BERKELEY JOURNAL OF INTERNATIONAL LAW

ARTICLES

BERKELEY JOURNAL OF INTERNATIONAL LAW

VOLUME 39 2021 NUMBER 2

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Citation: Cite as Berkeley J. Int'l L.

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BERKELEY JOURNAL OF INTERNATIONAL LAW

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A ROSE IS A ROSE IS A ROSE. INTERNATIONAL LEGAL FUNCTIONALISM AS A METHOD OF STATEHOOD ANALYSIS

Professor Volker Roeben and Sava Janković*

Statehood is a foundational concept of international law. This Article argues that what is considered a State within the realm of international law is best explained by its external effectiveness in the international legal order, rather than, as so far accepted, by internal facts of people, government, and territory. Against this background, an alternative method of cognizance of statehood in international law is advanced, termed International Legal Functionalism (ILF). ILF suggests that in order for a State to be regarded as such, it should join international organizations, create international law (conclude international agreements), send diplomatic and consular agents, avail itself of the international judiciary, and exercise its inherent rights and obligations. This has implications for the normative steering of statehood as an objectives-driven process.

INTRODUCTION

The State has always occupied international lawyers. Although there exists a consensus that States are the primary subjects of international law, it is still difficult to conclusively define what is a State. Examples of such difficulty to conclusively define statehood include the debates over whether Somaliland, Taiwan, Kosovo, Palestine, or Catalonia qualify as "States." This situation is practically inconvenient and also implicates the integrity of international law. For if international law is defined by its subjects, then the lack of a sound definition of a State impinges on its quality and completeness.[1]

The International Law Commission (ILC) has endeavored a few times to fashion an appropriate and universally acceptable definition of statehood, but has ultimately concluded that "no useful purpose would be served by an effort to define the term 'State.'"[2] During its work on the Draft Declaration of Rights and Duties of States and the Vienna Convention on the Law of Treaties, the Commission declined to provide a legal definition of a State.[3] According to the Commission, any definition proposed by States, other than the definition "commonly accepted in the international practice," would cause misunderstandings.[4]

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[1] *See* Lech Antonwicz, *Zagadnienie Podmiotowosci Prawa Miedzynarodwoego,* 32 Annales Universitatis Mariae Curie-Skłodowska 7 (1998); CHRISTIAN N. OKEKE, CONTROVERSIAL SUBJECTS OF CONTEMPORARY INTERNATIONAL LAW 215–227 (1974); DAVID BEDERMAN, THE SPIRIT OF INTERNATIONAL LAW 49 (2002) (describing clear rules for what subjects of international law are necessary for the construction of an international legal system).

[2] Int'l L. Comm'n, Rep. of the Int'l L. Comm'n on the work of its 1st Session, U.N. Doc. A/925 (Apr. 12, 1949).

[3] The meaning of statehood was again discussed in the ILC during its work on the Vienna Convention on the Law of Treaties (VCLT), yet likewise ended without agreement. Rep. of the Comm'n to the Gen. Assembly, [1956] 2 Y.B. Int'l L. Comm'n 107, U.N. Doc. A/CN.4/SER.A/1956/Add.1.

[4] Special Rapporteur Alfaro criticized the criterion of permanent population for excluding nomadic peoples. Sir Bengal Rau demanded an institution to assess statehood issues. Mr. Koretsky thought only the international community capable of deciding on statehood matters. *See Summary Records and Documents of the First Session including the report of the Commission to the General Assembly,*

Article 1 of the Montevideo Convention on the Rights and Duties of States (Montevideo Convention) stipulates that "the State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States."[5] This definition of a State has not been rethought as of late in the literature and attempts at reconceptualizing statehood have not brought a breakthrough.[6] As observed by D'Aspremont, today's disputes about statehood arise either within a strict legal sphere between facticists (who advocate for minimal requirements of statehood in line with the Montevideo Convention) and legalists (who propose the more elaborate legal version of a State). Or they arise within a more political ambit between inter-subjectivists (who accept statehood only upon its recognition) and objectivists (who argue that a State exists as an object independent of recognition).[7] The ontological perplexities have been resolved by the conciliatory approach, that a State is primarily an effective social reality as envisaged by Article 1 of the Montevideo Convention. However, some international legal principles, especially the prohibition of the use of force and the right of self-determination, likewise have an impact on statehood status.[8] The 'great debate' on the value and nature of recognition has been resolved in favor of the declaratory camp, which claims that statehood cannot be determined by the will of others and is an ascertainable social construct mirrored in Article 1 of the Montevideo Convention.[9] In other words, the 1933 Montevideo Convention idea of statehood remains intellectually dominant, such that reference to the Convention "is nearly a reflex."[10] All proffered addenda (democracy, legitimacy

[1949] 1 Y.B. Int'l L. Comm'n ¶¶ 63, 68, 70, U.N. Doc. A/CN.4/SR.1/1949. Special Rapporteur Fitzmaurice proposed that in addition to the case of entities recognized as being States on special grounds, the term 'State' corresponds to the Montevideo Convention vision. This should have been the formulation of Article 3 of the VCLT. Later propositions were aimed at adding to Article 6 of the VCLT that "the term ''State'' is used in this paragraph with the same meaning as in a) the Charter of the United Nations; b) the Statute of the Court; c) the Geneva Conventions on the Law of the Sea; d) the Vienna Convention on Diplomatic Relations, i.e. means a State for the purposes of international law." 2 Y.B. Int'l L. Comm'n 107 ¶ 4, U.N. Doc. A/CN.4/SER.A/1956/Add.1; Summary records of the eighteenth session, [1966] 1 Y.B. Int'l L. Comm'n 192, U.N. Doc. A/CN.4/SER.A/1966.

[5] Signed 26 December 1933, entered into force 26 December 1934. Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (Montevideo Convention), December 26, 1933, 165 L.N.T.S. 19.

[6] *Cf.* Mathias Forteau, *L'Etat Selon Le Droit International: Une Figure À Géométrie Variable,* 111 Revue Générale De Droit International Public 737–770 (2007); Steven Wheatley, *The Emergence of New States in International Law: The Insights from Complexity Theory*, 15 Chinese J. Int'l L. 579–606 (2016); Janis Grzybowski, *To Be or Not to Be: The Ontological Predicament of State Creation in International Law,* 28 EUR. J. INT'L L. 419–432 (2017).

[7] Jean d'Aspremont, *The International Law of Statehood: Craftsmanship for the Elucidation and Regulation of Births and Deaths in the International Society,* 29 CONN. J. INT'L L. 205–210 (2014).

[8] Anne Peters, *Statehood After 1989: 'Effectivités' Between Legality and Virtuality,* 3 SEL. PROC. EUR. SOC'Y INT'L L. 175–177 (J. Crawford & S. Nouwen ed., 2012).

[9] Stefan Talmon, *The Constitutive Versus the Declaratory Doctrine of Recognition: Tertium Non Datur*, 75 BRIT. Y.B. INT'L L. 101 (2004).

[10] Thomas D. Grant, *Defining Statehood: the Montevideo Convention and its Discontents*, 37 COLUM. J. TRANSNAT'L L. 415 (1999).

of government, economic viability, constitution, and proceduralization) have been regarded as criteria for recognition of a State or at best de lege ferenda criteria for statehood.[11] They do not alter the existing conception.

Rather than contest the Montevideo definition, the International Court of Justice (ICJ) in the *Kosovo Opinion* has conspicuously avoided any foray into the substance of statehood. Taking a *Lotus*-style approach, it has only identified marginal parameters that may prevent an entity from attaining that status.[12] However, the Montevideo definition has very limited congruence with international law, at least in marginal cases where an entity's claim to statehood is questioned. We submit that the Montevideo's statehood construction—with corresponding legal precepts—does not sufficiently reflect a State's characterization in international law. First, as a socio-theoretical construct, it does not correspond to the functionality notion dominating contemporary international law.[13] Second, as a mechanism, it is frequently unable to capture and categorize relevant phenomena.

This Article, therefore, moves beyond the Montevideo proposition. To this effect, it draws a parallel with international organizations, secondary subjects of international law, focusing on the aspect of functionality. Functionality remains the *raison d'être* of international organizations.[14] We submit that the functionality approach might be extended to States. Accordingly, States in international law should be perceived as ontic geopolitical entities which operate within the international legal system and exercise their international rights and obligations. Accordingly, International Legal Functionalism (ILF) assesses the State's international legal existence. ILF does not reject the Montevideo definition but shifts the emphasis to the crucial aspect of functionality in the sense of its external effectiveness. It enhances legal certainty in international relations because the external effectiveness of a State can be assessed with somewhat greater accuracy

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[11] JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 148–155 (2nd ed. 2006); JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 130 (9th ed. 2019); JURE VIDMAR, DEMOCRATIC STATEHOOD IN INTERNATIONAL LAW: THE EMERGENCE OF NEW STATES IN POST-COLD WAR PRACTICE (2013).

[12] The *Lotus* Principle entails that the non-prohibition of a certain course of conduct is equal to that conduct being permitted. For the ICJ, no 'rule prohibiting the making of a declaration of independence' can be inferred, neither from state practice, nor from the practice of the Security Council. Such a declaration could only be invalid if connected to the breach of a peremptory norm of international law. Accordance with International law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. REP. 403, ¶¶ 79, 81, 84 (July 22).

[13] In this Article the words 'functionality' and 'effectiveness' should be construed as synonyms. Functionality underpins the functionalist concept employed in international organizations law as well as our correlative concept of international legal functionalism (ILF). It is performance/functionality that lies at the core of certain phenomena and is capable of determining/defining their existence. A broader explanation will follow in the next section.

[14] Raison d'être (fr) - the most important reason or purpose for someone or something's existence. See *Functionalism (international relations)*, *in* Britannica https://www.britannica.com/topic/functionalism-international-organizations.

than the internal. More fundamentally, ILF develops a normative conception of statehood.

The Article proceeds as follows. Part I defines ILF, positions it within the functionalist literature, and explains that ILF refers to the State being externally effective by engaging with the international legal order. Then, it points out that ILF is not as much a doctrine as a method that requires indicators. Part II will then explore those indicators in depth. On that basis, Part III points out that ILF advances international legal certainty, connects the concept of the State with international law, and that its scope of application comprises all States. The purpose of the Article is conceptual, not prescriptive. Therefore, it does not reach conclusions on controversial or hard cases of putative statehood, but it does discuss these cases to evidence general points.

I.
DEFINING INTERNATIONAL LEGAL FUNCTIONALISM

For the purpose of this Article, the simplest definition of ILF is the ability of a State to function in international law. ILF defines a State in international law from an empirical point of view. Hence, a State is not merely a theoretical construct of rules for what it takes to be a State (Montevideo criteria and legality facets) but is predominantly a practical phenomenon defined by the notion of what it means to be a State in a world of States (functionalism). As in the duck test, a duck would not be a duck if it only looked like a duck. It also has to swim like a duck and quack like a duck in concert with other ducks; it has to behave like a duck.[15] We submit that construing States through their international legal functions and attributes is not only more comprehensive but also more accurate from the standpoint of international law.

A. Positioning ILF

We can position ILF against established theories of law and social sciences, especially the functionalist theory. With regard to legal theories, ILF is more closely associated with legal realism than with positivism. Legal realism sees law as the "output of decisions and behavior by judges and others."[16] Realists predict and appraise the law empirically as it actually emanates from courts instead of studying or developing a set of doctrines.[17] Like legal realism, ILF is practical in nature and rejects formalism. And like legal realism, ILF perceives a branch of

[15] The "duck test" is a form of abductive reasoning attributed to James Whitcomb Riley. *See* JAMES WHITMAN RILEY, POEMS & PROSE SKETCHES: "WHEN I SEE A BIRD THAT WALKS LIKE A DUCK AND SWIMS LIKE A DUCK AND QUACKS LIKE A DUCK, I CALL THAT BIRD A DUCK." (2017).

[16] Steven R. Ratner, *Legal Realism School*, 6 MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. 801 (2012).

[17] Samuel Mermin, *Legal Functionalism*, Anuario De Filosofía Del Derecho 81–92 (1973).

law (the international law of statehood) through the prism of the real behavior of States rather than through doctrine.

With regard to theories of social sciences, ILF resembles the functionalist theory proffering that all aspects of a society (institutions, roles, norms, etc.) serve a purpose and that all are indispensable for the long-term survival of the society.[18] In sociology and anthropology, the functionalist theory conceives society as a system consisting of interconnected parts, each of which performs a specific function in this system.[19] Stated differently, the functions are part of a society and in a specific way, determine and define the society. In psychology, the functionalist theory posits that mental processes must fulfill certain functions, and these functions organize them.[20] The interdependence between the performance of functions and certain phenomena and their existence manifests itself also in legal and international relations disciplines. The functionalist theory of international law "correlates the development and study of international law with the satisfaction of certain social functions in the international system" and "separates interests seen by States as vital from non-vital interests, with non-vital interests, such as communications, health, safety, being entrusted to international rules."[21] In international relations, the functionalist theory arose during the interwar period with the aim of securing peace and stability in an increasingly interconnected world.[22] The theory claims that international organizations, due to their international character, conferred competencies, and technical focus can perform certain functions more efficiently than individual States.[23] The European Union is the classic example of an international organization, where the functionalist approach is seen as a driving force towards securing the integrationist agenda, peace, and stability.[24] That is why it seems plausible to connect ILF with the functionalist theories in social sciences disciplines since all of them predicate upon the performance of functions, which are material for the existence of certain phenomena and thereby expressly or impliedly define these phenomena. No author has gone so far as to extend the notion of functionalism to

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[18] *See Functionalism (social sciences), in* Britannica, https://www.britannica.com/topic/functionalism-social-science.

[19] *See* Józef Obrębski, *O Metodzie Funkcjonalnej Bronisława Malinowskiego*, 2 STUDIA SOCJOLOGICZNE 35–63 (2004).

[20] In psychology of mind, mental states (beliefs, desires, being in pain, etc.) are constituted solely by their functional role, which means their causal relations with other mental states, sensory inputs and behavioral outputs. See *Functionalism, in* Stanford Encyclopedia of Philosophy, https://plato.stanford.edu/entries/functionalism.

[21] JOHN P. GRANT & J CRAIG BARKER, PARRY AND GRANT ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW 231 (3d ed. 2009). *See ALSO* WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964).

[22] David Long & Lucian M. Ashworth, *Working for Peace: The Functional Approach, Functionalism and Beyond*, *in* NEW PERSPECTIVES ON INTERNATIONAL FUNCTIONALISM 1–2 (1999).

[23] Jan Klabbers, *The Emergence of Functionalism in International Institutional Law: Colonial Inspirations*, 25 EUR. J. INT'L L. 645 (2014).

[24] Liesbet Hooghe & Gary Marks, *Grand Theories of European Integration in the Twenty-first Century,* 26 J. EUR. PUB. POL'Y 1113–1133 (2019).

statehood analysis,[25] although it has become a developing and polysemic concept (e.g., neo-functionalism).[26] However, the extension is justifiable. ILF maintains that the State fulfils its *raison d'être* of providing security and services in cooperation with others through international law. The flipside is also true; a dysfunctional State loses its reason for existence.[27] Furthermore, the notion of (functional) integration connects both the concept of international organization and the State. Integration within an organization or the international community of States will enable States to fulfil their functions and corroborate the reason for their existence.

B. External Effectiveness as the Linchpin of ILF

Effectiveness, which some authors connect with Machiavelli and Hegel,[28] is a linchpin of international law.[29] International law is a legal system that endows with legal consequences primarily, if not always, situations and claims that are effective.[30] A situation is considered effective when it is solidly implanted in real life.[31] As remarked by Lauterpacht, international law "cannot lag for long behind facts."[32] It is devoid of any central power to enforce duties and rights; therefore the reliance on effectiveness is much greater.[33] Koskenniemi has argued that the dialectic oscillation between concreteness and normativity could not be explained better than by the concept of effectiveness.[34] Visscher shared this view, propounding: "L'effectivité …suggère à la fois l'idée d'une certaine tension et celle d'une ultime adéquation entre le fait et le droit."[35]

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[25] Long & Ashworth, *supra* note 22, at 9–11.

[26] *See* Laurence Boisson de Chazournes, *Functionalism! Functionalism! Do I Look Like Functionalism?*, 26 EUR. J. INT'L L. 954 (2016).

[27] *See* Volker Roeben, *What About Hobbes? Legitimacy as a Matter of Inclusion in the Functional and Rational Exercise of International Public Power*, *in* LEGITIMACY IN INTERNATIONAL LAW 353–367 (R. Wolfrum & V. Roeben eds., 2008).

[28] FLORIAN COUVEINHES-MATSUMOTO, L'EFFECTIVITE EN DROIT INTERNATIONAL 5–14 (2014).

[29] HEIKE KRIEGER, DAS EFFEKTIVITÄTSPRINZIP IM VÖLKERRECHT 173 (2000).

[30] ANTONIO CASSESE, INTERNATIONAL LAW 12–13 (2d ed. 2005).

[31] HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 426 (1947).

[32] *Id.*

[33] Karl Doehring, *Effectiveness*, *in* THE ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW 44–45 (1995).

[34] MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 284 (2006).

[35] "Effectiveness ... suggests both the idea of a certain tension and that of an ultimate adequacy between fact and law'' (own translation). Charles de Visscher, *Observations Sur L'effectivité Un Droit International Public*, 62 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 601 (1958).

The notion of effectiveness as an argument for the evaluation of facts has been used in relation to government,[36] treaties,[37] acquisition of territorial title,[38] nationality[39] and, finally, to statehood itself.[40] Governmental effectiveness as a statehood criterion has been conceived as the ability to maintain control internally and provide goods, security, and services to the people within the State's borders, and to an extent externally, predominantly denoting independence from other subjects of international law.[41] Since the Aaland Islands case, in which the International Committee of Jurists questioned Finnish statehood in 1917 on the basis of internal disorder and the lack of independence,[42] scholars have continued to determine statehood primarily through internal effectiveness.[43] It has been maintained that statehood status is acquired when a seceding entity exhibits durable and real control over the community.[44] Conversely, statehood status is said to be lost when the governmental effectiveness has disappeared and cannot be re-established.[45] Whether governmental effectiveness disappears in times of forceful occupation, as was the case in Ethiopia, Austria, and Poland in the period from 1936 to 1940, is disputed.[46] However, the *ex injuria jus non oritur* maxim[47] would exclude that occupation can affect statehood. There has not been much of an attempt to unravel the specifics of external effectiveness, with the exception of an enduring attempt to understand independence.

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[36] Peters*, supra* note 8, at 171–175.

[37] ICJ Rep. 65, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase), Advisory Opinion, 65, 229 (July 18, 1950).

[38] Hiroshi Taki, *Effectiveness*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 348 (Vol. III, 2012).

[39] Nottebohm case (*Liech. v. Guat.*), 1950, ICJ REP. 4, 22 (Apr. 6); Merge Case (*United States v. Italy)* Italy and United States Conciliation Commission, 1955, 14 RIAA 236, 247; Iran-United States Claims Tribunal, Case No. A/18, 1984, Decision No. DEC 32-A18-FT (Apr. 6), reprt. in 5 IRAN-US CL. TRIB. REP 251, 263 (1984).

[40] Gleider I. Hernández*, Effectiveness, in* CONCEPTS FOR INTERNATIONAL LAW: CONTRIBUTIONS TO DISCIPLINARY THOUGHT 246 (Jean d'Aspremont & Sahib Singh eds., 2019).

[41] Stein Sundstøl Eriksen, *State Failure' in Theory and Practice: The Idea of the State and the Contradictions of State Formation,* 37 REV. OF INT'L STUD. 229–237 (2011).

[42] "It is therefore difficult to say at what exact date the Finnish Republic, in the legal sense of the term, actually became a definitely constituted sovereign State. This certainly did not take place until a stable political organisation had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops". *Aaland Islands* case, 3 League of Nations Official J, Spec. Supp. 3, at 8–9 (1920).

[43] *See* ENRICO MILANO, UNLAWFUL TERRITORIAL SITUATIONS IN INTERNATIONAL LAW: RECONCILING EFFECTIVENESS, LEGALITY AND LEGITIMACY 60–61 (2005) (the state is "a stable and organized political community" and internal effectiveness is "material" for statehood).

[44] CASSESE, *supra* note 30, at 13.

[45] Doehring, *supra* note 33, at 45.

[46] Recognition/Non-Recognition in International Law, 78 Int'l L. Ass'n Rep. Conf. 461 (2018).

[47] Illegal acts do not create law. See Michel Virelly, *Le Rôle Des « principes » Dans Le Développement Du Droit International, in* LE DROIT INTERNATIONAL EN DEVENIR. ESSAIS ÉCRITS AU FIL DES ANS 195–212 (Michel Virally ed., 1990) ; *see generally* ANNE LAGERWALL, LE PRINCIPE EX INJURIA JUS NON ORITUR EN DROIT INTERNATIONAL (2016).

Effectiveness in the context of statehood assessment by ILF takes a different meaning and form than so far accepted. It validates a State's external legal functionality that embraces a whole range of activities in the international arena, as well as in the State's bilateral and multilateral interactions. The international effectiveness of a State can be reliably measured against this scope of legal activities. A State's effectiveness on the international level is expressed in its ability to create and use international law, implying the conclusion of bilateral and multilateral agreements, membership in international organizations, and the utilization of international rights and obligations, all of which are inherent to a State and acquired subsequently.

For a State to function in a legal sphere—engage in treaties, have access to global courts and otherwise exercise relations with other States— "it must be accepted and treated as independent by other States."[48] Only if the international community in this way embraces the 'questionable' internal situation of the State, can it be approved or legally validated. The principle of *ex injuria jus non oritur* is a factor,[49] but ultimately a decision by the system's central actors about whether to acquiesce is what controls, such as when, the United Nations General Assembly (UNGA) finally credentialed the Soviet-installed Hungarian government in 1963.[50]

C. ILF as Method. Indicators of Progress to Statehood

Following Czapliński and Wyrozumska, subjects of international law could be defined by the degree of their *modus operandi* in international law.[51] Consequently, international legal personality—the capacity of being a bearer of international rights and duties—is linked also to the manifestation of the personality, that is, the capacity to act, which may determine participants of the international legal order. States are meant to possess full, unrestricted international legal personality *and* be able to use its attributes to act in

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[48] Ermira Mehmeti, *Recognition in International Law: Recognition of States and European Integration - Legal and Political Considerations,* 2 EUR. J. INTERDISCIP. STUD. 240 (2016) ("independence alone is not sufficient (…) and recognition is a precondition to secure the functioning of a State in the international order").

[49] *See* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 53 (2001). Article 41 of the ILC Articles on State Responsibility stipulates "No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation."

[50] G.A. Res. 1857 (XVII) (Dec. 20, 1962). In the remaining part of the article, we will return to the issue of the recognition of states and governments and how such recognition impacts on the question of functionality.

[51] WŁADYSŁAW CZAPLIŃSKI & ANNA WYROZUMSKA, PRAWO MIĘDZYNARODOWE PUBLICZNE. ZAGADNIENIA SYSTEMOWE 167–170 (2014).

international law, whereas other subjects will dispose of lesser levels of personality, which will accordingly translate to their international status.[52]

ILF connects the legal concept of a State with the capacity to act in international law, and the effective exercise of that capacity. International functionality and external effectiveness of an entity as a State are not static affairs. Rather, they are objectives the State in question pursues on the international plane. ILF then becomes a method for assessing statehood, rather than a doctrine that can be directly applied. This method calls for developing indicators to assess a State's progress towards the objective of statehood. Like all indicators, these should be valid and measurable. The next Section will identify indicators that measure the functionality of the State in the international arena.

II.
INDICATORS OF INTERNATIONAL LEGAL FUNCTIONALISM

ILF denotes the exercise of functions of a State in the international legal context, which presupposes the interaction with other subjects of international law, in particular States, as well as the exercise of rights and fulfilment of obligations under international law. International legal functionality of a State (a feature of functionalism understood as a concept) is, therefore, a composite of the legal actions of a State in its international relations.[53] A State can be considered functional within the international legal sphere if it: (A) concludes international agreements and accesses to multilateral treaties; (B) maintains diplomatic and consular relations; (C) exercises State immunity and other privileges; (D) accesses the international judiciary and resolves international disputes in a peaceful manner; (E) joins international organizations; (F) manifests fundamental rights and obligations; and (G) is recognized.

The Article will now consider these indicators. It will present each indicator, explain why it is important for statehood, and give examples with a focus on marginal cases.

A. The Conclusion of International Agreements and Accession to Multilateral Treaties

The conclusion of treaties and particular multilateral treaties is the first indicator that may determine statehood and is conducive to its achievement. The

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[52] Y.B. INT'L L. COMM'N 24 para. 26 (1965). ("[Mr. Lachs] certainly could not accept the comment of the Government of Finland (A/CN.4/175, Section 1.8) which suggested that there might be States which were not subjects of international law. Every State possessed *ex definitione* the right to conclude treaties; no State could suffer such a *capitis diminutio*. The right to conclude treaties could be an inherent right or a delegated right. States had an inherent right; an international organization could have the right to conclude treaties conferred upon it by States.")

[53] *Cf.* Brad R. Roth, *Secessions, Coups, and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine*, 11 MELB. J. INT'L L. 393–440 (2010).

capacity to conclude treaties (*ius tractatuum*, treaty-making power) is a landmark feature of States as primary subjects of international law, is considered part of their sovereign competencies,[54] and has been enshrined in Article 6 of the 1969 Vienna Convention on the Law of Treaties.[55] Conversely, the absence of the contractual capacity of an entity claiming statehood, empirically evidenced by the non-conclusion of treaties, will cast doubt on the legal status of the entity. Thus, as a general rule, statehood may be confirmed if *ius tractatuum* is exercised. To the contrary, it may be denied if the treaty-making power does not exist or is limited.

In particular, the treaty-making power of constituent units of a State, such as the States or *Länder* in a federal system or provinces in a decentralized system, is not original, comprehensive, or rooted directly in international law, but is delegated by the federation.[56] For instance, the Spanish Constitutional Court, ruling on a conflict of competence brought by the Spanish government against certain precepts of a Decree 89 promulgated by the Basque government, delineated competencies vested in the Spanish State and those vested in its Autonomous Communities.[57] The Court observed that the content and subject of international legal relations of a State are determined by the rules of both general and particular international law applicable to Spain under Art. 149.1.3 of the Constitution.[58] They include signing treaties (*ius contrahendi*), representation of the State in other countries (*ius legationis*), and the creation of international obligations for a State, linked with its international responsibility.[59] On the other hand, the Court noted that the Autonomous Communities in Spain either do not have such competencies or cannot realize them to the full extent because they are limited by particular statutes and predominantly by the Spanish Constitution itself.[60]

In borderline cases, *ius tractatuum* is often used as *arguendo*, corroborating or refuting the status of an entity. Palestine's recent accession to multilateral treaties, many of which are only open to States, arguably confirmed Palestine's statehood at least for the purposes of these treaties.[61] It has acceded to the Vienna

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[54] SS 'Wimbledon [Government of His Britannic Majesty v. German Empire] PCIJ Series A No. 1, 35 ("the right of entering into international engagements is an attribute of State sovereignty"); *see also* JAROSŁAW SOZAŃSKI, WSPÓŁCZESNE PRAWO TRAKTATÓW 27 (2005).

[55] During the discussion on the law of treaties in the ILC, Mr. Lachs shared Mr. Ago's view on the legal and political importance of stating the principle that every State possessed the *ius tractatuum.* Y.B. INT'L L. COMM'N 24 para. 25 (1965).

[56] *See* Anne Peters, *Treaty Making Power*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, vol. X para. 19 (2012).

[57] STC 165/94, BOE 25.6.94.

[58] 3 SPANISH Y.B. INT'L L. 383 (1993-1994); The Spanish Constitution, BOE No. 311, 29.12.1978.

[59] *Id.* at 69; *see also* Spanish Constitutional Court decisions SS. TC 137/1987; 153/1989 and 80/1993; *Cf* 228/2016.

[60] Judicial Decisions*,* 3 SPANISH Y.B. INT'L L. 381 (1993-94).

[61] *See* Shadi Sakran & Hayashi Mika, *Palestine's Accession to Multilateral Treaties: Effective Circumvention of the Statehood Question and Its Consequences,* 25 J. INT'L COOP. STUD. 91–92

Convention on the Law of Treaties, the Vienna Convention on Diplomatic Relations, and the United Nations Framework Convention on Climate Change.[62] On the other hand, an entity not concluding its own treaties indicates a lack of statehood. For instance, in 1991 a United States Court of Appeal while analyzing Palau's plea for sovereign immunity concluded that Palau did not have the attributes of statehood because the United Nations Trusteeship Agreement delegated the United States "full power of administration, legislation and jurisdiction over the territory" meaning that all the agreements, mainly fisheries and marine resources, must be concluded with the approval of the US.[63] In fact, at the time of the judgment, Palau was still the Pacific Trust Territory, preparing for independence. It could be added though that even at the time of Palau's independence (1994), it was still heavily connected with the US by the Compact of Free Association Agreement and had no say in certain important matters.[64]

Egypt, in a similar vein, could hardly be considered a State until the mid-1950s despite its arranged independence in 1922. It remained under British political and military control, which also performed external affairs, including treaties.[65] Taiwan is a contemporary example; almost all of its international affairs, including treaties, are conducted by the People's Republic of China in line with the One-China Policy.[66] Treaties signed by Taiwan create substantial ambiguities

(2017); *see also* Yael Ronen, *Recognition of the State of Palestine: Still Too Much Too Soon*?, *in* SOVEREIGNTY STATEHOOD AND STATE RESPONSIBILITY – ESSAYS IN HONOUR OF JAMES CRAWFORD 244 (Christine Chinkin & Freya Baetens eds., 2015).

[62] VIENNA CONVENTION ON THE LAW OF TREATIES, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en (indicating that Palestine acceded to the Vienna Convention on the Law of Treaties on April 2, 2014) (last visited Apr. 22, 2021); VIENNA CONVENTION ON DIPLOMATIC RELATIONS, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&clang=_en (indicating that Palestine acceded to the Vienna Convention on Diplomatic Relations on April 2, 2014) (last visited Apr. 22, 2021); UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en (indicating that Palestine acceded to the United Nations Framework Convention on Climate Change on December 18, 2015) (last visited Apr. 22, 2021).

[63] *Morgan Guar. Trust Co. of N.Y. v. Republic of Palau*, 924 F.2d 1237 (2d Cir. 1991).

[64] Aristoteles Constantinides, *Statehood and Recognition*, *in* INTERNATIONAL LAW IN DOMESTIC COURTS: A CASEBOOK 36–37 (André Nollkaemper ed., 2018).

[65] *See* Editorial Comment, *Egypt a British Protectorate*, 9 AM. J. INT'L L. 202–04 (1915). According to the Declaration to Egypt by His Britannic Majesty's Government of 28 February 1922, the following matters are absolutely reserved to the discretion of His Majesty's Government: (a) the security of the communications of the British Empire in Egypt; (b) the defence of Egypt against all foreign aggression or interference, direct or indirect; (c) the protection of foreign interests in Egypt and the protection of minorities; and (d) the Soudan. *Id.*

[66] *See Indem. Ins. Co. of N. Am. v. Expeditors Int'l of Washington Inc.*, No. 17-CV-2575, 2019 WL 6842073 (S.D.N.Y. Feb. 19, 2019) (holding that for purposes of international dispute resolution adjudicated in the US, China cannot bind Taiwan to international treaties, even though the State Department has expressly recognized that Taiwan is a part of China).

if somebody were to infer statehood status therefrom.[67] Namely, the Taiwanese name hardly ever appears on these instruments. This was the case with Taiwanese accession to the Agreement Establishing the World Trade Organization, where Taiwan appears under the name of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei).[68]

Beyond the (in)ability to conclude treaties, a State's international legal functionality, *ergo* the substance of statehood, is shaped by the content of certain multilateral law-making treaties.[69] In the first instance, the rights and obligations stemming from a treaty may be of such interest and value for statehood that they can be considered constitutive. One example is the 1982 UN Convention on the Law of the Sea (UNCLOS)[70]. This treaty allocates sovereign rights over critical marine living and non-living resources, such as oil, gas, and offshore wind. The direct relevance of this treaty for statehood claims is evidenced in the Eastern Mediterranean where rich gas deposits exist off the coast of Cyprus and Gaza. Unlike Cyprus and Greece, Turkey is not a signatory to the UNCLOS.[71] It has concluded a bilateral delimitation agreement on the continental shelf with Northern Cyprus that the UN Secretariat, the institutional guardian of the Convention, has not recognized.[72] The practice in this case instantiates that ILF fits with the international community exercising legal control over what entities should attain statehood.[73] Boyle has clearly articulated the importance of certain law-making treaties so that, for instance, Palestine, by acceding to UNCLOS, would get "legal access and a legal right to these enormous gas supplies right off the coast of Gaza, which Israel has access to."[74] Further, "they can become a party to the International Civil Aviation Organization and get legal, sovereign control

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[67] *See e.g.*, Pasha L. Hsieh, *Rethinking Non-Recognition: The EU's Investment Agreement with Taiwan Under the One-China Policy*, 33 LEIDEN J. INT'L L. 689–712 (2020).

[68] Kuan-Hsiung Wang, *Current International Legal Issues: Taiwan*, 23 ASIAN Y.B. INT'L L. 63–64 (2017). In a similar vein, Taiwan acceded in 2002 to the Metre Convention, which created the International Bureau of Weights and Measures as Chinese Taipei and is listed under the category of "Associate States and Economies." Taiwan has also concluded a couple of bilateral free trade agreements (with El Salvador, Guatemala, Honduras Nicaragua, New Zealand, Singapore, Panama) mainly as "Chinese Taipei."

[69] JAROSŁAW SOZAŃSKI, PRAWO TRAKTATÓW: ZARYS WSPÓŁCZESNY 33, 81 (2009).

[70] U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

[71] *See id.* at 397–98.

[72] ÇAĞATAY ERCIYES, MARITIME DELIMITATION & OFFSHORE ACTIVITIES IN THE EASTERN MEDITERRANEAN 26 (2012), http://www.mfa.gov.tr/site_media/html/maritime_delimitation.pdf. The agreement has not been published in the Law of the Sea Bulletin (LSB), where official submissions by states regarding the law of the sea are published, and it has not been listed as an official deposit on the website of the UN Department of Oceans and the Law of the Sea.

[73] *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion I.C.J. Reports 2010, ¶ 81 (July 22, 2010). The Turkish Republic of Northern Cyprus, which has been occupied by the Turkish Armed Forces since 1974, is deemed invalid by the UN Security Council in Security Council resolution 541/83. *See id.*

[74] Dennis Bernstein, *An Interview with Professor Francis Boyle,* COUNTERPUNCH (Dec. 4, 2012), https://www.counterpunch.org/2012/12/04/an-interview-with-professor-francis-boyle/. The same would be the case for Northern Cyprus.

over their own air space. By becoming a member of the International Telecommunications Union, they will get control of their air waves, phone lines, bandwidths for the internet, satellite access, and things of this nature."[75]

The actual capability to carry out the obligations from a treaty affects the international legal functionality of a State.[76] This capability hinges upon the internal situation and factors, such as high crime rates, internal armed conflict, political corruption, ineffective State apparatuses, poor financial assets, or military interference in politics, may render a State legally ineffective. States, like Angola, Liberia, the Democratic Republic of Congo, and Somalia, all went through protracted periods of internal strife and inefficacy. The UN Secretary-General has observed that "since 1970, more than 30 wars have been fought in Africa, the vast majority of them intra-State in origin. In 1996 alone, 14 of the 53 countries of Africa were afflicted by armed conflicts, accounting for more than half of all war-related deaths worldwide and resulting in more than 8 million refugees, returnees, and displaced persons. The consequences of those conflicts have seriously undermined Africa's efforts to ensure long-term stability, prosperity, and peace for its peoples."[77]

The debilitating internal situation has affected the external relations of the affected African States. Other States were disinclined to establish relations with them.[78] The States concerned were unable to fulfil the existing obligations or take upon new ones.[79] They often failed to protect human rights and international humanitarian obligations under treaty and customary law.[80] They also defaulted on their payment obligations to international organizations. For instance, Somalia did not fulfill its financial obligations toward the United Nations under Article

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[75] *Id.*

[76] Vienna Convention on the Law of Treaties art. 26, May 22, 1969, 1155 U.N.T.S. 331. The United States observed that the *pacta sunt servanda* principle was "the keystone that supports the towering arch of confidence among States." 2 Y.B. INT'L L. COMM'N 356 (1966).

[77] U.N. Secretary-General, *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa*, U.N. Doc. S/1998/318. *See also* Ali A. Mazrui, *The Blood of Experience: The Failed State and Political Collapse in Africa*, 12 WORLD POL'Y J. 28–34 (1995).

[78] NEYIRE AKPINARLI, THE FRAGILITY OF THE 'FAILED STATE' PARADIGM: A DIFFERENT INTERNATIONAL LAW PERCEPTION OF THE ABSENCE OF EFFECTIVE GOVERNMENT 25–26 (2010).

[79] Sierra Leone closed 18 embassies in 1989 for material reasons. When the Embassy of Somalia in Bonn could not pay its diplomats in 1992, the Superior Administrative Court of North Rhine-Westphalia received an application for social security assistance from a Somali diplomat. *See also* GERARD KREIJEN, STATE FAILURE, SOVEREIGNTY AND EFFECTIVENESS: LEGAL LESSONS FROM THE DECOLONIZATION OF SUB-SAHARAN AFRICA 237–290 (2004).

[80] Daniel Thürer, *The "Failed State" and International Law*, INT'L REV. RED CROSS 836 (1999); Oriol Casanovas y la Rosa, *Los Estados Fracasados*, *in* LA SEGURIDAD COMPROMETIDA NUEVOS DESAFÍOS, AMENAZAS Y CONFLICTOS ARMADOS 83 (Caterina García & Angel Rodrigo eds., 2008). Jackson noted that there are many places around the globe where "[r]eports of international humanitarian organizations annually catalogue arbitrary detentions, beatings, political killings, torture, terror, political prisoners, disappearances, refugees, death squads, destruction of livelihood, and various other human rights violations which fill the pages of substantial volumes." ROBERT H. JACKSON, QUASI-STATES SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD 139–163 (2011).

17(2) of the UN Charter between 1993-2001, while Liberia did not pay for two years, as observed by the Contribution Committee in 1997.[81] The absence of contribution to the UN may result in revocation of the voting right in the General Assembly under Article 19 of the UN Charter.[82] Similarly, an ineffective State could be unable to protect diplomatic facilities, archives, and other property of sending States, to which it is obliged by Articles 44-45 of the Vienna Convention on Diplomatic Relations (VCDR).[83] Internal instability may also deter other States from entering into closer relations with the affected one. Bakke, referring to some post-Soviet republics, noted that the prolongation of internal conflict makes such a State unable to integrate with international political and legal structures.[84] Lynch, Zabyelina, and Markovska refer to four post-Soviet breakaway territories (Abkhazia, South Ossetia, Transnistria, and Nagorno Karabakh) in this vein.[85] The European Union has engaged in initiatives to solve some of the ongoing conflicts but is far from entering into legal relations or political integration with regions troubled by the conflict. For instance, while the EU maintains relations with Ukraine, it does not with the Donetsk Republic, which separated unilaterally from Ukraine after the 2014 Euromaidan revolution.[86]

Internal ineffectiveness has been marginally effective. While States that fail to meet their contractual obligations have acquired disparaging appellations in the legal parlance (e.g., collapsed, failed, quasi, or disorientated States),[87] they persist. International law prefers continuity and hence continuity of State parties.

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[81] On Somalia, *see* U.N. Secretary-General, *Letter dated 28 Feb. 1996 from the Secretary-General addressed to the President of the General Assembly*, U.N. Doc. A/50/888 (Feb. 28, 1996) and U.N. Secretary-General, *Letter dated 17 March 1998 from the Secretary-General to the President of the General Assembly*, U.N. Doc. A/ES-10/25 (Mar. 17, 1998). On Liberia *see* ROBIN GEISS, "FAILED STATES": DIE NORMATIVE ERFASSUNG GESCHEITERTER STAATEN 149 (2005).

[82] This hardly ever happens, however, as the Organization prioritizes maintaining the membership. In G.A. Res. 74/1, 5–6 (Oct. 10, 2019), the General Assembly decided that the following three Member States—Comoros, Sao Tome and Principe, and Somalia—shall be permitted to vote in the Assembly until the end of its 74th session and revoked the right only to Venezuela.

[83] *See* U.N. Secretary-General, *Consideration of effective measures to enhance the protection, security and safety of diplomatic and consular missions and representatives*, U.N. Doc. A/69/185 (2014).

[84] Kristin M. Bakke, *After the War Ends: Violence in Post-Soviet Unrecognized States*, *in* UNRECOGNIZED STATES IN THE INTERNATIONAL SYSTEM 90, 102–03 (Nina Caspersen & Gareth R. V. Stansfield eds., 2011).

[85] Yuliya Zabyelina & Anna Markovska, *Ukraine: Organised Crime, Politics and Frozen Conflicts*, *in* HANDBOOK OF ORGANISED CRIME AND POLITICS 106–107 (Felia Allum & Stan Gilmour eds., 2018); Dov Lynch, *De facto 'States' around the Black Sea: The Importance of Fear*, 7 SE. EUR. AND BLACK SEA STUD. 483, 489–91 (2007).

[86] *See e.g.*, Council of the EU Press release, Declaration by the High Representative on behalf of the EU on the "elections" planned in the so-called "Luhansk People's Republic" and "Donetsk People's Republic" for 11 November 2018 (Nov. 10, 2018).

[87] Daniel Thürer, Der Wegfall effektiver Staatsgewalt: "The Failed State," 34 BERICHTE DGVR 9–48 (1996); Nii Lante Wallace-Bruce, Of Collapsed, Dysfunctional and Disoriented States: Challenges to International Law, NETHERLANDS INT'L L. REV. 53–73 (2000); AKPINARLI, *supra* note 78, at 27–28, 84–85. These authors mainly focus on the internal sphere. Rotberg defined failed States as "tense, deeply conflicted, dangerous, and contested bitterly by warring factions . . . Occasionally, the official authorities in a failed state face two or more insurgencies, varieties of civil unrest, . . . and a plethora

B. Maintenance of Diplomatic and Consular Relations

ILF emphasizes that the maintenance of diplomatic and consular relations between States is a key feature of international effectiveness. The capacity to send and receive consuls and diplomats (*ius legationis),* is inherent in a State,[88] and generally reserved for States.[89] Both the 1961 VCDR and the 1963 Vienna Convention on Consular Relations (VCCR) in Article 2 stipulate that States establish diplomatic or consular relations with one another by mutual consent.[90]

The codified rules that circumscribe this legal functionality of a State in precise terms make them valid indicators of statehood, measuring a State's internationally effective exercise.[91] Accordingly, as a part of their diplomatic relations, two States send diplomats to work in each other's country and deal with each other formally. Diplomatic missions must be protected against any interference. Their staff are generally exempt from civil and criminal jurisdiction, taxation,[92] and customs duties.[93] A State exercising consular relations enjoys functional immunity, and consular premises are inviolable and exempt from

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of dissent directed at the state . . ." ROBERT ROTBERG, STATE FAILURE AND STATE WEAKNESS IN A TIME OF TERROR 5 (2003). Kreijen, after also focusing on the internal situation, refers to the external side, saying, "failed States are dysfunctional from the perspective of international law because they are the explicit denial of the basic legal presumption that States must possess at least a minimum of positive capacity in order to be meaningful subjects of international law." KREIJEN, *supra* note 79, at 375.

[88] The earliest expressions of international law were the rules of war and diplomatic relations. See C. H. Alexander, International Law in India, 1 INT'L & COMP. L.Q. 289 (1952).

[89] International Organizations can also send and receive representatives, who likewise enjoy privileges. *See* U.N. Charter art. 105; Treaty on the Functioning of the European Union art. 221, June 7, 2016, 2016 O.J. (C 202). Certain specific subjects of international law, like the Sovereign Military Order of Malta or the Holy See, also possess the legation right. See Code of Canon Law, cc. 361–363, in CODE OF CANON LAW, LATIN-ENGLISH EDITION (Canon L. Soc'y of Am. ed.,1999).

[90] *See* Zdzisław Galicki, Kodyfikacja Międzynarodowego Prawa Dyplomatycznego, in 50 LAT KONWENCJI WIEDEŃSKIEJ – AKTUALNA KONDYCJA UREGULOWAŃ DOTYCZĄCYCH STOSUNKÓW DYPLOMATYCZNYCH 15–22 (Zdzisław Galicki, Tomasz Kamiński & Katarzyna Myszona Kostrzewa eds., 2012).

[91] MICHAEL RICHTSTEIG, WIENER ÜBEREINKOMMEN ÜBER DIPLOMATISCHE UND KONSULARISCHE BEZIEHUNGEN: ENTSTEHUNGSGESCHICHTE, KOMMENTIERUNG 17 (2010).

[92] See ILC Commentary to Article 41(1) regarding personal inviolability of consular officials "The arrest of a consular official hampers considerably the functioning of the consulate and the discharge of the daily tasks—which is particularly serious inasmuch as many of the matters calling for consular action will not admit of delay (e.g., the issue of visas, passports and other travel documents; the legalization of signatures…)." Int'l Law Comm'n, Rep. on the Work of Its Thirteenth Session, U.N. Doc. A/4843 (1961).

[93] "There is no more fundamental prerequisite for the conduct of relations between States… than the inviolability of diplomatic envoys and embassies..." Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*,* Judgment*,* 1980 I.C.J. 42 (May 24). *See also* VCDR art. 22, 24, 27, 29, 34, 36.

taxation.[94] Maintaining consular relations benefits the State's citizens. For example, they enjoy legal care in case of arrest or other deprivation of freedom.[95] Consuls are also entitled to perform in civil matters[96] and provide protection to tourists.[97] The rights and obligations stemming from customary international law and the conventions endow States and their citizens with legal functionality. By participating in this law, States become effectively capacitated. States cooperate on their consular and diplomatic representation—powerfully so in the European Union, where the EU citizens can avail themselves of another member State's representation—if their country is not represented in a third State.[98] On the other hand, States not partaking in these regimes will not be considered functional to this end. They will not benefit from the privileges and immunities reserved for diplomatic missions or consular posts and their staff during the performance of their functions.[99]

For example, a Greek court in 1924 held that two defendants charged with attempted murder could not object to the jurisdiction of the court on the basis of possessing diplomatic immunity as Armenian diplomats. The court reasoned that because the Treaty of Sèvres, which in Articles 88-93 established the independent State of Armenia, had not been ratified. Consequently, the accused persons could not invoke diplomatic status and ensuing immunities.[100] In a similar vein, a UK minister in February 1991, while answering parliamentary questions on granting diplomatic accreditation to Baltic States representatives, stated that "the Baltic States do not fulfil the condition for recognition as independent sovereign States. The question of diplomatic accreditation for their representatives, therefore, does not arise."[101] And in 2002, a diplomat accredited to the Palestinian Authority was not in a position to invoke immunity so as not to appear before the French court

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[94] Vienna Convention on Consular Relations, art. 31–33, 40–43, 21 U.S.T. 77, 596 U.N.T.S. 261; STEFAN SAWICKI, IMMUNITET JURYSDYKCYJNY KONSULA: STUDIUM PRAWNOMIĘDZYNARODOWE (1987).

[95] LaGrand (Ger. v. U.S.), Judgment, 2001 I.C.J. Rep. 466 (June 27).

[96] TEFAN SAWICKI, UNKCJE KONSULA: STUDIUM PRAWNOMIĘDZYNARODOWE (1992); Piotr Cybula & Mariusz Załucki, *Funkcje Konsula w Sprawach Spadkowych, in* WYBRANE ZAGADNIENIA WSPÓŁCZESNEGO PRAWA KONSULARNEGO 107–125 (Paweł Czubik & Wojciech Burek eds., 2014).

[97] Piotr Cybula & Paweł Czubik, *Opieka Konsularna nad Turystami, in* PRAWO W PRAKTYCE BIUR PODRÓŻY 380 (Piotr Cybula ed., 2006).

[98] Pursuant to Article 1 of the 2015 Council Directive on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries' citizens of the Union to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that Member State. Council Directive 2015/637, on the Coordination and Cooperation Measures to Facilitate Consular Protection for Unrepresented Citizens of the Union in Third Countries and Repealing Decision 95/553/EC, 2015 O.J. (L 106) 1.

[99] EILEEN DENZA, DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 19–21, 367–373 (3d ed. 2016).

[100] Re Armenian Chargé d'Affaires, ANN. DIG. OF PUB. INT'L L. CASES 301 (1923-24).

[101] HC Deb (26 Feb. 1991), col. 459W.

in a divorce case instituted by his wife.[102] Accreditation is a prerequisite for immunity under both domestic and international law.

Nonparticipation in consular and diplomatic intercourse can also negatively bear on legal transactions. This is the case, for instance, with the Hague Convention Abolishing the Requirement of Legalization of Foreign Public Documents (Apostille Convention) to which most unrecognized and partially recognized States are not parties.[103] In fact, nonparties to the Apostille Convention can still legalize their official documents at consulates; however, many States have yet to establish consular relations with contested States. Sometimes, a paradoxical situation might appear in which the government recognizes another State yet does not exercise diplomatic or consular relations with it because the accreditation of diplomatic staff lies within the competence of another State organ such as the President of the Republic, as is the case in Poland.[104] Consequently, although Poland recognizes Kosovo, there are no formal consular and diplomatic relations between them.[105] Diplomatic and consular relations governed by customary law and treaties corroborate States' legal functionality using these rules,but States not involved in such intercourse will be legally incapacitated.

C. State Immunities

A State cannot exist without possessing legal immunities.[106] The law of immunity is predominantly customary international law, shaped by decisions of domestic courts or domestic legislation.[107] States enjoy immunity from the jurisdiction of courts of other States (*par in parem non habet imperium*), even if accused of serious violations of international human rights law or the international law of armed conflict, as ruled by the ICJ in *Jurisdictional Immunities of the State*.[108] This strict immunity reinforces the international legal functionality of

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[102] Al Hassan c Nahila el Yafi 2001/18887, 108 REVUE GENERALE DE DROIT INTERNATIONALE PUBLIC 1066 (2004) (Fr.).

[103] Hague Conference on Private Int'l L, Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, https://www.hcch.net/en/instruments/conventions/status-table/?cid=41.

[104] Recognition is a two-phased process - the first being an official declaration, whereas the second the constitutive establishment of relations. ALFRED VERDROSS, VÖLKERRECHT 246 (1964).

[105] The Apostille Convention became effective on 14th of June 2016 for Kosovo and while Poland has not put any reservation (unlike, for example, Germany) the documents do not need to be legalized by consulates any longer. *See* Paweł Czubik, *Dokumenty z Państw Nieuznanych w Obrocie Cywilnoprawnym,* VII PWPM 119–134 (2009).

[106] ''Immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system.' Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 63, ¶ 75 (Feb. 14) (joint separate opinion by Higgins, J., Kooijmans, J., and Buergenthal, J.).

[107] Christopher Greenwood, J., Int'l Ct. of Just., Immunities from Jurisdiction in U.N. Audiovisual Libr. of Int'l L. Lecture Series.

[108] Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), 2012 I.C.J. 99, 122 (Feb. 3).

States solving disputes through negotiation and international law-making.[109] States remain immune for their sovereign actions (*acta iure imperii*), while commercial activities enjoy restricted immunity (*acta iure gestionis*).[110] State immunity extends to a certain group of individuals representing the State, such as the heads of States and governments, ministers of foreign affairs, ambassadors, and consuls.[111] In principle, these high-ranking officials for the sake of properly exercising their functions are exempt from the jurisdiction of a court seeking to enforce the domestic law.[112] It is questionable whether personal immunity is revocable for the commission of terrorist activities or grave human rights violations by State officials.[113]

State immunity serves as an indicator of statehood status. This is not to say that only States possess immunities under international law,[114] but that States must *exhibit* them in order to be termed as such. The possession of immunities also affects the legal functionality of a State. Immunity is precisely envisaged for the purpose of the proper functioning of State and its organs externally. Both aspects are correlated. McGuiness noted that an entity not enjoying immunity "would find any legal benefits of statehood weakened substantially," and the extension of immunity by a foreign court in fact "serves to validate an entity's claim to be a [S]tate."[115] Thus, States with no recognition or limited recognition (de facto States) may not have their immunities respected. Such States and their officials could be subject to administrative, civil, and criminal proceedings as well as enforcement measures in courts of other States or international courts.

For example, in *Knox v. Palestine Liberation Organization,* before the New York district court, defendants (Palestine Liberation Organization, or PLO) claimed sovereign immunity against criminal charges under the Foreign Sovereign Immunities Act (28 U.S.C. § 1602) by virtue of being a "foreign State."

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[109] Volker Roeben, *Institutions of International Law: How International Law Secures Orderliness in International Affairs*, 22 MAX PLANCK Y.B. OF U.N. L. 189, 199–200, 203–204 (2018). *See also* U.N. Convention on Jurisdictional Immunities of States and Their Property, *adopted* Dec. 2, 2004, U.N. Doc. A/RES/59/38, Art. 27 [hereinafter United Nations Convention].

[110] On restrictive immunity, *see* Trendtex Trading Corp. v. Cent. Bank of Nigeria [1977] QB 529 (Eng.); U.N. Convention, *supra* note 109, Art. 10.

[111] Peter-Tobias Stoll, *State Immunity*, *in* 10 MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. 498 (2012).

[112] Slightly different is the case of former heads of States. The British courts rejected Pinochet's claim that he was entitled to immunity as a former head of State and ruled that he could be extradited to Spain to stand trial. R (Pinochet Ugarte) v. Bow St Metro. Stipendiary Magistrate [2000] 1 AC 147.

[113] *See* Philippa Webb, *The Immunity of States, Diplomats and International Organizations in Employment Disputes: The New Human Rights Dilemma?*, 27 EUR. J. INT'L L. 745 (2016); *see also* Concepción Escobar Hernández (Special Rapporteur), Sixth Rep. on Immunity of State Officials From Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/722 (June 12, 2018).

[114] Some international organizations have them too. *SEE* NIELS BLOKKER & NICO SCHRIJVER, IMMUNITY OF INTERNATIONAL ORGANIZATIONS (2015).

[115] Margaret E. McGuinness, *Non-recognition and State Immunities: Toward a Functional Theory*, *in* UNRECOGNISED SUBJECTS IN INTERNATIONAL LAW 284 (Władysław Czapliński & Agata Kleczkowska eds., 2019).

The court concluded that the PLO (and the Palestinian Authority, or PA) were not entitled to sovereign immunity because the State of Palestine did not meet the legal criteria for statehood. The court went further to say that:

> Even assuming for the sake of argument that, as Defendants contend, there exists a sovereign 'State of Palestine under international law,' it does not follow that Defendants are entitled to the immunity they seek from the exercise of this Court's subject matter jurisdiction. Defendants have presented no evidence, and the Court is not aware of any, establishing that Palestine, whatever its status in other jurisdictions, has been recognized, or otherwise treated as a sovereign State, by the United States. Nor is there any indication that the United States has conferred upon the PLO and PA recognition as official representatives of the government of the purported Palestinian State, thereby entitling them to assert the privileges and immunities ordinarily accorded to specified officials and agents of sovereign entities.[116]

The judicial status of an unrecognized entity arises generally when that entity seeks access to property located in the forum State or seeks access to the forum court or otherwise tries to assert immunity as a defense to a suit before a forum court. Courts need not necessarily agree with the executive on the "existence" of an entity.[117]

D. Accessing International Judicial Fora

Access to the international judiciary is another indicator of statehood. International judiciary is understood here as comprising both courts and tribunals, which are permanent, established by a legal instrument, operating on the basis of international law, and producing legally binding decisions.[118] Although access to such bodies has historically been restricted to sovereign States, they have recently become more available to non-state actors, especially international organizations and individuals, albeit only to a limited extent.[119] Yet States should be able to make comprehensive use of international judicial bodies designed for them.[120] *Locus*

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[116] *Knox v. Palestine Liberation Org.*, 306 F. Supp. 2d 424, 438–39 (S.D.N.Y. 2004) (citations omitted).

[117] *See* The Dora and the Annette [1919] 35 TLR 288 (Eng.); *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 138 N.E. 24 (N.Y. 1923); *see also* Julius H. Hines, *Why do Unrecognized Governments Enjoy Sovereign Immunity? A Reassessment of the Wulfsohn Case,* 31 VA. J. OF INT'L L. 717 (1991).

[118] Cesare Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle,* 31 N.Y.U. J. OF INT'L L. & POL 709, 713-714 (1999).

[119] Christian Tomuschat, *International Courts and Tribunals*, *in 5* MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. 499 (2013); *see also* Francisco Orrego Vicuña, *Individuals and Non-State Entities before International Courts and Tribunals*, 5 MAX PLANCK Y.B. OF U.N. L. 53 (2001).

[120] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174 (April 11). On whether *jus standi* is a prerequisite for legal capacity or *vice versa*. *See. e.g.*, ANNA MEIJKNECHT, TOWARDS INTERNATIONAL PERSONALITY: THE POSITION OF MINORITIES AND INDIGENOUS PEOPLES IN INTERNATIONAL LAW 58 (2001).

standi before international courts and tribunals is construed as part of State's sovereignty and bears on the legal functionality of a State.[121] To be a subject of a system of law necessitates the capacity of "claiming the benefit of the rights conferred by the content of the law."[122] Lack of standing conversely prompts questions as to status of such an entity. States or other entities unable to exhibit international *locus standi* suffer important defects within the sphere of international law. Without access to justice, States cannot claim rights under international law. They would also not be able to be held accountable judicially for unlawful actions.[123] The inability to access international dispute settlement mechanisms reduces the capacity of a State to interact in international law and is conducive to the prolongation of conflicts.

International courts and tribunals exist at multiple levels. At the global level, there are courts with general jurisdiction (ICJ) or specialized jurisdictions (Administrative Tribunal of the International Labour Organization, International Tribunal for the Law of the Sea). Courts and tribunals can be of a regional character (Court of Justice of the European Union, African Court on Human and Peoples' Rights). They can be autonomous institutions or affiliated to a particular international organization. They can have different criteria for membership, but their shared aim is to secure the international rule of law.[124] Contested States, like Kosovo or Taiwan, have limited avenues to take advantage of the international judiciary and, most notably, the International Court of Justice.[125] They cannot institute any proceedings *in foro* against other States or be sued by other States, with the exception of compromissory clauses.[126]

Several avenues exist to access the ICJ. Article 35(1) of the ICJ Statute provides that the Court shall be open to the States parties to the Statute, while Article 93(1) of the UN Charter sets forth that "[a]ll Members of the United

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[121] MACIEJ PERKOWSKI, PODMIOTOWOŚĆ PRAWA MIĘDZYNARODOWEGO WSPÓŁCZESNEGO UNIWERSALIZMU W ZŁOŻONYM MODELU KLASYFIKACYJNYM 199 (2008).

[122] OKEKE, *supra* note 1, at 19. *Cf.* HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 27 (1950). Lauterpacht, referring to individuals though, observed the "fact that the beneficiary of rights is not authorized to take independent steps in his own name to enforce them does not signify that he is not a subject of the law.''

[123] U.N. Charter art. 33.

[124] *Cf.* Iain G.M. Scobbie, *The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function*, 8 EUR. J. INT'L L 264-98 (1997); Armin von Bogdandy & Ingo Venzke, *Zur Herrschaft internationaler Gerichte: Eine Untersuchung internationaler öffentlicher Gewalt und ihrer demokratischen Rechtfertigung,* 70 ZAÖRV [HEIDELBERG J. INT'L L.] 1-49 (2010)

[125] Charles F. Whitman, *Palestine's Statehood and Ability to Litigate in the ICJ,* 40 CAL.W.INT'L L.J. 74, 89ff. (2013).

[126] *In foro* – before the court. Hsieh argues that in line with Article 36(1) of the ICJ Statute, the ICJ can hear "all matters provided for in the treaties and conventions in force." Hence, Taiwan falls within the ICJ jurisdiction, inter alia, by virtue of Article XXVIII of the 1946 ROC-U.S. Treaty of Friendship providing that any disputes regarding the interpretation of the Treaty should be submitted to the ICJ. Pasha L. Hsieh. *An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan,* 28 MICH. J. INT'L L. 765, 796-97 (2007).

Nations are *ipso facto* parties to the Statute."[127] There are two additional avenues for access to the ICJ. First, Article 93(2) of the UN Charter provides that "[a] State which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council."[128] This was the case of Nauru, Japan, Lichtenstein, San Marino, and Switzerland.[129] The Security Council issued recommendations, and the General Assembly determined conditions for access for these States.[130] However, such a scenario is barely conceivable in the case of contested States primarily because of the extreme difficulty in receiving the Security Council recommendation, but also, in most cases, because of insufficient diplomatic support in the General Assembly. For example, a legal action brought by the FR Yugoslavia against NATO members was rejected on the grounds of it not being a party to the ICJ Statute.[131] Second, Article 35(2) of the ICJ Statute stipulates that States not parties to the Statute may make use of the Court subject to conditions adopted by the Security Council. In Resolution 9 of 1946, the Security Council enabled access to the Court if a nonparty deposited with the Registrar of the Court a declaration by which it accepts the jurisdiction of the Court, in accordance with the Charter of the United Nations and with the terms and subject to the conditions of the Statute and Rules of the Court, and undertakes to comply in good faith with the decision or decisions of the Court and to accept all the obligations of a Member of the United Nations under Article 94 of the Charter.[132] Palestine has been attempting to gain access to the ICJ by this avenue, depositing a declaration of acceptance of the ICJ jurisdiction in a pending case relating to the US Embassy in Jerusalem.[133] If it receives recognition by the ICJ, Palestine bolsters its claims to statehood on the international stage.

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[127]U.N. Charter art. 93 ¶ 1.

[128] U.N. Charter art. 93 ¶ 2.

[129] Karin Oellers-Frahm, *Article 93*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 179, 183 (Andreas Zimmermann et al. eds., 2012).

[130] They regarded a) acceptance of the provisions of the ICJ Statute; b) acceptance of all the obligations under Article 94 of the UN Charter; c) contribution to the expenses of the Court. *See* G.A. Res. 91(I) (Dec. 11, 1946) (Switzerland); G.A. Res. 363(IV) (Dec. 1, 1949) (Lichtenstein); G.A. Res. 805(VIII) (Dec. 9, 1953) (Japan); G.A. Res. 806(VIII) (Dec. 9, 1953) (San Marino).

[131] Legality of Use of Force (Serb. and Montenegro v. Cana.) (Preliminary Objections), 2004 ICJ REP. 429, para. 114 (Dec. 15).

[132] SC Res. 9 (Oct. 15, 1946).

[133] On 28 September 2018, Palestine instituted proceedings against the USA before the ICJ. They relate to the establishment of the US embassy in Jerusalem, which is arguably contrary to the VCDR. The submission states that on 4 July 2018, ''in accordance with Security Council Resolution (1946) and Article 35 (2) of the Statute of the Court [Palestine] submitted a Declaration recognizing the Competence of the International Court of Justice.'' ICJ Press Release No. 2018/47.

E. Membership in International Organizations

Membership in an international organization indicates a State's international legal functionality in a specific domain. On the reverse, non-membership deprives an entity of distinct legal rights and duties, consequently diminishing its international legal functionality.[134] By the exercise of one of their attributes of international legal personality, namely, *ius contrahendi*, States are meant to be able to join international organizations. As Peters has noted, States use international law to constitute, empower, and constrain international organizations.[135] In principle, States are generally superior to international organizations. In practice, international organizations have gained more and more competences in realization of the objectives which they pursue in the global public interest,[136] increasing their independence from States but decreasing their accountability.[137] International organizations now regulate issues related to culture (UNESCO), sports (IOC, FIFA), human rights (UNICEF, OHCHR), food (FAO), security (OSCE, INTERPOL), politics (UN, EU), transport (IATA), military (NATO), the economy (WTO), environment (IUCN, UNEP), health (WHO), justice (ICJ, ICC), social rights (ILO), and many other issues. International organizations are likely to assume a greater role in the future.[138]

International organizations are embedded in the structure of international law-making and application, hence a State's membership is a good indicator of international legal functionality. International organizations deliver justice (courts and tribunals), create international law (assemblies), and are responsible for its development and supervision (councils, commissions). International organizations belong to the sphere of international law because they adopt resolutions and decisions that may be considered a source of international law[139] enact international law subject to acceptance (e.g., treaties). However, they belong to the international sphere predominantly because they are based on a founding instrument that regulates the work of the organization and endows members of

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[134] Christoph Schreuer, *Die Bedeutung internationaler Organisationen im heutigen Völkerrecht*, 22 ARCHIV DES VÖLKERRECHTS 363-404 (1984).

[135] Anne Peters, *International Organizations and International Law*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ORGANIZATIONS 33 (Jacob Katz Cogan et al., ed., 2016).

[136] Evelyne Lagrange, *La Catégorie "organisation internationale*", *in* DROIT DES ORGANISATIONS INTERNATIONALES 64, 67 (Evelyne Lagrange & Marc Sorel eds., 2013).

[137] René-Jean Dupuy, *L'organisation Internationale Et L'expression De La Volonté Générale*, 61 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 563, 574 (1957); JAN KLABBERS, INTERNATIONAL ORGANIZATIONS LAW (2015). On accountability *see* Peters, *supra* note 135, at 41.

[138] Malcolm Shaw, *International Organization*s, *in* ENCYCLOPEDIA BRITANNICA https://www.britannica.com/topic/international-law/International-organizations.

[139] Jochen Frowein, *The Internal and External Effects of Resolutions by International Organizations,* 49 ZAÖRV [HEIDELBERG J. INT'L L.] 778-790 (1989); Natalia Buchowska, *Uchwały Organizacji Międzynarodowych Jako Źródło Prawa Międzynarodowego*, 3 RUCH PRAWNICZY, EKONOMICZNY I SOCJOLOGICZNY 49-60 (2001).

the organization with a wealth of international rights and obligations.[140] Therefore, States will be considered more legally effective on the international plane if they join international organizations. For instance, States prepare treaties for ratification within the International Maritime Organization (IMO). There have been more than fifty international conventions and agreements adopted within the IMO so far.[141] Furthermore, by joining the IMO States acquire a right to co-operate in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping as well as the obligation to remove discriminatory action and unnecessary restrictions affecting shipping engaged in international trade.[142]

It is understandable that an entity claiming statehood would seek to join international organizations, claiming the right to do so before international judicial bodies if contested. This was the case when North Macedonia (known then as the Former Yugoslav Republic of Macedonia) sued Greece in the ICJ, invoking the violation of Article 11, paragraph 1, of the Interim Accord (1995) and demanding that the Court confirm the State's right to join NATO as well as all other international, multilateral, and regional organizations.[143] Palestine, by joining UNESCO in 2011, significantly expanded its functionality within the international legal order.[144] Essentially, Palestine could then become a party to international agreements employing the so-called "Vienna formula" that is, those open for signature to "all States Members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, and by any other State invited by the General Assembly of the UN to become a party to the Convention."[145] Palestine's landmark membership of UNESCO has also paved its access to the ICJ, pursuant to Article 35(2) of the ICJ Statute, and impliedly confirmed Palestine's statehood.[146]

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[140] Voting is an example of a right, whereas financial contribution is an obligation. *See* NIGEL D. WHITE, THE LAW OF INTERNATIONAL ORGANISATIONS 131-156 (2005).

[141] Conventions, INTERNATIONAL MARITIME ORGANIZATION, https://www.imo.org/en/About/Conventions/Pages/Default.aspx (last accessed Aug. 31, 2021).

[142] Convention on the International Maritime Organization (signed 06 March 1948, entered into force 17 March 1958, as amended) 289 U.N.T.S. 3, Art. 1.

[143] Greece used to persistently block Macedonia's international relations as it objected to the use of the name Macedonia, which is historically linked to the Greek territory. Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), 2011 ICJ REP 644, para. 12 (Dec. 5).

[144] According to Article 2(2) of the UNESCO Constitution, a two-thirds majority vote of the General Conference is required for admission of a new member. The vote was carried by 107 votes in favor of admission and 14 votes against, with 52 abstentions.

[145] Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980) 1155 U.N.T.S. 331 (hereinafter cited as VCLT) Art. 81.

[146] For Vidmar, only the purposes of the treaties that Palestine has signed should confirm its statehood. *See* Jure Vidmar, *Palestine and the Conceptual Problem of Implicit Statehood,* 12 CHINESE J. INT'L L. 19–41 (2013) ("State creation cannot be implicit and it cannot result from procedural tricks via international treaties and organizations.").

It remains doubtful whether membership of a particular international organization can be tantamount to statehood. If the organization is universal and significant, like the United Nations or the League of Nations before it, and admits new members contingent upon their ability to function independently within the organization and to carry out membership obligations, then there is merit in such a proposition.[147] Statehood can be inferred not only from the fact that UN membership is open only to States, but also from the admission process, which constitutes a "screening phase" of legal functionality of an aspiring entity.[148] Such screening has been evident in the admission of microstates to the UN and the League of Nations, which were not considered as totally sovereign and functional as their participation in organized international relations was limited and they were largely dependent on more powerful neighbors.[149] As Bartmann noted, against traditional models of statehood, microstates appeared as caricatures.[150] Good, commenting on the geopolitical realities of his time, observed that "new microstates appear as more hope than actuality."[151] Higgins observed that the ability and willingness to obey international law prescribed by Article 4 of the UN Charter do not suffice for the admission of an entity which is not truly independent (microstate). That contributed to the nonappearance of such entities as Andorra, Monaco, San Marino, and Liechtenstein upon the list of UN members.[152] The same holds true for the earlier debates within the League of Nations, where the Fifth Committee often questioned the sovereignty and viability of microstates to function within international law, emphasizing their seeming inability to fulfill obligations arising out of membership. There, the Committee rejected Liechtenstein's application for membership on the grounds of the Principality's

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[147] THOMAS D. GRANT, ADMISSION TO THE UNITED NATIONS: CHARTER ARTICLE 4 AND THE RISE OF UNIVERSAL ORGANIZATION 251 (2009).

[148] "Article 4(1) of the UN Charter explicitly mentions the ability and willingness 'in the judgment of the Organization' to carry out international obligations as a criterion for admission of new members to the United Nations, and by doing so merely stipulates what constitutes statehood in accordance with international law." Christian Hillgruber, *The Admission of New States to the International Community*, 9 EUR. J. INT'L L. 499 (1998).

[149] JOHN BARTMANN, MICRO-STATES IN THE INTERNATIONAL SYSTEM 22 (2014).

[150] *Id.* at 70; *see* Roger Fisher, *The Participation of Microstates in International Affairs,* ASIL PROCEEDINGS 166 (1968) (One other author observed that "there is inevitably an attempt on the part of lawyers and others who look at the microstate problem to adopt the solution of Procrustes (...) we tend to insist that a small entity fit the bed that we have constructed. If it is not big enough to be a traditional state, 'a viable international unit', then it should go back where it came from.").

[151] Robert C. Good, *State-Building as a Determinant of Foreign Policy in the New States*, *in* NEUTRALISM AND NON-ALIGNMENT 3 (Laurence W. Martin ed., 1962). Farran connected the status of microstates to their limited and inhibited participation in international diplomacy; D'Olivier Farran, *The Position of Diminutive States in International Law, in* INTERNATIONALRECHTLICHE UND STAATSRECHTLICHE ABHANDLUNGEN-FESTSCHRIFT FUR WALTER SCHATZEL 131-147 (Erik Briiel et al. eds., 1960).

[152] Rosalyn Cohen (later Higgins), *Concept of Statehood in United Nations Practice*, 109 U. PA. L. REV. 1147 (1961).

contractual bonds with Switzerland.[153] Similarly, Iceland's application for membership was rejected in 1920 because Denmark was still responsible for her foreign relations and League membership would seem to require a departure from her traditional neutrality in order that she could fulfil the obligations of the Covenant.[154] Therefore, smallness was often synonymous with legal inefficacy.

F. Exercise of the Fundamental Rights and Duties of a State

The penultimate indicator of statehood is the manifestation of fundamental rights and duties by a State. The idea that States possess certain innate absolute rights and obligations (*absolus, primitifs ou éthique*) by virtue of their existence, dates back to the seventeenth and eighteenth century.[155] Natural law scholars (Grotius, Vettel, Wolf, and Martens) articulate that among fundamental (intrinsic) rights of States are the right to self-preservation, the right to independence, the right to equality, the right to respect, and the right to international commerce.[156] Positivists, like Grégoire and Bentham, add sovereignty, jurisdiction, nonintervention, self-defence, mutual respect of the rights of all, immunity of ambassadors, and the precept *pacta sunt servanda*.[157] These rights and obligations could be termed as prelaw (*Urrecht*), which are valid against other States and without which no international society could exist.[158] They are attributes or

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[153] "There can be no doubt that juridically the Principality of Liechtenstein is a sovereign State, but by reason of her very limited area, small population, and her geographic position, she has chosen to depute to others some of the attributes of sovereignty. For instance, she has contracted with other Powers for the control of her Customs, the administration of her Posts, Telegraphs and Telephone Services, for the diplomatic representation of her subjects in foreign countries, other than Switzerland and Austria, and for final decisions in certain judicial cases. Liechtenstein has no army. For the above reasons, we are of the opinion that the Principality of Liechtenstein could not discharge all the international obligations which would be imposed on her by the Covenant." Rep. of the Second Sub-Comm. to the Fifth Comm., League of Nations, Records of the First Assembly, Plenary Meetings 667 (1920). Liechtenstein is, however, a member of the UN and it actively discharging its membership obligations, not least in the context of the Crime of Aggression under the Rome Statute.

[154] Only Switzerland had been able to reserve neutrality. Switzerland and the United Nations, Rep. of the Federal Council to the Federal Assembly concerning Switzerland's Relations with the United Nations 8-11, 141- 144, 153-155 (Berne 1969).

[155] CHARLES CALVO, LE DROIT INTERNATIONAL THEORIQUE ET PRATIQUE 193 (1887-1896). Nijman argued that Leibniz, as the proponent of the idea that only strong sovereign States possess rights and duties, could be considered as the forerunner of "personalization" of international law. JANNE E NIJMAN, THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW 449 (2004); *see also* REMIGIUSZ BIERZANEK, STUDIA NAD SPOŁECZNOŚCIĄ MIĘDZYNARODOWĄ: ŹRÓDŁA PRAWA MIĘDZYNARODOWEGO 99 (1991).

[156] Sergio M. Carbone & Lorenzo Schiano di Pepe, *States, Fundamental Rights and Duties, in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 562, 564 (4th ed. 2012); *see also* A Pillet, *Les Droits Fondamentaux des États*, 1 REVUE GENERALE DE DROIT INTERNATIONAL Public 77, 86 (1898); Gilbert Gidel, *Droits Et Devoirs Des Nations, Théorie Classique Des Droits Fondamentaux Des États,* 10 RECUEIL DES COURS 537 (1925).

[157] Carbone & di Pepe, *supra* note 156, at 564.

[158] JOHANN LUDWIG KLÜBER, EUROPÄISCHES VÖLKERRECHT 46 (1851).

qualities inherent in the State.[159] In 1919, the Institut de Droit International invited Mr. Lapradelle to work on the Draft Declaration of Rights and Duties of Nations, where he, inter alia, stressed the nonrecourse to illegitimate force.[160] In 1939, at its thirty-ninth session, the International Law Association adopted a declaration regarding rights and obligations of States, including the right to self-defense.[161] In the twentieth century, three regional legally binding agreements outlining fundamental rights and obligations of States were adopted: the Montevideo Convention on the Rights and Duties of States (1933),[162] the Charter of the Organization of American States (1948),[163] and the Constitutive Act of the African Union (2000).[164] At the universal level, the ILC's 1949 Draft Declaration on Rights and Duties of States, submitted to the General Assembly,[165] and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, unanimously adopted by the General Assembly on 24 October 1970,[166] reaffirm these fundamental rights and obligations.

There is, then, a strong relation between the inherent rights and obligations and the legal functionality of a State. These create the guaranteed legal sphere within which the State functions. The more a State manifests its rights and obligations against other participants of international relations, the more "law-effective" it becomes. The less a State exercises these rights, the less legally functional it is. By way of example, Northern Cyprus or Taiwan could be considered partially legally dysfunctional as they are bereft of fundamental State

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[159] Ricardo J Alfaro, *The Rights and Duties of States*, 97 RECUEIL DES COURS 96 (1959). In a similar way Katzenstein notes: "In some situations norms operate like rules that define the identity of an actor. . ." Peter Katzenstein, *Introduction: Alternative Perspectives on National Security*, *in* THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS 5 (Peter Katzenstein ed., 1996).

[160] Albert de Lapradelle, *Declaration of Rights and Duties of Nations*, 28 ANNUAIRE INSTITUT DE DROIT INTERNATIONAL 205 (1921).

[161] "Projet définitif de Déclaration sur les Données fondamentales et les grands Principes du Droit international moderne." 39th Conference, Int'l L. Ass'n Rep. 333-339 (1939).

[162] Montevideo Convention, *supra* note 5, Art. 8 (the obligation of non-intervention in the internal or external affairs of other States), Art. 10 (the obligation of settling the disputes by recognized pacific methods), Art. 11 (the obligation of non-recognition of territorial acquisitions or special advantages which have been obtained by force).

[163] Charter of the Organization of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 U.N.T.S. 3 (Article 13 provides for the right to preservation and prosperity, independence and organization of internal affairs as a State sees fit, while Article 18 for the right to development).

[164] Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) OAU Doc. CAB/LEG/23.15 (hereinafter AU Constitutive Act). In Article 4, the Constitutive Act sets out the principles on which the African Union is based. Member States enjoy sovereign equality, have a right to live in peace and security – if such is endangered, they have a right to seek intervention from the Union in order to restore peace and security, have a right to resolve their disputes peacefully and are entitled to the protection of territorial integrity in line with the *uti possidetis juris* principle. They are obliged not to interfere in the internal affairs of another Member State and not to use force or threaten to use force against another Member State of the Union.

[165] Y.B. INT'L L. COMM'N 286-290 (1949).

[166] G.A. Res. 2625 (XXV) (Oct. 24, 1970).

rights, such as the right to nonintervention (Taiwan)[167] and the right to title itself as a State (Turkish Republic of North Cyprus).[168]

Independence is mentioned as a right in Article 1 of the ILC Draft Declaration on Rights and Duties of States and entails both the prohibition of any foreign intervention and the freedom to choose one's own form of government.[169] Independence signifies a range of additional entitlements. First, and unwritten, the right to existence, as some ILC members tried to express it.[170] Independence also entails rights to sovereignty, equality with other States, liberty in internal affairs within its own territory, enacting laws, drawing up and amending its own constitution, autonomous self-governance, choosing officials, appointing and accrediting its representatives to other States, and similar functions.[171]

The Sahrawi Arab Democratic Republic (SADR) can hardly be described as a legally functional State if the right to independence is relativized. The UN's official consideration of Western Sahara as "non-self-governing territory" and the many States' refusal to recognize the SADR as a State substantially lessens the SADR's enjoyment of independence and rights associated with it.[172] States who have aligned themselves with Morocco in the Western Sahara conflict, *ipso facto*, reject SADR's right to independence (US, France, Spain, Poland, Serbia, Egypt, Senegal).[173] At the forty-second session of the Human Rights Council in 2019, a group of States supporting "Morocco's territorial integrity" stressed the relevance of the autonomy initiative proposed by the Kingdom of Morocco to definitively put an end to the conflict over the "Moroccan Sahara"(Saudi Arabia, United Arab Emirates, Qatar, Bahrain, Kuwait, Sultanate of Oman, Jordan, the Comoros, the Democratic Republic of Congo, Gabon, Burkina Faso, Burundi, Djibouti, Senegal, the Central African Republic, Guinea, Côte d'Ivoire, Sao Tome and

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[167] Christopher J. Carolan, *The "Republic of Taiwan": Legal-Historical Justification for a Taiwanese Declaration of Independence,* 75 N.Y.U. L. REV. 430 (2000). *See also* Jonathan I. Charney & J. R. V. Prescott, *Resolving Cross-Strait Relations between China and Taiwan*, 94 AJIL 471-472 (2000).

[168] When the Finnish Foreign Minister Alexander Stubb met the President of Northern Cyprus in 2009, it was officially classified by the Ministry of Foreign Affairs of Finland as a meeting with the leader of the Turkish Cypriot community. In a similar vein, President Joe Biden, while serving as Vice President, stressed during his visit to the northern part of the Republic of Cyprus in 2014 that his visit to the north would not constitute recognition of "the Turkish Cypriot administration." More in James Ker-Lindsay, *Engagement Without Recognition: The Limits of Diplomatic Interaction with Contested States*, 91(2) INT'L AFF., 1-16 (2015).

[169] Independence as a right of a State appears in a similar form in Principle 1 of the U.N. Declaration on Friendly Relations.

[170] In the end, the ILC did not accept the Panamanian draft proposal and deemed it to be tautological to say that an "existing State has the right to exist." For the debate on Article 1 of the Draft *see* Preparatory Study Concerning a Draft Declaration on the Rights and Duties, U.N. Doc. A/CN.4/2, at 49-52 (Dec. 15, 1948); Y.B. INT'L L. COMM'N 287 (1949).

[171] Preparatory Study, *supra* note 170 at 61-62.

[172] Press Release, U.N. General Assembly, Fourth Committee (Special Political and Decolonization) Taking Backward Steps on Western Sahara Question, says Namibia's Representative, amid Continuing Debate on Decolonization Issues, U.N. Press Release GA/SPD/695 (Oct. 11, 2019).

[173] Reuters, *U.S. Supports Moroccan Autonomy Plan for Western Sahara,* Mar. 16, 2016.

Principe, Paraguay, Guatemala, Saint Lucia, and El Salvador).[174] In a similar vein, those States who pronounced neutrality on the issue cannot be counted as supporters of the SADR's independence. Therefore, the right to independence is very subjective in nonrecognition cases and is exacerbated by the involvement of international missions in the conflict (MINURSO, whose mandate keeps being extended).[175] It could therefore be concluded that the SADR's claim to independence does not exist *erga omnes* against all other States, which affects its role in the international legal sphere and its status as a State.[176] On the other hand, there are indicators of independence from Morocco. An illustration is the line of case law of the European Court of Justice (ECJ) concerning agreements of the EU with Morocco.[177] The ECJ has consistently ruled that these treaties cannot apply to Western Sahara as a matter of international law, on the ground of the *pacta tertiis* principle of the law of treaties (a treaty binds only the parties, art. 34 Vienna Convention on the Law of Treaties). The Court accepts that Western Sahara is in that sense a third party because of the right to self-determination of its population.

G. Recognition of a State

The final indicator is recognition of a State by its peers. There is a clear overlap with independence discussed above, as well as the possession and exercise of other inborn State's international rights and duties. As argued by Williams, the doctrine of recognition provides "a common system of international rights and duties binding on all members of the Family of Nations," meaning that the unrecognized or partially recognized entities will be positioned outside the full legal interrelationship.[178] Non-recognizing States take very limited account of the entity and will not treat it as equal. What Scelle aptly calls "equality before the rule of law" will not be enjoyed.[179] This dynamic is enshrined within the international legal structure. Article 2(1) of the UN Charter provides that "the Organization is based on the principle of the sovereign equality of all its

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[174] *42nd Session of HRC: Support Group of Morocco's Territorial Integrity Highlights Relevance of Autonomy Initiative*, *Sahara Question*, (11 Sep. 2019) https://sahara-question.com/en/news/19204.

[175] S.C. Res. 2494 (Oct. 30, 2019).

[176] *Cf.* Jure Vidmar, *The Concept of the State and its Right of Existence*, 4(3) CAM. J. INT'L COM. L. 547, 552 (2015).

[177] Judgment of the European Court of Justice (Grand Chamber) of 21 December 2016, Council of the European Union v. Front Populaire Pour la Libération de la Saguia-El-Hamra et du Rio de Oro (Front Polisario), Case C-104/16 P (Feb. 27, 2018); The Queen, on the Application of Western Sahara Campaign UK v. Comm'rs for Her Majesty's Revenue and Customs and Sec'y of State for Env't, Food and Rural Affs., Case C-266/16 (Apr. 16, 2018).

[178] John Fischer Williams, *Some Thoughts on the Doctrine of Recognition in International Law*, 47 HARV. L. REV. 776, 777 (1933-34).

[179] GEORGES SCELLES, MANUEL DE DROIT INTERNATIONAL PUBLIC 116 (1948). Before, the American Institute of International Law declared "Every nation is in law and before law the equal of every other State composing the society of nations." PHILIP M. BROWN, THE RIGHTS OF STATES UNDER INTERNATIONAL LAW, 26 YALE L. J. 91 (1916).

Members."[180] The Charter does not require recognition and indirectly does not require Member States to treat members equally.[181] Regardless of the rather stale debate about whether recognition is constitutive or declaratory, it is clearly normatively relevant for the ability of a State to function internationally. Recognition substantially impacts legal relations of a State (affects the ILF's indicators of statehood). Recognition by other States then is an indicator of statehood within ILF, but it needs to be applied with caution in three respects.[182]

First, recognition of a State must be distinguished from recognition of a government.[183] Although they coincide, it is recognition of a State that provides the firm, long-term foundation for the State's legal effectiveness. By contrast, rejecting legitimacy of a government is usually not universal, but transient, and does not affect the international legal personality of a State in question to considerable extent.[184]

Second, recognition is not absolute but relative and incommensurable. Thus, questions arise as to how many States need to accord recognition to a State for it to be regarded as a State in general terms,[185] whether recognition from certain members of the international community is more valuable,[186] and what the status of partially recognized States should be.[187] In response to these questions, some have argued that partially recognized States should be States only in relation to

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[180] U.N. Charter art. 2 ¶ 1.

[181] Still, the U.N. members are more likely to enjoy certain equality standards than non-members, most of which are conventionally not even treated as States.

[182] Using recognition as an indicator for statehood within the ILF concept might trigger some questions. First, because it is more of a factor, alongside smallness, financial capacity, internal disorders, skilled political cadre, etc., which determines all the other statehood indicators. Second, because it is distinct from other indicators, which stipulate what a State should "do" in order to be considered effective. On the other hand, recognition has an international character and, broadly speaking, makes the State effective/ineffective in a demonstrable way.

[183] On other forms of recognition, such as the recognition of a capital city, *see* Marco Pertile & Sondra Faccio, *What we talk about when we talk about Jerusalem: The duty of non-recognition and the prospects for peace after the US embassy's relocation to the Holy City*, 33 LEIDEN J. INT'L L. 621-647 (2020).

[184] *See* STEFAN TALMON, RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW: WITH PARTICULAR REFERENCE TO GOVERNMENTS IN EXILE 21-24 (1998).

[185] *See* RENÉ LE NORMAND, LA RECONNAISSANCE INTERNATIONALE ET SES DIVERSES APPLICATIONS, 24-25 (1899); Scipione Gemma, *Les Gouvernements de fait,* 4 RECUEIL DES COURS 333 (1924); TI-CHIANG CHEN, THE INTERNATIONAL LAW OF RECOGNITION: WITH SPECIAL REFERENCE TO PRACTICE IN GREAT BRITAIN AND THE UNITED STATES 41, 45-46 (1951).

[186] "Recognition by the great powers has normally preceded, and carried far more weight than, recognition by other states. Indeed, the latter have normally looked to the former for direction; where they did not, their expeditiousness was likely of little import." MIKULAS FABRY, RECOGNIZING STATES: INTERNATIONAL SOCIETY AND THE ESTABLISHMENT OF NEW STATES SINCE 1776, 8 (2010).

[187] Kelsen argued that there is no such thing as "absolute existence." He even added that a State that proclaimed itself "becomes a subject of international law for itself and not in relation to others." Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AJIL 605, 609 (1941). Baty disagreed, stressing that either a State exists, or it does not, and "the opinion of other people on the subject does not alter the fact". THOMAS BATY, THE CANONS OF INTERNATIONAL LAW 205 (1930).

recognized States while others claim that partially recognized States will be de facto States, contested States, or non-universally recognized States for "everyone."[188] Others still argue that non-universally recognized States are legally dysfunctional.[189] It is not clear, however, how many recognitions and by whom would make an entity/State legally functional. From the point of view of the ILF, the more recognitions, including those from important global players, the better, but that recognition alone would not render a State legally functional.

Third, and most critically, recognition is considerably less formal than often assumed. Talmon, Chen, and Roth highlight that a formally unrecognized State may nevertheless realize the benefits of recognition in alternative, informal ways.[190] These scholars, among others, refer to the ability of unrecognized States to informally exercise diplomatic and consular relations with comparable results. Talmon discusses the decision of the United Kingdom to maintain diplomatic relations with Israel, despite according only de facto recognition to the new State.[191] Chen notes that the most common method of establishing *relations officieuses* (official relations) by receiving and sending nondiplomatic agents. Chen refers to informal relations between the US and Spain's Supreme Junta in 1809 and between the US and the Revolutionary Party in Ecuador in 1895.[192] Chen also argues that informal relations are so similar to formal legal relations that even the rights and prerogatives of public officials, such as the possession of juridical immunity, may apply.[193] One such example Chen provides is that of the American Minister who retained diplomatic immunities despite the unrecognized status of the Rivas-Walker Government in Nicaragua.[194] Roth notes that Taiwan maintains scores of semi-official relations with other States which do not differ from the official ones, noting that one commentator termed them "a veritable network of alternative missions or ersatz embassies, usually on a reciprocal basis."[195] These

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[188] For terminological variances *see* Scott Pegg, INTERNATIONAL SOCIETY AND THE DE FACTO STATE (1998); Vladimir Kolossov & John O'Loughlin, *Pseudo-States as Harbingers of a New Geopolitics: The Example of the Trans-Dniester Moldovan Republic (TMR), in* BOUNDARIES, TERRITORY AND POSTMODERNITY, 151–176 (David Newman ed., 1999); Pål Kolstø, *The Sustainability and Future of Unrecognized Quasi-States*, 43 J. OF PEACE RSCH. 273-40 (2006); Marc Weller, CONTESTED STATEHOOD: KOSOVO'S STRUGGLE INDEPENDENCE (2009); Stefan Talmon, KOLLEKTIVE NICHTANERKENNUNG ILLEGALER STAATEN: GRUNDLAGEN UND RECHTSFOLGEN EINER INTERNATIONAL KOORDINIERTEN SANKTION, DARGESTELLT AM BEISPIEL DER TÜRKISCHEN REPUBLIK NORD-ZYPERN (2006); Petra Minnerop, *The Classification of States and the Creation of Status within the International Community*, 7 MAX PLANCK Y.B. UN. L 79-182 (2003).

[189] More details in NINA CASPERSEN & GARETH R. V. STANSFIELD, UNRECOGNIZED STATES INTERNATIONAL SYSTEM (2011).

[190] CHEN, *supra* note 185, at 41; Talmon, *supra* note 9*,* at 101-105; Brad R. Roth, *The Entity that Dare Not Speak its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order*, 4 E. ASIA L. REV. 98 (2009).

[191] Talmon, *supra* note 9*,* at 104.

[192] CHEN, *supra* note 185, at 217-18.

[193] *Id.* at 140-44, 218.

[194] *Id.* at 218.

[195] Roth, *supra* note 190, at 110.

(semi-official) offices and their counterparts in the Republic of China "are accorded privileges and immunities characteristic of those accorded to official diplomatic missions."[196] This informality decreases the importance of recognition in evaluating statehood.

III.
PRACTICAL ADVANTAGES, CONCEPTUAL ATTRACTIVENESS, AND THE SCOPE OF APPLICATION OF ILF

The previous part has demonstrated that ILF provides workable indicators for evaluating statehood. On this basis, Part III discusses arguments for and against adopting ILF. It first outlines the methodological advantages and potential downsides. Some advantages include objectivity and ease of use of ILF. Some potential downsides include the difficulties in determining the exact level of functionality to confirm statehood and the possibility of circumvention of the formal indicators. The next section turns to the most attractive feature of ILF, its conceptual connection with international law. The final section describes the scope of application of ILF to entities, ranging from existing States to those in *statu nascendi,* or potential States.

A. Objectivity and Ease of Use of ILF and Potential Drawbacks

A significant advantage of ILF is that it is a transparent method. The indicators by which it is measured are formal and can be objectively applied in practice. The State is either a member of an international organization or it is not. The State either is a party to an international treaty or it is not. Similarly, the State either maintains diplomatic relations with another State or it does not. This is a zero-one model of assessment which does not involve a complicated analysis. Certainly, there are various types of membership of international organizations or ways of entering into relations between States, but they can only impact the level of functionality and not the existence of functionality. In that sense, scholars, States, and other relevant subjects can use the concept to confirm or reject statehood claims avoiding the accusation of manipulation or subjectivity.

The concomitant advantage of objectivity is the ease of use. Scholars tend to use some of the indicators of ILF in their works or statements, especially in the fields of political sciences and international relations, but also in law. Although statehood analysis is generally not conducted in an "all-embracing" manner because authors tend to employ selective indicators, the analysis is nevertheless conducted. The use of the statehood analysis may even have surpassed the Montevideo recital, especially in nonlegal environments.[197] Politicians continue to

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[196] *Id.* at 111.

[197] *See* Edward Newman & Gezim Visoka, *The Foreign Policy of State Recognition: Kosovo's Diplomatic Strategy to Join International Society*, 14 FOREIGN POL'Y ANALYSIS 367–387 (2018);

invoke the ILF indicators in public discourse, at international fora, and within international organizations as a result of the convenience and persuasiveness of ILF indicators. Statespersons have tried to justify statehood of an entity relying on some of the ILF indicators. For instance, the Foreign Minister of Kosovo claimed that Kosovo has received widespread recognition, established diplomatic relations with 70 States, and become a member of many international and regional organizations, and therefore, it is a State.[198] Similarly, Taiwanese high-ranking officials asserted that membership in international organizations has a "very positive effect on Taiwanese international status."[199] The US State Department website contains information about the relations between the US and other States as well as the list of treaties and organizations that a particular State has joined, which can be apprehended as status-confirming elements.

Of course, we anticipate potential drawbacks of ILF. One relates to the threshold of its indicators for statehood.[200] So, how many international organizations should a would-be State join in order to be considered as a State? Is only the quantitative aspect important? Perhaps there exist some more important organizations or treaties than others? Does membership of the United Nations confirm statehood? Is membership of the UN specialized agencies more important than membership in regional organizations? In the same vein, how many treaties does an entity need to sign or ratify in order to acquire the status of a legally functional State? Are economic treaties more significant than environmental ones? There is also the difficulty of weighing different indicators. For instance, does the ability to conduct diplomatic relations with other States make a State more legally functional than its ability to access international judiciary? Another question that can be posed in this context is whether the functionality should be calculated solely by actual practice, although a State may voluntarily refrain from acceding to that treaty. Equally, what if a State does not wish to send a diplomatic envoy to another State due to the severance of mutual relations?[201] None of these questions are followed by an easy answer and the problem is familiar as the principle of effectiveness on which ILF is based is subject to similar problems of

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James Ker Lindsay, *The Stigmatisation of de facto States: Disapproval and 'Engagement without Recognition*,' 4 ETHNOPOLITICS 362-372 (2018). Nevertheless, almost all authors analyzing statehood from the perspective of international law referred in one way or another to some indicators of ILF. *See* ELŻBIETA DYNIA, UZNANIE PAŃSTWA W PRAWIE MIĘDZYNARODOWYM. ZARYS PROBLEMATYKI (2017), chapters 4 and 5; Piotr Łaski, *Secesja Części Terytorium Państwa W Świetle Prawa Międzynarodowego Publicznego. Zarys Problematyki,* 25 ACTA IURIS STETINENSIS 79 (2019).

[198] Emphasis added. Interview conducted by Visoka, and quoted from Newman & Visoka, *supra* note 197, at 368.

[199] Cited by Dennis van Vranken Hickey, *Taiwan's Return to International Organizations: Policies, Problems, and Prospects, in* THE INTERNATIONAL STATUS OF TAIWAN IN THE NEW WORLD ORDER: LEGAL AND POLITICAL CONSIDERATIONS 72 (Jean-Marie Henckaerts ed., 1996).

[200] *See generally* Andraž Zidar, *Interpretation and the International Legal Profession*, *in* INTERPRETATION IN INTERNATIONAL LAW 133-146 (Andrea Bianchi, Daniel Peat, Matthew Windsor eds., 2015).

[201] Chen concluded that "the establishment of diplomatic relations is a super-addition to international personality, not its essence." CHEN, *supra* note 185, at 16.

measurement. It is equally unclear exactly how much independence the government needs to possess.[202] Arguably, the answer in both external and internal effectiveness is that practice over time will tell.[203] For the time being, it is suggested that the more internationally legally functional an entity is, the more marks of statehood it exhibits. Statehood becomes an objective, and progress towards this objective is made over time through accumulated functionalities. At a minimum, entities which are legally ineffective overall can hardly be termed as States. Partially legally effective entities would constitute a particular sphere of borderline entities, called de facto States, as in the case of partially recognized States. This last category will necessitate the most attention, especially with regard to providing a conclusive statement of when an ineffective entity becomes partially effective and when a de facto State turns into a normal State in international law according to the ILF gauge.

A second difficulty is that entities may be tempted to circumvent the formal indicators of ILF. Yet, the rationale of ILF centers on formal legal functionality and not on para-legal forms replacing it. For instance, an entity/nonmember State may attain an observer status within the UN and participate in the sessions and the work of the General Assembly, yet it will not be able to enjoy benefits stemming from full membership in the United Nations (e.g. be elected to the Security Council).[204] To furnish another example, since 1997 Northern Cyprus's delegates to the Parliamentary Assembly of the Council of Europe (PACE) have the right to express views on all issues under discussion, but no right to vote.[205] An entity may obtain a particular status for that purpose which is still short of full accession. It would be difficult to treat the legal functionality of such an entity as comprehensive. The functionality will exist, but it will be lower.

B. The Connection with International Law

However, the main attraction of ILF is conceptual. It directly connects a normative concept of statehood with modern international law, distinguishing ILF from alternative approaches such as facticist, legalist, objectivist, and subjectivist.[206] What these have in common is that international law has only a limited role to play in what essentially remains a factual conception of statehood.

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[202] CRAWFORD, *supra* note 11, at 55-88; Jean d'Aspremont, "*Effectivity" in International Law: Self-Empowerment against Epistemological Claustrophobia*, 108 AJIL UNBOUND 103-05 (2017).

[203] In the similar way, certain permissible thresholds have been established with reference to the Montevideo Convention criteria of the defined borders and permanence of the population.

[204] *See* G.A. Res. 67/19 (Nov. 29, 2012). In 2012 Palestine's observer status was changed from "non-member observer entity" to "non-member observer State." See e.g., John Cerone, *Legal Implications of the UN General Assembly Vote to Accord Palestine the Status of Observer State*, 16(37) ASIL INSIGHTS (2012).

[205] *See* Council of Europe, Parliamentary Assembly Resolution 1113 (1997); Council of Europe, Parliamentary Assembly Resolution 1376 (2004).

[206] *See Part I* Introduction.

The Montevideo conception is facticist. The criteria articulated in Article 1 of the Convention of population, government, territory, and the capacity to enter into relation with the other States, are socio-political and geographical categories.[207] They are without a substantial link with international law.[208] What makes statehood a legal fact in this conception is that it implies legal entitlements. Legalists are more normatively interested. For them, a putative State must comply with fundamental principles of international law, in particular the prohibition of the use of force and the respect for self-determination.[209] This connects statehood with international law, but only to the very limited portion that has acquired peremptory status and demarcates the outer boundaries of factuality. The objectivist and (inter)subjectivist views of statehood have limited congruence with international law. The basic assumption of the (inter)subjectivist vision of statehood is that it transpires between the mutually recognized States.[210] By definition, the question of legality is excluded from its scope. It only indirectly permeates the concept given that States usually resort to legality analysis prior to extending recognition. The case is different with the objectivist vision, where certain objective categories—the Montevideo criteria—carry determinative weight.[211]

The difference between these conceptions and the ILF conception lies in that the ILF conception positions statehood squarely within international law. Analytically, a State in the ILF model is conceptually constituted and practically evidenced by the utilization of international law. ILF incorporates the full spectrum of international law, not just a limited number of principles. To be termed as such, a State operates in international law. That is, the State creates international law, enforces it, and participates in the institutions of international law such as international organizations and international judicial systems. Indeed, the cardinal feature of ILF is the creation of international law by the entity while attaining statehood. ILF then establishes reflexivity, where entities treated by States as having international legal personality, acquire such status.

ILF connects the State with international law as a particular legal order with landmarks ranging from its sources; methods of creation and execution; the body

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[207] See Ngaire Naffine, *Can Women be Legal Persons*?, *in* VISIBLE WOMEN: ESSAYS ON FEMINIST LEGAL THEORY AND POLITICAL PHILOSOPHY 72 (Susan James, Stephanie Palmer ed., 2002). Naffine noted that the State is a legal fiction much like a person is. "It is a contingently constructed socio legal complex."

[208] DAVID RAIČ, STATEHOOD AND THE LAW OF SELF DETERMINATION (2002). For some, the Montevideo criteria apart from being factual are for the most part legal. "A State is not an international person because it satisfies the criteria for statehood, but because international law attributes full international personality to such a factual situation."

[209] Jean d'Aspremont, *The International Law of Statehood and Recognition: A Post-Colonial Invention, in* LA RECONNAISSANCE DU STATUT D'ETAT À DES ENTITES CONTESTEES 22-23 (T. Garcia ed., 2018)

[210] TANJA E. AALBERTS, CONSTRUCTING SOVEREIGNTY BETWEEN POLITICS AND LAW 83-85 (2012).

[211] d'Aspremont, *supra* note 7, at 207.

of rights and obligations; instruments and institutions; and general principles.[212] International Law extends these landmarks to States to order their international affairs. Comprehensive involvement in and use of this international law defines a State in the ILF model. As an increasingly institutional legal order, international law constitutes States as its subjects and principal organs of law-making and law-application, and if this law could not be applied by and in relation to States, then the existence of such States would be tantamount to legal fiction.

Normatively, ILF postulates that subjects of international law should meaningfully utilize the attributes attached to their existence. ILF closely connects to the foundational self-determination and the aspiration of a people to express this in the form of statehood. ILF permits each person to obtain statehood through action that in the first instance makes the proposition of statehood so attractive.[213] But, critically, the success of this action remains in the hands of the international community whose members are the other parties to a treaty or that decide on admission to an international organization. It also advances the maxim *ex injuria jus non oritur*. Facts on the ground related to the population and territory (internal effectiveness) might be validated by effective governance (even under occupation),[214] but facts in the international arena in order to become operative need to gain acceptance of the international community. ILF hence turns the factual process of gaining statehood short of armed struggle into a normatively guided one.

C. The Scope of Application of ILF

This Section will turn to the final question of the scope of application of ILF to various entities. ILF as a method of statehood evaluation embraces all statehood-related subjects of international law. It could be used to assess the statehood of potential future states, nascent States, existing States, entities with long-lasting claims to statehood, federal/confederal compounds, national liberation movements fighting for independence, States in the process of disintegration, partially recognized States, occupied States, non-self-governing territories, and failed States.

Undoubtedly, most of the extant States, perhaps to the exclusion of diminutive and failed States, would "pass" the statehood test. More interesting is its practical usefulness in hard or marginal cases. Here the main contribution of ILF is to recognize statehood as a process for which there are indicators. Potential

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[212] Consult Oleg I. Tiunov, *Concepts and Features of International Law: Its Relation to Norms of the National Law of the State*, 38 ST. LOUIS U. L. J. 915-928 (1994); United Nations, INTERNATIONAL LAW AS LANGUAGE FOR INTERNATIONAL RELATIONS (1996); Philip Allott, *The Concept of International Law*, 10 EUR. J. INT'L L. 31-50 (1999).

[213] M. Craven, *Statehood. Self-Determination and Recognition, in* INTERNATIONAL LAW 177, 193 (M. Evans ed., 2019).

[214] Marten Breuer, *Effektivitätsprinzip*, *in* VÖLKERRECHT: LEXIKON ZENTRALER BEGRIFFE UND THEMEN 72 (Burkhard Schöbener ed., 2014).

statehood claims can be assessed against the level of international legal functionality at any point in time. The same would pertain to national liberation movements and partially recognized States which are in the process of entering the legal sphere of functionality and struggle for the acknowledgement of their rights and postulates by others.[215]

A similar position has been expressed towards the Montevideo Convention criteria that were designed for the assessment of newcomers, not only already existing States.[216] Nascent States or partially recognized Sates will encounter difficulties in meeting the Montevideo Convention criteria, and that amounts to doctrinal bankruptcy if combined with newcomers that were accepted when they really did not satisfy the criteria.[217] This is not to say that the Montevideo Convention version of statehood should cease to be used. Indeed, a State is inconceivable without territory, people, and government. Rather, the basis for statehood should be developed as put forward by the ILF model.

IV.
CONCLUSIONS

What is a State in international law, or rather, how do we know when statehood is attained and maintained? This Article has offered a novel conceptualization of the State in international law, which almost fell into oblivion after the ILC abandoned the project. This Article proposes International Legal Functionalism as a method that can contribute to better cognition of statehood, particularly in hard or marginal cases. The conceptual framework comprises a definition of ILF that sees statehood as an objective-driven normative process rather than being frozen in time and factual. ILF is substantially correlated with the principle of effectiveness to the extent that functionalism and effectiveness could be used interchangeably. ILF broadens the ordinary application of the principle of effectiveness to statehood assessment under the Montevideo definition to the external legal relations of an entity. This positions ILF against the functionalist theory of international organization, with which it shares the aspect of effective integration into the international community of States. This Article has also identified and applied indicators of international legal functionality of an entity, and hence, progress towards statehood: the conclusion of international agreements, membership in international organizations, the

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[215] W.H. ALEKJIAN, DIE EFFEKTIVITÄT UND DIE STELLUNG NICHTANERKANNTER STAATEN IM VÖLKERRECHT 206 (1970). The international legal personality of a state is, in the total absence of inter-state relations and international intercourse, a total abstraction, because the domestic effectiveness of an entity as state is not *per se* identical with the effectiveness of the same as a subject of international law, and cannot *per se* induce, without the willingness of other states, the establishment of inter-State relations.

[216] CRAWFORD, *supra* note 11, at 45, 667; *see generally*, KRYSTYNA MAREK, IDENTITY AND CONTINUITY OF STATES IN PUBLIC INTERNATIONAL LAW (1968).

[217] Examples of the latter are Congo in 1960, Angola in 1975, and Bosnia in 1992.

exercise of inherent rights and duties, accessing the international judiciary, and recognition. With reference to advantages of the ILF concept, the Article identified greater ease of use in cases of entities aspiring to statehood while noting that measurement and threshold definitions will eventually be established mainly through *consuetudo* (practice) of the existing States.

The persuasiveness of ILF rests on its proposition to emphasize the external viewpoint of statehood over the traditionally dominant internal one. ILF provides a method of evaluating statehood in the context of the development of international law towards a more objective legal order that assesses its members for whether they actively contribute to it. What really ought to matter is whether an entity can effectively avail itself of key facets of contemporary international law, thus functioning as a member of the international community of States, rather than being a factual success. Processes of attaining statehood remain in the hands of the international community whose members are the other parties to a treaty or decide on admission to an international organization.

The Racism in Climate Change Law: Critiquing the Law on Climate Change-Related Displacement with Critical Race Theory

Dylan Asafo*

The recent decision by the UN Human Rights Committee in Ioane Teitiota v. New Zealand was celebrated in the media as a "landmark" and "historic" decision for people in the Pacific Islands and around the world facing realities of climate change-related displacement. However, in adopting a Critical Race Theory (CRT) lens, this Article offers a critique that examines the racism underpinning the Committee's reasoning in doing so. My central thesis is that the Committee's decision, and the decisions of the New Zealand courts it affirmed, should be understood as an instance of racist climate change law. Specifically, I argue that in these decisions, racism manifested when the white privilege of the predominantly white decision-makers (which I refer to as "judicial white privilege") led them to impose poor standards of living for Black, Indigenous, and people of color, adopt inadequate and empty lines of reasoning to justify their judicial inaction, and obscure the racist colonial roots of vulnerabilities to climate change in the Pacific Islands.

In considering the implications of this racism, this Article then confronts the tension between the apparent need to find legal solutions to climate change-related displacement and long standing calls by people in the Pacific Islands for wealthy states to fulfil their obligations to reduce their emissions and support climate change adaptation measures in the Pacific Island region.

In opting to support the latter and in being inspired by the relationship between racism and climate change in the Pacific, this Article proposes that climate justice movements consider adopting a racial justice framing of climate

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change in the Pacific. The Article suggests that this racial justice framing may effectively change the hearts and minds of lawmakers to make meaningful strides in mitigating climate change and helping Pacific Islanders and other Black, Indigenous, and people of color to adapt to climate change.

PROLOGUE: THE SPACE MOVERS

January 1, 2035

The first surprise was not their arrival. The messages through social media and streaming platforms had been sent weeks before. Despite the initial shock and panic, the visitors had provided details of their bodies, history, culture, and more importantly their intentions to "do no harm, only help" in a series of documentaries and videos that eventually eased most of the world's fears and concerns.

No, the first surprise was their ships. Contrary to depictions in countless films over the decades that imagined grand vessels towering beyond the skies, the visitors actually arrived in five sleek silver crafts that looked strikingly similar to regular airplanes they were used to flying in themselves.

Then came the second surprise. The visitors could speak every human language and appeared to have a deep understanding of all the different societies, cultures, traditions, histories, technologies, and contemporary concerns of the world–in particular, the force of destruction called climate change that had by now submerged whole cities and nations and made devastating natural disasters a weekly occurrence in every continent.

This led to the third surprise. In a live-streamed announcement upon their arrival, the visitors' leader stated that their pods contained hundreds of thousands of mini-planes that could easily transform into the normal sized ones with a press of a button. These planes were capable of transporting approximately 500 million beings across space to other planets the visitors had inhabited, one of which was a perfect replica of Earth as it was in 1760 before the Industrial Revolution. The visitors announced that it could be a "New Earth," a second chance for humans to avoid making the mistakes that inevitably lead to climate change. The visitors had only one condition—only white people could move to the New Earth, and all Black, Indigenous, and people of color were to remain on Earth, or what they called the "Old Earth."

As the world's leaders and their people listened in disbelief and awe, the visitors' leader emphasized that the world leaders were free to reject their proposal and that no pressure or force would be used to coerce them into accepting it. Not one of the visitors, who were labelled the "Space Movers" by one of the world leaders, revealed why they would only allow white people to move to the New Earth and wanted all Black, Indigenous, and people of color to remain in the so-called Old Earth. The Space Movers simply wished them a good day and said that they would appear again in 72 hours to receive a response to their offer.

January 2, 2035

Chaotic outrage, dread, and violent terror spread across the world immediately after the Space Movers' proposal was announced. An "Anti-Moving

Coalition," led by the leaders and activists of color of the world, was quickly established to put pressure on the world's leaders to reject the visitors' racist proposal. All of the world's leaders quickly assured their respective populations that they would reject the offer and asked for calm. However, a secret meeting between the leaders of a few select nations (the United States, the United Kingdom, Russia, France, and Australia) was taking place. The President of the United States had set up the meeting to ask the leaders of the powerful, majority-white states to take the offer – "the survival of humanity is at stake." After a few moments, they all agreed.

Knowing that a secret meeting like this would take place, the leader of China rushed to propose a deal with the colluding leaders of the majority-white states–1 million seats on the planes for Chinese people in exchange for their technological advances and expertise, as well as ceding economic advantage to the majority-white states on the New World for ten years. The leaders of the powerful, majority-white nations promised to propose an ultimatum to the Space Movers for honoring this deal with China. An hour later, the leaders of India, Sri Lanka, Brazil, and other non-white majority nations made the same deal.

January 3, 2035

With four hours to go before the seventy-two-hour deadline, the leaders of the five white states announced their decision to accept the Space Movers' proposal. Immediately, leaders from the non-white majority countries declared war against the powerful five leaders and even the Space Movers themselves. However, their armies paled in comparison, and their threats simply came too late.

As the sun set, the Space Movers directed hundreds of millions of white people around the world to check their luggage, line up, and finally enter the planes. In China, India, Brazil, and other non-white majority nations, the wealthy and powerful elite eagerly waited for the planes promised to them by the leaders of the powerful, majority-white states–but these planes never came. A few of them even tried to board planes elsewhere, but standing by every one of the planes around the world stood guards, guns at the ready, who ignored their claims of a secret deal guaranteeing their entry to the New Earth. They had been betrayed. For them, like all people of color, there was no escape from the Old Earth, no alternative life. They could only look on with heads bowed and hearts linked in solidarity, as white people left the Old Earth to conquer new frontiers just as their ancestors had done before them.

INTRODUCTION

If our entire world were to become uninhabitable due to climate change, do you think the powerful leaders of predominantly white countries would leave Black, Indigenous, and people of color behind to move to a brand new world?

To some people, this would probably be a ridiculous, outrageous, and even offensive question to ask. However, this question is not so outrageous to those who continue to observe inaction against climate change by leaders of predominantly white countries in the face of increasingly disproportionate impacts on Black, Indigenous, and people of color.[1] It is very much worth asking and grappling with.

The fictional story above is based on *Space Traders* by Derrick Bell, a story of aliens coming to Earth and the United States in particular to offer gold, safe nuclear power, and other alluring technological advances. In exchange, the government would hand over all Black US citizens so that they could be taken by the aliens back to their home planet in chains.[2] Bell's narrative posits that the US government would make this trade and hold a referendum to enable it—and even Black, wealthy conservatives who thought of themselves as exempt due to their political and socioeconomic standing would find out that this would not be the case.

In *Space Movers*, I globalize the narrative beyond the United States and reverse the migration paradigm to explore what Bell's hypothesis in *Traders* (that wealthy, powerful governments of predominantly white countries would willingly exchange white advancement for Black enslavement and suffering) means in our current global climate crisis in 2020. In adopting Bell's hypothesis, the *Movers* narrative posits that when given the chance, wealthy, powerful governments of predominantly white nations such as the United States would abandon all Black, Indigenous, and people of color to live in a fresh new world while escaping the consequences of their actions (or inactions).

An important feature of my narrative is that even the wealthy and powerful Black, Indigenous, and people of color in predominantly non-white nations like China, Brazil, and India (regarded as among the key contributing nations to carbon emissions[3]) will not be spared from the racist agenda despite their money

1. Kara Thompson, *Traffic Stops, Stopping Traffic: Race and Climate Change in the Age of Automobility*, 24 INTERDISC. STUD. LITERATURE AND ENV'T 92, 93 (2017) (noting "[s]cholars and activists who take up the racialized contours of climate change offer widespread evidence that effects of global warming disproportionately affect people of color and others in structurally oppressed positions because of class, geographic location, and citizenship status.").

2. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM, 158 (1992).

3. Jeff Tollefson, *The hard truths of climate change — by the numbers*, 573 NATURE 324, 326 (2019) ("Where China goes, the world goes. The country is the largest source of CO2 and its emissions are growing . . ."). In January 2020, it was found that previous reports that India and China had reduced their emissions from 2014-2017 were unfounded. Kieran M. Stanley et al., *Increase in global*

and status. This was a hard lesson learned by the Black conservative character Professor Gleason Golightly when he was prevented from fleeing the United States in Bell's *Traders*.

Despite the science fiction flare, *Movers* is inspired by our current reality. In a less literal but still very real way, powerful governments of predominantly white nations are failing to act effectively against climate change but still evading the brunt of its destructive impacts, leaving Black, Indigenous, and people of color bearing those burdens disproportionately.[4] As I illustrate in *Movers*, this failure is heavily racialized, and government actions (or more accurately, inactions) against climate change can be called out as racism against Black, Indigenous, and people of color who continue to suffer disproportionately from climate change compared to white people.

To further understand this racism, this Article offers a critique of legal responses to climate change from a Critical Race Theory (CRT) perspective. As

emissions of HFC-23 despite near-total expected reductions, 11 NATURE COMM. 397, 397 ("Starting in 2015, China and India, who dominate global HCFC-22 production [75% in 2017], set out ambitious programs to reduce HFC-23 emissions. Here, we estimate that these measures should have seen global emissions drop by 87% between 2014 and 2017. Instead, atmospheric observations show that emissions have increased and in 2018 were higher than at any point in history."). However, while the wealthy ruling classes in developing countries like India, Sri Lanka, China, and Brazil have the highest emissions and contributions to climate change, I argue that their status as developing status and high rates of abject poverty follow that their capacity and responsibility to divest from fossil fuels need to be distinguished from that of wealthy developed countries like the United States, New Zealand, and Australia. TEALL CROSSEN, THE CLIMATE DISPOSSESSED – JUSTICE FOR THE PACIFIC IN AOTEAROA, 41 (2020).

> ("Some of the larger developing countries have more advanced economies and are increasingly responsible for current greenhouse gas emissions, including China, India, Brazil and South Africa. Avoiding the worst impacts of climate change is dependent on these countries, along with every other country, reducing their pollution. Per capita emissions from developing countries, however, while growing in some, remain lower than in the developed world. For example, in 2015 India's per capita emissions were around 2.7 tCO2e [tonnes of carbon dioxide equivalent], less than half the world's average of around 7 tCO2e.27 By comparison, New Zealand's per capita emissions were 17.5 tCO2e, more than double the world average, enabling people in New Zealand to enjoy a relatively high standard of living. Around 31 million homes in India do not have access to electricity. More than 25 per cent of the population of Brazil – a staggering fifty-five million people – live below the poverty line. That's not to say there aren't growing middle classes and very wealthy people in both India and Brazil. But there is also a lot of abject poverty. And right now, the only proven, viable and affordable path out of poverty at scale is the burning of fossil fuels.").

4. Thompson, *supra* note 1, at 93. *See generally* J. Andrew Hoerner and Nia Robinson, *Just Climate Policy—Just Racial Policy*, 16 RACE, POVERTY & THE ENV'T 32, 32 (2009) ("Climate change is not only an issue of the environment; it is also an issue of justice and human rights, one that dangerously intersects race and class . . . In all cases, people of color, indigenous peoples, and low-income communities bear disproportionate burdens from climate change itself, from ill-designed policies to prevent it, and from the side effects of energy systems that cause it."); S. Nazrul Islam and John Winkel, *Climate Change and Social Inequality* 17 (DESA Working Paper No. 152ST/ESA/2017/DWP/152, 2017) (observing that the "differential effect of climate change with respect to race is found in both developing and developed countries, although in both cases low income status is also intertwined. with race and ethnicity status.").

a "movement of a collection of activists and scholars interested in studying and transforming the relationship among race, racism, and power,"[5] CRT provides an apt framework with various tools and analyses that can help explain why this inaction is racism and what a racial justice framing of climate change advocacy means moving forward.

While there are many topics related to legal responses to climate change that could benefit from a CRT analysis, this Article focuses on the laws around climate change-related displacement. This phenomenon consists of communities and individuals being relocated from their homes, both within and across borders, because their homelands have (or will soon) become uninhabitable due to impacts related to climate change.[6]

Climate change-related displacement for communities and individuals of color is happening all over the world.[7] This Article examines the specific realities of displaced peoples from the Pacific Islands as a case study.

The recent decision by the UN Human Rights Committee in *Ioane Teitiota v. New Zealand*[8] has been celebrated as a "landmark"[9]and "historic[10] decision for people in the Pacific Islands and around the world facing realities of climate change-related displacement. However, in adopting a CRT lens, this Article observes that despite the praise surrounding the Committee's decision, it actually upheld decisions of the New Zealand courts to deny claims of protection from climate change-related displacement. Therefore, in adopting a CRT lens, this

5. RICHARD DELGADO AND JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION, 2 (2001).

6. *See* Walter Kälin, *Conceptualising Climate-Induced Displacement*, CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSP. 84 (Jane McAdam ed., 2010) (finding that when it comes to the "best" way to conceptualise climate-induced displacement, the following three "non-controversial observations" can be made: "(i) climate and climate change per se do not trigger the movement of people, but some of their effects, in particular sudden and slow-onset disasters, have the potential to do so; (ii) such movement may be voluntary, or it may be forced; and (iii) it may take place within a country or across international borders.").

7. This includes but is not limited to: Alaskan Native villages in the United States, Bangladesh, African States, and States in Latin America and the Caribbean. S*ee generally* Craig Welch, *Climate Change Has Finally Caught Up to This Alaska Village*, NAT'L GEOGRAPHIC, Oct. 22, 2019; Jane McAdam & Ben Saul, *Displacement with Dignity: International Law and Policy Responses to Climate Change Migration and Security in Bangladesh*, 53 GERMAN YEARBOOK OF INT'L L. 233 (2010); TAMARA WOOD, THE ROLE OF FREE MOVEMENT OF PERSONS AGREEMENTS IN ADDRESSING DISASTER DISPLACEMENT: A STUDY OF AFRICA, Platform on Disaster Displacement (2018); DAVID JAMES CANTOR, CROSS-BORDER DISPLACEMENT, CLIMATE CHANGE AND DISASTERS: LATIN AMERICA AND THE CARIBBEAN, Platform on Disaster Displacement (JULY 2018).

8. Ioane Teitiota v. New Zealand, U.N. Human Rights Committee Dec. 2728/2016, CCPR/C/127/D (Jan. 27, 2020).

9. Melissa Goodin, *Climate Refugees Cannot Be Forced Home, U.N. Panel Says in Landmark Ruling*, TIME (Jan. 20, 2020).

10. U.N. Off. of the High Comm'r for Hum. Rts., Historic UN Human Rights case opens door to climate change asylum claims (Jan. 21, 2020), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25482.

Article offers a critique that examines the racial dynamics of the Committee's reasoning in doing so.

My central thesis is that the Committee's majority decision and the decisions of the New Zealand courts it upheld should be understood as instances of racism in climate change law. Specifically, I argue that in this series of decisions, racism manifested when the predominantly white decision-makers' white privilege (which I refer to as "judicial white privilege") led them to impose poor standards of living for Black, Indigenous, and people of color, adopt inadequate and empty lines of reasoning to justify their judicial inaction, and obscure the racist colonial roots of vulnerabilities to climate change in the Pacific Islands.

In considering the implications of this racism, this Article then confronts the tension between calls to find legal solutions to climate change-related displacement and persistent demands by Pacific Island peoples for wealthy states to reduce their emissions and support climate change adaptation measures in the Pacific.

In opting to support the latter, and in being inspired by the relationship between racism and climate change in the Pacific, this Article proposes that climate justice movements should consider adopting a racial justice framing of climate change in the Pacific. This racial justice framing may effectively change the hearts and minds of lawmakers and inspire them to make meaningful strides in climate mitigation and adaptation for Pacific peoples, and all Black, Indigenous, and peoples of color at the forefront of climate change's impacts.

This Article proceeds in four parts. Part I provides a brief overview of the problem of climate change-related displacement in the Pacific Islands. Part II outlines the current international and domestic legal framework for addressing climate change-related displacement as elucidated by the Committee's majority decision. Part III critiques this framework with a CRT lens and argues that the Committee's majority decision to uphold the denial of protection to peoples of color facing climate change-related displacement must be understood as racist climate change inaction. Finally, in seeking a way forward, Part IV explores the adoption of a racial justice reframing by climate justice and racial justice activists to motivate governments to honor the aspirations of Black, indigenous, and people of color at the forefront of climate change's impacts.

I.
CLIMATE CHANGE-RELATED DISPLACEMENT IN THE PACIFIC ISLANDS

It is well established that the Pacific Island region is and will continue to be among the worst-affected by climate change in the world.[11] The ongoing impacts

11. John Campbell, *Climate-Induced Community Relocation in the Pacific: The Meaning and Importance of Land*, CLIMATE CHANGE AND DISPLACEMENT: MULTIDISCIPLINARY PERSP. 57, 57 (Jane McAdam ed., 2010) ("The Pacific Islands . . . have been singled out as being among those places that may be rendered uninhabitable by the effects of climate change.").

of climate change in the Pacific Islands—such as rising sea levels, increasing ocean temperatures, and increasing frequencies of adverse weather events tropical cyclones[12]—have led to increased coastal erosion, flooding, and saltwater intrusions resulting in unclean water, food insecurity, sewage overflow leading to increased rates of communicable diseases,[13] and increased tensions and disputes due to competition for space and resources.[14]

It is important to emphasize that these realities in the Pacific Islands are not due to climate change alone. Rather, as McAdam emphasizes, climate change is a "threat multiplier" that exacerbates not only the geographic and environmental vulnerabilities of the Islands in being low-lying and having tropical climates, but also their socioeconomic vulnerability as developing countries with poorly-funded infrastructure and high poverty rates.[15] Accordingly, climate change has and will continue to have an "incremental impact" by worsening existing problems and compounding existing threats to life in the Pacific Islands.[16] As this Article will discuss later, these increasing threats to life have led to a significant amount of discourse around the appropriateness of small and large-scale efforts to relocate Pacific Island communities to larger neighbouring Organisation for Economic Co-operation and Development (OECD) countries (such as New Zealand and Australia).

12. Adelle Thomas, Patrick Pringle, Peter Pfleiderer & Carl-Friedrich Schleussner, Climate Analytics (2017) at 1 ("The South Pacific has recently been hit by particularly destructive cyclones like Winston and Pam. Estimated economic cost of Cyclone Pam in Vanuatu across all sectors was approximately 64% of the country's GDP in 2016. In Fiji, Cyclone Winston displaced over 130,000 people. Attribution of tropical cyclones to climate change is difficult. However, a robust increase of the most devastating storms with climate change is evident. Under 2.5°C of global warming, the most devastating storms are projected to occur up to twice as often as today.").

13. *See generally* Jon Barnett, *Climate Change and Food Security in the Pacific Islands*, *in* FOOD SECURITY IN SMALL ISLAND STATES (Springer 2020) at 25–38; Johan Bell, Mary Taylor, Moses Amos, & Neil Andrew, *Climate Change and Pacific Island Food Systems* (CGIAR Research Program on Climate Change, Agriculture and Food Security and the Technical Centre for Agricultural and Rural Cooperation, 2016) at 14-15; Lachlan McIver et al., *Health Impacts of Climate Change in Pacific Island Countries: A Regional Assessment of Vulnerabilities and Adaptation Priorities*, 124 ENV'T HEALTH PERSP. 1707, 1708 (2016).

14. AF (Kiribati), [2013] at 72. Here the Immigration and Protection Tribunal noted, "The general observations earlier regarding the potential for environmental degradation and natural disasters to result in conflict is demonstrated in the case of Kiribati. Credible evidence has been given that this can cause tension over land which has given rise to physical assaults and even deaths," referring to expert evidence given by climate change researcher, John Cochran.

15. Jane McAdam, *Conceptualizing Climate Change-Related Movement*, CLIMATE CHANGE, FORCED MIGRATION, AND INT'L LAW, 24 (2012). ("[I]t is inherently fraught to speak of 'climate change' as the 'cause' of human movement, even though its impacts may exacerbate existing socio-economic or environmental vulnerabilities.").

16. *Id.*

II.
AN OVERVIEW OF THE JURISPRUDENCE AROUND CLIMATE CHANGE-RELATED DISPLACEMENT

A. The Plight of Ioane Teitiota in the New Zealand Courts

There is currently no specific policy or legal framework of international law to protect people who have been or will be displaced due to climate change-related factors.[17] While there are a number of international law instruments touching on the rights and entitlements of displaced peoples—namely, the Refugee Convention, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention Against Torture—none of these instruments explicitly provide specific protection for vulnerable people facing displacement from the impacts of climate change.[18] As Rive notes, this reveals a "protection deficit" in the international law framework.[19] This protection deficit has been most vividly illustrated by the plight of Ioane Teitiota from the Pacific Island nation of Kiribati in his attempt to seek protection from climate change-related displacement.

1. The Facts

In 2007, Teitiota and his wife migrated from Kiribati to New Zealand on temporary residency permits because various climate change-related problems had made their home uninhabitable.[20] Observing that the impacts of climate change had only worsened, he, his wife, and the three children they had had since arriving decided to stay in New Zealand after their visas expired in October 2010.[21] Facing deportation, Teitiota applied for protection as a refugee per the Refugee Convention and as a protected person per the ICCPR, which are both incorporated into the relevant domestic legislation, the Immigration Act of 2009.[22]

Teitiota's application claimed that freshwater had become scarce because of saltwater contamination and overcrowding on his island of Tarawa. He also claimed that land on the island had eroded, resulting in a housing crisis and land disputes that have caused a number of physical conflicts and even deaths.

17. Vernon Rive, *Safe Harbours, Closed Borders? New Zealand Legal and Policy Responses to Climate Displacement in the South Pacific*, THE SEARCH FOR ENVIRONMENTAL JUSTICE (Paul Martin, Sadeq Z. Bigdeli, Trevor Daya-Winterbottom, Willemien du Plessis, Amanda Kennedy, eds., 2015) at 224.

18. *Id.*

19. *Id.*

20. Kiribati [2013] NZIPT 800413 at 40. This was not the stated reason for their visa as no such visa ground existed and exists today, but this rationale for their move was testified to in their claim to the Tribunal.

21. Ioane Teitiota, *supra* note 8, at 4.1.

22. Immigr. Act, 2009 (Act No. 51/2009) (N.Z.).

Additionally, the damage to crops and other infrastructure meant he could not find employment to support himself and his wife.[23] A climate change researcher and doctoral candidate at the University of Waikato provided expert evidence in support of these circumstances. Their testimony "described Kiribati as a society 'in crisis' as the result of population pressure and climate change."[24] Overall, Teitiota claimed that his home on Tarawa had become an uninhabitable environment for him despite well-meaning attempts by the government to combat sea-level rise with an adaptation plan in 2007 that had largely been ineffective.[25]The Tribunal and appellate court's review of these claims are laid out below.

2. The Refugee Status Claim

Teitiota made his refugee status claim under Section 129(1) of the Immigration Act of 2009, which required the Tribunal (and the appellate courts) to determine whether Teitiota met the following elements of a "refugee" as defined in Article 1A (2) of the Refugee Convention:[26]

(1) The claimant is living outside their home country;
(2) They are not able or willing to return to their home country;
(3) This is due to a "well-founded fear of being persecuted"; and
(4) The fear is based on a Convention recognized reason of race, religion, nationality, membership of a particular social group or political opinion.

The Tribunal determined that while elements (1) and (2) were evident, (3) and (4) were not fulfilled on the evidence provided. In the Court's view, element (4) was clearly not satisfied as "the effects of environmental degradation on [Teitiota's] standard of living were, by his own admission, faced by the population generally," and the government had not failed to take steps to protect him from harm due to a Convention recognized reason.[27]

With regard to element (3), the Tribunal concluded that Teitiota did not have a "well-founded fear of being persecuted" because he did not objectively face a real risk of persecution if he returned to Kiribati.[28] The Tribunal reasoned that he had not been personally subjected to any land dispute in the past and there was no evidence that he faced a real chance of suffering serious physical harm from violence linked to housing, land, or property disputes in the future. It also determined Teitiota would be able to find land to provide accommodation for

23. Kiribati, [2013] NZIPT 800413 at 40.
24. *Id.* at 12-24.
25. *Id.* at 5-6.
26. Immigr. Act, 2009, § 129(1).
27. Kiribati, [2013] NZIPT 800413 at 75.
28. *Id.* at 74.

himself and his family; it would be difficult but not impossible.[29] The Tribunal found no evidence to support his contention that he was unable to grow food or obtain potable water, or that the environmental conditions he faced on returning to Tarawa were so perilous as to jeopardize his life.[30]

When Teitiota appealed to the High Court, Justice Priestly affirmed the Tribunal's ruling and added that it was not possible for Teitiota to seek refuge within the very countries that were allegedly "persecuting" him. [31]

In Teitiota's subsequent appeal to the Court of Appeal, Justice Wild endorsed this reasoning and also noted that Teitiota's claim "attempts to stand the Convention on its head", and therefore could not be accepted.[32] Finally, in its short six-page judgment upholding the rulings below, the Supreme Court also concluded that Teitiota did not face "serious harm" and that the Government of Kiribati had not failed to protect him on any convention ground.[33]

3. The Protected Person Status Claim

In terms of Teitiota's claim under Section 130 of the Immigration Act of 2009, which incorporates and adapts Article 6 of the ICCPR, the Tribunal and the appellate courts needed to be satisfied that in facing deportation from New Zealand, there were "substantial grounds for believing [Teitiota] would be in danger of being subjected to arbitrary deprivation of life or subjected to cruel treatment."[34]

The relevant ground here was arbitrary deprivation of life. The Tribunal emphasized that the "arbitrariness" requirement was not satisfied on the grounds that the Government of Kiribati did not fail to take programmatic steps providing for the basic necessities of life to meet its positive obligation to fulfil Teitiota's right to life.[35] In fact, the Tribunal observed that the Government had taken steps to address the effects of climate change according to the 2007 National Adaptation Programme of Action submitted by Kiribati under the United Nations Framework Convention on Climate Change.[36]

29. *Id.* at 73.

30. *Id.* at 74.

31. Teitiota v. Chief Exec. Ministry Bus. Innovation and Emp., [2013] NZHC 3125 at 55 (reasoning that granting Teitiota refugee status would reverse the Convention's paradigm and be inconsistent with the historical context of the Convention in being designed for innocent people caught in conflict).

32. Teitiota v. Chief Exec. Ministry Bus. Innovation and Emp., [2014] NZCA 173 at 40.

33. Teitiota v. Chief Exec. Ministry Bus. Innovation and Emp., [2015] NZSC 107 at 12.

34. Immigr. Act, 2009, § 131(1).

35. Kiribati, [2013] NZIPT 800413 [2013], at 86-88.

36. *Id.* at 88.

The relevant ICCPR case law suggests that there is also an "imminence" requirement, which means that the risk to life must be "at least, likely to occur."[37] The Tribunal found in the evidence that Teitiota would not imminently face life-threatening conditions and that his claim of facing an arbitrary deprivation of life was firmly "in the realm of conjecture or surmise" and therefore could not be accepted.[38]

Agreeing with the judgments of the High Court and Court of Appeal, the Supreme Court unanimously held that "the provisions of the ICCPR relied on [did not] have any application on these facts."[39] Finally, the Court was not persuaded that there was "any risk of a substantial miscarriage of justice."[40] In the final paragraph of its judgment, the Court stressed that the decision to dismiss Teitiota's claim and allow his deportation was due to the lack of appropriate factual circumstances and that there could be a "pathway" to protection in the future, stating:

> That said, we note that both the Tribunal and the High Court emphasized their decisions did not mean that environmental degradation resulting from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction. Our decision in this case should not be taken as ruling out that possibility in an appropriate case.[41]

B. The "Landmark" Human Rights Committee Decision

1. The Majority Judgment

After the Supreme Court's decision, New Zealand deported Teitiota back to Kiribati in September 2015. Teitiota then filed a communication with the Human Rights Committee that same month, claiming that New Zealand, as a State party to the ICCPR, violated his right to life under Article 2 by deporting him to Kiribati.[42]

In order to find a violation, the Committee has to be satisfied that the State party's determination was clearly arbitrary or amounted to a manifest error or a denial of justice.[43] The Committee dismissed the claim by a 16-2 majority. The majority accepted the general finding from the Tribunal and the appellate courts

37. *Id.* at 89-90 (referring to Aalbersberg v. Netherlands CCPR/C/87/D/1440/2005 at 6.3 (Aug. 14, 2006).

38. *Id.* at 91-92.

39. Teitiota, [2015] NZSC 107 at 12.

40. *Id*.

41. *Id.* at 13.

42. Ioane Teitiota, *supra* note 8, at 1.1.

43. *Id.* at 9.3, *citing* inter alia, M.M. v. Denmark (CCPR/C/125/D/2345/2014), para. 8.4; B.D.K. v. Canada (CCPR/C/125/D/3041/2017), para. 7.3; *see also* Human Rights Committee, *General Comment No. 32*, Article 14: Right to equality before courts and tribunals and to a fair trial (CCPR/C/GC/32) (2007).

that an arbitrary deprivation of life "must be personal" and not rooted in "the general conditions of the receiving State, except in the most extreme cases."[44] Reviewing the specific evidence, the majority reasoned that Teitiota had not demonstrated clear arbitrariness or error in the assessments by the New Zealand courts as to "whether he faced a real, personal and reasonably foreseeable risk of a threat to his right to life" from being harmed in a land dispute due to housing shortages,[45] whether he would be unable to access potable water,[46] and whether he would be unable to grow crops for food and income.[47]

Finally, the majority took note of a string of claims by Teitiota that (1) he faced threats to his life from overpopulation as well as frequent and increasingly intense flooding and breaches of sea walls, (2) the New Zealand courts erred in determining the time frame within which serious harm to Teitiota would occur in Kiribati, (3) the New Zealand courts did not give sufficient weight to the expert testimony of the climate change researcher, and (4) that Kiribati would become uninhabitable within ten to fifteen years.[48] In response, the majority made two comments.

First, the New Zealand courts were correct in their assessment of the facts: a State party may be in breach of its human rights obligations if it returns someone to a country where "the effects of climate change in receiving states may expose individuals to a violation of their rights . . . thereby triggering the *non-refoulement* obligations of sending states."[49] Second, regarding Teitiota's claim that Kiribati will not survive in ten to fifteen years, the Committee stated:

> The timeframe of 10 to 15 years, as suggested by the author, could allow for intervening acts by the Republic of Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population. The Committee notes that the State party's authorities thoroughly examined this issue and found that the Republic of Kiribati was taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms.[50]

Therefore, in finding no error or arbitrariness in the New Zealand court's assessment of the evidence, and no non-refoulement obligations triggered by the

44. Ioane Teitiota, *supra* note 8, at 9.3.

45. *Id.* at 9.7.

46. *Id.* at 9.8 ("While recognizing the hardship that may be caused by water rationing, the Committee notes that the author has not provided sufficient information indicating that the supply of fresh water is inaccessible, insufficient or unsafe so as to produce a reasonably foreseeable threat of a health risk that would impair his right to enjoy a life with dignity or cause his unnatural or premature death.").

47. *Id.* at 9.9 ("The Committee observes the finding of the domestic authorities that, while the author stated that it was difficult to grow crops, it was not impossible.").

48. *Id.* at 9.10.

49. *Id.* at 9.11.

50. *Id.* at 9.12.

present facts, as well as believing there was a suitable time frame for intervening acts, the Committee decided that it was "not in a position to hold that the author's rights under Article 6 of the Covenant were violated upon his deportation to the Republic of Kiribati in 2015."[51]

2. The Dissenting Opinions

(a) Committee member Sancin

The dissenting opinion from Committee member Sancin rejected the majority's heavy reliance on the evidence that Teitiota and his family had access to potable water, explaining that "'potable' should not be equated with 'safe drinking water.'"[52] Her dissent also recognized that potable water could contain microorganisms dangerous to health, particularly for children—especially since all three of the Teitiota's dependent children were born in New Zealand and had never been exposed to the particular microorganisms in Kiribati.[53]

Committee member Sancin also expressed concern with the majority's satisfaction with the steps taken by the government of Kiribati with its 2007 National Adaptation Programme of Action. She noted that a more detailed analysis of Kiribati's adaptation measures would reveal that the measures did not relate to water access and that those planned had not been implemented.[54] In light of these circumstances, Committee member Sancin stated that the onus should be on New Zealand to demonstrate that Teitiota would enjoy access to safe drinking (or even potable) water in Kiribati in order to comply with its "positive duty to protect life from risks arising from known natural hazards" per Article 6.[55] Accordingly, her dissent concluded that the New Zealand courts' assessment of Teitiota's situation was "clearly arbitrary or manifestly erroneous" and constituted a breach of Article 6.[56]

(b) Committee member Muhumuza

The second dissent, from Committee member Muhumuza, argued that the majority placed an "unreasonable burden of proof" on Teitiota to establish a real risk of danger of arbitrary deprivation of life, stressing that "the facts before the Committee reemphasize[d] the need to employ a human-sensitive approach to human rights issues."[57] In undertaking this approach, the high evidential threshold

51. *Id.* at 9.14.
52. *Id.* at Annex 1, para. 3.
53. *Id.*
54. *Id.* at Annex 1, para. 5.
55. *Id.*
56. *Id.* at Annex 1, para. 6.
57. *Id.* at Annex 2, para. 1.

imposed by the New Zealand courts and approved by the majority was criticized as follows:

> It would indeed be counterintuitive to the protection of life, to wait for deaths to be very frequent and considerable; in order to consider the threshold of risk as met. It is the standard upheld in this Committee, that threats to life can be a violation of the right, even if they do not result in the loss of life. It should be sufficient that the child of the author has already suffered significant health hazards on account of the environmental conditions. It is enough that the author and his family are already facing significant difficulty in growing crops and resorting to the life of subsistence agriculture on which they were largely dependent.[58]

Committee member Muhumuza concluded their dissent with a critique of the majority's reasoning that Teitiota should not receive protection from New Zealand on the basis that his situation is the same as many others in Kiribati:

> While it is laudable that Kiribati is taking adaptive measures to reduce the existing vulnerabilities and address the evils of climate change, it is clear that the situation of life continues to be inconsistent with the standards of dignity for the author, as required under the Covenant. The fact that this is a reality for many others in the country, does not make it any more dignified for the persons living in such conditions. New Zealand's action is more like forcing a drowning person back into a sinking vessel, with the "justification" that after all there are other voyagers on board. Even as Kiribati does what it takes to address the conditions; for as long as they remain dire, the life and dignity of persons remains at risk.[59]

Although the Committee majority denied Teitiota's claim, its decision was celebrated by mainstream media as a "historic" and "landmark" decision for peoples facing or at risk of facing climate change-related displacement.[60] This was mainly due to the majority's comments about how non-refoulement obligations can possibly be triggered if the factual circumstances are compelling enough. The UN Office of the High Commissioner for Human Rights announced the ruling with the headline "Historic UN Human Rights case opens the door to climate change asylum claims."[61] Similarly, *Time* also reported the case with the headline "Climate Refugees Cannot Be Forced Home, U.N. Panel Says in Landmark Ruling,"[62] with *The Guardian* using a near-identical headline as well.[63] I will critique the accuracy of this portrayal of the majority's decision using CRT in Part III.

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58. *Id.* at Annex 2, para. 5.

59. *Id.* at Annex 2, para. 6.

60. U.N. Off. of the High Comm'r for Hum. Rts., *supra* note 10; Goodin, *supra* note 9.

61. U.N. Off. of the High Comm'r for Hum. Rts., *supra* note 10.

62. Goodin, *supra* note 9.

63. Kate Lyons, *Climate refugees can't be returned home, says landmark UN human rights ruling*, THE GUARDIAN (Jan. 20, 2020), https://www.theguardian.com/world/2020/jan/20/climate-refugees-cant-be-returned-home-says-landmark-un-human-rights-ruling.

III.
UNDERSTANDING THE RACISM IN CLIMATE CHANGE-RELATED DISPLACEMENT JURISPRUDENCE WITH CRITICAL RACE THEORY

A. Critical Race Theory and Climate Change

To date, critical legal scholarship on the various legal issues concerning climate change has mainly focused on framing inadequate legal responses as "carbon colonization,"[64] "slow violence,"[65] "human rights violations,"[66] and "climate [in]justice."[67] While all these perspectives are incredibly important, the foundational work by legal scholars Carmen Gonzalez and Maxine Burkett demonstrate that it is important to examine legal responses to climate change with a racial justice lens.[68]

Furthermore, scholars from other disciplines including sociology,[69] psychology,[70] geography, and communications studies have also taken up the challenge of applying such a lens to the laws and policies concerning climate change. All of these scholars have mostly dedicated their scholarship to continuing the ground-breaking work of the environmental justice movement in conceptualizing the environmental harms disproportionately facing Black, Indigenous, and people of color as "environmental racism."[71] For example,

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64. *See generally* Julia Dehm, *Carbon Colonialism or Climate Justice? Interrogating the International Climate Regime from a TWAIL Perspective*, 33 WINDSOR Y.B. ACCESS JUST. 129, 131 (2016); Sumudu Atapattu & Carmen G. Gonzalez, *The North–South Divide in International Environmental Law: Framing the Issues*, *in* INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, 6 (Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, & Jona Razzaque eds., 2015).

65. Amy McQuire & Jeffrey McGee, *A Universal Human Right to Shape Responses to a Global Problem? The Role of Self-Determination in Guiding the International Legal Response to Climate Change*, 26 RECIEL 54, 64 (2017) (quoting ROB NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR 40 (2011)).

66. Bridget Lewis, *Indigenous Human Rights and Climate Change*, 7 ILB 11 (2008); *see* Pepe Clarke, *Climate Change and Human Rights in the Pacific Islands*, 1 NELR 59, 60-61 (2009).

67. HENRY SHUE, CLIMATE JUSTICE: VULNERABILITY AND PROTECTION 264 (2014).

68. Carmen Gonzalez, *Climate Change, Race, and Migration*, 1 Journal of Law and Political Economy 109, 110 (2020) (arguing that "a race-conscious analysis of carbon capitalism grounded in political economy can foster alliances among scholars and social movements that seek systemic change by highlighting common patterns and sources of oppression"); Carmen Gonzalez, *Racial Capitalism, Climate Justice, and Climate Displacement*, 11 Oñati Socio-Legal Series 108 (2021); Maxine Burkett, *Root and Branch: Climate Catastrophe, Racial Crises, and the History and Future of Climate Justice*, 134 Harv. L. Rev. F. 326 (2020).

69. Danielle Falzon & Pinar Batur, *Lost and Damaged: Environmental Racism, Climate Justice, and Conflict in the Pacific*, *in* HANDBOOK OF THE SOCIOLOGY OF RACIAL AND ETHNIC RELATIONS (Pinar Batur & Joe R. Feagin eds., 2018).

70. Thompson, *supra* note 1.

71. Born from the environmental justice movement launched in the 1970s-80s in the United States, "environmental racism" was coined by former executive director of the United Church of Christ

geography scholar Laura Pulido explores environmental racism and related concepts of white supremacy and white privilege with regard to regulatory non-compliance[72] and racial capitalism in the context of State-sanctioned racial violence through pollution.[73] More recently, Pulido and others have explored "spectacular racism" and white nationalism in the Trump era of aggressive environmental deregulation and fossil fuel investment.[74]

In the field of communications studies, Elizabeth Dickinson has adopted CRT to critique the decision of New Mexico government officials to move protected rock carvings in Petroglyph National Monument for the construction of a road.[75] In what appears to be the only piece of scholarship on environmental racism to explicitly apply a CRT lens, Dickinson aptly describes the need to embrace CRT perspectives when critiquing cases of environmental racism:

> CRT positions [cases of environmental racism] within a critical framework, where racism and whiteness are predictable, institutional, and mainstream, and they occur materially, ideologically, locally, and globally (Crenshaw, Gotanda, Peller, & Thomas, 1995; Delgado, 1995). CRT scholars argue that a lack of true racial reform stems from the popularly held belief that, after the U.S. civil rights movement, race is no longer a significant issue (Tate, 1997). CRT repositions racism as rampant and current and not an unfortunate historic act; racism upholds the invisibility of whiteness and allows racism to endure. Race and whiteness continue to play an influential role . . . in environmental issues.
>
> CRT additionally positions racism as still having certain forms of ideological space within ''traditional liberal civil rights discourse'' (Tate, 1997, p. 203) and among left-leaning political players. Social progressivism and the judicial system are not likely to enact social change, as they are part of the problem (Tate, 1997). In this regard, racism and whiteness are not just performed by stereotypical southern poor whites, but by white collar, Democratic, liberal ''nonracist'' whites (Delgado &

(UCC) Commission for Racial Justice, Benjamin Chavis, in campaigning against hazardous waste in Warren County, North Carolina. Chavis defined the term as "racial discrimination in environmental policy making, the enforcement of regulations and laws, the deliberate targeting of communities of color for toxic waste facilities, the official sanctioning of the life-threatening presence of poisons and pollutants in our communities, and the history of excluding people of color from leadership of the ecology movements." Paul Mohai, David Pellow, & Timmons J. Roberts, *Environmental Justice*, 34 ANN. REV. OF ENV'T & RES. 405, 406–407 (2009).

72. *See generally* Laura Pulido, *Geographies of Race and Ethnicity 1: White Supremacy vs. White Privilege in Environmental Racism Research*, 39 PROGRESS IN HUM. GEOGRAPHY 809 (2015).

73. *See* Laura Pulido, *Geographies of Race and Ethnicity II: Environmental Racism, Racial Capitalism and State-Sanctioned Violence*, 41 PROGRESS IN HUM. GEOGRAPHY 524 (2017). *See also* Gonzalez, *Climate Change, Race, and Migration*, *supra* note 68.

74. *See* Laura Pulido, Tianna Bruno, Cristina Faiver-Serna & Cassandra Galentine, *Environmental Deregulation, Spectacular Racism, and White Nationalism in the Trump Era*, 109 ANNALS OF THE AMERICAN ASS'N OF GEOGRAPHERS 520, 520 (2019).

75. Elizabeth Dickinson, *Addressing Environmental Racism Through Storytelling: Toward an Environmental Justice Narrative Framework*, 5 COMMC'N, CULTURE & CRITIQUE 57 (2012).

> Stefancic, 2001; Tate, 1997). CRT writers wish to expose this contradiction and the invisibility of whiteness.[76]

Since CRT has had limited engagement with climate justice as a scholarly movement, this Article seeks to continue building CRT scholarship in this increasingly urgent area of racial injustice. Accordingly, in addition to my CRT-style storytelling with *Movers* at the beginning of this Article, my critique adopts a CRT lens that is informed by the seminal work of CRT scholars, the literature on environmental racism, and the critical legal scholarship on climate change noted above. While CRT provides a range of critical tools and modes of analysis, from intersectionality analyses to critiques of liberalism, my critique will focus on analyzing the above jurisprudence with regard to white privilege as a form of racism.

B. Conceptualizing Judicial White Privilege

As white privilege is a contentious and controversial concept, it is necessary to unpack some of these disputes before adopting a white privilege analysis to inform this critique. This Article owes a great intellectual debt to CRT scholar Khiara Bridges, whose work grappling with the implications of these contentions is exceptional among progressive race scholars.

As Bridges notes, the most influential conceptualization of white privilege comes from Peggy McIntosh's seminal essay *White Privilege: Unpacking the Invisible Knapsack*, where white privilege is defined as:

> [A]n invisible package of unearned assets which . . . can . . . [be] [cashed]in each day . . . White privilege is like an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools and blank checks.[77]

CRT scholars also emphasize this general understanding of white privilege—that it confers benefits to white people at the expense of Black, Indigenous, and people of color. For example, Devon Carbado and Mitu Gulati

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76. *Dickinson, supra* note 75*,* at 59 (citing: KIMBERLÉ CRENSHAW, NEIL GOTANDA, GARY PELLER & KENDALL THOMAS, CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (1995) (citation omitted); RICHARD DELGADO, CRITICAL RACE THEORY: THE CUTTING EDGE (1995) (citation omitted); William F. Tate IV, *Chapter 4: Critical Race Theory and Education: History, Theory, and Implications*, 22 REVIEW OF RESEARCH IN EDUCATION 195 (1997) (citation omitted); RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (2001) (citation omitted)).

77. Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 778-779 (2019), *quoting* Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, PEACE & FREEDOM, July–Aug. 1989 at 10; *see also* Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 VA. L. REV. 449, 456–62 (2019); *see also* KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER 157-180, 195-214 (2019).

argue that white privilege "is nothing more than a claim about the existence of discrimination."[78]

Furthermore, Cheryl Harris helps to conceptualize white privilege as tangible and intangible "wages of whites," arguing that these wages "are available to all whites regardless of class position, even to those whites who are without power, money, or influence. Whiteness, the characteristic that distinguishes them from Blacks, serves as compensation even to those who lack material wealth."[79] However, while these common formulations of the term emphasize positive outcomes for white people, Bridges posits that white privilege need not always lead to benefits for white people and disadvantages for Black, Indigenous, and people of color. Rather, she notes that "it is not uncommon for white privilege to lead to white disadvantage. In fact, white disadvantage is an expected, one might even say *intentional*, consequence of white privilege."[80]

Other progressive race scholars have pushed back against the concept of white privilege altogether. For example, Zeus Leonardo argues that there is a need to move "beyond the discourse of 'white privilege'" because it narrowly focuses on the benefits that white people receive by virtue of their race and "turns attention away from the oftentimes violent processes that have yielded those benefits."[81] Instead of white privilege, Leonardo argues for a focus on "white supremacy."[82] However, as Bridges points out, this pushback is not about the existence of white privilege, but rather its tendency to misrepresent the realities of racial injustice.[83]

In drawing on Leonardo's insights, Pulido has also expressed reservations about using a white privilege analysis in the context of environmental racism, stating:

> I worry that I have contributed to an over-reliance on the concept to the detriment of other forms of racism, including white supremacy. Though I still believe that white privilege is a powerful force . . . it is not sufficient to explain all forms of environmental racism. Since environmental racism is produced through various means, it should not be surprising that there are multiple forms of racism at work

78. *Id.* at 779, *referring to* Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L. J. 1757, 1777 (2003) (book review).

79. *Id.* at 783, *referring to* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1759 (1993).

80. *Id.* at 785. Here, Bridges draws on the Marxist roots of the term which follow "white privilege is harmful to white people—specifically, the white working class." It is "bourgeois poison aimed primarily at the white workers, utilized as a weapon by the ruling class to subjugate black and white workers," *referring to* Letter from Noel Ignatin to Progressive Labor (Mar. 1967), *in* REVOLUTIONARY YOUTH & THE NEW WORKING CLASS 148, 152 (Carl Davidson ed., 2011).

81. Zeus Leonardo, *The Color of Supremacy: Beyond the Discourse of "White Privilege,"* 36 EDUC. PHIL. & THEORY 137, 137 (2004).

82. *Id.* (elaborating that "discourse on privilege comes with the unfortunate consequence of masking history, obfuscating agents of domination, and removing the actions that make it clear who is doing what to whom. Instead of emphasizing the process of appropriation, the discourse of privilege centers the discussion on the advantages that whites receive.").

83. *Id.* at 781.

> . . . according to Leonardo (2004), . . . dominant racial ideologies and concepts, including white privilege, have essentially eliminated all agents. White privilege highlights the benefits that whites receive while overlooking the process of taking or appropriation, including the taking of land, wages, life, liberty, health, community, and social status.[84]

While I agree with Pulido and Leonardo that common conceptualizations of white privilege can obscure the wider structural processes of "taking" or "appropriation," I argue that this is simply a matter of definition. The term can be expanded by linking the structures and processes of white supremacy, while maintaining the power of white privilege. This will accurately capture the collective mindsets within those structures and processes. White privilege can be used to describe how the harmful decisions of white people need not be driven by particular racial animus or discriminatory intent but are often simply driven by a desire to create the best opportunities for white people and their families, which, in a highly racialized society, reproduces racial inequality.[85]

Therefore, for the purposes of this Article, white privilege refers to the unearned tangible and intangible wages of whiteness that all white people own. These wages typically operate to benefit wealthy white people and possibly disadvantage lower classes of white people, but in any case, they serve to maintain structures and processes of white supremacy to the ultimate detriment of Black, Indigenous, and people of color. I also posit that white privilege must be understood and called out as racism when State institutional power reinforces the formation and fortification of systemic marginalization and subordination of Black, Indigenous, and people of color in a white supremacist society.[86] However, in an attempt to further communicate the structural force of white privilege in the context of climate change-related displacement, I will explicitly refer to and apply here "judicial white privilege" to describe the structures and dynamics surrounding judgments made by predominantly white decision-makers.[87]

C. Critiquing the Racism in Judicial White Privilege

As mentioned above, to find an Art. 6 violation, the Committee needed to have been satisfied that the conduct of the New Zealand courts met the threshold

84. Pulido, *supra* note 72 at 810, 812.

85. *Id.* at 810.

86. Here, I draw on and modify the "prejudice plus power" model popularized by Joseph Barndt, which proposes that two elements are required in order for racism to exist: (1) racial prejudice and (2) the power to codify and enforce this prejudice into society, JOSEPH R. BARNDT, DISMANTLING RACISM: THE CONTINUING CHALLENGE TO WHITE AMERICA 29 (1991).

87. In stating "predominantly white," I acknowledge that while all of the judges in the New Zealand court decisions are white, fourteen of the sixteen members of the Committee majority are white as well. I argue that despite there being two people of color in the majority, being a person of color does not prevent one from perpetuating racism and subscribing to white supremacy and thus it is fair to identify racist white privilege in the majority's decision.

of being clearly arbitrary or having amounted to a manifest error or a denial of justice.[88] In the majority's analysis, they noted how the courts applied the protected person status threshold of "imminence". The court found that Teitiota's claims—including unsafe drinking water, unsuitable crop conditions, housing unsuitability, financial insecurity, and dangers to his and his families' lives—were "firmly in the realm of surmise and conjecture," because "there was no evidence establishing that his situation in the Republic of Kiribati would be so precarious."[89] In supporting these evidentiary findings, the majority also formulated their own conclusions on the evidence to reason that the courts' conduct did not meet the Art. 6 threshold.[90]

However, I argue that their ardent efforts to minimize and dismiss the seriousness of Teitiota's situation is due to their judicial white privilege, which manifested in three main ways.

1. The Legitimization of Two Standards of Dignity

First, their findings on Teitiota's circumstances accept and legitimize low standards of living for Black, Indigenous, and people of color. For example, as Committee member Sancin emphasized in their dissent, the Committee majority clearly ignored the fact that potable water does not equal safe cleaning water and, moreover, that such water can pose real threats to the health of Teitiota's New Zealand born children. In showing their obliviousness to the "tangible wages" of their whiteness, the white decision-makers demonstrate their inability to imagine themselves and their own families in these circumstances, and therefore legitimize these health risks for Teitiota's family and the Black, Indigenous, and people of color they represent. No passage captures the severe obliviousness of these white decision-makers more clearly than the following comments of Justice Wild in the New Zealand Court of Appeal decision:

> Certainly, there was evidence from each of MrTeitiota, Mr Corcoran and Mr Teitiota's wife, that the rise in the level of the Pacific Ocean is adversely affecting homes, crops, coconut palms and freshwater supplies in Kiribati. At high tides and king tides, seawater sometimes comes into coastal homes. Salt water has killed some coconut palms and crops. It has contaminated drinking water drawn from wells. But the Tribunal was right to find that the supplies of food and water for Mr Teitiota and his family would be adequate if they were required to return to Kiribati. The Tribunal readily accepted that the standard of living of the Teitiota family back in Kiribati would compare unfavourably to that it enjoyed in New Zealand. But the Tribunal was, on the evidence it heard, *entitled to find that Mr Teitiota and his*

88. Ioane Teitiota, *supra* note 8, at 9.3.

89. *Id.* at 2.9.

90. *Id.* at 9.8 (finding for example that "the author has not provided sufficient information indicating that the supply of fresh water is inaccessible, insufficient or unsafe so as to produce a reasonably foreseeable threat of a health risk that would impair his right to enjoy a life with dignity or cause his unnatural or premature death").

> *family on return to Kiribati could "resume their prior subsistence life with dignity."*[91]

Here, Justice Wild took note of the multiple pieces of evidence demonstrating that Teitiota would face adverse conditions if deported to Kiribati, but nonetheless made the judgement that the conditions were "adequate" enough for his family to "resume their prior subsistence life with dignity." Justice Wild reached this conclusion even though there was no counter evidence (expert or otherwise) provided supporting the view that conditions for Teitiota and his family would be "adequate."

It is important to call out the significant confidence or entitlement that Justice Wild and the other white decision-makers in the Tribunal (and the Committee majority) possess. They are willing and able to effectively downplay expert evidence and the lived experiences of Teitiota and his wife in favor of their own value judgments.

These value judgments demonstrate how the law can give white decision-makers significant discretion when making decisions that can detrimentally impact Black, Indigenous, and people of color. This discretion can provide them with a safe space to make assessments that are devoid of evidence and substantiation, centered on their own limited opinions and interests. In the present case, this means that the white decision-makers were allowed to side-step evidence, instead focusing on whether they were personally comfortable and satisfied with the living conditions they were willing to impose on Black, Indigenous, and people of color. Their answer is inevitably impacted by the knowledge that they would face no consequences and repercussions for making these value judgements devoid of evidence, and that their families would never be subject to the same realities as Teitiota's family.

Therefore, I argue that the white decision-makers in the *Teitiota* litigation, in deciding to justify the deportation of Teitiota and his family, have legitimized and enforced two standards of dignity—one for themselves and another for Black, Indigenous, and people of color facing climate change-related displacement. In line with the concept of judicial white privilege, the legitimization and enforcement of these different standards serve to further white supremacy on a global scale.

2. Inadequate and Empty Lines of Reasoning

Second, the white decision-makers' judicial white privilege manifested in their inadequate and empty lines of reasoning—namely, setting impossibly high evidentiary thresholds for Teitiota, imposing a strict requirement for violations to

91. Teitiota v. Chief Exec. Ministry Bus. Innovation and Emp. [2014] NZCA 173, at 37 (emphasis added).

be personal, and making an unfounded statement of faith in the international community's willingness and ability to take action.

(a) Setting Impossibly High Thresholds

In their judgments denying Teitiota's claims, it is clear that the white decision-makers in the New Zealand courts and the Committee majority are of the view that current conditions in Kiribati do not warrant any form of protection for refugees. However, it is in realizing the implications of this view that a serious problem arises: if Kiribati is one of the areas in the world most adversely impacted by climate change, and the conditions in Kiribati do not meet this threshold in 2020, it is difficult (if not impossible) to imagine a situation that would. Did Teitiota have to provide evidence showing that he barely survived a flood? Did his wife have to escape a near-death fight with a neighbor over land or food? Did one of his children have to drown or be poisoned from drinking contaminated drinking water—or did all three of them have to? The white decision-makers blatantly avoided commenting on the wider implications of their evidentiary conclusions. However, considering how quickly they pivoted to a very optimistic "wait for international action" approach, one cannot be sure if evidence of any or all of these extreme conditions would have made a difference. In other words, it appears that these white decision-makers were never, under any circumstances, going to find in favor of Teitiota where the thresholds were intentionally applied in a way to make it impossible for him (and any other person seeking protection from climate change-related displacement) to meet. The notion that Teitiota's claim was doomed regardless of the evidence he could provide is further supported by the other two poorly reasoned, if not empty, justifications the decision-makers in the committee majority gave for their decision that are critiqued below.

(b) The Strict Requirement for Personal Violations and the Disposability of Black, Indigenous, and People of Color

One of these justifications is that there can be no "arbitrary deprivation of life" when many other citizens in Kiribati essentially face the same circumstances: violations must be personal.[92] The emptiness of this justification is most effectively elucidated by the analogy Committee member Muhumuza gives in their powerful dissent: "New Zealand's action is more like forcing a drowning person back into a sinking vessel, with the 'justification' that after all there are other voyagers on board."[93]

This analogy also helps one to realize that this justification engages what critical studies scholar Henry Giroux calls the "politics of disposability"—a

92. Ioane Teitiota, *supra* note 8, at 9.6, 9.3.

93. *Id.* at Annex 2, para. 6.

politics in which poor and racially marginalized populations are imagined to offer little value to the world of buying and selling, therefore, becoming "collateral damage in the construction of the neoliberal order."[94] Giroux argues that this "politics of disposability" was revealed most spectacularly by the US government's inaction and incompetence in the wake of Hurricane Katrina, which was deeply rooted in racism.[95] The predominantly white decision-makers perpetuated these politics in their judgments, who, with the tangible and intangible wages of their whiteness, have rendered Teitiota, his family, and all other Black, Indigenous, and people of color facing climate change-related displacement disposable.

(c) Unfounded Faith in the International Community

The other justification given is that the government of Kiribati and the "international community" are well-equipped to fight climate change or at least relocate and protect Teitiota and his family when larger scale relocation is deemed necessary in ten to fifteen years.[96] To justify their faith in the government of Kiribati's capabilities, the Committee majority relied solely on the existence of the 2007 National Adaptation Programme of Action as "adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms."[97]

However, the Committee majority did not mention whether the programme had proven to be successful since it was established. As the dissent by Committee member Sancin makes clear, the programme and various other initiatives by the government had either been unsuccessful or have fallen through[98]—a fact conveniently not addressed by the majority.

More egregiously, the majority provided absolutely no evidence or analysis supporting their statement that the "international community" is and will be willing and able to assist Kiribati "to take affirmative measures to protect and, where necessary, relocate its population" in ten to fifteen years.[99] I argue that this is simply because such evidence does not exist. Rather, the current realities demonstrate that countries are failing in their obligations to reduce their emissions,[100] including New Zealand,[101] and that climate change denialism and

94. HENRY GIROUX, STORMY WEATHER: KATRINA AND THE POLITICS OF DISPOSABILITY 11 (2006).

95. *Id.*

96. Ioane Teitiota*, supra* note 8, at 9.12.

97. *Id.*

98. *Id.* at Annex 1, para. 4.

99. *Id.*

100. Stanley *et al.*, *supra* note 3; Tollefson, *supra* note 3.

101. For example, it was reported in December 2018 that New Zealand is "still falling woefully short of international commitments" made under the Paris Agreement, in which "New Zealand pledged to reduce its emissions 30 percent by 2030 on 2005 levels." Michael Neilson, *'We need to do*

deregulation in the United States is a major barrier to climate action.[102] I posit that the decision-makers were slightly or acutely aware of this reality of inaction and, instead of addressing the inherent human rights violations in this inaction, opted to feign ignorance to avoid the political ramifications of telling this truth.

Some may defend the Committee majority's ruling on the grounds that they understandably did not want to make a major political decision on behalf of New Zealand and other States. However, this CRT critique of their reasoning has illuminated how their judicial white privilege, in being backed by State power, resulted in the detriment of Teitiota and other Black, Indigenous, and people of color facing climate change-related displacement. This is an instance in which these decision-makers have become not only complicit but also key participants in racist climate change inaction.

3. The Hidden Racist Roots of Climate Vulnerability

Third, judicial white privilege manifests in the inability of the predominantly white decision makers to appreciate the racist historical roots of Kiribati's particular vulnerabilities to climate change. These decision makers fail to appreciate that climate change vulnerability is the reason for the continued existence, or even growth, of these racist roots today. Unlike the manifestations outlined above, however, this does not necessarily reflect a glaring omission by the decision makers, as Teitiota's counsel did not raise this point. Rather, this is better understood as a reflection of the inability of current legal frameworks to hold State parties accountable for their racist roots.[103]

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more': New Zealand falling short on international climate change greenhouse gas commitments, THE NEW ZEALAND HERALD, Dec. 19, 2019.

102. *See* Pulido, *supra* note 73, at 520 (arguing that Trump's "spectacular racism," racism characterized by sensational visibility, helps obscure the profound deregulation underway. The white nation plays a critical role here, as Trump uses spectacular racism to nurture his base, consolidate his power, and implement his agenda); *see also* Luis E. Hestres, *Fighting Climate Change Denialism in the United States*, *in* CLIMATE CHANGE DENIAL AND PUBLIC RELATIONS: STRATEGIC COMMUNICATION AND INTEREST GROUPS IN CLIMATE INACTION (Núria Almiron & Jordi Xifra eds., 2019) (noting that "deficiencies in the U.S. public's understanding of climate change are due partly to a well-organized public communication campaign that denies the existence of climate change as a phenomenon, downplays its consequences for the United States and the rest of the world, and dismisses the ability or need for human beings to do anything about it. Driven by an alliance between the fossil fuel industry and conservative ideologues, the purpose of this campaign has been to sow doubt in the collective U.S. mind about the seriousness of the threat that climate change poses to human societies").

103. For example, history-based arguments distinguish "imminent" danger from 'current' "persecution", but also reflect how these histories of colonial racism have been effectively hidden and erased from modern memory. In any case, even if this history of colonial racism was raised by Teitiota to somehow strengthen his claims for protection, I argue that it is highly likely that any argument drawing on this history would be rejected by both the New Zealand courts and a Committee majority, who would see the racist creation of these vulnerabilities as an unfortunate but ultimately *historical* fact that current administrations of these colonizing nations cannot be held accountable for, as they are considered irrelevant to today's affairs. For example, if Teitiota was to claim persecution on the

The racist processes of colonization have contributed to the creation of the racist roots of climate change in the Pacific Islands, which, in turn, have exacerbated the islands' vulnerabilities to climate change and climate change-related displacement. As mentioned above, McAdam emphasizes that climate change-related displacement is "multi-causal" in being due to both environmental and socioeconomic vulnerabilities.[104] It appears, however, that these vulnerabilities have been incorrectly conceived of as unpreventable and natural realities of the world for which no one party can be held accountable.

This misconception is evident in the Tribunal's brief reference to them:

> . . . it is recognized. . . that broad generalizations about natural disasters and protection regimes mask a more complex reality. The relationship between natural disasters, environmental degradation, and human vulnerability to those disasters and degradation is complex. It is within this complexity that pathways can, in some circumstances, be created into international protection regimes, including Convention-based recognition. . .
>
> First, the reality is that natural disasters do not always occur in democratic states which respect the human rights of the affected population . . . In other words, the provision of post-disaster humanitarian relief may become politicized. . . .
>
> Second, although the work is controversial, increasing attention has been given to the linkage between environmental issues and armed conflict and security.[105]

The Committee majority only mentioned "existing vulnerabilities" in passing to dubiously explain that the Kiribati government was taking adequate action to address them, as noted above.[106]

Sociologists Falzon and Batur provide a historical account of environmental degradation in the Pacific Islands highlighting that their current vulnerability to climate change cannot be characterized as mere happenstance for which no one is to blame:

> Pacific Island Nations, along with regions across what is now termed the "Global South," have faced injustices for centuries. Their current vulnerability and lack of capacity to adapt to climate change on their own is premised on years of rapid resource depletion, oppression, and exploitation under colonialism, and post-colonial political marginalization on the global stage.
>
> Their current prospective or loss of land, cultures, homes, and potentially sovereignty are therefore part of a complex web of interconnected injustices, which diminishes the agency of these nations and their citizens to shape their futures. While the histories of the Pacific Island Nations do not begin with their colonization by the Western world, such colonization is the beginning of the

grounds of race in his refugee status claim (even if against New Zealand as the sending state, not Kiribati as the receiving state, as Justice Priestely noted the Convention requires in the High Court judgment).

104. McAdam, *supra* note 15.

105. Kiribati*,* [2013] NZIPT 800413 at 57-59.

106. Ioane Teitiota, *supra* note 8, at 9.12.

> oppression, marginalization, and exploitation that creates the nations' realities today.[107]

Falzon and Batur also emphasize that these processes were racially driven with regard to this "oppression, marginalization, and exploitation" in the Pacific. They illustrate how colonizers like Milo Calkin, an explorer of the islands in the 1830s, adopted overtly racist narratives of the Pacific Islanders as "dangerous immoral savages" who were sexually predatory, spiritually undeveloped, and living in primitive societies.[108] Colonizers intended these false, racist narratives to justify the need for European intervention to civilize, bring religion, and assert colonial control through imposed impoverishment and exploitation of these Pacific environments for economic gain.[109]

One egregious example of environmental exploitation is the mass extraction of phosphate in the Island of Banaba in Kiribati. British forces mined Banaba heavily from the early 20th century to the 1940s, rendering it decreasingly capable of sustaining both the locals and the growing mining industry.[110] As a result, when Japanese forces took control of the island during World War II, they forcibly moved Banabans to internment camps on other islands in Kiribati, such as Tarawa.[111] After the war, Australian forces took control of Banaba, and the British reinitiated the intensive mining of phosphate, forcefully displacing the Banabans to the island of Rabi in north-eastern Fiji.[112] By the time mining stopped on Banaba in 1979, 90 percent of the surface soil had been removed, effectively destroying the landscape, including sacred water caves.[113]

Banaba in Kiribati and Nauru[114] exemplify how extreme environmental exploitation in the Pacific has led to both environmental and socioeconomic vulnerability to climate change. While it is beyond the scope of this Article, there are many other tales of how racist colonial marginalization and oppression across other Pacific Islands link to their particular socioeconomic vulnerabilities. This includes instances like New Zealand's colonial rule of Samoa, which led to the decision to introduce a flu pandemic to Samoa in 1918, resulting in the deaths of

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107. Falzon and Batur, *supra* note 69, at 402.

108. *Id.*

109. *Id.* at 404.

110. *Id.*

111. *Id.*

112. *Id.* (noting the devastating impact of forced relocation on the Banabans, "[t]hough the island of Rabi seemed similar enough to Banaba in the eyes of the British, Banabans had to develop entirely new ways of sustaining themselves and coping with their losses. This forced move, in addition to negatively impacting the island of Rabi, was accompanied by the destruction of the peoples' sustainable lifestyle because of their unfamiliarity with this new environment.").

113. *Id.* (citing Julia B. Edwards, *Phosphate and forced relocation: An assessment of the resettlement of the Banabans to Northern Fiji in 1945*, 4 THE JOURNAL OF IMPERIAL AND COMMONWEALTH HISTORY, 783 (2013)).

114. *See generally* Antony Anghie, "*The Heart of my Home": Colonialism, Environmental Damage, and the Nauru Case*, 34 HARV. INT'L. L. J. 445 (1993).

20 percent of the population.[115] New Zealand also exploited Fiji through the Colonial Sugar Refining Company,[116] and, of course, blackbirding slavery. Two other examples include French Polynesia and New Caledonia which the British, Australia, and other colonizing nations similarly exploited.[117]

Given the degree to which these histories have been obscured, a degree of leniency might be shown to the predominantly white decision makers, who—true to their judicial white privilege—do not show even the slightest awareness of the fact that Kiribati's current climate vulnerability is due to the racist processes of colonization.

4. Where to Go from Here? Confronting the Tension in Climate Justice Discourse in the Pacific

What should follow from this Article's examination of the racism present in climate change-related displacement law? First and foremost, this Article aims to honor and serve the aspirations of the communities at the forefront of racial injustice in the spirit of CRT.

Pacific Island peoples are not a monolithic group. There is a diverse range of aspirations among Pacific Island peoples, reflecting the rich diversity of identities and experiences within both the region and the wider diaspora. Some of these aspirations can be in conflict, or at least in tension, with each other. Such is the case with legal responses to climate change-related displacement.

On one hand, there are the aspirations of Pacific Island peoples like Ioane Teitiota and others who have unsuccessfully sought legal protection from climate change-related displacement and fought for the requisite major legal developments.[118] On the other, there are Pacific Island governments and other advocates who have made clear their aspirations to resist "hopeless" displacement narratives, summarized as follows:

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115. *See generally* Ministry for Culture and Heritage, *Influenza in Samoa*, NZ HISTORY, https://nzhistory.govt.nz/culture/1918-influenza-pandemic/samoa.

116. *See generally* Bruce Knapman, *Capitalism's economic impact in colonial Fiji. 1874–1939: Development or underdevelopment*, 20 THE JOURNAL OF PACIFIC HISTORY 66 (1985).

117. *See generally* GERALD HORNE, THE WHITE PACIFIC: US IMPERIALISM AND BLACK SLAVERY IN THE SOUTH SEAS AFTER THE CIVIL WAR (2007); Merze Tate & Fidele Foy, *Slavery and Racism in South Pacific Annexations*, 50 THE JOURNAL OF NEGRO HISTORY 1 (1965). For another revelatory account of colonial environmental degradation as racist processes outside of the Pacific, *see* Nancy Tuana, *Climate Apartheid: The Forgetting of Race in the Anthropocene*, 7 CRITICAL PHILOSOPHY OF RACE 1,1 (2019) (arguing that "[d]ifferential impacts of climate change, while an important dimension, is ultimately inadequate to understanding and responding to both climate justice and environmental racism" by examining "three instances of the intermingling of racism and environmental exploitation: climate adaptation practices in Lagos, Nigeria; the enmeshment of race and coal mining in the post–Civil War United States; and the infusing of precarity and rainforest destruction in Brazil.").

118. *See* Laura Walters, *NZ plans for inevitable climate-related migration*, NEWSHUB, Apr. 24, 2019, https://www.newsroom.co.nz/2019/04/24/548955/nz-planning-for-inevitable-climate-related-migration (reporting that 11 claims for protection have been made in New Zealand since 2011).

1. To continue living in their home countries with dignity, in safety and prosperity for as long as possible by adapting to the impacts of climate change;[119]
2. To prevent the international community from escaping their obligations/commitments to reduce greenhouse emissions by offering relocation through large scale migration options as the sole solution to climate change;[120] and
3. To ensure that any migration efforts should be the last resort and take place in a planned and coordinated way that honors the resilience and strength of Pacific peoples.[121][122]

These aspirations are, in large part, a product of the harm perpetuated by several non-Pacific Western contributions to climate justice discourse, which include sensationalist narratives of "sinking islands" and "tragic victims,"[123] calls

119. Carol Farbotko, *Voluntary Immobility: Indigenous Voices in the Pacific*, 57 FORCED MIGRATION REVIEW 81, 81 (2018) (noting that "[i]ndigenous people of the Pacific are increasingly expressing a preference to stay on their lands for cultural and spiritual reasons, even in the face of significant deterioration in health and livelihoods associated with climate change. In some cases, they say that they are prepared to die there rather than relocate."); Karen E McNamara, Robin Bronen, Nishara Fernando and Silja Klepp, *The Complex Decision-Making of Climate-Induced Relocation: Adaptation and Loss and Damage* 18 CLIMATE POLICY 111, 115 (2018) (On the need to adapt rather than migrate: "As indicated by the I-Kiribati again and again, they do not want to become refugees, but want to actively decide their destiny and participate in the development of both adaptation and migration strategies.").

120. For example, in September 2017, Pacific climate justice activist group, the Pacific Climate Warriors, released "The Pacific Climate Warriors Declaration on Climate Change" ahead of COP 23, which called on the world to "1. End the era of fossil fuels and move to 100% renewable energy, 2. Kick the big polluters out of the climate talks, 3. Support the immediate delivery of finance needed for countries already facing irreversible loss and damage; 4. Do what is needed to limit warming to 1.5°C." *See* Pacific Climate Warriors, *The Pacific Climate Warriors Declaration on Climate Change*, 350 PACIFIC, https://act.350.org/act/pcw-declaration/haveyoursei.org.

121. Karen E. McNamara and Helene Jacot Des Combes, *Planning for Community Relocations due to Climate Change in Fiji*, 6 INT'L J. DISASTER RISK SCI. 315, 317 (2015) ("As an option of last resort, this position was made clear in an interview with a climate change policy officer, speaking on behalf of the Climate Change Division of the Fiji Government: ''When it comes to relocation it's the last resort for us; we want to be able to do it in a way that is very, very holistic; it's not about moving houses, it's about moving lives.").

122. Rive, *supra* note 17, at 221.

123. Carol Farbotko, *Tuvalu and Climate Change: Constructions of Environmental Displacement in the Sydney Morning Herald*, 87 GEOGR. ANN. 279, 289 (2005) (arguing that "the construction of Tuvaluans as tragic victims through a hierarchical island/mainland alterity is problematic in the way it presents a particular perspective of Tuvalu, through a lens of vulnerability"); Tanja Dreher & Michelle Voyer, *Climate Refugees or Migrants? Contesting Media Frames on Climate Justice in the Pacific*, 9 ENVIRONMENTAL COMMUNICATION 58 (2015) (positing that the "rare coverage of climate justice issues often focuses on Small Island Developing States (SIDS) such as Kiribati and commonly makes use of four main media frames: SIDS as "proof" of climate change, SIDS as "victims" of climate change, SIDS communities as climate "refugees," and SIDS as travel destinations. Yet, these frames undermine the desire of SIDS communities to be seen as proactive, self-determining, and active agents of change").

for an international treaty on climate change relocation,[124] and even proposals for citizenship in exchange for resources.[125]

The crux of this complex tension in the current climate justice discourse for the Pacific is that by addressing these claims of climate change-related displacement, one runs the real risk of conveying that displacement is inevitable and efforts towards mitigation and adaptation are futile. Teall Crossen aptly captures this tension as follows:

> Discussing how to provide for people at risk of climate-induced displacement provides an excuse to continue to pollute the global atmosphere; it privileges polluting countries and entrenches unequal global power dynamics. Arguably, you can reduce emissions and plan for protecting the climate dispossessed at the same time, but planning for the worst-case scenario fundamentally changes your attitude. It says you have given up. If your house is threatened by fire, you don't start looking for a new home, you stay and fight to put the fire out. . . .
> To be sure, there is also danger in not planning for all eventualities. If your house is already burning, and it's clear that it can't be saved from the flames, you are going to need somewhere else to live. Looking sooner, rather than later, might improve your chances of securing a viable new home. President Tong took that approach by seeking support from the international community to allow the people of Kiribati to migrate with dignity, rather than as climate refugees. . . .[126]

McAdam also emphasizes the danger of not planning for climate change-related displacement, arguing that because this climate phenomenon is happening now, planning and policy development for this displacement needs to happen concurrently:

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124. *See* Frank Biermann & Ingrid Boas, *Preparing for a Warmer World: Towards a Global Governance System to Protect Climate Refugees*, Global Governance Working Paper No. 33 (Nov. 2007), subsequently published as 10 GLOBAL ENVIRONMENTAL POLITICS 60 (2010); Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVT. L. REV. 349 (2009); Draft Convention on the International Status of Environmentally-Displaced Persons (CRIDEAU and CRDP, Faculty of Law and Economic Science, University of Limoges), 4 REVUE EUROPÉENE DE DROIT DE L'ENVIRONNEMENT 375 (2008). *See also* Jane McAdam, Swimming against the Tide: *Why a Climate Change Treaty Is Not the Answer*, 23 INT'L J. REFUGEE L. 2, 4 (2011) (McAdam provides a robust case against international climate migration treaty proposals, questioning "the utility – and, importantly, the policy consequences – of pinning 'solutions' to climate change-related displacement on a multilateral instrument, in light of the likely nature of movement, the desires of affected communities, and the fact that a treaty will not, without wide ratification and implementation, 'solve' the humanitarian issue.").

125. *See* Gonzalez, *Climate Change, Race, and Migration*, *supra* note 68, 127 (arguing that these approaches to climate justice "advance the racist ideologies that justify carbon capitalism by casting the North as superior and civilized while invoking the specter of disorderly, disruptive, dark-skinned migrants who threaten Northern borders" and "suggest that the future of white supremacy depends on its ability to manage and contain the teeming masses from the South that climate change threatens to unleash."); *Marshall Islands rules out relocation in climate fight*, RADIO NEW ZEALAND (Mar. 4 2019) ("Marshall Islands president Hilda Heine says her government won't consider relocating its citizens in response to climate change. Former Australian Prime Minister Kevin Rudd sparked outrage last month when he suggested Australia offer citizenship to small Pacific nations in exchange for control of their seas.")

126. CROSSEN, *supra* note 3, 109-10.

> Often people think about climate change-related displacement as something we need to maybe be thinking about at some point in the future, whereas we need to be addressing it now—to be thinking about it, understanding it, and putting in place sensible policies so that we can avert some displacement where possible but also manage it where it does occur.[127]

Crossen addresses the tension as follows:

> Right now, however, the focus of the Pacific, the countries most at risk, is calling for the global community to rapidly reduce their climate pollution and provide financial support for adaptation, as well as for loss and damage, to enable Pacific countries to build resilience and avert displacement. A just response to climate change means we should stop stealing from the Pacific. We should be doing everything we can to avoid climate change dispossessing people from their island nations.
>
> If we are forced to confront the reality of cross-border displacement in our region, however, our approach needs to be firmly grounded in international legal principles recognising the sovereign equality of all states and responsibility for the damage we have contributed to. We need to be brave enough to address the compensation owing. We can start by increasing our investment in Pacific resilience. And if asked to by the Pacific, we should be allies in developing new legal norms for the protection of the climate dispossessed in a meaningful way.[128]

Crossen's analysis clarifies that anyone arguing that the Committee and courts of New Zealand must decide claims similar to Teitiota's differently would actually be asking these institutions to dramatically develop law in climate change-related displacement without the support of Pacific Island governments. This would not only create a precedent that Pacific Island governments would likely reject and oppose, it would also result in the undermining of their sovereignty within UN fora.

Therefore, this Article does not advocate for the *Teitiota* precedent to be overruled by the Committee and courts of New Zealand.

However, this position does not mean to criticize or condemn Teitiota and other Pacific Island people seeking protection from climate change-related displacement. Nor does it mean to say that these claims are not genuine, unworthy of intervention, or that climate change-displacement is not happening now—it clearly is. It certainly does not say that Teitiota was rightfully deported by New Zealand or that it was appropriate for him to be subject to the racist white privilege that the courts and Committee majority exhibited.

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127. Jane McAdam, *Climate Change Displacement Is Happening Now*, DISPLACED SEASON 2 (Ravi Gurumurthy and Grant Gordon, Mar. 19, 2019), https://www.rescue.org/displaced-season-2/climate-change-climate-change-displacement-happening-now.

128. CROSSEN, *supra* note 3, at 110-11.

Rather, this position argues that the legal and political implications of having these claims succeed are significant and far-reaching for many Pacific Island peoples, both present and future. Therefore, the answer to climate justice for Pacific nations is not litigation that only considers particular circumstances and considerations (at least, not at this moment).

For racial justice advocates and scholars, this means looking to Pacific Island governments and other Pacific Island climate justice advocates to see if, what, when, and how any laws and policies around climate change-related displacement should be implemented. It also means simply supporting their calls for States to take action through fulfilling their obligations to reduce emissions and supporting adaptation measures of climate resilience.

Nevertheless, one question remains—what are the implications of examining the racist white privilege in climate change law?

This CRT critique demonstrates not only that a racial justice lens on climate change in the Pacific is possible, but also that it has the potential to inform calls for stronger mitigation and adaptation support measures in both international and domestic contexts.

Therefore, in looking beyond litigation-focused measures for ways forward, the next part of this Article explores how a racial justice framing of climate change in the Pacific might be achieved.

IV. TOWARDS RACIAL JUSTICE FOR PEOPLE OF COLOR FACING CLIMATE CHANGE-RELATED DISPLACEMENT

A. Framing Climate Justice as a Racial Justice Issue

1. Previous Framings of Climate Justice as a Racial Justice Issue

It is important to note that social justice advocacy groups have already attempted to frame climate justice as a racial justice issue. For example, on September 6, 2016, nine Black Lives Matter UK (BLMUK) activists chained themselves together on a runway of London City Airport, holding a sign that read "Climate Crisis is a Racist Crisis."[129] The protest was to "highlight the environmental impact of air travel on the lives of black people locally and globally."[130] Although these BLMUK activists were successful in gaining media attention after effectively grounding airplanes and passengers at the airport,[131] the aftermath exposed the dynamics of white privilege that takes place in climate

129. Matthew Weaver & Jamie Grierson, *Black Lives Matter protest stops flights at London City airport*, THE GUARDIAN (Sept. 6, 2016), https://www.theguardian.com/uk-news/2016/sep/06/black-lives-matter-protesters-occupy-london-city-airport-runway.

130. *Id.*

131. *Id.*

justice activism, and the white privilege of white judges in responding to such activism. This was aptly described by Thompson:

> [The protesters] were arrested and charged with "obstructing a person engaged in lawful activity," to which they all pled guilty. Nevertheless, all were granted a "conditional discharge" and faced no immediate punishment for their actions.
>
> Eight of the nine protesters were white, all were relatively middle-class, and most had already engaged in direct actions for issues related to climate change, extractive industries, and/or fair wages. A few had prior convictions. District Judge Elizabeth Roscoe scolded the group for the disruption of air traffic flow, and for the seriousness of trespassing in a secure and bounded landscape, such as an airport tarmac. But she also reframed their actions as sincere and well-intentioned. As she handed down sentences that effectively protected and upheld white sincerity and benevolence, Judge Roscoe explained that she did not see the links among Black Lives Matter (a movement she attributes only to the United States), an airport in London, and climate change.
>
> While they set out to argue that "the climate crisis is a racist crisis," their identities and actions are historically bound to white paternalism and patronage: the sense that "nature" belongs to, and thus needs to be protected by, the white middle-class, or to practices that manage to supplant voices of the very people they purport to defend.[132]

In addition to perpetuating "white paternalism and patronage," Anupama Ranawana and James Trafford also point out that these climate activist tactics also systematically "exclude migrants and racialized or working-class people by putting them in differentially precarious relationships to state violence" which "suggests a bewildering short-sightedness regarding the fact that arrest for people from the Global South could mean deportation."[133]

In thinking about how a racial justice framing might be adopted in future advocacy and litigation efforts, it is clear that "white paternalism and patronage" needs to be actively avoided. In 2020, following the resurgence of Black Lives Matter (BLM) protests around the world in response to the killing of George Floyd by Minneapolis police on May 25, 2020, there was an increase in public discourse around the relationship between climate change and racism. For example, climate justice advocacy groups like 350.org stood in solidarity with the BLM movement. 350.org North America director Tamara Toles O'Laughlin stated:

> There is no climate justice without a racial analysis. At 350.org, we know that the work of dismantling white supremacy is essential to building a climate movement that matters and stands any chance of winning . . . . Decades of environmental

132. Thompson, *supra* note 1, at 92–93.

133. Ranawana and Trafford note this specifically about the environmentalist group Extinction Rebellion, which adopts similar tactics that aim to raise awareness through protests that involve members being arrested and imprisoned. Anupama Ranawana & James Trafford, *Imperialist Environmentalism and Decolonial Struggle*, DISCOVER SOCIETY (Aug. 7, 2019), https://archive.discoversociety.org/2019/08/07/imperialist-environmentalism-and-decolonial-struggle/.

> justice activism has shown that communities facing racist violence and over-policing are also overrun by fossil fuel extraction, pollution, and every manner of related health disparities . . . . Our fight for climate justice must necessarily include challenging the systems of racism that protect profits for the wealthy few and destroys Black Lives.[134]

There were also powerful calls from both BLM and climate justice movements to acknowledge that climate justice must mean fighting for racial justice.[135]

However, beyond this, it appears that climate justice has not been explored further as a racial justice issue. This is not to criticize any current approaches to climate justice advocacy by groups like 350.org, including the Pacific Island section of the group, the Pacific Climate Warriors,[136] whose peaceful, non-violent approaches have garnered attention and praise.[137] Rather, one potential reason for

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134. Press Release, 350.org, 350.org in Solidarity with the Movement for Black Lives; Reinforces Commitment to Dismantle White Supremacy, (June 1, 2020), https://350.org/press-release/solidarity-m4bl/.

135. *See* Mary Annaïse Heglar, *We Don't Have To Halt Climate Action To Fight Racism,* HUFFINGTON POST (June 12, 2020), https://www.huffpost.com/entry/climate-crisis-racism-environmenal-justice_n_5ee072b9c5b6b9cbc7699c3d ("Climate change is framed as the issue that threatens 'all of us' and therefore should be everyone's priority. Climate change, the myth goes, is the Great Equalizer. Not only is this approach dismissive and insensitive, the premise is simply untrue. It's been documented again and again that climate change hurts Black people first and worst — both in the United States and globally. Moreover, Black people did the least to create the problem, and our systemic oppression runs directly parallel to the climate crisis."); *Intersectional Environmentalism: Fighting For Climate Justice Means Also Fighting For Racial Justice*, 1 MILLION WOMEN (June 2, 2020), https://www.1millionwomen.com.au/blog/intersectional-environmentalism-fighting-climate-justice-means-fighting-social-justice/.

136. Here, I note that the Warriors have not used a racial justice framing or rhetoric in their activism to date. As stated on their official website, their general approach to activism is as follows:

> Active in 15 of the Pacific Island Nations, we have a unique approach of empowering young people to understand the issue of climate change and to take action to protect and enrich our islands, cultures, and oceans . . . . What we do have is a network of courageous young Pacific Islanders – from Niue to Tuvalu – that . . . are clued up about how climate change is affecting their Islands, and are ready to stand up peacefully to the fossil fuel industry . . . as warriors for their Islands have been learning new skills and campaign tactics to take on the challenge of achieving global action on climate change – the future of our islands depend on it.

350 Pacific, *The Pacific Warrior Journey*, PACIFIC CLIMATE WARRIORS, https://world.350.org/pacificwarriors/the-pacific-warrior-journey/. It has been noted that this presentation of Pacific climate justice activists as warriors is a recent shift in their image:

> [W]hile early Pacific ICT-based climate change campaigns used iconic images of Pacific Islanders leaving their homelands, more recent campaigns have leveraged social media to depict Pacific Islanders not as victims but as 'warriors'. This new imagery aims to empower Pacific Islanders and engender a regional Pacific identity that shows strength and solidarity on the Pacific's stance towards climate change.

Jason Titifanue et al., *Climate Change Advocacy in the Pacific: The Role of Information and Communication Technologie*s, 23 PAC. JOURNALISM REV. 133, 133 (2017).

137. One of the most notable examples of the Warriors' unique approach to activism, was their blockade of the largest coal port in the world located in Newcastle, Australia in October 2014 to

the lack of racial justice framing on climate justice issues may in fact be due to the dearth of scholarship and research to help inform this framing.

In seeking to help fill this gap, the purpose of this part of the Article is to suggest that advocates in activist groups, social movements, the law, and beyond consider a racial justice framing of inaction against climate change. It is hoped that this framing will be able to help change the hearts and minds of law-makers and inspire them to take meaningful action against climate change for Pacific Island peoples, and all Black, Indigenous, and people of color, who suffer disproportionately from climate change's impacts.

2. The Potential Goal of a Racial Justice Framing

It is beyond the scope of this Article to discuss and propose a number of specific end goals for climate justice advocates to pursue with this racial justice framing.[138] However, in this part, I briefly suggest that efforts around climate change litigation should be aimed at holding governments and corporations accountable for their inaction against climate change.

Globally and in international law, climate justice advocates have already framed climate justice as a youth or intergenerational justice issue. Chazan and Baldwin provide the following snapshot of this intergenerational injustice framing and its powerful impact:

> Post 2018, youth leaders are capturing media attention with sophisticated analyses and complex demands. They are calling for deep transformation of global economic systems, away from capitalist-colonial extraction, toward different ways

demand that various companies trading in fossil fuels and greenhouse gas emitting countries take responsibility for their actions and inactions. To do this, the Warriors sailed out in traditional canoes to prevent coal ships entering and leaving the port. Although they were dressed as traditional war-time warriors in their blockade, their activism was strictly peaceful, and they used traditional music, dance, oration, and storytelling rather than force to block the ships. The blockade was considered by *The Guardian* to be the second most important sustainability campaign of 2014 worldwide and was called 'the David versus Goliath campaign of the year', Karen E. McNamara & Carol Farbotko, *Resisting a 'Doomed' Fate: An Analysis of the Pacific Climate Warrior*s, 48 AUSTL. GEOGRAPHER 17, 22–23 (2017) (citing Frances Buckingham, *Top 10 Sustainability Campaigns of 2014*, THE GUARDIAN, (Dec. 24, 2014)). More recently, the Warriors demonstrated their youth and Pacific culture centered approach at the 23rd Annual Conference of the Parties to the United Nations Framework Convention on Climate Change in November 2017, which Fiji presided over. Not only did the Warriors contribute to the conference with various performances and side events, they also announced their demands for action with the Pacific Climate Change Warriors Declaration noted above. Pacific Climate Warriors*, supra* note 120; Oliver Hasenkamp & Elisabeth Worliczek*, COP23: A "Pacific COP" with "Islandised" Outcomes?*, 49 PAC. GEOGRAPHIES 12, 15, 18 (2018).

138. However, it is important to note one potential goal from Gonzalez who argues for a "just approach to climate displacement" that "should respect the perspectives and priorities of states and peoples who face actual or imminent displacement, including their demands for self-determination with respect to migration pathways and for resources to support their mobility decisions", see Gonzalez, *supra* note 68, 127-131. While it is beyond the scope of this article to engage with Gonzalez's proposals here, I posit that this approach is consistent with the aspirations of Pacific Island governments and other Pacific Island climate justice advocates mentioned above.

> of organizing societies, economies, and lives. . . . Ultimately, they are demanding intergenerational justice: calling on older generations, particularly those who have reaped the benefits of wealth accumulation and technological advancement over their lifetimes and who now hold the balance of global power, to radically change their actions, beliefs, and lifestyles now in order to prevent the mass suffering and extinction of generations to come . . . . While these youth leaders are truly remarkable, dominant media representations of youth-led climate justice uprisings depict them as lone revolutionaries within a global movement replete with generational divisions . . . .[139]

This framing has led to a number of legal actions that youth climate justice advocates have taken in international law fora.

The first one being the petition filed by sixteen children—from Tunisia, India, Palau, Argentina, Marshall Islands, Brazil, Nigeria, France, Germany, the United States, as well as the Pacific Island nation of the Marshall Islands—on September 23, 2019 to the Committee on the Rights of the Child.[140] The petition alleged that the five respondents, Argentina, Brazil, France, Germany, and Turkey, violated their rights as children under the Convention on the Rights of the Child by failing to make sufficient reductions to greenhouse gases and failing to encourage the world's biggest emitters to curb carbon pollution.[141] The rights violations claimed included violations of the right to life, health, and the prioritization of the child's best interest, as well as the cultural rights of petitioners from Indigenous communities.[142] In terms of relief, the petition asks the Committee to declare not only that the five respondents violated their rights under the Convention, but also that the "climate crisis is a children's rights crisis" and to recommend actions for the respondents regarding climate change mitigation and adaptation.[143]

In response to the petition, Brazil, France, and Germany argued that the petition was not admissible on three grounds: (1) the Committee lacks jurisdiction; (2) the petition is manifestly "ill-founded or unsubstantiated"; and

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139. May Chazan & Melissa Baldwin, *Granny Solidarity: Understanding Age and Generational Dynamics in Climate Justice Movements*, 13 STUDIES IN SOC. JUST. 244, 245 (2019). In addition to this insight, a descriptive framing analysis has found:

> Thunberg mainly identifies climate change through a crisis frame which entails an idea that there is an inherent political and moral issue in our current political and social system. Moreover, Thunberg has also framed her cause as a need for opinion, engagement as well as established a conflict between those in power and people with less influential authority.

Sofia Murray, Framing a Climate Crisis: A Descriptive Framing Analysis of How Greta Thunberg Inspired the Masses to Take to the Streets, 33 (2020) (Independent Bachelor Thesis, Uppsala University).

140. *Sacchi, et al. v. Argentina, et al.*, Communication No. 104/2019, Communication to the Committee on the Rights of the Child, 1 (U.N. Convention on the Rights of the Child, Sept. 23, 2019).

141. *Id*.

142. *Id.* at 27–30.

143. *Id.* at 7–8.

(3) the petitioners have not exhausted domestic remedies.[144] On May 4, 2020, the petitioners filed a reply asserting that the petition is admissible on three grounds: (1) the Committee has jurisdiction as the children are "directly and foreseeably injured by greenhouse gas emissions originating in Respondents' territory"; (2) their claims are "manifestly well-founded" as they are "suffering direct and personal harms now and will continue to for the foreseeable future"; and (3) pursuing domestic remedies would be "futile".[145]

Another action seeking to frame climate justice as a youth justice or children's rights issue is the complaint filed by six Portuguese youths on September 2, 2020 against thirty-three European Union member states to the European Court of Human Rights.[146] The complaint alleges that the respondents have violated their human rights under the European Convention on Human Rights by failing to take sufficient action on climate change, and seeks an order requiring them to take more ambitious actions.[147]

At the time of writing, both the Committee's and the European Court's decisions have yet to be released, which means the effectiveness or persuasiveness of the youth or intergenerational justice framing in international fora cannot yet be examined. However, given the significant work that climate justice advocates around the world have put into framing climate justice as a youth justice or children's rights issue, and the extensive research and support that have been behind these claims,[148] I posit that there is a strong chance that these decisions will result in at least one favorable finding for climate justice advocates.

Nonetheless, I argue that a racial justice framing and a racial discrimination complaint or communication in international fora such as the Committee on the Elimination of Racial Discrimination should still be considered. This is because a youth justice or children's rights framing will not necessarily serve the Black, Indigenous, and people of color who disproportionately suffer from climate change.[149] In other words, the particular needs and priorities of Black, Indigenous,

144. Commc'ns n 105/2019 (Braz.), n 106/2019 (Fr.), n 107/2019 (Ger.) (unpublished). The arguments are summarized in *Sacchi v. Arg.*, Petitioners' Reply to the Admissibility Objections of Braz., Fr., and Ger., Commc'n to the Comm. on the Rts. of the Child (May. 4, 2020), 2.

145. *Id.* at 3.

146. *Duarte Agostinho and Others v. Portugal and 32 Other States*, Eur. Ct. H.R. (filed Sept. 2, 2020).

147. *Id.* at 8-10.

148. Here, I note that the legal representation and support for the *Sacchi v. Arg.* petition comes from Hausfeld LLP (US), Hausfeld (UK) and Earthjustice.

149. It has been noted that the youth climate justice movement has largely ignored and marginalized activists of color, Chika Unigwe, *It's Not Just Greta Thunberg: Why Are We Ignoring the Developing World's Inspiring Activists?*, THE GUARDIAN (Oct. 5, 2019), https://www.theguardian.com/commentisfree/2019/oct/05/greta-thunberg-developing-world-activists ("[W]hile we continue to work towards that goal, the moral thing for western media to do is to also highlight the contributions of the black and brown saviours trying to make that happen so that when future generations talk of it, this will not be the story of a single narrative"). Furthermore, it has been observed that "by the media and public making [Thunberg] the center of youth-led climate activism, the work of many Indigenous, Black, and Brown youth activists is often erased or obscured", Nylah

and peoples of color, such as the urgent climate adaptation needs for Pacific Island peoples, could potentially be obscured or undermined in favor of more general demands that will serve children and young people globally.

I argue that a racial justice framing and a racial discrimination complaint will allow decision makers in international fora to reckon with the racist colonial histories and ongoing forces of racism that this Article has touched on. Undeniably, as the robustly researched aforementioned petition and complaint make clear, detailed legal research is required to support these claims.

Unfortunately, it is beyond the scope of this Article to conduct this research, develop this racial discrimination claim, and discuss the likelihood of this claim succeeding in international fora. However, in noting from the youth climate justice movement that advocacy in the media should precede any legal action, the next section proposes a plan to frame climate justice as a racial justice issue.

B. A Communications Plan

To guide this framing, I suggest following the advice in the Communications Toolkit produced by the social justice communications organization, The Opportunity Agenda.[150] The Toolkit is an evidence-based guide to help social justice advocates build communications strategies capable of moving "hearts, minds, and policy over time."[151]

The Toolkit recommends the following seven steps for devising a communications strategy: (1) Determine organizational goals; (2) Determine communications goals; (3) Research; (4) Framing, narrative, and message development; (5) Create an outreach strategy; (6) Integrate and implement; and (7) Implement and evaluate.[152]

While it is beyond the scope of this Article to develop the communications strategy in the depth required,[153] for step (1), the broad purpose of this plan is to persuade an international decision making body, such as the Committee on the Elimination for Racial Discrimination or the Human Rights Committee, to find that inadequate action against climate change constitutes racial discrimination under international law.

For step (2), I propose the primary target audience for this strategy to be the persuadable demographic of decision-makers in international fora, which I

Burton, *Meet the Young Activists of Color Who Are Leading the Charge Against Climate Disaster*, VOX (Oct. 11, 2019).

150. THE OPPORTUNITY AGENDA, VISION, VALUES, AND VOICE: COMMUNICATIONS TOOLKIT 2.0, 2 (2014), https://www.opportunityagenda.org/sites/default/files/2019-05/2019.05.06%20Toolkit%20Without%20Comic%20Book.pdf.

151. *Id.*

152. *Id.* at 6–8.

153. It is beyond the constraints of this Article to explore the practical steps (6) and (7), especially given no opportunity for input from the Warriors and other interested activists.

broadly assume to be people who see climate change and racism as serious issues worth addressing, but do not necessarily understand their relationship to each other.

With regard to step (3), it is not possible in this Article to conduct the required public opinion, media, and field research required.[154]

Accordingly, the central contribution of this Article is to propose an approach to step (4) around framing, narrative, and message development[155] for the Warriors and other potentially interested climate justice advocates to take in consideration. As Lakoff explains, when the current framing of an issue is not fit for purpose, there needs to be an honest "reframing" of the issue:

> Reframing is telling the truth as we see it—telling it forcefully, straightforwardly, articulately, with moral conviction and without hesitation . . . . It is not just a matter of words, though the right words do help evoke a progressive frame: . . . Reframing requires a rewiring of the brain. That may take an investment of time, effort, and money. The conservatives have realized that . . . . Moral: The truth alone will not set you free. It has to be framed correctly.[156]

For step (5), I propose a dual communications strategy to reframing that includes: (1) targeted media communications by activists that emphasizes the racism in inaction regarding change related displacement; and (2) developing legal scholarship on this racism by activist legal scholars to present a robust body of legal authority to the target audience (which the key decision-makers are likely to belong to) that they cannot ignore and dismiss as illegitimate. While the first part is aimed at changing their hearts, the second is more geared towards changing their minds.

Unfortunately, without proper media research[157] and any communications and creative expertise,[158] it is beyond the scope of this Article to propose what the first part of this reframing strategy will involve. However, it is possible and

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154. THE OPPORTUNITY AGENDA, *supra* note 150, at 6.

155. *Id.* at 14 (defining "framing" as "the identification of a set of values and themes within which we will present our issue. Because there are usually many ways to think about and talk about each issue we work on, it's important to be strategic in the way we present our story to audiences."; defining "narrative" as "the set of frames we use to tell the story of a specific issue. By identifying overarching key themes and values we want our audiences to identify with an issue, we can help to ensure a level of resonance and consistency that won't happen if we frame each sub-issue independently of a larger theme.").

156. George Lakoff, *Simple Framing* (2006), https://tmiller.faculty.arizona.edu/sites/tmiller.faculty.arizona.edu/files/Simple%20Framing_0.doc.

157. THE OPPORTUNITY AGENDA, *supra* note 150, at 6 ("Media research is an important component in this step. Regular media monitoring and analysis show trends over time in coverage and conversations and can also show how and if your strategy is working. It may also help to identify reporters and commentators who can help to convey your message.").

158. *Id.* at 23. Here, the Toolkit explains that "the fields of advocacy and art can and should work for even more intentional alignment and alliances. Socially engaged artists, media makers, and cultural organizations play a vital role in building the national will for equal and greater opportunity."

important to explain the second part of this dual strategy, as it may initially appear to be unorthodox, if not inappropriate, for climate justice advocates to adopt.

This proposal to develop legal scholarship on the racism in climate change inaction is inspired by a key tactic of a movement that has achieved success: the movement led by the National Rifle Association (NRA). That movement, although on the other side of the political spectrum, resulted in the law providing an unfettered right of individual gun ownership in the United States under the Second Amendment.[159] As Michael Waldman argues, in order to pave the road to the US Supreme Court's decision in *District of Columbia v. Heller*,[160] the NRA promoted a "fusillade of scholarship and pseudo-scholarship insisted that the traditional view [of the Second Amendment]—shared by courts and historians—was wrong" and had to be "overturned."[161] Waldman explains how much of this scholarship was poorly written and evidenced, and some of it was downright "funny," but nonetheless, "all this focus on historical research began to have an impact. And eventually these law professors, many toiling at the fringes of respectability, were joined by a few of academia's leading lights."[162]

Of course, the Warriors and other activists do not have the resources and political maneuvering, the NRA possessed to make this "profusion of scholarship" as powerful. However, I argue that a commitment to developing a similar body of scholarship is worth serious consideration by activists for two reasons.

First, while the racial justice reframing of climate change is indeed honest, key decision-makers may actually see it as dishonest and "funny", just like how decision-makers in the US first thought Second Amendment arguments were before the "profusion of scholarship" helped them to believe otherwise.[163] Therefore, to effectively address the robust forces of white privilege and unconscious racism underpinning of the protection deficit, a body of legal scholarship committed to transforming the biased views of the target audience (and therefore decision-makers) will go a long way in building what is a legitimate academic and legal basis for racial discrimination claims to them. It should be noted that this body of scholarship would not be poorly evidenced and "funny" like the one fostered by the NRA on the road to *Heller*, but would instead be dignified, robust, and persuasive.

Secondly, while activists engaging in this reframing may lack resources and political connections, I posit that the potential for radically imaginative

159. Michael Waldman, *The Road to Heller*, LEGAL CHANGE: LESSONS FROM AMERICA'S SOCIAL MOVEMENTS, 53, 53–54 (Jennifer Weiss-Wolf & Jeanine Plant-Chirlin ed., 2015).

160. D.C. v. Heller, 554 U.S. 570 (2008).

161. Waldman, *supra* note 159, at 56.

162. *Id.* at 57. In describing the bi-partisan, cross-party influence of the scholarly movement, Waldman notes that "Levinson was soon joined by Akhil Reed Amar of Yale and Harvard's Laurence Tribe. These prominent progressives had differing opinions on the amendment and its scope. But what mattered was their political provenance — they were liberals! (One is reminded of Robert Frost's definition of a liberal: someone so open-minded he will not take his own side in an argument.)".

163. *Id.* at 56–57.

scholarship designed to serve and empower radical social justice movements is limitless. Here, I draw on the inspiring words of Amnar Akbar, in arguing the power of radically "reimagining" the law as demonstrated by the Vision for Black Lives movement:

> [V]isions of . . . radical social movements offer an alternative epistemology for understanding and addressing structural inequality. By studying not only the critiques offered by radical social movements, but also their visions for transformative change, the edges of law scholarship can be expanded, a deeper set of critiques and a longer set of histories—of colonialism and settler colonialism . . . and a bolder project of transformation forwarded. These visions should push legal scholars toward a broader frame for understanding how law, the market, and the state co-produce intersectional structural inequality . . . . [164]

Therefore, in the spirit of expanding the "edges of legal scholarship," I urge other scholar-activists in CRT, climate justice, and other scholarly movement groups to learn and be inspired by the radical bravery of climate justice advocates on the ground and build on the foundations of this Article in order to "reimagine" and work towards a world where Black, Indigenous, and people of color are able to hold wealthy, high-contributing states accountable for their climate and racial injustices.

V. CONCLUSION

While the decision of the Committee in *Ioane Teitiota v. New Zealand* was celebrated, this Article has adopted a CRT lens to expose the racism perpetuated by the predominantly white decision-makers. With their judicial white privilege, the Committee and the courts legitimized poor living standards for displaced Black, Indigenous, and people of color, provided inadequate and poorly evidenced lines of reasoning to avoid holding majority-white countries accountable for their continued environmental harms, and obscured the racist historical roots of climate vulnerability in Kiribati and the wider Pacific Islands that continue to grow today.

It is tempting with this racial justice framing to immediately pursue racial discrimination claims to overturn the *Teitiota* precedent. However, this Article

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164. Amnar A. Akbar, *Towards a Radical Reimagination of Law*, 93 N.Y.U. L. REV. 405, 405 (2018). As Akbar concludes at 479:

> [The Movement for Black Lives] wants to build another world, organized very differently than the one we have inherited. It is not just deconstructive and critical; it is reconstructive and visionary, pushing for a radical reimagination of the state and the law that serves it. It is here that legal scholars may have the most to learn from, and the most to contribute, if we imagine collaboratively with these movements. As legal scholars, we are too often unwitting volunteers in a project of law reform that addresses racial capitalism's brutal excesses, effectively extending its lifespan. These movements, and the histories they point to, suggest this is a fool's errand. It is time to turn to something new, time for a radical reimagination of the state and of law—time to imagine with social movements.

acknowledges that there is a tension between overturning the *Teitiota* precedent to make major reforms for climate change-related displacement at international law, with the calls from Pacific Islanders to avoid an international focus on displacement narratives and their push for the international community to fulfill their mitigation obligations and support adaptation measures.

In opting to support the latter calls, this Article argues that the insights gained from the CRT critique demonstrates that climate justice advocates should consider pursuing a racial justice framing of climate justice to make racial discrimination claims in international fora that are aimed at persuading states to improve their mitigation and adaptation measures.

Accordingly, this Article draws on social justice communication principles to propose for a racial justice framing of climate justice. This framing involves, but is not limited to: targeted media communication that inspires action by exposing and emphasizing the racism in climate change inaction and developing radically reimaginative legal scholarship that builds on the insights of this Article. Ideally, this framing will help keep stories like *Movers* firmly in the realm of outrageous and baseless fiction.

A Counterintuitive Approach to the Interaction Between Trademarks and Freedom of Expression in the US and Europe: A Two-Way Relationship

Alvaro Fernandez-Mora*[1]

As trademarks have evolved to perform an expressive function, courts and scholars on both sides of the Atlantic have devoted increased attention to elucidating when, and how, marks and speech interact. Three forms of interaction can be identified in US and European case law. First, in infringement litigation, a defendant can invoke speech with a view toward insulating from liability his unauthorized use of plaintiff's mark for expressive purposes, usually for parody or commentary. Second, in trademark registration, unsuccessful applicants can invoke speech to challenge the validity of a refusal of registration. And third, in constitutional challenges, a trademark owner can invoke speech in seeking to strike down public measures encroaching on trademark use. Regrettably, to date, commentators have had a tendency to focus on one form of interaction at a time, placing special emphasis on infringement cases. Their analyses and proposals for reform have privileged this form of interaction in an effort to avoid the severe repercussions that unbridled enforcement of trademark rights could have on defendants' speech. This has led to an impoverished understanding of the interaction between marks and speech, broadly considered. In the absence of comprehensive studies covering the diversity of instances where both sets of rights interact, conventional wisdom posits that their interaction is unidirectional, in the sense that trademark rights chill expression. This Article seeks to redress this misconception by engaging in a taxonomic analysis of the diverse scenarios in which marks and speech interact. Their joint study reveals that this interaction is best understood as a two-way street, where freedom of expression can simultaneously limit and validate trademark rights. This Article posits that the proposed reconceptualization of the interaction between marks and speech can contribute significantly to the advancement of the field.

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INTRODUCTION

Trademarks no longer only serve a source-identifying function, but rather have evolved to perform a plethora of functions. These range from signaling information about quality or reputation to conveying complex messages that different individuals can rely upon for expressive purposes.[2] The expressive

2. Trademarks' ability to perform functions beyond source-signaling has been widely acknowledged by courts and commentators on both sides of the Atlantic. *See*, in the United States: Mattel, Inc. v. MCA Recs., Inc., 296 F.3d 894, 900 (9th Cir. 2002) ("[T]rademarks [can] transcend their identifying purpose. Some trademarks enter our public discourse and become an integral part of our vocabulary."); Alex Kozinski, *Trademarks Unplugged*, 68 N.Y.U. L. REV. 960, 977-78 (1993) ("It is enough for today to recognize that in our culture, trademarks are doing all kinds of work they weren't originally meant to do. As their new functions become more important, so will the need for law to keep up."); Jerre B. Swann Sr., David A. Aaker & Matt Reback, *Trademarks and Marketing*, 91 TRADEMARK REP. 787, 799 (2001) ("[m]odern brands . . . communicate more information at deeper levels than did their progenitors"); Rochelle C. Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, NOTRE DAME L. REV. 397, 397-98 (1990) ("Trademarks have come a long way. … [I]deograms that once functioned solely as signals denoting the source, origin,

capabilities of marks have given rise to unprecedented opportunities and challenges in trademark doctrine, triggering a growing body of case law and literature in both the United States and Europe.[3]

In infringement litigation involving the use of "recoded" (i.e., modified) marks for expressive purposes (usually for parody or commentary),[4] the defendant's invocation of freedom of expression often translates into courts balancing an owner's proprietary interests against the defendant's speech.[5] In such cases, freedom of speech is understood to operate as a defense to the exclusive rights granted to owners,[6] shielding most unauthorized expressive uses

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and quality of goods, have become products in their own right, valued as indicators of the status, preferences, and aspirations of those who use them. Some trademarks have worked their way into the English language; others provide bases for vibrant, evocative metaphors. In a sense, trademarks are the emerging lingua franca: with a sufficient command of these terms, one can make oneself understood the world over"). In Europe, the recognition that marks can perform additional functions to that of origin is often framed within the broader debate on the "functions theory" as developed by the Court of Justice of the European Union in, *inter alia*, Case C-487/07, L'Oréal v. Bellure, ECLI:EU:C:2009:378 (June 18, 2009). As acknowledged by the Court, marks can also perform quality, advertising, investment, and communication functions. *See*, discussing this topic: Luis H. Porangaba, *A Contextual Account of the Trade Mark Functions Theory*, 3 INTELL. PROP. Q. 230 (2018); Martin Senftleben, *Function Theory and International Exhaustion: Why it is Wise to Confine the Double Identity Rule in EU Trade Mark Law to Cases Affecting the Origin Function*, 36 EUR. INTELL. PROP. REV. 518 (2014); Annette Kur, *Trade Marks Function, Don't They? CJEU Jurisprudence and Unfair Competition Practices*, 45 INT'L REV. OF INTELL. PROP. & COMPETITION L. 434 (2014); Annette Kur, *Harmonization of Intellectual Property Law in Europe: The ECJ Trade Mark Case Law 2008-2012*, 50 COMMON MKT. L. REV. 773 (2013); Lisa P. Ramsey & Jens Schovsbo, *Mechanisms for Limiting Trade Mark Rights to Further Competition and Free Speech*, 44 INT'L REV. OF INTELL. PROP. & COMPETITION L. 671 (2013); Dev S. Gangjee, *Property in Brands*, *in* CONCEPTS OF PROP. IN INTELL. PROP. LAW 29 (Helena Howe & Jonathan Griffiths eds., 2013); Tobias Cohen Jehoram, *The Function Theory in European Trade Mark Law and the Holistic Approach of the CJEU*, 102 TRADEMARK REP. 1243 (2012).

3. As we shall see upon closer study of the different scenarios in which trademarks and speech interact, the volume of case law and literature addressing this topic is overwhelming, especially in the United States. These sources are cited in a systematic way throughout this Article to ensure adequate support to the taxonomic methodology employed, in notes 8, 12, 16 (case law), 10, 13 and 17 (literature) *infra. See* Dev S. Gangjee & Robert Burrell, *Trade Marks and Freedom of Expression: A Call for Caution*, 41 INT'L REV. OF INTELL. PROP. & COMPETITION L. 544 (2010) (acknowledging the growing interest in the interaction between marks and freedom of expression).

4. The term 'recoded' is borrowed from Justin Hughes, *"Recoding" Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923 (1998).

5. Jonathan Moskin, *Frankenlaw: The Supreme Court's Fair and Balanced Look at Fair Use*, 95 TRADEMARK REP. 848, 871 (2005) ("courts have employed a balancing approach, weighing fair use concerns and First Amendment rights of expression, on the one hand, against the trademark owner's claimed proprietary interests–at least for some parodic fair use cases.").

6. The ability of speech to insulate defendants' unauthorized use of marks for expressive purposes has been explicitly recognized by courts on numerous occasions. *See, e.g.*, Yankee Publ'g Inc. v. News Am. Publ'g Inc., 809 F. Supp. 267, 275-76 (S.D.N.Y. 1992) ("where the unauthorized use of a trademark is for expressive purposes …, the law requires a balancing of the rights of the trademark owner against the interests of free speech"; and "the First Amendment confers a measure of protection for the unauthorized use of trademarks when that use is a part of the expression of a communicative message."); Mut. of Omaha Ins. Co. v. Novak, 648 F. Supp. 905, 911 (D. Neb 1986) ("In defense of [the likelihood of confusion] claim, [defendant] relies on the First Amendment. …

from liability.[7] Regrettably, the litigious—and contentious—nature of third party recoding has had the unintended consequence of overshadowing other scenarios where marks and speech rights interact. Because the vast majority of cases addressing the interaction between marks and speech involve expressive uses of marks by recoders,[8] conventional wisdom posits that the relationship between

While the Court recognizes [defendant's] right to express his views, such a right must in this case be balanced against the rights of [plaintiff] to protection of its trademark."); Reddy Commc'ns., Inc. v. Envt'l Action Found., Inc., 199 U.S.P.Q. (BNA) 630 at 634 (D.D.C. 1977) ("a more proper characterization of the case is that it pits plaintiff's … right … against defendant's First Amendment right of free speech, and requires a delicate balancing of the conflicting interests"); Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Grp., Inc., 886 F.2d 490, 494 (2d Cir. 1989) ("the principal issue before the district court was how to strike the balance between the two competing considerations of allowing artistic expression and preventing consumer confusion."); Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989) ("in general the [Lanham] Act should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression."); Planned Parenthood Feder'n of Am., Inc. v. Bucci, 42 U.S.P.Q. 2d (BNA) 1430, 1440 (S.D.N.Y. 1997) ("Defendant's use of another entity's mark is entitled to First Amendment protection when his use of that mark is part of a communicative message."); Anheuser-Busch, Inc. v. Balducci Publ'ns, 28 F.3d 769, 776 (8th Cir. 1994) ("There is no simple, mechanical rule by which courts can determine when a potentially confusing parody falls within the First Amendment's protective reach."); *Mattel*, 296 F.3d at 906 ("If speech is not "purely commercial"—that is, if it does more than propose a commercial transaction—then it is entitled to full First Amendment protection."); Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 7, 2005, Neue Juristische Wochenschrift [NJW] 2856 (2005) (Ger.) (for an English translation of the decision, *see* Violet Postcard 38 INT'L REV. OF INTELL. PROP. & COMPETITION L. 119, 121 (2007)) ("a trade mark infringement by the defendant. . .can be excluded by taking into account the defendant's right to the freedom of art[istic expression] as protected by … the Constitution."); Rb.'s-Gravenhage 4 mai 2011 NJF 2011, 264 (Nadia Plesner/Louis Vuitton) (Neth.), para. 4.6 ("the interest of [defendant] to (continue to) be able to express her (artistic) opinion … should outweigh the interest of [plaintiff] in the peaceful enjoyment of its possessions."); Cour d'Appel [CA] [regional court of appeal] Paris, 4 ch., Nov. 16, 2005, 04/12417 (Fr.) (for an English translation of the decision, *see* Esso Plc v. Greenpeace France [2006] ETMR 53, 671 ("[defendant] has … kept its activities within the limits of freedom of expression, in such a way that the trade mark infringement suit brought against it by [plaintiff] must be rejected.")

7. William McGeveran, *The Imaginary Trademark Parody Crisis (and the Real One)*, 90 WASH. L. REV. 713, 713 (2015) ("plausible claims of parody almost always prevail over trademark rights in judicial rulings."); *id.* at 715 ("In the last decade, defeats for trademark parodies have become blue-moon rarities."); Sonia K. Katyal, *Trademark Cosmopolitanism*, 47 U.C. DAVIS L. REV. 875, 927 (2013) ("All of the major cases discussed thus far have all reached conclusions that are strongly protective of the [recoder].").

8. In the **United States**: VIP Prods. L.L.C. v. Jack Daniel's Props., 953 F.3d 1170 (9th Cir. 2020); Ebony Media Operations L.L.C. v. Univision Commc'ns Inc., No. 18-cv-11434-AKH (S.D.N.Y. Jun. 3, 2019); Louis Vuitton Malletier S.A. v. My Other Bag Inc., 156 F. Supp. 3d 425 (S.D.N.Y. 2016); Louis Vuitton Malletier S.A. v. Hyundai Motor Am., 10 Civ. 1611 (PKC) (S.D.N.Y. 2012); Univ. of Ala. Bd. of Trs. v. New Life Art Inc., 683 F.3d 1266 (11th Cir. 2012); Starbucks Corp. v. Wolfe's Borough Coffee Inc., 588 F.3d 97 (2d Cir. 2009); Smith v. Wal-Mart Stores, Inc., 537 F. Supp. 2d 1302 (N.D. Ga. 2008); E.S.S. Entm't. 2000 Inc. v. Rock Star Videos Inc., 547 F.3d 1095 (9th Cir. 2008); Louis Vuitton Malletier S.A. v. Haute Diggity Dog L.L.C., 507 F.3d 252 (4th Cir. 2007); Nissan Motor Co. v. Nissan Comput. Corp., 378 F.3d 1002 (9th Cir. 2004); Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003); World Wrestling Fed'n Ent. Inc. v. Big Dog Holdings Inc., 280 F. Supp. 2d 413 (W.D. Pa. 2003); Parks v. LaFace Recs., 329 F.3d 437 (6th Cir. 2003); *Mattel,* 296 F.3d 894; Tommy Hilfiger Licensing v. Nature Labs L.L.C., 221 F. Supp. 2d 410 (S.D.N.Y. 2002); Harley Davidson Inc. v. Grottanelli, 164 F.3d 806, 813 (2d Cir. 1999); Jews For

marks and speech is unidirectional, in the sense that trademark rights chill expression.[9] Scholars have contributed to this phenomenon through analyses and proposals for reform that have focused on recoding cases in an effort to avoid the severe repercussions that unbridled enforcement of trademark rights could have on recoders' freedom of expression.[10] The unduly narrow emphasis placed on one

Jesus v. Brodsky, 993 F. Supp. 282 (D. N.J. 1998); Am. Dairy Queen Corp. v. New Line Prods. Inc, 35 F. Supp. 2d 727 (D. Minn. 1998); *Planned Parenthood,* 42 U.S.P.Q. 2d (BNA) 1430; Dr. Seuss Enters., L.P. v. Penguin Books USA Inc., 109 F.3d 1394 (9th Cir. 1997); Hormel Foods Corp. v. Jim Henson Prods., Inc., 73 F.3d 497 (2d Cir. 1996); Panavision Int'l, L.P. v. Toeppen, 945 F. Supp. 1296 (C.D. Cal. 1996); *Balducci Publ'ns*, 28 F.3d 769; Deere & Co. v. MTD Prods. Inc., 41 F.3d 39 (2d Cir. 1994); *Yankee Publ'g*, 809 F. Supp. 267; Anheuser–Busch Inc. v. L. & L. Wings, Inc., 962 F.2d 316 (4th Cir. 1992); Hard Rock Cafe Licensing Corp. v. Pac. Graphics, Inc., 776 F. Supp. 1454 (W.D. Wash. 1991); *Cliffs Notes, Inc.*, 886 F.2d 490; Schieffelin & Co v. Jack Co of Boca Inc., 725 F. Supp. 1314 (S.D.N.Y. 1989); *Rogers*, 875 F.2d 994; *Mut. of Omaha Ins. Co.*, 836 F.2d 397; Jordache Enters. Inc. v. Hogg Wyld Ltd, 828 F.2d 1482 (10th Cir. 1987); L.L. Bean Inc. v. Drake Publishers Inc., 811 F.2d 26 (1st Cir. 1987); Universal City Studios, Inc. v. Nintendo Co., Ltd., 746 F.2d 112 (2d Cir. 1984); Wendy's Int'l, Inc. v. Big Bite, Inc., 576 F. Supp. 816 (S.D. Ohio 1983); Gen. Foods Corp. v. Mellis, 203 U.S.P.Q. 261 (S.D.N.Y. 1979); Dallas Cowboy Cheerleaders Inc. v. Pussycat Cinema Ltd., 604 F.2d 200 (2d Cir. 1979); Gucci Shops, Inc. v. RH Macy & Co., 446 F. Supp. 838 (S.D.N.Y. 1977); *Reddy Commc'ns., Inc.*, 199 U.S.P.Q. (BNA) 630; Coca-Cola Co. v. Gemini Rising, Inc., 346 F. Supp. 1183 (E.D.N.Y. 1972). In **Europe**: Cour d'Appel [CA] [regional court of appeal] Paris, 5 ch., Dec. 11, 2015, 14/32109 (Fr.); Cour d'Appel [CA] [regional court of appeal] Rennes, 2 ch., Apr. 27, 2010, 09/00413 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Apr. 8, 2008, Bull. civ. I, No. 104 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] 2e civ., Oct. 19, 2006, Bull. civ. II, No. 282 (Fr.) (for an English translation of the decision, *see* Comité National contre les Maladies Respiratoires et la Tuberculose v. Société JT International GmbH 38 INT'L REV. OF INTELL. PROP. & COMPETITION L. 357 (2007)); Cour d'Appel [CA] [regional court of appeal] Paris,4 ch., Nov. 16, 2005, 04/12417 (Fr.) (for an English translation of the decision, see Esso Plc v. Greenpeace France [2006] ETMR 53); Cour d'Appel [CA] [regional court of appeal] Paris, 14 ch., Feb. 26, 2003, 02/16307 (Fr.) (for an English translation of the decision, *see* Association Greenpeace France v. SA Société ESSO [2003] ETMR 66); Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, May 14, 2001, 01/55088 (Fr.) (for an English translation of the decision, *see* Société Gervais Danone v. Société Le Réseau Voltaire [2003] ETMR 26); Ate My Heart, Inc. v. Mind Candy Ltd. [2011] EWHC 2741; Miss World Ltd. v. Channel 4 Television Corp. [2007] EWHC 982; Gof's-Amsterdam 13 september 2011, IES 2012, 15 m.nt. Herman MH Speyart (Mercis BV/Punt.nl BV) (Neth.); Rb.'s-Gravenhage 4 mai, 2011 NJF 2011, 264 (Nadia Plesner/Louis Vuitton) (Neth.); Rb.'s-Amsterdam 3 april 2003 KG 2003, 108 (Joanne Kathleen Rowling/Uitgeverij Byblos BV) (Neth.); Oberlandesgericht Hamburg [OLG] [Hamburg Higher Regional Court] Aug. 9, 2010, Gewerblicher Rechtsschutz und Urheberrecht, Rechtsprechungs-Report [GRUR-RR] 382 (2010) (Ger.); Oberlandesgericht Hamburg [OLG] [Hamburg Higher Regional Court] Jan. 5, 2006, Gewerblicher Rechtsschutz und Urheberrecht, Rechtsprechungs-Report [GRUR-RR] 231 (2006) (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 7, 2005, Neue Juristische Wochenschrift [NJW] 2856 (2005) (Ger.) (for an English translation of the decision, *see* Violet Postcard 38 INT'L REV. OF INTELL. PROP. & COMPETITION L. 119 (2007)).

9. Given the relevance of this assertion for purposes of my argument, I provide extensive proof of this misconception below. *See* text to notes 134 to 136 *infra*, as well as the quoted excerpts in note 137 *infra*.

10. Michal Bohaczewski, *Conflicts Between Trade Mark Rights and Freedom of Expression Under EU Trade Mark Law: Reality or Illusion?*, 51 INT'L REV. OF INTELL. PROP. & COMPETITION L. 856 (2020); Kathleen E. McCarthy, *Free Ride or Free Speech: Predicting Results and Providing Advice for Trademark Disputes Involving Parody*, 109 TRADEMARK REP. 691 (2019); Sara Gold, *Does Dilution Dilute the First Amendment: Trademark Dilution and the Right to Free Speech after Tam and Brunetti*, 59 IDEA 483 (2018); Sabine Jacques, *A Parody Exception: Why Trade Mark Owners*

subset of expressive users has come at a cost: it has led to an impoverished understanding of other interactions between marks and speech.

Should Get the Joke, 38 EUR. INTELL. PROP. REV. 471 (2016); Stacey L. Dogan & Mark A. Lemley, *Parody as Brand*, *in* THE LUXURY ECONOMY AND INTELLECTUAL PROPERTY 93 (Barton Beebe, Haochen Sun, & Madhavi Sunder eds., 2015); Christine H. Farley & Kavita DeVaney, *Considering Trademark and Speech Rights through the Lens of Regulating Tobacco*, 43 AIPLA Q.J. 289 (2015); McGeveran, *supra* note 7; Rebecca Tushnet, *More than a Feeling: Emotion and the First Amendment*, 127 HARV. L. REV. 2392 (2014); Rt. Hon. Sir Robin Jacob, *Parody and IP claims: A Defence? – A Right to Parody?*, *in* INTELLECTUAL PROPERTY AT THE EDGE – THE CONTESTED CONTOURS OF IP 427 (Rochelle C. Dreyfuss & Jane C. Ginsburg eds., 2014); Ramsey & Schovsbo, *supra* note 2; Katyal, *supra* note 7; David A. Simon, *The Confusion Trap: Rethinking Parody in Trademark Law*, 88 WASH. L. REV. 1021 (2013); Wojciech Sadurski, *Allegro without Vivaldi: Trademark Protection, Freedom of Speech, and Constitutional Balancing*, 8 EUR. CONST. L. REV. 456 (2012); Lucie Guibault, *The Netherlands: Darfurnica, Miffy and the right to parody!*, 3 JIPITEC 236 (2011); Gangjee & Burrell, *supra* note 3; Rochelle C. Dreyfuss, *Reconciling Trademark Rights and Expressive Values: How to Stop Worrying and Learn to Love Ambiguity*, *in* TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH 261 (Graeme B. Dinwoodie & Mark Janis eds., 2008); Rebecca Tushnet, *Truth and Advertising: the Lanham Act and Commercial Speech Doctrine*, *in* TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH 294 (Graeme B. Dinwoodie & Mark Janis eds., 2008); William McGeveran, *Four Free Speech Goals for Trademark Law*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1205 (2008); William McGeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49 (2008); Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 S.M.U. L. REV. 381 (2008); Andreas Rahmatian, *Trade Marks and Human Rights*, *in* INTELLECTUAL PROPERTY AND HUMAN RIGHTS 335 (Paul Torremans ed., 2008); Christophe Geiger, *Trade Marks and Freedom of Expression – The Proportionality of Criticism*, 38 INT'L REV. OF INTELL. PROP. & COMPETITION L. 317 (2007); Katja Weckström, 11 LEWIS & CLARK L. REV. 671 (2007); Margreth Barrett, *Domain Names, Trademarks and the First Amendment: Searching for Meaningful Boundaries*, 39 CONN. L. REV. 973 (2007); Stacey L. Dogan & Mark A. Lemley, *The Trademark Use Requirement in Dilution Cases*, 24 SANTA CLARA COMPUT. & HIGH TECH. L.J. 541 (2007); Mary LaFrance, *No Reason to Live: Dilution Laws as Unconstitutional Restrictions on Commercial Speech*, 58 S.C. L. REV. 709 (2007); Moskin, *supra* note 5; Hannibal Travis, *The Battle for Mindshare: The Emerging Consensus That the First Amendment Protects Corporate Criticism and Parody on the Internet*, 10 VA. J.L. & TECH. 74 (2005); Pratheepan Gulasekaram, *Policing the Border Between Trademarks and Free Speech: Protecting Unauthorized Trademark Use in Expressive Works*, 8 WASH. L. REV. 887 (2005); Megan Richardson, *Trade Marks and Language*, 26 SYDNEY L. REV. 193 (2004); Kelly L. Baxter, *Trademark Parody: How to Balance the Lanham Act with the First Amendment*, 44 SANTA CLARA L. REV. 1179 (2003); Sarah M. Schlosser, *The High Price of (Criticizing) Coffee: The Chilling Effect of the Federal Trademark Dilution Act on Corporate Parody*, 43 ARIZ. L. REV. 931 (2001); Michael Spence, *Intellectual Property and the Problem of Parody*, 114 L.Q.R. 594 (1998); Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687 (1998); Michael K. Cantwell, *Confusion, Dilution, and Speech: First Amendment Limitations on the Trademark Estate*, 87 TRADEMARK REP. 48 (1997); Keith Aoki, *How the World Dreams Itself to Be American: Reflections on the Relationship between the Expanding Scope of Trademark Protection and Free Speech Norms*, 17 LOY. L.A. ENT. L. REV. 523 (1996); Mark V. B. Partridge, *Trademark Parody and the First Amendment: Humor in the Eye of the Beholder*, 29 J. MARSHALL L. REV. 877 (1995); Kozinski, *supra* note 2; Arlen W. Langvardt, *Protected Marks and Protected Speech: Establishing the First Amendment Boundaries in Trademark Parody Cases*, 36 VILL. L. REV. 1 (1991); Dreyfuss, *supra* note 2; Robert N. Kravitz, *Trademarks, Speech, and the Gay Olympics Case*, 69 B.U. L. REV. 131 (1989); Robert J. Shaughnessy, *Trademark Parody: A Fair Use and First Amendment Analysis*, 72 VA. L. REV. 1079 (1986); Harriette K. Dorsen, *Satiric Appropriation and the Law of Libel, Trademark, and Copyright: Remedies Without Wrongs*, 65 B.U. L. REV. 923 (1985); Robert C. Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 2 WIS. L. REV. 158 (1981).

Thus, the literature lacks in comprehensive studies mapping the multi-faceted nature of the interaction between marks and speech. This is surprising in an area of law that has attracted so much scholarly attention over the past four decades.[11] To redress this gap in the literature, this Article aims to dispel the notion that the interaction between marks and speech is unidirectional. Speech claims need not operate as a limit to owners' exclusive rights in all instances where marks interact with freedom of expression. Precedent exists in both US and European case law where free speech is invoked to validate trademark rights. These cases involve instances where the constraints imposed on expressive use of marks stem not from owners' exclusive rights, but rather from measures of public law encroaching on trademark use or registration. In doing so, they erect legal barriers preventing trademark owners and applicants, respectively, from making use of marks to express their preferred messages.

For instance, in recent years, refusals to register signs pursuant to the statutory ground that they are immoral, disparaging, or scandalous in the United States—or contrary to public policy or morality in Europe—have been challenged on grounds that they contravene applicants' speech rights.[12] Admittedly, these decisions sparked a lively debate among commentators on the role that speech protection ought to play in the registration context, especially in the United States.[13] However, and as was the case with scholarship discussing recoding

11. The first articles on the subject date back to the early and mid-1980s: Shaughnessy, *supra* note 10; Dorsen, *supra* note 10; Denicola, *supra* note 10.

12. Respectively: Iancu v. Brunetti, 139 S. Ct. 2294 (2019); Case C-240/18, Constantin Film Produktion ('FACK JU GÖHTE') v. EUIPO, ECLI:EU:C:2019:553 (Feb. 27, 2019). Other cases include, in the **United States**: Matal v. Tam, 137 S. Ct. 1744 (2017); Pro-Football, Inc. v. Blackhorse, 112 F. Supp. 3d 439 (E.D. Va. 2015); *In re* Fox, 702 F.3d 633 (Fed. Cir. 2012); *In re* Boulevard Ent., Inc., 334 F.3d 1336 (Fed. Cir. 2003); Pro–Football, Inc. v. Harjo, 57 USPQ 2d 1140 (D.D.C. 2000); William B. Ritchie v. Orenthal James Simpson, 170 F.3d 1092 (Fed. Cir. 1999); Harjo v. Pro Football, Inc., 30 USPQ 2d 1828 (TTAB 1994); *In re* Mavety Media Grp. Ltd. Eyeglasses, 33 F.3d 1367 (Fed. Cir. 1994); *In re* McGinley, 660 F.2d 481 (CCPA 1981). In **Europe**: Case T-69/17, Constantin Film Produktion v. EUIPO, ECLI:EU:T:2018:27 (Jan. 24, 2018); R 2244/2016-2, Application of Brexit Drinks Ltd. (Jun. 28, 2017); R 2205/2015-5, Application of Constantin Film Produktion GmbH (Dec. 1, 2016); R 519/2015-4, Application of Josef Reich (Sept. 2, 2015); R-793/2014-2, Application of Ung Cancer (Feb. 23, 2015); R 2804/2014-5, Application of Square Enix Ltd. (Feb. 6, 2015); R 2889/2014-4, Application of Verlagsgruppe D. K. GmbH & Iny Klocke (May 28, 2015); Case T-54/13, Efag Trade Mark Co. v. OHIM, ECLI:EU:T:2013:593 (Nov. 14, 2013); Case T-417/10, Federico Cortés del Valle López v. OHIM, ECLI:EU:T:2012:120 (Mar. 9, 2012); Case T-232/10, Couture Tech Ltd v. OHIM, ECLI:EU:T:2011:498 (Sept. 20, 2011); R 168/2011-1, Application of Türpitz (Nov. 30, 2010); R 495/2005-G, Application of Jebaraj Kenneth (July 6, 2006); Scranage's Trademark Application [2008] ETMR 43; French Connection Ltd.'s Trademark Application [2007] ETMR 8; Basic Trademark SA's Trademark Application [2006] ETMR 24; Ghazilian's Trademark Application [2002] ETMR 57.

13. In the **United States**: Ned Snow, *Immoral Trademarks after Brunetti*, 58 HOUS. L. REV. 401 (2020); Niki Kuckes, *Iancu v. Brunetti: Free Speech Meets "Immoral and Scandalous" Trademarks in the Supreme Court*, 25 ROGER WILLIAMS U. L. REV. 80 (2020); Gary Myers, *It's Scandalous - Limiting Profane Trademark Registrations after Tam and Brunetti*, 27 J. INTELL. PROP. L. 1 (2019); Sonia K. Katyal, Brands Behaving Badly, 109 TRADEMARK REP. 819 (2019); Gary Myers, *Trademarks & the First Amendment after Matal v. Tam*, 26 J. INTELL. PROP. L. 67 (2019); Vicenc Feliu, *The F Word - An Early Empirical Study of Trademark Registration of Scandalous and Immoral*

Marks in the Aftermath of the In Re Brunetti Decision, 18 J. MARSHALL REV. INTELL. PROP. L. 404 (2019); Barton Beebe & Jeanne C. Fromer, *Immoral or Scandalous Marks: An Empirical Analysis*, 8 N.Y.U. J. INTELL. PROP. & ENT. L. 169 (2018); John Langworthy, *A Slanted View on the Morality Bars: Matal v. Tam, in re Brunetti, and the Future of Section 2(a) of the Lanham Act*, 2 BUS. ENTREPRENEURSHIP & TAX L. REV. 477 (2018); Clay Calvert, *Merging Offensive-Speech Cases with Viewpoint-Discrimination Principles: The Immediate Impact of Matal v. Tam on Two Strands of First Amendment Jurisprudence*, 27 WM. & MARY BILL RTS. J. 829 (2018); Niki Kuckes, *Matal v. Tam: Free Speech Meets Disparaging Trademarks in the Supreme Court*, 23 ROGER WILLIAMS U. L. REV. 122 (2018); Gold, *supra* note 10; Alex Weidner, *Examining the Impact of In re Brunetti on Section 2(a) of the Lanham Act*, 83 MO. L. REV. 1153 (2018); David C. Brezina, *The Slants Decision Understates the Value of Trademark Registration in Promoting Speech - Correctly Decided With a Conclusory Analysis*, 17 J. MARSHALL REV. INTELL. PROP. L. 380 (2018); Mark Conrad, *Matal v. Tam - A Victory for the Slants, a Touchdown for the Redskins, but an Ambiguous Journey for the First Amendment and Trademark Law*, 36 CARDOZO ARTS & ENT. L.J. 83 (2018); Andrew M. Lehmkuhl, *The Aftermath of Matal v. Tam: Unanswered Questions and Early Applications*, 87 U. CIN. L. REV. 871 (2018); Russ VerSteeg, *Historical Perspectives & Reflections on Matal v. Tam and the Future of Offensive Trademarks*, 25 J. INTELL. PROP. L. 109 (2017); Timothy T. Hsieh, *The Hybrid Trademark and Free Speech Right Forged from Matal v. Tam*, 7 N.Y.U. J. INTELL. PROP. & ENT. L. 1 (2017); Ned Snow, *Denying Trademark for Scandalous Speech*, 51 U.C. DAVIS L. REV. 2331 (2017); Rebecca Tushnet, *Registering Disagreement: Registration in Modern American Trademark Law*, 130 HARV. L. REV. 867 (2017); Clay Calvert, *Beyond Trademarks and Offense: Tam and the Justices' Evolution on Free Speech*, 2016 CATO SUP. CT. REV. 25 (2016–2017); Lisa P. Ramsey, *A Free Speech Right to Trademark Protection*, 106 TRADEMARK REP. 797 (2016); Rebecca Tushnet, *The First Amendment Walks into a Bar: Trademark Registration and Free Speech*, 92 NOTRE DAME L. REV. 381 (2016); Russ VerSteeg, *Blackhawk down or Blackhorse down: The Lanham Act's Prohibition of Trademarks That May Disparage & the First Amendment*, 68 OKLA. L. REV. 677 (2016); Marc J. Randazza, *Freedom of Expression and Morality-Based Impediments to the Enforcement of Intellectual Property Rights*, 16 NEV. L.J. 107 (2015); Ron Phillips, *A Case for Scandal and Immorality: Proposing Thin Protection of Controversial Trademarks*, 17 U. BALT. INTELL. PROP. L.J. 55 (2008); Regan Smith, *Trademark Law and Free Speech: Protection for Scandalous and Disparaging Marks Note*, 42 HARV. C.R.-C.L. L. REV. 451 (2007); Llewellyn Joseph Gibbons, *Semiotics of the Scandalous and the Immoral and the Disparaging: Section 2(a) Trademark Law after Lawrence v. Texas*, 9 MARQ. INTELL. PROP. L. REV. 187 (2005); Cameron Smith, *Squeezing the Juice out of the Washington Redskins: Intellectual Property Rights in Scandalous and Disparaging Trademarks after Harjo v. Pro-Football Inc.*, 77 WASH. L. REV. 1295 (2002); Justin G. Blankenship, *The Cancellation of Redskins as a Disparaging Trademark: Is Federal Trademark Law an Appropriate Solution for Words that Offend*, 72 U. COLO. L. REV. 415 (2001); Jeffrey Lefstin, *Does the First Amendment Bar Cancellation of REDSKINS*, 52 STAN. L. REV. 665 (2000); Jendi B. Reiter, *Redskins and Scarlet Letters: Why Immoral and Scandalous Trademarks Should Be Federally Registrable*, 6 FED. CIR. B.J. 191 (1996); Stephen R. Baird, *Moral Intervention in the Trademark Arena: Banning the Registration of Scandalous and Immoral Trademarks*, 83 TRADEMARK REP. 661 (1993); Theodore H. Jr Davis, *Registration of Scandalous, Immoral, and Disparaging Matter under Section 2(a) of the Lanham Act: Can One Man's Vulgarity Be Another's Registered Trademark*, 54 OHIO ST. L. J. 331 (1993). In **Europe**: Tobias Endrich-Laimböck & Svenja Schenk, *Then Tell Me What You Think About Morality: A Freedom of Expression Perspective on the CJEU's Decision in FACK JU GÖHTE (C-240/18 P)*, 51 INT'L REV. OF INTELL. PROP. & COMPETITION LAW 529 (2020); Christophe Geiger & Leonardo M. Pontes, *Trade Mark Registration, Public Policy, Morality and Fundamental Rights*, CENTRE FOR INT'L INTELL. PROP. STUD. (CEIPI) RSCH. PAPER NO 2017-01; Susan Snedden, *Immoral Trade Marks in the UK and at OHIM: How Would the Redskins Dispute Be Decided There?*, 11 J. INTELL. PROP. L. & PRAC. 270 (2016); Enrico Bonadio, *Brands, Morality and Public Policy: Some Reflections on the Ban on Registration of Controversial Trademark*, 19 MARQ. INTELL. PROP. L. REV. 43 (2015); Ilanah Simon Fhima, *Trade Marks and Free Speech*, 44 INT'L REV. OF INTELL. PROP. & COMPETITION L. 293 (2013); Teresa Scassa, *Antisocial Trademarks*, 103 TRADEMARK REP. 1172 (2013); Jonathan Griffiths, *Is there a right to an immoral mark?*, *in* INTELLECTUAL PROPERTY AND HUMAN RIGHTS 309 (Paul Torremans ed., 3d ed. 2015); Marco Ricolfi, *Trademarks and Human Rights*, *in*

litigation, their contributions do not venture beyond the boundaries of the interaction at issue.

Furthermore, restrictions on trademark use impacting their expressive function not only stem from trademark statutes, but sometimes also from public measures seeking to regulate consumption of certain goods.[14] This is the case, most notably, of legislation aimed at preventing use of marks that can mislead consumers as to the characteristics of the goods bearing them and/or induce customers, through the positive images conveyed by the marks, to purchase such goods when they pose a risk to health. Examples include measures restricting the use of marks in relation to tobacco products, such as health warnings, advertising bans, or, in more recent years, standardized packaging.[15] Right holders have challenged the validity of such measures on the basis, *inter alia*, that they effect an unjustified interference with their right to freedom of expression.[16] This form of interaction has also attracted scholarly commentary, for the most part in the United States.[17] However, very much like scholars addressing recoding and

INTELLECTUAL PROPERTY AND HUMAN RIGHTS 453 (Paul Torremans ed., 3d ed. 2015); Gordon Humphreys, *Deceit and Immorality in Trade Mark Matters: Does it Pay to Be Bad?*, 2 J. INTELL. PROP. L. & PRAC. 89 (2007).

14. That government-imposed restrictions on trademark use can impinge on right holders' freedom of expression has been recognized by both US and European courts. Since this line of case law constitutes the basis for one of the three forms of interaction between trademarks and speech identified in this Article, it will be addressed in extensive detail in Section II(C)(3). below.

15. Regulations requiring that tobacco products bear health warnings have been in effect since 1965 in the United States (The Cigarette Labelling and Advertising Act of 1965, Pub. L. No. 89-92), 1976 in France (Loi 76-616 du 9 Juillet 1976 Relative à la Lutte Contre le Tabagisme) or 2001 in the EU (Directive 2001/37, of the European Parliament and of the Council of 5 June 2001 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning the Manufacture, Presentation and Sale of Tobacco Products, 2001 O.J. (L 194) 26. Advertising bans have been regulated in the EU by means of several instruments, including: Council Directive 89/552 of Oct. 3, 1989, on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298) 23; or Directive 98/43, of the European Parliament and of the Council of 6 July 1998 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Relating to the Advertising and Sponsorship of Tobacco Products, 1998 O.J. (L 213) 9 [hereinafter First Tobacco Products Directive]. Some European countries have recently adopted plain packaging legislation, such as France (Loi 2016-41 du 26 janvier 2016 de modernisation de notre système de santé), Ireland (Public Health (Standardised Packaging of Tobacco) Act 2015) or the UK (Standardised Packaging of Tobacco Products Regulations 2015).

16. In the **United States**: Cigar Assoc. of Am. v. FDA, 315 F. Supp. 3d 143 (D.D.C. 2018); RJ Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001). In **Europe**: Case C-547/14, Philip Morris Brands S.A.R.L. v. Secretary of State for Health, ECLI:EU:C:2016:325 (May 4, 2016); Opinion of Advocate General Kokott in Case C-547/14, Philip Morris Brands S.A.R.L. v. Secretary of State for Health, ECLI:EU:C:2015:853 (Dec. 23, 2015); R. (on the application of British American Tobacco UK Ltd.) v. Secretary of State for Health [2004] EWHC 2493 (Admin); Opinion of Advocate General Fennelly in Case C-376/98, Germany v. European Parliament, ECLI:EU:C:2000:324 (June 15, 2000).

17. Sunil S. Gu, *Plain Tobacco Packaging's Impact on International Trade and the Family Smoking Prevention and Tobacco Control Act in the U.S. and Drafting Suggestions Notes*, 16 WASH. U. GLOB. STUD. L. REV. 197 (2017); Matthew J. Elsmore, *Trademarks, Tobacco, Health: Brokerage by Fundamental Rights?*, *in* The New Intellectual Property of Health Beyond Plain Packaging 69

registration cases, the aim of these authors is not to engage in a taxonomic analysis of the diverse scenarios where marks interact with speech in the search for the broader principles that govern this interaction.[18]

(Alberto Alemanno & Enrico Bonadio eds., 2016); Sergio Puig, *Tobacco Litigation in International Courts*, 57 HARV. INT'L L.J. 383 (2016); Farley & DeVaney, *supra* note 10; Tushnet, *More than a Feeling: Emotion and the First Amendment*, *supra* note 10; Richard J Bonnie, *Impending Collision between First Amendment Protection for Commercial Speech and the Public Health: The Case of Tobacco Control*, 29 J. L. & POL. 599 (2014); Sarah A. Hinchliffe, *Comparing Apples and Oranges in Trademark Law: Challenging the International and Constitutional Validity of Plain Packaging of Tobacco Products*, 13 J. MARSHALL. REV. INTELL. PROP. L 130 (2013); John D. Kraemer & Sabeeh A. Baig, *Analysis of Legal and Scientific Issues in Court Challenges to Graphic Tobacco Warnings*, 45 AM. J. OF PREVENTIVE MED. 334 (2013); Fhima, *supra* note 13; Nathan Cortez, *Do Graphic Tobacco Warnings Violate the First Amendment?*, 64 HASTINGS L.J. 1467 (2013).

18. This is not an easy argument to substantiate since authors' contributions are not framed within the taxonomy of cases proposed here. However, in explaining the aim of their contributions, some authors have made explicit reference to the scope of their pieces being limited to one form of interaction between marks and speech. First, in the recoding context, *see*, for instance: Dogan & Lemley, *Parody as Brand*, *supra* note 10, at 94 ("Our goal in this chapter is to understand why, and to think about what circumstances (if any) should lead courts to find [trademark] parody illegal"); Denicola, *supra* note 10, at 190-93 (1981) ("The remainder of this article will examine the extent to which trademark protection premised on misappropriation and dilution is consistent with the right of free expression."); Kozinski, *supra* note 2, at 966 ("I want to discuss some considerations that might define the proper scope of protection for trademarks serving not just as source identifiers, but also as part of the language"); Ramsey & Schovsbo, *supra* note 2, at 671 (2013) ("This article evaluates the different mechanisms that nations use to limit trade mark rights to promote … free speech"); Jacques, *supra* note 10, at 472 (2016) ("This article proposes that trade mark law should provide more room for the creation of trade mark parodies."); Sadurski, *supra* note 10, at 491 (2012) ("The aim of this article was to … argue… that in the conflicts of values illustrated by trademark … parody, the interests in freedom of speech should prevail"). Second, in the registration context, *see*, for instance: Myers, *Trademarks & the First Amendment after Matal v. Tam*, *supra* note 13, at 68 (2019) ("This article provides an analysis of the implications of *Tam* for trademark law, both in terms of eligibility for registration and in terms of the scope of trademark protection."); Myers, *It's Scandalous - Limiting Profane Trademark Registrations after Tam and Brunetti*, *supra* note 13, at 2 (2019) ("In light of *Tam* and *Brunetti*, … this article explores whether a statute … precluding the registration of vulgar, profane, and obscene marks might be drafted such that it constitutes a reasonable, viewpoint-neutral restriction on speech."); Conrad, *supra* note 13, at 89 ("This article will discuss what the court did and did not do in the *Tam* ruling."); Hsieh, *supra* note 13, at 1 ("This paper examines the holding of the Matal v. Tam case and predicts how the case will influence the behavior of trademark filings and the development of trademark law."). And third, in the context of health-furthering, trademark-restrictive measures, *see*, for instance: Sunil S. Gu, *Plain Tobacco Packaging's Impact on International Trade and the Family Smoking Prevention and Tobacco Control Act in the U.S. and Drafting Suggestions Notes*, 16 WASH. U. GLOB. STUD. L. REV. 197, 199 (2017) ("The note will then proceed to assess how U.S. courts dealt with [the constitutionality of a health-furthering, trademark-restrictive measure targeting tobacco products] under the First Amendment … Lastly, this note will also suggest how the FDA would effectively cope with potential challenges by tobacco manufacturers if it plans to introduce [a] new bill [encroaching on their First Amendment rights."); Cortez, *supra* note 17, at 1467 (2013) ("This Article considers several ambiguities that … cases [dealing with the constitutionality of health-furthering, trademark-restrictive measures under the First Amendment] have left unresolved and suggests how the FDA and courts should confront these questions during the next round of rulemaking and litigation"); Kraemer & Baig, *supra* note 17, at 334 (2013) ("The current paper describes the legal standards that will be used to assess the [compatibility with tobacco manufacturers' First Amendment rights of government-imposed health] warnings, and the empirical questions that must be answered in order to determine whether each standard has been met").

Against this backdrop, cases addressing the interaction between marks and speech have adopted two different postures: (a) "recoding" cases, where freedom of expression is invoked by the recoder as a defense to an infringement claim;[19] and (b) "ownership" cases, where speech is invoked by the owner or applicant to validate trademark rights.[20] The interaction between marks and speech is, thus, not unidirectional, but rather operates as a two-way street.

Acknowledging that the interaction between marks and speech goes both ways can contribute to the advancement of the field in five ways. First, it allows for a more precise understanding of this interaction. Second, a more accurate reading of the interaction between marks and speech can, in turn, lead to a more refined understanding of the opposing interests at stake in interaction cases. This could result in fairer adjudication. Third, the parallels identified in American and European approaches to the interaction between marks and speech can lead to more fruitful exchange between both jurisdictions in this area of law. Fourth, awareness of the full range of scenarios where both sets of rights interact serves to highlight the potential ramifications that courts' findings in one scenario could have in others. For instance, a finding that recoded uses of marks in infringement litigation ought to be afforded reinforced protection under freedom of expression as artistic speech could be irreconcilable with the characterization of applicants' speech as purely commercial in refusals of registration. After all, an applied-for mark could potentially be put to use by its would-be owner for any and all purposes, including to convey messages with an artistic or political component.[21]

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19. *See* case law cited *supra* note 8.

20. *See* case law cited *supra* notes 12 and 16.

21. This can occur where the right holder uses its mark not only to distinguish or promote its goods or services, but also to express its view on a broader topic and engage in public debate. This was the case, for instance, in the 'Benetton' advertisements saga decided by the Federal Constitutional Court of Germany. *See* Bundesverfassungsgericht [BverfGE] [Federal Constitutional Court] Dec. 12, 2000, 102 Entscheidungen des Bundesverfassungsgerichts [BVERFGE] 347; Bundesverfassungsgericht [BverfGE] [Federal Constitutional Court] Mar. 11, 2003, 107 Entscheidungen des Bundesverfassungsgerichts [BVERFGE] 275. The contentious ads showed different images dealing with issues of environmental, social and health concern, for instance, a picture of a person's naked behind with the words 'HIV Positive' stamped on the skin, or a dying AIDS patient surrounded by his grieving family. The apparel company's well-known mark consisting of the words 'UNITED COLORS OF BENETTON' contained in a green square was featured in a corner of the ads. In overturning the decision of the Federal Court of Justice upholding a ban on the publication of these ads pursuant to the Unfair Competition Act, the Federal Constitutional Court gave much weight to the robust protection afforded to political expression under the German Constitution. According to the court, this degree of protection is in no way affected by the fact that the socially relevant message is conveyed in an advertising context where the aim is not only to engage in public debate, but also to further the company's commercial interest in attracting consumers by building a particular brand image. In the words of the court:

> The advertisements draw the attention to socially and politically relevant issues and are also suitable for gaining public attention for these issues. The special protection that [the right to freedom of expression] provides particularly for this form of expression is not diminished by the fact that [the ads] . . . do not make any substantial contribution to the debate on the deplorable situations that they depict. The (mere) denouncement of an injustice can also be an important contribution to the free exchange of ideas. . . .

And fifth, understanding that the interaction between marks and speech operates as a two-way street provides a solid foundation for the reconceptualization of this interaction as competing forms of speech.[22] The repercussions of such a reconceptualization on the field could be far-reaching.

Proper engagement with this topic requires that we begin by exploring, in Section I, the expressive dimension of marks. This will be followed, in Section II, by explaining the diverse ways in which marks interact with speech with a view to dispelling the misconception that the relationship between both sets of rights is unidirectional. This will include (a) an introduction to the right to freedom of expression as protected under US and European law, (b) a discussion on the lack of scholarly work mapping the multi-faceted nature of the interaction between marks and speech, and (c) an overview of ownership cases where courts operating out of the United States and Europe have factored in the expressive interests of right holders/applicants to validate trademark rights. Section III will explore the theoretical underpinnings for the proposition that speech can validate trademark rights. Concluding remarks will follow in Section IV.

> The denouncing effect of the advertisements, which are critical of society, is not called into question by the advertising context.

Bundesverfassungsgericht [BverfGE] [Federal Constitutional Court] Dec. 12, 2000, 102 Entscheidungen des Bundesverfassungsgerichts [BVERFGE] 347, paras. 62-63 (Ger.).

22. Three authors have already advanced the notion of competing expression in interaction cases: Matthew Elsmore, Michael Spence and Justin Hughes. However, the way that they conceptualize competing expression in interaction cases, as well as the breadth of their contributions, differs from the one suggested here. As regardsElsmore, his analysis is constrained to cases where right holders have challenged the validity of health-furthering, trademark-restrictive cases on speech grounds. As a result, he does not propose that competing expression occurs between different trademark users, but rather between: (a) the right holder through trademark use; and (b) public authorities through use of the package space of tobacco products to insert health warnings. Elsmore, *supra* note 17, at 106-07. Admittedly, Spence's claim that recoding cases would be best addressed as competing forms of expression between the right holder and the recoder is more in line with the reconceptualization proposed here. However, because his analysis is limited to recoding cases, his proposal for reform is premised on an incomplete understanding of the various ways in which speech can validate trademark rights. Spence proposes that speech be mobilized to safeguard right holders' expressive autonomy by ensuring protection against compelled speech resulting from recoders' unauthorized use of their marks. An overview of what I have labelled ownership cases reveals, however, that right holders' speech claims not only stem from compulsions on speech, but also from restrictions on trademark use/registration. Consequently, Spence's reconceptualization of the interaction between marks and speech as competing expression barely has repercussions beyond recoding litigation (i.e., potentially only in challenges to the validity of health-furthering, trademark-restrictive measures requiring owners to include health warnings in the packaging of their goods, which could amount to compelled speech). Michael Spence, *Restricting Allusion to Trade Marks: A New Justification*, *in* TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH 324, 339–40 (Graeme B. Dinwoodie & Mark Janis eds., 2007). The same considerations apply to the work of Hughes, whose proposal to conceive of the interaction between intellectual property right (including trademarks) and speech as competing forms of expression is also restricted to the recoding context. Hughes, *supra* note 4, at 1007 et seq.

I.
TRADEMARKS AS EXPRESSIVE ARTIFACTS

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) defines a trademark as "[a]ny *sign* … capable of distinguishing the goods or services of one undertaking from those of other undertakings".[23] Similar provisions can be found in the Lanham Act in the United States,[24] and in the EU Trade Mark Regulation (EUTMR) and the Trade Marks Directive (TMD) in Europe.[25] At their most basic, trademarks are signs. Signs, in turn, are units of language that convey information and, through their use, enable communication between two or more people. The words that I am writing right now are signs that allow me to communicate with you, the reader. The same is true of trademarks: they convey information and enable communication in the marketplace and in society at large.

The fundamental information conveyed by a mark is the commercial origin of goods or services.[26] For instance, the "Apple" mark represents a particular commercial origin, i.e. Apple, Inc. Use of this mark in the course of trade allows its owner to distinguish its goods from those of its competitors. Contemporary marks can be used to convey a wide range of meanings in addition to commercial origin, ranging from signaling information about quality or reputation to conveying lifestyle preferences that individuals can rely on to pursue their preferred identity projects.[27] Going back to the previous example, the "Apple" mark is loaded with additional meanings: it is synonymous with innovation, high quality, reliability, sleek design, and has come to symbolize a set of values, and

23. Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Art. 15, Apr. 15, 1994, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) (emphasis added).

24. 15 U.S.C. § 1127.

25. Regulation 2017/1001, of the European Parliament and of the Council of 14 June 2017 on the European Union Trade Mark, Art. 4, 2017 O.J. (L 154) 1; Directive 2015/2436, of the European Parliament and of the Council of 16 Dec. 2015 to Approximate the Laws of the Member States Relating to Trade Marks, Art. 3, 2015 O.J. (L 336) 1.

26. Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 412 (1916) ("The primary and proper function of a trade-mark is to identify the origin or ownership of the article to which it is affixed."); Robert C. Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 2 WIS. L. REV. 158, 158-59 (1981) ("The information conveyed through the use of a trademark generally relates … to the details of prospective commercial transactions—the source or quality of specific goods or services."); Keith Aoki, *How the World Dreams Itself to Be American: Reflections on the Relationship between the Expanding Scope of Trademark Protection and Free Speech Norms*, 17 LOY. L.A. ENT. L.J. 523, 531 (1997) ("Trademarks are traditionally viewed as a source identifier. They are words and designs whose purpose is to distinguish the goods or services of one company from the goods or services of another company.").

27. The ability of contemporary trademarks to convey very diverse meanings and, thus, to perform functions other than source-identification has been widely acknowledged in the literature and case law. Jerre B. Swann Sr., *An Interdisciplinary Approach to Brand Strength*, 96 TRADEMARK REP. 943 (2006); Swann, Aaker & Reback, *supra* note 2; Kozinski, *supra* note 2.

even a lifestyle that is hip, sophisticated, stylish, design-conscious, and creative.[28] Because they provide consumers with a wealth of useful information about the goods to which they are affixed, these additional meanings—which are crucial to building brand image—are extremely valuable to right holders.[29] So much so that firms are often willing to devote vast amounts of resources to develop and maintain them, usually by means of costly promotional activities.[30]

How can signs, including trademarks, develop such complex meanings? Meaning of signs is the result of a social consensus, whereby individuals agree that sign "x" will carry meaning "y."[31] For example, the word "tree" symbolizes

28. Grainne M. Fitzsimons et al., *Automatic Effects of Brand Exposure on Motivated Behavior: How Apple Makes You "Think Different,"* 35 J. CONSUMER RSCH. 21, 24 (2008) ("Apple has labored to cultivate a strong brand personality based on the ideas of nonconformity, innovation, and creativity"); Traci H. Freling et al., *Brand personality appeal: conceptualization and empirical validation*, 39 J. ACAD. OF MKTG. SCI. 392, 392 (2011) ("[Apple's brand personality, as projected through its products] advertisements is … young, hip and easy to use"); Clarinda Rodrigues & Paula Rodrigues, *Brand love matters to Millennials: the relevance of mystery, sensuality and intimacy to neo-luxury brands*, 28 J. OF PROD. & BRAND MGMT. 830, 833-34 (2019) ("brands such as Apple … have positioned themselves … as neo-luxury brands, [associated with] quality, creativity, innovation and authenticity", as well as with "sophistication [and] uniqueness").

29. Swann et al. have described in very persuasive terms the diverse ways in which the additional meanings conveyed by contemporary brands serve right holders' interests. In their own words:

> For their owners, therefore, strong brands are far more than a simple "investment." Rather, as a consequence of their bond with consumers, they: (i) allow access to consumers' minds; (ii) make advertising less expensive or more impactful (or both); (iii) enable a manufacturer to communicate more directly with a consumer, cushioning any vagaries of distribution; (iv) assist in attaining channel power; (v) provide a more efficient and credible means of extending into related goods, and give rise to licensing opportunities; (vi) serve as certificates of "authenticity"; (vii) afford resilience; and (viii) constitute an asset-brand equity-that is frequently a company's most valuable single property.

Swann, Aaker & Reback, *supra* note 2, at 807.

30. Reza Motameni & Manuchehr Shahrokhi, *Brand equity valuation: a global perspective*, 7 J. OF PROD. & BRAND MGMT. 275, 275 (1998) ("To create a brand from scratch requires huge investments. … Empirical research has shown that massive sums spent on advertising … translate … into … brand awareness, image, and loyalty"); Swann, *supra* note 27, at 957, 969 (2006) ("the cost to create a new brand is huge"; "Changes [in the mental clusters that exist for strong brands] have occurred as a result of enormous investments in brand information, and they possess … substantial benefits for consumers"). This has also been acknowledged by the US Supreme Court in the following terms: "Companies spend huge amounts to create and publicize trademarks that convey a message." Matal v. Tam, 137 S. Ct. 1744, 1760 (2017).

31. In his influential study on the semiotics of trademark law, Barton Beebe explains Saussure's view on the arbitrariness of meaning in symbols in the following terms: "Saussure held that, at least in spoken and written language, the relation between the sign's signifier and its signified is 'arbitrary.' By this he meant that there is no natural connection between the concept of a book and the sound or appearance of the word 'book' …. Their relation is established and sustained by convention alone: 'It is because the linguistic sign is arbitrary that it knows no other law than that of tradition, and because it is founded upon tradition that it can be arbitrary.'" Barton Beebe, The Semiotic Analysis of Trademark Law, 51 U.C.L.A. L. REV. 621, 634 (2004), quoting FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 74 (Charles Bally & Albert Sechehaye eds., Roy Harris trans. 1990) (1916) at 74.

the "woody perennial plant" found in nature only insofar as English speakers have agreed as much.[32] Put differently, there is no necessary correlation between the word "tree" and the meaning "woody perennial plant." Rather the relation between word and meaning is contingent on social convention and, as such, is arbitrary. Because social consensus is not static, meaning in signs is subject to constant transformation.[33] For instance, until the second half of the 20th century, the signifier "gay" acted solely as an adjective meaning "light-hearted and carefree."[34] In the 1960s, however, with the advent of the gay rights movement, that same signifier developed new meaning as a noun to refer to "a homosexual, especially a man", or as an adjective to describe someone's "homosexual[ity], especially a man['s]."[35] Consequently, the precise meaning that the word "gay" conveys can, in contemporary English, fluctuate from one meaning to the other on the basis of context.

The same is true of marks, the meanings of which may evolve over time depending on how they are used.[36] Going back to the previous example, the "Apple" mark performs a source-identifying function when it is used to differentiate electronic goods originating from the company Apple Inc. from the like products of its competitor Samsung Electronics Co. Ltd., marketed under the "SAMSUNG" mark. But marks also perform an advertising function when they are used to "convey[] a particular image to the … consumer of the goods or services in question."[37] For instance, Apple Inc.'s use of its "Apple" mark on advertisements featuring renowned artists working on "Apple"-branded

32. The Oxford English Dictionary Home Page, www.oxforddictionaries.com (last visited Oct. 30, 2020).

33. Building on Saussure's study of semiotics, Raber & Budd explain the historical contingency of meaning in signs in the following terms: "Signs are arbitrary creations …. Language is determined by a community of speakers who share and sustain it historically by means of convention and tradition. … Like any social institution, language admits the possibility of change." Douglas Raber & John M Budd, *Information as sign: semiotics and information science*, 59 J. OF DOCUMENTATION 507, 512 (2003). *See also* Richardson, *supra* note 10, at 200 ("From a modem linguistic perspective, the notion that any meaning is 'inherent' in words is impossible: meaning is a product of social discourse.").

34. *Id*.

35. *Id*.

36. Jason Bosland, *The Culture of Trade Marks: An Alternative Cultural Theory Perspective*, 10 MEDIA & ARTS L. REV. 99, 108 (2005) ("trade mark language is constructed and transformed through the production and consumption of trade marks in everyday life. … [T]rade mark language … is in a constant process of change and evolution."). *See also* Deven Desai, *From Trade Marks to Brands*, 64 FLA. L. REV. 981, 986 (2012) at 1041-42; Gangjee, *supra* note 2, at 58.

37. Datacard v. Eagle Technologies [2011] EWHC 244 Pat [272]. At the EU level, the CJEU has defined the advertising function of marks as "that of using a mark for advertising purposes designed to inform and persuade consumers." Case C-129/17, Mitsubishi v. Duma Forklifts, ECLI:EU:C:2018:594, ¶ 37 (July 25, 2018). See also Joined Cases C-236/08 to C-238/08, Google France v. Louis Vuitton, ECLI:EU:C:2010:159, ¶¶ 91-92 (Mar. 23, 2010). According to Fhima, "contemporary trade marks … have a wider range of functions. In particular, their use in advertising allows their owners to build a reputation and image around the mark." Fhima, *supra* note 13, at 293.

computers conveys an image of high quality, creativity, and style.[38] Marks also perform an expressive function when they are used to express allegiance to a certain idea, whether by the mark owner, consumers of branded goods, or third parties wishing to comment on/parody the values embodied by the mark. For example, the "Apple" mark performs an expressive function when consumers purchase and use "Apple"-branded products with a view to expressing their adherence to a creative and stylish lifestyle.

Courts and commentators writing in both the legal and marketing fields have widely acknowledged that marks perform an expressive function. For instance, Dreyfuss has argued that "ideograms that once functioned solely as signals denoting the source, origin, and quality of goods, have become … indicators of the status, preferences, and aspirations of those who use them."[39] According to McGeveran, "many uses of trademarks in today's culture go far beyond the boundaries of … commerc[e] …. They can involve political expression, artistic works, parodies, or criticism."[40] In its recent decision in *Matal v. Tam*, the United States Supreme Court held that:

> [T]rademarks often have an expressive content. Companies spend huge amounts to create and publicize trademarks that convey a message. It is true that the necessary brevity of trademarks limits what they can say. But powerful messages can sometimes be conveyed in just a few words. Trademarks are . . . speech.[41]

The list goes on.[42] These examples serve two purposes. First, they show just how widespread the consensus is regarding the ability of marks to convey

38. Commenting on this series of ads (entitled 'Behind the Mac'), a reporter for the online publication "AppleInsider" describes them as follows: "A type of customer testimonial, the ads are expertly crafted to show, not tell, Mac's ability to augment, enhance and facilitate the creative process." AppleInsider Staff, *New 'Behind the Mac' ad features Kendrick Lamar, Gloria Steinem, Billie Eilish, more,* APPLEINSIDER (Nov. 10, 2020) https://appleinsider.com/articles/20/11/10/new-behind-the-mac-ad-features-kendrick-lamar-gloria-steinem-billie-eilish-more.

39. Dreyfuss, *supra* note 2, at 397.

40. McGeveran, *Four Free Speech Goals for Trademark Law, supra* note 10, at 1211.

41. Matal v. Tam, 137 S. Ct. 1744, 1769 (2017).

42. Desai has advanced that "Consumers often buy branded goods not for their quality but as badges of loyalty, ways to express identity, and items to alter and interpret for self-expression". Desai, *supra* note 36, at 986. Elsmore is "astonish[ed] [by] the role of trademarks as proxy mechanisms for consumers to advertise themselves and their values, and the marked products, through displaying trademark". Elsmore, *supra* note 17, at 101. Gangjee has argued that "brand image may also provide the resources for both individual as well as collective identity projects. Since consumers fabricate their identities within a market context, brands signal social identity or status." Gangjee, *supra* note 2, at 35. According to Richardson:

> Now trade marks do more than 'sell' goods and services, let alone distinguish their "origin"—still the only true function of trade marks according to trade mark law. Like them or not, trade marks tell stories. Their expressiveness is the basis of commercial activity, the trader-author the conduit of meaning, and the market audience the monitor and arbiter of taste.

expressive meaning. Second, they illustrate the diversity of ways individuals can use marks for expressive purposes to pursue their preferred identity projects.[43] Going back to the electronic goods example, Apple Inc. expresses its belief in the desirability of leading a creative and stylish lifestyle by manufacturing, branding, and offering for sale electronic goods that maximize functionality without compromising on design.[44] Consumers can express their adherence to such a lifestyle through the purchase and use of "Apple"-branded goods. In contrast to these types of expressive uses, a third party may modify—or recode—Apple Inc.'s "iPhone" mark to read "iClone," altering its original meaning to comment on the deceitful marketing practices of multinational companies such as Apple Inc., which are often said to employ sophisticated communication strategies to

Richardson, *supra* note 10, at 196; Jacques has claimed that "[c]onsumers do not buy goods and services to merely satisfy their needs, but they *consume* trade marks for the messages they convey." Jacques, *supra* note 10, at 473 (emphasis in the original). Ricolfi has advanced that "brands may convey –and do convey– not only messages about the origins of the goods and their quality but also other messages, about lifestyles, values, attitudes towards society and the like". Ricolfi, *supra* note 13, at 470. Dogan and Lemley believe that "brands . . . convey information *about* the consumer and allow members of the public to communicate to each other. By selling branded products, producers enable us to brand ourselves." Dogan & Lemley, *Parody as Brand, supra* note 10, at 106 (emphasis in the original). According to Sakulin:

> [C]onsumers seem to purchase and "consume" the communicative value or status of trademarks. If and to the extent that certain trademarks communicate status, success, or (sexual) appeal, many consumers may be induced to buy trademarked goods and services in part or mainly because of the additional value offered by the trademark.

WOLFGANG SAKULIN, TRADEMARK PROTECTION AND FREEDOM OF EXPRESSION 11 (2011). Spence advocates for the "recognition that a mark is a form of speech. Trade mark owners work hard to ensure that their mark communicates, not only the trade origin of goods, but also a whole range of associated values." Michael Spence*, The Mark as Expression/The Mark as Property,* 58 CURRENT LEGAL PROBS. 491, 504 (2005); Keller, writing in the marketing field, believes that "for many people, … [brands] serve the function that fraternal, religious and service organizations used to serve –to help people define who they are and then help them communicate that definition to others". KEVIN L. KELLER, STRATEGIC BRAND MANAGEMENT: BUILDING, MEASURING, AND MANAGING BRAND EQUITY 8 (1998) (paraphrasing Daniel Boorstein).

43. This diversity has also been noted by Sonia K. Katyal, *supra* note 7, at 878 ("Each of these audiences—whether consumers of luxury goods … or artist/activists …—oppositional or otherwise, all integrate and respond to particular brands as part of their process of self-expression.").

44. For instance, Apple's press release covering the launch of its higher-end Apple Watch model in collaboration with French fashion powerhouse Hermès features testimonies from senior executives at both companies claiming to be "united by the same vision, the uncompromising pursuit of excellence and authenticity, and the creation of objects that remain as relevant and functional as they are beautiful." In the words of Apple's chief design officer at the time, Jonathan Ive: "Apple and Hermès make very different products, but they reflect the deep appreciation of quality design. … Both companies are motivated by a sincere pursuit of excellence and the desire to create something that is not compromised. *Apple Watch Hermès is a true testament to that belief*" (emphasis added). Press Release, Apple, Apple and Hermès Unveil the Apple Watch Hermès Collection, Apple (September 9, 2015), https://www.apple.com/newsroom/2015/09/09Apple-and-Herm-s-Unveil-the-Apple-Watch-Herm-s-Collection/.

magnify the innovative features of their newly-released goods to lure consumers into buying them.[45]

II.
THE INTERACTION BETWEEN TRADEMARKS AND FREEDOM OF EXPRESSION

Although they do so in different manners, and for different purposes, these examples show that individuals are able to express themselves through trademark use. But are all individuals really able to use marks expressively in any and all instances? More importantly, should they be able to do so? These are the fundamental questions that have occupied courts and scholars dealing with the interaction between marks and speech since the 1970s.[46]

To assist in answering these questions, I propose making a preliminary distinction between a *de facto* and *de jure* ability to use a mark for expressive purposes. The previous section explored the expressive capabilities of trademarks in *de facto* terms, describing how different individuals—right holders, consumers, and recoders—can, in principle, rely on the plurality of meanings that marks convey to express themselves through their sale, consumption, or recoding. However, this may not necessarily be the case as a matter of law, where legal barriers may prevent certain individuals from using marks for expressive purposes. Let us now turn to look at some of these barriers.

Trademark rights constitute the most obvious barrier to expressive use of marks by non-owners, and often are invoked by right holders seeking an injunction before the courts.[47] This is particularly true where a third party uses a recoded version of a reputed mark for parodic or critical purposes, which easily lends itself to infringement actions on likelihood of confusion and, more often,

45. *See*, Jason Martuscello, *13 Strategies Apple Uses to Get Customers to Upgrade iPhones*, BEESY (Apr. 20, 2018), https://beesystrategy.com/13-strategies-apple-uses-to-get-customers-to-upgrade-iphones/ ("How does Apple convey they are the most innovate iPhone? It is simple, they tell you! Innovation, like art, is in the eye of the beholder. It is a perception. Apple fuels this innovation perception by directly communicating every year 'this is the best iPhone we have ever created.'").

46. Early decisions in this regard include: Dallas Cowboy Cheerleaders, Inc. v. Pussycat Cinema Ltd., 604 F.2d 200 (2d Cir. 1979); Coca-Cola Co. v. Gemini Rising, Inc., 346 F. Supp. 1183 (E.D.N.Y. 1972). Early scholarship on the topic includes: Kozinski, *supra* note 22; Langvardt, *supra* note 10; Dreyfuss, *supra* note 2; Shaughnessy, *supra* note 10; Dorsen, *supra* note 10; Denicola, *supra* note 10.

47. This is expressed in very eloquent terms by Judge Kozinski writing for the majority in both New Kids on the Block v. News Am. Publ'g, Inc., 971 F.2d 302, 306 (9th Cir. 1992) ("the primary cost of recognizing property rights in trademarks is the removal of words from (or perhaps non-entrance into) our language") and Mattel, Inc. v. MCA Recs., Inc., 296 F.3d 894, 900 (9th Cir. 2002) ("Were we to ignore the expressive value that some marks assume, trademark rights would grow to encroach upon the zone protected by the First Amendment"). *See also* Yankee Publ'g, Inc. v. News Am. Publ'g, Inc., 809 F. Supp. 267, 275-76 (S.D.N.Y. 1992) ("Because the trademark law regulates the use of words, pictures, and other symbols, it can conflict with values protected by the First Amendment. The grant to one person of the exclusive right to use a set of words or symbols in trade can collide with the free speech rights of others.").

dilution grounds.[48] Thus, an individual who wishes and is—*de facto*—able to engage in expressive use of a mark might be precluded from doing so on legal grounds. This begs the question of the extent to which trademark rights are intended to preclude expressive use of marks by third parties, especially in light of their fundamental right to freedom of expression as recognized in constitutional and human rights instruments.[49] In recoding cases, invocation of free speech by defendants often results in courts engaging in a balancing exercise whereby owners' proprietary interests are pitted against defendants' speech. In such cases, speech is understood to operate as a defense to the exclusive rights granted to right holders, shielding most unauthorized expressive uses from liability.[50]

However, owners' exclusive rights are not the only legal constraint to expressive use of marks. Some of the fundamental provisions found in trademark statutes worldwide seek to police who can make use of certain signs as trademarks and for what purposes.[51] In so doing, they erect legal barriers preventing certain individuals from making use of marks to express their preferred messages. For instance, by precluding certain signs from accessing the trademark register altogether, the absolute ground for refusal of descriptive signs ensures that one single individual, such as the would-be trademark owner, does not appropriate the communicative potential of such signs.[52] The absolute ground for refusal of marks that have become generic—i.e. a mark that no longer identifies a given commercial origin but rather has become synonymous with the class of goods—raises similar concerns.[53] The generic mark is removed from the register to allow other firms trading in the class of goods to use it without fear of infringing on the owner's exclusive rights.[54] These restrictions serve to foster competition in the marketplace.

At the same time, however, they prevent applicants/owners from registering/continuing to own descriptive/generic signs and, consequently, from using them in the manner that best suits their interests, including their expressive

48. *See* case law cited *supra* note 8.

49. U.S. Const. amend. I; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), Art 10.

50. *See* excerpts extracted from the case law cited *supra* note 6.

51. McGeveran, *Four Free Speech Goals for Trademark Law, supra* note 10, at 1210.

52. 15 U.S.C. § 1052(e); EUTMR, Art 7(1)(c); TMD, Art 4(1)(c). Supporting this view, *see* Case C-108/97, Windsurfing Chiemsee v. Boots, ECLI:EU:C:1999:230, ¶ 25 (May 4, 1999); Joined Cases C-53/01 to C-55/01, *Linde and Others*, ECLI:EU:C:2003:206 ¶ 73 (Apr. 8, 2003); Case C-191/01, OHIM v. Wrigley, ECLI:EU:C:2003:579 ¶ 31 (Oct. 23, 2003); Sakulin, *supra* note 42, at 57; McGeveran, *Four Free Speech Goals for Trademark Law, supra* note 10, at 1210; Pierre N. Leval, *Trademark: Champion of Free Speech*, 27 COLUM. J.L. & ARTS 187, 191-92 (2004).

53. 15 U.S.C. § 1064(3); EUTMR, Art 7(1)(d); TMD, Art 4(1)(d).

54. New Kids on the Block v. News Am. Publ'g, Inc., 971 F.2d 302, 306 (9th Cir. 1992); Sakulin, *supra* note 42, at 57; Rebecca Tushnet, *Why the Customer Isn't Always Right: Producer-Based Limits on Rights Accretion in Trademark*, 116 YALE L.J. POCKET PART 352, 353 (2007); Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 HOUS. L. REV. 777, 793 (2004); Leval, *supra* note 52, at 191-92.

interests. These are instances where the expressive interests of all other traders (in addition to consumers' interest in having access to product information and, broadly considered, the interest of all market participants in maximized efficiency) clearly outweigh those of the trademark applicant/owner.[55] This likely explains why no challenges have been raised on free speech grounds to the validity of decisions denying registration to descriptive marks/removing generic marks from the register.

The same is not true of the absolute grounds for refusal of marks that are immoral, disparaging, or scandalous in the United States or contrary to public policy or morality in Europe.[56] In recent years, refusals from trademark offices to register signs that are liable to offend the public, most often unsavory terms, have been challenged on grounds that they contravene the fundamental right to freedom of expression of trademark applicants.[57] Applicants argue that their inability to communicate their preferred messages in the course of trade—i.e. through the exclusive use of their preferred signs resulting from registration—runs counter to their speech rights. This can happen in three ways.

First, refusals of registration encumber applicants' ability to use their applied-for signs in relation to their goods in exclusive terms—in Europe, where unregistered marks enjoy very limited protection, refusals of registration will go as far as to prevent applicants from using their applied-for signs in exclusive terms.[58] Exclusivity plays a fundamental role in allowing signs to further the communicative needs of traders when operating in the course of trade, most notably, the ability of signs to clearly signal commercial origin—which is only possible where exclusive use is guaranteed.[59] If two or more traders were to brand their competing goods using the same sign, consumers looking to buy such goods would very likely be confused as to the commercial source of each of them. Second, the inability of unsuccessful applicants to use their applied-for signs in exclusive terms would severely impact their advertising strategy. Uses of marks for promotional purposes in advertising campaigns and other marketing channels

55. Sakulin, *supra* note 42, at 192-93 ("Seen from the perspective of freedom of expression, this ground for refusal is one of the most important limitations of the grant of trademark rights. It applies to descriptive signs as well as to … generic signs. The public interest, which underlies [these grounds for refusal] is … [the protection] of the freedom of commercial expression of third-party traders to communicate with consumers by means of descriptive signs.").

56. These grounds for refusal are regulated in 15 U.S.C. § 1052(a); EUTMR, Art 7(1)(f); TMD, Art 4(1)(f).

57. *See* case law cited *supra* note 12.

58. The expressive constraints imposed on applicants by refusals of registration are more stringent in Europe than in the United States, where common law marks (i.e., unregistered) are deserving of a substantial degree of protection as a result of use.

59. There is wide support for this proposition in the literature. *See, e.g.*, Dreyfuss, *supra* note 2, at 400 ("exclusivity is essential to an efficient marketplace. Without an unambiguous signal for goods, consumers would have no way to apply their past experience to future purchasing decisions"); Gangjee, *supra* note 2, at 29 ("Granting exclusive rights to a mark preserves its ability to reliably signal origin. This ability reduces consumer search costs and protects producer goodwill.").

are often so onerous that unsuccessful applicants would lack the incentive to make the required investment on the rejected signs if other traders were also allowed to use them. In the words of the EUIPO Grand Board of Appeals in *Jebaraj Kenneth*:

> While it is true to say that a refusal to register does not amount to a gross intrusion on the right of freedom of expression, since traders can still use trade marks without registering them, it does represent a restriction on freedom of expression in the sense that businesses may be unwilling to invest in large-scale promotional campaigns for trade marks which do not enjoy protection through registration because the Office regards them as immoral or offensive in the eyes of the public.[60]

And third, applicants' inability to use their applied-for signs in exclusive terms would, in turn, preclude them from building a brand image around these signs.[61] This could lead to the signs not evolving in such a way as to convey the additional meanings that the applicants wish to communicate in the marketplace.[62]

Furthermore, the impact of restrictions on trademark use on the expressive interests of right holders not only stem from trademark statutes but may also stem from public measures seeking to regulate the consumption of certain goods. Since the 1960s, legislation aimed at furthering public health has been implemented in certain industries—most notably, the tobacco, alcohol, and food industries—through advertising bans, health warnings, and, more recently, plain packaging.[63] The rationale behind these measures is to reduce the appeal that unhealthy products have to consumers by reducing/eliminating the advertising that the trademark performs and by better informing consumers of the risks that consumption of these products poses to their health.[64] Tobacco manufacturers

60. R 495/2005-G, Application of Jebaraj Kenneth, ¶ 15 (July 6, 2006). *See*, in similar terms, Bonadio, *supra* note 13, at 56; Scassa, *supra* note 13, at 1190–92. By contrast, Kapff, Griffiths, and Ricolfi have argued that free speech can hardly be said to be curtailed as a result of refusals of registration, since applicants are still able to market their goods using the contentious sign. Philipp von Kapff, *Fundamental Rights in the Practice of the European Trade Mark and Designs Office (OHIM)*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 273, 303 (Christophe Geiger ed., 2015); Griffiths, *supra* note 13, at 448–49; Ricolfi, *supra* note 13, at 471.

61. According to Dreyfuss: "Th[e] absence [of exclusivity in the use of a mark] would reduce suppliers' incentives to invest in quality-producing and brand-differentiating activities as the benefits of the investment could not be captured through repeat sales to loyal customers." Dreyfuss, *supra* note 2, at 400-01.

62. I have explored in further detail the rationale for invoking speech protection in refusals of registration elsewhere: Alvaro Fernandez-Mora, *Inconsistencies in European Trade Mark Law: The Public Policy and Morality Exclusions*, 4 INTELL. PROP. Q. 271, 284–85 (2020).

63. *See*, for a list of relevant examples of health-furthering, trademark-restrictive measures, *supra* note 15.

64. This has been acknowledged by regulators, courts, and scholars. For instance, in its proposed rule to introduce combined health warnings (i.e., consisting of both text and images) for tobacco products in the United States, the FDA explained that "new required warnings are designed to clearly and effectively convey the negative health consequences of smoking on cigarette packages and in cigarette advertisements, which would help both to discourage nonsmokers, including minor children, from initiating cigarette use and to encourage current smokers to consider cessation to greatly reduce the serious risks that smoking poses to their health." Proposed Rules, Department of Health and

have very often challenged the validity of these measures on grounds that they contravene their fundamental rights to (intellectual) property and/or freedom of expression.[65] As regards the latter right, these measures interfere with owners' ability to communicate their preferred messages in the marketplace. This can occur in two ways. First, because they impose restrictions on the manner in which marks can be used (and sometimes even on the types of marks that can be used, as with plain packaging), these measures hinder marks' ability to perform their functions.[66] Admittedly, the fundamental aim of health-furthering, trademark-restrictive measures is to target the advertising function of marks by reducing the appeal that certain signs have on consumers, especially fanciful logos.[67] However, the spillover effect of these measures often has an impact on marks' ability to perform their original function (with the ensuing increase in consumers' search costs and the decrease in market efficiency),[68] as well as to develop and convey expressive meaning, thus precluding right holders and other categories of users from using them for communicative purposes. Second, by forcing manufacturers to showcase their marks alongside the unappealing content of health warnings,

Human Services (HHS), Food and Drug Administration (FDA), Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69524 (Friday, November 12, 2010). In the EU, the latest Tobacco Products Directive also recognizes this when it holds that "The labelling and packaging of [tobacco] products should display sufficient and appropriate information on their safe use, in order to protect human health and safety, should carry appropriate health warnings and should not include any misleading elements or features." Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products, OJ L 127 at Recital 42. In *Reynolds*, the United States Court of Appeals for the District of Columbia Circuit also found "that the graphic warnings are intended to encourage current smokers to quit and dissuade other consumers from ever buying cigarettes." RJ Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1218 (D.C. Cir. 2012). This has also been noted by scholars, for instance, by Enrico Bonadio, *Bans and Restrictions on the Use of Trademarks and Consumers' Health*, 4 INTELL. PROP. Q. 326, 330 (2014).

65. For property-based challenges, *see* R. (on the application of British Am. Tobacco UK Ltd.) v. Sec'y of State for Health [2016] EWCA Civ 1182; R. (on the application of British Am. Tobacco (UK) Ltd.) v. Sec'y of State for Health [2016] EWHC 1169 (Admin); Case C-547/14, Philip Morris Brands S.A.R.L. v. Sec'y of State for Health, ECLI:EU:C:2016:325 (May 4, 2016); Case C-491/01 Sec'y of State for Health v. British Am. Tobacco (Investments) Ltd. et al, ECR I-11453 (2010). For speech-based challenges, *see* case law cited *supra* note 8.

66. Bonadio, *supra* note 64, at 339-40.

67. *Id.* at 338 ("These measures aim . . . to correctly inform consumers and curb the promotional impact of the relevant brands.").

68. *Id.* at 339-40 ("The main problem surrounding [plain packaging] measures . . . lies in the fact that it is not possible to curb the promotional effects of packaging without 'touching' some distinctive elements of the brand: indeed, the two elements of trade marks (promotional and distinctive) overlap. If governments adopt measures aimed at neutralising the promotional effects of brands, it is inevitable that doing this will also lower their (abstract) distinctiveness."). In similar terms, Ricketson has argued in relation to plain packaging that "[i]n terms of strict trade mark theory, the marks are stripped of all their advertising or promotional capacity while retaining a bare shred of their function of denoting origin". Sam Ricketson, *Plain Packaging Legislation for Tobacco Products and Trade Marks in the High Court of Australia*, 3 QUEEN MARY J. INTELL. PROP. L. 224, 230 (2013).

their marks go on to become associated with a negative image.[69] This interferes with right holders' freedom of expression as a form of compelled speech, i.e. they are required to communicate a message with which they do not wish to be associated.

Before looking at these barriers in more detail, and to ensure a proper understanding of the conflicting interests at stake, it is helpful to explain the legal protection afforded to freedom of expression under US and European law.

A. The Right to Freedom of Expression

In Europe, the fundamental right to freedom of expression is enshrined in Article 10(1) of the European Convention of Human Rights (ECHR).[70] It provides as follows: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."[71] In the United States, the First Amendment to the Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."[72]

Freedom of expression lies at the very heart of democratic societies. It allows individuals to express their views and engage in debate without fear of censorship by the State or other individuals and, in so doing, allows societies to progress and flourish.[73] Its prominent role in society explains why the European Court of Human Rights (ECtHR) and the US Supreme Court have interpreted this right

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69. This was acknowledged by Heydon, J. in his dissenting opinion in the constitutional challenge to the validity of plain packaging legislation in Australia in the following terms:

> [Plain packaging] legislation *compels* the presence on the cigarette] packets of the [government's] … *messages* ….
>
> In effect, the [government] has … command[ed tobacco manufacturers] as to how [they] are to use what is left of [their] property … with a view to damaging [their businesses] by making the products [they] sell *unattractive* ….

JT Int'l SA v. Australia [2012] HCA 43 ¶ 225-26 (Austl.) (emphasis added). It should be noted that despite Heydon, J.'s language being evocative of restrictions on speech, the court's analysis did not venture beyond the compatibility of the impugned legislation with the right to (intellectual) property.

70. European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953). In the EU, this right is also protected by virtue of the Charter of Fundamental Rights of the European Union art. 11, Dec. 18, 2000, 2000 O.J. (C364) 1 (hereinafter EU Charter).

71. ECHR art. 10(1).

72. U.S. CONST. amend. I.

73. "According to the Court's well-established case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. … [This right affords robust protection to speakers in the interests] of pluralism, tolerance and broadmindedness, without which there is no 'democratic society'." Tammer v. Estonia, App. No. 41205/98, ¶ 59 (Feb. 6, 2001). *See also*, in similar terms, Zana v. Turkey, App. No 18954/91, ¶ 51 (Nov. 25, 1997). "'Those who won our independence believed … that public discussion … should be a fundamental principle of the American government.'" N.Y. Times Co. v. Sullivan, 376 US 254, 270 (1964) quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

widely.[74] This is not to say that the scope of protection afforded to individuals under freedom of expression in each jurisdiction is equivalent. Any comparative exercise involving speech protection in the United States must be undertaken with caution.[75] This is due to the peculiarity of First Amendment doctrine within the political and legal landscape of the United States, where it is heavily relied upon to rein in government action in all its forms. Accordingly, not only is the manner in which speech rights can be relied upon to challenge public measures in the United States often different from other jurisdictions, including Europe, but the scope of protection afforded to individuals in the United States is often broader.[76]

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74. The US Supreme Court "consider[s free speech] case[s] against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." N.Y. Times Co. v. Sullivan, 376 U.S. 254, at 270 (1964). For its part, the ECtHR has acknowledged that the protection afforded under freedom of expression "is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb." Tammer, App. No. 41205/98, ¶ 59 (Feb. 6, 2001); Zana, App. No 18954/91, ¶ 51 (Nov. 25, 1997). Fhima has also read the latter decision as proof that "The right [to freedom of expression] has been construed widely by the Strasbourg court." Fhima, *supra* note 13, at 295.

75. This has also been noted by Gangjee & Burrell, *supra* note 3, at 21 ("the exceptional nature of First Amendment jurisprudence, in part attributable to a strong suspicion of Government, suggests that it may be too firmly rooted for a successful legal transplant"). The High Court of England and Wales has also cautioned against too heavily relying on US First Amendment doctrine upon assessment of the proportionality limb of the test mandated under Article 10 ECHR, in R. (on the application of British Am. Tobacco UK Ltd.) v. Sec'y of State for Health [2004] EWHC 2493 (Admin). In weighing whether a domestic advertising ban on tobacco products effected a disproportionate interference with tobacco manufacturers' right to freedom of expression under the ECHR, the court advanced that:

> [T]he First Amendment to the U.S. Constitution is expressed in broad terms and does not have a 'justification' provision such as Article 10(2) of our Convention. … With the very greatest of respect to that distinguished [Supreme] Court, it was dealing with the United States Constitution rather than our Convention. While it is instructive, in general terms, to see how another respected jurisdiction has dealt with a related but confined problem, the balance between State legislation and federal legislation in the United States is a subject of renowned complexity. Decisions on such matters can have limited effect on our consideration of the balance to be struck in considering a restriction of a limited Convention right and the measure of a discretion to be afforded to Parliament and ministers under our own rather different constitutional system.

Id. at ¶ 36. In *Reynolds*, the United States Court of Appeals for the District of Columbia Circuit also relied on the comparatively robust protection afforded to free speech in the United States to justify its finding that pictorial health warnings affect an unjustified interference with tobacco manufacturers' First Amendment rights. After listing over 30 countries where similar restrictions had passed constitutional muster, the court "not[ed] that the constitutions of these countries do not necessarily protect individual liberties as stringently as does the United States Constitution." RJ Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1209 (D.C. Cir. 2012).

76. This has been acknowledged by ERIC BARENDT, FREEDOM OF SPEECH 54 (2d ed. 2007) ("[The] US approach to free speech issues differs considerably … [from] the jurisprudence in many other countries and jurisdictions. . .[F]reedom of speech is more strongly protected against Government regulation in the United States, than it is, say, in Germany and under the ECHR"). *See also*: echoing Barendt's views and applying them to the interaction between trademarks and speech,

In spite of these differences, freedom of speech plays an equally pivotal role in the promotion of democratic values in both jurisdictions that justifies its robust protection.[77]

The central role that freedom of expression plays in the regulation of public activity in both jurisdictions opens the door to the sorts of parallels that allow for comparative analysis. This is especially true where the analytical frameworks employed by decision makers operating out of different jurisdictions bear resemblance, as is the case for the interaction between marks and speech. The way speech protection is relied upon by different expressive users of marks is strikingly similar on both sides of the Atlantic. First, in recoding litigation, both US and European courts have recourse to freedom of expression to insulate defendants' unauthorized use of plaintiffs' marks.[78] Second, in trademark registration, both US and European courts hear appeals on the compatibility of refusals of registration with applicants' speech rights.[79] And third, as regards challenges to the validity of health-furthering, trademark-restrictive measures, both US and European courts assess whether the encroachments they effect on right holders' speech rights are justified.[80] What is, however, different in each jurisdiction is the scope of protection afforded to the speaker under freedom of expression. This explains why similar analytical frameworks have led to

Gangjee & Burrell, *supra* note 3, at 21; and building on Gangjee and Burrell's work, *see* Katyal, *supra* note 7, at 928.

77. Compare, for instance, the reasoning of the ECtHR in Zana v. Turkey with that of the US Supreme Court in N.Y. Times Co. v. Sullivan in *supra* note 74.

78. Amongst others, in the **United States**: VIP Prods. L.L.C. v. Jack Daniel's Props., 953 F.3d 1170 (9th Cir. 2020); Ebony Media Operations L.L.C. v. Univision Commc'ns, Inc., No. 18-cv-11434-AKH (S.D.N.Y. Jun. 3, 2019); Louis Vuitton Malletier S.A. v. My Other Bag, Inc., 156 F. Supp. 3d 425 (S.D.N.Y. 2016); Univ. of Ala. Bd. of Trs. v. New Life Art, Inc., 683 F.3d 1266 (11th Cir. 2012); Smith v. Wal-Mart Stores, Inc., 537 F. Supp. 2d 1302 (N.D. Ga. 2008); E.S.S. Entm't. 2000 Inc. v. Rock Star Videos Inc., 547 F.3d 1095 (9th Cir. 2008); Nissan Motor Co. v. Nissan Comput. Corp., 378 F.3d 1002 (9th Cir. 2004); World Wrestling Fed'n Ent., Inc. v. Big Dog Holdings, Inc., 280 F. Supp. 2d 413 (W.D. Pa. 2003); Mattel, Inc. v. MCA Recs., Inc., 296 F.3d 894 (9th Cir. 2002); Anheuser-Busch, Inc. v. Balducci Publ'ns, 28 F.3d 769 (8th Cir. 1994); *Yankee Publ'g*, 809 F. Supp. 267; Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Grp., Inc., 886 F.2d 490 (2d Cir. 1989); Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989); L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26 (1st Cir. 1987). In **Europe**: Gof's-Amsterdam 13 september 2011, IES 2012, 15 m.nt. Herman MH Speyart (Mercis BV/Punt.nl BV) (Neth.); Rb.'s-Gravenhage 4 mai, 2011 NJF 2011, 264 (Nadia Plesner/Louis Vuitton) (Neth.); Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 7, 2005, Neue Juristische Wochenschrift [NJW] 2856 (2005) (Ger.)

79. Amongst others: Iancu v. Brunetti, 139 S. Ct. 2294 (2019); Matal v. Tam, 137 S. Ct. 1744 (2017); Case C-240/18, Constantin Film Produktion ('FACK JU GÖHTE') v. EUIPO, ECLI:EU:C:2019:553 (Feb. 27, 2019); French Connection Ltd.'s Trademark Application [2007] ETMR 8.

80. Amongst others: RJ Reynolds Tobacco, 696 F.3d at 1205 (D.C. Cir. 2012); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); Case C-547/14, Philip Morris Brands S.A.R.L. v. Sec'y of State for Health, ECLI:EU: C:2016:325 (May 4, 2016); Opinion of Advocate General Fennelly in Case C-376/98, Germany v. European Parliament, ECLI:EU:C: 2000:324 (June 15, 2000).

contrasting outcomes—especially in ownership cases, where applicants/owners in the United States have been more successful than in Europe.[81]

Despite constituting the cornerstone of free societies, the right to freedom of expression is not without limits.[82] In Europe, Article 10(2) ECHR qualifies the scope of the right by providing that "[t]he exercise of these freedoms . . . may be subject to such . . . restrictions . . . as are prescribed by law and are necessary in a democratic society."[83] Interference with freedom of expression might, thus, be justified, provided that the following requirements are cumulatively met: (a) the measure must be prescribed by law, (b) the measure must pursue a legitimate aim, and (c) the measure must be "necessary" in a democratic society, in the sense that the interference responds to a "pressing social need," is accompanied by "relevant and sufficient reasons," and is "proportionate."[84] As regards the latter requirement (i.e. "necessity"), a fundamental part of the inquiry revolves around determination of the margin of appreciation to be afforded to the public authority.[85] This varies in accordance with the type of speech interfered with.[86] Political and artistic expression, which are deemed to be of utmost importance for the proper functioning of a democratic society, are worthy of heightened protection and, thus, any interference will be strictly scrutinized.[87] According to the ECtHR, encroachments on political and artistic expressions are "narrowly interpreted and the[ir] necessity . . . must be convincingly established."[88] At the other end of the

81. These divergences are explored in Sections II(C)(3) and II(C)(2) below.

82. "This freedom is subject to the exceptions set out in Article 10(2), which must, however, be construed strictly." Tammer v. Estonia, App. No. 41205/98, ¶ 59 (Feb. 6, 2001).

83. ECHR art. 10(2).

84. Mouvement Raëlien Suisse, App. No. 16354/06 (July 13, 2012); VgT Verein Gegen Tierfabriken v. Switzerland, App. No. 24699/94 (June 28, 2001); Casado Coca v. Spain, App. No. 15450/89 (Feb. 24, 1994); Markt Intern Verlag GmbH and Klaus Beermann v. Germany, App. No. 10572/83 (Nov. 20, 1989); Zana v. Turkey, App. No 18954/91, ¶ 51 (Nov. 25, 1997).

85. "[U]nder Article 10 of the Convention, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent an interference with the freedom of expression guaranteed under that provision is necessary. However, this margin goes hand in hand with European supervision …. In exercising its supervisory function, the Court's task is not to take the place of the national courts, but rather to review … whether the decisions they have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied on." Axel Springer AG v. Germany, App. No. 39954/08, ¶¶ 85-86 (Feb. 7, 2012). *See also*, in similar terms: Tammer, App. No. 41205/98, ¶ 60 (Feb. 6, 2001); Mouvement Raëlien Suisse, App. No. 16354/06, ¶ 59-60 (July 13, 2012).

86. "The breadth of such a margin of appreciation varies depending on a number of factors, among which the type of speech at issue is of particular importance." Mouvement Raëlien Suisse, App. No. 16354/06, ¶ 61 (July 13, 2012).

87. "[T]here is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate on matters of public interest". Ceylan v. Turkey, App. No. 23556/94, ¶ 34 (July 8, 1999). *See*, in similar terms, Wingrove v. The United Kingdom, App. No., ¶ 58 17419/90 (Nov. 25, 1996).

88. VgT Verein Gegen Tierfabriken, App. No. 24699/94, ¶ 66 (June 28, 2001); Hertel v. Switzerland, App. No. 25181/94, ¶ 46 (Aug. 25, 1998); Handyside v. The United Kingdom, App. No. 5493/72, ¶ 49 (Dec. 7, 1976).

spectrum lies commercial expression, which the ECtHR has held to be deserving of less protection.[89] Under this category of expression, "the Court must confine its review to the question whether the measures [interfering with speech] are justifiable in principle and proportionate."[90]

In the United States, courts have also applied different thresholds of protection depending on the category of speech interfered with.[91] Three levels of scrutiny have been identified. First, a lower-level scrutiny imposing a reasonableness test applies to "purely factual and uncontroversial" disclosure requirements imposed by the government.[92] Under a reasonableness test, the interference with speech must simply be "reasonably related to the State's interest" and not "unjustified or unduly burdensome" to pass constitutional muster.[93] Second, intermediate-level scrutiny mandates that the encroachment on speech "directly advance . . . the [substantial] governmental interest asserted, and . . . it is not more extensive than is necessary to serve that interest."[94] Interferences with commercial speech (including speech uttered through trademark use) are commonly scrutinized under intermediate-level scrutiny.[95] And third, strict

89. "Whilst there is little scope under Article 10 § 2 of the Convention for restrictions on political speech … States have a broad margin of appreciation in the regulation of speech in commercial matters or advertising." Mouvement Raëlien Suisse, App. No. 16354/06, ¶ 61 (July 13, 2012).

90. Markt Intern Verlag GmbH and Klaus Beermann v. Germany, App. No. 10572/83, ¶ 33 (Nov. 20, 1989). *See also*, in similar terms, Casado Coca v. Spain, App. No. 15450/89, ¶ 50 (Feb. 24, 1994).

91. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64-65 (1983) ("[T]he Constitution accords less protection to commercial speech than to other constitutionally safeguarded forms of expression"). *See*, in similar terms, Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 562-63 (1980). *See also* Sorrell v. IMS Health Inc., 564 U.S. 552, 579 (2011) ("the government's legitimate interest in protecting consumers from 'commercial harms' explains 'why commercial speech can be subject to greater governmental regulation than noncommercial speech.'"), quoting Cincinnati v. Discovery Network, 507 U.S. 410, 426 (1993).

92. Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*,* 471 U.S. 626, 651 (1985).

93. *Id.* at 651. In *Zauderer*, the government's interest in mandating the disclosure of the information sought to protect consumers from misleading information conveyed by the manufacturer. This justification has since been broadened to include other interests. *See* Am. Meat Inst. v. U.S. Dept. of Agric., 760 F.3d 18, 22-23 (D.C. Cir. 2014).

94. RJ Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1217 (D.C. Cir. 2012) (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980)).

95. *Cent. Hudson Gas*, 447 U.S. at 566; *RJ Reynolds Tobacco*, 696 F.3d at 1213; Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554-55 (2001); Matal v. Tam, 137 S. Ct. 1744, 1763-64 (2017). It should be noted that courts have applied heightened scrutiny in cases involving encroachments on commercial speech where the challenged measure engages in "viewpoint discrimination", an "egregious form of content [based] discrimination … which is presumed impermissible". Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829-30 (1995). For instance, in Sorrell v. IMS Health Inc., the Supreme Court held that "[c]ommercial speech is no exception" to the rule according to which "[t]he First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'" 564 U.S. 552, 566 (2011) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). These cases are also discussed by Justice Kennedy in his concurring opinion in Matal, 137 S. Ct. 1744, 1767. In his view, given that the disparagement clause of the Lanham Act engages in viewpoint discrimination, its constitutionality

scrutiny, which requires the government to prove that its actions are "narrowly tailored to achieve a compelling government interest"—applies to restrictions on noncommercial speech.[96]

In light of the above, determination of the type of speech involved in trademark is crucial when assessing restrictions on expressive use of marks and whether such restrictions comport with freedom of expression. In Europe, speech limited to proposing business transactions or promoting goods and services is often deemed commercial expression.[97] As a result, most conventional uses of marks by right holders will fall within commercial expression.[98] These are uses where the mark is signaling the origin, quality, or other characteristics of goods or services, whether for purposes of informing or attracting consumers. This was precisely the finding of the ECtHR in *Dor v. Romania*, a case involving the compatibility of freedom of expression with the refusal to register the sign "CRUCIFIX" on misleading grounds.[99] The European Union Intellectual Property Office (EUIPO) has also characterized the category of speech interfered with in refusals of registration as commercial.[100] The Court of Justice of the European Union (CJEU) and its Advocates General (AG) have done the same in cases where the interference with owners' speech results from health-furthering, trademark-restrictive measures.[101] This is in contrast with recoding cases, where courts from different European jurisdictions have characterized recoders' speech parodying a reputed mark as artistic and, thus, deserving of reinforced protection under freedom of expression.[102] Unfortunately, decision makers do not seem to be aware of these differences in reasoning and, consequently, have not attempted to justify them. This could prove problematic for the overall consistency in the field. In particular, the finding that marks can convey artistic meaning in recoding cases might be difficult to reconcile with the finding that applied-for marks

ought to be assessed under strict scrutiny even if trademarks are deemed commercial speech in all instances. *Id.*

96. *RJ Reynolds Tobacco*, 696 F.3d at 1213.

97. Casado Coca v. Spain, App. No. 15450/89 (Feb. 24, 1994); Markt Intern Verlag GmbH and Klaus Beermann v. Germany, App. No. 10572/83 (Nov. 20, 1989).

98. Fhima, *supra* note 13, at 295 ("Cases where trademarks and free speech clash will generally involve commercial speech and may not involve any political or artistic element").

99. Dor v. Romania, App. No. 55153/12 (Aug. 25, 2015).

100. R 2804/2014-5, Application of Square Enix Ltd. (Feb. 6, 2015); R 495/2005-G, Application of Jebaraj Kenneth (July 6, 2006).

101. Case C-547/14, Philip Morris Brands S.A.R.L. v. Secretary of State for Health, ECLI:EU:C:2016:325, ¶ 155 (May 4, 2016); Opinion of Advocate General Kokott in Case C-547/14, Philip Morris Brands S.A.R.L. v. Secretary of State for Health, ECLI:EU:C:2015:853, ¶ 233 (Dec. 23, 2015); Opinion of Advocate General Fennelly in Case C-376/98, Germany v. European Parliament, ECLI:EU:C:2000:324, ¶ 153 (June 15, 2000).

102. Rb.'s-Gravenhage 4 mai, 2011 NJF 2011, 264 (Nadia Plesner/Louis Vuitton) (Neth.), para. 4.8; Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 7, 2005, Neue Juristische Wochenschrift [NJW] 2856 (2005) (Ger.) (for an English translation of the decision, *see* Violet Postcard 38 INT'L REV. OF INTELL. PROP. & COMPETITION L. 119, 121–22 (2007)).

amount to commercial speech since the potential uses of a registered mark by its owner could include artistic—and even political—ones.[103]

In the United States, the debate as to whether trademark use deserves protection under the First Amendment as commercial or noncommercial expression has been undecided since *Matal v. Tam*.[104] In that landmark decision, the Supreme Court invalidated a provision of the Lanham Act which provided the basis for refusal of registration of disparaging signs on First Amendment grounds.[105] The Court was also asked to rule on whether marks ought to be characterized as commercial speech in all instances, or whether some marks have an expressive component conveying meaning beyond source identification—in which case they would deserve reinforced protection under the First Amendment.[106] This was relevant to the case since the applied-for sign "THE SLANTS" "not only identifies the band but expresses a view about social issues."[107] Avoiding the issue, however, the Court saw no need to answer this question since the disparagement exclusion could not even withstand the intermediate level of scrutiny that applies to commercial speech.[108] It is regrettable that the Court remained silent on this issue, opening the door to speculation and uncertainty. In contexts other than registration, US courts have found that government-imposed restrictions on use of marks by their owners fall within commercial expression,[109] while many unauthorized uses of recoded marks by parodists/commentators have been deemed to be noncommercial.[110] Like their European counterparts, United States courts have not provided justification for these differences, further threatening the consistency of the field.

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103. The potential for owners' trademark usage to convey messages beyond commercial source was explored in detail in *supra* note 21.

104. Matal v. Tam, 137 S. Ct. 1744 (2017). For a thought-provoking discussion of the legal repercussions that can ensue from the characterization of trademark use as commercial or political speech under First Amendment doctrine, *see* Tushnet, *Truth and Advertising: the Lanham Act and Commercial Speech Doctrine, supra* note 10.

105. Matal, 137 S. Ct. at 1765.

106. *Id.* at 1763–64.

107. *Id.* at 1764.

108. *Id.*

109. Cigar Assoc. of Am. v. FDA, 315 F. Supp. 3d 143, 164 (D.D.C. 2018); RJ Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1212 (D.C. Cir. 2012) (note that the Court leaves the door open to tobacco manufacturers' speech not being commercial); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 553–54 (2001).

110. Smith v. Wal-Mart Stores, Inc., 537 F. Supp. 2d 1302 (N.D. Ga. 2008); Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792 (9th Cir. 2003); Mattel, Inc. v. MCA Recs., Inc., 296 F.3d 894 (9th Cir. 2002); Dr. Seuss Enters. L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997). The anti-dilution provisions of the Lanham Act contain a list of exclusions insulating defendants from liability, including for noncommercial uses of marks. 15 U.S.C. § 1125. This explains why US courts have sometimes engaged in analysis of the nature of defendants' speech in recoding cases.

B. The Interaction Between Trademarks and Freedom of Expression in the Literature

The most striking finding when one conducts research on the interaction between trademarks and freedom of expression is the lack of comprehensive studies covering all instances where marks interact with speech. An overview of this literature reveals a tendency to focus on the expressive interests of one subset of trademark users at a time, often third party recoders who face infringement actions before the courts.[111] But the focus is not limited to third party recoders. Commentators have also explored the extent to which the expressive interests of trademark applicants are deserving of protection in refusals of registration.[112] Comparatively little attention has been devoted to cases where speech rights have been invoked by right holders to challenge the validity of health-furthering, trademark-restrictive measures.[113] Admittedly, the aim of these authors is not to engage in a taxonomical analysis of the diverse scenarios where trademarks interact with speech with a view to mapping the multi-faceted nature of this interaction.[114] However, their narrow focus on one subset of interaction cases at a time has led to an impoverished understanding of the interaction between marks and speech.

Efforts at categorizing the diversity of judicial approaches to the interaction between marks and speech in the literature are, thus, not only scarce, but also limited in both their taxonomical relevance and territorial scope. Take, for instance, Fhima's thorough overview of European case law on the topic. It is difficult to see the criteria that guide Fhima's taxonomy, which sometimes arranges cases on the basis of trademark doctrines (e.g. grounds for invalidity, infringement, or defenses), on specific use contexts (e.g. internet), or even on procedural categories (e.g. interim relief cases).[115] While practical in the sense that it enables her to exhaustively review all relevant cases on the matter, Fhima's taxonomy proves of limited value when identifying general patterns that would allow for a better understanding of prevalent approaches to the interaction between marks and speech. Similar assessments can be made of other authors' approaches to the topic. Although ambitious in taxonomical scope, Sakulin's doctoral thesis on the topic fails to engage with cases where speech has been relied upon by applicants/right holders to challenge the validity of measures of public law restricting trademark registration/use.[116] This is surprising in light of his thorough analysis of all grounds of refusal of registration through the lens of their impact on the fundamental right to freedom of expression, including of signs that

111. *See* literature cited *supra* note 10.

112. *See* literature cited *supra* note 13.

113. *See* literature cited *supra* note 17.

114. *See* discussion in *supra* note 18.

115. Fhima, *supra* note 13.

116. Sakulin, *supra* note 42.

are contrary to public policy or morality. Sakulin's concern lies systematically with the protection of the speech interests of third parties wishing to make unauthorized use of trademarks for expressive purposes, including recoders.[117] In the sole instance where he engages with the argument that freedom of expression not only serves to limit trademark rights, but may also validate them, he dismisses it as far-fetched in a brief and unpersuasive argument.[118]

Furthermore, Sakulin's monograph is limited in jurisdictional reach, mainly covering European case law.[119] Regrettably, this is very often the case in trademark literature. There appears to be an Atlantic divide, with most authors focusing on either European or US case law on the topic.[120] Some, such as Christophe Geiger, focus even further by singling out one European jurisdiction (in his case, France).[121] To continue with Europe, Senftleben's analysis of the doctrinal tools that already incorporate speech concerns within the trademark system ultimately seeks to carve out space for unauthorized expressive uses of marks by non-owners, notably recoders and competitors.[122] His focus is on recoding cases. Rahmatian concedes that marks interact with speech in both infringement and registration litigation.[123] However, he fails to extract any relevant conclusions from this finding after dismissing the relevance of speech-based challenges to refusals of registration in rather cursory terms.[124]

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117. *Id.* at 21 ("this book will not examine the question of whether the rules of trademark law may limit the freedom of expression of a prospective trademark rights holder himself. Instead, the focus of this research is on exploring the conflict between trademark holders' rights and the free expression rights of third parties who may want to use the former's trademarks.").

118. *Id.* at 21–22 ("In my opinion, there is a severe dogmatic problem when assuming that the grant, refusal or, limitation of trademark rights may impair the freedom of expression of the relevant trademark right holder. First, a (potential) trademark right holder always remains free to use a sign in trade, as he does not need a trademark right in order to use the sign. Second, and most importantly, however, trademark rights grant a right holder the exclusive right to prevent third parties from using a sign, which is the antithesis of freedom of expression, which grants a right to non-exclusive use of a sign in order to e.g., inform consumers. Not being granted such a right to prevent can never affect the freedom of expression of a right holder. Therefore, I will not deal with this alleged freedom of expression of trademark right holders."); *id.* at 67 ("In my opinion, it is conceptually wrong to deduce a trademark right from freedom of expression. Freedom of expression provides the right holder with a freedom and such a freedom can never be extended to a right to prohibit third parties (!) to speak").

119. *Id.* at 22–23.

120. Exceptions to this rule include: Snedden, *supra* note 13; Bonadio, *supra* note 13; Ramsey and Schovsbo, *supra* note 22; Teresa Scassa, *supra* note 13; Dreyfuss, *Reconciling Trademark Rights and Expressive Values: How to Stop Worrying and Learn to Love Ambiguity, supra* note 10; Weckström, *supra* note 10.

121. Geiger, *supra* note 10.

122. Martin Senftleben, *Free Signs and Free Use – How to Offer Room for Freedom of Expression within the Trademark System, in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND INTELLECTUAL PROPERTY 354 (Christophe Geiger ed., 2015).

123. Rahmatian, *supra* note 10.

124. *Id.* at 348 ("in the context of trade mark law, th[e] problem area [of speech-based challenges to registration] seems to have little practical relevance and is rather confined to some bizarre fringe cases.")

In the United States, Farley and DeVaney engage in a joint analysis of recoding and ownership (only analyzing challenges to health-furthering, trademark-restrictive measures) cases to illustrate the courts' inconsistent application of First Amendment protection in each instance.[125] Although they identify some of the principles that govern each set of cases, their aim in doing so is not to propose a taxonomy of interaction cases, but rather to denounce the comparatively reduced protection afforded to recoders' speech rights in infringement litigation when compared to those of right holders in ownership cases.[126] Tushnet also explores recoding cases alongside owners' challenges to the validity of health-furthering, trademark-restrictive measures.[127] However, the aim of her piece is not to address instances where marks interact with speech, but rather to show, through exploration of different scenarios (some of which operate outside the boundaries of trademark law, such as defamation), how First Amendment doctrine has been applied inconsistently in cases lying at the intersection between facts and emotions.[128] Gold seeks to extract lessons from the Supreme Court's findings in *Matal v. Tam* and *Iancu v. Brunetti* with a view to assessing the constitutionality of the Lanham Act's anti-dilution provisions under the First Amendment.[129] Far from proposing a taxonomy of interaction cases, her aim is to mobilize the precedents set in registration cases to shield recoders' expressive uses of marks from the threat of dilution actions.[130] Leval explores different trademark doctrines that already incorporate speech concerns (e.g. descriptiveness) to argue that the interaction between marks and speech goes beyond invocation of First Amendment protection as a constitutional safeguard to infringement actions.[131] Unfortunately, the lessons that he extracts from this exercise are rather limited since he does not go on to study other scenarios where marks interact with speech in the search for the broad principles that govern this interaction.[132] Instead, and to avoid excessive reliance on constitutional

125. Farley and DeVaney, *supra* note 10.

126. *Id.* at 292 ("Tobacco firms argue strenuously for robust First Amendment rights when challenging government regulations, and then seek to suppress others' assertion of speech rights by using their assertion of trademark rights as a sword. When these disputes are examined side-by-side, we see that strong speech rights emerge from clear doctrine in the tobacco regulation cases, but that speech rights are vulnerable in the disorderly doctrine that has emerged in the trademark speech cases.").

127. Tushnet, *More than a Feeling: Emotion and the First Amendment*, *supra* note 10.

128. *Id.* at 2396-415.

129. Gold, *supra* note 10.

130. *Id.* at 489 ("This Note argues firstly that because the free-speech harms of dilution laws outweigh the purported benefits, dilution laws fundamentally violate the First Amendment. Secondly, in the aftermath of Tam and Brunetti, courts are more willing to critically evaluate trademark law's constitutionality and are thus likely to recognize that dilution law does not comport with free-speech principles.").

131. Leval, *supra* note 52.

132. *Id.* at 188 ("The question I explore is whether … the trademark laws rather represent an integrally complete, multifaceted body of rules, designed to balance a trademark owner's interest in exclusive use of the mark in commerce against society's interest in free expression.").

adjudication in infringement cases, he urges courts to mobilize the in-built speech levers provided by trademark doctrines to balance owners' interests against those of recoders.[133]

Against this backdrop, conventional wisdom posits that the relationship between marks and speech is unidirectional and that trademark rights chill expression. For instance, McGeveran begins his study of the interaction between marks and speech arguing that "Trademarks constrain the use of language."[134] In more poetic terms, Dreyfuss begins one of her pieces by discussing the topic and asserting that "Trademarks and free expression are on a collision course."[135] According to Ramsey and Schovbo, "The European Union, United States, and other nations have expanded trademark rights in various ways that may threaten other public interests, such as . . . freedom of expression."[136] The list goes on.[137]

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133. *Id.* at 189 ("The trademark law itself is fashioned to protect free-speech interests that may justify uses of a trademark by persons other than its owner. … Where the trademark law, by its own terms, protects the unauthorized use of another's trademark, there is no need to turn to the Constitution to justify a judgment in the alleged infringer's favor."). *Id.* at 209 ("Avoiding unnecessary constitutional adjudication is not merely a matter of form or etiquette. It has serious practical consequences: … (d) excessive reliance on the Constitution, in place of recognizing the free speech-protecting policies of the trademark law, will sometimes produce undesirable rulings.").

134. McGeveran, *Four Free Speech Goals for Trademark Law, supra* note 10, at 1205.

135. Dreyfuss, *supra* note 10, at 262. In another piece, Dreyfuss warns that "if courts continue to permit trademark owners to extend their control, a framework for identifying and protecting core expressive interests will need to be developed." Dreyfuss, *supra* note 2, at 399.

136. Ramsey and Schovsbo, *supra* note 22, at 672.

137. Lemley contends that "The expansive power that is increasingly being granted to trademark owners has frequently come at the expense of freedom of expression." Lemley, *supra* note 10, at 1710. McGeveran has advanced that "The ever-expanding scope and strength of trademark rights has caused justifiable fears of a threat to free expression". William McGeveran, *Rethinking Trademark Fair Use*, *supra* note 10, at 49; According to Denicola, "The struggle to extend the scope of trademark protection . . . has . . . raised for the first time the possibility of genuine conflict between trademark law and the first amendment." Denicola, *supra* note 10, at 160. In Jacques' view, "as EU trade mark law moves towards stronger protection for trade mark owners . . ., a more robust EU framework is necessary to best preserve freedom of expression." Jacques, *supra* note 10, at 481. Farley and DeVaney argue that "structuring a framework to protect the freedom of expression of trademark appropriators could temper trademark law's chilling effect on speech." Farley & DeVaney, *supra* note 10, at 327. Partridge conceptualizes of interaction cases involving parodic uses of recoded marks as the weighing of the "competing interests of artistic expression on the one hand and trademark protection on the other." Partridge, *supra* note 10, at 890. In similar terms, Sadurski conceives of recoding cases as entailing "the balancing of competing values: those which are behind trademark protection and those which support freedom of speech." Sadurski, *supra* note 10, at 457. In Baxter's view, "Because the Lanham Act fails to adequately address First Amendment protection for commercial parodies and courts have interpreted the Act inconsistently, Congress needs to balance these two competing concepts." Baxter, *supra* note 10, at 1210. Dorsen believes that "In creating a trademark claim for satiric appropriation by recognizing claims for harm to reputation in the defamation sense of "reputation," the courts' decisions compromise the first amendment." Dorsen, *supra* note 10, at 949. According to Sakulin, "protection [against dilution] may conflict … with the freedom of third parties who want to use trademarks as social, cultural or political communicators, e.g. in art, criticism, parody, or satire. It is here that the core conflict with freedom of expression … comes into play." Sakulin, *supra* note 42, at 12. In Cantwell's view, "anti-dilution provision[s] … directly conflict with the free speech guarantees incorporated in the First Amendment." Michael K. Cantwell, *Confusion, Dilution, and Speech: First*

A possible explanation for the misconception that the interaction between marks and speech is unidirectional may be historical. The vast majority of interaction cases to date have dealt with infringement actions launched by right holders seeking to enjoin unauthorized third party use of their marks for expressive purposes.[138] The scope of protection afforded to right holders has continued to expand through the adoption of anti-dilution provisions in trademark statutes worldwide.[139] In the face of increasing pressure from owners to protect their marks against blurring, tarnishment, and, in Europe, free riding, courts began to have recourse to freedom of expression as a reactive tool to accommodate the expressive needs of recoders.[140] Speech-infused rationales soon sparked a wave of optimism amongst scholars wishing to curb the ever-expansive claims of overzealous right holders.[141] In their search for a middle ground that would incentivize owners' investment in the brand dimension of trademarks while ensuring other users' access to their expressive component, most commentators have relied on speech to suggest different ways of striking the right balance.[142]

Amendment Limitations on the Trademark Estate, 87 TRADEMARK REP. 48, 52 (1997). Katyal explores "the growing set of case law regarding the conflicts between the transnational brand, activist movements, and freedom of speech." Katyal, *supra* note 77, at 934.

138. *See* case law cited *supra* note 88. The reader will notice that most recoding cases to date have originated in the United States. This likely explains why American authors have shown a comparatively higher interest on the topic than their European counterparts.

139. Anti-dilution provisions are contained in: 15 U.S.C. § 1125(c); EUTMR, Art 9(2)(c); TMD, Art 10(2)(c).

140. Geiger, *supra* note 10, at 317 ("courts are increasingly relying on freedom of expression as a ground for permitting the use of trade marks for purposes of parody or criticism."); Leval *supra* note 52, at 187–88 ("In the last quarter century, we have witnessed a new aggressiveness on the part of advertisers, social commentators and wisecrackers in the use of other people's trademarks. … In dealing with such [recoding] cases, courts often treat them as instances of conflict between trademark rights and the First Amendment."). For an illustrative list of cases where courts have mobilized free speech to balance defendants' expressive interests against plaintiffs' trademarks rights, *see* excerpts cited *supra* note 66.

141. Although ultimately critical of mobilizing free speech principles to constrain trademark rights (especially outside of the United States), Burrell and Gangjee's piece on the topic lends support to this proposition when they state that "United States academics have led the way in arguing that we should look to freedom of expression principles to curb the expansion of trade mark law. Increasingly, however, commentators in other jurisdictions are taking this suggestion seriously." Gangjee & Burrell, *supra* note 3, at 544 (2010). *See also* literature cited *supra* note 10. *See*, in similar terms: Dogan & Lemley, *The Trademark Use Requirement in Dilution Cases*, *supra* note 10, at 544 (2007) ("Numerous scholars … have pointed out the ways in which broad dilution protection can choke off speech"); Griffiths, *supra* note 13, at 426 ("Commentators have observed that the enhancement of trade mark rights, particularly as weapons against "dilution", has increased the potential for conflict with the interests of parodists, protestors and other cultural commentators."); Fhima, *supra* note 13, at 294(2013) ("The potential conflict between free speech and trade mark law has long been acknowledged in the United States. There is also a growing awareness of the issue amongst academic circles in Europe."). *See also* Geiger, *supra* note 10, at 324 (2007) ("it seems to us that the invocation of freedom of expression in order to justify [unauthorized] uses [of recoded marks] is not without benefit.").

142. McGeveran, *Rethinking Trademark Fair Use*, *supra* note 10, at 49 ("In response [to fears that the expansion of trademark rights can threaten speech], concerned scholars generally focus on perfecting the substance of legal rules that balance free speech against other goals."). Relevant

Conversely, conceptualizing the role of freedom of expression in trademark litigation as a defense, by default, has held the narrative captive. This Article seeks to dispel this misconception by showing that the interaction between marks and speech operates as a two-way street, where freedom of expression can simultaneously limit and validate trademark rights. To this end, the following section will look at the role that speech plays in validating trademark rights in both Europe and the United States. Evidence to this effect can be found in the growing body of case law.[143] Applicants and right holders are invoking freedom of expression to challenge the validity of measures encroaching on trademark registration or use, respectively. Before exploring these cases, however, the comprehensive aspiration of this piece mandates that we begin by reviewing the courts' approach to the interaction between marks and speech in recoding litigation. In the interest of brevity, this analysis will place emphasis on the courts' unidirectional conceptualization of this interaction. On all other aspects of the interaction, I defer to other authors' exhaustive coverage of the case law.[144]

C. The Interaction Between Trademarks and Freedom of Expression as a Multi-Faceted Legal Problem: Rethinking the Role of Speech in Trademark Law

1. The Interaction Between Trademarks and Speech in Recoding Litigation

a. Europe

Courts from different European jurisdictions have reached inconsistent outcomes in recoding litigation. As I will go on to explore, this is often the result of different courts adopting divergent thresholds for determining what amounts to a protected expressive use of a mark under Article 10 ECHR.

The stricter thresholds imposed in the UK and France have led courts to side with plaintiffs after a finding that defendants' recoded uses were not expressive.[145] Judging from French case law, recoders will only be able to rely on

examples of authors' attempts at striking the right balance in recoding cases can be found in the excerpts cited *supra* note 18 in relation to scholarship addressing recoding litigation.

143. *See* case law cited *supra* notes 12 (for speech-based challenges to refusals of registration) and 16 (for cases addressing the compatibility of health-furthering, trademark-restrictive measures with freedom of expression). *See also* Bonadio, *supra* note 13, at 56 ("U.K. and EU judges and examiners, in particular, increasingly refer to Article 10 ECHR when it comes to refusing registration of signs which are considered contrary to public policy and morality."); Griffiths, *supra* note 13, at 427 ("It has increasingly been accepted that any refusal to register a mark on public policy/morality grounds constitutes an interference with the applicant's right to freedom of expression and, therefore, calls for justification under Article 10(2) of the ECHR.").

144. *See* literature cited *supra* note 10.

145. Ate My Heart, Inc. v. Mind Candy Ltd. [2011] EWHC 2741; Miss World Ltd. v. Channel 4 Television Corp. [2007] EWHC 982; Cour d'Appel [CA] [regional court of appeal] Paris, 5 ch., Dec.

a speech defense when their unauthorized use of plaintiffs' marks is purely noncommercial, i.e., where it does not identify the origin of goods or services offered for profit in the course of trade.[146] There is room to argue that the High Court of England and Wales does not require such a high bar for determination that a recoded use is deserving of protection under freedom of expression. Although we lack precedent to this effect, the court has seemed open to shielding fundamentally noncommercial recoded uses from infringement, i.e., where the defendant, despite using the recoded mark on goods or services offered for sale, primarily seeks to convey his parodic/critical message.[147]

In contrast, the courts of Germany and the Netherlands have applied a more generous threshold which has often shielded defendants from infringement after a finding that their uses were expressive.[148]

11, 2015, 14/32109 (Fr.); Cour d'Appel [CA] [regional court of appeal] Rennes, 2 ch., Apr. 27, 2010, 09/00413 (Fr.).

146. In cases where recoders' unauthorized use of plaintiffs' marks is commercial, French courts have denied relief to defendants on the basis that, unlike copyright law, trademark statutes do not provide a speech-based defense to infringement. Cour d'Appel [CA] [regional court of appeal] Paris, 5 ch., Dec. 11, 2015, 14/32109 (Fr.); Cour d'Appel [CA] [regional court of appeal] Rennes, 2 ch., Apr. 27, 2010, 09/00413 (Fr.). This is in contrast with cases where recoders' use of marks "do not manifestly seek to promote the marketing of products or services . . . for the profit of [defendant], but rather fall within purely controversial use which is alien to business life and competition between commercial enterprises." Cour d'Appel [CA] [regional court of appeal] Paris, 4 ch., Nov. 16, 2005, 04/12417 (Fr.) (for an English translation of the decision, *see* Esso Plc v. Greenpeace France [2006] ETMR 53, 670). *See also*, in similar terms, Cour d'Appel [CA] [regional court of appeal] Paris, 14 ch., Feb. 26, 2003, 02/16307 (Fr.) (for an English translation of the decision, *see* Association Greenpeace France v. SA Société ESSO [2003] ETMR 66, 845). For a finding that defendant's noncommercial use of a recoded mark can constitute an abuse of the right to freedom of expression that gives rise to infringement, *see* Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Apr. 8, 2008, Bull. civ. I, No. 104 (Fr.).

147. *Ate My Heart, Inc.*, [2011] EWHC 2741, [45]-[47]; *Miss World Ltd.*, [2007] EWHC 982, [31]-[42]. In both cases, the High Court acknowledges, in dicta, the likelihood that recoded use of reputed marks could trigger the protection afforded under freedom of expression in fact patterns approximating those of the renowned South African case of *Laugh It Off Promotions CC v. South African Breweries (Finance) BV t/a Sabmark Int'l* 2006 (1) SA 144 (CC) (i.e., involving the sale of T-shirts bearing a clearly parodic recoded version of the 'Carling' mark for beer).

148. Oberlandesgericht Hamburg [OLG] [Hamburg Higher Regional Court] Jan. 5, 2006, Gewerblicher Rechtsschutz und Urheberrecht, Rechtsprechungs-Report [GRUR-RR] 231 (2006) (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 7, 2005, Neue Juristische Wochenschrift [NJW] 2856 (2005) (Ger.); Rb.'s-Gravenhage4 mai, 2011 NJF 2011, 264 (Nadia Plesner/Louis Vuitton) (Neth.) (although this case involved infringement of a registered design, the court's balancing of plaintiff's right to [intellectual] property against recorder's freedom of expression is illustrative for trademark purposes too); Gof's-Amsterdam 13 september 2011, IES 2012, 15 m.nt. Herman MH Speyart (Mercis BV/Punt.nl BV) (Neth.). We find precedents to the contrary in these jurisdictions. *See*, in Germany, discussing both the AOL Logo and Violet Postcard cases, Oberlandesgericht Hamburg [OLG] [Hamburg Higher Regional Court] Aug. 9, 2010, Gewerblicher Rechtsschutz und Urheberrecht, Rechtsprechungs-Report [GRUR-RR] 382 (2010) (Ger.). The Dutch courts also refused to insulate defendant's allegedly recoded use of a reputed mark on speech grounds Rb.'s-Amsterdam 3 april, 2003, KG 2003, 108 (Joanne Kathleen Rowling/Uitgeverij Byblos BV) (Neth.). In this case, however, as the court rightly points out, it is difficult to *see* the parodic intent underlying defendant's unauthorized use of plaintiff's mark.

b. United States

It is no easy endeavor to systematize the different rationales employed by US courts in recoding cases. There are three reasons for this. First, the volume of decisions dealing with the interaction between marks and speech in recoding cases has resulted in courts adopting a wide range of approaches to resolving this form of interaction.[149] Second, as the amendment of the Lanham Act in 2006 to broaden the "fair use" defense in dilution cases led to a shift in judicial approaches to recoding cases involving blurring and tarnishment causes of actions.[150] And third, the approaches adopted by US courts to resolving recoding cases vary significantly depending on whether plaintiff's infringement claim is grounded on likelihood of confusion or on dilution grounds. This has resulted in a rather complex framework, whereby the tension between owners' exclusive rights and recoders' speech interests is resolved differently depending on a variety of factors. At the risk of oversimplifying, I propose classifying court decisions in recoding cases in accordance with two factors: (a) whether defendant's recoded use of plaintiff's mark is or is not deserving of protection under the First Amendment and (b) whether plaintiff's infringement claim is grounded on "likelihood of confusion" or on dilution.

In "likelihood of confusion" cases, US courts have often held that recoders' unauthorized use of plaintiffs' marks for expressive purposes is entitled to such limited protection under the First Amendment that the Lanham Act will prevail upon a finding of confusion.[151] This is most common where recoders' use is for

149. *See* case law cited *supra* note 8. Dogan & Lemley also note that "courts have struggled with the evaluation of parody under trademark law. While many trademark courts have protected parodies, there are a surprising number of cases that hold obvious parodies illegal." Dogan & Lemley, *Parody as Brand*, *supra* note 10, at 94. Taking their criticism of the diversity of approaches adopted by US courts further, these authors contend that "[D]espite increasing attention to speech interests in recent years, the law's treatment of parody reflects too much uncertainty … In particular, given the flexibility of likelihood of confusion analysis, parodists' fate is usually determined by the subjective judgment of courts, whose treatment of parody often seems to turn on instinct rather than trademark principles." *Id.* at 94.

150. Anti-dilution provisions were first introduced in the United States by virtue of the Federal Trademark Dilution Act of 1995, Pub. L. No. 104-98, § 3, 109 Stat. 985 (1995). The Act already sought to reconcile the expressive interests of defendants with right holders' expanded causes of action by recognizing, *inter alia*, a "fair use" (in comparative advertising) and "noncommercial use" defenses. *Id.* In 2006, Congress passed legislation to amend the dilution provisions. Among other changes, the Trademark Dilution Revision Act (TDMR) broadened the fair use exclusion from comparative advertising to parody, criticism and commentary, provided that defendant's use is not "as a mark" (i.e., to identify goods or services). Pub. L. No. 109-312, § 2, 120 Stat. 1730, 1731 (2006). For a detailed exploration of the changes brought about by the Revision Act, *see* Dogan & Lemley, *The Trademark Use Requirement in Dilution Cases, supra* note 10.

151. Hard Rock Cafe Licensing Corp. v. Pac. Graphics, Inc., 776 F. Supp. 1454, 1462 (W.D. Wash. 1991); Schieffelin & Co. v. Jack Co. of Boca, Inc., 725 F. Supp. 1314, 1323–24 (S.D.N.Y. 1989); Mut. of Omaha Ins. Co. v. Novak, 836 F.2d 397, 402–03 (8th Cir. 1987); Tommy Hilfiger Licensing v. Nature Labs, L.L.C., 221 F. Supp. 2d 410, 415 (S.D.N.Y. 2002); Planned Parenthood

origin-signaling purposes;[152] the rationale is that speech rights are not intended to insulate defendants from infringement in instances of commercial fraud, i.e., where consumers are deceived as to the commercial origin of the goods or services bearing the recoded mark.[153] Given courts' reluctance to grant broad speech protection to recoders in "likelihood of confusion" cases, there are numerous instances where courts have refused to shield defendants' unauthorized use from infringement on First Amendment grounds.[154] We can find, however, many cases where US courts considered the expressive interests of recoders upon assessment of "likelihood of confusion."[155] This usually results in plaintiffs' infringement actions being dismissed.[156]

In dilution cases, the "fair use" provision of the Lanham Act mandates that courts conduct their infringement analysis irrespective of First Amendment protection whenever the defendant's recoded use is "as a trademark" (i.e., to identify the source of goods or services).[157] This analysis has sometimes led courts

Fed'n of Am., Inc. v. Bucci, 42 U.S.P.Q. 2d (BNA) 1430, 1440–41 (S.D.N.Y. 1997); Yankee Publ'g, Inc. v. News Am. Publ'g, Inc., 809 F. Supp. 267, 275–76 (S.D.N.Y. 1992); Parks v. LaFace Recs., 329 F.3d 437, 447 (6th Cir. 2003); Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1405–06 (9th Cir. 1997).

152. *Planned Parenthood*, 42 U.S.P.Q. 2d (BNA) at 1440–41; *Yankee Publ'g*, 809 F. Supp. 276.

153. World Wrestling Fed'n Ent., Inc. v. Big Dog Holdings, Inc., 280 F. Supp. 2d 413, 430 (W.D. Pa. 2003); *Tommy Hilfiger Licensing*, 221 F. Supp. 2d at 415.

154. *Hard Rock Cafe*, 776 F. Supp. 1454; *Mut. of Omaha Ins. Co.*, 836 F.2d 397; Gucci Shops, Inc. v. RH Macy & Co., 446 F. Supp. 838 (S.D.N.Y. 1977); Harley Davidson, Inc. v. Grottanelli, 164 F.3d 806 (2d Cir. 1999); Wendy's Int'l, Inc. v. Big Bite, Inc., 576 F. Supp. 816 (S.D. Ohio 1983); *Parks*, 329 F.3d 437 ; Am. Dairy Queen Corp. v. New Line Productions Inc, 35 F. Supp. 2d 727 (D. Minn. 1998); *Planned Parenthood*, 42 U.S.P.Q. 2d (BNA) 1430; *Dr. Seuss Enters., L.P.*,109 F.3d 1394; Gen. Foods Corp. v. Mellis, 203 U.S.P.Q. 261 (S.D.N.Y. 1979); Dallas Cowboy Cheerleaders, Inc. v. Pussycat Cinema Ltd., 604 F.2d 200 (2d Cir. 1979). We also find precedents in the case law of recoding cases where, despite First Amendment protection not being available, the parodic intent underlying defendant's use was found not to be liable to confuse consumers: Hormel Foods Corp. v. Jim Henson Prods., Inc., 73 F.3d 497 (2d Cir. 1996); *World Wrestling Fed'n Ent. Inc.*, 280 F. Supp. 2d at 430, 439 (the Court's reasoning is not clear, for it begins its analysis of consumer confusion holding that "Parody . . . is not an affirmative defense," and yet concludes with a finding that defendant's "parodies . . . entitle its . . . merchandise to First Amendment protection"); *Tommy Hilfiger Licensing*, 221 F. Supp. 2d 410 ; Anheuser-Busch Inc. v. L. & L. Wings, Inc., 962 F.2d 316 (4th Cir. 1992) (procedural constraints prevented the Court from ruling on whether defendant was entitled to First Amendment protection); Universal City Studios, Inc. v. Nintendo Co., Ltd., 746 F.2d 112 (2d Cir. 1984); Jordache Enters. Inc. v. Hogg Wyld Ltd, 828 F.2d 1482 (10th Cir. 1987) (in the last two cases, the courts did not rule on whether defendant was entitled to First Amendment protection as a result of its parodic intent but took it into consideration when assessing likelihood of confusion).

155. Anheuser-Busch, Inc. v. Balducci Publ'ns, 28 F.3d 769 (8th Cir. 1994); Rogers v. Grimaldi, 875 F.2d 994 (2d Cir. 1989); Univ. of Ala. Bd. of Trs. v. New Life Art, Inc., 683 F.3d 1266 (11th Cir. 2012); Mattel, Inc. v. MCA Recs. Inc., 296 F.3d 894 (9th Cir. 2002); Cliffs Notes, Inc. v. Bantam Doubleday Dell Publ'g Grp., Inc., 886 F.2d 490 (2d Cir. 1989).

156. E.S.S. Ent. 2000, Inc. v. Rock Star Videos, Inc., 547 F.3d 1095 (9th Cir. 2008); *Univ. of Ala. Bd. of Trs.*, 683 F.3d 1266; *Mattel*, 296 F.3d 894; *Yankee Publ'g*, 809 F. Supp. 267; *Rogers*, 875 F.2d 994; *Cliffs Notes, Inc.*, 886 F.2d 490.

157. 15 U.S.C. § 1125(c)(3)(A). This is discussed in Starbucks Corp. v. Wolfe's Borough Coffee, Inc., 588 F.3d 97, 111–13 (2d Cir. 2009).

to find against the defendant,[158] but not always.[159] By contrast, where defendants' unauthorized use is not "as a trademark", courts will shield such use from infringement in recognition of their First Amendment rights (as mandated under the "fair use" defense).[160]

Regardless of the outcome, these cases all illustrate how courts on both sides of the Atlantic have conceptualized the interaction between marks and speech in unidirectional terms, in the sense that speech protection (when available) is understood to operate as a limit to trademark rights.[161]

2. The Interaction Between Trademarks and Speech in Ownership Cases (I): Refusals of Registration

a. Europe

Trademark offices and appellate courts have split on what role the protection afforded under Article 10 ECHR ought to play in the registration context.[162] The UK Appointed Person, the General Court (GC), and the EUIPO Boards of Appeal have reached contrasting outcomes in similar scenarios involving challenges to refusals of registration on public policy or morality grounds.[163] While the UK Appointed Person has repeatedly acknowledged that freedom of expression is

158. Louis Vuitton Malletier S.A. v. Hyundai Motor Am., 10 Civ. 1611 (PKC) (S.D.N.Y. 2012); Jews For Jesus v. Brodsky, 993 F. Supp. 282 (D. N.J. 1998); Panavision Int'l, L.P. v. Toeppen, 945 F. Supp. 1296 (C.D. Cal. 1996); Deere & Co. v. MTD Products, Inc., 41 F.3d 39 (2d Cir. 1994). Before the adoption of the broader fair use exclusion by virtue of the TDMR in 2006, courts sometimes found against defendants despite their recoded uses not being 'as a mark', *e.g. Dallas Cowboy Cheerleaders, Inc.*, 604 F.2d 200; Coca-Cola Co. v. Gemini Rising, Inc., 346 F. Supp. 1183 (E.D.N.Y. 1972).

159. We find precedents in the case law of courts finding against plaintiff even when recoder's use is 'as a mark' on grounds that the obvious parodic intent underlying defendant's use prevents any dilutive harm: Louis Vuitton Malletier S.A. v. Haute Diggity Dog L.L.C., 507 F.3d 252 (4th Cir. 2007); *Jordache Enters., Inc,* 828 F.2d 1482.

160. 15 U.S.C. § 1125(c)(3)(A) & 3(C). Case law in this regard includes: VIP Prods. L.L.C. v. Jack Daniel's Props., 953 F.3d 1170 (9th Cir. 2020); Ebony Media Operations L.L.C. v. Univision Commc'ns, Inc., No. 18-cv-11434-AKH (S.D.N.Y. Jun. 3, 2019); Louis Vuitton Malletier S.A. v. My Other Bag, Inc., 156 F. Supp. 3d 425 (S.D.N.Y. 2016). Prior to the broadening of the "fair use" defense in 2006 (to cover parody, commentary, and criticism), courts adjudicating dilution actions often took into consideration defendants' First Amendment rights by means of applying the "noncommercial use" exclusion that could already be found in the Federal Trademark Dilution Act as adopted in 1995. Notable decisions in this regard include: Nissan Motor Co. v. Nissan Comput. Corp., 378 F.3d 1002 (9th Cir. 2004); Smith v. Wal-Mart Stores, Inc., 537 F. Supp. 2d 1302 (N.D. Ga. 2008); *Mattel*, 296 F.3d 894; L.L. Bean, Inc. v. Drake Publishers, Inc., 811 F.2d 26 (1st Cir. 1987).

161. For further evidence of the conceptualization of speech as a defense in recoding cases in both the United States and Europe, *see* excerpts cited *supra* note 6.

162. I have written extensively on this topic elsewhere, with a focus on the uncertainty ensuing from the inconsistent interpretation of these exclusions by European decision makers: Fernandez-Mora, *supra* note 62.

163. These grounds of refusal are regulated in the EUTMR, Art. 7(1)(f); TMD, Art. 4(1)(f).

implicated in refusals of registration,[164] most decisions from the GC have denied this possibility.[165] The EUIPO Board of Appeals are split on the matter, with some following the GC's position,[166] and others factoring in applicants' speech interests in their registration decisions.[167]

To complicate things further, in its decision in *Constantin Film Produktion v. EUIPO*, the GC appeared to reject the possibility of freedom of expression ever being implicated in trademark law broadly considered—and not just in the registration context—when it held that "there is, in the field of art, culture and literature, a constant concern to preserve freedom of expression which does not exist in the field of trade marks."[168] This is problematic. Quite apart from the possible sweeping implications it could have in the field, this finding is at odds with respect to: (a) the recitals to the EUTMR and TMD, which provide that both instruments "should be applied in a way that ensures full respect for fundamental rights and freedoms, and in particular the freedom of expression;"[169] (b) the case law of the ECtHR acknowledging that applicants' speech can be interfered with as a result of refusals of registration;[170] and (c) the European case law addressing the compatibility of health-furthering, trademark-restrictive measures with Article 10 ECHR.[171]

Fortunately, on appeal, the CJEU ended this controversy when it held that "contrary to the General Court's finding . . ., freedom of expression . . . must . . . be taken into account when applying [the public policy and morality exclusions]."[172] By harmonizing one aspect of the interaction between marks and speech that had been highly contested in Europe, the Court's finding that Article

164. Amongst others: Scranage's Trademark Application [2008] ETMR 43; French Connection Ltd.'s Trademark Application [2007] ETMR 8.

165. Case T-69/17, Constantin Film Produktion v. EUIPO, ECLI:EU:T:2018:27 (Jan. 24, 2018); Case T-417/10, Federico Cortés del Valle López v. OHIM, ECLI:EU:T:2012:120 (Mar. 9, 2012); Case T-54/13, Efag Trade Mark Co. v. OHIM, ECLI:EU:T:2013:593 (Nov. 14, 2013). The sole exception to this is Case T-232/10, Couture Tech Ltd v. OHIM, ECLI:EU:T:2011:498 (Sept. 20, 2011), where the GC seemed ready to accept applicant's free speech argument.

166. R-793/2014-2, Application of Ung Cancer (Feb. 23, 2015); R 168/2011-1, Application of Türpitz (Nov. 30, 2010).

167. R 2244/2016-2, Application of Brexit Drinks Ltd. (Jun. 28, 2017); R 519/2015-4, Application of Josef Reich (Sept. 2, 2015); R 2889/2014-4, Application of Verlagsgruppe D. K. GmbH & Iny Klocke (May 28, 2015); R 495/2005-G, Application of Jebaraj Kenneth (July 6, 2006).

168. Case C-240/18, Constantin Film Produktion ('FACK JU GÖHTE') v. EUIPO, ECLI:EU:C:2019:553 ¶ 56 (Feb. 27, 2019), citing Case T-69/17, Constantin Film Produktion v. EUIPO, ECLI:EU:T:2018:27 ¶ 29 (Jan. 24, 2018).

169. EUTMR, Recital 21; TMD, Recital 27.

170. Dor v. Romania, App. No. 55153/12 (Aug. 25, 2015).

171. *See* European case law cited *supra* note 16. These cases will be discussed in further detail in Section II(C)(3)(a) below.

172. Case C-240/18, Constantin Film Produktion ('FACK JU GÖHTE') v. EUIPO, ECLI:EU:C:2019:553 ¶ 56 (Feb. 27, 2019).

10 ECHR is implicated in trademark registration is a welcome development.[173] As I have argued elsewhere, it is regrettable that the CJEU failed to build on this finding and left the more substantial questions raised by the interaction between marks and speech in the registration context unanswered.[174] For current purposes, however, the Court's finding that applicants' Article 10 ECHR rights are triggered by refusals of registration constitutes proof of speech's ability to validate trademark rights in Europe.

b. United States

In *Matal v. Tam*, the lead member of a dance-rock band was denied registration of the sign "THE SLANTS"—a derogatory term for people of Asian descent—on grounds that it contravened the disparagement clause of the Lanham Act.[175] In *Iancu v. Brunetti*, appellant was the owner of a clothing business.[176] His application for registration as a federal trademark of the sign "FUCT"—that can be pronounced as either four letters, i.e., F-U-C-T, or the offensive term "fucked"—was not allowed on the register because of immoral or scandalous grounds.[177] Both decisions were overturned on appeal to the Supreme Court.[178] Importantly, the challenges raised by both applicants were not circumscribed to the validity of the US Patent and Trademark Office's decisions denying registration to their applied-for signs, but went beyond to question the constitutionality of all three grounds for refusal under the First Amendment.[179]

In finding for appellants in both cases, the Supreme Court relied on the doctrine of viewpoint discrimination, according to which the "government may not discriminate against speech based on the ideas or opinions it conveys."[180]

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173. The controversy in the literature as to whether trademark applicants' speech rights are triggered in refusals of registration was discussed in *supra* note 60.

174. Notably, the Court remained silent on: (a) why speech protection is implicated in refusals of registration; and (b) how its finding that speech protection is implicated in refusals of registration builds into the test developed to determine when an applied-for sign is morally objectionable and, thus, unregistrable. For a more detailed discussion of this topic, *see* Fernandez-Mora, *supra* note 62, at 294–98.

175. Matal v. Tam, 137 S. Ct. 1744 (2017). For the decision of the Trademark Trial and Appeal Board denying registration to the applied-for mark in application of the disparagement clause of the Lanham Act, *see In Re* Tam, 108 U.S.P.Q.2d (BNA) 1305 (T.T.A.B. 2013).

176. Iancu v. Brunetti, 139 S. Ct. 2294 (2019).

177. *Id.* For the decision of the Trademark Trial and Appeal Board denying registration to the applied-for mark in application of the scandalous or immoral clause of the Lanham Act, *see In re* Brunetti, 2014 TTAB LEXIS 328 (T.T.A.B. 2014).

178. Matal, 137 S. Ct. 1744; Iancu, 139 S. Ct. 2294.

179. In Matal, the applicant challenged the constitutionality of the disparagement clause of the Lanham Act. Matal, 137 S. Ct. 1744. In *Iancu*, the applicant questioned the compatibility with the First Amendment of the Lanham Act's scandalous or immoral clause. Iancu, 139 S. Ct. 2294.

180. Iancu, 139 S. Ct. 2294. It should be noted that viewpoint discrimination is not the only claim discussed by the Supreme Court in its decisions, especially in *Tam*. However, as explained by Justice Kagan writing for the majority in *Brunetti*, viewpoint discrimination constitutes the central claim in

Applying this doctrine in *Tam*, the court found that "the disparagement clause discriminates on the bases of 'viewpoint,' . . . [i]t denies registration to any mark that is offensive to a substantial percentage of the members of any group. . . . Giving offense is a viewpoint."[181] In *Brunetti*, the Supreme Court explored this rationale further when it held that:

> [T]he [Lanham Act] . . . distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them [i.e., immoral signs]; those inducing societal nods of approval and those provoking offense and condemnation [i.e., scandalous signs]. The statute favors the former, and disfavors the latter.
> The . . . viewpoint bias in the law results in viewpoint-discriminatory application. . . . [T]he PTO has refused to register marks communicating "immoral" or "scandalous" views about (among other things) drug use, religion, and terrorism. But all the while, it has approved registration of marks expressing more accepted views on the same topics.[182]

Because they contravene the constitutional protection afforded to free speech under the First Amendment, the grounds for refusal of registration of disparaging, scandalous, or immoral signs were struck from the Lanham Act.[183]

The repercussions of these decisions are far-reaching. Not only do they open the floodgates for registration as trademarks of signs which convey the most profane and hateful of messages, but they set a high constitutional bar for any

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both cases, as well as the ground on which all eight justices (Justice Gorsuch did not take part in the decision in *Tam*) agreed upon in *Tam*—there was disagreement between the justices as to whether the exclusions amount to a condition on a government benefit, or ought to be regarded simply as an interference with free speech. *Id.* at 2298-99. For the sake of precision, the reader should also be aware that the reasoning put forward in each of the two four-judge opinions in *Tam* is slightly different also as regards viewpoint discrimination, even if they end up reaching the same conclusion. This is also acknowledged by Justice Kagan in *Iancu*. *Id.* at 2299. The situation in Europe is quite different where the ECtHR has repeatedly held that restrictions on speech that conveys certain messages, in particular hate speech, can effect a proportionate interference with the right to freedom of expression enshrined in Article 10 ECHR. See Leroy v. France, App. No. 36109/03 (ECtHR, 2 October 2008); Féret v. Belgium, App. No. 15615/07 (July 16, 2009); Sürek v. Turkey (No. 1), App. No. 26682/95 (July 8, 1999); Balsytė-Lideikienė v. Lithuania, App. No. 72596/01 (Nov. 4, 2008).

181. Matal, 137 S. Ct. at 1763.

182. Iancu, 139 S. Ct. at 2296. This language was also employed by Justice Kennedy in his dissenting opinion in Matal, 137 S. Ct. at 1766 ("an applicant may register a positive or benign mark but not a derogatory one. The law thus reflects the Government's disapproval of a subset of messages it finds offensive, the essence of viewpoint discrimination."). In *Brunetti*, the Supreme Court rejected the Government's additional argument that the morality/scandalous exclusion could be construed as viewpoint-neutral (instead of viewpoint-discriminatory) if it were to refuse registration only to signs whose "mode of expression" is shocking or offensive, regardless of the views they express. This would allow restricting the scope of the exclusion to signs that are "'vulgar'—meaning 'lewd', 'sexually explicit or profane.'" Iancu, 139 S. Ct. at 2301-02. According to the Court, this reading is incompatible with the wording of the provision as drafted by Congress, which is overly broad in its ban on certain marks on the basis of their content.

183. As regards the disparaging clause, *see* Matal, 137 S. Ct. at 1751. In relation to the scandalous or immoral clause, *see* Iancu, 139 S. Ct. at 2297.

future attempt by Congress to reinstate the exclusions.[184] More importantly, these decisions set a precedent, which cannot be overturned except by the Supreme Court, for the ability of speech to validate trademark rights in the United States. When compared to the decision of the CJEU in *Constantin Film Produktion*,[185] *Tam* and *Brunetti* demonstrate how the disparate degrees of protection afforded under freedom of expression on each side of the Atlantic are conducive to different outcomes.[186] This is so despite the similarities in the analytical frameworks employed, i.e., despite decisionmakers of both jurisdictions acknowledging that applicants can rely on their speech rights to validate their registration claims.

3. The Interaction Between Trademarks and Speech in Ownership Cases (II): Health-Furthering, Trademark-Restrictive Measures

a. Europe

In 1998, the EU adopted the Tobacco Products Advertising Directive imposing advertising and sponsorship bans on tobacco products.[187] The Directive was challenged by Germany and by tobacco manufacturers on several grounds, including the Directive's incompatibility with Article 10 ECHR.[188] Unfortunately, the Court failed to engage with this claim when it annulled the Directive on grounds of improper legal basis under the EC Treaty.[189]

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184. *See* Katyal, *supra* note 13 (discussing the growing evidence that signs that consist of slurs and other hateful messages are being granted access to the federal trademark register).

185. Case C-240/18, Constantin Film Produktion ('FACK JU GÖHTE') v. EUIPO, ECLI:EU:C:2019:553 (Feb. 27, 2019). The findings of the CJEU in relation to the degree of protection afforded to trademark applicants under Article 10 ECHR were explored in the previous subsection.

186. Matal, 137 S. Ct. 1744; Iancu, 139 S. Ct. 2294. The different approaches to freedom of expression adopted in the United States and Europe were explored in Section II(A) above, including support for the proposition that speech enjoys broader protection in the United States than it does in Europe. *See supra* note 76.

187. First Tobacco Products Directive.

188. Case C-376/98, Germany v. European Parliament, ECLI:EU:C:2000:544 (Oct. 5, 2000).

189. *Id.* at ¶ 118. It is worth noting that the CJEU was given a second chance to assess the compatibility with freedom of expression of the reformulated advertising ban Directive several years later in Case C-380/03, Germany v. European Parliament, ECLI:EU:C:2006:772 (Dec. 12, 2006). Unfortunately, however, the relevance of this decision for purposes of the argument advanced here is somewhat limited for four reasons. First, the reformulated Directive did not contain any form of advertising ban impinging directly on trademark use (such as a prohibition on the use of trademarks of tobacco products in relation to other goods). *See* Directive 2003/33, of the European Parliament and of the Council of 26 May 2003 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Relating to the Advertising and Sponsorship of Tobacco Products, 2003 O.J. (L 152) 16. Instead, it prohibited more conventional forms of advertising, such as in printed media (Article 3) and radio (Article 4), which affect trademark use only indirectly. Second, it is unclear from the decision whether the expressive concerns of tobacco manufacturers were at issue in this case in addition to those of journalists. While the claimant's (Germany) speech-based challenge to the Directive seemed broad enough to incorporate tobacco manufacturers' freedom of commercial

Guidance can, however, be found in the opinion of AG Fennelly.[190] The AG applied the ECtHR's proportionality test to interferences with commercial expression.[191] Under this test, a measure encroaching on speech will be valid when the public authority has "reasonable grounds for adopting [it] . . . in the public interest. In concrete terms, it should supply coherent evidence that the measure will be effective in achieving the public interest objective invoked—in these cases, a reduction in tobacco consumption relative to the level which would otherwise have obtained—and that less restrictive measures would not have been equally effective."[192] Because the EU had furnished evidence of "a correlation both between tobacco advertising and the taking up of smoking . . ., and between the banning of advertising and reductions in average per capita tobacco consumption," the AG found the advertising ban to legitimately encroach on manufacturers' speech.[193] Admittedly, most advertising bans do not directly impinge on trademark use, but rather forbid commercial communication between undertakings and consumers through the use of different means, including trademarks.[194] This explains why the AG's reasoning does not specifically address, upon analysis of the advertising ban on tobacco products, restrictions on trademark use. However, to the extent that marks can be said to perform an advertising function that is liable to be directly affected by other trademark-restrictive measures, such as health warnings or plain packaging, the rationale of the AG is relevant to our discussion.[195]

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expression ("the prohibition on advertising covers any indirect effect on the sale of tobacco products of any form of commercial communication"), the Court only made explicit reference to journalists' speech interests. Case C-380/03, Germany v. European Parliament, ECLI:EU:C:2006:772 ¶ 132 (Dec. 12, 2006). Third, the Court seemed skeptical of the ban's ability to interfere with freedom of expression when it began its analysis with the following caveat: "even assuming that the measures laid down in . . . the Directive prohibiting advertising and sponsorship have the effect of weakening freedom of expression indirectly." *Id.* at ¶ 156. And fourth, the Court adopted such a deferential approach towards the assessment of restrictions on the freedom of commercial expression that its analysis is extremely succinct and lacking in nuance. *Id.* at ¶ 154-56.

190. Opinion of Advocate General Fennelly in Case C-376/98, Germany v. European Parliament, ECLI:EU:C:2000:324 (June 15, 2000).

191. *Id.* at ¶ 158-59.

192. *Id.* at ¶ 159.

193. *Id.* at ¶ 162.

194. This has also been noted by Fhima, *supra* note 13, at 312. There are, however, two types of advertising bans that impinge directly on trademark use: (a) bans that prohibit the use of marks already associated with other goods on tobacco products; and (b) bans that prohibit the use of marks already associated with tobacco products on other goods. As we will go on to see, these types of bans were also discussed by AG Fennelly in his opinion.

195. As demonstrated by the following excerpt from the AG's opinion, where he comments on the justifications put forward by the EU legislature for the adoption of the Directive, the fundamental issues raised by this case can be very easily extrapolated to measures that directly impinge on trademark use:

> The case made for the Advertising Directive is that consumption of tobacco products is dangerous for the health of smokers, that advertising and sponsorship promote such consumption and that the comprehensive prohibition of those forms of expression will result in a reduction in tobacco consumption and, thus, improved public health.

Regardless of the outcome of this debate, the applicability of AG Fennelly's reasoning to restrictions directly targeting trademark use can hardly be questioned in light of his next finding. The challenged Directive included two additional prohibitions: (a) on the use of marks associated with other goods on tobacco products and (b) on the use of marks associated with tobacco products on other goods.[196] According to the AG, these restrictions on trademark use effected an interference with tobacco manufacturers' freedom of commercial expression which the EUhad failed to justify on public health grounds.[197] This finding was thus premised on the notion that trademark use implicates freedom of expression. This is expressly recognized by the AG: "the application of . . . a brand or mark to a product also constitutes an exercise of freedom of commercial expression."[198]

AG Fennelly's opinion constitutes the most robust precedent in EU law of speech protection being mobilized by trademark owners to validate their exclusive rights. First, it constitutes an acknowledgment, within the EU's highest judicial body, of the communicative role that marks play in the marketplace and, hence, of their entitlement to protection under the fundamental right to freedom of expression when their use is threatened by measures of public law.[199] And second, by finding the prohibition on trademark use invalid for lack of evidence of the health benefits derived from such measure that would justify the encroachment on freedom of expression, the AG's opinion is a valuable precedent for the role of speech as validating trademark rights in the EU.

In 2016, the CJEU was once again given the opportunity to address the compatibility of trademark-restrictive measures with freedom of expression in a challenge that tobacco manufacturers brought regarding the legality of the latest Tobacco Products Directive.[200] The Directive mandates, *inter alia*, that packages of tobacco products (a) bear enlarged health warnings covering 65% of their front and back surfaces (a considerable increase from the 30% required by the previous Directive of 2001) and (b) do not feature any misleading information, such as use

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Opinion of Advocate General Fennelly in Case C-376/98, Germany v. European Parliament, ECLI:EU:C:2000:324, ¶ 156 (June 15, 2000).

196. First Tobacco Products Directive, arts. 3(3)(a) and 3(3)(b). These provisions are discussed by AG Fennelly in Opinion of Advocate General Fennelly in Case C-376/98, Germany v. European Parliament, ECLI:EU:C:2000:324, ¶ 176 (June 15, 2000).

197. Opinion of Advocate General Fennelly in Case C-376/98, Germany v. European Parliament, ECLI:EU:C:2000:324, ¶ 176 (June 15, 2000).

198. *Id.* ¶ 176. Griffiths, *supra* note 13, at 447-48, has conceded that restrictions on trademark use will likely be deemed by the ECtHR to interfere with freedom of expression ("Even if one does not accept any of the more elaborate claims made for the use of a mark as a form of expression, a mark undoubtedly provides information of some use to consumers. As such, it seems quite likely that, in the eyes of the Strasbourg Court, the use of a mark by its proprietor will fall within the scope of protected "expression" under Article 10 [ECHR]."). This has also been noted by Ricolfi, *supra* note 13, at 472.

199. This has also been noted by Fhima, who believes that "[t]his decision is interesting because the Advocate General was prepared to apply ECHR principles directly in order to protect the use of trade marks in speech." Fhima, *supra* note 13, at 313.

200. Case C-547/14, Philip Morris Brands S.A.R.L. v. Secretary of State for Health, ECLI:EU:C:2016:325 (May 4, 2016).

of the expressions 'low-tar', 'ultra-light', 'without additives', or 'slim'.[201] The manufacturers' claim that the Directive was incompatible with their fundamental right of freedom of expression was restricted to the second requirement regarding misleading information.[202]

The Court began by acknowledging that the ban on misleading information "constitutes . . . an interference with a business's freedom of expression and information."[203] An interference, however, that must be deemed proportionate since: (a) it is narrow in scope, in the sense that it does not "prohibit . . . the communication of all information about the product, [but] . . . only the inclusion of certain elements and features";[204] and (b) pursues a legitimate health objective, where "human health protection . . . outweighs the [expressive] interests put forward by [tobacco manufacturers]."[205] Although the Court does not say this in explicit terms, it seems to reach its decision by applying the lower level of scrutiny afforded to freedom of commercial expression, since claimants "rely, in essence . . ., on the freedom to disseminate information in pursuit of their commercial interests."[206]

Regrettably, the Court's proportionality assessment is rather cursory.[207] Judging by the high degree of protection afforded under the EU Charter and the ECHR to the right to health on the one hand (as acknowledged by the court),[208] and the right to freedom of expression on the other,[209] it is striking that the CJEU failed to engage in a more nuanced balancing exercise here. Instead, by way of adopting a highly deferential approach to review of the acts of the EU legislature, the Court appears to consider its proportionality test satisfied so long as the challenged measure pursues the promotion of health.[210] According to the Court: "Given that it is undisputed that tobacco consumption and exposure to tobacco smoke are causes of death, disease and disability, the [challenged] prohibition . . . contributes to the achievement of that objective in that it is *intended* to prevent the promotion of tobacco products and incitements to use them."[211] This prevents the Court from engaging in sophisticated analysis of the colliding interests at stake, notably by requiring proof of the attainment of the health objective pursued. Furthermore, it would have been useful for the Court to explore further whether

201. *Id.* at ¶ 138-42.

202. *Id.* at ¶ 137.

203. *Id.* at ¶ 148.

204. *Id.* at ¶ 151.

205. *Id.* at ¶ 156.

206. *Id.* at ¶ 155.

207. *Id.* at ¶ 153-62.

208. *Id.* at ¶ 157.

209. The crucial role that freedom of expression plays in democratic societies was discussed in Section II(A) above, including evidence from the ECtHR in *supra* note 73.

210. *Id.* at ¶ 156.

211. *Id.* at ¶ 152 (emphasis added).

the scope of the prohibition was indeed narrow.[212] It can be easily argued that the type of information that manufacturers are precluded from communicating on the packaging is precisely the type which is of most value to them, i.e., information that seeks to attract consumers by informing them of some characteristic of the product that they may be particularly interested in. Therefore, the fact that all other information is still available for use on the packaging appears to be of little use in practice.

The opinion of AG Kokott offers further guidance.[213] Importantly, even though the referring court had limited its question to the compatibility with speech of the prohibition on the use of misleading information, the AG also analyzed whether the restrictions imposed by enlarged health warnings were compatible with Article 10 ECHR.[214] In doing so, the AG arguably acknowledged both that (a) traders' interest in expressing their opinions through trademark use merits protection under the fundamental right to freedom of expression and (b) that health warnings interfere with said freedom. However, she failed to explain how they interfere, notably by removing space on the package that could otherwise be devoted to trademark use, or by requiring tobacco manufacturers to convey a health-related message against their will, or possibly both.

She begins her proportionality analysis by conceding that freedom of expression calls for the application of a stricter test than that which applies to other freedoms, such as the freedom to conduct a business. However, she goes on to conclude that the requirements contained in the Directive effect a proportionate interference with freedom of expression for two reasons: (a) they promote public health, "which has been recognised as having a particularly high importance" and (b) they impact commercial expression, which is deserving of limited protection under the ECHR.[215] In her own words: "[T]he dissemination of opinions and information which—as in this case—are intended to pursue solely business interests generally warrants less protection as a fundamental right than other expressions of opinion in the economic sphere or even political expressions of opinion."[216]

Even though the AG and the CJEU recognize that the challenged measures interfere with tobacco manufacturers' freedom of commercial expression, they both fail to apply the proportionality test mandated under Article 10 ECHR in such instances.[217] This is in contrast with the nuanced assessment undertaken by

212. *Id.* at ¶ 151.

213. Opinion of Advocate General Kokott in Case C-547/14, Philip Morris Brands S.A.R.L. v. Secretary of State for Health, ECLI:EU:C:2015:853 (Dec. 23, 2015).

214. *Id.* at ¶ 211.

215. *Id.* at ¶ 233.

216. *Id.* at ¶ 233.

217. As discussed in Section II(A) above, the ECtHR has developed a proportionality test in cases involving restrictions on freedom of commercial expression in, *inter alia*: Markt Intern Verlag GmbH and Klaus Beermann v. Germany, App. No. 10572/83, ¶ 33 (Nov. 20, 1989). *See also*, in similar terms, Casado Coca v. Spain, App. No. 15450/89, ¶ 50 (Feb. 24, 1994).

AG Fennelly in *Germany v European Parliament*.[218] Despite this shortcoming, both the Court's decision and the AG's opinion constitute valuable precedent on the role of speech as amenable to the validation of trademark rights in Europe.[219]

b. United States

Courts in the United States have also acknowledged that owners' speech rights can be interfered with by government-mandated restrictions on trademark use.[220] Because of the broader scope of protection afforded to individuals under the First Amendment as compared to Europe, we find precedents in the United States of health-furthering, trademark-restrictive measures being struck down on speech grounds.[221]

In *Lorillard Tobacco Company v. Reilly*, the Supreme Court partially upheld tobacco manufacturers' speech claims against a Massachusetts regulation which imposed advertising and sale restrictions on tobacco products.[222] Among other prohibitions, the challenged measure (a) banned all advertising within a 1,000-foot radius of schools or playgrounds and (b) imposed restrictions on indoor, point-of-sale advertising.[223] Because the regulation under scrutiny targeted speech that "propos[es] a commercial transaction", the Court went on to apply intermediate scrutiny.[224] The burden of proof imposed on the regulatory authority under this standard is considerably high in that the measure must "directly advance" the substantial governmental interest asserted, and must not be "more

218. Opinion of Advocate General Fennelly in Case C-376/98, Germany v. European Parliament, ECLI:EU:C:2000:324 (June 15, 2000).

219. An additional precedent in this regard can be found in the decision of the High Court of England and Wales in R. (on the application of British American Tobacco UK Ltd.) v. Secretary of State for Health [2004] EWHC 2493 (Admin). This case involved a speech-based challenge to the validity of the British advertising ban on tobacco products. Although the Court eventually sided with the government, its detailed discussion of whether the measure effected a proportionate interference with tobacco manufacturers' freedom of expression constitutes further evidence of the ability of speech to validate trademark rights in Europe.

220. Cigar Ass'n of Am. v. FDA., 315 F. Supp. 3d 143 (D.D.C. 2018); RJ Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001).

221. *See, e.g.*, *RJ Reynolds Tobacco Co.*, 696 F.3d at 1205; partially in *Lorillard Tobacco Co.*, 533 U.S. at 525.

222. *Lorillard Tobacco Co.*, 533 U.S. at 525.

223. *Id.* at 534-35. The measure under scrutiny also regulated sales practices by tobacco manufacturers and retailers, notably the bar of self-service displays and the requirement that tobacco products only be accessible to salespeople. It is unclear how these restrictions relate to trademark use, or even impinge on manufacturers' ability to communicate (the latter was noted by the Court, too). *Id.* at 569. Insofar as claimants' First Amendment rights were curtailed by sales restrictions, the Court concluded that they complied with constitutional requirements. *Id.* at 567-70.

224. *Id.* at 554-55. The Court did not explore how the regulations encroached on manufacturers' speech since the defendant "ha[d] assumed for purposes of summary judgment that petitioners' speech is entitled to First Amendment protection." *Id.* at 555.

extensive than is necessary to serve that interest."[225] In this case, the regulatory authority was unable to meet this burden and justify the constitutionality of either advertising ban.[226] The ban on advertising within 1,000 feet of schools or playgrounds proved controversial.[227] After careful consideration of the evidence furnished by the government, the Court concluded that the impugned measure was able to advance the public interest pursued of reducing underage consumption of the tobacco products under analysis.[228] The defendant, however, was unable to furnish evidence that the outdoor advertising ban was no more extensive than necessary to serve that interest.[229] This led the Court to side with plaintiff after finding that "[t]he broad sweep of the regulations indicates that the [government] did not 'carefully calculate the costs and benefits associated with the burden on speech imposed' by the regulations."[230] Because of the high school density in metropolitan areas, the regulation effectively amounted to a near-complete ban on all forms of advertising in several geographical areas within Massachusetts.[231] Additionally, the Court had no difficulty in striking down the provisions of the regulation imposing restrictions on indoor advertising because the regulator had failed to demonstrate both that it advanced the public interest pursued and that it was tailored to that interest.[232]

A decade later, in *R.J. Reynolds Tobacco Company v. FDA*,[233] tobacco manufacturers successfully challenged the validity of a proposed Food and Drug Administration (FDA) regulation promulgating a set of pictorial health warnings that would be affixed to cigarette packages.[234] The FDA had issued this regulation under the statutory directive of The Family Smoking Prevention and Tobacco Control Act, which imposed combined health warnings—consisting of both text and images—covering 50% of the front and back surfaces of cigarette

225. *Id.* at 554 (quoting Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980)).

226. *Id.* at 566-67. As discussed in *supra* note 223, the Court did not reach the same conclusion in relation to sales restrictions.

227. *Id.* at 556-66.

228. *Id.* at 556-61. It is worth noting that the Court's analysis was restricted to smokeless tobacco and cigars since plaintiffs' challenge in relation to cigarettes had been successful on grounds that federal law (the Federal Cigarette Labelling and Advertising Act, 15 U.S.C. § 1333) pre-empted the regulation. *Id.* at 550-51.

229. *Id.* at 561-66.

230. *Id.* at 561 (quoting Cincinnati v. Discovery Network, 507 U.S. 410, 417 (1993)).

231. *Id.* at 561-66.

232. *Id.* at 566-67.

233. RJ Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012). *But see* Disc. Tobacco City & Lottery, Inc. v. U.S., 674 F.3d 509, 524-27 (6th Cir. 2012), where tobacco manufacturers' facial challenge to the validity of the same Act was unsuccessful as regards, *inter alia*, the compatibility of the required pictorial health warnings with the First Amendment.

234. Proposed Rules, Department of Health and Human Services (HHS), Food and Drug Administration (FDA), Required Warnings for Cigarette Packages and Advertisements, 75 FR 69524 (Nov. 12, 2010).

packages.[235] The Court of Appeals for the District of Columbia Circuit was easily satisfied that the challenged regulation compelled the plaintiffs to express the FDA's views towards the health risks posed by tobacco products and, thus, interfered with their First Amendment rights.[236] According to the Court, "[t]his case contains elements of compulsion [to express certain views] and forced subsidization [of speech to which plaintiffs object]."[237] To determine whether this interference was constitutional, the Court first had to elucidate the applicable level of scrutiny.[238] The FDA argued for the application of lower-level scrutiny because the proposed health warnings constituted factual information about the health risks derived from smoking.[239] However, the Court instead found that the graphic component of the proposed health warnings consisted of "inflammatory images" that "are unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting."[240] The Court thus went on to apply intermediate scrutiny.[241] Because the FDA was unable to furnish convincing evidence that the proposed images would "directly advance" the governmental interest in reducing smoking prevalence, the challenged regulation was held to be unconstitutional.[242] According to the Court:

> FDA has not provided a shred of evidence—much less "substantial evidence" …—showing that the graphic warnings will "directly advance its interest" in reducing the number of Americans who smoke. FDA makes much of the "international consensus" surrounding the effectiveness of large graphic warnings, but offers no evidence showing that such warnings have directly caused a material decrease in smoking rates in any of the countries that now require them. …
> The … [FDA] estimated the new warnings would reduce U.S. smoking rates by a mere 0.088%, …, a number the FDA concedes is "in general not statistically distinguishable from zero." … Indeed, because it had access to "very small data sets," FDA could not even reject the statistical possibility that the Rule would have no impact on U.S. smoking rates.[243]

In a more recent decision, *Cigar Association of America v. FDA*, the court found that the FDA's enlarged health warnings for cigars were constitutional on the grounds, *inter alia*, that they effected a justified encroachment on cigar

235. *RJ Reynolds Tobacco Co.*, 696 F.3d at 1205.

236. *Id.* at 1211-12.

237. *Id.* at 1211.

238. *Id.* at 1211-17.

239. *Id.* at 1212-13.

240. *Id.* at 1216-17.

241. *Id.* at 1217. However, this is in clear contrast to the decision of the 6thCircuit in *Discount Tobacco*. Upon assessing the constitutionality of the pictorial health warnings mandated under the Act on their face (i.e. in the abstract, before the FDA had issued the proposed images challenged in *RJ Reynolds*), the Court applied lower-level scrutiny. *Disc. Tobacco City & Lottery, Inc.*, 674 F.3d at 558-61.

242. *RJ Reynolds, Tobacco Co.*, 696 F.3d at 1234-37.

243. *Id.* at 1219-20.

manufacturers' First Amendment rights.[244] Compared to *Reynolds*, the proposed health warnings in this case were considerably less intrusive on manufacturers' speech rights because they consisted of text rather than images and only covered 30% of the front and back surfaces of packages.[245] It was precisely on this basis that the Court decided, after acknowledging that the proposed health warnings interfered with manufacturers' speech, to assess the constitutionality of the required warnings under a standard of lower-level scrutiny, i.e., scrutiny which applies to purely factual and uncontroversial information. Under this standard, the regulatory authority must show that the proposed measure is "reasonably related" to the pursued aim and is not "unjustified or unduly burdensome."[246] According to the Court, whereas the graphic health warnings in *Reynolds* had been "controversial" and "inflammatory," the textual warnings required for cigars were "unambiguous and unlikely to be misinterpreted by consumers."[247] The FDA effectively demonstrated that (a) informing consumers of the health risks derived from smoking cigars constitutes a substantial government interest[248] and (b) the provision of accurate information on the health risks associated with smoking in the form of health warnings "in a size, format, and manner that consumers will readily notice and retain" satisfies the "means-end fit" requirement under the lower-level scrutiny standard.[249]

A comparison between these three cases reveals the fundamental repercussions derived from which standard of scrutiny is applied. In intermediate scrutiny, the evidentiary requirements are rather strict—so much so that it seems unlikely that the government will be able to meet the required burden of proof in the near future.[250] As noted by the court in *Reynolds*, because variations in smoking rates over time are heavily dependent on a myriad of factors, researchers will have a hard time gathering robust evidence of reductions in smoking prevalence that are the direct result of one factor alone, for instance, enlarged health warnings.[251] In contrast, in lower-level scrutiny, the burden of proof required is significantly lower. In *Cigar Association of America*, the court relied on prior case law to describe the applicable burden of proof as follows: "'[C]onstitutionality under [lower-level scrutiny] does not hinge upon some quantum of proof that a disclosure will realize the underlying purpose. A

244. Cigar Assoc. of Am. v. FDA, 315 F. Supp. 3d 143 (D.D.C. 2018).

245. *Id.* at 153-54.

246. Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985).

247. *Cigar Assoc. of Am.*, 315 F. Supp. 3d at 166.

248. *Id.* at 167-71.

249. *Id.* at 171-72.

250. As the Court of Appeals for the District of Columbia Circuit put it in *Reynolds*: "The government bears the burden of justifying its attempt to restrict commercial speech …, and its burden is not light." RJ Reynolds, Tobacco Co. v. FDA, 696 F.3d 1205, 1218 (D.C. Cir. 2012).

251. *Id.* at 1219 ("But the raw numbers don't tell the whole tale. FDA concedes it cannot directly attribute *any* decrease in the Canadian smoking rate to the graphic warnings because the Canadian government implemented other smoking control initiatives, including an increase in the cigarette tax and new restrictions on public smoking, during the same period.") (Emphasis in the original).

common-sense analysis will do. And the disclosure has to advance the purpose only slightly.'"[252] Most measures restricting trademark use will pass constitutional muster under this standard of review, regardless of whether or not they contribute to the attainment of the alleged health objective. These differences underscore that much of the discussion in cases dealing with the interaction between trademarks and speech turns on the assessment of what type of speech is involved and, consequently, on what level of scrutiny is to be applied. Despite their contrasting outcomes, these cases constitute very valuable precedents for the role of speech in validating trademark rights in the United States.

III.
THE 'SCHOOL OF SPEECH IN TRADEMARK LAW': THEORETICAL FOUNDATIONS FOR THE PROPOSITION THAT SPEECH CAN VALIDATE TRADEMARK RIGHTS

The work of a small number of legal scholars also provides a solid theoretical foundation for the proposition that speech can validate trademark rights, in particular the works of Justin Hughes, Jason Bosland, and Michael Spence.[253]

The contributions of these authors are best framed within a broader debate which lies at the intersection between intellectual property law and cultural studies: the extent to which intellectual property rights serve to lock up meaning in cultural goods.[254] Cultural studies scholars addressing the interaction between

252. *Cigar Assoc. of Am.*, 315 F. Supp. 3d at 171 (citing Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001)).

253. Hughes, *supra* note 4; Bosland, *supra* note 36; Spence, *supra* note 42. I have pondered long and hard as to whether I should include Megan Richardson (with her seminal piece on the topic, *Trade Marks and Language*, *supra* note 10) in this group. However, her interest in justifying anti-dilution protection for trademarks with an expressive component is not premised on a reconceptualization of the interaction between marks and speech. This is in contrast with the rationales put forth by the other three authors to justify broad trademark protection, which ultimately seek to further the expressive interests of different trademark users, whether they be right holders, consumers of branded goods or users of cultural artefacts. Instead, Richardson's support for anti-dilution statutes is premised on utilitarian notions of incentive maximization akin to those underpinning copyrights and patents. By advancing that there is significant value attached to the expressive component of marks, she conceives of reinforced trademark protection as a means to incentivize investment in the creation of expressive meaning. And while her theory challenges the widespread misconception that broad trademark protection can reduce the pool of available words in our language (in line with Bosland's proposition), her aim in doing so is different to Bosland's. Her concerns do not lie with the expressive interests of users of cultural artefacts (although one could argue that they will benefit indirectly from her proposal), but rather with the creation of an incentive structure that can maximize right holders' investment in trademarks. Also, her pushback is not directed so much towards cultural studies scholars as it is towards the historically induced mistrust of registered trademarks, which are said to diminish the pool of available words in our language.

254. Relevant contributions to this debate include: Gangjee, *supra* note 2; Desai, *supra* note 36; Sonia Katyal, *Semiotic Disobedience*, 84 WASH. U. L. REV. 489 (2006); Dan Hunter, *Culture War*, 83 TEX. L. REV. 1105 (2005); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004); Keith Aoki, *Adrift in the Intertext: Authorship and Audience "Recoding Rights"*, 68 CHI.-KENT L. REV. 805 (1993); Rosemary

cultural production and intellectual property rights are often critical of most forms of ownership over cultural goods.[255] In those scholars' view, ownership over intangibles through the grant of intellectual property rights often leads to valuable meanings embodied in protected cultural artifacts being locked away or monopolized by their rights holders to the detriment of the general interest.[256] In the trademark context, this concern translates into the inability of third parties to effectively participate in the cultural discourse revolving around marks that convey expressive meanings to the extent that owners' exclusive rights can be invoked to prevent recoded uses of their marks.[257] In other words, trademark laws are said to run counter to cultural production by shielding the meaning of marks from appropriation through dialogic practice.

It is against this backdrop in the cultural studies literature that Justin Hughes and Jason Bosland (and, to a lesser extent, Michael Spence, for his pushback is directed towards critics of anti-dilution statutes generally) propose an alternative reading of the role that trademark laws play in cultural production and dialogic practice. According to these authors, reinforced trademark protection of the type so often criticized by cultural studies scholars better serves the public interest than allowing for indiscriminate recoding of expressive marks.[258]

In the case of Hughes, his pushback is directed towards critics of broad intellectual property rights who believe in the need for greater "recoding freedom" to ensure that social meaning is not locked-up by right holders.[259] Importantly, even though he writes of "recoding freedom", the backbone of such concept is

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J Coombe, *Objects of Property and Subjects to Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991).

255. Coombe, *supra* note 254, at 1855 ("intellectual property laws stifle dialogic practices-preventing us from using the most powerful, prevalent, and accessible cultural forms to express identity, community, and difference."); Hunter, *supra* note 254, at 1120 ("without . . . limitations [to their scope] the expansion of intellectual property must eventually lead to a kind of intellectual and cultural paralysis."); Katyal, *supra* note 254, at 497 ("intellectual property . . . creates boundaries that enfranchise certain types of speech at the expense of others."); Gangjee, *supra* note 2, at 57 (the "brand propertisation [model] is therefore not only inaccurate in presuming single author brand creation, but also deeply troubling since it marginalises consumer agency and reinforces the exploitation of their immaterial labour through the instrumentality of trade mark law.").

256. Bosland explains this phenomenon in the following terms: "It has long been recognised that intellectual property rights, depending on how they are framed, can be used to prohibit access to, and the use of, many cultural forms: stories, images, logos and other communicative devices become 'locked-up' in the hands of private owners." Bosland, *supra* note 36, at 100. In Hughes' words: "The … argument [put forth by proponents of greater recoding freedom] is that some forms of intellectual property we recognize as defending realms of personal expression (copyright, trademark, the right of publicity) may suppress personal expression by putting important cultural symbols off limits to non-owners." Hughes, *supra* note 4, at 930.

257. In Bosland's words: "for most cultural theorists, the 'public interest' in the cultural aspects of trade marks is seen as best served by the outright avoidance of trade mark rights." Bosland, *supra* note 36, at 101.

258. Hughes, *supra* note 4; Richardson, *supra* note 10; Bosland, *supra* note 36; Spence, *supra* note 22; Spence, *supra* note 42.

259. Hughes, *supra* note 4, at 926-29.

arguably speech. His argument centers on recoding freedom as the freedom to express oneself through an altered version of a cultural object protected by an intellectual property right.[260] Hughes argues that most recipients of a cultural product are mere listeners, not recoders—which would appear to be the underlying assumption of proponents of greater "recoding freedom".[261] Therefore, by placing all their emphasis on recoders, cultural studies scholars fail to account for the interests of a vast number of individuals who identify with the meaning conveyed by the mark.[262] Hughes advances that the interests of listeners in the cultural object remaining stable over time also need to be taken into consideration when attempting to delimitate the content of intellectual property rights.[263] Safeguarding their interests (expressive and otherwise) requires granting broad exclusive rights to the right holder so as to ensure that the meaning(s) conveyed by the mark can remain stable.[264]

Bosland pushes back against critics of broad trademark protection who believe that strong trademark rights lock-up extremely valuable cultural artifacts.[265] He argues that, in addition to serving source-identifying and persuasive functions, marks are imbued with cultural significance.[266] They can transcend their core functions and develop into cultural artifacts that are incorporated into ordinary public discourse, allowing individuals to express themselves through their use. Therefore, he rejects the notion that trademark rights lock-up valuable cultural artifacts and stifle dialogic practice.[267] In his view, trademark protection creates quite the opposite effect: it facilitates dialogic practice by allowing signs to develop into cultural artifacts with meaning that can be relied upon for expressive purposes.[268] As he rightly points out, without the protection afforded to marks by intellectual property laws, there would be no cultural goods in certain signs in the first place.[269] Accordingly, insufficient trademark protection would ultimately go against the public interest that cultural

260. *Id.* at 924-26.

261. *Id.* at 926-28.

262. This includes other intellectual property rights since Hughes' inquiry is not limited to trademarks. *Id.*

263. *Id.* at 926. Hughes takes this argument further to propose that even recoders themselves rely on the cultural object retaining some stability in order for the recoding acts to be successful. *Id.* at 941.

264. *Id.* at 926, 1005-06, 1010. Building on Hughes' work, Desai has reflected on the difficulties derived from the inherent tension between recoding and stability of meaning in expressive marks. Desai, *supra* note 19, at n.35.

265. Bosland, *supra* note 36, at 100-06.

266. *Id.* at 106-08.

267. *Id.* at 100, 103.

268. *Id.* at 100, 104.

269. *Id.* at 104 ("The discourse of trade mark ownership therefore facilitates trade mark language. It is precisely because trademarks are owned that they are valued as such powerful expressive devices. Without this ordering in the form of 'ownership', it would be near impossible for trade mark meaning to develop. By investing a trade mark with meaning and using it as a cultural tool, the public can express, for example, approval or criticism at the ideological stance of a trade mark owner.").

studies scholars seek to protect by removing many cultural signs from dialogic practice altogether. For Bosland therefore, the grant of broad rights to trademark owners—especially those recognized in anti-dilution statutes—is the best way to ensure that meaning in expressive marks can remain stable over time by preventing fragmentation resulting from excessive recoding acts.[270]

Finally, Spence's pushback is aimed against supporters of broad trademark protection based on their characterization of trademark rights as property rights.[271] He argues that a paradigm shift from a property-centric to a speech-centric understanding of trademark law best suits trademark purposes.[272] This shift allows for a better delimitation of the content of trademark rights. For Spence, marks are a form of speech that entitle owners to communicate a variety of messages through their use, including, but not limited to, trade origin.[273] As part of their right to free speech, trademark owners ought to be afforded protection against certain forms of compelled speech.[274] This would be the case where a third party seeks to recode the meaning conveyed by a mark through parodic or artistic use; otherwise, right holders would be precluded from ensuring that the meanings conveyed by their marks remained stable over time.[275] This would, in turn, prevent them from developing their expressive autonomy as realized through use of their marks.[276] Spence believes that the best way to grant protection to owners against compelled speech is through anti-dilution measures.[277] It is relevant to note that Spence is the only one of the three who explicitly rejects the widespread notion that freedom of speech can only be invoked as a defense in trademark law, that is, to limit the exclusive rights of owners.[278] In his view, freedom of speech also serves to validate trademark rights. In his own words:

> This [that freedom of expression can validate trade mark rights] is a surprising claim. Free speech is usually thought of as only limiting, and not grounding, trade mark rights: practitioners think that free speech issues are only relevant when . . . [a trade mark owner] wants to prevent an artist from using [his] trade mark in a protest work. But I hope to show that free speech, or at least a respect for expressive autonomy, is the best justification for the [expanded] scope of the trade mark protection against [dilution] afforded by [trade mark statutes].[279]

270. *Id. at* 110.
271. Spence, *supra* note 42.
272. *Id.* at 491.
273. *Id.* at 504-05.
274. *Id.* at 506.
275. *Id.* at 505.
276. *Id.* at 496, 500, 504.
277. *Id.* at 506.
278. *Id.* at 496.
279. *Id.* at 496.

Against this backdrop, it would appear that the portrayal by cultural studies scholars of the effect that trademark protection has on cultural production and expressive freedom is incomplete and, as a result, inaccurate. Far from locking-up valuable meaning in cultural artifacts, trademark rights promote cultural production and further the expressive interests of individuals in a variety of ways. It is only through the exclusive rights granted to trademark owners that distinctive signs go from signaling commercial sources to becoming cultural artifacts that convey expressive meanings. Expressive meanings can, in turn, be relied upon not only by recoders (as the work of cultural studies scholars would suggest), but also by right holders, consumers of branded goods and users of cultural artefacts generally. However, all these communicative projects can only be deployed insofar as the expressive meanings conveyed by a mark remain stable over time. This is also true of third party recoding, since the new meaning conveyed by the recoded sign originates in the mark. It would, therefore, be inaccurate to conceptualize each and every effort by trademark owners to preserve the expressive meanings conveyed by their marks as conducive to locking-up valuable meaning in cultural artifacts.

This can be easily illustrated by reference to health-furthering, trademark-restrictive measures, where owners' inability to continue using their marks freely on the packaging of their goods can have a severe impact on the expressive (and other) meanings conveyed by the mark. This, in turn, will prevent all other expressive users from pursuing their identity projects through use of the mark, whether they are aligned with, or critical of, those of the right holder. In this context, owners' efforts to retain package space can hardly be said to run counter to cultural production and expressive freedom. Quite the contrary: safeguarding trademark use through the protection afforded to right holders under freedom of expression serves to further both goals.

IV.
CONCLUSION

In the absence of comprehensive studies covering the diverse scenarios in which marks and speech interact, the emphasis placed by commentators on recoding cases has led to the misconception that the interaction between both sets of rights is unidirectional in the sense that trademark rights chill expression. This Article has sought to redress this misconception by engaging in taxonomical analysis of recoding and ownership cases on both sides of the Atlantic. This study has revealed that the interaction between marks and speech is best understood as a two-way street, where freedom of expression can both limit and validate trademark rights.

Acknowledging that the interaction between marks and speech goes both ways can contribute to the advancement of the field in five ways. First, it allows for a more precise understanding of this interaction; one that is not driven by a normative agenda that seeks to mobilize the protection afforded by freedom of

expression to curb trademark rights. Second, a more accurate reading of the interaction between marks and speech can, in turn, lead to a more refined understanding of the opposing interests at stake in interaction cases. This could result in fairer adjudication. Third, the parallels identified in American and European approaches to the interaction between marks and speech can lead to more fruitful exchange between both jurisdictions in this area of law. Fourth, awareness of the full range of scenarios where both sets of rights interact serves to highlight the potential ramifications that courts' findings in one scenario could have in others. And fifth, understanding that the interaction between marks and speech operates as a two-way street provides a solid foundation for the reconceptualization of this interaction as competing forms of speech. The repercussions of such a reconceptualization on the field could be far-reaching. Notably, acknowledgement that right holders' expressive interests are deserving of protection in ownership cases can lead to infringement scenarios where courts are asked to balance the speech interests of the recoder against both the proprietary and expressive interests of the mark owner. Inversely, the recognition that non-owners use marks for expressive purposes in recoding litigation can lead to ownership cases where courts are asked to factor in not only the speech rights of the trademark owner, but also those of consumers and potential recoders. The implications that such a rebalancing of rights would have in interaction cases lie, however, beyond the scope of this Article, and will be best addressed in future pieces.

Stateless by Sex: An Evaluation of Sex Discrimination in Nationality Laws, and their Effects on Statelessness

Kelsey Peden*

Twenty-five nations across the world have nationality laws that prevent women from conferring their citizenship onto their children. This form of sex discrimination in nationality laws can lead to childhood statelessness, which prevents children from accessing education, health care, and other social protections. International legal frameworks, like CEDAW and the CRC, are successful in setting international standards preventing statelessness and promoting anti-discrimination. However, their non-enforceability makes them an ineffective tool to combat the twenty-five nationality laws that still discriminate on the basis of sex. Instead, the focus on international obligations should shift to national legal methods of change and grassroots advocacy. Existing changes to nationality laws, and failures to change in nations with high gender equality rankings, demonstrate the crucial role national legal frameworks play in the conversation. In this Note, I argue that targeting nationality laws discriminating on the basis of sex through national court systems and grassroots advocacy is the most effective method to prevent future statelessness by sex discrimination.

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INTRODUCTION

Parents pass many things onto their biological children—hair color, height, traditions—traits that reflect the continuity of life. For most, citizenship is one of these inherited traits. Few even think about how they inherited their citizenship; it is simply passed-on.

However, certain nationality laws prevent women from transferring citizenship to their children simply because they are women. Currently, twenty-five nations have laws that specifically limit the rights of women to confer their nationality onto their children.[1] These laws create a situation whereby a child can become legally "stateless" if they are unable or unwilling to take their father's nationality.[2] This stark gap in gender equality leads to a myriad of severe consequences. Statelessness is not simply a lack of the label "citizen." It denies individuals access to basic necessities, such as medical aid, education, land ownership, the ability to travel, and more.[3] Children of stateless individuals cannot receive their parent's nationality, continuing the cycle to the next

1. Nationality in these twenty-five nations is decided through the parents' birth-assigned sex. This author recognizes that these binary definitions are likely over- and under-inclusive and do not account for the experiences of many people who may identify as non-binary or transgender. However, for the sake of clarity, the paper will use the terminology used by the laws it is discussing.

2. Defined by UN General Assembly, Convention relating to the Status of Stateless Persons, adopted 28 July 1951, G.A. Res. 429 (V), 360 U.N.T.S. 117 (entered into force 6 June 1960).

3. *I am Here, I Belong*: *The Urgent Need to End Childhood Statelessness,* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES 6 (Nov. 2015), https://www.unhcr.org/ibelong/the-urgent-need-to-end-childhood-statelessness/: s*ee also It's tough to live in limbo*, THE ECONOMIST, Nov. 29, 2007, https://www.economist.com/international/2007/11/29/its-tough-to-live-in-limbo.

generation.[4] Even after life ends, statelessness is a problem. The death of a stateless individual often isn't formally recognized with a death certificate, creating additional burdens for the loved ones left behind.[5]

Sex discrimination[6] in nationality laws is a primary factor in the issue of statelessness.[7] This Note surveys the nationality laws of 195 nations,[8] detailing the unequal rights of mothers and fathers to confer their nationality onto their children. It then contrasts the nationality laws with international gender equality rankings to create a matrix, categorizing nations by the intersection of gender equality and nationality laws. Finally, it examines what successfully motivates change to these laws in order to recommend progressive solutions.

Section One details the methodology used for this Note. Section Two conceptualizes the current issue of sex discrimination and statelessness through an historical examination. This examination is developed into a three-tier ranking system, with existing laws analyzed for their severity and likelihood of increasing statelessness. Section Three outlines the existing legal frameworks that standardize national obligations. Section Four examines the intersection of gender-equality rankings and nationality laws. This section creates a four-category matrix of existing laws using an intersection of country data contrasted with 2019 equality rankings.[9] Each category is further examined for previous changes to nationality laws, with a focus on how these laws can most equitably be changed.

Using this data, this Note ultimately theorizes that national sex equality legislation is the most effective method to combating sex discrimination in nationality laws. However, institutional willingness to enforce sex equality, as

4. *I am Here, I Belong, supra* note 3.

5. *See Prisoners of the Past: Kuwaiti Bidun and the Burden of Statelessness*, HUMAN RIGHTS WATCH (June 13, 2011), https://www.refworld.org/docid/4df7191b2.html (stateless individuals "interviewed by Human Rights Watch … alleged that the government systematically denies them death certificates, which are necessary for families to claim their deceased relative's remains and to prove claims of inheritance, unless they obtain 'clearance' from the committee by renouncing their claims to citizenship. Iman H., a 25-year-old Bidun woman, told Human Rights Watch, 'My brother died, [but] we have no death certificate. There is no proof that he even existed.'").

6. Existing literature also refers to this as "gender discrimination." However, most countries discussed in this Note do not take into consideration a person's preferred gender when conferring nationality. Instead, most laws are written to allow children to inherit nationality either from their "mother and father," or, as is the focus here, only their "father." Nations that use gender-neutral terminology, such as "parents," are not the focus of this specific piece. Accordingly, I use the terminology "sex discrimination" in this Note in recognition that individuals may be denied citizenship rights based on their birth sex in the discussed nations, rather than their gender.

7. *I am Here, I Belong*, *supra* note 3, at 6.

8. The number of nations in the world is determined by adding the 193 U.N. Member states and two non-member observers. *See Member States*, U.N., https://www.un.org/en/about-us/member-states (last visited Aug. 30, 2021); *Non-Member States*, U.N., https://www.un.org/en/about-us/non-member-states (last visited Aug. 30, 2021).

9. *Women, Peace, and Security Index 2019/20 DATA*, GEORGETOWN INSTITUTE FOR WOMEN, PEACE AND SECURITY, https://giwps.georgetown.edu/the-index/.

well as anti-discrimination activism, has a powerful effect in combatting sex discrimination in nationality laws, even in nations with lower sex-equality rankings. While no one path can be prescribed for the remaining twenty-five nations with discriminatory nationality laws, advocates for ending statelessness could successfully change existing norms through national sex equality legislation, judicial redress, or grassroots advocacy.

I.
METHODOLOGY

This Note examines the intersection of nationality laws and gender equality, ultimately focusing on the varied reactions of national institutions in implementing change over the last twenty years.[10] The scope of this project is concentrated on the twenty-five nations that currently discriminate based on sex in their nationality laws.[11] Research on national laws was gathered using the online Global Nationality Laws Database to compile a list of nations with sex-specific language.[12] This research examines the laws of 195 nations and categorized them as non-sex specific, sex specific, or recently changed language within the previous twenty years. These laws are then juxtaposed against existing primary data on gender equality provided by the Georgetown Institute for Women, Peace and Security's yearly Women, Peace, and Security Index.[13] This data is produced yearly in partnership with the Peace Research Institution of Oslo, and is used to rank each nation's overall gender equality based on eleven indicators in three categories.[14] These break down into categories of "Justice," "Security," and "Inclusion," with indicators of legal discrimination, son bias, discriminatory norms, intimate partner violence, community safety, organized violence, education, financial inclusion, employment, cellphone use, and parliamentary representation falling into the larger categories.[15] This Note uses data from 2019/2020.[16] In order to validate claims and gain better insight into the featured countries, U.N. regional and global data is used, specifically focusing on data provided by the United Nations High Commission for Refugees (UNHCR) and the United Nations Children's Fund (UNICEF). This Note begins with a

10. This includes changes occurring between 1999 and 2019.

11. Data gathered using *Global Nationality Laws Database*, GLOBALCIT, https://globalcit.eu/national-citizenship-laws/ (last visited March 29, 2021).

12. *See infra* tbl.1 for list of twenty-five nations; s*ee also 2020 Background Note on Gender Equality, Nationality Laws, and Statelessness,* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (2020), https://www.refworld.org/pdfid/5f0d7b934.pdf.

13. *Women, Peace, and Security Index 2019/20 DATA*, *supra* note 9.

14. *See Women, Peace, and Security Index 2019/20 Report*, GEORGETOWN INSTITUTE FOR WOMEN, PEACE AND SECURITY, https://giwps.georgetown.edu/wp-content/uploads/2019/12/WPS-Index-2019-20-Report.pdf.

15. *Id.* at 11. Further information of indicator definitions can be found at *id.* at App. 1.

16. *Women, Peace, and Security Index 2019/20 DATA*, *supra* note 9.

conceptualization of the problem, a definition of statelessness, and a summary of changes to national discrimination laws over the previous twenty years. It then contrasts how nations approach these laws with national gender equality ratings, and ultimately develops principles for moving forward in light of current institutional realities.

II.
CONCEPTUALIZATION OF SEX DISCRIMINATION AND STATELESSNESS

Level 1	Level 2	Level 3
Mauritania	Bahamas Bahrain Barbados Burundi Iran Iraq Jordan Kiribati Liberia Libya Malaysia Nepal Oman Saudi Arabia Sudan Syria Togo United Arab Emirates	Brunei Darussalam Kuwait Lebanon Qatar Somalia eSwatini (formerly Swaziland)

Table #1; Created by Author

Nationality laws that discriminate on the basis of sex exist in different forms; some prohibit all women from passing on their nationality to their children, some prevent only specific categories of women from doing so, while others prohibit all women but make exceptions when such laws result in child statelessness. These twenty-five nations can be broken into three categories based on the strictness and effects of their laws.[17]

Level One, containing only Mauritania, has nationality laws limiting a woman's right to confer her nationality. However, Mauritania has implemented exceptions that successfully prevent all cases of statelessness.[18] Although Mauritania's law discriminates based on sex, it has less severe practical

17. Gathered through the *Global Nationality Laws Database*, *supra* note 11. Results were compared to similar United Nations Advocacy studies. *See 2018 Background Note, Gender Equality, Nationality Laws and Statelessness,* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (2018), https://www.refworld.org/pdfid/5aa10fd94.pdf7.

18. Association des femmes chefs de famille, et al., *Joint Submission to the Human Rights Council at the 37th Session of the Universal Periodic Review: Mauritania* 8 (Jul. 9, 2020), https://files.institutesi.org/UPR37_Mauritania.pdf.

consequences, largely still allowing stateless individuals access to health, education, and documentation.[19] Level Two—a group populated by the majority of these twenty-five nations—has more complex, diluted sex-discriminating nationality laws. This group includes nations that discriminate against specific categories of women.[20] The Bahamas, for example, does not allow children born abroad to married Bahamian mothers to inherit their mothers' nationality.[21] However, automatic citizenship is granted to children "born outside of The Bahamas to a married Bahamian male who was not born outside The Bahamas."[22] Iraqi nationality laws similarly prevent women from conferring citizenship on their children if born abroad, unless the father is unknown and such a law would make the children stateless.[23] Finally, Level Three nations have the strictest versions of sex-discriminatory nationality laws, with little or no exceptions made to avoid statelessness. In Qatar, for example, a Qatari woman married to a non-Qatari man can obtain permanent resident status for her children, but not citizenship.[24]

The harmful impact of these discriminatory laws is not avoided simply because a child has two parents, only one of whom can pass on their nationality. Instead, these laws can lead to child statelessness when it is not possible for a child to acquire their father's nationality.[25] There are multiple reasons this happens, including when 1) the father is unknown, 2) the father is unwilling to confer his nationality, 3) the father is stateless, 4) the father's country does not allow conferral of nationality in the specific circumstance, or 5) the father is unable to prove either paternity or his own nationality due to unforeseen circumstances, such as a misunderstanding of documentation, displacement, separation, statelessness, or death.[26]

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19. By effectively preventing statelessness, the nation avoids the implications of statelessness on access to state programs, education, travel, etc. *See Mauritanie: Loi N° 1961-112, Loi portant code de la nationalité mauritanienne* (June 13, 1961), https://www.refworld.org/docid/3ae6b5304.html.

20. These nationality laws will make exceptions to confer nationality in specific cases, such as when the father is stateless, unknown, or the mother is able to complete extensive application processes. The United Nations High Commissioner for Refugees uses a similar categorization. *See 2020 Background Note, supra* note 12, at 6.

21. *See Citizenship*, GOV. OF THE BAHAMAS DEPT. OF IMMIGRATION, https://www.immigration.gov.bs/applying-to-stay/applying-for-citizenship/ (last visited Aug. 20, 2020).

22. *Id.*

23. *Iraqi Nationality Law*, Law 26 (Mar. 7, 2006), https://www.refworld.org/docid/4b1e364c2.html (last accessed Mar. 30, 2020) ("The Law entered into force on its publication in the Iraqi Official Gazette Issue 4019 on March 7, 2006. The Law repeals Iraqi Nationality Law No. 42 of 1924, the Iraqi Nationality Law No. 43 of 1963 and No. 5 of 1975 on granting Iraqi nationality to Arabs.").

24. *Qatar: Residency Reform Doesn't End Gender Bias*, HUMAN RIGHTS WATCH (Aug. 2017) https://www.hrw.org/news/2017/08/04/qatar-residency-reform-doesnt-end-gender-bias.

25. *2018 Background Note*, *supra* note 17, at 2.

26. *Id.* at 3-4.

Level Two and Three discriminatory laws are likely to have dire effects on already vulnerable populations.[27] Single mothers who do not wish to share parental rights are vulnerable, since paternal recognition, and therefore paternal rights, is needed to gain citizenship.[28] Victims of sexual or domestic violence may be unwilling or unable to identify a child's biological father to the state because doing so could risk their own safety.[29] Displaced families face an additional burden, since family separation and document loss can make it almost impossible for mothers to prove a link between child and father.[30] Finally, members of the LGBTQ+ community, including same-sex female couples, face increased vulnerabilities.[31] Homosexuality is currently illegal in twenty-one out of twenty-five of these nations, with some penalties as high as death.[32] Sex discrimination in nationality laws may force mothers to choose between potentially dangerous "outing" situations or recognizing paternal rights of the sperm provider, who had never been a real party to their relationship.[33]

A. Defining Statelessness

Laws that deny women equal rights to confer their nationality on their children leave populations exposed to statelessness and further inequality. A stateless person is "a person who is not considered as a national by any State under the operation of its law."[34] Statelessness can occur *de jure*, where no government recognizes the citizenship of an individual, or *de facto*, where a person is effectively stateless even if they have a claim to citizenship under the laws of a nation.[35] As citizens of no country, stateless populations are often left in unprotected and dangerous situations.[36] While they may not necessarily face

27. *See Statelessness & minorities globally*, MINORITY RIGHTS GROUP INTERNATIONAL, https://stories.minorityrights.org/statelessness/chapter/statelessness-and-minorities-around-the-world/ (last visited Mar. 10, 2021).

28. *See, e.g.,* Emma Batha, *Nepalese mum tells how unfair citizenship laws squander children's futures,* REUTERS (June 27, 2019, 8:04 PM), https://news.trust.org/item/20190627194611-ydi45/.

29. *I am Here, I Belong, supra* note 3.

30. *Id.*; *See Advocacy Brief: Refuge and Migrant Response in Europe, Ending Childhood Statelessness in Europe,* UNITED NATIONS CHILDREN'S FUND & UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (Jan. 2019).

31. *See* Thomas McGee, 'Rainbow Statelessness' – Between Sexual Citizenship and Legal Theory: Exploring the Statelessness-LGBTIQ+ Nexus, Vol. 2 No. 1 Statelessness & Citizenship Rev. 86 (2020).

32. *Map of Countries that Criminalize LGBT People*, HUMAN DIGNITY TRUST, https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/ (last visited Mar. 20, 2020).

33. *See* Thomas McGee, *supra* note 31 at 81.

34. UN General Assembly, *Convention Relating to the Status of Stateless Persons*, United Nations, Treaty Series, vol. 360, p. 137, Art. 1 (Sept. 28, 1954), https://www.refworld.org/docid/3ae6b3840.html (entering into force June 6, 1960).

35. *Statelessness*, U.S. DEPARTMENT OF STATE BUREAU OF POPULATION, REFUGEES, AND MIGRATION, https://www.state.gov/other-policy-issues/statelessness/ (last visited March 25, 2020).

36. *I am Here, I Belong, supra* note 3, at 12.

direct persecution for their identity, stateless individuals are excluded from state services.[37] Stateless status may limit access to services like healthcare and education, and may also expose individuals to higher risks of violence, trafficking, child marriage, and exploitation.[38] In at least thirty nations, individuals need proof of nationality to receive medical care, and in twenty nations, proof is needed to receive vaccinations.[39] Without documentation, many stateless individuals also face risk of arrest, detention, and expulsion from their country.[40] Additionally, they are prevented from receiving passports, which would allow them to legally cross borders.[41] As of the end of 2018, the UNHCR estimated there were approximately 10 million stateless persons worldwide, 3.9 million whose data had been successfully collected.[42] The UNHCR estimates that a child is born into statelessness every ten minutes.[43]Each year, at least 70,000 stateless children are brought into the world.[44]

The situation is growing increasingly urgent. As the U.N. notes, "[s]tateless children are born into a world in which they will face a lifetime of discrimination; their status profoundly affects their ability to learn and grow, and to fulfill their

37. *See generally, Protecting the Rights of Stateless Persons*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES 2 (Jan. 2014), https://www.refworld.org/pdfid/4cad88292.pdf (stating, for example, that "[s]tateless people are often without a legal status and feel left out of society. The Galjeel, are a sub-clan of Somali descent and have lived in Kenya since the late 1930s. For decades, the Galjeel held Kenyan ID cards, participated in local and national elections, owned businesses and enjoyed full access to State services. But in 1989 the government introduced a screening system to identify irregular migrants from Somalia. During this process, the authorities confiscated most forms of identification that linked the Galjeel to Kenya. Many became stateless, losing the rights they had enjoyed for decades.").

38. *Id.*

39. *I am Here, I Belong, supra* note 3, at I. This has become a particular area of concern with the spread of the COVID-19 virus and the subsequent development of vaccines. *Inside the Mammoth Undertaking of Global Vaccine Distribution*, WORLD HEALTH ORGANIZATION (Feb. 26, 2021), https://www.who.int/news-room/feature-stories/detail/inside-the-mammoth-undertaking-of-global-vaccine-distribution ("Even within countries, there have been reports that not everyone has been incorporated into national vaccination plans, with refugees, stateless people, and asylum seekers at risk of being left behind.").

40. *See Stateless Persons in Detention,* UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES 10-12 (June 2017), https://www.refworld.org/pdfid/598adacd4.pdf (stating, "[s]tatelessness typically severely restricts access to basic identity and travel documents that nationals normally possess. Moreover, stateless persons often do not have legal residence in any country. Because they generally do not possess identity documents or valid residence permits, stateless persons can be at high risk of arrest and repeated and prolonged detention. In situations where they are detained outside their country of origin, they may also face prolonged detention because they are unable to return to their country of origin.").

41. NATIONALITY AND STATELESSNESS: A HANDBOOK FOR PARLIAMENTARIANS, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES & INTER-PARLIAMENTARY UNION 21 (2005), https://www.un.org/ruleoflaw/files/Nationality%20and%20Statelessness.pdf.

42. *Global Trends: Forced Displacement in 2017*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES 51 (Jun. 25, 2018), https://www.unhcr.org/5b27be547.pdf.

43. *I am Here, I Belong, supra* note 3, at I.

44. *Id.*

ambitions and dreams for the future."[45] While nationality laws that discriminate on the basis of sex are not the only factor leading to statelessness, they are considered a large contributor.[46]

B. Moving Away from Sex Discrimination in Nationality Laws

Over the last twenty years, approximately twenty nations have reformed their nationality laws in favor of sex equality and preventing statelessness.[47] In 1998, Gabon passed Law No. 37-1998 regarding Nationality of Gabon, allowing children to inherit citizenship from "a parent of Gabonese nationality."[48] This changed the law from language that had previously excluded women.[49] In 2010, Kenya's constitutional reform incorporated the goals of the United Nations Convention to End All Forms of Discrimination Against Women, granting women the right to pass nationality to both their children and their spouses.[50] This past decade alone, several Middle East-North Africa countries, including Egypt, Morocco, Tunisia, and Yemen, have reformed their nationality laws.[51] While not all nations are moving towards ending sex-discriminatory nationality laws, they are trending towards equality. These numbers show that over the last two decades, the number of nations with discriminatory nationality laws has almost halved.

Delving into when and how these laws came into effect is beyond the scope of this Note. It is, however, important to note the colonial influences that shaped these discriminatory nationality laws in non-Western nations.[52] While the majority of these laws currently exist in North African, Middle Eastern, and Southeast Asian nations, they likely did not originate there.[53] According to the nonprofit Global Campaign for Equal Rights, "[m]any of these laws are rooted in

45. *Id.*

46. *Id.* at 6.

47. These include Gabon in 1998, Sri Lanka in 2003, Egypt in 2004, Algeria in 2005, Indonesia in 2006, Iraq in part in 2006, Sierra Leone 2006 and 2017, Morocco in 2007, Bangladesh in 2009, Zimbabwe in 2009, Kenya in 2010, Tunisia in 2010, Yemen in 2010, Monaco in 2005 and 2011, Senegal in 2013, Suriname in 2014, Madagascar in 2017, United States in 2017, United Arab Emirates partially in 2011 and 2017, and Iran partially in 2019. Loi N'37-1998, Code de la Nationalité Gabon, Art. 11 (1998), https://www.refworld.org/pdfid/4c5847492.pdf (last visited May 10, 2020); s*ee also 2020 Background Note*, *supra* note 12, at 3; For information on the United States, *see infra* section IV. B. (1); for information on Iran *see infra* section IV. F.

48. Loi N'37-1998, Code de la Nationalité Gabon, Art. 11 (1998), https://www.refworld.org/pdfid/4c5847492.pdf (last visited May 10, 2020).

49. *Id.*

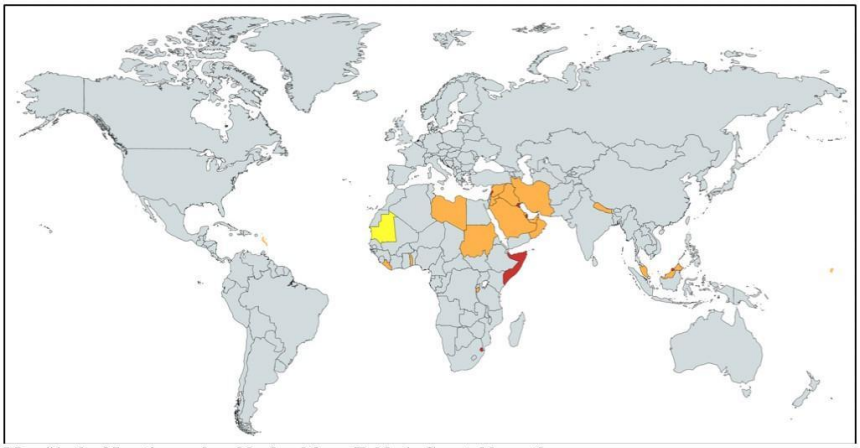
50. Bettina Ng'weno, *Irony of Citizenship: Descent, National Belonging, and Constitutions in the Postcolonial African State,* 53 LAW & SOC'Y R. 141, 141 (2019).

51. *Middle East and North Africa,* GLOBAL CAMPAIGN FOR EQUAL NATIONALITY RIGHTS, https://equalnationalityrights.org/index.php/countries/middle-east-north-africa.

52. *Global Overview*, GLOBAL CAMPAIGN FOR EQUAL NATIONALITY RIGHTS, https://equalnationalityrights.org/index.php/countries/global-overview.

53. *Id.*

colonial legacies, reflecting the discrimination against women embedded in colonial powers' legal systems, which included other forms of discrimination."[54] The UNHCR recognizes the effect of colonialism in its annual Background Note on Gender Equality, Nationality Laws and Statelessness: "discriminatory elements of previous nationality laws were 'inherited' by new States shortly after gaining independence from former colonial powers."[55] Any conversation about changing these laws is incomplete without first acknowledging that Western powers implemented them in the first place. The twenty-five nations that have discriminatory nationality laws in place vary widely in location, religion, ethnicity, and Gross Domestic Product. Most of these were former British colonies.[56] However, all twenty-five nations subscribe to some form of international legal framework prohibiting such laws, yet all have failed to implement change. These international frameworks are outlined in the following section.



Map #1; the 25 nations colored by level from Table 1; Created by author

III.
INTERNATIONAL LEGAL FRAMEWORK

Many international frameworks promote sex equality in nationality laws, mostly in the form of international human rights treaties.[57] Guarantees of the right to nationality free from gender discrimination are found in the Universal

54. *Id.*

55. *2019 Background Note on Gender Equality, Nationality Laws, and Statelessness*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES 3 (Mar. 2019), https://www.refworld.org/pdfid/5c8120847.pdf.

56. *See generally* Former British Colonies, World Atlas, https://www.worldatlas.com/articles/former-british-colonies.html (last visited Dec. 10, 2020).

57. *See generally* NATIONALITY AND STATELESSNESS, *supra* note 41, at 8–16 for a guide to broad principles of international law and statelessness.

Declaration of Human Rights,[58] the International Covenant on Civil and Political Rights,[59] the Convention on the Elimination of All Forms of Racial Discrimination,[60] the Convention on the Rights of Persons with Disabilities,[61] and the Convention on the Reduction of Statelessness.[62] The mandate to end gender discrimination in the United Nations Convention on the Elimination of All Forms of Discrimination against Women[63] and the Convention on the Rights of the Child[64] also applies to all twenty-five nations examined in this paper.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is an international treaty adopted in 1979 that aims to promote equality of the sexes and to end discriminatory practices.[65] Article 9(2) of the Convention declares that all "States Parties shall grant women equal rights with men with respect to the nationality of their children."[66] There are no exceptions.[67]

Additionally, a child's right to a nationality is protected under the United Nations Convention on the Rights of the Child (CRC).[68] Article 7 of the CRC guarantees every child the right to acquire a nationality.[69] Article 2 of the CRC protects a child's right to be free of discrimination of any kind, including the denial of the child's nationality on the basis of sex, race, language, religion, or

58. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 15, 217 A (III) (Dec. 10, 1948). https://www.refworld.org/docid/3ae6b3712c.html ("(1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.").

59. International Covenant on Civil and Political Rights, art. 24(3) Dec. 19, 1966, 999 U.N.T.S. 171 https://www.refworld.org/docid/3ae6b3aa0.html ("Every child has the right to acquire a nationality").

60. International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(d)(iii), Dec. 21, 1965, 660 U.N.T.S. 195 https://www.refworld.org/docid/3ae6b3940.html ("Other civil rights, in particular… the right to nationality").

61. U.N. GAOR, 61st Sess., 76th plen. mtg., U.N. Res. A/RES/61/106, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006) https://www.refworld.org/docid/45f973632.html (guaranteeing people with disabilities "[h]ave the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability").

62. *See Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175,* https://www.refworld.org/docid/3ae6b39620.html.

63. Convention on the Elimination of All Forms of Discrimination Against Women, art. 9(2), Dec. 18, 1979, 1249 U.N.T.S. 13, https://www.refworld.org/docid/3ae6b3970.html [hereinafter *CEDAW*].

64. G.A. Res. 44/25, United Nations Convention on the Rights of the Child (Nov. 20, 1989) https://www.refworld.org/docid/3b00f03d30.html [hereinafter *CRC*].

65. *See CEDAW*, *supra* note 63.

66. *Id.* at art. 9 (2).

67. *See id.*

68. *See CRC, supra* note 64.

69. *Id.* at art. 7.

other status.[70] This means that nationality laws that prevent a child from acquiring nationality because of their parents' sex are not compliant with the CRC.[71]

Of the twenty-five nations with sex discrimination in their nationality laws, twenty-two are signatories to CEDAW,[72] with Iran, Somalia, and Sudan as the exceptions.[73] However, five of these twenty-two nations currently hold reservations to the nationality provision of CEDAW. Mauritania, for instance, holds a reservation to CEDAW for instances where the convention conflicts with Sharia law.[74] Nevertheless, all twenty-five nations are signatories to the CRC.[75] Only The Bahamas holds a reservation to non-discrimination under CRC Article 2.[76] Accordingly, all twenty-five nations have an international legal obligation to end discrimination in nationality laws.

United Nations conventions, though not enforceable like national laws, are politically binding obligations.[77] Countries are subject to periodic review by the convention body, and they can face claims brought by other signatory States if they have signed onto an optional protocol.[78] Currently, the international legal framework is built to inspire national level action.[79] However, twenty-five nations still have nationality laws discriminating on the basis of sex, forty-one years after CEDAW originated.[80] The next section examines national institutions and sex equality rankings to theorize why these laws still exist and what principles can be adopted to move forward towards greater equality.

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70. *Id.* at art. 2.

71. *Id.*

72. *Status of Ratification Interactive Dashboard*, OHCHR, https://indicators.ohchr.org/.

73. Amnesty International, *Reservations to the Convention on the Elimination of Discrimination Towards Women* 3 (2004), https://www.refworld.org/pdfid/42ae98b80.pdf.

74. *Id.* at 12.

75. *Status of Ratification Interactive Dashboard, supra* note 72.

76. *See Id.*

77. For more on general enforceability of conventions, *see* F. Blaine Sloan, *The Binding Force of a Recommendation of the General Assembly of the United Nations*, 25 BRIT. Y.N. INT'L L. 1 (1948); *see also* Karen A. McSweeney, *The Potential for Enforcement of the United Nations Convention on the Rights of the Child: The Need to Improve the Information Base*, 16 B. C. INT'L & COMP. L. REV. 467 (1993).

78. *See* United Nations General Assembly, *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women,* 2131, U.N.T.S., at 83 (Oct. 6, 1999), https://www.refworld.org/docid/3ae6b3a7c.html.

79. The process of adopting a U.N. Convention or treaty varies from nation to nation, with some nations having a monist—immediate—approach to adopting international law once a treaty is ratified, or a dualist —separate—approval approach. For more, *see generally* David Sloss, *Domestic Application of Treaties*, SANTA CLARA L, DIGITAL COMMONS, (Apr. 29, 2011), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1620&context=facpubs; s*ee generally* United Nations Department of Economic and Social Affairs, National Legislation and the Convention – Incorporating the Convention into Domestic Law, in HANDBOOK FOR PARLIAMENTARIANS ON THE CONVENTION THE RIGHTS OF PERSONS WITH DISABILITIES, (2007) (describing the general goals of conventions to inspire national legislative change in dualist states).

80. *See supra* Section II; *CEDAW, supra* note 63.

IV.
SEX EQUALITY AND NATIONAL INSTITUTIONS

While international legal frameworks outline goals for, but do not enforce, non-discrimination, the global shift towards international women's rights may help prevent discriminatory nationality laws.[81] Sex discrimination is defined by CEDAW as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."[82] Current national women's rights ratings are a strong indicator of past actions, current laws, and potential for future change. This Section uses a four-by-four matrix that categorizes nations by using data provided by the Women, Peace, and Security Index with nationality laws. This is done to address both the impact of these laws and potential changes through 1) defining the matrix, 2) examining two conflicting categories, and 3) examining what factors overlap between the categories and the most recent changes to nationality laws. This matrix illustrates that while a nation's sex equality score is a good indicator of current policy, an improved gender score does not guarantee change to existing sex discriminatory nationality laws. Instead, institutional willingness to enforce sex equality and anti-discrimination laws, as well as grassroots activism, are better indicators of change.

A. Defining the Matrix

In this matrix, a country's ranking on women's rights and equality is contrasted with the use of sex discrimination in nationality laws. National gender equality rankings are drawn from the 2019/2020 Georgetown Women, Peace, and Security Index (WPS), with quintiles one to three representing the top 101 nations, and quintiles four and five representing the bottom sixty-six.[83] The WPS Index uses eleven indicators in three dimensions: 1) inclusion, 2) justice, and 3) security.[84] Additionally, nations are divided into simple yes/no dummy variables based on existing sex discrimination in their nationality laws. The twenty-five nations with these sex-specific laws are isolated in the two "yes" categories, whereas the remaining 170 nations are distributed into "no."

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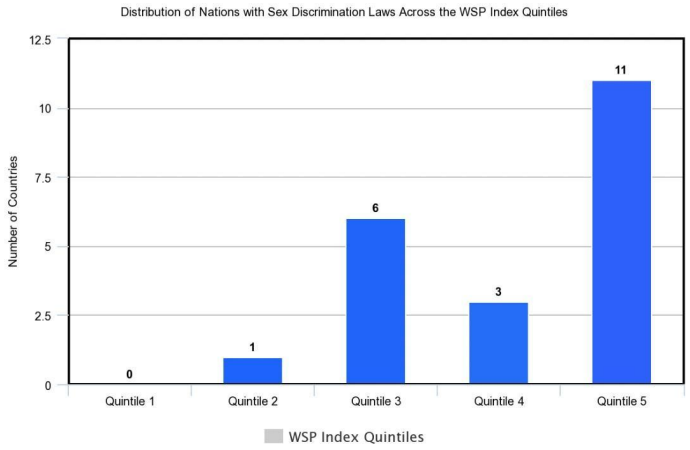
81. *2020 Background Note on Gender Equality, supra* note 12, at 7.

82. *CEDAW, supra* note 63, at art. 1.

83. This Index does not include data on 22 UN nations, or the two non-member observers—notably including the Bahamas, Brunei Darussalam, Oman, Kiribati, and Vanuatu. *See Women, Peace, and Security Index 2019/20 DATA*, *supra* note 9. The WPS Index generates a country value out of 1.0, with the top nation's (Norway) WPS value of 0.904, and the lowest nation (Yemen) 0.351. *Id.*

84. *See Women, Peace, and Security Index 2019/20 report, supra* note 14.

Category One nations display both high indicators of women's equality and a lack of sex discrimination in their nationality laws. These include ninety-four nations, thirty-six of which are European. Category Two nations have a high-ranking equality indicator, but still have sex discriminatory nationality laws in place. These include the United Arab Emirates, ranked in the second quintile, as well as Qatar, Malaysia, Bahrain, Nepal, Barbados, and Kuwait, in the third quintile.[85] Category Three nations rank lower on the WPS Index, with the bottom two quintiles made up of the sixty-six nations with the lowest total scores,[86] but do not currently have sex discriminatory nationality laws in place. Like Category One nations, Category Three nations have a history of sex discriminatory nationality laws, but such laws are no longer in force. Category Three includes fifty-two nations, five of which changed their laws in the past twenty years.[87] Finally, Category Four nations rank both low on the WPS Index and have discriminatory nationality laws in place. These nations include Togo, Saudi Arabia, Jordan, Burundi, Eswatini, Liberia, Lebanon, Mauritania, Somalia, Sudan, Libya, Iraq, and Syria.[88]



Graph #1; Created by Author

Overall, the data suggests a correlation between gender equality rank and the likelihood that a nation currently has discriminatory nationality laws in place. Rank, interestingly, does not correlate with severity of laws: of the strictest (red) nations in Table 1, roughly half fall into quintile three, and half into quintile five.[89] However, gender equality rank alone does not indicate a likelihood these laws will change in the future.

85. *Women, Peace, and Security Index 2019/20 DATA, supra* note 9.

86. *Id.*

87. *Id.*

88. *Id.*

89. Table created by author, contrasting data from *id.* with the twenty-five nations with sex discrimination in nationality laws.

If there is a correlation between ranking and existence of law, that correlation alone is not predictive. As is the case with the international legal framework, a commitment to sex equality as a whole is not the same as specific national action to end anti-discrimination in nationality laws. Instead, by looking at each category of nations, we can see three main historical components to change that could act as future predictors: 1) the existence of anti-discrimination nationality laws, 2) institutional flexibility to change, and 3) the presence of grassroots social activism. Next, this Note focuses on Category One nations to examine how gender equality interacts with institutional realities.

B. Category One Nations

Category One nations institutionalize sex equality. These nations rank high on the WPS Index and do not currently have nationality laws that discriminate on the basis of sex. Notably, the most recent addition to this category is the United States, which had male-discrimination in their nationality laws until 2017.[90] While the change in US law now prevents disproportionate statelessness of children born to single fathers, it is important to examine the history of this law and the factors motivating its change.

1. Case Study: The United States of America

The United States ranks number nineteen out of 167 worldwide on the WPS Index.[91] The country projects a strong dedication to gender equality,[92] and legal protections against sex and gender-based discrimination are built into its system under judicial interpretations of the Fifth and Fourteenth Amendments of the US Constitution.[93] The exact number of stateless individuals in the United States is unknown,[94] although unreliable estimates from various organizations range in the

90. *See infra* section IV. B. 1.

91. *See Women, Peace, and Security Index 2019/20 DATA, supra* note 9.

92. This number has increased in the past few years, with the US previously not making the top 20 for its high rate of domestic violence. *See Women, Peace, and Security Index 2019/20 report, supra* note 14, at 55.

93. These are known as the Due Process and Equal Protection Clauses of the US constitution. U.S. Const. amend. V & XIV; Ruth B. Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L. Q. 161, 165-67 (1979).

94. The UNHCR labels the US as a nation without reliable data on statelessness. *See Persons under UNHCR's Statelessness Mandate*, Table 7, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (2018), https://www.unhcr.org/statistics/18-WRD-table-7.xls.

low thousands.[95] The United States has signed the CRC but has not ratified it, making it the only U.N. Member State not a party to the CRC.[96] The same is true of CEDAW.[97]

Yet, until the 2017 Supreme Court ruling in *Sessions v. Morales-Santana*, the United States still had sex-discriminatory nationality laws in place.[98] Unlike the twenty-five nations surveyed for this paper, sex discrimination in the United States targeted males and the notion of fatherhood, effectively increasing childhood statelessness.[99] United States Code section 1401 required US-citizen parents to be physically present in the United States or an outlying possession for five years prior to the birth of their child to pass on their citizenship.[100] However, while this rule applied to married US-citizen parents[101] and unmarried US-citizen fathers,[102] a Congressional exception allowed US-citizen mothers to pass on their nationality if they met a shorter physical presence requirement of one year.[103] In this case, the plaintiff, Luis Ramón Morales-Santana, claimed that US nationality laws discriminated against single fathers by requiring a longer physical presence in the United States than single mothers faced.[104] Morales-Santana was denied US citizenship on the grounds that his unwed-US-citizen father was twenty days short of meeting the physical presence requirement when Luis was born.[105] If he were

95. The Center for Migration Studies bases their numbers on the deportation data, stating for support that "Representative Lamar Smith (R-TX), for example, claimed that between 2009 and 2011 the United States government released almost 10,000 deportees after their purported countries of origin refused to take them back. With no legal status in the United States and no country willing to grant them legal status, such people could be considered *de facto* stateless." *See* John Corgan, *The Statelessness in the United States*, CENTER FOR MIGRATION STUDIES, https://cmsny.org/the-stateless-in-the-united-states/. However, this organization has been criticized by the Southern Poverty Law Center as an anti-immigrant hate group, which could affect numbers given. *See Center for Immigration Studies*, SOUTHERN POVERTY LAW CENTER, https://www.splcenter.org/fighting-hate/extremist-files/group/centerimmigration-studies. Articles widely shared online place this number around 4,000, but no source for their data is given. *See* Lorena Rios, *Stateless people in the US have begun to unite for the first time*, TRT WORLD, https://www.trtworld.com/magazine/stateless-people-in-the-us-have-begun-to-unite-for-the-first-time-18541.

96. Sarah Mehta, *There's Only One Country That Hasn't Ratified the Convention on Children's Rights: US*, ACLU BLOG (Nov. 20, 2015), https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens.

97. *A Fact Sheet on CEDAW: Treaty for the Rights of Women*, AMNESTY INTERNATIONAL (Aug. 25, 2005) https://www.amnestyusa.org/files/pdfs/cedaw_fact_sheet.pdf.

98. *Sessions v. Morales-Santana,* 137 S.Ct. 1678, 1686 (2017).

99. *Id.*; 8. U.S.C. § 1401.

100. At least two of these years must occur after the citizen-parent turns 14 years of age. 8 U.S.C. § 1401(g) (2012 ed.). Previously, US Citizen-Parents required a physical presence of 10 years prior to birth, at least 5 of which were past the age of 14. This older rule is what applied in Morales-Santana. *See* 8 U.S.C. § 1401(a)(7) (1958 ed.).

101. 8 U.S.C. § 1401.

102. 8 U.S.C. § 1409(a).

103. 8 U.S.C. § 1409(c).

104. *Morales-Santana*, 137 S.Ct. at 1686; *Nguyen v. Immigr. & Naturalization Serv.*, 533 U.S. 53 (2001).

105. *Morales-Santana,* 137 S. Ct. at 1687.

born to an unwed-US-citizen mother instead, he would have been granted citizenship.[106]

Sessions v. Morales wasn't the first time the Supreme Court addressed the issue of sex discrimination in nationality laws.[107] In 2001, the Court declined to overturn similar sections of the United States Code in *Nguyen v. INS*, in a case offering almost the exact same fact pattern.[108] In that case, the child of an unwed US-citizen father challenged the disparate rules between mothers and fathers in proving parentage for the purpose of citizenship.[109] The court held that a relationship between parent and child is distinctly tied to parental sex, stating "a relationship. . . that consists of the real, everyday ties that provide a connection [is] inherent in the case of an American mother and her child, but not inevitable in the case of a single father."[110] This reasoning built off of the 1998 plurality opinion by the Court in *Miller v. Albright*, which suggested that this form of sex discrimination was lawful if it served a justifiable purpose of government interests and national security.[111]

Ultimately, the Court in *Morales-Santana* distinguished the case from this precedent by holding that physical presence requirements failed to serve a valid government interest because time spent in the United States is not a determining factor of parenthood for either gender.[112] Therefore, the court reasoned that existing sex discrimination in US nationality laws should no longer be allowed under the Fifth Amendment's Due Process Clause, stating that "the gender line Congress drew is incompatible with the requirement that the Government accord to all persons 'the equal protection of the laws.'"[113] The Court could not grant citizenship to Morales-Santana, but it raised the physical presence requirement of unwed US-citizen mothers to that of unwed US-citizen fathers, which forcefully required gender neutrality in future domestic nationality laws.[114]

While the plaintiff in *Morales-Santana* did not risk statelessness from his denial of citizenship, this recent movement of the United States to Category One highlights how widespread and entrenched sex discrimination in nationality laws can be.[115] Ultimately, it was the legal system's use of existing sex-equality protections that changed these laws. The Supreme Court's decision abrogated US nationality laws, "leveling down" the extra protections granted to single mothers

106. *See id.*

107. *Nguyen*, 533 U.S. at 56.

108. *Id.* at 72, 57.

109. *Id*. at 58.

110. *Id.* at 65.

111. This standard, referred to as intermediate scrutiny, is seen in most gender/ sex discrimination cases. *See Miller v. Albright*, 523 U.S. 420, 423 (1998).

112. *Morales-Santana*, 137 S.Ct. at 1694; *Nguyen*, 533 U.S. at 53.

113. *Morales-Santana*, 137 S. Ct. at 1686.

114. *Id.*

115. *Id*. at 1678, 1687.

to match that of single fathers.[116] While statelessness can still occur with a US-citizen parent,[117] sex discrimination as a cause of statelessness was combatted through existing sex protections in the law. The legal avenue used was the Fifth Amendment's protection against discrimination, not international obligations or considerations about statelessness.[118]

C. Category Two Nations

Category Two nations are nations that rank in the first three quintiles on the WPS Index but still have gender discriminatory laws in place. This is a small category, containing only the United Arab Emirates, Qatar, Malaysia, Bahrain, Nepal, Barbados, and Kuwait. These nations run counter to the theory that there is a link between gender equality ranking and the use of sex discriminatory laws. This next Section examines Nepal and theorizes that slow institutional adaptation to increased gender equality is a major factor preventing legal change.

1. Case Study: Nepal

Located in the southern Himalayan mountain ranges in Asia, The Kingdom of Nepal is a country of about thirty million people.[119] Nepal was declared a democratic republic in 2007, after decades of conflict and the creation of the 2006 Comprehensive Peace Agreement.[120] As a result, an interim constitution was passed[121] and a constitutional assembly created the Constitution of Nepal in 2015.[122] This new constitution resulted in "months of protest and violence (on the part of both state actors and protestors), in which over fifty people lost their

116. Sandy De Sousa, *An Analysis of Sessions v. Morales-Santana's Implications on the Plenary Power Doctrine and the Supreme Court's Approach to Equal Protection Challenges*, 49 SETON HALL L. R. 1123, 1126 (June 17, 2019).

117. Statelessness in the US can still occur through other means; including but not limited to improper documentation and residency requirements for applicants. *See generally Stateless in the United States*,

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, UNITED STATES, https://www.unhcr.org/stateless-in-the-united-states.html.

118. *Morales-Santana*, 137 S. Ct. at 1678.

119. Nepal, ENCYCLOPEDIA BRITANNICA (last updated May 2020), https://www.britannica.com/place/Nepal; *Nepal*, CIA World Factbook (Mar. 23, 2021), https://www.cia.gov/the-world-factbook/countries/nepal/.

120. *Citizenship, Gender and Statelessness in Nepal: Before and After the 2015 Constitution,* DISCOVER SOCIETY (Sep. 5, 2017), https://discoversociety.org/2017/09/05/citizenship-gender-and-statelessness-in-nepal-before-and-after-the-2015-constitution/#.

121. The Interim Constitution of Nepal 2063 (2007), https://www.wipo.int/edocs/lexdocs/laws/en/np/np006en.pdf.

122. Constitution of Nepal (Sep. 20, 2015), https://www.wipo.int/edocs/lexdocs/laws/en/np/np029en.pdf.

lives."[123] The protests were largely attributed to continued constitutional prohibitions on mothers from conferring their nationality on their children.[124] According to a 2018 report by the US State Department, Nepal had an estimated population of 5.4 million stateless individuals.[125] These 5.4 million individuals are denied equal access to education, health services, relief programs, and more.[126]

The Constitution of Nepal grants citizenship to children of one Nepali parent, but stipulates that children born to a Nepali mother and non-Nepali father can only pass citizenship to their children through a process of naturalization.[127] In 2011, a decision by the Supreme Court of Nepal granted naturalization rights to mothers in cases where fathers are unknown or absent.[128] In theory, this decision helped combat statelessness, but, according to researchers, the process of naturalization remains inaccessible in the country.[129] Legal provisions that require extensive documentation, access to State services, and an understanding of how to navigate the system's complex rules disproportionately burden rural or displaced peoples.[130] The Nepal government justified this approach by citing concerns about national security, resources, previously changing borders, and lack of geographic access to rural communities.[131] Nonetheless, few changes have been made to accommodate government limitations and instances of the government granting citizenship through naturalization are incredibly rare; as the US State Department reported, "[a]lthough they lack specific data, human rights lawyers reported that the government has processed few applications for naturalization of children in

123. Subin Mulmi and Sara Shneiderman, *Citizenship, gender and statelessness in Nepal*, *in* UNDERSTANDING STATELESSNESS 135 (Tendayi Bloom, Katherine Tonkiss & Phillip Cole eds., Routledge, 2017).

124. *Id.* ("Central to the constitutional debate were the constraints placed on the conferral of citizenship by women and by naturalised citizens of all genders to their offspring. These constitutional ambiguities, along with difficulties often experienced in obtaining citizenship certificates even in cases where the legal framework should grant such a certificate, have the potential to render significant numbers of people stateless").

125. The U.S. State Department reports this number as individuals lacking citizenship documentation, under the heading of stateless persons. Effectively, these are the same thing. U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., 2018 Country Reports on Human Rights Practices: Nepal (2018), https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/nepal/.

126. *Id.*

127. *Id.* at Stateless Persons.

128. *Id.*

129. Susann Nowack, *Gender Discrimination in Nepal and How Statelessness Hampers Identity Formation* 4, Statelessness Working Paper Series No. 2015/02, INSTITUTE ON STATELESSNESS AND INCLUSION (Dec. 2015), https://files.institutesi.org/WP2015_02_Rothe.pdf ("In the last 6 years, Nepali officials have refused every citizenship application of children born to foreign fathers").

130. Understanding Statelessness, *supra* note 123, at 137.

131. Diane Richardson et al., *Women and Citizenship Post-Trafficking: The Case of Nepal*, 64 THE SOCIO. R. 329, 339-341 (2016).

recent years."[132] According to on-the-ground researchers, "only 13 persons had obtained such naturalized citizenship certificates as of January 2017."[133]

Notably, Nepal is seen worldwide as a middle-of-the-road nation when it comes to gender equality and progressive rights.[134] The nation ranks eighty-four out of 167 on the WPS Index, placing it in the third quintile.[135] On LGBTQ+ issues, Nepal is one of the leading progressive nations in Asia.[136] In 2007, the Supreme Court of Nepal ordered the government to legally recognize the existence of a third gender category and change existing laws that discriminate against the LGBTQ+ community.[137] In 2011, Nepal became the first country in the world to list a third gender option on the national census.[138] Additionally, in 2015, the new Constitution of Nepal became the world's tenth constitution to specifically include language protecting LGBTQ+ rights.[139] While gay marriage is not legal in Nepal, there are no laws prohibiting homosexuality, and a committee has been formed to develop future legislation recognizing same-sex couples.[140]

Nepal's progressive stance on LGBTQ+ issues makes the nation an interesting example of institutional delay. While same-sex couples are not criminalized, female-female couples are unable to pass on their citizenship without a difficult naturalization process, and extensive paperwork showing the lack of a father.[141] Additionally, while third genders are recognized on passports and legal documents, Nepal has yet to include gender-neutral language in its laws that govern the process of conferring citizenship.[142] Institutional failures to adjust to these norms to provide easier paths to naturalization leave LGBTQ+ individuals, those residing in rural areas, displaced communities, and single mothers particularly vulnerable to statelessness.

This Nepal case study demonstrates not only the importance of gender equality, but also the importance of pushing for institutional change. Most positive

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132. U.S. Dep't of State, *supra* note 125.

133. *Citizenship, Gender and Statelessness in Nepal, supra* note 120.

134. *Women, Peace, and Security Index 2019/20 DATA, supra* note 9.

135. *Id*.

136. *LBGT Rights in Nepal*, EQUALDEX, https://www.equaldex.com/region/nepal (last visited Dec. 10, 2020); Kyle Knight, *How Did Nepal Become a Global LGBT Rights Beacon?,* HUMAN RIGHTS WATCH (Aug. 11, 2017), https://www.hrw.org/news/2017/08/11/how-did-nepal-become-global-lgbt-rights-beacon; *but see* Sanju Gurung, *Nepal, the Beacon of LGBTQ+ Rights in Asia? Not Quite*, THE DIPLOMAT (Feb. 10, 2021), https://thediplomat.com/2021/02/nepal-the-beacon-of-lgbtq-rights-in-asia-not-quite/.

137. *Pant v. Nepal*, NJA L. J. 262 (Sup. Ct. Div. Bench, Writ No. 917 2007).

138. Knight, *supra* note 136.

139. *Id*.; Constitution of Nepal, art. 18(3) (Sep. 20, 2015).

140. *Pant*, Writ No. 917.

141. *LBGT Rights in Nepal*, *supra* note 136; Constitution of Nepal, (Sep. 20, 2015).

142. Kyle Knight, *Nepal's Third Gender Passport Blazes Trails*, HUMAN RIGHTS WATCH (Oct. 26, 2015, 4:06 PM), https://www.hrw.org/news/2015/10/26/nepals-third-gender-passport-blazes-trails.

change in Nepal, whether it is gender equality or LGBTQ+ rights, stems from political and legal activism. The Supreme Court of Nepal has been instrumental in implementing change on a national level and has primarily acted in response to cases brought by legal activists.[143] As many local activists argue, institutional change towards non-discriminatory nationality laws is delayed by political and institutional gridlock.[144] However, this does not mean the laws will never change. For nations with higher gender equality that still have discriminatory laws, legal change seems to be a matter of institutional delay. This, along with the role of social and legal activism, can be applied with country-specific adjustments to the remaining Category Two nations of the United Arab Emirates, Qatar, Malaysia, Bahrain, Barbados, and Kuwait. While not all alike in government resources or populations, these nations display a higher tendency towards non-discriminatory sex laws, but the incorporation of non-discrimination into nationality laws suffers from institutional delay.[145]

D. Category Three Nations

Category Three nations are nations that rank in the bottom quintile of the WPS Index but do not have sex-discriminatory nationality laws in place. This category includes fifty-three nations across the world, including a substantial number of nations that have changed their nationality laws in the previous twenty years, such as Lesotho, Sierra Leone, Madagascar, Niger, and Senegal.[146] As nations with lower ranking gender equality scores, a strict correlation between nationality laws and gender equality would suggest these progressive changes should not have taken place. However, as is the case with Category Two nations, while gender equality contributes to change, it alone is not enough. This Section examines Madagascar, analyzing how lessons learned from this nation can be applied to improve the situation in nations with similarly low gender equality scores.

1. Case Study: Madagascar

Madagascar is a semi-presidential republic located off the coast of east Africa.[147] The nation ranks in the fifth quintile of the WPS Index, ranking it 136

143. *Pant*, Writ No. 917.

144. *Citizenship, Gender and Statelessness in Nepal*, *supra* note 120.

145. *Women, Peace, and Security Index 2019/20 DATA, supra* note 9.

146. *See 2020 Background Note, supra* note 12, at 6.

147. 2020 Country Reports on Human Rights Practices: Madagascar, U.S. Dept. of State, Bureau of Democracy, Human Rights, and Labor (March. 30, 2021), https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/madagascar/.

out of 167.[148] Women represent only 19.2 percent of the country's parliament.[149] Madagascar has adopted only an estimated 33.3 percent of UN-recommended legal frameworks preventing violence against women and gender equality.[150] An estimated 41.8 percent of women are married before eighteen years old, and women in rural communities struggle to access education and medical aid.[151] Notably, however, Madagascar is a signatory to CEDAW and does not outlaw homosexuality.[152] This demonstrates the progressive qualities of the nation and suggests that sex discrimination in nationality laws likely is not being used to target and prevent LGBTQ+ motherhood.

Before 2017, Madagascar was not a positive example for non-discrimination in nationality laws. Established during the country's independence in 1960, Madagascar's previous nationality laws only granted citizenship conferral rights to Malagasy women with children "born in wedlock" to a father of "stateless or of unknown nationality."[153] Malagasy women with foreign husbands were excluded, as were vulnerable communities like single mothers, victims of sex and gender-based violence, or LGBTQ+ parents.[154] On January 25, 2017, however, Madagascar made a significant change to its Nationality Code, granting equal rights to all citizens, regardless of gender, to confer their nationality onto their children.[155]

Since Madagascar is a low-ranking nation on the WPS Index,[156] it is important to examine the motivation behind this change. Unlike Nepal, where government institutions failed to keep pace with social and political demands for equality, Madagascar implemented sex-neutral policies despite the institutional challenges in place. Contributing to this shift, Madagascar faced international political pressure for change as a signatory to CEDAW, heightening around 2015 when the UNHCR partnered with non-profit organizations to promote reform.[157] Importantly, this institutional change resulted from decades of local activism. Change was not easy in a nation where authorities "routinely decline requests for

148. *Women, Peace, and Security Index 2019/20 DATA, supra* note 9.

149. *Id.*

150. *Madagascar*: *United Nations Women Data*, UNITED NATIONS WOMEN https://data.unwomen.org/country/madagascar.

151. *Id.*

152. *Map of Countries that Criminalize LGBT People*, *supra* note 32; *CEDAW, supra* note 63, at 18.

153. *2014 Background Note on Gender Equality, Nationality Laws, and Statelessness*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (MAR. 7, 2014), https://www.unhcr.org/4f5886306.pdf.

154. *Id.*; Loi n'2016-038, http://data.globalcit.eu/NationalDB/docs/Madagascar-Loi-n2016-038%20[ORIGINAL%20LANGUAGE].pdf.

155. Loi n'2016-038, *supra* note 154.

156. *See Women, Peace, and Security Index 2019/20 DATA, supra* note 9.

157. *Madagascar Moves Closer to Reforming Discriminatory Laws,* Equal Rights Trust, (Nov. 3, 2015), https://www.equalrightstrust.org/news/madagascar-moves-closer-reforming-gender-discriminatory-nationality-law.

protests and rallies in the name of public security" and subject protestors to violence.[158] As the Global Campaign for Equal National Rights explains, "[t]he fight to reform the nationality law has been a long effort led by women's rights activists."[159] As observed with Nepal, while gender equality is one indicator of the existence of sex-discriminatory laws, it is not dispositive. Ultimately, Madagascar's institutional flexibility and social activism created an opportunity to change these laws even though broader gender equality remains lacking.

E. Category Four Nations

1. Case Study: Iran

Finally, this Note examines a Category Four nation that has recently moved toward gender equality in its nationality laws. After the Iranian Revolution of 1979, Iran's government became a unitary Islamic republic, ruled by a combination of a president, one legislative house, the office of the Supreme Leader, and a Guardian Council which approves legislative decisions.[160] Iran ranks 118 out of 167 on the WPS Index, and most observers would conclude that it does not project a strong commitment to gender equality.[161] Notably, Iran is one of only six UN member nations that is not a signatory to CEDAW.[162] Several laws implemented during the 1979 Revolution that restrict female clothing and movement remain in place, thereby violating human rights standards.[163] Gender equality in government is also lacking, with women making up only 6 percent of the parliamentary body.[164] Furthermore, rights for the LGBTQ+ community are practically nonexistent outside of limited transgender protections.[165]

158. *Freedom in the World 2018 – Madagascar,* FREEDOM HOUSE (Sep. 5, 2018) https://www.refworld.org/docid/5b964c964.html.

159. *Madagascar Reforms its Nationality Law,* GLOBAL CAMPAIGN FOR EQUAL NATIONALITY RIGHTS (Jan. 2017), https://equalnationalityrights.org/news/78-madagascar-reforms-its-nationality-law-guaranteeing-mothersindependent-right-to-confer-nationality-on-children.

160. *See generall*y Constitution of the Islamic Republic of Iran (Oct. 24, 1979), https://www.refworld.org/docid/3ae6b56710.html.

161. *See Women, Peace, and Security Index 2019/20 DATA*, supra note 9.

162. *Beyond the Veil: Discrimination against Women in Iran,* CEASEFIRE CENTER FOR CIVILIAN RIGHTS, 4 (Sept. 16, 2019), https://minorityrights.org/wp-content/uploads/2019/09/MRG_CFR_Iran_EN_Sept191.pdf.

163. *See id.* at 4, 35.

164. Shima Esmailian, *As Women Make up Only 6% of Parliament, Gender Equality is Still a Long Way off in Iran*, RUSSIAN INTERNATIONAL AFFAIRS COUNCIL (Apr. 15, 2020), https://russiancouncil.ru/en/analytics-and-comments/columns/middle-eastpolicy/as-women-make-up-only-6-of-parliament-gender-equality-is-still-a-long-way-off-in-iran/.

165. *Map of Countries that Criminalize LGBT People*, *supra* note 32. The topic of trans rights and representations in Iran is sadly beyond the limited scope of this Note, but is worth reading about. For more, *see* S.T., *How Iran Persecutes Some LGBTQ+ Members while Subsidizing Others*, LSE BLOG (Apr. 12, 2021), https://blogs.lse.ac.uk/humanrights/2021/04/12/how-iran-persecutes-some-lgbtq-members-while-subsidizing-others/; Human Rights Report: Being Transgender in Iran,

Homosexuality remains illegal throughout the nation and is punishable by death, with individuals executed as recently as last year.[166]

Despite these significant gender equality issues, Iran has become the most recent nation to address sex discrimination in its nationality laws. Prior to this change, the Iranian Civil Code granted the right to confer nationality only to Iranian fathers, regardless of whether the child was born abroad or at home.[167] Children with absent, missing, or non-Iranian fathers could become stateless since nationality could not be conferred through mothers.[168] While no formal United Nations data exists on stateless populations in Iran, various Iranian news agencies have estimated that between forty-nine thousand and five-hundred thousand children remain stateless.[169] A 2017 survey by the Iranian Government put this number closer to fifty thousand.[170]

In October 2019, the Guardian Council of Iran approved parliamentary legislation allowing women to confer citizenship to their children, but only after significant pressure from internal social movements.[171] This same council had rejected a similar bill in June 2019, citing a concern for security.[172] The new bill grants women the right to confer their nationality.[173] However, to address the Council's security concerns, the bill requires mothers to formally apply for nationality for their children under eighteen years old, which will be granted as

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OutRight International, https://outrightinternational.org/sites/default/files/OutRightTransReport.pdf (last visited Nov. 1, 2021).

166. *See* U.K. Home Office, *Country Policy and Information Note Iran: Sexual Orientation and Gender Identity or Expression* 4.1.6, 4.1.4 (June 2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/810845/CPIN_-_Iran_-_SOGI_-_v3.0__June_2019__EXT.PDF.

167. *Beyond the Veil: Discrimination against Women in Iran*, supra note 162 at 26.

168. *Id.*

169. *Id.* at 26.

170. *UNHCR Welcomes Iran's New Nationality Law Addressing Statelessness*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (Oct, 2019), https://www.unhcr.org/ir/2019/10/08/unhcr-welcomes-irans-new-nationality-law-addressing-statelessness/.

171. *Iran Women Married to Foreigners can Pass Citizenship to Children*, ALJAZEERA (Oct. 2, 2019), https://www.aljazeera.com/news/2019/10/iran-women-married-foreigners-pass-citizenship-children-
191002145229455.html.

172. Tara Far, *Iran's Nationality Law Bill Highlights Challenges for Legislative Reform,* HUMAN RIGHTS WATCH (Aug. 9, 2019), https://www.hrw.org/news/2019/08/09/irans-nationality-law-bill-highlights-challenges-legislative-reform.

173. Administrative Action No. 24957/ T 57624 AH 1399/3/13, Regulation for ranting Iranian citizenship to children born of Iranian women married to foreign men, Council of Ministers (June 2, 2020) http://www.rrk.ir/Laws/ShowLaw.aspx?Code=22043; *Guardian Council Ratifies Bill Granting Citizenship to Children of Iranian Mothers, Foreign Fathers*, ISLAMIC REPUBLIC NEWS AGENCY (Oct. 2, 2019), https://en.irna.ir/news/83500806/Guardian-Council-ratifies-bill-granting-citizenship-to-children*; UNHCR Welcomes Iran's New Nationality Law Addressing Statelessness*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (Oct. 8, 2019) http://unhcr.org.ir/en/news/50796/UNHCR-welcomesIran's-new-nationality-law-addressing-statelessness.

long as they do not pose a national security risk.[174] Individuals over eighteen years old who were previously denied citizenship because of their parentage may also apply.[175] However, as the Center for Human Rights in Iran points out, "the amendment leaves children and their loved ones subject to increased scrutiny by Iran's intelligence establishment for seeking a basic right. It also discriminates against Iranian women, since there's no legal provision for security checks on Iranian men married to foreign women."[176] Since treatment is still gendered, Iran falls into a Category Four nation, but one that has recently made significant improvements.

What is interesting in Iran's case is that its change is not attributed to its international legal obligations as signatories under the Convention for the Rights of the Child, International Covenant on Economic, Social and Cultural Rights, or the Convention on the Rights of Persons with Disabilities.[177] What brought about this change in Iran, rather, was a public domestic push for equality, spanning over a decade, and ultimately the voice of a specific woman: Maryam Mirzakhani.[178] Mirzakhani, a world-renowned mathematician and Stanford professor, was unable to get Iranian citizenship for her daughter due to the sex-discriminatory nationality laws.[179] In 2013, Mirzakhani publicly asked for Iranian citizenship conferral rights after being diagnosed with breast cancer.[180] As her cancer spread to her bones and liver in 2016, these calls for her daughter to hold Iranian nationality in her memory increased, with global support continuing even after her death.[181] Her story, and her dying wish for her daughter to have Iranian citizenship, inspired social pressure on the Iranian legislature to make the change.[182] Mirzakhani's ability to effect change, where large governmental organizations could not, presents an opportunity to reconsider the effective catalysts for changing discriminatory nationality laws.

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174. *See* Administrative Action No. 24957, *supra* note 173.

175. *Id.*

176. *Children Born to Non-Iranian Fathers Win Right to File for Citizenship – With a Catch*, CENTER FOR HUMAN RIGHTS IN IRAN (Oct. 7, 2019), https://iranhumanrights.org/2019/10/children-born-to-non-iranian-fathers-win-right-to-file-for-citizenship-with-a-catch/.

177. Iran is not a member of CEDAW or the Convention relating to the Status of Stateless Persons. *See Status of Ratification Interactive Dashboard, supra* note 72, at "Iran."

178. Rothna Begum, *Reforms Will Grant Nationality to Children of Iranian Women,* HUMAN RIGHTS WATCH (Oct. 3, 2019), https://www.hrw.org/news/2019/10/03/reforms-will-grant-nationality-children-iranian-women.

179. *Id.*

180. Frud Bezhan, *Iranian Lawmakers Aim to Scrap Discriminatory Citizenship Law*, Radio Free Europe, (July 19, 2017), https://www.rferl.org/a/iranian-lawmakers-aim-to-scrap-discriminatory-citizenship-law/28625934.html

181. Roshanak Asteraky, *The Extraordinary Life of Maryam Mirzakhani, 'Queen of Mathematics,'* KAYHAN LIFE, (July 30, 2017), https://kayhanlife.com/people/extraordinary-life-maryam-mirzakhani-queen-mathematics/.

182. *Id.*

V.
PRINCIPLES FOR MOVING FORWARD

Several unifying factors can be drawn from the intersection of data presented. Change in the last twenty years has come from the use of existing non-discrimination protections, the willingness of courts to enforce those protections, and grassroots social activism. Looking forward, these three tools will likely motivate future changes. The twenty-five nations that still discriminate in nationality laws based on gender are already party to international frameworks which can support activists and offer policy feedback.[183] However, these countries have yet to change their laws to match their international obligations, which signals that more action is needed. While existing nondiscrimination laws would be an ideal method of challenging sex discrimination in nationality laws, this is not always an option. In countries where nondiscrimination laws exist, like Nepal, activists will likely continue to use the court system as a tool to pressure compliance with non-discrimination.[184] This can be a lengthy process if the court or the legislature has not adapted to cultural and legal norms at the same rate as the public. In the United States, it took three Supreme Court cases challenging the disparate treatment in nationality laws before a change was made.[185] This will likely be the case in Nepal as well, where the legislature's reluctance to match the country's demand for equality is resulting in more and more litigation.[186]

In countries without such protections, social activism targeting gender discrimination in nationality laws as a source of statelessness appears to be the key to change. While pressuring institutions to promote broad gender equality may have farther-reaching benefits, using statelessness as a narrative instead of issuing larger demands for equality has motivated change. Accordingly, activists in more restrictive countries, like Madagascar and Iran, should approach future changes through political and social activism.[187] In some cases, this may need to be done through non-profits to protect activist's anonymity in countries with high rates of violent government retribution.

As the number of stateless individuals increases, and the conversation about their rights grows, pressure on nations with sex discrimination in their nationality laws will increase. As history shows, sex-discriminatory nationality laws are a dying form of nationality criteria. Trends suggest that these laws will become obsolete through national action rather than international obligations, helping prevent a major cause of statelessness through the promotion of sex equality.

183. *See supra* Section IV. A.

184. *See supra* Section IV. C. 1.

185. *See supra* Section IV. B. 1.

186. *See supra* Section IV. C. 1.

187. *See supra* Section IV. D. 1. & E.

VI.
CONCLUSION

Nations are moving away from the use of sex discriminatory nationality laws. Not only do many international legal frameworks now discourage the use of these laws, but nations are also responding. The number of nations with such laws has decreased by 50 percent from twenty years ago. The reality is that there is no one variable that explains *why* nations have these laws. While gender equality is a strong indicator of which nations maintain these laws, this factor alone does not cause immediate change. Gender equality must be paired with institutional readiness and social activism. For nations that still have these laws, it is largely the result of slow institutional change. Nepal, which is ahead of its peers in addressing issues of gender equality and LBGTQ+ rights, has a legislature that does not represent the views of the nation due to political gridlock. Existing anti-discrimination laws help combat such gridlock by giving activists an avenue to challenge the discriminatory practices, as is seen in the United States.

In contrast, nations that have not yet achieved greater gender equality have managed to remove sex discrimination in nationality laws when public interest and activism advocate for institutional change, as seen in Madagascar. Activism, both by international institutions and local actors, is a consistent force for change within the gender equality framework. As seen in Iran, it is the overlap of institutional willingness, support for gender equality, and social activism that moves national laws toward change. While international frameworks have succeeded in promoting the conversation and offering aid, national action is the crucial element. The use of existing anti-discrimination laws, institutional flexibility, and activism have, and likely will remain, the catalysts of future change. Thus, these three factors can be used as principles to promote gender-neutral nationality laws in the future.