formation of lawsuits beyond using them as named plaintiffs.

The power model, by contrast, is based on an inherent distrust of the process by which decision-makers make their determinations, an acknowledgement that “the public participation process is not designed to hear and address their concerns, but instead to manage, diffuse, and ultimately co-opt community opposition to projects.”⁴⁴ Under the power model, the movement’s focus is mostly on active community involvement and self-determination, so legal action necessarily plays an ancillary role. Under the power model, movement protagonists and organizers focus on pressuring decision-makers from outside the established system, not working within the system. Examples of the power model are protests, strikes, and other public demonstrations of dissent.

Although effective advocacy in the movement space requires an attorney to step back from the protagonist’s role, lawyers can be integral to or-

41 Luke W. Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENVTL. L.J. 687, 695 (1995).

42 *Id.* at 708.

43 *Id.* at 705.

44 *Id.* at 701.

ganizing strategies. Lawyers' value stems from their ability to be translators and liaisons between powerful actors and the community members who have been shut out of elite spaces by wealth disparities, racism, language barriers, and education gaps. Owen with ACE explained that this is a different sort of value than students are likely to learn in law school: "It's not just about writing the perfect white paper and designing a policy that looks good on paper, but thinking through and hearing from community about what are the things that are needed or what does it actually look like on the ground."⁴⁵

IV. LOCAL MOVEMENT LAWYERING FOR CLIMATE JUSTICE

In the scope of history, climate justice is a relatively new idea. Climate change has only been prominent in scientific study for half a century, and it has only become a household term in recent decades. Therefore, a conception of how to respond justly to climate change is also recent. However, limiting climate justice initiatives to address only issues that can be directly attributable to man-made climate change is like limiting a pointillist artwork to one section of painted dots. Climate justice, environmental justice, housing justice, and civil rights are each their own demands, but they are also part of a larger, older cause: fighting for a world in which everyone has the right to live and thrive with dignity in a safe and healthy environment. On the local level, movements and the attorneys that assist them can and must build upon the successes, and learn from the failures, of prior struggles in that larger fight. Specifically in Boston, deeply rooted social justice movements have established a tradition of advocacy that will be vital in maintaining pressure on city officials for policies rooted in climate justice. "Even though the thinking around climate crisis and catastrophe is new in the mainstream, these are issues that David [Noiles] and others have been fighting for years," Owen said, when I asked her about ACE's climate justice work, "the imbalance that there is as a result of the historic burdens from systemic racism."

Through the federal government's use of redlining to discourage investment in neighborhoods with non-white residents, systemic racism has guided the development in Boston over the past century.⁴⁶ Roxbury, the neighborhood where ACE and REEP are located, was coded "red" in the government's color-coded real estate maps for investors in the 1930s.⁴⁷ Property in those neighborhoods was undervalued compared to property in whiter neighborhoods. Decades after banks and real estate companies segregated

45 Owen & Noiles, *supra* note 17.

46 Stephanie Leydon, *How a Long-Ago Map Created Racial Boundaries That Still Define Boston*, WGBH (Nov. 12, 2019), <https://www.wgbh.org/news/local-news/2019/11/12/how-a-long-ago-map-created-racial-boundaries-that-still-define-boston>.

47 *Id.*

Roxbury into a neighborhood comprising almost completely people of color, land speculators are now buying up that undervalued property and putting many long-term Roxbury residents at risk of losing their homes.⁴⁸

Through organizations like ACE, REEP, and the housing justice group City Life/Vida Urbana (“CVLU”), Roxbury residents have organized for years against the policies and practices that have led their neighborhood to be more vulnerable to environmental hazards, displacement, and other consequences of low investment. As an example of the ways in which local residents have built power through organizing, Noiles and Owen pointed to the initiative to improve air quality in Roxbury in the 1990s and 2000s. That initiative was led by local youth, who named the problem and determined the path to a solution. Movement attorneys provided guidance and help along the way.

In 1996, a student at Phyllis Wheatley high school died from asthma. His classmates had been learning about environmental justice through REEP and ACE.⁴⁹ They were motivated after that student’s death to begin learning about the high rates of asthma in their community and to take action against the heavy presence of hazardous air pollution in their neighborhood. They mapped polluting sources, “including nail and hair salons, solid waste facilities, and bus and truck depots.”⁵⁰ They found “more than 15 bus and truck depots garaging more than 1,150 diesel buses and trucks within 1.5 miles of Dudley Square,” and decided to focus their energy on those vehicles. Along with youth from other neighborhood schools, they organized and marched in an Anti-Idling Day, drawing attention to diesel vehicles that violated Massachusetts’ anti-idling law. They monitored particular matter in the atmosphere near local residences. Their coalition brought attention to the issue from the media and from the EPA. Their work pressured the MBTA to replace their fleets with buses that run on cleaner fuel or compressed natural gas. In 2010, they began drafting the Diesel Emission Reduction Ordinance. Then-Mayor Marty Walsh signed that ordinance in June 2015.

Movement attorneys provided assistance at each step. Attorneys

48 Interview with Esme Caramello, Harvard Legal Aid Bureau office (March 2, 2020), on file with author.

49 Alternatives for Community & Environment, *Victory for clean air!* (June 3, 2015), https://web.archive.org/web/20200129203710/https://ace-ej.org/victory_for_clean_air.

50 Penn Loh, Jodi Sugerman-Brozan, et al, *From Asthma to AirBeat: Community-Driven Monitoring of Fine Particles and Black Carbon in Roxbury, Massachusetts*, 110 ENVIRON HEALTH PERSPECT 297, 297 (2002).

helped the students learn about the state's anti-idling law.⁵¹ They convened meetings between community members and city officials, and helped organizers prepare for those meetings. They drafted the ordinance and worked with partners for years to get it enacted. These actions align with the “participatory” and “power” models of movement lawyering described by Cole, and with the list of helpful legal actions detailed by Hung. Noiles, who was one of the local students working on this campaign, recalled that the “role of lawyers was to say, ‘Okay you brought me this issue, what are the ways that we could address what you’re talking about.’”⁵² He said that the trust built over the years between attorneys, organizers, and affected community members in this project continues to this day.

Staci Rubin was an attorney with ACE during this project, and she is now an attorney at the Conservation Law Foundation, an environmental law group. Looking back on her role after transitioning from work at a movement-based organization to a more traditional nonprofit, she recalled that a major part of her role in the movement was knowing “how to be at both tables in a respectful way.”⁵³ The most difficult part of movement lawyering, according to Rubin, was performing this role while “constantly swimming upstream,” because of the “wealth of laws and policies and regulations that favor development and corporate power at the expense of community power.”⁵⁴

In strategizing how and where to most effectively apply legal pressure, organizers usually begin by identifying the actors with the most power and inclination to help them. That decision-making is often aided with the practice of power mapping, in which movement stakeholders create a physical chart of the landscape of power that they are trying to influence and disrupt.⁵⁵ Owen noted that the city of Boston has a particularly strong mayoral office, so gaining the mayor’s support is key for pushing forward new policies or pushing against old ones. In particular, the Boston mayor has control over the Boston Planning and Development Authority (“BPDA”), which has immense power over the city’s plans for new development.⁵⁶ This political

51 *Id.* For information on Massachusetts’s anti-idling law, see MASS. GEN. LAWS ch. 90, §16A (2020).

52 Owen & Noiles, *supra* note 17.

53 Interview with Staci Rubin, via Zoom (Feb. 3, 2020), on file with author.

54 *Id.*

55 Martín Diego Garcia, *Power Mapping: Understanding Your Political Landscape*, THE CAMPAIGN WORKSHOP: BLOG (Jan. 28, 2019), <https://www.thecampaignworkshop.com/power-mapping-understanding-your-political-landscape>.

56 Qainat Khan, The Office of Councilor Lydia Edwards, PLANNING FOR FAIR HOUSING: ADDRESSING FAIR HOUSING AND CIVIL RIGHTS THROUGH PLANNING AND ZONING 3 (2019) (“BPDA is a staggeringly powerful agency.”).

structure is especially significant after Michelle Wu was elected mayor of Boston in November 2021, since her campaign developed a “Boston Green New Deal and Just Recovery” plan that would enact climate justice policies on the municipal level.⁵⁷ Rubin pointed out that if a policy has the backing and public support of a key actor like the mayor, the city could turn into a powerful force for promoting policies in other cities and on the state level.⁵⁸

Within Boston’s municipal governance structure, Owen and Noiles also pointed to the importance of gaining city council support — particularly the support of the city councilor who represents the movement’s district. Before even getting to that stage, however, they said that it is important to the movement to elect a councilmember who truly represents the racial and economic diversity of the community. Noiles particularly pointed out the importance to environmental justice communities of having Black women and other people of color listening to and representing their interests. In particular, Owen and Noiles pointed to Lydia Edwards, who represents District 1 on the city council of Boston. Edwards’ office partnered with a Northeastern graduate student to produce a report on how the BPDA and other planning agencies have historically impeded fair housing in the city, and how those agencies could rectify that history.⁵⁹ The report gives a history of redlining in Boston and connects that history to the modern-day displacement of residents due to gentrification. In the analysis, the report emphasizes the importance of centering local community needs and opinions through “procedural equity,” which means “meaningfully engaging communities who are often not heard in the planning process.”⁶⁰

As previously discussed, climate change includes the threat of climate gentrification, the process by which property that is more insulated from natural events increases in value, thus causing residents to be displaced. This phenomenon is demonstrably happening in Miami, where residents of color who had previously been prevented from living near the coast by segregation are now being pushed out of the higher-elevation communities that they built

57 See Alissa Walker, *Michelle Wu Can Be America’s First Actual Honest-to-Goodness Climate Mayor*, CURBED, (Nov. 3, 2021), <https://www.curbed.com/2021/11/michelle-wu-boston-transportation-climate-mayor.html>.

58 Rupin, *supra* note 52. Of particular relevance here is that the state of Massachusetts passed legislation to “combat climate change and protect vulnerable communities” in March 2021. See *Governor Baker Signs Climate Legislation to Reduce Greenhouse Gas Emissions, Protect Environmental Justice Communities*, Mass.gov (Mar. 26, 2021), <https://www.mass.gov/news/governor-baker-signs-climate-legislation-to-reduce-greenhouse-gas-emissions-protect-environmental-justice-communities> (last visited Nov. 7, 2021).

59 See generally Khan, *supra* note 55.

60 *Id.* at 9.

over generations.⁶¹ Boston can similarly expect to see its shoreline property threatened by rising tides.⁶² Caramello sees climate gentrification as yet another issue that Boston housing advocates will have to confront while they simultaneously try to improve the conditions in their neighborhoods and prevent gentrification of their neighborhoods. “People fight for improvements to their communities, then those improvements lead to the displacement of the very families that fought for those improvements,” Caramello said. “In any environmental justice work you have to think about how you’re going to keep those benefits secured for the people who fought for them.”

Climate justice advocates in Boston can and should build upon the relationships, strategies, and tools honed in earlier struggles, particularly as the city prepares for rising coastlines, hotter heatwaves, and increased flooding as a byproduct of climate change. Under former Mayor Marty Walsh, the city of Boston developed a climate action plan for reducing the city’s carbon footprint and an initiative called Climate Ready Boston as a roadmap for preparing neighborhoods for environmental changes.⁶³ According to the city’s projections, neighborhoods will be impacted to varying degrees by rising river-line and coastal flooding, frequent stormwater flooding, and extreme heat.⁶⁴ Roxbury in particular is a neighborhood that will be vulnerable to all three hazards, on top of the social vulnerabilities the neighborhood already faces.⁶⁵ Mayor-elect Wu’s “Boston Green New Deal” is a sweeping plan to confront these dangers: it calls for decarbonization, clean energy, food justice, programming to develop green jobs, and other policy measures, as well as a “justice audit and framework” to address “structural injustices

61 Nadege Green, *As Seas Rise, Miami’s Black Communities Fear Displacement From The High Ground*, WLRN (Nov. 4, 2019), <https://www.wlrn.org/post/seas-rise-miami-s-black-communities-fear-displacement-high-ground#stream/0>.

62 See generally OFFICE OF THE MAYOR OF THE CITY OF BOSTON, CLIMATE VULNERABILITY ASSESSMENT (2017) [hereinafter VULNERABILITY ASSESSMENT], https://www.boston.gov/sites/default/files/imce-uploads/2017-01/crb_-_focus_area_va.pdf. For a visual illustration of projected impacts of climate change on Boston, see Climate Ready Boston Map Explorer, <http://boston.maps.arcgis.com/apps/View/index.html?appid=7a599ab2ebad43d68adabc9a9e6e0e6&extent=-71.1583,42.2897,-70.9309,42.4060> (last visited Nov. 7, 2021).

63 See *Boston Climate Action*, CITY OF BOSTON, <https://www.boston.gov/departments/environment/boston-climate-action> (last accessed Nov. 7, 2021); see also *Preparing for Climate Change*, CITY OF BOSTON, <https://www.boston.gov/departments/environment/preparing-climate-change> (last visited Nov. 7, 2021).

64 See VULNERABILITY ASSESSMENT, *supra* note 61; see also OFFICE OF THE MAYOR OF BOSTON, CLIMATE READY BOSTON: EXECUTIVE SUMMARY, https://www.boston.gov/sites/default/files/file/2019/12/02_20161206_executivesummary_digital.pdf; Climate Ready Boston Map Explorer, *supra* note 61.

65 See VULNERABILITY ASSESSMENT, *supra* note 61, at 13.

by starting with the structure of [the] city government.”⁶⁶ Wu’s plan calls for “bold, progressive change”⁶⁷ and echoes the demands of the climate justice movement:

Ultimately, a Green New Deal for Boston would seek to mitigate the threat of climate change, attack poverty and economic inequality, close the wealth gap, and dismantle structural racism at the scale necessary for a Just Recovery from the devastation of this pandemic. But we can only do so through community leadership, accountability, and long-term engagement.⁶⁸

When plans to incorporate climate justice in government decision-making finally take shape, activists avoid complacency even while they celebrate victories. Noiles and Owen noted that the community needs to stay engaged in and critical of policymakers’ plans, since “inviting the community to participate doesn’t actually mean that there will be meaningful participation and it doesn’t mean that people’s needs and wants will be taken seriously” and community involvement could end up being merely a “check the box” for officials.⁶⁹ Cole described this problem in his explanation of different models of movement lawyer: in some public process, “communities [have learned] the hard way that the public participation process is not designed to hear and address their concerns, but instead to manage, diffuse, and ultimately co-opt community opposition to projects.”⁷⁰

This is not to say that Wu’s “Boston Green New Deal” or the city’s existing climate preparedness programs are not intended to center climate justice, but rather to emphasize that climate justice requires constant and consistent consideration of community needs — not just occasional moments of listening without commitment to real action. Any steps forward for a community, cause, or movement have to be protected. As the report from Edwards’ office states, unless public benefits are “permanently protected,” “they are vulnerable to amendment, changing in staffing of city agencies or changes in

66 Office of Boston City Councilor Michelle Wu, *Planning For A Boston Green New Deal & Just Recovery*, 2-3 (Aug. 2020), <https://assets.ctfassets.net/1hf11j69ure4/B6NLx1OVxTVMNbHEvFaQE/700f4762bae92990f91327a7e01e2f09/Boston-Green-New-Deal-August-2020-FINAL.pdf> (last accessed Nov. 7, 2021).

67 *Id.* at 6.

68 *Id.*

69 Owens & Noiles, *supra* note 17.

70 Cole, *supra* note 40, at 701.

ownership.”⁷¹ “To achieve the equitable city we all want, we need to be cognizant of our past and actively pursue strategies that center racial equity.”⁷² Even after winning policy victories, movement lawyers must continue to actively monitor new policy developments, inform affected community members about those developments, and maintain communication lines between decision-makers and the movement.

V. CHALLENGES IN MOVEMENT LAWYERING FOR CLIMATE JUSTICE

When I asked Caramello about how and whether she weighs climate justice in her housing justice work, she sighed. We sat in the Harvard Legal Aid Bureau (“HLAB”) office, a floor of a converted house near Harvard Law School, which was humming with law students and their supervisors. These lawyers and soon-to-be lawyers represent hundreds of indigent clients a year in a spectrum of civil cases. Caramello said that climate gentrification is a clear problem for the communities with whom she works, who are at risk of becoming unhoused by current rates of gentrification in the Boston area. Caramello explained the difficulty for public interest attorneys in working on a long-term issue like climate change when every day holds a new set of emergencies — and when the attorneys with the skillsets to address either problem are overworked and under resourced. “Maybe we should be doing long-range planning, but there’s like 2-300 people in the housing court every week,” she said. “We’re not going to abandon the emergency room to do 40-year planning.”⁷³

Caramello named a problem inherent but not unique to climate justice: the difficulty of gaining momentum on a problem that looms in the future but may not appear to be immediately affecting environmental justice community members’ quality of life. Caramello noted that she was impressed at the amount of civil protest around climate change that has sprung up in recent years, through events like Fridays for Future and the Global Climate Strike and groups like Extinction Rebellion and the Sunrise Movement. However, social justice requires that communities most affected by an issue are given precedence and voice in the movement around that issue. Caramello pointed out that members of environmental justice communities, who may be working several jobs, raising children, and experiencing other serious life stressors, may find a protest against an immediate threat, like eviction, more worth their limited spare time than a climate march.

71 Khan, *supra* note 55, at 30.

72 *Id.* at 56.

73 Caramello, *supra* note 47.

Climate change is a new kind of threat, but movements for climate justice share many of the same challenges as other social justice movements. Those challenges include the difficulties of building lasting coalitions between experts, like lawyers and scientists, and affected community members; the potential for hard-fought improvements to lead to gentrification; the necessity of counteracting revisionist histories and powerful narratives; the fatigue that can come from constantly fighting what can seem to be an uphill battle; and the conundrum of how to subscribe to the ethics of movement lawyering when a social justice movement is in its fledgling stages. Climate justice differs from other movements in the scale of the problem: climate change is a threat to the entire human population. Most of the country, including the powerful and the wealthy, see climate change as an issue affecting them that requires action. The challenge in climate justice is to make sure that the ways in which society adapts to those changes do not amplify the racial, economic, and social inequalities that exist.

HLAB is a civil legal services organization, but Caramello also works with City Life/Vida Urbana, a group that works to “help people stay in their homes” through community organizing and collective action.⁷⁴ Her advocacy in that housing justice movement is mainly through helping individual clients fight their cases in housing court, a strategy that aligns with Cole’s participatory model of lawyering. Although she said she sees the difficulties of organizing around climate change, she said that strong movements like City Life/Vida Urbana have the grassroots power to get people to take action on issues that might not immediately affect them. City Life/Vida Urbana has the reputation, trust, and momentum to draw connections between a single tenant’s eviction and the fate of a neighborhood, incentivizing entire crowds to protest a family’s eviction. In the same way, “the movement plays a role in drawing the connections between present and future.”⁷⁵

However, Caramello noted the difficulty for social justice movements in making sure that their actions aimed at addressing current conditions also include forward-thinking components. As an example, Caramello pointed to activism around the creation of the Fairmount train line, a relatively new extension of the MBTA’s commuter line that connects the lower income and diverse neighborhoods of southwest Boston to downtown.⁷⁶ For years, com-

74 See City Life/Vida Urbana, <http://www.clvu.org/> (last accessed November 7, 2021).

75 Caramello, *supra* note 47.

76 See Clara Hudson, ‘Indigo Line’ Advocates Keep Pushing for a Switch from Commuter Line to Rapid Transit, DORCHESTER REPORTER (Dec. 15, 2016), <https://www.dot-news.com/2016/indigo-line-advocates-keep-pushing-switch-transit>; see also Nik DeCosta-Klipa, Marty Walsh Says Improving This MBTA Line Could be a ‘Game-Changer’ for Parts

munity advocates pushing for more access to economic opportunities for their neighborhoods joined with environmental advocates pushing for more public transportation to pressure the MBTA to add commuter rail stops in underserved neighborhoods. The addition of those stops for the community was a victory for the whole coalition, but it is a victory that carries the risk of a different problem: a new rail stop could lead to gentrification.

Caramello said that sometimes an initiative may have gaps in foresight because of a gap in shared understanding among coalition members. She cited the Fairmount line campaign as an example of environmentalists and housing advocates working together, but such a coalition can be hard to keep together after the stated goal is met. She asked, “How do we build lasting coalitions so that when these big things come up, we have ways of working together rather than seeing ourselves as separate interest groups?” If individuals continue to cultivate relationships built during one campaign, the coalition may continue for future campaigns. Caramello said that the trust that develops through those maintained relationships, like what she has experienced between HLAB and CVLU, is what makes movements long-lasting and efficient. Cross-disciplinary coalition building is particularly important to a cause like climate justice, where highfalutin legal language combines with the technocratic jargon of climate and environmental science. Movements need experts to interpret for and advocate for their mission, and they need to be able to trust those experts.

Through the long-term activity of groups like CVLU, ACE, and REEP, Roxbury is a neighborhood with an entrenched tradition of social justice movements. Caramello noted that the strong presence of these groups is something other cities can learn from, and she also noted the difficulties for aspiring movement lawyers in locations without strong movements already present. In other jurisdictions without a similar tradition, particularly in areas where the legal system is more oppressive towards environmental justice communities and less amenable to public activism, movement lawyering can be more complicated because the affected communities may not be as visibly organized.

Particularly for climate change, communities may not be concerned about the danger of inequities it causes, or residents may be too overwhelmed with more immediate crises to put their energy into fighting such a seemingly theoretical issue. Movement lawyering is bound to be different in every locality, because each community has its own unique history, culture, motivations and personalities. It is up to movement lawyers to listen openly to those af-

of Boston, BOSTON.COM (Oct. 7, 2019),
<https://www.boston.com/news/local-news/2019/10/07/mbta-fairmount-line>.

fectured by an issue and to use their legal expertise with humility and honesty to help movement protagonists on the path to power.

VI. CONCLUSION

Movement lawyering for climate justice looks a lot like movement lawyering for environmental, economic, and housing justice. That's because all of those movements are part of the same wider struggle for dignity and self-determination — a struggle that involves legal successes and failures but is not limited to them. Climate justice is distinct because it requires movement attorneys, organizers, and affected community members to organize around climate change — a “threat multiplier” that may not appear to have a tangible immediate effect on communities not yet regularly confronted with unusual weather events, rising coastlines, and extreme heatwaves. However, existing movements can provide a solid ground for a local climate justice movement by supporting advocates with the coalitions and grassroots power needed to pressure local government to respond to climate change in an equitable and just way. Attorneys can support these efforts with education, lobbying, litigation, and other legal skills and privileges. In order to truly be engaged in climate justice, however, lawyers must approach their work with respect, humility, and a confrontation of their own biases and assumptions about hierarchy.

The research I conducted for this article was limited to movement lawyering strategies, but much more research can and should be done on specific tactics that movement lawyers can use to implement those strategies. I also limited the bulk of my research and interviews to organizations and actors in Boston, but research with a wider geographic would provide a more diverse, and therefore more universally applicable, set of movement successes, setbacks, and lessons. In particular, I think a valuable addition would include study of the climate justice movement growing out of regions with less progressive politics, such as the Southeast. A much more expansive research project could explore policies in countries with other legal regimes and compare climate justice movement strategies in civil law regimes against those in common law regimes. Other research that could be useful includes more interviews with movement lawyers and organizers; more application of international frameworks to local policy; and more research on indigenous-led movements.

My purpose in researching this topic was to explore both an area of the law and a theory of lawyering that I did not find in the Harvard Law School curriculum when I was a student. While climate law is burgeoning within the environmental law sphere, I did not find much guidance on climate

justice from casebooks. Despite calls for the law school to establish a movement lawyering clinic, Harvard does not have many options available for students interested in practicing public interest law that do not fall within the assumed categories of impact litigation, direct services, or government work.⁷⁷ I chose to write this article to learn how I can become a legal advocate who treats clients with respect and humility, and who advocates with an understanding of power dynamics. Since completing this essay, I have started work as a Climate Justice Legal Fellow for the environmental justice nonprofit GASP in Birmingham, Alabama. As a new attorney, I try to incorporate the lessons I learned from this research in my everyday practice.

As existential threats from climate change to the COVID-19 pandemic change our society and our future, powerful and wealthy individuals will tend to use tragedy as opportunity to further undermine the rights of others.⁷⁸ My belief is that lawyers dedicated to the public interest must understand their own power to press against that current and use their skills and privileges to support others in their struggle. Because, as movement lawyers Alexi and Jim Freeman said, “despite what seem like long odds, oppressed communities can win. As history has shown us time and time again, David can beat Goliath. However, doing so requires that the affected community marshals more power than those who are invested in preserving the status quo.”⁷⁹

77 See Aidan F. Ryan, *Activists Urge Harvard Law School to ‘Better Prepare’ Students to Support Incarcerated People*, HARV. CRIMSON (Sept. 27, 2018), <https://www.thecrimson.com/article/2018/9/27/blsa-letter-prison-strike-demands-social-justice-programs/>.

78 See Naomi Klein, *Coronavirus Capitalism — and How to Beat It*, THE INTERCEPT (Mar. 16, 2020), <https://theintercept.com/2020/03/16/coronavirus-capitalism/>; see also Naomi Klein, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM*, Picador (2007).

79 Freeman & Freeman, *supra* note 19, at 151.

HOW TO SUPPRESS STUDENT SPEECH: THE HARVARD LAW SCHOOL PLAYBOOK¹

By Amanda T. Chan²

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I. INTRODUCTION

“All members of the University have the right to press for action on matters of concern by any appropriate means. The University must affirm, assure, and protect the rights of its members to organize and join political associations, convene and conduct public meetings, publicly demonstrate and picket in orderly fashion, advocate, and publicize opinion by print, sign, and voice.”

— University-Wide Statement of Rights and Responsibilities, 2020³

¹ I would like to thank all those who agreed to an interview or phone call. I thank Prof. Noah Feldman for his feedback. Thank you to the editors of this journal for your meticulousness. Law students Mary Claire Kelly and Marina Multhaup contributed to legal research for this paper.

² Amanda Chan is a graduate of Harvard Law School.

³ UNIVERSITY-WIDE STATEMENT ON RIGHTS AND RESPONSIBILITIES, <https://provost.harvard.edu/university-wide-statement-rights-and-responsibilities> [Perma-link: <https://perma.cc/BU7R-E2XK>] (last visited Nov. 14, 2021).

In fall of 2015, Harvard Law students formed a group called “Royall Must Fall” which objected to the Royall family crest represented in Harvard Law School’s shield. According to these students,

The Harvard Law School crest is a glorification of and a memorial to one of the largest and most brutal slave owners in Massachusetts. But Isaac Royall, Jr., was more than simply a slave owner; he was complicit in torture and in a gruesome conflagration wherein 77 black human beings were burned alive.⁴

Eventually, the students staged an occupation of one of Harvard Law’s beloved student lounges, renaming the lounge to “Belinda Hall” named after one of the enslaved women who was sold and whose profit was used to establish Harvard Law as an academic institution. Armed with sleeping bags, air mattresses, and political literature, students formed the Reclaim Movement and occupied Belinda Hall in 2015. They demanded that Harvard Law School replace its shield, which featured three bales of wheat in reverence to the slave-owning Isaac Royall family, with something else and honor the legacy of the slaves who suffered for the profit of Harvard Law. The Reclaim occupation worked: In 2016, the Harvard Corporation voted to take down the Harvard Law shield. This made the headlines in countless worldwide and national papers, including the *Washington Post*, the *New York Times*, the *Boston Globe*, and countless others. With these acts of organizing, students shamed Harvard Law into taking just action.

In this article, I posit that Harvard Law School has since developed a closed-door system to ensure that such student organizing never happens again. Harvard Law has perfected this subtle strategy by making unofficial threats of academic discipline against vulnerable student organizers, especially Black female students. Student activists at Harvard Law School, racial justice activists in particular, have experienced false accusations, increased surveillance, a culture of paranoia and fear, and investigation from outside counsel. On one hand, there is a group of passionate students who view Harvard as an epicenter of power, money, and exploitation. They target the Law School’s weaknesses and make demands of authority figures. They are organizers. On the other hand, the administrators must protect the Law School’s public image as an traditional and long-established educational institution —

4 Antuan Johnson, Alexander Clayborne, and Sean Cuddihy, *Royall Must Fall*, THE HARVARD CRIMSON, Nov. 20, 2015 (<https://www.thecrimson.com/article/2015/11/20/hls-royall-must-fall/>).

an image where the Law School nominally supports students' "free speech."

But the administration, in trying to balance these interests, has effectively squashed student dissent. The administration has overstepped its bounds when it comes to mechanisms for controlling student behavior. As a result, the Dean of Harvard Law, Dean John Manning, now heads an administration that simultaneously boasts of being the "best" law school in the country while actively working to suppress its students' free speech.

Harvard Law School has violated the University's and Law School's self-espoused values, purporting to support free speech and the right to associate. The University's Statement of Rights and Responsibilities states, "The University must affirm, assure, and protect the rights of its members to organize and join political associations, convene and conduct public meetings, publicly demonstrate and picket in orderly fashion, advocate, and publicize opinion by print, sign, and voice." Harvard Law students, former and current, report that the Law School did not affirm, nor ensure, nor protect the rights of the students to organize, associate, and convene public meetings. On the contrary, the students reported fear and intimidation tactics as a result of their chosen methods of expression and speech. As part of a student-led program called DisOrientation, for example, students reported that the Dean of Students threatened the students with disciplinary action if they were to gather in a student lounge to discuss historical events.

The University-Wide Statement on Rights and Responsibilities states:

In particular, it is the responsibility of officers of administration and instruction to be alert to the needs of the University community; to give full and fair hearing to reasoned expressions of grievances; and to respond promptly and in good faith to such expressions and to widely expressed needs for change. In making decisions that concern the community as a whole or any part of the community, officers are expected to consult with those affected by the decisions.⁵

This does not match the experiences of students at Harvard Law, who found that Dean Manning's administration ignored the students' grievances and repeatedly threatened students with disciplinary action instead of allowing students to choose their own methods of expression freely and widely.

5 UNIVERSITY-WIDE STATEMENT ON RIGHTS AND RESPONSIBILITIES, <https://provost.harvard.edu/university-wide-statement-rights-and-responsibilities> (last visited Nov. 14, 2021).

This article outlines discoveries from confidential interviews and anonymous survey submissions on the policing of political speech at the Law School. This article further outlines recommendations for how the administration can move forward and respect the rights of students to dissent and express their own beliefs without reactionary measures.

I should note at the outset that I, Amanda Chan, am one of the many students who received increased scrutiny from the administration for my dissent and protest. I am not a third-party neutral in any way. I cannot claim to know the psychology and rationale behind the actions of The Dean of Students nor Dean Manning, nor anybody else in the Law School administration. Dean of Students Marcia Sells thrice did not respond my invitations to interview for this article. This article is intended as a historical record of tactics used by the administration to stifle political speech at the Law School. I hope this record will be a useful resource for the future generations of student organizers at Harvard Law School. I also hope all those affiliated with Harvard Law School understand the importance of the free speech of student organizers.

II. METHODOLOGY

I conducted socially-distant interviews with all the participants, mostly through Zoom. I explained repeatedly to each participant that the interview was completely voluntary, they could pass on any question, and they could stop at any time. Most participants were eager to share their stories, as they do not have other forums to air their grievances with the Harvard Law administration without revealing their identities and risking retaliation. I also created a short online survey regarding free speech where people could anonymously submit information, in lieu of a confidential interview with me. I received three anonymous submissions via this method. I also had confidential phone calls with two people who did not want to be officially interviewed but were willing to answer a few, short pointed questions about certain facts.

I categorize the types of interactions that students had with the Dean of Students (“DOS”) in three different frames: *Interference*, *Intimidation*, then *Investigation*. First, the participants describe DOS interference in their organizing and educational activities. In the *Interference* stage, DOS never tells students “no” outright, but rather asserts strange hoops that students must jump through or new rules not previously known to students

Then, if *Interference* does not work, the DOS moves onto the next stage: *Intimidate*. The Dean of Students sends an email demand to meet with

various students, usually those who have engaged in some sort of dissent. In this meeting, The Dean of Students outlines at length the disciplinary procedures facing the student, with the clear implication that the students in the meeting could be in serious trouble – for what, exactly, is not clear on the face of the email. But in these meetings, the DOS refuses to provide any information about the student’s alleged conduct, any accusers, any accumulated evidence against the student, or any other information which may provide clarity or quell the students’ concerns. Typically, the DOS will discuss, at length, the procedures of the Harvard Law School Disciplinary and Administrative Board (“Ad Board”).

Usually, most students stop their dissent and protest at the interference or intimidation stage. DOS’s actions scare the students enough so that most focus on their studies or choose to advocate more quietly. But, for the few students who persist, there comes the final hammer – the *Investigation* stage. The Ad Board launches an investigation of the students, and the students have no choice but to cooperate. This causes a great deal of prolonged pain and suffering for the students and is an effective dissent suppressant.

III. PROTEST CULTURE AT HARVARD LAW SCHOOL

The protest culture at Harvard Law is thoughtful, strategic, and valued. Student protestors are not unhinged rabble rousers; they view their actions as a means of pushing the institution into the progressive future. For example, Participant 1 said, “[Protest is] the only way to affect change on these issues. . . . Protests are important for making the stakes high enough for the administrators, so they let change happen.”⁶ Participant 5 noted, “I think it’s important to challenge institutions you’re a part of. I am really invested in my personal liberation and liberation of all Black people. For me, that means looking to dismantle institutions that oppress Black people where I can.”⁷ Participant 6 described protest as a last resort because all other attempts at communication have been siloed or ignored:

Protest is . . . an effective form of communication and is often a form of sometimes frustrated communication. The other methods of communication have been tried. I know that students have been organizing on campus either trying to contact Dean Manning or other administrators . . . we felt that the campaign was not gaining—didn’t get the respect or attention that it de-

6 Confidential Interview with Participant 1 (July 24, 2020) (on file with author).

7 Confidential Interview with Participant 5 (Aug. 23, 2020) (on file with author).

served and wasn't being taken seriously by the Administration, particularly Dean Manning. And even if they did, the format in which the law school likes to have these conversations are very siloed and ineffective. Really, it's part of the project to quell any speech that challenges the foundations of Harvard Law School.⁸

Participant 7 insisted that protest is part and parcel with the student experience—challenging the powerful institutions:

We're trying to use knowledge that we've gained to challenge the institutions around us, that we're most intimately connected to. . . I'm not just some passive person gratefully receiving a gift from the university. I paid years of my life in debt to go to this school. Potentially the rest of my life . . . they want Harvard to be a big part of our lives from the moment we get in until we die. Why wouldn't I be critical of that? . . . Why wouldn't I investigate the blood on the money? That's what being a responsible student is.⁹

For the Harvard Law School administration to suppress, intentionally or not, this protest culture is a deep disservice not only to the many intelligent individuals who attend the school but also to the rich history of leadership and progressive change at Harvard.

IV. INTERFERENCE

A. Suppression of handbilling and leafletting

When the Harvard Administration does not approve of student speech, they begin their first step—Interference. At first, it is just bizarre. The office of the DOS starts asking students strange questions. Participant 1 encountered Interference when she was simply “tabling,” a very common practice at Harvard Law School where people sit at a table near the dining hall and hand out literature to or chat with passers-by. Participant 1 was spreading information about LexisNexis and Westlaw, two very common legal databases, which have financial connections to U.S. Immigration and Customs Enforcement (“ICE”). DOS sent Participant 1 emails asking Participant 1 and her colleagues to perform extra tasks in order to finalize the table reservation.

8 Confidential Interview with Participant 6 (Apr. 7, 2021) (on file with author).

9 Confidential Interview with Participant 7 (Apr. 11, 2021) (on file with author).

These emails required students to jump through extra hoops to have their tabling reservations confirmed, hoops through which other student groups were not required to leap. For example, one DOS staffer demanded that the student group, National Lawyers Guild (“NLG”), contact a professor before DOS would approve of the group’s tabling reservation:

We received this request from NLG for tabling with the title of Immigration Advocacy and with the purpose as “NLG Members will chat with interested students about immigration advocacy opportunities available to law students.” As you know, we have a wonderful group of people at the Harvard Immigration & Refugee Clinical Program [“HIRC”], OPIA [Office of Public Interest Advising] and even OCS [Office of Career Services], in WCC [Wasserstein Hall] who would love to know more about what you are planning to present to the students. They also could help with information that they already have and that could be beneficial to the students learning as well. Please reach out to Professor [redacted], copied on this reply and who is the [redacted] for the HIRC, so you can start this conversation with her. We can still talk about tabling after your conversation with HIRC if there is no change of plans.¹⁰

Notably, the DOS office very explicitly blocks the students’ tabling request until further “conversation” with someone who has no administrative oversight over students at the Law School. The students interpreted this as discouragement from actively advocating against, or even speaking of, the Law School’s contracts with companies who provide services to ICE.

Some of the smaller obstacles, especially through the National Lawyers Guild, we tried to conduct routine business, booking tables in shared space or booking rooms, we sometimes got weird invasive emails from

the Dean of Students office sort of questioning if outside people were coming in to talk at these tables. Or questioning if what we were doing was really necessary because the Law School offered immigration rights programming. We got weird interference, which

10 Confidential Interview with Participant 1 (July 29, 2021) (on file with author).

we had never heard of happening to people just, like, booking tables... When this interference happened, we took it very seriously. We took it as pressure to not partake in these forms of advocacy.¹¹

We were told, for example, that we had to check in with the immigration clinic and the clinical professors to get their approval for the activity [regarding information about legal research companies that contract with ICE]. So, we reached out separately to the person we were told to reach out to. And she was confounded by the entire thing. She had never encountered this before where she was told to basically approve of student activity. That was definitely novel. And again, there is nowhere on the HLS website where it says that you need to get approval from any such entity or professor before you can table. Tabling is generally just a generic thing you can do. But we ran into these hurdles.¹²

This regulation of the mere act of leafleting and speaking with passers-by is especially concerning for those who believe that Harvard Law should honor the fundamental principles of free speech. Leafleting and handbilling is a quintessential part of free speech. As the Supreme Court noted:

The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press, in its historic connotation, comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated.¹³

This “liberty of the press” is the same liberty of press expressed in the University-Wide Statement of Rights and Responsibilities: “All members of the University have the right to press for action on matters of concern by any ap-

11 *Id.*

12 Confidential Interview with Participant 5 (Aug. 23, 2020) (on file with author).

13 *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

appropriate means. The University must affirm, assure, and protect the rights of its members[.]”¹⁴ Yet, imposing surprise requirements and extra bureaucratic steps is antithetical to the encouragement—much less the affirmance, assurance, nor protection—of this liberty. Of course, the City of Griffin’s handbill ordinance banned all leafleting, which the Dean of Students did not do. Still, the selective imposition of these unrecognized encumbrances should raise eyebrows.¹⁵

Participant 5 experienced interference when printing posters advertising for the Harvard Prison Divestment Campaign¹⁶ as well as a different student group’s podcast. According to Participant 5, the Dean of Students Office interfered with the most basic and foundational rights under the First Amendment – the right to print leaflets and spread the word.

After the event at the institute of politics, I felt that I was being increasingly targeted by the Dean of Students Office. There were several incidents. First, we had tried to print out posters for HPDC using the NLG institutional capacity and we faced a ton of pushback [from the law school copy center]. We were not allowed. We were initially allowed to print out one poster, and then apparently, we had to go through a process where the Dean of Students to approve any further things that we had to print out.¹⁷

We were not told [beforehand] that there was this process, there is nowhere on the HLS website that says you have to go through a process of getting approval from the Dean of Students before you print something out. And we were told something about copyright infringement because [the divestment campaign’s] logo

14 UNIVERSITY-WIDE STATEMENT ON RIGHTS AND RESPONSIBILITIES, <https://provost.harvard.edu/university-wide-statement-rights-and-responsibilities> [Perma-link: <https://perma.cc/BU7R-E2XK>] (last visited Nov. 14, 2021).

15 Throughout this paper, I make many comparisons between First Amendment jurisprudence and the practices of the Harvard Law Administration’s policing of speech. To be clear, the First Amendment does not bind Harvard Law School, as a private institution. But as a as an institution that expressly endorses First Amendment principles in its policies, such jurisprudence is useful for both policy guidance and as a comparative tool.

16 The Harvard Prison Divestment Campaign is a student-led activist group aiming to persuade Harvard to divest its endowment from companies which significantly profit off of the prison-industrial complex. More information is available at harvardprisondivest.org.

17 Confidential Interview with Participant 5 (Aug. 23, 2020) (on file with author).

uses Harvard’s shield—uses a shield that resembles Harvard’s shield.¹⁸

When Participant 5 returned to the Copy Center with a new version of the flyer without any shield or logo, the Copy Center again refused to print the flyer and insisted they needed permission from the Dean of Students: “They said, without the Dean of Student’s approval, they couldn’t do it.”¹⁹

In the absence of overt threats, the hovering presence and surveillance from the administration left students feeling uneasy and reluctant to speak up:

I got way more security conscious. I felt like every email I was sending was being scrutinized and surveilled. That was anxiety-inducing. We even switched around roles in the [student group National Lawyers Guild] so that someone [a student] who hadn’t been in the spotlight was doing the work of liaisoning [sic] with the Administration. Similarly, we did the same thing with the podcast. . . . To just be in the [law school] building and to know that every action I did was being surveilled by the Administration.²⁰

B. Suppression of spoken word

It appears that the use of one’s “voice” is not beyond the purview of irregular regulation by the Dean of Students. For example, a podcast attracted the attention of the Harvard Law Administration. Participant 5 recounted her experience with the DOS related to her work with a Black Law Students Association (“BLSA”) podcast:

The podcast was a BLSA-affiliated podcast. We were again printing out signs advertising the protest. This was again sanctioned by the leadership BLSA. And we apparently had to wait, before the signs could be printed out, which were literally just advertising that the podcast was happening—apparently [we] had to wait for the Dean of Students Office to listen to the podcast and make sure that there wasn’t any material that didn’t reflect poorly on the school or something. I

18 Confidential Interview with Participant 5 (Aug. 23, 2020) (on file with author).

19 *Id.*

20 *Id.*

didn't know what exactly they were looking for.²¹

Per this account, the Dean of Students Office was pre-screening speech of Black students before allowing its dissemination to the larger Harvard Law body. Notably, the Civil Rights and Civil Liberties Journal, a prestigious civil rights law journal at Harvard Law, also hosts a podcast. Two former editors of this journal – active on campus at the same time as Participant 5 – did not face any attempts, whatsoever, to regulate or pre-approve the content of the Civil Rights and Civil Liberties Journal podcast before it was released; suggesting that the administration subjects some student organizations to different speech regulations than others.

This type of regulation is analogous to prior restraint, where a governing body requires that certain speech be subject to approval before dissemination:

The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. . . A prior restraint . . . has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time.²²

The debate in *Stuart* was, in some ways, a conflict between the First Amendment and the Sixth Amendment: Whether a prior restraint on reporting of a murder trial violated a defendant's right to a fair trial.²³ But here, there is no evidence that the BLSA podcast was possibly endangering anyone's Constitutional rights. Instead, the first episode spoke of free food, printing quotas, the Harvard Law grading system, and Shaun King. Harvard Law has no written rules regulating the dissemination of podcasts granting the DOS the authority to place this prior restraint on the podcast other than its apparent ability to give orders to the Harvard Law Copy Center. It is unclear why the Civil Rights and Civil Liberties Journal podcast faced no similar restraint. Even if there were prior restraints on other podcasts, why there must be a prior restraint in the first place?

C. *Suppression of the right to associate*

21 *Id.*

22 *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976).

23 See generally *Id.*

The DOS office sometimes accuse students of improper behavior based on with whom the student associates. The DOS office warns students about potential violations of the rules, even if the accusation or direction of the warning is factually incorrect. On September 12, 2019, the DOS sent me and two other student organizers²⁴ an email that stated, “I was sent a note that you are requesting booking space in Haas Lounge for a ‘demonstration.’ This space is not one that is booked by students. This was noted in a message that Dean Claypoole, Burns and I sent to all student [sic] on September 6th.”^{25,26} The Dean of Students was referring to the anti-JAG protest, where some students protested JAG recruiters at campus and more specifically, JAG’s anti-trans discriminatory hiring policies. This email from the Dean of Students confused me. I was not involved in leading the organizing around the alleged “demonstration.”

On Sunday, October 20, 2019, I sent the Dean of Students an email denying the accuracy of the alleged “note” and asked who sent the “note.” The Dean of Students claimed that the Harvard Event Management System (“EMS”), the online network which allows students to book rooms, sent her the note.²⁷

I went through my emails on Sunday and found I had

I was sent a note that you are requesting booking space in Haas Lounge for a “demonstration”. This space is not one that is booked by students. This was noted in a message that Dean Claypoole, Burns and I sent to all student on September 6th.

I only learned about your request this morning. You can be very visible and read your statement near the Hark ramp and hand out the statement to students and give out buttons about support for Trans-students. This space is still available.

Dean Sells

Marcia Lynn Sells, Esq. | Associate Dean & Dean of Students

Harvard Law School

leadership position, is the affinity group for queer or trans people of color. All three were known student organizers. The alleged protest was against Harvard Law’s decision to allow military JAG recruiters onto campus despite its transphobic hiring policies.

²⁵ E-mail from Dean of Students Marcia Sells, Harvard Law School, to author (Sept. 12, 2019, 11:00am ET) (on file with author).

²⁶

²⁷ E-mail from author, to Harvard Law Dean of Students Marcia Sells (Oct. 20, 2019, 10:10am ET) (on file with author) (“Hello Dean Sells, I deny the accuracy of this note. I must ask: who sent you such a note?”).

sent this note to you and the leadership of QTPOC back in September.²⁸ I had been sent a note from Event Management System that someone from LAMBDA or QTPOC had tried to reserve Haas Lounge. I did not have the name of who was trying to book the space.”^{29,30}

Another student, who did help to organize the anti-JAG protest, said:

[Dean Sell’s] email . . . was sent saying that we could not protest in Belinda Hall [a.k.a. Haas Lounge]. The JAG protest the year before had successfully taken place in Belinda and we were trying to replicate the format. I was alarmed to receive a personal email from the [Dean of Students] herself telling us to move our protest. She made it seem that we were trying to “reserve” Belinda for our “event,” but we had not reserved any room since this was a protest, not a sanctioned event.³¹

As a result, this student said, “we moved our protest and changed its format based on a vaguely threatening email from DoS[.]”³²

Other students attempting to gather in Belinda Hall have also faced similarly inexplicable roadblocks from the DOS. One such unofficial student

28 The Dean of Students did not send this email in question to anybody else in the QTPOC leadership. She only sent it to me and two leaders in Lambda.

29 E-mail from Dean of Students Marcia Sells, Harvard Law School (Oct. 21, 2019, 11:06am ET) (on file with author).

30 The Dean of Students’ claim that there was an attempt on EMS to book Haas Lounge was not supported by evidence. By the very nature in which the EMS system is designed, at the time, it was impossible for a student, such as myself at that time, to attempt to book the Haas Lounge because it is not an available selection on the EMS. It was technologically impossible to make an EMS reservation of Haas Lounge because it is not listed as an option on EMS. It is like ordering a cheeseburger from a salad shop—It is just not a choice on the menu. Furthermore, the EMS system forces the user to login with personal credentials; student organizations did not have group credentials. If there was an attempt to book a room, the database would show an individual’s credentials, not the credentials of a student organization, and certainly not the credentials of two different student organizations. That means that either the EMS system had glitched severely in creating a reservation on behalf of three known student organizers at Harvard Law or on behalf of student organization accounts which did not exist, for a room which did not exist on EMS – or, more likely, the Dean of Students’ statement was false.

31 Anonymous survey submission (on file with author).

32 *Id.*

group, Law Students Against ICE, aimed to have a teach-in in Belinda Hall but instead found that the Dean of Students claimed that such a teach-in was in violation of a rule and demanded that the students moved the teach-in to a

Hello Amanda,

I went through my emails on Sunday and found I had sent this note to you and the leadership of QTPOC back in September. I had been sent a note from Event Management System that someone from LAMBDA or QTPOC had tried to reserve Haas Lounge. I did not have the name of who was trying to book the space.

I gather it took you a while to get through past emails and that is when you found this note. It would be great to talk with you about it if you have time. I will ask Edgar in our office to schedule a time.

All the best,

Marcia Sells

different location.³³

In response to the DOS's email, the NLG students clarified that the DOS was mistaken. The students meant to use Belinda Hall as a social gathering space – not as an official “event” as the Dean had incorrectly stated. Thus, they did not need to “book” the space through official DOS channels. The students also noted that the “Use of Space” rule failed to define “event” or “programs, meetings, or other activities” in any capacity, and thus, no reasonable reader could materially evaluate whether their planned social gathering would violate the so-called “Use of Space” rule. Further, an email from the DOS is not necessarily binding upon the students as agreed-upon law or policy. It certainly does not carry the same weight as, for example, the rules enshrined in the Harvard Law Handbook of Academic Policies. Clearly, as the students noted, there were many holes in the DOS's attempted enforcement of this alleged “Use of Space” rule.

On its face, the “rule” is discretionary. It states that students looking to use Belinda Hall for an event “may” do so through the Dean of Students Office. A reasonable interpreter of this statement may believe that the Dean of Students is simply offering a service – not banning all events which are not approved and requiring students to acquire approval before gathering in

33 E-mail from Dean of Students Marcia Sells, Harvard Law School, to NLG students (Nov. 13, 2019, 10:13pm) (on file with author).

Belinda. There are many unanswered questions about this “notice” which the DOS has yet to clarify.

Most importantly, why would a teach-in about ICE and its actions be a problem in the first place? Does Harvard Law School stand for the principle

On Nov 13, 2019, at 10:13 PM, Sells, Marcia <msells@law.harvard.edu> wrote:

I am writing because I received a flyer that notes an event the National Lawyers Guild is planning for tomorrow. In our records for student organizations you each are listed as having leadership roles--- President, Vice President and Treasurer—for the NLG, so I write to you about this event. It indicates NLG is planning a teach in on an important national concern. However, the flyer has listed the location as “Belinda Hall” which is known as Haas Lounge. This lounge is not available for scheduling an event.

On September 6, 2019, all students were sent a notice from Dean Burns, Dean Claypoole and myself. In this notice it states:

Use of Space – Students who wish to book space for programs, meetings, or other activities that connect to important issues that arise or engage the community in dialogue may do so through the Dean of Students Office. We will ensure that space is made available. The Law School’s lounges and other shared spaces are reserved for personal study, small group study and small social groups. The Law School has defined these as the “normal activities” for these spaces within the meaning of the University’s Statement of Rights and Responsibilities. Please also review the Law School’s [Protest and Dissent Guidelines](#), which strike the balance between the right to protest and the right of speakers to be heard, and the [HLS Bulletin and Chalkboard Policy](#).

For this very important teach in that NLG is planning we can book you into a class room or you can use the Student Organization Workroom. I hope you will reach out to DOS to plan this event in one of those spaces.

All the best,
Dean Sells

that students may express their views in a non-protest format only under certain conditions in certain location with a certain number of people? What is so worrisome about students providing educational services to other students? Yet, it is unclear what purpose the so-called “rule” could serve exactly other than to limit student speech and association.

The right to speak in a public forum is one of the most fundamental pieces of the First Amendment.³⁴ Harvard Law’s property is not a public forum, but if Harvard Law and Harvard generally is committed to upholding

³⁴ See *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 512 (1939) (“[I]t is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the Amendment protects.”).

principles of free speech, then a peaceful educational gathering in a social space – a space which tourists and non-Harvard affiliated visitors frequently use – should not be scrutinized by the administration. In the *Hague v. Committee for Industrial Organization*, the Supreme Court wrote:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.³⁵

Belinda Hall—while not public property—is a private equivalent of public space. Within Harvard Law School Belinda Hall is common space for students, a space where anyone can study, socialize, exchange ideas, and relax. Harvard Law should think deeply before limiting speech and association in this space, and must critically examine the wording and implementation of any such limitations.

V. INTIMIDATION

If these acts of Interference do not deter students from advocacy, the next step is Intimidation. This usually occurs in the form of a mandatory meeting with the DOS, where the Dean discusses the Administrative Board—Harvard Law School’s disciplinary board and “Ad Board” for short—and the corresponding disciplinary process at length with students.

A. *DisOrientation*

Participant 4, a Black woman, describes one such meeting, where the DOS allegedly threatened Participant 4 with Ad Board discipline for reading a poem about Belinda, an enslaved African woman who was sold to profit Harvard Law School.³⁶ The DOS asked Participant 4 to meet; Participant 4 was wary:

I felt suspicious. I didn’t feel scared or intimidated but I did feel suspicious because before she asked me to come, I knew [The Dean of Students] had a history of

³⁵ *Id.* at 515.

³⁶ Confidential Interview with Participant 4 (Aug. 6, 2020) (on file with author).

targeting Black women in particular who speak out, trying to get them to not speak out. Because she did the same thing to the Black woman who organized DisOrientation the year before[.] . . . I thought, oh, she's probably going to try to discourage me. And that's what she did.³⁷

DisOrientation is a yearly gathering of students to discuss the history of student and faculty activism at Harvard Law,³⁸ usually held in Haas Lounge, colloquially known as Belinda Hall, renamed after the enslaved woman Belinda Sutton by the Reclaim Movement in 2015.

I was helping organize DisOrientation. We wanted to have it in Belinda Hall because of the history of Belinda Hall. And because I had written a poem about Belinda Sutton that I wanted to read at DisOrientation. And so I was like, I think it's important that

we do this *in* Belinda Hall. And the Dean of Students called me to her office and told me that she supports DisOrientation and that she thinks we should have it, but that we just can't have it in Belinda Hall specifically. Like we need to have it somewhere else. . . She offered to book another room but if we decided to have it in Belinda Hall, she said she could send me to the Administrative Board because I would be breaking the rule. . . She said, 'If you do this, then I might have to send you to the Administrative Board.'³⁹

Two issues arise here: 1) which rule Participant 4 might break; and, 2) who interprets the rules and decides when they are broken. The so-called "rule" in question was not in the Protest and Dissent Guidelines, nor in the Student Handbook of Academic Policies, nor in the University-Wide Statement on Rights and Responsibilities. Rather, the rule was found in an email from Dean Lisa Burns, Assistant Dean and Registrar of Harvard Law School, dated September 6, 2019, which stated:⁴⁰

37 Confidential Interview with Participant 4 (Aug. 6, 2020) (on file with author).

38 DisOrientation is also held at law schools throughout the United States. See National Lawyers Guild, <https://www.nlg.org/disorientation/> (last visited Nov. 10, 2021).

39 Confidential Interview with Participant 4 (Aug. 6, 2020) (on file with author).

40 At some point, one must ask why the Harvard Law Administration even bothers with publishing the Handbook of Academic Policies, if they have the self-designated right to create new rules, without notice, without comment, at a moment's notice.

Use of Space – Students who wish to book space for programs, meetings, or other activities that connect to important issues that arise or engage the community in dialogue may do so through the Dean of Students Office. We will ensure that space is made available. The Law School’s lounges and other shared spaces are reserved for personal study, small group study and small social groups. The Law School has defined these as the “normal activities” for these spaces within the meaning of the University’s Statement of Rights and Responsibilities. Please also review the Law School’s Protest and Dissent Guidelines, which strike the balance between the right to protest and the right of speakers to be heard, and the HLS Bulletin and Chalkboard Policy.⁴¹

Paradoxically, this email or “rule” refers to the Protest and Dissent Guidelines but nowhere in these Guidelines are students required to have their dissent, meetings, or protests pre-approved by the Dean of Students. There is no additional information to help interpreters of this “rule” to understand what “personal study, small group study and small social groups” means.

The term “normal activities” is from the University’s Statement of Rights and Responsibilities, but this Statement fails to define normal activities. The only available definition is:

The central functions of an academic community are learning, teaching, research and scholarship. By accepting membership in the University, an individual joins a community ideally characterized by free expression, free inquiry, intellectual honesty, respect for the dignity of others, and openness to constructive change. The rights and responsibilities exercised within the community must be compatible with these qualities.⁴²

Nothing about reading a poem about a slave or talking about the actions of

41 E-mail from Assistant Dean and Registrar Lisa Burns, Harvard Law School (Sept. 6, 2019, 3:14pm) (on file with author).

42 UNIVERSITY-WIDE STATEMENT ON RIGHTS AND RESPONSIBILITIES, <https://provost.harvard.edu/university-wide-statement-rights-and-responsibilities> [Perma-link: <https://perma.cc/BU7R-E2XK>] (last visited Nov. 14, 2021).

ICE seems to disrupt this definition of the central functions of the academic community. If anything, the gathering of students to discuss ideas and learn about the world seems exactly aligned with the purpose of the academic community to learn and teach.

Notably, the “rule” also asks that the students review the Protest and Dissent Guidelines. First, it is not clear how the Protest and Dissent Guidelines apply to a social gathering, where no protest or demonstration is happening. Second, the Protest and Dissent Guidelines speak mostly of the acceptable ways to protest against a speaker. For example, “The speaker is entitled to communicate her or his message to the audience during her or his allotted time, and the audience is entitled to hear the message[.]” When there is no speaker, how could these Protest and Dissent Guidelines apply?

Participant 4, as well as many other students at Harvard Law, believe that the Administration likely has a concerted interest in keeping political activity—particularly political activity associated with racial justice—away from Belinda Hall in order to prevent another occupation or political protest.

It is a common sentiment among students, particularly those involved with racial justice oriented causes, that Harvard Law School will go to great lengths to prevent another student occupation or student uprising like Reclaim. Participant 4, when speaking about her own attempt to use Belinda Hall for DisOrientation, said, “My perception is that [the Dean of Students] or the Administration doesn’t want anything in Belinda Hall because of Reclaim. Like, they don’t want another Reclaim to happen.”⁴³ She also said, “I really hit a nerve. Part of the Reclaim movement was talking about Harvard’s history with slavery. And I, again, years later, am talking about Harvard’s history with slavery – the fact that she threatened me with the Administrative Board shows that Harvard really does not want to confront its history.”⁴⁴ At the end of our interview, Participant 4 stated again, “I really want to very heavily emphasize, I think that this heavy pressure coming down on students of color is a direct response to the Reclaim movement. I think they’re trying really hard to not have that shit happen *ever* again. Any inkling of student protest, student dissent, especially if it’s coming from students of color, they squash it.”⁴⁵

In response to the threat of disciplinary action, Participant 4 cited various parts of the University-Wide Statement on Rights and Responsibili-

43 Confidential Interview with Participant 4 (Aug. 6, 2021) (on file with author).

44 *Id.*

45 *Id.*

ties to support the proposition that DisOrientation’s presence in Belinda Hall did not violate the rules, including “free expression, free inquiry, intellectual honesty, respect for dignity of others, and openness to constructive change. [.]” Participant 4 also told The Dean of Students via email, “We, students of Harvard Law School, plan to use Belinda Hall as a gathering place, not to interfere with its use as a gathering place. I hope this email clarifies our intentions for you.”⁴⁶

I told her what I am trying to do in Belinda Hall, a.k.a. reading a poem about a slave, it is in total alignment with the Handbook of Student Rights and Responsibilities . . . she ended up not sending me to the Administrative Board—yet! We’ll see! (laughs).⁴⁷

Participant 4 laughs because the DOS rarely – from my research – informs students after an Ad Board threat whether the Ad Board has decided to pursue discipline against the student. As a result, the students are left hanging in uncertainty, never sure if they will hear days, weeks, months, or maybe even years into the future, that they are under investigation or possibly will be charged by the Ad Board. This hanging sword has a chilling effect on future dissent and protest activities, a win for an institution that wants to avoid future protests but a major loss for an institution that claims to champion free speech. The DisOrientation in question occurred in October 2019 but in my interview with Participant 4 in August of 2020, Participant 4 could not say definitively whether she would be investigated or charged by the Ad Board:

Me: [The Dean of Students] didn’t provide any certainty. She didn’t tell you who is on the Ad Board? What is the racial composition? Who are the students [on the Ad Board]? What is the timeline? Did she provide you any of those kinds of details?

Participant 4: No. She just said, I *might* have to send you to the Administrative Board. . . The only reason I knew, like broadly, what the Administrative Board was because my other Black female friends have also been threatened with it. (laughs)⁴⁸

46 E-mail from Participant 4 to Harvard Law Dean of Students Marcia Sells (Oct. 7, 2019, 6:25pm) (on file with author).

47 Confidential interview with Participant 4 (Aug. 6, 2020) (on file with author).

48 *Id.*

DisOrientation is a teach-in and gathering. There is no chanting, occupation, or even singing. Participant 4 emphasized, “Students of color are organizing to talk about the history of other students of color at this law school, to read poetry, you know, it was a very harmless event. It was a teach-in. It was not even a protest.”⁴⁹ Participant 4 felt angry with the DOS, during and after their short 10-minute meeting, citing, “I felt angry mostly. I told her in the meeting, let me just get this straight, you’re telling me that you might send me to the Administrative Board because I want to read a poem about a slave in public? And she was like, no, not because you’re reading a poem about a slave but because of *where* you’re reading this poem.”⁵⁰

The DOS’ threat caused emotional turmoil for Participant 4:

I felt a mix of both, like, concern or like worry, anxiety. A mix of anxiety and kind of indignation. . . Part of my personality is that if someone threatens me, that makes me even more upset. And I couldn’t believe that she was threatening me over something that I knew was *not* wrong. I was like, it is not wrong for me to honor the ancestors. That’s not bad! But I still did feel anxiety . . . because what if, this, like, ruins my entire Harvard Law education? What if I don’t get my diploma, or something, because I read this poem? . . . I’m the first in my family to go to law school. I’m the first in my family to go to an ivy-league institution. And so a lot of people are rooting for me, a lot of people are cheering for me, you know, like, back home. And I feel this dual responsibility . . . to my community to graduate from this school and to do as well as I can while I’m here, but also a responsibility to tell the truth while I am at this school.⁵¹

Word of Dean Sells’ threat to send Participant 4 to the Ad Board traveled quickly. Participant 5, another Black woman, also helped organize DisOrientation also feared retaliation from the Ad Board or the DOS and quickly re-organized the teach-in in an effort to avoid disciplinary trouble. Participant 5 describes:

I was one of the organizers [of DisOrientation] this

49 *Id.*

50 *Id.*

51 *Id.*

year . . . I along with other students were concerned about facing disciplinary consequences from Dean Sells. So a lot of people's roles in the event actually shifted because they were worried about facing disciplinary consequences. I know that even though I had a speaking role, I had a less prominent role because I was concerned about facing further disciplinary consequences. . . I know that the student whose name was featured prominently on the flyers advertising the event was emailed saying that she might possibly face disciplinary consequences for holding the event in Belinda . . . There was just a lot of consternation during the planning process from various individuals who had various run-ins with Dean Sells not wanting to engage in particular ways because they were worried that she would engage in some kind of retaliatory action.⁵²

Participant 4 described a similar re-shift in roles towards white students in response to the perception that the Dean of Students was targeting Black students:

With DisOrientation, I added more protection. So I, immediately after that meeting with Dean Sells, when I sent that email to Dean Sells, I also cc'd white faculty members just so they could see what was happening. . . I also reached out to the other organizers of DisOrientation and told them that we needed the white people who were involved with organizing DisOrientation to be a little more heavily involved and that we needed Legal Observers. If [the DOS] calls the police on DisOrientation, we need white people who are willing to deescalate, confront the police. We added extra layers of protection.⁵³

Both Participant 4 and 5 were wary of the Dean of Students' alleged threats and were frustrated with how unnecessarily difficult, in their view, the Administration was making it to hold a peaceful educational gathering about the history of anti-Blackness at Harvard Law. During the teach-in itself, the Harvard University Police Department arrived, which Participant 5 perceived to be an extension of the administration's threat:

52 Confidential Interview with Participant 5 (Aug. 23, 2020) (on file with author).

53 Confidential interview with Participant 4 (Aug. 6, 2020) (on file with author).

The cops actually showed up during DisOrientation. There was an HUPD car. Belinda has a wall of windows. And there was a cop car that showed up with its lights brightly flashing through the windows, shining through the windows. And the cop car was there for a lengthy period of time. That was clearly a tool of intimidation. There was no reason for the cop car to be there. Belinda is a space that students hang out in and convene in regularly, like, everyday. So there was no reason to have a cop car there again. But when you see certain student activities as disruptive or dangerous, obviously, you have to take action to quell those events and stifle dissent.⁵⁴

Partway through the event, the police showed up in an SUV in what is clearly a walking path through the law school. That's the path I take every day to walk back and forth to class. It is very much not a street. The police pulled up in their big SUVs and blasted their headlights through the window towards the speakers, who were all people of color. There was very obviously a tension in the room at that point. . . The speaker pointed out that it was dramatic . . . and that the students would try to keep each other safe in case the police would come in. . . We know that people call the cops on Black and brown people when there are too many in one room or when they're talking about their own power. This history is not a wild history. It could have been spoken about at Harvard's own orientation. Maybe acknowledge its not-perfect history. . . I think Harvard could have done their own jobs as a justice school, quote-unquote. . . I think we know that cops show up when people of color are asserting their own rights or speaking to their own power[.]”⁵⁵

When I checked, the HUPD Police Log for “demonstrations” for the falls of 2018 and 2019 showed no calls to report a demonstration to Wasserstein Hall, which suggests the call to dispatch the police did not originate from a fellow student or passer-by. Perhaps, the call to the police originated from someone who called the police directly, not through the normal hotline open

54 Confidential Interview with Participant 5 (Aug. 23, 2020) (on file with author).

55 Confidential Interview with Participant 2 (July 31, 2020) (on file with author).

to the public.

Participant 5 and 4 both expressed suspicion that the police presence was due to the high attendance of Black students at DisOrientation, although it is unclear if they are talking about the same DisOrientation year.

I definitely think that the fact that it was mostly Black students did play a role. I do think that if the event was mostly white, no, the police probably would not have been called[.]⁵⁶

I was like, wow, this feels like a little bit of an over-reaction. We're just talking in this hall. . . that was my first precursor to realizing that when Black and brown people speak out at Harvard Law School, they face consequences. So it made me feel a little less likely to speak out. . . It made me feel discouraged . . . like, oh, they might call the police on me if I talk about slavery. (laughs) . . . I don't know who called the police, but the police showed up.⁵⁷

The Participants could not confirm who exactly called the police.

I asked Participant 4 how the DOS and school administration could have managed the situation better.

In that specific instance, I think something [The Dean of Students] could have done better was recognize the intent behind the event . . . And instead of being motivated by this fear of Black thought or students of color revolting, they should be, what's the word I'm looking for? It's not inspired, because they're not going to be inspired. They should see the larger issue, the larger arch of history. It's important for these students to be able to say what they think! They also should be able to have the academic freedom that we like to talk about. Especially when it's non-violent. Especially when it's not even a protest. Literally, the event is *teaching* in a *school* (laughs) . . . It's really interesting to me that the school, the administration, the Dean of Students Office

56 Confidential Interview with Participant 5 (Aug. 23, 2020) (on file with author).

57 Confidential Interview with Participant 4 (Aug. 6, 2020) (on file with author).

specifically feel the need to intervene whenever Black people start to have autonomous thought[.]

Participant 4 expressed frustration with what she identified as disparate treatment by the Administration between regulation of Black students' speech and white students' speech. In an unrelated meeting with various leaders of HLS affinity groups, Dean John Manning, and the Dean of Students, Dean Manning allegedly told Participant 4 that writing a letter to fellow students to call out anti-Blackness in the classroom was an inappropriate violation of other students' academic freedom, according to Participant 4.⁵⁸ As a result, Participant 4 thought these comments from Dean Manning and the threat of disciplinary action by the Ad Board to be part of a larger pattern of stifling Black student dissent but failing to regulate white student speech in any manner.

"In fact, when they [Law School administrators] do intervene when white people start talking, it's to *protect* those white people, to protect their academic freedom. That's what the Dean of Students needs to do differently, to realize the disparity in how they are treating students of color and rectify that disparity by allowing students of color to have the same freedom to speak as they let white students have . . . Dean Manning and Dean Sells were all saying that we need to protect the other students in the class from feeling too scared to speak. . . And I'm like, that's so interesting that you're focused on protecting these white students from being scared to speak and you never protected me. Do you know how scared I feel to speak? As a Black woman, first person in my family to go to law school? When white people are saying blatantly racist things in class, do you know how much courage it takes for me to speak up? And you never thought about protecting my right to speak."⁵⁹

58 *Id.*

59 *Id.*

Although Participant 4 declined to give specific examples from her classroom experience, due to fear of divulging her identity, many students of color at Harvard Law School assert that their classmates often say racist things during class. The @BlackatHarvardLaw Instagram account gives many examples of such racist discussions. The official Harvard Law Instagram account follows @BlackatHarvardLaw and so presumably, the Administration is aware of the many claims of racism made on this page.

One post describes, "In my Family Law class, a white student volunteered to discuss Lov-

This disparity is also evident in what students signs the Law School allows on its walls. During Participant 4's first DisOrientation, the Dean of Students demanded that the DisOrientation organizers take down the signs they had hung up. "My 1L year, we tried to hang up signs and the Administration told us we had to take it down . . . Dean Sells came into Belinda Hall and told organizers they had to take the [Disorientation] signs down. The organizers also had a projector for a PowerPoint or something, and she made them take that down too."⁶⁰



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ing v. Virginia. He explained that the state's rationale was to protect white identity and culture. The professor, a woman of color, gently corrected him and said, 'Do you mean white supremacy?' (Note: the case itself actually describes the rationale as white supremacy.) And he said, 'I don't like to use that term because it is pejorative. I prefer white identity.' No one held him accountable for saying that accurately labeling white supremacy was 'pejorative.'"⁶⁰ <https://www.instagram.com/p/CB9GbMhn5U1/>

Another post on this Instagram states: "My 1L contracts professor began a completely off-topic tirade about undocumented people in the US (or 'illegals' as she called them). Then, she cold called me—the only immigrant latinx in the class—to begin a debate on whether as a future upholder of the law, I have a duty to call ICE on my future undocumented clients. She pushed me on it for about 20 minutes . . . She knew I was an immigrant. She had no idea whether I was documented or not. She seemed to enjoy debating me to tears in front of my classmates."⁶¹ https://www.instagram.com/p/CBwbrN6HL_x/

Another post: "I was the only Black person in my first amendment class on the day that we were discussing fighting words. My first amendment professor cold-called me that day and asked: 'If I called you the n-word right now, would you fight me?'"⁶¹ <https://www.instagram.com/p/CBqYIx2HpDc/>

⁶⁰ Confidential Interview with Participant 4 (Aug. 6, 2020) (on file with author).

⁶¹ Sidni M. Frederick, "BELINDA HALL", THE CRIMSON (last visited Nov. 14, 2016) (<https://www.thecrimson.com/image/2016/2/25/belinda-hall/>).

This treatment stands in stark contrast to the signage that students hung up next to Professor and Senator Elizabeth Warren's portrait in March of 2020, when she announced that she dropped out of the race for the Democratic Presidential nomination. There, a few students hung up sticky-notes thanking Professor Warren for her campaign and other positive messages. A couple of sticky-notes ballooned into many more. Instead of enforcing the rule against signs, the Administration put out a table to facilitate students writing nice messages on sticky-notes and affixing them to the wall. The sticky notes were left untouched for at least a few days.



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This Elizabeth Warren sticky-note homage wall provides a comparison point in reviewing the Administration's treatment of the DisOrientation organizers, many Black, who could not even hang up a sign declaring Haas Lounge to be "Belinda Hall" despite students commonly referring to the lounge as Belinda. It seems that messages which highlight the dark practices of Harvard Law School are not allowed by the Administration, while messages which promote praise and reverence of Harvard and its professors are not only allowed, but *encouraged*.

I think that the reason that Harvard is silencing us specifically is because we're people of color talking about

62 Photograph of Elizabeth Warren Portrait in Harvard Law School's Wasserstein Hall (on file with author).

racial justice. I think that's the entire reason . . . That's part of the reason why when we were organizing DisOrientation and The Dean of Students threatened me why we had more white people get involved, because we *know* that the School is not going to come after white people the same way it comes after people of color. . . even if white people are talking about racial justice, the School doesn't come down on them as hard.⁶³

Another instance that exemplified this for Participant 4 was a rally that another student group, which did not have as many Black student leaders as DisOrientation (if any), held in advocacy against Supreme Court Justice Kavanaugh's professorship at Harvard Law School.

[Other student group] had everybody meet in Belinda Hall and then march outside to have the rally. And as far as I know, there weren't any repercussions for them having the meeting place or rally to be Belinda Hall.

Per Participant 4's observation, non-Black students face no threats for using Belinda Hall as a rallying space, but Black students face threats of Ad Board for using Belinda Hall as an educational space. I spoke with an organizer with this other student group, which is predominately white, and confirmed that there were no disciplinary threats or repercussions for this rally, although they emphasized that Belinda Hall was simply a meeting place for rally participants, not the location of the actual rally itself. Apparently, according to this anonymous organizer, this student group had found out through an indirect, trusted source that the Dean of Students Office was not happy, allegedly, about this public rally. Even so, the Dean of Students Office never expressed any sort of discontent or unhappiness to the organizers of the rally. Even more strangely, this rally was advertised as a "walk-out" from class, where students were encouraged to walk out of their classroom to join the rally for rhetorical effect. The encouraged disruption of class seems more than anything to be a violation of the normal purposes of an academic institution, yet the student organizers of the rally heard nothing from the administration before or after the rally.⁶⁴

Furthermore, this organizer informed me that this student group frequently held "phone banks" in Belinda Hall where students gather to phone

63 Confidential Interview with Participant 4 (Aug 6, 2020) (on file with author).

64 Confidential phone call with organizer (Dec. 28, 2020).

people for a cause and never received any communication from the Dean of Students Office regarding these. When I asked this organizer whether they had ever been investigated for their political organizing on campus, they responded, “What would they investigate? People are allowed to have political activity on campus. There’s nothing wrong with that.”⁶⁵

This point of view is worlds away from the view of Black student organizers at Harvard who have faced repeated threats of investigation for their political activity. The difference is stark. Black students face many negative consequences that others, it appears, do not for their political activity.

Lambda is another group on campus which has received undue scrutiny from the Dean of Students Office. Lambda is a student affinity group for those who identify as LGBTQ or otherwise queer. Lambda stages an annual protest against the presence of JAG recruiters on campus because of JAG’s anti-trans hiring policy. Participant 4 noted this protest as one that has received less pushback.

Lambda [in 2018] organized a protest with Harvard bringing JAG on campus . . . because they exclude trans people. And so Lambda organized that protest and that protest happened in Belinda Hall. We all held up signs protesting JAG in Belinda Hall. . . I don’t know who organized it but the majority of the people who were at the protest were white. . . They did not get the heat the way that people of the color get the heat, you know.

A witness to the development of the protest confirmed that Lambda received permission to protest JAG in Belinda Hall in the Fall of 2018 from the Dean of Students and that one administrator brought cookies to the anti-JAG protest. This source assured me that there was “nothing interesting” about this interaction and that the JAG protest was successful. Notably, while in the year the JAG protest was approved, Lambda’s presidents were not Black, but in the year following where the Dean of Students warned student organizers not to have the JAG protest in Belinda, one of the Lambda presidents was Black.

The main dispute between the Dean of Students and the organizers

65 Confidential phone call with organizer (Dec. 28, 2020).

of DisOrientation was not necessarily the content of DisOrientation, but the location of it. Indeed, the Dean of Students' alleged statement of Participant 4 ("[N]ot because you're reading a poem about a slave but because of *where* you're reading this poem.") raises the same questions as "time, place, and manner" restrictions on speech addressed by the Supreme Court. Importantly, when "time, place, and manner" restrictions are concerned, the Supreme Court has held that regulations must be content, neutral, narrowly tailored in support of a significant government interest, and leave open ample alternative channels for the affected speech.⁶⁶ Of course, First Amendment doctrine is not binding upon a private academic institution, it is a helpful framework to understand how free speech at Harvard Law operates.

Notably, in most cases, the Dean of Students is careful to provide an alternative space for students to conduct their gathering. For example, the Dean of Students allowed JAG protestors to protest near a ramp and the Dean of Students also offered to book another room for Participant 4's poem. Thus, a naysayer may argue that this time, place, and manner regulation is aligned with the principles of free speech established by the Supreme Court, given that the Dean of Students offered alternatives. But under the principles of First Amendment jurisprudence, courts may not agree. In *Million Youth March, Inc. v. Safir*,⁶⁷ the City of New York denied the Million Youth March organizers a permit to parade in Harlem and asked the organizers to parade on Randall Island instead.⁶⁸ The court ruled that while the speaker has no constitutionally "protected franchise on the forum of its choice" the state must take into account "(1) the audience to which the speaker seeks to communicate and (2) the contribution of the desired location to the meaning of the speech."⁶⁹ When it came to the Million Youth March organizers' desire to hold their rally in Harlem, the court reasoned, "Holding the event in that location will infuse substantial and unique additional meaning to the message of the event. While this alone is not controlling here, its relevance to the analysis was recognized expressly by the Supreme Court in *City of Ladue* and by the district court in the highly-analogous *Nationalist Movement* decision. The special significance of Harlem thus undermines the adequacy of the City's alternative locations."⁷⁰

The *Million Youth March* plaintiffs' reasons for marching in Harlem closely parallel the reasons a poem about Ms. Belinda should be read in Be-

66 *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

67 18 F. Supp. 2d 334 (S.D.N.Y. 1998).

68 *Million Youth March, Inc. v. Safir*, 18 F. Supp. 2d 334 (S.D.N.Y. 1998)

69 *Id.* at 347.

70 *Id.*

linda Hall instead of any other place. As Participant 4 noted, the place of Belinda Hall was of particular importance due to its name homage to Belinda herself and due to the history of the student activism which took place in Belinda Hall. Moreover, as Belinda Hall is located in a large, open lounge it has the potential to reach many more students. The DOS' suggested use of the student organization room would only allow those who had a Harvard ID card to attend and attract only those who affirmatively chose to attend the poem reading. Furthermore, it does not appear that the DOS nor Dean Manning would be able to allege any of the same concerns that New York City asserted in *Million Youth March*, such interference with repair work, inability to physically or safely contain the expected crowd, possible problems for emergency vehicles, and excessive traffic congestion. Why exactly the Dean of Students would not permit DisOrientation to occur, other than allegedly breaking a possible rule, are unknown.⁷¹

B. The Protest Against Harvard University President Lawrence Bacow

Participant 1 and 5 were both called to meetings with the DOS during which the vague threat of Ad Board discipline was floated. In April of 2019, the Harvard Prison Divestment Campaign, a group of student organizers agitating to divest Harvard's endowment from significant actors in the prison-industrial complex, protested a speaking event featuring Harvard President Lawrence Bacow and the Dean of the Education School Bridget Long.

One thing we did to challenge the narrative the institution is pushing, by pointing to how its endowment is actually antithetical to [their] objectives and how prisons are really not good for people's economic well-being and how investments in prisons actually take resources away from other resources that communities need to thrive. . . We were trying to push [Bacow] to take action around our key demands . . . The attendees at the event were donors, very wealthy and influential donors at the Kennedy School. We thought it was a good chance to pressure the University. Again, there are a few things that Harvard responds to which are money and [embarrassment to their] public reputation. . . We decided to dissent by holding up signs and

⁷¹ To be clear, the First Amendment does not actually apply to Harvard Law School, as it is a private actor, but using the framework of First Amendment jurisprudence as a baseline for what is an acceptable restriction in a space proclaiming itself to be pro-free speech is helpful and illuminating.

disrupting the event and ultimately shutting down the event briefly before it was moved to a different room.⁷²

Some of the audience members verbally abused the protestors, according to Participant 5. After the protestors left, the Harvard University Police Department followed them:

At the location where we debriefed, we discovered that we had been followed by some members of the Harvard University Police Department. They had surrounded the building that we were in. They were essentially looking for folks who had participated [in the protest]. There were several, if I recall, cop cars outside the building that we were in. And so, that caused a bit of consternation. . . I was concerned. I did not want to get into any altercation with the police. I understand the role the police play, which is especially at the university to police who does and doesn't belong. . . As a Black woman, I was concerned with being dealt with violently by the police. . . I was definitely a little concerned, more than a little concerned with their presence.

A few days after the protest, the Dean of Students demanded to meet with Participant 5 under vague circumstances. It was a confusing and convoluted interaction, marked with non-transparency and distress. Participant 5, who is Black, describes:

In the days following, I received an email communication from the Dean of Students at the Law School, summoning me to her office to have a meeting with her about the events that occurred at the talk with the

President. Very vague. At that point, after some brief digging, I discovered that I was the only one who had received this communication.

And so I responded, initially, telling the Dean that I was skeptical about this summoning, indicating that as far as I was able to gather, I was the only one who received this communication. It struck me as possibly

72 Confidential Interview with Participant 5 (Aug. 23, 2020) (on file with author).

discriminatory, that I was the only one from the Law School who had been identified as someone who had participated in this protest and was possibly the only one who was going to be disciplined as a result, despite the fact that other non-Black students from the Law School and other schools had participated in this protest. Then, I received a very cagey response, being like ‘we don’t discuss other student’s disciplinary issues’ et cetera.

Then, initially, [the DOS] had set a date for me to come in and in response to me pointing out, at that point, I was the only one being summoned, she tried to push the date of the meeting back. In my mind, it was pretty clear to me that she was doing that to cover her tracks and essentially try and pull other people in so to basically undermine any accusations of discriminatory action on her part.

So I refused to change the meeting because I did not want to give her the time to cover her tracks and had already made the time to meet with her at that time. So I thought it was unprofessional to change the meeting time at what was fairly last-minute. A few hours after the initial email she sent me trying to change the meeting, I found out that another person had received an email communication summoning them to a meeting. So it was clear to me that they had gone back and tried to identify other people to, again, cover their tracks. Later, maybe a day or two later, another student was also summoned.⁷³

In response to this, Participant 5 panicked, unsure how to handle what she perceived to be the selective persecution of her dissent. She said, “I definitely had an anxious reaction to this. I was a first year law student and I did not intend to get expelled or kicked out or significantly disciplined in my first year of law school. . . I was definitely in panic mode at that point. . . I felt like I was being singled out. That was definitely anxiety-inducing.”⁷⁴

73 *Id.*

74 *Id.*

75

Participant 1, a white woman, was one of the other students “summoned” to meet with the Dean of Students.

76

Participant 1 describes:

At the protest, I had been someone who was sitting on the stage, holding a sign, and chanting. But totally peaceful. I didn’t have any contact with the police officers during the protest or anything like that. . . I

Hello 

This meeting which must take place is to talk to you face to face about the Harvard Law School Handbook of Academic Policy (“HAP”) and make sure you understand the requirements of the policy. A formal charge, at this moment, has not been made. In the event of a formal charge, you would have received a letter outlining the charge, the role of the Ad Board, the range of possible sanctions, your right to a hearing and right to have legal representation. This meeting is to explain the full scope of the HAP and the Ad Board’s role when allegations of violations of academic policy are charged.

I want you to have a full understanding of the concerns raised by your actions. Again I look forward to our face to face conversation on Tuesday in my office.

All the best,

Dean Sells

75 E-mail from Dean of Students Marcia Sells, Harvard Law School to Participant 5, Professor Alex Whiting, Lakshmi Clark-McClendon, Edgar Filho (Apr. 07, 2019, 7:34pm) (on file with author).

76 E-mail from Dean of Students Marcia Sells, Harvard Law School to Participant 1, Professor Alex Whiting, Sarah Kinkade, Lakshmi Clark-McClendon (Apr. 9, 2019, 10:49am) (on file with author).

initially didn't get any contact from the Dean of Students. My fellow protestor [Participant 5], who is a

Dear [REDACTED]

We must schedule a meeting within the next two days. It is important that we meet to discuss your actions at an event at the Harvard Kennedy School last week. Please follow up with Sarah Kinade in the Dean of Students Office to schedule a time.

All the best,
Dean Sells

Marcia Lynn Sells, Esq. | Associate Dean & Dean of Students
Harvard Law School

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Black woman, did get an email from Marica Sells, the Dean of Students, saying that she had to come in. My fellow protestor's first response was, 'why am I only being asked to come in? There were like a lot of other Harvard Law School students there, including a white woman who was right next to me on the stage doing the exact same actions as me.' After that, I was also sent an email saying that I had to come in with a meeting with the Dean of Students, Marcia Sells.

So this other protestor and I took the meeting together with [the DOS]. It was a very confrontational meeting. Going in, I think we already felt that we were being investigated and punished. It was set up in a way that felt very intimidating and we were supposed to feel intimidated. I guess we were told that the meeting was so we were aware of what [the Ad Board's] processes are and what our rights are and what we were facing. But that didn't ring totally true. They did a lot of things unnecessarily intimidatingly and meant to intimidate us. For example, we were told that if the issue were remanded to the Ad Board, the Ad Board could take a number of actions against us, like find us not guilty,

give us a warning. It could suspend us. It could expel us. And some other things that were even more severe than expulsion.

We weren't told what rule we had broken ever, which we asked for very specifically. It wasn't super clear who was making the decisions if we were going to be remanded. . . . From [Dean Sell's] email and coming out of the meeting, this felt like a mandatory process, one that would be used to decide whether I would be punished or not. [This meeting] would affect my education and future employability. So it was emphasized as a severe thing. The way things were framed by the email and what [the Dean of Students] said, it was always assumed that I had broken some school rule. So I think intensity was always maintained by [the Dean of Students]. It was always framed as a serious thing that had happened and that I could be getting in serious trouble.⁷⁷

Participant 1 was adamant that this meeting was mandatory: "At this point, I was explicitly told it was a mandatory meeting . . . [The DOS] said something like, we *have* to meet."⁷⁸ Participant 5 also felt that the meeting was mandatory and that she had no choice but to meet with the Dean of Students: "It definitely seemed mandatory, not optional at all. I had no sense that it was optional."⁷⁹

Approximately six months later, the Dean of Students requested a meeting with me regarding a separate protest but stated that such a meeting was optional after I pointed out that such a meeting was not within the Disciplinary Procedure outlined in the Handbook of Academic Policy.

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Participant 1 described the experience as wreaking havoc on their emotional health:

I think it was very stressful. It probably increased my

⁷⁷ Confidential Interview with Participant 1 (July 29, 2020) (on file with author).

⁷⁸ *Id.*

⁷⁹ Confidential Interview with Participant 5 (Aug. 23, 2020) (on file with author).

⁸⁰ E-mail from Dean of Students Marcia Sells, Harvard Law School, to author (Nov. 17, 2019, 4:49pm) (on file with author).

daily anxiety and it probably made it harder for me to enjoy normal life. I was probably pretty preoccupied with it at the time . . . I don't think anyone enjoys getting in trouble. I was worried about my standing in the

Amanda,

Thank you for your note. The meeting is to discuss the events that took place on Saturday, October 26th. It is a chance to explain the HLS policies and procedures. I have no vote on the Ad Board decisions; my role is to provide information if you have questions. You do not have to meet with me if you do not want to, it is your choice.

All the best,

Dean Sells

legal community, my ability to get a job, my ability to graduate, and also, you know, no one likes to be forced to interact with people who are treating you in a harsh disciplinary way without a good reason.⁸¹

The DOS's reputation for disciplinary threats precedes her. I asked Participant 5, "How did you know that this meeting was going to be about discipline if Dean Sell's email did not mention it to you?" Participant 5 answered:

I mean, I think I deduced from her history at the institution. As someone who, again, was very much interested in protest and dissent, I had conversations with individuals who were involved in Reclaim and other protest movements at the Law School and they essentially had made it clear to me the role that the

Dean of the Law School played in the institution was basically to police student dissent and to stifle student activism at the school. She essentially didn't do much else[.]⁸²

Participant 7 also had been called into a meeting with Dean Sells as a result of allegations regarding the Institute of Politics protest. However, Participant 7 found the conversation to be much less a session to review the Protest and

81 Confidential Interview with Participant 1 (July 29, 2020) (on file with author).

82 Confidential Interview with Participant 5 (Aug. 23, 2020) (on file with author).

Dissent Guidelines and more of an attempt to scold the student for her political activity.

She gave me this whole lecture about like, there was this one weird thing she said, like *you know what I understand that people want to protest but this is not the right way to protest*. She was like, and *I understand there are some laws that don't make sense, like a law that criminalizes people for sleeping under bridges when they have nowhere else to sleep. Like, I could understand that you're really angry at that law, as a law student, I understand that there is anger against unfair laws and things. But that is not the same situation that we're in right now . . . something about some laws being unfair and some laws not being unfair. And I pushed back on that, I told her, no, actually, this is very similar to the unfair situation that you're describing. It's just that I think that prisons are extraordinarily and deeply unjust. Extremely violent, and like, evolutions of slavery. All these sort of things that are deeply upsetting to me. So I do have every right to be protesting this. And she just didn't really respond at all to that.*⁸³

The Harvard Law Administration never followed up with any of the participants to confirm whether the students would be formally disciplined, which meant that the threat of disciplinary action hung over the students until they graduated:

I was told I would get, like, a follow-up email saying if the issue was being put before the Ad Board or not. . . [The Dean of Students] told me that verbally during the meeting. But I never received any follow-up from her . . . We asked who was making the decision if the Ad Board was going to make this decision or not. And

83 Confidential Interview with Participant 4 (Aug. 6, 2020) (on file with author).

Participant 7's conversation with the Dean of Students is particularly interesting in that it raises questions about whether the Administration was selectively enforcing the guidelines against students for their viewpoints. Was it that the particular demand of prison divestment, as opposed to say something more mainstream like reducing prison sentences for non-violent offenders, that incited a negative reaction from the Administration? Few of the participants heard Dean Sells' personal opinion on any particular controversial issue.

she said it was Dean Manning of the Law School and herself. I think we asked what rule we were accused of breaking, and she wasn't super clear on that . . . She gave vague answers that weren't totally satisfying. We had wanted her to point to something concrete in the policy that we had violated and she couldn't do that at the time.⁸⁴

Dean Sells just didn't get back to me. She never did . . . She didn't follow up like she said that she would. It just sort of disappeared. So it seemed like it was purely an intimidation tactic and there was absolutely no weight behind it. It doesn't seem like she ever was planning on following-through with anything. It seems like she just did it in an attempt to try to intimidate us.⁸⁵

Some Participants found the meeting lacked information, clarity, and clear procedure. Multiple Participants explained that it always felt like the “goalposts” were moving. The students could not keep up with the new rules that the Administration seemed to be pulling out of its back pocket at any given moment.

It's especially powerful in a school setting, I think, to speak about history, because we are only . . . citizens or residents of this space for a few years and then we leave. So the school only needs to distract us or stop us from building power for a couple of years. But DisOrientation has grown a quite bit in the last few years since the Reclaim Movement. And so I think DisOrientation poses a direct threat to the Administration. . . Oppressors often have all the same rules or all the same tactics. . . There's not that many tactics. You can see them on rotation. . . Something as silly as pizza can be used to throw sand in the gears and stop power building. DOS can make up a fake rule about food not being allowed in a space *once* that space becomes an organizing space and therefore a threat. So it wasn't that we were having pizza in that space [that was the problem], it was that we were using that space to build power, which the Administration is afraid of—a seem-

84 Confidential Interview with Participant 1 (July 29, 2020) (on file with author).

85 Confidential Interview with Participant 5 (Aug. 23, 2020) (on file with author).

ingly neutral rule to get in our way.⁸⁶

In school, the question is, if the action, if you feel like it's something that risks suspension or expulsion, or some sort of disciplinary action—ideally, you can determine how high risk your action is by looking at the rules. But we've seen even in instances where you specifically plan protests that don't break a single rule, they still get angry, they still try to penalize you, they still drag it out for years, they make a big deal out of it, they make new rules, they try to track you. You can't really determine how high or low risk an action is going to be, because they keep changing the goalpost. They keep changing the definition that lets you determine if something is high or low risk. that makes it difficult. . . It's like Whack-A-Mole. The rules grow alongside us as we're moving.⁸⁷

VI. INVESTIGATION

Sometimes, Interference and Intimidation are not enough to diminish a student's political activities. This is when the Administration's harshest threat of disciplinary action arises in the context of student dissent: an Investigation into a student's conduct that may lead to formal disciplinary charges.

The foremost example of this was a 7-month investigation conducted over a silent protest of Dean John Manning's speech at the Harvard Law School Fall Alumni Reunion Class of 1969.⁸⁸ The Ad Board investigated four students ("Student Dissenters") out of the approximately ten who took part in the protest. The student group behind the protest, the Harvard Prison Divestment Campaign, circulated a press release:

On Saturday morning, student organizers from the Harvard Prison Divestment Campaign staged a silent protest at the Harvard Law School Annual 45th Fall Reunion at "A Conversation with Dean John F. Manning '85" with HLS alumni. Dean Manning initially asked the organizers to leave. But after being handed a copy of Harvard Law School's policy on protest and

86 Confidential Interview with Participant 2 (July 31, 2020) (on file with author).

87 Confidential Interview with Participant 6 (Apr. 7, 2021) (on file with author).

88 The author was an active participant in this protest.

dissent, he allowed the students to stay and continued his talk to alumni.⁸⁹



Pictured: Dean Manning (left), The Author (right)

⁸⁹ PRESS RELEASE: HPDC STAGES SILENT PROTEST AT HLS REUNION EVENT (<https://harvardprisondivest.org/press-release-hpdc-stages-silent-protest-at-hls-reunion-event/> [Perma-link: <https://perma.cc/955F-MSG7>]) (last visited Nov. 14, 2021).

⁹⁰ *Id.*



9 1

Pictured: Protestor (left), Dean Manning (right)

This protest took place on October 26, 2019. the Dean of Students Office subsequently hired the firm Hogan & Lovells to investigate the protest.⁹² The investigator was Natasha Tidwell, a former federal prosecutor turned partner at Hogan Lovells and now a partner at Saul Ewing.⁹³ According to her report, which none of the student protestors were able to read until after graduating and submitting FERPA requests to the Law School, the protest started as Dean Manning began speaking and student protestors walked to the front of the room and held up signs while standing behind him. Ms. Tidwell, from watching the alumni staff's video footage of the event, described the protest as follows:

Dean Manning stops speaking for approximately one minute while the students, including [redacted] hands out flyers and positions themselves around the room. The audience members talk quietly. [. . .]

91 *Id.*

92 Confidential Final Investigative Report (March 20, 2020) (on file with author).

93 Ms. Tidwell's biography states, "Natashia Tidwell brings a depth of experience and nuanced perspective to the Firm's practices in Higher Education, K-12 Schools, and White Collar and Government Litigation. As a former police officer and federal prosecutor, Natasha offers a practical real-world approach to her work leading internal investigations for colleges, universities and independent secondary schools in matters involving racial discrimination, Title IX and other federal and state constitutional issues." NATASHIA TIDWELL, (<https://www.saul.com/attorneys/natashia-tidwell>) (last visited Nov. 14, 2021).

Manning: At Harvard Law School, we respect the right to protest. We respect the right to speak. But it must not disturb and disrupt the right of others to engage in their speech. [Chan makes a “go ahead” gesture.] So I am going to say thank you for presenting these signs and I’m going to ask you now to let us resume our work. You may sit down [Chan again makes a “go ahead” gesture] and you may hear what we’re talking about, but this is not consistent with the guidelines that we have on time, place, and manner of dissent.

Chan: Are you sure about that?

Manning: Yes, I am.

There is brief applause and some unintelligible dialogue. [Redacted] then reaches in her bag and shows the Dean a copy of what appears to be the HAP Protest and Dissent Guidelines. [Redacted] can be heard stating that protestors can stand quietly with signs, but her comments are not fully captured on the video recording. The conversation continues:

Chan: That’s the policy you wrote.

Manning: That’s not a policy that I wrote, but—

Chan: —That’s the policy that your administration enforces— [unintelligible]

Manning: You know what? We can sort all of this out later. And if you stand, you’re on notice . . . [Cross-talk by [redacted]] So we’re not going to [Crosstalk by [redacted]] You know what, we have time, place, and manner restrictions on this, so we will sort this all out later. [Crosstalk by [redacted]] So we will, we will sort it out later. So right now, you’re disrupting an event. We will sort this out later.⁹⁴

94 Confidential Final Investigative Report (March 20, 2020) (on file with author) at pg. 3-5.

The student protestors left a few minutes later. Natasha Tidwell concluded, “In sum, the protest lasted . . . roughly eight and a half minutes.”⁹⁵ A total of nine law students protested at that event. But only four law students, all three of the law students of color and one white woman, were investigated by the Administration. The other five law students, all white, received no communication whatsoever from the Administration.

The Protest and Dissent Guidelines are a fairly recent development from the Harvard Law Administration. Such Guidelines did not exist until the Fall of 2019, so the Student Dissenters at the Fall 2019 Reunion were venturing into new territory. This protest took place on April 9, 2019. A few months later, in September 2019 the Protest and Dissent Guidelines were introduced to the Harvard Law student body, although the Harvard Law Faculty had not voted to implement them.

At the Kennedy School protest, Dean Douglas Elmendorf of the Kennedy School attempted to reason with the protestors and encouraged the protestors to stand at the side with their signs instead of shutting down the event. The protestors refused. Dean Elmendorf then said:

I understand that some of you [the protesters] want to make a point. And you can make that point. What I’m afraid you can’t do is hinder the ability of other people here to listen to our speakers. So if you want to stand there [gestures to side of stage] and hold up your signs in a way that does not block other people from seeing our guests, you can do that[.]⁹⁶

95 *Id.*

96 Dean Douglas Elmendorf, Harvard Kennedy School Institute of Politics, Address to Protestors (Apr. 4, 2019) (on file with author). The recorded video of this event was previously available on Harvard’s website, though it has since been taken down.



Dean Douglas Elmendorf speaking to protestors at the April 4, 2019 event at the Harvard Kennedy School Institute of Politics.

Dean Elmendorf's permission to protest beside a stage informed the planning of the protest at the Fall HLS 2019 Reunion, especially because the Student Dissenters understood the Protest and Dissent Guidelines were designed to prevent another protest as aggressive as the one that took place at the Kennedy School. A reasonable dissenter, looking to exercise his right to free speech, could interpret the Protest and Dissent Guidelines to allow signholding without disruption. The Protest and Dissent Guidelines state "Displaying a sign, wearing significant/symbolic clothing, gesturing, standing, or otherwise protesting noiselessly is acceptable unless the protest interferes with the audience's view or prevents the audience from paying attention to the speaker. Any use of signs, prolonged standing or other activity likely to block the view of anyone in the audience should be confined to the back of the room."⁹⁷

One of the student protestors expressed skepticism towards the Protest and Dissent Guidelines:

Understanding the history of [the Protest and Dissent Guidelines], that they came after the Reclaim of Belinda Hall, that the particular purpose of that is to stop

⁹⁷ PROTEST AND DISSENT GUIDELINES (ARCHIVED) (<https://hls.harvard.edu/dept/dos/dos-student-orgs/protest-and-dissent-guidelines/>) (last visited Nov. 14, 2021).

any other protest like this one. On one hand, what is the purpose of the Protest and Dissent Guidelines? Who are they meant to address? They're not meant to address folks who have capital in traction at Harvard Law School . . . Historically, the people who have been marginalized are radical leftists, intellectual scholars, organizers, and movements. [The Guidelines] criminalizes dissent but dissent specifically that the left and radical thinkers and organizers use.⁹⁸



Throughout the six months of investigation, all the Student Dissenters suffered greatly from the prolonged nature of the investigation, the lack of transparency, the looming threat of a delayed graduation, and, for some of the student dissenters, risk of losing post-graduation employment. And because the Administration decided to continue this investigation throughout the first wave of the coronavirus pandemic, some of the Student

98 Confidential Interview with Participant 6 (Apr. 7, 2021) (on file with author).

99 PHOTO GALLERY FALL REUNION 2019 (<https://hls.harvard.edu/alumni/reunions/fall-reunion-2019/photo-gallery/>) (last visited Nov. 14, 2021).

Dissenters were simultaneously suffering through the threat of Harvard Law disciplinary action as well as the illness and pending eviction of their family members. Although these hardships were communicated to the Dean of Students and to the Administrative Board, neither party made any offer to drop the investigation— even though the protest had taken place in October of 2019 and the pandemic had not set in until March of 2020.¹⁰⁰

Amongst all the chaos, uncertainty, and feelings of unfairness and corruption, the most notable aspect of the investigation was its complete lack of transparency.¹⁰¹ The Ad Board and the Dean of Students very rarely communicated via paper or email and insisted on chatting via phone calls with the Dissenters' lawyers. Although the Student Dissenters repeatedly asked to see the Ad Board's evidence, no Harvard Law Administrator ever presented the Student Dissenters with any evidence during the course of the investigation. Some Dissenters, including myself, were only able to view the Natasha Tidwell report after Harvard Law produced it under a FERPA request in September 2020. The protest itself took place in October 2019.

The Student Dissenters described the investigation as muddled, untransparent, and confusing.

[The Ad Board] was telling each of the four students investigated, kinda, different things, like, piecemeal through our lawyers that we would have to piece together . . . It was never said what we were accused of . . . It was never said to me, like, this is how you violated the rules . . . Another one of the student [Dissenters] was told by our lawyers that maybe it was the guy in charge of alumni relations [Steven Oliveira who reported us].¹⁰²

100 Confidential Interview with Participant 6 (Apr. 7, 2021) (on file with author).

101 XI. (B.) PROCEDURES FOR DISCIPLINARY CASES* (<https://perma.cc/ZK9B-USBY?type=image>) (last visited Nov. 14, 2021).

The investigation was in part due to the Ad Board's designation of the investigation in as "informal" meaning that the student was not yet charged with a "formal" investigation. Although this meant that the student would not have to disclose the informal investigation on their future bar application, it also meant that the student was accorded none of the benefits or privileges afforded to the student under the Disciplinary Procedure as outlined in the Student Handbook of Academic Procedure.

102 Confidential Interview with Participant 1 (July 29, 2020) (on file with author).

Moreover, the Ad Board did not follow any particular process and failed to explain its erratic approach of making repeated requests of statements from the Student Dissenters.

It was a very odd process. They kept asking us more and more questions about our conduct. And they also demanded that we give an apology to the alumni staff and they asked me for references about my character—they asked me for character references. They didn't give me that much information. Their asks would just slowly trickle in, like requests for information and character references. And stuff like that, it would just drag out the process.¹⁰³

One student found this particularly frustrating as he was also facing severe Covid-19 related family problems; the Administrative Board did not seem to care about the investigation's effect on the student's life and mental well-being.

I made that very clear. I even asked my attorney, do you think this is something I should bring up? He said, yeah, you should let [the Ad Board] know what is going on with your family. So I did. I wrote them a statement, look this is what is happening with my family. I don't have time for this petty investigation. I have given you all that you need . . . I explained to them with as much information as I felt comfortable sharing with them what was happening with my family. They didn't care! There was no response to it. There was no response. I had family members getting Covid-19, getting hospitalized, people being laid off, et cetera, not having food. They didn't care. They just wanted to know again, how come I was wearing a nametag with no name? How come I was holding up a sign?¹⁰⁴

What information did the Ad Board or Dean of Students provide in the course of the investigation?

They told me what the potential consequences would be if you're found guilty by the Ad Board, including

103 *Id.*

104 Confidential Interview with Participant 6 (Apr. 7, 2021) (on file with author).

expulsion and worse. They told me that I was being investigated by a law firm. But they never told me when they would make a decision on it. They never told me exactly what I was being accused of . . . They never gave me what they had against me. They asked me questions about my conduct, which, I eventually, with a lawyer and in contemplation with the other students, answered.¹⁰⁵

Whatever the intention of the Harvard Law Administration, the Investigation took a toll on the mental health of the Student Dissenters, who found that their graduation would possibly be delayed as a result of an undecided Ad Board.

Other Student Dissenters also found it to be a harrowing experience.

Anytime they contacted us, it was pretty stressful. It was a stressful dynamic between me and the other students, and the lawyers. Especially once the pandemic started, it was very front of mind. Because we kept asking them questions and they weren't very forthcoming. They also insisted on handling the students as quote-unquote separately. Other students would get requests and the others wouldn't—so it was pretty clear they were trying to wedge us off from each other. . . Especially the last few weeks, it was the only thing on my mind. All of this during a pandemic as well. There was a lot of stress about my future and my ability to plan for myself have security. So it definitely had a really big mental impact on me at the time . . . I lost sleep as well. I was not able to eat healthily. I was not able to focus on other things . . . I wasn't sure if I was going to graduate or have something on my record that would make it harder for me to be accepted into the bar.¹⁰⁶

A. Students of Color Targeted In Particular

The Administration seems to have a particular eye for student organizers of color. About nine law students, including myself, Participant 1, Participant

105 Confidential Interview with Participant 1 (July 29, 2020) (on file with author).

106 *Id.*

6, and Participant 5 was present at Fall Reunion 2019 protest. There were nine law students present at the protest, six white and three students of color. The three students of color were Participant 5, myself, and another student. According to the Dean of Students, the Law School possesses video of the protest, which is likely how they identified Participant 5.¹⁰⁷

The Harvard Prison Divestment Campaign had issued a press release about the protest.¹⁰⁸ In the press release, there were photos of the protestors, including a photo of a white male protestor, who was never investigated by the Ad Board. Furthermore, the HPDC Press Release was included as an exhibit to the Tidwell Report.¹⁰⁹ All parties were on notice that there was a white male protestor who stood next to Dean Manning – yet there was no evidence or attempt to ever contact this student and subject him to the same disciplinary consequences as all of the students of color were facing for half a year.

There is evidence of both white students and students of color protesting on October 26.¹¹⁰ But The Dean of Students sent Notice Letters to only the students of color and to Participant 1, who was previously left out in one of DOS' *Intimidation* meetings, as discussed above. Participant 5 implied that DOS was acting discriminatorily by scrutinizing her, but not Participant 1.¹¹¹ Thus, DOS launched investigations against only students of color and the one white student already under scrutiny – but failed to do so for all other white protestors.¹¹²

This should raise eyebrows, especially when compared to the Administration's reaction to other student protests. A group of Harvard Law students, mostly white, held a #DropExxon protest against Paul Weiss, the law firm which represents the energy giant. The protestors attended a Paul Weiss recruiting event, held up a banner, chanted, and disrupted the event for ap-

107 Confidential Final Investigative Report (Mar. 20, 2020) (on file with author). The Dean of Students has refused and continues to refuse to release the video to the students who are under investigation so I cannot be sure to the content of the video.

108 PRESS RELEASE: HPDC STAGES SILENT PROTEST AT HLS REUNION EVENT (<https://harvardprisondivest.org/press-release-hpdc-stages-silent-protest-at-hls-reunion-event/> [Perma-link: <https://perma.cc/955F-MSG7>]) (last visited Nov. 14, 2021).

109 Confidential Final Investigative Report (Mar. 20, 2020) (on file with author).

110 PRESS RELEASE: HPDC STAGES SILENT PROTEST AT HLS REUNION EVENT (<https://harvardprisondivest.org/press-release-hpdc-stages-silent-protest-at-hls-reunion-event/> [Perma-link: <https://perma.cc/955F-MSG7>]) (last visited Nov. 14, 2021).

111 Confidential Interview with Participant 5 (Aug. 23, 2020) (on file with author).

112 I AM A WHITE STUDENT PROTESTOR BUT I WAS NEVER INVESTIGATED BY HARVARD (<https://medium.com/@studentdissenter/i-am-a-white-student-protestor-but-i-was-never-investigated-by-harvard-402d71efab17>) (last visited Nov. 14, 2021).

proximately 15 minutes, then left without incident.¹¹³ None of these students received any investigation or threats of discipline from the Harvard Law Administration.¹¹⁴ One #DropExxon protestor reported, “I didn’t experience any direct blowback from the school for my role in our protests,” but added, “I would say what they’ve done to the Prison Divest folks is super fucked up . . . knowing that these kind of responses do happen could certainly create a chilling effect on direct action and make it harder to recruit more students to take part in this kind of organizing.”¹¹⁵

When the #DropExxon protestors crashed a Harvard-affiliated event, chanted, disrupted, and held up a banner, the Administration took no action. When prison divestment protestors attended the widely-attended alumni reunion and silently held up signs, all of the students of color received threats of expulsion while 5 out of the 6 white protestors heard absolutely nothing. Why treat the two groups so differently? Some will accuse the Administration of racism, others will insist that there must be some innocent explanation. Regardless, the root of the problem is that such a discrepancy exists *at all*. The Protest and Dissent guidelines, the Disciplinary Process, and the Ad Board decisions are not transparent enough to accurately inform the student body of what constitutes actionable conduct and how such alleged conduct will be investigated. A future Harvard Law dissenter may not be able to parse the meaning behind the words of the Protest and Dissent Guidelines if these are the two points of comparison.

VII. CHILLED SPEECH

Harvard Law School’s unequal application of policy results in the chilling of student speech – not just the speech of the surveilled students, but the speech of Harvard students generally who hear of the threats against their colleagues and fellow students. Indeed, I left a rally early, while I was under investigation, for fear that I would run into an HLS Administrator knowing that the wrong move, even within my rights, could sway the Ad Board to find more ways to punish me. Multiple students described the suppression of their speech and political activity as a result of the Administration’s actions.

113 Joe Patrice, *Harvard Law School Students Protest Paul Weiss Recruiting Event*, ABOVE THE LAW (<https://abovethelaw.com/2020/01/harvard-law-school-students-protest-paul-weiss-recruiting-event/>) (last visited. Nov. 17, 2021).

114 Anonymous survey submission (on file with author).

115 *Id.*

There's a fairly robust protest culture but there's also the concern that any time you step on some random person's toe, you know, who feels really big and proud of themselves and they decide to do what they can to make you miserable. . . There is a culture that you should be quiet and that you should be grateful that you're here. That's the response that protesters get a lot at HLS, like, *what are you complaining about, aren't you lucky to be here*, like that . . . I know for a fact that people have gotten in trouble for protesting at HLS.¹¹⁶

During this time, I wasn't participating in anything, any other events [protests] at Harvard . . . the school only targeted students of color and one white woman but the protests included ten other students and most of whom were white, even visibly, there was a white Latinx student in front, who was right next to Dean Manning who was not facing this investigation. So I knew they were specifically targeting certain students who were the most visible, most vocal on campus to make examples out of. That became clear when one of the 2Ls [redacted], when she was also brought in because she was also politically active . . . she got off with a warning, but her warning essentially was: don't participate in any other events . . . it was to the effect of, don't participate again, you are getting off with a warning. So, essentially, she was on probation . . . So I felt like I couldn't participate in other events. And also, I was tending to personal family matters because of Covid-19, finding housing, moving across the country, dealing financially with situations with people at home, people were getting laid off, people couldn't make rent, people couldn't pay for food. So I was more concerned with dealing with basic material things. On top of that, Harvard was asking me, *how come you held up a sign?* I just didn't want to give more energy. So yes, overall, my speech and activism on campus during my seminal semester at Harvard was much more censored and much more surveilled

116 Confidential Interview with Participant 3 (Apr. 11, 2021) (on file with author).

than before.¹¹⁷

I was genuinely fearful that I might, you know, face some sort of consequence and be, like, suspended or expelled or something like that. And that's a really scary thought when I have hundreds of thousands of loans that I'm taking out for this. . . the thought of coming out of this with 200,000 or 300,000 dollars in debt and no degree is pretty terrifying . . . The whole point of my going to law school—to do public defense work—I wouldn't be able to do that. I would have to like, change my entire career path and all my plans, and like, what would my family think? Things like that. Yeah, it did scare me, even if I thought that there was a really small chance.¹¹⁸

I've never, like, completely ceased my political activities on campus but I definitely participated in less things with something hanging over me, both because I don't want to get more in trouble or, like, risk getting in more trouble. And also, it takes up a lot of time dealing with Dean of Students stuff and I'm just anxious. I have to spend a lot of time managing my anxiety.¹¹⁹

This intimidation, anxiety, and chilled speech did not just apply to the targeted students. Once word spreads of these threats, the entire student body is put on notice that they could be next. This makes students more hesitant to publicly support causes and movements which have an adversarial relationship with the Administration. In this way, the Administration's strategy is effective: it avoids bad press (certainly reporters would be interested to hear about threats of expulsion over protest at famously pro-speech Harvard Law School)¹²⁰ while sending an unofficial warning to other students who may otherwise protest and dissent.

117 Confidential Interview with Participant 6 (Apr. 7, 2021) (on file with author).

118 *Id.*

119 Confidential Interview with Participant 1 (July 29, 2020) (on file with author).

120 Telephone Interview with prominent New York publication.

VIII. POLICY RECOMMENDATIONS

I offer a list of policy changes in order to avoid these problems. I must emphasize that while these policy changes would be positive steps, no amount of rules could change or reform an institution which is composed of Administrators who do not value student intellectual diversity and speech. All of these suggested changes must accompany an attitude change that views student dissent as essential to the law school experience.

1. **No threatening of disciplinary charges unless a student has clearly broken a rule.** In all the incidents described above, no accused student has clearly or undisputedly broken a rule. The rules were largely vague, undefined, and unhelpful in allowing the students to understand the bounds which policed their free speech. It is unfair for the Administration to punish students for its failure to draft clear rules. Accordingly, students should not be threatened with discipline unless it is clear and undisputable that the student broke a rule.

2. **Clarify the purview of the Protest and Dissent Guidelines; Apply the Rule of Lenity where the rule writer fails to cure ambiguity.** _

As it stands, the Administration expects that the 600 words of the Guidelines will clearly govern the culture of dissent and protest at Harvard Law School. These 600 words are ambiguous, as demonstrated by the numerous examples of students facing discipline while not being told what rule they violated.

Some of the best legal scholars in the world teach at Harvard Law School. Surely, between the elite faculty and an engaged student body, Harvard could draft better guidelines for student dissent. Unlike some of the other policies outlined in the Handbook of Academic Policies, the Protest and Dissent Guidelines were not approved by the Harvard Law faculty before implementation.

Furthermore, where the rules are ambiguous, the ambiguity should be construed against the drafter instead of the accused violator. It is a well-settled principle in American jurisprudence that rules should be interpreted strictly.¹²¹

¹²¹ See *United States v. Wiltberger*, 18 U.S. 76, 95 (1820); see also *McBoyle v. United States*, 283 U.S. 25, 27 (1931); *United States v. Lawrence*, 3 U.S. 42 (1795) (“[W]henver a new remedy is so introduced, (more especially in a case so highly penal) it must be strictly pursued.”); 1 W. Blackstone, *Commentaries on the Laws of England* 88 (1765) (“Penal statutes must be construed strictly.”). Nearly two centuries ago, Chief Justice Marshall explained that “[t]he rule that penal laws are to be construed strictly, is perhaps not

The most relevant language comes from *Yates v. United States*,¹²² where the Court wrote:

Finally, if our recourse to traditional tools of statutory construction leaves any doubt about the meaning of “tangible object,” as that term is used in §1519, we would invoke the rule that “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” *Cleveland v. United States*, 531 U. S. 12, 25 (2000) (quoting *Rewis v. United States*, 401 U. S. 808, 812 (1971)) . . . See *Liparota v. United States*, 471 U. S. 419, 427 (1985) (“Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.”). In determining the meaning of “tangible object” in §1519, “it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.” See *Cleveland*, 531 U. S., at 25 (quoting *United States v. Universal C. I. T. Credit Corp.*, 344 U. S. 218, 222 (1952)). See also *Jones v. United States*, 529 U. S. 848, 858–859 (2000) (rule of lenity “reinforces” the conclusion that arson of an owner-occupied residence is not subject to federal prosecution under 18 U. S. C. §844(i) because such a residence does not qualify as property “used in” commerce or commerce-affecting activity).

Here, the ambiguous language comes from the Protest and Dissent Guidelines. What is an “open” meeting? What is a “closed” meeting? What is “picketing in an orderly way”? Is that simply picketing while white? What is “interferes with audience’s view”? What is “prevents the audience from paying attention to the speaker”? Is getting up and leaving the room quietly interfering? Is holding a sign at the side of the room? What is “substantially interfere”? Indeed, the Tidwell Investigation and the Student Dissenters applied vastly different definitions to these terms. It seems inevitable that there would be conflicting interpretations when the wording is so vague and lacking in explanation.

much less old than construction itself.” *Wiltberger*, 18 U.S. 76, 95.

The only clarification that the Administration has provided is a footnote in the 2020-2021 Protest and Dissent Guidelines, which states, *inter alia*, that students may not share, swap, or steal nametags.¹²³ None of the Student Dissenters at the October 26, 2019 Alumni Reunion Event nor any of the DisOrientation organizers ever did such a thing—not that the new clarification could be applied retroactively. The core of it is this: The rules aren’t clear enough. Try harder. If the rules are ambiguous as applied, the rule of lenity kicks in.¹²⁴

3. Disclose any and all evidence to the accused which is used to investigate (formally or informally) and prosecute the accused. Through the entire process of “informal” investigation, none of the Student Dissenters were informed of the exact violations alleged. Although the Ad Board gestured generally towards the Protest and Dissent Guidelines in the Letter of Investigation, all three Student Dissenters received the same perfunctory language, even though the language did not apply to all of the Student Dissenters. As such, to ensure that the disciplinary process is transparent, any time the Ad Board or Dean of Students has reason to believe that a student has violated the Protest and Dissent Policy, the alleged violator should be immediately informed of what rule their alleged conduct violated. This information would have greatly sped along the seven-month investigation and relieved some of the unnecessary opaqueness, which seemed only to serve the Administration’s interests, rather than serve an actual inquiry into whether the accused broke any rules.

4. Always disclose the identity of the accuser and the person who filed the Complaint. It is very difficult, if not oftentimes impossible, to stage a defense when one cannot even know the identity of the accuser. This is a principle long recognized in the Constitution and should also be recognized as a basic right at Harvard Law School as well.¹²⁵ To conceal the identity of the accuser is to conceal many of the basic facts that the accused could in-

123 HANDBOOK OF ACADEMIC POLICIES 2020-2021 (<https://perma.cc/6H4G-6GDT>) pg. 100 n.1 (last accessed Nov. 14, 2021).

124 See *Yates v. United States*, 574 U.S. 528, 548 (2015) (“Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability.”) (cleaned up) (citations omitted).

125 See *Lee v. Illinois*, 476 U.S. 530, 541 (1986) (“This holding [in *Douglas v. Alabama*, 380 U.S. 415 (1965)], on which the Court was unanimously agreed, was premised on the basic understanding that, when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculcating another, the accusation is presumptively suspect, and must be subjected to the scrutiny of cross-examination.”)

investigate while building a defense. Without the ability to knowing the exact allegations, the exact wrongful conduct, nor the identity of the accuser, the accused have no choice but to answer the Ad Board's questions and hope for the best. This lack of due process greatly prejudices the accused.

5. Allow the accused to have input into the choice of investigator; using the same firm and same investigator every time creates a conflict of interest. Hogan Lovells appears to be the law firm of choice when it comes to Harvard Law School's commissioned investigations. It was the law firm used for the investigations of all four Student Dissenters, and for the investigation of anonymous racist, sexist texts and emails sent to students in an separate and unrelated series of incidents.¹²⁶ Some might believe that this relationship, where Harvard Law School repeatedly hires the same law firm to conduct investigations in exchange for significant pay, might influence the law firm—intentionally or not—to write reports which confirm the bias of Harvard Law School. Meanwhile, the party under investigation has no say whatsoever in the choice of the investigator. The American Bar Association propounds ethics guidelines for its arbitrators that disallow this exact type of conduct. Arbitrators are often lawyers or retired lawyers who agree to act as a third-party neutral to mediate or arbitrate disputes between parties. The American Arbitration Association connects these arbitrators with parties in need of one. The American Bar Association's Code of Ethics for Arbitrators in Commercial Disputes, Canon I states:

After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or professional relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality.¹²⁷

Any agreement to act as a third-party neutral should come with the explicit expectation that this neutral would not be used again, at least for a very long time. This would prevent the repeat customer relationship between Harvard and the neutral which creates the perverse incentive in the first place. Where the neutral has no reason to believe their conclusion will affect future earn-

¹²⁶ Nancy Vu, *These Harvard Law Students Said The School Didn't Do Enough After They Were Targeted With Racist And Sexist Messages*, BUZZFEED, July 22, 2019 (<https://www.buzzfeednews.com/article/nancyvu/these-harvard-law-students-say-the-school-didn't-do-enough>).

¹²⁷ THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (AM. BAR ASS'N 2004) (https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/commercial_disputes.pdf) (last accessed. Nov. 14, 2021).

ings, the neutral is more properly incentivized to be impartial.

6. **Select a Third-Party Neutral for the Hearing itself:** As it stands currently, the Administrative Board is the party who interprets the rules, applies the rules, and prosecutes those who violate the rules. The judge and the prosecutor are the same party here. A neutral and unbiased hearing is not guaranteed. I do not mean to say that the Administrators are inherently biased people; rather, there is an inherent contradiction in simultaneously acting as the prosecutorial body and the impartial body. Indeed, on April 14 of 2020, one of the members of the Ad Board informed my lawyer via phone conversation that I had violated the Protest and Dissent Guidelines – long before there was ever a hearing, not to mention before there were even formal charges.¹²⁸ In the event that I would get a formal hearing—and have a mark on my character & fitness application for the rest of my legal career—I would be making my case in front of the very people who had already decided that I was guilty.

This is unacceptable. It is unfair. It is illegitimate. It needs to change. The American Arbitration Association could be of assistance here, where, again, both parties have input in a third-party neutral. It defies all logic to allow the “prosecutor” and “judge” to be the same party here. This blatant conflict of interest is in need of correction.

IX. CONCLUSION

This research uncovered evidence of the suppression of student activism at Harvard Law School. There is evidence suggesting that Harvard Law School engaged in systematic racial discrimination when it came to policing the speech of student dissenters, protestors, and organizers. The process by which Harvard Law School regulates speech amongst its students must be more transparent and follow clear procedures. The rules need clarification. Dean Manning and his administration should take a hard look at the Protest and Dissent Guidelines and act to improve their content and application.

In the iconic 1989 Supreme Court decision, *Texas v. Johnson*, a five-justice majority, including Justice Antonin Scalia, ruled, “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”¹²⁹ Harvard Law School should embrace this principle. If it finds the reading of a poem about Belinda Sutton “offensive or disagreeable,” if it finds that holding signs a reunion event is not highly desir-

128 Telephone call with author’s counsel (Apr. 14, 2020).

129 491 U.S. 397, 414 (1989) (citing cases).

able, or if it finds that handing out leaflets about Harvard Law School's connections to ICE is not ideal, Harvard Law School should nevertheless encourage the growth of ideas and the freedom of speech amongst its students. That is because the freedom of speech is a fundamental element of an environment of learning. That is especially true for the students who bravely challenge the status quo and tirelessly organize to achieve the justice that the world so desperately needs. If one does not agree with the message, I hope that they can at least understand the importance of their ability to communicate the message.

ABOUT THE REVIEW

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