REVIVING OUR SOCIAL CONSCIOUSNESS
EXAMINING THE PERPETUAL INEQUITIES FACED BY MINORITIES

CHAPMAN UNIVERSITY FOWLER SCHOOL OF LAW

THE DIVERSITY AND SOCIAL JUSTICE FORUM

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Table of Contents

**Editor’s Note**  
By Rewa Ousman & Jenna Hou

**The Articles**

<table>
<thead>
<tr>
<th>Page</th>
<th>Title</th>
<th>Authors</th>
</tr>
</thead>
<tbody>
<tr>
<td>18</td>
<td><strong>INTEGRATING INTERSECTIONALITY IN THE FEDERAL RULE OF EVIDENCE 403</strong></td>
<td>By Sharon Perez</td>
</tr>
<tr>
<td>04</td>
<td><strong>INCARCERATION OF MUSLIMS DURING COVID-19 AND JUDICIAL RETORT IN THE INDIAN STATE OF MAHARASHTRA</strong></td>
<td>By Mohammad Umar &amp; Nizamuddin Ahmad Siddiqui</td>
</tr>
<tr>
<td>07</td>
<td>CHINESE ETHNIC ENCLAVE IN SAN FRANCISCO</td>
<td>By Elizabeth Kim &amp; Matthew Hong</td>
</tr>
<tr>
<td>28</td>
<td></td>
<td></td>
</tr>
<tr>
<td>39</td>
<td></td>
<td></td>
</tr>
<tr>
<td>51</td>
<td>2021-2022 DSJF Executive Board</td>
<td></td>
</tr>
</tbody>
</table>
CO-EDITORS-IN-CHIEF NOTE
By Rewa Ousman & Jenna Hou

To All our Readers,

Our names are Rewa Ousman and Jenna Hou and it is our honor to serve as Co-Editors-In-Chief of the Diversity and Social Justice Forum for the 2021-2022 academic year. We are proud to lead and be a part of an organization that is committed to implementing notions of diversity through the inclusion of a broad scope of unique perspectives, ideas, and backgrounds. To put our mission into metaphorical terms, diversity is having a seat at the table, and inclusion is having the opportunity to speak.

On behalf of the Diversity and Social Justice Editorial Board, we invite you to immerse yourself in our annual Publication, Volume V: Reviving Our Social Consciousness: Examining the Perpetual Inequities Faced by Minorities.

In 2020, we reflected on the social injustices faced disproportionately by minorities. Although these injustices are deeply embedded in our American history, we, as a society, were forced to confront these injustices—injustices that have been historically swept under the rug.

Progress has been made in 2021 with respect to recognizing the pervasive and prevalent social inequities and injustices against minorities. However, there is still more work to be done.

Our job now is to revive our social consciousness so we do not fall back into the full of ignorance.

Our contribution to the mission of reviving our collective social consciousness lies within the pages of this publication. Each article represents a ubiquitous form of discrimination aimed at historically marginalized communities, and invites the reader to acknowledge how we as a collective can further mitigate discriminatory thought and practice.

We hope that this publication not only encourages you to challenge your biases, but also inspires you to immerse yourself in intersectional discourse to advocate for the implementation of diversity and inclusion in various legal spaces.
Janine Young Kim is the Wylie A. Aitken Professor of Law, Race, and Social Justice at the Chapman University Fowler School of Law. Prior to joining the Fowler School of Law faculty in 2016, Professor Kim taught at Marquette University Law School for eight years, and previously taught at Southwestern and Whittier Law Schools. She received her JD from Yale Law School and both her M.A. and B.A. from Stanford University, where she was selected as a member of Phi Beta Kappa. At Yale Law School, she was an editor of the Yale Law Journal, a Coker Fellow, and the executive editor of the Yale Human Rights & Development Law Journal. Prior to teaching, Professor Kim practiced for three years with Simpson Thacher & Bartlett LLP in New York. She also served as a law clerk to the Honorable Alfred T. Goodwin of the United States Court of Appeals for the Ninth Circuit. Professor Kim’s scholarship focuses on criminal law theory and race and the law, with recent articles appearing in such journals as the SMU Law Review, University of Colorado Law Review, and the Journal of Criminal Law & Criminology.

INTRODUCTION By Professor Janine Kim

It is truly daunting to reflect on this year’s theme, for how does one arrive at an understanding of perpetual inequity? In a nation like ours that was founded upon the ideal of equality and the dream of opportunity, the very notion of perpetual inequity should strike us as incoherent, the condition of perpetual inequity as repugnant. Yet there is no gainsaying that unjust discrimination has been an enduring, and maybe even integral, feature of many of our most fundamental institutions (state, church, school, family, etc.). Moreover, our current struggle with multiple global crises - pandemic, climate change, authoritarianism - has demonstrated how easily inequity can grow ever more acute.

A little more than a year ago, it seemed that mainstream America was finally awakened to the existence of perpetual inequity by a video, taken by a teenager, of a police officer killing a Black man by kneeling on his neck for over nine minutes. Although outrage over such events, along with promises of change, have come before, many commentators observed that this time was different and we had at last arrived at a breaking point in our tolerance for injustice. The summer of 2020 was marked by what appeared to be sustained mass protest against police violence in the U.S. and across the world. Support for Black Lives Matter surged and decision makers vowed to challenge and change their practices. Yet in a matter of mere months, that support has eroded and the vows are languishing while reactionary forces gather. It now appears that we are in danger of falling back into our old patterns of forgetting and accepting, of perpetuating inequity once more.

What is to be done? Social justice is not hard to define - we know that it has to do with attending to fairness, sharing our freedoms, respecting diversity, and enabling a sense of belonging among all within the community. Our failings in this regard are not due to a lack of understanding about what social justice entails or even how to achieve it. Many brilliant minds have proposed a vast array of potential solutions to reform the criminal justice system, enhance community resources, equalize education funding, ameliorate residential segregation, and so on. Instead, much of the problem appears to be a lack of desire or will to change, driven in part by an inability to recognize especially those inequities that we have been living with for so long. In conjunction with the murder of George Floyd, the world-wide crisis caused by COVID-19 has brought these long-standing inequities into sharper relief and provided us with a newly urgent sense of their terrible consequences. In the shadow of such unprecedented devastation and the new forms of knowledge it brings, it is my hope that perpetual inequity will finally be met with a perpetual activism that is characterized by an abiding curiosity, compassion, and readiness to take action in the service of others.

Organizations like the Diversity and Social Justice Forum participate in this endeavor year after year by exploring some of our most pressing social issues and the various steps that we can take to improve the lives of those who have been systematically disadvantaged. The dedicated students who make up the Forum embody the type of activism I spoke of, as individuals and as a collective that inspires succeeding generations of law students to continue the work toward a more just and equitable society. We owe them a debt of gratitude for all that they do, but more than that, we owe it to them and to ourselves to engage in the opportunity that the Forum provides for rigorous dialogue and to act upon what we learn from this experience.
INTRODUCTION By Professor Denis Binder

Hugo Salazar, a 2L, had an inspiration seven years ago. The students at the Dale E. Fowler School of Law at Chapman University should have a Diversity and Social Justice Forum, not just as a student organization, but also as an academic program. A student organization does not need Faculty approval, but an academic program both publishing an annual journal and holding an annual symposium on social justice issues does.

Hugo, April Cristal, and Hadeer Soliman represented their fellow students in petitioning the Faculty for Approval. They asked Professor Deepa Badrinarayana and I to be Faculty Advisors.

The Faculty approved the request. The then Provost, now Chapman President, Daniele Struppa and Law School Dean Tom Campbell provided funding for the Diversity and Social Justice Forum. The Forum’s Mission Statement is clear — to provide a voice:

“The Diversity and Social Justice Forum is a student-run scholarly publication at Chapman University Dale E. Fowler School of Law, dedicated to providing a forum that can give expression and representation to a wide spectrum of progressive and diverse voices at Chapman. We believe that the key to fostering a strong and diverse student body is to ensure that we do not confine ourselves to an echo chamber, and that we are not dismissive of alternative viewpoints and methods. The Diversity and Social Justice Forum hopes to promote a climate of engagement and dialogue on issues of social justice....”

Both the Journal and the annual symposia have fulfilled this statement. The Journal is not intended as a traditional law review but as a forum for writers to express their views, often in the form of essays rather than articles. The Journal is one of reasoned discourse. The writers have strong opinions, but do not engage in the polemics so common today on social media. The students from the beginning have selected the topics, lined up speakers, and sought out the writers.

The never-ending pursuit of social justice goes back millennia. Supreme Court Justice Ruth Bader Ginsburg had this quote from the Torah on her office wall: “Justice, justice thou shalt pursue.”

Progressive lawyers pursuing social justice are increasingly entering the legal profession, reforming the law. They did not acquire their zeal for social change in law school, but law school sharpened their minds.

Matt Hong and Elizabeth Kim focus on the anti-Asian animus, both in general in San Francisco and California, and specifically in San Francisco’s historic Chinatown. Anti-Chinese racism goes back 170 years in San Francisco, beginning with the miners. They relate the long history of discrimination. The anti-Asian animus seemed to disappear after World War II, but Chinatown remains an economically poor enclave in the city, often separated by a language barrier.

I grew up in San Francisco during the 1950s and 1960s. Affluent Chinese were moving out of Chinatown into the Richmond and Sunset Districts just as immigrants “moved on up” in other cities. Tourists see the glitter, restaurants, and tourist shops on Grant Avenue, but usually do not see the byways and sidewalks of Chinatown. The historic Chinatown remains economically depressed and the new home of immigrants trying to adjust to their new country.

The anti-Asian racism, especially anti-Chinese animus has returned in recent years with discrimination in education and the rise of violent attacks against Chinese Americans. Some Americans attack Chinese Americans, especially elderly Chinese, in response to the COVID-19 virus which originated in Wuhan, China. Bias, discrimination, and racism often have no rational basis.

Social justice issues arise in new contexts. Kelly Ha discusses the effectiveness of “Ban-the-Box” laws. Persons with a criminal past have trouble obtaining meaningful employment because they are asked to disclose any criminal record on job applications. States, including California, have banned the “Box.”

Kelly studies the acts in practice and finds they are not totally effective. She then recommends changes that can improve the goal of employment prospects for previously incarcerated applicants.

Sharon Stephanie Perez proposes that intersectionality factors be considered under Federal rules of Evidence §403. Race can currently be considered, but intersectionality would allow the law to go beyond race since multiple intersectionality factors may be involved in understanding actions.

Social justice principles are universal, but the specific issues will vary. Professor Mohammad Omar of Bennett University, India and Nizamuddin Ahmad Siddiqui, Ph.D. candidate at Global Jindal Law school discuss the practice in the State of Maharashtra of blaming and incarcerating Muslims during the COVID Emergency. An estimated 207 million Muslims reside in India, about 10.9% of the country’s population. The Muslim population has periodically experienced Islamophobia and violent attacks. A recent manifestation is the response to the COVID-19 epidemic which is raging through India, with some casting blame on Muslims just as some in America cast blame on Chinese Americans.

These excellent papers further the Forum’s intent of providing a voice.
The Articles
INCARCERATION OF MUSLIMS DURING COVID-19 AND JUDICIAL RETORT IN THE INDIAN STATE OF MAHARASHTRA

by Mohammad Umar and Nizamuddin Ahmad Siddiqui

Mohammad Umar teaches as Assistant Professor of Law at Bennett University, India and is also Founder Advisor to Weeramamtry Centre for Peace, Justice and International Law. He holds a Ph.D. in international law and has published in areas like- global IP regime, regulation of fake news, transnational wildlife trade, gender in Muslim personal law etc. Umar has been invited to speak at several institutions including, among others-London School of Economics and Political Science, Hidayatullah National Law University, National University of Advanced Legal Studies, Jamia Millia Islamia and Indian Society of International Law. He has widely written for prominent Indian media houses and has also reviewed articles for reputed international journals. Currently, Umar is Co-Investigator in the research project concerning access to copyrighted works for visually impaired persons.

Nizamuddin Ahmad Siddiqui is Senior Research Fellow and PhD Candidate in International Law at Jindal Global Law School, India. Previously, he was Assistant Professor of Law at National Law University-Kolkata and Aligarh Muslim University (India). Mr. Siddiqui works in the area of law, religion and identity. He recently presented on the ‘Plurality of International Law’ at the Michigan Junior Scholars Conference (April 2021). His other work on ‘Islamic Origins of Common Law’ is scheduled for publication with Global Journal of Comparative Law (2022). Additionally, he runs a blog, The Indian Muslim, and has contributed extensively on citizenship rights and minority identity in India in the recent past. His Ph.D. explores the Shari’a Praxis in International Law.

1. Introduction

The COVID-19 pandemic not only brought health emergencies to our doorstep but also allowed some States to garner greater control over their population. Studies suggest that the pandemic helped in the growth of populist tendencies and downgrading of the rule of law in erstwhile flourishing democracies.[1] The declaration of a global health emergency allowed the States to call for national security response measures whereby international borders were sealed and the movement of people was disrupted. Some also engaged in the emergency in the search for the enemy – a subject who can be made a scapegoat for the governments’ failures in dealing with the virus. Some States blamed others for the global outbreak;[2] some blamed their neighbours for the cross-border transmission;[3] and then others blamed a section of their own population.[4] After all, the national emergency and the threat to the nation had to be put against “someone”. Hate is easier to manufacture against peoples who happen to be the “others” and fall into a group known to be educationally disempowered and politically disenfranchised. They will beat the receiving end of the right-wing populist discourse and are vulnerable to majoritarian intimidation.

The infection in India spread at a time when the country was engaged in a fierce battle of words over the Citizenship (Amendment) Act, 2019 - a highly discriminatory law that bluntly excludes Muslim migrants from being eligible to claim a fast-tracked citizenship. At the time when elections were about to happen in Delhi, the people protesting against the draconian law were being singled out by the State agencies.[5] Shaheen Bagh, a little known locality in Delhi, had been making global headlines for the Muslim women led protests,[6] the media was full of anti-Muslim rhetoric.[7] The communal atmosphere was charged to the extent that a call for killing Muslim ‘traitors’ was made by none less than a sitting minister at the Union level.[8] Then came the Delhi violence that resulted in violent attacks by charged organized mobs against Muslims in North Delhi, which led to the death of more than fifty people and many more injured.[9] COVID-19 set its foot in India in this backdrop.

This article attempts to trace how and why such developments happened, and the extent they affected the largest minority of India. The powerful narrative built around members of the popular Muslim group, Tablighi Jamat (translated as Society of Preachers), is a textbook study on how vulnerable minorities can be pinned to the wall by the vicious nexus of the right-wing State and media. Members of the group happened to be present in the Nizamuddin Markaz (hereinafter ‘Markaz’) situated in Delhi just when the coronavirus was picking up its pace in the country. A distasteful, obnoxious campaign followed against the group, which looked as if it was designed for the
The larger purpose of fulfilling the communal agenda of the ruling dispensation. The campaign included a litany of criminal prosecutions of Indians and foreigners who were or were suspected to be a part of the programs in Markaz. Several petitions and FIRs were heard across the country by the high and lower courts.

The courts in the State of Maharashtra (hereinafter “Maharashtra”) rejected the State’s stance against the members of the Tablighi Jamat. They played an instrumental role in breaking down the hateful plot brick by brick. The latter part of the article is dedicated to a detailed exposition of such cases that served a crucial purpose in dispelling some of the myths surrounding Muslim involvement in the spread of the disease. The article concludes with a remark on how a seemingly successful narrative built by the ruling party was busted by the strong judges of the courts in Maharashtra.

II. Muslims in India: A Backgrounder

Muslims as a minority community stand at the margins of the state. Recent research demonstrates that the social space for Muslim leadership in India has been constructed at the behest of the state. [10] It is argued that the Indian state makes representative claims by selectively co-opting the Muslim representatives to connect with the Muslim citizenry. The state thereby increasingly plays a significant role in defining the nature and the function of the Muslim leadership. It provides the necessary justification for such claims in the light of state sponsored secularism. [11] The research supports the decade old observations by Mushirul Hasan who argues that Muslims in India signify a stunted ability to both mobilize democratically and to stand against the authoritarian policies of the state, despite having faced a long-standing history of violence and discrimination. [12]

One of the chief reasons behind the limited representative capacity of the Muslim populace is the reduced ability of the Muslim Civil Society Organizations (CSOs) and the citizenry to ‘organise, participate and communicate without hindrance.’ [13] The South Asia Minority Report (2020) found that Muslims carry limited ability to enjoy equal rights and have much lesser influence upon the political and social structures around them. [14] The Report highlights a poor show by the Muslims on various counts. Their population share is over 14 percent, but their representation in the lower house of the Parliament currently stands at 4.9 percent. [15] Muslims represent only 3.7 percent of the central civil service recruits (as per the last round of recruitment), with none amongst the over 28 police chiefs and state chief secretaries. Currently only one of the Supreme Court judges is Muslim and none of the top professional colleges in India have Muslims as members of their board of governors. Similarly, Muslims stand grossly underrepresented at governing bodies of top corporations, banks, public sector enterprises and media houses. [16]

The National Statistical Office (NSO) Report reveals the increasing rate of school and college level dropouts amongst Muslims. It highlights their condition to be ‘as bad or even worse than Scheduled Castes (SCs) and Scheduled Tribes (STs) in India’. [17] Similarly, according to the Ministry of Minority Affairs statement in the Parliament, Muslims represent the lowest share of working people among all the communities (per Census 2011). [18] The US-India Policy Institute Report (2019) also observes that Muslims represent only 3.2 percent in the higher-level jobs and 1.6 percent in lower-level jobs which is significantly lower than that of the other minorities (Christians, Sikhs, Buddhists and Jains). [19] It argues that in order to fill this gap, the Muslims must receive at least 42 percent share in the 10 percent Economically Weaker Sections (EWSs) quota as approved by the Government of India. [20]

III. Manufacturing Violence

Targeted violence against Muslims has been part of the Indian psyche since independence. [21] Numerous incidents of communal violence, small and big, documented and undocumented, have been etched into the memory of every Indian. [22] However, the feeling of Islamophobia giving rise to hate crimes based on religious
identity is a recent phenomenon. A part of it could be attached to the post-9/11 Islamophobic mindset that percolated in virtually every public discourse. A much significant part, however, can be traced back to the ascendency of right-wing Hindu nationalism beginning in the early 1990s. The marriage of the Rashtriya Swayamsevak Sangh (RSS) and the Bharatiya Janata Party (BJP), formalised by LK Advani, the chief architect of the Ram Janmabhoomi Movement,[23] and signified in the Rath Yatra of September-October, 1990, resulted in the secular BJP adopting the right-wing nationalism of the RSS.[24] Since then the Islamophobic narrative has only got stronger.[25]

The situation has become even more alarming since the assumption of power by the BJP government at the centre beginning 2014. The narrative has reached its peak under the leadership of Modi[26] with 1) a rise in the hate crime incidents,[27] 2) passing of discriminatory laws targeting religious minorities,[28] 3) legislative enactments and judicial pronouncements affecting the Muslim citizenry in direct ways,[29]and 4) state brutality upon the dissenting voices.[30] especially from the Muslim minority institutions.[31] The Muslim civic space, signifying the ability to live freely as a religious minority, has seen further shrinking on account of the growing populism coupled with religious majoritarianism of the RSS-BJP combined.[32]

IV. Populism and the Question of "Identity"

Recent works on Indian politics demonstrate that populism has been the rise in India since 2014. [33] ‘Populism’, loosely defined as a ‘political strategy’[34], has the constitutive dimensions of both ‘anti-elitism’ and ‘anti-pluralism’. However, the term has been redefined under the Modi Government by encapsulating the Hindutva agenda of the RSS.[36] Hindutva was inspired by the writings of V.D. Savarkar, M.S. Golwalkar, and Deendayal Upadhyay.[37] and believes in Hinduism’s ‘ancient glory, spiritual superiority, and universal mission’. [38] The stigmatization of Muslims as aliens with corresponding victimization of Hindus clearly dominates the public imaginary of the Hindutva rhetoric. [39] Hindutva ideologically promotes a violent narrative of partition along religious lines, a constant state of conflict with the neighbouring Pakistan, and the idea that Muslim minority has consistently subjugated the Hindu majority, making the latter victims in their own land.[40]

This Islamophobic account of the ‘othered’ identity has metamorphosed into a dangerous trend more rapidly in recent times. It started with the securitization of Muslim identity, where Rohingya Muslims were targeted on account of their supposed terror links.[41] It then took the path of marginalizing the Muslim politico-legal identity through the route of Citizenship (Amendment) Act, 2019, followed by targeting the Muslim socio-economic identity with the spread of the pandemic in the country.[42]

V. COVID-19 and Unleashing of Islamophobia

Islamophobia gained further traction with the onset of COVID-19 infections. At the time when COVID-19 began to pose serious public health implications and the Indian authorities were under pressure to take decisive steps, coincidentally the Tablighi Jamaat held its meeting at its head-office at Nizamuddin in Delhi.[43] Similar gatherings were already being held at other parts of the country.[44] The Jamaat meeting gave enough content to the authorities to frame its members for the spread of COVID-19 throughout the country.[45] Soon thereafter Islamophobic discourse and its COVID-19 connection were injected into the public memory through various channels. Government agencies, [46] politicians including the Chief Ministers of states,[47] media outlets, [48] right-wing groups,[49] and even individuals[50] became part of the maligning campaign on several media platforms, including social media. Government mouthpieces failed to follow their own guidelines circulated on 8 April 2020 ordaining refrain from labeling ‘any community or area for the spread of COVID-19’. [51] The Joint Secretary to the Ministry of Health and Family Welfare specifically declared in his media briefing that around thirty percent of COVID-19 infections until the third week of April were linked to Tablighi Jamaat.[52]

Facts solely holding Tablighi Jamaat members responsible for the spread of the virus could not be substantiated.[53] Nevertheless, the use of hashtags like #CoronaJihad, #BioJihad, #TablighiJamaatVirus, #CrushTablighiSpitters, #MuslimMeaningTerrorist etc. were employed to frame individuals from the community and led to reported cases of suicide in a couple of instances.[54] This propaganda resulted in multiple hate crime incidents across the country, including attacks on Muslim places of worship.[55] Facebook and Twitter did not take action against these hate speeches.[56] Equality Labs, a US-based...
organization researching Islamophobic content, therefore, urged the World Health Organization (WHO) to ‘issue further guidelines against COVID-19 hate speech and disconnect it to religious communities’.[57]

Equity Labs’ action was necessary because even secular parties took a position of particularly naming Tablighi Jamaat while reporting cases on COVID-19 in their press conferences.[58] This kind of targeted profiling of Muslims with Tablighi Jamaat as a proxy was unprecedented. The malice in the joint chorus by media and the government was ostensible, more so when ruling politicians continued to cast communal aspersions simultaneous to the media’s full-fledged anti-Muslim smear campaign. This targeting (as discussed next) was recognized by the Indian courts, more particularly in Maharashtra, as an attempt to find a ‘scapegoat’ for one’s own failure.

VI. The Courts of Maharashtra

The persecution of the Muslim community on the pretext of waging ‘corona jihad’ against India coincided with the declaration of a complete twenty one day lockdown by the Ministry of Home Affairs, Government of India.[59] The right leaning Indian media’s diatribe against Muslims through the shoulders of Tablighi Jamaat continued to peak when India went immobile.[60] It was accompanied by a series of FIRs being lodged against them by the Centre and States across the country. The fact they attended the gathering at Markaz or were suspect in that regard supplied enough fodder to have them put on trial. Such blatant abuse of law led to several writ petitions in the higher courts including the ones situated at the Indian cities of Allahabad, Jabalpur, Delhi, Bombay, Patna, Madras, Bengaluru and Dhanbad. All cases relating to foreigners visiting Markaz ended in acquittal for lack of evidence, quashing the FIRs, or freeing the accused after a settlement through plea bargaining.

Different jurisdictions adopted different routes to provide relief but the courts in the State of Maharashtra stood out for their sharp analysis. The cases are:


Konan Kodio Ganstone & ors. v. State of Maharashtra[61]

The Konan Kodio judgment by the Aurangabad bench of the Bombay High Court stands out for its intellectual honesty and incisive clinical diagnosis of the issue. The case took up the combined writ petitions filed by both Indians (three) and foreigners (ten, comprising people from Ivory Coast, Tanzania and Iran). The accused were arraigned for the offences under:

1. Section 14 (b) and (c) of the Foreigners Act (violating visa conditions).
2. Sections 2, 3 and 4 of the Epidemic Disease Act, 1897 (EDA) (power of the government to take special measures as to dangerous epidemic and punish the contravention).
3. Section 51 of the Disaster Management Act, 2005 (DMA) (punishment for obstructing the employee of the government from discharging his/her functions).
4. Sections 188 (disobedience of order promulgated by public servant), 269 (negligent spread of disease), 270 (malignant spread of disease), 290 of the Indian Penal Code, 1860 (IPC).
5. Sections 37 (1) and (3) read with Section 135, Maharashtra Police Act, 1951 (prohibition of certain acts for prevention of disorder and to punish the contravention).
6. Section 11 of Maharashtra COVID-19 Measures and Rules, 2020 (power to penalise violations of Section 188, IPC).

Speaking through Justice TV Nalawade and Justice MG Sewlikar, the division bench quashed all the FIRs and gave the following observations on different aspects of the matter:

a. On Media: The court acknowledged the presence of a ‘big propaganda’ in media against foreigners attending markaz congregation, which led to a virtual ‘persecution’ and creation of ‘a picture that these foreigners were responsible for spreading COVID-19 virus in India.’[62] Calling this unwarranted, the court observed that Tablighi activities are going on for more than half a century and thus it would be wrong to say that congregations like these ‘started only after arrival of the foreigners’.[63]

b. On Government: Without naming any political party and mincing any words the court exclaimed:

A political Government tries to find the scapegoat when there is pandemic or calamity and the circumstances show that there is probability that these foreigners were chosen to make them scapegoats… It is now high time for the concerned to repent about this action taken against the foreigners and to take some positive steps to repair the damage done by such action.[64]

The allegation that members of Tablighi Jamaat brought COVID-19 virus along with them was rebuffed by the court as it saw a greater possibility of the accused getting infected in India instead of bringing the virus from their own countries.[65] In any case, if the virus did come through them, it would, in the court’s opinion qualify as a lapse on the part of the Central Government that was responsible for the screening of the tourists at the airport.[66]

c. On Tolerance: The court reminded the government of the Indian culture that requires the guest to be treated as God. If there was any substance in the allegation of spreading virus, then the proper action would have been to send them back to their country ‘without taking action like present one.’[67] It was thus noted:

we need to show more tolerance and we need to be more sensitive towards our guests particularly like the present petitioners...[1]Instead of helping them we lodged them in jails by making allegations that they are responsible for violation of travel documents, they are responsible for
spreading of virus etc.[68]

d. On Indian Constitution: A reference was made to the ideals in the American Constitution and spirit of 'fraternity', which found its way into the Preamble of the Indian Constitution. Hence, both the Courts and the Executive must also be conscious of the same before deciding upon taking any action. Even though liberties under Article 19 (freedom of movement and right to reside and settle) are available only to citizens of India, the rights under Article 21 (right to life), Article 20 (protection against ex post facto laws) and Article 25 (freedom to practice, profess and propagate religion) were rightly found to be available to all persons in India regardless of their nationality.[69]

Justice Nalawade also remarked that the laws at hand and actions taken by the Maharashtra state police against Tablighi Jamaat members were a mechanical exercise done 'under political compulsion' without any regard to powers under the procedural and substantive laws of the land.[70] He added:

The record shows that there was non application of mind by police and that is why even when no record was available to make out prima facie case, charge sheets are filed by police. The Government cannot give different treatment to citizens of different religions of different countries.

The court found such malicious instructions by the executive to the police discriminatory and thus violative of Article 14 of the Indian Constitution as well.[71]

e. On Visa Violations: The court referred to the language of the Visa Manual, 2019, which allowed the people on tourist visas to visit the religious places. The operative paragraph of the manual read as follows:

Foreign nationals granted any type of visa and OCI [Overseas Citizen of India] Cardholders shall not be permitted to engage themselves in tabligh work unless they are granted specific permission... There will be no restriction in visiting religious places and attending normal religious activities like attending religious discourses. (emphasis added)

The court also rejected the contention that information related to address was not duly shared by the accused as the visa process itself requires furnishing of all details related to the whereabouts of the incoming person.[72] Hence:

...Muslim persons who had given shelter to the foreigners are made accused probably with some purpose. This action must have created pressure on Indian Muslims. The persons of this community may avoid to keep contact with Muslims of other country now due to such actions. The material in respect of possibility of spreading of infection by the petitioners is already discussed with relevant dates. This situation created by the present action is against the promotion of idea of universal brotherhood.[77]

g. On 'Congregation': Looking into the functioning of Tablighi Jamaat, the court concluded that the presence of its members in masjids or Markaz cannot be called a congregation in violation of the law or circulars promulgated (during the COVID spike in the first wave) because many Muslims with tourist visas from across the world regularly attend jamathan programmes which are a 'continuous process' with no particular day fixed for 'congregation or any function'.[78] As far as residing within Masjid's premises is concerned, the residential facilities were enough to keep the gathering out of the purview of restrictions and hence, the living together of such residents cannot be classified as a congregation (even when the arrangements were apparently not in the form of
hostel). [79] This finding is critical because a place meant for residential purposes where people 'are living by restricting their movements cannot be treated as public place' as per orders of the state and central government. [80]

h. On Charges: The Court further ruled that as far as charges under special enactments (DMA and EA), Section 188 of IPC and the Maharashtra Police Act are concerned, their violation is predicated on the 'breach of some order', something that was absent in the case at hand. [81] Also, given the absence of breach in the visa conditions, the application of Section 14 (b) and (c) of the Foreigners Act on the accused was understood to be irrelevant. [82] The charge of negligently or maliciously spreading the infection (Sections 269 & 270 of the IPC) was found unfounded as it was not 'possible to infer under any circumstances' that the accused were infected when they arrived in India. [83] Finally, the material put forth by the prosecution could not show any nuisance (Section 290 of IPC) 'created by the foreigners or Indian Muslims'. [84] On the contrary, 'an attempt was made by others to create such atmosphere against them'. [85]

Justice Nalawade held that 'it will be abuse of process of law if the petitioners are directed to face the trial' in the case. [86] All FIRs were consequently quashed. Justice M. G. Sewlikar concurred with most of the reasoning put forth by Justice Nalawade except for his observations on the prosecution of Tablighis serving as an indirect warning to Indian Muslims who had been protesting for the equal treatment of their community under the CAA. [87]

Justice Nalawade's observations on grounds of acquittal are critical. In addition to the hard law factors discussed above, he also found a basis in the charitable nature of the religious places and the humanitarian work that they did during the lockdown period. He highlighted that in many religious places 'arrangement was made for destitute persons, to give them shelter and to provide them meals' and therefore, 'giving shelter to such persons could not have been treated as offence, commission of the act of disobedience of [Government's] orders'. [88] He disagreed with the decision of the Karnataka High Court in a similar matter wherein the court acquitted the petitioners (about nine) but also simultaneously barred them from visiting India in the next ten years and also directed to pay the fine as decided by the competent authority. Justice Nalawade held this order was 'not given on merits' and was only based on the 'concession proposed by the counsels of the State and Central Authority'. [89]

Decisions that followed Konan Kodio Judgment

_HLA Shwe and ors v. State of Maharashtra_ [90]

The case involved eight Burmese nationals charged with offences under Sections 188, 269, 270 of IPC, Section 14 of the Foreigners Act, Section 5 of EDA and Section 51 of DMA. They were arrested during the institutional quarantine period and (as in the case above) were pitched by the state as violators of the nationwide lockdown imposed on 24 March, Section 144 order [91] and conditions stipulated in the Visa Manual, 2019.

The applicant contesting these claims relied on both_Farhan Hussain and Konan Kodio rulings while making a plea for quashing the FIRs registered against them. The judges in the Division Bench, Justice V M Deshpande and Justice Amit Borkar, quoted relevant portions of the Visa Manual and inferred that even though the applicants were accommodated in Markaz, the prosecution could produce no material to prove that the applicants were engaged in 'tabligh work and they were involved in preaching religious ideology or making speeches in religious places'. [92] The court dismissed the IPC charges observing negative COVID-19 results of the applicants and the consequent non-fulfilment of ingredients of the contested provisions. [93] The material on record also could not establish any attempt of obstructing the work of any official of the government. Hence, no liability under DMA or EDA could be fixed. [94] The disobedience of the order promulgated under Section 144 of the Criminal Procedure Code, 1973, because the court read Sections 188 and 195 of the IPC to require police to file a complaint before the judicial magistrate and not register an FIR straight away. [95] No FIR was registered in this case.

All these factors combined led the court to believe that allowing the prosecution to continue would be nothing but an abuse of the process. Accordingly, all FIRs were quashed.

Orders by Mumbai Metropolitan Magistrates (10th and 12th Court)

Orders in the cases_State v. Siti Nurhalizar and ors_ [96] and _State v. Niaзов Nurgazyand ors_ [97] were passed by the Metropolitan Magistrate in Mumbai-Judge R K Khan, twenty days after the decision in a very similar matter was taken by his colleague Judge Jaydeo Ghule. Of all the charges levied (most of them overlapping with charges framed in the foregoing cases), Judge Ghule exonerated the accused (twelve Indonesian nationals) of visa violations observing that they did not 'deliberately disobeyed' government order or acted 'in the manner as was likely to spread the infection of the disease'. [98] The _Siti Nurhalizar_ and _Niaзов Nurgazy_ cases involved ten Indonesian and ten Kyrgyz Republic nationals. The court adhered to the ratio in _Konan Kodio_ and _HLA Shwe_ on most points, but the bench also looked into the charge of violating the order made under Section 37(3) t/w 135 of Bombay Police Act, 1951. Judge Khan relied on the decided cases on due promulgation of orders: [99]

it is incumbent upon prosecution to show that the said order was promulgated in sense that it was published and also displayed in prominent places in the city and in absence of this, accused cannot be found guilty of any offence of breach of such order.

The prosecution could not prove due promulgation of the order and the case of the prosecution was substantially weakened on this ground. Justice Khan also mentioned the fault lines in the witnesses' depositions. One of them admitted having never seen the 'female accused...in the mosque'. [100] Another (the Investigating Officer in the case) admitted that he neither prepared _Spot Panchanan_ nor recorded statement of Trustee of Masjid and adjacent residents. [101] Further perusal revealed that they neither entered mosques 'nor noticed accused contravening the lock-down norms'. [102] The court, considering these aspects in totality, acquitted the accused spotting 'no iota of evidence...to show any contravention of order...beyond all
shadow of doubt  [103]

VII. Conclusion

The COVID-19 pandemic in India seems to be a story out of a fantasy book. A bunch of foreigners from faraway lands brought the virus into the country. They entered India on the pretext of attending a religious gathering. They connived during one of the meetings with some local men who then took the task of spreading the infection further. The meeting was planned at a religious convention centre in the heart of the Indian capital under the guidance of a local henchman with untraceable whereabouts. The ‘terror’ group carrying ‘corona jihad’ seemed determined to destroy the nation and its people. As fate would favour, the State agencies were able to crack the code right in time. They were not only able to identify the perpetrators but also showed a firm resolve by detaining the foreigners who would have otherwise run away. Meanwhile, since the infection had already spread throughout the country, the government had to trace every single individual who was part of the meeting and detain him under the relevant measures. Several vigilante groups of citizens also undertook the responsibility to foil the efforts of these ‘human bombs’. The havoc could finally be averted due to the tireless leadership at the top that ultimately saved the nation by imposing the much-needed lockdown.

The story as it was being fed to the nation, however, had to be tested against some hard facts and questions of law. To the credit of the courts in Maharashtra, they performed their legal duties. The ratio and obiter in the Konan Kodio ruling will be archived for a long period of time because of its sheer reasoning and prognosis of the situation. The court took the unusual route of questioning the politics and malice behind the State action. A ruling government is rarely called out by the judiciary for hounding a religious minority and is told on face that such ‘propaganda’ driven ‘persecution’ is malicious. Judges in the case also deserve acknowledgement and praise for not sounding like patrons of the Muslims. Rather, the impression is that they spoke from the pedestal of the Muslim identity. Combined with other rulings of HLA Shwe and metropolitan magistrates in Mumbai, the overall outcome of the Tābitīyah Jamādat related jurisprudence in Maharashtra is that the Government of India was neither legally correct in its actions nor morally sound in dealing with the situation that the dreaded virus threw to 1.36 billion people of India.


[2] Harsh Kakar, The Blame game on coronavirus, the statesman (March 24, 2020), http://www.thestatesman.com/opinion/blame-game-coronavirus-1502869411.html. (while US President Donald Trump and his team called it the China virus or the Wuhan virus, the Chinese official retorted back by saying that its origins might be traced back to US).


[6] Rana Ayyub, Bulks: The 100 Most Influential People of 2020, Time (September 22, 2020), http://time.com/250/most-influential-people-2020/5882255/bulks/ (Bulks Dadi, aged 82, sitting at the Shaheen Bagh protest site said, “I will sit here till blood stops flowing in my veins so the children of this country and the world breathe the air of justice and equality.”).

[7] Hasan Suroor, BJP’s rhetoric against Shaheen Bagh may end up fuelling the very thing it fears – Islamic radicalism, thescroll (February 7, 2020), http://scroll.in/article/952364/bips-rhetoric-against-shaheen-bagh-may-end-up-fuelling-the-very-thing-it-fears-islamic-radicalism; Furinma S. Tripathi, BJP’s venomous rhetoric in Delhi assembly election campaign, frontline (February 28, 2020), http://frontline.thehindu.com/the-nation/article360791743.ece# (highlighting how Shaheen Bagh became the epicentre of BJP’s anti-Muslim poll rhetoric during Delhi elections).


[9] REPORT OF THE DELHI MINORITY COMMISSION


[13] SOUTHWEST ASIA STATE OF MINORITIES REPORT 2020, The South Asia Collective 93 (2020). See also Farah Naqvi, Working With Muslims: Beyond Burqa and Triple Talaq (Gurgaon: Three Essays Collective, 2018) (A study of over 350 NGOs working with Muslims from across eight states revealed that while over 70 per cent of NGOs headed by non-Muslims had access to international funds, only 30.5 per cent of those headed by Muslims had similar access. Likewise, nearly 50 per cent of NGOs headed by non-Muslims had accessed Indian donor agencies, while just over 21 per cent of Muslim-headed NGOs have this access.)

[14] The South Asia Collective, supra note 13, at 93 (arguing that research shows that the minority development programme constantly labors between the desire to fulfill the development gaps suffered by Muslims and the call not to be seen catering exclusively to the Muslim needs). See also Centre for Equity Studies, Promises to Keep – Investigating Government’s Response to Sachar Committee Recommendations (New Delhi: Centre for Equity Studies, 2011).


[17] Atul Thakur, Literacy rate for Muslims worse than 3G/SFs, The Times of India (August 13, 2020) https://timesofindia.indiatimes.com/india/literacy-rate-for-muslims-worse-than-scs-std/articleshow/77514868.cms?%3as=Text%3aLiteracyRate%20Rate%200f%2080%200.6%20%200.6%20%200.6%20%200.6%20%200.6; See also Rehan Ansari, Christophe Jaffrelot on Indian Muslims after 73 years of Independence, Muslim Mirror (August 14, 2020), http://muslimmirror.com/eng/christophe-jaffrelot-on-indian-muslims-after-72-years-of-independence/.


[22] See e.g. B. Rajeshwari, Communal Riots in India: A Chronology (1947-2003) Institute of Peace and Conflict Studies 25 (2004), http://www.nagarikmancha.org/images/1242-Documents-Communal_Riots_in_India.pdf (recording that an estimated 25,628 lives were lost, including 1005 in police firings till 2003); Steven Wilkinson. Cotes and Violence: Electoral Competition and Ethnic Riots in India 1 (New York: Cambridge University Press, 2004) (arguing that the major riots only happen when the state machinery refuses to stop them; while the decision depends largely upon the electoral incentives).

[23] The Ramjanmabhoomi Movement was initiated to spearhead the construction of Ram Temple at the contested site at Ayodhya in Uttar Pradesh. Recently, the Supreme Court has allowed the construction of the temple by handling over the site to the Hindus.


[25] Gareth Nellis, Michael Weaver & Steven C. Rosenzweig, Do Parties Matter for Ethnic Violence? Evidence From India, 11 Quarterly Journal of Political Science 249, 267–68 (2016) (arguing that “the BJ/BJP saw a 0.8 percentage point average increase in their vote share following a riot in the year prior to an election.”).


Hindu-Muslim mob violence in more than three decades which resulted in the death of more than 50 people, mostly Muslim.

[28]See USCIRF, supra note 27, at 23 (including anti-conversion laws targeting Muslims and Christians and laws meant for the protection of cows, targeting Muslims and Dalits).

[29]The Muslim Women (Protection of Rights on Marriage) Act, 2019 (July 31, 2019) also known as the ‘Triple Talaq’ Act’ (sections 3 and 4 of the Act provide that any pronouncement of ‘talaq’ (divorce) by a Muslim husband upon his wife shall be void and illegal, and shall also be punishable with an imprisonment of a term extending up to 3 years); see also The Jammu and Kashmir Reorganisation Act, 2019 (August 9, 2019) (abrogating Article 370 of the Indian Constitution while taking away the autonomy of Jammu and Kashmir, the only Muslim-majority state in the country); M. Siddiqui (D) ThLrs v. Mahani Suresh Das & Ors. Civil Appeal Nos 10866-10867 of 2010 (November 9, 2019) (ruling on the basis of Hindu faith that Babri mosque stood at the ruins of the birthplace of Lord Rama); The Citizenship (Amendment) Act, 2019 (December 12, 2019) (opening bureaucratic channels to render millions from amongst the Muslim citizenry to be declared as illegal migrants).


[32]Angana P. Chatterji, Thomas Blom Hansen and Christophe Jaffrelot (eds.), Majoritarian State: How Hindu Nationalism in Changing India (Harper Collins, 2019) 12 (observing that the ‘minority/Othered is now officially reconfigured as an obstacle to development, a drain on resources, an alien and socially divisive element that weakens cultural cohesion, a primitive, non-modern and unassimilable remnant of the past’).

[33]Id; see also Christophe Jaffrelot & Louise Tillin, Populism in India, KALTWASER ET AL (eds.), The Oxford Handbook of Populism (Oxford University Press, 2017).

[34]Kurt Weyland, Clarifying a Contested Concept: Populism in the Study of Latin American Politics, 34 (1) Comparative Politics 1, 14 (2001) (defining populism as a “political strategy through which a particularistic leader seeks or exercises government power based on direct, unmediated, uninstitutionalized support from large numbers of mostly unorganized followers.”).


[36]Christophe Jaffrelot and Louise Tillin, Populism in India, Kaltwasser et al (eds.), The Oxford Handbook of populism (Oxford University Press, 2017) (Modi’s ethno-religious populism needs to be distinguished from the socio-economic populism supported by Indira Gandhi and others); Plagemann & Destradi, supra note 35, at 289 (describing that while Indira Gandhi exhibited important elements of populism, her political strategy did not inspire anti-pluralism and anti-populism); id (the Indian government under Prime Minister Modi clearly entails both constitutive dimensions of populism: anti-elitism and anti-pluralism).

[37]Nilanjan Mukhopadhyay, The RSS: Icons of the Indian Right (Westland Publications, 2019) (highlighting the contributions of the major figures of the RSS movement starting from the very beginning); see also Walter Anders and shrirdhar d. damle, messengers of hindu nationalism: how the rss reshaped india(London: Hurst and Company, 2019) (highlighting how the RSS agenda is being taken forward by the BJP).

[38]Plagemann & Destradi, supra note 35, at 291.


[41]Mohammad Salimullah v. Union of India, WP (C) 793/2017 (pending) (April 8, 2021 order of the Supreme Court denied interim stay of Rohingyas deportation from India). See also Nizamuddin Ahmad Siddiqui & Abu Zar Ali, Supreme Court Order Allowing Deportation of Rohingyas Shows that India hasn’t Shied Partition Baggage, The Scroll(April 18, 2021), http://scroll.in/article/992447/supreme-court-order-allowing-deportation-of-romingyas-shows-that-india-hasn-t-shied-partition-baggage (arguing that the Supreme Court order links the issue Rohingyas deportation with citizenship anxieties of the post-partition days).


[44]Nila Mohammad, Coronavirus Spread In India Sparks Intolerance Toward Minority Muslims, Extremism Watch (April 17, 2020), http://www.voaosnews.com/extremism-watch/coronavirus-spread-india-sparks-intolerance-toward-minority-muslims (Faizan Mustafa, professor of constitutional law, argued that Tirupati Temple was open to the public till March 16, 2020 with an estimated 30,000 to 40,000 visitors per day. Similarly, Somnath Temple with average visitors of up to 5,000 per day kept open till March 18, 2020. Kashi Vishwanath Temple was also open until March 20, 2020); see also Nadini Marwah, COVID-19: Chronology which led to the “blame game” of a pandemic in India, inventiva(April 20, 2020), http://www.inventiva.co.in/stories/nadini/covid-19-chronology-which-led-to-the-blame-game-of-a-pandemic.
in India/ highlighting further that while the Jamaat incident took place on March 13-15, 2020, Siddhi Vinayak Temple in Mumbai was operational till March 16, 2020. Moreover, Shridi Sai Baba Temple and Vaishno Devi Temple kept open till March 17 and 18, 2020 respectively. Additionally, Karnataka's Chief Minister attended a marriage ceremony on March 15, 2020 with more than a thousand people present. Similarly, the Madhya Pradesh Chief Minister, Shivraj Singh Chouhan was sworn in in the presence of other leaders on March 23, 2020.

[45] Mamata targets 'communal virus', The Telegraph: online (April 11, 2020), http://www.telegraphindia.com/west-bengal/coronavirus-lockdown-mamata-targets-communal-virus/cid/1764225?ref=west-bengal_h (a memo sent by the central government asking the Government of West Bengal identified 6 out of 7 areas which were Muslim dominated).


[53] Shobh Danialy, Explained: How sampling bias drove sensationalist reporting around Tablighi coronavirus cases, Scroll.In (April 7, 2020), https://scroll.in/article/958392/explained-sampling-bias-drove-sensationalist-reporting-around-tablighi-coronavirus-cases (observing that Jamaat being solely responsible for the spread of the infection was a wrong conclusion based on a sampling bias).

[54] India's Hindu Nationalists Are Inciting Hate By Claiming Muslims Are Spreading Coronavirus, Vice (April 13, 2020), http://www.vice.com/en_in/article/akwmyj/indias-hindu-nationalists-are-inciting-hate-by-claiming-muslims-are-spreading-coronavirus (social media monitoring tool CrowdRanger recorded, between the period of March 29 and April 3 that the #coronajihad hashtag alone has had over 249,733 interactions on Facebook. Similarly, on Twitter, almost 300,000 conversations took place with the #coronajihad hashtag, with over 700,000 accounts engaging in those conversations as reported by social media analysis tool TalkWalker. Additionally, the potential reach of those conversations was estimated to be around 170 million accounts.); It Was Already Dangerous to Be Muslim in India. Then Came the Coronavirus, Time (April 3, 2020), http://time.com/5815264/coronavirus-india-islamophobia-coronajihad/; The Wire, supra note 50.

[55] The Wire, supra note 50 (Zafarul Islam, Chairperson of the Delhi Minorities Commission, reported that 200 men attacked and ransacked a mosque in Mukhmpur village in North West Delhi during the period); Andrea Malji, People Don't Want a Mosque Here: Destruction of Minority Religious Sites as a Strategy of Nationalism, 9 (1) J. of Religion and Violence 50 (2021) (arguing that the destruction of minority religious sites is an attempt towards historical revisionism and a re-assertion of the right to territory by the majority).

[56] See T.Soundararajan et al., supra note 49 (concluding that the reticence of social media platforms to remove known Islamophobic and casteist handles has led to this crisis).

[58] The Chief Minister of Delhi, Mr. Arvind Kejriwal from the Aam Admi Party made it sure to put up before the press that 'among the 20 new cases, 10 had attended the Tabligi Jamaat event in Nizamuddin. So far, 330 people from Markaz have tested positive'. 330 Markaz attendees ‘take Delhi’s COVID-19 tally to 523’: CM, Outlook India (April 6, 2020), http://www.outlookindia.com/newsscroll/330-markaz-attendees-take-delhis-covid19-tally-to-523-cm/1793457.


[62] *Id.* at 38.

[63] *Id.* at 39.

[64] *Id.* at 38.

[65] *Id.* at 37.

[66] *Id.*

[67] *Id.* at 40–41.

[68] *Id.* at 29.

[69] *Id.* at 36–37, 42.

[70] *Id.* at 55–56.

[71] *Id.*

[72] *Id.* at 36.

[73] *Id.* at 42–43.


[76] Bombay High Court (Aurangabad Bench), *supra* note 61, at 44.

[77] *Id.* at 52–53.

[78] *Id.* at 32–35.

[79] *Id.* at 50–51.

[80] *Id.*

[81] *Id.* at 45.

[82] *Id.* at 42–43.

[83] *Id.* at 46–47.

[84] *Id.*

[85] *Id.*

[86] *Id.* at 56–57.

[87] In a separate order released on 27 August 2020.

[88] *Id.* at 52–53.

[89] Farhan Hussain v. State and Anr., Karnataka High Court, Criminal Writ Petition No. 2376/2020. These conditions were finally overruled by the Supreme Court in an order delivered on 16 November 2020 in the case—Toichubek Uulu Bakybek v. State of Karnataka, CRIMINAL APPEAL NO. 754 OF 2020.


[91] Section 144 of the Indian Code of Criminal Procedure, 1973 empowers the magistrate to issue orders addressing urgent cases of apprehended danger or nuisance. Usually, the ban is to prohibit an assembly of five or more people in order to tackle situations like COVID-19, riots etc.


[93] *Id.* at 10–11, 13–14.

[94] *Id.* at 16.

[95] *Id.* at 18.

[96] Court of the Metropolitan Magistrate, 10th court, c.c. no. 1604 / pw / 2020.

[97] Court of the Metropolitan Magistrate, 10th court, c. c. no. 1603 / pw / 2020.

[98] Court of the Metropolitan Magistrate, 12th court, c.c. no. 663 / pw / 2020.


[101] *Id.*

[102] *Id.*

[103] *Id.*

by Kelly Ha

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Abstract

The ever-increasing incarceration rate of Americans engendered an important discussion regarding the reintegration of individuals with a criminal record into society. Reintegration into society involves providing these individuals with, among other things, educational and economic opportunities, so that they have the skills and money to become a contributing member of society. Researchers have found that providing these opportunities for the purpose of reintegration decreases the rate of recidivism, which is the tendency of a convicted criminal to reoffend. It helps these individuals gain the basic necessities for living and, thus, leads them away from turning to crime for money or other needs.

Ban-the-Box legislation was passed in several states and other jurisdictions to help with reducing recidivism by limiting the discrimination in the labor market against individuals with a criminal record. These laws differ in every jurisdiction, but they were all enacted to remove the check box that asks if applicants have a criminal record from hiring applications. The common purpose is to allow those with a criminal record to at least make it to the initial interview in the hiring process, so that they can display their qualifications before being asked about their criminal history.

This paper investigates the extent of the success of Ban-the-Box legislation in achieving its purpose in assisting ex-offenders to obtain employment opportunities by limiting the discrimination against individuals with a criminal record in the hiring process. Although Ban-the-Box legislation is an admirable step in the right direction towards assisting ex-offenders, research shows that the laws have been ineffective for several reasons. This paper focuses on two major, often-discussed reasons: statistical discrimination and the fact that Ban-the-Box laws merely delays access to criminal records. Section I describes Ban-the-Box laws, specifically the history and the purpose of the legislation, the similarity similarities and differences in the language of the legislation in differing jurisdictions, and the exceptions to the laws. Section II discusses the ineffectiveness of Ban-the-Box legislation with a focus on statistical discrimination and the fact that the laws merely delay access to criminal records. Finally, Section III discusses legal and non-legal recommendations for improving Ban-the-Box legislation, as well as the approaches that other countries, like Australia and Canada, have adopted to address the issue of discrimination against individuals with a criminal record.

Introduction

America has a mass incarceration problem that is reflected by statistics from 2016 which show that “more than 2.2 million Americans are incarcerated—representing 24 percent of the world’s prison population.”[1] This problem has created another problem for the country: “what opportunities should be afforded to ex-offenders?”[2] Every year, almost 600,000 people are released from state prison.[3] Ex-offenders, after release, search for employment and are often denied based on stereotypes and the employers’ fear of negligent hiring claims, “which hold employers liable for negligently exposing employees to dangerous co-workers.”[4] Without gainful employment, “many ex-offenders recidivate.”[5] Statistically, “seventy-seven percent of released prisoners re-offend and return to prison.”[6] Advocates lobbied for Ban-the-Box legislation with these issues regarding the lack of opportunities, specifically those related to jobs and housing.[7] in mind because a criminal record marks individuals “in ways that qualify them for discrimination or social exclusion.”[8]

The questions asked by this paper are: 1) to what extent has Ban-the-Box legislation succeeded in limiting discrimination against prospective employees with a criminal record; and 2) how can Ban-the-Box laws be improved for further success? These are important questions to consider as part of a plan for comprehensive criminal justice reform.[9] Improving reintegration of
ex-offenders will ultimately reduce the rate of recidivism and lower the mass incarceration rate in America.

Current Ban-the-Box laws are ineffective in limiting discrimination against prospective employees with a criminal record and have fallen short in serving their purpose to provide more employment opportunities for these individuals for many reasons. The two major, often-discussed reasons are: 1) statistical discrimination, and 2) the fact that Ban-the-Box laws merely delay an employer’s access to an applicants’ criminal records. Statistical discrimination is a phenomenon that economists have identified where employers “systematically overestimate the correlation between race and criminality.”[10] Statistical discrimination occurs when employers use certain characteristics, such as race or gender, to make assumptions “about group differences in productivity and other attributes” to make up for the lack of detailed information about applicants.[11] Under Ban-the-Box laws, employers lack information regarding an applicant’s criminal history and instead rely on statistical discrimination to save themselves time and/or money that they would spend in interviewing applicants.[12] This does not limit discrimination against ex-offenders, rather it overcompensates for the lack of information and leads to increases in racial discrimination against certain minorities who make up a large percentage of individuals with a criminal record in the American criminal justice system.[13] Moreover, the fact that Ban-the-Box legislation merely delays an employer’s access to applicants’ criminal records does not remedy any issues of discrimination because the absence of information as to an applicant’s criminal history is often what leads an employer to rely on generalizations and assumptions and, therefore, may be the cause for an increase in racial discrimination. Based on those two major reasons alone, Ban-the-Box legislation has not been very successful because it has led to a serious unintended consequence of increased racial discrimination, thereby failing to limit the discrimination of individuals, particularly people of color, with criminal records.[14]

I. What Are Ban-the-Box Laws?

History of Ban-the-Box

In 2004, All of Us or None, “a national civil rights movement of formerly-incarcerated people and [their] families,” began the Ban-the-Box campaign “after a series of Peace and Justice Community Summits identified job and housing discrimination as huge barriers to” the successful reintegration of ex-offenders into their communities.[15] The campaign challenges the discrimination against individuals with criminal histories by asking employers to consider job applicants based on their skills and qualifications, rather than their past convictions.[16]

The first phase of the Ban-the-Box campaign initially focused on public employers, such as government agencies and their hiring practices.[17] The campaign demanded changes in public agencies “to educate public officials about the needs of the communities they were elected to serve.”[18] Other advocates subsequently joined the campaign, “including formerly-incarcerated people, legal aid organizations, re-entry service providers, civil rights partners, and elected officials.”[19] Advocates of the campaign believe that Ban-the-Box legislation “is necessary because a growing number of Americans have criminal records due to tougher sentencing laws, particularly for drug crimes, and are having difficulty finding work because of high unemployment and a rise in background checks” following September 11, 2001.[20]

The Equal Employment Opportunity Commission (EEOC) in April 2012 provided an updated guideline to clarify and strengthen its guidance in support of the Ban-the-Box campaign.[21] Specifically, the EEOC updated its “Enforcement Guidance on Consideration of Arrest or Conviction Records in Employment Decisions.”[22] The EEOC intended the Enforcement Guidance to be a reference “for use by employers considering the use of criminal records in their selection and retention processes; by individuals who suspect that they have been denied jobs or promotions, or have been discharged because of their criminal records; and by EEOC staff who are investigating discrimination charges involving the use of criminal records in employment decisions.”[23] The EEOC “recommends that employers do not ask about convictions on job applications and that any inquiries regarding convictions be limited to those “for which exclusion would be job related for the position in question and consistent with business necessity.”[24] The Commission then discusses how the federal government has come up with a suitability requirement in reviewing applications for individuals with criminal records, which the “Office of Personnel Management (OPM) defines...as ‘determination based on a person’s character or conduct that may have an impact on the integrity or efficiency of the service.’”[25] Federal agencies have discretion “to consider relevant mitigating criteria when deciding whether an individual is suitable for a federal position.”[26]

Purpose of Ban-the-Box

Ban-the-Box legislation has one main purpose, which is to assist individuals with criminal records in gaining easier access to the labor market.[27] Within this main purpose, researchers have identified two other incidental purposes: (1) reducing recidivism, and (2) countering the deterrent effect of the box on the job application.[28] Reducing recidivism is an incidental purpose as it is likely a natural result of providing more labor market opportunities for those with criminal records because an increase in opportunities increases the likelihood of employment and, therefore, reduces the gains of criminal activity.[29] Moreover, the requirement on the initial application “asking an applicant to check a box indicating whether he has been arrested or convicted of a crime” creates a deterrent effect on prospective employees with criminal records because it is a common and reasonable belief that they will be screened out based on checking that box alone.[30] In that instance, individuals with criminal records will not apply to jobs that have applications with the check box because they believe it is pointless to apply for jobs that they know they will not get.[31]

Ban-the-Box Statutes in Different Jurisdictions

Currently, “over 45 cities and counties” have banned the box.[32] “Hawaii, California, Colorado, New Mexico, Minnesota, Massachusetts, and Connecticut have changed their hiring practices in public employment” in an effort to satisfy the purpose of Ban-the-Box legislation.[33] Massachusetts, along with some cities and counties, “have
also required their vendors and private employers to adopt these fair hiring policies.”[34] Most recently, Newark, New Jersey adopted an ordinance extending the policy behind Ban-the-Box to housing.[35] Ban-the-Box laws differ widely across jurisdictions, despite its uniform purpose.[36] There are six particular areas where the laws differ: (1) what type of employers are covered under the law; (2) at what point an employer may conduct a background check; (3) what type of information can be considered when evaluating a background check; (4) which factors an employer may use when making employment decisions; (5) disclosure obligations to an employee; and (6) enforcement provisions.”[37]

Hawaii in 1998 implemented the first Ban-the-Box law, which applied to both public and private employers.[38] In Hawaii, “employers are not permitted to inquire into any job applicant’s criminal history until a ‘conditional offer of employment’ is made.”[39] Hawaii’s statute further requires that employers show that the criminal conviction bear a “rational relationship to the duties and responsibilities of the position” if the employer wishes to rescind a conditional employment offer based on a criminal conviction that occurred “within the previous decade (or if incarceration occurred at any point).”[40] Hawaii’s Ban-the-Box law “remains among the nation’s most stringent” as other states, cities, and counties continue to adopt their own version of the law.[41]

In 2017, California passed the “California Fair Chance Act” requiring public and private “employers to delay any conviction background check as well as any questions about or consideration of a job applicant’s conviction history until after the employer extends a conditional offer of employment to the applicant.”[42] The law requires “individualized inquiry” when reviewing any conviction history by considering the factors identified and recommended by the EEOC, which at the very least include consideration of “the amount of time elapsed since the conviction, the nature of the conviction, and whether the conviction is directly job related.”[43] If the employer intends to rescind the conditional job offer, they are required to send a written preliminary notice to the job applicant, provide “time for the applicant to respond with evidence of inaccuracies in the record, rehabilitation, or mitigating circumstances,” and give a “final written notice rescinding the job offer.”[44] These laws apply to “private and public employers with at least five employees.”[45]

Hawaii and California have similar Ban-the-Box laws that are among the most restrictive in terms of what type of employers are covered; at what point an employer may conduct a background check; what information can be considered in a background check; which factors an employer may use when making employment decisions; and disclosure obligations to an employee.[46] Ban-the-Box legislation in the following states do not cover private employers: Arizona, Delaware, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Missouri, Nebraska, Nevada, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Utah, Virginia, and Wisconsin.[47] Connecticut’s law only prohibits criminal background questions on the employment application itself, “conceivably leaving open the possibility that an employer could ask about an applicant’s criminal record moments after” submitting an application “or even as a precondition to filling out an application.”[48] In contrast, Illinois law allows employers to “inquire about an applicant’s criminal record as soon as the applicant is selected for an interview.”[49] Other states’ laws do not allow employers to consider “certain types of offenses, such as arrests not leading to conviction, misdemeanors, and older convictions.”[50] Furthermore, other states may also “require employers to determine whether an applicant’s criminal record sufficiently relates to the job in question before factoring the conviction into an employment decision.”[51] As to any notice or disclosure obligations, “[s]everal laws require employers to supply applicants with a copy of their criminal record . . . [s]ome go further by obligating employers to provide written notice to an applicant of their reason for not hiring the applicant if the decision was based at least in part on the applicant’s criminal record.”[52]

Exceptions/Exemptions to Ban-the-Box Laws

Within every statute, there are exceptions and exemptions to Ban-the-Box laws based on the number of employees, job position, and, most importantly, whether state or federal law would prohibit an individual from employment for a specific past crime. California’s law exempts public and private employers that have less than 5 employees.[53] Illinois’ and Maryland’s laws exempt public
and private employers that have less than 15 employees.[54] Other state statutes include expressly identified exceptions for employment concerning public safety or correction-related jobs, such as law enforcement positions, security personnel, criminal justice positions, tax commission, alcoholic beverage control employers, and jobs that involve providing services to minors or vulnerable adults, specifically school administration.[55] Practically all exceptions are “for positions for which the employer is prohibited by law from hiring someone with a specific conviction history or required by law to conduct a background check.”[56]

II. Are Ban-the-Box Laws Effective?

Statistical Discrimination

As Ban-the-Box legislation has gained popularity across the nation, there have been many sociological studies conducted to analyze the effects of the legislation, particularly the effects on people of color with criminal records.[57] Devah Pager demonstrated in a 2003 study that, “among the Milwaukee employers observed, overt racial discrimination and its links to perceived criminality were even more prevalent than discrimination based on the records themselves.”[58] In other words, Devah Pager found that “even in the absence of criminal background checks, employers often use race or racial indicators (such as education levels) to make assumptions about criminality and unsuitability for jobs.”[59] Some sociologists have found that banning the box would adversely impact “the employment of people of color with records because of the insidious racial biases surrounding criminality in America.”[60] Harry Holzer, Steven Raphael, and Michael Stoll found in their multi-city survey based research that employers were more likely to hire black Americans if they were allowed to check criminal records and, thus, confirmed Devah Pager’s findings that “when criminal records were not consulted, black people were assumed to have them.”[61] This phenomenon has been identified as “statistical discrimination.”[62]

“Bruce Western, Bart Bonikowski, and Devah Pager published an extension of Pager’s 2003 study” to investigate further into statistical discrimination.[63] They matched white, black, and Latino testers and applied them to “340 real, entry-level jobs in New York City in 2004.”[64] Their study “found that employer prejudice fell into three categories of behavior: (1) ‘categorical exclusion,’ characterized by an immediate rejection of the black candidate in favor of a white applicant; (2) ‘shifting standards,’ reflecting actively shaped decisions made through a racial lens that considers black applicants more critically than whites; and (3) ‘race-based job channeling,’ resulting in steering black applicants toward particular job types usually with greater physical demands and reduced consumer contact.”[65] However, their report found that Ban-the-Box laws could have a real positive impact on the employment outcomes of people of color with records as “[b]ack applicants who met face-to-face with hiring authorities were found to fare better than those who did not, suggesting that broad in-person contact has the power to replace broad generalizations on group membership with more nuanced information about an applicant’s individual qualities.”[66]

One of the most frequently discussed experiments investigating Ban-the-Box laws and the effects of statistical discrimination is that of Amanda Agan and Sonja Starr.[67] Their research discusses statistical discrimination as an unintended consequence of Ban-the-Box as “applicants with no criminal records who belong to groups with higher conviction rates, such as young black males, would be adversely affected by BTB policies.”[68] Agan and Starr conducted a field experiment, where they “submitted nearly 15,000 fictitious online job applications to entry-level positions before and after BTB laws went into effect in New Jersey (March 1, 2015) and New York City (October 27, 2015).”[69] One of their results supports the policy behind Ban-the-Box, which is that “when employers ask about criminal records, having a record poses an obstacle to employment.”[70] They also found a substantial increase in racial discrimination, which they believe could be explained by at least two mechanisms: (1) statistical discrimination, and (2) Ban-the-Box as a benefit for white applicants.[71] Absent individual information regarding any criminal history, statistical discrimination negatively affects the employment of black men without records because employers will treat them as if it is more likely than not that they have a criminal record.[72] With the similar lack of information under Ban-the-Box laws, there is an inverse presumption for white men, which results in employers treating white applicants with records more favorably because, absent evidence to the contrary, employers are more likely to assume that white applicants generally do not have criminal records.[73] The Agan and Starr study suggests that Ban-the-Box leads to an increase in racial discrimination against certain minorities by employers and, thus, results in the exclusion of people of color with or without criminal records from the labor market, despite their qualifications.[74]

“Race remains highly salient in employers’ evaluation of workers,” based on the research findings.[75] Although race-based discrimination is illegal under Title VII, “it is difficult to assess the rationality of employer decisions.”[76] Employers consider a number of factors when making hiring decisions, such as “the costs of interviewing an applicant who turns out to have a disqualifying criminal record” or “the costs of inadvertently failing to interview a candidate (due to assumptions about his record) who would have been the best choice, that are relatively unknown to anyone besides the employer.”[77]

Overt racism in the workplace is no longer tolerated, but “unconscious discrimination has become more common.”[78] Unconscious discrimination “is based on cultural or emotional factors that might be unknown to the person.”[79] So, in situations where employers lack information due to Ban-the-Box, employers will rely on “cognitive shortcuts and information” based on any generalizations or beliefs they may have regarding gender or race and conflate those assumptions with “an applicant’s productivity and employability.”[80] Thus, the emergence of statistical discrimination as an unintended consequence of Ban-the-Box is not surprising.

Because the increase in racial discrimination is likely due to unconscious bias that has presented itself in the form of statistical discrimination, “failing to remain race-conscious in this new legal arena could come at the expense of those who fought to have these laws enacted to
protect them.”[81] Removing race from the legislative language ignores the issue of systemic racism within the American criminal justice system, where people of color are more likely to be arrested for or convicted of crimes that whites would not be held liable for, such as non-violent drug offenses.[82] “[T]he work of sociologists like Pager shows us that being marked with a criminal record while black is fundamentally different from being marked with a criminal record while white,” and the failure of Ban-the-Box legislation to recognize those differences in its race-neutral laws renders it ineffective in implementing changes and protecting the people the laws were passed to protect.[83]

**Mere Delay of Access to Criminal Records**

All Ban-the-Box laws merely delay an employer’s access to criminal records; none of the laws preclude access to criminal records entirely.[84] Two theories posit why legislators believed the delay in Ban-the-Box legislation would be sufficient to combat the discrimination against individuals with a criminal record. One theory is that “an applicant’s criminal history may be less important once an employer interviews a candidate,” because they are impressed with the candidate’s qualifications.[85] Another theory is that by the time an employer is allowed access to an applicant’s criminal history, the employer will have already invested too much time into that individual and “would rather not know if the candidate has a criminal record than face the prospect of having to restart the process with another candidate, who could also have a disqualifying criminal record.”[86] However, these theories do not account for the concerns that employers have about hiring an ex-offender. One concern is the fear of negligent hiring as employers have a legal duty to exercise reasonable care in selecting an employee.[87] Additionally, employers have concerns regarding safety and costs, which not only include the financial costs in the pre-hiring phase but also costs of turnover, absenteeism, and administrative expenses associated with employing an ex-offender.[88] Finally, a social stigma associated with a criminal record contributes to an employer’s decision in hiring an ex-offender.[89] Given the totality of these concerns, employers are more likely to implicitly or unconsciously “use race as a proxy”[90] to fill in any missing information to help gauge an applicant’s employability and to avoid the liabilities and costs that might arise as the employer’s concerns become more of a reality with the higher probability of hiring or investing too much into an ex-offender in the era of Ban-the-Box legislation.

One of the most important factors that influences an employer’s decision whether to hire an ex-offender is cost.[91] Employers during the pre-hiring phase may want to avoid any significant costs that are “associated with interviewing and making tentative offers to candidates that they fear will ultimately be disqualified after the background check.”[92] Other than the financial costs at the pre-hiring phase, additional financial costs include turnover and absenteeism that are associated with the employment of ex-offenders.[93] Absenteeism is identified as an “expense for businesses” that results in “significant losses in employee productivity that can damage the bottom line.”[94] Ex-offenders often have “irregular schedules due to not having adequate access to resources such as reliable transportation, consistent childcare, or a stable residence,” so the rate of turnover and absenteeism may be higher for ex-offenders.[95] These costs can be significant and substantial for an employer. To avoid these costs, an employer will likely try to get information in any way that they can, including taking cognitive shortcuts as discussed with statistical discrimination.[96] to determine an applicant’s employability.

Assuming that an appropriate amount of time has passed and an employer is legally allowed to look into an applicant’s criminal records, Jakari N. Griffith’s study found that managers equated the introduction of Ban-the-Box laws with second chances and, thus, suggests that the mere delay in access to criminal records did not necessarily mean an applicant will immediately be disqualified once a criminal record is found.[97] Griffith’s study draws information “from interviews with 18 human resource (HR) professionals in Ban the Box states.”[98] The human resource professionals, also referred to later as managers, “emphasized time, severity, and job-relatedness as important factors” in their evaluation of an applicant’s criminal history.[99] The study found that managers “placed less emphasis on crimes committed by younger persons, understanding that some behavior may stem from youthful indiscretion.”[100] With regards to severity of the offense, managers relied heavily upon what customers wanted or required, even if they may hold different beliefs.[101] As to job-relatedness, many managers “said that if the offense had no material bearing on the performance of the core duties, then they might discount the importance of this information.”[102] The study also found that managers looked for “evidence of applicant growth” by looking into whether an applicant had “regret or remorse,” “whether they accepted responsibility for their actions,” and whether they “had longstanding involvements in church, structured volunteering experiences, and other social organizations.”[103] However, all of these factors and considerations only come into play when sufficient time has passed and an applicant has at least made it past the initial application phase. The issue that arises with Ban-the-Box is that the lack of information will likely cause an employer to overcompensate for the missing information by conflating certain characteristics, such as race, with the employability of the individual to avoid wasting any time or costs or potentially subjecting themselves to liability, even when the characteristics are independent of each other.

An employer will likely find that it is not worth it to
invest the time and costs into allowing individuals that they believe are more likely to have a criminal record to move past the initial application process. In order to screen out these individuals, based entirely on the application itself, the employer may turn to generalizations about certain races or other characteristics that they assume make an individual more likely to have a criminal record, thereby increasing discrimination. Therefore, Ban-the-Box legislation has been ineffective because its delay of access to information may be too costly for an employer, leading to the practice of stereotypes that will most likely increase racial discrimination and result in the exclusion of people of color with or without criminal records from the labor market, regardless of their qualifications.

III. Recommendations For Improving Ban-the-Box Laws and Furthering Its Purpose

Legal Approaches

The sociological studies, as discussed above, include suggestions on how to improve the effectiveness of Ban-the-Box legislation. Several propose legislative changes to better serve the purpose of limiting discrimination and providing more employment opportunities to individuals with criminal records. One proposal is that Ban-the-Box laws be written with explicit references to antidiscrimination laws. The existing antidiscrimination laws may be amended with Ban-the-Box provisions to "reinforce to employers that drawing inferences about an applicant's criminal record because of [their] race is a prohibited form of discrimination."[104] Luci Gubemick proposes that the law incorporate a "Purpose section[] that addresses the disparate treatment of people of color by the criminal justice system and then by employers post-conviction."[105] Reforming Ban-the-Box legislation to include more race-conscious and anti-discrimination language is meant to remedy the issues of statistical and unconscious discrimination because specific language around race and discrimination will likely make employers more aware of any biases or assumptions that may be implicitly made when reviewing hiring applications.[106]

Since many of these studies are subject to limitations based on their subjects and their methodology, Ban-the-Box laws "should mandate data collection . . . by an equipped government body and measure not only the hiring rates of people with records generally, but, rather, the specific demographic makeup of those hires."[107] To determine whether minorities are affected by Ban-the-Box laws, "[t]he data should directly address the races of ex-offenders who are hired."[108] The data should be collected at least annually "by a relevant and competent government office or agency, either in conjunction with an enforcement body or with the power to enforce the laws itself."[109] Mandating data collection is essential to providing a more holistic and comprehensive understanding of how Ban-the-Box legislation, or possibly other sources, may institute change in employer hiring practices.[110] Furthermore, comprehensive data collection is needed to clear up the discrepancies between studies that have found Ban-the-Box legislation to be effective in increasing employment overall, as well as increasing employment for African-American men.[111]

Overall, mandating data collection will keep the public and future legislators better informed about the effectiveness of the current laws and what changes are needed for further success.[112]

To further the purpose of Ban-the-Box legislation, the EEOC recommends developing "a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct."[113] This process of creating a narrowly tailored written policy includes:

1) identifying "essential job requirements and the actual circumstances under which the jobs are performed;"

2) determining "the specific offenses that may demonstrate unfitness for performing such jobs" by using all available evidence;

3) determining "the duration of exclusions for criminal conduct based on all available evidence" including "an individualized assessment;"

4) recording "the justification for the policy and procedures;" and

5) keeping "a record of consultations and research considered in crafting the policy and procedures."[114]

Forcing employers to focus on the essential, the actual, the specific, and the individual will likely keep the employer from straying into discriminatory territory in evaluating hiring applications.

Instead of relying entirely on banning the box and hoping that employers will change their hiring practices, employment discrimination lawsuits should be reevaluated and changed to become more of a viable option for plaintiffs to hold employers accountable.[115] Employers are required under §709 of Title VII "to keep records relevant to determinations of whether unlawful employment practices are occurring and make reports from these records."[116] To comply with this mandate, employers must file an Equal Employment Opportunity Form (EEO-1), which "requires employers to indicate each employee's job description, gender, and race."[117] The EEO-1 form will "be a useful tool for advocates fighting against employment discrimination," but only if the EEOC properly enforces the data collection that is required by the EEO-1 form.[118] That data collected by the EEOC can help bolster an employment discrimination lawsuit.[119] However, that is not enough to make employment discrimination suits more winnable because the current single-motive standard requires that plaintiffs prove the employer made their decision solely on an improper purpose, which is a difficult standard to meet due to the multifaceted nature of the decision-making process.[120] Therefore, the mixed-motive standard should be adopted for employment discrimination suits because it accurately reflects the many factors that are considered in the decision-making process, including factors that employers are not fully aware of, such as stereotypes.[121] Changing the standard for employment discrimination suits to mixed-motive and increasing enforcement by the EEOC will make plaintiffs more of a legal threat to employers.[122] Consequently, employers will more likely "become aware of the prevalence of implicit bias" and proceed to implement systems to protect themselves against unconscious discrimination litigation."[123]
Professor Dallan F. Flake proposes that Title VII be amended "to include persons with 'nondisqualifying criminal records' as a protected class."[124] "Nondisqualifying criminal records" would be criminal records that do not have "a direct relationship between a previous criminal offense and the job in question, such that employing the individual would impose an unreasonable risk to property or to the safety of specific individuals or the general public."[125] This amendment will further the purpose of Ban-the-Box by providing applicants with the ability to bring suit under Title VII to individuals who are discriminated against based on their criminal records and cannot prove discrimination based on other protected classes, such as race, color, religion, sex, and national origin.

Ban-the-Box legislation should be more effective in conjunction with certificate-of-employability laws.[126] Certificate-of-employability laws "generally allow ex-offenders to present a court-issued document to prospective employers certifying that they have met certain requirements to demonstrate they have been sufficiently rehabilitated."[127] These laws would work in tandem. Initially, banning the box would presumably help an applicant move past the initial application phase to the interview phase where the employer might find out about the applicant's criminal history, depending on the jurisdiction. Instead of disqualifying the candidate due to the employer’s fear of negligent hiring, having a certificate-of-employability will increase the candidate's chances of getting hired because the certificate will help the employer defend against any potential claims of negligent hiring and, thus, relieve their fear of being subject to a lawsuit and the associated costs.[128] Combining these laws relieves some of the major concerns that an employer has with hiring an ex-offender, such as the fear of negligent hiring, the associated costs of defending a lawsuit, the costs of investing too much into a candidate that may later be disqualified due to their criminal record, and the costs of finding a replacement for that candidate. However, this approach alone would not make Ban-the-Box more effective because it assumes that an applicant will make it past the initial application phase, but applicants are more likely to be screened out based on statistical discrimination before then, so this approach must be combined with one, or all, of the approaches discussed above to improve the effectiveness of Ban-the-Box.

Non-Legal Approaches

Another approach to improving the effectiveness of Ban-the-Box is "asking employers to blind themselves to names" (and other potentially racially identifying information unrelated to job qualifications, such as home addresses) in addition to criminal records.[129] Furthermore, managers should go through training that would "help [] reduce prejudice and regulate personal motivation to respond without bias."[130] Training managers in such a manner "could reinforce the importance of hiring without discrimination, which signals genuine commitment to being an equal opportunity employer."[131] These approaches are meant to prevent statistical and unconscious discrimination by having employers focus on other more important job-related factors when evaluating a prospective employee's application. These approaches also make an employer more aware of their motivations in their decision-making process and, thereby, shift employers away from making assumptions based on stereotypes.

Other non-legal approaches that will likely further the purpose of Ban-the-Box legislation include providing financial incentives for hiring ex-offenders by subsidizing their wages and encouraging ex-offenders to participate in comprehensive rehabilitation programs that will provide them with "the education, skills training, and health services," particularly mental health counseling and programs for dealing with drug and alcohol addiction, required to reintegrate into society.[132] These programs and organizations will assist individuals with criminal records in obtaining easier access to the labor market by filling in any knowledge or skills-related gaps that were created due to their convictions. Moreover, providing financial incentives to employers for hiring ex-offenders will likely provide ex-offenders with more employment opportunities because the subsidization of the wages will save the employer enough money to alleviate some of the employer's concerns regarding costs to such an extent that the costs will not outweigh the benefits of hiring an ex-offender.

Approaches Adopted by Other Countries

Other countries, "such as Australia [and] Canada... have passed legislation prohibiting discrimination on the basis of criminal record[s]."[133] In Australia, discrimination based on one’s criminal record is forbidden "either through human rights legislation or spent convictions legislation."[134] Similarly, in British Columbia, Canada, the Human Rights Code provides that "no one should be denied employment because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person."[135] Proscribing discrimination based on criminal records in the human rights laws suggests that these countries recognize the right to employment or the right to make a living as a fundamental human right. This approach may be informative in improving Ban-the-Box as it may, similarly, be argued that gainful employment is part of the certain unalienable rights of life, liberty and the pursuit of happiness as identified in the Declaration of Independence and, therefore, discriminating on the basis of a criminal record without justification is a denial of a fundamental human right. This argument is not very strong, but at the
very least, identifying employment as an essential element to an individual's life and pursuit of happiness will likely make an employer think twice before disqualifying a prospective employee based solely on the fact that they have a criminal record, rather than making their hiring decision based on a holistic, individualized assessment.

Conclusion

Based on the current sociological studies, Ban-the-Box legislation has not succeeded in limiting discrimination against prospective employees with a criminal record. When employers lack information due to the delay required by Ban-the-Box, they rely on statistical discrimination, which increases racial discrimination against certain minorities and, thus, excludes people of color with or without criminal records from access to employment opportunities.[136] However, these findings suggest that Ban-the-Box has only been ineffective in limiting the discrimination against people of color, specifically African American men, with or without records. One particular study, by Agan and Starr, suggests that Ban-the-Box actually benefits whites as employers will generally assume that whites are less likely to have criminal records, absent information to the contrary.[137] Overall, Ban-the-Box legislation alone, and as written, cannot effectively remedy the issue of discrimination based on criminal records because of the underlying issue of racial discrimination, which is caused by the disparity in the criminal justice system that subjects racial minorities to harsher punishments as compared to whites.[138]


[3]Id.

[4]Id. at 549.

[5]Id.

[6]Id.

[7]About: The Ban the Box Campaign, All of Us or None Campaign (April 28, 2021), http://bantheboxcampaign.org/about/.


[13]See Doleac & Hansen, supra, note 13 at 6; see also Agan & Starr, supra, note 13 at 321.


[16]Id.

[17]Id.

[18]Id.

[19]Id.


[22]Id.

[23]Id.

[24]Id.

[25]Id.

[26]See id; id (providing that an individualized assessment of the applicant's background and allows consideration of the following factors: "(1) the nature of the position for which the person is applying or in which the person is employed; (2) the nature and seriousness of the conduct; (3) the circumstances surrounding the conduct; (4) the recency of the conduct; (5) the age of the person involved at the time of the conduct; (6) contributing societal conditions; and (7) the absence or presence of rehabilitation efforts toward rehabilitation.")


[28]See Sabia et al., supra note 1, at 1; see also Nina Kucharczyk, Thinking Outside the Box: Reforming Commercial Discrimination Doctrine to Combat the Negative Consequences of Ban-the-Box Legislation, 85 Fordham L. Rev. 2803, 2808 (2017).

[29]Sabia et al., supra note 1, at 1–2.

[30]Saba, supra note 2, at 561.

[31]Id.


[33]Id.

[34]Id.

[35]Id.


[37]Saba, supra note 2, at 562.
[38] Sabia et al., supra note 1, at 6.

[39] Id.

[40] Id.

[41] Flake, supra note 38, at 1088.


[43] Id.

[44] Id.

[45] Id.

[46] Id. at 9–13.

[47] Id. at 1, 12–15, 17–26.

[48] Flake, supra note 38, at 1089.

[49] Id.

[50] Id. at 1089–90.

[51] Id. at 1090.

[52] Id.


[54] Id. at 13, 15.

[55] Id. at 12, 14–16, 18–19, 22–24.

[56] Id. at 10.


[58] Id. at 1190.

[59] Id.

[60] Id. at 1190–91.

[61] Id. at 1191.

[62] Id.

[63] Id.

[64] Id.

[65] Id. at 1192.

[66] Id. at 1192–93.


[68] Id. at 2.

[69] Id. at 2–3. They also randomly varied whether the applicants had a felony conviction, whether the applicant has a GED, and whether the applicant has a one-year gap in employment.

[70] Id. at 24.

[71] Id. at 24–25. Before Ban-the-Box was implemented, white applicants were only 7% more likely to receive a callback as compared to similar black applicants. After Ban-the-Box was implemented, white applicants were 45% more likely to receive a callback as compared to similar black applicants.

[72] Id. at 22.

[73] Id. at 25.

[74] Id. at 22.

[75] Gubernick, supra note 11, at 1193.

[76] Agan & Starr, supra note 13, at 35.

[77] Id.

[78] Kucharczyk, supra note 30, at 2815.

[79] Id. at 2814–15

[80] Id.

[81] Gubernick, supra note 11, at 1193.

[82] Id. at 1197.

[83] Id. at 1198.


[85] Flake, supra note 38, at 1112.

[86] Id.


[90] Kucharczyk, supra note 30, at 2813.

[91] Griffith & Young, supra note 87, at 506.


[93] Griffith & Young, supra note 87, at 508.

[94] Id.

[95] Id.


[97] Griffith & Young, supra note 87, at 506.

[98] Id. at 502.

[99] Id. at 509.

[100] Id.

[101] Id. at 510.

[102] Id.

[103] Id. at 511–12.


[105] Gubernick, supra note 11, at 1211.


[107] Gubernick, supra note 11, at 1209.

[108] Id. at 1210.

[109] Id.

[110] Id. at 1209.

[111] See Maurice Emsellem & Beth Avery, Racial Profiling in Hiring: A Critique of New “Ban the Box” Studies, 2016 National Employment Law Project, 1, 6 (2016) (criticizing the conclusions of the Ban-the-Box studies, specifically, the studies conducted by Doleac/Hansen and Agan/Starr, as misplacing the issues of racial discrimination on Ban-the-Box laws instead of blaming the underlying, systemic racism of the nation).

[112] See Gubernick, supra note 11, at 1209.

[114] Id.


[116] Id. at 2834.

[117] Id.

[118] Id.

[119] Id. at 2831.

[120] Id. at 2831–32.

[121] Id. at 2832.

[122] Id. at 2833.

[123] Id.

[124] Flake, supra note 38, at 1123.

[125] Id.

[126] Id. at 1124–25.

[127] Id. at 1124.

[128] Id.


[130] Griffith & Young, supra note 87, at 515.

[131] Id.

[132] See Flake, supra note 38, at 1125; see also Services, Homeboy Industries, http://homeboyindustries.org/services/ (last visited April 28, 2021) (illustrating an organization that was created to help rehabilitate and reintegrate ex-offenders into society by providing tattoo removal services, education, substance abuse support, and mental health and legal assistance, amongst other things).


[134] Id. at 245.

[135] Id. at 248.

[136] See Doleac & Hansen, supra note 13, at 6; see also Agan & Starr, supra note 13, at 6–7.

[137] Agan & Starr, supra note 13, at 348.

CHINESE ETHNIC ENCLAVE IN SAN FRANCISCO
by Elizabeth Kim and Matt Hong

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Introduction

People of Asian descent throughout American history have been otherized and targeted for racial violence. Chinese immigrants were characterized as “filthy” and “perpetually foreign” beginning with the establishment of the Chinese ethnic enclave in San Francisco in the 1800s. These nativist ideologies were perpetuated by the dominant society, resulting in a tradition of exclusionary and hostile policies directed at the Chinese community. The othering of Chinese people in the United States has been tied to their usefulness in the American capitalist system, leading to the rise of Chinese Americans as a model minority. The emergence of COVID-19 led to a resurgence of an American tradition, scapegoating the Chinese people, and the rise of nativist policies.

This essay explores the consequences of systemic, institutional racism for the Chinese ethnic enclave in San Francisco. Part I will examine how Chinese migration was fueled by white America’s capitalist needs and the development of racist stereotypes assigned to Chinese people. Part II will explain the xenophobic policies used to target and restrict the freedoms of the Chinese community and how Chinese people resisted by creating an ethnic enclave in San Francisco. Last, Part III of this essay will analyze the modern effects of historic hostile policies against Chinese people.

Part I - Establishment of the Chinese Community and the Development of Stereotypes

Chinese migration to the United States exploded in the late 1840s during the California Gold Rush due to foreign, colonial influence, economic opportunity, and migratory traditions of the Southern Chinese. The Gold Rush set off a migration of miners from throughout the world to California. The Chinese were singled out for discrimination; their entry was met with socioeconomic othering; the acceptance of the Chinese migrants was limited to their economic usefulness as a source of cheap labor. White American society responded to the growth of the Chinese population with stereotyping, leading to Asian people being coded as a model minority, pitting them against other people of color, and a “yellow peril,” as a foreign and invasive population to dominant white society.

I. Entry

The first Chinese expats to travel to America because of foreign influence and economic opportunity were from the Pearl River Delta, particularly Toisan. An influx of British opium into China following the First Opium War destroyed the Chinese economy. Meanwhile, a series of natural disasters reduced crop viability in Guangdong. Resource scarcity and traditional ethnic divisions led to serial conflict in Southern China. Pearl River Delta and Guangdong residents had a long history of maritime
trade-labor migration was considered an extension of familial work duties. Hong Kong and the Pearl River Delta became the main port of exit for prospective Chinese migrants when news of international gold rushes reached Chinese ports in the 1840s. Hong Kong became the unofficial sister city to San Francisco for Chinese migrants, most coming from Toisan and the Pearl River Delta in 1848 when gold was discovered in California.

Most immigrants from the Pearl River Delta came intending to stay temporarily and return home, consistent with customs on work, migration, and familial duty. They were working men who came without their families and lived in temporary housing. Economic need created by western opportunism and the promise of financial gain established a commercially grounded pipeline between the Pearl River Delta and San Francisco. Almost half of California’s Chinese immigrant population by 1900 lived in San Francisco. American advancement of this economic relationship and increasing volumes of migration fueled budding hostility against Chinese migrants throughout later years.

II. Nativism and Stereotypes

Nativism arose in the United States through backlashes to different waves of migration. The origins of nativism lie with the Native American Party, better known as The Know Nothing Party that portrayed Catholic migrants as a threat to Anglo-Protestant Americans, who were native to European countries. Nativism is rooted in the antediluvian idea that certain immigrants are unassimilable due to their race, ethnicity, and culture. However, nativist policies and restrictions were often promulgated by working-class whites who feared losing their jobs to immigrants. “The native” is portrayed throughout American history as the inverse of “the other.” The other is depicted as barbaric, corrupt, lazy, and Godless, while the native is modern, pure, hardworking, and God-fearing.

As the Chinese population grew in San Francisco, so did nativist resentment giving rise to racist stereotypes. Whites believed that the Chinese population was unassimilable due to their physical characteristics, traditional dress and hairstyles, and their tendency to preserve their cultural practices and language. White society began to characterize Chinese people in the 19th century as “the sneaky Oriental,” “the yellow peril,” and “the indispensable enemy.” Chinese culture was caricatured not only as “primitive and backward, but also as an existential threat to US democratic institutions.” These harmful stereotypes were first associated with Chinese immigrants in the 1800s but were soon applied to other Asian-origin groups. Anti-Chinese sentiment appeared to materialize from the fear of economic competition, but the racialization of Chinese people as inferior and unassimilable seemed to affirm the white American identity by justifying exclusion.

The “yellow peril” stereotype soon morphed from a perception of Chinese people as an economic threat to a biological threat. An influx of Chinese immigrants and capitalist exploitation led to white workers accusing the Chinese community of building “a filthy nest of iniquity and rottenness.” The Workingman’s Party, a white labor-focused organization that gained control of San Francisco’s government in the 1870s, claiming that 90% of
California’s syphilis cases could be attributed to Chinese women working in the sex trades.[24] Public health officials blamed Chinatown for the intermittent smallpox outbreaks from 1868 through the 1880s.[25] They characterized San Francisco’s Chinatown as a place filled with “horrors of percolating waste, teeming bodies, and a polluted atmosphere,” accrediting these conditions to the cultural practices of the Chinese residents.[26] These narratives of Chinese people as the source of contagious illness are rooted in nativist racism and used to justify white supremacy and racial exclusion.

III. Racial Triangulation

Chinese residents of California have historically been "lauded as superior to Blacks on cultural-racial grounds.”[27] Racial triangulation is demonstrated by the positioning of Chinese people as superior to Black people, yet perpetually foreign and unassimilable into white society.[28] The former U.S. Consul to Japan demonstrated this triangulation during his testimony at the Joint Congressional Hearings on Chinese immigration in 1879 in California: "the Chinese have a great deal more brain power than the original negro... the negro is very easily taught; he assimilates more readily... The Chinese are non assimilable because their form of civilization has crystallized.”[29]

Beginning in the mid-1960s, Asian people “were conditionally accepted as the ‘model minority’ while simultaneously perceived as ‘perpetual foreigners.’”[30] The “model minority” stereotype crystallized during the civil rights movement with the publication of two influential articles in The New York Magazine and the U.S. News & World Report in 1966.[31] These articles discussed the success of Japanese and Chinese Americans in overcoming discrimination and financial hardship.[32] However, the construction of this “model minority” myth holds Asian-Americans to a different standard, perpetuates the myth that the United States is devoid of racism, and continues to pit Asian Americans against other ethnic groups, particularly Black people. The “perpetual foreigner” stereotype assigned to Asian Americans is particularly prominent for those who live in ethnic enclaves. Those with a preference for retaining their cultural practices find themselves subjected to this stereotype because “[m]aintaining a highly ethnic lifestyle is often misinterpreted as distance from, and resistance to, the mainstream culture.”[33] A solid connection to Asian culture has led white society to believe that Asian-Americans are unassimilable.[34]

The United States government instituted discriminatory policies targeting the Chinese community during the mid to late 1800’s. Labor restrictions limited the job opportunities available to Chinese and Asian people, restricting their ability to obtain economic independence. Migration policies led to the concentration of Chinese populations in particular areas. Nativist public health policies aimed against the Chinese community fueled scapegoating of the Chinese people. Anti-Chinese social policy established the Chinese as perpetual foreigners, intentionally curtailing their ability to seek redress from the government. Racial resentment boiled in the white community alongside these exclusionary laws. This resentment took the form of hostile, racist violence directed at Chinese people. The Chinese residents could not rely on the government to protect them, so they created intra-community structures to withstand extra-community hostility.

Part II - Early Discriminatory Policy

I. Labor Restrictions

American lobbyists, fearing competition, pushed for anti-immigrant and anti-Chinese legislation as the Chinese population grew throughout the 1840s and ‘50s. For example, the California Foreign Miners License Law of 1850 required miners who were not U.S. citizens to pay a $20 monthly fee.[35] White miners pushed for defensive taxes, limiting Chinese participation in areas with limited space and competition for mining sites. The cost to migrate compounded by economic push factors made mining impractical for the Chinese expats. The taxes forced the Chinese to pursue less lucrative work, particularly in the labor and service industries, leading to their increased presence in industries like laundry, farming, fishing, and mining as hired migrant laborers.

The Chinese likely entered industries where their pre-migratory skills could be utilized if and when mining became impractical, e.g., as fishermen, merchants, and service providers. The California legislature enacted more taxes to limit Chinese presence in areas where pre-migratory skills could be used. For example, the Chinese Fisherman’s tax of 1860, which charged $4 monthly for Chinese fishers, limited Chinese limited the Chinese people’s economic foothold in established industries.[36] Moreover, the California legislature enacted a law explicitly banning the Chinese from participating in industries such as fishing.[37] Congress in 1862 passed the Anti-Coolie Act,[38] which charged $2.50 for all “Mongolian races” who were not paying mining taxes or engaged in industries affected by anti-Chinese taxes. The Anti-Coolie act also taxed employers who hired Asian people. The value of Chinese labor was artificially devalued by labor taxes. Collectively, this series of taxes limited Chinese revenue sources and their ability to establish economic independence.

II. Migration Policies and Restrictions

If Chinese people chose to leave the city to pursue work outside of the anti-Chinese taxing scheme, they then faced additional taxes. For example, the Capitation Tax of 1855 charged $50 per person ineligible for citizenship aboard any vessel.[39] Taxing Chinese migration in America incentivized the Chinese people to remain close to their port of entry, contributing to the congestion of entry ports and the development of Chinese communities close to San Francisco. The tax encouraged employers, such as the railroad industry, to sponsor the movement of those who chose to move.

The United States government recognized that a workforce of Chinese men, willing to work for cheap, was growing and sought to take advantage of it. The United States initially encouraged Chinese migration, inflating the Chinese population in San Francisco to support capitalist interests through a steady flow of low-cost Chinese labor.[40] The Burlingame Treaty of 1869[41] was initially conceived to empower the United States to wield greater influence in the East and foster Christianity’s spread in
Asia, and Westernize China. The treaty allowed Chinese people to immigrate freely, travel within the United States and established greater protection in accordance with the favored-nation principle. This treaty reinforced U.S. trade interests with China and Chinese people’s dependency on capitalist needs to exist in America.

However, nativist legislation made it impossible for the Chinese to establish a presence in existing industries. Those who wanted to leave the living conditions and competition of urban life were forced to accept lower wages. Employers would have greater bargaining power, given the depressed wages and the number of Chinese laborers willing to accept existing work opportunities. The cost of mobility and access to intra-Chinese support networks resulted in Chinese congregation in San Francisco, guaranteeing employers an ample supply of replaceable workers. The growing Chinese presence fueled anti-Chinese sentiment by the 1870’s, resulting in even more restrictive anti-Chinese laws. Disease outbreaks in urban areas occurred from the late 1870s onwards. The completion of the transcontinental railroad in 1869 created an influx of more Chinese workers into San Francisco from their previously rural jobs. These factors led the Chinese to be coded as harmful and separate from white society, socially, linguistically, politically, and economically. Anti-Chinese sentiment led to the scapegoating of the Chinese community.

III. Health Policy

The Chinese residents of San Francisco were used during the late 1800’s and early 1900’s as a scapegoat for disease. Stereotypes of Chinese people as a source of contagious illness fueled anti-Chinese public health policy during outbreaks of disease in San Francisco. The federal government began to fear in 1896 that Chinese immigrants would bring disease to the West Coast. Hence, the Surgeon General ordered quarantine stations to disinfect the bags of all Chinese people entering the United States. The residents of Chinatown were viewed as filthy and “deemed a continual source of contagion and disease potentially afflicting whites in San Francisco.” The body of a Chinese man was discovered in Chinatown in March of 1900. He was quickly diagnosed with the Bubonic Plague. San Francisco’s Board of Health moved to quarantine all of Chinatown, allowing only white residents to leave the area and no one to enter. White people already saw Chinatown as a place of disease and contamination, so the death of this Chinese man led to hysteria fueled by racism and xenophobia. The Surgeon General attempted to require all Chinese residents of San Francisco to be inoculated with an experimental vaccine. He received authorization from the Secretary of Treasury “to forbid the sale or donation of transportation by common carrier to Asians or other races particularly liable” to the bubonic plague.

These blatantly racist, discriminatory orders produced protest in the Chinese community, but this protest was divided along class lines. The Chinese Consolidated Benevolent Association was composed of gentry scholars from China and the commercial elite who had made fortunes in California; they were responsible for coordinating political responses to discriminatory laws targeting Chinese residents in San Francisco. The CCBA sought a quick resolution to end the health crisis; they were willing to cooperate with public health authorities. The leadership advised the Chinese residents “not to argue with the health officers” and to put an end to their protest. This direction only fed into the widespread belief that the Chinese leadership sided with white authorities over their community. However, Chinese laborers and merchants opposed the orders from public health officials; they organized a large protest in front of the offices of the CCBA. The large crowd gathered outside the offices surprised the CCBA. One leader promised to pursue legal action in an attempt to disperse the protest. A larger crowd returned the next day; some entered the association offices demanding immediate action.

The CCBA in response to significant pressure filed suit on behalf of the Chinese community in San Francisco against the San Francisco Board of Health and the federal quarantine officials. The challenges to public health officials by the Chinese community caused politicians to rethink their racist belief that Chinese people were docile and offered unquestionable obedience to authority. A California District Court ruled in Wong Wai v. Williamson, in favor of the plaintiffs and issued an injunction against the federal officials on the grounds that their orders violated the Fourteenth Amendment. However, the ruling had no effect; San Francisco’s Board of Health quarantined all of Chinatown.

IV. Social Policy and White Hostility

Anti-Chinese sentiment grew as Chinese people continued to migrate, challenging the establishment of white settlers. The California Supreme Court in People v. Hall in 1854 ruled that Chinese people are inferior, cannot
claim citizenship, and cannot participate in government administration.[67] This case barred three Chinese witnesses from testifying against a white man who killed another Chinese person.[68] This decision further established that all Chinese people, alongside Native and African Americans, lacked the status required to testify against white Americans in court.[69] The California Supreme Court solidified Chinese people's status as perpetual foreigners in the eyes of the law. Chinese people could not pursue claims against white violence, leading to reliance on independent policing systems. The Chinese grew to distrust dominant society from this and similar acts of racism in the law. They began to create a separate social scape in response to hostility by white citizens and governmental forces.

The growing presence of Chinese labor led to growing, grassroots hostility against the Chinese people. The Workingman's party, a lobbying group, focused on anti-Chinese policy and protecting the interests of white workers under the slogan "The Chinese must go,"[70] which coincided with riots targeting Chinese communities and sponsored increasingly anti-Chinese legislation.[71] The riots included, but were not limited to, the Denver Riots, Spring Rocks Riots, Los Angeles Riots, and the destruction of Sacramento's Chinatown.[72] The 1877 San Francisco riot killed several Chinese people and destroyed about $100,000 worth of Chinese property and businesses.[73] The local police as part of the response, deputized citizens to quell the rioters. Ultimately, gangs of white workingmen razed pre-marked Chinese businesses with police approval, marking the beginning of hostile policing practices targeting the Chinese people.[74]

White laypeople's efforts also led to increasingly severe, anti-Chinese legislation. The Cubic Air Ordinance of 1870 prohibited renting rooms with less than 500 cubic feet of air per person.[75] Chinese occupied housing in San Francisco was generally designed for single resident occupancy, in accordance with their intentions to stay temporarily.[76] The Sidewalk Ordinance of 1873 prohibited carrying loads on poles on sidewalks, and the Queue Ordinance of 1873 required all Chinese prisoners to cut their hair to one inch.[77] These laws reflect the particularity of anti-Chinese sentiment among more general nativist sentiment of the 1870s. Nativist groups like the Workingman's party reflected a growing cultural hostility against the Chinese people by targeting cultural practices and ways of living inherent to the Chinese community in America. Moreover, these laws reflect how increasing racism in the social sphere permeated policy to create increasingly targeted, racial policy.

Lobbyists pushed for increasingly stringent laws against Chinese labor and establishment beyond attacking social practices. The Laundry Ordinance of 1873 required laundries to pay up to $15 in taxes per load transported.[78] Harsher laws and taxes, for businesses where Chinese labor was still dominant such as laundries, choked the establishment of the Chinese community. California's Second Constitution in 1879 granted the legislature authority to "protect state, counties, and cities from undesirable aliens" by forbidding corporations to hire Chinese.[79] The Chinese were forbidden to work on public works, and the Legislature was given the authority to remove foreigners outside city limits.[80] These laws effectively made Chinese jobs and living spaces dependent on dominant society's permission.[81] Successful passing of anti-Chinese legislation and growing anti-Chinese sentiment likely created social precedent for increasingly hostile legislation.

Hostile social policy from the 1870s rapidly influenced political and legal policy against Chinese people. The Burlingame-Seward treaty in 1880, was revised to match growing anti-Chinese sentiments. Restrictions came to a head with the Federal Chinese Exclusion Act of 1882, the only immigration law in United States history to explicitly ban immigration of a named race. Xenophobic fears from white working-class laborers about competition for jobs and the possibility of decreased wages fueled the Chinese Exclusion Act.[82] White laborers feared a "Chinese invasion" which harmful rhetoric was proliferated in the media, causing this belief to spread.[83] Immigration restrictions stagnated the flow of immigrants from the Pearl River Delta and catalyzed the development of robust Chinese support networks, separate from white society.

V. Community Response to Hostility

The Chinese organized intra-community structures to provide support such as jobs, loans, and physical protection in response to external hostility.[84] Two structures dominated Chinese-American society by the 1850's: the Huiguans, an association which limited membership by dialect, pre-migration origin, or ethnic and clan affiliation; and the Tong, fraternal organizations composed of members of different clans and districts, based on mutual aid and protection.[85] Both systems were primarily focused on helping migrants adjust to American society.[86] However, illegal activity was sponsored among some Tongs.[87] Activities considered illegal to Americans were not considered illegal to the Chinese.[88] In the face of white hostility, many turned to Tong-sponsored, illegal activity to find employment.[89] While some Tongs engaged in unlawful activity, it was not common as Tongs served more as social clubs.[90]

The Huiguans and Tongs gained significant power after
the enactment of the Chinese Exclusion Act. Both
organizations possessed the funds necessary to sponsor
Chinese migration and the social standing to vet Chinese
laborers to non-Chinese society.[91] Associations of
intra-community structures, particularly the Chinese Six
Companies, essentially represented all Chinese society to
outside groups because they supported and represented
such a large portion of the community.[92] The Huiguans
and Tongs did not primarily influence dominant society
because they regulated matters internal to the Chinese
community.[93] San Francisco established the “Chinatown Gang” to
combat what white society saw as a rise of criminality
caused by Chinese Tongs.[94] This gang of vigilantes,
edorsed by the San Francisco mayor, entered Chinese
homes and businesses to destroy property under the
pretext of policing.[95] The gang ultimately aimed to
disrupt Chinese industry and spread Christianity within
the community.[96] The policing by the Chinatown Gang
was largely ineffective because by then, Chinatown had
largely been insulated by outside influence due to the
protection and peacekeeping regulated by the Huiguan
and Tongs.

The Hart-Cellar Act of 1965 abolished immigration
quotas based on national origin as part of the growing civil
rights movement and calls for immigration reform.[97]
This act effectively dismantled the Chinese Exclusion Act,
increasing immigration from Hong Kong and mainland
China. Chinatowns were unprepared in San Francisco, and
other parts of the United States, to accommodate the large
group of “new stock” immigrants.[98] Established
communities rejected new immigrants out of fear of
competition for already limited opportunities, ethnic
differences, and overcrowding.[99] Thus, the new wave
Chinese immigrants often moved to the outskirts of
Chinatown, encroaching on white neighborhoods and
renewing violence from the white community. Calvin Toy
attributes the 1960s’ culture of community empowerment
and lobbying to the development of “new youth” gangs
among the new Chinese communities.[100] Existing Tong
gangs would clash with new youth gangs, leading to the
San Francisco Tong Wars when lobbying and petitions to
the Tongs proved ineffective.[101] This violence ultimately
led to the 1977 Golden Dragon Massacre.[102] Policing
systems outside Chinatown could no longer avoid the
violence after the massacre. White citizens were involved
in the shooting.[103] leading to the revival of the previously
defunct “Chinatown Gang” to crackdown on Tong and
Chinese gang activity.[104] The rebirth of the “Chinatown
Gang” marks the introduction of racialized policing in San
Francisco. The Gang Task Force still exists and has
expanded to create specialized Latin and Black
community-focused sections.[105]

Part III - Modern Effects of Historic Hostile Policy

Chinatown residents experienced this year, the birth of
a new civil rights movement. People took to the streets to
protest against police brutality and were also exposed to a
deadly pandemic and harmful racial stereotypes.
Chinatown residents experience lower wages and higher
rates of poverty than San Francisco as a whole, their social
and cultural institutions have allowed for less preventable
health-related deaths. However, the perpetuation of
anti-Chinese stereotypes and nativist beliefs fuel racial
violence against Asian Americans. Historical themes of
nativism and scapegoating continue to ravage the Chinese
community in San Francisco. This community was
particularly vulnerable during the COVID-19 pandemic
because of archaic institutional structures which have
persisted since the arrival of Chinese people in the United
I. Chinatown’s Population and Economic Conditions

San Francisco’s Chinatown has a population of 14,600 people, 80% of which are Asian.[106] Asian people make up about 34% of San Francisco’s population.[107] Asians are one of the smallest minority groups, making up less than 6% of the total population.[108] Of that 6%, about 15% are mixed-race, 60% (or 7.2 million) are first-generation American, 25% are second-generation American, and only 15% are third-generation.[109] 16.7 million Asian-Americans are in the United States, of which Chinese-Americans are the oldest and largest Asian-origin group, accounting for 3.7 million in the United States.[110]

While Asian Americans are one of the smallest ethnic groups in the United States, they have the largest median family income, reported as $78,000 in 2009, and one of the lowest family poverty rates, at 9%, second only to white families at 7%.[111] However, these statistics do not accurately represent the economic conditions experienced by the Chinese residents of San Francisco. For example, Chinatown has one of the lowest median incomes in San Francisco at $19,950 compared to $78,710 for San Francisco overall.[112] Additionally, the poverty rate in Chinatown (28%) is more than double San Francisco’s overall rate (13%).[113]

Currently, Chinatown’s economy relies heavily on the food industry, which makes up 59% of all retail sales in the area.[114] The Chinese population has decreased in the last decade due to gentrification, causing retail sales to fall.[115] The average income of the Asian population in the United States has significantly increased; however, the Chinese labor community in San Francisco is still subject to lower wages and hazardous conditions.[116] The Chinese Progressive Association in 2010 surveyed restaurant workers in Chinatown, finding that half experience wage theft costing these workers an estimated $8 million a year in lost wages.[117] This study found that 40% of these workers do not receive any breaks, 42% work over 40 hours a week, and 48% have been injured while working.[118] Additionally, 95% of the workers surveyed reported that they did not earn enough to support a family of four.[119]

San Francisco’s Chinatown recently experienced a decrease in family households leading to an increase in white residents. Between 1990 and 2013, “the share of Asian households in the neighborhood decreased by 11 percentage points between 1990 and 2013, corresponding with a growth of 5 percentage points in the share of white households.”[120] Rising housing costs in San Francisco have led to a decline in family households and an increase in single-occupancy residences (SROs).[121] The number of families living in SROs in San Francisco from 2001 to 2014 increased by 55%, the vast majority (74%) of these families live in Chinatown.[122] The decline of family households in Chinatown and changes in the population’s racial composition is associated with gentrification.[123]

Chinatown residents, despite these economic challenges, experience fewer preventable hospitalizations due to chronic health conditions than the population of San Francisco as a whole.[124] The factors allowing for better health conditions in Chinatown include strong cultural and social institutions, inexpensive places to buy healthy foods, and relatively low-cost housing.[125]

II. Perpetuation of Anti-Chinese Stereotypes and Hate Crimes

The racialization of contagious diseases in the 1800s grew from stereotypes of Chinese people, which were energized by nativism.[126] Still, the perpetuation of these stereotypes continues to color how Chinese Americans are treated when diseases crop up.[127] The United States government instituted discriminatory policies in 1900 targeting Chinese residents in San Francisco’s Chinatown during a small outbreak of the bubonic plague. Currently, Chinese Americans face racism fueled by government action due to an outbreak of disease, this time in the form of violence and hate crimes directed at Asian people. San Francisco saw a 50% increase in anti-Asian hate crimes in 2020.[128] Hate crimes against Asian Americans during the COVID-19 pandemic are manifestations of historical otherization, nativism, and xenophobia, entrenched in American culture.[129]
Chinese immigrants in San Francisco experienced a communication barrier during interactions with the police and 95% said that there were not enough bilingual police officers in the city.[148] Language barriers are not the only communications problem. Chinese immigrants in San Francisco are generally distrustful of the police, with less than one-third agreeing that police were effective in handling crime, and only 36% expressing satisfaction with police in the city.[149] Very few immigrants are satisfied with the police, but most reported feeling neutral (over 50%).[150] This same study found that the longer these immigrants resided in the United States, the less favorably they rated police.[151]

Racial bias amongst the San Francisco police has fostered distrust in the Asian community. The San Francisco Police Department had only four categories to identify the race of arrestees until 2012: Black, white, Chinese, and other.[152] These categories led to nearly all Asians who were arrested being categorized as Chinese, making it difficult for community leaders to know where to focus their resources.[153] This classification system contributed to the model minority myth that most Asian groups do not commit crimes.[154] However, San Francisco police data from 2016 shows that Asian drivers were more likely to be cited than white drivers.[155]

**Conclusion**

Economic opportunities and capitalist demands drew Chinese people to San Francisco. They have established a vibrant community in the past 170 years despite incredible opposition from white society. This community has historically been targeted through nativist laws restricting their labor, movement, health, and social standing. These discriminatory policies incited and perpetuated racial violence against members of the Chinese community. The effects of these exclusionary policies are still felt in San Francisco’s Chinatown. Economic conditions continue to worsen for the Chinese residents of San Francisco, and the community continues to shrink due to gentrification. Furthermore, in 2020, Asian Americans experienced a resurgence of hate crimes because of how public officials have framed the cause of COVID-19, but the community is still divided on whether they can trust the police to protect them due to racist policing practices. The path forward is unclear, but history has indicated that this ethnic enclave will fight to protect itself through its social and cultural institutions, community organization, and political action.

[2] Id. at 15.
[3] Id.
[4] Id.
[7] Id. at 20–21.
[8] Id. at 17.


[12] Id.


[14] Id. at 219–20.


[16] Id.

[17] Young, supra note 13, at 220.


[19] Young, supra note 13, at 220.

[20] Id. at 221.

[21] Id. at 6.


[23] Zhou, supra note 18.


[26] Id.


[28] Id. at 109.

[29] Id. at 110.


[31] Id. at 10.

[32] Id. at 11.


[34] Id.


[37] Id. at 144.

[38] A Bill to Prohibit the “Chinese Coolie Trade” By American Citizens in American Vessels, H.R. 109, 37th Cong. (2nd Sess. 1861).


[42] Id.

[43] Id.


[47] Id. at 105.

[48] Id.

[49] Id. at 106

[50] Id.

[51] Id.

[52] Id.

[53] Id.

[54] Id.

[55] Id. at 131.

[56] Id. at 137.

[57] Id.

[58] Id.

[59] Id. at 134.

[60] Id.

[61] Id.

[62] Id.

[63] Batlan, supra note 45, at 107.

[64] Shah, supra note 55, at 137.

[65] Wong Wai v. Williamson et al., 103 F. 1 (N.D. Cal. 1900).

[66] Batlan, supra note 45, at 107.

[67] Immigration and Ethnic History Society, People v Hall 1884.

[68] Id.

[69] Id.

[71] Lair of the Golden Bear, CAA Homecoming - Lok Siu Guest Speaker, http://www.youtube.com/watch?v=O11_ZavkSsA.

[72] Id.

[73] Katie Dowd, supra note 68.

[74] Id.


[77] KPBS, supra note 76.

[78] Id.

[79] Id.

[80] Id.


[83] Id.


[85] Id.

[86] Toy, supra note 82, at 651.

[87] Id.

[88] Id.

[89] Id.

[90] Id.

[91] Lawrence Douglas Taylor Hansen, supra note 85, at 41.

[92] Id.

[93] Id. at 654.


[95] Id.

[96] Id.

[97] Toy, supra note 82, at 653.

[98] Id.

[99] Id.

[100] Id.

[101] Id. at 657.

[102] Id. at 658.

[103] Id.

[104] Kamiya, supra note 95.


[107] Id.

[108] Zhou, supra note 18, at 3.

[109] Id.

[110] Id. at 4.

[111] Id. at 7–8.

[112] Sustainable Chinatown, supra note 107, at 6, 68.

[113] Id. at 68.


[115] Id. at 7.

[116] Zhou, supra note 18, at 7–8; Chinese Progressive Association, supra note 115, at 3.


[118] Id.

[119] Id. at 13.

[120] Montijo, supra note 9, at 1, 5.

[121] Id. at 9.


[123] Montijo, supra note 9, at 5.

[124] Sustainable Chinatown, supra note 104, at 64.

[125] Id.


[127] Id.


[130] Id. at 654.

[131] Id.

[133] Id; Grover, Harper & Langton, supra note 83, at 654.


[135] Id.


[137] Id. at 428.


[140] Id.

[141] Id.


[143] Id.


[147] Id.


[149] Id. at 634.

[150] Id.

[151] Id. at 638.


[153] Id.


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**Introduction**

The murders of Ahmaud Arbery, Breonna Taylor, George Floyd, and countless other African Americans, who lost lives at the hands of police, sparked mass protests all over America. The national consciousness is being re-awakened to the idea that the United States still needs radical changes, particularly in the ways interpersonal and systemic discrimination is conceptualized and functions. Professor Cornel West argues progressive legal practitioners "confront the difficult task of linking their defensive work within the legal system to possible social motion and movements that attempt to fundamentally... transform American society".[1] However, if the transformation West suggests is only addressed on the basis of race, and race is not inherently intersectional, the particularities of how people of color, men, women, men of color, women of color, LBGTQIA+ people, disabled individuals, immigrants and especially the intersections of these identities, tend to be negated.

Professor Kimberlé Crenshaw coined the term “intersectionality," which describes how systems of oppression overlap to create distinct experiences for people with multiple identity categories.[3] Intersectionality encompasses how overlapping or intersecting social identities, particularly minority identities, function and relate to systems and structures of discrimination.[4] Intersectionality allows the legal practice to go beyond race and address the specificity and intersections within suspect groups of race, sex, class, gender, sexuality, religion, immigration status, class status, and those within the LBGTQIA+ community. Thus, an intersectional lens is vital to legal practitioners and our legal system because it acknowledges and incorporates complexity in how the law is practiced and upheld. If explicitly implemented in evidentiary law, intersectionality would address the implicit biases that are not uniform across the categories of race, gender, class, and more. This Note asserts that a more equitable and complex framework for implementing intersectionality's role in perception and overall judgment in the legal system and evidentiary discourse, specifically surrounding the Federal Rule of Evidence 403 "FRE 403", will allow legally significant differences between divergent types of evidence to be better analyzed and articulated.

The Federal Rules of Evidence 403 states, “the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”[5] Currently, FRE 403 does not call for an intersectional lens when considering the unfair prejudice of particular evidence. FRE 403 negates the intersections of suspect classes, and it does not adequately prepare judges and attorneys to address the possessive investment in whiteness[6] ingrained within themselves, jurors, and the entire legal system. Additionally, FRE 403 does not adequately account for jurors’ implicit biases elicited by a party's intersectional identity and the emotional responses the jurors may face from these biases in their decision-making. This Note will offer mitigation to the effects of implicit bias and the possessive investment in whiteness within the legal system by proposing an intersectional lens within the evidentiary discourse of FRE 403. If an intersectional framework is explicitly considered when looking at a piece of evidence and its potential prejudicial effect, the party's identity and the implicit biases that come with that identity can be explicitly considered when raising the FRE 403 objection.

This Note proceeds in five parts. Part I will discuss the framework of intersectionality created by Professor Crenshaw. It details the lack of said framework within legal practitioners and the legal practice. Further, it will discuss the current evidentiary discourse surrounding FRE 403 and how objections to unfair prejudice have been noted historically and contemporarily. Part II addresses the narratives typically invoked in our legal system when analyzing suspect classes and how implicit bias can
infiltrate legal practitioners and jurors, ultimately affecting their decision-making process. Furthermore, it will discuss and evaluate Dr. George Lipsitz’s book, The Possessive Investment in Whiteness[7], and how this notion may be upheld within white jurors and white legal practitioners. Part III will discuss the current legal mechanisms available to address racial bias and the existing scholarly literature addressing the need for more effective interventions to limit those biases. Part IV will provide a specific proposal as to how intersectionality can become a part of FRE 403 and how an intersectional lens may allow objections based on unfair prejudice to be raised more efficiently.

Intersectionality must be defined and analyzed to fully recognize why it is a necessary framework for the legal field and legal decision-making process that should be explicitly stated and considered in the balancing test of FRE 403. Additionally, FRE 403 must be explained so that the current language of the rule may be understood and subsequently addressed. Then, with an understanding of how FRE 403 functions and an acknowledgment of the persistent racism in our legal system and society, "signs of racial subordination in the evidence context will come more clearly into view."[8]

I. Kimberlé Crenshaw’s Intersectionality and Federal Rules of Evidence 403: Unfair Prejudice

A. Kimberlé Crenshaw’s Intersectionality

Professor Crenshaw created the framework of “intersectionality” in 1989. The civil rights activist and legal scholar[9] has been actively involved in race and civil rights work for over thirty years.[10] She was recently elected to the American Academy of Arts and Sciences.[11] Professor Crenshaw wrote in the University of Chicago Legal Forum that antiracist policies and traditional feminist pathologies exclude Black women due to the overlapping discrimination they face.[12] However, intersectionality is not limited to Black females, accurately describing their position in our country.[13] Intersectionality has now been defined as a sociological term by the Oxford English Dictionary meaning, “the interconnected nature of social categorizations such as race, class, and gender, regarded as creating overlapping

and interdependent systems of discrimination or disadvantage; a theoretical approach based on such a premise.”[14] Intersectionality has also been defined as “the complex, cumulative way in which the effects of multiple forms of discrimination (such as racism, sexism, and classism) combine, overlap, or intersect especially in the experiences of marginalized individuals or groups.”[15] These marginalized groups include people of color, men, women, men of color, women of color, LBGTQUIA+ people, disabled individuals, immigrants, and working-class people.

Professor Crenshaw starts her analysis of intersectionality by discussing how focusing on otherwise-privileged groups, such as white females experiencing sexism and Black males experiencing racism, “creates a distorted analysis of racism and sexism because the operative conceptions of race and sex become grounded in experiences that actually represent only a subset of a much more complex phenomenon.”[16] Thus, Crenshaw uses the experiences of Black women and how the court frames and interprets their stories to display how intersectionality functions in the legal apparatus.[17] Crenshaw considered cases such as Moore v. Hughes Helicopter, Inc. in order to illustrate the difficulties inherent in judicial treatment of intersectionality.[18] This case failed to recognize Black females as class representatives in race and sex discrimination cases, resulting in a Black woman’s complaints of discrimination being left groundless because the court reasoned that she “never claimed before the EEOC that she was discriminated against as a female but only as a Black female,” and that there were serious doubts about the ability for the Black female employee “to adequately represent white female employees.”[19] The Ninth Circuit’s decision displays how the antidiscrimination doctrine fails to embrace the framework of intersectionality while also making the white female experience central in the concept of gender discrimination.[20] Thus, Moore is a prime example of the limitations that legislation and law, such as the antidiscrimination doctrine, face when intersectionality is ignored. The distinct experiences of particular groups of individuals are left unprotected. Intersectionality allows for the fullness of an individual’s identity to be considered within the legal field. Specifically, an intersectional framework explicitly added to the FRE 403 would allow the fullness of a party’s identity to be considered. Intersectionality will allow 1) counsel to advocate for them entirely, 2) a judge to contemplate how evidence will invoke biases when it comes to a party’s intersecting identities, and 3) the jury will either be shielded or shown evidence that allows them to consider the wholeness of the party’s identity when contemplating a decision.

B. Meaning of FRE 403

The historical background of FRE 403 and its origins show how pivotal FRE 403 became to evidentiary discourse and the legal field. One comprehensive article discussed how Congress quickly enacted the rule on its face value and adopted the rule.[21] The article analyzed how much power FRE 403 gives to a trial judge when making decisions starting with whether the rule should be applied to a piece of evidence and then:

“...must estimate both the probative value and the prejudicial effect of the particular
evidence and decide which factor outweighs the other. Additionally, the judge must determine what to do about evidence that in some way runs afoul of the rule. This last decision is often the most troublesome. A judge’s perceptions of the goals and values of the prejudice rule, of course, will influence greatly a decision in any phase of a prejudice rule determination during trial.**[22]**

FRE 403 provides “tremendous latitude and unfettered discretion”**[23]** to judges. With this discretion comes the high likelihood that the judge may overlook a person’s intersecting identity and how those identities can significantly affect a party’s case. Thus, if mandated to do so, judges are more likely to consider how a party’s lived experience is vastly different from their own, and how their lived experience and intersectional identity should be considered when using their discretion and analyzing a piece of evidence under FRE 403.

The Federal Rules of Evidence 403 states, “the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”**[24]** The advisory notes provide that “unfair prejudice... means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.”**[25]** This note simply means that evidence can be excluded if it “appeals to”**[26]** emotions of the jury instead of rational thought. Thus, emotion can be considered a “hallmark of unfair prejudice.”**[27]** However, emotion is pivotal to people’s everyday life. Emotions can convey information, such as repugnance or anger when analyzing a situation.**[28]** This natural emotional response in jury members is accounted for currently in our legal system, but not with the perspective of how a party’s intersectional identity sparks those emotions and implicit biases.

Furthermore, emotions do not always ignite prejudice, but “they can lead to prejudice in more complex and subtle ways than previously recognized, impacting not only the decision maker’s reactions to evidence but also the decision-making process itself.”**[29]** In legal decision-making, emotion should not be categorized as prejudicial from the start. Instead, it should shift to specific questions that are designed to “determine which emotions, under which circumstances enhance [or limit] legal decision making.”**[30]** Thus, when a particular piece of evidence ignites the emotional reactions of the jurors, it must be considered whether that emotional reaction is working simultaneously with the implicit biases that come with a party’s intersecting identity. The emotional response from prejudice is essential to discuss because they are frequently considered from a position of race only. This would mean the prejudice that comes with people’s intersecting identities would be negated and the judge and attorney may allow the jury to consider evidence that sparks their implicit biases, from said identities, because an intersectional consideration was negated.

C. Current Legal Notion of Unfair Prejudice and FRE 403 in Practice

Lawyers in determining how to present evidence are experts on the issues mentioned above and must explain why a piece of evidence is prejudicial or has probative value.**[31]** Lawyers are in charge of describing the appropriate way a particular piece of evidence should be used by a jury, or a lawyer must explain the reasoning behind why a piece of evidence shall not be admitted.**[32]** When a piece of evidence is not admitted by a lawyer, it is usually with the fear that a piece of evidence is prejudicial because it will invoke an emotional response and thus will not be appropriately used by the jury.**[33]** Lawyers usually do not invoke a dry narration of the case’s facts in advocating for their clients. More often than not, arguments draw on vivid stories that elicit emotions because this approach makes it more likely for details to stay in the jury’s memory due to the attention they capture.**[34]**

FRE 403 functions as a balancing test in order to ensure due process**[35]** in the wake of these epic narratives told. A lawyer articulates whether a piece of evidence is probative or has a substantial prejudicial effect. The judge has discretion to admit or reject the proffered evidence. However, a lawyer must be able to advocate entirely for a client, including understanding how to make a prejudicial argument to a piece of evidence if necessary. A lawyer must know how to advocate for their client passionately when objecting to a piece of evidence based on its prejudicial effect, including the consideration of all aspects of a client’s identity. For instance, “the fact that a piece of evidence hurts a party’s chances does not mean it should automatically be excluded...”**[36]**. The question is of unfair prejudice- not of prejudice alone. Thus, if lawyers are mandated to consider their client’s intersecting identities, they will likely be more equipped to identify a juror’s implicit biases that are elicited by their client. They would then be able to use that reasoning as a part of their argument as to why a piece of evidence is prejudicial. Lastly, if judges are mandated to apply an intersectional lens, then they will have a better understanding as to how a juror may negatively see a party’s intersecting identities.

With the judge and attorney considering how pieces of evidence impact a juror’s perception, weaving intersectionality within the FRE 403 balancing test and in the decision-making process would allow the identities of the parties of litigation to be considered, analyzed, and can lend to either side of the balancing scale. Thus, the lawyer must formally and affirmatively allow the parties’ identities to be considered and then profess the importance of those intersecting identities to the judge. Furthermore, this process would offer parties in an adversarial process an opportunity to lobby the jury by educating them about the complex identity of a witness, defendant, plaintiff, and so forth. Considering all aspects of a party’s identity will also allow the judge and attorney to be explicitly aware of how that party’s identity could elicit implicit biases in the jury. Thus, they can consider those implicit biases when advocating and considering the admissibility of pieces of evidence.

II. Constructions of Race, Implicit Bias, and the Possessive Investment of Whiteness

The ways in which people of color, LGTQIA+ people, disabled individuals, women, men of color, women of color, and immigrants are constructed and
discriminated against based on implicit and explicit biases needs to be discussed in order to evaluate the issue that an intersectional lens within evidentiary discourse will address.

A. Constructions of Race and Implicit Bias

One issue with current evidentiary discourse is that unfair prejudice based on race is not inherently intersectional because race is only a singular identity. Nevertheless, a discussion on the constructions of race, gender, class, citizenship status, et al. and the implicit biases related to the coexistence of an individual’s particular identities is necessary to understand intersectionality’s importance within evidentiary discourse. Persistent racial stereotypes connect notions of blackness with criminality. [37] Social science research demonstrates that most Americans harbor implicit racial biases that connect blackness with negative characteristics such as aggression, hostility, violence, criminality, and weapons. [38] These binary assumptions of race within pervasive stereotypes, which are ultimately assumptions of personality and character traits based on race, often function as implicit biases within many individuals. These implicit biases then maneuver on a subconscious level, causing individuals to have a particularly negative outlook and reaction to specific target groups. [39] For instance, “seventy-five percent of people who have taken the Implicit Association Test for race have demonstrated a subconscious preference for whites and an implicit racial bias against Black people.” [40]

Within our nation, African Americans are 2.5 times more likely than whites to be stopped pulled over, and arrested. [41] Bryant Stevenson states, “in poor urban neighborhoods across the United States, Black and Brown boys routinely have multiple encounters with the police. Even though many of these children have done nothing wrong, they are targeted by the police, presumed guilty, and suspected by law enforcement of being dangerous or engaged in criminal activity.” [42] He supports the notion that even at a young age, the police system targets people of color. In fact, according to the 2014 report on racial discrimination in America, juveniles of color represented roughly 67 percent of juveniles committed to public facilities nationwide. [43] Same question about the original source.

Another instance of racial profiling and implicit bias in the United States was in New York City. Stop and frisk is a "New York City Police Department practice of temporarily detaining, questioning, and at times searching civilians on the street for weapons and other contraband.” [44] In 2010, white people accounted for 44 percent of New York’s population, while African Americans accounted for 22.5 percent. [45] Despite the population being predominately white, in 2010-New Yorkers were stopped 601,285 times-315,083 were Black (54 percent), 189,326 were Latinx (33 percent), 54,810 were white (9 percent). This pattern persisted in the first three quarters of 2016: citizens were stopped 10,171 times, 5,401 were Black (54 percent), 2,944 were Latinx (29 percent), 1,042 were white (10 percent). [46] The New York Police Department in 2019 recorded 13,459 stop; 7,981 were Black (66 percent), 3,869 were Latinx (29 percent), and 1,215 were white (9 percent). [47]

Implicit biases go beyond race. They can encompass negative emotions towards women, immigrants, LBGTQUI+ people, disabled people, and be specific. For example, the Department of Justice in Windsor v. United States summarized the history of discrimination against LBGTQUIA+ people in its brief to the United States Supreme Court. [48] This history of discrimination is common by law enforcement officials and includes “profiling, entrapment, discrimination and harassment by officers; victimization that often was ignored by law enforcement; and discrimination and even blanket exclusions from being hired by law enforcement agencies.” [49] These statistics and information illustrate the high likelihood that the implicit biases associated with intersecting identities can be ignored within some judges, attorneys, and jurors. These biases may be activated by specific racial imagery or perpetuating stereotypes and can limit how a piece of evidence is analyzed, considered, and weighed under FRE 403. Additionally, within these implicit biases, there is a Black/White binary paradigm of race [50] within these implicit biases excludes the intersections of individuals’ identities. Thus, issues that are about race, particularly implicit and explicit racial biases, are not inherently intersectional. Additionally, the lived experiences and biases around those who have intersecting identities [51] are often ignored in evidentiary discourse, leaving them susceptible to limited representation and treatment within our justice system.

Furthermore, intersectionality within FRE 403 is pivotal because white individuals, who are commonly heterosexual, make up a majority of jury pools, lawyers, judges, and magistrates. [52] Thus, if some of those white jurors, lawyers, judges, and magistrates are invested in maintaining the systemic and interpersonal privileges that come with their whiteness and have implicit biases about people of color or individuals with multiple intersecting identities, an intersectional lens within evidence law may allow them to see beyond their own racialized, gendered, and classed experiences. Furthermore, a mandated
intersectional lens may illuminate the subordination of people with identities that are traditionally marginalized within evidentiary law and offer a solution to that systemic subordination by ensuring individuals suspect class intersections are considered and prioritized.

B. “The Possessive Investment in Whiteness” Within White Jurors and White Legal Practitioners

Dr. George Lipsitz, in his book “The Possessive Investment in Whiteness: How White People Benefit from Identity Politics,” unfolds how the artificial construction of whiteness almost always comes to possess white people themselves, unless they develop antiracist identities and unless they divest themselves of their investment in white supremacy.[53] Dr. Lipsitz gives a detailed account of the history of the United States and how systems that reinforce white advantage and supremacy function most effectively when there is no acknowledgment of the offered privileges, allowing for white privilege to stay unaddressed. He articulates how many white individuals historically and contemporarily “attach to mechanisms that give whiteness force and power” and how the history of the United States “has consistently been built on racial exclusions.”[54] White individuals have benefitted within the legal field from these same racial exclusions. For example, the California Crimes and Punishment Act of 1850 state that “no black or mulatto person, or Indian, shall be permitted to give evidence in favor of or against any white person.”[55] This Act illustrates how white privilege and racial discrimination in the law were more explicit in relatively recent history. However, although no evidentiary rules distinctly exclude racial groups contemporarily, implicit ways exist of discrimination functions, including the misconception of racial equality and the subsequent perpetuation of colorblindness.[56] Colorblindness assists in upholding white privilege by not explicitly incorporating anti-racist language in the law, and those within that privileged group tend to generate new mechanisms to increase the value of past and present discrimination.

The contemporary mechanisms for upholding white privilege can function implicitly and explicitly. Racial categorization is a way that discrimination and exclusion function implicitly within the United States as “racial categorization creates social structures and assigns moral qualities to members of racial groups in ways that benefit people designated as white.”[57] Thus, racism can exist without explicit discriminatory legislation because racism functions through the centrality of the white experience and white, middle-to-upper class, cisgendered, heterosexual men “collectively receiving privileges and benefits from the systemic subordination of non-whites” is foundational to past and present systemic issues.[58]

The investment many white people have in the privileges that come with their race and other hegemonic identities may cause whiteness to represent as the norm, and anything outside that norm can spark implicit biases. The investment in whiteness and white norms that have historically been and continue to be embedded in our legal system raise an issue for parties, especially those with multiple identities that are systemically and interpersonally discriminated against, to be seen as outside that norm. Furthermore, strictly white experiences can allow evidence of white experiences and customs to be submitted to the jury without objection because these experiences are considered the norm.[59] For instance, an example of how white lived experiences can function as the norm can be found when analyzing a defendant’s flight from the police.
When looking at flight through the experiences of people of color, the fear of being targeted due to their race and becoming a potential victim of police brutality is often present. However, when looking at flight through the white experience, it is often looked at as a consciousness of guilt for some crime committed. Furthermore, this power dynamic can be further exacerbated when you consider an individual's intersecting identities. A Black trans-woman may run away from the police due to the increased fear incited by the combination of racism, transphobia, and sexism within our country. These examples highlight how the lived experiences of people of color and their other intersecting identities are not always considered within the legal field.

Understanding the possessive investment in whiteness and the urge for many white people to uphold their lived experiences as the norm is important because white individuals make up many jury pools. For example, between 2005 and 2009, half of Houston County juries were all-white while the other half included only one Black member. The analysis, conducted by the non-profit Equal Justice Initiative, further discusses how the process for striking jurors of color is a standing operating procedure in many District Attorney’s Offices and Public Defender’s Offices because the policy for systematically excluding people of color from a jury is not convoluted. Striking jurors of color is due to the notion that “any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons.” This practice of racial discrimination in jury selection is also found in California. Students and faculty from Berkeley Law’s Death Penalty Clinic evaluated 683 California Courts of Appeal cases from 2006 to 2018 that involved objections to prosecutors’ peremptory challenges. They were used by attorneys to excuse potential jurors without providing a reason why. Prosecutors used their strikes to remove African American jurors in nearly 75 percent of these cases, Latinx jurors in about 28 percent, and white jurors in only three cases (0.4 percent). These statistics shed light on the idea that juries are more likely to be predominately white, thus invoking the white experience as a norm. Therefore, intersectionality should be explicitly implemented in evidentiary discourse so that the lived experiences of people with marginalized identities who are parties in litigation are considered during the legal process. This will combat the white norm and hegemonic ideals that are likely to be perpetuated in a courtroom that is predominantly filled with white individuals.

Many white judges and attorneys are likely to invest in their whiteness and hegemonic ideals as well. However, introducing intersectionality as a standard lens within FRE 403 will mandate attorneys and judges to consider the lived experiences of minority parties and make their identities a pivotal component in their legal advocacy. By explicitly adding an intersectional framework to FRE 403, attorneys and judges will be mandated to consider how it functions within a given case by expressly adding an intersectional framework to FRE 403. This revision could not only increase the probability of sparking judges’ and attorneys’ cognition to their own implicit biases towards the intersections of an individual’s identity, but also mandate them to consider how an individual’s intersecting identity may spark a juror’s implicit biases. Although an intersectional lens within evidentiary discourse may not stop white judges, attorneys, and jurors from investing in their whiteness, hegemonic ideals, and upholding whiteness as the status quo, it forces white judges and white attorneys to think outside their lived experiences because they will be mandated to do so instead of having the mere choice to do so.

III. Current and Proposed Mechanisms to Combat Implicit Bias within Evidentiary Procedure

This section will examine current mechanisms in the law and in academic proposals to address implicit biases within evidentiary discourse. It will analyze that although race-based solutions are important, we must go beyond those initial suggestions for reform and consider an intersectional framework within the legal field.

A. Legal Mechanisms that Currently Address Racial Biases and Racial Bias as a Trial Strategy

The current legal mechanisms in place to address implicit and explicit racial biases within the courtroom do not address the biases that may arise from a person’s intersectionality. For example, the Supreme Court in Pena-Rodriguez v. Colorado created an exception to FRE 606(b) that prohibits a juror from testifying about “any statement made . . . during the jury’s deliberations . . . or any juror’s mental processes concerning the verdict or indictment.” The Supreme Court held that the Sixth Amendment requires that the “no impeachment rule give way” if a criminal defendant was convicted by a juror based on a clear statement that the conviction was based on racial stereotypes or racial hostility. Explicitly not addressing the mental processes of jurors causes insufficiency in addressing all biases and focuses on race alone.

Additionally, there have been cases in which race was explicitly targeted in order to elicit racial biases within the jury. The North Carolina State Supreme Court has reviewed cases based on instances where lawyers for six death row inmates argued that racial bias played a dominant role in the outcome of their cases. In the case against one of the defendants, the prosecution deployed violent racialized stereotypes, calling the Black defendant a “big black bull.” This shows that race has been used to incite the jury to push toward conviction, and in other instances race-neutral approaches have been used that omit race as a primary factor and argue it as non-relevant. North Carolina enacted in 2009 “The Racial Justice Act” which allowed death row inmates to contest their conviction if they could display that race was a “significant factor in being sentenced to death.” This law was repealed soon after its inception in 2013, but the issues that it was intended to address are still potent and consistently active. As previously discussed, racial biases within most individuals are inevitable, but even laws that only focus on race, such as the Racial Justice Act, are missing pivotal components of a person’s identity. Although the law was enacted to combat racial inequality through biased convictions, it still only addressed race. This racially violent classification of “big black bull” also addressed specifically Black men. Thus, even if the legislation was not overturned (or others similar to it that
irrelevant and prejudicial racial insinuations during trial.”[79]

However, this proposed solution is solely based on race, which is not inherently intersectional.[80] The particular needs of victims in self-defense cases who have intersecting suspect class identifications will not be accounted for when using this rule. Furthermore, this rule needs to be changed as the legal system evolves from the “white norm” as the default. This rule is structured around white experiences as the norm, although this rule addresses implicit biases by not allowing those who are pleading self-defense to use race as a basis for their determination of whether severe bodily harm was imminent.[81] This rule is structured around white experiences being the norm. Whites rarely use their whiteness as a reason they pose as a threat, however as previously discussed; it is common for individuals to connect blackness with criminality and violence.[82] The goal as legal scholarship evolves would be to stray away from this white narrative as the norm within legal analysis and advocacy. This rule is brilliantly proposed and a necessary addition to the Federal Rules of Evidence; it illuminates the greater need for intersectionality in proposed solutions.

Individuals within the justice system may not obtain the legal advocacy they deserve without intersectionality used as a lens in which evidentiary work is approached. The lack of consideration of all of the aspects of an individual’s intersecting identities, especially if their experience, and the associated implicit and explicit biases accompanied by their experience, are reduced down to only a racialized lens. These current scholarly approaches demonstrate the one-dimensional focus on race as it pertains to addressing bias and evidence in the legal system. Race-based solutions are a starting point to the issue of implicit biases because that is the common way of understanding how implicit biases function.[83] The problem of intersectionality is much broader than just race. Going beyond those solutions and addressing those who are, for example, Black, female, and part of the LGBTQIA+ community is critical to reducing or eliminating discrimination in the legal system. Someone with intersecting identities that are traditionally marginalized is at a higher risk of particular implicit biases against them. If race-based solutions are proposed, then they only capture part of the person’s identity, and deny the complexities of a person’s lived experience and their relationship to systems of power. In relation to the example given above, only the individual’s race would be addressed with critical race theory and not the individuals sex, sexual
IV. Proposal for an Intersectional Lens to be Integral to the Federal Rules of Evidence 403

A. Proposed Intersectional Lens to FRE 403

The Federal Rules of Evidence 403 requires a piece of evidence to be evaluated through a balancing test that weighs the probative value of that piece of evidence against the prejudicial effect that piece of evidence might have. The most frequently used objection to the admissibility of a piece of evidence is that it is prejudicial.[84] As previously discussed, the advisory notes of the federal rule define unfair prejudice as an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.[85] This note proposes that unfair prejudice should be explicitly defined within the rule of FRE 403; intersectionality must be a key component of that definition. FRE 403 currently reads, “the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”[86]

This Note’s proposed revision to this rule would be to add after “needlessly presenting cumulative evidence” the following definitions should apply under this article:[87]

(a) Unfair Prejudice: within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.[88] When analyzing unfair prejudice, intersectional identities of a plaintiff, defendant, witness, co-party, petitioner, respondent, cross-complaining, cross-defendant, and/or any other party must be taken into consideration to account for specific implicit biases that are likely to arise.

Furthermore, this proposal includes a clear and concise definition of intersectionality within FRE 403’s advisory committee notes:

“Intersectionality is the interconnected nature of social categorizations, such as race, class, gender, religion, sexuality, LGBT/QIA+ involvement, disability, et al. regarded as creating overlapping and interdependent systems of discrimination or disadvantage.”[89]

This proposal for an explicit definition of unfair prejudice that includes intersectionality within FRE 403 has the likelihood of addressing common implicit biases that are likely in the adversarial process. Attorneys and judges will be mandated to consider intersectionality within their understanding of FRE 403. This standard will cause attorneys to explicitly consider how their client’s intersecting identity can lead to the argument of unfair prejudice when trying to make a piece of evidence inadmissible. For example, if a working-class Black transgender female is on trial, her attorney will be sparked by this proposed explicit inclusion of intersectionality to consider how their client’s intersecting identities of Transgender, Black, working class, and Female can cause unique implicit biases within the jury. Thus, attorneys will be in a better place to advocate for their clients in regard to how to object to pieces of evidence, thanks to the consideration of all aspects of their client’s identity and the emotional response that intersecting identities may cause. Further, if mandated to do so, judges are more likely to consider not only how a party’s lived experience could be vastly different from their own, but how their lived experience and intersectional identity needs to be considered when using their discretion and analyzing a piece of evidence under FRE 403. This proposal is not suggesting a limitation of a judges’ discretion. However, since judges tend to exercise their discretion based on their own perceptions and lived experiences (which, based on the demographics of judges, are often from a white, heterosexual male perspective), this proposal will require them to think about intersectionality and thus the lived experiences of those outside whiteness, heteronormativity, the male perspective, and more.

B. How Intersectionality can Lend to Either Side of the FRE 403 Balancing Scale

This proposal does not state that intersectionality can only be considered on the unfair prejudicial side of the FRE 403 balancing test. An intersectional analysis would also weigh to the other side of the balancing scale. For instance, defendants in United States v. Armstrong filed a motion to dismiss the indictment for selective prosecution. They argued that the U.S. Attorney prosecuted virtually all African Americans charged with crack offenses in federal court but left all White crack defendants to be prosecuted in state court, resulting in much longer sentences for identical offenses.[90] To make their claim the court ruled that “defendant must produce credible evidence that similarly situated defendants of other races could have been prosecuted, but were not; and (2) to establish a discriminatory effect of prosecution in a race case, defendant must show that similarly situated individuals of a different race were not prosecuted...”[91] The defendants motion was denied.[92] Had the attorneys and judges been mandated to explicitly consider intersectionality within the consideration of the admissibility of the evidence presented, the defendants in the Armstrong case may have been more successful in their motion. Defendants’ lived experiences with policing and drugs, along with their intersecting identities, may have been considered widely probative to the evidence. Additionally, if the attorneys had taken into consideration the Defendants’ intersecting identities, the attorneys may have been better suited to articulate the Defendants’ cases that were tried unfairly compared to that of their white counterparts. Furthermore, this proposal can affirmatively allow parties’ identities to be considered because with intersectionality in mind by the advocates their intersecting identity will likely add probative value; it may “lobby” the jury by educating them about the party’s identity if the evidence of their lived experience is admitted.

Thus, intersectionality does not only have to be on the side of unfair prejudice. However, intersectionality will likely be considered more on the unfairly prejudicial end of the balancing scale because that is where jurors’ implicit
biases are more likely to be an issue that needs to be addressed. Additionally, the inclusion of an intersectional analysis each time an FRE 403 balancing test is done will mandate that attorneys consider their clients' intersectionality when objecting on the basis of unfair prejudice.

C. Possibility for Efficient Arguments based on Intersecting Identities

An intersectional framework within FRE 403 will cause judges and attorneys to consider a person's intersecting identities when considering any piece of evidence. Furthermore, it will have legal advocates consider the possible emotional response of jurors, which is pointed to in the advisory notes of the rule [93] more in-depth because they will see how an intersectional identity can spark implicit biases within certain jurors. For instance, if intersectionality is explicitly considered when looking at a piece of evidence and its potential prejudicial effect, the party's identity and the implicit biases that come with that identity, can be explicitly considered when raising the FRE 403 objection.

The court ruled in the well-known case Old Chief v. United States, that Old Chief's prior conviction could be stipulated to and not described in detail because its prejudicial effect substantially outweighed the probative value of disclosing the felony.[94] Although Old Chief was successful in his defense by limiting the implicit biases that could have been sparked in the jury had his felony been fully disclosed, the opinion after the decision, in large, was a victory for the prosecution.[95] The opinion states that although a piece of evidence may be stipulated to by the defense, the "prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away."[96] This commonly occurs in cases that are not factually similar to the Old Chief case itself.[97]

If we look at this case through the view of the proposed rule that this Note suggests, then the negative effects that the opinion has on future defendants may be limited. First, having intersectionality as explicitly part of FRE 403 would allow defendants more ground to objecting on the basis of unfair prejudice. Intersectionality will likely cause the judge to consider the intersecting lived experiences of the defendant, including the implicit biases and negative attitudes that can be incited in jurors against people of color, men, women, members of LGBTQIA+, disabled individuals, working class individuals, et al.

The prejudice and implicit biases that arise from jurors based on a party's intersecting identities are not commonly addressed risks under FRE 403.[98] Furthermore, the proposal of intersectionality as part of the rule would allow defendants, such as those post Old Chief, to introduce evidence of their unique lived experiences. Those lived experiences can combat an admissible piece of evidence's prejudicial effect. Furthermore, the proposed addition of intersectionality to FRE 403 would mandate that judges consider an individual's intersectionality and how those intersections may spark the emotions of the jury through implicit biases. If the judge is mandated to consider this, they are able to conduct the balancing test of FRE 403 with the lived experiences of the party's identities in mind. Thus, the judge is more likely to see how a defendant's intersecting identities may lend to a piece of evidence being unfairly prejudicial and if it sparks an emotional response in some jury members. Although a judge can consider these intersections of identity now, it is up to their discretion. If an intersectional framework is explicitly part of the FRE 403, judges will be mandated to consider it. This is beneficial because tapping into the lived experiences of individuals, especially those with multiple marginalized identities,[99] can continue inclusivity-based reform efforts in our legal system.[100]

Intersectionality includes a person's socio-economic status. People of color, within class distinctions, do not experience oppressive systems of capitalism within the legal field the same way that whites do. The intense intersections of wealth and race can be seen when looking at individuals' advantages and disadvantages in the workforce. Additionally, class works differently when looking at how racial stratification is maintained, how wealth is passed among generations, and how legal policy is targeted to benefit whites.[101] With intersectionality in the mind of advocates, the class struggles that follow racial and ethnic minority groups can be considered, resulting in a more complete representation of these individuals within the legal system.

D. Expected Critiques and Responses

There will be critiques of this proposal for an intersectional framework as a part of an FRE 403 balancing test analysis. One example being that implicit biases may not be uniform or standard across the board; thus, how will they be adequately addressed? Intersectionality calls for the consideration of all the aspects of an individual's identity. This also allows for a consideration of how those distinct intersections of a person's identity may spark implicit biases in others. Thus, intersectionality does not cover one uniform form of implicit bias but allows for intersecting
identities of people to be considered and the implicit biases that those identities may spark.

Another critique may be that not all aspects of an individual’s identity are relevant to the case at hand. However, judges, attorneys, and jurors “draw assumptions about reality as they understand it based on the way they perceive it.”[102] Therefore, identity is constantly being subconsciously factored into a person’s perception if not done consciously. As previously mentioned, implicit biases are inevitable to be within jury pools and legal advocates.[103] These implicit biases largely go unrecognized because they are subconscious biases. Scott Wilson states in his article on implicit biases, “the most dangerous racial prejudice is not an overt call to racial hatred, which most people would find repugnant; it is subtler, invidious racism that persuades while going unrecognized.”[104] Therefore, identities are almost always relevant to cases because implicit biases and assumptions of the world from a personal perspective are always occurring.[105] With the addition of intersectionality as an explicit part of the rule, jurors, attorneys, and judges can better account for these biases by considering how intersecting identities of an individual and pieces of evidence may be prejudicial if they spark those implicit biases.

V. Conclusion

Attorneys are able to advocate with consideration for a person’s intersectionality within the adversarial process, but they are not mandated to. Evidence and evidence law are pivotal in what gets presented in legal cases and what cases are successful or not. People deserve for the wholeness of their identity to be considered in the legal system, and that evidence law incorporates an intersectional framework. Although this proposal for intersectionality within FRE 403 will not eradicate race and implicit biases within the legal system, it is a steppingstone to mandating that the complexity of an individual’s life experiences and identities be considered. An intersectional consideration will obligate attorneys and judges to contemplate perspectives outside the white norm. This consideration by attorneys and judges has the prospect for these advocates to ruminate an individual’s intersecting identities and see how they may elicit implicit biases and emotional responses in the jury. I am hopeful this Note will spark more inclusive and innovative ways for evidentiary law to advocate for all identities.


[3]Kimberlé W. Crenshaw, *On Intersectionality: Essential Writings* (2017) (Kimberlé Crenshaw is a pioneering scholar and writer on civil rights, critical race theory, Black feminist ideology, and race, racism and the law. She is a distinguished Professor of Law at the University of California, Los Angeles and Columbia Law School.)


[7]Id.


[12]Id.


[16]Crenshaw, *supra* note 9, at 140.

[17]Id. at 141.


[20]Id.


[22]Id. at 225.


[26]State v. Phillips, 156 P.3d 583, 587–88 (Idaho Ct. App. 2007) (“Appeals to emotion, passion or prejudice of the jury through use of inflammatory tactics are impermissible.”).


[30] Id. at 1008.


[32] Id.

[33] Id. at 37.


[36] Onuigbo v. United States, 817 F. 2d 3, 6 (1st Cir. 1987).


[39] Id. at 1567.

[40] Id. at 1555.


[43] Id.


[47] Id.


[51] Intersecting identities are the multiple suspect classes that individuals fit in such as their; race, gender, sex, sexuality, disabilities, ethnicity, religion, etc.


[54] Id. at 236.


[58] See Frances Lee Ansley, Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship, 74 CORNELL L. REV. 993, 1023–24 (1989) (discussing the system of racial subordination and white supremacy and how this system has persisted).


[63] Id.


[66] Id.


[69]Id. at 869.


[71]Id.


[73]Allyn, supra note 70.

[74]Smiley & Fakunle, supra note 37, at 357–61.


[76]Id. at 2308.


[78]Id. at 1523.

[79]Id. at 1535.

[80]See discussion supra Section I.


[85]Fed. R. Evid. 403 advisory committee's notes.


[87]This proposed rule is drafted similarly to the definitions found in Fed. R. Evid. 801.


[92]Id.


[96]Id. at 189.

[97]Id.

[98]Charles Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 323 (1987) (because racism is so deeply engrained in our culture, it is likely to be transmitted by tacit understandings.).

[99]“Multiple intersections” are referring to individuals to face intersecting identities that are usually considered as part of minority groups, for example a Black Transgender Woman faces the biases that come with being Black, Transgender, and a Women in America.

[100]Jessica Colarossi, Tapping into the Lived Experiences of People in Black Communities is Key to Police Reform, The Brink Boston University (June 10, 2020), http://www.bu.edu/articles/2020/tapping-into-lived-experiences-of-black-communities-police-reform-efforts/.


[102]Susan M. Behuniak, How Race, Gender, and Class Assumptions Enter the Supreme Court, 10 Race, Jean Ait Belkhiri, Race, Gender, & C.J.79, (2003).

[103]Id.


[105]See supra note, at 175.
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