



# National Lawyers Guild *Review*



# **NATIONAL LAWYERS GUILD REVIEW**

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## **Editor's Preface**

*By Dalia Fuleihan*

When I sit down to write the preface to each new issue of the National Lawyers Guild Review my goal is to put the work of our wonderful contributors in context, to comment on the current state of affairs in our world and situate our articles within it. Today, I am not able to do this. We have three exemplary articles in this issue, which I will introduce in due course. However, I am not able to let this moment pass, without discussing the ongoing genocide in Palestine.

At the time of writing, Israel has been perpetrating a genocide in plain view of the world for over two months. The indiscriminate bombing, massive civilian death toll, targeted attacks on journalists, hospitals, aid workers, and medical staff, coupled with the explicit genocidal language of Israeli politicians is like nothing we have seen before. The majority of the population of Gaza has been displaced and is being forced into smaller and smaller areas. Israel continues to relentlessly bomb the entire Gaza strip, including the so-called "safe areas." While this is going on, raids and attacks on Palestinians in the West Bank have increased. Thousands of Palestinians have been arrested by Israeli forces and settler attacks are rampant. At the same time, the Israeli military continues to bomb Syria and Lebanon.

Perhaps one of the most infuriating parts of this genocide is the complicity and collusion of the United States. Historically, the United States sends Israel billions of dollars in aid every year. Now, in light of the genocide, President Biden asked for an additional \$14 billion in military aid, he has bypassed congress to send millions of dollars worth of weapons, and is using his diplomatic power to shield Israel from attempts to curb or condemn its blatant violations of international law. Simultaneously, those in the United States organizing and attempting to place pressure on the U.S. government to put an end to this genocide are facing an extraordinary degree of repression. While there has always been a coordinated effort to silence criticism of Israel, this effort has reached a new level. People are fired from their jobs, disciplined in schools, doxed, and arrested by the hundreds for speaking out against genocide. As members of the progressive movement and advocates for social justice, we ought to be horrified and we cannot remain silent in the face of such injustice.

The NLG has long held a position of solidarity with Palestine and support for self-determination of the Palestinian people. Many chapters of

the NLG have issued statements in support of Palestine and condemning the ongoing genocide. Many NLG members have been actively involved in defending activists who are being unjustly targeted by the government for speaking out against Palestine. This work is vital to the continuation of the movement and reflects the NLG's longstanding commitment to Palestinian freedom.

As dire as the current situation is, the outpouring and sustained support for Palestine around the world does give me hope. Massive protests have taken place all over the world. Calls for boycott have been made and observed. Pressure is being placed and sustained on elected officials to support a ceasefire along with dignity and self-determination for Palestinians. It seems that there is a revitalization of progressive movements and the young generation in particular understand that Palestinian liberation is linked with our collective liberations. They see that our struggles are all interconnected, that we cannot talk about liberation here at home without also advocating for liberation in Palestine, in the Democratic Republic of Congo, in Sudan, and everywhere else in the world.

It is with the idea of intersectionality, that I turn to introduce our three articles in this issue. Our first article, *Law for the People: Supporting Mass Protest, Political Resistance, and Movements for Social Change* by Kris Hermes documents the history of the NLG's mass defense programs. The NLG is well known for providing legal observers at various protests throughout history, however less known is the NLG's commitment to wholistic legal support of those organizing for justice and liberation. Hermes's article documents the history of the NLG's legal support for political activists throughout its existence. At a time when hundreds of protesters are being arrested at Palestine solidarity actions, the NLG's mass defense program has never been more important. Hermes's article reminds us of the important role legal support plays in any progressive movement.

Our next two articles focus on the ways in which some of the most vulnerable among us are targeted by institutions for discriminatory purposes. In *Grindr and Privacy Concerns of LGBTQ+ People in the United States and the European Union*, Zane McNeil and Riley Clare Valentine use Grindr's various data privacy issues to compare the data privacy landscape in both the United States and the European Union. Their analysis highlights the importance of data privacy to protect the interests of vulnerable groups.

Lastly, in *Define to Exclude: Comparing Historic Racial Purity Laws to Current Anti-LGBTQ+ Legislation*, Jaqueline Spreadbury compares the racial purity laws of this country's past to the current efforts by state

and federal legislatures to pass anti-LGBTQ+ laws by defining gender to exclude trans and non-binary folks. Spreadbury's article pays particular attention to the way in which legislators utilize narrow definitions as a mechanism to exclude and further marginalize vulnerable populations—racial minorities in the past, and LGBTQ+ communities now. Spreadbury's analysis exposes the use of this exclusionary mechanism throughout history, and provides important lessons for how to combat exclusionary policies now and in the future whether they be targeting LGBTQ+ communities, racial or ethnic minorities, or any other group in the future.

I sincerely hope that you enjoy the articles in this issue of the National Lawyers Guild Review. At times this preface seems like an exercise in pessimism—continuously commenting on the injustices in our society. At the same time this is the work of the progressive. We cannot achieve justice without first identifying where and how the various systems of oppression function. The articles in this issue provide important perspectives on exactly this. I am proud that the work of the National Lawyers Guild Review can play a small part in the global struggle for justice. So, I will close by saying Free Palestine, Free Congo, Free Sudan, and free us all.

2024

# **Law for the People: Supporting Mass Protest, Political Resistance, and Movements for Social Change**

*By Kris Hermes\**

The National Lawyers Guild (NLG or Guild) and its members have been supporting radical left activists and progressive social movements since the organization was founded in 1937. NLG members take action against all forms of oppression and work in solidarity with those who struggle for justice. In support of countless political struggles—from anti-war and immigrant rights to Black liberation and prison abolition—the NLG provides direct support to activists and mass movements demanding social change.

The NLG embraces a holistic approach to legal support that goes far beyond what the organization is best known for—legal observing. The NLG understands the importance of supporting activists in the streets and helping them navigate a repressive legal system. But, its members also understand that the intersection of politics and the law represents a unique opportunity to advance social change. When carried out strategically and with collective purpose, legal support can have a transformative effect.

While the Guild’s legal support certainly includes monitoring police misconduct in the streets and defending activists in the courtroom, it encompasses so much more. From setting up legal offices during mass protests to staffing legal hotlines and from organizing jail and court support programs to holding police accountable in civil court, NLG members have consistently pushed the boundaries of the law to support activists and their causes. In some cases, NLG members have politicized trials, employed unorthodox legal tactics, and used the media to shape the public narrative. These innovative forms of legal support are carried out by local and national mass defense committees, a mass defense staff person in the Guild’s National Office, and thousands of Legal Observers (LOs) across the country. NLG members and local chapters also work collaboratively with activist-led legal collectives, anti-repression crews, defense committees that form around specific cases, and community-based groups engaged in defendant support.

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\* Kris Hermes is a longstanding NLG Legal Worker, a current member of the NLG Mass Defense Steering Committee, a former NLG National Office staff and board member, and author of *Crashing the Party: Legacies and Lessons from the RNC 2000* (PM Press).

This article should give you a better sense of the Guild’s vision of legal support, why it is important, and how it has been implemented over the years.

### **Legal Observers®**

In 1968, the NLG formalized its direct support of political movements and mass protest by [establishing the role of the LO](#).<sup>1</sup> The Guild deployed LOs at least twice that year, once in April during the occupations and brutal mass arrests at Columbia University and again in August at the Democratic National Convention (DNC) protests in Chicago, widely characterized as a police riot.

LOs are typically trained, coordinated, and directed by NLG lawyers, law students, or legal workers. The primary role for LOs is to monitor and record police misconduct, under the supervision of an attorney, in the event that such information or “work product” can be used in a related criminal or civil case. LOs have produced evidence in consequential criminal cases that have resulted in dismissals and acquittals. LOs have also produced evidence for—and even acted as plaintiffs in—civil litigation that has had a significant impact on free expression and political protest over the years.

Another LO role during political demonstrations is to record the arrests of protesters, other LOs, journalists, medics, and bystanders, all of whom are commonly swept up when police carry out mass arrests. In this way, the NLG, legal workers, and activists can support arrestees through the often-dehumanizing jail process by ensuring their needs are met.

Although the NLG is not politically impartial and expressly supports progressive and radical left political movements, LOs are trained to be observers of police conduct and, while in their role, to not take part in demonstrations. LOs typically do not attend a demonstration unless they are requested by event organizers. LOs will often wear lime-green baseball caps at protests to distinguish themselves and to let police and those involved in the demonstration know they are present and observing police conduct. While the presence of LOs does not necessarily prevent police abuse, to the extent law enforcement has concerns over being held accountable for their actions, LOs can sometimes have a de-escalating effect and serve as a deterrent to police violence or unconstitutional behavior against protesters.

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<sup>1</sup> See National Lawyers Guild, *Mass Defense Program*, <https://www.nlg.org/legalobservers/>.



The LO program has been the entry point for thousands of lawyers, law students, legal workers and activists who have been trained as LOs since the program began in 1968. Law students make up a large proportion of LOs on the streets, drawing from the many law schools across the country, as do legal workers and activists.

Perhaps because the LO program is so decentralized and massive in scale, a concern about the need to maintain the program's integrity led to the pursuit of a trademark on the term "Legal Observer." In 2009, the Guild [applied to the US Patent Office](#) for a certification mark that would restrict use of the term "Legal Observer" to maintain consistency in the principles that underpin the practice of legal observing.<sup>2</sup> Rather than trying to establish itself as the only organization to train and dispatch LOs, the Guild continues to encourage the development of local and national LO programs by other organizations, especially groups of color, consistent with the Guild's legal observing principles and practices. The Guild's LO certification mark, with the program's familiar lime-green color that adorns countless baseball caps, was [registered by the US Patent Office in 2017](#).<sup>3</sup>

After receiving criticism in 2016 for a lack of diversity, cognitive bias, and exclusionary practices in the LO program, the Guild's Mass Defense Committee (MDC) leadership made a number of constructive changes, including a revised LO manual that strives to address many of these issues. These changes also included encouraging new outreach methods to make the LO program more accessible to people of color and to the varied political communities the Guild supports in the streets.

### **Mass Defense Committees**

For decades, the Guild has organized local committees to support activists and mass protests. But it was not until 2000, at its annual convention held that year in Boston, that the Guild formed the nationally coordinated MDC. The MDC consists of a network of hundreds of Guild lawyers, legal workers, and law students in dozens of local committees across the country. The name is a bit of a misnomer, as MDC members have not only defended activists on criminal charges but have also made extensive use of civil litigation over the last twenty years in an effort to push back against police abuse at

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<sup>2</sup> See [http://tsdr.uspto.gov/#caseNumber=77813382&caseType=SERIAL\\_NO&searchType=statusSearch](http://tsdr.uspto.gov/#caseNumber=77813382&caseType=SERIAL_NO&searchType=statusSearch).

<sup>3</sup> United States Patent and Trademark Office, Certification Mark on Supplemental Register, US Serial Number 86778461 (See [http://tsdr.uspto.gov/#caseNumber=86778461&caseType=SERIAL\\_NO&searchType=statusSearch](http://tsdr.uspto.gov/#caseNumber=86778461&caseType=SERIAL_NO&searchType=statusSearch)).

mass demonstrations.

MDC members in local chapters across the country oversee a staggering array of projects and roles, including some or all of the following:

- Representing activists on criminal charges;
- Pursuing impact litigation;<sup>4</sup>
- Managing local LO programs;
- Providing “Know Your Rights” trainings and literature;
- Engaging with and advising activists on protest actions and potential legal consequences;
- Setting up legal support infrastructure-staffed offices, hotlines, jail support; and
- Developing and running bail support programs

One of the most important functions of the MDC is the daily exchange of relevant news, legal precedents, ideas, and theories, as well as summaries of work the chapters are doing to support political movements at the local level. The committee is also a repository of information and a valuable collective resource for how best to litigate criminal and civil protest cases.

Soon after the MDC was formed, the NLG began publishing reports about the state’s crackdown on dissent, based largely on the work of local and national mass defense committees:

- [The Assault on Free Speech, Public Assembly, and Dissent](#) (2004)<sup>5</sup>
- [Punishing Protest](#) (2007)<sup>6</sup>
- [The Policing of Political Speech](#) (2010)<sup>7</sup>
- [Operation Backfire](#) (2012)<sup>8</sup>
- [Developments in the Policing of National Special Security Events](#) (2013)<sup>9</sup>

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4 Impact litigation refers to the practice of bringing lawsuits intended to effect social change. Impact litigation includes class action lawsuits and individual claims with broad social significance.

5 Heidi Boghosian, *The Assault on Free Speech, Public Assembly, and Dissent*, National Lawyers Guild (2004), [https://www.nlg.org/wp-content/uploads/2020/03/assault\\_on\\_free\\_speech\\_public\\_assembly\\_and\\_dissent.pdf](https://www.nlg.org/wp-content/uploads/2020/03/assault_on_free_speech_public_assembly_and_dissent.pdf).

6 Heidi Boghosian, *Punishing Protest: Government Tactics that Suppress Free Speech*, National Lawyers Guild (2007), <https://www.nlg.org/punishing-protest/>.

7 Heidi Boghosian, *The Policing of Political Speech*, National Lawyers Guild (2010), <https://www.nlg.org/wp-content/uploads/2016/09/PolicingPolSpeechCoverAndBody.pdf>.

8 National Lawyers Guild, *Operation Backfire*, 2012, <https://www.nlg.org/operation-backfire/>. This report explores the state’s targeting of environmental and animal rights activists as domestic terrorists.

9 Traci Yoder and Nathan Tempey, *Developments in the Policing of National Special Security Events: An Analysis of the 2012 RNC and DNC*, National Lawyers Guild (2013),

With the emergence of the Occupy Wall Street movement (Occupy) in 2011, and mass protests erupting across the country, the Guild's National Office hired a mass defense coordinator to work with the MDC and its leadership to support the thousands of arrestees and to challenge the widespread attacks on civil liberties. Having a staff person in the National Office exclusively dedicated to supporting social movements meant the organization could develop and implement new legal support tools, and the MDC could strengthen its efforts in a decade of rising and coordinated unrest across the country.

The structure of the national MDC is fairly informal, with a chairperson who moderates online discussion, facilitates meetings of the MDC's Steering Committee, and represents the committee at national board meetings. In 2014, the MDC implemented the structure that established the Steering Committee and treasurer, adopted two-year terms for the chairperson position, and formalized an election process. The MDC chairperson and the Steering Committee work in tandem with the Guild's National Office and the mass defense staff person to coordinate support for protest activity across the country, especially in places where local committees lack capacity or do not exist.

### **Decades of NLG Support of Activists and Social Movements in Politicized Cases**

One of the most important roles the NLG has played over the years is defending dissidents from state. Indeed, the Guild has spent decades representing activists on criminal charges and has thousands of examples to draw from.

Former NLG president Ernie Goodman could be considered one of the country's first movement lawyers who honed his skill of advancing political movements by supporting the efforts of factory workers and industrial unionism, [defending Ford strikers in the 1930s](#).<sup>10</sup> In 1952, during the McCarthy era, Goodman defended the "Michigan 6," who were accused by the House Committee on Un-American Activities of sedition and advocating the violent overthrow of the US government. [Goodman represented three of the defendants](#) and argued that their membership in the Communist Party was

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[https://www.nlg.org/wp-content/uploads/2016/09/NLG-Report-Developments-in-the-Policing-of-NSSEs-at-2012-RNC-and-DNC\\_1.pdf](https://www.nlg.org/wp-content/uploads/2016/09/NLG-Report-Developments-in-the-Policing-of-NSSEs-at-2012-RNC-and-DNC_1.pdf).

10 Obituary, "Ernest Goodman, 90, Civil Rights Lawyer," *New York Times* (Apr. 2, 1997), <https://www.nytimes.com/1997/04/02/us/ernest-goodman-90-civil-rights-lawyer.html>.

protected by the First Amendment, whereas the other three defendants represented themselves and used a politically motivated strategy to expose the advent of fascism in America and their denial of a fair trial.<sup>11</sup> All six defendants were convicted.

After the 1968 DNC, several protest organizers were federally charged with felony [conspiracy and crossing state lines to incite a riot](#).<sup>12</sup> In one of the most well-known political group trials in US history, the “Chicago 8” defendants and their NLG lawyers William Kunstler and Leonard Weinglass used the spectacle of a months-long trial as an opportunity to advance the movement against the Vietnam War and shine a light on the inanity of the legal system itself. During the trial, Judge Julius Hoffman denied legal representation to Black Panther Party (BPP) co-founder Bobby Seale, ordering him bound and gagged when he vociferously objected, and eventually severed Seale from the case altogether. Five defendants were convicted on the riot charges and Judge Hoffman, reacting at least in part to the spectacle of the trial, [charged all the defendants and both Guild lawyers with contempt of court](#).<sup>13</sup> Stiff sentences were imposed by the judge, but all charges were eventually overturned on appeal.

Thirty years later, when tens of thousands of people flooded the streets of Seattle to protest the WTO meetings in late 1999, they were met with extensive police violence. The Seattle chapter of the NLG prepared and delivered Know Your Rights workshops in the months leading up to the November 30 demonstration, trained and dispatched hundreds of LOs, and assisted in the selection of plaintiffs for successful class action litigation.<sup>14</sup> The Seattle NLG and other legal groups published *Waging War on Dissent*, a comprehensive report on the WTO demonstrations and violent police reaction, funded in part by a Haywood Burns grant from the NLG National Office.<sup>15</sup>

The WTO protests ushered in a wave of global justice actions, which were met with a method of policing coined by social scientists as “strategic

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11Angela D. Dillard, “Ernie Goodman’s Long Struggle,” *Solidarity*, March/April 2012, <https://solidarity-us.org/atc/157/p3540/>.

12 Jalyn Henderson, “50 Years Later: The Chicago 7 Trial,” *WLS-TV Chicago* (Sept. 25, 2019), <https://abc7chicago.com/5568363/>.

13 Tribune News Service, “Background: Chicago 7 Trial,” *Chicago Tribune* (Oct. 24, 2016), <https://www.chicagotribune.com/news/chicago-8-trial-chicago-7-trial-story.html>.

14 *Waging War on Dissent*, eds. Seattle National Lawyers Guild WTO Legal Group, November 2000, <https://ratical.org/co-globalize/NLG-REPORT.pdf>.

15 Ibid.

incapacitation.”<sup>16</sup> From heavy surveillance and infiltration to preemptive arrests and widespread use of less-lethal weapons, this renewed level of state repression has been used ever since. In the summer of 2000, the NLG provided legal support to activists protesting at the Republican National Convention (RNC) in Philadelphia and the DNC in Los Angeles. It was during these two mass demonstrations that the foundation of the contemporary playbook of violent police tactics became clear. The NLG worked to fight against preemptive actions by the state to shut down activist spaces and suppress dissent in Los Angeles. On the other side of the country, hundreds were arrested in Philadelphia, charged with felonies and high-level misdemeanors, and held in jail on bails as high as \$1 million.<sup>17</sup> The Philadelphia chapter of the NLG worked with the defendant-led R2K Legal Collective for more than three years to [politicize the criminal cases and engineer innovative solidarity tactics in the courtroom](#). This confrontational strategy included refusing plea bargains en masse and demanding jury trials, calling for the recusal of a blatantly biased judge, and engaging the mainstream media in a way that drew public attention to widespread overcharging and aggressive prosecutions, and was successful at clearing almost everyone’s charges.

The September 11, 2001 attacks in New York City led to a substantial erosion of civil liberties in the US, further emboldening police to refine their tactics used to suppress dissent. Two years later, in November 2003, during demonstrations against the Free Trade Area of the Americas (FTAA) in Miami, police responded with a staggering array of weaponry in one of the most violent episodes in the prior twenty years.<sup>18</sup> Thousands of protesters were shot at, gassed, tasered, pepper-sprayed, clubbed, and brutally beaten. These protestors also saw the emergence of synchronized militarism, urban tanks, and [long range acoustic devices \(commonly referred to as “LRAD”\)](#).<sup>19</sup> A Miami circuit court judge who observed some of the protests himself said he saw “[no less than 20 felonies committed by police officers](#).”<sup>20</sup> In addition to

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16 Patrick Gillham and John Noakes, “Aspects of the New Penology in the Police Response to Major Political Protests in the United States, 1999–2000,” in *The Policing of Transnational Protest after Seattle*, eds. Donatella della Porta et al. (Ashgate, 2006), 111–13.

17 Kris Hermes, *Crashing the Party: Legacies and Lessons from the RNC 2000* (PM Press, 2015).

18 Jeremy Seahill, “Mayhem in Miami,” *Democracy Now!* (Nov. 21, 2003), [https://www.democracynow.org/2003/11/21/mayhem\\_in\\_miami\\_amidst\\_tear\\_gas](https://www.democracynow.org/2003/11/21/mayhem_in_miami_amidst_tear_gas).

19 Boghosian, *supra* note 7 at 43.

20 Amy Driscoll, “Judge: I Saw Police Commit Felonies,” *Miami Herald* (Dec. 20, 2003), [https://www.citizenstrade.org/ctc/wp-content/uploads/2011/05/miamiherald\\_judge\\_12202003.pdf](https://www.citizenstrade.org/ctc/wp-content/uploads/2011/05/miamiherald_judge_12202003.pdf).

setting up a legal office and deploying scores of LOs, the NLG filed multiple lawsuits [challenging the sweeping and coordinated police repression](#).<sup>21</sup>

The following year, in the summer of 2004, New York City hosted the RNC. The local chapter of the NLG staffed a legal office to support the hundreds of thousands of demonstrators who took to the streets. More than 36,000 police officers were deployed in a concerted effort to stifle dissent.<sup>22</sup> Before the convention even began, police had harassed thousands of cyclists in a planned “Critical Mass” demonstration and [arrested more than 260 people](#).<sup>23</sup> The city refused to issue a permit to antiwar organizers for a protest on the Great Lawn in Central Park, which was successfully challenged by NLG lawyers from the Partnership for Civil Justice Fund (PCJF).<sup>24</sup> More than 1,800 people were arrested over several days of protests, with most of them [processed in an old bus depot](#) converted into a detention center.<sup>25</sup> To add insult to injury, [hundreds of arrestees were detained longer than legally allowed](#), compelling the NLG and Legal Aid Society to file writs of habeas corpus for their immediate release. The NLG accused the city of deliberately delaying the arrestees’ detention until President George W. Bush had left the convention.<sup>26</sup> During the ensuing criminal trials, the NLG worked with I-Witness Video, a collective that monitored police misconduct during the protests, and used their footage as evidence to refute police testimony and discredit their prejudicial narrative.<sup>27</sup>

In 2008, the RNC was hosted by the Twin Cities of Minneapolis and St. Paul, whose police responded with a level of violence and repression not seen since the 2003 FTAA protests in Miami. Use of surveillance and infiltration by informants and undercover police was widespread and, be-

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21 See *Killmon v. City of Miami*, 199 Fed. Appx. 796 (11th Cir. 2006), [https://www.nlg.org/wp-content/uploads/2017/02/Killmon\\_Eleventh\\_Circuit\\_Ruling.pdf](https://www.nlg.org/wp-content/uploads/2017/02/Killmon_Eleventh_Circuit_Ruling.pdf).

22 Hermes, *supra* note 17 at 247.

23 Amy Goodman, “Critical Mass: Over 260 Arrested in First Major Protest of RNC,” *Democracy Now!* (Aug. 30, 2004), [https://www.democracynow.org/2004/8/30/critical\\_mass\\_over\\_260\\_arrested\\_in](https://www.democracynow.org/2004/8/30/critical_mass_over_260_arrested_in).

24 Alan Feuer, “Settlement on Use of Central Park’s Great Lawn,” *New York Times* (Jan. 8, 2008), <https://www.nytimes.com/2008/01/08/nyregion/09cnd-lawn.html>.

25 Ed Pilkington, “New York agrees \$18m settlement with 2004 Republican convention protesters,” *The Guardian* (Jan. 15, 2014), <https://www.theguardian.com/world/2014/jan/15/new-york-agrees-settlement-2004-republican-convention>.

26 “City of New York to Pay \$230,000 to Settle Republican National Convention Contempt Proceeding,” press release, National Lawyers Guild, New York chapter, April 15, 2005.

27 Amy Goodman, “NY Law Enforcement Caught Doctoring Video of RNC Arrests,” *Democracy Now!* (Apr. 14, 2005), [https://www.democracynow.org/2005/4/14/ny\\_law\\_enforcement\\_caught\\_doctoring\\_video](https://www.democracynow.org/2005/4/14/ny_law_enforcement_caught_doctoring_video).

fore the protests began, police shut down the RNC Welcoming Committee convergence space, detaining dozens of people and seizing personal belongings, computers, and political propaganda.<sup>28</sup> Police also used assault rifles to raid the houses of multiple activists in both Minneapolis and St. Paul, charging some with conspiracy to riot. Police used tear gas, pepper spray, stun grenades, rubber bullets, and other projectile weaponry, ultimately arresting more than 800 people.<sup>29</sup> In addition to working with Coldsnap Legal Collective to set up a legal office and dispatching scores of LOs, the local NLG chapter also worked with an arrestee-led legal support group called Community RNC Arrestee Support Structure (CRASS) to defend the “RNC 8” against conspiracy and state terrorism charges and mitigate the legal harm that hundreds of others were facing.<sup>30</sup>

On the shoulders of the Arab Spring, the Occupy movement against social and economic inequity began on September 17, 2011, in Zuccotti Park, near New York City’s financial district. The Zuccotti Park encampment, which became a symbol of the movement, quickly inspired dozens of encampments in cities across the US and the world. The occupations were experiments in direct democracy—laboratories for non-hierarchical, anti-authoritarian, democratic organizing with roots in an [anarchist political tradition](#).<sup>31</sup> By early October 2011, there were Occupy protests in [over 900 cities across 82 countries](#).<sup>32</sup> There were [more than 600 occupations in the US alone](#).<sup>33</sup> Police began a coordinated crackdown in late October, culminating in [nearly 8,000 arrests](#) across the country.<sup>34</sup> NLG lawyers defended many of the arrestees in court and, using civil litigation, [successfully challenged police policy](#) in cities like Oakland, California.<sup>35</sup> In late 2012, NLG lawyers obtained [a trove](#)

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28 Boghosian, *supra* note 7 at 29.

29 Hermes, *supra* note 17 at 231.

30 “Untitled, or What to Do When Everyone Gets Arrested: A CRASS Course in Providing Arrestee Support,” zine, Community RNC Arrestee Support Structure, 2010, <https://archive.org/details/CRASSZinePrint/mode/2up>.

31 David Graeber, “Occupy Wall Street’s anarchist roots,” *Al Jazeera* (Nov. 29, 2011), <https://www.aljazeera.com/indepth/opinion/2011/11/2011112872835904508.html>.

32 Alan Taylor, “Occupy Wall Street Spreads Worldwide,” *The Atlantic* (Oct. 17, 2011), <https://www.theatlantic.com/photo/2011/10/occupy-wall-street-spreads-world-wide/100171/>.

33 Joanna Walters, “Occupy America: protests against Wall Street and inequality hit 70 cities,” *The Guardian* (Oct. 8, 2011), <https://www.theguardian.com/world/2011/oct/08/occupy-america-protests-financial-crisis>.

34 Caroline Fairchild, “Occupy Arrests Near 8,000 As Wall Street Eludes Prosecution,” *HuffPost* (May 23, 2013), [https://www.huffpost.com/entry/occupy-wall-street-arrests\\_n\\_3326640](https://www.huffpost.com/entry/occupy-wall-street-arrests_n_3326640).

35 Eoin Reynolds, “Occupy Oakland protesters awarded \$1m over police violence during



[of documents](#) through the Freedom of Information Act, which revealed that the Federal Bureau of Investigation (FBI), Department of Homeland Security (DHS), local police, counterterrorism fusion centers, and private security companies employed by major banks collected and shared information used to target and arrest Occupy protesters.<sup>36</sup>

NLG lawyers from Chicago were still in court defending hundreds of local Occupy protesters when, in May 2012, the city hosted meetings of the North Atlantic Treaty Organization (NATO), designated by DHS as a [National Special Security Event](#).<sup>37</sup> Just weeks earlier, the Chicago chapter of the NLG had [won a \\$6.2 million settlement](#) against the police for improperly arresting over 700 people at an antiwar demonstration in 2003.<sup>38</sup> Despite this clear message from the courts to respect free expression, the week of NATO demonstrations was [dominated by police harassment and violence](#), serious injuries, high-level charges, and exceptionally high bonds.<sup>39</sup> The NLG staffed a twenty-four-hour legal office, dispatched LOs, and represented protesters facing charges. It was also mostly NLG lawyers, including those from the People's Law Office, who defended the NATO 3, activists [indicted on terrorism charges from the Illinois version of the USA PATRIOT Act](#), in a highly politicized trial.<sup>40</sup>

A year later, in 2013, the Black Lives Matter (BLM) movement [began as a hashtag](#) and an online call to action after George Zimmerman was acquitted for the 2012 murder of Trayvon Martin.<sup>41</sup> In 2014, when police murdered Michael Brown in Ferguson, Missouri, and Eric Garner in New York City, BLM's online activism shifted to direct action in the streets. The

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arrests," *The Guardian* (July 3, 2013), <https://www.theguardian.com/world/2013/jul/03/occupy-oakland-protesters-1m-police>.

36 "FBI Documents Reveal Secret Nationwide Occupy Monitoring," Partnership for Civil Justice Fund, [http://www.justiceonline.org/fbi\\_files\\_ows](http://www.justiceonline.org/fbi_files_ows) (last visited Aug. 17, 2023).

37 Yoder and Tempey, *supra* note 9.

38 "NLG Reaches \$6.2 Million Settlement in Class Action Against Chicago Police," press release, National Lawyers Guild (Feb. 8, 2012), <https://www.nlg.org/nlg-reaches-6-2-million-settlement-in-class-action-against-chicago-police/>.

39 "NLG Provides Wrap-up of Police Reaction to NATO Demonstrations," press release, Chicago Chapter of the National Lawyers Guild (May 25, 2012), <https://nlgchicago.org/blog/nlg-provides-wrap-up-of-police-reaction-to-nato-demonstrations/>.

40 Yana Kunichoff, "NATO 3 Indictment Shows Increased Terrorism Charges," *Truthout* (June 21, 2012), <https://truthout.org/articles/nato-3-indictment-shows-increased-terrorism-charges/>.

41 Elizabeth Day, "#BlackLivesMatter: the birth of a new civil rights movement," *The Guardian* (July 19, 2015), <https://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement>.



movement became known for its militant tactics of blockading freeways, occupying shopping malls, and demonstrating outside of police stations. Mass protests were not only local, where the police murders took place, but also coordinated among cities across the country. The police murders of Brown and Garner were followed by the murders of Laquan McDonald in Chicago, Tamir Rice in Cleveland, Freddie Gray in Baltimore, and so many others, each sparking outrage and mass street actions. Over several years, thousands of BLM activists were arrested, many of whom were bailed out by local NLG chapters and represented in court by NLG lawyers. The BLM movement has given rise to many important legal groups, including the [Chicago Community Bond Fund](https://chicagobond.org),<sup>42</sup> which was formed by impacted community members, activists, and NLG members, and [Law for Black Lives](http://www.law4blacklives.org),<sup>43</sup> a Black femme-led national network of radical lawyers and legal workers—many from the NLG—who are building legal infrastructure for movement organizations and cultivating a community of legal advocates trained in [movement lawyering](#).<sup>44</sup>

In early 2016, members of the Standing Rock Sioux tribe established the [Sacred Stone Camp](#) as an Indigenous-led resistance to the Dakota Access Pipeline (DAPL), which was proposed to run from the Bakken oil fields in North Dakota to southern Illinois.<sup>45</sup> The pipeline's path beneath the Missouri and Mississippi Rivers, as well as under part of Lake Oahe near the Standing Rock Indian Reservation, threatened the region's water supply and sacred land.<sup>46</sup> By summer 2016, additional camps had formed and [thousands of people went to Standing Rock](#) in support of the #NoDAPL movement.<sup>47</sup> Police regularly used repressive tactics, violence, and less-lethal weapons against water protectors; on one occasion, a private security company [used dogs to attack water protectors](#), injuring several people.<sup>48</sup> [More than 800 people were arrested](#) over several months of resistance.<sup>49</sup> The NLG helped form the [Water](#)

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42 See <https://chicagobond.org>.

43 See <http://www.law4blacklives.org>.

44 See <http://www.law4blacklives.org/respond>.

45 Ladonna Brave Bull Allard, "Why the Founder of Standing Rock Sioux Camp Can't Forget the Whitestone Massacre," *Yes! Magazine* (Sept. 3, 2016), <https://www.yesmagazine.org/democracy/2016/09/03/why-the-founder-of-standing-rock-sioux-camp-cant-forget-the-whitestone-massacre/>.

46 See <https://www.nlg.org/wp-content/uploads/2016/11/TRO-Memo.pdf>.

47 David Archambault II, "Taking a Stand at Standing Rock," *New York Times* (Aug. 24, 2016), <https://www.nytimes.com/2016/08/25/opinion/taking-a-stand-at-standing-rock.html>.

48 Amy Goodman, "Standing Rock Sioux Chairman Calls for Investigation of Dog Attacks on Native American Protesters," *Democracy Now!* (Sept. 6, 2016), [https://www.democracynow.org/2016/9/6/standing\\_rock\\_sioux\\_chairman\\_calls\\_for](https://www.democracynow.org/2016/9/6/standing_rock_sioux_chairman_calls_for).

49 See <https://www.waterprotectorlegal.org/post/wpplc-concludes-nodapl-criminal-defense-program-in-north-dakota>.

[Protector Legal Collective](#) (WPLC) to serve as an on-the-ground legal team.<sup>50</sup> At the request of tribal leadership, the WPLC set up its office in a tent in Oceti Sakowin Camp, representing many of the arrestees. Eventually WPLC filed a [class action lawsuit](#) over a militarized police attack that took place in November and left many people injured.<sup>51</sup> Although the Army Corps of Engineers had been conducting a formal environmental impact assessment, four days after President Donald Trump took office in 2017, he [signed an executive order](#) authorizing the pipeline's construction.<sup>52</sup>

On January 20, 2017 (J20), amid thousands of protesters who had converged on the nation's capital to protest the inauguration of President Trump, a few hundred militant anti-capitalists and anti-fascists took to the streets in black bloc<sup>53</sup> formation. During a march that snaked through downtown Washington, DC, some people destroyed property at targeted businesses such as Starbucks, McDonald's, and Bank of America. Police used chemical and projectile weapons to attack the crowd, and eventually "kettled" and arrested more than 230 protesters, journalists, medics, LOs, and bystanders.<sup>54</sup> Many individuals were indicted on several riot-related felonies and misdemeanors, and faced more than sixty years in prison. These "J20 defendants" joined with supporters and NLG legal workers to collectively fight their charges.<sup>55</sup> Most of the defendants unified around a refusal to accept plea bargains or to cooperate against their codefendants, but the collective effort also involved defendants and supporters sharing information with each other, developing and implementing legal strategies, and working with the mainstream and independent media to shape the political and legal narratives.<sup>56</sup>

The Trump administration spent millions of dollars and used renewed

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50 See <https://waterprotectorlegal.org>.

51 See <https://www.nlg.org/wp-content/uploads/2016/11/TRO-Memo.pdf>.

52 Robinson Meyer, "Trump's Dakota Access Pipeline Memo: What We Know Right Now," *The Atlantic* (Jan. 24, 2017), <https://www.theatlantic.com/science/archive/2017/01/trumps-dakota-access-pipeline-memo-what-we-know-right-now/514271/>.

53 A black bloc is a tactic used by protesters who wear black clothing, cover their faces, and tend to move in group formation. Black bloc participants are commonly associated with anarchism, anti-capitalism, and anti-fascism. The tactic was developed in the 1980s during the European autonomist movement.

54 "NLG Denounces Politically Motivated Superseding Indictment in DC Inauguration Felony Cases," press release, National Lawyers Guild (May 2, 2017), <https://www.nlg.org/nlg-denounces-politically-motivated-superseding-indictment-in-dc-inauguration-felony-cases/>.

55 See <https://www.defendj20resistance.org> (archived at: <https://web.archive.org/web/20181228230058/http://defendj20resistance.org/>).

56 From author's own involvement.

levels of repression—including widespread use of conspiracy and other serious felony charges against hundreds of anarchists and left radicals—in an effort to gain convictions against J20 defendants. Prosecutors hacked defendants’ seized phones and used benign communications as grounds for a criminal conspiracy. They also seized private Facebook and Apple Cloud data and communications and forced a large web hosting company to turn over the IP addresses of visitors to a protest-related website.<sup>57</sup> Members of the Guild’s mass defense leadership played an independent, yet integral, role in providing legal support to J20 defendants who successfully exposed the political motivations of the government’s case by publicizing its vulnerabilities and connections to far-right groups and bigoted police witnesses. After being sanctioned by the court for withholding key evidence, and unable to secure a single conviction in the first two trials, the US Attorney’s Office eventually [dismissed nearly all the cases](#).<sup>58</sup>

Many of the J20 defendants self-identified as “antifa,” a social movement whose increased ranks were coincident with the election of President Trump, the proliferation of his racist and xenophobic policies, and a sharp public rise in white supremacist and white nationalist groups in the US. As antifa continues to confront fascists in the streets of cities such as Berkeley, Charlottesville, Olympia, and Portland, NLG lawyers and legal workers have been providing a range of support to anti-fascist activists. Serious attention is being paid by the NLG to better understand how to support such activists, who are targeted by both fascists and police.<sup>59</sup> The police, many of whom are already working with fascist and far-right organizers,<sup>60</sup> are routinely arresting and assaulting anti-fascist activists.<sup>61</sup> To address this rise in violent demonstrations and attacks by the far right, the Guild invested resources into ensuring its online data are more secure and legal hotlines are less susceptible to ambush. The Guild also updated its LO manual in 2019, which includes

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57 Kris Hermes, “Remaining J20 Cases Dismissed: Takeaways for Anarchists and our Social Movements,” *Agency* (July 27, 2018), <https://www.anarchistagency.com/commentary/remaining-j20-cases-dismissed-takeaways-for-anarchists-and-our-social-movements/>.

58 Jude Ortiz, “J20 Case Ends in Dropped Charges After Prosecutor Caught Hiding Evidence,” *Guild Notes*, Summer/Fall 2018, <https://www.nlg.org/guild-notes/article/j20-case-ends-in-dropped-charges-after-prosecutor-caught-hiding-evidence/>.

59 Traci Yoder, “Legal Support for Anti-Fascist Action,” National Lawyers Guild (July 10, 2017), <https://www.nlg.org/legal-support-for-anti-fascist-action/>.

60 Erik Ortiz, “‘Disturbing’ texts between Oregon police and far-right group prompt investigation,” *NBC News* (Feb. 15, 2019), <https://www.nbcnews.com/news/us-news/disturbing-texts-between-oregon-police-far-right-group-prompts-investigation-n972161>.

61 Marc Steiner, “Hate Groups March in Portland, Oregon and Police Attack Counter-Protesters,” *The Real News Network* (Aug. 17, 2018), <https://therealnews.com/stories/hate-groups-march-in-portland-oregon-and-police-attack-counter-protesters>.

a section on best practices for observing police at demonstrations in which fascists are present.

On May 27, 2020, amidst the COVID-19 pandemic, George Floyd, a 46-year-old African-American man, was killed by Derek Chauvin, a white Minneapolis Police Department (MPS) officer, who knelt on his neck for nearly eight minutes. Floyd's killing, along with the March 2020 murder of Breonna Taylor by white police officers serving a "no-knock" warrant in Louisville, Kentucky, sparked widespread civil unrest under the banner of Black Lives Matter. Protests began in Minneapolis, but quickly spread across the country and around the world, with reports of uprisings in [more than 2,000 US cities](#)<sup>62</sup> and in [over 60 countries](#).<sup>63</sup> As many as 26 million people participated in what are considered to be the [largest protests in US history](#).<sup>64</sup> The police response was massive, violent, and repressive, with rampant use of less-lethal weapons. By early June, more than 200 US cities had imposed curfews, and at least 24 states and the District of Columbia [deployed nearly 62,000 National Guard soldiers](#).<sup>65</sup>

In the US, [over 17,000 people were arrested](#),<sup>66</sup> mainly for low-level offenses such as curfew violations or blocking roadways,<sup>67</sup> but more than 360 people were prosecuted for federal offenses such as property destruction, conspiracy to riot, and other riot-related charges.<sup>68</sup> Police [arrested, attacked, and tear gassed](#) numerous LOs while they were monitoring police miscon-

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62 Audra D. S. Burch, Weiyi Cai, Gabriel Gianordoli, Morrigan McCarthy and Jugal K. Patel, "How Black Lives Matter Reached Every Corner of America, *New York Times* (June 13, 2020), <https://www.nytimes.com/interactive/2020/06/13/us/george-floyd-protests-cities-photos.html>.

63 Wikipedia, "List of George Floyd protests outside the United States," [https://en.wikipedia.org/wiki/List\\_of\\_George\\_Floyd\\_protests\\_outside\\_the\\_United\\_States](https://en.wikipedia.org/wiki/List_of_George_Floyd_protests_outside_the_United_States) (last visited Aug. 17, 2023).

64 Larry Buchanan, Quoc Trung Bui, and Jugal K. Patel, "Black Lives Matter May Be the Largest Movement in U.S. History," *New York Times* (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

65 Alexandra Sternlicht, "Over 4,400 Arrests, 62,000 National Guard Troops Deployed: George Floyd Protests By The Numbers," *Forbes* (June 2, 2020), <https://www.forbes.com/sites/alexandrasternlicht/2020/06/02/over-4400-arrests-62000-national-guard-troops-deployed-george-floyd-protests-by-the-numbers/>.

66 Meryl Kornfield, Austin R. Ramsey, Jacob Wallace, Christopher Casey and Verónica Del Valle, "Swept Up By Police," *Washington Post* (Oct. 23, 2020), <https://www.washingtonpost.com/graphics/2020/investigations/george-floyd-protesters-arrests/>.

67 Meg Kelly and Elyse Samuels, "Who caused the violence at protests? It wasn't antifa," *Washington Post* (June 22, 2020), <https://www.washingtonpost.com/politics/2020/06/22/who-caused-violence-protests-its-not-antifa/>.

68 From data gathered by the Mass Defense Director of the NLG.

duct in at least a dozen cities.<sup>69</sup> NLG lawyers represented hundreds of people accused of state and federal offenses from every corner of the country. The uprisings, which continued into 2021, precipitated a racial reckoning in the US and elsewhere, leading to the removal of numerous statues and monuments, as well as the adoption of dozens of policy proposals intended to address systemic racism and police violence, including bans on chokeholds, reduced funding for police, and restricted use of less-lethal weapons. Soon after the uprisings began, the Minneapolis city council voted overwhelmingly to [dismantle the MPS](#).<sup>70</sup> But, perhaps as an indication of the struggle needed to challenge the institution of policing, the city council [only reduced its funding](#) by \$7.7 million.<sup>71</sup>

### Using Civil Litigation to Protect Social Movements and Free Expression

The Guild's involvement over the years supporting and defending activists against criminal charges is complemented by its use of civil litigation to protect free expression, to fight back against police abuse, and challenge unconstitutional patterns and practices by the state. This work has been carried out mainly by members of the Guild's MDC and National Police Accountability Project, and has garnered many milestone settlements that have helped curb some of the worst abuses against activists and social movements.

Amid the fallout of the FBI's counterintelligence program (COINTELPRO), NLG lawyers filed important civil lawsuits against local police agencies in Chicago and New York City. In 1971, NLG lawyer Barbara Handschu, along with Abbie Hoffman, members of the War Resisters League, Gay Liberation Front, Black Panther Party, and others, filed the lawsuit *Handschu v. Special Services Division*.<sup>72</sup> This lawsuit challenged the New York City Police Department's (NYPD) use of informants, infiltration, surveillance, and summary punishment against left activists engaging in First Amendment-protected activity. The case resulted in a 1986 consent decree that aimed to restrict such police practices without evidence of current or planned crimes

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69 "Police Targeting NLG Legal Observers at Black Lives Matter Protests," National Lawyers Guild (June 7, 2020), <https://www.nlg.org/police-targeting-nlg-legal-observers-at-black-lives-matter-protests/>.

70 Dionne Searcey and John Eligon, "Minneapolis Will Dismantle Its Police Force, Council Members Pledge," *New York Times* (June 7, 2020), <https://www.nytimes.com/2020/06/07/us/minneapolis-police-abolish.html>.

71 Liz Navratil, "Divided Minneapolis City Council votes to cut \$8 million from police budget," *Star Tribune* (Dec. 10, 2020), <https://www.startribune.com/divided-minneapolis-council-keeps-mayor-jacob-freys-target-for-a-larger-police-force/573343121/>.

72 See *Handschu v. Special Services Division*, 605 F. Supp. 1384 (S.D.N.Y. 1985).

and established an oversight body—the *Handschu* Authority—to hold the NYPD accountable for its actions.<sup>73</sup> The *Handschu* consent decree still exists today, but has been weakened due to years of eroding civil liberties and an inability to effectively hold the NYPD in check.

In *Alliance to End Repression v. City of Chicago*,<sup>74</sup> police were similarly taken to task by NLG lawyers for decades of political spying, disruption, and sabotage. The case helped establish the 1981 “Red Squad” consent decree, designed to curb the activities of the Chicago police division that was dedicated to spying on political dissidents.<sup>75</sup> But, by 2001, the “Red Squad” consent decree was all but eviscerated.

In 1996, an NLG attorney won a significant victory with *Collins v. Jordan*,<sup>76</sup> a lawsuit challenging First Amendment restrictions predicated on the basis that similar political activity resulted in instances of violence sometime in the past.<sup>77</sup> Nonetheless, police have repeatedly used the specter of “violent anarchists” and images of property destruction over the prior two decades to justify massive shows of force and extensive violence against activists.

The Guild has consistently worked with activists and organizers to oppose the state’s efforts to restrict the terms of political protest. In 2000, the Los Angeles NLG chapter sued and won an injunction in the lead-up to the DNC, [striking down a “secure zone” of more than eight million square feet](#) around the convention site, as well as striking down the city’s onerous park-permit regulations.<sup>78</sup> The Guild also used civil litigation to force the repeal of unconstitutional permit schemes and assembly laws used in advance of the 2003 FTAA protests.<sup>79</sup> Yet, despite these kinds of victories, cities continue to selectively refuse demonstration permits and, even when they are granted, march routes and rally locations are commonly dictated by local or federal officials.

NLG lawyers also used civil litigation in advance of the 2000 DNC to prevent city agencies, such as the Fire Department, from preemptively

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<sup>73</sup> Boghosian, *supra* note 6 at 59.

<sup>74</sup> See *Alliance to End Repression v. City of Chicago*, 561 F.Supp. 537 (N.D.Ill.1982).

<sup>75</sup> *Ibid* at 61.

<sup>76</sup> See *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996).

<sup>77</sup> Boghosian, *supra* note 5 at 9.

<sup>78</sup> Boghosian, *supra* note 7 at 13.

<sup>79</sup> Boghosian, *supra* note 5 at 89.



raiding activist convergence spaces.<sup>80</sup> Yet, despite this success, administrative searches have been used in other cities since then to disrupt or shut down political spaces.<sup>81</sup>

Activists protesting the International Monetary Fund (IMF) and World Bank in April 2000 in Washington, DC were violently attacked and entrapped by police, who arrested nearly 700 people. NLG lawyers at the PCJF sued the District of Columbia, the Metropolitan Police Department, and others for mass false arrest, excessive force, and other claims, eventually reaching a settlement agreement in 2009 with monetary awards of [more than \\$13 million](#) and policy reforms that included a prohibition on the use of police lines to trap and detain protesters.<sup>82</sup> The federal judge who oversaw the litigation called the class-action settlement “[historic](#)” and an achievement for future generations.<sup>83</sup>

Even though police violence routinely occurs at political protests, legal challenges against police misconduct can be difficult to win because of sweeping immunity protections afforded to law enforcement. Proving the exception, lawyers and legal workers from the NLG and American Civil Liberties Union (ACLU) of Northern California won a class-action lawsuit against police for their violent attack on an antiwar picket at the Port of Oakland in April 2003. Police fired wooden bullets, sting ball grenades, and shot filled bean bags at hundreds of protesters and dock workers, resulting in numerous injuries, including broken bones. In a landmark settlement reached in 2004, the Oakland Police Department agreed to reform their crowd-control policy, making Oakland the first city in the US to forbid “the indiscriminate use of wooden bullets, rubber bullets, tasers, bean bags, pepper spray and police motorcycles to control or disperse crowds or demonstrations.”<sup>84</sup>

Lawyers with the Los Angeles NLG chapter and the Mexican Ameri-

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<sup>80</sup> Ibid, 26.

<sup>81</sup> Similar tactics were used in advance of IMF/World Bank protests in April 2000, RNC 2000 protests, and RNC 2008 protests, among others.

<sup>82</sup> Sarah Karush, “DC Agrees to Pay \$13M over Arrests of Protesters,” *Associated Press* (Nov. 23, 2009), [http://www.justiceonline.org/dc\\_agrees\\_to\\_pay\\_13m\\_over\\_arrests\\_of\\_protesters](http://www.justiceonline.org/dc_agrees_to_pay_13m_over_arrests_of_protesters).

<sup>83</sup> Maria Glod, “D.C. agrees to \$13.7 million settlement in 2000 mass arrest,” *Washington Post* (July 1, 2010), <https://www.washingtonpost.com/wp-dyn/content/article/2010/06/30/AR2010063005200.html>.

<sup>84</sup> “In Landmark Agreement, Oakland Prohibits Less Lethal Weapons for Crowd Control,” ACLU of Northern California (Nov. 9, 2004), <https://www.indybay.org/news-items/2004/11/10/17044661.php>.

can Legal Defense and Educational Fund won a landmark class-action settlement stemming from police violence at a 2007 May Day immigrant rights march. In what became known as the “May Day Melee,” three platoons of officers from the Los Angeles Police Department (LAPD) charged a crowd of more than 6,000 people demonstrating in Macarthur Park, [clubbing them and shooting them with less-lethal weapons](#).<sup>85</sup> The settlement included an award of nearly \$13 million, officer terminations and suspensions, and extensive reforms to LAPD crowd-control policies and training.

In 2014, NLG lawyers won the [largest payout for protesters in US history](#) when New York City settled multiple lawsuits stemming from the 2004 RNC for a total of \$18 million.<sup>86</sup> More than 1,800 people arrested in massive police sweeps before and during the convention were held in overcrowded, deplorable conditions. Some protesters were taken to the hospital to treat [rashes and asthma caused by oil-soaked floors and chemical fumes](#) they were exposed to during their detention in an old bus depot.<sup>87</sup> Members of the New York City NLG chapter won another landmark civil victory in 2023, with a \$13.7 million class-action settlement over rights violations by law enforcement against more than a thousand New Yorkers protesting the police murder of George Floyd in 2020.<sup>88</sup>

The following table illustrates some of the key monetary victories from contemporary civil litigation undertaken by NLG attorneys:

| Mass Protest in US                     | Year | City            | Civil Suit(s) Settlement Amounts           |
|--|------|-----------------|--|
| World Trade Organization               | 1999 | Seattle, WA     | <a href="#">\$1,800,000</a> <sup>89</sup>  |
| Democratic National Convention         | 2000 | Los Angeles, CA | <a href="#">\$4,100,000</a> <sup>90</sup>  |
| International Monetary Fund/World Bank | 2000 | Washington, DC  | <a href="#">\$13,700,000</a> <sup>91</sup> |
| Iraq War                               | 2003 | Chicago, IL     | <a href="#">\$11,000,000</a> <sup>92</sup> |
| Republican National Convention         | 2004 | New York, NY    | <a href="#">\$18,000,000</a> <sup>93</sup> |

<sup>85</sup> Boghosian, *supra* note 7 at 61.

<sup>86</sup> Sarah Lazare, “‘Largest in US History’: NYC to Pay \$18 Million for Mass Arrests at RNC,” *Common Dreams*, January 16, 2014, <https://www.commondreams.org/news/2014/01/16/largest-us-history-nyc-pay-18-million-mass-arrests-rnc>.

<sup>87</sup> Ed Pilkington, “New York agrees \$18m settlement with 2004 Republican convention protesters,” *The Guardian* (Jan. 15, 2014), <https://www.theguardian.com/world/2014/jan/15/new-york-agrees-settlement-2004-republican-convention>.

<sup>88</sup> Colin Moynihan, “New York to Pay \$13 Million Over Police Actions at George Floyd Protests,” *New York Times* (July 20, 2023), <https://www.nytimes.com/2023/07/20/nyregion/nypd-george-floyd-protesters-settlement.html>.



|                        |      |                 |   |
|------------------------|------|-----------------|---|
| May Day                | 2007 | Los Angeles, CA | <a href="#">\$12,800,000<sup>94</sup></a> |
| George Floyd Uprisings | 2020 | New York, NY    | <a href="#">\$13,700,000<sup>95</sup></a> |

### Upending the “Service Provider” Model of Legal Support

As part of an institution that reproduces systems of hierarchy and forms of oppression, the Guild has struggled with the tendency to think of legal support as a service provided to those in need, which in turn can keep its members at arm’s length from the social movements the Guild supports. The “service provider” model is a concept that is still fully entrenched in the legal profession and, for most lawyers, is rooted in the role of “expert” and the precedence of an individual client’s interests at the exclusion of any broader legal implications, any impacts on other activists, or any consequences for the larger social movement.

The Guild’s efforts to support and work in solidarity with social movements took a sharp turn when the “New Left” started shaping the politics of the 1960s. It did not take long for this wave of younger and more radical activists to shake up systems of hierarchy, sexism, and elitism in the legal profession, and the Guild was no exception.

In the late 1960s and early 1970s, a number of legal collectives were formed by NLG members in cities such as Los Angeles, San Francisco, Chicago, and New York, with a dedicated focus on defending activists and social movements. These collectives were immersed in radical political theory, and certain members fancied themselves as activists first and lawyers second.<sup>96</sup> In some cases, lawyers and legal workers alike were paid based on need rather than status or accreditation, and work was shared equitably.

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89 Bob Young, “City to pay \$1 million to settle lawsuit over WTO arrests,” *Seattle Times* (Apr. 3, 2007), <https://www.seattletimes.com/seattle-news/city-to-pay-1-million-to-settle-lawsuit-over-wto-arrests/>.

90 Heidi Boghosian, *supra* note 5 at 63.

91 Maria Glod, “D.C. agrees to \$13.7 million settlement in 2000 mass arrest,” *Washington Post*, July 1, 2010.

92 “Case Profile,” *Vodak v. City of Chicago, Civil Rights Litigation Clearinghouse*, <https://www.clearinghouse.net/detail.php?id=11954> (last visited Aug. 17, 2023).

93 Lazare, *supra* note 86.

94 Boghosian, *supra* note 7 at 62.

95 Moynihan, *supra* note 88.

96 Camilo E. Lund-Montano, “Out of Order: Radical Lawyers and Social Movements in the Cold War,” PhD diss., (University of California, Berkeley, 2018), 87.

This shake-up also impacted the Guild as an organization. Building on the experiences of legal collectives across the country, New Left activists and members of the women's movement within the Guild began restructuring the National Office by forming the National Office Collective in 1973.<sup>97</sup> Two years earlier, in 1971, the NLG voted to accept legal workers—those who do “legal work” or “legal support work” but do not hold a bar card and are not enrolled in law school—as full-fledged members of the organization.<sup>98</sup> Adding legal workers to its ranks, a hard-fought struggle led by the Women's Caucus, was incredibly important to the direction of the organization, then and for decades to come.

Legal workers typically make up a large proportion of NLG members actively working at the local level to support social movements, and frequently come from or are still involved in political organizing. Legal workers tend to maintain strong bonds and build trust with the social movements they are supporting. Whereas lawyers can be restricted by legal ritual and a professional obligation to adhere to the rules of the legal system, legal workers are better positioned to bridge gaps between legal and political communities.

NLG members play a crucial role in helping to demystify the law for activists, sharing valuable skills and information, and framing the legal fight as a political fight too. Legal workers in particular have tried to avoid the “service provider” trap by engaging directly with activists throughout the protest organizing process. Integrated legal support can offer more unmediated relationships with social movements and can open up more possibilities for pushing back against the legal system. Whether operating independently, as a legal support affinity group, or as part of a legal collective, Guild members have been able to develop peer relationships with activists and organizers. By working together in the streets, in the jails, and in the courtrooms, those in the legal community and political organizers have collectively used the principles of mutual aid, decentralized decision-making, and nonhierarchical organizing to effectively exploit points of legal and political leverage, and build stronger movements for social change.

At the same time, the legal system's traditional, hierarchical, and patriarchal roots run deep, making it difficult to completely disrupt the service

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<sup>97</sup> Karen Jo Koonan, Oral History Interview, quoted in Camilo E. Lund-Montano, “Out of Order: Radical Lawyers and Social Movements in the Cold War,” PhD diss., 90.

<sup>98</sup> “Programs and Resolutions Submitted by the Women's Caucus,” 1972, BAN-AFG, Box 35 Folder 2, quoted in Camilo E. Lund-Montano, “Out of Order: Radical Lawyers and Social Movements in the Cold War,” PhD diss., 72.

provider model. This is true for lawyers and legal workers who intentionally or unintentionally reinforce the more oppressive tendencies of the legal system. But it is also true for defendants and other activists who relinquish a certain amount of autonomy and independent decision-making when they defer to lawyers and legal workers, thereby reproducing a societal understanding of the legal system and how they fit into it. Nonetheless, the NLG, and the Mass Defense Committee in particular, remains committed to upending the “service provider” model of legal support, which includes better understanding the role of the movement lawyer.

### **A Legal Collective Renaissance**

A new wave of legal collectives swept across North America in the early 2000s, starting with the 1999 protests against the WTO in Seattle and the resulting formation of the Midnight Special Law Collective.<sup>99</sup> Legal victories in Seattle and, shortly thereafter, in Washington, DC helped inspire a new generation of activists. And, the members of Midnight Special, many of whom were also active members of the NLG, brought with them a new vision for how activists could engage the legal system.

Although legal expertise can never replace a strong social movement, Midnight Special maintained that “by deepening our collective understanding of the legal system, spreading the tools to fight it and keeping decision-making power in the hands of the people affected by those decisions, activist-based law collectives are helping to strengthen the movement.”<sup>100</sup> Midnight Special also argued against the notion that formal education is necessary to understand the law, a myth the collective said is “perpetuated in order to keep power in the hands of the privileged.”<sup>101</sup>

Midnight Special maintained that the ability to monkey wrench the legal system is a valuable tool and, by understanding its vulnerabilities and points of intervention, we can effectively turn the machine on itself with stunning results. It was this desire to push the boundaries of the legal system while supporting political arrestees that sparked another renaissance of legal collectives. Shortly after the turn of the century, new collectives formed in Austin, Cincinnati, New York, Philadelphia, Washington, DC, and other loca-

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<sup>99</sup> Hermes, *supra* note 17 at 261.

<sup>100</sup> Phaedra Travis, Sarah Coffey, and Paul Marini, “Wrenching the Bench: People’s Law Collectives and the Movement,” *Earth First! Journal*, 2002 [archived at: <https://web.archive.org/web/20110727023933/http://www.earthfirstjournal.org/article.php?id=123>]

<sup>101</sup> Id.

tions around the country. As with Midnight Special, many members of these collectives were also legal worker members of the Guild.

Other commonalities besides membership in the NLG existed between this newer wave of legal collectives and their historical counterparts, including organizing principles based on mutual aid, consensus decision-making, and an egalitarian approach to work. That said, most contemporary legal collectives are activist led, often deliberately excluding lawyers, whereas most of the collectives from the 1960s and 1970s were lawyer-focused and represented defendants like traditional law firms. According to Midnight Special, activist-led legal collectives “can keep the case politically focused, create propaganda and work with the media in ways that most lawyers can’t.”<sup>102</sup>

The Guild benefitted profoundly from this renewed, vital energy in the legal worker community, which helped the organization deepen its connections and solidarity with movements for social change. While Midnight Special and other legal collectives from that era have since disbanded, newer legal collectives and support crews have taken their place. As an example, [anti-repression committees](#) grew out of the Occupy movement and formed in various cities across the country to support radical left activists caught up in the legal system. Some of these committees include or work with Guild members, and several still exist today.

### **Pushing Boundaries by Exploiting the Nexus of Politics and the Law**

There have been several examples over the decades to show how movement lawyers, legal collectives, and activists have worked “outside the box” to achieve remarkable results. Those historical milestones are rare, in part because of a tendency by activists to underestimate their collective strength against an intimidating legal system.

In 1969, the Chicago 8 defendants and their lawyers put the legal system on trial and made a memorable spectacle of their legal predicament. Shortly after, in 1971, with the culmination of efforts by the “Catholic Left” to resist the Vietnam War by raiding dozens of draft boards and destroying thousands of Selective Service documents, [twenty-eight Catholic clergy and antiwar activists were arrested and charged with felonies](#) for their part in burning draft files in Camden, New Jersey.<sup>103</sup> With the help of NLG lawyers,

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<sup>102</sup> Id.

<sup>103</sup> “The Story,” The Camden 28, *PBS POV* (Sept. 11, 2007), <http://www.camden28.org/master.html?http://www.camden28.org/thestory.htm>.

the “Camden 28” [took the protest into the courtroom](#) and put the Vietnam War on trial.<sup>104</sup> Despite fully acknowledging their actions, all the defendants were acquitted by [jury nullification](#).<sup>105</sup>

Nearly thirty years later, just after its formation in 2000, Midnight Special began working with activists to prepare for protests against the World Bank and IMF held that April in Washington, DC. During multiple days of protests, more than 1,200 activists were arrested, the vast majority of who engaged in a practice known as “jail solidarity,” a set of non-cooperation tactics, including the refusal to identify oneself to authorities, used collectively to protect vulnerable arrestees and mitigate legal harm.<sup>106</sup> The local NLG chapter worked with Midnight Special, which acted as a mediator and helped arrange negotiations between jailed arrestees and the political leadership in DC.<sup>107</sup> After five days in jail, an agreement was reached resulting in the release of nearly all IMF/World Bank protesters on minor infractions and a small fine that was paid for with funds raised by Midnight Special. These extraordinary negotiations stood out as one of the more innovative legal maneuvers stemming from mass political arrests over the prior twenty years.

Although the successful use of collective action to negotiate the terms of release from jail is rare, arrestees have additional opportunities to use their collective strength in the weeks and months after their release. Arrestees have used “court solidarity” strategies to politicize their cases, such as pleading “not guilty” en masse, refusing plea bargains, invoking speedy trial rights, and demanding to be tried as a group.

Less than four months after the IMF/World Bank protests, thousands of people flooded the street of Philadelphia and used mass direct action to protest the 2000 RNC. Jail solidarity tactics were used by hundreds of arrestees but were largely ineffective against an intransigent and brutal law enforcement apparatus. Soon after the last arrestees were released from jail

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104 Apoorva Tadepalli, “Meet Marty Stolar, a Lawyer Who Carries Protests into the Courtroom,” *The Independent* (Mar. 30, 2018), <https://indypendent.org/2018/03/meet-marty-stolar-a-lawyers-who-brings-the-protest-into-the-courtroom/>.

105 *Frequently Asked Questions*, Fully Informed Jury Association, <https://fija.org/library-and-resources/library/jury-nullification-faq/what-is-jury-nullification.html> (last visited Aug. 17, 2023).

106 Kris Hermes, “Collective Action Behind Bars,” *Upping the Anti* (June 28, 2016), <https://uppingtheanti.org/journal/article/18-collective-action-behind-bars>.

107 Hermes, *supra* note 17 at 263. This author was arrested, engaged in jail solidarity tactics, and took part in negotiations with DC leadership to achieve release from jail for nearly all protesters and with minimal legal consequences.

more than two weeks after the protests, with hundreds of people facing felonies and other serious charges, the R2K Legal Collective started organizing a “court solidarity” strategy.<sup>108</sup> Led by defendants, R2K Legal also included activists, legal workers, law students, and movement lawyers, many of whom were NLG members.

First, in a staged show of defiance, RNC defendants refused guilty plea offers en masse and steadfastly pursued trials. Then, in the months and years that followed, R2K Legal exposed widespread police surveillance and infiltration, used innovative political and legal tactics, and staged political trials. Understanding the broader political implications and need for public support, R2K Legal mounted campaigns to garner community support and put pressure on key officials to dismiss the charges. The proactive use of media to shift public opinion from contempt for protesters to near-unanimous support was also pivotal to R2K Legal’s success.

The media can be a powerful tool in leveraging the nexus of politics and the law for the purpose of advancing movements for social change. In addition to helping build public support, the media can be used to expose preemptive state tactics, highlight police brutality, keep activists out of jail, and mitigate the harm of the legal system. In 2012, during demonstrations against NATO in Chicago, the local NLG chapter worked with the media to draw attention to rampant police abuse and to strategically expose the identities of two undercover Chicago police officers who were part of a sting operation that resulted in the arrest of three people (later called the “NATO 3”) on state-level terrorism charges.<sup>109</sup> NLG lawyers and legal workers, including from the People’s Law Office in Chicago, helped defend the NATO 3 in what was a highly politicized trial.<sup>110</sup>

A few years later, in July 2016, amid a growing BLM movement, people took to the streets in the Twin Cities outraged by the police murder of Philando Castile. In one protest, thousands of people occupied a section of I-94 west of downtown St. Paul and shut down the freeway for several hours. Dozens of people were arrested on riot-related charges and other misdemeanors. Castile’s cousin, Louis Hunter, was targeted by police and was the only

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<sup>108</sup> Id. at 113.

<sup>109</sup> “Photograph of Suspected Informant,” Chicago Chapter of the National Lawyers Guild (May 21, 2012), <https://nlgchicago.org/mass-defense-committee/nato/media/photograph-of-suspected-informant/>.

<sup>110</sup> “People’s Law Office Supporting NATO Protesters,” People’s Law Office, <https://peopleslawoffice.com/lawyers-representing-nato-protests-nato3-police-brutality-against-protester/> (last visited Aug. 17, 2023).

person arrested to be charged with felonies. NLG lawyers were there to represent Hunter and other defendants but, most remarkably, a collective approach was taken by defendants and supporters to use legal and political strategies to push back. Right away, a majority of the defendants [deliberately refused plea offers](#) to use the threat of dozens of costly trials to demand the dismissal of charges against Hunter.<sup>111</sup> Supporters also mounted a [months-long campaign](#), including “call-in” days, rallies, and strategic use of the media, to apply political pressure and call on the prosecutor to drop the charges.<sup>112</sup> More than a year after his arrest and a week before the first I-94 trial was set to begin, the prosecutor [dismissed all charges](#) against Hunter.<sup>113</sup>

Today, with the climate crisis and the grassroots response ramping up, one of the more innovative legal tools used to help bring politics into the courtroom and advance the movement against fossil fuels is the “necessity defense.” Just in the last few years, [environmental and climate activists have invoked the necessity defense in more than thirty cases](#)—arguing that civil disobedience is necessary to prevent a much greater threat to civilization—with varying degrees of success.<sup>114</sup> For the most part, judges and prosecutors are reticent to allow evidence of the climate catastrophe into criminal cases and, as a result, very few defendants get to use the defense at trial. Judges often deny the defense outright and, on the rare occasions when the court allows it, most prosecutors would rather dismiss the charges than take part in a show trial. One recent exception was a case involving five Extinction Rebellion activists from Portland, Oregon who, in April 2019, were [arrested for blockading train tracks](#) used by Zenith Energy to transport tar sands oil.<sup>115</sup> After being granted use of the necessity defense, NLG lawyers from the Civil Liberties Defense Center and elsewhere [made convincing arguments](#)

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111 Sarah Horner, “Most Philando Castile protesters plead not guilty, rejecting deal,” *Pioneer Press* (Jan. 12, 2017), <https://www.twincities.com/2017/01/12/many-philando-castile-protesters-plead-not-guilty-rejecting-plea-deal/>.

112 Niko Georgiades, “Action to ‘Drop the Charges’ on Louis Hunter,” *Unicorn Riot* (July 28, 2017), <https://unicornriot.ninja/2017/action-drop-charges-louis-hunter/>.

113 Susan Du, “Prosecutor drops rioting charges against Castile’s cousin Louis Hunter,” *City Pages* (Aug. 2, 2017), [archived at: <https://web.archive.org/web/20170804235909/http://www.citypages.com/news/prosecutor-drops-rioting-charges-against-castiles-cousin-louis-hunter/438138193>]

114 “Climate Necessity Defense Case Guide,” Climate Defense Project (Dec. 29, 2020), <https://climatedefenseproject.org/wp-content/uploads/2021/05/CDP-Climate-Necessity-Defense-Case-Guide.pdf>.

115 Jake Johnson, “Landmark Win in ‘Fight for Habitable Future’ as Jury Refuses to Convict Climate Activists Who Presented Necessity Defense,” *Common Dreams* (Feb. 28, 2020), <https://www.commondreams.org/news/2020/02/28/landmark-win-fight-habitable-future-jury-refuses-convict-climate-activists-who>.



[and called expert witnesses](#) to testify, compelling five out of the six jurors to acquit the activists of trespass charges, which resulted in a hung jury.<sup>116</sup> The prosecutors declined to retry the case, giving climate activists an important victory in advancing the necessity defense and in using the courts to advance social movements.

## Where to From Here?

Ever since dissidents came under renewed attack at the turn of the century,<sup>117</sup> police have been finding new and increasingly opaque methods to spy on and disrupt social movements and mass protest in the US. Rapidly evolving technology has spurred innovations in surveillance and inadequate privacy protections have [left us even more vulnerable](#).<sup>118</sup> Local police have also become [more militarized](#),<sup>119</sup> from their use of camouflage and riot gear to tanks and [weapons made for war](#).<sup>120</sup>

For more than twenty years, the FBI, Secret Service, and other federal, state, and local law enforcement agencies have used the designation of National Special Security Event (NSSE) to engage in surveillance, infiltration, and disruption of protest organizing for political summits such as the WTO and NATO meetings, as well as the presidential inaugurations and quadrennial Democratic and Republican conventions.<sup>121</sup> Local police departments have also used federal funding from NSSEs to [buy up arsenals of less-lethal weaponry](#)<sup>122</sup> that are later used on members of marginalized communi-

116“Extinction Rebellion Portland Activists’ Protest Charges Dismissed in Major Victory for Climate Necessity Defense,” Civil Liberties Defense Center (Feb. 27, 2020), <https://cldc.org/necessity-defense-victory-Portland-XR>.

117Patrick F. Gillham, “Securitizing America: Strategic Incapacitation and the Policing of Protest Since the 11 September 2001 Terrorist Attacks,” Western Washington University, 2011, [https://cedar.wvu.edu/sociology\\_facpubs/12/](https://cedar.wvu.edu/sociology_facpubs/12/).

118 Charlie Warzel and Stuart A. Thompson, “How Your Phone Betrays Democracy,” *New York Times* (Dec. 21, 2019), <https://www.nytimes.com/interactive/2019/12/21/opinion/location-data-democracy-protests.html>.

119 Glenn Greenwald, “The Militarization of U.S. Police: Finally Dragged Into the Light by the Horrors of Ferguson,” *The Intercept* (Aug. 14, 2014), <https://theintercept.com/2014/08/14/militarization-u-s-police-dragged-light-horrors-ferguson/>.

120 Terry Gross, “Militarization Of Police Means U.S. Protesters Face Weapons Designed For War,” *National Public Radio* (July 1, 2020), <https://www.npr.org/2020/07/01/885942130/militarization-of-police-means-u-s-protesters-face-weapons-designed-for-war>

121 Yoder and Tempey, *supra* note 9.

122 “DC Police Spent Over \$300,000 in Weapons, Ammunition to Use Against Inauguration Day Protesters,” DC Chapter of the National Lawyers Guild (Oct. 30, 2017), <https://www.commondreams.org/newswire/2017/10/30/dc-police-spent-over-300000-weapons->



ties who already deal with police violence on a daily basis.

We have also seen a precipitous rise in state-level anti-protest legislation aimed at curtailing free expression and mass protest. With help from the American Legislative Exchange Council (ALEC) and other conservative groups, [forty-five US states have introduced more than 260 anti-protest bills, and have enacted 42 of them since 2017](#).<sup>123</sup> Several of those bills were based on protection of so-called “critical infrastructure” in an effort to further [criminalize Indigenous and environmental movements](#) against the fossil fuel industry.<sup>124</sup> When legislation fails to suppress dissent, corporations are increasingly using [Strategic Lawsuits Against Public Participation](#) (SLAPPs) to silence their critics by drawing them into protracted and costly legal battles, seeking monetary damages for defamation or by imposing injunctions that prevent lawful protest.<sup>125</sup>

As evidenced by years of work and action, NLG lawyers, law students, and legal workers will be there to monitor police misconduct, support jailed activists, represent political defendants against criminal charges, and challenge police abuse in the civil courts, but we must up the ante to match the current climate. Quick to respond and build collective strength, NLG lawyers and legal workers joined with Defending Rights and Dissent and others in 2018 to form the “[Protect Dissent Network](#)” in an effort to fight anti-protest bills around the country.<sup>126</sup> The NLG also joined more than two dozen legal, environmental, and human rights organizations to form “[Protect the Protest](#),” a strong coalition confronting the widespread use of SLAPP lawsuits across political movements.<sup>127</sup>

This is the kind of power we must build to preserve free expression and to challenge state and corporate-led repression. We must be nimble in our response to a changing legal and political landscape. Our ability to protect and care for each other, especially with increasingly punitive legal consequences, will depend in part on our ability to employ ever-more innovative strategies and tactics to confront political repression and the broader systems of oppression.

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[ammunition-use-against-inauguration-day](#).

123 See <https://www.icnl.org/usprotestlawtracker/>.

124 Traci Yoder, “The Attack on Climate Justice Movements,” National Lawyers Guild (Mar. 14, 2019), <https://www.nlg.org/the-attack-on-climate-justice-movements/>.

125 See <https://protecttheprotest.org/history/>.

126 See <https://rightsanddissent.org/campaigns/defend-the-right-to-protest/>.

127 See <https://www.protecttheprotest.org/about/>.

# **Grindr and Privacy Concerns of LGBTQ+ People in the United States and the European Union**

By Zane McNeill and Riley Clare Valentine \*\*

## **INTRODUCTION**

In 2016, the European Union (EU) instituted the General Data Protection Regulation (“GDPR”) which has greatly expanded the privacy rights of European internet users.<sup>3</sup> Under the GDPR, the processing of data concerning a person’s sexual orientation or sex life is a special category of data which is required to have a higher standard of protection.<sup>4</sup> The GDPR recognizes that LGBTQ+ people are at a higher risk of discrimination and violence if their personal information is revealed; therefore, data relating to this community must be under a heightened standard of privacy protection.<sup>5</sup>

In 2020, the Norwegian Consumer Council (“NCC”) filed a series of GDPR complaints against the LGBTQ+ social networking app, Grindr, alleging that the company violated the regulation by engaging in the unlawful sharing of personal data with third parties for marketing purposes.<sup>6</sup> The NCC complaints claimed that Grindr shared sensitive personal data, including the

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<sup>1</sup> E.g., Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance (Art. 9). European Commission, Guidance note on the collection and use of data for LGBTIQ equality, [https://commission.europa.eu/system/files/2023-07/202307\\_JUST\\_Guidance\\_note\\_on\\_the\\_collection\\_and\\_use\\_of\\_data\\_for\\_LGBTIQ\\_equality.pdf](https://commission.europa.eu/system/files/2023-07/202307_JUST_Guidance_note_on_the_collection_and_use_of_data_for_LGBTIQ_equality.pdf) (last visited Nov 26, 2023).

<sup>2</sup> *Id.*

<sup>3</sup> European Commission, *Guidance note on the collection and use of data for LGBTIQ equality*, [https://commission.europa.eu/system/files/202307/JUST\\_Guidance\\_note\\_on\\_the\\_collection\\_and\\_use\\_of\\_data\\_for\\_LGBTIQ\\_equality.pdf](https://commission.europa.eu/system/files/202307/JUST_Guidance_note_on_the_collection_and_use_of_data_for_LGBTIQ_equality.pdf) (last visited Nov 26, 2023).

<sup>4</sup> EUROPEAN DATA PROTECTION BOARD, NORWEGIAN DPA IMPOSES FINE AGAINST GRINDR LLC NORWEGIAN DPA IMPOSES FINE AGAINST GRINDR, LLC (2021), available at <https://edpb.europa.eu/news/national-news/2021/norwegian-dpa-imposes-fine-against-grindrllc-en#:~:text=Summary%20of%20the%20Decision&text=In%202020%2C%20the%20Norwegian%20Consumer,in%20question%20was%20on%20Grindr> (last visited Nov 26, 2023).

GPS locations, IP addresses, Advertising IDs, ages, and genders of its users to outside marketing companies.<sup>7</sup> A year later, on January 26, 2021, Grindr was fined 10 million Euros, which was later adjusted to a 5.3 million Euro fine.<sup>8</sup>

In the wake of the NCC complaint against Grindr, the Council, alongside the cybersecurity company, Mnemonic, released a report titled “Out of Control,” which highlighted how advertising technology companies receive personal data about app users and profile them for targeted advertising.<sup>9</sup> Specifically, the NCC found that Grindr shared detailed user data with major advertising companies, which reserved the right to share the data they collected with their large number of partner companies.<sup>10</sup>

In response to requests from the NCC and Mnemonic, Grindr said that the company collected numerous data points on its users, including: chat messages and images (that may be sexually explicit); email addresses; display names; age; height; weight; body type; favored sexual position; ethnicity; relationship status; “tribes” (bear, twink, jock, trans, etc); “looking for” (chat, friends, right now, etc); gender, preferred pronouns (he, they, etc); HIV status and testing details; linked Facebook, Instagram; and Facebook data; in addition to user’s profile pictures; location data; IP address; and device ID such as Google Advertising ID.<sup>11</sup>

The NCC not only found that the large amount of user data that Grindr was collecting, sharing, and processing, often without their specified consent, was illegal under the GDPR, but also emphasized that the collection of this vast amount of sensitive data could be used for discriminatory purposes and put the app users at risk of harm.<sup>12</sup>

This Article addresses the importance of LGBTQ+ privacy online and compares the protection offered to the LGBTQ+ community in Europe to the U.S. As such, Part I discusses the importance of data privacy for vulnerable groups. Part II introduces the privacy landscape in the U.S. and in the EU and how it affects LGBTQ+ users. Concluding, Part III delves deeper into Grindr’s privacy concerns and compliance issues in the U.S. and the EU.

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5 *Out of control: Complaints and follow up*, FORBRUKERRÅDET (Jan. 14, 2020), <https://www.forbrukerradet.no/side/complaints-against-grindr-and-five-third-party-companies/>.

6 Terje Solsvik, *Grindr fine cut to \$7 mln in Norway Data Privacy Case*, REUTERS (Dec. 15, 2021), <https://www.reuters.com/technology/grindr-fine-cut-7-mln-norway-data-privacy-case-2021-12-15/>.

7 *Out of control*, *supra* note 6.

8 *Id.*

9 Alex Scroxton, *LGBTQ+ social app Grindr accused of breaching GDPR*, COMPUTER-WEEKLY.COM (Jan. 15, 2020), <https://www.computerweekly.com/news/252476780/LGBTQ-social-app-Grindr-accused-of-breaching-GDPR>.

10 *Out of control*, *supra* note 6.

## **I. The Landscape of Data Privacy Concerns for LGBTQ Populations: The Importance of Strong Data Privacy Protections for LGBTQ People**

For LGBTQ+ people, a data breach that could expose, or “out,” their sexual orientation could have far-reaching consequences, including loss of employment, loss of familial relationships, and the potential for physical harm or even death.<sup>13</sup> In “Outed by Advertisements: How LGBTQ Internet Users Present a Case for Federal Data Privacy Legislation,” Noah Ashman details how advertisements targeting LGBTQ+ people in the U.S. can create safety concerns and my ‘out’ individuals in a country which lacks federal protection for sexual orientation and can create numerous possibilities for discrimination.<sup>14</sup> Although the vulnerabilities the LGBTQ+ community experiences are shared across marginalized communities, for example gender discrimination, the confluence of gender, sex, and sexuality raises particular and unique concerns pertaining to data security.

The U.S. has lagged behind other countries when it comes to privacy rights for its citizens; other countries have recognized that LGBTQ+ people are a vulnerable group whose require a higher level of data protection and privacy rights.<sup>15</sup> Some jurisdictions have even established a general prohibition against processing sensitive information, including information relating to an individual’s sex life or sexual orientation include sexual practices, sexual attraction, sexual orientation, gender identity, stages of gender transition, and consumption habits, except in limited circumstances, because of potential discrimination risks.<sup>16</sup>

When intimate data is leaked or disclosed to hackers and criminals, individuals have an increased risk of reputational ruin, blackmail, and extortion...These risks are not evenly distributed across society. Women and marginalized communities disproportionately bear the burden of private-sector surveillance of intimate life,” Danielle Keats Citron explains in “A New Compact for Sexual Privacy.”<sup>17</sup>

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<sup>11</sup> I am focusing largely on sexuality and mostly excluding privacy concerns gender identity in this analysis.

<sup>12</sup> Noah Ashman, *Outed by Advertisements: How LGBTQ Internet Users Present a Case for Federal Data Privacy Legislation*, 99 OR. L. REV. 523, 524 (2021).

<sup>13</sup> European Commission, *Guidance note on the collection and use of data for LGBTIQ equality*, [https://commission.europa.eu/system/files/202307/JUST\\_Guidance%20note%20on%20the%20collection%20and%20use%20of%20data%20for%20LGBTIQ%20equality%20%E2%80%93%202023.pdf.pdf](https://commission.europa.eu/system/files/202307/JUST_Guidance%20note%20on%20the%20collection%20and%20use%20of%20data%20for%20LGBTIQ%20equality%20%E2%80%93%202023.pdf.pdf) (last visited Nov 26, 2023).

<sup>14</sup> Such as Brazil (General Personal Data Protection Law), the European Union (General Data Protection Regulation), and China (Personal Information Protection Law).

These higher standards of privacy protections for LGBTQ+ people are necessary because in the European Union and the United States being “outed” can lead to LGBTQ+ people being fired from their jobs or denied housing. In countries where being LGBTQ+ is illegal, proxy attributes such as location data and interests, which are often used for behavioral advertising, could also reveal sensitive information related to topics such as sexual preferences. This information could be used for surveillance or criminalization of LGBTQ+ people in those countries.<sup>15</sup>

According to Carlos Gutierrez, the deputy director of legal and policy affairs at the LGBT Technology Partnership & Institute, in addition to the heightened risks that LGBTQ+ people face from a data privacy breach, this population also tends to be heavier users of the internet and online services than their heterosexual counterparts, which can intensify potential harms.<sup>19</sup> “Mobile devices play a particularly vital role in the lives of LGBT-identifying adults across jurisdictions because of their unique need to find resources and places that will be welcoming and supportive of them.”<sup>20</sup> Specifically, the LGBT Technology Institute has found that 81% of LGBTQ+ youth have searched for health information online, compared to just 46% of non-LGBTQ+ youth and 80% of LGBTQ+ respondents participated in a social networking site, compared to only 58% of the general public.<sup>21</sup>

The high usage of the internet and social media by LGBTQ+ people, coupled with the risks of employment discrimination, loss of liberty, housing discrimination, and healthcare discrimination, makes this population particu-

15 Danielle Citron, *A New Compact for Sexual Privacy*, 62 WM. & MARY L. REV. 1763, 1768-1769 (2021).

16 Matt Payton, *Egyptian Police “Are Using Grindr to Find and Arrest LGBT people”*, INDEPENDENT (Aug. 27, 2016), <https://www.independent.co.uk/news/world/africa/egyptian-police-grindr-dating-app-arrest-lgbt-gay-antigay-lesbian-homophobia-a7211881.html>. In a report by the cybersecurity organization Recorded Future, they found that the LGBTQ+ community in Russia and Eastern European were targeted by cyberattacks, censorship, and surveillance. Recorded Future found that law enforcement and, very likely, intelligence agencies in the Middle East, Asia, and Africa “have deployed the use entrapment to expose members of the LGBTQIA+ community for imprisonment and torture,” through LGBTQ dating apps. INSIKT GROUP, *Online Surveillance, Censorship, and Discrimination for LGBTQIA+ Community Worldwide*, RECORDED FUTURE (July 14, 2020), <https://www.recordedfuture.com/lgbtqia-community-cyber-threats>.

17 National Cybersecurity Alliance, *Data Privacy is Crucial for the LGBT Community*, (Feb. 28, 2018), <https://staysafeonline.org/online-safety-privacy-basics/data-privacy-crucial-lgbt-community/#:~:text=A%20privacy%20data%20breach%20that,for%20physical%20harm%20or%20death>.

18 *Id.*

19 CHRIS WOOD ET AL., *THE ROLE OF DATA PROTECTION IN SAFEGUARDING SEXUAL ORIENTATION AND GENDER IDENTITY INFORMATION* 7 (2022), available at [https://www.lgbttech.org/\\_files/ugd/1b643a\\_21883c316e1547c99c6a1d997688f975.pdf](https://www.lgbttech.org/_files/ugd/1b643a_21883c316e1547c99c6a1d997688f975.pdf).

larly vulnerable.<sup>22</sup> Because of this, “data privacy is a special concern for the LGBT community. Our heightened use of the internet, coupled with the potentially catastrophic consequences of a data breach, makes our community especially vulnerable.”<sup>23</sup>

## **II. A Comparative Look at Data Protection Legislation in the U.S. and Europe**

While an investigation into the landscape of data protection laws across the world is necessary to determine how different legal regimes protect and process the sensitive data of LGBTQ+ users, this Article specifically surveys the U.S. and European approaches to privacy concerns.<sup>24</sup> Regulations in the U.S. and the EU could possibly eliminate the concerns we have raised, due to the U.S. and the EU as predominantly the origins of these apps. Usually in countries without data protection legislation, the LGBTQ+ population faces higher levels of persecution than in countries with data protection laws.<sup>25</sup> In the 162 countries with data protection laws, the protected status of LGBTQ+ people under the law determines what protection is established for data regarding an individual’s sexual orientation or gender identity.<sup>26</sup>

### **A. Data Protection and Concerns for LGBTQ+ People in the United States**

In the United States, there is an absence of a uniform data privacy scheme. The right to privacy was explicitly applied to the LGBTQ+ community in *Lawrence v. Texas*.<sup>27</sup> Although the Texas’ laws against sodomy were at issue in the case, the holding itself was more narrow and applied strictly to consensual sexual acts between adults in private spaces.<sup>28</sup> Nonetheless, these protections have been called in question by the Supreme Court’s recent ruling in *Dobbs v. Jackson*.<sup>29</sup> Privacy scholars have con-

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<sup>20</sup> *Id.*

<sup>21</sup> National Cybersecurity Alliance, *supra* note 18.

<sup>22</sup> This Article focuses on regulations in the U.S. and E.U. because these are predominately the countries of origin of apps like Grindr.

<sup>23</sup> STONEWALL, DO ASK, DO TELL CAPTURING DATA ON SEXUAL ORIENTATION AND GENDER IDENTITY GLOBALLY (2016), available at, [https://www.stonewall.org.uk/sites/default/files/do\\_ask\\_do\\_tell\\_guide\\_2016.pdf](https://www.stonewall.org.uk/sites/default/files/do_ask_do_tell_guide_2016.pdf).

<sup>24</sup> Importantly, not all of these nations have protected status for LGBTQ+ persons. For example, Abu Dhabi has data privacy laws, but no protections for LGBTQ+ persons. Graham Greenleaf, *Global Data Privacy Laws 2023: 162 National Laws and 20 Bills*, 181 PRIVACY LAWS AND BUSINESS INTERNATIONAL REPORT (PLIBR) 1, 2-4 (2023), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4426146](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4426146).

<sup>25</sup> See *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>26</sup> See *id.*

<sup>27</sup> In landmark Supreme Court decisions, including *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Whalen v. Roe*, 429 U.S. 589 (1977),



tended that the “constellation” of constitutional privacy rights that have been discussed in cases like *Obergefell v. Hodges* may be imperiled<sup>30</sup> by the *Dobbs* decision.<sup>31</sup> The *Dobbs* ruling has also recently been used by conservative lawyers and judges to support their arguments that gender-affirming care bans for transgender youth are constitutional.<sup>32</sup>

Instead of a uniform privacy law framework, the U.S. has a loose mix of federal privacy laws that protects health-related data (The Health Insurance Portability and Accountability Act of 1996), the data of children under 13-years old (Children’s Online Privacy Protection Rule), sensitive data of the clients of financial companies (Gramm-Leach-Bliley Act), the accuracy and fairness of consumer information assembled by Credit Reporting Agencies (The Fair Credit Reporting Act), and other privacy laws designed to target only specific types of data in special, often outdated, circumstances.<sup>33</sup>

Some federal statutes in the U.S. require that before collecting personally identifiable information from an individual, a company collecting the data must provide the individual with notice of what information it will collect and how it expects to use that information.<sup>34</sup> Often, this notice is accomplished by providing a link to the companies’ privacy policy or is hidden at the bottom of an agreement or otherwise not visible or consciously engaged

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the Court has recognized the right of privacy for citizens, including personal matters. In the Third Circuit decision of *Sterling v. Borough of Minersville*, 232 F.3d 190 (3rd Cir. 2000), the Third Circuit held that sexual orientation specifically falls within the “zone of privacy.” However, after the Supreme Court ruling in *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022), the case that overruled *Roe v. Wade*, 410 U.S. 113 (1973), privacy advocates are concerned that the court may be signaling that long-standing federal recognition of rights directly or indirectly concerning sexual orientation and gender identity (“SOGI” information) may be at risk.

28 The Court’s holding in *Roe v. Dobbs* that “a right of personal privacy, or a guarantee of certain areas or zones of privacy [existed] under the Constitution” (specifically in matters relating to marriage, procreation, contraception, family relationships, child rearing and education,) led to “other rights giving individuals control over their bodies and their most personal and intimate associations.” The minority in the *Dobbs* decision attested that the privacy rights protected by *Roe* may be eroded by the *Dobbs* decision. Maya Manian, *The Ripple Effects of Dobbs on Health Care Beyond Wanted Abortion*, 76 SMU L. REV. 77, 78 (2023).

29 E.g., Rona Kaufman, *New Supreme Court Cases: Duquesne Law Faculty Explains: Privacy: Pre- and Post-Dobbs*, 61 DUQ. L. REV. 62 (2023).

30 Erin Reed, *6<sup>th</sup> Circuit judges cite Dobbs Abortion ruling to uphold TN Trans Care Ban* 6<sup>th</sup> Circuit Judges Cite Dobbs Abortion Ruling To Uphold TN Trans Care Ban, (July 8, 2023), <https://www.erininthemorning.com/p/6th-circuit-judges-cite-dobbs-abortion>.

31 Mike Davis, Opinion, *US must catch up with rest of the world on Data Privacy*, ROLL CALL (Oct. 14, 2021), <https://rollcall.com/2021/10/14/us-must-catch-up-with-rest-of-the-world-on-data-privacy/>.

32 John Rothchild, *Against Notice and Choice: The Manifest Failure of the Proceduralist Paradigm to Protect Privacy Online (Or Anywhere Else)*, 66 CLEV. ST. L. REV. 559, 607 (2018).

with by the user.<sup>35</sup> The individual, being notified of what information will be collected and how it will be used, then is given a choice about whether to consent to that collection of data or not.<sup>36</sup> As Daniel Citron explains in *A New Compact for Sexual Privacy*: “American privacy law generally does not curtail data collection. Instead, it focuses on procedural protections, such as ensuring the transparency of corporate data practices (referred to as notice) and securing certain rights over personal data (referred to as choice).”<sup>37</sup>

Consent in the U.S. evolved from tort and contract law.<sup>38</sup> In contract law, consent is not necessarily consent to just one activity.<sup>39</sup> For example, a contract of adhesion, while it can be challenged as unfair in court, can render consent applicable to all potential uses.<sup>40</sup> Additionally, if an individual does not consent to the collection of their data, they may not be able to use the product that would otherwise be provided to them if they had consented.<sup>41</sup> While “consent is the primary mechanism for legally permitting collection and use of personal information, a functional proxy for choice,” the U.S. theory of consent is less strict than “consent” under the GDPR.<sup>42</sup>

In the United States, a primary mechanism for federal enforcement of the right to privacy is the Federal Trade Commission Act (FTC Act).<sup>43</sup> Under Section 5 of the FTC Act, “unfair or deceptive acts or practices in or affecting commerce” are prohibited.<sup>44</sup> Unfair acts or practices include acts that causes or is likely to cause substantial injury to consumers, acts that cannot be reasonably avoided by consumers, and acts that are not outweighed by countervailing benefits to consumers or to competition.<sup>45</sup> Deceptive acts are a representation, omission, or practice that misleads or is likely to mislead the consumer.<sup>46</sup> The consumer’s interpretation of the representation, omission, or practice must be considered reasonable under the circumstances and the misleading representation, omission, or practice must be material.<sup>47</sup> “The FTC’s emphasis on transparency enables a system (commonly called “notice-

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33 *Id.*

34 *Id.*

35 Citron, *supra* note 16, at 1804.

36 Charlotte A. Tschide, *Meaningful Choice: A History of Consent and Alternatives to the Consent Myth*, 22 N.C. J.L. & TECH. 617, 623 (2021).

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.* at 650.

41 See 15 USCS § 57a.

42 FEDERAL TRADE COMMISSION, A BRIEF OVERVIEW OF THE FEDERAL TRADE COMMISSION’S INVESTIGATIVE, LAW ENFORCEMENT, AND RULEMAKING AUTHORITY (2021), available at, <https://www.ftc.gov/about-ftc/mission/enforcement-authority>.

43 *Id.*

44 *Id.*

45 *Id.*



and-choice”) that leaves dating apps largely free to set their own privacy policies,” Caitlin Chin, explained in 2020.<sup>48</sup> In the U.S., the Federal Trade Commission (FTC) has stepped into the role of policing consumer privacy and data security. The FTC carries out its Section 5(a) mission through formal rulemaking and case-by-case litigation.<sup>49</sup> While the FTC has gone after BetterHelp, Inc.,<sup>50</sup> a mental health platform that hosts a counseling service called “Pride Counseling” that targets the LGBTQ+ community, for sharing consumer’s data with Facebook and Snapchat for advertising, advocacy groups in the U.S. have alleged that the FTC has remained disinterested in investigating LGBTQ+ dating apps for similarly violating users’ privacy.<sup>51</sup>

Between 2012 and 2018, dozens of consumer complaints against Grindr were filed with the FTC, alleging deceptive trade practices and misrepresentation, but the agency has not publicly opened an investigation into the company.<sup>52</sup> The FTC’s role is limited to stopping unfair and deceptive practices, which means if Grindr, or other LGBTQ+ dating apps, disclose their privacy practices truthfully, even if they are bad practices, those apps are not engaging in prohibited conduct.<sup>53</sup> As Danielle Citron explains: “So long as companies post privacy policies and offer opt-out rights under state law, they can largely collect, use, and sell intimate information without limitation. It should therefore not be a surprise that Grindr’s privacy policy warns that its advertising partners may also collect information directly from you.”<sup>54</sup>

Federal policies in the United States are significantly more substantive than those of private organizations. Due to this, self-regulatory initiatives have an important role in terms of data collection. The Network Advertising Initiative (NAI) develops and enforces self-regulatory policies surrounding data collection and its usage for digital advertising.<sup>55</sup> NAI’s Code of Conduct

46 Caitlin Chin & Mishaela Robison, *This Cuffing Season, It’s Time to Consider the Privacy of Dating Apps*, BROOKINGS (Nov. 20, 2020), <https://www.brookings.edu/articles/this-cuffing-season-its-time-to-consider-the-privacy-of-dating-apps/>.

47 FEDERAL TRADE COMMISSION, *supra* note 43.

48 *FTC to Ban BetterHelp from Revealing Consumers’ Data*, FEDERAL TRADE COMMISSION (Mar. 2, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-ban-betterhelp-revealing-consumers-data-including-sensitive-mental-health-information-facebook>.

49 *Historic Grindr Fine Shows Need for FTC Enforcement Action*, PUBLIC CITIZEN, <https://www.citizen.org/news/historic-grindr-fine-shows-need-for-ftc-enforcement-action/> (last visited Dec. 9, 2023).

50 Federal Trade Commission, <https://www.ftc.gov/legal-library/browse/frequently-requested-foia-records/online-dating/foia-2018-00259-grindr-consumer-complaints-december-1-2012-through-december-1-2017> (last visited Aug 1, 2023).

51 While there has been some evidence that the FTC expects sensitive information to require enhanced notice to users, there is not remedy for the user to seek if an entity misuses their sensitive information. Daniel J. Solove & Woodrow Hartzog, *THE FTC AND THE NEW COMMON LAW OF PRIVACY*, 114 COLUM. L. REV. 583, 585 (2014).

52 Citron, *supra* note 16, at 1804.

53 *Id.*

requires individual businesses to seek for opt-in consent for targeted advertising based upon a person's known or inferred sexual orientation.<sup>56</sup> A report from the Future of Privacy Forum notes, "In contrast, the Digital Advertising Alliance (DAA), a larger self-regulatory organization that is made up of a number of industry advertising trade groups, does not consider sexual orientation to be sensitive except in the context of health conditions derived from medical records."<sup>57</sup>

In 2021, forty members of Congress sent a letter<sup>58</sup> to Lina Khan, Chair of the Federal Trade Commission, and Jessica Rosenworcel, chair of the Federal Communications Commission, urging the agencies to develop new rules against the collection and sale of consumers' location data after a Catholic media site used commercially available app data to out a Catholic church official, which resulted in his resignation.<sup>59</sup> Despite pressure from members of Congress, the privacy concerns and endangerment of the LGBTQ+ community have persisted. "Experts have warned for years that data collected by advertising companies from Americans' phones could be used to track them and reveal the most personal details of their lives," Senator Ron Wyden (D-Oregon) told *Recode* in 2021. "Unfortunately, they were right. Data brokers and advertising companies have lied to the public, assuring them that the information they collected was anonymous. As this awful episode demonstrates, those claims were bogus — individuals can be tracked and identified."<sup>60</sup>

In addition to having to comply with the Federal Trade Act, Grindr, which is a California company, is also subject to the California Consumer Privacy Act of 2018 (CCPA).<sup>61</sup> The CCPA greatly expands privacy rights for Californians, including a right to know about the personal information collected, the right to delete the personal information collected, the right to out-

54 Marc Groman, *No One Should be Outed By an Ad*, IAPP, <https://iapp.org/news/a/nai-takes-lgbt-stand/> (last visited Dec. 9, 2023); see also NETWORK ADVERTISING INITIATIVE, 2020 NAI CODE OF CONDUCT (2020), available at, [https://www.networkadvertising.org/sites/default/files/nai\\_code2020.pdf](https://www.networkadvertising.org/sites/default/files/nai_code2020.pdf).

55 Wood, *supra* note 20.

56 JOEL REARDON ET AL., 50 WAYS TO LEAK YOUR DATA: AN EXPLORATION OF APPS' CIRCUMVENTION OF THE ANDROID PERMISSIONS SYSTEM (2019), available at, [https://www.ftc.gov/system/files/documents/public\\_events/1415032/privacycon2019\\_serje\\_egelman.pdf](https://www.ftc.gov/system/files/documents/public_events/1415032/privacycon2019_serje_egelman.pdf).

57 Michelle Boorstein, Marisa Iati & Annys Shin, *Top U.S. Catholic Church official resigns after cellphone data used to track him on Grindr and to gay bars*, WASH. POST (July 21, 2021), <https://www.washingtonpost.com/religion/2021/07/20/bishop-misconduct-resign-burrill/>.

58 Sara Morrison, *This Outed Priest's Story is a Warning for Everyone About the Need for Data Privacy Laws*, Vox (July 21, 2021), <https://www.vox.com/recode/22587248/grindr-app-location-data-outed-priest-jeffrey-burrill-pillar-data-harvesting>.

59 Some states, including California, Colorado, Connecticut, Iowa, Virginia, and Utah, have taken it upon themselves to pass state privacy protection laws in the absence of federal protections. *E.g.*, Anokhy Desai, *US State Privacy Legislation Tracker*, <https://iapp.org/resources/article/us-state-privacy-legislation-tracker/> (last updated Dec. 8, 2023).

out of sharing personal data, and the right to non-discrimination for exercising their CCPA rights.<sup>62</sup> While the CCPA has been celebrated as the strongest data protection law in the country, it encompasses less rights and protections than the GDPR and is limited to residents of only one state.<sup>63</sup> While other states have enacted or have considered enacting state-level privacy protections, none have approached the level of protection offered by the GDPR.

## **B. Data Protections and Concerns for LGBTQ+ People in the European Union**

Unlike the U.S., which has a loose patchwork of privacy laws, the EU has an uniform data privacy scheme, the GDPR, which sets a minimum standard of data protection for each member state.<sup>64</sup> The GDPR centers the overarching principles of “lawfulness, fairness, and transparency,” to guide the way personal data is collected, processed, and stored.<sup>65</sup> Specifically, in order to be compliant with the GDPR, data must be “collected for specified, explicit and legitimate purposes,” and thus be limited to those specific purposes; stored for only as long as necessary to fulfil those purposes; be accurate and kept up to date; and, be processed in a way that guarantees the “integrity and confidentiality” of data subjects.<sup>66</sup> To ensure compliance with these principles, the GDPR holds data controllers liable for any violations.<sup>67</sup>

The GDPR also provides data subject with an explicit set of rights that can be employed to protect their privacy, including: the right to access their personal data from data controllers;<sup>68</sup> the right to rectify any inaccurate data concerning them;<sup>69</sup> the right to have their personal data erased;<sup>70</sup> and the right of explanation regarding how certain algorithms process and make

60 State of California - Department of Justice - Office of the Attorney General, *California Consumer Privacy Act (CCPA)*, <https://oag.ca.gov/privacy/ccpa> (last visited Aug 1, 2023).

61 Salomé Viljoen, *The Promise and Pitfalls of the California Consumer Privacy Act*, (Apr. 11, 2020), <https://www.dli.tech.cornell.edu/post/the-promise-and-pitfalls-of-the-california-consumer-privacy-act>.

62 Ashman, *supra* Note 13.

63 Regulation 2016/679 (Art 5 (1)(a).

64 A legitimate purpose, under the GDPR, is the usage of data to prevent fraud, ensure network and information security, or protection from possible criminal acts or threats to public security. Regulation 2016/679 (Art 5(1)(a) – Art 5(1)(e).

65 A data controller is a body that determines the purposes of any personal data and the means of processing it. A data processor is a body who processes personal data on behalf of a data controller. The data controller is liable for GDBR compliance violations.

66 Art 15 – data subjects may also access additional information, such as the purposes of the data processing, the categories of the data processing, the recipients in which the data will be disclosed, and right to lodge a complaint with a supervisory authority in regards to the data being collected and processed.

67 Regulation 2016/679 Art 16.

68 Regulation 2016/679 Art 17.

decisions based on the processing of their data.<sup>71</sup> The GDPR creates a private right of action for data subjects whose privacy rights were violated.<sup>72</sup>

As mentioned earlier in this Article, the GDPR also explicitly prohibits the processing of data pertaining to a person's sex life or sexual orientation. This prohibition can be circumvented if the data subject gives explicit consent or if other requirements are met.<sup>73</sup> This circumvention gives significant power to the individual and their right to privacy.

Under the GDPR, consent is subject to a heightened standard than in the U.S. and must be "freely given," meaning that the data subject must freely give a "specific, informed and unambiguous indication" that they agree to have their data collected, processed, and stored.<sup>74</sup> Individuals can thereby withdraw their consent at any time. An individual's consent must also be in the form of a "clear affirmative action," which means that "opt-in" consent, such as a pre-checked box, is not sufficient to show consent under the GDPR.<sup>75</sup> Additionally, freely given consent must be given by the data subject for every type of data collection and processing being done by the data controller—in other words, consent for one type of processing cannot be used for consent of another type of processing.<sup>76</sup>

The GDPR outlines specific enforcement provisions that give data subjects the right to file complaints with supervisory authorities and includes a private right of action to hold data controller's accountable.<sup>77</sup> These specific enforcement provisions allow individuals who pursue claims to be compensated for their damages.<sup>78</sup> Under this enforcement scheme, privacy advocates have celebrated the EU for achieving effective and uniform privacy standards.<sup>79</sup>

LGBTQ+ dating apps, which use vast amounts of personal data – including name, email, age, and location – have struggled to comply with the GDPR heightened privacy protections for vulnerable groups.<sup>80</sup> Because LGBTQ+ people are under a higher risk of harm if their privacy rights are

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69 Regulation 2016/679 Art 22.

70 TrueVault, *The GDPR's private right of action* TrueVault, <https://www.truevault.com/learn/gdpr/gdpr-private-right-of-action#:~:text=It's%20a%20big%20question%20for,whose%20privacy%20rights%20were%20violated>. (last visited Nov 26, 2023).

71 Regulation 2016/679 Art 9(2).

72 Regulation 2016/679 Art 4(11).

73 Regulation 2016/679 Art 7,

74 A provided box at the end of a catchall policy, therefore, is also not sufficient to illustrate consent under this standard.

75 Regulation 2016/679 Art 77 – Art 79.

76 TrueVault, *supra* Note 71.

77 Dana Leigh, *5 Years Of GDPR, What Do The Experts Say?*, TECHROUND (May 25, 2023), <https://techround.co.uk/news/5-years-of-gdpr-what-do-the-experts-say/>.

78 Regulation 2016/679 Art 9.

violated, apps like Grindr face a higher scrutiny when it comes to privacy protections for app users. Grindr necessitates some data collection to connect users. Location being one such important piece of data for the app. The purposes of Grindr and other LGBTQ+ dating apps necessitate the sharing of some data; however, there is significant concern over what data ought to be retained.

Warwick International Higher Education Academy's (WIHEA) resource on best practices for gender and LGBTQ+ data collection under the GDPR privacy scheme highlights that apps must be conscious specifically about data minimization.<sup>81</sup> Data minimization requires that data controllers only process data that is "adequate, relevant and limited to what is necessary in relation to your processing purpose."<sup>82</sup> Many apps in the U.S. collect and process as much data as possible, often outside the scope of what is necessary, in order to sell it to advertisers.<sup>83</sup> Under the GDPR, this practice, which can have harmful consequences, is unlawful.<sup>84</sup>

As the "Out of Control" report shows, LGBTQ+ apps also have struggled with complying with the needed consent for data processing under the GDPR. None of the apps investigated in the report, including Grindr, OkCupid, and Tinder, "provide[d] any meaningful ways of giving or refusing consent to the sharing of personal data with third parties."<sup>85</sup> The report argues that the advertising technology system in its current form "is deprived of any meaningful individual choice and transparency, and personal data is transmitted to an enormous amount of actors who each operate with their own privacy policies," and that, therefore, the industry as a whole is unlikely to be complying with GDPR consent responsibilities.<sup>86</sup> The Norwegian complaint against Grindr highlights these concerns. Grindr unlawfully shared GPS data, IP address, age, and gender data. Alongside this, Grindr's former chief privacy officer, Ron De Jesus, in a lawsuit against Grindr alleges the companies stored personal data such as nude photos, which violates privacy law.<sup>87</sup>

79 Warwick International Higher Academy, [https://warwick.ac.uk/fac/cross\\_fac/academy/activities/learningcircles/transqueerpedagogies/datacollection/](https://warwick.ac.uk/fac/cross_fac/academy/activities/learningcircles/transqueerpedagogies/datacollection/) (last visited Dec. 9, 2023).

80 Regulation 2016/679 Art 5.

81 Jason Cohen, *These Apps Collect the Most Personal Data*, PCMag (Jan. 11, 2022), <https://www.pcmag.com/news/sick-of-data-collection-try-these-apps-instead>.

82 Matt O'Brien & Frank Bajak, *Priest Outed via Grindr App Highlights Rampant Data Tracking*, AP News (July 22, 2021), <https://apnews.com/article/technology-europe-business-religion-data-privacy-97334ed1aca5bd363263c92f6de2caa2>.

83 Out of Control, *supra* Note 6.

84 *Id.* at 171.

85 Epic, *In re grindr, LLC*, <https://epic.org/documents/in-re-grindr-llc/#:~:text=In%20June%202023%2C%20Grindr's%20former,to%20correct%20its%20privacy%20practices>. (last visited Nov 26, 2023).

### **III. Grindr and Privacy Concerns in the U.S. and the European Union**

Grindr has been in hot water multiple times in the past few years. In 2018, an investigation by the Norwegian nonprofit SINTE found that Grindr shared user's HIV status and "last tested date" with two companies.<sup>88</sup> Because the HIV information was provided to the companies along with users' GPS data, phone ID, and email, researchers at SINTE could identify specific users and their HIV status.<sup>89</sup>

While Grindr contended that information provided to vendors was encrypted, SINTEF's analysis found that some information shared with third-party advertisers was sometimes shared via "plain text," which can be easily hacked.<sup>90</sup> In the same year, Grindr also suffered from a security issue which had the potential to expose the information of its users.<sup>91</sup> In 2019, security researchers exposed how Grindr could be used to pinpoint the location of its users.<sup>92</sup>

The 2020 NCC investigation into Grindr revealed multiple potential GDPR violations by the company. Particularly, privacy advocates were concerned about 1) "vagueness of which legal basis Grindr is using for processing personal data;" 2) the company attempting to "shift accountability for the advertising technologies that it is using away from itself;" 3) whether users are given "sufficient information about how data may be shared during the registration process in the app."<sup>93</sup> Specifically, the Norwegian Data Protection Authority (NDPA) found that the company breached articles 6(1) and 9(1) of the GDPR.<sup>94</sup>

Art 6(1) of the GDPR relates to the lawfulness of processing.<sup>95</sup> It was found that Grindr was providing advertisers with personal data without a

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86 Jenna Payesko, *Grindr found to be sharing users' HIV status with other companies*, CONTAGIONLIVE (Apr. 3, 2018), <https://www.contagionlive.com/view/grindr-found-to-be-sharing-users-hiv-status-with-other-companies>.

87 Azeen Ghorayshi & Sri Ray, *Grindr Is Letting Other Companies See User HIV Status And Location Data*, BUZZFEED NEWS (Apr. 2, 2018), <https://www.buzzfeednews.com/article/azeenghorayshi/grindr-hiv-status-privacy#.yp0J48W0N>.

88 *Id.*

89 Brian Latimer, *Grindr Security Flaw Exposes Users' Location Data*, NBC (Mar. 28, 2018), <https://www.nbcnews.com/feature/nbc-out/security-flaws-gay-dating-app-grindr-expose-users-location-data-n858446>.

90 Chris Fox, *Gay Dating Apps Still Leaking Location Data*, BBC (Aug. 8, 2019), <https://www.bbc.com/news/technology-49265245>.

91 Out of Control, *supra* Note 6, at 72-74; 131.

92 Natasha Lomas, *Grindr Hit With \$7M Fine for GDPR Consent Breaches*, TECHCRUNCH (Dec. 15, 2021), <https://techcrunch.com/2021/12/15/grindr-final-gdpr-fine/>.

93 Regulation 2016/679 Art. 6(1).



legal basis—and that, specifically, the company was found to have disclosed special category personal data without receiving proper consent or another valid exemption via Art 9(1).<sup>96</sup> The NDPA's conclusion that Grindr had violated the GDPR sparked interest in the U.S., where privacy advocates were concerned about whether Grindr's privacy policy also failed to comply with the CCPA.<sup>97</sup> A group of civil rights and consumer groups in response to the NCC's investigation of Grindr urged federal and state regulators to use the finding to pass a federal law similar to GDPR and investigate any potential violations of the CCPA by Grindr.<sup>98</sup>

While Grindr made changes “to remedy the deficiencies in their previous consent-management platform,” leading to a drop in NDPA fines, an ex-employee recently blew the whistle on other privacy concerns at the company.<sup>99</sup> According to the company's former chief privacy officer, Ron De Jesus, who is engaged in a wrongful termination suit with Grindr, the company has repeatedly violated the CCPA.<sup>100</sup>

De Jesus has alleged that he was terminated in retaliation for raising concern regarding data privacy practices at the company, which allegedly included the retention of users' personal data, including sexually explicit images and HIV status, that were accessible by third parties and staff even after the user deleted their account.<sup>101</sup> In addition to violating state privacy laws, De Jesus has accused Grindr of contradicting its own privacy policy, which may constitute deceptive trade practices under the FTCA and open the company up to an investigation by the FTC.<sup>102</sup> However, at this time, there is no evidence that the FTC or the California's Office of the Attorney General, which is responsible for enforcing the CCPA, has opened an investigation

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94 Administrative Fine - Grindr LLC, <https://www.datatilsynet.no/contentassets/8ad827efefcb489ab1c7ba129609edb5/administrative-fine---grindr-llc.pdf> (last visited Aug 1, 2023).

95 Bobby Allyn, *Study: Tinder, Grindr And Other Apps Share Sensitive Personal Data With Advertisers*, NPR (Jan. 14, 2020), <https://www.npr.org/2020/01/14/796427696/study-grindr-tindr-and-other-apps-share-sensitive-personal-data-with-advertisers#:~:text=Tiny%20Desk->.

96 *Leading Consumer and Privacy Groups Urge Congress, the FTC, State AGS in California, Texas, Oregon to Investigate Several Popular Dating Apps*, PUBLIC CITIZEN (Jan. 14, 2020), <https://www.citizen.org/article/popular-dating-health-apps-violate-privacy/>.

97 Terje Solsvik, *Grindr fine cut to \$7 mln in Norway Data Privacy Case*, REUTERS (Dec. 15, 2021), <https://www.reuters.com/technology/grindr-fine-cut-7-mln-norway-data-privacy-case-2021-12-15/>.

98 Skye Witley, *Fired Grindr Executive says App Places “profit over privacy”*, YAHOO! FINANCE (June 15, 2023), <https://finance.yahoo.com/news/fired-grindr-executive-says-app-182812301.html>.

99 Epic, *In re grindr, LLC*, <https://epic.org/documents/in-re-grindr-llc/#:~:text=In%20June%202023%2C%20Grindr's%20former,to%20correct%20its%20privacy%20practices>. (last visited Nov 26, 2023).

100 *Id.*



into the company.<sup>103</sup>

In the U.S., privacy advocates have demanded that the U.S. implement a federal data privacy scheme, similar to the EU's GDPR, and recognize the importance of enacting special protections for sensitive information and vulnerable groups. However, European privacy advocates have alleged that the EU's approach may in fact be failing<sup>104</sup> because of a lack of enforcement.<sup>105</sup> Despite challenges implementing and enforcing a data privacy scheme, it is imperative for privacy experts and legislators to consider how data privacy and civil rights interact. As De Jesus' case illustrates, data privacy is largely determined by the companies. If the companies lack an adherence to data privacy laws, which vary significantly, it is difficult to maintain a level of protections for at-risk groups, such as LGBTQ+ people. For marginalized groups, particularly LGBTQ+ people, who face a high level of discrimination, it is imperative that there is a higher level of data protection and privacy rights.

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101 *Id.*

102 Vincent Manancourt, *EU Privacy Chief Bashes Lack of GDPR Enforcement Against Big Tech*, POLITICO (June 17, 2022), <https://www.politico.eu/article/gdpr-europe-wojciech-wiewiorowski-privacy-chief-lack-enforcement-big-tech/>.

103 The low number of GDPR compliance violation cases have led WIRED writer, Matt Burgess, to allege that GDPR is, in fact, failing and European Data Protection Supervisor Wojciech Wiewiórowski has remarked that there has not yet been sufficient enforcement of the data privacy scheme. Matt Burgess, *How GDPR Is Failing*, WIRED (May 23, 2022), <https://www.wired.com/story/gdpr-2022/>.

## Define to Exclude:

# Comparing Historic Racial Purity Laws to Current Anti-LGBTQ+ Legislation

*By Jacqueline Spreadbury\**

On March 23, 2022, Senator Marsha Blackburn, a republican from Tennessee was asking questions to then U.S. Supreme Court Nominee Ketanji Brown Jackson at her confirmation hearings. The following exchange occurred.<sup>1</sup>

Sen. Marsha Blackburn asked, “Can you provide a definition for the word woman?”

Justice Ketanji Brown Jackson responded, “Can I provide a definition? No. I can’t.”

Sen. Marsha Blackburn interjected, “Yeah.”

Justice Ketanji Brown Jackson affirmed, “I can’t.”

Sen. Marsha Blackburn followed up with, “You can’t?”

Justice Ketanji Brown Jackson affirmed, “Not in this context. I am not a biologist.”

Sen. Marsha Blackburn inserted her own testimony by saying, “So you believe the meaning of the word woman is so unclear and controversial that you can’t give me a definition?”

Justice Ketanji Brown Jackson replied, “Senator, in my work, as a judge, what I do is I address disputes. If there is a dispute about a definition, people make arguments and I look at the law and I decide.”

Sen. Marsha Blackburn continued, “The fact that you cannot give me a straight answer about something as fundamental as what a woman is underscores the dangers of the kind of progressive education that we are hearing about.”<sup>2</sup>

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1 USA Today, “Sen. Blackburn asks Supreme Court nominee to define ‘woman’ | USA Today” Youtube, uploaded by USA Today (Mar. 23, 2022) <https://www.youtube.com/watch?v=BWtGzJxiONU>.

2 Senator Marsha Blackburn has never stated *why* she asked Justice Ketanji Brown Jackson to “define woman.” The Senator could have asked this question for many different reasons.

In the following weeks, Republicans from all over the country proposed various definitions for “woman,” as if it was obvious, easy to define, or ridiculous that Justice Ketanji Brown Jackson said she could not define the word. Madison Cawthorn (R-N.C.) took the House floor to say, “I never imagined that one of my sacred duties in this hallowed chamber would be explaining to the House Speaker the difference between a man and a woman,” he said, referencing House Speaker Nancy Pelosi (D-Calif.). “Take notes, Madame Speaker, I’m about to define what a woman is for you. XX chromosome, no tallywacker.”<sup>3</sup>

Rep. Marjorie Taylor Green (R-Ga) responded with her own definition. “I’m going to tell you right now what is a woman. This is an easy answer. We’re a creation of God. We came from Adam’s rib. God created us with his hands. We may be the weaker sex — we are the weaker sex — but we are our partner — we are our husband’s wife.”<sup>4</sup>

Sen. Josh Hawley (R-Mo.) was asked by a member of the press to “define woman” and responded with the following: “Someone who can give birth to a child, a mother, is a woman. Someone who has a uterus is a woman. It doesn’t seem that complicated to me.” The reporter followed up by asking Sen. Hawley whether a woman whose uterus was removed during a hysterectomy was still a woman. Hawley replied, “Yea, well I don’t know. Would they?”<sup>5</sup> Josh Hawley then changed his definition to someone not with a uterus, but with a vagina.<sup>6</sup>

Republicans seemed determined to come up with a definition for this “easy” question. Because on the surface, it seems like an easy word to define—“woman.” But it’s not an easy definition. There is no one definition, one way to “define woman.”

Even if we set aside gender fluid and transgender identities for a moment, (we will return to the topic later), all of these purported definitions *still* fail. Let’s examine them one-by-one. Madison Cawthorn’s “XX chro-

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Senator Blackburn might have asked this “seemingly easy” question to Justice Jackson in order to reinforce racist stereotypes. Senator Blackburn could have intended to continue pushing anti-LGBTQ rhetoric. The author does not know the intention behind why Senator Marsha Blackburn asked Justice Ketanji Brown Jackson this question.

3 David Moyer, *Madison Cawthorn’s Definition Of A Woman Gets Thoroughly Mocked*, Huffington Post (Apr. 4, 2022) [https://www.huffpost.com/entry/madison-cawthorn-woman-tallywacker\\_n\\_624b440ce4b0e44de9c5ae5b](https://www.huffpost.com/entry/madison-cawthorn-woman-tallywacker_n_624b440ce4b0e44de9c5ae5b).

4 Monica Hess, *Republicans Thought Defining Woman Was Easy. Then They Tried.*, The Washington Post (Apr. 6, 2022) <https://www.washingtonpost.com/lifestyle/2022/04/06/republican-woman-definitions/>.

5 *Id.*

6 *Id.*

mosome, no tallywacker” definition is both underinclusive and overinclusive. First, this definition is underinclusive because it excludes anyone with Turner’s Syndrome, someone born with only one X chromosome.<sup>7</sup> People with Turner’s syndrome often are assigned female at birth. Similarly, trisomy X is a condition where people have an extra X sex chromosome, so they have XXX.<sup>8</sup> These people are also typically assigned female at birth. Second, Cawthorn’s definition is overinclusive because it includes people with Klinefelter Syndrome who have XXY as their chromosomes.<sup>9</sup> These people have two XX chromosomes, but are typically assigned male at birth.<sup>10</sup> Plus, there are a wide variety of intersex conditions people are born with that make this definition unworkable. Someone with 46, XX testicular disorder has two XX chromosomes, often has a uterus and ovaries, but also has external genitalia that resembles a penis.<sup>11</sup> This shows that looking to sex chromosomes is not a simple way to define “woman,” as it is both overinclusive and underinclusive.

Marjorie Taylor Green gave an unworkable, untestable definition. It is rooted in a specific religion’s definition—one many people do not subscribe to. Would Marjorie Taylor Green propose that we “test” for the presence of Adam’s rib in anyone that is a “woman?” Does Marjorie Taylor Green also think that people who are “woman” have one more rib than someone who is “man?” People, regardless of their gender, have the same number of ribs.<sup>12</sup> More importantly, the United States is *supposed* to be a nation with separation of church and state.<sup>13</sup> Different religions likely have different definitions for man and woman. But one specific religion’s definitions should not be used to define “woman” for this entire nation.

Sen. Hawley’s definition quickly revealed its own fallacies with the

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7 Turner Syndrome is a disorder caused when a person has only one x chromosome, and no second sex chromosome. People born with Turner Syndrome are assigned female at birth. People with Turner Syndrome tend to have underdeveloped characteristics typically associated with people assigned female at birth. *Turner Syndrome*, NICHD - Eunice Kennedy Shriver National Institute of Child Health and Human Development <https://www.nichd.nih.gov/health/topics/factsheets/turner>.

8 Medline Plus, *Trisomy X*, <https://medlineplus.gov/genetics/condition/trisomy-x/>.

9 Evan Los and George A Ford, *Klinefelter’s Syndrome*, National Library of Medicine (Last Updated Feb. 3, 2023) <https://www.ncbi.nlm.nih.gov/books/NBK482314/>.

10 *Id.*

11 Medline Plus, *Intersex*, <https://medlineplus.gov/ency/article/001669.htm>; see also 46, *XX testicular disorder of sex development*, Genetic and Rare Diseases Information Center <https://rarediseases.info.nih.gov/diseases/399/46xx-testicular-disorder-of-sex-development>.

12 Healthline, *How Many Ribs Do Men Have*, <https://www.healthline.com/health/bone-health/how-many-ribs-do-men-have#takeaway>.

13 Erwin Chemerinsky, *Why Church and State Should be Separate*, 49 Wm. & Mary L. Rev. 6, (May 1, 2008) <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1164&context=wmlr>.

reporter's follow-up question. Women who have undergone a hysterectomy do not lose their gender identity. Plus, there are many people who do not have a uterus (for a plethora of reasons) that are women. Someone with a chromosomal syndrome discussed above might not be born with a uterus but is still nonetheless a woman.<sup>14</sup> Many people are women but not mothers, and some women cannot give birth because of infertility. Hawley's new definition—women are people with vaginas—includes people who have had feminizing genital surgery. These are the same people that Josh Hawley likely aimed to exclude from his definition.

Gender identity is a deeply personal question. It is outside the scope of a single all-inclusive definition. Because no matter what definition someone comes up with for “woman,” it will not be fully inclusive. Instead, the best way to find out if someone is a woman is simply to ask them. Let each person define for themselves whether they are a woman or not.

Yet, none of the Republican politicians discussed above gave definitions of “woman” because they were deeply interested in defining this complex term. Instead, they are far more interested in the rhetoric that a question like “define woman” invokes. They are interested in promoting the culture war against LGBTQ+<sup>15</sup> identities and the wave of repression against women happening in the United States right now. They are not interested in a definition of “woman” to further our understanding of gender, with all its complexities. These politicians are interested in defining a woman so LGBTQ+ identities can be excluded from fundamental rights—“gender purity laws.”

Part One of this paper looks at the historical racial purity laws of the United States. Part One explores the role of defining race for the purpose of exclusion and how The Supreme Court decided constitutional questions about these racial purity laws. Part Two of this paper examines the current anti-LGBTQ+ laws; specifically, it explores how legislators define gender in legislation, for the purpose of excluding LGBTQ+ identities. Part Three of this paper compares historic racial purity laws to today's gender purity laws and highlights many similarities. Part Four looks to the current issue of constitutional protection for LGBTQ+ identities and advocates for declaring all gender purity laws as unconstitutional.

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<sup>14</sup> *Intersex*, *supra* note 11.

<sup>15</sup> LGBTQ+ will be used throughout this paper. Some people prefer to use LGBTQQ and others advocate for A, I, and P to be included. For sake of consistency, this paper will use LGBTQ+. There are many more terms that LGBTQ+ does not include in its acronym. That is why the + designation is used. This is by no means meant to exclude anyone who identifies with a gender and/or sexual orientation that is not represented with the LGBTQ+ acronym.

## I. Racial Purity Laws of the 1800s and 1900s.

## A. Laws Require Definitions

For most legislation in the United States, terms need to be defined in the law. Usually, a bill or law starts with a section defining each key term. When laws look to exclude a group or identity, the legislators first must define that group or identity. If a law looks to exclude someone based on race, the law must first define race. Similarly, if a law looks to exclude someone based on gender, the law must first define gender. Historically, racial purity laws looked to exclude people based on race. The law makers had to define race: define white; non-white; and how one proved their race. Today, as discussed in Part Two, laws are seeking to define gender in order to exclude.

## B. Defining Race to Exclude

Racial purity laws were historic laws throughout the United States that excluded people who were deemed “non-white.” Almost every state during the 1800s and early 1900s had racial purity laws.<sup>16</sup> Six states even had racial purity laws embedded into their state constitutions.<sup>17</sup> All of these laws all operated in similar ways. The legislation defined how “pure”<sup>18</sup> one had to be in order to be “white” and participate in many aspects of society. Also known as Eugenics Laws or anti-miscegenation laws, these laws defined people by their race.<sup>19</sup> If one was not “pure” enough—pure meaning white—then they were excluded. Laws prohibited owning land,<sup>20</sup> interracial marriage,<sup>21</sup> immigration, and citizenship<sup>22</sup> for people the law deemed “non-white”. Many Jim Crow laws also defined race in order to exclude. These laws enforced racial segregation by dictating what bathroom, drinking fountain, seat on the bus, and school one could use.<sup>23</sup> If one fit the definition of “non-white” they were excluded from participation in society. However, in order to exclude based on race, states had to first define race—including a test for who belongs and

16 Judy Scales-Trent, *Racial Purity Laws in the United States and German*, The John Hopkins University Free Press Vol. 23, Number 2 (May 2001) <https://muse.jhu.edu/article/13774>.

17 Paul Lombardo, *Eugenics Laws Against Race Mixing*, Doland DNA Learning Center, <http://www.eugenicsarchive.org/html/eugenics/essay7text.html>.

18 Pure means white. Whiteness was always considered the “pure” race while all other races were by definition “not white.”

19 Lombardo, *supra* note 17.

20 Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America*, Liveright (2017).

21 Kevin Noble Maillard, *The Pocahontas Exception: The Exemption to American Indian Ancestry and Racial Purity Laws*, Michigan Journal of Race and Law Vol 12 (2007) <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1115&context=mjrl>.

22 Scales-Trent, *supra* note 16 at 269.

23 This is not an extensive list. Jim Crow laws affected nearly every aspect of society.

who does not.

### C. How States Defined Race

“In 1866, the Virginia legislature stated that ‘every person having one-fourth or more [Black] blood shall be deemed a colored person.’”<sup>24</sup> Virginia later changed the definition in the Racial Act of 1924, which defined a person of color as someone with one-sixteenth or more [Black] blood, while a white person had no trace of non-white blood.<sup>25</sup> This definition quickly led to another issue in Virginia: What about someone who was less than one-sixteenth African American but also did not have “no-trace” of non-white blood? Virginia redefined the law to say that anyone having “any ascertainable degree of [Black] blood, or who is descended on the part of the father or mother from negro ancestors, without reference to or limit of time or number of generations removed ...” This concept became popularly known as the “one drop rule.”<sup>26</sup> This definition then led to another issue: what “race” are Native Americans? Virginia went on to adopt a new definition two years later; “members of Indian tribes living on reservations allotted them by the Commonwealth of Virginia having one-fourth or more Indian blood and less than one-sixteenth of [Black] blood shall be deemed tribal [Native Americans] so long as they are domiciled on said reservations.”<sup>27</sup>

In 1924, Altha Sorrells wanted to marry Robert Painter, a white man, in Virginia. The state clerk refused to issue the marriage license because the clerk deemed Sorrells “not-white.” “Sorells had the burden to prove that she was not Negro—that is according to the trial judge, she had to prove the nonexistence of “alien strain” over the previous twenty-five generations.”<sup>28</sup> Other states came up with their own ways to define race. “In North Carolina, for example, a person was “colored” if he had “any visible admixture of black blood”; in Ohio, the standard was “the preponderance of blood”; and in Michigan, as in Virginia, “the preponderance of white blood must only be in the proposition of three fourths.””<sup>29</sup>

Virginia, in 1853, required by law that the color of the child be put on each birth certificate “to preserve the racial integrity” of the white race. It became illegal to *not* put the color of the child on the birth certificate. This was to ensure that moving forward, the state knew the race of every person.

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<sup>24</sup> Scales-Trent, *supra* note 16 at 265.

<sup>25</sup> Brendan Wolfe, *Racial Integrity Laws (1924-1930)*, Encyclopedia Virginia, <https://encyclopediaivirginia.org/entries/racial-integrity-laws-1924-1930/>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Scales-Trent, *supra* note 16 at 278.

<sup>29</sup> *Id.* at 282.



This racial designation allowed for easier enforcement of racial purity laws.

#### D. Internal Identity Versus External Definition

Trying to define race will almost certainly lead to overinclusive or underinclusive definitions. First, people are not just white, person of color, or Native American. People who were kidnapped from Africa and forced into slavery in the United States did not originally see themselves as Black or person of color but instead Yoruba, Ibo, Akan, Mende, Wolof, Fon, Dinka, Bakongo, Temme, Angolan, or Malika, to name a few.<sup>30</sup> “Blackness” was *externally* put upon people as an identity, in order for those in power to easily identify and control.<sup>31</sup> Of course, plenty of other people see themselves as a race other than white, person of color, and/or Native American. However, the state was not interested in defining people based on their *internal* identities for racial purity laws. Instead, the state looked to define people based on external definitions created in order to control and exclude. Plus, deducing all the complexities of race to a binary was convenient for these laws. Instead of laws looking to how people *actually* identify with race, legislators created a test for a white/“non-white” binary. Then, people were excluded solely based on external definitions, not internal identities.

These definitions for race were never meant to be inclusive of all variations of people’s racial identities. In fact, the state could care less about how someone self-identified.<sup>32</sup> It did not matter to the state how someone internally defined their identity—to the state someone was “white/pure” or “non-white.” The state’s purpose was to externally define race in order to control and exclude those who were not defined as white.

#### E. The Constitutionality of Racial Purity Laws

For most of this country’s existence, racial purity laws were considered constitutional. Federal laws enacted in 1790 stated that only white people could be citizens.<sup>33</sup> It did not matter what definition each state used to define “white” or each race. Each state could have slightly different definitions for race, because The Supreme Court deferred to the state for the definition of race.<sup>34</sup> The Supreme Court affirmed this in *Dred Scott*, when The Court ruled that a Black person could not be a citizen.<sup>35</sup> This ruling was consistent with the laws at that time, holding that Black people were not able to be citizens worthy of full inclusion in society.

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<sup>30</sup> *Id.* at 261.

<sup>31</sup> *Id.*

<sup>32</sup> Scales-Trent, *supra* note 16.

<sup>33</sup> *Id.* at 269.

<sup>34</sup> *Id.* at 282.

<sup>35</sup> *Dred Scott v. Sanford*. 60 U.S. 393 (1857).

This remained valid until the ratification of the Fourteenth Amendment in 1866, which extended citizenship to “persons of African nativity or African descent.”<sup>36</sup> However, this did not stop those in power from defining race for the purpose of discrimination and exclusion. The Supreme Court created the separate but equal doctrine with its ruling in *Plessy v. Ferguson*,<sup>37</sup> a mere thirty years after the Fourteenth Amendment. States could continue to define people by race for the purpose of separation: separate railcars, bathrooms, water fountains, schools, parks, and more. States continued to create laws, even after the Fourteenth Amendment, to define race for the purpose of separation and exclusion.<sup>38</sup>

The Supreme Court would continue to define race for the purpose of exclusion into the 1900s. In *Ozawa v. United States*, The Court decided that “white” meant members of the Caucasian race and had nothing to do with color.<sup>39</sup> Three months later, The Court was called to decide if someone from India was “white,” based off the *Ozawa* decision. In an about-face, The Supreme Court quickly changed the definition of “white person” from Caucasian to whatever is “the understanding of the common man.”<sup>40</sup> The Court, in *United States v. Bhagat Singh Thind*, went on to say:

It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today. . . . We venture to think that the average well informed white American would learn with some degree of astonishment that the race to which he belongs is made up of such heterogenous elements.<sup>41</sup>

The new test from The Supreme Court became one of assimilation—do white people think you are white? If so, then you can be white.

Laws defining race for the purpose of exclusion were fundamental to the United States for most of this country’s existence. It was not until *Shelly v. Kramer* that The Supreme Court struck down a facially racist restrictive law.<sup>42</sup> Here, The Court held that racially restrictive covenants in deeds to property

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36 See footnote 28 from Scales-Trent, *supra* note 16 at 269. U.S. Const. amend XIV.

37 *Plessy v. Ferguson*, 163 U.S. 537 (1896).

38 Wolfe *supra* note 25.

39 Scales-Trent, *supra* note 16 at 288. See also, *Ozawa v. United States*, 260 U.S. 178 (1922).

40 *United States v. Bhagat Singh Thind*, 261 U.S. 204, 214-215 (1923).

41 *United States v. Bhagat Singh Thind*, 261 U.S. 204, 214-215 (1923). See also Scales-Trent, *supra*. at 288.

42 *Shelly v. Kraemer*, 334 U.S. 1 (1948).

are unenforceable. Then, the landmark *Brown v. Board*<sup>43</sup> decision came down in 1954 and struck down segregation, in the realm of schools. Thirteen years later, in another landmark decision, *Loving v. Virginia*, The Supreme Court finally deemed racial purity laws unconstitutional. Specifically, Virginia's law against interracial marriage was unconstitutional because Virginia's racial purity laws violated the Due Process and Equal Protection Clauses of the 14<sup>th</sup> Amendment.<sup>44</sup> However, in the time leading up to the *Loving v. Virginia* ruling, twenty-nine states had laws defining race in order to exclude.<sup>45</sup> Over half the states had laws prohibiting interracial marriage at the time of *Loving v. Virginia*.<sup>46</sup> Some of these laws remained on the books well after the *Loving* decision, and Louisiana had laws defining race for the purpose of exclusion up until 1993.<sup>47</sup> It took The Supreme Court 177 years to declare racial purity laws unconstitutional, 99 years after the Fourteenth Amendment was ratified.

## II. Anti-LGBTQ+ Laws of Today Are Gender Purity Laws

All across America, legislators are introducing bills targeting LGBTQ+ identities, especially LGBTQ+ youth. A year ago, Arkansas passed the SAFE act, prohibiting gender-affirming care in LGBTQ+ youth.<sup>48</sup> Both Carolinas have similar bills pending.<sup>49</sup> Florida recently passed the "Don't Say Gay" law, which prohibits discussion of LGBTQ+ identities in elementary schools.<sup>50</sup> Alabama has a similar bill pending Governor's signature.<sup>51</sup> Legislators in Ohio are trying to pass a law that prohibits transgender athletes from participating in youth sports.<sup>52</sup> Twenty-eight other states have introduced similar bills.<sup>53</sup> South Dakota legislators recently tried to pass a law so students could sue school officials if people were using a bathroom that did not match their assigned gender at birth.<sup>54</sup> Oklahoma passed a very similar law, prohibiting children from using a bathroom in a school that does not match

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43 *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

44 *Loving v. Virginia*, 388 US 1 (1967).

45 Scales-Trent, *supra* note 16 at 283.

46 *Id.*

47 *Id.*

48 2021 Ark. ALS 626, 2021 Ark. Acts 626, 2021 Ark. HB 1570.

49 2021 N.C. Senate Bill DRS45274-NB-92, 2021 S.C. House Bill 4047.

50 2022 Fl. ALS 22 , 2022 Fla. Laws ch. 22 , 2022 Fla. HB 1557.

51 2022 Ala. House Bill 322.

52 Jo Ingles, *Bill to stop transgender athletes from participating in girls sports passes the Ohio House*, WKSU Public Radio News for Northeast Ohio, (Jun. 2, 2022) <https://www.wksu.org/government-politics/2022-06-02/bill-to-stop-transgender-athletes-from-participating-in-girls-sports-passes-the-ohio-house>.

53 *Legislation Affecting LGBTQ Rights Across the Country*, American Civil Liberties Union, (last updated Jul. 1, 2022) <https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country>.

54 2022 Bill Text SD H.B. 1005.

their assigned sex at birth.<sup>55</sup> Mississippi and South Carolina also have similar bills pending.<sup>56</sup> All of these bills and law have similarities to them: they mistakenly use sex to define gender in order to exclude.

### A. Sex Versus Gender

Sex and gender are not the same. Sex refers to someone's biological attributes including chromosomes, gene expression, hormone levels, and reproductive anatomy.<sup>57</sup> Sex is typically what is assigned at birth.<sup>58</sup> However, someone's sex assigned at birth automatically becomes their gender assigned at birth. Gender refers to socially constructed roles, behaviors, expression and identities.<sup>59</sup> Gender has nothing to do with biological attributes, although biological attributes can contribute to how society socially construes someone's gender. However, societal construction of gender alone is not

enough to create a person's gender. Instead, it is about how one identifies in this world, and how they choose to present themselves. Gender is both an internal identity for how one sees themselves and an external identity for how they express themselves.

### B. Using Sex to Define Gender

The anti-LGBTQ+ bills discussed above have another similarity—none of them make any distinction between sex and gender. Instead, these bills use definitions of sex in order to exclude gender identities. They look to biological differences used to assign sex at birth, then dictate that the sex assigned at birth *must* be that person's gender identity. The politicians writing and advocating for these bills are not trying to understand the difference between sex and gender, nor are they grappling with the complexities of gender identity.

Oklahoma, for the purpose of policing which bathroom people use, defines sex as, “the physical condition of being male or female, as identified at birth by that individual's anatomy.”<sup>60</sup> Similarly, South Dakota defines sex as “a person's immutable, biological sex, as determined by the person's

55 2022 OK. ALS 323, 2022 OK. Laws 323, 2022 OK. Ch. 323, 2021 OK. SB 615.

56 2022 Miss. Senate Bill 1164, 2022 S.D. House Bill 1005.

57 *Sex and Gender Identity*, Planned Parenthood, <https://www.plannedparenthood.org/learn/gender-identity/sex-gender-identity>. See also, *What is Gender? What is Sex?*, Canadian Institute of Health Research, (Apr. 28, 2020) <https://cihr-irsc.gc.ca/e/48642.html>.

58 Sex is assigned at birth for babies born without intersex conditions, conditions that affect the reproductive system, or conditions of the sex chromosomes. But as discussed above, there are conditions that can cause one's sex assigned at birth to be misaligned, and there are also conditions that do not fix the sex binary.

59 *Id.*

60 2022 Okl. Senate Bill 1164.

genetics and anatomy existing at the time of the person's birth."<sup>61</sup> The South Dakota bill makes zero mention of the word gender, only looking to one's sex at birth to dictate which bathroom one can use. North Carolina states, "the sex of a person is the biological state of being female or male, based on sex organs, chromosomes, and endogenous hormone profiles, and is genetically encoded into a person at the moment of conception, and it cannot be changed."<sup>62</sup> Similarly, South Carolina in a bill to prevent "alter[ing] the appearance of the minor's gender" defines gender as "sex which means the biological state of being male or female, based on the individual's sex organs, chromosomes, and endogenous hormone profile."<sup>63</sup>

### C. Internal Identity Versus External Definition

Someone might be externally defined as male/female; yet, their internal gender identity does not match that external designation. Transgender "is an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth."<sup>64</sup> Gender identity "refers to a person's internal sense of being male, female or something else; gender expression refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice or body characteristics."<sup>65</sup> People identify as "transgender" when their external sexual identity assigned at birth is opposite of their internal gender identity. People identify as genderfluid, nonbinary, or gender nonconforming when their gender identity does not match their sex identity assigned at birth, nor does their gender identity fit into simply "male" or "female" binaries.

### D. Legislators Using Sex to Exclude Gender Identities

Collectively, these bills and laws discussed above use sex for excluding LGBTQ+ gender identities. They use an external definition of sex, specifically sex assigned at birth, to dictate what someone's internal gender identity *must* be. These bills and laws impose that only people whose gender identity match their sex assigned at birth get to participate. It is erasure of gender identity, in favor of having some quick "test" for these gender purity laws. Because everyone is assigned male or female at birth, these bills and laws can use that designation to define gender in order to exclude. Legislators are using the false binary definition of sex to exclude LGBTQ+ gender identities.

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<sup>61</sup> 2022 S.D. House Bill 1005.

<sup>62</sup> 2021 N.C. Senate Bill DRS45273-NB-92.

<sup>63</sup> 2022 S.C. House Bill 4047.

<sup>64</sup> *What Does Transgender Mean?*, American Psychological Association (2014) <https://www.apa.org/topics/lgbtq/transgender>.

<sup>65</sup> *Id.*

For example, many of the bathroom laws say that people can only use the bathroom that matches their sex that was assigned at birth. It does not take into account the complexities of gender identity, and the politicians who are seeking to exclude LGBTQ+ identities in these binary definitions are not interested in grappling with the complexities. Instead, it draws a simple test in order to exclude; does your gender identity match the sex assigned at birth? Either someone is “male” or “female” and that was determined the moment one was born. It is a quick and easy test for the purpose of excluding gender identity. This is exactly how these laws operate.

The Ohio bill to exclude children from sports says that only a child whose sex was designated female at birth can participate in girls’ sports.<sup>66</sup> If the child is accused of having a gender identity that is not the same as what was assigned at birth, then the child must undergo an examination of their genitalia and reproductive organs to determine if they can participate in sports.<sup>67</sup> If there are any discrepancies, then the child cannot participate. Here, the legislature has created a literal test to determine how “female” one is, and if the child does not meet that test, they do not get to participate. Besides excluding children who are genderfluid and/or trans, this law can also exclude girls who are intersex. For example, children born with Turner’s Syndrome often do not have fully developed reproductive organs. Are they not allowed to play sports?

#### E. Gender Purity Laws

Gender is far too complicated to fit into a single definition, because gender is also deeply personal. Instead, legislators, for purposes of excluding LGBTQ+ identities, look to deducing gender to a binary—male or female—and this *must* be based on sex assigned at birth. This way, the definition is simple. But having laws that define gender (or replace gender with sex) for the purpose of excluding people from participation are harmful, hateful, and transphobic. They are gender purity laws. They are laws to separate those

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66 Samantha Hendrickson, *Ohio House passes bans on transgender student athletes and gender-affirming care for minors*, AP Press (Jun 21, 2022) <https://apnews.com/article/ohio-gender-care-ban-transgender-sports-52136dfab6b29cca547d7e97f0b7c715>; 2022 Ohio H.B. 151 (Note, the portion of the bill that required a genital exam for children who were accused of having a gender identity different from the sex assigned at birth was amended after much public backlash and replaced with a requirement that the child would have to show their birth certificate.).

67 These types of genital exams for female athletes are not new. Compulsory sex testing of female athletes was introduced at the European Athletes Championships in 1966, via an external examination of female athletes. Sexual testing was added to the Olympics in 1968 and continued through 1998. See James L Rupert, *Genitals to Genes: The History and Biology of Gender Verification in the Olympics*, *Canadian Bulletin of Medical History* 2011 28:2, 339-365.

“pure enough” in their gender identity and allow them to participate in society while excluding anyone who isn’t “pure” in their gender identity. These operate similar to the racial purity laws of the 1800s and 1900s throughout the United States, and those similarities are discussed below in Part Three. For racial purity laws of the past or gender purity laws of today, the first step for excluding a group is through legally defining the group.<sup>68</sup> It is crucial that these definitions imposed are external definitions placed on someone’s identity. Legislators are not using definitions that people create for their own self-identity but definitions that the state place upon people—external definitions, not internal ways to self-identity.

“How else will the state know whom to favor and whom to target if group membership is not clearly defined?”<sup>69</sup> People in power are creating these definitions to create opportunities for the law to discriminate against and promote hatred of LGBTQ+ identities. Laws need to have definitions, but politicians are not struggling with these complex definitions for narrow areas of laws where sex might matter, but instead are intentionally creating definitions to exclude LGBTQ+ identities from participation in society. By doing so, they are saying that certain people “fit,” to the exclusion of others. If someone identifies as transgender, gender-nonconforming, genderqueer, genderfluid, or any other gender identity that is not clearly defined in these binary definitions, then these people are excluded from participation under these gender purity laws.

### III. Similarities Between Historic Racial Purity Laws and Gender Purity Laws

#### A. Race and Gender as Social Constructs

Race and gender are social constructs<sup>70</sup> used to classify and control people. However, there are some key differences that need to be discussed between race and gender. A Black person in this county will usually have a child that is seen as Black in society, but a female will not always give birth to

<sup>68</sup> Scales-Trent, *supra* note 16 at 264.

<sup>69</sup> Scales-Trent, *supra* note at 276.

<sup>70</sup> This paper’s purpose is not to argue that race and gender are social constructs. This is taken as a starting point. There is a lot of scholarship on race and gender as social constructs. For more on race as a social construct, see Ta-Nehisi Coates, *What We Mean When We Say ‘Race is a Social Construct’*, The Atlantic (May 15, 2013) <https://www.theatlantic.com/national/archive/2013/05/what-we-mean-when-we-say-race-is-a-social-construct/275872/>. For more on gender as a social construct, see Amy Wilson, *The Social Construct of Gender*, University of North Carolina at Pembroke (Oct. 2019). [https://www.researchgate.net/publication/354193145\\_The\\_Social\\_Construct\\_of\\_Gender](https://www.researchgate.net/publication/354193145_The_Social_Construct_of_Gender). See also, John S. Mahoney Jr. and Paul G. Kooistra, *Policing the Races: Attempts to Enforce Racial Purity in Virginia (1630-1930)*, Virginia Commonwealth University (1995) [https://scholarscompass.vcu.edu/wilder\\_pubs/3/](https://scholarscompass.vcu.edu/wilder_pubs/3/).



a female. Many transphobic people, like Matt Walsh in “What Is A Woman” argue that because transgender is an identity, transracial must also be.<sup>71</sup> This is a fallacy. Race is a social construct.<sup>72</sup> Race is not inherently hereditary. However, race is socially constructed to mean differences in the amount of melanin people’s skin produces. The amount of melanin that someone’s skin produces is controlled by genetic makeup, and genetic makeup is hereditary. So, race is nor hereditary per se, but is passed down because of the way the United States socially constructs race.

Compare this with sex and gender. Neither sex nor gender is passed down. A person giving birth typically has a 50% chance of having a child assigned female at birth versus a child assigned male at birth. What someone is assigned at birth is reflective of their sex. Each person born has about a 50% chance of being socially constructed to have one of two gender identities at birth, but this is not inclusive of all gender identities. However, when a Black person gives birth to a child, that child is usually socially construed as “Black.” Therefore, while race and gender are both social constructs, they operate in different ways. It is from this difference that transracial is not an identity, but transgender is.<sup>73</sup>

#### B. Deducing Complicated Internal Identities to Binaries

Both the racial purity laws of the past and gender purity laws of today operate by creating external binaries and forcing them onto people’s identities. As discussed in Part One, someone’s internal identity for race can fully reject the white/”non-white” or white/Black binary racial purity laws used. Instead, someone who is externally deemed “Black” by the state could have an internal identity with a specific tribal lineage, nationality, or ancestry other than “Black.” But the state used the external definition of “white” and “non-white/Black” to replace the complexities of individuals’ racial identities.<sup>74</sup>

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71 Matt Walsh also uses trans-animal (meaning that humans can choose to identify as non-human) and/or transability (meaning someone without a disability identifies with a disability) as a means to discredit transgender as an identity. These are also false analogies because everyone born of a human is a human (there is no variety in the “human” descriptor). Human is not a social construct. Disability is not an identity born from social constructs but instead is a way to explain someone’s limitation on full ability to do a certain action. Therefore, both trans-animal and trans-ability are not a thing.

72 Coates, *supra* note 70.

73 There are some people who use the term trans-racial to explain a specific lived experience. People of color who were adopted by white families and raised in an all-white culture sometime use this term. The child grows up in a white culture, absent exposure to cultures and communities that reflect their race. This use of the term is outside the scope of this paper.

74 Because many people were kidnapped from their homeland and forced into slavery, their lineage and ancestry have been tragically lost for many.

Similarly, legislators today are deducing the complexities of gender identity to a simple binary. People must be either “male” or “female.” That identity is externally defined and assigned at birth. For these gender purity laws, that external identity cannot change despite how one internally identifies. These laws deduce all of the complexities of gender identity to a simple externally defined binary—male/female. Under these gender purity laws, someone can fully reject the gender identity the state is imposing on them, but nevertheless is controlled by that external definition.

### C. Justifying Racial Purity Laws and Gender Purity Laws

Historically, people gave two justifications for the need of racial purity laws: religion and *actual* biological differences resulting in the inferiority of the “non-white” race. These are the same justifications used today with gender purity laws.

#### 1. Biological Differences

[No] state seemed particularly troubled by the confusion between “race” as a fixed biological category, and “race” as a category which society could change at will [meaning it was a social construct]. There was a desire to target some people for oppression, a desire to legitimize this act through legislation, and a simultaneous desire to hide the cruel purpose behind so-called biological imperatives. In a sense, [all] states were claiming that it was Nature, not them, who was creating these differences: [The State’s] hands were clean.<sup>75</sup>

For centuries, states and legislators justified racial purity laws because they claimed it was part of biology; society must have racial purity laws to prevent contamination of the “superior race”. People justified racial purity laws because of “innate biological differences.” Except, this is false. It is widely known there is no superior or inferior race when it comes to biology.<sup>76</sup> There is no *biological* difference between people of different races. Instead, race is a social construct used for power and control.

One can immediately see that states are trying to redefine a social construct as a biological reality. If these groups really are different biologically from one another,

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<sup>75</sup> Scales-Trent, *supra* note 16 at 271.

<sup>76</sup> The laws and history of this country lead to intentional, systemic, and disparate impact racism that permeates throughout all aspects of life. Plus, the United States has a growing number of groups that are openly white supremacists. This continues to enforce racial oppression. The author is not discrediting this whatsoever, just pointing out that it is not from an “innate biological difference” but a culture rooted in racism.

then state-created “differences” gain scientific legitimacy. This “scientific” foundation justifies treating certain groups in different and oppressive ways and takes away any sense of guilt. “These people are simply not like us”<sup>77</sup>

Today, we have the same thing happening with gender. People say gender is an innate biological condition. They use this “biological difference” to exclude people whose gender identity do not match the gender assigned at birth. They cite these “biological differences” to “protect” people whose gender identity *matches* the one assigned at birth. Politicians say that young girls need protecting from people whose identify is not congruent with the gender they were assigned at birth. These politicians cite “biological differences” to give scientific legitimacy to their hateful exclusion of certain gender identities. Ohio says that young children who do not identify with the gender they were assigned at birth can no longer play in sports, because of biological differences.<sup>78</sup> Numerous states say that children who do not identify with their gender assigned at birth cannot even use the bathroom or locker room at school. Yet only sixty years ago, people were excluded from using a bathroom or playing sports based on “biological differences” in race.

## 2. Religious Freedom

Religions that invoke their beliefs to justify white supremacy are on-the-fringes today. However, mainstream religion in the United States was historically used to justify racism.<sup>79</sup>

*“Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.”*<sup>80</sup>

— Judge Leon M. Bazile, January 6, 1959

Pastors of mainstream Christian-based religions would regularly use the bible to justify slavery, Jim Crow, and segregation.<sup>81</sup> White Christians

<sup>77</sup> Scales-Trent, *supra* note 16 at 299.

<sup>78</sup> Ingles, *supra* note 52.

<sup>79</sup> Ian Millhiser, *When Religious Liberty was used to Justify Racism Instead of Homophobia*, Think Progress (Feb. 12, 2014) <https://archive.thinkprogress.org/when-religious-liberty-was-used-to-justify-racism-instead-of-homophobia-67bc973c4042/>.

<sup>80</sup> *Id.*

<sup>81</sup> Tom Gjelten, *White Supremacist Ideas Have Historical Roots in U.S. Christianity*, NPR, (July 22, 2020) <https://www.npr.org/2020/07/01/883115867/white-supremacist-ideas-have-historical-roots-in-u-s-christianity>.

said they *must* have racial purity laws because of their religion—that God demanded the separation of races. James Henry Thornwell, a Harvard-educated pastor told his congregation that “the relation of master and slave stands on the same foot with the other relations of life. In itself, it is not inconsistent with the will of God. It is not sinful.”<sup>82</sup>

These ideas were not from extremist religious groups, like the white supremacist sect of the Asatru religion seen in the United States today.<sup>83</sup> Instead, they were widely popular among white Christians throughout the history of the United States, especially in the Southern Baptist Church, Methodist Episcopal Church, and the Southern Presbyterian Church.<sup>84</sup> Religion was used to defend the need for racial purity laws everywhere.<sup>85</sup> According to many white Christians in history, God demanded these racial purity laws, and they were simply invoking their “freedom of religion.” As recent as 1983, The Supreme Court was considering whether religious freedom was a defense to excluding people based on race.<sup>87</sup> Luckily in *Bob Jones University v. United States*, The Supreme Court rejected this defense for racial discrimination.<sup>88</sup>

Today, religion is invoked to justify the oppression and exclusion of LGBTQ+ identities. People invoke God, the Bible, and their religion for why LGBTQ+ people cannot have the same rights. In fact, politicians have invoked religion to justify these gender purity laws. Wide-spread hatred of LGBTQ+ identities based on religious freedom is everywhere in America today.<sup>89</sup> In fact, many religious people are *proud* of how their religion supports

82 *Id.*

83 The Asatru religion claims that a tenant of its religion is the superiority of the white race and use religious “doctrine” to justify racist beliefs. Only white people who can prove their ancestry is “purely white European” can be a part of this church. For more see Jack Jenkins, *The New Religion of Choice for White Supremacists*, Think Progress (Nov 13, 2015) <https://archive.thinkprogress.org/the-new-religion-of-choice-for-white-supremacists-8af2a69a3440/>.

84 *Religion, Race, and Racism: A (very) Brief History*, Department of Religious Studies, University of Pittsburgh, (Jun. 1, 2020) <https://www.religiousstudies.pitt.edu/resources-social-action/religion-race-and-racism-very-brief-introduction>.

85 Not all Christians in the United States history held these racist views. There were many Christians that rejected this, one example being the Quakers.

86 Bailey AK, Snedker KA. Practicing What They Preach? Lynching and Religion in the American South, 1890 - 1929. *AJS*. 2011 Nov;117(3):10.1086/661985. doi: 10.1086/661985. PMID: 24327771; PMCID: PMC3856205.

87 *Bob Jones University v. United States*, 461 U.S. 574 (1983).

88 *Bob Jones University v. United States*, 461 U.S. 574 (1983).

89 Again, not *all* religious people push for the oppression and exclusion of LGBTQ+ identities. There are many churches and religious people that actively support LGBTQ+ rights and include LGBTQ+ identities in their religion. The point here is how mainstream the hatred of LGBTQ+ identities are in religion today in America and how often people invoke

and justifies their hatred of LGBTQ+ people—that their religion demands they are hateful towards LGBTQ+ people.<sup>90</sup>

There are many bills and laws that allow people to *legally* discriminate against LGBTQ+ identities because of “religious freedom.” A bill in Massachusetts aims to protect any person who discriminates based off of LGBTQ+ status, in the name of religious freedom.<sup>91</sup> Bills recently signed into law in Montana and South Dakota extend protection to those who discriminate based on religious freedom.<sup>92</sup> Many other states have similar bills currently pending that will also extend protection to those people who discriminate based on LGBTQ+ status, while simultaneously excluding LGBTQ+ people from participation in society. All in the name of religion.

The justification of these hateful anti-LGBTQ+ laws are the same as the racial purity laws a century ago—biology and religion. Politicians and legislators are repeating the same oppressive hatred today, with the same justifications, but now the primary target are LGBTQ+ folks, with gender purity laws.

#### D. Making Identities Illegal

To prevent “racial contamination”, racial purity laws prohibited any racial mixing in society. People would be incarcerated or sentenced to terms of indentured servitude for violating racial purity laws. In Virginia, people faced imprisonment for marrying someone of a different race.<sup>93</sup> White women had to pay a fine or were incarcerated for five years if they gave birth to a child of color.<sup>94</sup> This law did not apply to Black women, because Black women could not give birth to a white child. White men and white women faced a six-month prison sentence if they married someone who was “non-white.”<sup>95</sup> The length of the prison sentence became increasingly longer as racial purity laws became stronger.<sup>96</sup>

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religion to justify hatred.

90 “*All We Want Is Equality*” *Religious Exemptions and Discrimination Against LGBTQ People in The United States*, Human Rights Watch, (Feb. 19, 2018) <https://www.hrw.org/report/2018/02/19/all-we-want-equality/religious-exemptions-and-discrimination-against-lgbt-people>.

91 2021 Mass. HB 3468 <file:///C:/Users/jmspr/Downloads/H1536.pdf>.

92 2021 Mt. SB 215, [http://laws.leg.mt.gov/legprd/law0210W%24BSIV.ActionQuery?P\\_BILL\\_DFT\\_NO5=LC2836&Z\\_ACTION=Find&P\\_Sess=20211](http://laws.leg.mt.gov/legprd/law0210W%24BSIV.ActionQuery?P_BILL_DFT_NO5=LC2836&Z_ACTION=Find&P_Sess=20211), 2021 S.D. SB 124 <https://sdlegislature.gov/Session/Bill/22127/214181>.

93 Scales-Trent, *supra* note 16 at 272.

94 *Id.*

95 *Id.*

96 *Id.*

Similarity, legislators today are trying to criminalize gender non-conforming identities and those who affirm people's gender identity. There is legislation that criminalizes parents and doctors who give youth gender-affirming healthcare. Arkansas created a law that prohibited children from receiving puberty blockers, criminalizing those who give children access to such treatment.<sup>97</sup> Texas has directed Child Protective Services to investigate parents for "abuse" if they affirm their child's gender, if that gender identity is not the same as the one assigned at birth.<sup>98</sup> Alabama made it a felony, punishable up to ten years in prison to give gender-affirming medication.<sup>99</sup> Collectively, all of these anti-LGBTQ+ laws lead to the marginalization and criminalization of people whose gender identity is incongruent with the one assigned at birth.<sup>100</sup>

### E. Exclusion

The first step for exclusion is for those in power to define the group. Then, those in power can enact laws to exclude based on that definition, giving more rights and privileges to those who are included. Those in power routinely change laws and definitions of various identities as the need to exclude changes.<sup>101</sup> In the first four hundred years of this country, the focus was exclusion based on race. Now, the focus is exclusion based on gender identity. The racial purity laws of the past two centuries and the gender purity laws of today exclude many people from society. They prevent identities from flourishing by conditioning people to only exist in binaries that are defined into laws: male/female and/or white/non-white.

97 2021 Ark. ALS 626, 2021 Ark. Acts 626, 2021 Ark. HB 1570.

98 Anne M. Coughlin and Naomi Cahn, *Texas is Trampling Parents' Rights In Its Investigations of Trans Kids*, The Washington Post, (Apr. 8, 2022) <https://www.washingtonpost.com/outlook/2022/04/08/texas-transgender-family-law/>.

99 *A Judge Blocks Part of an Alabama Law that Criminalizes Gender-Affirming Medication*, The Associated Press with National Public Radio, (May 14, 2022) <https://www.npr.org/2022/05/14/1098947193/a-judge-blocks-part-of-an-alabama-law-that-criminalizes-gender-affirming-medication>.

100 *Quick Guide to the Criminalization of Transgender and Gender Non-Conforming People*, Transformative Justice Law Project of Illinois, <https://www.prisonlegalnews.org/media/publications/Guide%20to%20Criminalization%20of%20Trans%20%26%20Gender%20Non-Conforming%20People%20Transformative%20Justice%20Law%20Proj.%20of%20IL.pdf>.

101 One example of this is when the Federal Government passed the General Allotment Act. Before this, Native American was often designated as people have one-fourth or more "Native American blood." However, this act gave land to Native Americans, so the government changed the definition of Native American to those people having one-half or more "Native American blood" so they did not have to give away so much land. For more see M. Annette Jaimes, *Federal Indian Identification Policy: A Usurpation of Indigenous Sovereignty in North America*, *Native Americans and Public Policy*, 116-117 (1992).

## 1. Ways States Exclude

Years ago, non-white children were prohibited from participating in sports<sup>102</sup>, playing at the playground<sup>103</sup>, going to school<sup>104</sup>, accessing healthcare,<sup>105</sup> or using the same bathroom.<sup>106</sup> White schools taught the supremacy of white people. Today, legislation is targeting LGBTQ+ people with similar exclusions: not participating in sports;<sup>107</sup> not being able to use the bathroom;<sup>108</sup> prohibiting access to healthcare;<sup>109</sup> prohibiting books on gender identity;<sup>110</sup> prohibiting anyone from changing their state-designated gender;<sup>111</sup> prohibiting preferred pronouns;<sup>112</sup> or making it illegal to show respect to trans and gender-nonconforming people.<sup>113</sup> In fact, schools today have even forbid the teaching of gender identities other than cisgender.<sup>114</sup>

## 2. The Burden of Proof for Excluding

For both racial purity laws and gender purity laws, the burden of proof is on the person being excluded to prove that they in fact belong.<sup>115</sup> Under racial purity laws, people who were accused of being “non-white” had to prove through their lineage and genealogy that they were, in fact, “white” and “pure”.<sup>116</sup> Those excluded would have to find witnesses who could testify in court about how “white” their relatives were. Different laws would require different levels of “purity.” For example, some laws excluded people if they were one-fourth “non-white.”<sup>117</sup> Virginia excluded anyone who

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102 *Jim Crow Laws*, National Park Services, [https://www.nps.gov/malu/learn/education/jim\\_crow\\_laws.htm](https://www.nps.gov/malu/learn/education/jim_crow_laws.htm).

103 *Id.*

104 *What Was Jim Crow*, Jim Crow Museum, Ferris State University, <https://www.ferris.edu/HTMLS/news/jimcrow/what.htm>.

105 *Id.*

106 *Id.*

107 Ingles, *supra* note 52.

108 2022 Bill Text SD H.B. 1005.

109 2021 Ark. ALS 626, 2021 Ark. Acts 626, 2021 Ark. HB 1570, 2021 Ken. HB 336 <https://apps.legislature.ky.gov/record/21RS/hb336.html>.

110 2022 Ok. SB 1142 [http://webserver1.lsb.state.ok.us/cf\\_pdf/2021-22%20INT/SB/SB1142%20INT.PDF](http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20INT/SB/SB1142%20INT.PDF).

111 2021 S.D. HB 1076 <https://mylrc.sdlegislature.gov/api/Documents/212531.pdf>.

112 2021 Ark. HB1749 <https://www.arkleg.state.ar.us/Bills/Detail?id=HB1749&ddBienniumSession=2021%2F2021R&Search=>.

113 2022 N.D. HB 1476 <https://www.ndlegis.gov/assembly/67-2021/bill-actions/ba1476.html>.

114 2022 Fl. ALS 22, 2022 Fla. Laws ch. 22, 2022 Fla. HB 1557, 2021 Iowa Senate File 167 <https://www.legis.iowa.gov/legislation/BillBook?ga=89&ba=SF%20167&v=i>.

115 Scales-Trent, *supra* note 16 at 262.

116 *Id.* at 262-263.

117 *Id.* at 265.



could not prove their ancestry, going back twenty-five generations, were all white.<sup>118</sup> The burden of proof was always on those initially excluded to prove their “whiteness.”

Similarly, people accused of being anything other than cisgender carry the burden of proof. They must show they are cisgender, or face exclusion. Different laws have different tests to prove one’s “pureness” of male or female. Some tests simply look to whether the person “passes” as male or female. However, the Ohio bill that aims to exclude transgender youth from participation in sports requires that anyone whose “sex is in dispute” to undergo an examination. The child must go to a doctor, who will perform and examination, to determine the child’s gender. This determination must be based on “1. The participant’s internal and external reproductive anatomy; 2. The participant’s normal endogenously produced levels of testosterone; and 3. Analysis of the participant’s genetic makeup.”<sup>119</sup> The child holds the burden to prove they are “female-enough” in order to play sports through a physical examination of their genitalia. Just like the racial purity laws, these gender purity laws require those being excluded to prove their “pureness” in their gender.

#### IV. Extending Constitutional Protection to LGBTQ+ People

##### A. Constitutional Rights Expanding

The Constitution has been around for 238 years, but for the first 178 years, The Supreme Court deemed racial purity laws constitutional. Now, states cannot have openly explicit racial purity laws, which is great progress towards equality. But it was not a specific Constitutional Amendment that made those changes; instead, it was The Supreme Court finally expanding rights by striking down racial purity laws. The Supreme Court has in the past eighty years moved to be somewhat more inclusive, by extending constitutional rights to people regardless of race.<sup>120</sup> Today, courts apply strict scrutiny to facially racially restrictive laws and almost always strike those laws down.<sup>121</sup> The courts do not allow these racially restrictive laws to stand

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<sup>118</sup> *Id.* at 278.

<sup>119</sup> 2022 Ohio Sub House Bill 151, also known as “Save Woman’s Sports Act”.

<sup>120</sup> Facially neutral laws with a disparate impact are still often upheld by The Supreme Court. This continues to have racist impacts and implications in society. These effects are rampant and widespread. However, the effect of these rulings are outside the scope of this paper. This paper is examining the constitutionality of racial purity laws of the past and gender purity laws of today, both of which are facially discriminatory.

<sup>121</sup> There have been a few times where courts have upheld facially racially restrictive laws because they have survived strict scrutiny. The compelling government interest is almost always repairing old wrongs, like in *Brown v. Board of Education 2*, 349 U.S. 294 (1955).

because of biology or religion, the two main arguments used to uphold those laws in the past.

### B. The Questionable Constitutionality of Gender Purity Laws

The Supreme Court has not explicitly extended constitutional rights and protections to LGBTQ+ identities. This gives space for legislatures all across this country to pass and enforce gender purity laws. The Court extended the right for people to engage in consensual sexual activity in *Lawrence v. Texas*, but this ruling was grounded in the right to privacy, not the rights of LGBTQ+ people as a protected class.<sup>122</sup> Later, The Supreme Court ruled that the right to gay marriage is protected under the 14<sup>th</sup> Amendment in *Obergefell v. Hodges*.<sup>123</sup> But this case does not explicitly extend constitutional protections to LGBTQ+ people. It does not hold LGBTQ+ as a protected identity, nor does its reach and application make these gender purity laws unconstitutional. Chief Justice Robert's scathing dissent in *Obergefell* is telling—he argues that the Constitution does *not* protect LGBTQ+ people nor their right to marriage.

*Bostock v. Clayton County* is the closest The Supreme Court has ruled regarding constitutional rights and protection of LGBTQ+ people.<sup>124</sup> Here, The Supreme Court ruled that Title VII prohibits employer's discrimination based on sexual orientation or gender identity, because both are discrimination based on sex. However, even this case falls short of recognizing LGBTQ+ as a protected identity. Instead, this case is grounded in Title VII of the Civil Rights Act,<sup>125</sup> not extending constitutional protections to LGBTQ+ identities. Plus, The Supreme Court has not been consistent in protecting LGBTQ+ people against discrimination.

There have been two recent decisions where The Supreme Court ruled on very narrow terms. The Court has avoided the question as to whether LGBTQ+ identities are a protected class. First, in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, the Court avoided the question of whether LGBTQ+ identities are a protected class and instead ruled that the Civil Rights Commission was animus towards the cakeshop based on very specific facts.<sup>126</sup> Similarly, in *Fulton v. City of Philadelphia*, the Court once again dodged extending LGBTQ+ rights by ruling that the city was being animus

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122 *Lawrence v. Texas*, 539 U.S. 558 (2003). This explicitly overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986) which had upheld sodomy laws and denied any protection to LGBTQ+ people.

123 *Obergefell v. Hodges*, 574 U.S. 1118 (2015).

124 *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

125 42 U.S.C.S. §2000e-2(a)(1).

126 *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018).

towards Catholic Charity Services by not giving it an exemption.<sup>127</sup>

But these two cases reveal something more telling; in both cases, the Petitioners alleged that it was their *religious freedom* that requires them to discriminate based on LGBTQ+ status. Masterpiece Cakeshop refuses to bake cakes for gay weddings, and this is allowed for now. Catholic Charity Services actively prevents LGBTQ+ people from becoming foster parents, because of its own religious beliefs. Very recently, the Supreme Court just upheld someone's right to discriminate against LGBTQ+ identities based on "religious freedoms" in *303 Creative*.<sup>128</sup> Plus, many states like Iowa, are trying to remove gender identity as a protected class under the Iowa Civil Rights Act, in the name of religious freedom.<sup>129</sup>

#### V. Conclusion—Been There, Done That

For years, this country enforced racial purity laws, citing innate biological differences and religion. Today, this country is currently enforcing gender purity laws, citing the exact same reasons. One of these has been held unconstitutional, one has not. But from a zoomed-out perspective, these laws operate very similarly. Those in power are defining innate identities, based on a social construct, for the purpose of exclusion. They are externally defining identities through binaries instead of allowing identities to flourish with all of their complexities. Hopefully, enough people can see these similarities and "learn from history." Because this country desperately needs to not repeat itself with more "purity laws" based on identity.

Or maybe this is exactly what the United States does: define to exclude. Maybe the underlying values of the United States have never changed; that it's acceptable to discriminate based on identity as long as one can defend that discrimination through "innate biology" and "religious freedom." Up until recently, only white meant full citizenship. Only man meant full citizenship. And today, under many of these gender purity laws, only cisgender means full citizenship.

Advocates can argue that LGBTQ+ identities should be a recognized protected class, but that likely will not pass the "deeply rooted in history and tradition" standard that the majority on today's Supreme Court adhere to. Advocates can argue that governmental discrimination by identity in education, healthcare, sports, and bathrooms each would only receive rational basis review, but collectively demand higher scrutiny—similar to the argument in

<sup>127</sup> *Fulton v. City of Phila.*, 141 S. Ct. 1868 (2021).

<sup>128</sup> *303 Creative v. Elenis*, 600 U.S. \_\_\_\_ (2023).

<sup>129</sup> 2021 Iowa House File 272 <https://www.legis.iowa.gov/legislation/BillBook?ga=89&ba=HF%20272&v=i>.

*Plyler v. Doe*.<sup>130</sup> But advocates should also argue that these gender purity laws operate in the same way as racial purity laws—they define to exclude based on an identity. Advocates should argue that The Supreme Court already decided this issue, and this discrimination is unconstitutional. In the end, advocates need to argue that the government cannot exclude based on people’s intrinsic identities, based on a social construct. This country cannot let these gender purity laws continue to spread, because it will only lead to more discrimination and hate.

#### VI. One Final Thought

So, what is a woman? We could leave the defining up to each individual person. Each person can define for themselves if they are a woman. Alternatively, a working definition could be the following, “A woman is one of the multitude of genders on a spectrum within the social construct of gender which people can identify with; identifying with this gender leads to social expectations, norms, and repression over one’s body, autonomy, and opportunity.”

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<sup>130</sup> *Plyler v. Doe*, 547 U.S. 202 (1982).

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