LET IT BURN: REPRESSION, RESOLUTION, REVOLUTION

NATIONAL LAWYERS GUILD REVIEW ISSUE 80
VOL. 2, NO. 1

Nottoway Plantation, Louisinana, Summer 2025

National Lawyers Guild Review

Volume II

"Repression, Resolution, Revolution"

Table of Contents

Marsha P. Johnson(top right) and The Stonewall Uprising, 1968

.

BE GAY DO CRIME: EVERYDAY ACTS OF QUEER RESISTANCE AND REBELLION (PM Press 2025).

ZANE MCNEILL, RILEY CLARE VALENTINE, & BLU BUCHANAN.

Reviewed by Nathan Poirier

This book arrived immediately in the wake of the self-defense action taken against Charlie Kirk. Largely because of that, this book has faced unfair backlash from people who clearly have not read it but chose to take a reactionary stance against this book's brilliant title to weaponize their interpretation of "crime." Interestingly, this book has the same main title as another earlier the same year (Llewellyn and Buckley 2025) composed of fictional stories—albeit one that imagines two women assassinating the current president during a speech, mirroring Trump's near assassination in July 2024. Yet somehow, that book seems to not have been given the same level of scrutiny, despite that fiction can be a vehicle for real life actions.

Be Gay, Do Crime compiles snippets from LGBTQ+ history organized chronologically throughout the year on a day-by-day basis. Entries range widely from what might be more expected topics such as birth and death dates of particularly prominent figures, to famous events such as Stonewall or supreme court or other major political rulings, to more obscure happenings such as Harvey Milk opening a camera shop that became a community gay hub. Entries also include negative instances such as General Francisco Franco amended criminalizing homosexuality in Spain in 1933.

Even being composed of short, fragmented paragraphs (although editors do connect entries by referencing other entries of the same person or event and directing readers to those relevant dates), there is much that can be gleaned for social movement. One perhaps obvious takeaway is the history of LGBTQ+ movements. By going over these entries, one can gain a sense of just how long and varied "gay" activism has been. Current movements and their practitioners, whether they are aware of it or not, have been influenced by past actions. For instance, movements today that are "against equality" inherited the mainstream push for gay marriage to become legal and argue against such tactics via the downfalls of a politics of visibility. Having an idea of who did what and when can help someone feel as if they are part of a long lineage of resistance, a community as it were. They can look back at what worked and what didn't work so well to adjust for the present times. These lessons and sense of belonging are invaluable.

Another movement point is that social movements do not have to be composed of only outward actions like street protests. Other acts of resistance could include publishing journals, papers, or other radical literature (such as those by James Baldwin, see August 2, 1924; creating works of art (photos, film, paintings, etc., see September 15, 1988); or lone direct actions against oppressive situations (see September 16, 2019). One may be reminded of the saying that "existence is resistance." But this can be misleading. Merely existing in a state of barely staying alive is not necessarily resistance. In fact, it may represent being in a state of oppression. Also, as Marquis Bey has argued with respect to race, and J. Smilges with disability, one's hegemonic identity may not correspond to a political identity. This has nuance I can't go into here, but what this book does is present political acts of resistance.

Third, one can glean that LGBT+ movement need not consist of a mass of individuals working together on a particular shared task. It can, and is, composed of individuals to be sure, but they can be working on very disparate acts of resistance that together make up the movement on the whole. So a camera shop in California, a book published through a London, UK publisher, and a meet-up at a local coffee shop are all part of the same general movement even if no one in any of these actions is connected to anyone else in any of the others. Ideologies, strategies, tactics, and overall approach can—and should—diverge wildly. This variation not only represents the inherent variability (one might use the word "diversity") not only among queers themselves but also provides a multifaceted attack on the status quo. These various versions will appeal to different potential and would-be allies helping to grow the overall movement and also speaks to a multi-pronged system of domination. Somewhat of a death by 1000 cuts. It is exceedingly valuable to not rest a movement on a single approach. As an extension of this, movement "success" does not come in a single action, and certainly not by a single person. Success is a cumulation of innumerable people and diversity of acts that continuously unfold over time. This book shows that.

It should be noted that all of the above lessons are general, they should apply to any movement for liberation. But Be Gay, Do Crime applies all of them to an LGBT+ context.

Due to the nature of this book, it is best read more or less on pace with the entries, that is, one day's worth of entries per day—kind of like a "word-of-the-day" desk calendar, but of queer history. Reading this straight through like a proper book will likely cause entries to blur together. This book functions more like a reference volume, a jumping off point for people to learn about individuals and events they may not have been aware of. Readers can then follow up on those topics by pursuing other sources. As such, this is a good starter text for someone just getting into or curious about gender-based activism. However, given that there are well over 365 entries in this book, even a seasoned gender researcher will likely find something new in this book. One can easily read (or skim) this book to find inspiration for action, and find ideas for what kind of action may be right for them—for you!

Fidel Castro And Malcom X meet up at Hotel Theresa in Harlem, New York.
September 19, 1960

The Legality of the Executive Order Imposing Sanctions on the International Criminal Court

Curtis Doebbler[1]

Background

The International Criminal Court (ICC), established by the Rome Statute of 1998, represents the international community's most ambitious endeavour to end impunity for the most serious crimes of concern to all humanity: genocide, crimes against humanity, war crimes, and the crime of aggression. Its jurisdictional triggers—complementarity, territoriality, and Security Council referral—are carefully calibrated constructs of international law, designed not to supplant national systems but to act when they are unwilling or unable to do so genuinely.

As a pivotal figure in the post-WWII legal order, the US was a key participant in the Rome Conference, but ultimately chose not to ratify the treaty. It did this, however, after President Clinton signed the Rome Statute in 2000,[2] thereby expressing an intention to ratify it. However, two years later the Bush Administration withdrew the signature of the US.[3] Nevertheless, the Bush Administration cooperated with the ICC on its Darfur investigation.[4] At the same time the Bush Administration entered into Article 98 Agreements—bi-lateral agreements allowed between States—that were used to protect American nations in the Rome Statute States.[5] This led to an increasingly tense relationship between the US and the Court that came to a head in 2020 when President Trump attempted to impose sanctions on the Court during his first term in office.[6] Although President Biden rescinded these sanctions,[7] he made no attempt to ratify the Rome Statute.

When Trump was re-elected he almost immediately re-imposed the prior sanctions on February 6, 2025, by promulgating an Executive Order (EO) entitled "Imposing Sanctions on the International Criminal Court" with an Annex of names of individuals to whom the sanctions apply.[8] The EO relies on the International Emergency Economic Powers Act[9] and the National Emergencies Act,[10] which grant the President broad powers to regulate international commerce during national emergencies, and the American Service Members' Protection Act,[11] that provides for the protection of US military personnel and officials from prosecution by international courts, it doesn't explicitly authorize sanctions against the ICC or persons cooperating with the ICC. Although the Annex was not made public, the US Department of the Treasury's Office of Foreign Assets Control has identified specific individuals and entities sanctioned under the authority of this EO through its standard public

1 Curtis Doebbler is Research Professor of Law at the University of Makeni in Sierra Leone and an American attorney.
2 Bellinger, J.B., "The United States and the International Criminal Court: Where We've Been and Where We're Going," Remarks to the DePaul University College of Law (April 25, 2008) https://2001-2009.state.gov/s/l/rls/104053.htm (accessed 3 October 2025).
3 Letter from John R. Bolton, Under Sec'y of State for Arms Control & Int'l Sec., to Kofi Annan, Sec'y-Gen., U.N. (May 6, 2002) , available at https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm.
4 Bellinger, J.B., "What President Biden and the ICC Prosecutor Should Do to End the United States–ICC Conflict," U.S. Sanctions Debate — Should the U.S. Use Sanctions to Try to Influence the Actions of the ICC?, ICCForum.com (January-June 2021) , available at https://iccforum.com/sanctions.
5 See generally, Galbraith, J., "The Bush Administration's Response to the International Criminal Court," 21 Berkeley Law Journal 283 (2003).
6 Exec. Order No. 13,928, 3 C.F.R. 13,928 (2020), reprinted as amended in 50 U.S.C. § 1701 note, and at 85 Fed. Reg. 36,139 (June 11, 2020). Also see, Hathaway, O.A. "The Sovereign's Immunity: The Trump Administration's Effort to Sanction the International Criminal Court," 62 Harv. Int'l L.J. 1 (2021).
7 Executive Order 14,022, signed on April 1, 2021, which took effect on April 2, 2021.
8 President of the United States, Executive Order Imposing Sanctions on the International Criminal Court ("EO"), Executive Order 14,203, 90 Fed.Reg. 9369 (2025).
9 50 U.S.C. 1701 et seq. (1977).
10 50 U.S.C. § 1601-1651 (1976).
11 22 U.S.C. 7421, et seq. (2002).

listing procedures.[12] The Executive Order aims to deter cooperation with the ICC and block the ICC's actions with which the US does not agree by imposing mainly monetary and immigration-based consequences on entities and their family members cooperating with the ICC or supporting the work of the ICC.

Consequences of the Executive Order

The EO contains two threats of action. First, US citizens who cooperate[13] with the ICC could face having their property and assets in the United States or cooperating countries being frozen if they encourage the prosecution of an international criminal who is a US person[14] or a foreign person who is a citizen or lawful resident of a US ally who has not consented to the ICC's jurisdiction.[15] The EO gives the Secretary of State broad power to determine who is subject to the penalties.[16] Example of individuals covered by the EO and subject to its sanctions include human rights attorneys who provides the ICC with information about international crimes committed by American citizens; journalists in NATO countries who, acting on a tip, conducts a series of interviews that uncover and provide to the ICC the financial records of a current or former US official alleged to be involved in war crimes; foreign staff of human rights organizations who collect and submit forensic evidence to the ICC to support an arrest warrant for Israeli officials concerning their participation in the genocide in Gaza; and immediate family members of any of the above individuals whether they even know of the concerned conduct.

Second, in addition to financial sanctions there are immigration consequences for foreign nationals. Immediate family members (spouses and children) of a US citizen may be denied entry into the United States and future visa restrictions.[17] These immigration consequences can be in addition to the financial consequences, which are the same as those for US citizens, especially as concerns funds or property in the US or a country that decides to comply with the US sanctions. The Trump administration has even suggested that Americans might be banned or removed from the US, but it is hard to see how such actions would be compatible with the US Constitution[18] or international law.[19]

The unambiguous intent of the EO is to prevent the prosecution of individuals the US favors despite credible evidence that these persons have committed serious international crimes such as war crimes, crimes against humanity, and genocide.

The Legality of the Executive Order

There are several legal grounds on which the EO can be challenged. These grounds can be raised concurrently before the US courts. The first four grounds are challenges based on the US Constitution and, of course, relevant before the US courts. The fifth ground is based on international law and is relevant before US courts and international bodies.

12 See, for example, U.S. Dep't of Treasury, Office of Foreign Assets Control, Specially Designated Nationals and Blocked Persons List (SDN) Human Readable Lists (Oct. 29, 2024), available at https://sanctionslist.ofac.treas.gov/Home/SdnList (accessed on 29 October 2025).

13 Cooperating is defined as materially assisting, sponsoring, or providing financial, material, or technological support for, or goods or services to or in support of, any effort by the ICC to investigate, arrest, detain, or prosecute a protected person without consent of that person's country of nationality or any person whose property or interests in property are blocked pursuant to this order or own or control or have acted or purported to act for or on behalf of, directly or indirectly, any person whose property or interests in property are blocked pursuant to this order.

14 This includes US citizens, permanent resident aliens, any entity organized under US laws, or any persons in the United States. EO, Sec. 8(c).

15 EO, Sec.1(a).

16 EO, Sec. 1(a)(ii).

17 EO, Sec. 4.

18 See United States v. Wong Kim Ark, 169 U.S. 649 (1898) (finding that Chinese-American Wong Kim Ark, as a naturalized US citizen, could not be barred from entering the US).

19 Art. 12(2) and (4), ICCPR, infra note 49, and art. VIII, ADRDM, infra note 50.

Executive Authority

The EO can be challenged for being inconsistent with the Constitution of the United States because it exceeds the President's authority under the Constitution, which requires the President to "take Care that the Laws be faithfully executed."[20] The President's power to issue executive orders must stem from either an act of Congress or the Constitution itself. If it does not it is an unconstitutional exercise of Executive authority. The Supreme Court has already established a precedent for finding a President's exercise of Executive authority unconstitutional. In *Youngstown Sheet & Tube Co. v. Sawyer*,[21] the Supreme Court found that President Truman's order to seize steel mills during the Korean War exceeded his constitutional authority because the power to effectuate such a seizure was a legislative function belonging to Congress, and Congress had neither expressly nor implicitly granted him that authority.[22] The Youngstown analysis essentially requires courts to define the President's act as pursuant to express or implied congressional authorization, in the absence of congressional grant or denial of authority, or an act that is incompatible with the express or implied will of Congress.

The Supreme Court has adhered to Youngstown in subsequent cases, even when it upheld Executive authority. For example, during the Cold War the Court upheld President Carter's use of an executive agreement to suspend claims against Iran during the hostage crisis.[23] The Court found that Congress had implicitly approved of such executive action through its historical acquiescence and related statutes.[24] More recently, the Court in Hamdi v. Rumsfeld, Justice O'Connor in her plurality opinion invoked Youngstown to argue that "a state of war is not a blank check for the President."[25] And in Hamdan v. Rumsfeld the Court struck down military commissions created by an Executive Order of President Bush for Guantanamo detainees holding that the commissions violated US and international law and were not authorized by Congress.[26] This was a direct and powerful use of Youngstown to invalidate a core executive wartime policy.

The Court followed its Youngstown reasoning in Biden v. Texas, citing Youngstown to reject the Executive's argument that the executive branch has sole and un-reviewable authority over immigration enforcement.[27] In *National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration*[28] and *West Virginia v. Environmental Protection Agency*[29] the Court held that agencies cannot decide issues of vast "economic and political significance" without clear congressional authorization.[30] In other words, the Court has consistently held that if the Executive is acting on a matter of major national importance without a clear statement from Congress, it is presumed to be acting contrary to the implied will of Congress.

Separation of Powers

The EO may also violate the separation of powers doctrine inherent throughout the Constitution because it encroaches on legislative powers. The Constitution vests the legislative power in Congress, and Executive

---

20 U.S. Const. art. II, § 3.
21 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
22 Id.
23 Dames & Moore v. Regan, 453 U.S. 654, 686-89 (1981).
24 Id. at 686-88.
25 Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (plurality opinion).
26 See Hamdan v. Rumsfeld, 548 U.S. 557, 593-95, 624-35 (2006) (striking down President Bush's military commissions because they were not expressly authorized by Congress and because their procedures violated the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions).
27 Biden v. Texas, 597 U.S. 785, 808 (2022).
28 National Federation of Independent Business v. Department of Labor, Occupational Safety and Health Administration, 595 U.S. ___, 141 S. Ct. 661, 665-66 (2022) (per curiam).
29 West Virginia v. Environmental Protection Agency, 597 U.S. ___, 142 S. Ct. 2587, 2608-09, 2614-16 (2022).
30 See, notes 23 and 24, respectively, 141 S. Ct. 665-66 and 142 S. Ct. 2608-09, 2614-16.

Orders cannot create new powers for the President. As far back as *Marbury v. Madison*,[31] the Supreme Court has struck down Executive Orders that overstep this boundary. As Congress has not passed a law specifically allowing the President to sanction entities cooperating with the ICC, the President relied on the International Emergency Economic Powers Act,[32] the National Emergencies Act,[33] and the Service Members' Protection Act.[34] The International Emergency Economic Powers Act grants the President broad powers to deal with an "unusual and extraordinary threat... to the national security, foreign policy, or economy of the United States.[35]" When a national emergency is declared the International Emergency Economic Powers Act allows the President to block transactions and freeze assets under US jurisdiction, but it provides no specific reference to the ICC nor does the extension to activities concerned with the ICC appear to have been intended by Congress. Similarly, the National Emergencies Act allows the President to designate emergency situations, but it provides no explicit authority for sanctions. And the Service Members' Protection Act provides for the protection of US military personnel and officials from prosecution by international courts, but it does not explicitly authorize sanctions against the ICC or persons cooperating with the ICC.

Freedom of Expression

The EO may infringe upon the constitutional right to freedom of speech in the First Amendment that protects the freedom to communicate information to others.[36] This freedom may only be limited for specific reasons related to crucial national interests.[37] As the EO appears to punish individuals for the content of their speech its application will likely not survive the strict scrutiny required for interferences on individuals' freedom of expression. Thus, while government can restrict speech that poses a threat to national security when there is a "clear and present danger" to national security,[38] it cannot do so based on mere speculation of a danger.

The limits on freedom of speech have been articulated by the Court. Speech that constitutes a true threat towards an individual or group is not protected, but such speech must include threats of violence or harm.[39] Speech that is considered obscene and lacks serious literary, artistic, political, or scientific value is not protected.[40] Libel, written defamation, and slander, spoken defamation, are not protected forms of expression.[41] And speech that incites imminent lawless action and is likely to produce such action is not protected.[42] The government may also impose reasonable restrictions on the time, place, and manner of speech, especially in public spaces, to ensure public safety and order, but cannot prohibit protected speech.

It is unlikely that any of the just-named reasons can be invoked to override the freedom of expression under the First Amendment as providing information about individuals committing international crimes would appear to be in the national interest and at best could very speculatively lead to harm. It contains no threats of

31 5 US (1 Cranch) 137 (1803).
32 50 USC. 1701 et seq. (1977).
33 50 USC. § 1601-1651 (1976).
34 22 USC. 7421, et seq. (2002).
35 50 U.S.C. § 1701(a) (2018).
36 U.S. Const. amendment 1. See Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853 (1982) (plurality opinion) (stating "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom." Id. at 867).
37 See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) (holding that "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment... [and] must be subjected to the most exacting scrutiny"). Id. at 118.
38 See Schenck v. United States, 249 US 47 (1919).
39 See Virginia v. Black, 538 U.S. 343 (2003) (holding that "'[t]rue threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.") Id. at 359.
40 See Miller v. California, 413 U.S. 15, 24 (1973).
41 See New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964).
42 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam).

violence, it is not obscene, it is not libelous if based on honest facts, and it does not incite lawless action. In fact, the speech being prohibited by the EO promotes law enforcement.

Due Process

The suspension of entry for US citizens and their families to the United States could be challenged on due process grounds.[43] The Fifth Amendment guarantees that no person shall be deprived of life, liberty, or property without due process of law. This could be a basis for legal challenges to the EO by any person affected by restrictions on their entry to the US. The due process clause of the Fifth Amendment "provides heightened protection against government interference with certain fundamental rights and liberty interests."[44] When a fundamental right is at stake, the government can act only by narrowly tailored means that serve a compelling state interest.[45] Even if the US government may be able to deny entry to family members of a US citizen,[46] it is very unlikely to be able to deny a US citizen entry to the US.[47]

International law

The EO also appears to conflict with treaties that the US has ratified as well as customary international law. In principle this could raise issues under the supremacy clause of the Constitution, which establishes that treaties are the "supreme Law of the Land"[48] and that customary international law or the "law of nations" must be respected by the courts of the US.[49] The US Supreme Court, however, has also determined that some human rights treaties, which have as their object and purpose the protection of individual rights, do not create rights for individuals that can be raised in US courts.[50] However, failing to act in a manner consistent with international law, including international human rights law can have significant importance for the reputation of the US within the United Nations system and in the even wider realm of international affairs. States that do not abide by their international legal obligations can be treated and sometimes even publicly branded as 'rogue States'.[51] The US risks such isolation if it acts in a manner that is inconsistent with its international legal obligations to respect the rights to freedom of expression, to due process, and to ensure individuals are not subjected to treatment that is inhuman, degrading or constitutes torture.

Freedom of expression is protected in article 19 of the International Covenant on Civil and Political Rights, a treaty the US has ratified,[52] and under article IV of the American Declaration of the Rights and Duties of Man.[53] These treaties also provide for due process protections[54] and the prohibition of torture, inhumane or

43 U.S. Const. amendment 5.
44 See Washington v. Glucksberg, 521 US 702, 720 (1997).
45 See Washington v. Glucksberg, 521 U.S. 702, 721 (1997).
46 See Dep't of State v. Muñoz, 602 U.S. 899 (2024).
47 See Trump v. Hawaii, 585 U.S. 667, 702 (2018).
48 U.S. Const. art. VI, § 2, cl. 2.
49 U.S. Const. art. III, § 2, cl. 1, and Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (stating that "[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations [i.e. customary international law]"). Id. at 729.
50 Sosa v. Alvarez-Machain, 542 U.S. 692, 735 (2004). This is counter to the understanding of the founder fathers, see, for example, The Federalist No. 3, at 22 (John Jay) (Jacob E. Cooke ed., 1961); the early precedents of the Court itself, see, for example, Ware v. Hylton, 3 U.S. (3 Dall.) 199, 236-37 (1796); and the very nature of human rights treaties that have the overriding purpose of creating rights for individuals.
51 See, generally, O'Reilly, K.P., "Perceiving Rogue States: The Use of the 'Rogue States' Concept by U.S. Foreign Policy Elites," 3 Foreign Policy Analysis 295-315 (2007), for a history and general explanation of the US government's use of the concept of a rogue States.
52 International Covenant on Civil and Political Rights (ICCPR), art. 19, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).
53 American Declaration of the Rights and Duties of Man (ADRDM), art. IV, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, O.A.S. Doc. OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).
54 Arts. 9 and 14, ICCPR, supra note 49, and arts. XXV and XXVI, ADRDM, supra note 50.

degrading treatment.[55]

The UN Human Rights Committee has held that sanctions such as expelling[56] or imprisoning[57] a lawyer due to his representation of individuals. Moreover, in the case of lawyers representing clients, the principle is well established that lawyers must not be identified with their clients or their causes.[58] And in addition, individuals who cooperate with the ICC in good faith to bring international criminals to justice are likely human rights defenders, for whom there are additional mechanisms of protection. For example, the adoption of the Declaration on Human Rights Defenders[59] by the United Nations, led to the creation of the post of Special Rapporteur on the situation of human rights defenders to monitor and intervene with States where human rights defenders are mistreated. The Inter-American Commission similarly adopted a resolution on human rights defenders[60] and created the Office of the Special Rapporteur for Human Rights Defenders and Justice Operators to monitor the situation of human rights defenders in the Inter-American region and to issue reports and call for urgent precautionary measures where human rights defenders are mistreated and threatened with mistreatment. These mechanisms can be employed against the US to subject it to significant international condemnation if the EO is implemented.

Finally, the EO is undoubtedly contrary to the Rome Statute of the International Criminal Court itself. Thus although the US is not a party to the Rome Statute, its sanctions are likely to be unenforceable in any country that is a party to the Rome Statute.

Legal Challenges to Executive Order to-Date

Almost immediately after the EO was issued on 6 February 2025, on 15 April 2025, Gabor Rona and Lisa Davis (the Plaintiffs), two law professors teaching at law schools in New York City and who provide advice to the ICC, challenged its constitutionality.[61] The civil suit filed in the US District Court for the Southern District of New York claimed the EO:

"Threatens to unconstitutionally impose civil and criminal penalties, including up to 20 years' incarceration, on Plaintiffs for providing education, advice, training, information, analysis, and other services to or for the benefit of the Prosecutor of the ICC, in aid of the ICC's investigation and prosecution of war crimes, crimes against humanity, and genocide."

The Plaintiffs arguments were framed (1) the EO violated the First Amendment, (2) the EO was unconstitutionally vague, and (3) the EO was ultra vires the International Emergency Economic Powers Act on which

55 Arts. 7 and 10 (for detained persons), ICCPR, supra note 49, and arts. I, XXV and XXVI, ADRDM, supra note 50.
56 See Eric Hammel v. Madagascar, Human Rights Committee, Comm. No. 155/1983, UN Doc. CCPR/C/29/D/155/1983 (3 April 1983), find a violation of the prohibition against arbitrary detention in article 9, para. 4 of the ICCPR because Madagascar deported a French lawyer who was also admitted to the Madagascar bar due to the client he was representing.
57 Ramón B. Martínez Portorreal v. Dominican Republic, Human Rights Committee, Comm. No. 188/1984, UN Doc. CCPR/C/31/D/188/1984 (5 November 1987), finding violations of ICCPR arts. 7 and 10, para. 1, because the lawyer was detained and subjected to inhuman and degrading treatment and to lack of respect for his inherent human dignity during his detention; art. 9, para. 1, because the lawyer was arbitrarily arrested; and, art 9, para. 2, because the lawyer was not informed of the reasons for his arrest.
58 See Principle 18, UN Basic Principles on the Role of Lawyers, pmbl., U.N. Doc. A/CONF.144/28/Rev.1 (7 September 1990) (last accessed 12 October 2025), and Principle 7, Standards for the Independence of the Legal Profession of the International Bar Association, (Int'l Bar Ass'n 1990), https://www.ibanet.org/MediaHandler?id=F68BBBA5-FD1F-426F-9AA5-48D26B5E72E7 (last accessed 12 October 2025).
59 Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (known as the UN Declaration on Human Rights Defenders), G.A. Res. 53/144, U.N. Doc. A/RES/53/144 (Mar. 8, 1999).
60 Inter-Am. Comm'n H.R., Resolution on Human Rights Defenders: Support for the Individuals, Groups, and Organizations of Civil Society Working to Promote and Protect Human Rights in the Americas, AG/RES. 2067 (XXXV-O/05) (7 June 2005).
61 Rona and Davis v. Trump, Complaint, Case number 1:25-cv-03114 (SDNY, Apr.16, 2025)

it was allegedly based. The court issued a permanent injunction in favour of the Plaintiffs on 30 July 2025[62] and a final judgement on 18 August 2025[63] confirming its decision and permanently enjoining the US government from enforcing the civil or criminal penalties against the defendants. The government did not appeal.

Rone and Davis v. Trump had been preceded by the 2020 case of *Open Society Justice Initiative v. Trump*,[64] in which the plaintiffs argued that the freedom of expression (First Amendment) and due process (Fifth Amendment) had been violated by Executive Order. While the plaintiffs successfully argued for a preliminary injunction, the case was ultimately dismissed when the Biden administration withdrew the 2020 Executive Order 14,022.[65]

Similarly, in *Smith v. Trump*,[66] the ACLU on behalf of several human rights advocates obtained a preliminary injunction on First Amendment or freedom of expression grounds. And in *Iverson v. Trump*,[67] an employee working for the Prosecutors Office of the ICC successfully argued for a temporary order restraining the US government from applying the sanction against him.

Although each of these cases only apply to the plaintiffs bringing the actions, the reasoning of the different federal courts is compatible with each other shows a strong concurrence of federal judges about the unlawfulness of the various Executive Order sanction regimes.

Conclusion

While the EO is intended to have a stifling effect on cooperation with the ICC to protect US citizens, particularly officials of the US government, and allies it is unlikely that its sanctions can be applied consistent with existing US or international law. In any event, its application is likely to be challenged in the US courts, if it is applied. Perhaps an overriding question that Americans should ask themselves is do they want to allow individuals who commit crimes that have been sanctioned as the most hideous and destructive of human life to be allowed to continue to live in their communities because the President wants to grant them impunity. In this situation it is hoped that lawyers of conscience will continue to strive to uphold John Adams' belief that the US has "A government laws, and not of men".

---

62 Rona and Davis v. Trump, Opinion and Order granting Permanent Injunction, Case number 1:25-cv-03114 (SDNY, July 30, 2025).
63 Rona and Davis v. Trump, Judgement, Case number 1:25-cv-03114 (SDNY, Aug. 18, 2025)
64 510 F. Supp. 3rd 198 (S.D.N.Y. 2021) (Gabor Rone was also one of the plaintiffs in this case).
65 See supra note 7.
66 No. 1:25-cv-00158-NT (D. Me. July 18, 2025).
67 No. 1;25-cv-03222 (S.D.N.Y. May 15, 2025).

Photo Document of Afro-Asia Conference in Bandung, Indonesia 1955

Chilling Freedom of Speech at Higher Education Institutions: Then & Now

*By Aislin Murphy**

Table of Contents

Abstract

Several scholars and organizations have noted the striking similarities in institutional responses to on-campus student protests against the Vietnam War in the 1960s and 1970s and institutional responses to modern day on-campus Pro-Palestine student protests. This Comment builds on these comparisons by examining institutional responses specifically to Kent State University's Vietnam War protests and institutional responses to the University of Texas-Austin's Pro-Palestine protests.

This examination will reveal a history of discriminatory adoption and enforcement of Time/Place/Manner restrictions by public Higher Education Institutions (HEIs) and federal and legislative attempts to restrict students' First Amendment rights when faced with large-scale on-campus student protests that challenge basic aspects of neoliberalism and American military involvement abroad.

The Comment will additionally posit that the tension that arises between the First Amendment and Title VI and IX would be partially resolved if HEIs were to use a minority rights protecting framework that advances equity rather than equality in disciplinary actions involving student protest and enforcement of Time/Place/Manner restrictions.

Introduction

During my freshman year of undergraduate studies at UC Santa Cruz (UCSC), academic workers went on a wildcat strike for weeks on end to demand Cost of Living Adjustment in their salaries.[1]

When they collaborated with undergraduate students to stage mass protests, the police were called to campus– peaceful protestors were met with paddywagons and officers in riot gear, physical violence and military surveillance were used on students, and 82 graduate students were fired.[2]

Since I graduated, academic workers have continued to organize strikes, adding to their demands on May 10, 2024, divestment from "weapons manufacturers, military contractors, and companies profiting from Israel's war on Palestine."[3] The related strikes and protests have led to an increased police presence on UCSC's campus, student and student organization suspensions, and seizures of students' personal property.[4]

Per UCSC's mission statement, the university values social justice and student-centered learning that champions "the open exchange of ideas".[5] Watching an institution continue to punish students and workers for protesting for social justice, despite its own stated values, over the course of several years, was disappointing. But this phenomenon did not begin or end with UCSC. The history of American public Higher Education Institutions (HEI's)— and executive powers and legislative bodies— attempting to chill and punish students' exercise of their First Amendment rights on campus has existed as long as HEI's have existed, and are exemplified in responses to modern Pro-Palestine demonstrations in the last year and historically in responses to protests against the Vietnam War in the 60's and 70's.

Public institutions of higher education, like most other public forums, are legally allowed to regulate First Amendment rights by instituting time/place/manner restrictions.[6] Time/place/manner restrictions are con-

---

1 *J.D. Candidate, 2026, University of Richmond School of Law
Wildcat Campaign Timeline, pay us more ucsc, https://payusmoreucsc.com/wildcat-campaign-timeline/.
2 Id.
3 2024 Strike Resources Background: UAW 4811 strike demands, pay us more ucsc, https://payusmoreucsc.com/resources/.
4 2024 Daily Sheets- Day 15, pay us more ucsc, https://payusmoreucsc.com/2024-daily-sheets/.
5 Mission and Vision, UCSC, https://www.ucsc.edu/mission-and-vision/.
6 See Andrea Jane Martin, Balancing Freedom of Expression and Equality on College Campuses in the Wake of Intensified Antisemi-

stitutionally permissible limits set by government actors on when, where, and how citizens may protest; they must be content-neutral, "narrowly tailored to serve a significant government interest", and leave open ample other channels of protest.[7] These limits are often a well-meaning attempt to protect student safety and their access to education.[8] In reality, institutions respond to controversial protests that do not champion neoliberalism—that is, in the HEI context, the concept that privatization and corporatization of public funds and services actually serves the public best[9]— with seemingly content-neutral time/place/manner restrictions and consequently chill the speech of student groups seeking peace abroad.[10]

This Comment will specifically examine responses to Kent State University's Vietnam War protests and responses to the University of Texas-Austin's Pro-Palestine protests. These case studies will demonstrate drastic federal and faculty misrepresentations of student demonstrations, legislative attempts to control campuses, and changes to or discriminatory enforcement of disciplinary codes when a student protest challenges basic aspects of neoliberalism.[11]

Further, because of the dual responsibility that HEI's have to protect student safety and promote the free flow of ideas, or between Title VI and IX and the First Amendment, tension arises.[12] This tension may be eased by a more intentional utilization of the tools HEI's have before them for responding to student protests. Specifically, HEI's ought to center marginalized individuals and speakers in decisions regarding use of outside law enforcement, time/place/manner restrictions, and public statements about student protests. Additionally, HEI's should employ an equity-based test for any liberty-limiting intervention they are considering employing against student protestors.

To effectuate this examination, the Comment proceeds in four Parts. Higher Education Students' First Amendment Rights are examined generally in Part I. Part II examines historical student protests against the Vietnam War and institutional responses to them. Part III examines modern student Pro-Palestine protests. Finally, Part IV will compare the problems illuminated by both case studies and illustrate how HEI's could reframe their decision-making to minimize any chilling effect on students' Freedom of Speech.

Part I: Student First Amendment Rights, Generally

Student Protests Prior to 1965: In Loco Parentis

In order to contextualize why discussion of First Amendment rights on public college campuses is necessary, a brief history of student First Amendment Rights and the concept of free speech as an educational,

---

tism, 90 Brook. L. Rev. 1, 49-51 (forthcoming Winter 2024).

7 Ward v. Rock Against Racism, 491 U.S. 781, 791 (quoting Clark v. Cmty. for Creative NonViolence, 468 U.S. at 293) (1986).

8 See, id.; See also Catherine E. Lhamon, Dear Colleague Letter: Protecting Students from Discrimination, such as Harassment, Based on Race, Color, or National Origin, Including Shared Ancestry or Ethnic Characteristics, U.S. Dep't of Edu. Off. Civ. Rights, 3-5 (May 7, 2024).

9 See, Jason Del Gandio, Neoliberalism and the Academic-Industrial Complex, TRUTHOUT (Aug. 12, 2010), https://truthout.org/articles/neoliberalism-and-the-academicindustrial-complex/.

10 See, e.g., Wrong Answer: How Good Faith Attempts to Address Free Speech and Anti-Semitism on Campus Could Backfire: A PEN America White Paper, PEN America, 7-16 (Nov. 7, 2017) https://pen.org/wp-content/uploads/2024/06/2017_wrong-answer_11.9.pdf; Kristina Clement, More than Free Speech: Politics, Higher Education, and the First Amendment, 4 (May 15, 2020) (Ph.D. dissertation, Georgia State University) (ScholarWorks), https://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1255&context=eps_diss.

11 See, e.g., Kristina Clement, More than Free Speech: Politics, Higher Education, and the First Amendment, 125-128 (May 15, 2020) (Ph.D. dissertation, Georgia State University) (ScholarWorks), https://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1255&context=eps_diss; Adam Federman, The Crackdown on Campus Protests Is Just Beginning, Type Investigations (June 20, 2024), https://www.typeinvestigations.org/investigation/2024/06/20/the-crackdown-on-campus-protests-is-just-beginning/.

12 See Catherine E. Lhamon, Dear Colleague Letter: Protecting Students from Discrimination, such as Harassment, Based on Race, Color, or National Origin, Including Shared Ancestry or Ethnic Characteristics, U.S. Dep't of Edu. Off. Civ. Rights, 2-3 (May 7, 2024).

American, and democratic value must first be established.

Prior to 1965, institutions of higher education operated largely, if not entirely, in loco parentis.[13] This means that students were subject to paternalistic regulations and disciplinary actions.[14] Even so, students protested throughout the early 1900's about several political topics that concerned them, usually sparked by wars, and when HEI's decided to punish them, it was without due process.[15]

The Classical Civil Rights Movement came to a peak in the 1950's and 1960's; this bred largely off-campus student involvement with activism.[16] The Free Speech Movement at UC Berkeley also occurred during this era, bringing forth some of the first on campus time/speech/manner restrictions.[17] The Dixon v. Alabama State Board of Education decision was made in 1961, creating the first federal standard that required public HEI's to include students in their own disciplinary hearings, under the basis of due process.[18] This marked the beginning of the end of in loco parentis in public HEI's.[19]

Key Doctrines & Legislation in the Post-In Loco Parentis Era of Higher Education Student First Amendment Rights

Colleges as Bastions of Free Speech

The First Amendment was ratified in 1791 as the first of ten amendments that would make up the Bill of Rights.[20] It enshrined the freedom of religion, freedom of speech, freedom of press, and freedom of assembly as fundamental rights of American citizens.[21] Today, many public HEI's have these concepts enshrined in mission statements.[22]

Students at public HEI's had their First Amendment Rights on campus protected and affirmed by the Supreme Court in a 1969 case, Tinker v. Des Moines Independent Community School District.[23] Students are, of course, held to the standards set by the Supreme Court's interpretation of the First Amendment– impermissible speech including imminent lawless action, true threats, and harassment but not hate speech.[24]

Time/Place/Manner Restrictions on Campuses

Under First Amendment jurisprudence, the kinds of regulations that can be applied to any given forum is directly related to the kind of forum where speech is being regulated.[25] Parks, sidewalks, and university meeting

---

13 Kristina Clement, More than Free Speech: Politics, Higher Education, and the First Amendment (May 15, 2020) (Ph.D. dissertation, Georgia State University) (ScholarWorks), 1-28 https://scholarworks.gsu.edu/cgi/viewcontent.cgi?article=1255&context=eps_diss.
14 Id. at 12-13.
15 In the 1920's, student protests of HEI administrations often resulted in expulsions without student participation in disciplinary hearings. In the 1930's, American public HEI's saw the first wave of student activism championing leftist ideals like peace, better conditions for the working class, and student involvement in university governance. It was at this time that the parent organization for Students for a Democratic Society (SDS), a nationwide student organization that became known for its anti-Vietnam War protests, was born. The 1950's saw a surge in conservative student activism championing Anti-Communism. Id. at 1-28.
16 Id. at 39-49.
17 Id. at 32-34.
18 Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961)
19 Supra Note 13 at 28.
20 Library of Congress, Today in History- December 15, https://www.loc.gov/item/today-in-history/december-15/.
21 Id.
22 See, e.g., UC Santa Cruz, Mission and Vision, https://www.ucsc.edu/mission-and-vision/; University of Virginia, Mission Statement of the University of Virginia, https://provost.virginia.edu/faculty-handbook/mission-statement-university-virginia.
23 Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).
24 Supra Note 6 at 39-44.
25 See Kevin F. O'Neill, Disentangling the Law of Public Protest, 45 Loy. L. Rev. 411, 419-423 (1999), https://engagedscholarship.

facilities are traditional public forums that allow regulation of speech through "content-neutral" time, place, manner (TPM) restrictions—restrictions that limit when, where, and how people may protest.[26] Additionally, TPM restrictions must be "narrowly tailored to serve a significant government interest" and allow for ample other channels to communicate the same information.[27]

In his Article, First Amendment Rights on Trial: A Critique of the Time, Place, and Manner Doctrine, scholar Alec Greven illustrates at length several issues with TPM doctrine.[28] One of the issues he cites with the modern TPM doctrine is the way in which government actors have been able to essentially repackage TPM regulations aimed at quelling specific speech as "content-neutral" manner-based regulations by arguing that the regulation was simply put in place to protect some facet of public safety.[29] In other words, so long as an HEI couches a new TPM restriction in a justification that does not directly reference the content of the speech it is aiming to regulate, it is constitutionally valid, despite the possibility that the regulation only came to be to chill a specific class of speaker or kind of speech. He additionally argues that the TPM doctrine allows for selective enforcement based on viewpoint discrimination by government actors.[30]

The Free Speech Movement at UC Berkeley concluded with some of the first enshrined HEI TPM restrictions in the mid-1960's.[31] Similarly, Tinker provided that HEI's may prohibit speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others".[32] The President's Commission on Campus Unrest (PCCU) recommended HEI's all institute clear, content-neutral TPM restrictions in 1970.[33] HEI's quickly followed suit.[34] This led to the institution of Speech Zones and Codes in the 1980s through the 2000s.[35] Every Speech Code challenged in Court has eventually lost.[36] Speech Zones are widely opposed.[37]

Title VI and IX

At tension with the First Amendment, which protects hate speech, are Title VI and Title IX, which prohibit discrimination on the basis of race and on the basis of sex in public HEI's, respectively.[38] At least one jurisdiction has found that institutions are responsible for responding properly to hostility towards students, not in the form of punishment that would breach First Amendment rights, but in the form of public statements from the HEI or faculty or new educational forums.[39]

An issue that arises in this conception of proper and necessary responses from an institution of higher education is the freedom it allows faculty to opine and misrepresent vulnerable and minoritized students and student groups: what happens when a faculty member condemns a protest in a public statement, citing hatred or bias on the part of the organizers, that the organizers emphatically disagree with?[40] This presents a whole

csuohio.edu/cgi/viewcontent.cgi?article=1320&context=fac_articles.
26 Id.
27 See Alec Greven, First Amendment Rights on Trial: A Critique of the Time, Place, and Manner Doctrine, 77 Okla. L. Rev. 285, 287 (2025), https://digitalcommons.law.ou.edu/olr/vol77/iss2/3.
28 Id.
29 Id. at 314-317.
30 Id. at 329.
31 Supra Note 13 at 32-35.
32 Supra Note 23.
33 Supra Note 13 at 96-100.
34 HEIs recognized the recommendation as a way to maintain order and administrative power on campuses Id.
35 Id. at 127.
36 Id. at 7.
37 Id. at 7-8.
38 While the First Amendment trumps Title VI and Title IX, even at public HEI's, several jurisdictions are beginning to grapple with how public HEI's legally need to respond to hostility towards students that fall within Title VI and Title IX violations. Supra Note 12.
39 Id.
40 Take for instance, a faculty member erroneously conflating the Anti-Zionist rhetoric found in chapters of Students for Justice

new issue for minoritized students– being misrepresented on a university-wide or nationwide level when courts have found that faculty should, and sometimes must, opine on student protests if there are Title IX and VI based claims associated with them.[41] Scholars have argued that this practice chills, or even represses, free speech on campuses.[42]

Another solution for this tension that some scholars have advocated for (in the context of First Amendment rights at large) is the use of creative interpretations of the First Amendment. Scholars, Lucy Williams and Mason Spedding, argue that an interpretation of the First Amendment that recognizes the constitutive consequences and value of speech—that is the ability for speech to function not only as a tool for communication and persuasion, but as a process of culture and meaning making—would necessarily favor First Amendment jurisprudence that regulates hate speech.[43] Under this theory, a hate speech exception to the First Amendment would take into account the ability for certain speech to harm marginalized communities and protected classes; Williams and Spedding suggest that this hate speech exception could be realized if Courts were willing to see it as a permissible TPM restriction.[44]

Professor Genevive Lakier, is also concerned with illustrating a vision of the First Amendment that protects marginalized communities in her piece, Imagining an Antisubordinating First Amendment.[45] Lakier, though, argues that the modern Supreme Court has strayed from a "context-sensitive, substantive-equality-promoting view of the First Amendment" and trended towards a rigid, formalistic view; this has, in turn, created First Amendment doctrine that favors both the government and wealthy actors over marginalized speakers.[46] Her proposed solution to the lack of protection that First Amendment jurisprudence provides to marginalized people is not a hate speech exception, but a standard of review that factors in actors' social standing when analyzing the constitutionality of First Amendment restrictions. [47]

Both pieces present a creative solution to the tension that arises between Title VI and IX and the First Amendment, a solution that would not require HEI administrators to individually produce their own public statements on their support or distaste of specific student protest but rather charges the Court with taking speakers' social and cultural standing into account when evaluating restrictions on those speakers.

Part II: Student Protests Against the Vietnam War

Student Demands & Tactics

---

in Palestine (SJP) and Jewish Voice for Peace (JVP) with Anti-Semitism, as was the case with Dean Chemerinsky of UC Berkeley School of Law, leading to the Berkeley Journal of Black Law and Policy and Berkeley Law Jews for Palestine to author a piece entitled, 'Hypocritical and insulting': Black and Jewish students at Berkeley Law say Dean Chemerinsky uses them as props to vilify Palestine Solidarity Movement (Oct. 25, 2024) https://www.dailycal.org/opinion/op-eds/hypocritical-and-insulting-black-and-jewish-students-at-berkeley-law-say-dean-chemerinsky-uses-them/article_9cbe4ccc-9299-11ef-bec1-83f03a661cc9.html.

41 See, supra Note 13; Note 12.

42 To the Note 40 example, researchers have coined the phrase, "The Palestine Exception", to point out the hypocrisy in HEI encouragement of protests that do not center Palestinians and repression of protests in favor of Palestinian liberation. See Dina Awshah, Civil Rights? But Not for You: Chilling a Globalized Palestinian Resistance Movement's Freedom of Expression Protections as Guaranteed by the International Covenant on Civil and Political Rights, 53 Geo. J. Int'l L. 125 (Fall 2021); Palestine Legal & Center for Constitutional Rights, The Palestine Exception to Free Speech, Palestine Legal (2015) https://palestinelegal.org/the-palestine-exception; Wrong Answer: How Good Faith Attempts to Address Free Speech and Anti-Semitism on Campus Could Backfire: A PEN America White Paper, PEN America (Nov. 7, 2017) https://pen.org/wp-content/uploads/2024/06/2017_wrong-answer_11.9.pdf.

43 Lucy Williams and Mason Spedding, The First Amendment and Constitutive Rhetoric: A Policy Proposal, 99 N.Y. Univ. L. Rev. 1338, 1376 (Oct. 2024) https://nyulawreview.org/wp-content/uploads/2024/10/99-NYU-L-Rev-1338.pdf.

44 Id. at 1378-79.

45 Genevieve Lakier, Imagining an Antisubordinating First Amendment, 118 Columbia L. Rev. 2117 (2019) https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=13790&context=journal_articles.

46 Id. at 2120.

47 Id. at 2153-2157.

Contrary to President Nixon's statements and messaging from mainstream media at the time, student anti-war protestors were not simply draft dodgers.[48] Students were concerned with a) the morality of the war itself, b) HEI's complicity in military research, and c) compulsory training and the presence of on-campus military offices.[49]

While this Comment is less concerned with the history surrounding the military campaigns that led to student protests and is more concerned with the demands made and tactics used by student protestors, key inflammatory incidents regarding the morality of the Vietnam War often cited by student protestors will be briefly examined. Students, and much of the general public[50] felt negatively about President Lyndon B. Johnson's (LBJ) initial escalation.[51] At the time, scholars noted that the Vietnam War violated every point of the just war theory[52] . and many pointed out the capitalistic and imperialistic motives behind America's involvement in this overseas military campaign.[53]

Student protestors were taking their demonstrations to campus for two main reasons: HEI ties to military research and on-campus Reserve Officers' Training Corps (ROTC) offices and recruitment on-campus.[54]Because students regarded American involvement in the Vietnam War as immoral, they saw HEI's complicity in accepting military research grants through the Department of Defense's Project Themis[55] and other nonprofits as advancing such an unjust cause.[56] Further, most HEI's allowed on-campus ROTC recruitment and offices.[57] To protestors, this mere presence of the ROTC and its open recruitment of students represented the predatory use of HEI's as grounds to find brain and manpower to fuel the military industrial complex.[58]

Student protestors used a variety of tactics to demonstrate against the Vietnam War, the most popular being traditional marches and protests, like the Students for a Democratic Society (SDS) March on Washington.[59] Students also participated in on-campus sit-ins, teach-ins, and occupations of buildings on campus as well as strikes (and picket lines).[60] The vast majority of the protests were planned to be peaceful and were executed as such, escalating only when police and National Guardsmen were called in.[61]

Institutional Responses to Student Protests

Federal Responses

LBJ saw the American public as divided between "cut-and-run people and patriotic people".[62] Nixon

48 Supra Note 13 at 49-64, 75-76.
49 Id.
50 See id. at 49-64; see also, Robert McMahon, Lyndon B. Johnson's Decision Not to Run in 1968, Bill of Rights Institute, https://billofrightsinstitute.org/essays/lyndon-b-johnsons-decision-not-to-run-in-1968.
51 See Mulford Q. Sibley, II. Morality of War: The Case of Vietnam, National Law Forum, 209, 210-211 (1967). While Sibley uses a specific rendition of the just war theory in his analysis in this piece, he notes, "While the present writer would personally subscribe to the pacifist position, it is still the outlook of only a tiny minority. Most men today and for many hundreds of years have in principle subscribed to some kind of 'just war' theory. Whatever its specifics, such a view holds that, while the burden of proof must always be upon those who would resort to war, there are, nevertheless, circumstances under which war can be 'just' or 'moral.'"
52 Id. at 224.
53 Id. at 212; see also supra Note 13 at 49.
54 Supra Note 13 at 17-18, 49-50.
55 Kenneth J. Heineman, Campus Wars: The Peace Movement At American State Universities in the Vietnam Era 20-35 (NYU Press, 1993).
56 Id.
57 Id.
58 The War Machine Needs Your Mind!, Loaded: Special Issue Vol. 2, No. 9 (Apr. 24, 1972) (UCSC student-published zine).
59 Supra Note 13 at 52-54.
60 Id. at 49-110.
61 Id. at 100.
62 Lyndon B. Johnson - Protest at home, WorldBiography: U.S. Presidents, https://www.presidentprofiles.com/Kennedy-Bush/Lyndon-B-Johnson-Protest-at-home.html#google_vignette.

would later call student protestors “college bums”[63], revealing what seemed like– but was not, according to polls[64]– bipartisan support of the War. He then signed an Executive Order creating the President’s Commission on Campus Unrest (PCCU)[65]. The PCCU issued a response to campus protests just months after it was created in 1970.[66] In addition to recommending HEI’s institute content-neutral TPM restrictions, the PCCU also promoted the “exchange of intelligence” between HEI’s and law enforcement and condemned the media for misrepresenting student protestors.[67]

Legislative Responses

In the wake of student protests, legislation aimed at barring campus unrest was proposed in forty states.[68] The legislation passed in thirty-two states, with the eight outliers being states that had generally seen fewer student protests.[69] This legislation provided punishments for participating in what the HEI deemed to be an impermissible protest, including loss of financial aid and dismissal from faculty positions.[70] Additionally, many of the bills imposed strict regulations to keep non-students (or students who had previously been suspended) off campus.[71]

California even went so far as to make it a criminal misdemeanor to bar any pupil or teacher from attending class.[72] In the same year, the California legislature also cut university funding and exempted HEI faculty who had protested from raises.[73] In other states, Governors stepped in, sometimes at the request of HEI officials, and called troops of police and National Guardsmen to campus in order to quell campus protests.[74]

Higher Education Responses

Emboldened by politicians’ public condemnation of the student protests on the state and federal level, HEI’s began cracking down. One study found that where on-campus anti-Vietnam War protests occurred, HEI discipline occurred in about 75% of the cases.[75]

Examining the tragedy at Kent State University and the responses from university faculty illuminates many trends in HEI responses to student protest. In February 1965, the Kent Committee to End War in Vietnam held their first on-campus event.[76] Immediately, Kent State University President White publicly spoke of his distaste for Kent Committee to End the War in Vietnam’s (KCEWV) peaceful protest, stating that the protestors did not represent his students.[77] This was a theme: hawkish campus officials and professors often publicly disavowed and misrepresented student protestors at schools throughout the nation.[78] In 1968 the Kent State University chapter of the SDS was established by students who found KCEWV to be too dovish; at this point,

63 Supra Note 13 at 74.
64 Id. at 80.
65 Id. at 77.
66 Id. at 80-84.
67 Id. at 96-102.
68 32 States Fight Campus Unrest: Pass Laws Designed to Bar Any Further Disorders, N.Y. Times (June 28, 1970), https://www.nytimes.com/1970/06/28/archives/32-states-fight-campus-unrest-pass-laws-designed-to-bar-any-further.html.
69 Id.
70 Id.
71 Id.
72 Id.
73 Supra Note 13 at 109
74 Id. at 61-64, 110.
75 Id. at 111.
76 Id. at 58.
77 Id.
78 Id.

police surveillance on HEI campuses is regular practice nationwide,[79] but particularly at Kent State University.[80] SDS protests led to the suspension of two members which in turn led to another protest that President White called the police on; 59 students were arrested, White banned SDS meetings and groups on-campus, and Ohio passed anti-riot legislation that allows the state to intervene on campuses.[81] HEI officials regularly called police on their students during peaceful protests, and many students were wrongfully arrested after facing batons, tear gas, pepper spray, and officers in riot gear.[82] SDS organizations were also banned at multiple schools nationwide.[83]

On May 1, 1970, Nixon's Cambodia escalation led to an off-campus riot and the mayor called the National Guard.[84] On May 2nd, an unidentified group of students burned down the on-campus ROTC building and police did not intervene, despite being on campus.[85] Even though campus gatherings were banned the next day, anti-war student protestors began to peacefully sit on a lawn on campus.[86] The National Guard moved in and threw tear gas at the students and began to fire shots. Four students were killed.[87] On May 6th, a pre-planned nationwide strike garnered the participation of approximately four million students across over a thousand schools.[88]

In October of the same year, a grand jury in Kent indicted twenty-five student protestors and exonerated the National Guard.[89] When students began to protest outside the courthouse, they were met with an injunction prohibiting them from demonstrating outside the courthouse.[90] This was also commonplace in this era; at least fifty-three injunctions were sought by HEI's against student protests.[91] This "crisis management" tactic was so commonplace, in part, because injunctions are designed to be secured quickly, often in a matter of hours,[92] and because courts exhibited intense deference to the HEI's requesting injunctions, regardless of the "limiting principles of equity jurisprudence"[93] and of First Amendment considerations.[94]

Common HEI responses also included newly instituted TPM restrictions, in accordance with the PCCU recommendations and UC Berkeley's lead.[95] These restrictions were considered content-neutral but were only instituted after or during the HEI's student protests[96] and included modes of peaceful protest that Anti-Vietnam War student protestors were using or had used often, like sound amplification and occupations.[97] These restrictions often segued into speech zones and codes in the 1980s and 1990s.[98] As previously mentioned, speech

79 Id. at 59-61.
80 Id.
81 Id. at 59-63.
82 See e.g., UW Madison Department of History, Object History: National Guard Nightstick, Wisconsin 101, https://wi101.wisc.edu/object-history-national-guard-nightstick/; Christopher Beaudet, Eleven Bayonetted and 131 Arrested at Student Union Building, University of New Mexico, https://timeline.unm.edu/item/eleven-bayonetted-and-131-arrested-at-student-union-building.html; Alan Bjerga, May 1972: antiwar protests become part of U history, The Minnesota Daily (May 12, 1997), https://mndaily.com/188358/uncategorized/may-1972-antiwar-protests-become-part-u-history/.
83 See supra Note 13.
84 Id. at 61-64.
85 Id.
86 Id.
87 Id.
88 Id.
89 Id. at 106.
90 Id. at 106-107.
91 Equity on the Campus: The Limits of Injunctive Regulation of University Protest, 80 Yale L.J. 987 (April 1971) https://openyls.law.yale.edu/server/api/core/bitstreams/4995b0fe-3c45-44e2-bed4-b814309ca5fa/content.
92 Id. at 987-989.
93 Id. at 992.
94 Id. at 993-997.
95 Supra Note 13 at 96-100.
96 Id.
97 Id at 113-114.
98 Id at 127.

zones are widely opposed and in use today and speech codes often do not hold up in court.[99] HEI's also expanded on campus police forces, doubling, tripling, and in the case of UCLA, quintupling the size of their police force after Anti-War protests.[100] In accordance with the legislation passed in several states, HEI's also participated in the reprimanding and firing of faculty who were supportive of student protestors.[101]

Part III: Pro-Palestine Student Protests

Student Demands & Tactics

Echoes of Nixon-esque condemnations of Pro-Palestine student protests have filled mainstream media[102], primarily since October 2023, despite the Gaza Strip having been classified as an occupied territory since June 2007[103] and despite many Americans holding similar views to the protestors.[104]

Like with Part II, contextualizing the students' reasons for protesting is important but this Comment will only focus on that briefly. Many student protestors had been aware of the ongoing struggle for Palestinian self-determination throughout history.[105] However, Israel's escalation after the October 7th, 2023 Hamas attack brought the struggle back into mainstream media.[106] Students protesting often point to violations of the just war theory[107], the ruling by the International Court of Justice that Israel is plausibly committing genocide[108], and the United Nation's (UN) research into Israel blocking humanitarian aid to Palestinians[109] as evidence that their protests are not just against American involvement in an unjust military conflict, but against American passive approval of a genocide, more akin to student protests against South African Apartheid.[110] Like with US involvement in Vietnam, students cite US involvement and support of Israel as motivated strongly by capitalism and imperialism.[111]

Students have brought these protests onto campus, broadly, because of many HEI's have not acknowledged Israel's ongoing human rights violations or the Palestinian civilian death and hostage toll, while many have made statements on the tragic October 7th death and hostage toll.[112] Students have taken issue with many

99 Id at 7.
100 Id at 112-113.
101 Id. at 96-102.
102 See e.g., Julia Swerdin, Berkeley law student who interrupted social event at dean's home in protest of Israel faces accusations of antisemitism, Free Speech Project (May 7, 2024 at 6:59 PM).
103 University of Texas at Austin Palestine Solidarity Comm., University of Texas at Austin Student Statement of Solidarity with Palestine (petition), https://docs.google.com/document/d/1eIe8eruPeruKh66i-b2IfrChqF_9-V-2rEazsfCaJHo/edit?tab=t.0.
104 Voters Support the U.S. Calling for Permanent Ceasefire in Gaza and Conditioning Military Aid to Israel, Data for Progress (Feb. 27, 2024), https://www.dataforprogress.org/blog/2024/2/27/voters-support-the-us-calling-for-permanent-ceasefire-in-gaza-and-conditioning-military-aid-to-israel.
105 Supra Note 103.
106 A search ran on muckrack.com showed fluctuations from approximately 1,000 articles to 5,000 articles per month from January 2022 to September 2023 to over 300,000 articles in October 2023 with the keywords "Israel", "Palestine", and "Gaza" in news media; since then, coverage has dwindled but consistently remained over 40,000 articles per month from October 2023 to present. https://muckrack.com/trends/report/?terms=Palestine+AND+Israel+AND+Gaza&daterange_starts=2021-12-19&daterange_ends=2024-12-19.
107 Supra Note 103.
108 Fatima Al-Kassab, A top U.N. court says Gaza genocide is 'plausible' but does not order cease-fire, NPR (Jan. 26, 2024 at 2:38 PM), https://www.npr.org/2024/01/26/1227078791/icj-israel-genocide-gaza-palestinians-south-africa#:~:text=ICJ%20says%20it's%20'plausible'%20Israel%20committed%20genocide%20in%20Gaza%20The,call%20for%20a%20cease%2Dfire.
109 Daniel Estrin and Aya Batrawy, Israel threatens to starve out northern Gaza, U.N. aid agencies say, NPR (Oct. 15, 2024 at 6:55 PM), https://www.npr.org/2024/10/15/nx-s1-5154065/israel-north-gaza-food-aid-block.
110 Students for Just. in Palestine & Jewish Law Students Ass'n, CUNY School of Law, "Inherently Expressive": BDS Organizing for Palestinian Liberation at CUNY School of Law and Beyond, 26 CUNY L. Rev. 67, 67-68 (Winter 2023).
111 Id. at 79.
112 See, e.g., Erwin Chemerinsky, Dean's Message: At this very difficult time, email to all law school students, staff, and faculty (Oct. 10, 2023).

HEI statements since then erroneously claiming anti-Zionist protestors, many of whom are Jewish, are antisemitic.[113]

Other than statements, students want action on the part of HEI's to divest from investments, particularly weapons investments in Israel.[114] The UC system, for instance, has investments– totaling $32 billion– in weapons and other companies that benefit from the conflict in Gaza.[115] This demand is a product of the Boycott, Divest, Sanction (BDS) movement that has been around for over a decade; the movement encourages citizens to boycott Israeli goods & services, divest from Israel, and sanction Israel for its human rights violations.[116] The movement mirrors, nearly perfectly, the boycott and divestment movements of the South African Apartheid protest era.[117] Similarly, depending on the HEI, some students are protesting American military research in HEI's, as this necessarily benefits the US's allies, Israel included.[118] Others are protesting HEI-sponsored Israel study abroad programs that take place in occupied territories.[119]

Pro-Palestine student protest tactics have run the gamut, although the most reported on and widely used were student on-campus encampments.[120] On-campus encampments are not a new form of student protest– students protesting South African Apartheid and the Gulf War used encampments.[121] Encampments are the occupation of an outdoor area, using tents and blankets to create a semi-permanent living space for protestors.[122] Other tactics have included: sit-ins, study-ins, teach-ins, occupations of on-campus buildings, student and faculty strikes (and picket lines), rallies, marches, walkouts, and solidarity seders and sukkahs.[123]

Institutional Responses

Executive Responses:

In October, the Biden Administration stated that a ceasefire would only benefit Hamas[124] (before supporting a ceasefire in June).[125] The Administration then pushed for more on-campus surveillance as a means

113 Berkeley Journal of Black Law and Policy and Berkeley Law Jews for Palestine, 'Hypocritical and insulting': Black and Jewish students at Berkeley Law say Dean Chemerinsky uses them as props to vilify Palestine Solidarity Movement (Oct. 25, 2024) https://www.dailycal.org/opinion/op-eds/hypocritical-and-insulting-black-and-jewish-students-at-berkeley-law-say-dean-chemerinsky-uses-them/article_9cbe4ccc-9299-11ef-bec1-83f03a661cc9.html.
114 Supra Note 103.
115 Sophie Austin, University of California official says system has $32 billion in holdings targeted by protesters, AP News (May 15, 2024 at 7:23 PM) https://www.sandiegouniontribune.com/2024/05/15/university-of-california-official-says-system-has-32-billion-in-holdings-targeted-by-protesters/.
116 Supra Note 110 at 68-72.
117 Id. at 67-68.
118 See Associated Press, Pro-Palestine protests: What are college students demanding?, Fox59 (Apr. 24, 2024 at 4:15 PM), https://fox59.com/news/national-world/pro-palestine-protests-what-are-college-students-demanding/.
119 Michael Burke, How Pro-Palestinian Protestors at One UC Campus Got A Deal, EdSource (June 12, 2024), https://edsource.org/2024/how-pro-palestinian-protesters-at-one-uc-campus-got-a-deal/712927.
120 Ryan Maxin, What is an encampment protest? Students at UT-Austin join college protests nationwide, Austin Amn.-Statesman (Apr. 29, 2024 at 3:51 PM).
121 Adam Federman, The Crackdown on Campus Protests Is Just Beginning, Type Investigations (June 20, 2024), https://www.typeinvestigations.org/investigation/2024/06/20/the-crackdown-on-campus-protests-is-just-beginning/.
122 Supra Note 120. Similar to sit-ins, the goal is to create a striking visual for other students and faculty to affect the desired change
123 See e.g., Clara Harter, One arrested as UCLA police dismantle 'Gaza solidarity sukkah' and disperse student protest, LA Times (Oct. 21, 2024 at 10:48 PM); Solidarity Seder flyer, https://www.indybay.org/newsitems/2024/04/25/18865350.php; Laney Crawley, Hundreds of pro-Palestinian protestors hold walkout, spray paint University buildings, The Daily Tar Heel (Sept. 19, 2024 at 4:07); Zach Leggio, Hundreds of pro-Palestinian protestors hold walkout, spray paint University buildings, The Red & Black (Oct. 7, 2024); Nora Igelnik et al., Photo Gallery: Students For Justice In Palestine Hosts Study-In For Northern Gaza at Thompson Library, The Lantern (Oct. 23, 2024); The Palestine Teach-In Series at the University of Maryland, https://umdpalestineteachin.com/.
124 Erica L. Green and Michael Crowley, White House Says a Cease-Fire Would Only Benefit Hamas, NY Times (Oct. 24, 2023), https://www.nytimes.com/2023/10/24/us/politics/israel-hamas-cease-fire.html.
125 Joint Statement from the Leaders of the United States, Argentina, Austria, Brazil, Bulgaria, Canada, Colombia, Denmark, France, Germany, Poland, Portugal, Romania, Serbia, Spain, Thailand, and the United Kingdom on Gaza (June 6, 2024), https://www.white-

of countering growing antisemitism: "Since October 7th, FBI and DHS [Federal Bureau of Investigations and Department of Homeland Security] have taken steps to expand and deepen engagements with campus law enforcement" and "DHS's Cybersecurity Infrastructure Security Agency (CISA) tasked its field force to proactively engage with schools".[126] Reporting in mainstream media about the Biden Administration's plan to track antisemitism on campuses largely emphasized the plan's interest in Pro-Palestine student protests and cited statistics from pro-Israel advocacy organizations that considered use of the word "Zionist" antisemitic.[127] Similarly, The Dear Colleague Letter produced by the Biden administration's Department of Education's Office of Civil Rights (OCR) introduces examples of actions that would require OCR investigation.[128] In three of the four hypotheticals relating to antisemitism, the OCR presents the antisemitic protest or person as also holding anti-Zionist views.[129] These statistics and hypotheticals reveal an implicit equation of two ideologies that are both facially and actually at odds with each other– one that expressly stands with oppressed peoples and one that expressly dehumanizes an oppressed people.[130]

Meanwhile, during the election Republican candidate Donald Trump stated to his donors that he would attempt to deport student protestors and that, if re-elected, "we're going to set that movement back 25 or 30 years".[131] On the campaign trail, Democratic candidate Kamala Harris vowed to continue sending weapons to Israel.[132]

As promised, since he was inaugurated in January, Trump "has waged open warfare on higher education", targeting diversity, equity, and inclusion (DEI), transgender students, immigration, and pro-Palestinian student activism.[133] On January 29, 2025, Trump issued an Executive Order entitled "Additional Measures to Combat Anti-Semitism".[134] In Section 1, he immediately invokes the Order's predecessor, Executive Order 13899, which adopted the International Holocaust Remembrance Alliance (IHRA) definition of antisemitism.[135] In its definition, the IHRA labels specific critiques of the State of Israel as antisemitic.[136] In his 2025 Executive Order, Trump "builds on the first [Executive Order pertaining to antisemitism] in characterizing criticism of Israel after the October 7 Hamas attacks as antisemitic."[137] In Section 3(e), Trump advises HEI's to familiarize

house.gov/briefing-room/statements-releases/2024/06/06/joint-statement-from -the-leaders-of-the-united-states-argentina-austria-brazil-bulgaria-canada-colombia-denmark-france-germany-poland-portugal-romania-serbia-spain-thailand-and-the-uni/.

126 FACT SHEET: Biden-Harris Administration Ramps Up Actions to Counter Antisemitism on College Campuses and Protect Jewish Communities (May 7, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/05/07/biden-harris-administration-ramps-up-actions-to-counter-antisemitism-on-college-campuses-and-protect-jewish-communities/.

127 Nell Srinath, Zionism and surveillance create the Biden administration's nightmarish new tool, The Daily Campus (Oct. 31, 2023), https://dailycampus.com/2023/10/31/zionism-and-surveillance-create-the-biden-administrations-nightmarish-new-tool/.

128 Supra Note 12 at 6-14.

129 Id.

130 Supra Note 113.

131 Josh Dawsey et al., Trump told donors he will crush pro-Palestinian protests, deport demonstrators (May 27, 2024), https://www.washingtonpost.com/politics/2024/05/27/trump-israel-gaza-policy-donors/.

132 Madeline Halpert, Harris Rejects Claims She Would Support Israel Arms Embargo, BBC (Aug. 8, 2024), https://www.bbc.com/news/articles/cg798l439ydo. Here, again, we see an evidently 'bipartisan' support of American involvement in unjust foreign military campaigns; this is only facially true though, as Biden's own former Democratic presidential candidate nominee colleagues, Bernie Sanders and Elizabeth Warren, both used their platform to advocate for a Ceasefire and sanctions on Israel. Jaclyn Diaz, Sen. Bernie Sanders Calls For A Gaza Ceasefire, NPR (Aug. 20, 2024 at 10:48 PM), https://www.npr.org/2024/08/20/g-s1-18254/bernie-sanders-gaza-ceasefire-democratic-national-convention.

133 Jonathan Feingold and Veena Dubal, Trump Is Revealing Our Higher Ed Crisis, Academe Mag. (Spring 2025), https://www.aaup.org/academe/issues/spring-2025/trump-revealing-our-higher-ed-crisis.

134 Exec. Order No. 14188.

135 Sameer Ashar, The Assault on Campus Protests, Academe Mag. (Spring 2025), https://www.aaup.org/academe/issues/spring-2025/assault-campus-protests.

136 Working Definition of Antisemitism, Intl. Holocaust Rememberance Alliance, https://holocaustremembrance.com/resources/working-definition-antisemitism. The definition includes "claiming that the existence of a State of Israel is a racist endeavor", "Applying double standards by requiring of it [Israel] a behavior not expected or demanded of any other democratic nation", "Drawing comparisons of contemporary Israeli policy to that of the Nazis" as examples of antisemitism, conflating anti-Zionist critiques with antisemitic rhetoric.

137 Supra Note 135

themselves with 8 U.S.C. 1182(a)(3), a section of the US Code that classifies immigrants who have engaged in "terrorist activity" as inadmissible aliens; this inclusion "invites university cooperation in identifying and monitoring pro-Palestinian protesters as targets for deportation" and signals to law enforcement to do the same.[138]

Legislative Responses:

In response to Biden's heightened efforts against antisemitism, a Congressional hearing was called that led to the resignation of one private HEI President[139] and the introduction of House Resolution 927 which states that "the other Presidents should follow suit", thus, implicating public law and setting a dangerous precedent that implicates public HEI actors too.[140] Similarly, as of June 2024, at least eight new federal laws have been proposed that would punish student protestors.[141]

On the statewide level, several governors have worked with HEI's to call in state troopers and local police[142] to peaceful Pro-Palestine protests and make statements against protests.[143]

Higher Education Responses:

More than 3,000 students have been arrested, hundreds have been threatened with suspension, expulsion, or have been denied their diplomas,[144] and several faculty members have been fired in relation to Pro-Palestine protests or statements.[145]

Much of the immediate reactions to Pro-Palestine student protests by HEI's are encapsulated in HEI officials' actions at the University of Texas Austin (UT-A). The Palestine Solidarity Committee, a Pro-Palestine UT-A student organization, held an educational event in October 2023.[146] The event was interrupted by three students who called the group "terrorists" and threatened that they would be "killing Arabs"; the UTPD found no criminal offense.[147] This is an issue on many HEI campuses: Islamophobic hate crimes are on the rise[148] and many HEI and government officials have stayed silent on that issue, even while they condemn antisemitic hate crimes.[149]

138 Id.
139 The Presidents' answering legal questions in a legal way, like "it depends" and "depends on the context", were construed as the Presidents condoning antisemitism, leading to public backlash and claims of antisemitism, leading President Magill to resign. Marc Levy, Liz Magill, U. Penn's president, and board chair resign as antisemitism testimony draws backlash, Assoc. Press (Dec. 9, 2023 at 7:55 PM), https://apnews.com/article/new-york-governor-antisemitism-colleges-israel-gaza-ae1294d644b3305cc51e8d9bb7252766.
140 Condemning antisemitism on University campuses and the testimony of University Presidents in the House Committee on Education and the Workforce, H.R. 927, 118th Cong. (2023).
141 Supra Note 121.
142 Molly Hennessy-Fisk and Patrick Svitek, Criticism, praise of Texas governor after dramatic use of troopers on protestors, The Washington Post (Apr. 25, 2024), https://www.washingtonpost.com/nation/2024/04/25/protests-texas-abbott-gaza/. See also, Abdallah Fayyad, The Lessons From Colleges That Didn't Call the Police, Vox (May 3, 2024), https://www.vox.com/24147461/columbia-gaza-encampment-campus-protests-police-crackdown-pro-palestinian-students.
143 Governor Abbott in Texas going so far as to issue an Executive Order that made no mention of Palestinian plight or a rise in Islamophobic hate crimes in the discussion of violence in Gaza and protests on-campus. Abbott then "ordered scores of riot gear-clad state troopers to arrest protestors at the University of Texas Austin". Exec. Order GA 44 (Mar. 27, 2024); see also, id.
144 Supra Note 121.
145 Natasha Lennard, University Professors Are Losing Their Jobs Over "New McCarthyism" on Gaza, The Intercept (May 16, 2024 at 5 AM), https://theintercept.com/2024/05/16/university-college-professors-israel-palestine-firing/.
146 Maryam Ahmed, Students Disrupted at Palestine Education Event, Palestine Solidarity Committee Speaks Out, The Daily Texan (Oct. 22, 2023), https://thedailytexan.com/2023/10/22/students-disrupted-at-palestine-education-event-palestine-solidarity-committee-speaks-out/.
147 Id.
148 Supra Note 127; see also, Sanya Mansoor, Anti-Muslim hate in US rises since 7 October but advocates praise community resilience, The Guardian (Oct. 3, 2024 at 7), https://www.theguardian.com/us-news/2024/oct/03/october-7-israel-gaza-islamophobia.
149 See, e.g., supra Note 127; Legal Advocates Letter to University of California, UC Berkeley, and Berkeley Law Leadership, https://docs.google.com/document/d/1lwfA72mgmBpr4DmHtwrD9qCuQ6YEFYwfnGHJDrWXJ8s/edit?tab=t.0.

In the wake of that event, two teaching assistants sent out statements to their classes of solidarity and included mental health resources for those experiencing any kind of discrimination.[150] They were then dismissed from their roles.[151] Both TA's and UT-A PSC claim that UT-A did not follow disciplinary procedure in their removal.[152] Supportive HEI faculty and student workers are being frequently punished for expressing their solidarity with student protestors.[153]

In April 2024, the President of UT-A with Governor Abbott called the state troopers on horseback, UTPD, and Austin PD to the scene of not one but two peaceful outdoor protests.[154] On the 24th, over 56 students were arrested on "criminal trespassing" charges.[155] The following day, UT-A issued UT-A PSC an interim student organization suspension.[156] Then, the prosecutor dropped all of the charges against the 56 arrestees.[157] The next week, UT-A PSC began to erect an outdoor encampment; 90 people were arrested, as law enforcement used pepper spray and flash bangs to break up the nonviolent demonstration.[158] Many HEI's have engaged in the same practice of calling law enforcement on peaceful Pro-Palestine student protests; on many occasions, violence is only observed upon law enforcements' interference.[159]

The UT-A incidents led PSC leader, Ammer Qaddumi, to file suit against UT-A for unlawful retaliation in August 2024.[160] This is a theme, particularly in the fall and winter of 2024, as Pro-Palestine students and faculty begin to find representation.[161] The next month, UT-A suspended Qaddumi, against the recommendation of the School Conduct Board,[162] which exemplifies yet another theme in Pro-Palestine student protestors' scholarly careers.[163] UT-A PSC totals three suspensions and 79 unfair disciplinary actions against students since November 22, 2023; the organization remains suspended by UT-A.[164]

In addition to direct unfair actions against students, HEI administrations have begun tweaking time/place/manner restrictions in order to prohibit specific tactics employed by Pro-Palestine student protestors, like

---

150 University of Texas at Austin Palestine Solidarity Comm., UT Austin TAs Dismissed from Roles for Message of Support Offered to Palestinian Students, https://drive.google.com/file/d/1kprs6IPxusUGY-Ns-I_oPG2XWcol-fpw/view.
151 Id.
152 Id.
153 Supra Note 145; see also pay us more ucsc, Hands off Summer Sullivan! Defend UCSC Grad Fired For Participating in a Legal Strike, https://payusmoreucsc.com/.
154 Audrey McGlinchy, UT Austin Committee Says Administrators Violated Own Rules When Handling Protests, KUT 90.5 Radio (Aug. 6, 2024, 5:44pm), https://www.kut.org/education/2024-07-31/ut-austin-committee-of-counsel-on-academic-freedom-and-responsibility-report-pro-palestinian-protests.
155 Lily Kepner, UT Suspends Student For 'Unauthorized' Pro-Palestinian Protest; Student Seeks to Stop Move, Austin Amn.-Statesman (Oct. 25, 2024, 4:29pm), https://www.statesman.com/story/news/education/2024/10/25/university-of-texas-suspends-student-for-pro-palestinian-protest/75838119007/.
156 Johann Castro and Isabella Basco, UT's Palestine Solidarity Committee Placed on Interim Suspension After Wednesday's Protest, KVUE (Apr. 26, 2024 at 10:58 PM), https://www.kvue.com/article/news/education/university-of-texas/university-texas-palestine-solidarity-interim-suspension-protest-chaos/269-f5c3b407-6889-4a63-bc18-ee5b0af21942.
157 Jamie Stengle, Prosecutors Drop Nearly 80 Arrests From A Pro-Palestinian Protest At the University of Texas, AP News (June 26, 2024, 10:39pm), https://apnews.com/article/university-of-texas-protest-arrests-dismissed-79fd041085bdab0ad7a9fb3bd51c7d29.
158 Ikram Mohamed et al., Dozens more arrested at UT-Austin as police use pepper spray, flash bangs to break up protests, Texas Tribune (Apr. 29, 2024 at 10 PM), https://www.texastribune.org/2024/04/29/university-texas-pro-palestinian-protest-arrest/.
159 See Abdallah Fayyad, The Lessons From Colleges That Didn't Call the Police, Vox (May 3, 2024), https://www.vox.com/24147461/columbia-gaza-encampment-campus-protests-police-crackdown-pro-palestinian-students; see also Letter to University of Richmond School of Law Students from University of Richmond National Lawyers Guild Executive Board (May 6, 2024), https://nlg-protest-statement.tiiny.site/.
160 Lily Kepner, Student Threatened With Suspension Sues University of Texas for 'Unlawful Retaliation', Austin Amn.-Statesman (Aug. 29, 2024, 4:52pm), https://www.statesman.com/story/news/education/2024/08/29/pro-palestine-protest-ut-austin-student-files-lawsuit-first-amendment-violations/74997168007/.
161 See ACLU NorCal, Civil Rights Groups Sue UCSC for Unlawful Campus Bans and Response to Student Protests, Press Release (Sept. 9, 2024), https://www.aclunc.org/news/civil-rights-groups-sue-ucsc-unlawful-campus-bans-and-response-student-protests.
162 Supra Note 160.
163 Supra Note 121
164 Supra note 83.

encampments.[165] Some HEI administrations did so directly prior to the first on-campus protests that had been planned and advertised at their respective HEI.[166] Indiana University went so far as to ban encampments the night before a Pro-Palestine encampment that was planned for a meadow that had previously housed two long-term protest encampments during the Gulf War and South African Apartheid.[167] Other HEI administrations did so during the summer,[168] the UC system banning on-campus encampments and masks "worn to conceal identities"[169]– a tactic that had become commonplace for student protestors worried about the threat of surveillance and about accessibility for disabled and high-risk student protestors.[170] UCLA further limited expression to designated zones– none of which were spots where students had erected encampments, banned overnight protests, restricted amplified sound, and required protestors to produce identification when asked.[171]

Part IV: Equity-Based Tests for HEI Disciplinary Actions as A Partial Solution to the Tension Between Title VI and IX and the First Amendment

Institutional Responses and Protest Tactics Compared

The motivations, demands, and tactics used by Anti-Vietnam War student protestors and Pro-Palestine student protestors are strikingly similar, as are the federal, legislative, and administrative institutional responses to each movement.

Both groups of student protestors were motivated, in varying degrees and with various proposed solutions, by opposition to American involvement in a foreign military campaign that the group deemed unjust and immoral. Both groups sought to use the tactic of on-campus protest to highlight HEIs' perceived complicity in the aforementioned unjust campaigns through research grants and weapons investments. Both groups of protestors reflected the majority of Americans: a 1968 Gallup poll indicating 56% of citizens favoring withdrawing from Vietnam and a 2024 Data For Progress Poll finding that 64% of Americans support a Ceasefire and 53% favor withdrawing military aid if Ceasefire is not met.[172]

The institutional responses to both mass student protests have been similar too. In both cases, the federal government presented bipartisan support of American involvement with the military campaign and denounced student protestors; further, the Nixon and Biden administrations both championed stronger surveillance of student protestors. Federal and state legislation was introduced and often passed in order to promote government interference in student protests, in both cases; state government actors were quick to offer HEI administrations access to state troopers, local police, and the National Guard, particularly at Kent State University and UT Austin, and such interference usually led to escalations in violence and arrests of nonviolent student protestors. At the HEI level, student protestors in the 60's and 70's and student protestors in the 2020's were subject to

165 Adam Federman, The War on Protest Is Here, Type Investigations (Apr. 17, 2024), https://inthesetimes.com/article/war-protest-standing-rock-cop-city-repression-criminalize-dissent-political-rights-first-amendment.
166 Supra note 150.
167 Id.
168 Id. UCLA further limited expression to designated zones– none of which were spots where students had erected encampments, banned overnight protests, restricted amplified sound, and required protestors to produce identification when asked. Shiv Patel & Dylan Winward, UCLA Announces New Time, Place and Manner Policies, Limits Public Expression Areas, Daily Bruin (Sept. 25, 2024, 11:30pm), https://dailybruin.com/2024/09/04/ucla-announces-new-time-place-and-manner-policies-limits-public-expression-areas.
169 Cecilia Nowell & Dani Anguiano, University of California Bans Camps And Face Masks Used to 'Conceal Identity', The Guardian (Aug. 19, 2024, 3:03pm), https://www.theguardian.com/us-news/article/2024/aug/19/university-california-gaza-protests-encampment-face-mask-bans.
170 Id.
171 Shiv Patel & Dylan Winward, UCLA Announces New Time, Place and Manner Policies, Limits Public Expression Areas, Daily Bruin (Sept. 25, 2024, 11:30pm), https://dailybruin.com/2024/09/04/ucla-announces-new-time-place-and-manner-policies-limits-public-expression-areas.
172 Supra Note 104; Guido H. Stempel, Polls Tell Us No More Than Where We Are; Vietnam War Opinion, New York Times (Sept. 7, 1988), https://www.nytimes.com/1988/09/07/opinion/l-polls-tell-us-no-more-than-where-we-are-vietnam-war-opinion-139188.html.

either the adoption of new TPM restrictions that effectively limited freedom of expression and speech depending on what the HEI saw fit or the modifying of such restrictions to prohibit popular nonviolent protest tactics on-campus in response to planned demonstrations. The TPM restrictions of both eras, while perhaps facially content-neutral, are necessarily not content-neutral in creation[173] or as applied.

An obvious difference between each case study is the level of violence that law enforcement interference brought. At Kent State University, four students died at the hands of the National Guard. As of now, there is, fortunately, no death toll for Pro-Palestine student protestors as a result of law enforcement interference. However, the timelines must be paramount to this analysis: it took one KCEWV protest for HEI administration to speak out against the group, four years of KCEWV and SDS protests for HEI to request police assistance, and five years of protests and continued US involvement in the military campaign.[174] While Pro-Palestine student protestors have been organizing on-campus for well over a decade, the protests have grown in number and frequency since October 2023. It follows then that if US involvement in aiding Israel's military campaign continues– and it seems it will if the recent federal stance against honoring the ICC's arrest warrant for Netanyahu is any indication– student protests will continue and HEI backlash to protests may lead to more extreme law enforcement involvement and potentially more extreme violence against student protestors.

Statements from HEI administrations and from politicians play a large part in the public's perception of on-campus student protests. When the messaging from the government and from HEI's was that the protestors were creating campus unrest, even while the majority of the American public believed the US should withdraw from Vietnam[175], the majority did not take issue with harsh punishment or even physical violence being enacted against students who were protesting for that very withdrawal.[176]

Suppression of the freedom of speech and assembly creates a chilling effect: when the potential for and the actual effect of harsh punishment is so high, fewer students will exercise their First Amendment rights.[177] The students this most greatly affects are members of minoritized and oppressed populations and students who stand in solidarity with those members because those people may have no other way to be heard than to protest.[178] This poses a great threat of passive cultural approval of discrimination. This threat then is at odds with claims of discrimination from students who align themselves with the oppressive ideals minoritized student protestors are demonstrating against.[179]

In the cases of both Anti-Vietnam War student protests and Pro-Palestine student protests, federal actors misrepresented student protestors' expressive speech and demands. Legislative and state actors followed suit and HEI's co-opted their rhetoric and interpretations of the protests, instead of attempting to truly understand the protest demands. But HEI administrators have some latitude: They can choose how to write TPM restrictions, if and when they should capitulate to pressures to investigate and punish students for expressive speech, and how to go about responding to perceived discrimination otherwise.

Reframing HEI Approaches to Student Protests

---

173 Supra Note 27.
174 Supra Note 13 at 58-64
175 Supra Note 104.
176 Supra Note 13 at 95, 105.
177 See Dina Awshah, Civil Rights? But Not for You: Chilling a Globalized Palestinian Resistance Movement's Freedom of Expression Protections as Guaranteed by the International Covenant on Civil and Political Rights, 53 Geo. J. Int'l L. 125 (Fall 2021) https://law-journals-books.vlex.com/vid/civil-rights-but-not-951160419.
178 Michael Hamilton, Freedoms of Assembly, Consequential Harms and the Rule of Law: Liberty-limiting Principles in the Context of Transition, 27 Oxford J. Legal Stud. 75, 76-83 (2007) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1352347.
179 A well-known example of this is the concept of discrimination through reverse-racism, which while a justiciable discrimination claim, has been actually debunked. See Cornell Univ. Library, So You Want to Talk About Race: Race/Racism, https://guides.library.cornell.edu/oluo/race.

Reliance on Outside Law Enforcement

In many instances explored above, when state troopers, local police, and/or National Guardsmen were called into on-campus protests, the protests became more dangerous for the students involved. Here, the solution should remain relatively simple: protest safety should be left up to on-campus security and police. Calling in law enforcement, often armed with lethal weapons, unnecessarily escalates peaceful protests and chills future expression. To the extent that it is within the HEI's control, they should consider and use protest safety options that do not include outside law enforcement.

Time/Place/Manner Restrictions

TPM restrictions have been a popular tactic for HEI's in responding to campus protests since the 1970's, but as evidenced above, there are several issues with TPM restrictions. The issue of ex post facto creation and modification of TPM restrictions is one that HEI's ought to be aware of; HEI's ought to interrogate why whatever new time, place, or manner they are deciding to restrict had yet to be restricted prior.[180]

In accordance with First Amendment jurisprudence, HEI's should also analyze whether a TPM restriction leaves open ample other channels of expression. Several scholars have critiqued ample channels requirement jurisprudence for its inability to truly take into account whether a marginalized group of people actually has anywhere, anytime, anyway else to protest that would be equally as effective.[181] But HEI administrations could use this gap in the doctrine to the advantage of marginalized students– they could require more of their TPM restrictions than the Court would. Prior to adopting new or revised TPM requirements, HEI's should consider every possible substantive equality issue, not just the formal equality issues, as Professor Lakier suggests.[182]

This solution, however, should not extend to the incorporation of protected classes of speech, including hate speech, into TPM restrictions. Williams and Spedding's argument for a hate speech exception would give an unreasonable amount of power to government actors to regulate speech that has already been found to be protected by the First Amendment.[183] What is necessary is not a more limited First Amendment, but a more expansive, substantive analysis (and review of) the limitations government actors are attempting to put on expressive speech. Finally, HEI's should be concerned with the selective enforcement of TPM restrictions and should consider reviewing instances of enforcement.[184]

Public Statements by Government Actors

Public condemnations and statements by government actors of every level– federal, state, and HEI administrations– about both protests played a major role in public perception and in HEI intervention of each movement. Public statements also have a specific chilling effect on students' expression. Thus, if a government actor feels compelled to speak about a specific student protest, they should assume the responsibility of truly understanding the issues brought up by the protest. Here, educating themselves on creative interpretations of the First Amendment may be incredibly helpful– understanding Williams and Spedding's vision of a constitutive First Amendment and Laiker's vision of an antisubordinating First Amendment, for example, would help orient the government actor on not only the true issue at hand but also the role their rhetoric may play in dissuading students from exercising their First Amendment rights.[185]

---

180 Supra Note 27.
181 Supra Note 27 and Note 45.
182 Supra Note 45.
183 Supra Note 43
184 Sura Note 27.
185 See supra Note 27 and Note 43.

Emphasizing Equity in Any HEI Liberty-Limiting Action

In addition to implementing creative interpretations of the First Amendment, HEI's could consider applying an equity lens to their decisions regarding any kind of First Amendment restrictions. HEI's in the past have utilized equity lenses for DEI initiatives and could potentially easily modify those frameworks for student protest cases.[186]

Conceptualizing an equity lens that would provide a framework for HEI's to decide how to respond to student protests that implicate race and ethnicity, like with the Anti-Vietnam War and Pro-Palestine student protests, must also necessarily include an understanding of liberty-limiting principles. Specifically, an analysis of liberty-limiting principles in transitional societies–societies that have seen mass national conflict or authoritarian rule and are working towards peace– is apt here. In the last decade, America has seen mass national protests, riots, and even an insurrection with race and class at the center and these conflicts give rise to turbulence on-campus at HEI's; further both student protest case studies implicate US involvement in violent conflict abroad.

The liberty-limiting principles and recommendations in Michael Hamilton's Freedom of Assembly, Consequential Harms and the Rule of Law: Liberty-limiting Principles in the Context of Transition are particularly relevant.[187] Hamilton describes three ethical liberty-limiting approaches: liberty-limiting through the argument from democracy, toleration, and recognition.[188] Hamilton claims there are many weaknesses with the arguments from democracy and tolerance.[189] To the argument from democracy, Hamilton notes that the argument "fails to provide a normative framework for justifying interferences".[190] He writes that the core of the tolerance argument is that certain liberties are valuable with or without a doctrine stating such; three weaknesses of this argument are: "explaining why lexical priority should be accorded to conscience, autonomy, or dignity over and above other values such as community or security", the lack of possibility of discretion in application for transitional communities, and the potential for this argument to cause harm by its allowance of further entrenching divisions.[191] The argument for recognition involves a "positive 'recognition' between members of opposing groups", emphasizing that restrictions upon liberties are only justified "if they advance not merely the goal of formal equality [...] but also the goal of solidarity– of expanding relationships across ethnic boundaries".[192]

Of these approaches to liberty-limiting intervention, the recognition argument is the most congruent with an equity lens, as it promotes equality through inclusion and interference only when it would aid solidarity.[193] Combining a recognition approach to liberty-limiting interventions with already employed equity lenses in decision-making would create clearer guidelines on when and how an HEI decides to intervene in student protests, while protecting safety.

In practice, this may look like evaluating student protests on a case-by-case basis. HEI's would have to evaluate who the actual parties implicated are and their relationship to one another,[194] which would promote

---

186 See Harvard T.H. Chan School of Public Health Office of Diversity and Inclusion, Equity Lens for Decision Making, https://content.sph.harvard.edu/wwwhsph/sites/2597/2021/08/ODI-Equity-Lens-for-Decision-Making-WCAG.pdf.
187 Supra Note 178.
188 Id.
189 Id.
190 Id at 86.
191 Id.
192 Id. at 89.
193 This is at odds with the absolutist tolerance for free speech that American culture seemingly boasts; as has been examined through our case studies, though, our system does not functionally operate with true absolute tolerance for freedom of expression. See Palestine Legal & Center for Constitutional Rights, The Palestine Exception to Free Speech, Palestine Legal at 43 (2015) https://palestinelegal.org/the-palestine-exception.
194 Supra Note 179.

communication with dissenting students and a clearer understanding of student demands.[195] For instance, this kind of approach may have illuminated to the President of Kent State University that the students were not protesting veterans or even current officers, but the military campaign's effect on oppressed Vietnamese people and on middle to lower class Americans being drafted[196] or to the UT-A President that PSC's protests were not aimed against Jewish people but rather Israel's military campaign.[197]

In practice, this would allow HEI's to continue (or start) safely taking public stances against oppressive and discriminatory student protests and expression– like KKK rallies and marches[198] and on-campus antisemitic graffiti[199]– while also uplifting oppressed voices in more 'controversial' or complicated situations. Similarly, decisions to punish students and faculty and to intervene using law enforcement could therefore be reserved for truly oppressive, discriminatory expressions.

Situating liberation and amplifying oppressed voices as the main goals of HEI liberty-limiting intervention decisions would allow HEI's to promote recognition and solidarity between cultural groups and would allow for a less violent, tense on-campus environment for students.[200] Doing so would not only encourage a more equitable application of time/place/manner restrictions, but would actually allow for the tension between students' First Amendment rights and Title VI and IX to be eased too.

Conclusion

HEI's TPM restrictions limit students' First Amendment Rights and are often adopted or modified in the wake of 'controversial' on-campus student protests. In enforcing these restrictions, HEI's may resort to public condemnations, scholarly punishment, or criminal charges. However, these enforcements are seen more often in 'controversial' protests that challenge neoliberalism and the HEI itself.

This is exemplified in institutional responses to student Anti-Vietnam War protests and student Pro-Palestine protests, specifically in the cases of Kent State University in the 1960's and 1970's and in UT Austin in the mid-2020's.

Thus, while TPM restrictions are facially "content-neutral", because TPM restrictions are not neutral in creation and in application, HEI's must develop a framework that would allow for the balancing of Title VI and IX nondiscrimination rights and First Amendment rights as they apply to student on-campus protestors and specifically potential HEI disciplinary actions against protestors. To do this, HEI's should not resort to outside law enforcement when possible, be aware of how layered TPM restrictions are and should analyze them using approaches that center marginalized people, and should be cognizant of the possible chilling effects associated with public statements by government actors. Additionally, for all of these tools, HEI's should employ an equity lens to assess the goals and actors of a given protest in relation to their membership in minoritized and oppressed populations. Making these conscious institutional changes may ease tension between HEI's protections of Title VI and IX and the First Amendment.

195 See also, Abdallah Fayyad, The Lessons From Colleges That Didn't Call the Police, Vox (May 3, 2024), https://www.vox.com/24147461/columbia-gaza-encampment-campus-protests-police-crackdown-pro-palestinian-students.
196 Supra Note 13.
197 Supra Note 150.
198 Supra Note 113.
199 Supra Note 127
200 Supra Note 177, 175, and 173

Federal Judges and Free Speech: Testing Jurisprudential Regime Theory and Ideological Effects in the U.S. Courts of Appeals

*By Robert T.F. Downes[1]**

Abstract:

This study examines how jurisprudential regimes and judicial ideology influence judicial behavior in First Amendment cases decided by the U.S. Courts of Appeals between 1941 and 2002. The investigation focuses on matters of political speech and acts of dissidence, excluding Establishment Clause and other religious cases, in addition to cases related to press, commercial speech, and campaign finance. Anchored in jurisprudential regime theory (JRT), the analysis employs a 'two-regime test' to examine two key periods in high court jurisprudence: the pre-Brandenburg ("Clear and Present Danger") and post-Brandenburg ("Imminent Lawless Action") regimes. These periods demarcate an apparent differentiation in high court doctrine and juridical tests of free speech. In addition to testing the applicability of JRT at the appellate level, this investigation analyzes the attitudinal effects of median panel ideology, the strategic influence of the Supreme Court's median justice's ideology, and the impact of the specific type of free speech claim at issue. The findings suggest that a three-judge panel's ideological composition significantly impacts legal outcomes, with conservative panels less likely to adopt broad interpretations of First Amendment free speech protections. They also indicate that three-judge panels tend to defer to the Supreme Court's ideological median, reflecting the influence of hierarchical dynamics in the judiciary and the strategic consideration of higher court preferences. On the whole, the findings underscore the primacy of panel ideology and the impacts of strategic considerations on appellate court judges constrained by the possibility of reversal, with little evidence to support the influence of jurisprudential regimes.

Keywords:

First Amendment Jurisprudence, Free Speech Law, Judicial Ideology, Judicial Decision-Making, Jurisprudential Regime Theory (JRT), U.S. Courts of Appeals

"Shall free speech and free assemblage, shall criticism and opinion — which even the espionage bill did not include — be destroyed? Shall it be a shadow of the past, the great historic American past? Shall it be trampled underfoot by any detective, or policeman, anyone who decides upon it? Or shall free speech and free press and free assemblage continue to be the heritage of the American people?"

— Emma Goldman, "Address to the Jury" (1917)

Introduction: The Law and Politics of Free Speech

The opening quote was articulated by Emma Goldman—the Lithuanian-born Jewish anarchist, feminist, and labor activist—as she defended herself and her co-defendant and lover, Alexander Berkman, during their anti-conscription trial in New York City on July 9, 1917. The radical couple was on trial for allegedly conspiring to obstruct the draft—a charge brought against them by federal officials in the U.S. District Court for the

---

1 * Robert T.F. Downes is a Ph.D. candidate in the Department of Political Science at the University of Connecticut, specializing in political theory and public law. His recent work examines constitutional law with a particular focus on the separation of powers. He would like to thank Professor Virginia A. Hettinger for inspiring his interest in judicial decision-making and introducing him to the literature in this field.

Southern District of New York. Their prosecution was part of a broader federal government effort to enforce the Espionage Act[2] (signed into law by President Woodrow Wilson just twenty-four days prior to the trial) and suppress anti-conscription activism during World War I.[3] In other words, Goldman's trial was the product of the U.S. government's wartime crackdown on dissent and its imposition of content-based restrictions on political speech deemed too dangerous and intolerable to circulate in the so-called marketplace of ideas, targeting anarchists, communists, socialists, and other radicals who defied the state's authority to mandate military service—all under the guise of safeguarding national security.

Goldman embodied an unrelenting commitment to free speech, both in principle and in practice. She wielded her right to free speech alongside her faculty for impassioned eloquence, launching incisive critiques against unjust exercises of authority that betrayed the Republic's promises of liberty and progress. Prior to her prosecution under the Espionage Act, she was arrested in February 1916 for violating the Comstock Act after handing out pamphlets supporting access to birth control—educational content concerning reproductive healthcare that federal law deemed too "obscene" for lawful circulation.[4]

Enacted in 1873, the Act prohibited the circulation of "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and…Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use." Such "things" included "Every paper, writing, advertisement, or representation" and "Every written or printed card, letter, circular, book, pamphlet or advertisement… whether sealed or unsealed" that "may, or can, be used or applied for producing abortion, or for any indecent or immoral purpose.[5]" Named after Anthony Comstock, a zealous moral reformer and anti-vice crusader, the Act made it illegal to send, receive, or distribute anything considered indecent—including not only pornography but also contraceptives, abortion information, and sex education materials. The statute's broad language gave authorities wide discretion to censor printed matter and prosecute activists, writers, and educators who challenged prevailing moral norms. It was part of a larger cultural campaign to enforce Victorian morality and suppress dissenting or progressive speech on sexuality, reproductive rights, and women's autonomy.[6]

In Emma Goldman's case, her 1916 arrest under the Comstock Act stemmed from her public advocacy of birth control, which she framed as a matter of women's freedom and bodily self-determination. Her arrest reflected how the law functioned as a tool of political and moral repression—used to silence radical voices, particularly those advancing feminist and anarchist critiques of state power and sexual hypocrisy. Her example is remarkably salient for the present moment as political elites like Vice President J.D. Vance advocated for reviving and enforcing the Comstock Act to suppress pro-choice activism.[7] History attests to this obdurate fact that the content and contours of free political speech are neither fixed nor unequivocal. On the contrary, they are active sites of contestation, with elastic boundaries capable of expanding or contracting in response to shifting political, social, and legal forces.

2 Espionage Act of 1917, ch. 30, tit. I, 40 Stat. 217 (1917), https://www.govinfo.gov/content/pkg/STATUTE-40/pdf/STATUTE-40-Pg217.pdf.

3 Emma Goldman, Address to the Jury in U.S. v. Emma Goldman and Alexander Berkman (July 9, 1917), THE ANARCHIST LIBRARY, https://theanarchistlibrary.org/library/emma-goldman-address-to-the-jury. A transcript of the speech is available in the Records of the U.S. Supreme Court, Appellate Case No. 2619, Transcript on Microfilm No. 5694 mf., Kheel Ctr. for Labor-Mgmt. Documentation and Archives, Martin P. Catherwood Library, Cornell Univ., https://rmc.library.cornell.edu/EAD/htmldocs/KCL05694mf.html (last visited Nov. 3, 2025); See also, Kathryn Palmer & Stephen E. Lucas, On Trial: Conflicting Versions of Emma Goldman's Address to the Jury, 11 RHETORIC & PUBLIC AFFS. 47 (2008).

4 Emma Goldman, The Social Aspects of Birth Control (April 1916), THE ANARCHIST LIBRARY, https://theanarchistlibrary.org/library/emma-goldman-the-social-aspects-of-birth-control.

5 Comstock Act of 1873, 18 U.S.C. §§ 1461–1462 (2024).

6 Craig. L. LaMay, America's Censor: Anthony Comstock and Free Speech, 19 COMM. & L. 1, (1997); Helen L. Horowitz, Victoria Woodhull, Anthony Comstock, and Conflict Over Sex in the United States in the 1870s, 87 J. AM. HIST. 403 (2000); Martha J. Bailey, 'Momma's Got the Pill': How Anthony Comstock and Griswold v. Connecticut Shaped US Childbearing, 100 AM. ECON. REV 98 (2010).

7 Dan Diamond & Meryl Kornfield, Vance urged DOJ to enforce Comstock Act, crack down on abortion pills, THE WASHINGTON POST (July 17, 2024), https://www.washingtonpost.com/health/2024/07/17/jd-vance-abortion-comstock-vice-presidential-nominee/.

Earlier in her activism, Goldman found herself in the midst of the Industrial Workers of the World's (IWW) "Free Speech Fights."[8] The fights were a response to efforts throughout the nation to curtail the free speech rights of labor organizers and labor unions, and they largely took place throughout the western United States.[9] At the San Diego free speech fight of 1912, Goldman was joined by anarchists like the feminist writer and freethought advocate Voltairine de Cleyre.[10] The Free Speech Fights are a noteworthy addition to this historical preface of the empirical investigation below, for they emerged as a form of resistance against high courts' restrictive rulings on free speech. The Supreme Court's ruling in *Spies v. Illinois (1887)*[11], for instance, was a significant catalyst of the IWW's free speech campaigns.

In Spies, the Supreme Court upheld the state's conviction of eight anarchist and socialist labor activists indicted and facing possible death sentences for their involvement in the Haymarket affair of 1886. The affair took place in Chicago, beginning as a peaceful rally in support of striking workers demanding the eight-hour workday. During the demonstration, a bomb exploded near police who were dispersing the crowd, killing several officers and civilians. In the ensuing panic, police opened fire. Authorities blamed anarchist and socialist labor organizers—August Spies, Albert Parsons, and others—even though no evidence tied them directly to the bombing. The resulting trial effectively became a political prosecution, focusing less on concrete acts than on the defendants' political beliefs and speech.[12] The Court's ruling signaled that advocacy of revolutionary ideas could be punished as incitement, even without direct evidence of militant radicalism or calls for violence.

In this way, Spies tested—and limited—the boundaries of free speech and assembly, showing how dissenting political expression could be criminalized when associated with unrest, perceived threats to public order, or even a revolutionary viewpoint. Haymarket is thus an early example of the challenges high courts face in balancing constitutional protections of free speech and assembly with the pressures of public opinion and the legitimacy of state authority during moments of political unrest. Following the Court's ruling, the social anarchist Lucy Parsons—wife of Albert and a founding member of the IWW—wrote of the Justices, "These scoundrelly bigwigs, in solemn conclave, decided that no Constitutional right had been violated, although two of the main points in the Constitution," the rights of free speech and free assembly, "had been grossly trodden under foot" through the coercive power of the police and the Pinkertons.[13] The former acted as the enforcer of state power, while the latter—the Pinkerton National Detective Agency—was a private security force often hired by industrial capitalists to infiltrate unions, break strikes, and suppress labor organizing through violence and espionage.[14] Together, the police and the Pinkertons embodied the alliance between state authority and private capital in repressing working-class movements and radical dissent during the late nineteenth century, with one historian even naming the detective agency as "the private army for capital."[15]

In this saga of resistance and repression, the struggle for free speech and assembly came full circle with

8 MATTHEW S. MAY, SOAPSBOX REBELLION: THE HOBO ORATOR UNION AND THE FREE SPEECH FIGHTS OF THE INDUSTRIAL WORKERS OF THE WORLD, 1909-1916 (2013).
9 Anne F. Mattina, 'Yours for Industrial Freedom': Women of the IWW, 1905–1930, 43 WOMEN'S STUD 170 (2014); Catherine L. Fisk, Is It Time for a New Free Speech Fight? Thoughts on Whether the First Amendment Is a Friend or Foe of Labor, 39 BERKELEY J. EMP. & LAB. L. 253 (2018).
10 PAUL AVRICH, AN AMERICAN ANARCHIST: THE LIFE OF VOLTAIRINE DE CLEYRE (2018); See also, Shane Little, Voltairine de Cleyre Speaks Again!, 33 ANARCHIST STUD. 106 (2025)
11 Spies v. Illinois, 123 U.S. 131 (1887).
12 JAMES GREEN, DEATH IN HAYMARKET: A STORY OF CHICAGO, THE FIRST LABOR MOVEMENT AND THE BOMBING THAT DIVIDED GILDED AGE AMERICA (2006); PAUL AVRICH, THE HAYMARKET TRAGEDY (1984); TIMOTHY MESSER-KRUSE, THE TRIAL OF THE HAYMARKET ANARCHISTS: TERRORISM AND JUSTICE IN THE GILDED AGE (2011).
13 Lucy E. Parsons, The Eleventh of November, 1887, in THE FAMOUS SPEECHES OF THE EIGHT CHICAGO ANARCHISTS (Lucy E. Parsons ed., 1912), https://theanarchistlibrary.org/library/lucy-e-parsons-the-eleventh-of-november-1887.
14 S. PAUL O'HARA, INVENTING THE PINKERTONS; OR, SPIES, SLEUTHS, MERCENARIES, AND THUGS: BEING A STORY OF THE NATION'S MOST FAMOUS (AND INFAMOUS) DETECTIVE AGENCY (2016).
15 Id. at 71-89.

the Espionage Act of 1917, under which Goldman herself was convicted for opposing military conscription. As noted in the opening paragraph, her case exemplified how wartime legislation could be weaponized against political dissent, transforming political speech into a criminal offense in the name of national security. The Act would soon become the centerpiece of the Supreme Court's landmark decision in *Schenck v. United States (1919)*, where a unanimous ruling upheld the constitutionality of criminal convictions enforced under the statute and articulated the "clear and present danger" doctrine.[16] In other words, the Court permitted Congress to pass laws suppressing certain speech when that speech places national security or the public interest at risk. The opinion of the Court, authored by Justice Oliver Wendell Holmes, Jr., states the following.

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.[17]

It is for the above excerpt that Schenck is renowned in Americana for the proverbial "shouting fire in a crowded theater" test[18], yet it was the latter, precedential portion of the ruling that ultimately sealed Goldman's fate. After serving two-year prison sentences and paying fines of $10,000 each for their 1917 convictions under the Espionage Act[19], the "Queen of the Anarchists"[20] and her partner, Berkman, were arrested again shortly after their release from prison in 1919 during the infamous Palmer Raids at the height of the First Red Scare—once more for publishing and promoting anti-war literature. The couple was promptly deported to Russia aboard the USAT Buford[21], living the rest of their lives in exile after becoming disillusioned with the Bolshevik regime's betrayal of the socialist revolution's emancipatory potential—particularly its repression of dissent, its subversion of labor self-organization, and its exchange of libertarian ideals for authoritarian control.[22]

That same year, the five co-defendants in *Abrams v. United States (1919)*[23] met a similar fate just eight months after *Schenck*, when the Supreme Court upheld their convictions under the Sedition Act of 1918[24] for distributing anti-war leaflets condemning U.S. intervention in the Russian Revolution.[25] The Act had amended the Espionage Act to criminalize, during wartime, any willful utterance, printing, or publication of "any disloyal, profane, scurrilous, or abusive language about the form of government of the United States," its armed forces, or the war effort.[26] Notably, Justice Holmes dissented in Abrams, applying the "clear and present danger" standard established in Schenck and finding that the defendants' speech did not constitute a "substantive crime" or "immediate evil" that could be lawfully restricted.[27]

Together, the decisions in Schenck, Abrams, and later landmark First Amendment cases like *Gitlow v.*

---

16 Schenck v. United States, 249 U.S. 47 (1919) at 52.
17 Id.
18 Id
19 PAUL AVRICH & KAREN AVRICH, SASHA AND EMMA: THE ANARCHIST ODYSSEY OF ALEXANDER BERKMAN AND EMMA GOLDMAN 275-278 (2012).
20 PAUL AVRICH, ANARCHIST VOICES: AN ORAL HISTORY OF ANARCHISM IN AMERICA 45 (2005); PAUL AVRICH & KAREN AVRICH, SASHA AND EMMA: THE ANARCHIST ODYSSEY OF ALEXANDER BERKMAN AND EMMA GOLDMAN 3, 113 (2012).
21 PAUL AVRICH & KAREN AVRICH, SASHA AND EMMA: THE ANARCHIST ODYSSEY OF ALEXANDER BERKMAN AND EMMA GOLDMAN 291-300 (2012). See also, Alexander Berkman & Emma Goldman, Deportation — Its Meaning and Menace: Last Message to the People of America (1919), THE ANARCHIST LIBRARY, https://theanarchistlibrary.org/library/alexander-berkman-and-emma-goldman-deportation-its-meaning-and-menace-last-message-to-the-people.
22 Id. at 311-313.
23 Abrams v. United States, 250 U.S. 616 (1919).
24 Sedition Act of 1918, ch. 75, 40 Stat. 553 (1918), https://www.govinfo.gov/link/statute/40/553.
25 Abrams v. United States, 250 U.S. 616 (1919) at 620-623.
26 Sedition Act of 1918, ch. 75, 40 Stat. 553 (1918) at 553.
27 Id. at 628.

New York (1925)[28] illustrate the Court's struggle to clearly delineate the boundaries of protected speech within the scope of the early twentieth century's "clear and present danger" test. Earlier, in the *Masses Publishing Co. v. Patten (1917)*[29]—a ruling issued by the U.S. District Court for the Southern District of New York just over two weeks after Goldman and Berkman's convictions in the same jurisdiction—Judge Learned Hand articulated a standard closer to the incitement test later adopted in *Brandenburg v. Ohio (1969)*[30]. In defending the circulation of a leftist, anti-war magazine, Hand wrote the following:

Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government…. If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation. If that be not the test, I can see no escape from the conclusion that… every political agitation which can be shown to be apt to create a seditious temper is illegal. I am confident that by such language Congress had no such revolutionary purpose in view.[31]

Judge Hand's interpretation reflected Benjamin Franklin's foundational view that

Without Freedom of Thought, there can be no such Thing as Wisdom; and no such Thing as publick Liberty, without Freedom of Speech; which is the Right of every Man, as far as by it, he does not hurt or controul the Right of another: And this is the only Check it ought to suffer, and the only Bounds it ought to know.[32]

Both Hand's reasoning and Franklin's earlier assertion articulate, in different registers, a version of John Stuart Mill's 'Harm Principle' from *On Liberty (1859)*—the idea that speech and expression serve social utility and should circulate freely within the marketplace of ideas unless they directly cause harm to others.[33] In his *Abrams* dissent, Justice Holmes adapted Mill's insight, defending the "free trade in ideas" and asserting that "the best test of truth is the power of the thought to get itself accepted in the competition of the market"[34]—a formulation that mirrors Mill's conviction that truth and progress emerge through open discussion and debate rather than suppression. Despite this philosophically liberal foundation, Hand's decision in Masses Publishing Co. was reversed by the Second Circuit Court of Appeals[35], reflecting the judiciary's enduring uncertainty over where to draw the line between protected dissent and punishable sedition.

Regimes of Speech: Twentieth-Century Shifts in First Amendment Jurisprudence

This introduction to the history of early twentieth-century Supreme Court free speech jurisprudence—portrayed through Goldman and her radical contemporaries' run-ins with the law—illustrates a series of interactions between judicial doctrine and the tumultuous sociopolitical landscape of a nation marked by war, ideolog-

28 Gitlow v. New York, 268 U.S. 652 (1925).
29 Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917), https://www.thefire.org/research-learn/us-district-court-southern-district-new-york-opinion-masses-publishing-co-v-patten.
30 Brandenburg v. Ohio, 395 U.S. 444 (1969) at 448-449
31 Masses Publ'g Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917) at 3, https://www.thefire.org/research-learn/us-district-court-southern-district-new-york-opinion-masses-publishing-co-v-patten (citing PDF pagination at 3).
32 Benjamin Franklin, Silence Dogood, No. 8, 9 July 1722, FOUNDERS ONLINE: NATIONAL ARCHIVES, https://founders.archives.gov/documents/Franklin/01-01-02-0015 [Original source: THE PAPERS OF BENJAMIN FRANKLIN, VOL. 1, JANUARY 6, 1706 THROUGH DECEMBER 31, 1734 (Leonard W. Labaree ed., 1959)].
33 JOHN STUART MILL, ON LIBERTY 31-99 (1859). See also, KATHRYN GRIFFITH, JUDGE LEARNED HAND AND THE ROLE OF THE FEDERAL JUDICIARY 57-60 (1973).
34 Abrams v. United States, 250 U.S. 616 (1919) at 630. See also, Irene M. Ten Cate, Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendel Holmes's Free Speech Defenses, 22 YALE J.L. & HUMAN. 35 (2010).
35 Masses Publ'g Co. v. Patten, 246 F. 24 (2d Cir. 1917), https://www.thefire.org/research-learn/us-court-appeals-second-circuit-opinion-masses-publishing-co-v-patten.

ical conflict, and shifting public sentiment. It also reveals fundamental disagreements within the judiciary itself, as lower courts grappled with the task of interpreting and applying constitutional protections amid social and political strife. In such moments, the courts are charged with mediating the fragile balance between individual liberty and collective security.

Taking this into account, one is left with the following testable question of judicial behavior: *What factors influence judges' decisions in First Amendment cases? More specifically, this inquiry asks to what extent appellate-level judicial ideology, Supreme Court ideology, jurisprudential regimes, and/or specific case characteristics shape the directionality of First Amendment rulings in the U.S. Courts of Appeals?* The literature review in the next section refines this research question into discrete variables, relying on prior scholarly investigations into Supreme Court and appellate-level judicial behavior to inform this investigation's hypotheses, methodology, and measurements. This section provides a brief examination of the relevant case law and historical background leading up to the Supreme Court's reversal of the "clear and present danger" standard in *Brandenburg*, offering additional theory-driven factors that inform this approach.

Despite its flaws and ambiguities, the clear and present danger doctrine remained a durable test for justifying the suppression of political speech and acts of dissidence throughout the first half of the twentieth century. For example, the Court cited both Schenck and Abrams when applying the clear and present danger standard in Gitlow, later cases like *Whitney v. California (1927)*[36], and the McCarthy era cases *Dennis v. United States (1951)*[37] and *Yates v. United States (1957)*[38]. Each decision upheld criminal convictions related to socialist or communist advocacy and alleged threats to national security.

Other landmark free speech cases in the early half of the twentieth century, such the *Chaplinsky v. New Hampshire (1942)* "fighting words" decision[39], suggest that the early half of twentieth-century American legal history may be characterized as relatively restrictive toward free speech, with narrower Supreme Court interpretations of First Amendment protections when compared to subsequent decades. To further substantiate this claim through historical examples, one may cite the febrile hysteria of anti-communist sentiment that accompanied the Second Red Scare. As with the *Espionage Act of 1917*, the rise of McCarthyism throughout '50s concretized through the enforcement of the Smith Act (a.k.a. the Alien Registration Act of 1940) to prosecute individuals accused of representing a clear and present danger to national security on account of their alleged espousal of communist ideologies.[40]

As the twentieth century progressed into its latter half, shifts in judicial philosophy and public sentiment catalyzed the reconstitution of free speech legal doctrine, culminating in pivotal rulings like *New York Times Co. v. Sullivan (1964)* that expanded First Amendment protections of the press through the "actual malice" doctrine.[41] Five years later, the Court would go on to recognize the First Amendment rights of public school students through *Tinker v. Des Moines (1969)*.[42] That is, it ruled in favor of the young dissenters protesting the Vietnam War and calling for an immediate ceasefire.[43] When juxtaposed with the criminalization of anti-war activists in the earlier half of the century, Tinker emerges as a remarkable volte-face in the Court's First Amendment jurisprudence.

36 Whitney v. California, 274 U.S. 357 (1927)
37 Dennis v. United States, 341 U.S. 494 (1951)
38 Yates v. United States, 354 U.S. 298 (1957)
39 Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) at 573
40 Robert T.F. Downes, Constitutional Dictatorship and Enemies Within: A Constitutional and Historical Analysis of the Alien and Sedition Acts from John Adams to Donald Trump, 10 J. INT'L REL., PEACE STUD. & DEV. 1, 24-26 (2025); Robert Mollan, Smith Act Prosecutions: The Effect of the Dennis and Yates Decisions, in PRE-NINETEEN SIXTY DEVELOPMENTS IN THE BILL OF RIGHTS AREA (Paul L. Murphy ed., 2014).
41 New York Times Co. v. Sullivan, 376 U.S. 254 (1964) at 279-280
42 Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969).
43 Id. at 514.

That same year, the Supreme Court would overturn *Schenck, Abrams, Whitney, Dennis*, and *Yates* with its ruling in *Brandenburg.* In the Court's opinion, issued *per curiam*, the Justices abandoned the "clear and present danger" standard in favor of the "imminent lawless action" test, marking a new era of jurisprudence on protections of free speech.[44] It is notable, however, that the appellant in this case, Clarence Brandenburg, was neither a leftist anti-war activist nor a student protester, but rather a prominent leader in the Ku Klux Klan.[45] Despite his advocacy of white supremacy and racial hatred[46], the Court reversed Brandenburg's conviction, defending his bigotry under the First Amendment's protection of free speech. Nonetheless, with respect to jurisprudence, the reversal of the "clear and present danger" test and its substitution with the "imminent lawless action" test demarcates an apparent jurisprudential regime change.

It follows from this brief overview of developments in twentieth-century free speech jurisprudence that one may consider an additional testable dimension to the two questions stated above: *How does the Supreme Court's transition from one jurisprudential regime to another influence judges' interpretation and application of First Amendment protections of political speech and acts of dissidence? How does jurisprudential regime change affect decision-making within the lower courts? To what degree are the lower courts compliant with the established regime?* In other words, *how do interpretations of First Amendment protections of free speech vary pre- Brandenburg (i.e., the "clear and present danger" regime) and post-Brandenburg (i.e., the "imminent lawless action" regime)?* This investigation examines these doctrinal shifts to discern if and how the transition from the "clear and present danger" regime to the "imminent lawless action" has influenced appellate-level judicial behavior, shaped high court jurisprudence, and influenced institutional trends within the judiciary.

While jurisprudential regimes offer a succinct framework for understanding shifts in judicial behavior over time, this study also examines the role of judicial ideology. By focusing on the ideological composition of three-judge panels, the analysis provides insight into the attitudinal factors that may influence First Amendment rulings on matters of free speech. The analysis also captures strategic dynamics within the judicial hierarchy. Of particular importance here is the role of the median Supreme Court Justice, whose position often serves as the ideological fulcrum for the majority opinion.[47] These variables are measured alongside specific free speech issue classifications to evaluate how jurisprudential regime, judicial ideology, panel composition, and the Supreme Court median interact with the substantive context and facts of each case. Together, they allow for a nuanced analysis of how distinct types of free speech claims are adjudicated under varying jurisprudential and ideological conditions.

Literature Review: High Court Decision-Making and Ideological Measures

This study investigates how the jurisprudential regime shifts from the "clear and present danger" standard pre-Brandenburg to "imminent lawless action" standard post-Brandenburg, judicial ideology, and specific case facts shape appellate court decision-making in matters concerning political speech and acts of dissidence. It also examines the interaction effect between appellate-level and Supreme Court Justice ideological measures. This section builds on the preceding discussion of the legal and historical rationale for this investigation, reviewing the relevant literature on high court decision-making and measures of judicial ideology to further inform the approach.

Jurisprudential Regime Theory (JRT)

The principal aim of this investigation is twofold: a) to test jurisprudential regime theory (JRT) and b) to assess its applicability to appellate courts, examining whether and to what extent shifts in jurisprudential regimes influence judicial decision-making in cases concerning freedom of speech and acts of dissidence. JRT

44 See supra note 29.
45 Brandenburg v. Ohio, 395 U.S. 444 (1969) at 444.
46 Id. at 445-447.
47 Jeffrey A. Segal & Chad Westerland, The Supreme Court, Congress, and Judicial Review, 83 NCL REV. 1323 (2004).

propounds a concise theoretical framework for understanding how transitions between landmark legal doctrines shape judicial behavior. Its general premise is captured in the term punctuated equilibrium:

Judicial decision making proceeds in a stable fashion and rests on some key foundations, but then a landmark precedent by the Supreme Court shatters the old regime and creates a new regime, significantly altering the impact of key legal considerations on justices' votes. Law matters but not deterministically; justices' ideologies can still exhibit an independent, concurrent impact alongside law.[48]

The 'two-regime test' of JRT formulated for this investigation considers the directionality of appellate-level First Amendment interpretations during the "clear and present danger" and "imminent lawless action" regimes. This doctrinal shift creates two clear periods of landmark jurisprudence for study. That is, Brandenburg represents a significant reorientation in the Court's approach to balancing free speech protections against the state's interest in maintaining public order, establishing a precedent that effectively reversed—or "shattered"—the old Schenck regime.

Richards and Kritzer (2002) examine the jurisprudential regimes of free expression law, covering criminal, civil, labor, and regulatory matters.[49] Their study finds evidence that the Supreme Court's decisions in *Chicago Police Dept. v. Mosley (1972)*[50] and *Grayned v. City of Rockford (1972)*[51] established "content-neutrality" as a "general free expression regime" influencing judicial behavior in subsequent First Amendment cases.[52] The finding suggests that while judicial attitudes play a significant role, the arrival of landmark binding precedent serves as a directive for future decision-making—constraining judicial behavior through the Court's institutional obligation to maintain the uniformity of precedent and ensure relative consistency in the treatment of subsequent cases. Accordingly, while ideological and strategic factors may still influence judicial behavior, the authors' find evidence to support the conclusion that jurisprudential regimes significantly and systematically influence judicial behavior. In this case, the novel and landmark content-neutrality regime established by Mosley and Grayned structured judicial decision-making by distinguishing between content-based regulations (subject to strict scrutiny) and content-neutral regulations (subject to intermediate scrutiny). This framework guides judges' evaluations of case facts regardless of ideological shifts or changes in Court personnel. Crucially, this approach highlights how doctrinal frameworks mediate judicial behavior and aligns closely with the study's focus on the shift from the "clear and present danger" standard to the "imminent lawless action" regime.

In a later study, *Bartels and O'Geen (2015)* revisit Richards and Kritzer's study of the jurisprudential regimes covering free expression law to provide a nuanced appraisal of JRT and its alternatives. They highlight JRT's premise of "punctuated equilibrium,"[53] where landmark cases create structural shifts in high court jurisprudence. However, their empirical tests on free expression law reveal mixed evidence in support of JRT. For instance, some cases align with JRT's expectation of abrupt doctrinal shifts, while others show more gradual or inconsistent changes, suggesting that the effect of a regime depends on how prescriptive the new doctrine is and how readily lower courts adopt its framework. In other words, some findings support JRT's predictions of regime-induced changes, while others align with evolutionary change or legal stability models.[54] This variation is particularly relevant for this investigation since it informs the expectation that the integration of jurisprudential regimes established by the Supreme Court may not be uniform among the lower courts.

48 Brandon L. Bartels & Andrew J. O'Geen, The Nature of Legal Change on the US Supreme Court: Jurisprudential Regimes Theory and Its Alternatives, 59 AM J. POL. SCI. 880, 880 (2015).
49 Mark J. Richards & Herbert M. Kritzer, Jurisprudential Regimes in Supreme Court Decision Making, 96 AM. POL. SCI. REV. 305 (2002).
50 Police Dept. of City of Chicago v. Mosley, 408 U.S. 92 (1972).
51 Grayned v. City of Rockford, 408 U.S. 104 (1972)
52 See supra note 48, at 310
53 See supra note 47.
54 Brandon L. Bartels & Andrew J. O'Geen, The Nature of Legal Change on the US Supreme Court: Jurisprudential Regimes Theory and Its Alternatives, 59 AM J. POL. SCI. 880, 891-893 (2015).

Outside of JRT's relation to freedom of speech and expression, *Kritzer and Richards (2003)*[55] and *Scott (2006)*[56] investigate the impact of the Establishment Clause jurisprudential regime established by *Lemon v. Kurtzman (1971)*[57], focusing on how regime shifts influence both majority and dissenting justices. Their findings reveal that while the majority of justices adapt to new regimes immediately, dissenting justices exhibit delayed behavioral changes, indicating a gradual and varied incorporation of new regime principles among the *Justices on the Supreme Court. Pang et al. (2012)* find evidence to support these authors' conclusions on the effects of jurisprudential regime changes in administrative law and Establishment Clause cases, but their study finds limited support for such shifts in free speech and search-and-seizure jurisprudence.[58]

Outside of First Amendment law, Richards, Smith, and Kritzer (2006)[59] explore the impact of jurisprudential regimes on Supreme Court decision-making in matters concerning deference to executive agencies, focusing on the administrative law jurisprudential regime set by *Chevron v. Natural Resources Defense Council (1984)*.[60] Their findings support the theory that jurisprudential regimes alter how justices evaluate case factors, such as executive agency rulemaking or statutory clarity. They demonstrate that Chevron led to increased deference to administrative agencies in non-rulemaking cases while curtailing deference in rulemaking cases.[61] These results highlight how jurisprudential regimes covering other areas of the law can establish durable juridical frameworks that shape judicial behavior beyond individual, ideologically oriented policy preferences.

Lax and Rader (2010a; 2010b)[62] critique the statistical methods used in Kritzer and Richards's studies on Jurisprudential Regime Theory (JRT), arguing that reliance on Chow tests leads to inflated findings of regime change due to violated assumptions of statistical independence. They propose randomization tests as a more reliable alternative and, through their application, find weaker evidence for regime-induced shifts under stricter scrutiny. In response, *Kritzer and Richards (2010)*[63] defend their methodology, emphasizing that Chow statistical tests were only one part of a broader analysis that included theoretical pattern matching and sensitivity testing. They present reanalyzed results using clustered standard errors, which they argue still support the existence of jurisprudential regimes, albeit with some limitations. This exchange highlights ongoing debates about methodological rigor in assessing the impact of JRT on high court decision-making.

To sum up, there is evidence to suggest that JRT holds moderate explanatory power for judicial behavior on the Supreme Court. The literature review further suggests that certain First Amendment issues (e.g., content-neutrality, freedom of expression, or Establishment Clause disputes) ought to alert investigators to the significance of jurisprudential regime change. Although the existing literature suggests that the utility of JRT is limited when applied to First Amendment cases decided by the Supreme Court, the above studies have not considered the effects of free speech jurisprudential regimes on the lower courts. On the contrary, they tend to "assume that lower courts are perfectly compliant with those outcomes truly preferred by the Supreme Court"[64] on account of the institutional constraints placed on lower court judges by the stratification of authority in the

55 Herbert M. Kritzer & Mark J. Richards, Jurisprudential Regimes and Supreme Court Decisionmaking: The Lemon Regime and Establishment Clause Cases, 37 LAW & SOC'Y REV. 827 (2003).
56 Kevin M. Scott, Reconsidering the Impact of Jurisprudential Regimes, 87 SOCIAL SCIENCE QUARTERLY 380 (2006).
57 Lemon v. Kurtzman, 403 U.S. 602 (1971).
58 Xun Pang, Barry Friedman, Andrew D. Martin, & Kevin M. Quinn, Endogenous Jurisprudential Regimes, 20 POL. ANALYSIS 417 (2012).
59 Mark J. Richards, Joseph L. Smith, & Herbert M. Kritzer, Does Chevron Matter?, 28 LAW & POL'Y 444 (2006).
60 Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).
61 Mark J. Richards, Joseph L. Smith, & Herbert M. Kritzer, Does Chevron Matter?, 28 LAW & POL'Y 444, 455-465 (2006).
62 Jeffrey R. Lax & Kelly T. Rader, Legal constraints on Supreme Court Decision Making: Do Jurisprudential Regimes Exist?, 72 J. POL. 273 (2010a); Jeffrey R. Lax & Kelly T. Rader, The Three Prongs of a Jurisprudential Regimes Test: A Response to Kritzer and Richards, 72 J. POL. 289 (2010b).
63 Herbert M. Kritzer & Mark J. Richards, Taking and Testing Jurisprudential Regimes Seriously: A Response to Lax and Rader, 72 J. POL. 285 (2010).
64 Jonathan P. Kastellec & Jeffrey R. Lax, Case Selection and the Study of Judicial Politics, 5 J. EMPIRICAL LEGAL STUD. 407, 433 (2008).

judicial hierarchy.[65] Accordingly, while the literature delivers the expectation of little to no effect, this investigation seeks to remedy this gap by applying JRT to judicial decision-making on U.S. Courts of Appeals.

The First Amendment and the Attitudinal Model

At the level of the Supreme Court, Jeffrey A. Segal and Harold J. Spaeth conclude, "The fact remains that the ideology of the justices drives their decisions."[66] This is the general premise of the attitudinal model used to explain judicial behavior in courts of last resort. Segal and Spaeth further argue that justices' ideologically-oriented policy preferences are strong predictors of their behavior, with liberal justices favoring more expansive interpretations of rights-based protections and conservative justices tending toward restraint when deciding cases on the merits.[67] This is due to the Supreme Court's relatively unconstrained institutional position—its insulation from the vicissitudes of political and electoral pressures that shape the legislative and executive branches, its justices' life tenure under Article III, and its primary institutional role as the final arbiter of constitutional interpretation. In the attitudinal model, legal principles and precedent serve not as predictors of judicial behavior but as post-hoc justifications for decisions that reflect the Justices' policy preferences.[68] Extensions of the attitudinal model to the U.S. Courts of Appeals suggest that lower court judges are not immune to ideological influence. For example, one finds evidence of attitudinal behavior at the appellate level during en banc review or in the rare instances when circuit judges author dissenting opinions.[69]

Since analyses of JRT are permissive of ideology's "independent, concurrent impact alongside law,"[70] it follows that one would expect to see more conservative (liberal) judges issuing narrower (broader) interpretations of First Amendment protections of free speech than liberal (conservative) judges, regardless of the jurisprudential regime in question. For example, *Gibson (2004)* further critiques the role of ideology in First Amendment cases, highlighting how the Justices in *McConnell v. FEC (2003)*[71] prioritized their policy preferences when addressing campaign finance laws, underscoring the malleability of case facts and the shifting significance they assume under an interpretive lens influenced by ideology.[72] *Braman (2006)* confirms the notion that justices' ideological leanings—such as their respective positions on abortion or free speech protections—affect their interpretations of legal standing in First Amendment cases. However, the author's findings support a "constrained attitudinal model,"[73] in which doctrine and precedent (i.e., jurisprudential regimes) moderate attitudinal influences. This finding demonstrates that jurisprudential regimes may exert an indirect effect on judicial behavior, reflecting the principle that judicial decision-making is shaped by a combination of legal norms and policy preferences.

By applying these insights to the present study, one would expect conservative (liberal) judges to issue narrower (broader) interpretations of First Amendment protections than liberal (conservative) judges, particularly in contexts where ideological stakes are high and institutional constraints are weak. However, beyond the

65 Jonathan P. Kastellec, Hierarchical and Collegial Politics on the US Courts of Appeals, 73 J. POL. 345 (2011); Kevin M. Scott, Understanding Judicial Hierarchy: Reversals and the Behavior of Intermediate Appellate Judges, 40 LAW & SOC'Y REV. 163 (2006).
66 JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 433 (2002).
67 Id. at 86-114, 312-356.
68 Id.
69 Micheal W. Giles, Virginia A. Hettinger, Christopher Zorn, & Todd C. Peppers, The Etiology of the Occurrence of En Banc Review in the US Court of Appeals, 51 AM. J. POL. SCI. 449 (2007); Virginia A. Hettinger & Stefanie A. Lindquist, Decision Making in the US Courts of Appeals: The Determinants of Reversal on Appeal, in NEW DIRECTIONS IN JUDICIAL POLITICS (Kevin T. McGuire ed., 2012); Virginia A. Hettinger, Stefanie A. Lindquist, & Wendy L. Martinek, Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the US Courts of Appeals, 48 AM. J. POL. SCI. 123 (2004). See also, Micheal W. Giles, Virginia A. Hettinger, & Todd Peppers, Picking Federal Judges: A Note on Policy and Partisan Selection Agendas, 54 POL RSCH. Q. 623 (2001).
70 Brandon L. Bartels & Andrew J. O'Geen, The Nature of Legal Change on the US Supreme Court: Jurisprudential Regimes Theory and Its Alternatives, 59 AM. J. POL. SCI. 880, 880 (2015).
71 McConnell v. Federal Election Commission, 540 U.S. 93 (2003)
72 James L. Gibson, BCRA's Assault on the First Amendment: The Death of the Overbreadth Doctrine?, 3 ELECT. L. J. 245 (2004).
73 Eileen Braman, Reasoning on the Threshold: Testing the Separability of Preferences in Legal Decision Making, 68 J. POL. 308, 313-319 (2006)

potential influence of jurisprudential regimes and judicial ideology, this investigation must also account for the strategic dynamics within the judicial hierarchy that mediate the relationship between the Supreme Court and the U.S. Courts of Appeals.

Strategic Concerns within the Judicial Hierarchy

Put simply, strategic models of judicial behavior suggest that judges are rational, forward-looking actors who take into account the potential reactions of other institutional players, including higher courts, co-equal branches of government, and even public opinion. Rather than exercising their naive policy preferences, justices will attempt to reach their ideologically preferred outcome by taking a sophisticated approach that balances their own ideals with that of their colleagues and other actors, such as Congress.[74] For example, Supreme Court justices may strategically align their decisions with the perceived policy preferences of the House or the Senate to safeguard the judiciary's legitimacy by avoiding legislative backlash, such as the passage of a law that could effectively nullify the Court's decision.[75]

On this head, while *Segal and Spaeth (2002)* are correct to point out that attitudinal pressures are most observable in the relatively unconstrained behavior of Supreme Court Justices[76], strategic concerns are prevalent in the lower ranks of the judicial hierarchy where judges must consider the potential for review or reversal by higher courts. Appellate judges, for instance, are often mindful of both Supreme Court precedent and the justices' preferences, strategically tailoring their decisions to avoid reversal or to align their rulings with anticipated outcomes at the Supreme Court level.[77] This finding underscores the importance of examining the relationship between appellate judges' ideology and the Supreme Court's ideological composition—particularly the ideology score of the median justice—to identify patterns of deference or divergence in First Amendment cases. It also suggests that a measurable interaction may exist between appellate-level and Supreme Court ideology. Examining this strategic dimension of judicial behavior tests the broad assumption that lower courts are typically "perfectly compliant" with the regime established by the Supreme Court.[78]

To gauge this strategic dynamic, this investigation relies on the median voter theorem.[79] When applied to the Supreme Court, the theorem suggests that the median justice on the Supreme Court often holds the pivotal position in determining a decision's ideological trajectory.[80] "Put in slightly more colloquial terms," write Segal and Westerland (2004), "the median member of the Court is the swing vote. As goes the median, so goes the Court."[81] The median voter theorem is applied to this study's measure of appellate panel-level ideological composition, based on the expectation that the median judge on a three-judge panel exerts moderating influence over their colleagues. Furthermore, by anticipating the preferences of the pivotal median justice on the Supreme Court, appellate judges can strategically minimize the risk of reversal and preserve circuit precedent by aligning their decisions with the dominant jurisprudential regime. In this way, measuring the ideology of both the median appellate panel judge and the median Supreme Court justice provides a strategic framework for interpreting patterns of compliance and deviation at the appellate level.

---

74 See supra note 66.

75 Jeffrey A. Segal, Separation-of-Powers Games in the Positive Theory of Congress and Courts, 91 AM. POL. SCI. REV. 28 (1997); Ryan J. Owens, The Separation of Powers and Supreme Court Agenda Setting, 54 AM. J. POL. SCI. 412 (2010).

76 See supra note 66.

77 Chad Westerland, Jeffrey A. Segal, Lee Epstein, Charles M. Cameron, & Scott Comparato, Strategic Defiance and Compliance in the US Courts of Appeals, 54 AM. J. POL. SCI 891 (2010); Donald R. Songer, Jeffrey A. Segal, & Charles M. Cameron, The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions, 38 AM. J. POL. SCI. 673 (1994).

78 See supra note 63.

79 Anthony Downes, An Economic Theory of Political Action in a Democracy, 65 J. POL. ECON. 135 (1957); Duncan Black, On the Rationale of Group Decision-Making, 56 J. POL. ECON. 23 (1948).

80 Clifford Carrubba, Barry Friedman, Andrew D. Martin, & Georg Vanberg, Does the Median Justice Control the Content of Supreme Court Opinions?, Paper Presented at the 2nd Annual Conference on Empirical Legal Studies (Nov. 9-10, 2007), available at https://papers.ssrn.com/sol3/Delivery.cfm?abstractid=998718.

81 Jeffrey A. Segal & Chad Westerland, The Supreme Court, Congress, and Judicial Review, 83 NCL REV. 1323, 1325 (2004).

Measuring Judicial Ideology

Judicial decision-making in First Amendment cases is enveloped by a complex interplay of legal doctrines, ideological preferences, and institutional dynamics, requiring analytical tools that can account for these interacting influences. After reviewing the history of twentieth-century free speech jurisprudence along with the scholarly literature on JRT, the attitudinal model, and strategic expectations of judicial behavior, it becomes evident that these frameworks provide complementary insights into how judges interpret and apply the law. To effectively analyze this interplay, it is essential to adopt a robust and reliable measure of judicial ideology that captures the policy preferences of judges across different historical and institutional contexts.

Judicial Common Space (JCS) scores, derived from the ideological positioning of appointing presidents and home-state senators, provide a widely accepted and empirically validated method for estimating judicial ideology.[82] The general premise of the JCS score is that a sitting judge's ideological preferences can be estimated based on the political alignment of their appointing president and, due to the unwritten institutional norm of senatorial courtesy to co- partisans, the ideological leanings of their home-state senators (calculated by their respective DW-NOMINATE scores)[83]. A more negative (positive) JCS score indicates a more liberal (conservative) judge. By situating judges in a continuous ideologically-oriented policy spectrum—from –1.0 (most liberal score) to +1.0 (most conservative score—alongside members of Congress and the president, JCS scores allow for consistent comparisons across various levels of the federal judiciary.

Put differently, JCS measures provide a standardized approach for quantifying judicial ideology, making it possible to examine how judges' attitudes influence decision-making in First Amendment cases at the appellate level. Accordingly, this investigation relies on the JCS scores of appellate court judges, in addition to the median JCS score assigned to the Supreme Court. While the Martin-Quinn scores are also reliable measures of the Supreme Court justices' ideologies,[84] this investigation opted for consistency between ideological measures and hence relies on JCS scores as the sole metric of judicial ideology.

On a final note, rather than measuring individual appellate-judge-level ideology, studies of judicial behavior on the U.S. Courts of Appeals find that the median measure of panel ideology (per the median voter theorem) provides a more accurate predictor of judicial behavior. This approach recognizes that appellate decisions are the product of collaborative deliberations among three-judge panels, where the median ideological position often determines the direction of opinions. It is for this reason that studies of judicial behavior focusing on U.S. Courts of Appeals have found measures panel-level ideology to be more reliable than the individual judge level of analysis.[85] By focusing on panel median rather than individual ideologies, this study aligns with the extant literature and examines the strategic and institutional dynamics that shape appellate decision-making in First Amendment cases. In this investigation's dataset, 177 (53.5%) of appellate three-judge panel median ideology scores are less than 0 (liberal), while 154 (46.5%) are greater than 0 (conservative).

Hypotheses

82 Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, & Chad Westerland, The Judicial Common Space, 23 J.L. ECON. & ORG. 303 (2007).
83 Jeffrey B. Lewis, Keith Poole, Howard Rosenthal, Adam Boche, Aaron Rudkin, & Luke Sonnet (2025), Voteview: Congressional Roll-Call Votes Database (2025), https://voteview.com/.
84 Andrew D. Martin & Kevin M. Quinn, Assessing Preference Change on the US Supreme Court, 23 J.L. ECON. & ORG 365 (2007).
85 Adam Bonica & Maya Sen, Estimating Judicial Ideology, 35 J. ECON. PERSP. 97 (2021); Christopher D. Johnston, Maxwell Mak, & Andrew H. Sidman, On the Measurement of Judicial Ideology, 37 JUST. SYS. J. 169 (2016); Gregory C. Sisk & Michael Heise, Judges and Ideology: Public and Academic Debates About Statistical Measures, 99 NW. U. L. REV. 743 (2004); Jonathan P. Kastellec, Panel Composition and Voting on the US Courts of Appeals Over Time, 64 POL. RSCH. Q. 377 (2011); Joshua B. Fischman & David S. Law, What is Judicial Ideology, and How Should We Measure It, 29 WASH U. J.L. & POL'Y 133 (2009).

After presenting the historical and theory-driven rationale for this study, it is appropriate to outline the following four testable hypotheses. Each hypothesis arises out of the expectations established in the preceding sections and aims to elucidate the relationships between jurisprudential regimes, judicial ideology, and specific claims in cases concerning political speech and acts of dissidence. The most notable contribution of this analysis lies in its application of JRT to the appellate courts, offering a nuanced perspective on how jurisprudential regimes operate at the penultimate strata of the judicial hierarchy.

H1 (Jurisprudential Regime Hypothesis): The transition from the "clear and present danger" regime (pre-Brandenburg) to the "imminent lawless action" regime (post-Brandenburg) will result in broader appellate-level First Amendment interpretations of free speech protections, reflecting the transition from the more restrictive standard established in Schenck to the more expansive standard established in Brandenburg.

H2 (Attitudinal Behavior Hypothesis): Three-judge panels with more liberal (conservative) median ideologies will be more likely to issue broad (narrow) First Amendment interpretations in rulings on free speech compared to conservative (liberal) panels.

H3 (Strategic Decision-Making Hypothesis): Three-judge panels are more likely to align their decisions with the preferences of the Supreme Court's median justice, reflecting strategic deference to higher court authority.

H4 (Case-Specific Hypothesis): Case characteristics, such as the type of speech involved (e.g., threats to peace, safety, and order, protest, or objection to war and the military), will significantly influence the direction of appellate rulings, independent of panel ideology or jurisprudential regime.

These hypotheses form the foundation of the methodology and measurements detailed in the subsequent sections, with each aimed at uncovering the complex array of factors shaping appellate-level judicial behavior in matters concerning political speech and acts of dissidence.

Research Design: Data, Methodology, and Measurement

The hypotheses above are derived from the expectations established by history and the literature on judicial behavior. This section outlines the operationalization and measurement of these hypotheses, detailing the data sources, methodology, and key variables. The design aims to empirically model how judicial ideology, jurisprudential regimes, and specific free speech claims shape appellate-level decision-making in First Amendment cases.

Data Sources

This study relies on a comprehensive dataset obtained from a merge of the *Songer (2008)*[86] and *Kuersten & Haire (2011)*[87] datasets for the U.S. Courts of Appeals hosted by the Judicial Research Initiative (JuRI).[88] The Songer dataset and codebook provide systematic information on a sample of decisions issued by the U.S. Courts of Appeals between 1925 and 1996, including the direction of case outcomes (e.g., liberal/conservative or broad/narrow), panel composition, and issue-specific categories. It is widely used for examining trends in appellate decision-making,[89] with observations coded for additional information, including litigant characteristics,

86 Donald R. Songer, The Original U.S. Courts of Appeals Database, 1925-1996 (UNIV. S.C., Judicial Research Initiative 2008), https://artsandsciences.sc.edu/poli/juri/databases.htm.

87 Ashlyn K. Kuersten & Susan B. Haire, Update to the Appeals Court Data Base (1997-2002), (UNIV. S.C., Judicial Research Initiative 2011), https://artsandsciences.sc.edu/poli/juri/databases.htm.

88 UNIV. S.C., Judicial Research Initiative (JuRI), https://artsandsciences.sc.edu/poli/juri/index.htm (last visited Nov. 5, 2025).

89 Andreas Broscheid, Comparing Circuits: Are Some US Courts of Appeals More Liberal or Conservative Than Others?, 45 LAW & SOC'Y REV. 171 (2011); Bryan Calvin, Paul M. Collins, Jr., & Matthew Eshbaugh-Soha, On the Relationship Between Public Opinion and Decision Making in the US Courts of Appeals, 64 POL. RSCH. Q. 736 (2011); Jonathan P. Kastellec, Panel Composition

procedural variables, treatment by the lower courts, and so on. *The Kuersten & Haire (2011)* dataset supplements the original Songer data with observations between 1997 and 2002. By merging these datasets, this study creates a robust analytical framework to investigate the factors influencing appellate-level First Amendment rulings.

Together, these datasets offer a detailed view of appellate court behavior across a wide temporal and jurisdictional scope (n = 20, 355). To maintain consistency between the two datasets, coding protocols for issue areas and case outcomes were cross-referenced, resolving discrepancies through original documentation or re-coding. To further enhance the analytical framework, Judicial Common Space (JCS) scores were integrated into the merged dataset. JCS scores provide a reliable measure of judicial ideology, allowing for consistent comparisons across judges, panels, and courts. The inclusion of JCS scores in the merged dataset allows for the operationalization of hypotheses concerning judicial ideology and strategic behavior.

Methodology

To investigate the influence of judicial ideology, jurisprudential regime shifts, case-specific characteristics, and hierarchical relationships between the U.S. Courts of Appeals and the Supreme Court, this study focuses on appellate decisions in First Amendment cases restricted to disputes over the permissibility of certain political speech and acts of dissidence. Since the merged dataset initially contained over 20,000 observations spanning 1925 to 2002, it was necessary to filter out extraneous cases and First Amendment issue areas outside the scope of this investigation. Accordingly, the merged dataset was refined using several filters obtained from the Songer (2008) codebook.

First, cases were identified according to their respective First Amendment issue codes. Each issue area is assigned a discrete code representing specific categories of First Amendment jurisprudence, including various forms of pure speech as well as cases involving campaign finance, press, and religious freedoms. Next, issue codes related to the Establishment Clause or other religious matters were excluded, along with cases concerning the press, obscenity, libel and defamation, commercial speech, and campaign finance. This refinement ensured that the remaining observations contained only cases pertaining to political speech and acts of dissidence without including First Amendment issues covered by other areas of the law and high court jurisprudence (e.g., *New York Times Co. v. Sullivan* with respect to press-related cases). The available data at this point presented a set of 208 cases with an apparent issue of underrepresentation: only 32 cases (15.38%) were recorded in the pre-Brandenburg period, while 176 cases (84.62%) belonged to the post-Brandenburg period.

Since one arrived at this set of 208 cases through filtering an already randomized sample of appellate-level decisions, the least biased means of correcting underrepresentation of the pre- Brandenburg period was to apply a weighting adjustment. Specifically, a frequency weight was implemented to balance the proportion of cases across the two periods, ensuring a more equitable representation of the pre-Brandenburg and post-Brandenburg regimes in the analysis. The weight was calculated based on the inverse of the observed frequencies for each period, assigning greater weight to cases from the underrepresented pre-Brandenburg period while preserving the integrity of the randomized sample. This approach allows for the representation of historical periods in a manner that does not distort the existing randomization of the dataset and, in turn, enables an adequate test of JRT given the temporal limitations of the available data.

By using frequency weights, the analysis maintains its ability to make inferences about the broader trends in appellate-level decision-making across both regimes without disproportionately emphasizing the effects of ideological measures or the more abundant post-Brandenburg cases. Consequently, the weighted dataset

and Voting on the US Courts of Appeals Over Time, 64 POL. RSCH. Q. 377 (2011); Mark S. Hurtwitz & Ashlyn Kuersten, Changes in the Circuits: Exploring the Courts of Appeals Databases and the Federal Appellate Courts, 96 JUDICATURE 23 (2012); Maya Sen, Is Justice Really Blind? Race and Reversal in US Courts, 44 J. LEGAL STUD. S187 (2015); Paul M. Collins, Jr. & Wendy L. Martinek, Friends of the Circuits: Interest Group Influence on Decision Making in the US Courts of Appeals, 91 SOC. SCI. Q. 397 (2010).

provides a fairer comparison. The model is able to account for the effects of jurisprudential regime shifts without succumbing to the biases introduced by unbalanced historical representation. This resulted in a final dataset of 336 cases with the following issue codes: 1) political association; 2) federal internal security and communist control acts, loyalty oaths, security risks; 3) legality of expression in context of overt acts (speeches, parades, picketing, etc.) protesting race discrimination; 4) overt acts opposing war and the military, including conscientious objection to military service or other First Amendment challenges to the military; 5) expression of political or social beliefs conflicting with regulation of physical activity (includes demonstrations, parades, canvassing, picketing); and 6) threats to peace, safety, and order (e.g., fighting words, clear and present danger, incitement to riot).

Then, cases with an ambiguous directionality or missing a judge's identification code (i.e., the identity of the judge was "not ascertained" in the sample) were excluded to ensure the analysis focused on clearly discernable judicial votes and legal outcomes. Once all testable variables were accounted for, the weighted dataset comprised 331 cases decided between 1941 and 2002, with 155 cases (46.83%) falling in the pre-Brandenburg period and 176 cases (53.17%) in the post-Brandenburg period. For these remaining cases (n = 331), the direction of the opinion (the dependent variable) was coded as a binary variable "for assertion of broadest interpretation of First Amendment protection" (coded as '3') and its "opposite" (i.e., narrowest interpretation of First Amendment protection, coded as '1'), per the codebook.[90] As a result of this filtering process, the temporal scope was restricted (dropping cases prior to 1941). Nevertheless, the rulings in this range cover the historical periods relevant to the hypotheses—the pre-Brandenburg ("clear and present danger") and post-Brandenburg ("imminent lawless action") regimes—enabling a comprehensive analysis of jurisprudential shifts over time.

Key independent variables include: appellate panel-level ideology (determined by the three-judge panel's median JCS score), median Supreme Court justice ideology (determined by the term's median JCS score), jurisprudential regime (coded as a binary variable distinguishing between the pre- and post-Brandenburg periods), and the type of speech involved (e.g., protest, conscientious objection, or threats to public order). An interaction term was included to examine the interaction between appellate panels and Supreme Court ideology.

A logistic regression was employed to model the likelihood of broad versus narrow First Amendment interpretations in free speech cases. The reliability of the model's findings was validated through a split of the dataset into two training and testing subsets (one conducted using a randomized sampling method, the other using a stratified method, both according an 80/20 split per the Pareto principle). While pruning the model, Akaike information criterion (AIC) was referenced to mitigate potential overfitting; furthermore, additional validation methods ensured that the full model was not compromised by any instances of collinearity among the variables. Additional statistics assessing model performance—such as the receiver operating characteristic (ROC) curve—were generated to verify the model's validity and overall fit.

To sum up, the approach ensures a systematic and rigorous analysis of how ideological, institutional, and jurisprudential factors shape free speech decisions in the U.S. Courts of Appeals. By combining historical, doctrinal, and theoretical frameworks with quantitative methods, the study offers a nuanced examination of judicial behavior. Its principal contribution rests with the full model's capacity to elucidate an understanding of the applicability of JRT to U.S. Courts of Appeals in matters concerning free speech and acts of dissidence.

Analysis and Findings

This section presents the full logistic regression model before discussing the findings in relation to the hypotheses. The full model evaluates how judicial ideology, jurisprudential regimes, and specific free speech claims shape appellate decision-making in First Amendment cases. The full model includes an interaction effect to measure the relationship between median appellate panel ideology and median Supreme Court ideology.

90 See supra note 85, citing codebook at 93

Complete Logistic Regression Model, Appellate Opinion Direction (n = 331)

Complet **(n = 331)**

Variable	Coefficient	Std. Error	P-Value
Three-Judge Panel Median Ideology	-3.032155***	1.023	0.003***
SCOTUS Median Ideology	6.464638***	1.305	0.0001***
Three-Judge Panel Median x SCOTUS median (interaction)	7.183299**	3.032	0.018**
Threats to Peace, Safety, and Order (e.g., fighting words, clear and present danger, incitement to riot)	2.452679*	1.44	0.088*
Internal Security Risks (e.g., communist control acts, loyalty oaths)	-0.067723	0.446	0.879
Political Activism (e.g., picketing, canvassing)	0.0172327	0.485	0.972
Civil Rights Activism/Protests Against Racial Discrimination	-0.0215989	0.717	0.976
Political Association	-0.8368465*	0.431	0.052*
First Amendment Opposition to War & Military	0.7354454**	0.358	0.040**
Post-*Brandenburg* regime	-0.6482734*	0.344	0.059*
_cons	-2.028514***	0.4969185	0

The complete logistic regression model above evaluates the relationship between judicial ideology, jurisprudential regimes, and case-specific factors in shaping appellate decision-making on First Amendment free speech cases. Statistical significance is assessed at the $p \leq 0.10$ level.[91] Below, is a review of the key findings from the model, with particular attention to the ideological variables and their interaction, as well as the implications of case-specific and regime variables.

Judicial Ideology (Panel Median and Supreme Court Median)

Three-Judge Panel Median Ideology: The coefficient for appellate panel median ideology is –3.03 ($p = 0.003$), indicating that more conservative panels are significantly less likely to issue broad, pro-speech rulings. The negative coefficient suggests that as a judge's ideology score increases (i.e., approaches +1.0) and thus becomes more conservative, the likelihood of a broad interpretation of First Amendment protections decreases. This supports Hypothesis 2 (H2), which posits that a panel's ideological composition directly impacts decision-making,[92] as conservative judges tend to favor narrower speech protections, reflecting an expected deference to order and institutional stability.

Supreme Court Median Ideology: The coefficient for Supreme Court median ideology is 6.46 ($p < 0.0001$). Because higher JCS scores reflect more conservative policy preferences, the positive coefficient sug-

91 Although $p \leq 0.05$ remains the conventional benchmark for statistical significance, this study also reports results at the $p \leq 0.10$ level to reflect the exploratory nature of the analysis and the limited number of appellate cases in the dataset. Findings significant at this level are interpreted as providing tentative or marginally significant evidence rather than definitive support for the hypotheses. Nevertheless, several results also meet the stricter $p \leq 0.05$ criterion.
92 Median appellate three-judge panel ideology scores range from –0.58 to +0.692.

gests that as the Supreme Court's ideological median becomes more conservative (approaches +1)[93], appellate panels are statistically more likely to issue broad (pro-speech) rulings. This is a counterintuitive finding, as conservative Courts are typically associated with narrower speech protections. It therefore runs against the expectation that appellate judges would strategically anticipate the Supreme Court's likely preferences by narrowing, rather than broadening, the scope of speech protections in alignment with conservative policy orientations. This result may instead suggest that appellate panels were strategically aligning with a shifting doctrinal regime in which conservative-leaning majorities on the Supreme Court continued to affirm broad protections for pure political speech, reflecting a complex and historically contingent relationship between ideology and First Amendment outcomes. In any case, based on the full regression results, Hypothesis 3 (H3) receives no support here. Still, the finding suggests that appellate panels are not "perfectly compliant with those outcomes truly preferred by the Supreme Court,"[94] at least within this set of cases.

Interaction Effect: Panel Median x SCOTUS Median Ideology

The interaction term between appellate panel median ideology and Supreme Court median ideology is statistically significant (coefficient = 7.18, $p = 0.018$). This indicates that the likelihood of a broad, pro-speech ruling increases when the appellate panel's ideological orientation aligns with that of the Supreme Court median. The finding underscores the strategic dynamic within the judicial hierarchy, suggesting that appellate panels are more likely to defer to the Supreme Court's preferences when their ideologies converge. Conversely, when ideological divergence occurs, panels may exercise greater independence, resulting in less predictable outcomes. The significant positive interaction thus offers marginal evidence of strategic behavior (H3), as appellate panels appear more likely to issue pro-speech rulings when their ideological orientations align with the Supreme Court's median justice—suggesting conditional deference and anticipatory alignment with higher court preferences. However, because the main effect runs counter to conventional expectations, with a more conservative Supreme Court associated with broader speech protections at the appellate level, the evidence is suggestive rather than decisive. At the same time, the finding of ideological alignment provides partial support for the attitudinal model (H2). Together, these results imply that appellate judges' decision-making in free speech cases is shaped by a combination of strategic responsiveness and ideological disposition, rather than by either model alone.

Case-Specific Issue Types (H4)

Threats to Peace, Safety, and Order (e.g., Clear and Present Danger): The positive coefficient for this variable is 2.45 ($p = 0.088$), indicating that cases involving speech alleged to pose immediate threats to public order are marginally more likely to yield broad interpretations of First Amendment protections at the appellate level. This pattern likely reflects the historical evolution of First Amendment jurisprudence, as courts have increasingly scrutinized governmental claims of public danger and moved toward stricter standards—such as the imminent lawless action test—when limiting political expression.

Political Association: The coefficient for this variable is –0.84 ($p = 0.052$), indicating a marginally significant negative relationship. Cases involving political association rights are therefore less likely to result in broad, pro-speech rulings at the appellate level. This pattern aligns with the historical tendency of courts to approach associational freedoms with caution, often balancing individual rights against perceived threats to national security and public order. It also corresponds with the historical review of free speech jurisprudence presented in the first two sections, in which courts upheld the convictions of leftist activists and organizations during the First and Second Red Scares.

Opposition to War & Military: The coefficient for this variable is 0.74 ($p = 0.040$), indicating that cas-

93 Median Supreme Court justice ideology scores range from –0.316 to +0.455
94 See supra note 63.

es involving anti-war or military opposition speech are significantly more likely to result in broad, pro-speech rulings at the appellate level. This finding may reflect the judiciary's increasing deference to expressive rights in cases framed as political dissent rather than as direct threats to national security, particularly following the doctrinal shift toward stronger protections for anti-war advocacy during the Vietnam and post-Brandenburg eras. Indeed, this pattern is exemplified by the Court's creation of the Tinker test—established roughly three months before the decision in Brandenburg—which extended First Amendment protections to students protesting the Vietnam War.[95] However, Tinker was not selected as the defining jurisprudential regime in this analysis because, while it established new and meaningful precedent, it did not constitute a clear doctrinal break from an earlier regime in the way that the Brandenburg "imminent lawless action" standard supplanted the Schenck "clear and present danger" test.

Jurisprudential Regimes (H1)

The coefficient for the post-Brandenburg regime is –0.65 ($p = 0.059$), indicating a marginally significant negative relationship. Rulings under the "imminent lawless action" standard are therefore slightly less likely to align with broad interpretations of the First Amendment than those under the earlier "clear and present danger" standard—an unexpected result given the conventional understanding of Brandenburg as expanding free speech protections. This finding aligns with the theoretical expectation that doctrinal shifts influence judicial behavior, though perhaps in indirect ways that vary across case types. However, it should be noted that the jurisprudential regime variable attains only marginal significance in the full logistic model with the interaction term; when estimated independently, it is statistically insignificant and exerts no discernible effect on appellate-level judicial behavior.

Overall Model Implications

Strategic Behavior: The significant interaction term between the appellate panel median and the Supreme Court median ideology provides marginal evidence of strategic behavior within the judicial hierarchy. Appellate panels appear more likely to align with the Supreme Court's anticipated preferences when their ideological orientations coincide, demonstrating conditional deference to higher court authority. This behavior reflects the influence of hierarchical constraints and supports the view that appellate judges engage in sophisticated, anticipatory decision-making rather than acting with either complete independence or compliance.

Role of Ideology: Both appellate panel and Supreme Court median ideologies exert a statistically significant influence on case outcomes, reaffirming the attitudinal model's claim that judicial behavior is not ideologically neutral. Attitudinal expectations are largely confirmed: conservative (liberal) appellate judges are more likely to issue narrow (broad) interpretations of the First Amendment. However, the significance of Supreme Court ideology suggests that these attitudinal effects are moderated by strategic considerations, as appellate panels remain attentive to the ideological disposition and potential reactions of the higher Court.

Case-Specific Characteristics: Certain types of free speech claims also condition appellate behavior. Cases involving opposition to war and the military or threats to peace and public safety appear to influence outcomes, with such cases more likely to receive broad First Amendment protections. Political association exerts comparatively little influence, while civil rights activism fails to reach statistical significance in this model. Taken together, these patterns underscore that judicial behavior is shaped not only by ideology and institutional hierarchy but also by the substantive context of the speech at issue.

Discussion

The findings of this investigation reveal nuanced relationships among judicial ideology, jurispruden-

95 See supra note 41

tial regimes, and the specific types of free speech claims that shape appellate-level decisions concerning First Amendment protections. These results provide critical insights into the applicability of jurisprudential regime theory (JRT), the attitudinal model, and strategic behavior frameworks to the study of judicial decision-making at the U.S. Courts of Appeals level, directly addressing the four central hypotheses outlined earlier.

The first hypothesis (H1), which posited that the transition from the "clear and present danger" regime to the "imminent lawless action" regime would lead to broader interpretations of free speech protections, finds only marginal support for the opposite effect in this analysis. Furthermore, the post-Brandenburg regime coefficient, though negative, is not consistently significant (in fact, it is only significant in the full model that includes the ideological interaction term), suggesting that the doctrinal shift alone did not produce a uniform effect on appellate-level decision-making. This outcome challenges the core assumptions of JRT that regime changes create punctuated shifts in judicial behavior. Instead, the limited effect of the regime variable indicates that lower courts may not uniformly adopt the Supreme Court's doctrinal reorientation or that its practical application at the appellate level is mediated through ideological and contextual considerations. This aligns with Bartels and O'Geen's (2015) findings that the prescriptive power of a new regime varies,[96] especially when lower courts exhibit a moderate degree of independence in their interpretive role.

By contrast, the second hypothesis (H2) concerning the attitudinal model receives strong empirical support. The significant and negative coefficient for median panel ideology underscores the influence of ideology on appellate judges. Specifically, panels with more conservative median ideology scores are significantly less likely to issue broad interpretations of First Amendment protections in cases involving political speech or acts of dissidence. This finding corroborates the attitudinal model's prediction that judges' ideological preferences, rather than doctrine alone, drive judicial outcomes. The results also confirm prior scholarship demonstrating that lower court judges, while more constrained than Supreme Court Justices, are not immune to ideological influence.[97]

The third hypothesis (H3) concerning strategic behavior and hierarchical deference finds suggestive evidence in the interaction effect between appellate panel ideology and Supreme Court median ideology. The positive and significant coefficient for the interaction term indicates that appellate panels are more likely to issue broad, pro-speech rulings when their ideological preferences align with those of the Supreme Court's median Justice. This result underscores the importance of strategic behavior within the judicial hierarchy, as appellate judges appear to anticipate and align their decisions with the preferences of the Supreme Court to minimize the risk of reversal. However, ideological divergence between the appellate three-judge panel median and the median Supreme Court justice appears to be associated with greater interpretive independence at the appellate level. By factoring in this strategic dimension, the findings reinforce the notion that appellate judges balance their own ideological leanings with institutional considerations, tempering attitudinal effects through forward-looking deference to higher court preferences.

The final hypothesis (H4), which examined the influence of specific free speech claims, indicates that contextual factors (i.e., claims and case facts) also exert a meaningful, albeit selective, influence on appellate judges' decision-making. Cases involving anti-war or military opposition speech, for instance, are significantly more likely to result in broad interpretations of First Amendment protections. This suggests that appellate courts may view such speech as political dissent deserving of heightened protection. Conversely, cases concerning political association rights exhibit a negative and marginally significant effect, indicating a judicial tendency to issue narrower interpretations of First Amendment protections when the speech in question challenges state authority or national security. Although cases involving threats to public order exhibit a positive association with broader speech protections, their marginal significance suggests that courts approach such claims cautiously, perhaps reflecting the enduring normative influence of the Harm Principle in free speech jurisprudence during the period under examination.

96 See supra note 53
97 See supra note 68.

Taken together, the findings offer a more comprehensive understanding of judicial behavior on U.S. Courts of Appeals. While JRT posits that landmark Supreme Court precedents produce doctrinal shifts capable of reorienting judicial decision-making writ large, the limited effect of the regime variable underscores the need for further evaluation of its applicability to lower courts. Instead, judicial ideology emerges as the most consistent determinant of outcomes, with conservative panels favoring narrower protections of free speech. At the same time, the interaction between appellate and Supreme Court ideologies underscores the strategic dynamics that shape appellate judges' behavior, suggesting that hierarchical constraints moderate attitudinal effects as judges endeavor to align their rulings with the ideological center of the Supreme Court. The particular type of free speech claim further complicates this dynamic, suggesting that judicial outcomes are shaped not only by ideological and institutional factors but also by the substantive context of the claims under consideration.

Conclusion

This study offers new insights into how appellate judges decide First Amendment cases involving political speech and acts of dissidence. By integrating jurisprudential regime theory, the attitudinal model, and strategic behavior frameworks, the findings demonstrate that judicial behavior is shaped by a complex interplay of ideology, institutional dynamics, and case-specific considerations.

From Emma Goldman's prosecutions and eventual deportation for anti-war speech in the early twentieth century to contemporary disputes over the political speech of Rümeysa Öztürk or Mahmoud Khalil,[98] U.S. free speech law has repeatedly staged the same core tension: when, if ever, dissent may be curtailed in the name of national security and public order. This study adds empirical texture to that tension as it unfolds in disputes brought before the U.S. Courts of Appeals. By integrating jurisprudential regime theory (JRT), the attitudinal model, and strategic behavior frameworks, the findings demonstrate that appellate judges' behavior emerges from a complex interaction among ideological orientation, institutional hierarchy, and the substantive nature of the free speech claim.

The results confirm that judicial ideology is a primary driver of appellate decision-making: panels with more conservative median ideological scores display a marked tendency to construe First Amendment protections more narrowly in cases involving political speech and dissident activity. Yet this attitudinal influence does not operate in isolation. A significant interaction between panel-median ideology and Supreme Court median ideology underscores the disciplining force of the judicial hierarchy: when panel and Supreme Court medians converge, appellate judges tend to align with the Court's ideological center, thereby dampening purely attitudinal effects. While JRT provides a useful and intuitive lens for understanding doctrinal shifts, its limited explanatory power here suggests that appellate judges do not uniformly internalize regime changes. Instead, ideological and strategic pressures loom larger.

Importantly, this analysis is bounded by its temporal scope (1941–2002). This span encompasses the Second Red Scare and subsequent cycles of protest and repression—including the Vietnam War era through the early War on Terror—but excludes the First Red Scare (c. 1917–1920), during which Goldman's cases arose. Even so, reading these appellate patterns against Goldman's era is illuminating. The same fault lines (e.g., national security rationales, perceptions of imminent harm, and the politicization of dissent) recur. As observers warn of an emerging "Third Red Scare"[99] these findings offer a provisional guide for anticipating how appellate

98 Jake Offenhartz, Mahmoud Khalil appears in appeals court as Trump administration continues efforts to deport him, ASSOCIATED PRESS (Oct. 21, 2025), https://apnews.com/article/mahmoud-khalil-propalestinian-protest-1bb6d864a8c51b5585617c31bcbc2b9f; Maya Yang & Noa Yachot, Rümeysa Öztürk, Tufts student held by Ice, released from Louisiana jail, THE GUARDIAN (May 9, 2025), https://www.theguardian.com/us-news/2025/may/09/trump-tufts-student-deportation-rumeysa-ozturk.

99 Branko Marcetic, Kim Phillips-Fein, Trump Is Planning a Third Red Scare, JACOBIN (Nov. 2, 2024), https://jacobin.com/2024/11/trump-red-scare-palestine-blm; Trump's Deportations Are a Throwback to Red Scare Politics, JACOBIN (Mar. 20, 2025), https://jacobin.com/2025/03/trump-deportations-red-scare-khalil.

courts may respond: ideological composition will matter; hierarchical signals from the Supreme Court will condition outcomes; and the specific framing of claims (e.g., threats to public order versus political advocacy) will shape the breadth of protection.

Future work should probe the mechanisms by which lower courts internalize—or resist—doctrinal change, test whether similar patterns of strategic deference and ideological alignment hold across other issue domains, and compare circuits to uncover regional variation. Additional investigations might also consider how specific litigants shape judicial reasoning and the framing of free speech claims. Situating appellate behavior within this broader historical, doctrinal, and theoretical framework underscores both the perennial contestation surrounding dissent and the institutional levers through which constitutional meaning is forged in times of political anxiety.

Ethiopian Emperor Menilek II Surveying his troops at the Battle of Adwa on March 1, 1896, in which Ethiopia defeated Italy, from *Le PetitJournal,* November 10, 1898

Captain Ibrahim Trarore, President
of Burkina Faso, 2025

Thomas Isidore Noel Sankara, President of Burkina
Faso, 1983

Palestine And The New Afrikan (Black) Nation

At the request of Indianapolis organizers, Shaka Shakur wrote the following text for the February 17, 2024 Global Day of Action for Palestine. In Indianapolis and over 100 other cities throughout six continents, the ANSWER Coalition (Act Now to Stop War and End Racism), Jewish Voice for Peace, Party for Socialism and Liberation, the Palestinian Youth Movement, and others organized coordinated protests outside and inside of the Lucas Oil Stadium as it hosted the NBA All-Star Weekend. As lead organizers played the recorded statement, the cheers from the audience grew louder than the speakers[1].

The colonization of a people and the theft of a people's land or the theft of a people and imposing second-class citizenship upon those ppl are crimes against humanity and International Laws that so-called Civilized Nations are supposed to be governed by.

You have a government that—through political, economical, and/or military domination—oppresses, kills, and dictates the quality of life under the guise of being the chosen people, under the guise of Zionism, under the guise of white supremacy, maintaining security and a host of other bogus reasoning: that is an outlaw government, a Terrorist State, a government that is guilty of genocide and committing crimes against humanity. It's interesting how there are so many similarities between colonial oppression and occupation in Palestine and the Ghetto Colonies throughout Amerikkka.

Both the United States and Israel came to exist as settler colonial powers predicated upon the genocide and erasing of Indigenous Peoples and communities. As well as the enslaving and slaughtering of Afrikan and New Afrikan People while occupying other people's land.
You have Gaza and the West Bank, where soldiers and settlers maintain and enforce that colonial domination and racist/Zionist policies and the same in Black and Brown communities throughout this Imperialist Empire.

In occupied Palestine land has been seized and redistributed. It is the same with New Afrikans and Indigenous folks, such as Native Americans, and all throughout the South within the National Territory where Black folks worked/slaved, shed blood and tears, and engaged in war, only to have their National Territory occupied, seized, confiscated, and redistributed, despite promises of 40 acres and a mule. Only to be denied the right to self-determination, only to be denied the right to nationality while having one imposed upon you and amending you as a people into a Constitution.

Just as in Palestine, you have soldiers and settlers policing the colonized, engaging in extra-judicial legal murders, and protected by the "law." You have the George Zimmermans, the cases of Sandra Bland, George Floyd, Brotha Aubrey, and too many others to name. You have instances where settlers and u.s. security forces have murdered unarmed civilians, same as in Palestine. Throw a rock and get murdered. Join a political or militant formation and challenge occupation and have your family evicted and your home blown up by a missile strike.

In contrast, live in the projects, so-called affordable housing, and/or live on reservations and get caught hustling to survive, get caught challenging oppressive neo-colonial power, and your family is evicted—grandma and everybody.

Live in a high-rise project and be subjected to prison-style lockdown as Kops (Kolonial Occupational Personnel) and tactical units and soldiers rush in with battering rams and carry out search-and-destroy opera-

1 See Liberator Staff, "During NBA All-Star Weekend, Indy Keeps all Eyes on Rafah!," Indianapolis Liberation Center, 18 February 2024. Retrieved on 17 May 2024 from: indyliberationcenter.org/nba-all-stars-eyes-on-rafah; and David Zirin, "To Find Excitement at the NBA All-Star Game, Look to the Stands," The Nation, 20 February 2024. Retrieved on 05 May 2024 from: thenation.com/article/society/nba-all-star-game-gaza-ceasefire.

tions!

Look at the Gaza Strip and West Bank during the protests and rebellions against colonial violence and you see tear gas, the firing of rubber bullets and live rounds, you see military vehicles and militarization. It kind of looks like Ferguson, when Mike Brown was murdered or Minnesota when George Floyd was murdered or Nashville when Breonna Taylor was murdered, or Watts or Compton or Crenshaw or Florence and Normandie after the kops got off for beating Rodney King.

No, We don't have F-16s and gunships strafing our communities like in occupied Palestine, We got ghetto birds doing 24-hour surveillance and dropping IED Bombs on homes full of womyn and children. Example: On A MOVE Philly, May 13, 1985: Bombs dropped, murdering New Afrikan Revolutionaries and burning down an entire Black community. MOVE were called terrorists also!

No, We are not getting bombed by gunships, instead, We are getting saturated by chemical and biological warfare agents. We are victims of a racist ass Medical-Industrial-Complex that allows New Afrikan womyn to die in massive numbers during childbirth or from breast or ovarian cancer, and a ton of other illnesses, many of which are preventable or curable.

No, Our children and men (increasingly more and more womyn) are being ethnically cleansed from our communities into the Prison Industrial Complex.

These are just a few of the reasons that those of Us who represent the New Afrikan Independence Movement and the Black Liberation Movement stand in Solidarity with Palestine and all Neo-Colonized Peoples fighting against Genocide and Struggling to Free The Land!!!

Free The Land!!
Shaka A. Shakur
New Afrikan Political Prisoner
ShakaShakur.org

Book Review:
Beth S. Lyons, Race, Culture and Mental Illness in the International Criminal Court's Ongwen Judgment: Biases and Blindspots, New Jersey, USA, Palgrave macmillan 2024, 12 pp.

Alan W. Clarke

They ordered us to slaughter these people with a knife, remove their intestines … hang their intestines on our necks … We sat where blood was dripping [and] we were forced to eat beans mixed with human blood.… whatever happens, I cannot forget the image.[1]

Duress, necessity and mental illness, have long been contentious issues when asserted as either defenses to, or mitigating factors in, assessing criminal liability. As a result, courts tend to severely limit such defenses.[2] Dominic Ongwen's case before the International Criminal Court (ICC) tests our capacity to see clearly when victimhood and evil collide.

At what point do we excuse abhorrent criminal misconduct where the perpetrator was subjected to the most egregious and prolonged duress and mental abuse imaginable? Does it matter that the offender began as a terrorized child, abducted at 8 or 9 years old, forced to become a child soldier, and continually abused thereafter until well into adulthood? That he was repeatedly coerced into criminality? Do the gravity of the offenses – atrocity crimes shocking to our shared humanity - overwhelm all consideration of the perpetrator's circumstances?

Or, failing as a complete defense, when can remorseless evil, unremittingly forced on an unwilling, defenseless and susceptible person, be considered as a factor mitigating punishment when the victim becomes the offender? When, where and how, should we take age, race, and culture into account? Moreover, where does the child soldier's many attempts to escape (attempts continued into adulthood) fit in the narrative? Can the executor of monstrous evil ever be seen as a victim?

Beth Lyons, a skilled and experienced criminal litigator before domestic and international criminal courts, makes a compelling case that if Dominic Ongwen's circumstances do not suffice, then none can; she further argues that because this is so, there is something seriously askew with the ICC and the Rome Statute

---

1 Quoted in Beth S. Lyons, Race, Culture and Mental Illness in the International Criminal Court's Ongwen Judgment: Biases and Blindspots, pp. 107-08.

2 In this regard, one has only to recall the public uproar at John Hinkley's successful defense of not guilty by reason of insanity in the attempted assassination of Ronald Reagan and the changes it gave rise to insanity laws for the US and some states. The defense of duress and necessity has historically met similar skepticism. The common law rejected the claim that duress could justify an intentional homicide. Many modern codes adhere to the same view. The Model Penal Code on the other hand has removed this limitation. In some jurisdictions, duress can reduce the homicide from murder to manslaughter. For a brief time, British authorities would allow the defense for accomplices but not the actual slayer, but this distinction has been overruled in favor of the common law rule that duress can never be a defense to an intentional homicide. The Rome Statute allows duress and mental disease as defenses, but the Ongwen case calls into question whether or not such a defense could ever be successful. Additionally, with respect to duress, to see the stringent way courts interpret this defense of duress, one has only to note the refusal of many courts to allow battered women to assert self-defense, duress or necessity) as a defense to harming their batterer on the ground that the defense is subjective and fails to meet the law's stringent imminence test. See, e.g., United States v. Willis, 38 F.3d 170 (1994) holding that the battered woman's syndrome is inherently subjective and therefore inconsistent with the duress defense. It is true that the law is evolving in this area, although in many jurisdictions it arguably has room to progress further. See, e.g. Jason Maclean, Nadia Verrelli, and Lori Chambers, Battered Women Under Duress: The Supreme Court of Canada's Abandonment of Context and Purpose in R. v. Ryan, 28 Canadian Journal of Women and the Law 60 (2016) (discussing R. v. Ryan, 2013 SCC 3 [Ryan (SCC)] which limited the defense to cases where the battered woman killed the abuser by her own hand and rejected the defense where the woman hired another to kill her abuser).

creating it. She charges the court with implicit biases, and blind spots, with respect to race, culture, and the importance of Indigenous knowledge, in the ICC's handling of the Ongwen case and goes on to make recommendations for reform.

In 1987 Joseph Kony's Lord's Resistance Army (LRA) abducted Dominic Ongwen, a child of 8 or 9. They forced him to fight as a child soldier in the brutal war raging in east Africa, brutally punishing multiple escape attempts. Finally, in 2014 he succeeded as an adult in escaping. He surrendered to the ICC which in turn charged him with 70 counts of war crimes and crimes against humanity. Ongwen admitted committing atrocities but contended that duress and mental illness either excused or mitigated the offenses while also rendering him incapable of understanding the proceedings against him and meaningfully participating in his own defense. The court rejected all defenses and attempts at mitigation.

The case took over 17 years to wind its way through the court system and its complexities required a book to summarize. It revolved around competing expert testimony regarding Ongwen's mental state at the time of trial and the effect of the coercion and duress experienced over many years. One set of experts relied on western psychiatry informed by the Indigenous cultural and spiritual knowledge of the Acholi people to assess Ongwen's mental state. Another set of experts relied solely on certain supposedly universal, neutral and scientific tests that eschewed completely the place of Indigenous cultural knowledge in assessing Ongwen's conduct. The court opted for the latter, dismissing out-of-hand expert opinion that relied on local cultural knowledge, belief systems and spirituality.

The defense's most compelling argument centered on this refusal to consider the Indigenous knowledge of the spiritual and cultural practices and ideas of the Acholi people[3] in informing expert psychiatric opinion. By this refusal, the ICC elevated supposed western objectivity and neutrality over Indigenous ways of understanding the world[4] – a world from which Ongwen plainly came and which was an integral part of his mental world. The court thereby erred in rejecting evidence which was relevant in assessing Ongwen and the forces that shaped him. As a result, the court blinded itself and, in so doing, allowed itself to slide into unconscious racism. In Beth Lyon's telling, this sad case demonstrates the need for jurisprudential reform.

In a revealing passage, the author, quoting Mark Drumbl, challenges both the selectivity and incoherence of the Ongwen decision.

The Ongwen Chamber's view of child soldiering, compared to the Lubanga Chambers view, illustrates the inconsistent judicial narratives of child soldiering at the ICC. As Mark Drumbl points out, 'Lubanga cast the linkage between the past as a child soldier and the present as linear and continuous. ... Once a child soldier in fact, always a child soldier in mind, body, and soul. In Ongwen, however, the linkage between the accused's past as a child soldier and his present as a former child soldier was seen as discontinuous and contingent. ...' He concludes that the different narratives on child soldiering in the two cases promote inconsistency and unpredictability in international criminal law.[5]

The ICC Chamber rejected the duress defense, finding Ongwen a willing participant in horrific atrocity crimes. It discounted the years of horrific abuse and coercion because the threats were not sufficiently imminent. It is beyond the scope of this review to recount all of the ways that the immanency requirement of the duress and necessity legal defenses myopically fails to take into account context and power. A single example borrowed from an analogous context must suffice. Women have struggled for decades to get courts to see how battered women differ from male combatants in a barroom brawl; the immanency of a swinging fist differs from

3 The Acholi are a Nilotic ethnic group from northern Uganda and South Sudan.

4 For an account of why it is important to consider Indigenous knowledge in such matters, and how it can undermine the supposed objectivity and neutrality of western science, see, e.g., Laurelyn Whitt, Science, Colonialism, and Indigenous Peoples: The Cultural Politics of Knowledge (Cambridge U. Press, 2009).

5 Lyons, supra. note 1, pp., 60-61

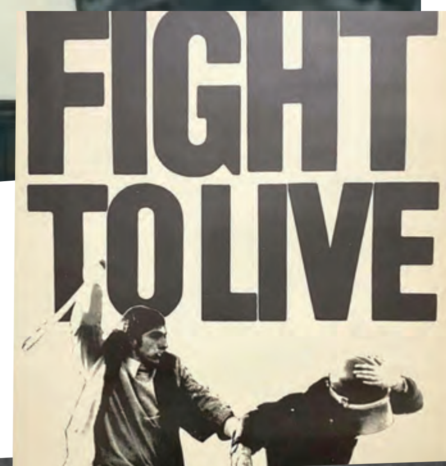
the immanency of fear engendered by years of cruelty and abuse. And, it is argued, the law ought to take those differences into account. Power differentials in these sorts of cases undermine the law's claim to universality and neutrality. In this alternative telling, universality and neutrality become a procrustean bed mutilating all who fail to meet the law's "reasonable man" standard. Similarly, as Drumbl clearly demonstrates, the ICC's failure to see the child soldier's past as pressing and immediate in the mind of a child turned adult is both a failure of imagination and a challenge to the law's supposed objectivity.

Beth Lyons has written an important book that challenges the ICC to adapt to current understandings of the human condition. However, it suffers from a few minor problems. It is in places a bit repetitious, repeating the same points in very nearly identical language.

The text might have been strengthened had the author directed considerable effort on explaining and critiquing the law's slow evolution on, and failures in, international and domestic tribunals, with respect to, mental illness, duress and necessity. Such discussion would have placed this case into a larger historical and jurisprudential context and made the arguments clearer and more powerful. Critiques of hard cases, such as Ongwen's, expose the unjustness brought about when the law fails to deliver justice. By revealing some of the same blind spots in other recent cases and which she contends affected this case could have made the rationale for reform more powerful.

Another shortcoming is admittedly a matter of style and not everyone will agree with this reviewer. However, the author waited until nearly three fourths of the way into the text to deliver the surrounding factual predicates that would allow one to see plainly the errors and biases that form the basis for her reform proposals. It seems to this reviewer that the book would have made a far more powerful case had the horror to which Ongwen was subjected been clearly laid out earlier. The quotation with which this review started came very nearly at the end of the book and the Drumbl quote appears half way through. The book starts with forceful claims of implicit biases and blind spots in the ICC. One should not have had to wait until the end to have a clear idea of how conspicuously shortsighted the court's decision appears. Nonetheless, this book is well worth the effort and, it is hoped, will spur needed reform at the ICC.

Beth Lyons has made a valuable contribution to our understanding of race, culture, mental illness, duress and necessity – a contribution that invites us to consider the tenuous line between objectivity and subjectivity, perpetrator and victim. It asks the most uncomfortable question of the reader: "what would I have done."



The Irish Republican Army (IRA)

V. Revolution:Exodus

JOINT STATEMENT FROM BLACK POWER MEDIA, THE FTP MOVEMENT, AND FOR THE PEOPLE ON THE PASSING OF IMAM JAMIL AL-AMIN (H. RAP BROWN)

On behalf of the Black Power Media, The FTP Movement, and For the People, we issue this statement expressing our profound concern and grief regarding the passing of Imam Jamil Al-Amin, formerly known as H. Rap Brown.

We write not simply to memorialize, but to raise serious questions about the systemic failures that led to his death. We believe the circumstances of his passing represent a grave injustice within our correctional and medical systems.

Imam Jamil Al-Amin often said, “No Slave Should Die a Natural Death.” There is nothing natural about an 82-year-old human rights advocate spending the last 25 years of his life in conditions we find deeply troubling. This spiritual leader and significant figure in American history experienced progressive vision loss and battled cancer while reportedly facing significant barriers to adequate medical care.

We believe this represents more than simple neglect—it reflects systemic failures in how we treat incarcerated individuals, particularly aging political prisoners who require specialized medical attention.
The denial of adequate care to someone who contributed so significantly to civil rights discourse raises serious concerns about our justice system’s priorities. When a person who once helped lead a movement for Black empowerment is allowed to go blind and suffers from untreated cancer, we must question the values underlying these decisions.

We understand that medical resources were available but not provided. We understand that surgeries were recommended but not performed. These are not mere administrative oversights—they represent policy choices that demand accountability. The use of bureaucratic processes to delay or deny life-saving treatment reflects a troubling pattern in how our institutions treat those they have deemed expendable.

Let us be clear: Imam Jamil Al-Amin remained a prisoner of conscience until his final breath. His passing in a federal facility underscores deep concerns about whether our legal system prioritizes justice and human dignity, or whether it perpetuates harm against those who have challenged its authority.

Inna lillahi wa inna ilayhi raji’un. To Allah we belong, and to Him we shall return.

We do not simply mourn his passing; we commit ourselves to ensuring that the systemic issues that contributed to his death do not claim others. We call on all who value justice to join us in demanding reform, accountability, and fundamental change in how institutions treat incarcerated individuals—particularly those whose advocacy has made them targets of state power.

The work continues. The principles Imam Jamil carried from the civil rights movement of the 1960s to his spiritual practice demand that we organize, mobilize, and continue the struggle for true justice and human dignity.

Peace to all who do good.

My Recent Visit With Imam Jamil Al-Amin at the Federal Prison in Tuscon, Arizona-January 2025

Dear friends,

Earlier this month, I was finally able to visit Imam Jamil Al-Amin, formerly H. Rap Brown, at the federal prison in Tucson, Arizona. Imam Jamil is one of the great political activists of the Black and Islamic movements. Most people have never heard of him. If they have, they are usually surprised to discover that he is still alive. His imprisonment is designed to make the world forget about him, and it has largely succeeded.

The last time I met with him was in August 2021 when I was able to spend two days in the Tucson prison interviewing him for the biography I am writing. Last year, I applied to visit him again, hoping I would not have to repeat the long, drawn-out legal process I had to go through to meet with him the first time. But the Federal Bureau of Prisons only allowed me to do another visit after the Cornell University Law School and Arizona State University Law School First Amendment Clinics threatened to go to court to say that blocking my visits was a violation of my constitutional rights.

In any case, when I landed in Arizona, I thought that everything had been agreed, and I would be able to spend four hours recording Jamil Al-Amin speaking about his life. I also expected to learn about the medical neglect he is experiencing. He's 81 years old and has had various health issues over the years of his incarceration. But recently a photo of him emerged showing a large swelling on his face that the prison was refusing to treat.

When I got to the prison, two unexpected things happened. Firstly, I was told by the corrections officers that I was not allowed to record Jamil Al-Amin speaking. That meant I wasn't able to get a recording of him talking about his medical situation, which would have been a powerful way to galvanize support for him to receive proper treatment. I assume that was exactly why the warden of the prison didn't want me to record the conversation.

Secondly, on my second day with Imam Jamil, I found out that he had in fact been taken to a hospital that morning. But instead of proper care, he received yet more abusive treatment. Someone attempted to pierce the swelling on his face by cutting it, hoping to drain the fluid. But that didn't work. So Imam Jamil was sent back to the prison, with a bandage over the left side of his face, the swelling untreated, and still without any diagnosis. He was in considerable pain, found hearing hard as the swelling was beginning to cover his ear, and could not swallow solid food; while I was with him, a prison guard gave him a nutritional shake, his only diet.

No-one should have to suffer this way. But for a man of Jamil Al-Amin's stature to be treated like this left me feeling enraged. I urge everyone reading this to support the campaign calling for an emergency medical transfer of Imam Jamil to the Federal Medical Center at Butner, North Carolina, and for him to receive immediate medical treatment there.

REVOLUTION IN THESE TIMES: BLACK PARTY VETERAN DHORUBA BIN-WAHAD ON ANTIFASCISM, BLACK LIBERATION, AND A CULTURE OF RESISTANCE

(Kalonji Jama Changa ed., Common Notions Press 2025). 174 pages. ISBN: 9781945335136 (paperback)

Reviewed by Nathan Poirier

As I hold this book in my hands it feels like I'm reading something I'm not supposed to. Like it's a piece of illicit contraband that Trump's cronies would arrest me for possessing if (or in these days you never know, maybe when) they barge into my house and rifle through my possessions. Like I should burn this after reading it to protect myself. Revolution in These Times: Black Panther Party Veteran Dhoruba Bin-Wahad on Antifascism, Black Liberation, and a Culture of Resistance is a book of a handful of interviews with the titular activist that go back over a decade.

Bin-Wahad was framed for killing two police officers in 1971. The event took place on Malcolm X's birthday and shortly after the acquittal of all of the Panther 21 of over 200 charges of conspiracy. The charges, of course, were a sham to begin with. The framing of Bin-Wahad was a ruse to put Black radicals in jail for life because the government saw them as a threat. The interviews range over a fairly contained set of themes, and include some overlap between them. These include the necessity for armed self-defense, the role of state repression (particularly COINTELPRO), both the capturing of the Black masses and Black activists by the state in an effort to quell disruption, some history of Assata Shakur and Angela Davis, police abolition, and the limits of movements like Black Lives Matter. This book is one of a number of recent edited volumes of interviews or presentations of veteran activists.[1]

This is truly a book for our times. Bin-Wahad drops lessons for activists page-by-page. Indeed, he discusses being in open and direct solidarity with Palestinians going back into the 1960s and just how important such alliances were. Two particular points stand out to me as particularly important: the need for armed self-defense, and the need to remember the history of radical struggle. The need to remember what radical activists have already accomplished is important so that current movements, in the words of Bin-Wahad, do not keep "reinventing failure." COINTELPRO was created to make sure effective grassroots movements don't even get started. This is because the Black Panthers were so effective at making change that the government is now scared of any mass organizing of citizens. Bin-Wahad details how the Panthers took matters into their own hands by organizing their own community protection organizations, free lunch programs, health care clinics, and much more. These are things the government didn't give them. Indeed, today these are things the US government is systematically taking away from everybody who isn't rich enough to privately afford such services.

This history is intimately related to armed self-defense. Bin-Wahad constantly mentions how the Pan-

1 ASHANTI ALSTON & WILLIAM C. ANDERSON, BLACK ANARCHIST FUTURES (Nathan Poirier & Zane McNeill eds. & transcrs., Active Distribution 2025).
LORENZO KOM'BOA ERVIN, JONINA ABRON-ERVIN & MODIBO KADALIE, BLACK ANARCHIST LEGACIES (Nathan Poirier & Zane McNeill eds. & transcrs., Active Distribution 2025)
JOY JAMES, BEYOND COP CITIES: DISMANTLING STATE AND CORPORATE FUNDED ARMIES AND PRISONS (Pluto Press 2024).
JOY JAMES, ENGAGE: INDIGENOUS, BLACK, AND AFRO-INDIGENOUS FUTURES (Pluto Press 2025).
JOY JAMES, CONFRONTING COUNTERINSURGENCY: COP CITIES AND DEMOCRACY'S TERRORS (Pluto Press 2025).

thers were “at war” with the US government, something echoed by JoNina Abron-Ervin (2025) as well. This does not seem an exaggeration. When people siege the means of survival for themselves out from under their governments, there will be violent retaliation. This is what COINTELPRO was. Whether we like it or not—and nobody forced to defend their lives likes it—we must be willing to kill our oppressors as they will always try to kill us. The only way they won’t is if we quietly follow their rules—which will still lead to our deaths, just perhaps slower. Bin-Wahad recounts how the Black Panthers did threaten to kill cops if the cops killed their people. He advocates throwing a brick at Daniel Pantaleo, the officer who choked Eric Garner to death, as a way to save Eric’s life. This is wise advice. His point is that we all have the ability to radically resist and protect our lives, but most of us choose not to and capitulate to white supremacy. This is how “they” win and we lose.

Government assassinations and lifetime prison sentences are ways of making sure that the knowledge found in this book doesn’t get passed on to future generations of people who can carry on the tradition (p. 47). But reading this book is what learning from history is all about. A deep study of the people, tactics, and rhetoric of the Black Panthers in particular shows that we can indeed threaten governments. And we can likely overthrow them if we create enough solidarity to come together despite our differences. As Bin-Wahad says, our strength lies in “unity, not uniformity.” As he briefly mentions more than once, and others have made more sustained focuses on[2], vigilante violence has been repressed by the willingness to kill oppressors in self-defense. The KKK was driven to be largely covert in the southern US because of Black people defending themselves with guns when attacked.

In this book Bin-Wahad unpacks these lessons in more detail and with multiple examples. He uses lessons from the past to inform the present. Ultimately this book is a reminder—as indeed, Bin-Wahad repeatedly makes clear that we need to be reminded of this these days—that the people can become threatening to the government and multiple systems of oppression simultaneously, even with little budget, no formal training, little personal property, and a relatively small group of people willing to risk it all.

2 For example see AKINYELE OMOWALE UMOJA, WE WILL SHOOT BACK: ARMED RESISTANCE IN THE MISSISSIPPI FREEDOM MOVEMENT (NYU Press 2013).


REST
IS
RESISTANCE
- Tricia Hersey

Race against Space-Time: Centering Black Temporalities for Liberated Housing Futures Excerpt from Dismantling the Master's Clock: On Race, Space, and Time

By Rasheedah Phillips

Time permeates every facet of our lives, subtly shaping interactions in the towering institutions that govern our day-to-day existence. Anthropologist Carol J. Greenhouse describes how "the Western cultural capacity for that belief [in linear time] was established a thousand years ago, or longer, when institutional and social structural changes gave linear time a path from the sacred domain to the domain of the everyday."[1] She argues that this belief becomes "reproduced in the juxtaposition of institutional forms and temporalities which constitute everyday experience in the modern world."[2] The institutionalization of linear time, therefore, is not just a relic of ancient belief systems but guides how we perceive the flow of events and their meaning in our daily lives.

As any lawyer can tell you, this is true of the legal system, where, as law professor Rebecca R. French emphasizes, "time enters every part of how we practice, analyze, project, and balance legal arguments; it is integral to our daily schedule, our client appointments, our classroom, teaching time, our court dates, our tickler files, our view of our careers." Despite time's omnipresence in the legal system, "we rarely think about how 'time' actually works, presuming that it is the simple linear measuring device that the clock creates for us."[3] Renisa Mawani adds to this analysis by asserting that "law is fundamentally about time," yet "few have examined how law appeals to particular conceptions of time, whether linear, chronological, circular, or instrumental," while "even fewer have asked how law produces time, how it orders the nomos through its own temporalities, aspiring to assimilate and absorb other temporalities in the process."[4]

Although much has been written about legal constructions of space and race, the function of time and race in this constellation has not been covered with the same breadth, despite playing a profound role in how people—particularly Black, poor, disabled, and other marginalized people—are valued, treated, punished, erased, or underserved within the legal system.[5]

Especially underexplored are substantive areas of civil rights, poverty, and public interest law in their temporal contexts, as are the ways in which the nexus of class oppression and institutional racism is reinforced by the union between time and the law. The deeply tangled relationship between race, space, time, systemic devaluation, and the law demands more rigorous scrutiny.

For over a decade I worked as an attorney at Community Legal Services of Philadelphia, where I was a daily witness to the dominance of time in the legal system. In addition to providing legal representation to low-income homeowners and tenants facing eviction and displacement, I led several housing policy advocacy initiatives, working among a team of attorneys, paralegals, and tenant organizers to advance housing rights protections and preserve affordable housing.

In this work I often utilized community lawyering practices, a process through which legal advocates

1 Carol J. Greenhouse, A Moment's Notice: Time Politics Across Cultures (Ithaca: Cornell University Press, 1996), 223, 230.
2 Carol J. Greenhouse, "Just in Time: Temporality and the Cultural Legitimation of Law," Yale Law Journal 98 (1989): 1631; see also Jeremy Rifkin,Time Wars: The Primary Conflict in Human History (New York: Henry Holt,1987), 146–47: "Western culture has institutionalized its images of the future by way of religion and politics," making sure that "the future can be made predictable and controlled."
3 Rebecca R. French, "Time in the Law," University of Colorado Law Review 72 (2001): 663–64.
4 Renisa Mawani, "Law as Temporality: Colonial Politics and Indian Settlers,"UC Irvine Law Review 4 (2014): 65–71.
5 See work by Michelle Bastian, Emily Grabham, Renisa Mawani, and Sarah Keenan.

lend their expertise to support initiatives identified by the community. The process aims to work directly with impacted communities, developing solutions that resonate with their needs while also helping build community leadership and institutions capable of sustaining power and influence. Incorporating community lawyering into my practice provided a pathway to integrate the Black Quantum Futurism perspective and a critical temporal analysis into the work. My approach combined legal and scientific inquiry with creative research and speculative theory, aiming to challenge and broaden prevailing narratives about time. It serves as an urgent call to reconsider conceptions of time in theory and practice, by amplifying overlooked temporalities and spatial experiences within Black communities, revealing them as sites of resistance, innovation, and transformation.

Merging legal and artistic methodologies, Black Quantum Futurism, with funding for socially engaged artists from A Blade of Grass, created a project called Community Futures Lab (CFL). From March 2016 to April 2017, we operated a community space in a storefront in Sharswood, North Philadelphia, where we developed and practiced a framework called Community Futurisms. This framework aimed to deepen the understanding of the community's dynamics, rhythms, temporalities, memories, histories, and ideas for shared futures. CFL was instrumental in connecting with the community on various housing fronts and fights, including campaigns to advance eviction protections and anti-displacement policies in the city, using it as an opportunity to explore the critical nexus of spatial inequity and temporal analysis, and highlighting the imperative to incorporate a nuanced understanding of time and space in housing policy and protections.

As a housing attorney, I perceived the concept of time not just as a backdrop but as a critical element governing every aspect of my work. This ranged from the mundane task of documenting my hours working on cases, to the immediate necessity of defending tenants in eviction court, to intervening in the trajectory of years and decades involved in preserving fair, safe, and affordable housing. While representing clients who couldn't afford to pay for attorneys, I saw the economic inequities my clients faced in presenting themselves temporally as well. Time is, after all, money in this society and is a critical factor in justice and access to resources. Such temporal inequities manifested conspicuously in the eviction process, situated comfortably at the usual intersections of gender, race, disability, and class. This was true in the short (and fully waivable) notice requirements for a landlord terminating a lease agreement under state law and the time allowed for an evicted family to vacate a unit, which often severely misaligned with the time needed to secure new housing. Racial inequities are embedded in the housing system; in Philadelphia, as in many parts of the country, most severely rent-burdened people are single mothers and overwhelmingly are people of color. It is not a coincidence, then, that those who get evicted from rental housing fall along the same racial and gender lines—eviction most frequently impacts Black women and their children, and in Philadelphia it impacts Black families disproportionately and regardless of their level of income or education.[6]

Justice on the Clock: Time in Eviction Court

In Center City Philadelphia, the clock strikes 9:00 a.m. in a bustling eviction court. Outside, Tiffany, a single mother juggling two jobs, races against time, her breath short as she navigates the crowded bus with her toddler. Her struggle is not just against the morning rush but against a system that has already started counting down her days in her home. Meanwhile, inside the court, the wooden gavel falls, marking another default judgment. In that moment, Tiffany becomes one of the countless tenants caught in the unforgiving gears of legal timelines, resulting in impending homelessness. For her, the law's clock ticked in a rhythm unsympathetic to the everyday realities of school runs, job shifts, and life's unpredictability.

Tiffany's story is one of many that demonstrate why there is such a high rate of default judgments in eviction court, where one side automatically loses the case because they were not present in court when the case was called. Reviews of the Philadelphia Landlord-Tenant Court dockets reveal that more than 34 percent of ten-

6 "Policy Brief: Evictions in Philadelphia," Reinvestment Fund, January 2017, https://www.reinvestment.com/research-publications/evictions-in-philadelphia.

ants with an eviction filing in Philadelphia between 2010 and 2020 had a default judgment entered against them, while over half of all legal evictions are the result of a default judgment entered against a tenant.[7]

In eviction court, default judgments are issued swiftly, sometimes only minutes after court proceedings begin and before the judge is even seated. If the tenant is not present in court at 9 a.m. on the dot, they can be evicted in as few as twenty-one days under the strict letter of the law.[8]

It is important here to distinguish between an eviction and an eviction filing. An eviction filing is the initial legal step a landlord takes to begin the process of removing a tenant, often resulting in a court case. An eviction, on the other hand, is the process of legally removing a tenant from a property, which occurs as a result of a court ruling, such as a default judgment.[9] This distinction is crucial as not all filings lead to actual evictions, but the threat and stress of the process has significant impacts on tenants' lives, while the court record itself can follow a tenant for life.

Default judgments are often a repercussion of tenants showing up late to or missing court due to conflicting demands on their time, such as getting children to and from school, attending jobs, managing other court dates, navigating disabilities, or dealing with delayed public transportation. These obligations can conflict with the rigid scheduling of court hearings, highlighting a broader societal issue where time is not just a resource but a privilege.

The challenges faced by these tenants underscore the concept of time poverty: the severe constraints on the availability of time experienced by certain communities, characterized by a lack of access to time resources. The default judgments also offer a vivid example of how legal frameworks of time, such as those characteristic of the eviction system, can enforce systematic dispossession and insecurity. Through this lens, time poverty not only reflects a logistical challenge but a structural inequity that disproportionately affects marginalized peoples.

This dialogue on time poverty and eviction has intricate ties to the evocative and historical concept of the "deadline," a term analyzed by attorney and geographer Danielle Purifoy in her session at the Prime Meridian Unconference called "Dead Line?: On Slowing Down in Black 'Spacetime.'" Purifoy examines the deadline as the latest time by which something should or can be completed while highlighting its connection to the legacy of plantation time. The deadline becomes more than a metaphorical construct; it is a tangible boundary with severe implications, with its historical usage delineating a perimeter around prisons—beyond which prisoners risked fatal consequences.

This chilling origin serves as a stark reminder of the immediate and historical threats imposed on Black lives by such temporal and physical boundaries. In the realm of eviction, Purifoy's notion of the deadline acquires a heightened significance, representing the severe risks of dispossession that can happen within moments of a judge's ruling, and the disjunction between the eviction process and the pursuit of long-term secure housing. This interpretation of the deadline magnifies its role as not merely a temporal marker but as a critical determinant of security, stability, and livelihood for those entangled in the eviction process.

In Philadelphia, landlords are allowed to serve court paperwork either in person or by posting it in a

---

7 Rasheedah Phillips et al., "Breaking the Record: Dismantling the Barriers Eviction Records Place on Housing Opportunities," Community Legal Services of Philadelphia, November 2020, https://clsphila.org/wp-content/uploads/2020/12/Breaking-the-Record-Report_Nov2020.pdf.

8 "Reducing Default Judgments in Philadelphia's Landlord-Tenant Court," Sheller Center for Social Justice, Temple University Beasley School of Law, June 2020. The most common reasons cited in cases where tenants tried to open up a default judgment were "lack of notice, medical issues, childcare problems, lateness, and difficulty finding the courthouse and courtroom." Eviction laws vary by state and city.

9 Illegal or informal evictions also occur outside of the law, but this analysis is limited to legal evictions that take place through the court system.

visible location, such as on a tenant's door or window. This method, however, is prone to failure for several reasons. Tenants may not receive court notices if they have already left the property, possibly in response to a lease termination notice issued before the eviction paperwork was filed. In some cases, landlords proceed with eviction filings even after tenants have vacated, for reasons such as securing a legal judgment to prevent tenants from returning, punishing the tenant, being unaware of the tenant's departure, or due to simultaneous processes. Additionally, notices posted on doors are susceptible to being removed, soaked through on a rainy day, or blown away by a gust of wind, resulting in tenants being unaware of the pending legal action.[10] The legal system's reliance on such service methods, without adequate safeguards to ensure that tenants are informed, reflects a broader systemic issue where the rights and needs of marginalized groups are overlooked in favor of procedural convenience.

The lease termination notice is also in itself a temporal phenomenon, serving a dual purpose of informing tenants of when they are expected to vacate and triggering the timeframe for landlords to file a formal eviction complaint. Yet under the Pennsylvania Landlord-Tenant Act, landlords can include provisions in their lease agreements through which a tenant waives their right to the receipt of a lease termination notice.[11] Waiver of notice to quit deprives tenants of a key safeguard, which is, at its essence, the benefit of time.

Many tenants are unaware of this provision in their leases or lack the bargaining power to negotiate its removal before signing. Further, a tenant may have few other options for housing such that they cannot afford to reject a rental offer—despite a lease containing provisions that are unfair, against the tenant's best interests, or even illegal.

The result is a coercive spatial-temporal manipulation that favors landlords' interests and destabilizes tenants' agency, security, and time. Even when tenants are served with a legal complaint for eviction, any waiver-of-notice provisions they may have signed will still often prevent them from raising a timely defense. These legally sanctioned lease provisions to waive notice to quit decrease the little time tenants do have to respond to complaints, secure legal counsel, negotiate with landlords, and prepare their legal defenses. As a result, tenants may present an insufficient defense to eviction or decide not to appear in court at all, leading to a default judgment.

These scenarios reflect a critique of how law asserts its sovereignty and authority by imposing its temporal framework, often erasing or overriding alternative temporalities. The legal system's responsiveness is limited to those temporalities that align with its structure, often ignoring those that do not. In this way, the law's temporal order prioritizes certain interests and narratives, in this case, those of landlords, while marginalizing others, particularly tenants, thereby perpetuating time poverty and its associated injustices.

Colonized Time, Racial Time, and the Time of Progress

In this context of legal and institutional bureaucracy, temporal oppression manifests through the imposition of rigid and standardized time norms and expectations, which may be out of sync with the lived experiences of marginalized Black communities. Strategies of temporal oppression are formidable instruments of control, surveillance, labor regulation, and punishment. These mechanisms, while perfected during enslavement, continue to exert their influence in various manifestations into the present. In political scientist Michael Hanchard's critical examination of "racial time," he articulates a sophisticated understanding of how power dynamics embedded in racial distinctions have historically orchestrated unequal access to institutions, resources, power, knowledge, and opportunities. Hanchard posits that racial time emerges from and contributes to the structural inequalities between racially dominant and subordinate groups, electively using temporality itself as a mech-

10 Editorial Board, "Evicted Without Warning," Philadelphia Inquirer, July 28, 2020; Ryan Briggs, "A Philly lawyer evicts people for city courts. She's married to a judge who presides over evictions," WHYY, July 24, 2020.
11 Pennsylvania Statutes Title 68 P. S. Real and Personal Property § 250.501, the full text of which can be read at https://codes.findlaw.com/pa/title-68-ps-real-and-personal-property/pa-st-sect-68-250-501-a.

anism of oppression. This manipulation of time—wherein racialized temporal inequalities are established and perpetuated—has profound implications for access to education, economic opportunities, and political power.

Hanchard traces the genesis of racial time to the era of racial slavery, suggesting that the very concept of time was weaponized to sustain a disjunctive temporal reality that favored racially dominant groups while subjugating others. This disjunction is not merely a metaphor but manifests in tangible disparities in people's daily lives in multiracial societies. He illustrates how the unequal temporal access to goods, services, resources, power, and knowledge is recognized and internalized by members of both dominant and subordinate groups, thereby reinforcing racial hierarchies and contributing to a structural effect upon the politics of racial difference. This structural temporal inequality thus becomes a central axis around which racialized experiences of modernity revolve, challenging conventional narratives of progress and equality.[12]

Consider again how racial time's manifestation emerged from the meticulous control exercised by masters over the distribution of time for enslaved people their bodies and their time, through labor, were commodified.[13] Here we see how "the rise of capitalism and the work-clock... went hand-in-hand: time became a quantifiable measure of exchange-value in the marketplace for trading in the commodity of human labour, the currency in which the workers' lives—their time, reified—was bought and sold."[14] On most plantations, "the masters ha[d] complete control over the distribution of the negro's time."[15] A staggering average sixteen-hour workday of backbreaking labor continued until 10 or 11 p.m. each evening, and still enslaved people remained "on call" twenty-four hours a day with the possibility of being summoned at any moment.

The relationship of Black people and the Western linear time is emblematic of an ongoing conflict, with time hegemony standing as "a reservoir of symbols with which the legitimacy of hierarchies can be defended and reproduced."[16] In this dynamic, "whites are self-positioned as the masters of their own time, as against those mastered by time."[17] It is an enduring dichotomy that illustrates how temporal control has been wielded as a tool of racial dominance, effectively binding Black people's movements in both space and time.

Tools of Temporal and Spatial Segregation

Interwoven with the struggle for emancipation were legacies of discrimination in public spaces, housing, and land in the United States. Known as slave codes, Jim Crow laws, and Black Codes, and showing up in the form of redlining and racially restrictive covenants in the real estate sphere, and then through zoning laws, these

---

12 Michael Hanchard, "Afro-Modernity, Temporality, Politics, and the African Diaspora," Public Culture 11, no. 1 (January 1999): 245, 253, https://doi.org/10.1215/08992363-11-1-245.

13 Cheryl I. Harris, "Whiteness as Property," Harvard Law Review, 106, no. 8 (1993): 1707: "The hyper-exploitation of Black labor was accomplished bytreating Black people themselves as objects of property. Race and property were thus conflated by establishing a form of property contingent on race—only Blacks were subjugated as slaves and treated as property."

14 Giordano Nanni, The Colonisation of Time: Ritual, Routine and Resistance in the British Empire (Manchester: Manchester University Press, 2013), 25, 41.

15 "Slavery Meeting at Colchester," Essex County Standard, January 19, 1838. An 1833 article in the Morning Standard discusses the issue of the most economical ways to divide up a "negro's time," should they be emancipated: "Three-fourths of the negro's time were to be given to former owner." See also Rasheedah Phillips, "Counter Clockwise: Unmapping Black Temporalities from Greenwich Mean Timelines," Funambulist 36, June 21, 2021, https://thefunambulist.net/magazine/they-have-clocks-we-have-time/counter-clockwise-unmapping-black-temporalities-from-greenwich-mean-timelines.

16 Greenhouse, "Just in Time," 1631

17 Charles W. Mills, "White Time: The Chronic Injustice of Ideal Theory," Du Bois Review 11, no. 1 (January 2014): 27, 31, https://doi.org/10.1017/S1742058X14000022; see also Octavia E. Butler, Kindred (New York: Doubleday,1979). Octavia Butler's speculative novel Kindred explores the implications of the inaccessibility of the future to enslaved Africans, and the utility and futility of fore- and hindsight when traveling along a progressive worldline. Butler's time-traveling protagonist Dana lands two hundred years into her relative past, pulled back by a soon-to-become slave-owning, slave-raping ancestor whom she must choose to continue to save to ensure her own time/bloodline. The date of Dana's last trip is the bicentennial on the Fourth of July. Philadelphia, once the ultimate futurist city of the white male utopian vision, is a city built upon the graves, ghosts, hands, and backs of Blackness.

laws were commonly thought of as spatial segregation that restricted Black people's movements through space. Critical race theorist and law professor Cheryl Harris notes, for instance that "between 1680 and 1682, the first slave codes appeared, codifying the extreme deprivations of liberty already existing in social practice. Many laws parceled out differential treatment based on racial categories: Blacks were not permitted to travel without permits, to own property, to assemble publicly, or to own weapons; nor were they to be educated."[18]

Though often framed as spatial segregation mechanisms, these instruments effectively shackled Black people's movements through space and time. The laws that were designed to deny Black people the right to vote also restricted where they could live, learn, and work, attempting to circumscribe the future Black people could manifest as much as access to physical space or rights. Philosopher Charles W. Mills called such laws a "racial regime (racial slavery, colonial forced labor, Jim Crow, or apartheid polities) [that] imposes, inter alia, particular dispositions and allocations of time that are differentiated by race: working times, eating and sleeping times, free times, commuting times, waiting times, and ultimately, of course, living and dying times."[19] To defy or challenge these laws often resulted in arrest or imprisonment, hefty fines, or extreme judicial and extrajudicial punishments of death and violence against Black people or entire communities. This stark reality represents not just a figurative but a literal deprivation of access to the future for Black people.

The potentiality or actuality of death, as a consequence of resisting these regimes, symbolizes an ultimate severance from the future. In the early 1900s, towns, cities, and states across the US began enacting zoning laws that regulated land use, building height, and other aspects of growth and development. While these laws appeared neutral on the surface, they were often explicitly designed or used to reinforce segregation and exclusion along racial and ethnic lines. These racist mechanisms of space-time control manifested in several forms, including exclusionary zoning laws, redlining, and racially restrictive covenants, all of which severely limited where Black people could live, work, and own property, effectively segregating them from white communities.[20]

The practice of exclusionary zoning implemented at the local, regional, or state level was a key tool in this process. Local zoning laws were further reinforced by the federal government's redlining policies of the 1930s. Exclusionary zoning designated certain areas of cities for specific uses, such as residential, commercial, or industrial. Often, the allocation of residential zones was done in a way that segregated Black communities into less desirable areas, away from white neighborhoods.

For example, a city might zone a particular area as residential, but with restrictions that only single-family homes could be built there. This type of zoning implicitly favors wealthier, often white residents who could afford such homes, while excluding lower-income residents needing affordable multifamily housing options. With Black families systematically excluded from jobs and other economic opportunities that could support the purchase of single-family residences in neighborhoods with amenities, Black communities were often pushed into areas zoned for multifamily housing or areas closer to industrial zones, which were less desirable due to factors like pollution, noise, and a lack of green spaces.

The impact of such zoning was not only immediate in terms of where people could live but also long-term in its effects on community development and prosperity. Predominantly Black neighborhoods relegated to less desirable zones faced challenges in attracting investment, leading to a cycle of poverty and disinvestment. These areas were often overlooked in terms of infrastructure development, maintenance, and public services. Additionally, property values in these areas were generally lower, impacting the wealth accumulation potential of their residents.

18 Harris, "Whiteness as Property," 1718.
19 Mills, "White Time," 28.
20 See generally: Keeanga-Yamahtta Taylor,/Race for Profit: How Banks and the Real Estate Industry Undermined Black Homeownership/(Chapel Hill:/University of North Carolina Press,/2019).

Exclusionary zoning thus created a landscape where Black communities were not only spatially segregated but also trapped in a temporal loop of economic stagnation. Their physical location within a city dictated their access to opportunities, resources, and the potential for future growth and prosperity. This systemic segregation through zoning laid the groundwork for enduring racial disparities in housing, wealth, and community development.

Redlining was enforced both implicitly and explicitly, with government agencies, banks, and insurance companies all participating in this discriminatory practice. Exclusionary zoning, coupled with federal redlining policies, significantly contributed to the temporal segregation and oppression of Black communities in the United States.

Redlining, initiated in the 1930s by the Home Owners' Loan Corporation and later adopted by banks, involved marking predominantly Black neighborhoods as high-risk for loan defaults, severely limiting residents' access to mortgages and home improvement loans. Racially restrictive covenants were agreements written into property deeds prohibiting the leasing or selling of property to certain racial or ethnic groups, most commonly Black people. These covenants were explicit tools of segregation, used by white property owners and developers to maintain the racial homogeneity of neighborhoods. The enforcement of these covenants was upheld by real estate boards and neighborhood associations, and even supported by court rulings, until they were declared unenforceable by the Supreme Court in 1948. While the Supreme Court ruled in the landmark case of Shelley v. Kraemer in 1948 that such racial covenants were unconstitutional, the practice of exclusionary zoning persists in various forms. These policies and their long-term legacies continue to affect communities of color today, with many neighborhoods still experiencing disinvestment, lack of access to quality education and healthcare, and other barriers to economic and social mobility.

Another particularly pernicious manifestation of racialized temporal oppression coupled with spatial segregation was the existence of "sundown towns." These towns, scattered throughout the United States, were characterized by the deliberate and stringent exclusion of Black people, enforced through a combination of law, custom, and chilling acts of violence.[21] In sundown towns, Black people faced the explicit mandate of leaving the town's limits before dusk and were also prohibited from residing in these areas. Such segregationist practices extended their grip to encompass entire "sundown counties" and "sundown suburbs."

Signs within the city limits openly proclaimed, "whites only." Local newspapers published warnings stating, "Don't let the sun set on you here, you understand?" These physical markers served as unambiguous reminders of the temporal boundaries imposed upon Black people specifically. The enforcement of these boundaries was brutal and direct, often involving extreme acts of violence. As on the plantations, audible signals like whistles would shrill to signify the time by which Black people needed to leave the area. Failure to comply resulted in severe consequences; shootings, beatings, and lynchings were not uncommon acts of violence inflicted upon those who were perceived to have violated the rules or missed the signs.[22] This was not just a social norm but was enforced through both the actions of residents and local authorities. While white citizens assumed the role of enforcers, they faced little to no legal repercussions for their actions, enjoying the privilege of wielding state-sanctioned violence with impunity.

The horror television series Lovecraft Country (2020), set in the 1950s, launches with its first episode, titled "Sundown," depicting the harrowing experiences endured by Black people navigating sundown towns. In this episode, the main characters on a road trip pass through a town, ripped right out of the pages of history, that displays a "whites only" sign. They then find themselves on a treacherous journey through another such town, where the threat of violence tracks their every move. The sheriff pulls them over to inform them that they must cross county lines before sunset at 7:09 p.m. Literally racing against time while trying to keep under the speed

21 James W. Loewen, Sundown Towns: A Hidden Dimension of American Racism (New York: The New Press, 2005).
22 Loewen, Sundown Towns.

Loewen, Sundown Towns. limit to avoid being pulled over again, they exit the county with ten seconds to spare, only to be arrested in the next jurisdiction. This portrayal captures the psychological toll inflicted by temporal oppression and spotlights the pervasive racial time inequities that have sculpted the American landscape.

Together, these mechanisms—exclusionary zoning, redlining, sundown towns, and racially restrictive covenants—formed an interconnected system that sustained and enforced racial segregation in housing. Temporal zoning might then refer to the regulation of time that has been historically used to segregate people of color, particularly Black people, from white communities. Zoning, whether spatial or temporal, or both, creates segregation of space in relationship to time, or of time in relationship to space, with resounding impacts on the social and economic fabric of a community.

These forms of spatial-temporal control and displacement extend far beyond the era in which they were explicitly enforced and into our own. Supported and perpetuated by a range of institutions, including government bodies, financial institutions, real estate companies, and local communities, these historical injustices and forms of trauma continue to cast shadows over Black life. The timeline from the ostensible end of chattel slavery to the present reflects a society minutely designed to systematically disadvantage Black families and marginalized communities.

The impact of these practices results in a contemporary reality of exploitative real estate practices, racial exclusion from housing opportunities, and the resulting housing and land access inequities that are not relics of history but active agents shaping lives today. These modern manifestations appear in the form of realtors and property managers showing Black renters and homebuyers fewer options; in neighborhoods cut off from adequate transportation, grocery stores, or green space; and in the form of policing practices and extralegal violence.[23] They appear as exclusionary zoning and redevelopment practices that displace Black residents from their homes and communities in favor of neighborhoods that become whiter and/or wealthier.[24] This segregation has had lasting effects on the socioeconomic status of Black Americans, contributing to ongoing disparities in wealth, education, health, and quality of life.

Revisiting the Past, Reshaping the Futures

When Black SpaceTime matters in housing policy, the past is recognized as neither dead nor immutable—it is a narrative still being written. Context can be added to the events of the past that can have an impact on the present and future. Decision makers like landlords and judges are positioned to determine the relationship of the past to the present and the present to the future for a tenant. Eviction records for example are snapshots in time that are often manipulated to prevent individuals from accessing housing far into the future. These records remain readily available to the public and to tenant-screening companies for indeterminate lengths of time, even when the eviction filing never led to an eviction or was resolved in a tenant's favor.

Landlords frequently refuse to rent to tenants who have even one eviction filing on their record, regardless of the outcome of the case or extenuating context of a prospective tenant's past rental circumstances, including temporary financial hardships such as job loss or medical emergencies, which do not predict future rental behavior. A tenant's efforts to rectify past issues, such as repayment of overdue rent or positive rental history prior to or after an eviction filing, can help to demonstrate stable tenancy, offering a more holistic view

---

23 "Housing Discrimination Against Racial and Ethnic Minorities 2012," US Department of Housing and Urban Development (June 2013), https://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012_execsumm.pdf; Jeannine Bell, "The Fair Housing Act and Extralegal Terror," Indiana Law Review 41, no. 3 (2008).

24 Bruce Mitchell, "Philadelphia and the Rapid Gentrification of Downtown," National Community Reinvestment Coalition (October 2018), https://ncrc.org/philadelphia-and-the-rapid-gentrification-of-downtown. Mitchell finds that between 2000 and 2013, 57 neighborhoods in Philadelphia showed signs of residential gentrification. This includes the influx of large numbers of college-educated residents, booming property values, and rising incomes; see also Jackelyn Hwang and Lei Ding, "Unequal Displacement: Gentrification, Racial Stratification, and Residential Destinations in Philadelphia," American Journal of Sociology 126, no. 2 (September 2020).

of a tenant's potential. Tenant-screening companies draw on opaque algorithms that offer renters little opportunity to challenge inaccurate or misleading scores that could be derived from incomplete or out-of-context data. And even if the record is accurate, a payment that is late by a few days becomes a record that lasts years into the future. The reliance on eviction records without context, where past events are seen as deterministic of future outcomes, functions as a time penalty. This penalty not only locks tenants out of stable housing opportunities but reflects and reinforces a system of values that disproportionately penalizes the already marginalized, effectively prioritizing punitive measures over rehabilitation or understanding. It highlights a systemic failure to acknowledge the complexity of tenants' lives and the myriad reasons behind housing instability, instead choosing to perpetuate dangerous time loops of generational instability, exclusion, and inequity that are locked within a linear progress narrative.

Eviction records are rarely a comprehensive reflection of a person's life. They might reflect temporary hardships—illness, job loss, family crises—now passed. Tenants who exercise their legal right to withhold rent for repairs are also often punished with an eviction filing. This stalemate is ended via a mechanism of power made available to landlords, with the result being a permanent blemish on a tenant's record regardless of the filing's outcome. The long temporal hold that eviction records carry over individuals more often than not traps these renters in subpar housing and limits their job mobility.

Renters facing eviction records encounter entrenched cycles of poverty, exacerbated by policies from courts and legislative bodies that prioritize transparency. This emphasis makes eviction records not only easy to acquire but also difficult, if not impossible, to get rid of. In Pennsylvania, the legal framework acknowledges multiple legal bases for public access to court proceedings. The US and Pennsylvania constitutions, alongside common law, grant a presumptive right to access judicial records and proceedings.[25] This "principle of openness" underpins the foundational belief in the transparency of both judicial records and court activities.[26] Moreover, common law upholds the public's right to inspect public documents. The intention behind granting access to court records is to enable public scrutiny of judicial operations, ensuring decisions align with legal standards.

This transparency comes at a significant cost to people with eviction filings. These records are often utilized punitively, allowing landlords to legally refuse housing based on past filings, irrespective of the eviction's legitimacy or the landlord's previous neglect. This practice serves as a form of extrajudicial punishment, tarnishing reputations and effectively blacklisting individuals based on minimal evidence. The result is a punitive cycle that sidelines fairness, trapping tenants with records in a state of perpetual vulnerability and hindering their ability to secure stable housing.

In confronting the punitive use of eviction records, my approach as both an advocate and an artist has been multifaceted, leveraging my dual roles as a housing lawyer at Community Legal Services and as a creator vitally engaged in Black Futurist expression. This dual capacity enabled me to legally challenge and creatively reimagine the narratives surrounding housing insecurity and eviction's impact on individuals and communities. In October 2020, Philadelphia City Council successfully passed Resolution #200531, introduced by Councilmember Isaiah Thomas, on the matter of eviction-record sealing. The resolution, co-written by community organizers and housing advocates, primarily from the Philadelphia Rent Control Coalition and Black and Brown Workers Cooperative, whose members had been directly impacted by eviction records from several years before based on an unexpected and illegal mass eviction by a gentrifying developer in 2017, called on the courts and government to create mechanisms for sealing eviction records."[27] Having had an opportunity to represent several of the mass evicted organizers and other tenants in housing discrimination lawsuits, I rejoined their efforts as

25 Stenger v. Lehigh Valley Hospital Center, 382 Pa. Super. 75 (1989). The decision acknowledges both a constitutional and common law right of access to judicial proceedings.

26 Miller v. Cty. of Ctr., 173 A.3d 1162, 1167 (Pa. 2017): "[The] principle of openness with respect to public judicial records is/./ /. also grounded in the Pennsylvania Constitution."

27 Resolution #200531 (October 2020), resolution co-written by members of the Black and Brown Workers Coalition, including Dominique London and Sterling Johnson.

a legal advocate in support of their fight for eviction-record sealing protections.

One of my first collaborative projects was with Black and Brown Workers Cooperative, coauthoring the policy brief "Breaking the Record: Dismantling the Barriers Eviction Records Place on Housing Opportunities." [28]This policy brief addresses the significant challenges faced by tenants with eviction records in securing housing, highlighting the disproportionate impact on Black women and their families in Philadelphia, a reflection of a national issue. It outlines how eviction filings, predominantly in communities of color, exacerbate existing inequalities, further strained by the COVID-19 pandemic's severe impacts on these communities, including higher infection and mortality rates, income loss, and housing instability.

The brief advocates for legislative and administrative reforms designed to dismantle systemic obstacles to housing access and alleviate the enduring repercussions of eviction records. Recommendations include sealing eviction records, limiting their consideration in rental decisions, and broadening tenant agreement opportunities, thereby addressing the sustained damage eviction records inflict on a tenant's housing access capabilities—even in instances where the tenant prevails in court or reaches a settlement to remain in their residence.

It also examines the systemic ramifications of eviction records as a matter of racial and gender equity. Authored in partnership with tenant organizers directly affected by eviction records, the report has garnered attention in numerous local and national outlets and spurred the formation of an eviction records sealing coalition that has been convening monthly since January 2020.

The Eviction Sealing Coalition harnesses the collective expertise and experiences of over forty-five stakeholders—spanning impacted tenants, organizers, legal and social service providers, social justice advocates, city officials, and landlords—to devise strategies addressing the profound, long-lasting effects of evictions and eviction records on individuals and families.

Comprehensive and life-affirming housing policies, including the adoption of eviction sealing and tenant-screening legislation in Philadelphia, aim to balance power dynamics between landlords and tenants. The coalition places at its core the leadership of individuals directly impacted by eviction histories, with an emphasis on combating racism, gender-based violence, ableism, economic oppression, and in fostering life-affirming alternatives. Recognizing eviction and its historical impact as one facet of broader housing injustices, the coalition commits to transformative, systemic change through collective action. Key goals include engaging with those who have firsthand experience with eviction, showcasing diverse stories through media and professional storytelling, and advocating for fair, accessible, swift, enforceable, and equitable processes for sealing or expunging eviction records, alongside regulating their usage. During this period, I secured funding as a former fellow of the Atlantic Fellows for Racial Equity, which supported coalition-building efforts, including funding, story bank training, and providing stipends to tenant participants in the coalition to enable their participation, attendance at meetings, and engagement despite limited time resources. Our goals also extended to reforming and eventually abolishing the systems responsible for recording and disseminating eviction information, such as court-reporting, tenant-screening, and credit-reporting agencies.

Once the coalition was established and after assessing the political landscape for the most impactful interventions in the shortest time span, we immediately began designing a citywide policy that could work to immediately mitigate the harms of eviction records. Navigating political time within COVID-19 pandemic time, the coalition collaborated with Philadelphia City Councilmember Kendra Brooks to propose legislation called the Renter's Access Act, which she introduced in April 2021. Our efforts to work through political time as a coalition faced challenges as the customary processes for passing legislation— requiring extensive in-person in-

28 Rasheedah Phillips, Dominique London, and Jenna Collins, "Breaking the Record: Dismantling the Barriers Eviction Records Place on Housing Opportunities," Community Legal Services of Philadelphia and Black and Brown Workers Cooperative, November 30, 2020, https://clsphila.org/housing/report-eviction-record-policy.

teractions and hearings—were disrupted due to COVID-19 work-from-home mandates in the city, necessitating the adoption of technologies that altered traditional in-person relationship building critical to a campaign.

However, the campaign also strategically utilized this political time, building on the emergency tenant protection measures enacted since the pandemic's onset, including state and local eviction moratoriums, emergency rental assistance, and eviction diversion programs. This momentum allowed the bill to progress through the political process at an accelerated rate, surpassing the typical timeline. Before the pandemic, a rental housing bill in Philadelphia would, based on my decade of experience in housing policy, ordinarily take an average of eighteen months, sometimes longer, to get from inception to implementation.

The Renters Access Act (RAA) was passed by Philadelphia City Council nearly unanimously in June 2021, going into effect ninety days later on October 13, 2021, a little under nine months after our first coalition meeting, after significant public education, political education, and advocacy with city councilmembers by coalition members and others in our collective networks. Tenant testimony was uplifted at the two city council hearings between February 2021 and June 2021.

Designed to break the long temporal chain of eviction records, the RAA mandates an increase in the transparency of the criteria used in tenant evaluations and requires the assessment of each tenant's circumstances individually (instead of a blanket ban on any tenant not meeting certain criteria). The mandates provide tenants with options for disputing inaccuracies and prohibit rental policies that reject applicants solely based on their credit score or eviction record.[29] The RAA gives applicants the right to dispute inaccurate information or to seek reconsideration in the case of mitigating circumstances, while requiring landlords to give time for consideration of new information.

By addressing time concerns in the design framework of the Renters Access Act, we deliberately approached the dimensions of past, present, and future as open-ended variables rather than as fixed entities. This demanded a deep reckoning with how historical injustices have actively constructed the current temporal context. It required us to be visionary in our policymaking, setting the stage for future states of being that manifest greater equity in the housing system. Borrowing the insight of physicist and philosopher Karen Barad, we understood that "it's not that the experimenter changes a past that had already been present. Rather, the point is that the past was never simply there to begin with, and the future is not simply what will unfold; the 'past' and the 'future' are iteratively reworked and enfolded through the iterative practices of spacetimemattering."[30]

In practical terms, this meant a mandate that landlords engage in a holistic review of a rental application. It is a tangible shift that alters our collective understanding of temporality and establishes a better collective approach to housing, as well as a collective sense of the unjust barriers to that right. It challenges the unreasonable standard that an eviction record restricts one's housing options indefinitely. Adding nuance to an individual's rental history as only a partial window on the fuller context of their lives, the new mandate destabilizes that history's function as a locked temporal point, a monolithic entity dictating the present.

Applying the rubric of Black SpaceTimeMatters to liberatory housing futures renders the concept of a deterministic past antithetical to the human need for housing. In this vision of the future, housing stability is guaranteed for everyone, encompassing access to housing that is safe and healthy, connected to social, familial, and cultural networks, and close to food, green areas, and transportation. To actualize this future, it is paramount to build frameworks that are rooted in the conviction that housing equity is not a distant dream but an immediate reality. The politics of immanence, emphasizing presence and agency in the here and now, dovetails with this vision, compelling us to acknowledge that equitable housing is not an aspirational goal but a present necessity.

---

29 "Renters' Access Act: Tenant-Screening Guidelines," Pa. Code § 9.1108, 3 and 4 (2021).

30 Karen Barad, "Quantum Entanglements and Hauntological Relations of Inheritance: Dis/continuities, SpaceTime Enfoldings, and Justice-to-Come," Derrida Today 3, no. 2 (2010): 240–68.

If we treat the future as if it has come to be, activists and policymakers can adopt a mindset in which housing equity is the default, enabling them to reflect on the features of the completed event of universal housing access. Unlike linear, deterministic thinking, which limits the openness of future possibilities, this "future perfect thinking," as coined by researchers Lars Fuglsang and Jan Mattsson, imbues the future with a sense of substance and stability.[31] Our collective vision is no longer a future controlled by a select elite but one where stable and equitable housing is a common and universally available resource.

However, realizing this vision necessitates a harmonious blend of imaginative foresight with pragmatic, immediate actions aimed at dismantling the entrenched systemic barriers that perpetuate housing inequities. By synchronizing visions with concrete actions, we can forge a housing landscape that truly reflects the fluid and dynamic essence of time itself, where the narratives of both past and future are actively shaped and reshaped. This iterative process of envisioning and action ensures that the pursuit of equitable housing transcends mere theoretical speculation, grounding it firmly in the realm of tangible and immediate outcomes.

Through such a holistic approach, we acknowledge the interlinking of temporal resources and spatial justice, emphasizing that the challenges of displacement and gentrification transcend the present moment. They are inheritances with echoes that ripple through generations, impacting successive epochs and communities.

BIOGRAPHY

Rasheedah Phillips is a queer housing and land justice advocate, lawyer, parent, and interdisciplinary artist working through a Black futurist lens. Phillips is the founder of the AfroFuturist Affair, founding member of the Metropolarity Queer Speculative Fiction Collective, and co-creator of the art duo Black Quantum Futurism. Phillips' book, Dismantling the Master;s Clock: On Race, Space and Time debuts on AK Press on January 28, 2025.

31 Lars Fuglsang and Jan Mattsson, "Making Sense of Innovation: A Future Perfect Approach," Journal of Management and Organization 17, no. 4 (2011): 448–58, doi:10.5172/jmo.2011.17.4.448.

ABOUT THE REVIEW

National Lawyers Guild Review, formerly Guild Practitioner, is published triannually by the National Lawyers Guild, a non-profit institution, at 132 Nassau Street, # 922, New York NY 10038. ISSN 0017-5390. Periodicals postage paid at New York, NY and at additional mailing offices.

Subscription rates are $75/yr for libraries and institutions; $25/yr for lawyers; $10/yr for legal workers/law students; $5/yr for incarcerated persons; add $5/yr for overseas; $6.50/single copy, and should be sent to:

132 Nassau Street, # 922
New York NY 10038

POSTMASTER: Send change of address to:
National Lawyers Guild Review
132 Nassau Street, # 922
New York NY 10038

Address all editorial correspondence and law-related poems, criticisms, articles and essays to:

Editor-in-Chief
National Lawyers Guild Review
132 Nassau Street, # 922
New York NY 10038

Unsolicited manuscripts will not be returned unless accompanied by return postage. National Lawyers Guild Review is indexed/abstracted in Westlaw, PAIS-Public Affairs Information Service, The Left Index, and the

SUBMISSION GUIDELINES

National Lawyers Guild Review is published twice a year by the NLG. Our readership includes lawyers, scholars, legal workers, jailhouse lawyers and activists. With that audience in mind, we seek to publish lively, insightful articles that address and respond to the interests and needs of the progressive and activist communities. We encourage authors to write articles in language accessible to both legal professionals and intelligent non-experts. Submissions that minimize legal jargon are especially encouraged.

Though we are open to manuscripts of any length, articles typically run about 7,000 words. Pages in issues of NLGR generally contain about 425 words.

Submit your manuscript in Microsoft Word format electronically as an attachment to an email. For reference, we use the Chicago Manual of Style. Citations should appear as footnotes and follow Bluebook style. Citations should identify sources completely and accurately. Lengthy textual commentary and string cites are discouraged.

In addition to scholarly articles, NLGR welcomes submissions of artwork, poetry, and fiction that relates to progressive social movements. Include a short sentence or two describing your professional affiliation, background and area(s) of legal specialization. This description will appear with the article if it is accepted for publication. Please also include a phone number and ground mail address.

Manuscripts should be sent to the Executive Editor at nlgreview.executive-editor@nlg.org, whereupon they will be forwarded to the Editor-in-Chief for review by members of the NLGR's editorial board. If accepted, manuscripts will be edited, and the edited manuscripts will be returned to the author for review; however, because of production schedules, late changes are prohibited and authors generally do not see typeset proofs. We make every effort to clear any changes with the author.