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Neo-Segregation in Minnesota

Myron Orfield† and Will Stancil

Introduction

If there were a single central contribution that Minnesota has made to American history, it would be its leadership in civil rights, particularly its efforts to advance racial integration in schools and housing. In no other field has the state had such a profound, positive impact on American law, culture, and politics. Minnesota leaders—Black and White, Republican and Democrat—were central to the development of the modern conception of racial civil rights and of an integrated, universal society. They pioneered far-sighted state laws and policies to achieve equality in schools and housing, inventing new ways of thinking about and using government and policy. Without those leaders and their intellectual and political labors, it is difficult to imagine that the core American civil rights laws—the 1964 Civil Rights Act, the 1965 Voting Rights Act, and the Fair Housing Act of 1968—would have been passed in their modern form.

Even more impressive progress occurred at the state and local level, where Minnesota law overcame many of the barriers, legal and political, that had limited the reach of federal statutory rights. Minneapolis would be one of the first cities in the country to pass an enforceable Fair Employment Practices Commission and outlaw racial covenants.[1] In 1955, the state enacted a Fair Employment Practices law; in 1961, a state Fair Housing Act; and in 1967, a comprehensive civil rights law that folded previous legal protections into a powerful state Human Rights Act providing disparate impact causes of action for all forms of discrimination and administrative authority to outlaw *de facto* segregation.[2]

But if the North Star State had helped lead the United States towards a more just and integrated society, in recent years an equally varied collection of Minnesotans is helping undermine those

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1. CARL SOLBERG, HUBERT HUMPHREY 106 (1984).

2. *Id.*; ELMER L. ANDERSEN, A MAN'S REACH 210 (Lori Sturdevant ed., 2000); *Your Civil Rights*, MINN. DEP'T OF HUM. RTS., https://mn.gov/mdhr/yourrights/ [https://perma.cc/X7MG-438X].

historic accomplishments. Where a cross-partisan consensus once existed in favor of traditional civil rights, today a coterie of Minnesotan leaders are working together to promote ideas that attempt to circumnavigate the thorny issue of equal rights and integration. The leaders include members of both major parties, elected officials, businesspeople, community figureheads, and industry representatives. In a number of notable instances, these leaders have directly defended racial segregation, or even praised its benefits. The reforms being promoted by this group may seem new—even innovative—at first glance. But those reforms defend and perpetuate the very old, and deeply entrenched, system of racial segregation. These are Minnesota's neo-segregationists.

Neo-segregationists use the purported defeat of Jim Crow to advance a set of solutions which leave racial enclaves untouched. They assert that—now that Black and Latino families have the legal right to live in any neighborhood they wish, and formal school segregation is nominally prohibited—any continuing racial patterns reflect a choice by those same families to live separately. Many maintain that not only is this choice clearly expressed, but it is in fact preferable and ultimately beneficial to the solidarity and economic prosperity of the groups in question. Despite overwhelming evidence of Black and Latino preference for integrated neighborhoods and decades of academic study showing the myriad ways that illegal discrimination produces segregation, neo-segregationists accept the status quo as proof that the status quo is desirable and inevitable.

This article traces Minnesota's civil rights heritage, including its historical contributions to the nation's movements for racial justice, its local innovations to promote integration and civil rights, and the emergence of the neo-segregationist opposition.

Part I briefly revisits the state's civil rights history, with an eye towards Minnesota's important role on the national stage. Part II discusses the pursuit of school integration in the state since *Brown v. Board of Education*, focusing on the recent resegregation of its schools. Part III discusses Minnesota's development, and then abandonment, of pioneering housing and urban development policies, which briefly served as a national model for housing integration.

Minnesota has in the past led the nation into progress on civil rights, creating some of the United States' most integrated schools and neighborhoods. People who would laud these victories can only fear the growing effectiveness of Minnesota's neo-segregationists,

and hope that, in this respect, the state does not once again act as a bellwether for the nation.

I. Minnesota's Civil Rights Heritage

Minnesota's role in the history of civil rights has been unique. Despite spending much of its history as one of the Whitest states,[3] Minnesota has led the nation in passing and supporting foundational civil rights legislation, particularly systemic reforms to housing and schools. The state has also produced a hugely disproportionate share of leaders for racial justice, both Black and White.[4] Some may argue that Minnesota's very Whiteness and homogeneity gave its political leaders freedom to act on these questions. Yet other equally-White states did not generate equivalent contributions. Instead, Minnesotan civil rights leadership is rooted, in large part, in a continuous intellectual and political heritage that can be traced to the Civil War and the state's founding years.

A. Early Years

Some of Minnesota's early territorial political leaders were abolitionists from Massachusetts, Maine, and New York.[5] After the passage of the Kansas-Nebraska Act (which overruled the Missouri Compromise and allowed the population of each state to decide its own status on slavery), Minnesota entered into the union as a free state in 1858, with both its Democrats and Republicans strongly opposing slavery.[6] Militant abolitionists protested the arrival of slaveholders on the St. Paul levy, at the hotels of slaveholders on vacation during Minnesota's temperate summers, and "kidnapped" slaves passing through the state in order to shepherd them to freedom.[7] Minnesota's courts flouted the Supreme Court's *Dred*

3. *Whitest States 2021*, WORLD POP. REV. (2021), https://worldpopulationreview.com/state-rankings/whitest-states [https://perma.cc/H27Z-UGUK].

4. *See* JENNIFER A. DELTON, MAKING MINNESOTA LIBERAL: CIVIL RIGHTS AND THE TRANSFORMATION OF THE DEMOCRATIC PARTY XVI, at 76–77 (2002).

5. *See* WILLIAM D. GREEN, A PECULIAR IMBALANCE: THE FALL AND RISE OF RACIAL EQUALITY IN EARLY MINNESOTA 71–82 (2007) [hereinafter GREEN, A PECULIAR IMBALANCE] (noting that these leaders settled and were most prominent in St. Anthony Falls).

6. *See id.* at 73, 82–89 (explaining that while both parties agreed on their opposition to slavery, they differed over the issue of Black suffrage).

7. WILLIAM D. GREEN, DEGREES OF FREEDOM: THE ORIGINS OF CIVIL RIGHTS IN MINNESOTA, 1865–1912, at 23–25 (2015) [hereinafter GREEN, DEGREES OF FREEDOM].

Scott decision by freeing slaves brought into the state by slaveholders under the Minnesota Constitution.[8]

Minnesota was the first state to offer troops in the Civil War.[9] The First Minnesota Volunteers suffered one of the highest casualties of any Northern regiment as they fought at Gettysburg, the turning point of the American Civil War.[10] On the last day of Gettysburg, the First Minnesota seized the Virginia militia's battle flag.[11] For 150 years, Virginia has demanded its return, President Grover Cleveland ordered its return through an executive order, and Virginians initiated a federal lawsuit claiming Minnesota is in illegal possession of the flag.[12] Minnesota has refused, with former Governor Mark Dayton declaring the captured flag "something that was earned through the incredible courage and valor [sic] men who gave their lives and risked their lives to obtain it," and that "it would be a sacrilege to return it" to a state planning to commemorate the Confederacy.[13]

Minnesota Congressman Ignatius Donnelly fought to forbid educational segregation in public schools established or aided by federal funds.[14] Minnesota legalized Black suffrage through public referendum two years before congressional ratification of the Fifteenth Amendment.[15] In 1869, Minnesota outlawed racial segregation in its schools and enacted legislation to withhold all state funding to any segregated public school (nearly 100 years

8. The most famous case being that of Eliza Winston, a slave accompanying her mistress on vacation to Minnesota in 1860. Abolitionists brought a writ of habeas corpus, and Winston was freed from her master, who was staying at a lodge on Lake Harriet in Minneapolis. A Hennepin County Judge held that the Minnesota Constitution forbade slavery despite the U.S. Supreme Court's ruling that no state could do so. William D. Green, *Eliza Winston and the Politics of Freedom*, 57 MINN. HIST. 106, 107–08 (2000).

9. *The Civil War (1861-1865)*, MINN. HIST. SOC'Y, https://www.mnhs.org/fortsnelling/learn/military-history/civil-war [https://perma.cc/G5U8-2BU7].

10. Maja Beckstrom, *Minnesota Civil War Regiment Charged Into History at Gettysburg*, PIONEER PRESS (Feb. 4, 2017), https://www.twincities.com/2013/06/28/minnesota-civil-war-regiment-charged-into-history-at-gettysburg/ [https://perma.cc/U8QF-4VHJ].

11. Brian Resnick, *150 Years After Gettysburg, Virginia and Minnesota Fight Over Confederate Flag*, ATLANTIC (June 28, 2013), https://www.theatlantic.com/national/archive/2013/06/150-years-after-gettysburg-virginia-and-minnesota-fight-over-confederate-flag/313796/ [https://perma.cc/7R79-DJLC].

12. *Id.*

13. *Id.*

14. GREEN, A PECULIAR IMBALANCE, *supra* note 5, at 168.

15. *Id.* at 148.

before Congress would do the same with passage of Title VI of the 1964 Civil Rights Act).[16]

In 1883, the U.S. Supreme Court in the *Civil Rights Cases* declared that prohibiting discrimination in public accommodations was beyond the reach of Congress under the Fourteenth Amendment.[17] Two years later, the Minnesota legislature outlawed segregation in public accommodations under state law.[18] In 1921, after a racially motivated lynching in Duluth, Minnesota made lynching a crime decades before Congress would act.[19]

The national movement toward racial integration in schools and neighborhoods began in St. Paul in 1905 when Frank McGhee, a brilliant Black Minnesota attorney, agreed, in two historic strategy meetings with W.E.B. Du Bois, to form the Niagara movement.[20] The movement broke with the separatist policies of Booker T. Washington and would lead to the formation of the NAACP and its central strategy to end apartheid in schools and neighborhoods.[21] McGhee would represent this movement by bringing legal actions against Jim Crow in Tennessee and other states.[22] McGhee was the first in a series of great Black civil rights lawyers fighting for racial integration, a pantheon that would ultimately grow to include Charles Hamilton Houston and Thurgood Marshall.

McGhee was a trailblazer: out of Minnesota, a new generation of remarkable Black civil rights leaders would launch their careers, and an unusual number became icons of the national movement. Roy Wilkins, Clarence Mitchell Jr., Anna Arnold Hedgemen, and Whitney Young, who either grew up or started their careers in Minnesota, secured some of the early victories of the modern civil rights movement against racial covenants and employment discrimination in Minneapolis and St. Paul.[23] Based on these local achievements, they moved to the national stage to become some of

16. *Id.* at 169–70.

17. GREEN, DEGREES OF FREEDOM, *supra* note 7, at 124–25.

18. *Id.* at 130–32.

19. Marilyn Ziebarth, *Judge Lynch in Minnesota*, MINN. HIST. SOC'Y, Summer 1996, at 72, 72–73 [https://perma.cc/B85Z-8KTN]; *see generally* William D. Green, *To Remove the Stain: The Trial of the Duluth Lynchers*, MINN. HIST. SOC'Y, Spring 2004, at 22 (recounting the events of the lynching and public response afterwards).

20. GREEN, DEGREES OF FREEDOM, *supra* note 7, at 289–91.

21. *Id.* at 293–94.

22. *Id.* at 298; *see also* ANGELA JONES, AFRICAN AMERICAN CIVIL RIGHTS: EARLY ACTIVISM AND THE NIAGARA MOVEMENT 224 (2011).

23. *See* DELTON, *supra* note 4, at 76, 83.

the most important national Black civil rights leaders.[24] Wilkins would become the national executive director of the NAACP during its years of greatest accomplishment, Young the executive director of the National Urban League, and Hedgemen leader of the movement toward the adoption of the Fair Employment Practices Committee.[25]

These iconic figures, together with Lena Smith, Minnesota's first Black female lawyer and chair of the Minneapolis NAACP,[26] Nellie Stone Johnson,[27] W. Harry Davis,[28] and Mathew Little,[29] would place racial integration of schools and neighborhoods at the heart of the civil rights movement in Minnesota, later at the center of the national struggle for freedom.

Minnesota experienced early successes that other places did not. As racial covenants and violence stopped residential integration in it tracks in Chicago, Detroit, and almost every northern city,[30] Smith and the Minneapolis NAACP defeated these tactics in a historical struggle in a south Minneapolis neighborhood.

In June of 1931, Arthur and Edith Lee, a Black couple, purchased a home at 4600 Columbus Avenue, in a White neighborhood bordering the "color line."[31] After initial threats against the Lees failed, abusive crowds of thousands gathered

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24. *Id.*

25. *Roy Wilkins*, NAACP, https://naacp.org/find-resources/history-explained/civil-rights-leaders/roy-wilkins [https://perma.cc/JD5N-SSFL]; *Whitney M. Young, Jr.*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/Whitney-M-Young-Jr [https://perma.cc/5K4B-SR2V]; Emma Rothberg, *Anna Arnold Hedgeman*, NAT'L WOMEN'S HIST. MUSEUM, https://www.womenshistory.org/education-resources/biographies/anna-arnold-hedgeman [https://perma.cc/EKX8-HQ64].

26. Jackie Sluss, *Lena Olive Smith: Civil Rights in the 1930s*, HENNEPIN HIST. MAG., Winter 1995, https://hennepinhistory.org/lena-olive-smith/ [https://perma.cc/5H66-SY3M].

27. DELTON, *supra* note 4, at 88–89.

28. *W. Harry Davis*, STAR TRIB. (Aug. 16, 2006), https://www.startribune.com/obituaries/detail/8414425/ [https://perma.cc/CNR2-DE3T].

29. *Matthew Little: Fighting the Fires of Injustice*, MINN. HIST. SOC'Y, https://www.mnhs.org/mgg/boom/building-life/6509 [https://perma.cc/6BS3-SPDH].

30. *See generally* JOE T. DARDEN & RICHARD W. THOMAS, DETROIT: RACE RIOTS, RACIAL CONFLICTS, AND EFFORTS TO BRIDGE THE RACIAL DIVIDE (2013) (providing historical analysis of racial conflict in Detroit and the violence that sprung from it); Whet Moser, *How White Housing Riots Shaped Chicago*, CHI. MAG. (Apr. 29, 2015), https://www.chicagomag.com/city-life/april-2015/how-white-housing-riots-shaped-chicago/ [https://perma.cc/JTE4-UB2S] (recounting decades of racial riots in Chicago and the similarities to how racial segregation developed and was sustained in Baltimore).

31. Ben Welter, *July 16, 1931: Angry White Mob Surrounds Minneapolis Home*, STAR TRIB. (May 29, 2020), https://www.startribune.com/july-16-1931-angry-white-mob-surrounds-minneapolis-home/283979011/ [https://perma.cc/4JCZ-KSTY].

nightly around their house, throwing stones and firecrackers, and becoming increasingly violent.[32] Rather than back down as others were forced to do all over the country, Lena Smith galvanized the local NAACP, churches, and reform organizations to defend the Lees.[33] Notably, she also personally appealed to progressive Governor Floyd B. Olson, who mobilized the Minnesota National Guard to disperse the crowds.[34] This was unprecedented in residentially segregated northern cities. Out of this victory would come the Tilsenbilt homes, likely the first intentionally racially integrated neighborhood in the United States.[35]

B. Emergence of the Civil Rights Movement

Perhaps because of successes like these, many of Minnesota's political leaders remained strong civil rights advocates throughout the 20th century. This included Republican Party leaders, such as Governors Harold Stassen, Luther Youngdahl, Elmer L. Anderson, Harold LeVander, Al Quie, and Arne Carlson, who remained supportive of civil rights initiatives through the 1990s, even while many of their co-partisans had backed away from racial justice issues.[36] Governor Quie, when he served in Congress, even worked hand in hand with Hubert Humphrey to pass the 1964 Civil Rights Act.[37]

But on the other side of the aisle, the issue had taken on an even greater importance. In 1944, the Minnesota Farmer-Labor Party, a left-leaning, anti-Wall Street, isolationist entity, merged with the more centrist Minnesota Democratic Party.[38] The Farmer

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32. *Id.*

33. *Id.*

34. *Lena at 100: Celebrating a Civil Rights Icon*, MITCHELL HAMLINE (June 14, 2021), https://mitchellhamline.edu/news/2021/06/14/lena-at-100-celebrating-a-civil-rights-icon/ [https://perma.cc/3A8R-B3SY].

35. Deebaa Sirdar & Richard L. Kronick, *Tilsenbilt Homes Historic District*, MINN. HIST. SOC'Y, https://minneapolishistorical.org/items/show/174 [https://perma.cc/U6JD-QD2R].

36. Iric Nathanson, *From Mainstream to Extinct: A Look Back at the GOP's Progressive Era in Minnesota*, MINNPOST (Oct. 18, 2018), https://www.minnpost.com/politics-policy/2018/10/from-mainstream-to-extinct-a-look-back-at-the-gops-progressive-era-in-minnesota/ [https://perma.cc/8PBD-WKNM].

37. *See* Doug Grow, *Remembering the Voting Rights Act – And an Era When Bipartisanship Wasn't Uncommon*, MINNPOST (July 31, 2015), https://www.minnpost.com/politics-policy/2015/07/remembering-voting-rights-act-and-era-when-bipartisanship-wasnt-uncommon/ [https://perma.cc/8SRE-WNVH].

38. *See* DELTON, *supra* note 4, at 1–18 (providing background on the rise of the Farmer-Labor party and its merger with the Democrats); *see generally* JOHN EARL HAYNES, DUBIOUS ALLIANCE: THE MAKING OF MINNESOTA'S DFL PARTY (1984) (accounting for the historically fraught struggle between the Democratic and Farmer

Laborites disliked and feared the pro-business, internationalist bent of the Democrats. They agreed to merge only after receiving a clear commitment that the new, joint party would become the national leader in the one area where both factions saw eye-to-eye: civil rights issues.[39] Thus, the question of racial equality and integration became the mortar which fused Minnesota's DFL party together.

Hubert Humphrey would emerge as the leader of this new party.[40] True to the terms of the merger, Humphrey would, as mayor of Minneapolis, act immediately to fulfill the party's civil rights agenda. In 1947, civil rights leaders would work with Hubert Humphrey to abolish racial covenants in Minneapolis.[41] Humphrey and the Minneapolis City Council would establish one of the nation's first fair employment ordinances that same year.[42]

These local accomplishments immediately made Humphrey a national civil rights figure, not to mention a hero of the Americans for Democratic Action, an organization that would become the era's leading liberal voice for integration.[43] Humphrey built his national reputation as a liberal Democrat interested in human relations and was called on to speak to emerging civil rights organizations throughout the north.[44] "I have an unholy desire to communicate to eastern audiences," he told a columnist.[45]

With Wilkins, Young, and Mitchell at his side—now national leaders in their own right—not to mention Lena Smith and Nellie Stone Johnson, young Hubert Humphrey would take on the President of the United States and the unified leadership of the Democratic Party to force the inclusion of a pro-integration civil rights plank in the national party platform.[46]

The struggle is nowhere better described than in Robert Caro's book *The Master of the Senate*. At first, Humphrey was stymied in

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Labor parties, their contentious merger into the Democratic Farmer Labor party, and how this influenced the generation of liberal Minnesotan politicians such as Hubert Humphrey and Walter Mondale that would follow).

39. DELTON, *supra* note 4, at 158–59.

40. *See* SOLBERG, *supra* note 1, at 122–23.

41. DELTON, *supra* note 4, at 104–10.

42. SOLBERG, *supra* note 1, at 106.

43. ROBERT CARO, MASTER OF THE SENATE: THE YEARS OF LYNDON JOHNSON III, at 437 (2003).

44. DELTON, *supra* note 4, at 119.

45. *Id.*

46. CARO, *supra* note 43, at 438.

the party's platform committee.[47] Caro describes Humphrey's triumphant effort to drive a sea change in the party:

> Humphrey was told to his face that speaking for the minority plank would ruin—permanently—his own career . . . . But, Humphrey was also to say, some issues were beyond compromise. "For me personally and for the party, the time had come to suffer whatever the consequences."
>
> . . .
>
> For once his speech was short—only eight minutes long, in fact, only thirty-seven sentences.
>
> And by the time Hubert Humphrey was halfway through those sentences, his head tilted back, his jaw thrust out, his upraised right hand clenched into a fist, the audience was cheering every one—even before he reached the climax, and said, his voice ringing across the hall, "To those who say we are rushing this issue of civil rights—I say to them, we are one hundred and seventy-two years late."
>
> "To those who say this bill is an infringement on states' rights, I say this—the time has arrived in America. The time has arrived for the Democratic Party to get out of the shadow of states' rights and walk forthrightly into the bright sunshine of human rights."
>
> "People," Hubert Humphrey cried, in a phrase that seemed to burst out of him; it was not in the written text. "People! Human beings!—this is the issue of the twentieth century." "In these times of world economic, political and spiritual—above all, spiritual—crisis, we cannot and we must not turn back from the path so plainly before us. That path has already led us through many valleys of the shadows of death. Now is the time to recall those who were left on the path of American freedom. Our land is now, more than ever before, the last best hope on earth. I know that we can—know that we shall—begin here the fuller and richer realization of that hope—that promise—of a land where all men are truly free and equal."
>
> . . .
>
> While Humphrey had been speaking, there had been something else that Paul Douglas would never forget: "hard-boiled politicians dabbing their eyes with their handkerchiefs."[48]

The minority plank would win, 651.5 to 582.5.[49] The Dixiecrats would walk out.[50] Strom Thurmond, as their nominee, would win four states, but Truman would more than make up for this in an increased Black vote in northern states that would carry him to victory.[51]

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47. *Id.* at 438–42.
48. *Id.* at 443–44.
49. *Id.* at 444.
50. *Id.*
51. *Id.*

After his election to the Senate, Humphrey would come to Washington as a liberal hero, but was initially marginalized by the Senate's political leadership.[52] However, events eventually quickened the pace of progress.

Congressional liberals were empowered by developments like the 1954 *Brown* decision, and the emergence of Martin Luther King, Jr. and his work on the Montgomery bus boycott.[53] Episodes like the Little Rock Crisis and the growth of massive resistance began to impress upon Lyndon Johnson, at the time Senate Majority Leader, the importance of making headway on civil rights if he wanted to ever lay claim on the Democratic presidential nomination.[54]

In this, Humphrey had a role to play. He began to serve as Majority Leader Johnson's conduit to the liberal faction of the legislature, and in that capacity helped Johnson break the Senate gridlock that had prevented the passage of civil right legislation for the past 80 years.[55] The 1957 and 1960 Civil Rights Acts were not substantive, but they represented a breaking of a dam, and suggested that future progress was on its way.[56]

In 1963, civil rights leaders organized the March on Washington, arguably the most important single civil rights demonstration in modern history.[57] Of the "Big Six" who organized the March, three would be Minnesotans. In addition to Dr. King, John Lewis, and James Farmer, the six included Roy Wilkins, Whitney Young, and Anna Arnold Hedgemen, representing the NAACP, National Urban League, and National Council of Churches, respectively (the latter taking the place of A. Phillip Randolph, the aging head of the Brotherhood of Sleeping Car Porters).[58]

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52. *See* SOLBERG, *supra* note 1, at 133–39 (noting that Humphrey, initially hailed by *Time* as the "[n]o. 1 prospect for liberalism in this country," received low level committee appointments, was referred to as a fool by Senate leader Dick Russell, had his favored legislation blocked, and was publicly embarrassed by the questioning of Senator Robert Taft).

53. CARO, *supra* note 43, at 709–10.

54. *Id.* at 132–63.

55. SOLBERG, *supra* note 1, at 179–80.

56. *Id.* at 79; CARO, *supra* note 43, at 1032–33.

57. *See generally* WILLIAM P. JONES, THE MARCH ON WASHINGTON: JOBS, FREEDOM, AND THE FORGOTTEN HISTORY OF CIVIL RIGHTS (2013) (providing a comprehensive history of the March on Washington and its impact).

58. Tina Burnside, *Minnesota Advocate Anna Arnold Hedgeman Worked at the Intersection of Black and Women's Rights*, MINNPOST (Mar. 8, 2021), https://www.minnpost.com/mnopedia/2021/03/minnesota-advocate-anna-arnold-hedgeman-worked-at-the-intersection-of-black-and-womens-rights/ [https://perma.cc/JW4Y-KEEP].

Humphrey's larger role would come after the March, as the floor leader for the passage of the 1964 Civil Rights Act, whose major planks involved employment and public accommodation.[59] Title VI allowed the Justice Department to commence school desegregation suits and the cutoff of federal funds to segregated schools and public housing.[60] The bill would take the whole summer of 1964, and Humphrey's legislative genius, especially bringing Illinois Republican Everett Dirksen into the fold, would be central to its passage.[61]

The leaders of the 1960s saw segregation as a central mechanism by which Black Americans were oppressed and understood the elimination of segregation to be a core aim, if not the core aim, of the entire movement. In his famous speech during the March on Washington, and over 100 other speeches and writings, King condemned segregation:

> But 100 years later, the Negro is still not free. One hundred years later, the life of the Negro is still sadly crippled by the manacles of segregation and the chains of discrimination. One hundred years later, the Negro lives on a lonely island of poverty in the midst of a vast ocean of material prosperity. One hundred years later, the Negro is still languished in the corners of American society and finds himself in exile in his own land.[62]

King was an unambiguous foe of segregation in schools and neighborhoods. He would write:

> [I]f democracy is to live, segregation must die. Segregation is a glaring evil. It is utterly unchristian. It relegates the segregated to the status of a thing rather than elevate him to the status of the person. Segregation is nothing but slavery covered up with certain niceties of complexity. Segregation is a blatant denial of the unity which we all have in Christ Jesus.[63]

Although the legal distinction between "de facto" and "de jure" segregation was not widespread at the time, writings from the period make it clear that leaders' concerns about segregation were not restricted to the mere existence of discriminatory laws, but the actual fact of racial separation. Humphrey himself would make this clear in his 1964 book *Integration vs Segregation*:

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59. SOLBERG, *supra* note 1, at 221–27.

60. *Title VI of the Civil Rights Act of 1964*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/fcs/TitleVI [https://perma.cc/6CHM-KC47].

61. *See* SOLBERG, *supra* note 1, at 223–27 (highlighting that Humphrey publicly praised and cultivated the support of Senator Dirksen from the start, constantly asking for his input and choosing to have negotiations take place in Dirksen's office).

62. Martin Luther King, Jr., I Have a Dream, Address at the March on Washington (Aug. 28, 1963).

63. Martin Luther King, Jr., Facing the Challenge of a New Age, Address at the First Annual Institute on Nonviolence and Social Change (Dec. 3, 1956).

> A first essential is to comprehend the magnitude of the problem [of segregation] as it exists now, after generations of segregated education. In any part of the nation today, a Negro baby has only half the chance of completing high school, and one-third the chance of completing college, as a white baby born at the same time and place. And today, almost a decade after the Supreme Court ruling against segregated education, only about 9 per cent of the more than three million Negro children of school age in the southern and border states attend integrated schools.[64]

And:

> [O]ur society cannot refuse the Negro an equal education and then refuse to employ him in a decent job on the grounds that he is untrained. We cannot follow a deliberate policy of *apartheid* and then say we refuse to have our children associate with the Negro because of differences in behavior. Such differences as exist result from this very pattern of forcing the Negro's exclusion from the mainstream of American life.
>
> . . . But if responsible leaders fail to act affirmatively and constructively, they lose the battle. If they wait for "public opinion to jell," the leadership role inevitably will be seized by racial extremists. Public opinion must be considered in shaping policy, but policy in itself is a powerful determinant of that opinion. For the successful desegregation and integration of our schools and communities, resolute leadership is essential.[65]

C. The Fair Housing Act

No single piece of civil rights legislation has stronger Minnesota ties than the Civil Rights Act of 1968, also known as the Fair Housing Act.

Throughout the 1960s, civil rights campaigners had pushed for government action to eliminate segregation in housing.[66] These fair housing advocates had seen little success at the federal level but had won some limited victories in state and local contexts.[67] This was especially true in Minnesota, where both the city of Minneapolis and the state itself were early adopters of fair housing legislation.[68]

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64. INTEGRATION VS SEGREGATION 2 (Hubert H. Humphrey ed., 1964).

65. *Id.* at 6–7.

66. *See generally* JULIET Z. SALTMAN, OPEN HOUSING AS A SOCIAL MOVEMENT (1971) (studying the housing movement at the national and local levels during the 1950s and 1960s).

67. *Id.* at 127–28 (noting that New York, Denver, Los Angeles, and Seattle all had fair housing programs that ranged from limited to tremendous success).

68. SOLBERG, *supra* note 1, at 117–18; ANDERSEN, *supra* note 2, at 210.

In 1966, Dr. King campaigned for the Fair Housing Act in Chicago.[69] Dr. King's efforts in the suburbs of Chicago were met with violence.[70] Riots broke out in Watts and Cleveland shortly thereafter.[71] Nearly 160 riots occurred across the country in July and August of 1967.[72]

As a result, progress on fair housing legislation had ground to a halt by January 1968.[73] Regardless of the fact that they were in fact rooted in segregation, the riots created a backlash. Exploiting White fear coming out of the riots, conservative forces picked up many seats in the 1966 election, and Ronald Reagan rose to prominence as the governor of California.[74]

As had happened with Humphrey twenty years prior, it was left to a young Minnesotan to spur representatives to abandon their course of inaction. With fair housing in a tough political spot, thirty-eight-year-old Walter Mondale was able to take leadership on the issue.[75] Ed Brooke of Massachusetts and Mondale co-authored a strong new fair housing amendment to an unrelated bill already moving through the Senate.[76] By pre-arrangement Humphrey himself was presiding over the bill and allowed Mondale to offer the amendment.[77]

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69. Walter F. Mondale, *Afterword: Ending Segregation: The Fair Housing Act's Unfinished Business*, *in* THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES, AND FUTURE IMPLICATIONS OF THE 1968 FAIR HOUSING ACT 291, 291–96 (Gregory Squires ed., 2017) [hereinafter Mondale, *Afterword*]; Mary Lou Finley, *The Open Housing Marches: Chicago Summer '66*, *in* CHICAGO 1966: OPEN HOUSING MARCHES, SUMMIT NEGOTIATIONS, AND OPERATION BREADBASKET 1, 1 (David J. Garrow ed., 1989).

70. Mondale, *Afterword*, *supra* note 69, at 291.

71. CHARLES LAMB, HOUSING SEGREGATION IN SUBURBAN AMERICA SINCE 1960: PRESIDENTIAL AND JUDICIAL POLITICS 37 (2005).

72. *The Riots of the Long, Hot Summer*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/story/the-riots-of-the-long-hot-summer [https://perma.cc/SYR4-BGHV].

73. Mondale, *Afterword*, *supra* note 69, at 291; *see also* LAMB, *supra* note 71, at 43–45 (noting that the legislation likely would not have later passed in 1968 had Dr. King not been murdered).

74. Cathleen Decker, *Analysis: Watts Riots Shifted State to the Right, But New Demographics Pushed It Left*, L.A. TIMES (Aug. 5, 2015), https://www.latimes.com/local/politics/la-me-pol-watts-politics-20150806-story.html [https://perma.cc/W2SJ-5YU2].

75. Mondale's account of the passage of the Fair Housing Act is available in several sources. *See, e.g.*, Walter F. Mondale, Address to the 2015 National Fair Housing Conference (Sept. 1, 2015); Mondale, *Afterword*, *supra* note 69.

76. Mondale, *Afterword*, *supra* note 69, at 291.

77. *Id.*

Southern senators launched a filibuster against the bill, and three cloture votes failed.[78] But on the day of the third vote, the Kerner Commission, tasked by President Johnson with uncovering the roots of the 1967 riots, finally released its report.[79] It attributed the riots to "residential segregation and the conditions of the ghetto."[80] Helpfully, the report urged passage of a comprehensive fair housing bill to prevent similar riots.[81]

The Kerner report's breadth and strong prescriptive conclusions jarred the fair housing law out of gridlock.[82] Several years earlier, in 1966, Minority Leader Dirksen had declared Mondale's fair housing proposal unconstitutional.[83] But with calls for action now coming from the public, from civil rights leaders, and from the Kerner Commission, he now expressed openness to compromise.[84] With assistance from President Johnson, the bill passed the Senate.[85]

In the House, the law stalled again, this time in the Rules Committee.[86] But on April 4th, Dr. King was shot in Memphis, triggering riots nationwide, with one of the most severe outbreaks of violence happening in Washington, D.C. itself.[87] Forced to react, the House passed the bill on April 10th, and the Fair Housing Act was signed into law the next day.[88]

In 2017, Mondale would reflect on the Act:

> Above all Congress intended—as the Supreme Court recently held—that the Fair Housing Act serve as a new, powerful tool to end racial residential segregation and to replace racial ghettoes with vibrant and racially integrated neighborhoods. The events of the late 1960s highlighted how deeply interwoven segregation was into the social fabric of American cities, and how concertedly American institutions had worked to maintain it. Racial separation, once enforced as policy, was now perpetuated as a matter of habit through the actions of public

78. *Id.* At the time, sixty-seven votes were needed to end a filibuster. *Id.*

79. *Id.* at 291–92.

80. *Id.* at 292.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *See id.* ("I called President Johnson and told him that Bob Bartlett of Alaska wanted the filibuster to remain a strong tool for small states like Alaska, but that he also badly wanted a certain federal construction project. After a moment's silence, I heard the president say, 'Thank you,' and there was a click. Bob Bartlett voted for cloture and we ended the filibuster . . . .").

86. *Id.*

87. *Id.*

88. *Id.*

> agencies and private citizens alike. Especially after the Kerner Commission report, Congress understood that integration was the only mechanism for attacking the root causes of the discrimination and suffering that plagued American cities. Halting segregation, dismantling it, and building integration were the overriding objectives of the [Fair Housing Act], the end goals towards which all its provisions were to be directed.[89]

For over a century, Minnesota has blazed a trail on civil rights in ways large and small. Its advocates and activists were instrumental in forging the 20th century's civil rights movement, and from the end of World War II, its elected leaders have been at the front lines of the legislative battle to fulfill the promise of *Brown v. Board of Education* and to make the guarantees of the Fourteenth Amendment a lived reality in American society. These courageous individuals risked their careers, endured threats and abuse, and two leaders—Hubert Humphrey and Walter Mondale—paid the ultimate political price, losing the presidency to opponents who campaigned on White reactionary and segregationist sentiment.[90]

II. School Desegregation

Like in almost all of America's major cities, schools in Minneapolis and St. Paul were racially segregated in the first half the 20th century.[91] However, the city's residents—and the state government—embraced desegregation efforts more readily than many others. Starting in the 1960s, various governmental entities in Minnesota began to proactively attack school segregation. Minn. Stat. § 123B.30, first enacted in 1959, forbade segregation on penalty of losing funding:

> No district shall classify its pupils with reference to race, color, social position, or nationality, nor separate its pupils into different schools or departments upon any of such grounds. Any district so classifying or separating any of its pupils, or denying school privileges to any of its pupils upon any such ground shall forfeit its share in all apportioned school funds for any apportionment period in which such classification, separation, or exclusion shall occur or continue.[92]

In 1967, the state added an additional anti-segregation provision to the Minnesota Human Rights Act forbidding local

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89. *Id.*

90. *See* LAMB, *supra* note 71, at 45; DELTON, *supra* note 4, at xii–xiii.

91. Greta Kaul, *With Covenants, Racism Was Written into Minneapolis Housing. The Scars Are Still Visible*, MINNPOST (Feb. 22, 2019), https://www.minnpost.com/metro/2019/02/with-covenants-racism-was-written-into-minneapolis-housing-the-scars-are-still-visible/ [https://perma.cc/36YZ-2UZD].

92. MINN. STAT. § 123B.30 (2020).

school districts from "discriminat[ing] in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person because of race, color, creed . . . ."[93] Discrimination is expressly defined to include segregation or separation.[94] The law also defined a discriminatory practice to "exclude, expel, or otherwise discriminate against a person seeking admission as a student, or a person enrolled as a student because of race, color, creed . . . ."[95]

By the early 1970s, state educational policy started galvanizing against segregation in earnest. Although federal law had begun to distinguish between *de jure* and *de facto* segregation, the Minnesota Board of Education announced its intention to regulate and reduce both types in 1967.[96] In 1973, the Minnesota Department of Education promulgated its first desegregation rule.[97] This rule applied flexible racial ratios in accordance with the Supreme Court's approved remedial framework outlined in *Swann v. Charlotte-Mecklenburg Board of Education*.[98]

Near simultaneously, local efforts to end racial segregation in schools begin to bear fruit—although not without some resistance in local government. In the late 1960s, a collection of parents sought to combine two South Minneapolis elementary schools, Field and Hale, one of which was predominantly Black and the other of which was predominantly White.[99] After successfully combining, both schools served all children in the area, with students attending Hale kindergarten through third grade and Field fourth through sixth grade.[100]

A federal school desegregation lawsuit, *Booker v. Special School District No. 1*, was filed against Minneapolis, resulting in a court-enforced desegregation order in 1972.[101] The decision creating the order cited "optional attendance zones," the "size and location of

93. MINN. STAT. § 363A.13(1) (2020).

94. MINN. STAT. § 363A.03(13) (2020).

95. MINN. STAT. § 363A.13(2) (2020).

96. *See* State of Minn. Dep't of Child., Families, & Learning, Statement of Need and Reasonableness, In the Matter of Proposed Rules Relating to Desegregation: Minnesota Rules Chapter 3535 (3535.0100 to 3535.0180) (1998) [hereinafter 1998 SONAR] (discussing the history of desegregation efforts and regulations in Minnesota).

97. *See id.*

98. *Id.* at 2; *see* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

99. *See, e.g.*, Brandt Williams, *40 Years Later, Minneapolis Parents Recall Bussing's Start*, MPR NEWS (May 4, 2012), https://www.mprnews.org/story/2012/05/04/minneapolis-busing-40-year-anniversary [https://perma.cc/CJ2Z-P6MN].

100. *See id.*

101. *See* Booker v. Special Sch. Dist. No. 1, 351 F. Supp. 799 (D. Minn. 1972).

schools," "transfer policies," and "racially motivated" boundaries as evidence of *de jure* segregation by the district.[102] For the following decade, the court helped guide policies such as school boundary decisions and conducted annual reviews of the district's progress towards integration.[103]

In the mid and late 1970s, the Minneapolis district and the state battled over the scope and reach of Minnesota desegregation rules. In 1978, the state released an administrative rule that would regulate not just intentional *de jure* segregation but also *de facto* segregation.[104] Local districts argued such a rule was impermissible, but in a 1978 Statement of Need and Reasonableness (SONAR), the Minnesota Attorney General and statewide Board of Education declared that such authorities were clearly intended by the state legislature.[105]

The Minneapolis district retaliated by challenging the state's authority to regulate *de facto* segregation in administrative proceedings, both on constitutional and state law grounds.[106] An administrative law judge upheld the state's regulation of *de facto* segregation and rejected every aspect of Minneapolis's challenge.[107] The judge found ample constitutional grounding for Minnesota's rules in the Supreme Court's 1971 *Swann* decision, which clearly distinguished between target racial ratios and prohibited quotas or racial balancing.[108] The opinion upheld the state's authority to forbid *de facto* segregation by examining the § 123B.30 statutory prohibition of segregation and the even broader prohibition of the Minnesota Human Rights Act.[109] The opinion noted that the legislature had acquiesced to these regulations by repeatedly

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102. *Id.* at 804, 809.

103. Many of the records related to the *Booker* decision are difficult to access today and perhaps lost altogether—a not uncommon predicament for desegregation plaintiffs. However, in 1978, midway through the courts' oversight of the *Booker* decision, one challenge to the case rose to the federal circuit courts, where it was defeated. *See* Booker v. Special Sch. Dist. No. 1, 585 F.2d 347 (8th Cir. 1978).

104. *See* State of Minn. Dep't of Educ., In the Matter of: The Proposed Amendments to Rules of the State Board of Education Governing Equality of Educational Opportunity and School Desegregation, Statement of Need and Reasonableness (1978).

105. *Id.*

106. *See* State of Minn. Off. of Hearing Exam'rs, Rep. of Hearing Exam'r, In the Matter of the Proposed Adoption of Rules of the State Board of Education Governing the Standard for Determining School Segregation and Community Services Dealing Specifically with the Limitations on Aids and Levies and the Annual Reporting Data (1978).

107. *See id.*

108. *Id.* at 1.

109. *Id.* at 4.

funding transportation, construction, and other activities undertaken in the course of desegregation.[110]

By the early 1980s, much of the resistance to school desegregation in the Twin Cities had faded into apparent consensus. The legal and policy worlds seemed to agree: Minnesota's desegregation efforts were working. The Minneapolis desegregation order was dissolved in 1983 to give the district "the opportunity for autonomous compliance with constitutional standards."[111] Notably, the court did not find that the Minneapolis school district was integrated or unitary, and received assurances that the State Department of Education was "willing and able to assume the duty of monitoring the further implementation of the District's desegregation/integration plan."[112]

A. The Rise of School Choice

Starting in the late 1980s, school diversity increased rapidly in Minnesota. While most non-White segregation had previously been between schools in the same district—primarily in Minneapolis and St. Paul—now, interdistrict segregation, where entire districts were racially isolated, had begun to grow rapidly.[113] As strong as the existing desegregation rules were in Minnesota, they imposed no interdistrict remedies—meaning districts, acting alone, could not avoid becoming segregated if their demographics shifted too much.

These shifts brought a wave of new attention to the problem of racial segregation. But while Minnesota had historically confronted segregation head-on with strong integration measures, this time would be different. Many of the state's public and private leaders and advocates would instead promote remedies that avoided integration—or worse, increased segregation outright—in misguided attempts to eliminate the harms of segregation without eliminating the thing itself.[114]

In a national context, the most significant of these efforts was the invention of the charter school and the expansion of school

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110. *Id.* at 3.

111. Booker v. Special School District No. 1, No. 4-71 Civ. 382, slip op. at 5 (D. Minn. June 8, 1983).

112. *Id.* at 4.

113. MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY 39–41 (Brookings Inst. & Lincoln Inst. of Land Pol'y eds., 1997).

114. *See* Rachel Cohen, *The Untold History of Charter Schools*, DEMOCRACY (Apr. 27, 2017), https://democracyjournal.org/arguments/the-untold-history-of-charter-schools/ [https://perma.cc/8S87-MRRZ].

choice. Although the name and the idea of independent schools stretched back decades, the modern concept of a school choice was born in Minnesota in the late 1980s.[115] A Minnesota reformer, Ted Kolderie, developed a theory of how education could be improved by inserting market-like competition into the supposedly monopolistic, non-competitive system governed by school boards.[116] Although Kolderie's initial broad proposal did not explicitly position itself as an alternative to segregation, it did identify segregated urban schools as the areas in need of reform.[117] Another Minnesota-based education reformer, Joe Nathan, spent much of the 1980s working with conservative governors to increase support for greater school choice, including vouchers.[118]

Some Minnesota policymakers and advocates seized on the ideas of Nathan and Kolderie as the vehicle to address the state's growing educational inequities. The Citizens League, a major nonprofit in the Twin Cities area, developed these early charter ideas into the nation's first complete proposal for the creation of charter schools.[119] The Citizens League proposal addressed the elephant in the room—desegregation—head-on. The proposal argued that, absent a charter school plan, the Twin Cities would have no choice but to adopt strong desegregation remedies, including redrawing or merging existing school districts.[120] This dramatic reconfiguration was put forward as the only alternative to the creation of Minnesota charter schools.[121]

Throughout this process, advocates of charter schools and school choice received support from groups positioned on the center-right and center-left. The Minnesota Business Partnership, which represented the leadership of some of the state's largest companies, heavily endorsed the idea of choice-based school reform.[122] The Progressive Policy Institute, a think tank founded by Bill Clinton's Democratic Leadership Council, consulted with Kolderie in 1990, and Kolderie subsequently produced policy papers about choice for

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* See also EMBER REICHGOTT JUNGE, ZERO CHANCE OF PASSAGE: THE PIONEERING CHARTER SCHOOL STORY (Beaver's Pond Press ed., 2012) for a brief history of the Minnesota roots of charter schools.

119. Cohen, *supra* note 114.

120. *See* CITIZENS LEAGUE, CITIZENS LEAGUE REPORT: CHARTERED SCHOOLS = CHOICES FOR EDUCATIONS + QUALITY FOR ALL STUDENTS (1988).

121. *Id.* at 19–20.

122. *See* JUNGE, *supra* note 118.

the Institute.[123] Ultimately, Minnesota enacted some of the nation's earliest and strongest school choice measures. These included an expansive open enrollment law in 1987 and the nation's first charter school law in 1992.[124]

Minnesota's charter schools were deeply segregated from the very beginning. Today, almost all of the Twin Cities' most segregated schools—both non-White *and* White—are charters.[125] Charter schools facilitate segregation in a number of ways.

First, as schools of choice, they have proven convenient vehicles for White flight from diverse traditional public schools.[126] Although all children are equally eligible to enroll in a charter, not every child is equally able to attend, due to practical obstacles such as transportation or curricular concerns.[127] As a consequence, heavily White charters have experienced very rapid growth in Twin Cities suburbs, where traditional schools are quickly becoming more diverse.[128]

In addition, charters are forced to recruit their student bodies from the student population, and many have opted to do so by billing themselves as racially targeted or culturally focused.[129] Minnesota is home to Afro-, Hmong-, Latino-, and Somali-centric charter schools, which explicitly recruit students on claimed commonalities.[130] Although there are no explicitly White-segregated charter schools, there are a number of European-oriented schools, such as a Russian language charter (96% White) and a classical academy (76% White).[131] In one particularly egregious case, a German immersion charter, which was 88% White, opened nine blocks from a traditional public school serving the same grades, which was only 8% White.[132]

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123. Cohen, *supra* note 114.

124. *See* JUNGE, *supra* note 118.

125. INST. ON METRO. OPPORTUNITY, THE MINNESOTA SCHOOL CHOICE PROJECT: PART I: SEGREGATION AND PERFORMANCE 2 (2017), https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1125&context=imo_studies [hereinafter MINN. SCHOOL CHOICE PROJECT] [https://perma.cc/B86U-5HH6].

126. *Id.* at 9.

127. INST. ON METRO. OPPORTUNITY, FAILED PROMISES: ASSESSING CHARTER SCHOOLS IN THE TWIN CITIES 44–46 (2008) [hereinafter FAILED PROMISES].

128. *See* MINN. SCHOOL CHOICE PROJECT, *supra* note 125; INST. ON METRO. OPPORTUNITY, CHARTER SCHOOLS IN THE TWIN CITIES: 2013 UPDATE 1 (2013); FAILED PROMISES, *supra* note 127.

129. Will Stancil, *Charter Schools and School Desegregation Law*, 44 MITCHELL HAMLINE L. REV. 455, 480 (2018).

130. *See id.* at 473–81; FAILED PROMISES, *supra* note 127.

131. Stancil, *supra* note 129, at 477–78.

132. *Id.* at 456.

As a result of these dynamics, and as the recipients of a blanket exemption from the state desegregation rule, charters are overwhelmingly more segregated than their traditional school counterparts. Of the 50 most segregated schools in the Twin Cities region, 45 are charters.[133] The region contains 78 schools that are more than 95% non-White; 59 are charters.[134] Out of all charter enrollees, 72% of Black students, 68% of Hispanic students, and 74% of Asian students are attending a highly segregated, more than 90% non-White, school.[135] At traditional schools, the equivalent figures are 16%, 11%, and 18%, respectively. Similarly high levels of segregation have existed at charters since at least the 1995–1996 school year.[136]

Minnesota's other major school choice mechanism, open enrollment, has also come to severely worsen segregation.[137] Initially, open enrollment options were limited by desegregation rules—a student could not enroll into a new district if the change would worsen segregation.[138] But the policy was exempted from desegregation rules in 2001, and additional resegregation followed rapidly.[139]

A 2013 study examined the effect of open enrollment on district demographics. In the 2000–2001 school year, 12% of White students' open enrollment moves were integrative in effect, and 20% were segregative in effect.[140] The remainder were neutral (i.e., between two similarly composed school districts).[141] By 2010, over a third—36%—were segregative in effect, while 19% were integrative in effect.[142]

The school districts most affected by open enrollment are those in rapidly diversifying suburbs, where the policy provides an escape route for White families concerned about integrated schools.[143] These communities include Richfield, Columbia Heights, Osseo,

133. *See* MINN. SCHOOL CHOICE PROJECT, *supra* note 125.

134. *Id.* at 4.

135. *Id.* at 12–14.

136. *Id.*

137. *See* INST. ON METRO. OPPORTUNITY, OPEN ENROLLMENT AND RACIAL SEGREGATION (2013) [hereinafter OPEN ENROLLMENT AND RACIAL SEGREGATION].

138. *See* Margaret C. Hobday, Geneva Finn & Myron Orfield, *A Missed Opportunity: Minnesota's Failed Experiment with Choice-based Integration*, 35 WM. MITCHELL L. REV. 936, 953–55 (2009).

139. *See id.* at 959.

140. OPEN ENROLLMENT AND RACIAL SEGREGATION, *supra* note 137, at 7.

141. *Id.*

142. *Id.*

143. *Id.* at 9.

and Robbinsdale.[144] Meanwhile, a number of districts serve as White flight hubs, receiving a significant portion of their overall student body as open enrollees from neighboring districts.[145] These include St. Anthony, Mahtomedi, Edina, and Minnetonka.[146]

Some districts have utilized open enrollment and diversifying neighborhoods as a strategy for recruiting wealthier student bodies. For example, four districts bordering the Minnetonka district have officially considered or implemented integrative boundary changes.[147] While its neighbors considered these plans, the Minnetonka school district launched an expensive and unusual paid advertising plan in local newspapers, television, and radio.[148] According to superintendents of neighboring districts, the Minnetonka district was engaged in an active effort to recruit skittish parents.[149] Not only could these efforts increase White segregation in Minnetonka schools, but they undermine attempts by neighboring districts to maintain demographically balanced schools.

B. Conflict Over Minnesota's Desegregation Rules in the 1990s

While Minnesota was introducing new school choice mechanisms that increased segregation, it was also weathering a conflict over the desegregation rules that existed in the early 1990s. A new rule was adopted in 1999 that reflected the views of integration skeptics, which led to additional legal and political conflict over segregation that continues to the present day.[150] Over time, many of the groups that had been previously involved in efforts for greater school choice enmeshed themselves in the desegregation rule battle. In fact, some of the strongest and most vocal advocates for reduced desegregation have been the very charter schools that Minnesota created in the early 1990s.[151]

In 1994, the Minnesota State Board of Education proposed a metropolitan-wide desegregation rule to resolve the growing

144. *Id.*

145. *See id.*

146. *See id.*

147. *Id.* at 19*; see also* Anthony Lonetree & MaryJo Webster, *Open Enrollment Keeps Students, Resources Flowing into Minnetonka*, STAR TRIB. (Jan. 13, 2018), https://www.startribune.com/open-enrollment-keeps-students-resources-flowing-into-minnetonka/469168323/ [https://perma.cc/N9RL-HTDT].

148. Lonetree & Webster, *supra* note 147.

149. *Id.*

150. Hobday et al., *supra* note 138, at 958–63.

151. *See id.*

problem of interdistrict segregation.[152] The rule used flexible racial ratios as integration targets.[153] A draft of the rule was provided to the Minnesota legislature, which indicated its approval by authorizing the Board to make new rules.[154] The authorization contained important limitations to ensure the Board directly addressed the question of segregation: "In adopting a rule related to school desegregation/integration, the state board shall address the need for equal educational opportunities for all students and racial balance as defined by the state board."[155] In the same law, the legislature established a new "office of desegregation/integration" to "coordinate and support activities" related to interdistrict integration efforts.[156]

But before they could be promulgated, the newly proposed rules were swallowed by a sharp political backlash, spurred in part by the suburbs' sudden inclusion in civil rights regulation.[157] Katherine Kersten, a conservative political columnist for the *Star Tribune*, launched frequent attacks against the proposal, and Bob Wedl, the Assistant Commissioner of the Department of Education, began to lobby for an alternative, "voluntary" integration approach.[158] Talk radio also pilloried the proposed rules and a separate, related set of "diversity rules."[159] The Department of Education received "hundreds of calls and letters concerning the proposed rules–including two death threats."[160] After years in limbo, the second set of rules was withdrawn, and soon thereafter, the State Board of Education was abolished altogether.[161]

The governor's office and particularly the Attorney General's office were asked to respond to the controversy. The governor's office was silent. Although the Chief Deputy Attorney General, John Tunheim, had been long supportive of civil rights, he was nominated by President Clinton in June of 1995 to be a federal judge for the District of Minnesota, removing him from the debate.[162]

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152. *Id.* at 953.
153. *Id.* at 954.
154. *Id.* at 955.
155. Minn. Stat. § 121.11 subd. 7d(b) (1994).
156. Minn. Stat. § 121.1601 (1994).
157. *See* Hobday et al., *supra* note 138, at 951.
158. *Id.* at 951–58.
159. *Id.* at 957–58.
160. *Id.* at 958.
161. *Id.*
162. *Tunheim, John R.*, FED. JUD. CTR., https://www.fjc.gov/history/judges/tunheim-john-r [https://perma.cc/J3FA-S9S9].

Tunheim's replacement, Lee Sheehy, appeared to have very different views on the advisability of desegregation. Sheehy was an ally of Minnesota Attorney General Hubert "Skip" Humphrey III, who was at the time running for governor.[163] Both Sheehy and Humphrey were members of the moderate center wing of the Democratic Party—a wing that, during the Clinton years, was defined in part by its intense concern about the political costs of Democrats' traditional defense of civil rights for Black Americans.[164] School integration in particular, which raised the bogeyman of "forced" busing, was considered too toxic a subject for any Democrat.[165] Democratic politicians especially feared the impact of desegregation on suburban voters and believed that aggressive desegregation plans would so alienate and anger White suburban voters that statewide political victories would become impossible.[166] Under Sheehy, the tenor of the Attorney General's office towards the proposed desegregation rules changed dramatically.

Sheehy was not the only individual in the Minnesota Attorney General's office hostile to the new desegregation plan. An Assistant Attorney General, Cindy Lavorato, took a major role in the conflict over the rule. Lavorato was the daughter-in-law of James I. Rice, 25-year state house member and powerful committee chair.[167] Lavorato would distinguish herself over the next two decades as one of the state's most tireless opponents of school integration.[168]

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163. *See Lee Sheehy*, LIVING CITIES, https://livingcities.org/people/lee-sheehy/ [https://perma.cc/267E-XV4N] (listing Sheehy as Attorney General Hubert Humphrey's Chief Deputy).

164. See generally, *see generally* THOMAS EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS (1992) for a survey of the views on race that motivated moderate Democrats in the 1990s.

165. *See id.* at 143.

166. *Cf. id.* (positing that "[t]he positions adopted by the national Democratic party in favor of racial preferences and busing were critical in allowing the national Republican party to take over the political and philosophical center.").

167. *Louis A. Lavorato*, IOWA JUD. BRANCH, https://www.iowacourts.gov/for-the-public/educational-resources-and-services/iowa-courts-history/past-justices/louis-a-lavorato [https://perma.cc/DR58-MC3F]; *Rice, James Isaac "Jim"*, MINN. LEGIS. REF. LIBR., https://www.lrl.mn.gov/legdb/fulldetail?ID=10561 [https://perma.cc/9KZQ-BUH4].

168. For instance, when the state attempted to modify the integration rule in 2016 to include charter schools, Lavorato was hired as the primary representative of charters in the rulemaking proceedings, testifying extensively against the change and submitting several lengthy sets of written comments. *See* Transcript of Public Hearing, In the Matter of Proposed Rules Governing Achievement and Integration, State of Minn. Off. of Admin. Hearings for the Minn. Dep't of Educ. (No. 65-1300-32227) (Jan. 7, 2016) [hereinafter Public Hearing Transcript]; Memorandum of Law in Support of the Disapproval of MDE'S Proposed Desegregation/Integration Rules Due to Four Substantive Defects, In the Matter of Proposed Rules Governing

In addition to the rulemaking, several other events brought the conflict over integration to a head. First, the Minneapolis school district proposed ending its existing school assignment plan, which had been in operation since the 1970s, mostly under a desegregation court order.[169] In its place, the district sought to implement a "neighborhood schools" plan, which would leave the racially segregated areas of the city attending equally segregated schools.[170]

Second, the Minneapolis NAACP filed a lawsuit against the state of Minnesota, bringing novel state-law claims that the schools were impermissibly segregated.[171] The lawsuit's plaintiffs sought, in particular, interdistrict desegregation mechanisms in an attempt to stem the problem of interdistrict segregation that had been growing since the late 1980s.[172]

In short, the pro- and anti-integration forces begin to cohere into discrete camps. On the pro-integration side was arrayed the NAACP, traditional civil rights organizations, the State Board of Education with its newly proposed rule, and the lawsuit plaintiffs. But that could scarcely compare to the strength of the anti-integration side, which included most of the top figures at the Attorney General's office: Assistant Commissioner Wedl and the powerful columnist Kersten.[173]

As the defense against the NAACP lawsuit began to merge with the larger question of the new statewide integration rule, the anti-integrationists began to pull in outside aid. The 1996 budget provided the state education department $700,000 for costs related to litigation of the NAACP lawsuit.[174] While records showing the full use of this expenditure are lost, at least several telling facts are known.

Kersten, the conservative columnist, had recommended that the state seek the aid of Alfred Lindseth, a politically-connected, conservative lawyer and longtime opponent of desegregation

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Achievement and Integration (OAH 1300-32227), State of Minn. Off. of Admin. Hearings; Memorandum of Law in Support of the Disapproval of MDE's Proposed Desegregation/Integration Rules as Fatally Defective, In the Matter of Proposed Rules Governing Achievement and Integration (OAH 1300-32227), State of Minn. Off. of Admin. Hearings.

169. Hobday et al., *supra* note 138, at 956.

170. Myron Orfield, *Choice, Equal Protection, and Metropolitan Integration: The Hope of the Minneapolis Desegregation Settlement*, 24 LAW & INEQ. 269, 298 (2006).

171. *Id.* at 311–12.

172. *Id.*

173. *See* Hobday et al., *supra* note 138 (providing an overview of the conflict over integration in the Minnesota state government in the 1990s).

174. 1996 Minn. Laws 739, ch. 471, art. 11, § 4, subd. 2 (1996).

plans.[175] Lindseth had taken a particularly active role opposing and dismantling integration plans in southern states, like North Carolina and Georgia. His clients often included school districts fighting court-ordered integration, and he appeared for the defendants in seminal desegregation cases like *Jenkins v. Missouri* and *Sheff v. O'Neill*.[176] Minnesota later hired Lindseth to work on its desegregation defense.[177]

Next, the Attorney General's office and state education department hired two national experts, David Armor and Christine Rossell, who had made their names fighting desegregation lawsuits in previous decades.[178] Indeed, Armor and Rossell had been so prominent resisting integration that they had turned it into a cottage industry. Armor states that he has appeared in over 50 segregation cases and authored a book chapter about the experience of serving as an expert witness for school districts trying to escape court orders;[179] Rossell appears to have appeared as a defense-side expert in over 75 cases.[180] Indeed, the pair held a virtual monopoly over this lucrative market sector. When the U.S. Supreme Court considered desegregation in the 2007 case *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, over 550 social scientists filed or signed amicus briefs in support of integration.[181] Rossell and Armor were two of six experts filing briefs for the plaintiffs attempting to eliminate integration plans.[182] Both Armor

175. KATHERINE KERSTEN, GOOD INTENTIONS ARE NOT ENOUGH. THE PERIL POSED BY MINNESOTA'S NEW DESEGREGATION PLAN 58 (1995).

176. *See, e.g.*, Scott Shepard, *Court-Ordered Busing Is Running Out of Gas; Desegregation Tool Falls Out of Favor; Focus of Battle Is Shifting to State; Courts*, ST. LOUIS POST-DISPATCH (Apr. 8, 1998), [https://perma.cc/SD6D-VJPE]; George Judson, *When Good Will Is Not Enough: Desegregation Project at Heart of Hartford School Suit*, N.Y. TIMES (Feb. 1, 1993), [https://perma.cc/HD3J-VYVB].

177. *See Alfred A. Lindseth*, EVERSHEDS SUTHERLAND, https://us.eversheds-sutherland.com/People/Alfred-A-Lindseth [https://perma.cc/CB2T-222T].

178. Hobday et al., *supra* note 138, at 961–964.

179. David J. Armor, *Reflections of an Expert Witness, in* THE END OF DESEGREGATION? 3–23 (Stephen J. Caldas & Carl L. Bankston eds., 2003); *Biography of David J. Armor*, SCHAR SCH. OF POL'Y AND GOV'T, GEO. MASON, https://schar.gmu.edu/about/faculty-directory/david-j-armor [https://perma.cc/2X6G-66NX].

180. *Curriculum Vitae of Christine Rossell*, POL. SCI., B.U., https://www.bu.edu/polisci/files/2020/10/Rossell-Vita-10-13-20.pdf [https://perma.cc/539W-A9UV].

181. *See* Brief of 553 Social Scientists in Support of Respondents, Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701 (2007).

182. *See* Brief of Amici Curiae Drs. Murphy, Rossell and Walberg in Support of Petitioners, Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701 (2007); Brief of David J. Armor, Abigail Thernstrom, and Stephan Thernstrom as *Amici Curiae* in Support of Petitioners, 551 U.S. 701 (2007).

and Rossell had frequently been employed by Lindseth in past anti-integration endeavors.[183]

Both the lawsuit and the rulemaking process wound to a conclusion in the late 1990s. As a result of conflicts related to the integration rule, the State Board of Education was ultimately abolished and replaced by a Commissioner of Education.[184] Meanwhile, the Department of Education and the Attorney General's office had already begun to strip the strongest desegregation tools out of the Board's original proposal.[185]

But one major twist remained. On September 17, 1998, the Attorney General's office released a Statement of Need and Reasonableness (SONAR) that unexpectedly and dramatically weakened the proposed integration rule.[186] The newly released SONAR, authored by Cindy Lavorato, marked a sharp break with previous iterations of the rule.[187] It altered the definition of segregation to only include intentional, *de jure* discrimination, limited the mandatory interdistrict integration requirements, and raised the standard for proving intentional discrimination far above that required by the U.S. Supreme Court.[188] The SONAR also argued that interdistrict open enrollment rules could not be guided by integration requirements, and, on policy grounds, it exempted charter schools from its provisions altogether, though they had previously been subject to desegregation rules.[189]

Although the lawsuit defense and rulemaking were nominally separate, Lindseth's influence on the rulemaking process was clear. Several passages of the SONAR closely resembled passages he had published.[190] In addition, the SONAR contained a number of legal conclusions that exhibited obvious hostility to the notion of school integration—and echoed prior Lindseth arguments.[191] The SONAR concluded that there was no compelling government interest in K-12 integration absent proof of intentional discrimination—limiting

183. *See*, *e.g.*, David Armor, Why the Gap Between Black and White Performance in School? (Testimony of David James Armor, March 5, 6, & 22, 1995), 66 J. Negro Educ. 311; Stell v. Bd. of Pub. Educ., 724 F. Supp. 1384, 1393–96 (S.D. Ga. 1988).

184. Hobday et al., *supra* note 138, at 958.

185. *Id.* at 958–960.

186. *See* 1998 SONAR, *supra* note 96.

187. Hobday et al., *supra* note 138, at 955.

188. *See* 1998 SONAR, *supra* note 96.

189. *Id.* at 30.

190. *Id.*; Alfred A. Lindseth, *Legal Issues Related to School Funding/Desegregation*, *in* SCHOOL DESEGREGATION IN THE 21ST CENTURY 41 (Christine H. Rossell, David J. Armor & Herbert J. Walberg eds., 2002).

191. *See, e.g.*, Lindseth, *supra* note 190.

districts' abilities to voluntarily implement integration plans.[192] Although this determination appeared to directly contradict the U.S. Supreme Court's most recent precedents, the SONAR based its conclusion on a prediction that Supreme Court justice retirements would result in a change to the law.[193] It noted that one 5-4 decision in 1990 "is surely the high water mark for diversity as a justification for racial preference."[194] Tellingly, the SONAR made a concerted effort to downplay the meaning and scope of *Brown v. Board of Education*, stating that the case "did not stand for the proposition that racially segregated schools, without more, are inherently equal."[195] At one point, the SONAR even appears to engage in an extended apologia for segregated schools:

> Throughout the United States, such public schools have tackled some of the toughest problems in urban education and been successful. These exemplary schools are located in some of the poorest inner-city neighborhoods, serving student bodies that are largely poor and minority . . . .
>
> It is certainly not the intent of the rule to promote racial separatism; however, it is important to understand that a desegregation rule is not unreasonable, or ineffective, simply because some schools may remain racially identifiable.[196]

It is impossible to detach the SONAR's substance from the deeply politicized environment that surrounded its release. The state was in the final stretch of a gubernatorial contest. Only three weeks prior to the SONAR's release by the Attorney General's office, Attorney General Skip Humphrey had won the Democratic Party's nomination for the governorship.[197] Several weeks after its release, Bob Wedl, now Commissioner of Education, announced that his new rule would end racial quotas.[198] The day after the new rule was announced, local conservative columnist Katherine Kersten used the issue of integration in a newspaper column to frame the differences between Humphrey and his opponent, Norm Coleman.[199] At a time when virtually all national political figures

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192. 1998 SONAR, *supra* note 96, at 17.

193. *Id.*

194. *Id.* (quoting Richard Kahlenberg, *Class Based Affirmative Action*, 84 CALIF. L. REV. 1037, 1039 (1996)).

195. *Id.* at B1.

196. *Id.* at 60–61.

197. *See, e.g.*, Dane Smith & Robert Whereatt, *Coleman, Humphrey Ready for Showdown*, STAR TRIB. (Sept. 16, 1998) [https://perma.cc/VCK9-9K2P].

198. *See, e.g.*, Norman Draper, *Plan Would End State's Race Quotas for Schools*, STAR TRIB. (Oct. 6, 1998), [https://perma.cc/JMF4-4UG7]; *State Leaders Drafting New Plan for Desegregation in Schools*, ST. PAUL PIONEER PRESS (Aug. 28, 1998), [https://perma.cc/MUZ6-E6D5].

199. Katherine Kersten, *Coleman Has a Better Plan for Governing Minnesota*,

were opposed to school desegregation, elevation of the issue in an election season could only augur badly for integration.

The new Minnesota Desegregation/Integration Rule, with the limitations imposed by the SONAR, was finally adopted in early 1999.[200] Shortly thereafter, a number of other integration policies in Minnesota schools came under legal attack by White parents, who echoed the SONAR's claim that there was no compelling governmental interest in K-12 integration absent intentional discrimination.[201] Fearing legal reprisals, many districts abandoned previous integration plans.[202] The NAACP lawsuit, after a twisting legal path, concluded in a settlement in 2000.[203] That settlement instituted a voluntary transportation program to help low-income Black children from Minneapolis's North Side attend affluent suburban schools—although some of the most affluent suburban schools refused to opt into the program.[204]

C. Continuing Conflicts Over Segregation in Minnesota Schools

In the two decades following the implementation of Minnesota's weakened desegregation rule, many of the battles from the 1990s have recurred, sometimes in eerily similar fashion, and even featuring the same cast of characters.

The 1999 rule has failed to stem or slow segregation.[205] If anything, the degree of segregation in Minnesota schools has grown sharply.[206] As discussed above, this is particularly true of charter schools, which account for a hugely disproportionate share of the state's most racially isolated schools.

Nor have the 1999 rule's legal conclusions withstood the test of time. Most importantly, the rule completely missed the mark with its suggestion that K-12 integration is not, or would be found not to be, a compelling government interest.[207] In 2007, the Supreme Court, in *Parents Involved in Community Schools v. Seattle School District No. 1*, confirmed the existence of a compelling government interest in encouraging diversity and

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STAR TRIB. (Oct. 7, 1998), [https://perma.cc/L6Z8-P2RM].

200. Hobday et al., *supra* note 138, at 958.

201. Orfield, *supra* note 170, at 306.

202. Hobday et al., *supra* note 138, at 965–66.

203. Orfield, *supra* note 170, at 314.

204. *See id.* at 315.

205. Hobday et al., *supra* note 138, at 965.

206. Orfield, *supra* note 170, at 299–300.

207. Hobday et al., *supra* note 138, at 959.

avoiding racial isolation in K-12 education.[208] It also reaffirmed the viability of several integration methods, such as the use of flexible racial ratios.[209] Justice Kennedy, whose opinion was controlling, wrote passionately in defense of integration:

> This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population.[210]

In similar fashion, the legality of the rule's charter school exemption has been called into question. In 2014, the U.S. Department of Education released guidance strongly suggesting that the exemptions are unconstitutional, because they allow a separate state-supported school district to interfere with and undermine the efforts of the state to integrate a segregated system.[211] The Department's official guidance document declared that "[c]harter schools located in a district subject to a desegregation plan (whether the plan is court ordered, or required by a Federal or State administrative entity) must be operated in a manner consistent with that desegregation plan."[212]

In 2013, the Minnesota legislature once again focused on school segregation. It enacted yet another statutory provision forbidding segregation, this time at Minn. Stat. § 124D.855:

> SCHOOL SEGREGATION PROHIBITED. The state, consistent with section 123B.30 and chapter 363A, does not condone separating school children of different socioeconomic, demographic, ethnic, or racial backgrounds into distinct public schools. Instead, the state's interest lies in offering children a diverse and nondiscriminatory educational experience.[213]

The legislature also created a policy task force to revise laws governing the use of achievement and integration state aid.[214] That task force delivered recommendations, including the retention of all

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208. *See* Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

209. *Id.* at 851.

210. *Id.* at 797–98.

211. *See* Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights at U.S. Dep't of Educ., Regarding Application of Civil Rights Law to Charter Schools (May 14, 2014), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405-charter.pdf [https://perma.cc/UA84-3DQ7].

212. *Id.* at 3–4.

213. Minn. Stat. § 124D.855 (2020).

214. MINN. DEP'T OF EDUC., INTEGRATION REVENUE REPLACEMENT ADVISORY TASK FORCE RECOMMENDATIONS 2 (2012).

existing remedial integration measures.[215] The legislature enacted these in 2013, as the Achievement and Integration for Minnesota statutes, and gave the state Department of Education authority to make rules for the new law.[216] Using this authority, the Department attempted to once again revise its desegregation rule.

In 2015, the Department released this new rule for public notice and comment.[217] The new proposal represented yet another dramatic weakening of the state's integration scheme. It was less than a quarter of the length of the extant 1999 rule, eliminating almost all of the rule's content.[218] It primarily restated statutory provisions and lacked important definitions—including "racial balance," which the authorizing statute required.[219] It eliminated virtually all remedial provisions in the extant rule, and made interdistrict remedies completely voluntary.[220] Despite a statutory instruction to promulgate a rule relating to desegregation/integration, the proposal did not address segregation; it also ignored the statutory requirement to address the need for equal educational opportunities for all students.[221] The only significant strengthening provision was the de-exemption of charter schools.[222]

A new SONAR, released in support of the proposed rule, failed to justify most of these changes.[223] The SONAR claimed that the Department lacked statutory authority to promulgate a broad new rule, but did not explain where it had derived the authority to repeal the vast majority of the existing rule.[224] In addition, Minnesota's administrative procedure laws require promulgating agencies to delineate who will be affected by a proposed rule.[225] The

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215. *Id.* at 6 ("The new program must do the following: Develop a new and modern integration rule that is grounded in our state's history and law, is sustainable, but also addresses a new vision that is measured beyond reading, writing and math and includes a more complete measure of achievement and access to opportunity.

i. Maintain language that prohibits intentional segregation in schools.

ii. Maintain current language defining racially isolated districts . . . .

iv. Maintain current language defining racially isolated schools.").

216. Minn. Stat. § 124D.896 (2020).

217. *See* MINN. DEP'T OF EDUC., STATEMENT OF NEED AND REASONABLENESS FOR PROPOSED RULES GOVERNING ACHIEVEMENT AND INTEGRATION FOR MINNESOTA (2015) [hereinafter 2015 SONAR] (explaining the proposed rules introduced in 2015).

218. *See id.*

219. *See id.*; Minn. Stat. § 124D.896 (2020).

220. 2015 SONAR, *supra* note 217, at 31.

221. *See id.*

222. *Id.* at 18.

223. *See id.*

224. *Id.* at 14.

225. Minn. Stat. § 14.05 (2020).

Department of Education dodged this requirement, saying only that "communities" where "achievement and integration plans are presented at public school board meetings which allow for input" would be affected "positively."[226] No mention of the effects on schoolchildren was made.[227] Indeed, at no point in the rulemaking process did the Department of Education affirmatively state if it expected the rule to reduce racial segregation in Minnesota schools.

The public hearing to the proposed rule generated considerable resistance. Civil rights groups objected to its overall lack of content.[228] Confronted about the lack of policy support for the rule, Department representatives confessed they had made no attempt to model the rule's impact on the demographic composition of Minnesota schools.[229] The Department also appeared to abandon its earlier position that there is no compelling interest in K-12 integration.[230]

Meanwhile, charter schools objected to the proposed elimination of their exemption. Representing the charters was Cindy Lavorato.[231] Lavorato, leading the charter opposition, retained Armor and Rossell as experts—just like the state had two decades earlier.[232] The charters included sweeping legal claims denouncing school integration as ineffective and attacking important historic precedent on the issue, like *Swann v. Charlotte-Mecklenburg*.[233] Lavorato argued that it was important for parents to be able to choose other school features instead of integration, if they wanted: "But not all parents and student [sic] value diversity above all other educational needs. . . . Some families price a premium on - and this was the case for me - small class size and a teacher to student ratio that's small."[234]

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226. 2015 SONAR, *supra* note 217, at 18.

227. *See id.*

228. *See* Inst. on Metro. Opportunity, Comments of the Institute on Metropolitan Opportunity on Proposed Permanent Rules for Achievement and Integration (Jan. 27, 2016).

229. *Id.* at 10.

230. *Id.* at 36.

231. Public Hearing Transcript, *supra* note 168.

232. *See* Memorandum of Law from Charter Schools in Support of the Disapproval of the Minn. Dep't of Educ. Proposed Desegregation/Integration Rules Due to Four Substantive Defects, Exh. 2–3 (OAH File No. 1300-32227).

233. *See* Inst. on Metro. Opportunity, Comments of the Institute on Metropolitan Opportunity in Reply to Comments Submitted by Charter Schools, Charter Advocacy Organizations, and Charter School Employees on Minnesota Proposed Permanent Achievement and Integration Rule (Feb. 3, 2016) [hereinafter Feb. 3 Reply to Comments].

234. Public Hearing Transcript, *supra* note 168.

At a public hearing, over a dozen charter administrators and representatives spoke.[235] A number of charter administrators affirmatively defended their right to operate racially-targeted schools, arguing that "cultural focus," in the form of segregation, was necessary because different racial groups think and behave differently.[236] For example, the director of a Hmong-focused charter school stated the following: "Each culture group has their own. The Hmong, we are very quiet. We are introvert[s]. We don't talk much. The African-American students, they are extrovert[s]. They talk. That's how they are."[237]

The director of the Excell Academy, which is nearly 100% Black and low-income, relayed messages from the school's enrollees: "You need to think about what you are doing to people of color and Whites. If you make a White kid go to a colored school or a colored kid go to a White school, there are a lot of things that can go wrong."[238]

The final report disapproved of the entire proposed rule on a variety of grounds.[239] Rather than correct the defects identified by the Administrative Law Judge, the Department of Education abandoned the rule altogether. Although it is still required by statute to adopt new rules that comport with the Achievement and Integration statute, it has not done so.

This failed rulemaking dovetailed with another school desegregation lawsuit against the state of Minnesota, called *Cruz-Guzman v. State of Minnesota*.[240] Like the 1995 lawsuit, the new plaintiffs once again argued that the state had ignored constitutional requirements by allowing schools in Minneapolis, St. Paul, and the suburbs to become intensely racially isolated.[241]

Although the lawsuit was filed against the state of Minnesota, a collection of charter schools successfully convinced the state district court to admit them as third-party intervenors.[242] They have remained in the suit ever since, continually lobbying the court

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235. *See id.*

236. *See id.*

237. *Id.*

238. *Id.* at 159.

239. *See* In re Proposed Rules Relating to Achievement & Integration, OAH No. 65-1300-32227 (2016).

240. Cruz-Guzman v. State, 916 N.W.2d 1 (Minn. 2018).

241. Class Action Complaint at 2, Cruz-Guzman v. State, 892 N.W.2d 533 (Minn. Ct. App. 2017) (No. 27-CV-15-19117).

242. *See, e.g.*, Rachel M. Cohen, *School Desegregation Lawsuit Threatens Charters*, AM. PROSPECT (Jan. 26, 2016), https://prospect.org/education/school-desegregation-lawsuit-threatens-charters/ [https://perma.cc/BE8P-43PV].

to recognize their right to maintain separate, segregated schools and positing that parent choice is an interest of equal or greater importance than desegregation.[243]

In 2018, the *Cruz-Guzman* lawsuit appeared in front of the Minnesota Supreme Court.[244] At issue was the preliminary question of whether Minnesota's fundamental right to an education was justiciable.[245] The state argued it was not, effectively rendering the fundamental right unenforceable.[246] The charter intervenors sided with the state.[247] The court, however, sided with the plaintiffs.[248] In its decision, it unambiguously held that the Minnesota constitution created justiciable rights for students, and, tellingly, stated that it is "self-evident" that a segregated system of schools could not satisfy the constitutional requirement that schools be "general," "uniform," "thorough," or "efficient."[249] The *Cruz-Guzman* suit entered settlement negotiations, where it remains at the time of this writing.[250]

The nearly 30-year battle over Minnesota desegregation rules has not left the state in a better place. At present, school desegregation in Minnesota is governed by a 1999 rule founded in fundamental legal errors and promulgated in a highly irregular process.[251] The Department of Education has indicated that it will not act to correct these errors until it receives additional guidance from the legislature, but the legislature has not provided such guidance.[252] There is no indication that the political resistance that has impeded all attempts to integrate Minnesota schools for the past four decades will abate soon.[253]

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243. At the time of this writing, the charter intervenors had most recently failed in a motion seeking to be exempted from the desegregation case. Elizabeth Shockman, *Court Declines to Exempt Charters from School Segregation Case*, MPR NEWS (June 13, 2019), https://www.mprnews.org/story/2019/06/12/court-declines-to-exempt-charters-from-school-segregation-case [https://perma.cc/KK7B-TGAU].

244. *Cruz-Guzman*, 916 N.W.2d at 1.

245. *Id.* at 4.

246. *Id.* at 7.

247. *See id.*

248. *Id.* at 15.

249. *Id.* at 10 n.6.

250. *See, e.g.*, Eric Golden, *School Integration Plan Awaits Minnesota Lawmaker's Action, May End Up Back in Court*, STAR TRIB. (May 29, 2021), https://www.startribune.com/school-integration-plan-awaits-minnesota-lawmakers-action-may-end-up-back-in-court/600062764/ [https://perma.cc/GCG5-UCBE].

251. *See* Minn. Dep't of Educ., Notice of Withdrawn Proposed Rules Governing Achievement and Integration, Minnesota Rules, ch. 3535, Revisor's ID Number 4309 (March 21, 2016)., https://education.mn.gov/MDE/about/rule/rule/deseg/.

252. *Id.*

253. *See, e.g.*, Orfield, *supra* note 170, at 301–02 (stating that Minneapolis School

The new mechanisms pioneered by Minnesota to circumvent the integration issue, charter schools and open enrollment, have failed to close education achievement gaps, which remain among the nation's worst.[254] Charters have produced endless conflict with public school districts, in Minnesota and nationwide.[255] Meanwhile, the charters themselves have become some of the nation's most vocal neo-segregationists. Their early opposition to desegregation has foreshadowed an ever-more-aggressive campaign for "culturally focused" education, and explicit denunciations of integration as unnecessary or even harmful.[256] Several Minnesota charter advocates have built national profiles as defenders of *de facto* school segregation—or even *intentional* segregation, under the aegis of "cultural affirmation."[257]

In the meantime, the wellbeing and education of tens of thousands of Minnesotan children is at risk, as the laws of their state steer them towards segregated schools.

III. The Rise and Fall of Regional Housing Planning

In the late 1960s and early 1970s, Minnesota was a national leader in regional planning. The state established a system to ensure that its core metropolitan region was overseen by a single government that could align metro-wide policies in a holistic, comprehensive, and mutually beneficial fashion.[258]

In most states, major cities are fractured into dozens of municipalities, each operating independently of each other—a recipe for destructive, zero-sum competition, demographic and economic fragmentation, and ultimately, residential exclusion.[259] The inability to construct unified regional housing policy is a recipe

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District enrollment continues to plummet while students instead attend problematic charter schools).

254. *See id.* at 269–70.

255. *See, e.g.*, Feb. 3 Reply to Comments, *supra* note 233 (detailing the debate surrounding charter schools).

256. *See, e.g.*, Robert Wedl & Bill Wilson, *In Minnesota, We Must Think Broadly About School Integration*, STAR TRIB. (Dec. 31, 2015), https://www.startribune.com/in-minnesota-we-must-think-broadly-about-school-integration/363960211/ [https://perma.cc/LM6U-TVUA].

257. *See, e.g.*, Chris Stewart, *Our Obsession with Integration Is Hurting Kids of Color*, WASH. POST (June 10, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/06/10/our-obsession-with-integration-is-hurting-kids-of-color/ [https://perma.cc/X75X-HSUT].

258. Myron Orfield & Will Stancil, *Why Are the Twin Cities So Segregated?*, 43 MITCHELL HAMLINE L. REV. 1, 9–10 (2017).

259. See DAVID RUSK, CITIES WITHOUT SUBURBS (2013) for a discussion of urban fragmentation.

for the emergence of the classic urban-suburban divides that were stereotypical of American cities in the 20th century, with white-picket-fence suburbs doubling as gated enclaves, built to exclude the poor and the non-White, both explicitly and implicitly.

Minnesota developed a better system. Although the Twin Cities are divided among many municipalities, those municipalities are subject to the authority of a regional government, the Metropolitan Council, which has been given the tools to corral them.[260] This metropolitan government for the Twin Cities area, known as the Met Council, has a well-established and robust state law authority to coordinate regional policy.[261] The Met Council adopted a metropolitan land use policy requiring all suburbs provide for their fair share of affordable housing.[262] Minnesota enacted a regional property tax base sharing act.[263] In upholding this act, the Minnesota Supreme Court declared the constitutional interdependency of Minneapolis and its suburbs.[264] By the early 1980s, the Twin Cities was one of the most integrated communities in the nation, with some of the smallest racial disparities.[265]

The Met Council of the Twin Cities was also at the vanguard of metropolitan civil rights and federal Fair Housing Act enforcement. The Council supervised the U.S. Department of Housing and Urban Development's (HUD's) Section 8 program and was given authority to tie grants of state and federal funds to actual progress on economic integration.[266] In most places, subsidized housing was rejected by affluent suburbanites, and segregated into impoverished urban neighborhoods.[267] The Met Council broke this pattern. By 1979, 70% of subsidized housing in the Twin Cities was constructed in the predominantly White developing communities of the suburbs—a record of integrated housing placement that has never been equaled in any major metropolitan area.[268]

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260. *See* Orfield & Stancil, *supra* note 258, at 27–28.

261. *Id.* at 10.

262. *Id.*

263. *See Fiscal Disparities*, METRO. COUNCIL, https://metrocouncil.org/Communities/Planning/Local-Planning-Assistance/Fiscal-Disparities.aspx [https://perma.cc/QX5K-23Y9].

264. *See* Village of Burnsville v. Onischuk, 222 N.W.2d 523 (Minn. 1974).

265. Orfield & Stancil, *supra* note 258, at 10.

266. *See* 42 U.S.C. § 3608; *Metro HRA Rental Assistance*, METRO. COUNCIL, https://metrocouncil.org/Housing/Services/Metro-HRA-Rental-Assistance.aspx [https://perma.cc/BK6T-PHYN].

267. Orfield & Stancil, *supra* note 258, at 22.

268. *Id.*

But the progress did not last. The Council caved under political pressure from the central cities and housing industry and returned to old, segregative patterns of development.[269] Many of the Met Council's pioneering practices were slowly abandoned—at least in practice, if not in the letter of the law.[270] In doing so, the Council unilaterally limited its own role in housing. Rather than coordinating housing development activity throughout the region, it now restricts its work to a handful of comparatively paltry funding sources over which it exercises direct control, and participation in a number of public-private "partnerships," largely with housing developers.[271] Under the Council's watch, local governments have abandoned integrative planning with a regional perspective.[272] They have reverted to segregative practices, creating a region in which exclusionary zoning reigns and lower-income housing is locked out of many communities.[273] While some communities have taken actions that reduce housing choice, and others are forced to bear the burden of runaway demographic transition, the Council has retreated.[274]

Worse still, the Council's more recent activities have promoted, rather than disrupted, the traditional concentrations of poverty and segregation in the central cities.[275] Its own funding sources have been distributed in a segregative fashion, with a disproportionately heavy emphasis on the central cities, and its negotiated housing goals have reduced the obligation of the region's Whitest communities to provide affordable housing.[276] It has embedded housing elements into its plans for other metropolitan systems like transportation—but only to encourage the development of lower-income housing along transit corridors, which are located almost exclusively in the central cities and less-affluent suburbs.[277]

The fields of housing and planning, once understood as a core civil rights concern where decisions could impact living patterns for

269. *Id.* at 37–47.

270. *Id.*

271. *Id.* at 47–54.

272. *Id.*; *see also* Edward G. Goetz, Karen Chapple & Barbara Lukermann, *Enabling Exclusion: The Retreat from Regional Fair Share Housing in the Implementation of the Minnesota Land Use Planning Act*, 22 J. PLAN. EDUC. & RSCH. 213, 217–18 (2003).

273. *See* Orfield & Stancil, *supra* note 258, at 27–30.

274. *See id.* at 43–44.

275. *See id.* at 26–27.

276. *See id.* at 42–44.

277. *Id.* at 48–49.

decades, are now dominated by parochial development interests and neighborhood activists. These include representatives from affluent and exclusionary suburbs, but also organizations working in the poorest quarters of the Twin Cities metropolitan area, where housing policy is dominated by the interest of nonprofit and public institutions that rely on the segregated status quo.[278]

A. The Met Council's Broad Authority to Seek Housing Integration

Just as riots throughout the country in the late 1960s led to the Kerner Commission Report and ultimately to the passage of the Fair Housing Act, serious civil disturbances in North Minneapolis and growing racial segregation in both central cities' school systems were driving forces behind the Council's fair share housing policy.[279] The Council believed that racial segregation was destroying the education and economic prospects of Black citizens in North Minneapolis, the fabric and vitality of their neighborhoods, and that growing racial and social segregation, left unchecked, would harm the economic vitality of the entire metropolitan area.

In the mid-1970s, the Council sought to establish a staged growth land planning system. It hired the renowned land use scholar, Robert Freilich, to design a new Metropolitan Land Planning Act for submission to the Minnesota legislature.[280] From the outset it was clear the Act would contain a "fair share" housing requirement, for Freilich believed that the staged growth system the Council wanted would be unconstitutional without it.[281] In January of 1974, Freilich produced a report to the Met Council outlining the proposed act and its fair share provisions.[282]

Freilich grounded his "fair share" proposals in explicit goals already annunciated by the Council, the requirements of the

278. *Id.* at 3.

279. *Cf. id.* at 21–22 (discussing implementation of the fair share goal and citing integration as a key motivating factor).

280. Robert H. Freilich & John W. Ragsdale, Jr., *Timing and Sequential Controls—The Essential Basis for Effective Regional Planning: An Analysis of the New Directions for Land Use Control in the Minneapolis-St. Paul Metropolitan Region*, 58 MINN. L. REV. 1009, 1009 n.1 (1974) ("This Article is the result of a 1972-73 grant from the Twin Cities Metropolitan Council to Professor Freilich to study and recommend a legal policy for regional growth in accordance with the Council's decision to pursue growth in a timed and sequential manner.").

281. *Id.* at 1086 ("Whatever the methods used, the region must make extensive provision for low-moderate income housing or face the grave danger that a general regional planning system of growth control will be subject to strict scrutiny and declared unconstitutional as violating the equal protection of the laws.").

282. *Id.* at 1009 n.1.

Federal Fair Housing Act, and the evolving case law prohibiting exclusionary zoning.

In its early planning documents, the Council highlights the importance of housing choice and desegregation. It defines the "Social Objectives of Physical Planning" to include:

1. To increase choice and opportunity for persons in the Metropolitan area, particularly people who are in some way disadvantaged, such as low income, minorities, senior citizens, etc.
2. To decrease residential segregation by race, class, and income level. To reduce the concentration of lower income families and individuals in the older areas of the region and increase housing choice for lower income persons throughout the area.[283]

After having achieved its full authorities under the Minnesota Land Use Planning Act, the Met Council had at its disposal an arsenal of powerful tools to shape, guide, and enforce local housing policies. These tools included the authority to:

- Review local applications for state and federal funding based on housing performance.[284]
- Award funds directly under its control on the basis of housing performance, including:
    - Sewer funds
    - Park funds
    - Transportation funds.
- Suspend state agency plans inconsistent with Council policies.[285]
- Suspend local comprehensive plans, which could include the mandatory housing element, if they do not conform with systems plans.[286]
- Embed housing elements into system plans.[287]
- Suspend any matter of metropolitan significance undertaken by a local government.[288]

283. Metro. Council, Discussion Statement on Metropolitan Development Policy 7 (Oct. 1973).

284. MINN. STAT. § 473.171 (2020).

285. *See* MINN. STAT. § 473.165 (2020).

286. *See* MINN. STAT. § 473.175 (2020).

287. *See* MINN. STAT. § 473.146 (2020).

288. MINN. STAT. § 473.173 (2020).

- Form collaborative review agreements with state agencies, including the state housing finance agency.[289]
- Review housing bonding plans.[290]

The Council also planned to rely on its suburban integration efforts to receive supplementary funding from HUD, which offered special allocations to metropolitan areas operating fair share housing plans.[291] On the basis of its promise to maintain a racially integrated regional fair housing program, the Council requested, and received, a 50% supplemental Section 8 allocation from HUD in both 1976 and 1979—almost twice the allocation received by any other region. It also received further support when its Areawide Housing Opportunity Plan, which encompassed its housing program, was certified for extra funding from HUD in 1976.[292]

B. The Council Promotes Housing Choice and Integration

In response to clear internal and external directives, the Council in the early 1970s used its state law powers to adopt and enforce a series of policies to improve racial and economic integration. It did so by ensuring that subsidized housing was produced in suburban communities.

The centerpiece of these was Policy 13—later renamed Policy 39—which, in the words of contemporaneous reports, "stated that in reviewing requests from a local community for state or federal grants that priority for such requests would be given based on the community's housing performance."[293] This method of prioritization meant that "applications for parks, sewers, water, highway construction, open space, aging and criminal justice funds [were] prioritized according to not only the merits of the application itself, but also on the community's plans and performance for providing housing for low and moderate income persons."[294]

In addition, the Metropolitan Land Planning Act, which was passed in 1976, empowered the Council to create numerical housing allocations for communities within its jurisdiction.[295] It could then

289. MINN. STAT. §§ 473.165, 474.173 (2020).

290. *See* MINN. STAT. § 473.173 (2020).

291. *See, e.g.*, Letter from John Boland, Chairman of the Metropolitan Council, to James L. Young, HUD Assistant Secretary for Housing (July 6, 1976).

292. BERKELEY PLAN. ASSOCS., ASSESSMENT OF THE IMPACT OF THE HOUSING OPPORTUNITY PLAN (AHOP) PROGRAM III-7 (1979).

293. TRUDY PARISA MCFALL, A REGIONAL HOUSING STRATEGY: FROM PLANS TO IMPLEMENTATION 8 (1975).

294. *Id.*

295. *See* MINN. STAT. § 473.859 subd. 2(c) (2020) ("A land use plan shall also include a housing element containing standards, plans and programs for providing

review local comprehensive plans to ensure that they were in compliance with allocated goals.[296] The Council was granted the authority to temporarily suspend plans that did not comply with its systems plans;[297] these systems plans complemented and incorporated the housing allocations through the use of density goals and similar measures of housing performance.[298]

These policies were remarkably successful at promoting fair housing; over the course of the 1970s the geographic distribution of subsidized housing in the Twin Cities changed dramatically. In 1970, 90% of Twin Cities subsidized housing was located in the central cities; by 1979, nearly 40% of units were in suburban communities.[299] In some of the intervening years, the proportion of new units built in the suburbs approached or exceeded 70% of the regional total.[300] Likewise, while only 16 of the region's 189 municipalities contained any subsidized housing at all in 1970, that number had grown to 97 by the end of the decade.[301] In under a decade, the total number of units in the suburbs increased nearly eight-fold, from 1,878 in 1971 to 14,712 in 1979.[302] Nine thousand four hundred, or 70%, of the over 13,000 units added in this period were located at the developing edge of the suburbs.[303] An examination of the comprehensive plans of twenty-five sample communities shortly after the passage of the Metropolitan Land Planning Act found that over 7,463 parcels of land, totaling 8,590 acres, had been set aside for high density affordable housing.[304] In short, through dedicated effort, the Metropolitan Council

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adequate housing opportunities to meet existing and projected local and regional housing needs, including but not limited to the use of official controls and land use planning to promote the availability of land for the development of low and moderate income housing.").

296. MINN. STAT. § 473.858 subd. 1 (2020).

297. *See* MINN. STAT. § 473.175 (2020).

298. *See* MINN. STAT. § 473.859 subd. 1 (2020).

299. Orfield & Stancil, *supra* note 258, at 22–23.

300. *Id.* at 22.

301. *Id.* at 22–23.

302. *See* METRO. COUNCIL, HOUSING OPPORTUNITY IN THE TWIN CITIES: A STAFF BACKGROUND REPORT ON THE LOCAL AND REGIONAL RESPONSE 1967-1978, at 3 (1978) [hereinafter STAFF BACKGROUND REPORT].

303. *Id.*; INST. ON METRO. OPPORTUNITY, COMMENTS ON SECOND DRAFT FAIR HOUSING EQUITY ASSESSMENT 28–29 (Feb. 28, 2014) [hereinafter SECOND DRAFT COMMENTS].

304. Edward G. Goetz, Karen Chapple & Barbra Lukermann, *The Minnesota Land Use Planning Act and the Promotion of Low- and Moderate-Income Housing in Suburbia*, 22 LAW & INEQ. 31, 40 (2004); SECOND DRAFT COMMENTS, *supra* note 303, at 28.

substantially and meaningfully opened many of the suburbs to lower income families.

Writing in 1975, the manager of the Council's housing program noted that "[t]he most pervasive characteristic of housing patterns in virtually all major metropolitan areas is that of socioeconomic and racial residential segregation."[305] In light of this fact, "[t]he Council has been chiefly concerned with locating subsidized housing in well serviced suburban locations."[306] Council documents rigorously tracked progress towards altering the distribution of subsidized housing between the suburbs and central cities; for example, the table below, reproduced from a Council housing report, depicts the rapid suburbanization of subsidized units.[307]

305. MCFALL, *supra* note 293, at 1–2.
306. *Id.* at 4.
307. SECOND DRAFT COMMENTS, *supra* note 303, at 30.

Subsidized Housing in the Twin Cities in the 197

	Region	Central Cities		Suburbs	
Year	New Units	New Units	Share	New Units	Share
1971-72	4,139	2,668	64%	1,471	36%
1972-73	2,147	1,083	50%	1,064	50%
1973-74	917	504	55%	413	45%
1974-76	5,363	2,029	38%	3,334	62%
1977	4,657	1,255	27%	3,402	73%
1978	2,099	831	40%	1,268	60%
1979	2,329	724	31%	1,605	69%
Totals	21,651	9,094	42%	12,557	58%

Cumulative Totals of Subsidized Housing
(includes units provided before 1971)

	Region	Central Cities		Suburbs	
Year	Total Units	Total Units	Share	Total Units	Share
July, 1971	18,736	16,858	90%	1,878	10%
July, 1973	24,202	19,877	82%	4,325	18%
July, 1974	25,013	20,414	82%	4,599	18%
Dec., 1976	27,986	20,118	72%	7,868	28%
Dec., 1977	31,851	21,060	66%	10,791	34%
Dec., 1978	34,650	21,891	63%	12,759	37%
Dec., 1979	37,268	22,556	61%	14,712	39%

Family Housing

	Region	Central Cities		Suburbs	
Year	Total Units	Total Units	Share	Total Units	Share
pre-1975	11,957	8,367	70%	3,590	30%
1975-76	3,578	1,537	43%	2,041	57%
1977-79	2,022	10	0%	2,012	100%

Remarkably, documents from the period indicate that the Council confronted, overcame, and eventually transformed political resistance to integration in the suburbs. At the outset, suburban communities were skeptical of the Council's housing policies—for instance, one staff report describes initial reactions "of anger, hostility, and frustration" from suburbanites.[308] But the agency remained dedicated to the principle of providing housing choice and opportunity, noting in the same report that "the available evidence strongly suggests that minority populations would like a far broader opportunity for suburban and rural living than they presently

308. METRO. COUNCIL, STAFF BACKGROUND REPORT, *supra* note 302, at 2.

have."[309] Moreover, the Council defended its authority to pursue that outcome, noting that its "review role [for funding] is an invaluable tool for implementing policy."[310]

Ultimately, the Council's determination paid off, and a number of the suburbs accepted or even embraced the goals of suburban integration. For instance, a 1979 report on the region's housing policy describes the extraordinary efforts of Edina, one of the region's wealthiest suburbs, to comply with its housing requirements (efforts which were undermined by HUD itself):

> The most extreme case we heard of was Edina's valiant effort to use one of its last remaining parcels (on its boundary) for family subsidized housing. It used CDBG funds for land write-downs, held developers' hands, got city council approval, and submitted the proposal (demand by the Metro Council's allocation plan) to HUD, which turned down the project on the grounds of "impaction of family housing" although Edina, the most affluent suburb in the metropolis, had only one other subsidized family project, and the proposed density was only nine units per acre. The Edina planner fears . . . the city will be left out of compliance with the regional plan.[311]

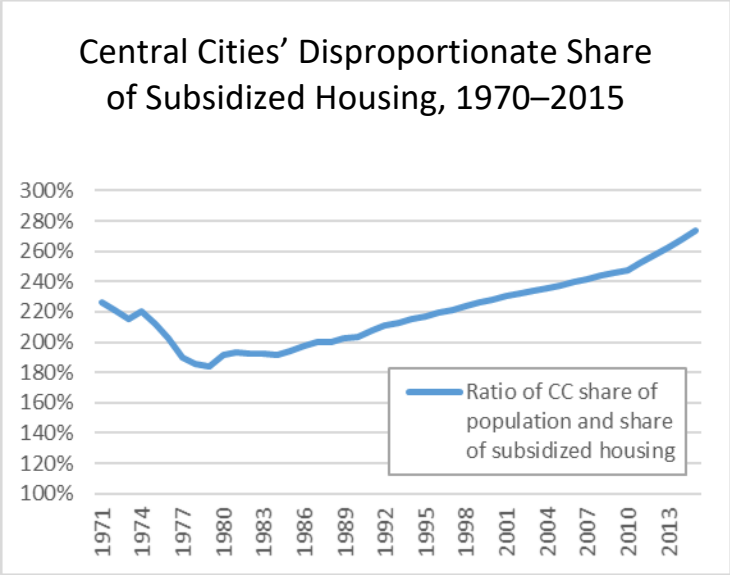
The same report describes many successful instances of cooperation with suburban communities to produce subsidized and lower-income housing.[312]

C. Retreat and Reversal

Today, as the result of a combination of political timidity and capitulation to special interests, the Council has unraveled virtually all of its previous progress towards housing integration.

309. *Id.*
310. *Id.*
311. BERKELEY PLAN. ASSOCS., *supra* note 292.
312. *Id.*

After the 1970s, the Council's efforts to integrate subsidized and affordable housing into the suburbs began to stagnate. The suburban share of subsidized housing reached approximately 42% in the mid-1980s and has not significantly changed since.[313] Meanwhile, as sprawl has progressed and the region has grown, the central cities' share of regional population has continually shrunk.314 As a result, the oversupply of subsidized housing in the central cities, as compared to their proportion of population, has worsened continually since 1980. Today, the mismatch between share of population and share of housing in the central cities is actually far worse than it was before the Council's integration efforts began in earnest in 1970 (see the chart below).[315]



The causes of this reversal are complex, but two factors have played a key role. First, political actors, particularly housing interests and central city governmental agencies, have battled to retain housing funding. Second, there have been marked policy

313. Orfield & Stancil, *supra* note 258, at 22–23.

314. Greta Kaul, Minneapolis Is Growing at its Fastest Rate Since 1950, MinnPost (May 23, 2018), https://www.minnpost.com/politics-policy/2018/05/minneapolis-growing-its-fastest-rate-1950/ [https://perma.cc/6ZM4-UJGU].

315. Data obtained from Orfield & Stancil, *supra* note 258, at 6.

changes at the Council itself, which has deemphasized the very housing policies it once strictly enforced.

Concern among central city political circles and development interests about the loss of funding is readily apparent in the historical documentary record. As early as 1975, the manager of the Council's housing program was reporting pushback arising out of worries over funding:

> The major issue which has arisen around the allocation plan has been the number of units which have been allocated to the center cities of Minneapolis and St. Paul; the plan directs that they should receive 16 and 12 percent of the available funding. City officials have argued that this is inadequate to meet their needs, slows their urban renewal efforts, and inadequately provides for relocation needs. The Council has, however, remained firm in its intention to carry out its plan to increase the supply of low income housing in suburban areas.
>
> That center city resistance should be the major issue surrounding the plan was surprising to us, but it certainly is understandable. Large and sophisticated housing authorities exist in the cities. . . . They have further relied heavily on subsidized housing to turn over the land cleared through urban renewal. Reduction of their programs through redirection of subsidy funds causes considerable problems and adjustments.[316]

Although this report was released before the passage of the Metropolitan Land Planning Act and subsequent creation of a numerical fair share plan, a 1979 report, commissioned by HUD to evaluate the region's areawide housing plan, makes clear that resistance continued and stiffened over time, resulting in demands for a higher housing allocation from the central cities. For instance, one section describes the political relationship between cities and suburbs:

> [T]he very success of the regional housing allocation plan has generated some discord among the multiple institutions dedicated to housing . . . . In the plan's early stages, the central cities – with 90% of the region's assisted housing – were eager for the suburbs to take on some of the burden. Now they feel dispersion may have gone too far, that central cities need more of the scarce housing resources.[317]

The report elaborated further on the pressures on the Council to abandon its integration efforts:

> The pressures to relax the plans aggressive fair share distribution comes from several sources. Most significantly, perhaps, the HUD area office . . . . At the same time the central

316. MCFALL, *supra* note 293, at 12.

317. BERKELEY PLAN. ASSOCS., *supra* note 292, at III-11.

> cities of Minneapolis and St. Paul are retreating from their support of the [areawide plan]. St. Paul, the more economically depressed, had never been as an enthusiastic [plan] supporter as its Twin City, and is now seeing considerable redevelopment promoted by an aggressive director of a highly centralized organization directly under the mayor. In this situation, St. Paul understandably seeks a larger share of subsidized housing, citing arguments such as relocation needs, gentrification, and that the [areawide plan's] "white flight" assumption is akin to generals fighting the last war . . . . [B]oth central cities are looking for larger percentage shares of subsidized housing in any revisions of the regional allocation plan.[318]

The result of these various pressures has been a marked change in the Council's priorities, and with it, a failure to enforce many of its own previous policies. The waning of political will to maintain the Council's housing policies is intrinsically linked to the growth of segregation in the region, as noted in one 2004 study:

> Two important changes in the socio-political environment of the Twin Cities region also undermined the state's commitment to fair share housing during the second wave. The first change was a reduction in gubernatorial support for an interventionist Met Council. Democrat Rudy Perpich and his successor, Republican Arne Carlson, both expressed little interest in metropolitan planning, especially in the area of low-mod housing, and neither advanced policies to strengthen Met Council. The second change was a demographic shift in the region. At the same as more people of color moved to the area, greater concentrations of poverty and attendant social problems emerged in core neighborhoods. The social and economic homogeneity that had been the foundation of almost two decades of regional problem-solving began to disappear. With it went the language of regional commitment to low-cost housing needs under the fair share method.[319]

The same study analyzed the interaction between Council policies and the comprehensive plans of twenty-five communities.[320] It found that, after the Council began aggressively enforcing its need allocations in the late 70s, "[t]he first round of plans addressed both the local and regional needs by referencing the fair share allocation established by Met Council."[321] The influence of the Council's policies are clear in the plans themselves, with "[s]ome plans even indicat[ing] that the regional allocation system was the

318. *Id.* at III-4, III-5.

319. Goetz et al., *supra* note 304, at 46 (footnotes omitted).

320. *Id.* at 40.

321. *Id.* at 48.

best way to determine local needs."[322] These plans "routinely acknowledge the local regulatory options to overcoming barriers to low-cost housing development."[323] Once again, suburban cooperation is a key theme: "the Apple Valley, Inver Grove Heights, and Eagan plans each contain language stating that housing needs are best established on a regional basis."[324]

But after the Council's commitment to integration subsided, cities felt free to ignore the fair share system. According to the study's authors, "[n]ot a single plan submitted later than 1990 . . . identified the local share of regional low [and moderate income] housing needs," and "[w]ith the exception of two communities, none of the later plans identified existing or projected low-mod housing needs at all."[325] Later plans "are generally bereft of specific statements outlining regulatory steps;"[326] for instance, an Inver Grove Heights plan only states that "[t]o the degree possible, the City will work to ensure that local actions do not unduly increase the cost of raw land."[327] The regionally-oriented language also vanished from the suburban plans, replaced by defiant assertions of local control:

> [I]n its place [was] language asserting each community's role in establishing housing goals. The 1999 plan for Apple Valley, for example, states that "[t]he City is in the best position to determine the most responsible option for meeting the future needs of Apple Valley rather than the Metropolitan Council, especially as it relates to residential densities."[328]

The 2004 study determined that these changes reflected a broader retreat from any consideration whatsoever of low-income housing in city planning:

> Five [cities] indicated that they do not calculate low-mod housing need in any way. One city planner said her community does not calculate need because it "is a factor of the marketplace and changes periodically and regularly with the market." In another community, the planner indicated, somewhat paradoxically, that they do not calculate need because they have determined that it is zero.[329]

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322. *Id.* at 48–49.

323. *Id.* at 55.

324. *Id.* at 49.

325. *Id.* at 48.

326. *Id.* at 55.

327. *Id.* at 57 (quoting CITY OF INVER GROVE HEIGHTS, INVER GROVE HEIGHTS COMPREHENSIVE PLAN-DRAFT 7 (1998)).

328. *Id.* at 49 (third alteration in original) (footnotes omitted) (quoting CITY OF APPLY VALLEY, COMPREHENSIVE PLAN UPDATE DRAFT 60 (1999)).

329. *Id.* at 50 (footnotes omitted) (quoting Interview by Leigh Tomlinson with Pam Dudziak, City Planner, City of Eagan, in Eagan, Minn. (June 29, 2001)) (citing

The Council's changing priorities are reflected in its own reports. As late as 1996, its Regional Blueprint discussed suburban housing integration, even noting the lack of progress over the previous decade.[330] But by 2004, the Blueprint omitted any discussion of the subject at all, instead only stating that "[t]he region will, of course, need much more housing in the next 30 years," and emphasizing the importance of "public-private partnerships" in expanding housing supply.[331]

These changes are all the more remarkable because the Council still retains the same authorities it had used to promote housing integration in previous decades.[332] In the mid-1990s, there were legislative efforts to force the Council to utilize its authorities more broadly (several of which were directed by Myron Orfield, an author of this article, who was at the time serving in the state House of Representatives).[333] The legislature twice passed a statute that would force a return to strong fair-share policies and would require the council to withhold other forms of financial aid from noncompliant cities.[334] Each bill was vetoed by Governor Arne Carlson.[335]

In 1995, a compromise measure, the Livable Communities Act (LCA), was passed and was signed into law.[336] This law did not contain the clear mandates of the previous effort, instead relying on voluntary, incentive-based development funding for regional jurisdictions.[337] Although the LCA in no way altered or reduced the

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Interview by Jill Mazullo and Mudia Ouzzi with Howard Blin, Plan. Dir., and Stacie Kvilvang, Econ. Dev. and Hous. Planner, City of Brooklyn Park, in Brooklyn Park, Minn. (Dec. 11, 2000)).

330. METRO. COUNCIL, REGIONAL BLUEPRINT 59 (1996).

331. METRO. COUNCIL, 2030 REGIONAL DEVELOPMENT FRAMEWORK 13 (2004).

332. *See, e.g.*, Minn. Stat. § 473.175 (2020) (granting the Metropolitan Council the ability to review comprehensive local plans).

333. *See* Dane Smith, *House Committee Approves Met Council Bill, Members Would Be Elected Instead of Being Picked by Governor*, STAR TRIB., Mar. 25, 1997, at B3 [hereinafter *House Committee*] [https://perma.cc/9RFL-JWFL]; Patricia Lopez Baden, *Tax-Sharing Bill Fails in Close Senate Vote, Plan Would Pool Revenues in Metro Area*, STAR TRIB., May 10, 1995, at 1B [https://perma.cc/R9S9-ZR5V]; Dane Smith, *House Again OKs Orfield Housing Bill; Carlson Set to Veto*, STAR TRIB., Apr. 23, 1994, at 1B [hereinafter *House OKs Orfield*] [https://perma.cc/6VE5-LTLA].

334. *See House OKs Orfield, supra* note 333.

335. *See id.* ("[T]he bill is almost certain to be vetoed by Gov. Arne Carlson."); Baden, *supra* note 333 (describing Governor Carlson's opposition to the tax shifting bill); *see also House Committee, supra* note 333 ("However, Gov. Arne Carlson is still opposed to an elected council. Spokesman Brian Dietz said Carlson considers it 'veto material.'").

336. *See* Metropolitan Livable Communities Act, ch. 255, 1995 Minn. Laws 2592 (codified as Minn. Stat. §§ 473.25–437.255).

337. Goetz et al., *supra* note 304, at 46–47.

Council's previously exercised powers, and was in fact intended to jumpstart the integrative processes that had been stalled since the previous decade, it was quickly used to justify the Council's changing priorities.[338] Suburban leaders argued, incorrectly, that the Council's previous legal authority "was superceded [sic] by the LCA."[339]

Once again, the Council's failure to enforce its policies allowed exclusionary practices to take root:

> Even though LCA benchmarks are low, many communities negotiate with Met Council to lower their goals even further. The 1998 plan for Lino Lakes, for example, provides no calculations of existing or projected need for low-mod housing, nor the City's share of the regional need for such housing. The plan references LCA goals, and notes that the goals for homeownership are to slightly reduce the rate at which affordable housing is produced in the City, and to slightly increase the rate at which affordable rental housing is developed. Even with the increase in affordable rental housing, Lino Lakes has adopted a goal that is ten to twenty-three percentage points below the benchmark provided to them by Met Council. Oakdale, Shoreview, and Prior Lake have also adopted goals below the provided benchmarks.[340]

The lopsided LCA benchmarks have resulted in even-more-lopsided funding outcomes.[341] Of the more than 14,000 housing units subsidized by LCA funding during the program's history, 49.8% have been located in the central cities of Minneapolis and St. Paul, which contain only 24.7% of the region's housing and a majority of its concentrated poverty and segregation.[342] Most of these allocations occurred under the previous set of benchmarks. But as Table Two demonstrates, when new benchmarks were negotiated, the Council worked not to arrest this trend, but instead accelerated it by giving the central cities higher goals.[343]

It remains unclear to this day exactly when and how the bold fair share policies of previous decades were eliminated at the Met Council. The best evidence suggests they were abandoned by piecemeal nonenforcement in the 1990s, seemingly out of the same concern over suburban backlash that had resulted in the gutting of

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338. *See* Orfield & Stancil, *supra* note 258, at 42–43.

339. Goetz et al., *supra* note 304, at 51 (quoting Interview by Jill Mazullo with John Heald, Cmty. Dev. Dir., City of Savage, in Savage, Minn. (Nov. 29, 2000)).

340. *Id.* at 53–54 (footnotes omitted).

341. Data on LCA funding was analyzed by the Institute on Metropolitan Opportunity at the University of Minnesota. Underlying datasets are on file with authors.

342. *Id.*

343. *See infra* note 361.

Minnesota's school desegregation rule.[344] Notably, some of the same figures crop up: Lee Sheehy, the Deputy Attorney General who had presided over the school rule's evisceration, became regional administrator at the Met Council in the early 2000s, where he oversaw much of the day-to-day operations of the agency.[345]

In the 2010s, under the Obama administration, the federal government began to refocus on questions of integration and segregation. These changes most notably took the form of a raft of new civil rights rules, including a Discriminatory Effect rule formalizing the Fair Housing Act's bar against the perpetuation of segregation and an Affirmatively Furthering Fair Housing Rule requiring some local jurisdictions to take affirmative steps to create integrated housing.[346]

However, the Met Council's housing policy efforts in the 2010s continued to reduce the role of integration in the agency's policies. In 2010, the Council was awarded a $5 million HUD grant under the national Sustainable Communities program, a federal effort to coordinate housing and transit planning.[347]

As a component of its Sustainable Communities grant, the Council was required to complete an "equity assessment," essentially identifying high-poverty and high-opportunity areas within the region and analyzing how those policies interacted with public investment and fair housing issues.[348] The Council's completed assessment, however, exhibited the influence of its integration-skeptical consultants and largely minimized the subject of segregation. Although it identified areas of concentrated poverty as required by grant terms, it did not articulate any real strategy for eliminating the segregation in those areas.[349] In addition, it conducted an assessment of neighborhood opportunity that acted as

344. Despite repeated requests, the Met Council has never provided authors or any other agency documentation of a specific decision to begin nonenforcement of these policies. See Orfield & Stancil, *supra* note 258, at 42–44 for additional discussion.

345. Brady Averill, *Klobuchar Picks Sheehy as Her New Chief of Staff*, STAR TRIB., May 19, 2007, at 11A [https://perma.cc/2MDT-Q8VS].

346. Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (codified at 24 C.F.R. pt. 100); Affirmatively Furthering Fair Housing Rule, 80 Fed. Reg. 42,272 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

347. *See* Twin Cities Metropolitan Sustainable Communities Regional Planning Program, Application to HUD 2 (August 22, 2010).

348. METRO. COUNCIL, *Executive Summary: About this Summary*, *in* CHOICE, PLACE, AND OPPORTUNITY: AN EQUITY ASSESSMENT OF THE TWIN CITIES REGION, at III–IV (2014).

349. *See id.* (explaining criteria for Racially Concentrated Areas of Poverty).

a virtual apologia for neighborhood segregation. Communities in the Twin Cities region were classified into opportunity tiers.[350] But rather than array those tiers from high to low, the Council's equity assessment identified advantages and disadvantages for each tier, making them appear in many respects equivalent. For instance, affluent suburban areas were identified as having "[a]bove average school performance" but "[l]ow access to social services," while segregated central city areas were described as having "[h]igh access to social services" but "below average school performance."[351]

Simultaneously, the Met Council was working on a renewed Housing Policy Plan for the region, the first formal update of its housing plan in nearly 30 years.[352] The plan it developed, which was adopted in 2014, echoed the ideas of the equity assessment.[353] It formally eliminated Policy 39 conditioning funding on housing performance, which had last been articulated in 1985.[354] Remarkably, despite the federal efforts to re-center housing segregation, the new Housing Policy Plan all but ignored the topic. Indeed, it only mentions the word four times: once describing future challenges for the region, once in a description of the equity assessment, and twice in a description of President Obama's new affirmatively further rule—which it otherwise ignored.[355]

The new housing plan updated the regional "housing need" calculation for every jurisdiction, and also updated LCA benchmarks for housing construction.[356] In the most recent set of LCA goals, nearly every subset of communities was permitted to adopt a benchmark far below their allocated regional need—except the central cities, which were explicitly required to adopt a benchmark that was 100% of their allocated need. The central cities

350. METRO. COUNCIL, *Section Six: Opportunity in the Region*, *in* CHOICE, PLACE, AND OPPORTUNITY: AN EQUITY ASSESSMENT OF THE TWIN CITIES REGION 2–3 (2014). ("A second shortcoming of the [Cumulative Opportunity] Index is that it categorizes communities as either low or high opportunity rather than recognizing each community's mix of assets and shortcomings. Consequently, it fails to capture the multi-dimensional nature of communities without labeling and stigmatizing some communities as 'bad' communities.").

351. *Id.* at 5.

352. METRO. COUNCIL, HOUSING POLICY PLAN 1 (2014) [hereinafter HOUSING POLICY PLAN].

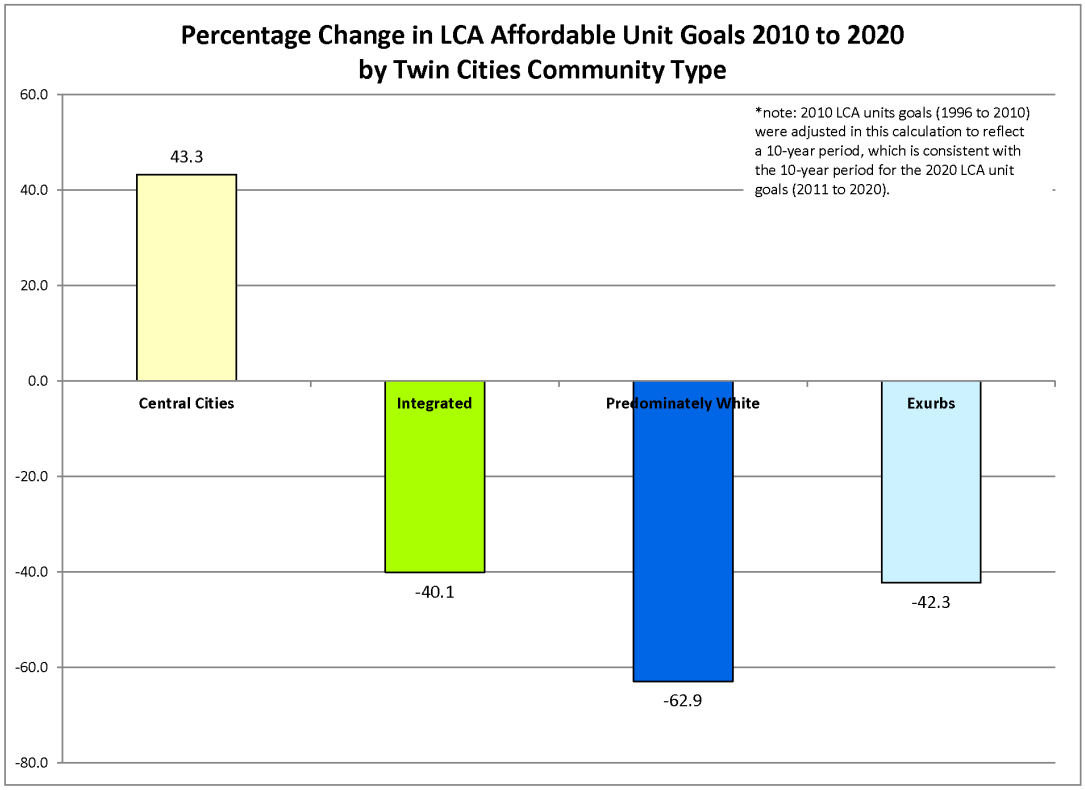
353. *See, e.g.*, *id.* at 136 (discussing the equity assessment).

354. *Id.* at 102–03.

355. *See id.* at 12, 58, 136.

356. *See* METRO. COUNCIL, 2021-2030 ALLOCATION OF AFFORDABLE HOUSING NEED IN THE TWIN CITIES (2014) (listing calculated need).

were the only communities whose LCA benchmarks actually increased in relation to the previous round (see the figure below).[357]



At every stage of the Met Council's policymaking process, civil rights advocates, including the authors of this article, attempted to draw attention to its missteps. In lengthy comments submitted on drafts of both the Equity Assessment and the Housing Policy Plan (as well as an amendment to the Housing Policy Plan in 2015), commenters drew attention to the reduced role of segregation in Council policy.[358] This omission, commenters argued, was both inadvisable as a matter of regional policy, and likely violative of federal civil rights law.[359] Nonetheless, these frustrations fell on

357. Calculations performed by the Institute on Metropolitan Opportunity.

358. *See* INST. ON METRO. OPPORTUNITY, COMMENTS ON THE METRO. COUNCIL PROPOSED AMENDMENTS TO THE HOUSING POLICY PLAN 1 (2015) [hereinafter COMMENTS ON AMENDMENTS].

359. SECOND DRAFT COMMENTS, *supra* note 303, at 7 ("The Met Council ignores

deaf ears and no significant revisions were made as a result of civil rights concerns.[360]

D. Neo-Segregation in Twin Cities Housing Policy

The abandonment of the Met Council's historic emphasis on coordinated regional planning has resulted in the atomization of housing policy in the Twin Cities region. Individual developers or cities compete for housing resources, often seeking the path of least resistance to acquire and utilize those resources.[361] Because of the long historical links between affordable development in non-White segregated neighborhoods, and the relative lack of affluent White exclusionary political forces in those areas, the path of least resistance is typically to concentrate affordable housing in those areas, further deepening segregation.[362]

In a process that mirrors the charter school system's eventual embrace of segregation, the entities that dominate modern affordable housing development have come to advocate against racial integration.[363] Thus the Twin Cities have developed a complex stakeholder group with direct interests in promoting the continuation of the status quo of residential segregation—in short, housing neo-segregationists.

Early manifestations of this approach appeared in government, as Minneapolis and St. Paul developed policy mechanisms to recapture housing money that was being allocated to suburban areas.[364] In 1980, the cities jointly created the Family Housing Fund, a "quasi-public" entity designed to help generate and allocate funding for central city housing projects.[365] In its first decade of existence, the Family Housing Fund reported that it had created approximately 10,500 units of affordable housing in the central cities.[366]

The Family Housing Fund still exists today, helping to produce hundreds of housing units annually, which are more likely to be

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the implications of the education data, even though it is clearly part of their duty under the Fair Housing Act and even though all of the FHEA material and webinars state this analysis of school segregation must be part of the FHEA."); COMMENTS ON AMENDMENTS, *supra* note 358, at 2 ("Federal law requires that the Council's policies actively promote the racial integration of housing.").

360. *See* HOUSING POLICY PLAN, *supra* note 352.

361. *See* Orfield & Stancil, *supra* note 258, at 23–24.

362. *Id.* at 4.

363. *Id.* at 26–27.

364. *Id.* at 3.

365. *Id.* at 3, 24.

366. *Id.* at 24.

located in segregated census tracts than regional subsidized housing as a whole.[367] It has, in the interim, spun off a number of subordinate organizations, such as the Twin Cities Community Land Bank and Twin Cities Housing Development Corporation, which have also at times have been described as quasi-public but now operate more or less independently.[368]

Efforts to return housing subsidies to the central cities were assisted by the implementation, in 1987, of the Low-Income Housing Tax Credit (LIHTC) system. Prior to LIHTC, most federal housing subsidies were managed by HUD, an agency with a strong statutory civil rights mandate and a civil rights division.[369] But in the second half of the 20th century, the amount of federal funding directed to public housing and these other subsidies rapidly declined—ironically, partly as a result of the concern that public housing was being constructed in a segregative fashion.[370] In 1986, the Reagan administration created a broad new tax credit for use constructing subsidized housing.[371] This tax credit is now the federal government's primary contribution to subsidized housing construction, which has effectively privatized the affordable housing industry and placed it under the management of the Internal Revenue Service, a department with no civil rights expertise.[372]

The advent of the LIHTC system muddled many of the avenues of control that the Met Council and other agencies had over housing siting. LIHTC projects are initially proposed by a developer—usually private—and agencies primarily exercise control over development with allocation criteria that incentivize certain types of proposals. As a result, subsidized units are more likely to be focused in areas where affordable housing developers are already experienced and active—primarily areas that are low-income and racially segregated.[373] Coordinated regional policy is much more difficult when responsibility for individual projects lies

367. Myron Orfield, Will Stancil, Thomas Luce & Eric Myott, *Response to Poverty-Pimping CDCs: The Search for Dispersal's Next Bogeyman*, 25 HOUS. POL'Y DEBATE 619, 627 (2015).

368. Orfield & Stancil, *supra* note 258, at 26.

369. *Id.* at 27.

370. Doug Gustafson, *Short History of Public Housing in the US (1930's – Present)*, HOMES NOW (Apr. 3, 2018), https://homesnow.org/short-history-of-public-housing-in-the-us-1930s-present/ [https://perma.cc/UV3A-SW5E].

371. CORIANNE PAYTON SCALLY, AMANDA GOLD & NICOLE DUBOIS, URB. INST., THE LOW-INCOME HOUSING TAX CREDIT: HOW IT WORKS AND WHO IT SERVES 1 (2018).

372. *See id.*

373. Orfield & Stancil, *supra* note 258, at 3.

with a dense cluster of individual private actors.[374] And while housing funding agencies may give preference to projects that are integrative, or at least, not segregative, they will likely face pushback from the developers that are primary clients and may resent any effort to make subsidies harder to obtain.[375] When lobbied by civil rights advocates to make their LIHTC allocation policies more integrative, or remove overtly segregative criteria, the Minnesota Housing Agency has responded reluctantly.[376]

In the Twin Cities, central city development interests went a step further to secure tax credit funding. As pressure to restore subsidies to the cities of Minneapolis and St. Paul mounted, the state legislature implemented a novel "suballocator" system.[377] The suballocator system gives Minneapolis and St. Paul independent control of a separate pool of tax credits, while the state housing agency manages tax credit awards for most of the rest of the state, including most Twin Cities suburbs.[378] As a result, the cities can protect their tax credits from suburban competition and set independent allocative criteria for that funding.[379] Notably, the share of tax credits assigned to the central city was set at the time of the system's implementation in 1987, and remained unchanged for many years, even while the cities' share of metropolitan population dropped.[380] The allocative system produced by the Council granted 35.6% of metropolitan tax credits to the Minneapolis and St. Paul suballocators, far greater than these cities' share of the regional population.[381] This share acts as an effective minimum allocation, but the cities are also eligible for

374. *See, e.g.*, *id.* at 50–51.

375. *Id.* at 31.

376. Myron Orfield, Will Stancil, Thomas Luce & Eric Myott, *High Costs and Segregation in Subsidized Housing Policy*, 25 HOUS. POL'Y DEBATE 574, 592 (2015) [hereinafter Orfield et al., *High Costs*].

377. *Id.* at 577.

378. *Id.* (noting that several suburban counties such as Dakota and Washington Counties and several non-metro cities are also suballocators); *see also id.* at 594 (explaining that suburbs receive relatively small pools of tax credits; the primary divide remains between the two central cities and the state housing agency).

379. *Id.* at 594 ("Another important consideration is the way in which the allocation process shields geographic shares of LIHTC funding from competitive pressure. The suballocator system ensures that the vast majority of central city allocations cannot be diverted to the suburbs, no matter how much cheaper it is to pursue suburban development.").

380. After the state housing agency and Met Council faced a HUD fair housing complaint in 2015, the suballocator shares were finally adjusted to more closely align with population share. *See* MINN. HOUS. FIN. AGENCY, AMENDED 2014/2015 HOUSING TAX CREDIT PROGRAM PROCEDURAL MANUAL (2015).

381. Orfield et al., *High Costs*, *supra* note 376, at 597.

additional credits, allocated by the state housing finance agency.[382] Between 2006 and 2016, the cities received an average of 45% of the regional allocation annually, and in some years, more than half the regional allocation.[383]

The privatization and fragmentation of housing subsidy streams, as well as the new, central-city driven policy consensus on affordable housing development has helped feed the growth of a vast network of nonprofit corporations, housing-oriented financial institutions, public-private collaboratives, housing-centric foundation work, and other small-bore efforts.[384]

This constellation of housing developers and other housing-related firms has created a welter of problems for Minnesota. Among the most severe of these is the seemingly irrepressible growth of affordable housing costs. There are limited cost controls on affordable housing development, and developers earn fees on a percentage-of-total-cost basis, creating a perverse incentive to drive costs up rather than minimize them. Perhaps relatedly, affordable development costs have skyrocketed. In recent years, it is not unusual for affordable housing projects to exceed $300,000, $400,000, and $500,000 per unit.[385] Tellingly, these per-unit costs are actually lower in suburban areas, despite suburban projects tending to include larger units.[386] Development costs tend to be higher in central cities, where projects are more likely to be managed by private nonprofit developers and include novel subsidies from many sources.[387] Tax credit projects also tend to have higher development costs.[388]

This lack of oversight and centralized coordination has given root to trends even more troubling than high costs. A recent fad in Minnesota affordable housing is the growth of ultra-high-cost subsidized housing projects where residents are predominantly White.[389] Rather suspiciously, given the demographics of their residents, these buildings also tend to bill themselves as "artist housing," which, under an obscure 2008 federal exemption, allows

382. *Id.*

383. Calculated from data provided by the Minnesota Housing Finance Agency.

384. Orfield et al., *High Costs*, *supra* note 376, at 589.

385. Data provided by Minnesota Housing Finance Agency.

386. Orfield et al., *High Costs*, *supra* note 376, at 584.

387. *Id.*

388. *Id.* at 583–88.

389. INST. ON METRO. OPPORTUNITY, THE RISE OF WHITE-SEGREGATED SUBSIDIZED HOUSING 1 (2016) [hereinafter WHITE-SEGREGATED SUBSIDIZED HOUSING].

building managers to pre-screen residents.[390] Often, these buildings are located in up-and-coming neighborhoods and have spectacular amenities, like gyms, yoga studios, and rooftop bars.[391] One developer, Dominium, has made such projects a major part of its housing portfolio.[392] It has produced several of the highest-cost projects in Minnesota, all of which are part of this trend.[393] This included a $170 million rehab of a historic Pillsbury A-Mill into a soaring housing complex on the Minneapolis riverfront.[394] Units in the A-Mill averaged $665,000 each—mostly for studio or one-bedroom apartments, albeit with fifteen-foot ceilings and sweeping views of downtown Minneapolis.[395]

The dense web of affordable developers has become a political actor in its own right. The number of entities involved in affordable housing development (the Twin Cities alone contains dozens of community development corporations) and the complexity of their joint efforts (a single housing project can involve the participation of close to a dozen different for-profit and non-profit partners) makes it impossible to fully trace industry influence on housing policy.[396] But there is no shortage of examples. The artist screening exemption mentioned above was added by the U.S. Congress after lobbying by a Minnesota-based affordable housing company.[397] And they have not hesitated to protect their ability to develop where and when they want. After Dominium came under scrutiny for its work on yet another nine-figure rehab, it sought—and received—a change to Minnesota law which forbade the state housing agency from considering high costs when determining whether to fund the project.[398] Dominium is also the highest contributor to a PAC—the Multi Housing Political Action Committee—representing developers in Minnesota state politics.[399]

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390. *Id.*

391. *Id.* at 3.

392. *Id.* at 32.

393. *Id.* at 1.

394. *Id.* at 17.

395. *Id.* at 4.

396. *E.g.*, Orfield et al., *High Costs*, *supra* note 376, at 601–02 (describing the Franklin-Portland project's complex mix of funding sources).

397. WHITE-SEGREGATED SUBSIDIZED HOUSING, *supra* note 389, at 5.

398. *See*, *e.g.*, J. Patrick Coolican, *Legislature Pushes Fort Snelling Affordable Housing, at $600k per Unit*, STAR TRIB. (May 25, 2018), https://www.startribune.com/legislature-pushes-fort-snelling-affordable-housing-at-600k-per-unit/483632651/ [https://perma.cc/NP52-87BG].

399. *Search Contributors,* MINN. CAMPAIGN FIN. BD., https://cfb.mn.gov/reports/#/contributors/ [https://perma.cc/NJA7-YLZ3].

Moreover, the largest entities sometimes partner directly with government bodies like the Met Council to coordinate housing and development choices. For instance, the Met Council and the aforementioned Family Housing Fund participated as leading partners on several local development coalitions, including the ostensibly-public Corridors of Opportunity program (funded by the 2010 Sustainable Communities grant and intended for development along urban transit corridors) and the ostensibly-private Central Corridor Funders' Collaborative (to promote development along the Green Line transit corridor through Minneapolis and St. Paul).[400] Both initiatives focused heavily on central-city housing development in high-frequency transit areas, ultimately driving greater urban subsidized housing development at the expense of projects in affluent, high-opportunity suburbs.[401] Other frequent partners included the Local Initiatives Support Corporation (or LISC), a national affordable housing financial institution designed to facilitate funding streams to subsidized projects.[402] LISC is so heavily connected to 1990s Democratic Leadership Conference neo-liberalism that its 20-year board chair is Clinton Secretary of the Treasury Robert Rubin, infamous for his role promoting subprime lending.[403] The organization participated in most major Twin Cities affordable housing policymaking of the previous decade, including both of the initiatives above.

Locally, developers have consolidated their efforts behind various entities, such as the Metropolitan Consortium of Community Developers.[404] They have also funded local nonprofits to support their efforts. For instance, developers have heavily

400. METRO. COUNCIL, CORRIDORS OF OPPORTUNITY, FINAL NARRATIVE REPORT 28 (2014) [hereinafter FINAL NARRATIVE REPORT] (listing Elizabeth Ryan of Family Housing Fund as a partner); *see generally* CENTRAL CORRIDOR FUNDERS COLLABORATIVE, THE FINAL REPORT (2016) (explaining the Metropolitan Council's involvement as the designer/builder of the Green Line).

401. *E.g.*, FINAL NARRATIVE REPORT, *supra* note 400, at 16–17 (describing site specific projects and pre-development projects, most of which are located in the central-city); *see generally* CENTRAL CORRIDOR FUNDERS COLLABORATIVE, *supra* note 400 (discussing affordable housing plans along the Central Corridor, a location in the city-center of the Twin Cities).

402. *See* FINAL NARRATIVE REPORT, *supra* note 400, at 17.

403. *See Board of Directors,* LOCAL INITIATIVES SUPPORT CORP., https://www.lisc.org/about-us/board-of-directors/ [https://perma.cc/W2J6-CU4F].

404. Orfield et al., *High Costs*, *supra* note 376, at 589 ("There is no truly 'typical' organization. Instead, the industry is composed of many heterogeneous firms. At present, the Metropolitan Consortium of Community Developers (MCCD), which includes almost all the major players in the Twin Cities housing nonprofit scene, has 49 members, which range from tiny community groups to large nonprofits with yearly revenues in the tens of millions of dollars.").

supported the Minnesota Housing Partnership. The organization blurs the line between lobbying and policy research, with its mission including "[p]rovid[ing] original research and education resources to generate public support of vital communities and affordable housing," and "[d]riv[ing] efforts to secure the policies and funding needed at the regional, state, and federal levels to advance local housing and community development."[405] The organization's board is primarily composed of the presidents of development companies, but also includes the housing and development directors from Minneapolis and St. Paul.[406] For many years, the president of the A-Mill developer Dominium served as chair of this organization.[407] The partnership's research never touches core civil rights questions like segregation in housing but reliably emphasizes the need for more funding to combat shortages and gentrification.[408]

This nonprofit industrial complex has helped spur the rise of a coterie of integration-skeptical academics, advocates, and attorneys. For example, a frequent partner of major Twin Cities housing nonprofits is the prominent Center for Urban and Regional Affairs at the University of Minnesota. The director of that institute, Edward Goetz, has positioned himself as a strong critic of housing integration policy for decades.[409] Goetz has consistently maintained that the Fair Housing Act was not intended to include an integration mandate and that "the language of the act itself is unambiguously focused on eliminating private discrimination in the private housing market."[410] In recent years, he has published a book-length refutation of the idea that integration is a core aim of the Fair Housing Act or should be a major goal of housing policy.[411] His claims about the Act, in addition to contradicting every

405. *See Who We Are*, MINN. HOUS. P'SHIP, https://www.mhponline.org/about [https://perma.cc/PWB9-DGZR] [hereinafter *Who We Are*].

406. *See Board*, MINN. HOUS. P'SHIP, http://www.mhponline.org/about/board [https://perma.cc/7VTS-49ZQ] [hereinafter *Minn. Hous. P'ship Board*].

407. *See id.*

408. *See, e.g.*, MINN. HOUS. P'SHIP, SOLD OUT (2016) (emphasizing increasing sales of rental property in the Twin Cities driving up rents).

409. *See, e.g.*, Edward Goetz, *Poverty-Pimping CDCs: The Search for Dispersal's Next Bogeyman*, 25 HOUS. POL'Y DEBATE 608, 610 (2015) ("Given these counter claims on housing policy, is there any evidence for the proposition that integration is a privileged objective of federal housing policy? Certainly not in the Fair Housing Act itself.").

410. EDWARD GOETZ, THE ONE-WAY STREET OF INTEGRATION: FAIR HOUSING AND THE PURSUIT OF RACIAL JUSTICE 96 (2018).

411. *See id.*

Supreme Court and Circuit Court interpretation to date, have been directly refuted by Walter Mondale, a co-author of the Act.[412]

This network of experts has played an important role in establishing a theoretical and academic framework for many of the neo-segregationist policies adopted by Minnesota governments and agencies. Most national research has shown clear benefits of integration in housing and schools, like the 2015 study by Harvard professor Raj Chetty that unambiguously showed that moving to affluent areas produced adult income benefits for low-income children.[413] But Minnesota agencies have typically preferred to rely on local experts and advocates instead, many of whom could be relied upon to produce dissenting, integration-skeptical work.

For example, in the wake of a civil rights lawsuit requiring the Minneapolis Public Housing Authority to stop segregatively concentrating its public housing units in heavily-Black North Minneapolis, the Family Housing Fund and the Minnesota state housing agency hired Goetz to produce a lengthy evaluative report.[414] Unsurprisingly, the resulting document suggested the lawsuit was ultimately unhelpful and argued that preserving community links was more important than attacking residential segregation.[415] In similar fashion, as a component of its 2010 Sustainable Communities grant, the Met Council also hired a team of Minnesota-based private and academic consultants to conduct evaluation.[416] That team included Goetz.[417] It also included Jack Cann, a housing attorney who frequently represented subsidized developers, and has opposed policies that require integrative placement of affordable units, describing Met Council fair-share

412. Walter F. Mondale, *The Civil Rights Law We Ignored*, N.Y. TIMES (Apr. 10, 2018), https://www.nytimes.com/2018/04/10/opinion/walter-mondale-fair-housing-act.html [https://perma.cc/9DJA-ALTG] ("At times, critics suggest the law's integration aims should be sidelined in favor of colorblind enforcement measures that stamp out racial discrimination but do not serve the larger purpose of defeating systemic segregation. To the law's drafters, these ideas were not in conflict.").

413. *See* Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855 (2016).

414. *See* EDWARD G. GOETZ, CTR. FOR URB. AND REG'L AFF., U. OF MINN., DECONCENTRATING POVERTY IN MINNEAPOLIS: HOLLMAN V. CISNEROS ix (2002) (thanking the Family Housing Fund and the Minnesota Housing Finance Agency for funding the research).

415. *Id.* at 16–21.

416. U.S. DEP'T OF HOUS. & URB. DEV., FY2010 SUSTAINABLE COMMUNITIES REGIONAL PLANNING GRANT PROGRAM – GRANTEES 1 (2010).

417. Edward G. Goetz, *Curriculum Vitae*, HUMPHREY SCH. PUB. AFFS., https://www.hhh.umn.edu/sites/hhh.umn.edu/files/2020-08/Goetz,%20Edward%20CV.pdf [https://perma.cc/NT39-YMT8].

policies as "dispersal" as early as 1973.[418] Another member of Goetz's Center sits on the board of the aforementioned Minnesota Housing Partnership.[419]

Although the Met Council remains the regional governmental entity primarily responsible for civil rights backsliding, other local governments, particularly in the central cities of Minneapolis and St. Paul, have undergone similar reversions under pressure from development interests. For example, in 2012, Minneapolis adopted a Consolidated Plan that weakened a previous bar on the use of HUD HOME funds to build affordable housing in racially identifiable neighborhoods.[420]

Declining concern about segregation is also evident in other government processes. Jurisdictions receiving HUD funding also are required to submit a five-year report called an Analysis of Impediments to Fair Housing (AI).[421] Similar to the Met Council equity assessment discussed above, these reports require jurisdictions to identify demographic patterns, as well as obstacles to fair housing opportunity, including patterns of integration and segregation.[422] In the Twin Cities region, the 13 HUD entitlement jurisdictions, which include Minneapolis, St. Paul, several large suburbs, and several counties, have coordinated their AI process, releasing a single "regional" AI that covers all communities.[423]

Two such AIs have been completed in the past decade: one in 2020 and one in 2014.[424] The latter entirely ignored the question of how racial segregation plays out in Minnesota.[425] Although federal policy requires AI jurisdictions to identify public policies that have created fair housing obstacles, both AIs spared the jurisdictions themselves from critique and focused heavily on private-market factors that obstructed housing opportunity.[426] Indeed, the 2014 AI avoided the word segregation altogether, except two brief summaries of third-party reports, a web survey response, and once

418. *See Low Income Housing Dispersal*, MINNEAPOLIS STAR, Jan. 2, 1973.

419. *Minn. Hous. P'ship Board*, *supra* note 406 (listing Dr. Brittany Lewis, Senior Research Associate of the Center for Urban and Regional Affairs, as a board member).

420. *See* U.S. DEP'T OF HOUS. & URB. DEV., THE FY 2012 MINNEAPOLIS CONSOLIDATED PLAN FOR HOUSING AND COMMUNITY DEVELOPMENT (2012–2013).

421. *Id.* at 83.

422. WESTERN ECON. SERV., LLC, FAIR HOUS. IMPLEMENTATION COUNCIL, 2009 ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE: FINAL REPORT 1 (2009).

423. *See id.* at 11; HOUSINGLINK, FAIR HOUSING IMPLEMENTATION COUNCIL, 2014 ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING CHOICE: TWIN CITIES REGION 6 (2015).

424. WESTERN ECON. SERV., LLC, *supra* note 422; HOUSINGLINK, *supra* note 423.

425. *See* HOUSINGLINK, *supra* note 423.

426. *Id.* at 43.

in the preface.[427] Although comments were submitted identifying these and other shortcomings, local leaders remained resistant to changing the documents.[428]

The growth of neo-segregationist thinking in Twin Cities housing politics reached a head in the mid-2010s. In 2014 and 2015, several Minneapolis neighborhood groups, a housing civil rights group, and three regional suburbs filed two HUD fair housing complaints.[429] The first complaint was filed against the Met Council and the state housing agency, citing their abandonment of previous housing integration policies, including the fair-share policy.[430] The second complaint was filed against the central cities of Minneapolis and St. Paul, citing their longstanding practice of disproportionately situating new affordable development in low-income areas.[431]

The complaints quickly became a flashpoint for housing politics. Exhibiting their deep skepticism of housing integration, local housing nonprofits, coordinated through several umbrella entities (most notably the Metropolitan Consortium of Community Developers), quickly opposed both complaints.[432] Developers organized letter-writing campaigns, arguing that the complaints would remove much-needed resources from poor areas, and attempted to intervene directly with HUD.[433]

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427. *See id.* at 6, 73, 76, 121.

428. *See, e.g.*, INST. ON METRO. OPPORTUNITY, COMMENTS ON THE DRAFT FHIC 2014 ANALYSIS OF IMPEDIMENTS FOR THE TWIN CITIES REGION (2015).

429. *See* Sasha Aslanian, *Twin Cities Suburbs File Housing Complaint Against State*, MPR NEWS (Nov. 10, 2014), https://www.mprnews.org/story/2014/11/10/Housing-complaing [https://perma.cc/PCQ5-WLT8]; Peter Callaghan, *Settlement Could Alter How Affordable Housing Is Built Throughout Twin Cities Metro*, MINNPOST (May 13, 2016), https://www.minnpost.com/politics-policy/2016/05/settlement-could-alter-how-affordable-housing-built-throughout-twin-cities-m/ [https://perma.cc/XFE2-7YZ7].

430. *See MICAH Fair Housing Complaints to HUD*, METRO. INTERFAITH COAL. ON AFFORDABLE HOUS., https://www.micah.org/hud-complaint [https://perma.cc/9873-TCKS] [hereinafter *MICAH Complaints*].

431. *See id.*; *see also* Peter Callaghan, *Civil Rights Complaint Seeks to Stop Cities from Concentrating Low-Income Housing in High-Poverty Neighborhoods*, MINNPOST (Apr. 14, 2015), https://www.minnpost.com/politics-policy/2015/04/civil-rights-complaint-seeks-stop-cities-concentrating-low-income-housing-hi/ [https://perma.cc/6E7W-RESY].

432. This opposition was primarily registered in materials distributed through the community. For example, one letter authored by the Consortium, on file with authors, claimed that the complaints were "[t]hwarting Business and Housing Opportunities" and focused heavily on how they would prevent additional housing funding in central city neighborhoods.

433. At a community meeting, the developer Urban Homeworks distributed postcards opposing the complaint, pre-addressed to HUD. A copy of this postcard is on file with the authors.

The second complaint, filed against Minneapolis and St. Paul, reached an ambiguous conclusion in 2016.[434] Both cities entered into Voluntary Compliance Agreements with HUD, agreeing to take certain measures to improve their housing policies.[435] Chief among these was a revision of the 2016 Analysis of Impediments. In what represented a tacit admission of the deficiencies of the 2016 submission, the revised document would be constructed by a Fair Housing Advisory Committee, and was required to include a renewed focus on integration, segregation, and public policies contributing to fair housing impediments.[436]

However, the Fair Housing Advisory Committee process envisioned in the compliance agreements was complex and contentious. The committees included both the original complainants, as well as the city respondents.[437] But after substantial lobbying by housing developers, a contingent of developer-friendly nonprofits—as well as several subsidized housing developers—were also awarded seats on the committee.[438] These nonprofit members argued vociferously against inclusion of any material that would suggest that integration was a major objective of housing policy, and suggested that integration be defined more nebulously to include areas that were non-White segregated.[439] The developers and nonprofit also argued that the

434. *See MICAH Complaints*, *supra* note 430 ("HUD announced agreements with the City of Minneapolis and the City of St. Paul to further housing choice and neighborhood opportunities in the two cities and the surrounding region.").

435. *See* Voluntary Compliance Agreement Between the U.S. Dep't of Hous. and Urb. Dev., the City of Minneapolis, the Metro. Interfaith Council on Affordable Hous., the Webber-Camden Neighborhood Org., the Whittier All., and the Folwell Neighborhood Ass'n (May 16, 2016).

436. *Id.*

437. *Id.* at 5.

438. *Id.*

439. Minutes for the Fair Housing Advisory Committee meetings, on file with the authors, demonstrate the persistent efforts of developer-affiliated groups to steer the conversation away from the mandated subject of integration. Taken together, they form a useful illustration of how neo-segregationist organizations can take advantage of consensus-driven processes to protect their material interests by invoking equity and broadmindedness.

- In a June 29, 2016 meeting, a representative from community developer ACER spoke up to try to reframe the discussion away from segregation and integration.
- In a July 27, 2016 meeting, the lobbyist for development-oriented groups tries to argue against the notion of affordable housing concentration, arguing that too much housing cannot be concentrated in a neighborhood.
- In a September 28, 2016 meeting, the ACER representative spoke up again to criticize the use of the term integration.
- In the same meeting, the lobbyist speaks up to say he has a fundamental disagreement with other people at the table about where investment should

focus of the revised AI should be gentrification and housing displacement, phenomena which conveniently served as a justification for the preexisting policy of siting subsidized housing in low-income areas.

As a result of these efforts, the final revised AI represented both a substantial improvement over the previous submission, and a policy mishmash that envisioned relatively minor changes.[440] Most of the recommendations in the final revised AI were policies already adopted, or already under consideration, in the central cities. Meanwhile, the process was completed in the early months of the Trump administration, at a time when federal fair housing enforcement was collapsing.[441] As a result, there has been, by all appearances, little follow-up oversight from federal agencies to ensure the cities are meeting even their small obligations.

The other HUD complaint, against the Met Council and state housing agency, was never resolved. Little progress was made after administrations changed in 2017. It remains to be seen how the matter will conclude.

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be spent.

- In the same meeting, a representative of a community developer based in the low-income Frogtown area speaks up to argue in favor of spending more housing funds in concentrated neighborhoods.
- In an October 26, 2016 meeting, the lobbyist speaks about the importance of focusing on gentrification and displacement.
- In a December 7, 2016 meeting, the lobbyist and the representative for the Minneapolis community development department, push back against the inclusion of research on segregation in a draft Analysis of Impediments.
- In a February 8, 2016 meeting, the lobbyist speaks up multiple times to insist that gentrification and displacement receive their own coverage in the final Analysis of Impediments.
- Finally, in the March 15, 2016 meeting, which served as the capstone discussion on the second draft Analysis of Impediments, the representative for the Minneapolis community development department talks about the need to focus development in highly concentrated areas where residents are cost-burdened.
- In the same meeting, the ACER representative said that she would like more emphasis on gentrification and displacement.
- In the same meeting, the lobbyist says that his comments have tried to move the group away from "segregation as the problem, and more so as the symptom." He expresses his concern about language that suggests the solution is to "move renters around, that is not getting to the root of the problem." The minutes note he "pushed back against the term desegregation plan, noting it sounds like a displacement plan."

440. *See* MOSAIC CMTY. PLAN., FAIR HOUS. IMPLEMENTATION COUNCIL, ADDENDUM TO THE TWIN CITIES REGIONAL ANALYSIS OF IMPEDIMENTS (2017).

441. *See, e.g.*, Eric Roper, *Federal Rule on Housing Integration Never Got Off the Ground*, STAR TRIB. (Oct. 3, 2020), https://www.startribune.com/federal-rule-on-housing-integration-never-got-off-the-ground/572627311/ [https://perma.cc/XW2Y-WUX6].

Conclusion

In much of the academic world, a consensus exists around the positive benefits of integration, akin to the consensus around the causes and harms of climate change. Despite this, neo-segregationist views have spent decades accumulating support in the ranks of Minnesota institutions. This includes organizations with a direct interest in maintaining the segregated status quo, like affordable housing developers and charters schools. But it has also meant the collection of organizations that support, fund, and promote those entities. Minnesota's largest philanthropies have flirted with neo-segregationism, absorbing figures from the government and nonprofit world who promote these ideas. For example, Lee Sheehy, the Deputy Attorney General who oversaw the gutting of the Minnesota school desegregation rule in 2019 and then served as the Met Council Regional Administrator, migrated to a position as the McKnight Foundation's Director of Regions and Communities, where he spent over a decade heavily funding community developers.[442] Sheehy even briefly served as interim president of the McKnight Foundation.443

Neo-segregationism's greatest political asset is how it depicts the status quo as desirable and change as reckless. This bias towards the status quo ensures that proponents of neo-segregationist policy can draw support from monied interests for whom major reform would be financially and politically disruptive. It also ensures that neo-segregationism can find easy support from political moderates of both parties.[444] Charter schools, for instance, were developed with the support of both center-leaning business-affiliated Republicans, and center-leaning, business-oriented Democrats.[445] Often, the campaign to promote charters, and defend the segregation they create, has become inextricably tangled with anti-union efforts from business interests.[446]

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442. The Regions and Communities program allocated $700,000 to the integration-skeptical Center for Urban and Regional Affairs, a project of the University of Minnesota Foundation, to conduct "strategic collaboration" with other community programs as recently as 2016. *Grant Search*, MCKNIGHT FOUND., https://www.mcknight.org/grants/search-our-grants/ [https://perma.cc/7SXQ-EDUC].

443. *McKnight Accelerates Economic Mobility in First Slate of Vibrant & Equitable Communities Grants*, MCKNIGHT FOUND. (Mar. 2021), https://www.mcknight.org/news-ideas/mcknight-accelerates-economic-mobility-in-first-slate-of-vibrant-equitable-communities-grants/ [https://perma.cc/VV4G-D2G3].

444. *See* JUNGE, *supra* note 118.

445. Cohen, *supra* note 114 ("Although conservatives led the way in for pushing education reform in the 1980s, centrist liberals jumped on board in the early 1990s.").

446. *Id.* ("Most charters are more segregated than traditional public schools, are

While the core strength of neo-segregation comes from how it protects the financial self-interest of the powerful, it has also made headway in academia. There is a cottage industry of think tanks and research organizations dedicated to supporting and assisting the housing industry and private education reformers, often directly funded by these industries.[447] These institutions reliably produce research and analysis that conform neatly to the policy objectives of their benefactors—highlighting the benefits of affordable housing, lauding school choice as instrumental to closing achievement gaps, and attacking alternative interpretations of the evidence.[448]

By design or otherwise, these institutions find themselves frequently in conflict with civil rights organizations, because a focus on segregation and racial isolation inevitably undercuts the assertion that technocratic, well-funded policy tinkering can eliminate racial disparities that have been growing since the 1990s.[449]

This conflict threatens to damage hard-fought civil rights victories, especially in the legal realm. In order to protect funding streams and the status quo, neo-segregationists today have adopted legal arguments first advanced by right-wing groups like the Pacific Legal Foundation. They have actively sought to limit *Brown v. Board of Education* and its progeny, to obstruct the ability of cities and schools to voluntarily integrate, and to undermine core elements of the Fair Housing Act—most especially, its integration imperative.[450]

In Minnesota these efforts are especially galling. Minnesota is the birthplace of a remarkable amount of American civil rights thinking—a history that should be celebrated. With the support of these allies, neo-segregationists are instead erasing and rewriting this history, contributing to greater racial inequality. As the civil rights era fades from living memory, it would be a travesty to allow

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non-union, and when charter educators do mount union campaigns, they almost always face tremendous opposition.").

447. *See, e.g.*, *id.* (describing the Democratic Leadership Council's Progressive Policy Institute); *Who We Are*, *supra* note 405, at 28.

448. *See* Goetz, *supra* note 414.

449. MINN. EMP'T AND ECON. DEV., DEED LAB. MKT. INFO. OFF., MINNESOTA DISPARITIES BY RACE REPORT (2020); *see generally* Greg Rosalsky, *Minneapolis Ranks Near Bottom for Racial Equality,* NPR NEWS: PLANET MONEY (June 2, 2020), https://www.npr.org/sections/money/2020/06/02/867195676/minneapolis-ranks-near-the-bottom-for-racial-equality [https://perma.cc/DP47-F47D] (expositing Minnesota's vast employment and wealth gap for White and Black residents).

450. *See, e.g.*, 1998 SONAR, *supra* note 96, at B1 (downplaying the importance of *Brown* deliberately).

segregation to prevail once again. Those who would have the United States divided should not be permitted to accomplish through policy subterfuge what they could not accomplish through open revolt or massive resistance. Minnesota should reclaim its civil rights heritage, reject segregation once and for all, and resume the march towards greater equality and integration.

Race, Place, and Citizenship: The Influence of Segregation on Latino Educational Attainment

Stella M. Flores, Suzanne M. Lyons, Tim Carroll, and Delina Zapata†

Introduction

As the population of the United States has diversified over the last fifty years, the nation's key sectors of housing, education, and labor have absorbed this diversity with varying degrees of receptivity. In 2019, Latinos continued their status as the nation's largest minority group, comprising nearly twenty percent of the population (18.5%), outnumbering the African American/Black population by more than five percentage points (13.4%) as well as the Asian population by more than twelve percentage points (5.9%).[1] Latino-origin individuals are now part of the nation's local schools, markets, and neighborhoods, yet, despite the growing presence of the Latino population, these institutions remain remarkably segregated, at least by race and income.[2] Segregation results in differential exposure to neighborhood conditions that

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1. Cliff Despres, *U.S. Latinos Reach Record-High of 18.5% of Nation's Population*, SALUD AMERICA (July 14, 2020), https://salud-america.org/u-s-latinos-reach-record-high-18-5-of-nations-population/ [https://perma.cc/2M4U-RC49].

2. Jorge De la Roca, Ingrid Gould Ellen & Justin Steil, *Does Segregation Matter for Latinos?*, 40 J. HOUS. ECON. 129, 129 (2018).

could lead to increased opportunity for educational attainment and increased wages, among other social and health factors. The negative outcomes associated with this lack of exposure have been recognized for Black Americans and are now increasingly present for Latinos.[3] These measures are particularly relevant by metropolitan area.[4]

During the demographic transformation in recent decades, a number of metropolitan areas, such as Los Angeles, New York, Miami, and Houston, continued to serve as key gateway entry points for Latino immigrants and their families.[5] New migration patterns have developed in other areas, however, such as those in southeastern states (Georgia, North Carolina, Tennessee).[6] These states have become new destinations for Latinos entering the U.S. for the first time or migrating from traditional U.S. gateway cities primarily due to more job opportunities.[7] As scholars attempt to estimate the settlement, segregation, and integration patterns of Latinos and their families, the reality is that the U.S. is in the midst of a double diaspora for Latino families—one in traditional gateway cities and one in new, primarily southern destinations.[8] This double diaspora complicates efforts of integration as different states and localities have their own laws regarding zoning for housing, schooling, and labor rules. U.S. cities have had a long history of either adjusting, restricting, or negotiating access to non-White populations, managing both formal and informal methods of segregation—the systemic separation of individuals by race, income, and other socially identifying factors in daily life. However, integration of Latino groups has been complex due to varied characteristics beyond race, including isolation and separation due to language, national origin, and citizenship.

While much of the scholarship on the effects of segregation on housing, education, and wages has focused primarily on the relationship between White and Black populations, researchers have begun to investigate segregation outcomes for Latinos as

3. *Id.*

4. *Id.*

5. Jorge Durand, Douglas S. Massey & Chiara Capoferro, *Chapter 1: The New Geography of Mexican Immigration*, *in* NEW DESTINATIONS: MEXICAN IMMIGRATION IN THE UNITED STATES 1, 14–15 (Víctor Zúñiga & Rubén Hernández-León eds., 2005); *see* Douglas S. Massey, Jacob S. Rugh & Karen A. Pren, *The Geography of Undocumented Mexican Migration*, *in* 26 MEXICAN STUDIES/ESTUDIOS MEXICANOS 129, 138 (2010).

6. Durand et al., *supra* note 5, at 12–18.

7. *Id.* at 11–13.

8. *Id.* at 12–15.

compared to Whites and, in some cases, Black populations. Overall, the verdict on segregation outcomes for Black and Latino populations is clear from a research perspective: as a force, racial segregation leads to lower exposure of Black and Latino populations to human, social, and health capital in neighborhoods, reduced high school graduation and college completion outcomes, reduced wages, and, in many cases, increased exposure to criminal activity.[9] As cities continue to transform into knowledge-based economies, the role of access to education, specifically a college degree, becomes especially critical. From the metropolitan area perspective, the number of college degrees in a geographic location has important impacts on an individual's and a community's overall economic attainment.[10] Moretti, for example, finds that an increase in the supply of college graduates in a city raises the wages of both high school dropouts and college graduates.[11] That is, a college degree provides not only individual private returns but also social returns for the average resident in a city.[12] Thus, increasing the opportunity to attend and graduate from college is a win for an entire community, not just the individual. If some populations—because of their race, ethnicity, or citizenship status—have less access to schools, quality educators, and jobs to pay for postsecondary education, their chances to attend and complete college are greatly diminished, as are the economic prospects for their area.

While the negative outcomes of racial segregation have become astonishingly clear, the mechanisms to desegregate or "disperse," as some scholars note, are less clear and there is much less agreement on how to employ any of these mechanisms.[13] In fact, in many cases there is a debate regarding the benefits of integration altogether.[14] In places where mechanisms have been attempted, these mechanisms have ranged from court ordered school busing, alternative admissions rules, optional standardized testing, advancements in recruiting and hiring practices, and other

9. De La Roca et al., *supra* note 2, at 135.

10. *See* Enrico Moretti, *Estimating the Social Return to Higher Education: Evidence from Longitudinal and Repeated Cross-Sectional Data*, 121 J. ECONOMETRICS 175 (2004) (exploring the hypothesis that a larger college educated population affects wages for the local community's workforce in a positive way).

11. *Id.* at 208–09.

12. *Id.*

13. *See* ANTHONY P. CARNEVALE & JEFF STROHL, SEPARATE & UNEQUAL: HOW HIGHER EDUCATION REINFORCES THE INTERGENERATIONAL REPRODUCTION OF WHITE RACIAL PRIVILEGE 37–40 (Geo. U. Pub. Pol'y Inst. Ctr. on Educ. and the Workforce ed., 2013).

14. *See* De la Roca et al., *supra* note 2, at 129.

options.[15] The issue is that education and employment are highly stratified and deeply interdependent, and a proposal in one area may not work if solutions in other areas are not also operating in a coordinated manner that accounts for historical and current stratification.[16] School quality is associated with where a student lives, which in turn shapes the educational resources (including teachers) that are available.[17] Employment and wages are tied to the level of educational attainment received, and housing security is dependent on economic security, which is influenced by educational attainment.[18] Thus, schools are the vehicles most likely to provide the credentials needed for economic security, yet they are also the ultimate microcosm of the level of segregation in a neighborhood.

Purpose

This paper examines the status of Latino-White segregation as it pertains to key characteristics related to integration into the United States—by race, language, and citizenship—via housing and education. We argue that the status of Latino educational achievement and success is connected to the level of segregation interwoven across these key sectors on these key forms of identity associated with Latinos. A legal review of how segregation affects Latinos in education is particularly connected to issues of language, while housing cases focus more prominently on the role of citizenship, in addition to race and ethnicity. Citizenship is also present in education cases, especially as it pertains to the rights afforded to undocumented students at the K-12 and postsecondary level. This finding is critical because Latinos who are naturalized citizens are more likely to earn a college degree than noncitizen Latinos.[19] With state "Dream Acts" opening up opportunities for a growing number of individuals who are undocumented to obtain a college degree, communities likely to have undocumented residents

15. *See* CARNEVALE & STROHL, *supra* note 13, at 38–40 (discussing different approaches colleges can take to include more Black and Latinx students).

16. DOUGLAS MASSEY, CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM 53 (Russell Sage Found. ed., 2007).

17. *See* CARNEVALE & STROHL, *supra* note 13, at 23–27 (explaining the findings of studies which show that lower resources result in lower opportunities in education for Black and Latino students, leading to substantial racial polarization in postsecondary education).

18. *See* Moretti, *supra* note 10, at 208–09 (finding positive social returns, specifically on wages, for communities with increased education levels).

19. Stella M. Flores, Tim Carroll & Suzanne M. Lyons, *Beyond the Tipping Point: Searching for a New Vision for Latino College Success in the U.S.*, 696 ANNALS OF AM. ACAD. POL. & SOC. SCI. 128, 150 (2021).

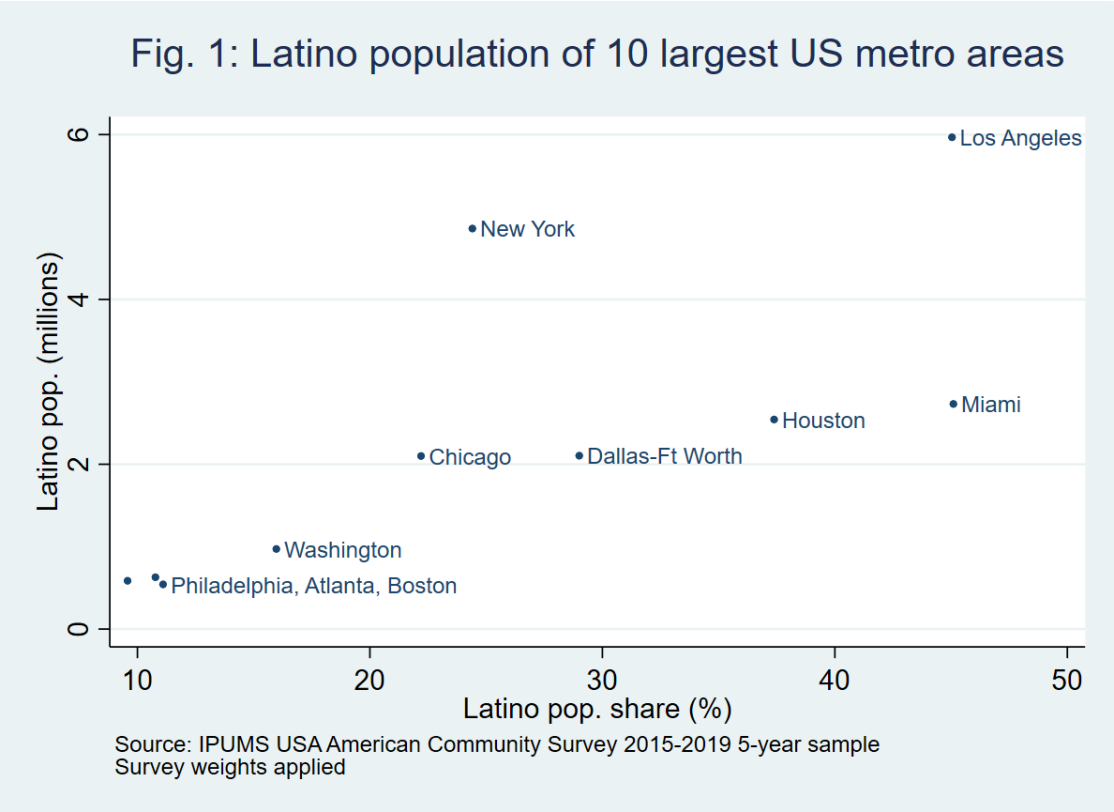
may also begin to experience higher levels of human capital.[20] Ultimately, we argue that understanding both the legal context that frames how the housing and education sectors operate, as well as insights from educational research about what influences Latino educational success, can provide a solid foundation from which to create more integrative activities aimed to reduce the barriers produced by racial segregation.

We continue this analysis with demographic portraits of key gateway cities where Latinos live in the U.S., a review of legal and research outcomes related to housing and education, and a final evaluation of the level of segregation and its influence on educational outcomes, particularly college degree attainment, of Latino populations in our key gateway cities. Our metropolitan areas of interest for this analysis include Chicago, Houston, Los Angeles, Miami, and New York. As Figure 1 shows, in addition to being among the largest metro areas in the United States, all of these metropolitan areas have a Latino population of at least two million (Y axis) constituting at least 20% of the metro population (X axis).[21] Unless noted otherwise, the data source for all tables is the 2015–2019 American Community Survey five-year sample released in harmonized form by IPUMS USA.[22]

20. *See* Stella M. Flores, *State Dream Acts: The Effect of In-State Resident Tuition Policies and Undocumented Latino Students*, 33 REV. HIGHER EDUC. 239, 239–40, 247 (2010).

21. Two other metropolitan areas, Texas' Dallas-Fort Worth and California's Inland Empire, have Latino populations of at least two million—we omit these from our list of focal cities to avoid duplicating state contexts.

22. Author's analysis of 2021 American Community Survey data from Steven Ruggles et al., IPUMS USA: Version 11.0 [dataset] (2021), https://doi.org/10.18128/D010.V11.0 [https://perma.cc/GT68-AVU3].



Within each focal metro area, we provide a portrait of the racial/ethnic composition including diversity within the Latino population (Table 1); average key demographic and economic characteristics including income and homeownership, citizenship status, and language isolation, overall and for Latinos (Table 2); and a breakdown of educational attainment, overall and for Latinos (Table 3). The paper culminates with a mapping of postsecondary opportunity onto residential segregation, comparing the bachelor's degree, or BA, attainment rate for neighborhoods with disproportionately high concentrations of Latino residents (i.e., Latino enclaves, defined in detail below) to the BA rate for Latino residents of other neighborhoods less marked by the forces of residential segregation (Table 4).

Table 1: Selected metropolitan areas by race and Latino origin (%)											
	Latino origin							Race (non-Latino)			
Metro area	All Latinos	*Mexican*	*Puerto Rican*	*Dominican*	*Cuban*	*Central American*	*South American*	White	Black	Asian	American Indian
Chicago	22.2	*17.5*	*2.2*	*0.1*	*0.3*	*0.9*	*0.8*	52.7	16.3	6.6	0.1
Houston	37.4	*27.8*	*0.7*	*0.1*	*0.6*	*5.4*	*1.6*	36.0	16.9	7.8	0.2
Los Angeles	45.0	*35.0*	*0.4*	*0.1*	*0.4*	*6.6*	*1.2*	29.6	6.4	16.0	0.2
Miami	45.1	*2.5*	*3.9*	*2.0*	*18.9*	*6.3*	*10.1*	30.5	20.1	2.5	0.1
New York	24.4	*3.0*	*6.2*	*5.5*	*0.7*	*3.0*	*4.7*	46.5	15.6	10.9	0.1
Included in calculations but omitted from table: Other/unspecified Latino origin, other/unspecified race, multiracial non-Latinos											

Table 1 shows the diversity of our focal metros. Latinos represent just under half of the population for Miami and Los Angeles, just over a third for Houston, and just under a quarter for New York and Chicago. Latinos (of all races) outnumber any single non-Latino racial group in Houston, Los Angeles, and Miami.[23] However, the demographics of the Latino population in these cities varies considerably. Mexican-origin Latinos represent over a third of the total metro population and nearly four-fifths of the Latino population in Los Angeles and constitute a similar share of the Latino population in Chicago and Houston. In contrast, the Mexican-origin population represents a minor portion of the Latino communities of Miami and New York. Nearly a fifth of Miami residents (and over forty percent of Miami Latinos) are of Cuban origin. Miami is also home to a substantial South American population (predominantly of Colombian and Venezuelan origins). New York's Latino population is especially diverse, with Puerto Rican, Dominican, South American, Mexican, and Central American communities each representing between three and six percent of the total metro population (with each group representing over ten percent of New York Latinos).

The segregation/integration history of each gateway is shaped by differing migration histories and citizenship rights of prominent Latino-origin groups. Latino communities may share some cultural and linguistic connections, as well as a community history tied to migration, but may differ substantially by citizenship and specific migration pathways (e.g., the asylum system, the prominence of undocumented and mixed-status families). For instance, the barriers associated with lack of citizenship are less salient for

23. Throughout the paper, our quantitative analysis is of the full metro area, not the core city, following the Office of Management and Budget's delineation of Metropolitan Statistical Areas.

Puerto Rican communities. Communities also differ by racial identity, skin color, and exposure to racial animosity.[24] For example, according to the same American Community Survey data used to produce the tables in this paper, approximately thirteen percent of Dominican-origin Latinos identify as Black, as do seven percent of Puerto Rican-origin Latinos residing in the mainland U.S.[25] This tells us that historic and contemporary anti-Black racism and anti-Black segregation are another layer in the varied experiences and opportunities of Latinos in the U.S., particularly in areas such as New York with large Dominican and/or Puerto Rican communities.[26] Finally, proximity to the border has affected both the history of Mexican migration and the exposure to the immigration enforcement apparatus for the predominantly Mexican-origin Latino border state populations, including our focal cities Los Angeles and Houston. These differences shape both everyday life and integration priorities of Latino communities across the country, including in our focal metros.

We now turn to the sector of housing—a root of segregation for many Latino communities.

I. The Role of Housing on Human and Social Capital Attainment

"Housing markets distribute not just houses, but also education, wealth, health, security, insurance, and social connections."[27] At the heart of many educational challenges is the very structure which creates disparities in the American education system in the first place: residential segregation coupled with a public school funding model anchored in property taxes, which ultimately separates wealthy K-12 districts from impoverished ones.

The role of housing markets in educational and economic attainment is important from both a theoretical and a practical perspective. From a theoretical perspective, Massey echoes Bourdieu's classic assertion that an individual's habitus, inclusive of their family and educational systems, serve to reproduce social

24. *See* Ruggles, *supra* note 22.

25. *Id.*

26. *See id.* (displaying the data for race and ethnic self-identification of the Latino community in New York and other major cities. From this data, we can deduce there is a likelihood that Latinos who identify also as Black face an additional component of anti-Black racism and other systemic barriers experienced by Black Americans).

27. MASSEY, *supra* note 16, at 110.

and cultural capital—relationships and cultural codes tied to human capital and ideally social mobility.[28] Unfortunately, as Massey notes, this transmission of capital in the United States takes place within the context of hyper-segregation, thereby perpetuating disparities.[29] Though some have argued that ethnic enclaves may provide certain protective factors and social capital, others suggest enclaves typically reflect less access to fewer public resources and human capital.[30] From a practical standpoint, the National Academies note that "[n]eighborhood economic context has powerful, long-term effects on educational achievement and attainment," and persistent socioeconomic segregation impacts "the quality of the education, support services, and enrichment opportunities that are available."[31] Subsequently, the National Academies advocates extending traditional measures of educational equity, such as gaps in test scores and curricular access, to include measures such as segregation and access to non-academic supports.[32]

The cumulative effects of housing segregation and educational inequities do not just end when a student graduates from high school. Racial inequities continue to play out at the college level in relation to the types of institutions college freshmen attend.[33] Between 1995 and 2009, 68% of new Black freshmen and 72% of new Latino freshmen enrolled at open-access institutions, while 82% of new White freshmen enrolled at the most selective four-year colleges.[34] This information on enrollment for different racial demographics is important not only because of the continued educational segregation, but also because graduation rates differ dramatically between institution types, with graduation rates at open-access schools hovering around 49% compared to 82% graduation rates at the most selective institutions.[35] Furthermore, the relationship between college graduation and economic

28. Pierre Bourdieu, *Cultural Reproduction and Social Reproduction*, *in* 71 KNOWLEDGE, EDUCATION AND CULTURAL CHANGE 84–92 (Richard Brown ed., 1973).

29. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 23–27 (Harv. Univ. Press 1993).

30. De La Roca et al., *supra* note 2, at 129.

31. NAT'L ACADS. OF SCIS., ENG'G, AND MED., MONITORING EDUCATIONAL EQUITY 46 (2019).

32. *Id.* at 50.

33. *See* CARNEVALE & STROHL, *supra* note 13, at 8 (explaining how the ethnic stratification in postsecondary education is based on a variety of different factors, most related to access, which do not even allow for prepared Black and Latino students to realize their full educational and career potential).

34. *Id.* at 9–11.

35. *Id.* at 11.

attainment has been well-documented, as previously noted, which in turn fuels future disparities in housing access.

Latino Housing Segregation: Class, Race and Citizenship

As a precursor to reviewing the legal history related to housing segregation, we first provide a general review of the Latino housing, economic, and linguistic landscape. Table 2 shows a summary of key characteristics in these areas for our five focal cities.

Table 2: Demographic and economic context by metropolitan area

Metro area		Population (millions)	Population (% of total)	English isolation[1]	Foreign-born noncitizens	Median income	Poverty[2]	Home ownership[3]
Chicago	Total	9.5	-	5%	9%	$83,000	12%	67%
	Latino	2.1	22%	14%	22%	$63,700	16%	57%
	White	5.0	53%	2%	3%	$102,000	7%	79%
Houston	Total	6.8	-	10%	14%	$75,000	14%	63%
	Latino	2.5	37%	22%	27%	$56,670	20%	57%
	White	2.4	36%	1%	3%	$104,000	7%	76%
Los Angeles	Total	13.2	-	11%	16%	$80,100	14%	50%
	Latino	6.0	45%	14%	23%	$65,000	18%	41%
	White	3.9	30%	3%	5%	$108,400	9%	61%
Miami	Total	6.1	-	14%	17%	$65,000	15%	60%
	Latino	2.7	45%	25%	27%	$60,000	16%	54%
	White	1.8	31%	3%	6%	$85,200	9%	74%
New York	Total	19.9	-	9%	12%	$93,000	13%	55%
	Latino	4.9	24%	20%	22%	$65,000	20%	32%
	White	9.3	46%	3%	4%	$118,890	7%	71%

[1]No member of household reported speaking English "only" or "very well"

[2]Member of a family with income at or below the federal poverty threshold

[3]Respondent's household owns primary residence (vs. renting)

Table 2 shows substantial differences between the Latino population and the population as a whole in all cities, with the exception of economic characteristics for Miami. The data indicates that Latinos in our focal metros are disproportionately likely to live in English-isolated households and disproportionately likely to be foreign-born noncitizens (as opposed to U.S.-born or naturalized citizens). English isolation, which indicates the share of residents for whom no member of the household self-reported speaking English exclusively or "very well," is important because it is tied to both time in the United States and everyday use and integration

with English speakers. We observe similar patterns for economic characteristics in Chicago, Houston, Los Angeles, and New York: the median income for Latinos is substantially lower than the median for the metro population as a whole and Latinos are disproportionately likely to have family incomes below the federal poverty threshold. Similarly, the Latino homeownership rate (an important proxy for wealth) is substantially lower than the average for each metro. The economic pattern for Miami follows the same direction as our other focal cities (with lower median income, higher poverty, and lower homeownership among Latinos), but the magnitude of the disparity is much smaller—in part because Miami has the lowest overall median income of these five metros. As presented in Table 3 and discussed below, these patterns are echoed in an examination of educational attainment in each metro.

Given the significant financial investment required to secure an apartment or purchase a home, income and poverty are important signals of both housing access and exposure to segregation and poverty's negative correlates. Beyond income, measures of household wealth highlight disparities in homeownership and, subsequently, residential segregation. In 2017, the median net worth of White households was $171,700 compared to $25,000 for Latino households.[36] When home equity is removed, the median net worth for White households is $70,240 compared to $7,108 for Latino households.[37] Latino median wealth consequently drops from 15% of White median wealth to 10% when home equity is excluded. This gap speaks to both present-day familial wealth, as well as future generational wealth since homeownership represents an important asset which can either support housing security or perpetuate residential segregation patterns.

Importantly, economic differences are only one part of the segregation story, especially for Latino families. Crowell and Fosset point out that Latino residential integration is limited "even when Latinos and Whites are comparable on relevant resources."[38] Despite the fact that Latino segregation from Whites has remained relatively stable, their residential isolation has increased.[39] This

36. *Quick Facts*, U.S. CENSUS BUREAU (Apr. 21, 2021), https://www.census.gov/quickfacts/fact/table/US/PST045219 [https://perma.cc/Y7CG-CFH6].

37. *Id.*

38. Amber R. Crowell & Mark Fossett, *White and Latino Locational Attainments: Assessing the Role of Race and Resources in U.S. Metropolitan Residential Segregation*, 4 SOCIO. RACE & ETHNICITY 491, 491 (2017).

39. *Id.* at 493.

phenomenon highlights the importance of examining enclave-based outcomes. Beyond race, ethnicity requires additional attention in the Latino community as studies have found that there is "substantial heterogeneity in the link between segregation and outcomes for Latino groups of different ancestry."[40] This heterogeneity is generally largest for individuals who self-identify as Puerto Rican or Dominican.[41]

Language and citizenship provide a final, yet critical part of the Latino housing segregation story. Crowell and Fossett find that residential contact with Whites is greater for Latinos who are U.S.-born and have English fluency, though the statistical significance of the results varies by metro area, highlighting the importance of local contexts.[42] Additionally, in his analysis of homeownership and citizenship status, Rugh notes that Latino families have an intergenerational wealth disadvantage due to both racial segregation and mixed-citizenship status families.[43] He argues that "intra-Latino inequality masquerades as success" since homeownership varies by race, ethnicity, and legal status within the Latino community.[44] Highlighting the role of racialized immigration enforcement, Rugh notes that 85% of deportees between 2007 to 2013 were employed Latino men, which exacerbated housing insecurity for mixed-status families.[45]

Though a full review of research on the effects of housing segregation is outside the scope of the current article, recent studies have found that Latino locational attainment is associated with socioeconomic status, race, citizenship, and English ability[46] and that higher levels of segregation are associated with negative effects for native-born Latino college enrollment, professional occupation, and income.[47]

With this context in mind, we now turn to the legislative and legal history of fair housing and its connection to educational outcomes.

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40. De la Roca et al., *supra* note 2, at 130.

41. *Id.*

42. Crowell & Fossett, *supra* note 38, at 10.

43. Jacob S. Rugh, *Why Black and Latino Home Ownership Matter to the Color Line and Multiracial Democracy*, 12 RACE & SOC. PROBS. 57, 61 (2020).

44. *Id.* at 57.

45. *Id.* at 62.

46. *See* Crowell & Fossett, *supra* note 38, at 14.

47. De La Roca et al., *supra* note 2, at 135.

The Evolution of Housing Discrimination and Latino Families

The legislative history of the Fair Housing Act (FHA) of 1968 highlights the critical connection between housing, education, and economic attainment. During the legislative hearings, Senator Mondale of Minnesota noted "[f]air housing is, therefore, more than merely housing. It is part of an educational bill of rights for all citizens."[48] Additionally, Ewert argues that two other goals of the FHA were to "promote access to employment" and "to affirm the value . . . and undo the psychological harm of being second class citizens."[49]

Given the vital role of housing in educational and economic attainment, housing discrimination perpetuates the deleterious effects of segregation. During the era in which the FHA was passed, the focal divide was primarily between Black and White households.[50] Nonetheless, many general practices in the housing market negatively impacted Latino families as well, and there are additional layers to the Latino segregation story, most notably citizenship and language as discussed above. Before addressing these Latino-specific housing issues, however, we first briefly review broader-reaching issues of housing discrimination and their evolution over time.

Historical practices in the housing market, and subsequent court cases, often resulted in disparate treatment of protected categories of citizens, such as discrimination based on race or national origin.[51] Ewert pointedly notes that discrimination in public policy enabled discrimination by private actors.[52] Examples include the creation of eminent domain and construction of urban housing projects via the 1949/1954 Housing Acts, and the systematic steering of Black Americans into hyper-segregated neighborhoods through realtor/lender redlining and restrictive covenants.[53] Though redlining is often considered past practice, it

48. Michelle Y. Ewert, *Things Fall Apart (Next Door): Discriminatory Maintenance and Decreased Home Values as the Next Fair Housing Battleground*, 84 BROOK. L. REV. 1141, 1174 (2019).

49. *Id.*

50. *See generally id.*

51. George D. Ruttinger, *Washington Lawyers' Committee for Civil Rights and Urban Affairs: A Report on the Committee's Fair Housing Project*, 62 HOWARD L.J. 51, 52–53 (2018).

52. Ewert, *supra* note 48, at 1150.

53. MASSEY & DENTON, *supra* note 29, at 52–53.

was given new life during the predatory lending era, which some refer to as "reverse redlining."[54]

More recently, issues of disparate impact have returned to the forefront via facially neutral policies that disproportionately affect protected classes.[55] The 2015 *Inclusive Communities* Supreme Court case was a pivotal decision, because it affirmed at a national level that disparate impact claims are cognizable under the FHA.[56] The case centered on a lawsuit alleging that the process employed by the Texas Department of Housing and Community Affairs to allocate its Low Income Housing Tax Credit "effectively restricted Section 8 tenants, who were predominantly [B]lack, to segregated neighborhoods."[57] The Supreme Court's holding identified specific standards for proving the existence of a disparate impact, and how to confirm that the disparate impact was caused by the policy at issue. While a detailed analysis is beyond the scope of this article, it is important to note that the Supreme Court leaned on the FHA's original intention of reducing segregation and the U.S. Department of Housing and Urban Development's 2013 definition of disparate impact as that which "creates, increases, reinforces, or perpetuates segregated housing patterns," before ultimately expanding the definition of disparate impact to include that which has a "disproportionate adverse effect on minorities."[58] Although proving statistical disparities is an important part of disparate impact arguments, plaintiffs must also prove that the disparities are connected to the policy in question.[59]

Prior to *Inclusive Communities*, which focused primarily on Black families, the 2016 *Yuma* case addressed the issue of disparate impact in the Hispanic community.[60] Using evidence of a significant income gap between White and Hispanic families, the plaintiffs argued that the City of Yuma's rejection of moderate-income housing would disproportionately affect Hispanics.[61] The Ninth Circuit found the evidence sufficient and "held that a reasonabl[e] jury could find that citizens' references to crime, large family sizes,

54. Ewert, *supra* note 48, at 1155–56.

55. Michelle Shortsleeve, *Challenging Growth-Restrictive Zoning in Massachusetts on a Disparate Impact Theory*, 27 B.U. PUB. INT. L.J. 361, 374 (2018).

56. *Id.* at 364; *see also* Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project Inc., 135 S. Ct. 2507 (2015).

57. Shortsleeve, *supra* note 55, at 370.

58. *Id.* at 371–72 (quoting Inclusive Cmtys. Project, 135 S. Ct. at 2513).

59. *Id.* at 375.

60. *Id.* at 373; *see also* Ave. 6E Invs., LLC v. City of Yuma, 818 F.3d 493 (9th Cir. 2016) *cert. denied*, 137 S. Ct. 295 (2016).

61. Shortsleeve, *supra* note 55, at 373.

and unattended children" (albeit facially neutral) "could suggest animus against Hispanics."[62] Highlighting the connection between housing, education, and economic opportunity, the *Yuma* court stated that "[c]omparable housing must have access to 'similarly or better performing schools, comparable infrastructure . . . as well as equal or lower crime levels.'"[63]

Whether through disparate treatment or disparate impact, the confluence of discriminatory housing practices with educational and economic outcomes over time has led to a concentration of "poverty's negative correlates" (e.g., crime, single-parenthood, dependency), which have perpetuated segregation and restricted educational access and economic opportunity.[64]

Latino-specific Housing Issues

As discussed earlier, language and citizenship are central to the Latino segregation story and warrant further attention in relation to housing discrimination cases. In one of the largest legal settlements of its time, the 1990 case of *Tscherny v. Horning Brothers* involved the "innovative provisions" requiring a firm to advertise to Hispanic communities and provide bilingual marketing materials and applications after it was found that they refused to rent to a Latino tester.[65] In more recent cases, language has been viewed as a marker or correlate of citizenship. Preservation of one's native language may be viewed as a refusal to assimilate or plant roots.[66] Alternatively, discrimination based on citizenship is often tied to the criminalization of immigration under the guise of public safety issues.[67]

The 2006 *Hazelton* case in Pennsylvania presents a poignant example as the first local anti-illegal immigration (AII) ordinance anchored in language and citizenship requirements, upon which over one hundred other similar ordinances were subsequently based nationwide.[68] While such ordinances varied in their reach, the ordinances at issue in *Hazelton* established English as the official

62. *Id.* at 374.

63. *Id.* at 375 (quoting Yuma, 818 F.3d at 512).

64. MASSEY, *supra* note 16, at 111.

65. Ruttinger, *supra* note 51, at 56; Tscherny v. Horning Bros., No. 1:88-CV-03426 (D.D.C. Nov. 29, 1998).

66. STEVEN W. BENDER, TIERRA Y LIBERTAD: LAND, LIBERTY, AND LATINO HOUSING 68–69 (NYU Press 2010).

67. *Id.* at 69.

68. Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 53, 59–60 (2009).

language, required proof of citizenship for rental properties, and threatened punishment against landlords and employers who knowingly harbored undocumented immigrants.[69] According to some scholars, the result of local citizenship and language ordinances was that landlords, neighbors, and/or local officials would default to ethnic profiling based on language, appearance, or names,[70] thereby blocking access to rental housing altogether or creating residential tensions. The *Hazelton* ordinances were deemed unconstitutional in 2007 by a district court and after seven years of appeals, the Supreme Court refused to hear the case in 2014, thereby effectively confirming the unconstitutionality of the ordinances.[71] Similar local ordinances passed in Escondido, California and Farmers Branch, Texas among other places, only to later be derailed like the Hazleton ordinance.[72]

Left without direct means to enforce immigration requirements on rental properties, localities have resorted to other facially neutral quality-of-life and public safety measures in attempts to curate neighborhood composition.[73] Density zoning as well as familial status and occupancy restrictions are among the most common enduring forms of housing ordinances that have a disparate impact based on race, class, and citizenship. A full review of these cases is beyond the scope of this article; however, familial status and occupancy restrictions present a particularly important issue in the Latino community due to the prevalence of intergenerational and extended family households, particularly in immigrant and mixed-status communities.[74] Interestingly, Bender notes, "the variety of zoning restrictions that plague Latino/a immigrant communities tend to pass constitutional muster, at least when challenged under federal law. This suggests that housing solutions for embattled Latino/a communities often are found in the political arena and the marketplace, rather than in the courtroom."[75]

We will revisit the issue of law and policy later in our discussion, but we now turn our attention to the issue of Latino

69. BENDER, *supra* note 66, at 67.

70. *Id.* at 67 ("Under this ordinance an official or resident—presumably someone who overhears Spanish or sees a Mexican-appearing person living next door—can lodge a complaint.").

71. *See Lozano v. Hazleton*, ACLU (Feb. 5, 2015), https://www.aclu.org/cases/lozano-v-hazleton [https://perma.cc/CKF7-8B7B].

72. BENDER, *supra* note 66, at 67.

73. *Id.* at 73.

74. *Id.* at 73–80.

75. *Id.* at 80.

education, because housing segregation inevitably feeds into schools, which are the ultimate microcosm of segregation within a neighborhood. Again, we argue that language and citizenship issues are a central component of the education story, which exhibits a similar interdependence with issues of housing.

II. Segregation and the Latino Student

Latinos have faced a long, enduring history of segregation laws that did not explicitly require the segregation of students into separate schools, although separation of Latino students was intentionally fostered.[76] In the early twentieth century, Latinos were racially categorized as White by the U.S. but nevertheless quickly became segregated from Whites in schools.[77] The placed racialization of Latino "whiteness" served as a constant threat to White European Americans who wished to assert, affirm, and own their whiteness and dominance in the racial hierarchy.[78] Donato and Hanson argue that, although Latinos were legally White, they were seen as socially "colored" and they became treated as such in their schools and communities.[79]

Latino students, unlike Black students, did not have state laws that explicitly mandated or permitted *de jure* segregation.[80] Latino students did, however, face *de facto* segregation mandated by school officials who argued the need for separate classrooms or schools due to pathologized language needs, or the community's desire to "Americanize" them.[81] This "othering" of Latinos' racial identity was largely socially constructed inside ever-changing concepts of race and ethnicity inside the Black-White binary.[82] While the social construction of race assigns value based upon skin

76. *See* Ruben Donato & Jarrod Hanson, *Mexican-American Resistance to School Segregation*, PHI DELTA KAPPAN (Jan. 21, 2019), https://kappanonline.org/mexican-american-resistance-school-segregation-donato-hanson/ [https://perma.cc/DT65-5HLJ] ("Mexican-American students did not face state laws explicitly mandating or permitting their segregation, and . . . school officials often segregated them all the same.").

77. Kristi L. Bowman, *The New Face of School Desegregation*, 50 DUKE L.J. 1751, 1763–64 (2001).

78. MASSEY & DENTON, *supra* note 29, at 23.

79. *See* Donato & Hanson, *supra* note 76 ("Legally, Mexican-American students may have been classified as White, but those students experienced segregation because local officials considered them to be *not* White.").

80. Bowman, *supra* note 77, at 1768–72.

81. GILBERT G. GONZALEZ, CHICANO EDUCATION IN THE ERA OF SEGREGATION 40–45 (Associated Univ. Presses, Inc. 1990).

82. *See* Bowman, *supra* note 77, at 1755–68.

color and other physiological characteristics,[83] ethnicity can be wrongly matched with race and connected to one's religion, traditions, and language. White norms made Latinos, with their brownness and carried homeland language, obvious outsiders while their language especially labeled them as "foreign."[84] Whiteness has historically been a term unwillingly shared by White people, as exemplified by the racial aggression that resulted from a 1930's census that classified Latinos as "White." As a result, Latinos were subsequently classified as "foreign-born Whites" by the 1940's.[85] Under this designation, Latinos were segregated across the country into "'Americanization schools' in which their 'deficiencies,' linguistic and otherwise, would be corrected."[86] The growth of the Latino population in the latter half of the 20th century did not resolve the challenge of Latino educational segregation, which persists in the current educational context.

A. Current Educational Context

According to the UCLA Civil Rights Project, the U.S. public school population has been reshaped by a surging Latino population.[87] The enrollment of Latino students has risen dramatically over time, with Latinos representing just 5% of enrollment rates in schools in 1970, and 26% by 2016.[88] Latino students are now "the second largest group in the nation's public schools . . . in most regions of the country—and are the largest group in public schools in the West" as well as in many of the nation's largest cities.[89] Continued growth of the Latino population will correlate with rising enrollment rates of Latinos, because the

83. *Id.* at 1756.

84. *See* LILIA FERNANDEZ, BROWN IN THE WINDY CITY: MEXICANS AND PUERTO RICANS IN POSTWAR CHICAGO (Univ. of Chi. Press 2012) ("[Puerto Ricans] challenged Americans' categories of racial knowledge even further, being 'Americans' and yet 'foreigners' at the same time. Like incoming Mexicans, they confounded the nation's black-white binary at a moment when European immigrants had consolidated their 'whiteness.'").

85. *Id.* at 66.

86. Michael E. Madrid, *The Unheralded History of the Lemon Grove Desegregation Case*, 15 MULTICULTURAL EDUC. 15, 17 (2008).

87. Press Release, UCLA Civil Rights Project, Brown at 65: No Cause for Celebration (May 10, 2019), https://civilrightsproject.ucla.edu/news/press-releases/press-releases-2019/brown-at-65-no-cause-for-celebration/ [https://perma.cc/G2M2-HT2F].

88. *Id.*

89. *Id.*

Latino population is generally younger and, therefore, more concentrated in the school systems.[90]

Latinos' growing presence in the U.S education system has led to a large language shift in schools. "Census data from 2010 reveal that Spanish is spoken by at least 25% of the population (5 years or older) in 54 out of 57 metropolitan areas in the United States."[91] Gándara and Aldana highlight that twenty-two of these metropolitan areas are located in California, twelve are in Texas, and despite the multilingual make up of students, schools have failed to capitalize on these linguistic assets.[92] The Latino population will continue to diversify the K-12 school system, making it more multiracial, multicultural, and multilingual. As a result, school district leaders must equip themselves and the schools within their jurisdiction with the tools needed to support the diverse change in student body demographics.

It must be noted that "as diversity spreads, so too does segregation."[93] In 2016, 41.6%of Latino students attended intensely segregated non-White schools.[94] Orfield and Frankenberg argue, "[a] primary challenge that faces schools today, and no doubt into the future, is the increasing segregation of these Latinos."[95] Segregation in particular has been harmful to Latino English Language Learners (ELLs) who face higher levels of segregation when compared to non-ELLs.[96] Moreover, segregation is especially harmful to Latino immigrant ELLs who are more likely to live in more segregated neighborhoods and are therefore forced to attend highly segregated schools where 90% of the student body are students of color.[97] Thus, Latino ELLs experience the long-lasting, ever-present negative impacts of segregation on their education,

90. Patricia C. Gándara & Ursula S. Aldana, *Who's Segregated Now? Latinos, Language, and the Future of Integrated Schools*, 50 EDUC. ADMIN. Q. 735, 736–37 (2014).

91. *Id.* at 736.

92. *Id.*

93. Gary Orfield & Erica Frankenberg, *Increasingly Segregated and Unequal Schools as Courts Reverse Policy*, 50 EDUC. ADMIN. Q. 718, 726 (2014).

94. *See* UCLA Civil Rights Project, *supra* note 87.

95. Gándara & Aldana, *supra* note 90, at 737.

96. *Id.* at 742.

97. *See* John Iceland & Melissa Scopilliti, *Immigrant Residential Segregation in U.S. Metropolitan Areas, 1990–2000*, 45 DEMOGRAPHY 79 (2008); *see also* CAROLA SUÁREZ-OROZCO, MARCELO M. SUÁREZ-OROZCO & IRINA TODOROVA, LEARNING A NEW LAND: IMMIGRANT STUDENTS IN AMERICAN SOCIETY (Harv. Univ. Press 2008); *see also* Julian Vasquez Heilig & Jennifer Jellison Holme, *Nearly 50 Years Post-Jim Crow: Persisting and Expansive School Segregation for African American, Latina/o, and ELL Students in Texas*, 45 EDUC. & URB. SOC'Y 609 (2013).

which is often reflected by low levels of academic achievement.[98] Importantly, Latino ELLs often face triple segregation and isolation by poverty, race, and language.[99] This knowledge is crucial for practitioners and policymakers as they seek to address centuries of segregation practices.[100]

B. Legal Context: Race, Language, & Educational Opportunity

Despite the barriers described, the Latino community has resiliently used various forms of capital to legally fight for integration in court settings. The *Roberto Alvarez v. Board of Trustees of the Lemon Grove School District* case of 1931 is one example.[101] In July of 1930, the Lemon Grove school district in California developed a plan to segregate the Mexican American children from the White children into a "special school."[102] "The school resembled a barn and was characterized by an inferior instructional program."[103] The court ruled in favor of Alvarez, an important victory that:

> [P]layed a significant role in the defeat of the Bliss Bill. . . . The Bliss legislation would have classified Mexicans as Indians which, in turn, would have allowed Mexicans and their children to be segregated . . . . Had the Bliss Bill been enacted, it may have facilitated the perpetuation of separate but equal facilities in California. [104]

As Madrid explains, "the passage of the Bliss legislation may have precipitated a victory for those in favor of segregation in *Mendez v. Westminster*, the 1945 case . . . ."[105] *Mendez* showed that the school districts in Southern California had segregated a group of Spanish-speaking children into "Mexican" schools separate from the English-speaking children.[106] The parents argued that their children and a group of five thousand other children were facing "a

98. *See* ADRIANA D. KOHLER & MELISSA LAZARÍN, NAT'L COUNCIL OF LA RAZA, HISPANIC EDUCATION IN THE UNITED STATES 1 (2007).

99. Heilig & Holme, *supra* note 97, at 616; *see also* UCLA Civil Rights Project, *supra* note 87.

100. Gándara & Aldana, *supra* note 90, at 737.

101. Alvarez v. Owen, No. 66625 (Cal. Sup. Ct. San Diego County filed Apr. 17, 1931).

102. Madrid, *supra* note 86, at 16–17.

103. *Id.* at 17.

104. *Id.* at 18.

105. *Id.*

106. GUADALUPE SAN MIGUEL JR., "LET ALL OF THEM TAKE HEED": MEXICAN AMERICANS AND THE CAMPAIGN FOR EDUCATIONAL EQUALITY IN TEXAS, 1910-1981, at 119 (Univ. of Tex. Press 1st ed., 1987).

concerted policy and design of class discrimination against persons of Mexican or Latin descent or extraction of elementary school age by the defendant school agencies . . . [which] resulted in the denial of the equal protection of laws of those persons."[107] The court's findings were significant because, for the first time, it was concluded that segregation of Latinos in public schools was a violation of the state law and a denial of equal rights.[108] The court also found that children do learn English more quickly in mixed settings rather than the separate ones, "which undercut a principal instructional reason for the existence of segregated schools."[109] *Mendez* has been cited as a foreshadowing of *Brown v. Board of Education* which played a "prominent role in dismantling the system of de facto segregation in the United States."[110]

In *Independent School District v. Salvatierra,* Jesus Salvatierra and his community in Del Rio brought a suit to the Texas Supreme Court that challenged "school plans to increase segregation of its Latino students."[111] The Texas court stated the Latinos could not be segregated from "other white races" for malice reasons but could in fact be segregated for pedagogical reasons.[112] "The appellate court allowed the district to segregate Latino students in early elementary grades"[113] "with no explicit constitutional, statutory or regulatory authority."[114] "Consequently, fashioning legal remedies for this discrimination using theories of either *de jure* or *de facto* segregation would prove next to impossible."[115] As such, segregation of Latinos became a strong "pattern throughout the Southwest."[116] As such, proficiency in English "often presented special challenges for Latino students"

107. *Id.*

108. *Id.*

109. *Id.*

110. Bowman, *supra* note 77, at 1768.

111. *Id.* at 1771–72.

112. *Id.*; *see also* Indep. Sch. Dist. v. Salvatierra, 33 S.W.2d 790, 794 (Tex. Civ. App. 1930).

113. Bowman, *supra* note 77, at 1772.

114. *Compare* Margaret E. Montoya, *A Brief History of Chicana/o School Segregation: One Rationale for Affirmative Action* , 12 BERKELEY LA RAZA L. J. 159, 165 (2002), *and* Bowman, *supra* note 77, at 1772. The two articles provide a picture of what the court effectively allowed the schools to do and how they allowed them to it; they were allowed to segregate students with no oversight protecting individuals' legal rights.

115. Montoya, *supra* note 114, at 165.

116. *See id.* at 164–65.

who were at risk of being segregated for so-called pedagogical purposes.[117]

Texas remained an example of blatant segregation in the southwest as seen in *Delgado v. Bastrop Independent School District*.[118] This case presented an argument against segregation, citing the 14th Amendment, which outlined Latinos' right to the Equal Protection Clause under which legal segregation was prohibited.[119] Latinos tried to use their status as White in defense against Texas public schools that were implementing a policy of segregating Mexican children into other school buildings and classrooms.[120] The court ruled in favor of Delgado affirming it was wrongful and illegal to segregate Latinos, "denying said pupils use of the same facilities and services enjoyed by other children of the same age or grades."[121] Nonetheless the court still decided that Mexican children could remain on a school campus but segregated into different school buildings or separate classrooms if they did not know sufficient English.[122]

C. Contemporary Issues of Linguistic Isolation

Although *Brown v. Board of Education* officially called for an end to legal segregation for students of color in 1954, Black and Latino students remain highly segregated. Of importance is the fact that the legacy of the *Brown* ruling made no reference to Latino cases in its decision and, as such, desegregation has remained complex for Latinos.[123] Political and social changes implemented by court systems for Black students did not transfer over similarly to Latino students.[124] The legal tensions between Latinos' racial categorization as "legally White" versus "socially colored" complicates the history and understanding of Latino experiences of educational segregation.

Brown, upon its ruling, had not worked favorably in the desegregation of Latino students until 1970 when two federal courts held that Latinos should be distinct from Whites in the context of

117. Bowman, *supra* note 77, at 1777.

118. Delgado v. Bastrop Ind. Sch. Dist., Civil Action No. 388 (W.D.Tex. 1948) (unreported); *see also* SAN MIGUEL JR., *supra* note 106, at 120–21.

119. SAN MIGUEL JR., *supra* note 106, at 123–24.

120. Montoya, *supra* note 114, at 163.

121. SAN MIGUEL JR., *supra* note 106, at 124.

122. *Id.* at 125.

123. *See* Bowman, *supra* note 77.

124. Steven H. Wilson, Brown *over "Other White": Mexican Americans' Legal Arguments and Litigation Strategy in School Desegregation Lawsuits*, 21 L & HIST. REV. 145, 146 (2003).

segregation.[125] In *Cisneros v. Corpus Christi Independent School District*, the 5th Circuit Court of Appeals ruled that Latino students should be protected from segregation under *Brown*.[126] However, it took until 1973, in *Keyes v. Denver*, for the Supreme Court to address the segregation of Latinos and "recognize[] the rights of Latino students (a great many of whom were English learners) to desegregation remedies."[127] In order to carry out their decision in *Keyes*, the district court "found it necessary to protect the rights of the school district's Latino students to appropriate linguistic support and successfully encouraged a settlement between the plaintiffs and the district on this issue."[128] Unfortunately, the *Keyes* decision did not come into fruition as the Nixon administration once again promoted "language as an issue" and supported educational segregation on the basis of language needs.[129] Once again, the focus for Latino students moved from desegregation to language assistance which became further "accelerated by the passage of the Bilingual Education Act in 1968, and then in 1974 the Supreme Court decision, *Lau v. Nichols*."[130]

While minority students' rights of language are critically important and should not be understated, the desegregation focus on race never fully addressed the accumulating and subsequently worsening factors of segregation facing Latino students. Latinos now represent a large and fast-growing presence in K-12 public schools in every region of the United States.[131] Yet, they are experiencing more rapidly rising segregation rates than any other racial/ethnic group.[132] Bowman argues that "[t]he first step in understanding Latinos' contemporary experiences in segregated schools is to review the historical foundations of such segregation."[133] This historical foundation includes the tension between the "legally White" versus "socially colored" status of Mexican Americans and the resulting legacy of Mexican-American

125. Bowman, *supra* note 77, at 1777.

126. *Id.* at 1778; Cisneros v. Corpus Christi Indep. Sch. Dist., 467 F.2d 142, 144 (5th Cir. 1972).

127. Gándara & Aldana, *supra* note 90, at 740; Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973).

128. Gándara & Aldana, *supra* note 90, at 740.

129. *Id.*

130. *Id.* at 741.

131. *See* Kohler & Lazarín, *supra* note 98, at 2.

132. *See generally* Orfield & Frankenberg, *supra* note 93, at 730–31 (noting that Latinos are now the most segregated demographic group).

133. Bowman, *supra* note 77, at 1768.

schools, particularly in the Southwest.[134] As Donato and Hanson explain, "[t]he history of Mexican American school segregation is complex, often misunderstood, and currently unresolved."[135] The response of school districts, urban planners, and state and national officials will be vital to the achievement, college success, and economic opportunity of Latino students.[136]

III. Analysis of the Influence of Segregation on Educational Outcomes: The Enclave Perspective

We now proceed to an examination of educational attainment, first comparing Latino degree attainment to the average attainment in each focal metropolitan area (Table 3), and then focusing on bachelor's degree (BA) attainment disparities among Latinos, specifically analyzing BA attainment for Latinos residing in Latino enclaves (i.e., the neighborhoods with the highest concentrations of Latino residents in each metro, a result of the intersection of residential preferences and patterns of segregation) and Latinos residing elsewhere in the same metro area (Table 4).

As with Tables 1 and 2, we use the IPUMS USA release of the 2015–2019 American Community Survey five-year sample.[137] For these analyses, we restrict the sample to respondents of age 25 to 34 (the standard cohort for postsecondary attainment analysis). Because the focus of this paper is on long-term educational outcomes in the context of Latino segregation in U.S. cities, we also omit respondents who immigrated to the United States after the age of seventeen (i.e., adult arrivals).

134. *See* Donato & Hanson, *supra* note 76.
135. *Id.* at 202.
136. *See* Orfield & Frankenberg, *supra* note 93, at 731–32.
137. Ruggles, *supra* note 22.

Table 3: Detailed degree attainment by metropolitan area (%)							
		Highest degree attained					
Metro area		HS or less	Some college	AA	BA	Graduate degree	Total
Chicago	Overall	26.2	21.1	7.5	31.8	13.4	100.0
	Latino	47.1	23.9	8.5	15.8	4.7	100.0
	White	15.7	17.1	7.4	42.1	17.8	100.0
Houston	Overall	32.9	25.2	8.1	24.6	9.2	100.0
	Latino	50.3	25.5	7.4	13.3	3.4	100.0
	White	20.8	22.3	8.3	35.5	13.1	100.0
Los Angeles	Overall	30.2	24.0	7.6	28.8	9.4	100.0
	Latino	46.0	27.5	7.4	15.4	3.7	100.0
	White	14.2	19.8	7.5	42.8	15.7	100.0
Miami	Overall	31.7	22.2	12.8	23.7	9.6	100.0
	Latino	34.6	22.1	13.9	21.1	8.4	100.0
	White	22.1	19.6	11.4	33.0	14.0	100.0
New York	Overall	25.6	16.4	7.5	34.4	16.1	100.0
	Latino	41.7	21.1	9.1	20.9	7.3	100.0
	White	15.7	12.3	6.4	43.4	22.3	100.0
Universe: age 25-34 excluding adult arrivals							

Table 3 shows educational attainment rates for Latinos in key metro areas relative to average attainment for those same metros. While Table 3 does not show cross-racial or cross-ethnic comparisons, prior research shows that Latinos are among the groups with the lowest rates of college access and participation (i.e., the share of the population whose highest educational attainment is a high school diploma or less), a pattern that holds even when excluding individuals who immigrated as adults, as we do throughout this analysis.[138]

Among the focal metros, Houston has the highest percentage of Latinos whose highest educational attainment is a high school degree or less, followed by Chicago and Los Angeles; Miami has the highest percentage of Latinos with at least some college experience. Relative to the average metropolitan area attainment, Latinos are also overrepresented in the "some college" (but no degree) and associate degree (AA) categories and underrepresented among BA holders and individuals with a graduate or professional degree. As with the economic indicators presented in Table 2, these patterns

138. Flores et al., *supra* note 19, at 147.

are also observable in Miami, but the magnitude of the disparity is much less. In other words, Latinos in Miami are slightly underrepresented among BA and graduate degree holders and slightly overrepresented among AA holders, but are closer to the population averages than is the case in our other focal metros. There are alarming disparities in the share of the White and Latino population whose highest degree is a BA, with a 12-percentage point gap in Miami and a 22–27-percentage point gap in all other focal metros. These disparities widen when considering graduate degrees. In Miami, the White graduate attainment rate is nearly double the Latino attainment rate; in New York, triple; and in Chicago, Houston, and Los Angeles, nearly quadruple. The narrower gap in Miami is partly attributable to the fact that of these five metro areas, Miami has the smallest share of White residents with a BA degree or higher. Thus, the narrower gap in Miami is attributable both to a relatively high level of Latino BA+ attainment and a relatively low level of White BA+ attainment.

We next consider disparities in educational attainment *among* Latinos in relation to patterns of residential segregation. Specifically, in Table 4, we present the BA (or higher) attainment rates for Latinos living within neighborhoods with disproportionately high concentrations of Latino residents (i.e., Latino enclaves) compared to attainment rates for Latinos living in neighborhoods whose Latino population share is similar to or lower than the metro area as a whole (i.e., non-enclaves).

We identify Latino enclaves at the level of the Public Use Microdata Area (PUMA), a Census-defined geographic area of approximately 100,000 residents that in a large metropolitan area typically consists of one or more contiguous neighborhoods. Following Cathy Yang Liu and colleagues,[139] we identify Latino enclaves based on the residential concentration quotient (RCQ)—the ratio of the Latino population share for a given PUMA to the Latino population share for the metropolitan area containing that PUMA—and define PUMAs as enclaves using an RCQ threshold of 1.5.[140] In simpler terms, we classify neighborhoods as Latino enclaves if they are at least 1.5 times as Latino as their metro area.

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139. Cathy Yang Liu, *Ethnic Enclave Residence, Employment, and Commuting of Latino Workers*, 28 J. POL'Y ANALYSIS & MGMT. 549, 600–25 (2009); Cathy Yang Liu & Gary Painter, *Travel Behavior Among Latino Immigrants: The Role of Ethnic Concentration and Ethnic Employment*, 32 J. PLAN. EDUC. & RSCH. 62 (2012); Pengyu Zhu, Cathy Yang Liu & Gary Painter, *Does Residence in an Ethnic Community Help Immigrants in a Recession?*, 47 REG'L SCI. & URB. ECON. 112 (2014).

140. The RCQ is calculated as $(P_{ij}/P_j)/(P_{im}/P_m)$, where for each PUMA j in metro m, P_{ij} is the population of Latinos in PUMA j, P_j is the total population of PUMA j,

Table 4: Latino BA+ attainment rates by metropolitan area and residence in Latino enclaves

	Proportion of Latinos with a BA or higher[1]			Disparity in BA+ attainment rate, non-enclave vs. enclave residents	
Column1	A. All Latino residents	B. Residents of Latino enclave neighborhoods[2]	C. Residents of non-enclave neighborhoods	D. Gap[3] (C - B)	E. Ratio[4] (C ÷ B)
Chicago	20%	17%	23%	6 pts	1.3
Houston	17%	10%	20%	10 pts	2.1
Los Angeles	19%	14%	22%	8 pts	1.6
Miami	29%	29%	30%	0 pts	1.0
New York	28%	22%	33%	11 pts	1.5

[1]Universe: Latinos age 25-34 excluding adult arrivals

[2]Neighborhoods whose Latino population share is at least 1.5 times that of the metropolitan area as a whole

[3]Calculated as difference between rates (e.g. in Chicago, 23% - 17% = 6 percentage points)

[4]Calculated as ratio of rates (e.g. in Chicago, 23% ÷ 17% = 1.3)

In every metro area except Miami, there is a substantial BA+ attainment gap for Latino enclaves compared to Latino residents of non-enclave neighborhoods. Across these four metros, the Latino enclave BA+ attainment rate is six to eleven percentage points lower than the non-enclave Latino attainment rate (column D). In terms of proportionality, the non-enclave Latino BA+ attainment rate is 1.3 to 2.1 times the Latino enclave rate (column D). In short, the Latino-White postsecondary attainment gap evident in Table 3 is especially pronounced in the neighborhoods with the highest concentration of Latino residents—that is, the neighborhoods where the processes of Latino residential segregation are most evident, and where Latino students are most likely to experience school segregation within a given metro area. As with previous tables, Miami is an exception, as the Latino BA attainment rate in enclave and non-enclave neighborhoods is nearly equal.

Table 4 can provide insight into the intersection of residential and educational segregation, as discussed previously in this paper, and long-term educational opportunities. While the analysis presented in Table 4 does not offer causal evidence, it does suggest that the long and ongoing history of Latino residential segregation

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P_{im} is the Latino population of metro m, and P_m is the total population of metro m. As Liu and colleagues note, an RCQ of 1 means that the Latino concentration in a PUMA is exactly equal to the concentration for that metro, while an RCQ greater than 1 means the PUMA's Latino concentration is disproportionately high relative to the demographics of the metro as a whole. Because the RCQ is calculated relative to the demographics of each city, the Latino population share threshold at which a PUMA is classified as a Latino enclave varies from city to city.

(which contributes to the concentration of Latinos in certain geographic sections of a city, i.e., enclaves) and school segregation (which isolates Latino students, and is often coupled with a lack of financial resources for their schools) is associated with disparities in BA attainment among Latinos of similar ages in the same metropolitan area. In sum, segregation can compound the Latino-White opportunity gap for residents of the most concentrated Latino neighborhoods.

IV. Discussion

This analysis sought to examine the role of segregation on Latino educational outcomes within the context of a history that has both ignored and accounted for the racialization of Latinos in the United States. Historical, legal, and academic research indicate that Latinos occupy a particular yet varied position on the racial stratum of U.S. society. As a group, Latinos may share social and cultural characteristics related to migration patterns or citizenship pathways, language, and race and/or ethnicity. However, Latinos are diverse among themselves regarding country of origin but also are a microcosm of the racial spectrum we see in the United States, from light skin and European ancestry to indigenous phenotypes to Black African-origin backgrounds.

The diversity of the Latino population is also captured in the range of large metropolitan areas we examined here. Houston and Los Angeles consist primarily of Mexican-origin Latinos, the subjects of interest in many of the civil rights cases we examined, at 27 and 35% respectively, while Miami and New York City are approximately 3% Mexican-origin. In Miami, Latinos are primarily of Cuban and South American origin and comprise almost half of all residents; Miami also has the largest percentage of Black non-Latino residents of the metro areas we evaluated. The largest Puerto Rican presence is in New York, with notable Puerto Rican communities in Miami and Chicago as well. It is perhaps no coincidence that the biggest civil rights cases regarding Latino rights to housing and education arise out of locations such as Texas and California where Mexican and Central American origin individuals sought to integrate into these important sectors.

The contributions of this analysis are threefold. First, we offer a historical as well as a contemporary quantitative perspective on the relationship between segregation and educational attainment of Latinos in key metropolitan areas. While our analysis is not causal, we assess key outcomes related to critical sectors in the U.S.—housing and education—and link education to Latino

segregation through the enclave unit. Overall, we find that the role of Latino segregation continues to influence educational outcomes. Latino segregation is not uniform across all cities, although it is clear that BA attainment rates are substantially lower for Latinos residing within enclaves than for their peers in non-enclave neighborhoods (with the exception of Miami, a location that differs from other focal metro areas, with higher-than-average rates of Latino college degree attainment and a primarily Cuban and South American origin Latino population). Additionally, our analysis finds that the White-Latino postsecondary attainment and opportunity gaps evident across the nation are pronounced in the metro areas with the largest Latino populations—that is, the areas in which daily life for many Latinos is shaped by the multiple intersecting forces of Latino segregation discussed above.

Conclusion

The status of Latinos in the U.S. will only become more prominent with increased entry into certain sectors. Contreras describes this as the "Brown Paradox" whereby Latinos' increasing presence in social and economic spaces is met with increased xenophobic responses in local, state, and federal policy, rather than leading to greater acceptance.[141] The results of recent desegregation efforts and the retraction of school related decrees to promote more integration for educational opportunity indicate that a resistance to Latinos in the U.S. is still in operation. The data and research are clear about the negative effects of segregation by race and ethnicity. Adding linguistic and citizenship segregation is likely to magnify these negative outcomes. At the same time, the research on increasing the number of college degrees of all residents is a win, not only for an individual, but also a community. As the courts battle the need for and methods of desegregation, we can act by providing more opportunity for college degrees while also reducing barriers to attaining these degrees in institutional, policy, and legal practices across various communities. The increase in degree completion for the largest minority in the nation is ultimately an economic development endeavor with long-term financial and social benefits for entire metropolitan areas, and by extension, the nation at large.

141. FRANCES CONTRERAS, ACHIEVING EQUITY FOR LATINO STUDENTS: EXPANDING THE PATHWAY TO HIGHER EDUCATION THROUGH PUBLIC POLICY (James A. Banks ed., 2011).

Making Sex Matter: Common Restrooms as "Intimate" Spaces?*

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Abstract

This Essay identifies and critiques a common trope used in litigation and public policy debates by opponents of allowing transgender people to use common restrooms (multi-user/shared gendered restrooms) consistent with their gender identity rather than the sex they were assigned at birth. The rhetorical tactic they use is to characterize such facilities as "intimate" spaces.

This Essay considers and rejects four conceptions of intimacy that the restrooms-as-intimate-spaces trope might be invoking. It examines notions of intimacy as relational, intimacy as a sharing of personal information, intimacy as emotional safety, and intimacy as in intimate anatomical parts. This Essay argues that each notion fails either to accurately describe common restrooms or to justify denying transgender persons gender-appropriate access to such facilities, or both.

Finally, this Essay suggests that deployments of the "intimate" spaces trope seek to make sex matter more in a time when sex/gender divisions seem again to be widely criticized. Those who embrace the intimate restrooms trope are trying to insist upon an intimacy of sex/gender, an intimacy among the sex classes of men and of women, an imagined sex intimacy whose phantasmatic character might help explain why they do not appear to regard various exemptions from laws designed to police common restroom usage as compromising the "intimacy" of those spaces that they claim transgender people violate.

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†. Newton Professor of Constitutional Law, University of Southern California Gould School of Law. My thanks to the audience at the Berkeley Journal of Gender, Law & Justice symposium on Gender, Sexuality, and Kinship: Cultural Narratives of Intimacy and their Legal Discontents (Mar. 20, 2017), especially commenter and symposium organizer Darius Dehghan; my colleagues Nomi Stolzenberg and Camille Gear Rich; USC Gould School of Law 2021 alum Ryan Gorman for excellent research assistance; and the editors of *Law & Inequality* for their excellent work on this Essay.

Introduction

On February 19, 2021, the Gloucester County School Board (the School Board) returned to the Supreme Court of the United States once again to seek certiorari in its litigation with Gavin Grimm over his access as a transgender person to gendered restrooms consistent with his gender identity.[1] Gavin, a young transgender man, sued the School Board in 2015, after his sophomore year of high school, when it adopted a policy stripping him of his access to the boys' restroom.[2] He argued that the School Board's policy violated his rights under Title IX of the Education Amendments of 1972 (Title IX), which forbids sex discrimination in educational programs receiving federal funding, and under the Equal Protection Clause.[3] He initially secured a preliminary injunction in June of 2016, but the Supreme Court stayed it later that summer[4] and granted certiorari in October.[5] The U.S. Court of Appeals for the Fourth Circuit had deferred to the Obama-era Department of Education's interpretation of Title IX as requiring transgender students be allowed to use gendered restrooms consistent with their gender identity,[6] but that guidance was withdrawn just 33 days into the Trump administration.[7] Thereafter the Supreme Court, in March of 2017, vacated the judgment below and remanded the case for further consideration by the Court of Appeals in light of that withdrawal.[8] Ultimately, the Court of Appeals held, in August of 2020, that the School Board had violated Grimm's rights under both Title IX and the Equal Protection Clause.[9] It is this Fourth Circuit decision for which the School Board sought Supreme Court review, but the Court rebuffed its efforts in June of 2021.[10]

Gavin Grimm's case is perhaps the most high-profile litigation involving conflicts over restroom use by transgender people. But in

1. Petition for a Writ of Certiorari, Gloucester Cnty. Sch. Bd. v. Grimm, 141 S. Ct. 2878 (2021) (Mem.) (No. 20-1163), 2021 WL 723101.

2. Grimm v. Gloucester Cnty. Sch. Bd., 302 F. Supp. 3d 730, 736–38 (E.D. Va. 2018).

3. *Id.* at 738.

4. Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm, 136 S. Ct. 2442 (2016) (Mem.).

5. Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 369 (2016) (Mem.).

6. *Grimm*, 302 F. Supp. 3d at 740.

7. *Id.*

8. Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017) (Mem.).

9. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586 (4th Cir. 2020).

10. Gloucester Cnty. Sch. Bd. v. Grimm, 141 S. Ct. 2878 (June 28, 2021).

recent years, the issue of transgender persons' access to gendered, multi-user restrooms—which this Essay will call "common restrooms" (or sometimes just "restrooms")—consistent with their gender identity—which I'll question-beggingly refer to as "gender-appropriate" or "appropriate access"—has been an extremely contentious one in the United States.[11] Opponents of such usage, denominated here as "opponents" for convenience, have deployed a variety of rhetorical moves. The focus of this Essay is the common assertion by opponents that restrooms are "intimate spaces," and therefore, by reasoning often apparently left implicit, that transgender persons should not be permitted to use restrooms consistent with their gender identity.

After introducing the issue further, this Essay will recount a small sample of the restrooms-as-intimate trope. It will then take up different possible meanings of "intimate" in this context: intimacy as relational, as a sharing of personal information, as emotional safety, and as in intimate anatomical parts. This Essay will also show that these conceptions of "intimacy" fail to either accurately describe common restrooms or justify denying transgender persons gender-appropriate access to such facilities, or both. Lastly, this Essay will address what may lie at the root of the proliferating invocation of the restrooms-as-intimate trope.

I. Deployments of the Common-Restrooms-as-Intimate Trope

Other than, perhaps, the restroom provision of North Carolina's HB2,[12] which was but one part of an extremely pernicious anti-civil-rights law,[13] probably the most high-profile restroom

11. Michael Lipka, *Americans Are Divided Over Which Public Restroom Transgender People Should Use*, PEW RSCH. CTR. (Oct. 3, 2016), https://www.pewresearch.org/fact-tank/2016/10/03/americans-are-divided-over-which-public-bathrooms-transgender-people-should-use/ [https://perma.cc/DE5U-LXGT].

12. 2016 N.C. Sess. Laws 3. HB2 required government buildings including public schools and universities to sex-segregate multi-user restrooms and locker rooms, and to limit access to such facilities by "biological sex." *Id.* at §§ 1.1–1.3. HB2's full title is "An Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations." 2016 N.C. Sess. Laws 3.

13. For example, HB2 repealed the municipal laws of Charlotte and six other local governments that prohibit sexual orientation and gender identity discrimination, and preempts any such local laws that might in the future be adopted. *Id.* § 3.1. As originally enacted, it eliminated private employees' ability to sue to vindicate their state law rights against discrimination based on race, national origin, religion, color, age, or sex. *Id.* at § 3.2; *see generally* Brian Clarke, *Employment Law Easter Eggs in North Carolina's HB 2*, PRAWFSBLOG (Mar. 29, 2016, 8:00 AM),

dispute came out of Virginia, the home of high school student and transgender boy Gavin Grimm, as noted in the Introduction.[14] Although he initially used the boy's restroom without incident,[15] complaints, seemingly originating from some parents, led the School Board to adopt a policy limiting restroom use by the undefined notion "biological gender."[16] As a result of this policy, Gavin was barred from using the common restrooms reserved for boys at his school.[17] He sued and secured a preliminary injunction from the Fourth Circuit on his claim under Title IX,[18] but the Supreme Court stayed that order and granted certiorari.[19] After the Education and Justice Departments under Trump withdrew the Guidance that had interpreted Title IX to protect appropriate restroom access for transgender students,[20] the Supreme Court vacated the lower court's decision and remanded the case for fresh consideration.[21]

The School Board's final certiorari petition invoked the common-restrooms-as-intimate trope twice. First, referring to "restroom facilities" separated "on the basis of sex," the petition insisted that "[t]he biological differences between the sexes allow government officials to separate men and women *in such intimate spaces*."[22] Then, using quotation marks carefully to allow it to deploy the adjective without technically (mis)representing that the Supreme Court itself has embraced that characterization of common restrooms, the petition writes: "This Court has already recognized the need to 'afford members of each sex privacy from the other sex' in *intimate settings*."[23]

The School Board's earlier Supreme Court brief, and those of many of its amici, profligately deployed the "intimate" spaces trope. From its first page the School Board sought to frame the case with the trope: the School Board claimed that Title IX embodies the principle "that *in intimate settings* men and women may be

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https://prawfsblawg.blogs.com/prawfsblawg/2016/03/employment-law-easter-eggs-in-north-carolinas-hb-2.html [https://perma.cc/4FWU-LEMQ].

14. *See* Grimm v. Gloucester Cnty. Sch. Bd., 302 F. Supp. 3d 730 (E.D. Va. 2018).

15. *Id.* at 737–38.

16. *Id.* at 738.

17. *Id.*

18. *Id.* (citing 20 U.S.C. § 1681(a)).

19. *Id.* at 740.

20. *Id.*

21. *Id.*

22. Petition for a Writ of Certiorari, *supra* note 1, at 31 (emphasis added).

23. *Id.* at 32 (emphasis added) (quoting United States v. Virginia, 518 U.S. 515, 550 n.19 (1996)).

separated 'to afford members of each sex privacy from the other sex.'"[24] Citing an influential 1971 law journal article that sought to support the proposed Equal Rights Amendment to the Constitution by limiting its scope in some respects, the School Board creatively invoked *Griswold v. Connecticut*, a case about "marital bedrooms," for the importance of privacy rights "in *intimate facilities* such as 'public rest rooms[.]'"[25] The brief repeated this "intimate facilities" characterization when it claimed that a requirement that transgender persons be allowed appropriate restroom access would lead either to the abolition of what Jacques Lacan[26] called "urinary segregation,"[27] or to unseemly, case-by-case excretory admissibility determinations, in my own terminology.

Alliance Defending Freedom, the School Board's amicus and architect of much anti-LGBTQ+ litigation,[28] and two anti-LGBTQ+ groups, the National Organization for Marriage and the Center for Constitutional Jurisprudence, repeatedly characterized restrooms as "intimate facilities" in their Supreme Court briefs.[29] Additional amici of the School Board, the National School Boards Association and the School Superintendents Association, similarly characterized restrooms as "intimate settings."[30] Politicians and government officials used the intimacy trope in amicus briefs as well: eighty members of the United States Senate and House of Representatives characterized restrooms as "intimate facilities,"[31]

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24. Brief of Petitioner at 1, *Gloucester Cnty. Sch. Bd.*, 302 F. Supp. 3d 730 (No. 16-273) (emphasis added) (quoting United States v. Virginia, 518 U.S. at 550 n.19).

25. *Id.* at 7 (emphasis added) (quoting Barbara A. Brown, Thomas I. Emerson, Gail Falk & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 900–01 (1971) (citing Griswold v. Connecticut, 381 U.S. 479 (1965))). I note, though, that Brown et al., while relying on the right of privacy, do not label public restrooms "intimate facilities."

26. Mary Anne Case, *Why Not Abolish Laws of Urinary Segregation?*, *in* TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING 211, 213 (Harvey Molotch & Lauren Norén eds., 2010) (quoting Jacques Lacan, *The Agency of the Letter in the Unconscious or Reason Since Freud*, 36/37 YALE FRENCH STUD.: STRUCTURALISM 112, 118 (1966)).

27. Brief of Petitioner, *supra* note 24, at 21–22.

28. *Alliance Defending Freedom*, SPLC, https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom [https://perma.cc/JHC8-HYUF].

29. Brief of Amicus Curiae Alliance Defending Freedom in Support of Petitioner, Gloucester Cnty. Sch. Bd. v. G.G., 137 S. Ct. 1239 (2017) (No. 16-273), 2017 WL 219353, at *4–5, *17; Brief of Amici Curiae National Organization for Marriage and Center for Constitutional Jurisprudence in Support of Petitioner, *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 167307, at *1, *4.

30. Amici Curiae Brief of the National School Boards Association and AASA The School Superintendents Association In Support of Petitioner, *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 128356, at *16.

31. Brief for Members of Congress as Amici Curiae in Support of Petitioner,

as did U.S. Commission on Civil Rights conservatives Gail Heriot and Peter Kirsanow,[32] and an FBI agent and a sheriff writing as "public safety experts."[33] Two nominally neutral amicus briefs nonetheless supporting the exclusion of transgender girls and women from women's restrooms characterized those restrooms as "intimate space"[34] or "intimate settings."[35]

One also sees the common-restrooms-as-intimate trope in other litigation over access by transgender persons. The Highland School District Board of Education repeatedly characterized girls' restrooms as "intimate facilities"[36] or "intimate environments."[37] The eleven states led by Texas that sued the federal government and persuaded a receptive court[38] to enjoin enforcement of the federal government's Guidance for how to treat transgender students characterized restrooms as "intimate areas."[39] North Carolinians for Privacy challenged that now-withdrawn Guidance, characterizing restrooms as both "intimate environments"[40] and "intimate, vulnerable settings,"[41] as did the plaintiff organization Students and Parents for Privacy.[42]

Gloucester Cnty. Sch. Bd., 137 S. Ct. 1239 (No. 16-273), 2017 WL 192763, at *12.

32. Brief of Gail Heriot & Peter Kirsanow, Members, U.S. Commission on Civil Rights, in Their Capacities as Private Citizens as Amici Curiae in Support of Petitioner, *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 219354, at *1, *3, *5–6, *22.

33. Brief of Amici Curiae Public Safety Experts in Support of Petitioner, *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 104592, at *1–2, *4, *11.

34. Brief of Amicus Curiae David Boyle in Support of Neither Party, *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 344432, at *1, *3.

35. Brief of Amicus Curiae Safe Spaces for Women Supporting Neither Party, *Gloucester Cnty. Sch. Bd.*, 137 S. Ct. 1239 (No. 16-273), 2017 WL 74871, at *1–2.

36. Verified Complaint for Declaratory and Injunctive Relief at ¶¶ 3, 228, Bd. of Educ. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850 (S.D. Ohio 2016) (No. 2:16-cv-524); Reply in Support of Plaintiff's Motion for Preliminary Injunction at 18, *Bd. of Educ.*, 208 F. Supp. 3d 850 (No. 2:16-cv-524).

37. Verified Complaint for Declaratory and Injunctive Relief, *supra* note 36, at ¶ 32.

38. *See* Emma Platoff, *By Gutting Obamacare, Judge Reed O'Connor Handed Texas a Win. It Wasn't His First Time.*, TEX. TRIB. (Dec. 19, 2018), https://www.texastribune.org/2018/12/19/reed-oconnor-federal-judge-texas-obamacare-forum-shopping-ken-paxton/ [https://perma.cc/52MK-8DH3] (discussing the Texas Attorney General's Office's affinity for filing suit in O'Connor's district).

39. Plaintiffs' Reply in Support of Application for Preliminary Injunction at 14, Texas v. United States, No. 7:16-cv-00054-O (N.D. Tex. Aug. 3, 2016).

40. Complaint for Declaratory and Injunctive Relief at ¶ 58, N. Carolinians for Privacy v. U.S. Dep't of Just., No. 5:16-cv-00845 (E.D.N.C. May 10, 2016).

41. *Id.* at ¶¶ 121, 202–03, 205.

42. Verified Complaint for Injunctive and Declaratory Relief at ¶ 263, Students and Parents for Privacy v. U.S. Dep't of Just., No. 1:16-cv-4945 (N.D. Ill. May 4, 2016).

And the trope is ubiquitous outside litigation as well. For example, when Texas Lieutenant Governor Dan Patrick and Texas State Senator Lois Kolkhorst unveiled SB6, which would have[43] prevented transgender Texans from using public bathrooms matching their gender identity and which passed the Texas Senate 21-10, Texas Attorney General Ken Paxton praised the bill because "Texans should feel safe and secure when they enter any intimate facility . . . ."[44] Displaying a profound but too common misunderstanding of gender identity, one letter to the editor of the *Wilmington Star News* opined: "The demand that men who decide to 'identify' as a woman be allowed to use *intimate facilities* designated for women only is preposterous and outrageous."[45]

II. Possible Significances of the Common-Restrooms-as-Intimate Trope

The ubiquity of the common-restrooms-as-intimate trope suggests that its propagators believe it supports their efforts to deny transgender persons appropriate restroom access, whether by providing justification or by framing effects. But is their characterization correct? Are restrooms "intimate" spaces? If so, in what sense? And, even if they are, what would follow from that?

Now, a concept like "intimacy" might not be definable in terms of necessary and sufficient characteristics. Rather, since "the meaning of a word comes from the way a word is used in language,"[46] legal privacy scholar Daniel Solove observes that "certain concepts might not share one common characteristic; rather they draw from a common pool of similar characteristics, 'a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail.'"[47] Furthermore, I agree with Ethan Leib that "we probably should not

43. The bill was not enacted, and no explicit "bathroom bill" has been enacted in Texas. Emma Platoff, *Dan Patrick Says He Won the Fight Over the Bathroom Bill, but at Schools Not Much Has Changed*, TEX. TRIB. (Jan. 9, 2019), https://www.texastribune.org/2019/01/09/texas-lt-gov-dan-patrick-dismisses-need-bathroom-bill-2019/ [https://perma.cc/M9QT-YWAM].

44. Bobby Cervantes, *Patrick, Kolkhorst Unveil 'Bathroom Bill' Aimed at Transgender Texans*, HOUS. CHRON. (Jan. 5, 2017), http://www.houstonchronicle.com/news/politics/texas/article/Patrick-Kolkhorst-unveil-bathroom-bill-aimed-10838579.php [https://perma.cc/W7CW-A2E6].

45. *Letters to the Editor*, WILMINGTON STAR NEWS ONLINE (Apr. 27, 2016) (emphasis added), http://www.starnewsonline.com/opinion/20160427/letters-to-the-editor-april-27 [https://perma.cc/7PR5-7Q2N].

46. Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1097 (2002).

47. *Id.* at 1097 (quoting LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 66–67 (G.E.M. Anscombe trans., 1958)).

collapse all forms of intimacy into one supervening category: the intimacy within a good friendship may be different from the intimacy within the home, which may be different from the intimacy at the workplace."[48] But it is not clear that restrooms should be adjudged "intimate" in any conception of the term. Conceptions of intimacy as relational, as a sharing of personal information, as emotional safety, and as in intimate parts either fail to accurately describe common restrooms or to justify denying transgender persons appropriate access, or both.

A. Common Restrooms and Intimacy as Relational

One sense of intimacy has to do with interpersonal relationships. To quote Lauren Berlant, the notion of *intimacy* "involves an aspiration for a narrative about *something shared*, a story about both oneself and others . . . ."[49] Solove has argued that "[i]ntimacy captures the dimension of the private life that consists of close relationships with others . . . ."[50] Philosopher Julie Inness has similarly argued that "intimate matters or acts draw 'their value and meaning from the agent's love, care, or liking.'"[51] To comparable effect, legal philosopher Jeff Reiman has argued "that what constitutes intimacy is not merely the sharing of otherwise withheld information, but the context of caring which makes the sharing of personal information significant."[52] This conception of intimacy accords with perhaps one of the most famous invocations of the intimate in U.S. constitutional law: *Griswold v. Connecticut*'s declaration that marriage is a relationship "intimate to the degree of being sacred."[53]

On an understanding of intimacy as relational, restrooms would not generally be intimate spaces. While we may routinely encounter familiar faces in a men's or women's restroom in our schools or workplaces, such repeat players are less likely to be common in the myriad other venues in which we use restrooms (e.g., restaurants, department stores, shopping malls, stadiums,

48. Ethan J. Leib, *Work Friends: A Commentary on Laura Rosenbury's* Working Relationships, 35 WASH. U. J.L. & POL'Y 149, 155 (2011).

49. Lauren Berlant, *Intimacy: A Special Issue*, 24 CRITICAL INTIMACY 281, 281 (1998).

50. Solove, *supra* note 46, at 1124.

51. *Id.* at 1122 (quoting JULIE C. INNESS, PRIVACY, INTIMACY, AND ISOLATION 78 (1992)).

52. *Id.* (internal quotations omitted) (quoting Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, *in* PHILOSOPHICAL DIMENSIONS OF PRIVACY 300, 305 (Ferdinand David Schoeman ed., 1984)).

53. Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

courthouses, county clerks' offices, etc.). Rather, restrooms are open to the public, and we routinely share them not with people who might be considered intimates, but with strangers. We do not, I believe, ordinarily consider ourselves to be in close relationships with these to whom we may not speak, with whom we generally are not having sex, with these people whose faces we might not even see as we pass in common restrooms. These are not generally our husbands, wives, spouses, girlfriends, boyfriends, or BFFs, nor does the experience of sharing these multi-user facilities ordinarily result in an intimate bond.

B. Common Restrooms and Intimate Information

A second, not wholly distinct sense of intimacy has to do with "intimate information." Legal philosopher Charles Fried treats "'intimate' information" as "information necessary to form and foster relationships involving respect, love, friendship, and trust."[54] Certainly the state of one's genitalia might be considered "intimate" information—it is information about body parts often considered "intimate" with which physical contact is shared restrictively. But, while recognizing that my knowledge of practices in women's restrooms is overwhelmingly derivative and not first-hand, the general point of restrooms is *not* to share such information.

Indeed, urinal shields in men's restrooms and toilet stalls in men's and women's restrooms are designed precisely to preclude or reduce the sharing of such information. Common restrooms do not conduce self-revelation of that kind. Moreover, most transgender people are not rushing to "share" such "intimate" information about themselves; witness, for example, Janet Mock's rejection of Piers Morgan's questioning her about her anatomical details.[55] As transgender people in some of the restroom litigation have argued, it is not sharing restrooms that facilitates sharing of "intimate" information. Rather, it is requirements—such as North Carolina's HB2—that people use restrooms consistent not with their gender identity but with their "biological sex," curiously and positivistically defined as the sex assigned on one's birth certificate,[56] that threaten to out many transgender persons as transgender, implicating their

54. Solove, *supra* note 46, at 1111.

55. CNN, *Janet Mock Joins Piers Morgan*, YOUTUBE (Feb. 5, 2014), https://www.youtube.com/watch?v=btmMVM23Ekk.

56. *See* An Act to Provide for Single-sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations, N.C. Session Law 2016-3, § 1.2 (Mar. 23, 2016) (adding G.S. 115C-521.2(a)(1) to state law).

birth anatomy and breaching the secrecy with which people often treat their genitals.

C. Common Restrooms and Intimacy as Emotional Refuge

Nor does a conception of intimacy as "emotional safety" succeed in rendering common restrooms "intimate" spaces, *pace* such appeals in various disputes over transgender persons' restroom access. Washington State Representative Luanne Van Werven, for example, argued that the now-withdrawn Obama administration Education Department/Department of Justice Guidance invaded the privacy of cisgender[57] persons by "[m]aking children, the elderly and the disabled share restrooms . . . with the opposite sex" when they "deserve to feel safe in intimate settings . . . ."[58] She was appealing to a notion of intimacy as emotional safety. Therapist Thomas Fitzpatrick has argued that "emotional safety is intimacy, the thing we most seek in a relationship."[59] Yet these are not feelings common restrooms routinely arouse. They are too often not comforting, but rather unclean, odoriferous, and harshly or otherwise ill-lit. Moreover, the very fact that defenders of denying appropriate access to transgender persons rely on safety as justification, or rather, rationalization—acknowledging that batteries and other serious crimes do occur in common restrooms—makes common restrooms, like so many other spaces public or private, places of risk, not safety.

To the extent that (some) women may conceive of common restrooms as a "safe space" or "haven," "a place to escape from a

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57. "Cisgender" commonly refers to persons whose gender identity matches the sex assigned to them at birth, the complement of transgender persons. *See, e.g.*, Sophie Saint Thomas, *What Does It Mean to Be Cisgender?*, COSMOPOLITAN (Nov. 24, 2018), https://www.cosmo.ph/relationships/cisgender-meaning-definition-src-intl%20-a898-20181124?ref=feed_1 [https://perma.cc/6JSJ-TB8V] ("[C]isgender . . . means you agree . . . with the gender you were assigned at birth." (internal quotations omitted) (quoting Jimanekia Eborn, sex educator and trauma specialist)); *see also* A. Finn Enke, *The Education of Little Cis: Cisgender and the Discipline of Opposing Bodies*, *in* TRANSFEMINIST PERSPECTIVES IN AND BEYOND TRANSGENDER AND GENDER STUDIES 60, 61 (Anne Enke ed., Temple University Press 2012) (recounting use of "cisgender to describe the condition of staying with birth-assigned sex, or congruence between birth-assigned sex and gender identity").

58. *Rep. Luanne Van Werven Says New Transgender Restroom, Locker Room Rule Needs to be Repealed*, WASH. STATE HOUSE REPUBLICANS (Jan. 7, 2016), https://luannevanwerven.houserepublicans.wa.gov/2016/01/07/rep-luanne-van-werven-says-new-transgender-restroom-locker-room-rule-needs-to-be-repealed/ [https://perma.cc/7EV6-Q2HW].

59. Thomas C. FitzPatrick, *Making Marriage Work*, 87 MICH. BAR J. 42, 43 (2008).

browbeating boss or importunate suitor,"[60] feminist legal scholar Mary Anne Case's responses seem apt. First, Professor Case has observed that "at least for some, the colored restroom could serve much the same function in the Jim Crow South,"[61] and that notions of contamination underlie both forms of restroom segregation, racial and gendered.[62] Further, Case notes that "[a] woman can escape her boss in the office women's room only if the bosses are men. The flip side of this safe space for female subordinates is a safe space for male bosses, free from the intrusion of women seeking professional advancement."[63] For women with woman bosses, however, restrooms are scant haven.[64] Similarly, though Case does not make this point in exact terms, respite from "suitors" is only available in common restrooms from suitors of a different sex; a women's restroom *simpliciter* shields no woman from a female suitor, just as a men's room without more shields no man from a male suitor.[65]

So, to the extent there may be some emotional safety aspect to common restrooms, it trades on occupational sex stratification and on the privileging of different-sex dating and the interests of heterosexually-identified persons over same-sex dating or the interests of gay, lesbian, and bisexual persons. Neither such oversimplification of the gendered contours of workforces nor such naked heterosexism should be understood as a persuasive justification for excluding transgender persons from restrooms consistent with their gender identity, let alone the "exceedingly persuasive justification" demanded of sex-discriminatory laws by equal protection doctrine.[66] And, of course more fundamentally, opponents have not explained how affording transgender persons gender-appropriate access would impair any sanctuary function of restrooms.

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60. Case, *supra* note 26, at 221.

61. *Id.*

62. *Id.* at 211–12.

63. *Id.* at 223.

64. *Id.*

65. "Suitor" may be too romantic a term to describe some persons who may be looking primarily to have sex with the social "refugee" at issue.

66. *See* United States v. Virginia, 518 U.S. 515, 524 (1996) (reiterating that government must provide an exceedingly persuasive justification to sustain action based on sex classifications challenged as denying equal protection (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982))).

D. Common Restrooms and "Intimate Parts"

Now, there is also a sense of "intimate" that refers to certain anatomical parts of persons, most particularly genitalia but also female breasts, sometimes anuses, and perhaps buttocks.[67] For example, in her article *Plotting Privacy as Intimacy*, Heidi Reamer Anderson treats "bodily intimacy" as an important "objective indicator[]" of intimacy,[68] though she too talks about "intimate body parts"[69] without defining them or explaining in what sense these parts are intimate. Professor Anderson does assert, without defense, that "sexual organs" (by which I'm guessing maybe she means genitalia, though there is a question whether she also would include bodily parts such as Fallopian tubes) are "the most intimate of body parts."[70] Are common restrooms "intimate spaces" because most people who use them for excretion do so using what might be considered "intimate" body parts?

I think not. Again, the point of common bathroom architecture and U.S. custom is that we excrete in private. Setting aside trough urinals, which are not provided in women's rooms (if built as such) and which we would not expect those transgender men with genitalia traditionally regarded as female to use, restrooms facilitate shielding one's genitalia (and one's buttocks and anus) from view. If the mere thought that a transgender person with genitalia or "intimate parts" different from one's own might be using a neighboring stall upsets a person, it is hard to see why the law ought to throw its weight behind such literally disturbed thoughts. Transgender and gender-nonconforming people have reported the hostility they've faced when using restrooms deemed "proper" for them based on sex assigned at birth.[71] Regardless of these harms,

67. None of the federal Fourth Amendment cases I've found that use the terms "intimate parts" or "intimate body parts" actually define the phrases, nor do the few state statutes I've examined. There's even a question in case law whether internal organs should be considered intimate body parts subject to special Fourth Amendment protection.

68. Heidi Reamer Anderson, *Plotting Privacy as Intimacy*, 46 IND. L. REV. 311, 315 (2013).

69. *Id.* at 319.

70. *Id.* at 326.

71. Zack Ford, *Study: Transgender People Experience Discrimination Trying to Use Bathrooms*, THINK PROGRESS (June 26, 2013), https://archive.thinkprogress.org/study-transgender-people-experience-discrimination-trying-to-use-bathrooms-34232263e6b3/ [https://perma.cc/K6WK-ZJVA] (citing a study demonstrating that 70% of transgender individuals in the Washington, D.C., area experienced some form of discrimination or harassment while using restrooms); Nico Lang, *What It's Like to Use a Public Bathroom While Trans*, ROLLING STONE (Mar. 31, 2016), https://www.rollingstone.com/culture/culture-news/what-its-like-to-use-a-public-bathroom-while-trans-65793/ [https://perma.cc/2VAZ-AD7T].

to make transgender people use common restrooms inconsistent with their gender identity does not protect the privacy of anyone's "intimate parts."

Water closets are where we closet our excretory activity. One can see how spouses or romantic partners voiding in the presence and in sight of their partner in a bathroom in their home, for example, might be viewed as engaging in intimate activity. And because of the conventionally closeted nature of the activity, one person assisting another with their literal toileting might similarly be adjudged "intimate." But co-presence, so often with strangers, in different stalls in a common restroom does not by itself seem particularly intimate. True, our society has conventions that many such facilities are sex-segregated, but it does not appear that such gendered privacy is protecting "intimacy." "Private" and "intimate" are not the same thing. There are lots of things people may do in private that are not especially intimate, so our traditions of excretory privacy do not mean that tending to one's excretory (by which I mean to include menstrual) needs in stalls in common restrooms is intimate activity.

III. Common Restrooms and "Making Sex Matter"

Given the failures of numerous ways to try to understand the notion that common restrooms are "intimate spaces," why then are so many opponents of transgender persons' using gender-identity-consistent restrooms invoking "intimacy," characterizing restrooms as "intimate spaces," "intimate settings," or "intimate facilities"? I think it is in part because they know at some level that transgender persons are not, as such, threats to their excretory privacy or any other version of intimacy that might plausibly occur in restrooms. It is not the boundaries of "the private" or even really "the intimate" in any sense that are at stake in questions of who may access which common restrooms under what conditions. It is the boundaries of gender being contested, and continued efforts to instill gendered intimacy within sex-based classes—to make sex matter in a time when sex's social or public significance may seem greatly diminished compared to the past.

Opponents do not accept transgender women as women, or transgender men as men. I know this is obvious on one level just from the terms of these laws, which may, like North Carolina's, provide for the first time a prescriptive definition of the two most commonly perceived sexes[72] and preclude local jurisdictions from

72. *See, e.g.*, Anne Fausto-Sterling, *The Five Sexes: Why Male and Female are*

embracing a different conception of sex. But I think that the "intimate spaces" trope underscores part of why opponents think sex-segregation is valuable: not just to protect gendered privacy, but gendered intimacy, or rather, the intimacy of gender. It is an intimacy, even if phantasmatic, that one imagines one shares by virtue of a common sex.

Unsurprisingly, laws predicated upon an imagined gendered intimacy are often not ideologically pure. Like most values, the perceived value of gendered intimacy yields when it conflicts sufficiently with the interests of those within the ambit of lawmakers' concern and respect—an attitude which too often is denied to transgender persons. Consider, for example, Texas Senate Bill 6, approved by its Senate though ultimately not signed into law.[73] It first would have barred local jurisdictions from regulating use of restrooms and certain other facilities,[74] and required public school districts, certain charter schools, local jurisdictions, and state agencies broadly defined[75] to restrict their common restrooms and other facilities by "biological sex,"[76] defined in oddly positivistic terms as "the physical condition of being male or female, which is stated on a person's birth certificate."[77] But a later section of the bill made an exception for parents and authorized caregivers, school employees, and authorized school volunteers "to accompany a student needing assistance in using" common restrooms at schools,[78] and allowed a child under age 8 to enter gendered government restrooms with an accompanying person who is caring for the child.[79] Other anti-trans bathroom laws, like the one enacted

Not Enough, THE SCIENCES, Mar.–Apr. 1993, at 20, 20–25. *But see* Leonard Sax, *How Common Is Intersex? A Response to Anne Fausto-Sterling*, 39 J. SEX RSCH. 174, 174 (2002) (criticizing Fausto-Sterling's definition of intersex and characterization of sex as a continuum rather than a dichotomy).

73. S.B. 6, 85th Leg., Reg. Sess. (Tex. 2017). *See supra* note 43 and accompanying text.

74. *Id.* at § 3 (adding section 250.008(b) to Chapter 250 of the Texas Local Government Code).

75. *See id.* at § 5 (adding section 769.001(8) to Title 9 of the Texas Health and Safety Code).

76. *Id.* (adding sections 769.051 and 769.101 to Title 9 of the Texas Health and Safety Code).

77. *Id.* (adding section 769.001(1) to Title 9 of the Texas Health and Safety Code).

78. *Id.* (adding section 769.053(4) to Title 9 of the Texas Health and Safety Code).

79. *Id.* (adding section 769.104(2) to Title 9 of the Texas Health and Safety Code).

for a time in Oxford, Alabama,[80] have contained similar exemptions.[81]

Perhaps "immature" genitalia impair intimacy, real or imagined, less than mature genitalia, and to the extent misplaced fears of sexual molestation have been sincere, that may describe some opponents' feelings. But, strikingly, the Texas school exception as written lets a "biological male" father with mature genitalia accompany his "biological female" daughter into girls' or women's restrooms if she needs assistance using them.[82] In general it seems likely that the supporters of these legislative exemptions have not thought through their beliefs about intimacy and restrooms, that they are accustomed to parents taking children into common restrooms regardless of the children's gender, and that, at least as a matter of revealed preferences, they value the convenience of heterosexually-identified parents—whose situations they readily grasp—more than the safety and wellbeing of transgender persons, about whom so many are so ill-informed.

I recognize this next observation likely will be contentious, but these caregiver exemptions from trans-exclusive sex-segregated restroom laws in some ways echo Louisiana's railroad racial segregation law disgracefully upheld by the U.S. Supreme Court in *Plessy v. Ferguson*.[83] That statute's first section required passenger railways to provide "equal but separate accommodations for the white, and colored races," and its first and second section required officers of the passenger trains to enforce those exclusions.[84] Yet its third section provided an exemption for "nurses attending children of the other race."[85] As Justice Harlan recognized in his deeply flawed but important dissent, the statute's overall purpose, "was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches."[86] The act thereby limited the reach of

80. *See* Ashley Fantz, *Anti-trans Bathroom Ordinance Repealed in Oxford, Alabama*, CNN (May 5, 2016), https://www.cnn.com/2016/05/05/us/oxford-transgender-bathroom-repeal [https://perma.cc/DXA4-EZ5K] (reporting 3-2 repeal of ordinance unanimously adopted the previous week but not yet signed by mayor).

81. For an *ad hominem* and infelicitously entitled blog post noting this exception, see Evan Hurst, *Inbred Alabama Hicks Can't Even Spell Why They Hate Transgenders So Much*, WONKETTE (Apr. 27, 2016), https://www.wonkette.com/inbred-alabama-hicks-cant-even-spell-why-they-hate-transgenders-so-much [https://perma.cc/8WW2-FPK6].

82. S.B. 6. § 769.053(4)(b).

83. Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

84. *Id.* at 540–41.

85. *Id.* at 541.

86. *Id.* at 557.

its discriminatory racial exclusion command in the service of the convenience of children's caregivers. These modern exemptions from restroom exclusion laws make similar child-focused exemptions from the gendered "intimacy" invoked, pretextually or unreflectively, by some defenders of these measures.

Conclusion

The "intimacy" defenses of laws seeking to make gender identity an insufficient basis for assigning transgender persons to particular gendered common restrooms fail. The Supreme Court does not currently have before it a case concerning whether federal statutory bans on sex discrimination or the Equal Protection Clause require that transgender people be able to use gender-appropriate common restrooms. The Court expressly did not reach the question whether the ban on sex discrimination in Title VII of the Civil Rights Act of 1964 (Title VII) requires such access for workers when it decided *Bostock v. Clayton County* in June 2020.[87] But it did not need to do so in that case, and the now late Justice Ruth Bader Ginsburg, who joined the *Bostock* majority in holding that firing "someone simply for being . . . transgender" discriminates on the basis of sex in violation of Title VII,[88] has been replaced by conservative jurist Amy Coney Barrett. Although the Supreme Court ultimately closed its doors to the Gloucester County School Board as it sought to vindicate its exclusion of Gavin Grimm, who is no longer in high school, from common boy's restrooms, we could see the Court take up the common restroom issue sooner rather than later. If it does, the Justices should not be led astray by the "intimate spaces" characterization of restrooms.

Opponents of gender-appropriate use of common restrooms by transgender persons often appear taken aback when confronted with the reality of the people who would have to use men's rooms or women's rooms under their benighted proposals: conventionally, binary-gendered trans men who look like other masculine men in women's rooms or conventionally, binary-gendered trans women who look like other feminine women in men's rooms.[89] Yet in Texas

87. Bostock v. Clayton County, 140 S. Ct. 1731, 1753 (2020).

88. *Id.* at 1737.

89. *See, e.g.*, Justin Wm. Moyer, *Why Houston's Gay Rights Ordinance Failed: Fear of Men in Women's Bathrooms*, WASH. POST (Nov. 4, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/11/03/why-houstons-gay-rights-ordinance-failed-bathrooms/ [https://perma.cc/7E34-2ZPK] (discussing political arguments behind Houston's HERO repeal); Marie-Amélie George, *Framing Trans Rights*, 114 NW. U. L. REV. 555, 559 (2019) (describing and critiquing LGBTQ+ rights groups' "assimilationist" use of "all-but-fully transitioned, conventionally

and other places opponents persist; they support and vote for these laws. Even when someone like Texas Attorney General Ken Paxton recognizes that trans people have been using restrooms consistent with their gender identity for many years, and will likely do so going forward—perhaps because to do otherwise might threaten their safety or even lives—he nonetheless supports these laws.[90] Under such circumstances, it's hard to deny that the, or at least a, point of these laws is precisely to mark transgender persons as *not* intimates, as not even part of the respectable community, by rendering them lawbreakers. It was hardly a defense of sodomy laws to point out that they would often be disregarded; they rendered otherwise law-abiding persons outlaws for no good reason. That is what trans-exclusionary restroom laws do, and that is an important reason informed people of good will, transgender or cisgender, binary gender or nonbinary, ought to do what we can to oppose such measures.

attractive men and women" in campaigns against measures targeting sexual orientation-and-gender identity antidiscrimination rules).

90. *See* Cervantes, *supra* note 44.

The Instrumental Case for Corporate Diversity

Naomi Cahn,† June Carbone,†† and Nancy Levit†††

A growing body of evidence indicates that diverse businesses outperform those with less diversity. These findings have fueled calls for mandating diversity on corporate boards and for undertaking greater efforts to ensure diversity in the corporate ranks. The question of where diversity fits in a corporate reform agenda, however, has yet to be clearly defined. Doing so requires resolving the following issues.

First, why does greater diversity appear to be correlated with better performance? Critics correctly observe that the "diverse companies do better" studies do not prove that simply adding diversity causes the improvement. Instead, they posit that the improvement is likely to be endogenous, that is, the factors that encourage and sustain diversity, such as greater transparency,[1] also improve financial performance, and the variables may interact in multifaceted ways.[2]

Acknowledging that correlation is not causation, however, does not make diversity irrelevant as a metric for better management practices. If the same factors that correlate with greater diversity also correlate with improved performance, then greater diversity can be a benchmark for better corporate

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1. *See* The Nasdaq Stock Mkt. LLC, Self-Regulatory Organization Filing of Proposed Rule Changes (Form 19b-4) 9 (Dec. 1, 2020), https://listingcenter.nasdaq.com/assets/RuleBook/Nasdaq/filings/SR-NASDAQ-2020-081.pdf [https://perma.cc/6ML8-98PG]; *cf.* Stephen Miller, *Transparency Shrinks Gender Pay Gap*, SHRM (Feb. 11, 2020), https://www.shrm.org/ResourcesAndTools/hr-topics/compensation/Pages/transparency-shrinks-gender-pay-gap.aspx [https://perma.cc/U79W-7MVK] (finding greater transparency assists in diminishing the gender pay gap).

2. On the meaning of business performance, see *infra* text accompanying notes 5, 93–98.

management. It can make diversity metrics a tool (though not necessarily an exclusive tool) in measuring the reform of dysfunctional corporate cultures. Diversity might then become part of an iterative process; maintaining diversity will require management reforms such as greater transparency that will in turn fuel transformations in management cultures that further both greater diversity and better overall performance.[3] We term this use of diversity as visible and easily measured marker of management reform "the instrumental case for diversity.

The second question is also a puzzle: if greater diversity correlates with better business performance, then why has it taken so long for companies to embrace it, and what accounts for the persistence of largely white male boards and upper management? The answer could be path dependence: a largely white and male management team may not recognize the importance of greater diversity or how to accomplish it. The existing literature on privilege, unconscious bias, and microaggressions emphasizes these factors, and diversity training has been designed to address them, albeit with limited success.[4] The persistent lack of diversity, however, may be more explicable as a design feature of flawed management practices. A 2020 Nasdaq report, for example, links greater diversity to the lesser incidence of opaque governance procedures, earnings manipulation, weak internal controls, and securities fraud.[5] Other studies find that lack of diversity is often

3. *See, e.g.*, Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L.J. 145, 180–82 (2019) (arguing that when women serve on corporate boards, their tenure is shorter than that of their male counterparts, they are overextended, and they lack clout). Reversing these patterns can serve as a metric for genuine corporate reform.

4. Indeed, Mike Selmi questions just how "unconscious" unconscious bias is. Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 ARIZ. ST. L.J. 193, 197–98 (2018) ("Rather than defining implicit bias as unconscious and uncontrollable . . . it should be treated as one possible step, usually the initial step, in a more elaborate deliberative process."); *see also* Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 523–47 (2018) (exploring the ways in which courts overlook explicit bias and accept justifications for it); Frank Dobbin & Alexandra Kalev, *Why Doesn't Diversity Training Work?: The Challenge for Industry and Academia*, ANTHROPOLOGY NOW, Sept. 2018, at 48, 49 [https://perma.cc/U5ZH-S7NZ] ("There is ample evidence that training alone does not change attitudes or behavior, or not by much and not for long. In their review of 985 studies of antibias interventions, Paluck and Green found little evidence that training reduces bias. In their review of 31 organizational studies using pretest/posttest assessments or a control group, Kulik and Roberson identified 27 that documented improved knowledge of, or attitudes toward, diversity, but most found small, short-term improvements on one or two of the items measured. In their review of 39 similar studies, Bezrukova, Joshi and Jehn identified only five that examined long-term effects on bias, two showing positive effects, two negative, and one no effect.").

5. The Nasdaq Stock Mkt. LLC, *supra* note 1, at 9.

associated with indifferent, harassing, or bullying bosses.[6] What these negative workplace attributes have in common is that they can also be used to enhance top executive power and compensation at the expense of other corporate objectives.[7] The instrumental case for diversity maintains that where such attributes, which involve conflicts of interest between top management and longer-term company interests, exist, an emphasis on greater diversity is also likely to make it easier to root out such practices because the lack of diversity is a sign of those practices.

The third question involves how our instrumental case relates to the moral and more traditional business cases for diversity. The simple answer is that the moral case treats diversity as an end in itself, a necessary part of a just society.[8] The traditional business case for diversity maintains that, even if diversity is not morally or legally compelled, it is a positive good that businesses should embrace because it will promote their own financial interests.[9] The instrumental case we are making in this Article exists alongside the moral and business cases. It argues that the promotion of diversity can in some cases become a tool for advancing corporate interests separate from diversity itself. The business case for diversity suggests, for example, that greater diversity may be beneficial in appealing to a more diverse customer base or in recruiting employees who prefer to work in diverse environments.[10] The instrumental case, in contrast, suggests that diversity may also be useful in countering illegal or unethical practices that require a carefully selected crony network to stay hidden.[11] Such an

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6. *Cf.* Jennifer L. Berdahl, Marianne Cooper, Peter Glick, Robert W. Livingston & Joan C. Williams, *Work as a Masculinity Contest*, 74 J. SOC. ISSUES 422, 422 (2018) (identifying workplaces as sites of "masculinity contests"); Kenneth Matos, Olivia (Mandy) O'Neill & Xue Lei, *Toxic Leadership and the Masculinity Contest Culture: How "Win or Die" Cultures Breed Abusive Leadership*, 74 J. SOC. ISSUES 500, 502–04 (2018); Shannon L. Rawski & Angela Workman-Stark, *Masculinity Contest Cultures in Policing Organizations and Recommendations for Training Interventions*, 74 J. SOC. ISSUES 607, 609–12 (2018).

7. *See, e.g.*, June Carbone & William K. Black, *The Problem with Predators*, 43 SEATTLE U. L. REV. 441, 468–71 (2020) [hereinafter Carbone & Black, *The Problem with Predators*] (describing how CEOs acquire greater power vis-à-vis boards by producing short-term earnings gains).

8. *See* David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1599–1600 (2004).

9. *See, e.g.*, Douglas E. Brayley & Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, 34 J. LEGAL PRO. 1, 2 (2009).

10. *Id.* at 25.

11. *See, e.g.*, Kristin N. Johnson, *Banking on Diversity: Does Gender Diversity Improve Financial Firms' Risk Oversight?*, 70 SMU L. REV. 327, 376 (2017) (describing the value of diversity in valuing groupthink); *cf.* Carbone & Black, *The*

argument does not replace the moral or business cases; it brackets them. Instead, it suggests a more fine-tuned analysis should regard the presence or absence of diversity as a signal tied to specific management practices.

To give an example of the difference, consider the traditional obstacles to diversity: women's greater family responsibilities or an emphasis on pathways into the executive suite that have historically not been open to underrepresented minorities or women. The moral case for diversity maintains that firms have an obligation to devise ways to overcome these obstacles. The business case suggests firms should reconsider whether it is in their interests to continue to maintain such narrow pathways to advancement, trading off traditional notions of merit for more representative inclusion of different groups. The instrumental case, instead, asks whether the presumed advantages of these factors are real. In the case of the emphasis on long hours at work, for example, a growing literature suggests the emphasis on long hours may result less from employer needs and more from an emphasis on zero sum (or often negative sum) competition that becomes an end in itself.[12] The three rationales may come together to question the emphasis on long or unpredictable work schedules as a barrier to the greater inclusion of women; the instrumental case, however, focuses greater attention on when and how such an emphasis is counterproductive.

This Article will provide a framework for answering these questions by examining changes in business practices over the last forty years. During that time period, large corporations have shifted from the era of the "corporation man," which featured large, secure, predictable, and largely homogenous business environments, to the era of the "tournament," that is, business environments that place greater emphasis on internal competition and short-term measures of performance.[13] This Article will suggest that tournament-like

Problem with Predators, *supra* note 7, at 460 (describing the way white collar criminals create seeming legitimacy for their predatory business practices); June Carbone, Naomi Cahn & Nancy Levit, *Women, Rule-Breaking, and the Triple Bind*, 87 GEO. WASH. L. REV. 1105, 1109 (2019) [hereinafter Carbone, Cahn & Levit, *The Triple Bind*] ("[C]ompanies use intensely competitive bonus systems to produce insular 'young boys' clubs' that promote a culture of rule-breaking; that is, the management systems deliberately and instrumentally select for alpha males who will flout the laws that stand in the way of these otherwise profitable business models.").

12. *See* Naomi Cahn, *Where Are All the Women Leaders?*, FORBES (Mar. 3, 2020), https://www.forbes.com/sites/naomicahn/2020/03/03/where-are-all-the-women-leaders/?sh=6290f2462ee7 [https://perma.cc/SV74-3T3P].

13. *See* Naomi Cahn, June Carbone & Nancy Levit, *Gender and the Tournament*: *Reinventing Antidiscrimination Law in an Age of Inequality*, 96 TEX. L. REV. 425, 447–48 (2018) [hereinafter Cahn, Carbone & Levit, *Gender and the Tournament*].

workplaces make it harder to maintain diversity—and often produce worse business outcomes. This analysis will lay the foundation for a deeper inquiry into the relationship between diversity and corporate reform.

The focus of this Article is on diversity among the corporate officers and directors who manage corporations. Outside of management, corporations often have no diversity "problems;" indeed, the problem is instead that lower-wage jobs are more likely to be filled by women and people of color.[14]

I. Diversity and Corporate Tournaments

Over the last several decades, the prevailing corporate ethos has become one of shareholder primacy; that is, a focus on short-term increases in share price to the exclusion of other considerations.[15] A growing critique maintains that too great an emphasis on short-term metrics is ultimately bad for business.[16] In addition, a different critique to which we have contributed argues that the practices associated with shareholder primacy, such as high stakes bonus pay, have also tended to drive women out.[17] The common denominator in these two critiques is the emergence of winner take all rewards: those calling the shots reorient institutions so that the CEO, influential shareholders, and a select group associated with the boss take a disproportionate share of the company's resources. This winner-takes-all approach is often at the expense of other employees, customers, and the company's long-term health. In this Section, we will describe the shift towards the winner-takes-all approach and explain why they may undercut long-term business performance. Then, we will consider why they may also be associated with less diversity. Considering the circumstances in which these factors may simultaneously undermine both the company prospects and the inclusion of women may offer new insights into the instrumental case for diversity.

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14. *See* MARTHA ROSS & NICOLE BATEMAN, METRO. POL'Y PROGRAM AT BROOKINGS, MEET THE LOW-WAGE WORKFORCE 9 (2019), https://www.brookings.edu/research/meet-the-low-wage-workforce/ [https://perma.cc/YQN5-3KHR]; *cf.* Noreen Ahmed, *Exposing Wage Theft Without Fear Is Possible and Necessary*, NAT'L EMP. L. PROJECT (Sept. 16, 2019), https://www.nelp.org/blog/exposing-wage-theft-without-fear-possible-necessary/ [https://perma.cc/S54G-VTDS] (explaining that lower-wage jobs are correlated with instances of wage theft, which have a disproportionate impact on women and people of color).

15. *See* Cahn, Carbone & Levit, *Gender and the Tournament*, *supra* note 13, 447–49.

16. *Id.* at 449.

17. *See id.*; Carbone, Cahn & Levit, *The Triple Bind*, *supra* note 11, at 1123–28.

A. Shareholder Primacy, Short-Termism, and Corporate Boards

An overarching change in corporate management since the 1980s is the reorientation of publicly traded companies to emphasize short-term gains in share price.[18] This shift can be thought of as involving three components: first, an insistence that officers and directors consider shareholder interests to the exclusion of other stakeholders such as customers and employees, and second, an alignment of executive and shareholder interests through a restructuring of top executive pay to place greater emphasis on stock options. As a consequence of the first two changes, the third component is greater pressure on CEOs to produce short-term results.[19] Each of these factors, both individually and collectively, has been the subject of extensive management critiques for reasons unrelated to diversity.

First, while shareholder interests can be diverse, shareholder primacy has tended to identify shareholder interests with short-term fluctuations in share price. This has been true for a number of reasons. The most immediate reason is that corporate boards measure CEO success in terms of their ability to generate earnings, which in turn pushes up share price.[20] Boards exercise oversight in the name of protecting shareholder interests.[21] As a practical matter, therefore, a CEO who has a strong initial run "creates

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18. *See* June Carbone & Nancy Levit, *The Death of the Firm*, 101 MINN. L. REV. 963, 966, 1003 (2017) [hereinafter Carbone & Levit, *The Death of the Firm*].

19. *See* Carbone & Black, *The Problem with Predators*, *supra* note 7, at 468–70; *id.* at 463–64 ("[T]o better align management and shareholder interests, top management compensation packages began to emphasize incentive pay tied overwhelmingly to stock options. Between 1993 and 2014, the percentage of CEO compensation attributable to incentive pay increased from 35% to 85%, and CEOs also faced greater risk of dismissal if share prices did not increase. The overall disparities in the pay of top executives at the same company increased, and between 1981 and 2013, the pay ratio between CEOs and average wage workers grew from 42:1 to 331:1.").

20. *See, e.g.*, Donald C. Langevoort, *Resetting the Corporate Thermostat: Lessons from the Recent Financial Scandals About Self-Deception, Deceiving Others and the Design of Internal Controls*, 93 GEO. L.J. 285, 295 (2004) ("The preference of the firm's *current* shareholders is for increasing profitability reflected in either dividends or stock price, which sometimes is aided by concealing the truth rather than revealing it."); *id.* at 313.

21. *See* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 563–65 (2003); Yaron Nili, *Horizontal Directors*, 114 NW. U. L. REV. 1179, 1188 (2020) ("[W]hile most of the operational decision-making can be, and is, delegated to management, the board is still required to be an active participant in some of the more important managerial business decisions, such as mergers, stock issuance, and changes to company governance documents.").

greater autonomy by both enhancing his bargaining position over time and increasing the cognitive commitment of the board to him."[22] A decline in share price, on the other hand, can and has led to the CEO's termination.[23] Activist hedge funds have been enforcing this system by waiting in the wings, ready to buy up stock, acquire board membership, and push through changes that boost the value of their typically short-term investments in the company.[24]

Second, to more closely match management and shareholder short-term interests, a higher proportion of CEO pay is now tied to stock options that increase in value with reported earnings.[25] Better alignment increases the incentives for CEOs to focus their efforts on boosting short-term earnings and share prices.[26] CEOs, in turn, have implemented bonus pay systems for top executives that align executive incentives with CEO objectives.[27] Critics allege that high stakes bonus pay has been associated with earnings management, accounting irregularities, increased use of stock buybacks, and outright fraud.[28] Indeed, a major advantage of such

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22. Langevoort, *supra* note 20, at 313.

23. *See* Andrew C.W. Lund & Gregg D. Polsky, *The Diminishing Returns of Incentive Pay in Executive Compensation Contracts*, 87 NOTRE DAME L. REV. 677, 695 (2011) (indicating that CEO terminations can be linked to share price performance).

24. *See* Brian R. Cheffins & John Armour, *The Past, Present, and Future of Shareholder Activism by Hedge Funds*, 37 J. CORP. L. 51, 59–61, 75, 80–82 (2011) (noting that publicly traded companies experience pressure to increase short-term earnings because of the role of hedge funds and other activist investors). As Virginia Harper Ho notes, however, there are two other camps of shareholder activists: "public pension funds, labor unions, religious orders, and individual 'gadflies,' whose activism has often aligned with particular values and interests . . . [and] mainstream institutional investors like Vanguard and Fidelity [that] have generally voted with management . . . ." Virginia Harper Ho, *From Public Policy to Materiality: Non-Financial Reporting, Shareholder Engagement, and Rule 14a-8's Ordinary Business Exception*, 76 WASH. & LEE L. REV. 1231, 1236 (2019).

25. *See* Carbone & Black, *The Problem with Predators*, *supra* note 7, at 444, 463–66.

26. *See* Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265, 320–21 (2012) (describing how executive compensation increases emphasis on short-term increases in share price).

27. *See* Lynne L. Dallas, *A Preliminary Inquiry into the Responsibility of Corporations and Their Officers and Directors for Corporate Climate: The Psychology of Enron's Demise*, 35 RUTGERS L.J. 1, 37–39 (2003) [hereinafter Dallas, *Enron*] (describing how Enron management used its bonus system to reorient company behavior in counterproductive and unethical ways); *see, e.g.*, Lynn A. Stout, *Killing Conscience: The Unintended Behavioral Consequences of "Pay for Performance"*, 39 J. CORP. L. 525, 534 (2014) (describing bonus systems and concluding that they are associated with "earning manipulations, accounting frauds, and excessive risk-taking").

28. *See* Shane A. Johnson, Harley E. Ryan, Jr. & Yisong S. Tian, *Managerial*

bonus systems is that they allow CEOs to emphasize their desired metrics while looking the other way at how subordinates achieve their results.[29] Critics call the system "plausible deniability," as executives can use bonuses to signal the desired behavior without complicity in the resulting illegal, unethical, or shortsighted tactics that executives use to produce results.[30] The association of modern executive compensation with abusive practices has become sufficiently widespread now that some of the original supporters of the move to bonus pay have withdrawn their support.[31]

Third, the single-minded focus on short-term shareholder primacy has led to concern about the effect on other stakeholders. For example, large investors like BlackRock have begun to pay greater attention to environmental issues, reasoning that climate change may affect the world economy in ways that share price fluctuations in individual companies may not reflect.[32]

Taken together, the combination of a short-term focus, the use of incentive pay to disguise CEO objectives and company health, and the failure to recognize more generalized challenges to global markets have persuaded many critics that corporate reform is in

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Incentives and Corporate Fraud: The Sources of Incentives Matter, 13 REV. FIN. 115, 115–16 (2009) ("[M]anagers with larger linear incentives may be more likely to commit fraud in an attempt to avoid severe price declines."); Sharon Hannes & Avraham Tabbach, *Executive Stock Options: The Effects of Manipulation on Risk Taking*, 38 J. CORP. L. 533, 545 (2013) (discussing the link between "executive incentive compensation, excessive risk taking," and the pressure to manipulate reported outcomes to influence share price); Lucian Arye Bebchuk, Jesse M. Fried & David I. Walker, *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751, 751 (2002) (arguing that executive ability to set compensation facilitates the ability to benefit from short-term and "rent extraction" strategies).

29. *See* Carbone & Black, *The Problem with Predators*, *supra* note 7, at 461–62.

30. *See* Charles W. Calomiris, *The Subprime Turmoil: What's Old, What's New, and What's Next*, J. STRUCTURED FIN., Spring 2009, at 6, 16 [https://perma.cc/JCR4-7LZR] (describing how plausible deniability allowed those overseeing mortgage-backed securities to escape accountability during the financial crisis); *see also* Cahn, Carbone & Levit, *Gender and the Tournament*, *supra* note 13, at 450–51 (describing how bonus systems can incentivize behaviors that cut against companies' ethics standards).

31. Michael C. Jensen & Kevin J. Murphy, *Remuneration: Where We've Been, How We Got to Here, What Are the Problems, and How to Fix Them* 44–45 (Harv. Bus. Sch., Working Paper No. 44, 2004), http://ssrn.com/abstract=561305 [https://perma.cc/2NEE-NAVR] (discussing how equity-based compensation led to unwise acquisitions, increased risk, "aggressive accounting," and even corporate fraud).

32. *See* Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1272–74 (2020) (describing how BlackRock started to emphasize environmental considerations, including the impact of climate disruption and potential regulatory reactions, in its portfolio as early as 2015).

order. These critics observe that CEOs can often produce an immediate boost in share prices by cutting labor costs through layoffs or reductions in training, slashing investment in research and equipment, engaging in stock buybacks, or concealing negative information.[33] All of these actions have been known to increase short-term share prices; all have the potential to threaten companies' medium to long-term interests.[34] The Corporate Roundtable and other influential actors have started to back away from that short-term shareholder focus, arguing that it is economically destructive.[35]

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33. Langevoort, *supra* note 20, at 295 ("The preference of the firm's *current* shareholders is for increasing profitability reflected in either dividends or stock price, which sometimes is aided by concealing the truth rather than revealing it."); *see* William Lazonick, *The Financialization of the U.S. Corporation: What Has Been Lost, and How It Can Be Regained*, 36 SEATTLE U. L. REV. 857, 888–89 (2013) (calling stock buybacks "weapons of value destruction" and arguing executives who make these corporate allocation decisions use stock buybacks to boost their companies' stock prices and manage quarterly earnings "because, through their stock-based pay, they are personally incentivized to make these allocation decisions"); *see also* Dallas, *supra* note 26, at 280 (describing CEO willingness to decrease research, development, and marketing expenses even if it would hurt the firm's medium to long term prospects).

34. *See* Carbone, Cahn & Levit, *The Triple Bind*, *supra* note 11, at 1115; *see also* Mark Desjardine & Rodolphe Durand, *Activist Hedge Funds: Good for Some, Bad for Others?*, HEC (Mar. 30, 2021), https://www.hec.edu/en/knowledge/articles/activist-hedge-funds-good-some-bad-others#:~:text=While%20we%20typically%20think%20of,with%20an%20aim%20to%20make [https://perma.cc/H2LJ-RQC5] (showing that while such strategies boost share price in the short run, they depress it over time).

35. *See Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/XDL2-7T5S]; Press Release, Bus. Roundtable, Statement on the Purpose of a Corporation (Feb. 2021), https://system.businessroundtable.org/app/uploads/sites/5/2021/02/BRT-Statement-on-the-Purpose-of-a-Corporation-Feburary-2021-compressed.pdf [https://perma.cc/QR48-MA6V]. Martin Lipton (of Wachtell Lipton Rosen & Katz) argued at the World Economic Forum in 2016 that "[a] short-term mindset in managing and investing in businesses has become pervasive and is profoundly destructive to the long-term health of the economy." MARTIN LIPTON, WORLD ECON. F., THE NEW PARADIGM A ROADMAP FOR AN IMPLICIT CORPORATE GOVERNANCE PARTNERSHIP BETWEEN CORPORATIONS AND INVESTORS TO ACHIEVE SUSTAINABLE LONG-TERM INVESTMENT AND GROWTH 5 (2016), https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.25960.16.pdf [https://perma.cc/32BX-VZ9J]. *See also* Nadelle Grossman, *Turning a Short-Term Fling into a Long-Term Commitment: Board Duties in a New Era*, 43 U. MICH. J.L. REFORM 905, 906 (2010) ("[B]oard short-termism also seems to be due to some investors with short investment horizons who use activism to influence boards to make decisions that yield short-term returns despite the longer-term impairing effects those decisions might have on the corporate enterprise.").

In addition, some investors now pay increased attention to environmental, social, and governance (ESG) factors.[36] In 2020, Moody's Investors Service announced that it "expect[ed] ESG considerations to be of growing importance in [its] assessment of issuer credit quality."[37] Moody's analysts wrote, "[w]hile our ratings have always reflected our views of ESG risks, the materiality of key environmental and social issues continues to increase."[38] ESG investing often combines two different motives: some funds market ESG investments in an effort to appeal to socially conscious investors.[39] Other investors emphasizing ESG factors maintain that share prices do not fully take into account medium-to-long-term risks arising from greater societal inequality, potential regulatory responses to inequitable business practices, or the inevitable transition to new energy sources.[40]

The rise in ESG investing also produces greater emphasis on diversity.[41] Particularly in the wake of #MeToo and Black Lives Matter protests, the failure to attend to diversity issues can be a

36. Caleb Mutua, *ESG Is Increasingly Important in Credit Ratings*, *Moody's Says*, BLOOMBERG (Apr. 14, 2020), https://www.bloomberg.com/news/articles/2020-04-14/esg-is-increasingly-important-in-credit-ratings-moody-s-says [https://perma.cc/T4FW-JJEX].

37. *Id.*

38. *Id.*

39. Robert G. Eccles & Svetlana Klimenko, *The Investor Revolution*, HARV. BUS. REV., May–June 2019, at 107, 111, https://hbr.org/2019/05/the-investor-revolution [https://perma.cc/759V-CNY6] (describing the increased demand for ESG investment options as linked to people's focus on nonfinancial outcomes that are "mak[ing] the world a better place").

40. *See* Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 398 (2020) (distinguishing between the different motivations for ESG investing and arguing that a "risk-return ESG analysis of a fossil fuel company might conclude that the company's litigation and regulatory risks are underestimated by its share price"); *see also* Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401, 1401–02 (2020) (concluding that "[s]ocial risk has proven highly destructive for corporate value even when the company's key failure is not violating laws, as the recent crises at Facebook and Uber demonstrate").

41. *See, e.g.*, Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, 130 YALE L.J. 869, 877, 885 (2021); *see also* Afra Afsharipour, *Bias, Identity and M&A*, WIS. L. REV. 471, 488 (2020) ("Shareholder pressure is also forcing boards to confront diversity head on."); Lisa M. Fairfax, *All on Board? Board Diversity Trends Reflect Signs of Promise and Concern*, 87 GEO. WASH. L. REV. 1031, 1032 (2018) (explaining the increased support from investors "engaged in specific direct action aimed at pressuring corporations to diversify their boards"); Barzuza, *supra* note 32, at 1265 ("[I]ndex funds are typically reticent followers when it comes to corporate governance reforms, but when the subject matter of activism turns from conventional governance reforms to demands for increased gender diversity on boards, index funds have been notably outspoken, both in communications directed primarily at corporate managers and in marketing efforts directed at the general public.").

risk factor for major companies on the same order as energy transition and accounting irregularities.[42] But, as we will show below, the failure to attend to diversity also provides a farther-reaching barometer of corporate governance issues.

B. Toxic Management Drives Women Out

In the shareholder primacy era, management styles have changed in ways that make diversity hard to maintain. CEOs have become more likely to be hired from outside a company, and CEO tenure has declined.[43] Given the pressure to accomplish quick results, CEOs may adopt top-down management systems, the use of reductionist metrics to measure success, or high stakes bonus systems that incentivize management priorities.[44] The CEO's focus, especially a CEO coming from outside the company or one with a mandate to produce immediate results, may be on how to gain control of what can be large, sprawling, and bureaucratic institutions. The goal may be to outflank the established players in the organization to find those willing to put the CEO's priorities first, especially where the CEO seeks to slash expenses, cut employment, or shake up the corporate mission. High-stakes bonus systems can be an attractive way to do so.

Jack Welch, the GE CEO identified with the modern era of corporate management, was a master in imposing his will on a large bureaucracy.[45] He developed an innovative management training program that regularly moved executives from division to division and an executive compensation system that introduced high-stake bonuses.[46] The company regularly ranked employees against each

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42. *See, e.g.*, Kate Harrison, *How Smart Employers Should Respond to #MeToo in 2019*, FORBES (Apr. 3, 2019), https://www.forbes.com/sites/kateharrison/2019/04/03/how-smart-employers-should-respond-to-metoo-in-2019/?sh=7c3c6e3a7f0d [https://perma.cc/F5Y2-GKWE] (describing the potential for "bad press" because of a lackluster response to #MeToo concerns); *see also* Martinez & Fletcher, *supra* note 41, at 885 ("[E]mployee and investor pressure for corporate action to address racial inequity remains high, motivating corporations to stay the course in their backing of the Black Lives Matter movement.").

43. *See* Curt Nickisch, *Outsider CEOs Are on the Rise at the World's Biggest Companies*, HARV. BUS. REV. (Apr. 19, 2016), https://hbr.org/2016/04/outsider-ceos-are-on-the-rise-at-the-worlds-biggest-companies [https://perma.cc/2EA3-7W9Z]; Carbone & Levit, *The Death of the Firm*, *supra* note 18, at 1002 n.196.

44. Carbone, Cahn & Levit, *The Triple Bind*, *supra* note 11, at 1109, 1115–16.

45. Jia Lynn Yang, *Jack Welch, Corporate America's 'Manager of the Century,' Dies at 84*, WASH. POST (Mar. 2, 2020), https://www.washingtonpost.com/local/obituaries/jack-welch-corporate-americas-manager-of-the-century-dies-at-84/2020/03/02/3cd83f0e-5c8c-11ea-9055-5fa12981bbbf_story.html [https://perma.cc/3QAK-TYXN].

46. *See* Jack Welch, *Jack Welch: 'Rank-and-Yank'? That's Not How It's Done*,

other, identifying about twenty percent who were groomed for promotion and notifying the bottom ten percent that they were at risk of dismissal.[47] He repeated the process each year, rewarding some with stock options that could be incredibly lucrative as the company's share price increased, and encouraging the ever-changing group receiving low marks to consider other employment.[48] For a time, his system proved incredibly influential with forty-nine percent of companies saying they used a form of stack ranking in a 2009 study done by the Institute for Corporate Productivity.[49] The specific system has since fallen out of favor;[50] still, variable pay remains the norm, with bonus pay in the form of stock options or year-end cash grants often dwarfing base pay for higher level employees in tech, finance, and other fields.[51] Such awards, as Jack Welch emphasized, allow corporate CEOs to incentivize their priorities.

Introducing such high-stakes bonus systems changes firm dynamics. Lynne Dallas observes that such systems, particularly where employees feel they are in competition with each other, produces a greater emphasis on self-interest, higher levels of distrust that undermine teamwork, greater homogeneity in the selection of corporate management, less managerial accountability,

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WALL ST. J. (Nov. 14, 2013), https://www.wsj.com/articles/8216rankandyank8217-that8217s-not-how-it8217s-done-1384473281 [https://perma.cc/DD8Y-QT67].

47. *See* NAOMI CAHN, JUNE CARBONE, & NANCY LEVIT, SHAFTED: WHY WOMEN LOSE IN A WINNER-TAKE-ALL WORLD ch. 2 (forthcoming 2022 Simon & Schuster); Welch, *supra* note 46; Carbone, Cahn & Levit, *The Triple Bind*, *supra* note 11, at 1115.

48. *See* Carbone, Cahn & Levit, *The Triple Bind*, *supra* note 11, at 1115–16; Yang, *supra* note 45.

49. *See* Cahn, Carbone & Levit, *Gender and the Tournament*, *supra* note 13, at 451 n.136; *see also* Chris Hardesty, *Should I Rank My Employees?*, WALL ST. J. (Apr. 7, 2009), http://guides.wsj.com/management/recruiting-hiring-and-firing/should-i-rank-my-employees/ [https://perma.cc/7Q99-AULE] (adapting ALAN MURRAY, THE WALL STREET JOURNAL ESSENTIAL GUIDE TO MANAGEMENT: LASTING LESSONS FROM THE BEST LEADERSHIP MINDS OF OUR TIME (2010) and describing "a survey of more than 200 human resources professionals" from large companies where "more than half . . . used forced ranking").

50. *See, e.g.*, Carbone, Cahn & Levit, *The Triple Bind*, *supra* note 11, at 1116–17 ("[C]ompanies have moved away from rigidly ordered approaches, particularly those mandating termination of a fixed percentage of the workforce every year, but competitive ranking systems that compare employees to each other remain common.").

51. *See* LAWRENCE MISHEL & JORI KANDRA, ECON. POL'Y INST., CEO COMPENSATION HAS GROWN 1,322% SINCE 1978: CEOS WERE PAID 351 TIMES AS MUCH AS A TYPICAL WORKER IN 2020 1, 5–10 (2021), https://www.epi.org/publication/ceo-pay-in-2020/ [https://perma.cc/XE3D-HG9X]; *see also* Carbone, Cahn & Levit, *The Triple Bind*, *supra* note 11, at 1115 (explaining the reliance on performance pay and stock options).

and more politicized decision-making.[52] In short, "supposedly meritocratic bonus systems have been found to replicate many of the attributes of old boys' clubs that protect insiders at the expense of outsiders."[53]

Even without the extremes of an Enron or a GE, competitive workplaces can lead to "masculinity contest cultures"[54] that pit employees against each other in high stakes, negative sum competitions that often lower morale and increase turnover.[55] Such cultures emphasize the internal competition between employees, which may take the form of artificial measures of devotion to the job such as long hours. over more job-related performance measures tied to productivity.[56] These cultures often select for bosses who thrive in such competitive environments and bully or harass their subordinates, particularly women and less traditionally masculine men.[57] Where such cultures take hold, turnover, sexual harassment, and demoralization increase—and diversity may be harder to maintain.[58]

Critics of performance pay emphasize that these systems also change the characteristics of the employees who rise to the top. Such systems become more likely to select for narcissism and overconfidence bias and less likely to select for humility, honesty, or empathy.[59] Studies find that greater power diminishes functional

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52. Dallas, *Enron*, *supra* note 27, at 37.

53. Cahn, Carbone & Levit, *Gender and the Tournament*, *supra* note 13, at 452.

54. *See* Berdahl et al., *supra* note 6. *See also* Carbone & Black, *The Problem with Predators*, *supra* note 7, at 479 (noting the gendering of competitive workplace cultures and emphasizing "the ways that the terms of competition are often artificial and increase male dominance in the workplace . . . where the celebration of extreme masculine traits becomes an end in itself, defining the workplace ideal in stereotypically male terms.").

55. *See* Berdahl et al., *supra* note 6, at 429 (observing that masculinity contests are "most prevalent—and vicious—in male-dominated occupations where extreme resources (fame, power, wealth) or precarious resources . . . are at stake . . .").

56. *Id.* at 430 (observing that "men compete at work for dominance by showing no weakness, demonstrating a single-minded focus on professional success, displaying physical endurance and strength, and engaging in cut-throat competition").

57. *Id.* at 428 ("The need to repeatedly prove masculinity can lead men to behave aggressively, embrace risky behaviors, sexually harass women (or other men), and express homophobic attitudes, when men feel that their masculinity is threatened.").

58. *See* Peter Glick, Jennifer L. Berdahl & Natalya M. Alonso, *Development and Validation of the Masculinity Contest Culture Scale*, 74 J. SOC. ISSUES 449, 449, 462 (2018).

59. Tomas Chamorro-Premuzic, *Why Do So Many Incompetent Men Become Leaders?*, HARV. BUS. REV. (Aug. 22, 2013), https://hbr.org/2013/08/why-do-so-many-incompetent-men [https://perma.cc/9QBH-ZW27] (observing that "when it comes to leadership, the only advantage that men have over women . . . is the fact that manifestations of hubris—often masked as charisma or charm—are commonly

empathy—higher social status and situational power are "associated with a reduced tendency to comprehend how other individuals see the world, think about the world, and feel about the world."[60] It turns out that traits like narcissism describe a distinct subset of the general population that is much more likely to be male[61]—and more likely to discriminate against outsiders.[62]

Accordingly, corporate environments that place greater emphasis on zero (or worse, negative) sum competition systems introduce a reinforcing set of effects. As law professor Donald Langevoort explained, "traits such as over-optimism, an inflated sense of self-efficacy and a deep capacity for ethical self-deception . . . are survival traits, not weaknesses, in a very Darwinian business world."[63] Such business worlds tend to select not just for men, but for a certain type of male leader—a type of leader who is also more likely than other men to drive women out.[64] And while bonus pay systems vary, they tend to be associated with greater gender pay disparities, further affecting the ability to retain female employees.[65]

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mistaken for leadership potential, and that these occur much more frequently in men than in women").

60. Adam D. Galinsky, Joe C. Magee, M. Ena Inesi & Deborah H. Gruenfeld, *Power and Perspectives Not Taken*, 17 PSYCHOL. SCI. 1068, 1072 (2006); *see also* DACHER KELTNER, THE POWER PARADOX 101 (2016) (identifying the four "[a]buses of power," including power that "leads to empathy deficits and diminished moral sentiments . . . self-serving impulsivity . . . incivility and disrespect . . . [and] . . . narratives of exceptionalism").

61. *See* Emily Grijalva, Daniel A. Newman, Louis Tay, M. Brent Donnellan, P.D. Harms, Richard W. Robins & Taiyi Yan, *Gender Differences in Narcissism: A Meta-Analytic Review*, 141 PSYCHOL. BULL. 261, 280 (2015) (observing that men display a type of narcissism more affiliated with exploiting others and a sense of entitlement than women).

62. Berdahl et al., *supra* note 6, at 435 (concluding that those who *thrive* in such environments tend to identify with the workers who have the same traits they see in themselves, and to exploit others' weaknesses, leading to the "exclusion and harassment toward historically disadvantaged groups and men with resistant masculinities").

63. Langevoort, *supra* note 20, at 288.

64. *See* Stout, *supra* note 27, at 529 ("Once relatively selfish actors come to dominate a workplace, less-selfish employees leave, and the employees who remain start acting in a more purely self-interested and opportunistic fashion."); *see also* Berdahl et al., *supra* note 6, at 432 (explaining how workplace "male masculinity contests" lead to winners and losers, typically at the expense of women and men of marginalized backgrounds, as men dominate underrepresented individuals).

65. MITA GOLDAR, CHRISTOPHER RYAN & AHU YILDIRMAZ, ADP RSCH. INST., RETHINKING GENDER PAY INEQUITY IN A MORE TRANSPARENT WORLD 2 (2020); Stefania Albanesi, *How Performance Pay Schemes Make the Gender Gap Worse*, WORLD ECON. F. (Dec. 23, 2015), https://www.weforum.org/agenda/2015/12/how-performance-pay-schemes-make-the-gender-gap-worse/ [https://perma.cc/896E-PFBT].

The net effect of these environments, which produce cutthroat corporate cultures, an emphasis on long hours as an end in themselves, and the promotion of misogynist managers, may literally be boys' clubs. The McKinsey/Lean In survey of more than 300 firms and 40,000 employees found that the percentage of women decreases at every step along the management pipeline, with women beginning at 47% at the entry level and ending at 21% of the C-Suite positions.[66]

The analysis above suggests that the presence of women—and often other underrepresented groups—in upper management is likely to be associated with better firm financial performance because of the dynamic described above. The most pernicious management techniques, such as earnings management, stock buybacks,[67] and other practices focused on the short term at the expense of a company's long-term health, depend on the CEO's ability to enlist the support of a small group of insiders to subvert standard business practices.[68] The CEO's most common way of identifying compatriots is through high-stakes incentive pay that allows the CEO to signal the desired performance and reward it

66. RACHEL THOMAS, MARIANNE COOPER, GINA CARDAZONE, KATE URBAN, ALI BOHRER, MADISON LONG, LAREINA YEE, ALEXIS KRIVKOVICH, JESS HUANG, SARA PRINCE, ANKUR KUMAR & SARAH COURY, MCKINSEY & CO., WOMEN IN THE WORKPLACE 2020, at 8 (2020), https://wiw-report.s3.amazonaws.com/Women_in_the_Workplace_2020.pdf [https://perma.cc/HTM6-UQFJ]; *see also* Tamara Lytle, *Closing the Gender Pay Gap*, HR MAG. (June 4, 2019), https://www.shrm.org/hr-today/news/hr-magazine/summer2019/Pages/closing-the-gender-pay-gap.aspx [https://perma.cc/3BBY-5YSM] (explaining how reducing gender disparities in pay helps retain more women).

67. William Lazonick, Mustafa Erdem Sakinç & Matt Hopkins, *Why Stock Buybacks Are Dangerous for the Economy*, HARV. BUS. REV. (Jan. 7, 2020), https://hbr.org/2020/01/why-stock-buybacks-are-dangerous-for-the-economy [https://perma.cc/XCT4-WVLG] ("With the majority of their compensation coming from stock options and stock awards, senior corporate executives have used open-market repurchases to manipulate their companies' stock prices to their own benefit . . . .").

68. Carbone & Black, *The Problem with Predators*, *supra* note 7, at 456–57 (describing the role of the CEO in creating "criminogenic" environments). This is particularly true where the conduct involves plausible deniability with respect to illegal or unethical conduct. *Id.* at 455, 462 (explaining how corporate cultures may "facilitate predation and rule breaking, if not necessarily outright criminality . . . . Those engaged in predation often create similar mechanisms within firms that provide incentives to engage in predatory practices while allowing senior officers and directors to maintain plausible deniability for the consequences"); *see also id.* at 468 n.167 (describing Enron's bonus system that encouraged "unethical" behavior). Even where the conduct is perfectly legal and visible, as with stock buybacks or layoffs, it may involve neutralizing internal opposition. *Id.* at 468 (explaining how these cultures create competitive environments and incentivize hiring decisions benefiting those who participate in predation).

without being directly involved in questionable behavior.[69] Even if the company is not engaged in illegal practices, the internal competition pits employees against each other, undermining cooperation and trust[70] and often leading to the promotion of what business psychology professor Tomas Chamorro-Premuzic suggests is too many "incompetent men."[71]

II. The Business Case for Diversity

The business case for diversity combines the commitment to diversity as a moral obligation with the argument that diverse institutions produce better results.[72] Promoting diversity, in accordance with this argument, produces win-win outcomes; business entities can "do the right thing" and promote diversity at no cost to the bottom line. This argument has become increasingly influential; it has led to efforts to mandate greater diversity on corporate boards. California and Washington have joined a number of European and Asian countries requiring a minimum percentage of women on the governing boards of publicly traded companies.[73] Some jurisdictions, including California, have gone further and added quotas for other underrepresented groups.[74]

The pure "business case," however, faces two significant limitations: first, it is difficult to prove that it is diversity per se that causes the improvements, and second, even if diversity in fact

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69. *Id.* at 469–70 (describing practices that give subordinates substantial authority without oversight).

70. Dallas, *Enron*, *supra* note 27, at 37.

71. Chamorro-Premuzic, *supra* note 59, at 172–73.

72. *See* Vijay Eswaran, *The Business Case for Diversity in the Workplace is Now Overwhelming*, WORLD ECON. F. (Apr. 29, 2019), https://www.weforum.org/agenda/2019/04/business-case-for-diversity-in-the-workplace/ [https://perma.cc/K3TU-FPXK].

73. *See, e.g.*, Anne Steele, *California Rolls Out Diversity Quotas for Corporate Boards*, WALL ST. J. (Oct. 2, 2020), https://www.wsj.com/articles/california-rolls-out-diversity-quotas-for-corporate-boards-11601507471 [https://perma.cc/Z3T9-4K6D]; *Will More States Set Board Diversity Mandates?*, LEXISNEXIS (Jan. 13, 2022), https://www.lexisnexis.com/community/insights/legal/capitol-journal/b/state-net/posts/will-more-states-set-board-diversity-mandates [https://perma.cc/UJ4P-89NU] (Washington, like California, has a diversity mandate, while Illinois, Maryland, and New York, require that boards disclose demographic information, and other states have considered mandatory disclosure); *see also* Jennifer Rankin, *EU Revives Plans for Mandatory Quotas of Women on Company Boards*, GUARDIAN (Mar. 5, 2020), https://www.theguardian.com/world/2020/mar/05/eu-revives-plans-for-mandatory-quotas-of-women-on-company-boards [https://perma.cc/2TFT-ELP5] (describing the European Union's attempts to impose quotas of women on executive boards).

74. In this Article, we focus specifically on women; however, portions of our argument apply to other underrepresented groups, and some of it does not.

accounts for the outcomes, an explanation is missing for why the appropriate focus should be on diversity on corporate boards, rather than in upper management. This Section examines the existing empirical basis for the business claims in the light of the analysis in Section I. It describes the empirical work linking diversity to better business outcomes, acknowledges the methodological limitations, and concludes, that in explaining outcomes, the links between the factors that promote pernicious business practices and those that obstruct efforts to promote greater diversity may be so deeply intertwined as to be impossible to separate. We conclude that the factors we describe in Section I therefore form the core of the instrumental case for diversity.

A. Corporate Boards

There is increasing scholarly inquiry into whether diverse firms outperform less diverse firms.[75] The easy (and uncomplicated) answer appears to be that diversity pays; more diverse firms, measured by the percentage of women on corporate boards, outperform those with fewer women when performance is measured by factors such as returns to equity or other measures of financial performance.[76] However, the studies are not uniform in finding better performance, particularly once they attempt to control for factors other than the mere presence of women. In short, the studies do not (and we will argue cannot) demonstrate that it is the presence of women per se that that causes better results.[77] Instead, the arrows linking diversity to better performance may run in multiple directions. It may be, for example, that better managed companies are more likely to achieve greater diversity, rather than diversity leading to better company performance.[78] It is also

75. *See, e.g.*, Eswaran, *supra* note 72; *see also* Robin J. Ely & David A. Thomas, *Getting Serious About Diversity: Enough Already with the Business Case*, HARV. BUS. REV., Nov.–Dec. 2020, https://hbr.org/2020/11/getting-serious-about-diversity-enough-already-with-the-business-case [https://perma.cc/VV5N-ARY2] (noting "rallying cries" for more diversity from CEOs).

76. Alice H. Eagly, *When Passionate Advocates Meet Research on Diversity, Does the Honest Broker Stand a Chance?*, 72 J. SOC. ISSUES 199, 201 (2016).

77. *See generally id.* at 200–03 (explaining that while there is significant research demonstrating the business value of increased representation of women on corporate boards, it is challenging to determine if their presence alone is driving these positive changes).

78. Juan M. Garcia Lara, Beatriz Garcia Osma, Araceli Mora & Mariano Scapin, *The Monitoring Role of Female Directors over Accounting Quality*, 45 J. CORP. FIN. 651, 651 (2017) ("Using a large sample of UK firms we find that a larger percentage of women among independent directors is significantly associated with lower earnings management practices. However, we show that this relation disappears if we focus on firms that do not discriminate against women in the access to

possible that the presence of women is associated with better management practices for reasons that empirical studies find difficult to tease out. It is entirely possible that better-run firms hire more women rather than that the women themselves cause the better outcomes.[79] The research that gained initial attention focused on corporate boards. Perhaps the most influential of the early studies is one performed by Catalyst.[80] This widely-cited study examined Fortune 500 companies from 2001 to 2004, determined the percentage of women on firm boards, and found that companies in the highest quartile of female representation outperformed those in the lowest quartile.[81] The study, however, simply reported the differences between the two groups without any effort to include control variables that might explain the results, and acknowledged that the correlation could not establish that it was the presence of women per se that caused the better performance.[82] Indeed, the strength of the relationships did not hold up in Catalyst's follow-up study looking at the same relationships during the 2004–2008 time period.[83] A later Credit Suisse Research Institute Study looking at

directorships.").

79. There are any number of other confounding correlations. For example, most studies find that large companies have more diversity on boards. Large companies may become large because they are better run, or they may find it easier to increase diversity by simply adding more members to their boards. Either way, the presence of more women may not be the proximate cause of financial performance. *See, e.g.*, Eagly, *supra* note 76, at 202 (noting that large firms have more women on their boards and that the failure to control for firm size skews the results of some studies); Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377, 387 (2014) (explaining why better or larger firms may be more attractive or have more resources to recruit women, and thus, may succeed regardless of their presence). It may be that there is some other type of diversity contributing to this performance. *See* VIVIAN HUNT, SARA PRINCE, SUNDIATU DIXON-FYLE, LAREINA YEE, MCKINSEY & CO., DELIVERING THROUGH DIVERSITY 12 (2018), https://www.mckinsey.com/~/media/mckinsey/business%20functions/organization/our%20insights/delivering%20through%20diversity/delivering-through-diversity_full-report.ashx#:~:text=We%20found%20that%20companies%20with,likely%20to%20experience%20higher%20profits [https://perma.cc/W8S7-D44S] (explaining how ethnic/cultural diversity is linked to financial performance).

80. CATALYST, THE BOTTOM LINE: CORPORATE PERFORMANCE AND WOMEN'S REPRESENTATION ON BOARDS (2007), https://www.catalyst.org/wp-content/uploads/2019/01/The_Bottom_Line_Corporate_Performance_and_Womens_Representation_on_Boards.pdf [https://perma.cc/GKU8-T8MX] (finding a positive relationship between gender diversity on corporate boards and firm performance).

81. *Id.*

82. Terry Morehead Dworkin & Cindy A. Schipani, *The Role of Gender Diversity in Corporate Governance*, 21 U. PA. J. BUS. L. 105, 107 (2018) ("Some industry studies, like those conducted by Catalyst, include an explicit footnote that 'correlation does not prove or imply causation.'").

83. *See* Rhode & Packel, *supra* note 79, at 384 (critiquing the 2007 Catalyst

more than 2,000 firms across the globe also found that firms with at least one woman on the board outperformed firms with all-male boards, reporting that among firms with a market capitalization of over $10 billion, the firms with female board representation had a 26% better performance in share price.[84] This study, too, lacked controls that might identify causal factors, and some scholars suspect that larger firms may find it easier to recruit and retain female board members in ways that skew the results.[85] A number of studies have shown similar correlations.[86]

While other studies have found a positive relationship using more sophisticated statistical techniques, some have not.[87] Overall, "an accurate description of this extensive empirical literature is that correlational findings relating percentages of women on corporate boards to firms' financial performance are mixed, and on the average lean very slightly in the positive direction but only for companies' accounting outcomes," though not necessarily other

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study's limitations).

84. MARY CURTIS, CHRISTINE SCHMID & MARION STUBER, CREDIT SUISSE RSCH. INST., GENDER DIVERSITY AND CORPORATE PERFORMANCE 12–16 (2012), https://publications.credit-suisse.com/tasks/render/file/index.cfm?fileid=88EC32A9-83E8-EB92-9D5A40FF69E66808 [http://perma.cc/TC6U-FAH2].

85. Rhode & Packel, *supra* note 79, at 385 (noting lack of controls); *see also* Eagly, *supra* note 76, at 202 (speculating on the impact of firm size on studies of this type).

86. For example, Morgan Stanley Capital International found that U.S. companies with at least three women on the board in 2011 experienced median gains in return on equity of 10% and earnings per share of 37% over a five year period, whereas companies that had no female directors in 2011 showed median changes of -1% in return on equity and -8% in earnings per share over the same five-year period. *See* MEGGIN THWING EASTMAN, DAMION RALLIS & GAIA MAZZUCCHELLI, MSCI, THE TIPPING POINT: WOMEN ON BOARDS AND FINANCIAL PERFORMANCE 3 (2016), https://www.msci.com/www/research-paper/the-tipping-point-women-on/0538947986 [https://perma.cc/2UX4-CVED] (analyzing U.S. companies that were constituents of the MSCI World Index for the entire period from July 1, 2011, to June 30, 2016). In addition, a 2018 Calvert report found that, over an eleven-year period, "companies with [a] higher percentage (%) of Women in Leadership positions (WLP) and [a] higher % of Women in Board positions (WBD) outperform companies with the lowest % of WLP and WBD as measured by ratios" for returns on sales, returns on assets, and returns on equity, noting that 33%–70% was the critical range for seeing "significant increase[s] in financial performance." CALVERT IMPACT CAPITAL, JUST GOOD INVESTING 11–12 (2018), https://assets.ctfassets.net/4oaw9man1yeu/2X1gLdNUrUPFhRAJbAXp1q/205876bdd2d7e076fce05d5771183dfe/calvert-impact-capital-gender-report.pdf [https://perma.cc/TYM9-B8X7]. The report also noted that it was not just the number of women in leadership or in board positions that mattered to returns, but the ratio of women to men. *Id.* at 12.

87. *See* Rhode & Packel, *supra* note 79, at 384–90 (summarizing studies finding positive, negative, and nonexistent relationships and ultimately concluding that "[d]espite increasing references to acceptance of the business case for diversity, empirical evidence on the issue is mixed").

factors such as returns to equity.[88] In the international context, the relationship between female board representation and market performance is stronger in countries with greater gender equality.[89] The varying results reflect differences in methodology, sample selections, and time periods.[90]

Relatively few of the studies attempt to tease out causation, and doing so is difficult. For one thing, "women" are hardly a single uniform category; the women on one board may not be identical to the women on other boards. As a general matter, women appointed "to corporate boards may not in fact differ very much in their values, experiences, and knowledge from the men."[91] A 2019 study by Crunchbase, Him for Her, and Kellogg Professor Lauren Rivera of privately-held companies showed that women on boards are more likely to be independent members rather than investors or members tied to management.[92] This suggests they are less likely to be either CEO acolytes or hedge fund activists pushing a short term agenda.[93] Accordingly, any rigorous study would have to look not just at the overall number of women, but what type of women produced the best results—any women, the women most similar to the men, or women who bring distinctly different perspectives?[94]

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88. Eagly, *supra* note 76, at 203 (defining accounting outcomes as profit and loss). *Compare* Paul Gompers & Silpa Kovvali, *The Other Diversity Dividend*, HARV. BUS. REV. (July–Aug. 2018), https://hbr.org/2018/07/the-other-diversity-dividend [https://perma.cc/JAG9-YV7F] (explaining the financial pitfalls of having homogenous boards and urging more diverse representation, including gender diversity), *with* Katherine Klein, *Does Gender Diversity on Boards Really Boost Company Performance?*, KNOWLEDGE@WHARTON (May 18, 2017), https://knowledge.wharton.upenn.edu/article/will-gender-diversity-boards-really-boost-company-performance/# [https://perma.cc/KAL7-5UUN] (summarizing studies that "suggest that the relationship between board gender diversity and company performance is either non-existent (effectively zero) or very weakly positive").

89. *See* Corinne Post & Kris Byron, *Women on Boards and Firm Financial Performance: A Meta-Analysis*, 58 ACAD. MGMT. J. 1546, 1560 (2015) (explaining that the relationship may be conditioned by context as it is "more positive" in countries with "greater gender parity").

90. Rhode & Packel, *supra* note 79, at 390 (concluding that "the empirical research on the effect of board diversity on firm performance is inconclusive" and "[t]he mixed results reflect the different time periods, countries, economic environments, types of companies, and measures of diversity and financial performance").

91. Klein, *supra* note 88.

92. Ann Shepherd & Gené Teare, *2020 Study of Gender Diversity on Private Company Boards*, CRUNCHBASE (Mar. 1, 2021), https://news.crunchbase.com/news/2020-diversity-study-on-private-company-boards/ [https://perma.cc/XTK9-5UA3].

93. *Id.*; *see also* Cheffins & Armour, *supra* note 24, at 80–82.

94. *See, e.g.*, Gompers & Kovvali, *supra* note 88 (describing how homogenous venture capital firms tend to be, with Harvard Business School graduates dominating the firms).

For another, the most important causal relationships, including those producing statistically significant results, almost always involve multiple factors with different effects. This may be intrinsic in this type of research because of the difficulty in ruling out endogeneity—the possibility, for example, that an unidentified factor influenced both better financial performance and greater diversity.[95] Nonetheless, the studies that attempt to identify potential causal factors are intriguing to the extent they identify characteristics that may be associated with alternative—and potentially better—*management practices.*

The single factor that comes up most frequently in studies of the relationship between board diversity and firm performance is increased monitoring. Adams and Ferreira found in 2009 that the presence of women on corporate boards was associated with better attendance at board meetings and closer company monitoring.[96] The greater monitoring increased the likelihood that CEOs would resign after poor company performance.[97] The same study, however,

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95. Eagly, *supra* note 76, at 202. Investopedia defines an "endogenous variable" as "a variable in a statistical model that's changed or determined by its relationship with other variables within the model." Will Kenton, *Endogenous Variable*, INVESTOPEDIA (Oct. 30, 2020), https://www.investopedia.com/terms/e/endogenous-variable.asp [https://perma.cc/6DJ3-L5E3].

96. *Id.* at 202 (referring to a study by Renée Adams and Daniel Ferreira and observing that women board members had higher attendance rates at board meetings, were more likely to serve on monitoring committees, and these factors correlated with more monitoring and better performance at low performing companies); *see also* Renée B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, 94 J. FIN. ECON. 291, 291–92 (2009) (describing the impact on board performance and finding that while more gender-diverse boards allocated more resources to monitoring, the "average effect of gender diversity on firm performance is negative. This negative effect is driven by companies with fewer takeover defenses").

97. Eagly, *supra* note 76, at 202 (observing that women board members had higher attendance rates at board meetings, were more likely to serve on monitoring committees, and these factors correlated with more monitoring and better performance at low performing companies). One reason for the correlation between more gender-diverse boards and increased monitoring is some indication that women may be more conscientious about attendance and demonstrate greater responsibility for oversight efforts. Adams and Ferreira note:

> Women appear to behave differently than men with respect to our measure of attendance behavior. Specifically, women are less likely to have attendance problems than men. Furthermore, the greater the fraction of women on the board is, the better is the attendance behavior of male directors. Holding other director characteristics constant, female directors are also more likely to sit on monitoring-related committees than male directors. In particular, women are more likely to be assigned to audit, nominating, and corporate governance committees, although they are less likely to sit on compensation committees than men are.

Adams & Ferreira, *supra* note 96, at 292. Other commentators have theorized that women have been trained toward detail orientation and are more likely to "engage

also found that increased monitoring was associated with weaker performance in stronger firms, producing a negative aggregate effect.[98] The authors could not explain the overall negative result, indicating their inability to rule out investor bias in the stronger firms—or other unidentified factors—in producing the negative results.[99] The significance of the study, for our purposes, is that it found that greater monitoring is correlated both with the greater presence of women and with firm performance (both positively and negatively).[100] What it did not explain was why the factor is correlated with the greater presence of women, or why it produced stronger performance in weak firms and weaker performance in strong firms. What it suggested, however, is that when more women are present, more monitoring takes place, and more monitoring correlates with changed business performance.[101]

Subsequent studies have contributed to the explanations of why factors associated with greater diversity such as monitoring might explain the relationship between diversity and stronger firm performance. In its report advocating gender diversity, Nasdaq reviewed elements associated with gender diversity that may explain the impact of diversity on firm performance.[102] A 2015 study, for example, found "strong evidence" that a greater number of women on boards was correlated with less securities fraud.[103] A later study suggested gender diversity is associated with stronger internal controls over financial reporting.[104] Some studies found correlations between the percentage of women on audit committees

in constructive dissent." Sandeep Gopalan & Katherine Watson, *An Agency Theoretical Approach to Corporate Board Diversity*, 52 SAN DIEGO L. REV. 1, 17 (2015).

98. Adams & Ferreira, *supra* note 96, at 293 (noting that additional monitoring is counterproductive in well-governed firms).

99. Eagly, *supra* note 76, at 202 (observing that institutional investors are often attentive to board governance).

100. *Id.* ("The increased monitoring associated with the increase in the presence of women on boards appeared to have positive effects on firms with weak governance but negative effects otherwise.").

101. *Id.*

102. The Nasdaq Stock Mkt. LLC, *supra* note 1, at 9–10.

103. *See* Douglas J. Cumming, T.Y. Leung & Oliver Rui, *Gender Diversity and Securities Fraud*, 58 ACAD. MGMT. J. 1572, 1577, 1589 (2015) (analyzing China Securities Regulatory Commission data from 2001 to 2010, including 742 companies with enforcement actions for fraud and 742 non-fraudulent companies for a control group).

104. *See* Yu Chen, John Daniel Eshleman & Jared S. Soileau, *Board Gender Diversity and Internal Control Weaknesses*, 33 ADVANCES ACCT. 11, 12 (2016) (analyzing a sample of 4,267 firm-year observations during the period from 2004 to 2013, beginning "the first year internal control weaknesses were required to be disclosed under section 404 of SOX [Sarbanes-Oxley Act of 2002]").

and better reporting results,[105] while other studies suggested that more female board members produced better monitoring even if women board members did not sit on the audit committees directly.[106] The Nasdaq report also found board gender diversity "to be positively associated with more transparent public disclosures."[107] What all of these studies have in common is that they found that greater diversity is linked with greater transparency, more accurate reporting, and less fraud. Nasdaq concluded:

> There is substantial evidence that board diversity enhances the quality of a company's financial reporting, internal controls, public disclosures and management oversight. In reaching this conclusion, Nasdaq evaluated the results of more than a dozen studies spanning more than two decades that found a positive association between gender diversity and important investor protections, and the assertions by some academics that such findings may extend to other forms of diversity, including racial and ethnic diversity.[108]

In short, Nasdaq reported that firms with greater diversity were less likely to be engaged in the practices most closely associated with short-termism and competitive pay: earnings management,

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105. *See* María Consuelo Pucheta- Martínez, Inmaculada Bel-Oms & Gustau Olcina-Sempere, *Corporate Governance, Female Directors and Quality of Financial Information*, 25 BUS. ETHICS: EUR. REV. 363, 363, 378–79 (2016) (analyzing a sample of non-financial companies listed on the Madrid Stock Exchange during 2004 to 2011 and finding that "the percentage of females on [audit committees] reduces the likelihood of receiving error, non-compliance or omission of information qualifications").

106. The Nasdaq Stock Mkt. LLC, *supra* note 1, at 27 (citing Chen et al., *supra* note 104, at 18) (finding that more female members produced better monitoring broadly, but not directly addressing their committees); *see also* Aida Sijamic Wahid, *The Effects and the Mechanisms of Board Gender Diversity: Evidence from Financial Manipulation*, 159 J. BUS. ETHICS 705, 706, 710 (2019) (analyzing 6,132 U.S. public companies during the period from 2000 to 2010, for a total of 38,273 firm-year observations).

107. The Nasdaq Report notes that:

> Gul, Srinidhi & Ng (2011) concluded that "gender diversity improves stock price informativeness by increasing voluntary public disclosures in large firms and increasing the incentives for private information collection in small firms." Abad et al. (2017) concluded that companies with gender diverse boards are associated with lower levels of information asymmetry, suggesting that increasing board gender diversity is associated with "reducing the risk of informed trading and enhancing stock liquidity."

The Nasdaq Stock Mkt. LLC, *supra* note 1, at 27–28.

108. U.S. SEC. & EXCH. COMM'N, No. 34-90574, SELF-REGULATORY ORGANIZATIONS; THE NASDAQ STOCK MARKET LLC; NOTICE OF FILING OF PROPOSED RULE CHANGE TO ADOPT LISTING RULES RELATED TO BOARD DIVERSITY 22 (2020), https://www.sec.gov/rules/sro/nasdaq/2020/34-90574.pdf [https://perma.cc/9MHQ-WJ9J].

accounting manipulation and fraud, and the suborning of internal controls.[109]

An Australian study looked at different factors, finding that adding women to boards strengthened a company's willingness to take prosocial actions, which produced higher levels of corporate social responsibility (CSR).[110] CSR, in turn, was positively linked to financial performance.[111] Once the study controlled for the CSR effect, the women's impact on firm performance became statistically insignificant.[112] The study concluded that increasing CSR, not the presence of women per se, turned out to be the decisive factor on firm performance.[113] Nonetheless, although it is difficult to establish the causal mechanism,[114] it appears that "female directors tend to be less conformist and are more likely to exhibit activism and express their independent views than male directors because they do not belong to 'old-boy' networks."[115] The relationship between gender diversity and CSR is stronger than that "between board gender diversity and company performance . . . ."[116] This effect, as the author of the Australian study suggests, may depend less on the presence of women than on which women are selected.[117] Nonetheless, the study finds that greater diversity, whatever the cause, tends to counter an exclusive focus on shareholders to the exclusion of other stakeholders who might affect the company's long-term prospects.[118]

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109. *See supra* discussion in text at notes 26–28, 30–35, 62–64, 67–68.

110. Jeremy Galbreath, *Is Board Gender Diversity Linked to Financial Performance? The Mediating Mechanism of CSR*, 57 BUS. & SOC'Y 863, 863 (2018).

111. *Id.* at 881 (finding that CSR activities appear to be positively linked to financial performance).

112. *Id.* at 876.

113. *Id.* at 863 (noting that CSR appears to fully account for the connection between the presence of women on boards and increased financial performance).

114. "It's worth noting that even *if* the meta-analyses revealed a stronger relationship between board gender diversity and firm performance, we couldn't conclude that board gender diversity *causes* firm performance. To establish causal effects, you need to conduct a randomized control trial. But, that's impossible here; we can't randomly assign board members to companies." Klein, *supra* note 88. Indeed, "[t]he women named to corporate boards may not in fact differ very much in their values, experiences, and knowledge from the men who already serve on these boards." *Id.*

115. Jie Chen, Woon Sau Leung, Wei Song & Marc Goergen, *Why Female Board Representation Matters: The Role of Female Directors in Reducing Male CEO Overconfidence*, 53 J. EMPIRICAL FIN. 70, 72 (2019).

116. Klein, *supra* note 88.

117. *Cf.* Galbreath, *supra* note 110, at 867–70 (describing specific characteristics of women that, if present, may lead to increased CSR, and thus to increased financial performance).

118. *Id.* (describing a stakeholder perspective theory which posits that, as the

These studies cannot tease out the effect women board members have on financial reporting with any precision. Instead, the relevant factors the studies identify are associated with both the presence of more women and better business performance.[119] Any causal relationships are likely to be multidirectional. Firms that operate in a more transparent way may be more hospitable to diverse boards, and firms that diversify by bringing in board members through less conventional networks—or simply networks less closely tied to existing management—may find that their new board members ask different questions and probe in different ways from board members who rise through more insular networks. The issue of the relationship between board diversity and performance may thus be more about openness to outsiders than about the inclusion of women per se.[120]

B. The Business Case for Diverse Management

A primary purpose of corporate boards is monitoring, and abuses such as earnings manipulation and accounting fraud cannot flourish once boards shine a spotlight on the practices. Once such practices are illuminated, a series of processes come into play that are likely to lead to reform of those practices.[121] Accordingly, to the

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demonstration of CSR is linked to meeting the interests of a broader group of stakeholders, the presence of women board members who encourage CSR will benefit non-shareholder stakeholders).

119. *See, e.g.*, Klein, *supra* note 88; *see also* Cumming et al., *supra* note 103, at 1572.

120. *See, e.g.*, Barbara Shecter, *Diverse Boards Tied to Fewer Financial 'Irregularities,' Canadian Study Finds*, FIN. POST (Feb. 5, 2020), https://financialpost.com/news/fp-street/diverse-boards-tied-to-fewer-financial-irregularities-canadian-study-finds [https://perma.cc/LR29-VC7S] ("If you're going to introduce perspectives, those perspectives might be coming not just from male versus female. They could be coming from people of different ages, from different racial backgrounds . . . [and] [i]f we just focus on one, we could be essentially taking away from other dimensions of diversity and decreasing perspective." (internal quotations omitted)). On avoiding groupthink, see Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 TUL. L. REV. 1363, 1384–91 (2002). *See also* AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY 107–08, 121 (2015) (introducing a study of boardroom homogeneity where sample included 23 directors of Norwegian corporate boards, representing an aggregate of 95 board appointments at more than 70 corporations); *see also* Gennaro Bernile, Vineet Bhagwat & Scott Yonker, *Board Diversity, Firm Risk, and Corporate Policies*, 127 J. FIN. ECON. 588, 591 (2017) (analyzing 21,572 firm-year observations across non-financial, non-utility firms for the years 1996 to 2014, based on the ExecuComp, RiskMetrics, Compustat, and CRSP databases).

121. While the risk of liability for corporate board members is typically low, participation in or countenance of fraud can expose directors to liability. Urska Velikonja, *Leverage, Sanctions, and Deterrence of Accounting Fraud*, 44 U.C. DAVIS L. REV. 1281, 1328 (2011).

extent more diverse boards are more inclined to look into the shadows of corporate operations, the more likely they are to discover abuses, which benefits the long-term health of companies.[122]

The case for diverse management is more complex. Management sets the tone for the entire company. As we indicated in Section I, corporate reformers have focused on high stakes bonuses systems as a source of both ineffective management and workplaces hostile to diversity. These systems, whether at corrupt companies like Enron[123] or more conventional companies like Microsoft,[124] have been identified with greater distrust, higher turnover, lower productivity, lesser diversity, and greater gender disparities in compensation.[125] Such systems tend to emphasize reductionist, short-term, transactional metrics:[126] Jack Welch, for example, at the height of GE's earnings management era, emphasized how important it was that his managers were "hitting the numbers."[127] At their worst, these systems encourage "masculinity contest cultures" that produce higher turnover, sexual harassment, bullying, and lower morale.[128] The literature on diversity and upper management should accordingly be interpreted through this lens.

The studies show that diverse management, just like diverse boards, creates value in multiple ways: it leads to greater profitability, market share growth, and more inclusive organizational cultures.[129] These analyses, however, suffer from the same issues that affect studies of corporate boards: the correlations have been repeatedly documented while causation is difficult to establish. Like the board literature, they also point to certain management factors as potential causal factors associated with both greater diversity and better firm performance.

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122. *Cf.* Michael C. Jensen, *Paying People to Lie: The Truth About the Budgeting Process*, 9 EUR. FIN. MGMT. 379, 379 (2003) (claiming that uncovering and stopping the cycle of budget gaming can increase productivity and value in firms).

123. Dallas, *Enron*, *supra* note 27, at 37; *see also supra* discussion in Section I (regarding Enron's business practices).

124. Carbone, Cahn & Levit, *The Triple Bind*, *supra* note 11, at 1119–20.

125. *See supra* text accompanying notes 5–7, 51–57.

126. Carbone, Cahn & Levit, *Gender and the Tournament*, *supra* note 13, at 427.

127. Carbone & Black, *The Problem with Predators*, *supra* note 7, at 465 ("In Welch's case, hitting the numbers ordinarily meant beating earnings estimates. . . . Welch beat the estimates almost every quarter for two decades, and GE faced a major securities fraud investigation once he left.").

128. *See supra* discussion in Section I, text accompanying notes 54–58; *see also* Berdahl et al., *supra* note 6.

129. Indeed, many companies achieve a significant degree of diversity in their entry level ranks without much diversity in their more significant decision-making levels. HUNT ET AL., *supra* note 79.

Some of the most influential studies look at the relationship between diversity and performance without controls that attempt to establish causation. The *Wall Street Journal*, for example, in a 2019 study, ranked the diversity of S&P 500 companies and then compared the most- and least-diverse companies along various performance metrics.[130] The top twenty companies, with the greatest amount of diversity, had an annual return in share performance of 10% over a five-period and 14% over a ten-year period, compared to the twenty least-diverse firms' returns of 4.2% and 12%.[131]

Three studies by McKinsey (published in 2015, 2018, 2020) show a strong association between diversity and financial performance.[132] The most recent such study focused on the companies in the top quartile for gender diversity on management teams and found that these companies "were 25[%] more likely to experience above-average profitability than peer companies in the fourth quartile . . . up from 21[%] in 2017 and 15[%] in 2014."[133] A 2009 study found that racial workforce diversity is correlated positively with a range of economic indicators, including larger market share and greater sales revenues, while gender diversity also correlates with greater sales revenue and increased profits.[134] A Credit Suisse study similarly "demonstrated that investment returns are 10[%] higher at companies with policies inclusive of LGBT+ people."[135]

A meta-analysis of studies, however, by Jeong and Harrison, looked at 146 primary studies conducted in 33 different countries and found that "[f]emale representation in the upper echelons in general is positively and weakly related to forms of long-term financial performance, but negatively and weakly related to short-

130. Dieter Holger, *The Business Case for More Diversity*, WALL ST. J. (Oct. 26, 2019), https://www.wsj.com/articles/the-business-case-for-more-diversity-11572091200 [https://perma.cc/T4X7-E3LC].

131. *Id.*

132. SUNDIATU DIXON-FYLE, KEVIN DOLAN, VIVIAN HUNT & SARA PRINCE, MCKINSEY & CO., DIVERSITY WINS: HOW INCLUSION MATTERS 3 (2020), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters [https://perma.cc/UD9X-V8E7].

133. *Id.*

134. Cedric Herring, *Does Diversity Pay?: Race, Gender, and the Business Case for Diversity*, 74 AM. SOCIO. REV. 208, 219–20 (2009).

135. Stephanie Sandberg, *It's 2017: Do You Know Where Your LGBT+ Board Candidates Are?*, HUFFINGTON POST (Apr. 4, 2017), https://www.huffingtonpost.com/entry/its-2017-do-you-know-where-your-lgbt-board-candidates_us_58e3c8cbe4b09deecf0e1a91 [https://perma.cc/GGZ5-89GY].

term stock market returns."[136] The meta-analysis found that there is a "short-term drop in stock market returns following the *announcement* of female CEO appointments," rather than a response to firm performance.[137] Overall, the meta-analysis found that studies of upper management, much like board studies, produced mixed results; that is, once appropriate controls were added, much of the increased performance from greater diversity disappeared.[138] There are, nonetheless, also intriguing indications of what some of the causal relationships might involve.

The meta-analysis's most important finding involved the comparison between short-term and long-term performance.[139] Short-term performance appeared to reflect investor bias.[140] The authors asserted that long-term performance, on the other hand, involved firm decision-making that reduced strategic risk-taking and "explains why financial performance is improved."[141] They found correlations between greater inclusion of women in upper management and better decision-making, postulating that the inclusion of women moderated the tendency of all-male decision-making groups to take more risks, in part because of the tendency of homogeneous groups to reach more extreme conclusions.[142]

In explaining their conclusions, Jeong and Harrison hypothesized that it may not be women, per se, but the impact of greater diversity on deliberations that creates the causal effect.[143] Other studies suggest that these results may be context

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136. Seung-Hwan Jeong & David A. Harrison, *Glass Breaking, Strategy Making, and Value Creating: Meta-Analytic Outcomes of Women as CEOs and TMT Members*, 60 ACAD. MGMT. J. 1219, 1219 (2016) (analyzing studies, with the largest group of studies coming from the United States).

137. *Id.* at 1234.

138. *Id.* at 1233.

139. *Id.* at 1234.

140. *Id.* at 1226, 1233–34 (noting an expected short-term backlash by the financial market due to anti-female CEO bias among investors).

141. *Id.* at 1219.

142. *Id.* at 1235 ("Our meta-analytic path analysis shows this reduction in strategic risk-taking—empirically captured through financial leverage, capital expenditures, and stock volatility—is one reason why female representation is linked to improved financial performance in the long run."). An underlying premise of the focus on risk-taking in the meta-analysis assumed that women are more risk averse. *Id.* at 1223 ("While several studies report evidence that existing patterns of gender differences in risk-taking might not apply to some managerial contexts, such evidence is outweighed by the larger and broader body of robust evidence which has established that females in general, and in their roles as CEOs, are risk-averse compared to males.") (citations omitted). That assumption may not be accurate. *See* Lara et al., *supra* note 78, at 3.

143. Jeong & Harrison, *supra* note 136, at 1223–24 (noting theories of group polarization which offer explanations for extreme or risky behavior).

dependent.[144] In finance, for example, a major purpose of hedge funds and other investment firms is to manage risk, and there is no suggestion that women fund managers are more risk averse than the men in finance.[145] Indeed, women-run funds routinely outperform those run by men, with some observers attributing the differences to better decision-making practices.[146] Economist Cristian Dezsö, one of those who finds that funds run by women outperform those run by men, adds a different wrinkle to the analysis.[147] His data show that women in women-dominant groups take more risks than women in male-dominant environments, suggesting that, freed from gender stereotypes, the women feel freer to do so.[148] In contrast with the Jeong and Harrison meta-analysis, though, he discovered that men also took greater risks when more women were present.[149] "Borrowing a conclusion from psychology research," he speculated that men in finance "feel threatened when they see females taking on more risk. So, they respond by taking more risk, too."[150] Either way, these findings suggest it is the dynamic of the group rather than the sex of the decision-maker that determines outcome quality.[151]

Other studies of diversity find that these effects may vary by industry. In considering innovation, for example, the findings may be particularly robust. One study found "a strong and statistically significant correlation between the diversity of management teams

144. Michael Brush, *Here's Why Women Fund Managers Regularly Outperform Men, Based on Newer Research*, MARKETWATCH (Oct. 23, 2020), https://www.marketwatch.com/story/heres-why-women-fund-managers-regularly-outperform-men-and-seven-stocks-thatll-help-you-do-the-same-11603382699 [https://perma.cc/XEK6-MKAU].

145. *Id.*

146. Steve Garmhausen, *Women: Better Advisors?*, BARRON'S (June 2, 2012), https://www.barrons.com/articles/SB50001424053111904081004577438301140635494 [https://perma.cc/WAC7-G8Y7]; *see also* Eric McWhinnie, *Women Are Mostly Better Investors than Men*, USA TODAY (Mar. 9, 2014), https://www.usatoday.com/story/money/personalfinance/2014/03/09/women-better-investors-than-men/6176601/ [https://perma.cc/KQZ5-QGC5].

147. SMITH BRAIN TR., *How Risk and Gender Affect Fund Manager Performance* (Oct. 28, 2020), https://www.rhsmith.umd.edu/faculty-research/smithbraintrust/insights/how-risk-and-gender-affect-fund-manager-performance [https://perma.cc/LDD7-KUSG].

148. *Id.*

149. *Id.*

150. *Id.*

151. Indeed, a different study attempting to tease out the relationship between women board members and risk in non-financial firms found no relationship once appropriate controls were introduced. *See* Vathunyoo Sila, Angelica Gonzalez & Jens Hagendorff, *Women on Board: Does Boardroom Gender Diversity Affect Firm Risk?*, 36 J. CORP. FIN. 26, 45–46 (2016).

and overall innovation."[152] The firms with greater than average diversity on their management teams "reported innovation revenue that was nineteen percentage points higher than that of companies with below-average leadership diversity."[153] The study did not just consider gender diversity, however. It examined diversity across a number of different dimensions and found "the most significant gains came from changing the makeup of the leadership team in terms of the national origin of executives, range of industry backgrounds, gender balance, and career paths."[154] Hiring managers from a different industry and hiring more women had similarly positive effects on firm innovation.[155] Other studies, looking specifically at new ventures, have also found a relationship between a management team's gender diversity and the innovation performance of the firm.[156]

Like the studies of board diversity, the studies focused on management find that openness to different views matters.[157] They also found that "participative" leadership that encourages frequent and open communication and fair employment practices contributes to effective workplace innovation.[158]

What these studies generally suggest is a contrast between the intense, competitive, negative sum workplaces that characterize masculinity contest cultures[159] and the more productive, innovative workplaces that pay greater attention to employee morale.[160]

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152. Rocio Lorenzo, Nicole Voigt, Miki Tsusaka, Matt Krentz & Katie Abouzahr, *How Diverse Leadership Teams Boost Innovation*, BCG HENDERSON INST. (Jan. 23, 2018), https://www.bcg.com/publications/2018/how-diverse-leadership-teams-boost-innovation [https://perma.cc/7GX6-2DKE].

153. *Id.*

154. *Id.*

155. *Id.*

156. *See* Ye Dai, Gukdo Byun & Fangsheng Ding, *The Direct and Indirect Impact of Gender Diversity in New Venture Teams on Innovation Performance*, 43 ENTREPRENEURSHIP THEORY & PRAC. 505 (2019).

157. *Id.*

158. *Id.* at 511. Other studies of gender based differences in leadership styles suggest that gender diverse leadership styles tend to be "more participative, democratic, and communal" and to encourage "more productive discourse and the airing of different points of view" than exclusively male leadership styles. Galbreath, *supra* note 110, at 868.

159. Carbone & Black, *The Problem with Predators*, *supra* note 7, at 478 ("These cultures make winning at all cost the test of success, and tolerate self-interested, unethical, and counterproductive behavior.").

160. *See, e.g.*, DONALD HISLOP, KNOWLEDGE MANAGEMENT IN ORGANIZATIONS 230 (3rd ed. 2013) (describing how the most effective way to deal with problems such as employee turnover is to develop institutional identity and employee loyalty, and observing that institutional identity that encourages employees to identify with firm objectives creates stronger loyalty than instrumental measures such as merit pay or

Economists George Akerlof and Rachel Kranton, for example, have argued that workers who think of themselves as insiders rather than outsiders require less in the way of extra compensation to produce desired results and become less likely to game the compensation systems that do exist.[161] They conclude that "[w]orker identification may therefore be a major factor, perhaps even the dominant factor, in the success or failure of organizations" and suggest that high stakes bonus systems are often counterproductive.[162] More conventional management theorists similarly emphasize factors such as engaging workers, staying committed, creating trust, and keeping open lines of communication.[163]

A meta-analysis of management styles, for example, found that for both men and women, "transformational" practices that communicate a compelling vision and pay attention to subordinates' individual needs produce the strongest positive results.[164] In contrast, managers who rely on a "transactional" approach based on incentive systems, bottom line metrics defining organizational objectives, and attention to problems rather than successes do not do as well.[165] Women leaders were more likely than the men to adopt transformational leadership styles.[166] The study authors speculate that this may be true, in part, because transformational styles conformed more closely to female gender stereotypes.[167] Thus, women who adopted other styles faced greater challenges from role incongruity.[168] The authors conclude that the differences in leadership styles may explain why some studies find women to be more effective leaders—the women who rise through the leadership ranks tend to use (and may be selected because they use) more

bonuses).

161. GEORGE AKERLOF & RACHEL KRANTON, IDENTITY ECONOMICS: HOW OUR IDENTITIES SHAPE OUR WORK, WAGES, AND WELL-BEING 59 (2010).

162. *Id.*

163. *See, e.g.*, *8 Best Practices in Business Management*, UNIV. OF ST. MARY, https://online.stmary.edu/mba/resources/8-best-practices-in-business-management [https://perma.cc/N28H-JVMW]; *see also* Alice H. Eagly, Mary C. Johannesen-Schidt & Marloes L. van Engen, *Transformational, Transactional, and Laissez-Faire Leadership Styles: A Meta-Analysis Comparing Women and Men*, 129 PSYCHOL. BULL. 569, 586 (2003) (summarizing the theory of leadership advice and observing that "as . . . textual analysis of mass-market books on management shows, managers are exhorted to 'reorient themselves toward a new role of coordinating, facilitating, coaching, supporting, and nurturing their employees'").

164. Eagly et al., *supra* note 163, at 570–72.

165. *Id.*

166. *Id.* at 578–79.

167. *Id.* at 572–73.

168. *Id.*

effective techniques than the men.[169] These techniques, however, work for men just as well as women.[170]

These studies suggest that adding women—and, indeed, increasing diversity generally—can have a positive impact on corporate performance, but that it may not simply be the presence of women per se that has the effect. Instead, it is the interaction of diversity with the broader corporate context that produces the result.[171] Indeed, recruiting, retaining, and promoting women executives may require reforming the most destructive aspects of competitive business cultures, and that may account for a significant part of the reason for the improved performance associated with greater diversity.[172]

III. Diversity as a Tool of Management Reform

The current generation of corporate reformers advocates not only for greater diversity as an end in itself but also for reforms that challenge shareholder primacy and its related emphasis on short-termism and bonus-based competitive pay.[173] Given the lack of conclusive findings on the impact of diversity in isolation, the classic justifications for greater diversity combine a moral case for diversity (including those who have been systematically excluded in the past is the right thing to do) and a business case for diversity (more diverse firms, at worst, do as well as other companies and at best do better, so there is no reason not to pursue diversity). This Article, however, suggests that while social science research cannot isolate causal links in a statistically rigorous way, it can identify the circumstances in which management reform and diversity efforts are most likely to reinforce each other.

A. Finding the Buried Bodies

The literature on corporate boards suggests that the correlations between greater diversity and improved medium- to long-term firm performance may involve greater monitoring and a

169. *Id.* at 586–87.

170. *Id.*

171. *See, e.g.*, Galbreath, *supra* note 110 (suggesting that increasing the representation of women on boards increases the corporate focus on community social responsibility and that doing so increases performance over time).

172. For an example of a destructive workplace culture that combines seven figure bonuses, unethical conduct, and gender disparities, see Complaint, Messina v. Bank of Am. Corp., No. 1:16-cv-03653 (S.D.N.Y. 2016).

173. *See, e.g.*, Barzuza et al., *supra* note 32, at 1279 (describing generational differences in ESG investing and describing how ESG investing differs from hedge funds focused on short-term results).

lesser incidence of accounting irregularities, earnings management, and fraud.[174] Companies that expand the number of diverse board members, particularly within a short period, may have to expand their search efforts to find board members, breaking the insularity of some existing boards. And, indeed, as we pointed out above, women are more likely to be appointed to independent board positions than to be appointed either from the hedge funds engaged in activist investing or the management board positions more directly under the control of the CEO.[175]

The impact of bringing in newcomers may be particularly great in companies that "manage" earnings, cover up unfavorable developments, disguise unethical conduct, or engage in legally dubious activities that create potential exposure to negative publicity, enforcement actions, or other risks.[176] Effective board monitoring is expected to police such activities; the creation of more diverse boards may well have maximum impact in circumstances where diversity recruiting increases the likelihood of effective monitoring or greater firm transparency. As we demonstrated in Sections I.B and II.B above, women who make it to upper management often demonstrate different qualities from the men who thrive in corporate tournaments.[177] In addition, given the paucity of women in upper management, CEOs may be less able to handpick women they know well.[178] So long as upper management is a boys' club, women board members are less likely to reflect the amoral, misogynist, narcissistic mindset that characterizes the corporate environments ripe for reform. Over time, of course, women on corporate boards may come to reflect the same perspectives as the men. Indeed, corporate board members, male or female, have innumerable incentives to look the other way with respect to management irregularities. The push for women on corporate boards may well come from the fact that it is relatively easy: firms can simply expand the size of the boards and add more women without significantly changing firm dynamics.[179] Sam

174. *See* The Nasdaq Stock Mkt. LLC, *supra* note 1.

175. *See* Shepherd & Teare, *supra* note 92.

176. The Nasdaq Stock Mkt. LLC, *supra* note 1, at 15 ("[C]ertain groups may be underrepresented on boards because the traditional director nomination process is limited by directors looking within their own social networks for candidates with previous C-suite experience.").

177. *See* discussion *supra* Sections I.B, II.B.

178. *See* Shepherd & Teare, *supra* note 92.

179. *See, e.g.*, Alexander Osipovich & Akane Otani, *Nasdaq Seeks Board-Diversity Rule That Most Listed Firms Don't Meet*, WALL ST. J. (Dec. 1, 2020), https://www.wsj.com/articles/nasdaq-proposes-board-diversity-rule-for-listed-companies-11606829244?mod=article_inline [https://perma.cc/3M4W-H9C7]

Walton, after all, dealt with pressure to increase diversity in the eighties by adding Hillary Clinton to the Walmart board.[180] As the board's first woman, youngest member, and one of the few board members lacking business experience, she had little impact.[181] The much more important changes in corporate cultures would come from greater diversity not just on boards but in upper management.

B. Eliminating the Incompetent Bullies

While the stock market (and CEO salaries) have soared, conventional measures of firm performance, such as increases in productivity, show that companies have performed less well over the last forty years than they did during the supposedly complacent managerial era.[182] A global study of CEO efficacy indicates that CEOs of the shareholder primacy era contribute little to improved firm function, with CEOs who are paid more not performing any better. The study concludes that the results suggest that the performance of CEOs "tend[s] to follow the performance of their firms."[183] Although women constituted less than 10% of the sample, the authors found that "the overperformance of CEOs in top companies is driven by female CEOs . . . [and] the underperformance of CEOs in the worst-performing companies is mostly due to male CEOs."[184]

At the same time, the literature identifying the factors that drive women out emphasizes the same factors that depress teamwork and innovation: negative sum internal competition, lack of trust, emotionally distant—or abusive—managers, and the lack of loyalty and commitment between employers and employers.[185]

(commenting that increasing board diversity should not cost much).

180. *See* Michael Barbaro, *As a Director, Clinton Moved Wal-Mart Board, but Only So Far*, N.Y. TIMES (May 20, 2007), https://www.nytimes.com/2007/05/20/us/politics/20walmart.html [https://perma.cc/BU98-P5VD].

181. *Id.*

182. *See* Brett Arends, *CEO Pay Has Gone Up 10-fold in the Past 40 Years—Do They Deserve It?*, MARKETWATCH (Apr. 16, 2021), https://www.marketwatch.com/story/hey-honchos-give-us-back-our-money-11618519002?mod=hp_minor_pos19&adobe_mc=MCMID%3D05280436024580085122294529340144801967%7CMCORGID%3DCB68E4BA55144CAA0A4C98A5%2540AdobeOrg%7CTS%3D1618590882 [https://perma.cc/8N7Y-VBJZ].

183. Arturo Bris & Maryam Zargari, *A Bullshit Job? A Global Study on the Value of CEOs*, SSRN, Mar. 16, 2021, at 31, https://ssrn.com/abstract=3805610 [https://perma.cc/C7TZ-3DUM].

184. *Id.* at 30.

185. *Compare* PATRICK LENCIONI, THE FIVE DYSFUNCTIONS OF A TEAM 188–89 (2002), *with* Kim Williams, *Women in Tech: How to Attract and Retain Top Talent*, INDEED (Nov. 6, 2018), http://blog.indeed.com/2018/11/06/women-in-tech-report/ [https://perma.cc/87PW-YSMV] (describing poor managers and harassment as major

Business psychology professor Tomas Chamorro-Premuzic argues that, instead of establishing gender quotas,

> a more reasonable goal would be to focus instead on selecting better leaders, as this step would also take care of the gender imbalance. Putting more women in leadership roles does not necessarily improve the quality of leadership, whereas putting more talented leaders into leadership roles will increase the representation of women.[186]

That is, while firms seem quite willing to promote "incompetent" or bullying, amoral, and narcissistic men, they are less willing to promote such women.[187] Simply selecting more competent managers would thus increase the percentage of women.

Focusing on a company's ability to retain a more diverse workforce may help to identify and reform toxic workplaces. A telling factor at Uber was the fact that while the company initially hired women as 20% of its workforce, that number fell to 7% due to the company's dysfunctional management practices.[188] Similarly, a sex discrimination class action brought against Microsoft persuaded the company to eliminate its stack ranking evaluation system, a system that many observers believe contributed not just to gender disparities but to Microsoft's loss of its competitive edge in designing new technology.[189] The problems at these companies came to light only when they became the subject of high profile sex

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reasons for women leaving tech).

186. Chamorro-Premuzic, *supra* note 59, at 172–73.

187. For discussions of the classic double bind in which women are treated more harshly for engaging in the same conduct as men, see Mark L. Egan, Gregor Matvos & Amit Seru, *When Harry Fired Sally: The Double Standard in Punishing Misconduct* 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 23242, Mar. 2017), https://www.nber.org/papers/w23242 [https://perma.cc/JSU7-JAAL]; Alicia R. Ingersoll, Christy Glass, Alison Cook & Karl Joseph Olsen, *Power, Status and Expectations: How Narcissism Manifests Among Women CEOs*, 158 J. BUS. ETHICS 893, 894 (2017) ("[W]omen leaders who display narcissistic personalities are perceived by men subordinates as less effective leaders than equally narcissistic men leaders . . . which suggests narcissistic women leaders may face biases that narcissistic men leaders do not.").

188. *See* Complaint ¶ 22, Avendano v. Uber Technologies, Inc. (No. CGC-18-566677), https://images.law.com/contrib/content/uploads/documents/403/15670/Complaint-1.pdf.

189. *See* Erika Anderson, *The Management Approach Guaranteed to Wreck Your Best People*, FORBES (July 6, 2012), https://www.forbes.com/sites/erikaandersen/2012/07/06/the-management-approach-guaranteed-to-wreck-your-best-people/?sh=264c35205743 [https://perma.cc/6AZD-CHWP]; Kurt Eichenwald, *Microsoft's Lost Decade*, VANITY FAIR (July 24, 2012), http://www.vanityfair.com/news/business/2012/08/microsoft-lost-mojo-steve-ballmer [https://perma.cc/7H2S-ZXSX].

discrimination complaints.[190] Diversity can be an effective barometer of management effectiveness.

Conclusion

Using diversity as an instrument of corporate reform requires more than adding a few women and stirring. Corporate leaders, after all, are adept at window dressing.[191] Nor is it simply a matter of diversity training or increased sensitivity to cultural differences.[192] Instead, it requires taking the idea of teamwork and trust seriously. The areas in the economy with the greatest gender disparities, including finance and tech, have high turnover rates for everyone—and even higher rates for women.[193]

Conversely, the workplaces that best promote innovation are also more effective at promoting diversity. The qualities that promote both diversity and innovation in such environments are "fair employment practices, such as equal pay; participative leadership, with different views being heard and valued; a strategic emphasis on diversity led by the CEO; frequent and open communication; and a culture of openness to new ideas."[194]

Along these lines, diversity should not just be a matter of adding a few women to corporate boards. Doing so in one sense is easy; legislatures can require increased board diversity without significant disruption to the corporate bottom line (or male careers).[195] If diversity is important to business performance, management policies, or gender justice, however, then the inquiry should be extended beyond board representation.

Furthermore, sustaining diversity requires a critical mass. Diversity is an iterative process that spurs more progressive

190. *See* Susan Fowler, *Reflecting on One Very, Very Strange Year at Uber*, SUSAN FOWLER (Feb. 19, 2017), https://www.susanjfowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber [https://perma.cc/TG84-8XJB].

191. *See, e.g.*, Barbaro, *supra* note 180 (acknowledging Clinton encouraged Walmart to hire more women but did not challenge its rampant anti-unionism).

192. *See* Alexandra Kalev, Erin Kelly & Frank Dobbin, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 611 (2006).

193. *See* Trae Vassallo, Ellen Levy, Michele Madansky, Hillary Mickell, Bennett Porter, Monica Leas & Julie Oberweis, *A 2015 Report of: Elephant in the Valley*, https://www.elephantinthevalley.com/ [https://perma.cc/H3GE-XBKA]; Williams, *supra* note 185.

194. *How Diverse Leadership Teams Boost Innovation*, SHINE, https://www.shine4women.com/diverse-leadership-teams-boost-innovation/ [https://perma.cc/A7BZ-Y3BY].

195. *See, e.g.*, Osipovich & Otani, *supra* note 179 (commenting that increasing board diversity should not cost much).

change.[196] Once workplaces become genuinely more diverse from entry level positions to the corporate boardroom, it spurs other changes that may have nothing to do with diversity per se. In the instrumental view, therefore, diversity is both a result and an architect of change.

The instrumental case for diversity we advocate in this Article concludes that better diversity is intertwined with better management. What is critical is "how an organization harnesses diversity, and whether it's willing to reshape its power structure."[197] Diversity is an indication, both internally and externally, of a company's values. While adding women and stirring has not been shown to be a causal factor for better business performance, the failure of a company to be able to maintain a diverse board or diverse management is a sign that something other than path dependence or unconscious bias and microaggressions is occurring at the company. Accordingly, for ESG investors who want to reform management practices—short termism, accounting fraud, ripping off customers, and low productivity because of poor management—diversity is both a metric and a tool, signaling problems or serving as a marker of change.

Corporate reform per se cannot address structural issues such as the lack of affordable childcare or deeply entrenched racial inequality, but it can address the dysfunctional aspects of corporate governance that have arisen in the shareholder primacy era.

196. On the level of political theory, "[t]he value of diversity is, first, instrumental because . . . cultural and national diversity reduces the concentration of political power within a state." Rainer Bauböck, *Cherishing Diversity and Promoting Political Community*, 1 ETHNICITIES 109, 113 (2001). This idea of diversity and power undoubtedly works on the micro level within companies as well as the macro level in nation states. Changing management practices to ensure ongoing diversity may also provide a basis for improved working conditions throughout the company. But guaranteeing a livable minimum wage and health care and retirement benefits for all requires the rule of law.

197. Ely & Thomas, *supra* note 75.

Strengthening Boards Through Diversity: A Two-Sided Market That Can Be Effectively Serviced By Intermediaries

Akshaya Kamalnath†

Abstract

The current focus on the monitoring role of the corporate board has come under much criticism. Independent directors play a significant role within this model. However, their ability to truly function independently has been rightly questioned in the last decade. Independent directors are impeded by two main problems: first, the lack of access to relevant information, for which they are reliant on management, and second, the high likelihood of being captured (to varying degrees) by management. There have been various suggestions to fix these problems, ranging from enhancing board diversity to drastically reforming the current model of corporate boards.

This Article argues that diversity holds the promise of slowly reforming the current board model, so long as well-considered measures are taken. To that end, this Article will propose a model of board governance that relies on providers of supplemental board services as intermediaries to facilitate diversity on boards. This model will, on the one hand, allow companies to attract both the best and diverse directors and on the other hand, allow board candidates (especially diverse candidates) to make well-informed decisions about taking on directorships. Eventually, companies may choose to share these reports with investors and the general public to signal their commitment to diversity and governance. Finally, the proposed model has the potential to drive boards to take on more of an advisory role along with the current focus on monitoring.

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†. Senior Lecturer, the Australian National University, College of Law. I am grateful to participants and organizers of the Feminism and Corporate Law: Reforming Corporate Governance Roundtable for their comments on the article during the Roundtable event. I am also grateful to Professor Cindy Schipani, Professor Faith Stevelman, and Professor Jefferey M. Lipsaw for comments on earlier drafts. All errors are mine.

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Introduction

The present model of the board of directors has come under much criticism, and the search is on for both potential fixes to the existing model and new governance models.[1] This Article argues that diversity can strengthen boards, provided that effective mechanisms are adopted as well. It will propose a model where supplemental providers of board services, like executive search firms and board evaluation providers, can assist in obtaining these benefits.

Increasing diversity on corporate boards has become an important issue for two reasons. First, diversity on corporate boards, by increasing workplace diversity (with a focus on demographic diversity), helps to reduce workplace inequality.[2] Second, diversifying the corporate board increases the variety of perspectives in decision making, which in turn improves corporate governance.[3]

Since gender diversity is easily measurable and most people agree on the need for gender equality, corporate diversity has come

1. *See, e.g.*, MELVIN A. EISENBERG, THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS 141–56 (1976) (critiquing the modern board practice and offering proposals for reform of the existing working models and legal models); *see also* Stephen M. Bainbridge & M. Todd Henderson, *Boards-R-Us: Reconceptualizing Corporate Boards*, 66 STAN. L. REV. 1051, 1072 (2014) (arguing that companies should outsource board activities as an alternative to the current practices).

2. *See* Mark McCann & Sally Wheeler, *Gender Diversity in the FTSE 100: The Business Case Claim Explored*, 38 J. L. & SOC'Y 542, 574 (2011) ("Women should be appointed as NEDs as an issue of social justice . . . .").

3. *See* Akshaya Kamalnath, *Defining Diversity in Corporate Governance: A Global Survey*, 45 J. LEGIS. 1 (2018) (discussing the meaning of diversity within corporate governance).

to focus mostly on gender.[4] The re-emergence of the Black Lives Matter movement following the murder of George Floyd has also brought attention to racial diversity in corporate boards.[5] This Article will show how the benefits of equality and corporate governance due to diversity on corporate boards are intertwined.

Before elaborating on these combined benefits of board diversity, it is necessary to mention that there is also a "business case" for board diversity; proponents of this business case attempt to show that diverse boards can be linked to increased profitability.[6] However, this is a very difficult link to prove, since a firm's profits are dependent on numerous factors. This problem is not unique to board diversity. The economic value of other corporate governance best practices, like independent directors, is also difficult to prove empirically, again because firm profits are dependent on various factors. Despite this difficulty, there is a continued reliance on the business case for board diversity, most likely because it is the easiest and most attractive way to "sell" board diversity to various groups.[7] This Article will not focus on the business case for diversity on boards nor the studies that have shown a correlation (positive or negative) between women directors and increased profits.[8]

Returning to the benefits of board diversity, the link between motivations for equality and motivations for corporate governance becomes clear when we think about what is meant by "corporate governance." Although the board's monitoring role is often the priority in large, public companies, corporate governance also

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4. *Id.* at 2.

5. *See* Gaurdie Banister, *How Black Lives Matter in Corporations—This Time Can Be Different*, CORPORATE BOARD MEMBER, https://boardmember.com/how-black-lives-matter-in-corporations-this-time-can-be-different/ [https://perma.cc/JM94-94FQ].

6. *See* Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795, 810–30 (2005) (using a cost-benefit analysis to argue that some business case rationales are flawed); *see also* McCann & Wheeler, *supra* note 2, at 557–73 (showing that the business rationale did not hold up based on an empirical analysis of FTSE 100 companies).

7. *See* Darren Rosenblum, *When Does Sex Diversity on Boards Benefit Firms*, 20 U. PA. J. BUS. L. 429 (2018) (critiquing corporate reliance on business case arguments for increasing board diversity).

8. *See, e.g.*, Akshaya Kamalnath*, Corporate Governance Case for Board Gender Diversity: Evidence from Delaware Cases*, 82 ALB. L. REV. 23, 28–29 (2018) ("The first wave of empirical literature on board gender diversity focused on the link between women directors and firm profits. However, the results of these studies are far from unequivocal, with some showing a positive correlation, others showing a negative correlation and still others showing no correlation.") (footnotes omitted).

involves providing both strategic guidance to management and access to various resources and networks.[9] Drawing from these functions, the Organization for Economic Co-operation and Development defines corporate governance as follows:

> Corporate governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.[10]

The emphasis on the board's monitoring role means that the benefits to corporate governance from diversity are understood as an improvement in the board's monitoring function.[11] Thus, the argument that diverse candidates, by bringing in different perspectives, do a better job of assisting the board in questioning and monitoring management has rightly gained ground.[12] However, the fact that boards also guide management, especially in times of crisis, means that boards should be attuned to the needs of various stakeholders.

Similarly, diverse candidates might also allow companies to access social networks that they might not otherwise be able to access.[13] The equality rationale mainly seeks to address the problem of qualified women and other minority groups being unable to access board positions as a result of conscious or unconscious bias.[14] However, this rationale could be expanded further to incorporate the idea that diverse boards would be better able to

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9. OECD, G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE 13, 45 (2015), https://www.oecd-ilibrary.org/docserver/9789264236882-en.pdf?expires=1593925258&id=id&accname=guest&checksum=06E9199088BE18A42F2D9F92B476C436 [https://perma.cc/9QXK-DJNP].

10. *Id.* at 9.

11. *See* Kamalnath, *supra* note 8, at 23.

12. *See* Rene B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, 94 J. FIN. ECON. 291 (2009) (finding that female directors enhance monitoring); *see, e.g.*, Michal Barzuza, *Proxy Access for Board Diversity*, 99 B.U. L. REV. 1279, 1284 (2019) (arguing that diversity can increase board accountability because "[d]iversity is likely to increase board turnover, independence, and monitoring functions").

13. *See* Debbie A. Thomas, *Bias in the Boardroom: Implicit Bias in the Selection and Treatment of Women Directors*, 102 MARQ. L. REV. 539, 559–60 (2018) (noting that board members have a tendency to recruit new members from a homogenous, small, and personal network instead of from a more diverse pool of individuals).

14. McCann & Wheeler, *supra* note 2, at 550 ("[I]n a world where rights to gender equality are seen as a basic human right there can be no case for exclusion."); *see also* Thomas, *supra* note 13 (discussing the role of implicit bias in preventing women from obtaining board positions).

guide management with regard to problems concerning various stakeholder groups. Although not theorized in this manner, we see in practice that companies and the general public react to a crisis involving the mishandling of sexual harassment claims by adding a woman director,[15] or to racial injustice issues by calling for a Black director.[16] While some of these may be ill-advised knee-jerk reactions, which could impose heavy burdens on minority directors, these early stirrings indicate that the rationales for equality and corporate governance are connected.

Therefore, diversity can strengthen boards in many ways, as long as all stakeholders are aware of and guard against issues like tokenism, stereotyping, and overburdening diverse members on the board. This Article proposes a model that will address each of these issues. Part I will outline the issues with the current monitoring board model and examine some of the fixes and alternatives that have been proposed. Part II will discuss the diversification of boards, showcasing the promise this could have for companies but also exploring the potential issues that could impact companies and diverse candidates. Part III will then propose a model that relies on third-party intermediaries to service companies, diverse board members, and eventually other stakeholders. This Article will conclude with some thoughts about future research on this topic.

I. The Current Monitoring Board – Problems and Solutions

The board of directors has three functions: to provide strategic advice,[17] bring valuable resources in the form of expertise and access to networks,[18] and monitor management.[19] Although the board of directors is generally required to run the company, it became apparent by the 1970s that, for large, public companies, the board of directors would not be involved in the day-to-day

15. *See, e.g.*, Michelle Meyers, *Arianna Huffington Becomes Uber's First Female Board Member*, CNET (Apr. 27, 2016), https://www.cnet.com/news/arianna-huffington-becomes-ubers-first-female-board-member/ [https://perma.cc/Y9YH-DE9V] ("[Huffington's] addition to Uber's board comes as the company . . . faces an outcry over its record of passenger safety, particularly for women.").

16. *See* Banister, *supra* note 5.

17. Jill E. Fisch, *Taking Boards Seriously*, 19 CARDOZO L. REV. 265, 267 (1997).

18. Lynne L. Dallas, *The Relational Board: Three Theories of Corporate Boards of Directors*, 22 J. CORP. L. 1, 10 (1996).

19. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 308 (1976) (noting that the monitoring model of the board is based on agency theory).

management.[20] As a result of this change, Professor Melvin Eisenberg proposed that boards take on a stronger monitoring role.[21] He proposed that the board's primary functions were to supervise, monitor, and select executive management.[22] In order for boards to perform these functions effectively, Eisenberg believed that laws should ensure that boards are independent of the executives they monitor and that they receive adequate and objective information, which would enable them to properly execute their monitoring function.[23]

Based on the recommendations of Eisenberg and a few others,[24] the American Law Institute (ALI) sought to enhance the monitoring, or oversight, function of the board in a draft of its 1984 Principles of Corporate Governance.[25] Ultimately, the Principles were published with a focus on increasing the number of independent directors on the board rather than making any substantive changes to the content of directors' duties.[26] Such a focus on independent directors has now been adopted in almost all of Delaware's jurisdictions.[27] This idea has been stamped into U.S. corporate law through the rules of the Securities and Exchange Commission (SEC) and the stock exchanges, NYSE and NASDAQ, which require public corporations to have a majority of independent directors on the board and on many board committees.[28]

The independent-director model has, however, come under increasing scrutiny, especially after the global financial crisis, in which large companies with a majority of independent directors failed to adequately monitor their management.[29] The main

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20. *See* George W. Dent Jr., *The Revolution in Corporate Governance, the Monitoring Board, and the Director's Duty of Care*, 61 B.U. L. REV. 623, 623, 625 (1981).

21. EISENBERG, *supra* note 1, at 162–68.

22. *Id.* at 162, 168.

23. *Id.* at 170.

24. Dalia Tsuk Mitchell, *The Import of History to Corporate Law*, 59 ST. LOUIS U. L. J. 683, 688–90 (2015).

25. PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 3.04 (AM. L. INST. 1984) (tentative draft No. 2).

26. Mitchell, *supra* note 24, at 690.

27. *Id.* ("Fully embracing the model as a structural rather than substantive one, the Delaware courts focused on the role of the independent directors.").

28. Robert Charles Clark, *Corporate Governance Changes in the Wake of the Sarbanes-Oxley Act: A Morality Tale for Policy Makers Too*, 22 GA. ST. U. L. REV. 251, 282–88 (2006).

29. *See, e.g.*, Theodore N. Mirvis & William Savitt, *The Dangers of Independent Directors*, 40 DEL. J. CORP. L. 481 (2016); *see also* Claire A. Hill & Brett H. McDonnell, *Reconsidering Board Oversight Duties After the Financial Crisis*, 2013

criticism is that independent directors are unable to act *truly* independently of the CEO, and are therefore unable to effectively monitor management.[30] One explanation for this failure is that independent directors often belong to the same social circles as the CEO, making them sympathetic to the CEO and unlikely to challenge a course of action suggested by the CEO.[31]

Even if independent directors were able to truly be independent of management, independent directors usually lack firm-specific commitment to their companies.[32] Beyond the global financial crisis, scholars have analyzed isolated corporate scandals and concluded that independent directors are so over-committed that they are unable to adequately monitor management.[33] Independent directors are reliant on the CEO for information about the company, which makes it difficult for independent directors to effectively oversee management.[34] Even when they are provided with all of the relevant information, independent directors are often unable to digest vast amounts of information because they hold multiple board memberships and are often themselves executives and CEOs of other companies.[35]

Following the acknowledgement of these deficiencies in the monitoring model of the board, with independent directors as the sharpest tools in the box, it is natural that scholars and companies have been looking for alternatives. At one extreme is the proposal by Professors Bainbridge and Henderson, who propose that the job of boards may be altogether outsourced to external service providers, such as law firms and auditing firms.[36] However, this proposal has not had much practical uptake even outside the United

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U. ILL. L. REV. 859, 874–75 (2013) (arguing that financial catastrophes, such as those at the center of *In re Goldman Sachs* and *In re Citigroup*, show that companies need to better monitor information, control, and risk management systems to avoid liability).

30. *See, e.g.*, Erica Beecher-Monas, *Marrying Diversity and Independence in the Boardroom: Just How Far Have You Come, Baby?*, 86 OR. L. REV. 373 (2007).

31. Fisch, *supra* note 17, at 270.

32. Mirvis & Savitt, *supra* note 29, at 487–88.

33. Jeremy C. Kress, *Board to Death: How Busy Directors Could Cause the Next Financial Crisis*, 59 B.C. L. REV. 877, 918 (2018).

34. *E.g.*, DAVID F. LARCKER & BRIAN TAYAN, NETFLIX APPROACH TO GOVERNANCE: GENUINE TRANSPARENCY WITH THE BOARD 1 (2018) (discussing the "information gap" between management and boards that arises as a result of board members not being actively involved with daily operations).

35. Akshaya Kamalnath, *The Perennial Quest for Board Independence: Artificial Intelligence to the Rescue*, 83 ALB. L. REV. 43, 49 (2019).

36. Bainbridge & Henderson, *supra* note 1, at 1072.

States, particularly in countries where corporations are not prohibited from being board directors.[37]

An alternative model, which has come out of innovative practices at Netflix (the Netflix Model), proposes that directors have better access to information.[38] This model includes two practices not seen in the traditional board model. The first practice is that directors regularly attend monthly and quarterly senior management meetings, albeit in an observational capacity.[39] The second practice is that board communications are "structured as approximately 30-page online memos in narrative form that not only include links to supporting analysis but also allow open access to *all data and information* on the company's internal shared systems, including the ability to ask clarifying questions of the subject authors."[40] These communications are then "shared with the top 90 executives as well as the board."[41] The CFO of Netflix explains the second practice as follows:

> [The board memo] is part of the evolution from a presentation culture to a memo-based culture [internally across the company]. Once you have the ability to effectively write collaboratively, you can then graduate to a memo that is collaboratively written . . . .The central coordinator, if there is one, is likely Reed [Hastings, the CEO of Netflix] himself or my Financial Planning & Analysis group. Or, for each of the areas that are writing these deeper memos, they have the C-level owner take responsibility for that.[42]

A third practice that some companies might claim to have, although uncommon, involves a board culture steeped in amenable collaboration. One board member describes this culture as follows:

> Reed [Hastings] has always been masterful at hiring really good people, pushing decision making to those people, and not micromanaging. Letting decisions roll up and be debated rather than micromanaged. That style, that kind of management philosophy rolls up into the board meetings where any one of the members of [the CEO]'s staff can comment or disagree, or take questions from any of us around the table and answer them openly.[43]

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37. The lack of reporting on the outsourcing of board services indicates that it has likely not yet occurred; should a company outsource its board services, there would most likely be ample reporting of the matter.

38. LARCKER & TAYAN, *supra* note 34, at 1.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 3 (first and second alterations in original).

43. *Id.* at 3–4.

Another board member says that "the overall tone Reed has set, really from early days, is around transparency . . . . There is no editorializing. There's no censorship."[44]

Although the directors talk about the quality of board members, the striking point about culture that comes from these comments (quoted above) is that both board members and the management staff are free to disagree, ask questions, and voice their own ideas.[45] This underlines the important role the CEO plays in setting the tone and culture, not only for the board of directors, but also for members of the management team.[46] This open culture is crucial for Netflix's practices of facilitating information flow through board attendance at management meetings and the thirty page memos provided to the board pre-meeting. It is questionable whether the Netflix Model can be adopted in its entirety by larger companies with numerous management teams. Board members would be grossly over-extended if they were required to attend *all* management meetings for large companies. Some aspects of the Netflix Model, however, should be encouraged in larger companies, particularly the CEO facilitating a culture of openness and freethinking in the board and management teams.

Ronald J. Gilson and Jeffrey N. Gordon provide an additional alternative to the current monitoring board model: they call it the "Board 3.0" Model, and propose that board members are "*thickly informed*, *well-resourced and highly motivated*," similar to the private equity model.[47] Calling the initial advisory model of the board, "Board 1.0," and the next monitoring model of the board, "Board 2.0," Gilson and Gordon explain that two developments since the adoption of the Eisenberg model required a change in board models: (1) the switch to majoritarian, institutional ownership of most large public companies, and (2) the rise of hedge funds.[48] These developments indicate that management is being challenged by activist investors, and Gilson and Gordon argue that the board should be able to either defend management against such attacks

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44. *Id.* at 4.

45. *Id.* at 3–4.

46. The idea of management setting the tone at the top is often used in the context of corporate culture. *See, e.g.*, Alfredo Contreras, Aiyesha Dey & Claire Hill, *Tone at the Top and the Communication of Corporate Values: Lost in Translation*, 43 SEATTLE U. L. REV. 497 (2020).

47. Ronald J. Gilson & Jeffrey N. Gordon, *Boards 3.0: An Introduction*, 74 BUS. L. 351, 353 (2019).

48. *Id.* at 352–53.

or, where appropriate, insist that management take the challenges seriously.[49]

Like other critics of the current monitoring model, they also believe that Board 2.0 directors were not strong enough on oversight of the company's strategy and operational performance because of both time constraints and dependence on the CEO for information.[50] These issues led Board 2.0 directors to rely on stock prices to evaluate management.[51] To overcome these issues, Gilson and Gordon proposed the Board 3.0 Model, in which "directors could credibly *to themselves* and to majoritarian owners assert that the stock price is missing a critical element of expected future realizations."[52] They see the Board 3.0 Model as mirroring the private equity model, which charges the board with a mix of monitoring and operational roles.[53]

> [A] Board 3.0 . . . is a board that contains a mix of directors on the current Board 2.0 model and "empowered" directors ("3.0 directors") who would specifically be charged with monitoring the strategy and operational performance of the management team. The 2.0 directors would serve, as now, on compliance-focused committees and otherwise take on the board's responsibilities, especially serving on "special committees" as necessary. The 3.0 directors would serve on an additional committee, the "Strategy Review Committee." Those directors would be supported by an internal "strategic analysis office" that would provide back-up support for a 3.0 director's engagement with the management team. If additional support was necessary, the 3.0 directors could engage outside consultants.[54]

Gilson and Gordon also address the issue of independent directors not being able to operate independently of management by proposing that Board 3.0 directors should have limited terms so that they are not "captured" by management.[55] While the compensation structure for independent directors is an important issue,[56] this Article will not focus on it because effective monetary incentives alone are not enough to address the main issues plaguing

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49. *Id.* at 353.
50. *Id.* at 356.
51. *Id.*
52. *Id.* at 357.
53. *Id.* at 359.
54. *Id.* at 361.
55. *Id.*
56. Gilson & Gordon, *supra* note 47, at 361 (proposing that the 3.0 directors within their new board model would be paid mainly through long-term stock compensation to incentivize them to enhance value creation for the company).

the current monitoring board model (i.e., directors being poorly informed).[57] Importantly, the Board 3.0 Model is currently hypothetical and is something that companies might experiment with in the future.[58] However, a voluntary pivot to this model is unlikely because companies would need to overcome status quo bias.[59] In any case, the take-home message of the Board 3.0 Model is that there are elements of the monitoring model that are worth retaining, but other elements relevant to the advisory model of the board are worth introducing.

The next proposal to fix the problems of the current monitoring model of the board comes from Faith Stevelman and Sarah Haan, who have suggested some "relatively low-cost, low-risk changes" that they believe would "improve boards' ability to deliver on the promise of improved corporate governance."[60] Their proposal consists of eight points: (1) separation of the CEO's and the Chair's roles; (2) being transparent about the CEO's involvement in the director search process; (3) increasing board diversity; (4) a non-binding expectation that director terms would be limited to a certain number of years; (5) the professionalization of directors via credentialing as in the case of doctors and lawyers; (6) board self-evaluation with the board chair, using these surveys to gauge the directors' understanding of the company's interests and also in the director selection process; (7) the creation of an informational infrastructure (similar to the one adopted by the Netflix Model, but different than directors actually being present at management meetings) that lets information flow directly to the board, rather than through the CEO;[61] and (8) designing internal codes of conduct and structuring compensation packages to ensure that there is a reciprocal duty of candor between directors and the CEO.[62] All of these points, like the other proposals, seek to address the main deficiencies in the current monitoring model of the board.

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57. *Id.* at 353 ("On the present board model, well-meaning directors are nonetheless thinly informed . . . .").

58. Although there is no evidence to suggest that companies are pursuing the Gilson and Gordon model, the authors' original goal was to create an experimental model following the previous experiment, Board 2.0. *Id.* at 354.

59. *Id.* at 361–62 (detailing the costs of implementing the Board 3.0 model, including friction against the company's current strategy).

60. Faith Stevelman & Sarah C. Haan, *Board Governance for the Twenty-First Century*, 74 BUS. L. 329, 338 (2019).

61. See Faith Stevelman & Sarah C. Haan, *Boards in Information Governance*, 23 U. PA. J. BUS. L. 179 (2020), for a detailed discussion of this point.

62. Stevelman & Haan, *supra* note 60, at 338–48.

Another potential avenue is Bainbridge and Henderson's Board Service Providers (BSP) Model, a provocative wake-up call that argues boards are not doing what they are supposed to be doing. However, the BSP Model itself will require us to re-imagine where decision-making should rest in corporate law. If the corporation is bound to decisions made by an external firm that is providing board services, then the incentives underpinning such a model would need to be examined in great detail before adopting it.[63] External audit firms have failed to detect fraud in many instances,[64] and it is not clear why a similar model would not give rise to similar failures for BSP firms. On the other hand, the Board 3.0 Model offers an interesting model that firms *might* adopt, although it would require companies to invest resources in restructuring their boards into this model.[65]

This Article will propose a model that uses diversity to strengthen boards, while also ensuring that the diverse board candidates are not over-burdened. Additionally, it will draw on and develop further some aspects of Stevelman and Haan's proposal, particularly those relating to diversity, professionalization, board evaluations, and the director selection process, as well as ideas that emerged from the Netflix Model. The model proposed in Part III of this Article will rely on third-party intermediaries (i.e., executive search firms and other organizations providing supplemental services to the board).

II. The Promise of Diversity – Addressing Both Sides of the Market

Board diversity is often expected to solve corporate governance and workplace equality problems as if it were fairy dust.[66] In reality, although diversity certainly comes with its benefits, if not properly implemented, it may impose costs on both companies and the

63. *See* Gilson & Gordon, *supra* note 47, at 364 (distinguishing the Board 3.0 model from the BSP model); *see also* Stevelman & Haan *supra* note 60, at 330–38 (critiquing the BSP model and the incentives it creates).

64. See *Accountancy Giants Face Revamp Amid Criticism*, BBC NEWS (Jul. 6, 2020), https://www.bbc.com/news/business-53307572 [https://perma.cc/W3ZV-2347], for a recent example.

65. Gilson & Gordon, *supra* note 47, at 361–63 (discussing the compensatory and reputational costs associated with implementing the Board 3.0 model).

66. *See* Fairfax, *supra* note 6 (evaluating the harm done by poor implementation of board diversity efforts despite an apparent increase in board diversity).

diverse board candidates being appointed.[67] In this Part, the Article will consider diversity from both sides of the market (i.e., companies on one side and the diverse board members, usually women and members of racial minority groups, on the other).

Companies want to see how their boards may be strengthened by diversity. The discussion in Part I makes it apparent that one of the major problems with the existing board model is the overemphasis on the monitoring function.[68] Another major problem is that the current model has not been successful in fulfilling the monitoring role due to informational disadvantages, a lack of true independence from the CEO, and the inability to exercise independence where it exists.[69] Simply adding diverse candidates to the board will not solve all of these problems. Thus, any proposal to strengthen boards through diversity should be complemented by various other mechanisms, as Stevelman and Haan have done.[70]

As a first step, the benefits of diversity to both the monitoring and operational functions of the board should be explored. The idea that diverse boards are better at monitoring upper management flows partly from the assumption that diverse candidates are more likely to come from different social circles and hence will not hesitate to question management.[71] Furthermore, it is assumed that diverse candidates will bring with them different life experiences, which in turn helps them provide alternative perspectives to the board discussion.[72] The hope is that these different perspectives will help overcome "groupthink," when members of a cohesive group, striving for unanimity, are unable to realistically appraise alternative courses of actions.[73] However, as

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67. *Id.* at 853–54 (concluding that justifying board diversity through business rationales alone may promote unrealistic expectations of business performance and marginalize diverse board members).

68. Most of the problems with the current model stem from the apparent necessity for boards to monitor corporate performance. *See supra* Part I.

69. *See* Stevelman & Haan, *supra* note 61, at 180, 243, 262. This combination of informational disadvantage and inability to exercise director independence exacerbates all the more the problems stemming from the overemphasis of the monitoring function.

70. *See* Stevelman & Haan, *supra* note 60.

71. Nanette Fondas, *Women on Boards of Directors: Gender Bias or Power Threat?*, *in* WOMEN ON CORPORATE BOARDS OF DIRECTORS: INTERNATIONAL CHALLENGES AND OPPORTUNITIES 172–73 (Ronald J. Burke & Mary C. Mattis eds., 2000) (referring to researchers suggesting that "more varied personal and professional backgrounds" of women contributed to more influence over management decisions).

72. AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY 157 (2015).

73. *See* Akshaya Kamalnath, *Gender Diversity as the Antidote to Groupthink on*

the interviews of board members of Netflix demonstrate, it is not common for a board to have a culture where dissentient views are encouraged.[74] Relying on diverse board members to overcome a board culture that discourages alternate viewpoints as a means of enhancing the board's monitoring function puts an unreasonable burden on these members.[75]

There is a range of empirical studies showing the impact that women directors have on a number of proxies for monitoring.[76] For instance, in an oft-cited study, Renee B. Adams and Daniel Ferreira found that women directors enhance monitoring.[77] However, evidence suggests that gender diversity had beneficial effects *only* in companies where additional monitoring is required.[78] Thus, the impact of women directors seems to depend on the needs on each firm. In the context of mergers and acquisitions, one study found that women directors were less acquisitive than their male counterparts when pursuing deals.[79] On the other hand, a different study, focusing on banks, found evidence to suggest that more women on boards would not necessarily lead to less risk being taken by banking companies.[80] Since these studies are not unequivocal, this Article will not rely on the empirical literature.[81] Unfortunately, there are not as many studies on the impact of race or other forms of diversity on board monitoring.[82]

It is, however, worth noting that in a qualitative study of Delaware cases examining whether gender diversity improves

Corporate Boards, 22 DEAKIN L. REV. 85 (2017).

74. Larcker & Tayan, *supra* note 34, at 1.

75. *See* DHIR, *supra* note 72, at 147–72 (concluding from interviews of directors in Norway that the introduction of women directors enhanced board processes).

76. *See* Deborah H. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377 (2014) (analyzing multiple studies on board diversity).

77. Renee B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, 94 J. FIN. ECON. 291, 292 (2009).

78. *Id.* at 292, 307.

79. Maurice Levi, Kai Li & Feng Zhang, Men are from Mars, Women are from Venus: Gender and Mergers and Acquisitions 4, 20 (Nov. 2011) (unpublished manuscript) (on file with the American Economic Association), https://www.aeaweb.org/aea/2012conference/program/retrieve.php?pdfid=191.

80. Renee B. Adams & Vanitha Ragunathan, Lehman Sisters 8 (Sept. 3, 2015) (unpublished manuscript) (on file with SSRN), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2380036.

81. See Kamalnath, *supra* note 8, for a summary of empirical studies specifically linking diversity to the board's monitoring function.

82. This illustrates a limit on the current research of the impact board diversity has on corporate performance. More research needs to be done to properly evaluate the likely beneficial impact diversity has on governance.

corporate governance, this author found that in some cases where the company had women directors, their decision-making was not very different from their male counterparts.[83] This is probably because the women had C-Suite experience and as a result did not bring with them a remarkably different perspective, at least in the context of the acquisition the decisions were about.[84]

In another case, two newly appointed directors, not diverse in terms of gender, questioned the board's decision not to fire the CEO in the face of a crisis.[85] This was possibly attributable to the fact that they were newly appointed to the board after the company had already received negative publicity.[86] Thus, board members who belong to different social groups/networks and newly appointed directors are likely to be better monitors, irrespective of their gender or race. This adds weight to the adoption of soft term limits for board directors, which was part of Stevelman and Haan's proposal.[87]

The same study of Delaware cases also found that when the same person held both the position of CEO and board chair, the board's ability to monitor management effectively was impaired.[88] This is again consistent with Stevelman and Haan's proposal.[89] However, the study goes on to note that the CEO and his "inner circle," all of whom were male and had worked together for a long time, within the management team seemed to be aware of and involved in the illegal activities carried on in the company.[90] This indicates the need for diversity within management teams and executive directors as well.[91] Furthermore, as the interviews of the Netflix directors show, the CEO must prioritize a culture within both the board and management teams that allows open discussion and transparency.[92]

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83. Kamalnath, *supra* note 8, at 115.

84. *Id.*

85. *Id.* at 113.

86. *Id.* at 116.

87. Stevelman & Haan, *supra* note 60, at 343; *see also* Yaron Nili, *The "New Insiders": Rethinking Independent Directors' Tenure*, 68 HASTINGS L.J. 97 (2016) (proposing that the increase in average director tenure is a direct response to independence requirements that lead companies to seek new directors).

88. Kamalnath, *supra* note 8, at 116.

89. Stevelman & Haan, *supra* note 60, at 343.

90. Kamalnath, *supra* note 8, at 80, 116–17.

91. *Id.* at 80; *see also* Afra Afsharipor, *Bias, Identity and M&A*, 2020 WIS. L. REV. 471, 484–85 (2020) (observing that increased gender diversity on boards is associated with "more vigorous board monitoring").

92. Larcker & Tayan, *supra* note 34, at 4.

Thus, while diverse directors are valuable, that diversity should not be restricted to independent directors. Liminality (i.e., outsider status) also plays an important role in monitoring ability, so periodic board refreshment is necessary.[93] Finally, the CEO should be invested in improving the board and top management culture. Such changes will help facilitate the free flow of information from management to the board and advice from the board to management.[94] The question then is how companies, and more specifically CEOs, may be incentivized to introduce such changes. The model proposed in Part III below seeks to address this.

The other side of the market consists of the diverse potential board and top management members. Women and members of minority racial groups will be the main focus of this discussion, but there will be some mention of members from different experiential backgrounds. While a lot of literature has been devoted to how diversity benefits companies,[95] not nearly as much literature has focused on why diverse candidates might want to serve as board directors or even remain in the workforce in executive roles.

Often businesses and law firms lament that the pool of diverse candidates is too shallow,[96] but recent diversity databases show that this is simply not the case.[97] Instead, it is likely that women and minority candidates are opting out of workplaces where racism, sexism, bullying, and discrimination are prevalent.[98] Similarly, potential board members would likely want to opt out of boards where they are merely hired as tokens to signal that the company cares about diversity, rather than as members whose contributions are valued. In one study, women directors said that they were not treated as full members of the group and that "many male directors seem unaware that they may create hostile board cultures, fail to listen to female directors or accept them as equals, and require them to continually reestablish their credentials."[99]

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93. Kamalnath, *supra* note 8, at 26.

94. *Id.* at 110–11.

95. *See* Kamalnath, *supra* note 8.

96. *See* Eli Wald, *In-House Myths*, 2012 WIS. L. REV. 407, 456 (2012).

97. *See, e.g.*, Derek T. Dingle, *Power in the Boardroom: Registry of Black Corporate Board Members*, BLACK ENTER. (Sept. 18, 2018), https://www.blackenterprise.com/registry-black-corporate-board-members-2018/ [https://perma.cc/X3D4-9QDS].

98. Cheryl L. Wade, *Gender Diversity on Corporate Boards: How Racial Politics Impedes Progress in the United States*, 26 PACE INT'L L. REV. 23, 34 (2014).

99. Boris Groysberg & Deborah Bell, *Dysfunction in the Boardroom*, HARV. BUS. REV. (June 2013), https://hbr.org/2013/06/dysfunction-in-the-boardroom

There is also the issue of "glass cliffs," in which women and racial minorities are appointed only when a company is facing a crisis.[100] In any kind of crisis, but especially when the crisis involves an issue of sexual harassment or unaddressed racism, a newly appointed director who is a woman or a member of a racial minority faces more scrutiny. For instance, when Ariana Huffington was appointed to the board of Uber after the allegations of sexual harassment created a reputational crisis for the company, some news articles discussed her appointment with negative undertones.[101] Similarly, in response to the Black Lives Matter movement, Reddit appointed a Black director to their board.[102] Especially with appointments that are made in response to high publicity events about company-specific or systemic injustices, it becomes increasingly important for these diverse candidates to be able to make informed assessments about the culture of the board and the wider company.

Being part of a board that does not in fact facilitate discussions of different perspectives means that diverse candidates will likely be unable to truly influence the board's decisions.[103] Further, to have an impact on issues like harassment and discrimination, directors need to perform both monitoring and advisory roles. It is then important to know whether the CEO and board culture facilitates such involvement. Such information will allow board candidates to assess whether they will be able to make a real contribution to the company. This is particularly important for diverse candidates who are hired in the context of social pressure

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[https://perma.cc/ZGK7-HGRJ].

100. Douglas M. Branson, *Pathways for Women to Senior Management Positions and Board Seats: An A to Z List*, 2012 MICH. ST. L. REV. 1555, 1568 (2012); Terry Morehead Dworkin, Aarti Ramaswami & Cindy A. Schipani, *A Half-Century Post-Title VII: Still Seeking Pathways for Women to Organizational Leadership*, 23 UCLA WOMEN'S L.J. 29, 46 (2016).

101. *See, e.g.*, Katerina Ang, *Can Arianna Huffington Help Uber Recover from Sexual Harassment Claims?*, MARKET WATCH (Mar. 24, 2017), https://www.marketwatch.com/story/can-arianna-huffington-help-uber-recover-from-sexual-harassment-claims-2017-03-24-9884450 [https://perma.cc/246D-RVZR].

102. Isabel Togoh, *Michael Seibel Becomes Reddit's First Black Board Member After Alexis Ohanian's Resignation*, FORBES (June 10, 2020), https://www.forbes.com/sites/isabeltogoh/2020/06/10/michael-seibel-becomes-reddits-first-black-board-member-after-alexis-ohanians-resignation/#5e551498430a [https://perma.cc/9J7X-J6MG].

103. Dirk-Jan Van Veen, Ravi S. Kudesia & Hans R. Heinimann, *An Agent-Based Model of Collective Decision-Making: How Information Sharing Strategies Scale With Information Overload*, 7 IEEE TRANSACTIONS ON COMPUTATIONAL SOC. SYS. 751, 765 (2020) (finding that diversity alone will not improve decision-making in a team if the team cannot "leverage the wisdom of disagreement").

resulting from social movements like #MeToo and Black Lives Matter, since the expectation seems to be that these candidates will help address problems of sexism and racism within the firm. If candidates are in fact able to make such assessments, then companies will also be incentivized to pay attention to these issues in order to attract more diverse candidates. This presents the issue of how a potential director may be assisted in making these assessments accurately. This will be addressed in the model proposed in Part III below.

What this Part II has described is a classic two-sided market where companies want to appoint diverse candidates, either to signal their commitment to social issues or to genuinely improve governance, and diverse candidates want the ability to accurately assess boards before joining them. As the next Part will show, third-parties providing supplemental board services, like board evaluations and executive and director search functions, are well-suited to service this two-sided market. In doing so, shareholders and other stakeholders stand to gain as well.

III. Reliance on Third-Party Intermediaries

Third-party providers of supplemental board services like executive and director searches and board evaluations are already being used by companies.[104] Omari Scott Simmons notes that executive search firms act as intermediaries in the labor market for executive talent since they facilitate transactions between companies and potential executives.[105] The executive search firms are able to fill information gaps between these two parties; however, as any third-party involvement naturally does, they do come with costs.[106] The fact that companies are using them indicates that the benefits exceed any costs.[107] For diverse candidates, the benefits are even more valuable, and the costs presumably stay the same, making acceptance of the costs much easier.

Executive search firms not only "research, identify, screen, interview, verify candidate qualifications, and engage in final offer negotiations," but also provide "leadership consulting, succession

104. *See* Omari Scott Simmons, *Forgotten Gatekeepers: Executive Search Firms and Corporate Governance*, 54 WAKE FOREST L. REV. 807 (2019).

105. *Id.* at 815.

106. *Id.* at 816.

107. *Id.* at 817–19 (establishing that, amongst other things, the benefits to the company include signaling good governance practices and shifting accountability).

planning, and board assessment" services.[108] Interestingly, the larger executive search firms also offer "culture shaping."[109] Recently, one of the big executive search firms bought a leadership consulting firm to consolidate its "culture shaping" offering.[110] The use of these executive search firms appears to be extensive: within the director hiring process, executive search firms "on average recommended 22.7% of independent directors to the board."[111]

The recent emphasis on diversity in boards, coupled with pressure from social movements, indicates that executive search firms are likely to be used more frequently in the coming days.[112] According to the board search guiding principles of the self-regulating Association of Executive Search and Leadership Consultants (AESC), diversity is already one of the factors that executive search firms engage with during the board consultation process.[113] On the company's side, executive search firms work to manage unconscious bias, while at the same time preparing candidates by briefing them about the company's culture and strategy.[114] Relatedly, they also focus on board refreshment practices and succession planning.[115]

Executive search firms like the AESC also consult with boards to provide advisory services which include assessing board culture, creating an inclusive board culture, inducting new board members, improving the relationship between the CEO and the board, and clarifying the roles of the board, its committees, and its members.[116] Crucially, it also includes board evaluation services.[117] While board evaluation is not a new idea, most company boards only conduct a

108. *Id.* at 820.

109. *Id.* at 825–26.

110. *See Heidrick Buys 'Culture Shaping' Firm for $53 Million*, STAFFING INDUS. ANALYSTS (Jan. 3, 2013), https://www2.staffingindustry.com/site/Editorial/Daily-News/US-Heidrick-Buys-Culture-Shaping-Firm-for-53-Million-24168 [https://perma.cc/486L-9M3E].

111. Ali C. Akyol & Lauren Cohen, *Who Chooses Board Members?*, *in* ADVANCES IN FINANCIAL ECONOMICS 43, 14 (Emerald Publ'g Ltd. 2013).

112. *See* Ang, *supra* note 101; Togoh, *supra* note 102; Branson, *supra* note 100; Dworkin, s*upra* note 100; ASS'N OF EXEC. SEARCH AND LEADERSHIP CONSULTANTS, AESC BOARD SEARCH & ADVISORY SERVICES GUIDING PRINCIPLES 2–3 (AESC ed., 2016).

113. ASS'N OF EXEC. SEARCH AND LEADERSHIP CONSULTANTS, *supra* note 112.

114. *Id.* at 4.

115. *Id.* at 3.

116. *Id.* at 5.

117. *Id.*

self-assessment.[118] Outsourcing it to a third-party firm can bring objectivity into the process. Since these same third-party firms also act as intermediaries for director appointments, the evaluations can be used as an important metric for candidates to assess the company. Thus, executive search firms, through the range of supplemental board services they provide, are already acting as intermediaries between boards and candidates for board directorships.

To ensure that these intermediaries are efficiently serving both sides of the market, it is necessary for them to focus their evaluations of company culture on issues that diverse board members might find particularly challenging. As discussed earlier in this article, important questions like whether dissentient views are frowned upon, or whether board members have timely access to information,[119] should be included in the evaluation metrics. These issues speak to a board's culture and diverse directors will particularly value these metrics when making decisions. Even information about the companies' board refreshment policies and succession planning can be useful to potential candidates in assessing the culture of the board. The more refreshment there is, the more open the board is to hear from newer members.[120] These factors might also help candidates who fulfill other facets of diversity (e.g., those from a different experiential background) to decide whether to take on the board position.

Further, under the current monitoring board model—since diverse board members usually bear the burden of being appointed after a human crisis (e.g., harassment, bullying, etc.) within the company or a social movement drawing attention to systemic problems—diverse directors cannot afford to be as under-committed to the company as many other independent directors currently are. Eventually, greater involvement of diverse directors, coupled with pressure from intermediaries providing board advisory services, has the potential to change the expectations for all independent directors.

Even though executive search firms provide numerous advantages, it is not advisable for regulators to require companies to engage them for director nomination, board evaluation, and other

118. *See* N.Y. STOCK EXCH., LISTED COMPANY MANUAL SECTION 303A CORPORATE GOVERNANCE STANDARDS 1–14 (NYSE ed., 2004) (requiring companies to conduct self-evaluations at least annually).

119. Kamalnath, *supra* note 8, at 113, 118.

120. *Id.* at 118.

board advisory services. It is likely that mandating board evaluation exercises would result in tick-the-box compliance rather than genuine investment in the process.[121] A better approach would be the creation of a market driven process in which the demand for board diversity results in intermediary firms refining their board evaluation processes based on the needs of diverse candidates. That said, the informational needs of diverse candidates is an under-researched issue that needs to be highlighted. Once the importance of board evaluation reports and their positive link to board diversity is understood, institutional investors, many of whom are already active on the diversity agenda, will begin to engage with companies requiring disclosure of board evaluation reports on these lines. Executive search firms would be able to exclude confidential information and provide a version of the report that is easily digestible for outsiders. Proactive companies could even start to make these reports available on their company website so that they are available not only to potential board members and investors, but also to the wider society.

Conclusion

This Article has attempted to address board diversity and board effectiveness in conjunction, because the former has potential to address the latter. However, it is not as simple as adding some diverse directors to the board and expecting governance problems to be resolved. There are serious problems with the current monitoring model of the board and, while it may be tempting to assume that diversity is an easy fix, it is time to realize that diversity will only be useful when complemented by other measures. The model proposed in this Article offers a solution to help both companies and diverse directors.

This Article has also reviewed a number of new board models, some as drastic as outsourcing the board entirely.[122] It has reviewed and drawn from less drastic models, such as the one proposed by Stevelman and Haan[123] and the one already in use at Netflix.[124] The Board 3.0 Model offers a good blueprint for adoption by companies

121. *See* Luca Enriques & Dirk Zetzsche, *Quack Corporate Governance, Round III: Bank Board Regulation Under the New European Capital Requirement Directive*, 16 THEORETICAL INQUIRIES L. 211, 212 (2015).

122. Bainbridge & Henderson, *supra* note 1, at 1056.

123. *See* Stevelman & Haan, *supra* note 60.

124. *See* Larcker & Tayan, *supra* note 34.

and could work in conjunction with the intermediary model suggested in this article. The model proposed here is also significant because it emphasizes the needs of diverse board members, which has generally been an under-researched area in corporate governance. In future research, this author hopes to empirically support the model proposed in this Article by interviewing diverse directors about the factors they considered before joining company boards, as well as what factors they might consider in the future.

Building a Radical Shift in Policy: Modifying the Relationship Between Cities and Neighbors Experiencing Unsheltered Homelessness

Brigid Kelly†

Introduction

> I would hardly wish to deny that in an ideal world, all citizens would have the dignity and privacy made possible by having a private dwelling. In an ideal world, park benches would be spaces for relaxation and not beds; transit facilities and public libraries would not be places where people went to stay warm; and garbage would be undisturbed by those looking for scraps to eat. What I object to is the assumption that we live in the sort of world where we can reasonably expect these things and where we can judge those who use public spaces in this manner as people who lack civic sense. I object to perceptions of the destitute that reduce them to public nuisances who have no entitlements to be in or use public spaces, and who can be made to magically disappear by acts of legislative conjuring. What I object to are policy responses to the homeless that are motivated simply by the desire to remove them from public view . . . .[1]

More than half a million of our neighbors in the United States will experience homelessness tonight.[2] Nearly forty percent of those neighbors will spend the night unsheltered—on the street, in parks, or in other places not meant for human habitation.[3] Systemic

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1. Uma Narayan, *No Shelter Even in the Constitution? Free Speech, Equal Protection, and the Homeless*, *in* THE ETHICS OF HOMELESSNESS 206, 217–18 (G. John M. Abbarno, ed., 2d ed. 2020).

2. *State of Homelessness: 2021 Edition*, NAT'L ALL. TO END HOMELESSNESS, https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-2021/ [hereinafter *State of Homelessness*] [https://perma.cc/35RF-6AYG].

3. MEGHAN HENRY ET AL., U.S. DEP'T OF HOUS. & URB. DEV., THE 2019 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 1 (2019) [hereinafter 2019 AHAR].

discrimination,[4] a lack of viable shelter availability,[5] inaccessible healthcare,[6] a global pandemic,[7] and an affordable housing crisis[8] paint a grim picture of the fight for survival taking place in many communities throughout the United States. Further, as homelessness increases and housing resources become less accessible, a growing number of cities are adopting criminalization policies to formally and informally punish those experiencing homelessness[9] for doing life-sustaining activities like sitting or lying down,[10] loitering,[11] and storing property.[12] Local ordinances

4. *See, e.g.*, NAT'L L. CTR. ON HOMELESSNESS & POVERTY, RACISM, HOMELESSNESS, AND COVID-19 (2020), https://nlchp.org/wp-content/uploads/2020/05/Racism-Homelessness-and-COVID-19-Fact-Sheet-_Final_2.pdf [hereinafter RACISM, HOMELESSNESS, AND COVID-19].

5. *See* SAMANTHA BATKO, BARBARA POPPE, SARAH GILLESPIE, STEPHEN METRAUX, KATRINA BALLARD & MARY CUNNINGHAM, URB. INST., ALTERNATIVES TO ARRESTS AND POLICE RESPONSES TO HOMELESSNESS 5 (2020) ("Overall, the US does not have enough emergency shelter and transitional housing beds to provide housing to every person experiencing homelessness . . . .").

6. *See* Seiji Hayashi, *How Health and Homelessness are Connected—Medically*, ATLANTIC (Jan. 25, 2016), https://www.theatlantic.com/politics/archive/2016/01/how-health-and-homelessness-are-connectedmedically/458871/ [https://perma.cc/JJB8-5CEB].

7. *See, e.g.*, NAT'L ALL. TO END HOMELESSNESS, POPULATION AT-RISK: HOMELESSNESS AND THE COVID-19 CRISIS 1 (2020) ("$11.5 billion is necessary for 400,000 new shelter beds needed to accommodate everyone who is unsheltered and to ensure appropriate social distancing, and[ ]the creation of quarantine locations for the sick and exposed."); Tatiana Parafiniuk-Talesnick, *Winter is Coming, and Homeless People in Lane County Have Few Places to Go*, REG.-GUARD (Nov. 11, 2020), https://www.registerguard.com/story/news/2020/11/11/winter-coming-homeless-people-lane-county-have-few-places-go/6079879002/ [https://perma.cc/7R6C-AN7F] (discussing the shortage of shelter beds in Lane County, Oregon due in part to COVID-19 health guidelines).

8. *See* ANDREW AURAND, DAN EMMANUEL, DANIEL THREET, IKRA RAFI & DIANE YENTEL, NAT'L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES (2020) [hereinafter THE GAP].

9. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 11 (2019) [hereinafter HOUSING NOT HANDCUFFS] ("The results of our research show that the criminalization of homelessness is prevalent across the country and has increased in every measured category since 2006. . . . We also found a growth in laws criminalizing homelessness since . . . 2016.").

10. *See id.* at 13 (finding that 55% of cities have policies that prohibit sleeping or lying down in public, even though "every human being must occasionally rest [and] laws restricting sitting and lying down in public punish people experiencing homelessness for doing so").

11. *See id.* (reporting that a growing number of cities are adopting laws that prohibit loitering, loafing, and vagrancy—laws that are "[s]imilar to historical Jim Crow, Anti-Okie, and Ugly laws . . . [because these] discriminatory ordinances grant police a broad tool for excluding visibly poor and homeless people from public places").

12. *See id.* at 46 (explaining that Sacramento, California has a policy that makes it unlawful to "'store personal property, including camp paraphernalia' on any public property").

and law enforcement practices reflect the sentiment expressed by Uma Narayan: a desire to remove humans labeled as nuisances from the public landscape, even though these individuals have nowhere else to go.[13] As municipalities cite public health concerns and safety to justify the enforcement of such legislative mechanisms,[14] the result is a cycle of expensive, inhumane, and short-term responses that cause cities to engage in potentially unconstitutional activities[15] and inefficient resource allocation.[16] The policies ultimately cater to those with conventional property

13. Narayan, *supra* note 1; *see also* Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99, 102 (2019) ("Key drivers for the criminalization of homelessness are increasingly popular laws and policies that seek to expel visibly poor people from public space.").

14. *See, e.g.*, Ellen K. Boegel, *Are Health and Safety Laws Violating the Equal Rights of the Homeless?*, AMERICA (Feb. 7, 2019), https://www.americamagazine.org/politics-society/2019/02/07/are-health-and-safety-laws-violating-equal-rights-homeless [https://perma.cc/NZB5-J5CV] (explaining that municipalities use "[a]nti-camping and public nuisance laws" to protect public spaces, prevent the blockage of sidewalks and doorways, and decrease fire hazards); *see generally* HOUSING NOT HANDCUFFS, *supra* note 9, at 11 ("[Cities] often justify enforcement of criminalization laws based on alleged availability of emergency shelter beds. But emergency shelters are not available in every community with unhoused people, and even where shelters exist, they are generally full and routinely turn people away at the front door. Moreover, emergency shelters offer only temporary shelter—sometimes only for a single night at a time—and frequently require that people separate from their families, beloved pets, and/or their property upon entry, or subject themselves to religious proselytizing. Shelters may also discriminate on the basis of sexual orientation or gender identity, and/or fail to accommodate disability needs.").

15. *See, e.g.*, Martin v. City of Boise, 920 F.3d 584, 617 (9th Cir. 2019) (considering the Eighth Amendment, the court found that "as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter"); Lavan v. City of Los Angeles, 693 F.3d 1022, 1030 (9th Cir. 2012) ("[B]y seizing and destroying Appellees' unabandoned legal papers, shelters, and personal effects, the City meaningfully interfered with Appellees' possessory interests in that property."); Cash v. Hamilton Cty. Dep't of Adult Prob., 388 F.3d 539 (6th Cir. 2004) (finding that failing to provide notice of property destruction or opportunity to reclaim belongings violated due process rights).

16. *See* TRISTIA BAUMAN ET AL., NAT'L L. CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 9 (2019) [hereinafter NO SAFE PLACE] ("Criminalization is the most expensive and least effective way of addressing homelessness. A growing body of research comparing the cost of homelessness (including the cost of criminalization) with the cost of providing housing to homeless people shows that housing is the most affordable option. With state and local budgets stretched to their limit, rational, cost-effective policies are needed—not ineffective measures that waste precious taxpayer dollars."); Eric Tars, *Alternatives to Criminalization: The Role of Law Enforcement*, CMTY. POLICING DISPATCH, Dec. 2015, https://cops.usdoj.gov/html/dispatch/12-2015/alternatives_to_criminalization.asp [https://perma.cc/P4DS-9L8J] ("[A]rresting people for performing basic life-sustaining activities like sleeping in public takes law enforcement professionals away from what they are trained to do . . . .").

ownership and neglect those bearing the brunt of systemic injustices.[17]

While unsheltered homelessness should not be accepted as a permanent component to cityscapes[18]—and the ultimate goal should be to secure a stable and dignified housing option for all—the crisis of unsheltered homelessness is reaching a breaking point in need of new approach: cities must shift policy away from criminalization and towards practices that protect those experiencing unsheltered homelessness with minimum standards of habitability as special tenants in our community.[19]

While calling for such a fundamental shift in policy may seem radical, this Note seeks to show that it is possible by drawing a parallel between the unsheltered homelessness crisis of today, and the similarly dire crisis experienced by rental housing tenants through the 1960s.[20] When tenants' rights reached a breaking point after being pushed by horrendous rental housing conditions, inadequate municipal responses, and a significant power imbalance between tenants and landlords, the courts—and later legislatures—stepped in to force a shift away from the outdated, inefficient underlying policy of caveat emptor and towards the new implied warranty of habitability.[21] While tenants' rights are far from perfect today, the implied warranty of habitability, seen as "too radical to believe" shortly before its nearly universal adoption across the country, fundamentally redefined the landlord-tenant relationship

17. HOUSING NOT HANDCUFFS, *supra* note 9, at 15 ("Laws criminalizing homelessness are rooted in prejudice, fear, and misunderstanding, and serve businesses and housed neighbors over the needs of unhoused neighbors. It is critical for lawmakers, policy advocates, and other key stakeholders to understand the fundamental roots of laws criminalizing homelessness: ignorance of the causes of homelessness and deep-seated prejudice against and fear of people experiencing it.").

18. *See id.* at 23.

19. This Note contains intentional, people-first language that will contribute to a conversation that works towards humanizing and resists stereotyping homelessness. Therefore, the phrase "homeless person" is intentionally excluded from this Note. Instead, the phrase "person experiencing homelessness" is used to center a human condition, not an identity. *See* Anna Scott, *Rethinking the Language Around Homelessness*, KCRW (Mar. 27, 2019), https://www.kcrw.com/news/shows/press-play-with-madeleine-brand/changing-the-language-around-homelessness/rethinking-the-language-around-homelessness [https://perma.cc/K9EM-DD5Q] (describing people-first language as an approach that "focuses on the person, rather than their circumstance").

20. *See* Tova Indritz, *The Tenants' Rights Movement*, 1 N.M. L. REV. 1, 5 (1971) (explaining typical rental housing conditions at issue during the tenants' rights movement through the 1960s).

21. *See* Donald E. Campbell, *Forty (Plus) Years After the Revolution: Observations on the Implied Warranty of Habitability*, 35 U. ARK. LITTLE ROCK L. REV. 793, 794 (2013).

by creating a landlord obligation to provide safe and adequate housing.[22] Many neighbors currently experiencing unsheltered homelessness face circumstances analogous to those experienced by tenants prior to the adoption of the implied warranty of habitability: the outdated and inefficient underlying policies of criminalization create dire living conditions defined by inadequate municipal responses. The crisis of unsheltered homelessness has reached a breaking point similar to the one experienced by tenants. There must be a new policy approach that improves living conditions and fundamentally redefines the relationship between people experiencing homelessness and the cities in which they live.

Part I of this Note provides background information on homelessness as a humanitarian crisis, homelessness as a "wicked problem," and the characteristics of unsheltered homelessness. Part II argues that the crisis of unsheltered homelessness is at a breaking point, as city responses are hindered by the underlying weight of expanding criminalization policies that are costly, inefficient, and potentially unconstitutional. After providing background on the tenants' rights movement through the 1960s and early 1970s, Part III argues that the parallels between the tenants' rights movement and the crisis of unsheltered homelessness indicate that unsheltered homelessness is at a similar breaking point in need of a "revolutionary" shift in policy. Finally, using the framework provided by the tenants' rights movement leading to the implied warranty of habitability, Part IV articulates how cities could implement a "revolutionary" change to city obligations by implementing a policy shift away from criminalizing people experiencing unsheltered homelessness, and towards a special city tenancy with minimum standards of habitability. Part IV also acknowledges several of the challenges that would need to be overcome should such a policy shift be implemented.

I. Background: Homelessness as a Humanitarian Crisis

In September 2019, Los Angeles Mayor Eric Garcetti called homelessness the "humanitarian crisis of our lives" during an interview with National Public Radio.[23] The description is striking

22. Serge Martinez, *Revitalizing the Implied Warranty of Habitability*, 34 NOTRE DAME J.L. ETHICS & PUB. POL'Y 239, 251 (2020); *see also* Kathryn A. Sabbeth, *(Under)enforcement of Poor Tenants' Rights*, 27 GEO. J. ON POVERTY L. & POL'Y 97, 98–100 (2019) (discussing how many households throughout the country continue to reside in substandard rental housing that "constitute blatant violations of law" due, in part, to the underenforcement of "established legal rights").

23. National Public Radio, *LA Mayor Eric Garcetti Calls Homelessness The 'Humanitarian Crisis Of Our Lives'*, ALL THINGS CONSIDERED (Sept. 21, 2019),

when one considers the meaning of a humanitarian crisis: "[a] sudden event that includes high levels of suffering that puts basic human welfare in danger on a large scale,"[24] and even more striking knowing that such crises typically exist internationally, warranting bipartisan funding and personnel intervention from the federal government.[25]

A. Measuring Homelessness

To better understand the extent of the crisis, the Department of Housing and Urban Development (HUD) requires Continuums of Care (CoCs)—local planning entities—to conduct local Point-in-Time (PIT) counts, typically annually in January.[26] The PIT counts capture geographically-based layers of data about individuals and families experiencing homelessness.[27] The HUD definitions and data relevant to this Note are outlined in Table 1.

Table 1

HUD Definition of Homeless:

"(1) Individual or family who lacks a fixed, regular, and adequate nighttime residence, meaning:

(i) Has a primary nighttime residence that is a public or private place not meant for human habitation;

(ii) Is living in a publicly or privately operated shelter designated to provide temporary living arrangements (including congregate shelters, transitional housing, and hotels and motels paid for by charitable organizations or by federal, state and local government programs); or

(iii) Is exiting an institution where (s)he has resided for 90 days or less and who resided in an emergency shelter or place not meant for human habitation immediately before entering that institution."[28]

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https://www.npr.org/2019/09/21/763073646/l-a-mayor-eric-garcetti-calls-homelessness-the-humanitarian-crisis-of-our-lives [https://perma.cc/QQU7-CFSP].

24. JACOB QUINTANILLA, JESSE HARDMAN, MATT ABUD, ALISON CAMPBELL & DEBORAH ENSOR, INTERNEWS, REPORTING ON HUMANITARIAN CRISES: A MANUAL FOR TRAINERS & JOURNALISTS AND AN INTRODUCTION FOR HUMANITARIAN WORKERS 33 (2014).

25. *See* RHODA MARGESSON, CONG. RSCH. SERV., INTERNATIONAL CRISES AND DISASTERS: U.S. HUMANITARIAN ASSISTANCE RESPONSE MECHANISMS 2 (2015).

26. *See* 2019 AHAR, *supra* note 3, at 2.

27. *See id.* at 8–75.

28. U.S. Dep't. of Hous. & Urb. Dev., *Homeless Definition* (2012), https://files.hudexchange.info/resources/documents/HomelessDefinition_RecordkeepingRequirementsandCriteria.pdf.

Term	Definition	Relevant 2019 PIT Count Statistics
Chronic Homelessness	"[A]n individual with a disability who has been continuously homeless for one year or more or has experienced at least four episodes of homelessness in the last three years where the combined length of time homeless on those occasions is at least 12 months."[29]	96,000+ people experienced chronic homelessness.[30]
Sheltered Homelessness	"[P]eople who are staying in emergency shelters, transitional housing programs, or safe havens."[31]	356,422 people experienced sheltered homelessness on any given night.[32]
Unsheltered Homelessness	"[P]eople whose primary nighttime location is a public or private place not designated for, or ordinarily used as, a regular sleeping accommodation for people . . . ."[33]	211,293 people experienced unsheltered homelessness on any given night.[34] While unsheltered homelessness has decreased since 2007, "unsheltered homelessness has increased over each of the last four years" with a 9% increase from 2018 to 2019.[35]
Emergency Shelter	"[P]rovides temporary or nightly shelter beds to people experiencing homelessness."[36]	"Of the 389,549 beds dedicated to sheltering people currently

29. 2019 AHAR, *supra* note 3, at 2.
30. *Id.* at 4.
31. *Id.* at 2.
32. *Id.* at 8.
33. *Id.* at 3.
34. *Id.* at 8.
35. *Id.* at 9.
36. *Id.* at 76.

		experiencing homelessness, 75[%] were emergency shelters . . . ."[37]
Transitional Housing	"[P]rovides homeless people with up to 24 months of shelter and supportive services."[38]	"Of the 389,549 beds dedicated to sheltering people currently experiencing homelessness . . . 25[%] were in transitional housing programs . . . ."[39]
Safe Haven	"[P]rovides temporary shelter and services to hard-to-serve individuals."[40]	"Of the 389,549 beds dedicated to sheltering people currently experiencing homelessness . . . [l]ess than one percent (0.6%) of shelter beds were provided through safe havens."[41]

The PIT count also reveals that this humanitarian crisis significantly impacts people of color,[42] as "Black, Latinx, Native American, and Native Hawaiian and Pacific Islander compose a much larger percentage of the homeless population than they do the general population," and at a disproportionate rate when compared to white communities.[43]

37. *Id.* at 77.
38. *Id.* at 76.
39. *Id.* at 77.
40. *Id.* at 76.
41. *Id.* at 77.
42. *See* BATKO ET AL., *supra* note 5, at 3 ("That homelessness and its impacts disproportionately affect people of color is well-documented. Black and Indigenous people in particular are overrepresented among people experiencing homelessness overall and among people enduring unsheltered homelessness. . . . Asian Americans are underrepresented among people experiencing homelessness overall, but among those who do, nearly 50[%] are unsheltered.").
43. RACISM, HOMELESSNESS, AND COVID-19, *supra* note 4 (displaying a chart showing "Homeless and General Populations by Race and Ethnicity"); *e.g.*, L.A. HOMELESS SERVS. AUTH., REPORT AND RECOMMENDATIONS OF THE AD HOC COMMITTEE ON BLACK PEOPLE EXPERIENCING HOMELESSNESS (2018) [hereinafter AD HOC COMMITTEE ON BLACK PEOPLE EXPERIENCING HOMELESSNESS] (discussing racial inequities in homelessness, for example, "[i]n 2017, Black people represented only 9% of the general population in Los Angeles County yet comprised 40% of the population experiencing homelessness"); U.S. Dep't of Hous. & Urb. Dev., *Racial Equity*, HUD EXCHANGE, https://www.hudexchange.info/homelessness-assistance/racial-equity/#covid-19 ("African Americans accounted for 40[%] of all

The PIT count provides essential data and drives policy decisions at the federal, state, and local levels,[44] but the results are seen by many as flawed undercounts.[45] According to a report released by the National Homelessness Law Center, PIT count weaknesses can be caused by the primary methodology: CoCs typically deploy volunteers and homeless services professionals to conduct a visual count of the number of people experiencing homelessness.[46] If someone is unsheltered and is not in a visible location on the night of the PIT count—perhaps because law enforcement forced movement from a sidewalk to a dark alley—it is unlikely that they will be counted.[47] Therefore, individuals and families experiencing unsheltered homelessness, the focus of this Note, are likely undercounted—resulting in a less accurate understanding of the individuals sleeping in places not meant for human habitation on any given night.

B. Defining Homelessness as a Wicked Problem

In the late 1960s, scholars began wielding "wicked problem" as the label for difficult-to-define social problems that are "unstructured," tangled with other societal issues, and caused by amorphous factors.[48] The label added value to policy and academic conversations by recognizing that "the dynamic complexity of many

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people experiencing homelessness in 2019 and 52[%] of people experiencing homelessness as members of families with children, despite being 13[%] of the U.S. population. In contrast, 48[%] of all people experiencing homelessness were [W]hite compared with 77[%] of the U.S. population. People identifying as Hispanic or Latino (who can be of any race) are about 22[%] of the homeless population but only 18[%] of the population overall.").

44. *What is a Point-in-Time Count?* NAT'L ALL. TO END HOMELESSNESS (Sept. 7, 2012), https://endhomelessness.org/resource/what-is-a-point-in-time-count/ [https://perma.cc/D9PY-M8YJ]; *see* L.A. HOMELESS SERVS. AUTH., GREATER LOS ANGELES HOMELESS COUNT PRESENTATION 2 (2020) [hereinafter LAHSA 2020 HOMELESS COUNT PRESENTATION] (providing information on the 2020 Greater Los Angeles Homeless Count and the role the data plays to "locally . . . inform policies and strategies to end homelessness . . .").

45. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, DON'T COUNT ON IT: HOW THE HUD POINT-IN-TIME COUNT UNDERESTIMATES THE HOMELESSNESS CRISIS IN AMERICA 6 (2017) (outlining the flaws of the PIT count and citing "[a] 2001 study using administrative data collected from homeless service providers estimated that the annual number of homeless individuals is 2.5 to 10.2 times greater than can be obtained using a point in time count").

46. *Id.* at 10–12.

47. *Id.* at 11.

48. Edward P. Weber & Anne M. Khademian, *Wicked Problems, Knowledge Challenges, and Collaborative Capacity Builders in Network Settings*, 68 PUB. ADMIN. REV. 334, 336 (2008); *see* John C. Camillus, *Strategy as a Wicked Problem*, HARV. BUS. REV., May 2008, 101 (displaying a table with the ten properties of wicked problems).

public problems defies the confines of established 'stovepiped' systems of problem definition, administration, and resolution."[49] Homelessness can be seen as an unstructured wicked problem due to the multitude of factors that can lead to homelessness[50]—including, but not limited to, systemic racism,[51] an expanding gap between incomes and the cost of housing,[52] disabling health conditions,[53] domestic violence,[54] and interactions with the criminal justice system.[55] Further, the solutions used to address homelessness differ from those associated with simpler problems because they are "strongly stakeholder dependent" and create lasting consequences that "may yield utterly undesirable repercussions which outweigh the intended advantages or the

49. Weber & Khademian, *supra* note 48 at 336.

50. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, TENT CITY, USA 18 (2017) [hereinafter TENT CITY] ("While every homeless individual's path to homelessness is unique, it is becoming more and more apparent that most paths to homelessness are not about bad choices or personal failures, but rather the result of collective policy choices over time that have created a critical deficit of adequate, affordable housing and other safety net services.").

51. *See, e.g.*, AD HOC COMMITTEE ON BLACK PEOPLE EXPERIENCING HOMELESSNESS, *supra* note 43; Rankin, *supra* note 13, at 101 (discussing how "[r]ace or, more pointedly, racism and homelessness are inseparable"); BATKO ET AL., *supra* note 5, at 4 (discussing how the disproportionately large percentage of people of color experiencing homelessness is "in part a result of the racism and discrimination embedded in the housing market and other systems, including the employment and criminal legal systems" in addition to the policies involved with homeless services, the siting and building of shelters in high-poverty neighborhoods).

52. HOUSING NOT HANDCUFFS, *supra* note 9, at 29 ("The gap between incomes and the cost of housing is a primary cause of homelessness."); *see* Andrew J. Liese, *We Can Do Better: Anti-Homeless Ordinances As Violations of State Substantive Due Process Law*, 59 VAND. L. REV. 1413, 1418–19 (2006) ("In fact, in forty-six of the fifty-two U.S. jurisdictions (including Puerto Rico and the District of Columbia), the Housing Wage is more than double the federal minimum wage, meaning that an employee earning the federal minimum wage would have to work over eighty hours each week for fifty-two weeks each year in order to afford a two-bedroom apartment at 30[%] of his or her income—the federal definition of affordable housing.").

53. LAHSA 2020 HOMELESS COUNT PRESENTATION, *supra* note 44, at 23 (citing "[d]isabling [h]ealth [c]ondition" as a primary cause of people experiencing homelessness for the first time).

54. U.S. Dep't of Hous. & Urb. Dev., *Domestic Violence and Homelessness*, HUD EXCHANGE, https://www.hudexchange.info/homelessness-assistance/domestic-violence/ [https://perma.cc/TR66-BBS3] ("Persons experiencing domestic violence, particularly women and children with limited economic resources, are at increased vulnerability to homelessness.").

55. *See* Sarah Gillespie, Samantha Batko, Ben Chartoff, Zach VeShancey & Emily Peiffer, *Five Charts That Explain the Homelessness-Jail Cycle—and How to Break It*, URB. INST. (Sept. 16, 2020), https://www.urban.org/features/five-charts-explain-homelessness-jail-cycle-and-how-break-it [https://perma.cc/UPL2-JSR5]; Rankin *supra* note 13, at 101 (describing how "some . . . characterize the United States' penal system as the nation's largest homeless shelter" and that "over 15[%] of those in jail were homeless prior to incarceration, a rate of 7.5 to 11.3 times higher than the general adult population").

advantages accomplished hitherto."[56] When a community attempts to alleviate the crisis of homelessness, the implemented solutions often reflect the dominant stakeholder interests[57] and, as has been shown with policies that criminalize homelessness, can result in inefficient repercussions that are more costly than beneficial to both a city and those experiencing homelessness.[58]

Labeling homelessness as a wicked problem also supports efforts to consider unique solutions that release communities from the restrictions imposed by "stovepiped" resolutions.[59] While homelessness already has a proven and cost-effective long-term solution—permanent housing[60]—the reality is that affordable and dignified housing solutions are not yet available to all. Therefore, the long-term and proven solution must be supplemented by interim innovations. Similar to the "revolution" in tenants' rights that called for a fundamental shift in defining the relationship between landlords and tenants in the 1960s, the ballooning humanitarian crisis of unsheltered homelessness faces a similar potential for radical change.[61]

C. Understanding Unsheltered Homelessness

The number of people experiencing unsheltered homelessness has been growing—by 22% from 2015 to 2019.[62] Experts caution that the 2019 numbers represent a pre-pandemic baseline[63] as the expiration of temporary eviction moratoriums, job loss, health

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56. Richard Tanter, *Ten Criteria for Wicked Problems*, NAUTILUS INST. (May 17, 2008), https://nautilus.org/gps/solving/ten-criteria-for-wicked-problems/ [https://perma.cc/K8WB-ZEF6].

57. *Cf.* Benjamin Oreskes & Doug Smith, *Garcetti's Signature Homeless Program Shelters Thousands, but Most Return to the Streets*, L.A. TIMES (Nov. 20, 2020), https://www.latimes.com/homeless-housing/story/2020-11-20/garcetti-a-bridge-home-homeless-program-offers-mixed-results [https://perma.cc/6J2N-7LPA] (discussing a unique city program to address homelessness that includes provisions to accommodate differing stakeholder interests).

58. *E.g.*, BATKO ET AL., *supra* note 5, at v ("[I]nstead of solving the homelessness crisis, these costly, punitive responses are ineffective and can make homelessness worse for those experiencing it and for the communities in which they live.").

59. Weber & Khademian, *supra* note 48, at 336.

60. *United Way of Greater Los Angeles' Funders Collaborative Seeks New, Creative, and Scalable Housing Concepts With Latest RFP*, UNITED WAY OF GREATER L.A. (Mar. 22, 2019), https://www.unitedwayla.org/en/news-resources/blog/united-way-greater-los-angeles-funders-collaborative-seeks-new-creative-and-scalable-housing-concepts-latest-rfp/ [https://perma.cc/CAL6-5GLZ].

61. Edward H. Rabin, *Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 521 (1984) (discussing why changes to landlord-tenant laws can "fairly be termed 'revolutionary'").

62. BATKO ET AL., *supra* note 5, at 2.

63. *State of Homelessness*, *supra* note 2.

expenses, and decreased shelter capacity will likely push a wave of individuals and families out of their homes, out of shelters, and to the streets.[64] The increasing number of people experiencing unsheltered homelessness is particularly concerning as most people living and sleeping outside experience chronic homelessness, need to perform life-sustaining activities in public, and cope with frequent visits and demands from law enforcement often responding to complaints submitted by community members.[65] Further, when compared to individuals in shelters, people experiencing unsheltered homelessness are more likely to have physical health, mental health, and substance use conditions.[66]

1. Encampments

Through efforts to develop community and enhance safety, people experiencing unsheltered homelessness may seek out encampments—sometimes referred to as tent cities or homeless camps.[67] Encampments are group-living environments in public spaces where people experiencing homelessness live in temporary

64. *See* Chris Arnold, *'Tsunami' of Evictions Feared as Extra $600 Unemployment Payments End*, NAT'L PUB. RADIO (July 24, 2020), https://www.npr.org/2020/07/24/894996949/concern-over-evictions-rise-as-covid-19-unemployment-benefits-expire [https://perma.cc/49LY-6JKY]; GENE FALK, JAMESON A. CARTER, ISAAC A. NICCHITTA, EMMA C. NYHOF & PAUL D. ROMERO, CONG. RSCH. SERV., UNEMPLOYMENT RATES DURING THE COVID-19 PANDEMIC: IN BRIEF (2020) (describing job loss during the COVID-19 pandemic); *see, e.g.*, Jessica Lee, *How Homeless Shelters Across Minnesota Are Scrambling to Prevent the Spread of COVID-19*, MINNPOST (Mar. 31, 2020), https://www.minnpost.com/health/2020/03/how-homeless-shelters-across-minnesota-are-scrambling-to-prevent-the-spread-of-covid-19/ [https://perma.cc/9KJ9-4LNU] (describing the decreased shelter capacity in Minnesota).

65. 2019 AHAR, *supra* note 3, at 4 (finding that two-thirds of individuals experiencing chronic homelessness were also staying in places not meant for human habitation); *see* JANEY ROUNTREE, NATHAN HESS & AUSTIN LYKE, CAL. POL'Y LAB, HEALTH CONDITIONS AMONG UNSHELTERED ADULTS IN THE U.S. 6 (2019) ("Unsheltered individuals report ten times as many police contacts on average (21 compared to 2) in the previous six months, and were approximately nine times as likely to report they had spent at least one night in jail in the last six months (81% vs. 9%) [when compared to sheltered individuals]."); Chris Herring, *Complaint-Oriented Policing: Regulating Homelessness in Public Space*, 84 AM. SOC. REV. 769, 770 (2019) (analyzing the role of "quality-of-life policing" in responding to "visible poverty").

66. ROUNTREE ET AL., *supra* note 65, at 3–6; *see* Ann Elizabeth Montgomery, Dorota Szymkowiak, Jessica Marcus, Paul Howard & Dennis P. Culhane, *Homelessness, Unsheltered Status, and Risk Factors for Mortality: Findings From the 100 000 Homes Campaign*, 131 PUB. HEALTH REPS. 765, 765 ("Studies show that people living in unsheltered situations are at increased risk for premature death . . . .").

67. Rankin, *supra* note 13, at 111.

structures or tents.[68] In a 2017 study, the National Homelessness Law Center reported a dramatic increase in the number of encampments over the past decade, impacting every state in the country.[69]

While encampments may provide safety, community, and independence to occupants, they frequently fail to fully address the vulnerability caused by exposure to the elements and lack of access to waste management and restroom facilities.[70] Encampments are also often the subject of community concern due to their visibility,[71] potential to impact safety, and unsanitary conditions.[72] The public concern prompts a variety of responses, depending on the community.[73] Some municipalities formally criminalize the existence of encampments by creating legislative mechanisms to cite encampment occupants for various municipal code violations,[74] while others provide official permits for encampments to exist with support that can include running water, bathroom facilities, and other services.[75] Some cities also allow for informal sweeps—

68. TENT CITY, *supra* note 50, at 28.

69. *Id.* at 7; *see* Rankin, *supra* note 13, at 111 ("The growing number of unauthorized encampments reflect the reality that many cities lack sufficient emergency shelter and transitional housing. With no safe and legal place to go, many homeless people find community in unauthorized encampments.").

70. *See, e.g.*, Jessica H. Leibler, Daniel D. Nguyen, Casey León, Jessie M. Gaeta & Debora Perez, *Personal Hygiene Practices Among Urban Homeless Persons in Boston, MA*, 14 INT'L J. ENV'T RSCH. & PUB. HEALTH 928, 928 (2017) ("Persons experiencing homelessness in the United States experience significant barriers to self-care and personal hygiene, including limited access to clean showers, laundry and hand washing facilities."); Rankin, *supra* note 13, at 111 ("Encampments can offer several benefits to people experiencing homelessness, such as a sense of safety, security, community, autonomy, stability . . . .").

71. See SAMIR JUNEJO, SEATTLE UNIV. SCH. OF L. HOMELESS RTS. ADVOC. PROJECT, NO REST FOR THE WEARY: WHY CITIES SHOULD EMBRACE HOMELESS ENCAMPMENTS 14 (Suzanne Skinner & Sara K. Rankin eds., 2016) for a discussion about how the visibility of encampments can "bring the issue of homelessness to the attention of the community and policymakers . . . [as] a form of advocacy."

72. *But see id.* at 7–8, 10 (noting that public safety concerns due to encampments often come from "isolated violent incidents rather than general trends . . . . Violence and criminal activity are not exclusive to homeless encampments . . . . Just because criminal activity can occur at encampments does not make them inherently unsafe").

73. See *id.* at 2–7 for a comprehensive discussion about the various types of encampments in municipalities throughout the United States—including authorized encampments, encampments on private property, and unauthorized encampments.

74. Terrah Glenn, *Solving Unsheltered Homelessness*, NAT'L LEAGUE OF CITIES (Nov. 12, 2019), https://www.nlc.org/article/2019/11/12/solving-unsheltered-homelessness/ [https://perma.cc/GY7P-45CG] ("Local governments, under political pressure from community stakeholders to eliminate these nuisance factors, have responded by passing and enforcing laws that effectively criminalize homelessness.").

75. *See* REBECCA COHEN, WILL YETVIN & JILL KHADDURI, U.S. DEP'T OF HOUS. & URB. DEV., UNDERSTANDING ENCAMPMENTS OF PEOPLE EXPERIENCING

encampment evictions—an expensive process during which law enforcement can uproot encampment occupants and force those experiencing unsheltered homelessness to move to a new space, often losing important property and contact with homeless services providers in the process.[76] The nature of sweeps can vary community to community—some municipalities require notice and case management outreach prior to sweeps and will store remaining personal belongings for a certain period of time following sweeps.[77] Other communities will use extreme measures—including violent property destruction—to clear people experiencing homelessness from encampments.[78]

2. Shelters

In colder climates where living outside during winter can be life-threatening, there is often a large shelter system. Consequently, those that remain unsheltered in colder climates are often those with "high rates of disability and mental health issues,

HOMELESSNESS AND COMMUNITY RESPONSES: EMERGING EVIDENCE AS OF LATE 2018, at 1 (2019) [hereinafter UNDERSTANDING ENCAMPMENTS]; JUNEJO, *supra* note 71, at 4 (explaining Seattle's city-sanctioned encampments to which the city provides "city funds for their operations, access to public property, access to social services, and funding for case management services").

76. *See* HOUSING NOT HANDCUFFS, *supra* note 9, at 40 (explaining that sweeps displace people experiencing homelessness from public spaces, cause the loss or destruction of property, disrupt access to case management and health resources, and impose significant costs on cities like Los Angeles, which spends $31 million on encampment evictions annually); Rankin, *supra* note 13, at 113 (discussing how encampment sweeps often violate the Fourth Amendment and "inflict real and lasting damage on people experiencing homelessness . . . . [by] exact[ing] significant emotional and psychological tolls on encampment residents"); Rick Paulas, *Encampment Sweeps Take Away Homeless People's Most Important Belongings*, VICE (Mar. 4, 2020), https://www.vice.com/en/article/v74pay/encampment-sweeps-take-away-homeless-peoples-most-important-belongings [https://perma.cc/YR3H-549V] ("Activists have dubbed [encampment sweeps as] the 'leafblower approach' to solving homelessness, essentially scattering people without hint or suggestion where they should go."); BATKO ET AL., *supra* note 5, at 8 ("[B]ecause sweeps are often conducted by or with the participation of police, they increase the likelihood that a person experiencing homelessness will have a negative interaction with police and receive a citation or be arrested."). *Cf. Interim Guidance on People Experiencing Unsheltered Homelessness*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 23, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html#prevention [https://perma.cc/6CVF-SXL3] (explaining the CDC's recommendation that communities avoid evicting encampments due to the risk that sweeps could spread the virus throughout the community).

77. *See* HOUSING NOT HANDCUFFS, *supra* note 9, at 24–25.

78. JUNEJO, *supra* note 71, at 15 ("In 2007, police in St. Petersburg, Florida seized 20 tents in an encampment using scissors, box cutters, and other blades to cut them down. 'I was in the tent when they started cutting. It was very reckless of them,' said one of the residents, who was asleep when the police arrived.").

which may create challenges to entering shelters."[79] In regions with warmer climates, limited shelter availability creates an unsheltered population with "a greater mix of people, including those who do not have behavioral health disabilities but are unable to access shelter for other reasons."[80] While many people experiencing unsheltered homelessness seek out shelter and accept emergency housing when it is available, the shelter system may not be for everyone—creating the misconception that people experiencing homelessness are service-resistant or "want to be homeless."[81] If a shelter bed is available,[82] refusing shelter is often a reflection of deeper variables including, but not limited to, logistical barriers imposed by shelter rules or religious affiliation, mental health conditions, and distrust of those offering assistance.[83] For example, some shelters enforce curfews, forcing those experiencing homelessness with jobs to choose between work and a space to sleep inside if the curfew and working hours conflict.[84]

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79. UNDERSTANDING ENCAMPMENTS, *supra* note 75, at 7; *see supra* Table 1 for the definition of "shelter."

80. UNDERSTANDING ENCAMPMENTS, *supra* note 75, at 7.

81. *See, e.g.*, Ruth Gourevitch & Mary K. Cunningham, *Dismantling the Harmful, False Narrative That Homelessness Is a Choice*, URB. INST. BLOG (Mar. 27, 2019), https://www.urban.org/urban-wire/dismantling-harmful-false-narrative-homelessness-choice [https://perma.cc/N9LZ-EWJR] (explaining that the "most common misconception" about people experiencing homelessness is that "they want to be homeless"); Joy H. Kim, *The Case Against Criminalizing Homelessness: Functional Barriers to Shelters and Homeless Individuals' Lack of Choice*, 95 N.Y.U. L. REV. 1150, 1156 (2020) ("[N]ot all shelters are a viable choice for persons experiencing homelessness . . . .").

82. *See* Joy Moses, *Coming Up Short for Individuals: Why Bed Counts Make a Difference*, NAT'L ALL. TO END HOMELESSNESS BLOG (Feb. 6, 2019), https://endhomelessness.org/coming-up-short-for-individuals/ [https://perma.cc/9W3J-GBNQ] ("Across America, providers only had enough year-round beds to serve 52[%] of [individuals experiencing homelessness] . . . . Bed availability varies greatly from one state to the next. Some states can offer beds to almost everyone who needs one. They include Maine (which has capacity for 95[%] of homeless individuals), West Virginia (94[%]), Kansas (93[%]), Delaware (93[%]), and New York (88[%]). (Of note, New York City has established a legal right to shelter.) Other states are clearly struggling in this area. California, the state with the largest number of homeless people, is only able to offer year-round beds to 21[%] of individuals experiencing homelessness.").

83. *Cf. Talk of the Nation: Why Some Homeless Choose the Streets Over Shelters*, NAT'L PUB. RADIO (Dec. 6, 2012), https://www.npr.org/2012/12/06/166666265/why-some-homeless-choose-the-streets-over-shelters [https://perma.cc/95TZ-5H5L] ("All I can say is that my fear of the unknown, of what might be waiting for me at that shelter, was worse than my fear of the known risk, you know, of staying out on the street. That was where I was comfortable. And I think people, we're creatures of habit. We get comfortable in the most uncomfortable positions, and that just becomes home.").

84. *See id.* ("The shelter where I stayed briefly, you had to be in line. They technically opened at 7:00, but you had to be in line at 4:30 in the afternoon to be

Some shelters do not allow pets or partners to stay together, forcing families to separate in order to access a shelter space.[85] For some, mental health conditions such as schizophrenia can make a crowded shelter an unhealthy environment.[86] While street outreach teams work to develop relationships with people experiencing unsheltered homelessness to connect them to the best possible resources—including shelters that can best respond to needs—building rapport can take time due to factors such as past negative experiences with social services or lost communication caused by a change in location following displacement mandated by law enforcement.[87] Ultimately, Housing First—"a homeless assistance approach that prioritizes providing permanent housing to people experiencing homelessness, thus ending their homelessness and serving as a platform from which they can pursue personal goals and improve their quality of life"—is proven to be a successful and cost-effective alternative to both unsheltered homelessness and the shelter

able to get your bed back, and this is obviously not conducive to anyone who is not working bank hours."); Rick Paulas, *This Is Why Homeless People Don't Go to Shelters*, VICE (Feb. 24, 2020), https://www.vice.com/en/article/v74y3j/this-is-why-homeless-people-dont-go-to-shelters [https://perma.cc/69KX-S3MK].

85. *See Talk of the Nation*, *supra* note 83 ("[W]hen I was homeless, I had a dog. I used my dog as protection because I was just a single young woman on the streets . . . . [T]hey wouldn't let him in shelters . . . . I mean, my dog was kind of my family. And so we slept outside because I didn't want to have to give up my dog."); Gourevitch & Cunningham, *supra* note 81 ("[People] may avoid shelters because of bed bugs, high rates of violence, or policies that prevent them from bringing their personal items or pets with them. Shelters may require sobriety or engagement in services. And couples are often split up when entering shelter, so some avoid it to stay together.").

86. *See Talk of the Nation*, *supra* note 83 (explaining that the "paranoia and the fear of large groups of people that comes along with schizophrenia," in part, deterred an individual from accessing shelter while experiencing homelessness).

87. *Cf.* SAN DIEGO CNTY., SAN DIEGO HOMELESS OUTREACH WORKER BEST PRACTICES 5 (2018) ("[T]he biggest challenge usually identified [for street outreach teams working with people experiencing homelessness] is unmanaged mental illness, which makes client engagement very difficult, particularly when individuals have a lack of insight to their symptoms or cannot provide informed consent. Other major challenges relate to a lack of client readiness, including fear of committing to a program or service requirements and lack of trust. On the systems level, most challenges revolve around limited resources, including difficulty contacting patients without phones or fixed addresses, distance and lack of transportation options, lack of language and interpretation services, and most importantly lack of readily available housing resources to offer clients (e.g., temporary or permanent housing)."); HOMELESS POL'Y RSCH. INST., HOMELESS OUTREACH: THE LOS ANGELES COUNTY CONTEXT 4 (2019) ("One of the primary goals of outreach workers is to gain the trust of the clients they are attempting [to] serve so that a lasting support relationship can develop . . . . However, several qualitative studies have noted that people experiencing homelessness, especially youth and veterans, tend to be distrustful of outreach workers and service provider staff.").

system.[88] However, the lack of available affordable housing options, such as permanent supportive housing,[89] creates a reality with two alternatives for those experiencing homelessness: temporary shelter that may or may not be healthy[90]—if beds are even available—and living outside.

II. Unsheltered Homelessness: A Crisis at a Breaking Point

A. City Responses to Unsheltered Homelessness

While it is widely recognized that access to safe, affordable housing through the Housing First model is the proven, long-term, and most cost-effective solution to homelessness, the reality caused by the current inadequate housing supply cannot be ignored.[91] In response to that reality, some cities have implemented a variety of community-based solutions that bridge the gap between unsheltered homelessness and access to permanent housing.[92] For example, New York City has a year-round "right to shelter" that requires the City to offer shelter to any individual or family experiencing homelessness.[93] In Denver, the City opened two sanctioned—or, city-approved—encampments in December 2020.[94]

88. *Housing First*, NAT'L ALL. TO END HOMELESSNESS (Apr. 20, 2016), https://endhomelessness.org/resource/housing-first/ [https://perma.cc/898N-NTR4].

89. *See* THE GAP, *supra* note 8, at 8 ("No state has an adequate supply of rental housing affordable and available for extremely low-income households."); EHREN DOHLER, PEGGY BAILEY, DOUGLAS RICE & HANNAH KATCH, CTR. ON BUDGET AND POL'Y PRIORITIES, SUPPORTIVE HOUSING HELPS VULNERABLE PEOPLE LIVE AND THRIVE IN THE COMMUNITY 1, 9 (2016) ("Supportive housing[is] a highly effective strategy that combines affordable housing with intensive coordinated services . . . . A broad body of research shows that supportive housing effectively helps people with disabilities maintain stable housing . . . . Despite its effectiveness, few of the people who would benefit most from supportive housing actually receive it."). See William N. Evans, David C. Phillips & Krista Ruffini, *Policies to Reduce and Prevent Homelessness: What We Know and Gaps in the Research*, 40 J. POL'Y ANALYSIS & MGMT. 914, 931–35 (2021), for a comprehensive overview of supportive housing's history and program design.

90. *But see* U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, KEY CONSIDERATIONS FOR IMPLEMENTING EMERGENCY SHELTER WITHIN AN EFFECTIVE CRISIS RESPONSE SYSTEM 5–6 (2017) (discussing the success of some shelters that operate with best practices including the provision of "[l]ow-[b]arrier [a]ccess" by "removing as many preconditions to entry as possible and responding to the needs and concerns of people seeking shelter" as well as "[a]ccommodating [p]artners, [p]ets, and [p]ossessions" by "inviting self-defined groups of friends and family to access and stay in shelter together," and "extending hours [for shelter access]").

91. BATKO ET AL., *supra* note 5, at 2.

92. See Evans et al., *supra* note 89, for a discussion evaluating how different levels of government and private philanthropy have responded to homelessness.

93. Kevin Corinth & Grace Finley, *The Geography of Unsheltered Homelessness in the City: Evidence from "311" Calls in New York*, 60 J. REG'L SCI. 628, 629 (2020).

94. David Mullen, *Denver's Second Sanctioned Homeless Camp is Now Open and*

In 2018, Los Angeles Mayor Eric Garcetti and the City Council declared an emergency shelter crisis and established A Bridge Home—an initiative to increase the supply of shelter beds and establish bridge housing in every City Council District.[95] While each approach is accompanied by well-documented strengths and weaknesses, the purpose of this Note is not to analyze, minimize, or advocate for the relative merits of innovative efforts.[96] Rather, this Note seeks to frame the conversation about municipal approaches to unsheltered homelessness from a different perspective: regardless of the relative effectiveness of innovative approaches to unsheltered homelessness, the crisis is at a breaking point because of the underlying prevalence of criminalization. As more cities lean on law enforcement and tools of criminalization to push people experiencing homelessness from one unsheltered location to another, cities not only undermine innovative efforts, but also exacerbate the crisis with costly, inefficient, and potentially unconstitutional efforts.[97]

B. The Criminalization of Homelessness

The National Law Center on Homelessness & Poverty (Law Center) tracks municipal laws to create the only national-level report available regarding the criminalization of homelessness.[98] According to the Law Center, "people without housing are ticketed, arrested, and jailed under laws that treat their life-sustaining conduct—such as sleeping or sitting down—as civil or criminal offenses [while] cities routinely displace [people experiencing

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at Full Capacity, COLO. POL. (Jan. 11, 2021), https://www.coloradopolitics.com/denver/denvers-second-sanctioned-homeless-camp-is-now-open-and-at-full-capacity/article_d63e68bd-8189-5384-a8cf-ac96ad846d7d.html [https://perma.cc/587N-NHVM] (explaining that one of the encampments features thirty heated tents in an enclosed area, one hot meal per day, access to services from the Mental Health Center of Denver and other organizations, and 24/7 staffing—among other accommodations).

95. *A Bridge Home*, L.A. MAYOR ERIC GARCETTI, https://www.lamayor.org/ABridgeHome [https://perma.cc/R73Z-ZKMM] ("[W]hile we ramp up the work of building those permanent units, we must be equally impatient about finding safe places to sleep for people who are on the streets now. That's why Mayor Garcetti has launched a new plan called A Bridge Home—to give homeless Angelenos in every neighborhood a refuge in the community they already know and love, until they can be connected with a permanent home.").

96. *See, e.g.*, Oreskes & Smith, *supra* note 57 (explaining the progress made by Los Angeles Mayor Eric Garcetti's A Bridge Home initiative).

97. *See* Trevor Bach, *Will Fines and Jail Time Fix the Homelessness Crisis?*, U.S. NEWS (Oct. 7, 2019), https://www.usnews.com/news/cities/articles/2019-10-07/us-cities-are-increasingly-cracking-down-on-homelessness [https://perma.cc/74GR-SFYA].

98. HOUSING NOT HANDCUFFS, *supra* note 9, at 9.

homelessness] from public spaces without providing any permanent housing alternatives."[99] In the 2019 report reviewing 187 cities, the Law Center found an increase in the prevalence of criminalization policies across the United States—both since 2006 and over the previous three years.[100]

The proliferation of anti-homelessness laws include city regulations prohibiting camping in public,[101] sleeping in public,[102] sitting and lying down in public,[103] loitering,[104] soliciting donations,[105] food sharing,[106] storing property,[107] urinating and defecating in public,[108] and scavenging.[109] The laws may be facially neutral—not naming homelessness as criminal in itself—but the laws undoubtedly disproportionately impact people experiencing homelessness as they "discriminatorily target" and may be "selectively enforced against" those without permanent housing.[110]

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99. *Id.*; *see also* Rankin, *supra* note 13, at 107 ("Living in public often triggers criminal charges, such as loitering or trespassing. But living in public also commonly triggers civil infractions: a ticket imposing conditions and requirements, such as an order to show up to court, avoid an area for significant period of time, or pay a fee."); JOSHUA HOWARD & DAVID TRAN, SEATTLE UNIV. SCH. OF L. HOMELESS RTS. ADVOC. PROJECT, AT WHAT COST: THE MINIMUM COST OF CRIMINALIZING HOMELESSNESS IN SEATTLE AND SPOKANE (Sara Rankin ed., 2015) iii n.1 ("Civil violations often evolve into criminal violations because a homeless defendant fails to pay for the fine or cannot appear to contest it.").

100. HOUSING NOT HANDCUFFS, *supra* note 9, at 11.

101. *Id.* at 12 ("'Camping' bans are often written to cover a broad range of activities, including merely sleeping outside. They also often prohibit the use of any 'camping paraphernalia' which can make it illegal for unhoused people to use even a blanket.").

102. *Id.* (describing that sleep is a life-sustaining human behavior and yet "city laws prohibiting sleeping in public have increased 50% since 2006").

103. *Id.* at 13.

104. *Id.* (describing laws related to "loitering, loafing, and/or vagrancy" as being "[s]imilar to historical Jim Crow, Anti-Okie, and Ugly laws . . . [that] grant police a broad tool for excluding visibly poor and homeless people from public places").

105. *Id.* (finding that 83% of the cities considered by the Law Center have at least one law restricting "begging in public").

106. *Id.* at 14.

107. *Id.* ("People experiencing homelessness often have no private place to secure their personal possessions. Laws that prohibit storing property in public space leave homeless people at constant risk of losing their property, including property needed for shelter, treatment of medical conditions, and proof of identity.").

108. *Id.* ("While cities have a legitimate interest in preventing the accumulation of urine and feces in public space, such interests cannot be met by criminalizing unavoidable bodily functions. If people do not have regular access to toilets, they will expel their human waste in areas other than toilets—they have no choice.").

109. *Id.* ("76% of cities prohibit rummaging, scavenging, or 'dumpster diving.'").

110. Kim, *supra* note 81, at 1152 (citing Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99, 107 (2019)); HOWARD & TRAN, *supra* note 99, at 2 (citing Bob Egelko, *U.N. Panel Denounces Laws Targeting Homeless*, SF GATE (May 2, 2014), http://www.sfgate.com/opinion/article/U-N-panel-denounces-laws-targeting-

For the purposes of this Note, the term "criminalization" also includes informal policies or procedures that may not result in criminal or civil penalties—such as "move-along warnings" and encampment evictions—practiced by cities and law enforcement.[111]

Efforts to criminalize life-sustaining conduct—both formally and informally—are seen by some as the prioritization of those in positions of traditional property ownership[112] and the general interest of "expel[ling] visibly poor people from public space."[113]

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homeless-5449307.php [https://perma.cc/9ZU8-AAG6]; Heidi Groover, *After SPD Sit-Lie Comments, Stuckart Proposes 'Bias-Free-Policing' Ordinance*, INLANDER (Sept. 22, 2014), http://www.inlander.com/Bloglander/archives/2014/09/22/after-spd-sit-lie-comments-stuckart-proposes-bias-free-policing-ordinance [https://perma.cc/3WHS-U4GX]).

111. *See* U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, SEARCHING OUT SOLUTIONS: CONSTRUCTIVE ALTERNATIVES TO THE CRIMINALIZATION OF HOMELESSNESS 5–6 (2012) [hereinafter USICH: SEARCHING OUT SOLUTIONS] ("[F]ormal and informal law enforcement policies are adopted to limit where individuals who experience homelessness can congregate, and punish those who engage in life-sustaining or natural human activities in public spaces."); Kim, *supra* note 81, at 1154 ("Some cities criminalize homelessness through more informal mechanisms, such as clearing homeless encampments or using police to reduce the visibility of homelessness on subways. These strategies are not necessarily documented in written policies or ordinances, and are thus more difficult to legally challenge . . . . [Cities] may use other laws—such as for illegal dumping or shopping cart possession—to cite homeless individuals.") (citing Letter from Andrew Cuomo, N.Y. Governor, to MTA Board of Directors (July 12, 2019), https://www.governor.ny.gov/news/gover-cuomo-issues-letter-mta-board-directors-urging-them-address-part-reorganization-plan; Lauren Aratani, *'I'm Just Sleeping': Police Crack Down on Homeless in New York's Subways*, GUARDIAN (Oct. 12, 2019), https://www.theguardian.com/us-news-2019-oct-12-new-york-homeless-subways-police-crackdown [https://perma.cc/HMX8-9Y2X]; Cynthia Hubert, *Sacramento County Cleared Homeless Camps All Year, Now It Has Stopped Citing Campers*, SACRAMENTO BEE (Sept. 18, 2018), https://www.sacbee.com/news/local/homeless/article218605025.html); Rankin, *supra* note 13, at 118 (explaining how "move-along warnings" may not result in formal citations, but are still a "form of criminalization that has 'detrimental consequences for wide swaths of the homeless population'" as "[s]uch warnings are a form of punishment, conducted under the explicit or implicit threat of criminal prosecution . . .") (quoting Christopher Herring, Dilara Yarbrough & Lisa Marie Alatorre, *Pervasive Penalty: How the Criminalization of Homelessness Perpetuates Poverty*, 67 SOC. PROBS. 131 (2020)) (citing Martin v. City of Boise, No. 145-35845, at 18–19 (9th Cir. Sept. 4, 2018)).

112. *See generally* Rankin, *supra* note 13, at 112 ("Advocates argue that privacy rights should not apply only to conventional homes with four walls and a lockable door[.]") (citing Evanie Parr, Note, *When a Tent is Your Castle: Constitutional Protection Against Unreasonable Searches of Makeshift Dwellings of Unhoused Persons*, 42 SEATTLE U. L. REV. 993 (2019)).

113. *Id.* at 102; *see also* USICH: SEARCHING OUT SOLUTIONS, *supra* note 111, at 5 ("Reflecting the frustration of business owners, community residents, and civic leaders who feel that street homelessness infringes on the safety, attractiveness and livability of their cities, some communities around the country are using, or considering using, the criminal justice system to minimize the visibility of people experiencing homelessness.").

Cities often cite public health,[114] safety, or concern over the impact on the local economy as the impetus behind the creation and enforcement of the previously stated criminalization policies.[115] However, criminalization fails to "solve" any of the previously stated concerns. Instead, criminalization might provide a temporary reprieve in the visibility of homelessness by shifting the concern to a new neighborhood. The collision of growing criminalization policies, more people experiencing unsheltered homelessness, and the decrease in both shelter and affordable housing capacity pushes the crisis towards a breaking point in need of an alternative approach.

1. Criminalizing Homelessness is Costly and Inefficient

Criminalizing homelessness is expensive for cities and, therefore, taxpayers.[116] In a study from the state of Washington considering the direct costs of enforcing municipal ordinances targeted at people experiencing homelessness, the research revealed that Seattle spent "[a]n estimated 5-year minimum of $2,300,000 . . . [on] enforcing just 16% of the city's criminalization ordinances."[117] In 2014, Denver disclosed spending approximately $750,000 to enforce "bans on panhandling and camping or sleeping

114. *But see* HOUSING NOT HANDCUFFS, *supra* note 9, at 15 ("[Criminalization policies] threaten public health by dispersing people who have nowhere to discard food waste and trash, to expel bodily waste, or to clean themselves and their belongings to more areas of the city, but with no new services to meet their basic sanitation and waste disposal needs.").

115. *See* HOWARD & TRAN, *supra* note 99, at 2 ("Although proponents tie [criminalization] to improved public safety and improved business, there is no evidence that criminalization ordinances accomplish either of these purported goals.") (citing Cathy Bussewitz, *New Laws Move the Homeless Out of Waikiki*, SEATTLE TIMES (Sept. 11, 2014), https://www.seattletimes.com/life/travel/new-laws-move-the-homeless-out-of-waikiki/ [https://perma.cc/83U5-FZCZ]); BERKELEY L. POL'Y ADVOC. CLINIC, DOES SIT-LIE WORK: WILL BERKELEY'S "MEASURE S" INCREASE ECONOMIC ACTIVITY AND IMPROVE SERVICES TO HOMELESS PEOPLE, *available at* http://www.law.berkeley.edu.files/1023sit-lie2.pdf); *see generally* Katherine Beckett & Steve Herbert, *Penal Boundaries: Banishment and the Expansion of Punishment*, 35 L. & SOC. INQUIRY 1, 1–2 (2010) (discussing the outcomes of legal banishment as a form of "spatial exclusion" meant to "maintain order and exercise social control" over populations including those experiencing homelessness) (citing Benjamin Z. Kedar, *Expulsion as an Issue of World History*, 7 J. WORLD HIST. 165 (1996); STEVE HERBERT, POLICING SPACE: TERRITORIALITY AND THE LOS ANGELES POLICE DEPARTMENT (1997); Zygmunt Bauman, *Social Issues of Law and Order*, 40 BRIT. J. CRIMINOLOGY 205 (2000); MICHEL FOUCAULT, ABNORMAL: LECTURES AT THE COLLÈGE DE FRANCE 1974–1975 (Graham Burchell trans.) (2003)).

116. See Rankin, *supra* note 13, at 109 n.52, for an overview of studies reviewing the costs of criminalizing homelessness in Seattle, Spokane, Central Florida, Los Angeles, and San Francisco.

117. HOWARD & TRAN, *supra* note 99, at iii (noting that the figure underestimates the total costs of criminalization).

in public spaces . . . ."[118] In Salt Lake City, 85% of the budget dedicated to homeless services is spent on policing.[119] In 2019, Los Angeles invested more than $30 million in the departments responsible for the city's encampment sweeps.[120] Further, while criminalizing people experiencing homelessness becomes an increasingly popular municipal tool, the risk of costly litigation also increases as various jurisdictions grapple with the civil and human rights of people experiencing homelessness.[121]

Criminalizing homelessness also drains resources from the criminal legal system.[122] In 2015, the Department of Justice published an article that acknowledged the wasted law enforcement resources involved with citing and informally criminalizing people experiencing homelessness for doing life-sustaining activities.[123] As people experiencing homelessness are eleven times more likely to be arrested than the those not experiencing homelessness, some jurisdictions evidently invest a significant portion of city law enforcement resources towards short-term responses related to homelessness.[124]

Criminalizing homelessness also perpetuates poverty. While cities exercise criminalization measures as fast-acting tools to

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118. BATKO ET AL., *supra* note 5, at 8–9.

119. HOUSING NOT HANDCUFFS, *supra* note 9, at 71.

120. Matt Tinoco, *LA Will Spend $30M This Year on Homeless Sweeps. Do They Even Work?*, LAIST (Apr. 10, 2019), https://laist.com/2019/04/10/homeless_sweeps_los_angeles_public_health.php [https://perma.cc/7H67-Y7WX].

121. NO SAFE PLACE, *supra* note 16, at 31 ("Criminalization laws expose local governments to protracted and expensive litigation for violating homeless persons' civil and human rights.").

122. *See* BATKO ET AL., *supra* note 5, at 7 ("Complaints from residents and businesses to police or public officials are often precursors to interactions between law enforcement officers and people enduring unsheltered homelessness . . . . [L]aw enforcement officers are often called to situations that involve homelessness (e.g., conflicts over use of and behavior in public spaces), which can result in arrests, citations, or other coercive measures, or 'complaint-oriented policing.'") (citing NO SAFE PLACE, *supra* note 16; Chris Herring, *Complaint-Oriented Policing: Regulating Homelessness in Public Space*, 84 AM. SOCIO. REV. 769 (2019)).

123. Tars, *supra* note 16 ("[A]rresting people for performing basic life-sustaining activities like sleeping in public takes law enforcement professionals away from what they are trained to do . . . .").

124. BATKO ET AL., *supra* note 5, at 8 ("[A] 2016 report by Los Angeles County found that $100 million was spent on homelessness-related activities, with $54 to $87 million going to law enforcement activities . . . .") (citing FEI WU & MAX STEVENS, THE SERVICES HOMELESS SINGLE ADULTS USE AND THEIR ASSOCIATED COSTS: AN EXAMINATION OF UTILIZATION PATTERNS AND EXPENDITURES IN LOS ANGELES COUNTY OVER ONE FISCAL YEAR (2016)); *see also* HOUSING NOT HANDCUFFS, *supra* note 9, at 71 ("One in five people booked into jail in Seattle, Washington are homeless.") (citing David Kroman, *In Seattle, 1 in 5 People Booked Into Jail are Homeless*, CROSSCUT (Feb. 19, 2019), https://crosscut.com/2019/02/seattle-1-5-people-booked-jail-are-homeless [https://perma.cc/9NXP-XCJP]).

respond to community complaints or to move the visibility of homelessness from one space to another, they ultimately keep individuals and families on the streets longer because "[o]nce individuals are saddled with a misdemeanor or a warrant, they are often rendered ineligible to access shelter, food, services, and other benefits that might support their ability to emerge from homelessness."[125] Therefore, laws that disproportionately impact people experiencing unsheltered homelessness do not address the roots of homelessness or contribute to the long-term solution of housing.

2. Criminalizing Homelessness Can Violate Rights and Expose Cities to Liability

The legal landscape interpreting the constitutional protections of individuals experiencing unsheltered homelessness is complex and varies from jurisdiction to jurisdiction. Part II, Section B.2 will provide a simplified overview of the web of litigation and scholarship exploring the legal protections available to neighbors experiencing unsheltered homelessness. Cities should be aware that criminalization policies—both formal and informal—can result in costly liability under nuanced constitutional interpretations as legal advocates bring successful claims under the First, Fourth, Eighth, and Fourteenth Amendments.[126]

The First Amendment likely protects people experiencing homelessness from a city's enforcement of ordinances that prohibit panhandling.[127] In 2015, *Reed v. Town of Gilbert* allowed the

125. Rankin, *supra* note 13, at 108 (citing SUZANNE SKINNER, SEATTLE UNIV. HOMELESS RIGHTS ADVOC. PROJECT, SHUT OUT: HOW BARRIERS OFTEN PREVENT MEANINGFUL ACCESS TO EMERGENCY SHELTER (Sara Rankin ed., 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2776421 [https://perma.cc/U9VY-MF3G]); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012); *see also* HOUSING NOT HANDCUFFS, *supra* note 9, at 64 (discussing how interactions with the legal system can cause people experiencing homelessness to miss and lose existing work due to the time spent incarcerated or fighting charges—in addition to potentially disqualifying individuals from future work due to disclosure requirements on job applications).

126. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: A LITIGATION MANUAL 8, 11 (2018) [hereinafter LITIGATION MANUAL] (explaining that since 2014, "most recent cases have upheld the legal rights" of people experiencing homelessness as "favorable results were obtained in 75% of cases challenging evictions of homeless encampments and/or seizure and destruction of homeless persons' belongings . . . 57% of cases challenging enforcement of camping and/or sleeping restrictions [and] 100% of cases challenging laws restricting begging and solicitation").

127. *See* Judith Welch Wegner & Matthew Norchi, *Regulating Panhandling:* Reed *and Beyond*, 63 S.D. L. REV. 579 (2019).

Supreme Court to review local regulations on outdoor signage.[128] The Court found that local laws imposing "more stringent restrictions on [certain] signs than it does on signs conveying other messages . . . [constitute] content-based regulations of speech that cannot survive strict scrutiny."[129] Since the 2015 ruling, all challenges related to panhandling ordinances have found local measures to be unconstitutional, citing *Reed* as authority.[130]

People experiencing homelessness "have a protected possessory interest in their property, and unreasonable interference with this protected property interest, such as through seizure and destruction of property during encampment sweeps, may violate the Fourth Amendment."[131] In *Lavan v. City of Los Angeles*,[132] Los Angeles city officials seized the belongings of several people experiencing homelessness while they temporarily left the items unattended on a public sidewalk.[133] The Ninth Circuit found that "by seizing and destroying Appellees' unabandoned legal papers, shelters, and personal effects, the City meaningfully interfered with Appellees' possessory interests in that property."[134] Some argue that *Lavan* provides an expansion in the Fourth Amendment protections guaranteed to people experiencing unsheltered homelessness in the Ninth Circuit because it provides "an alternative method through which [people experiencing homelessness can] vindicate their constitutional rights, and need not stake their Fourth Amendment claims . . . on a reasonable expectation of privacy."[135] Courts have also recognized due process claims under the Fourteenth Amendment when cities mishandle the property of people experiencing homelessness.[136]

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128. Reed v. Town of Gilbert, 576 U.S. 155 (2015).

129. *Id.* at 159.

130. LITIGATION MANUAL, *supra* note 126, at 8, 11 (describing how the Seventh Circuit, in *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015), found a city ordinance that prohibited the verbal solicitations of donations to be unconstitutional for lack of "compelling justification"); *see also* Thayer v. City of Worcester, 144 F. Supp. 3d 218 (D. Mass. 2015).

131. HOUSING NOT HANDCUFFS, *supra* note 9, at 77.

132. Lavan v. City of Los Angeles, 693 F.3d 1022 (9th Cir. 2012).

133. *Id.* at 1027.

134. *Id.* at 1030.

135. Benjamin G. Kassis, *Owning Property Without Privacy: How* Lavan v. City of Los Angeles *Offers Increased Fourth Amendment Protection to Skid Row's Homeless*, 46 LOY. L.A. L. REV. 1159, 1169 (2013) (citing *Lavan*, 693 F.3d at 1030).

136. *See* Rankin, *supra* note 13, at 113 (2019) (citing Mitchell v. City of Los Angeles, No. CV1601750SJOGJSX, 2016 WL 11519288 (C.D. Cal. Apr. 13, 2016)); *see also* LITIGATION MANUAL, *supra* note 126, at 7–8, 11 (providing an overview of how the Fourth and Fourteenth Amendments interact to protect people experiencing homelessness from encampment sweeps and other municipally-driven

In 2018, *Martin v. City of Boise*[137] "created shock waves throughout cities in the Ninth Circuit"[138] as it ruled that "the City of Boise violated the Eighth Amendment by prosecuting individuals for 'involuntarily sitting, lying and sleeping in public' when no sleeping space was 'practically available in any shelter' at the time of the plaintiffs' arrests."[139] The Ninth Circuit determined that the criminalization of unsheltered homelessness amounted to cruel and unusual punishment even when shelter beds were technically available, but conditioned on willingness to participate in religious activities.[140] While *Martin* provides new Eighth Amendment protections for people experiencing unsheltered homelessness facing municipal ordinances criminalizing their existence, the case is geographically narrow, and advocates are already calling for an expanded definition of "practically available" shelter.[141]

Ultimately, as discussed by numerous reports from a variety of sources—ranging from the Department of Justice[142] and HUD[143] to various nonprofits,[144] health institutions,[145] and city government

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criminalization efforts).

137. Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019).

138. Morgan Chandegra, *And It's Beginning to Snow*, 56 CAL. W. L. REV. 425, 425 (2020).

139. Kim, *supra* note 81, at 1155 (quoting Martin v. City of Boise, 902 F.3d 1031, 1048–49 (9th Cir. 2018), amended by 920 F.3d 584 (9th Cir. 2019) (en banc)).

140. *Martin*, 902 F.3d at 1041.

141. See Kim, *supra* note 81, at 1150, for an explanation of the Supreme Court's decision to deny review of *Martin v. City of Boise*, a robust discussion about viable shelter choices for people experiencing homelessness, and an overview of the argument in favor of treating homelessness as a status under the Cruel and Unusual Punishments Clause.

142. *See, e.g.*, LITIGATION MANUAL, *supra* note 126, at 7 (explaining that in 2015, the Department of Justice "filed a statement of interest in . . . *Bell v. Boise*, arguing that making it a crime for people who are homeless to sleep in public places, particularly in the absence of sheltered alternatives, unconstitutionally punishes them for being homeless. . . . The Justice Department urged the court to adopt the rationale of *Jones v. City of Los Angeles*, a Ninth Circuit decision which held that criminalizing life-sustaining conduct in public by homeless people, in the absence of any available alternative, is tantamount to criminalizing homeless status in violation of the Eighth Amendment's prohibition against cruel and unusual punishment"); Tars, *supra* note 16.

143. *See, e.g.*, HOUSING NOT HANDCUFFS, *supra* note 9, at 74 ("To encourage communities to invest in proven solutions for ending homelessness, the Department of Housing and Urban Development (HUD) created incentives for communities to stop criminalizing homelessness through its annual Continuum of Care (CoC) Program Competition, which awards more than $2 billion in federal funds for homeless housing and services each year.").

144. *See, e.g.*, *id.* at 73–74.

145. *See, e.g.*, *id.* at 15 ("[T]he American Medical Association and American Public Health Association have both condemned criminalization and sweeps in policy resolutions.").

coalitions[146]—the cost-benefit analysis reveals that formal and informal criminalization of people experiencing homelessness is an inefficient response to the crisis and opens municipalities to constitutional litigation. Therefore, cities should work towards eradicating criminalization policies and investing in proven best practices that end homelessness—housing and supportive services. However, given the long-term nature of such a shift in investment, an interim shift in perspective is needed to treat people experiencing unsheltered homelessness as special tenants, as informed by the tenants' rights movement.

III. Finding an Alternative to Criminalization: Informed by the Tenants' Rights Movement

A. A Brief History of the Tenants' Rights Movement

Between the 1800s and the 1960s, tenants, legislatures, and courts grappled with the appropriate way to link human dignity and housing habitability[147] with government enforcement and court authority. By the late 1960s, tenant conditions reached a breaking point—forcing courts and legislatures to call for a radical shift in perspective and establish minimum habitability standards with the implied warranty of habitability in rental housing.[148] While recognition of tenants' rights is far from perfect today, the adoption of the implied warranty of habitability—what some have labeled "too radical to believe"—provides a blueprint for shifting judicial, legislative, and municipal perspective to create protections for a historically neglected subset of the population.[149]

Prior to the late 1960s, tenants' rights in rental housing were defined by caveat emptor—a property law doctrine from the 1500s

146. *See, e.g.*, Glenn, *supra* note 74 ("While [criminalization] strategies may temporarily assuage public outcry against homeless encampments, they do not appear to work as therapeutic and cost-effective long term solutions for the unsheltered homeless. In fact, in the absence of a complimentary policies that emphasize the provision of a sufficient quantity of shelter and crisis services, enforcement activity alone may make conditions worse.").

147. *See* Martinez, *supra* note 22, at 244 ("The American housing movement is usually traced to New York City in the late 1800s, when Jacob Riis shocked the public with his revelatory series of photos of New York City tenements and their appalling conditions.").

148. *See* Matthew Desmond, *The Tenants Who Evicted Their Landlord*, N.Y. TIMES (Dec. 17, 2020), https://www.nytimes.com/2020/10/13/magazine/rental-housing-crisis-minneapolis.html [https://perma.cc/YY23-RZRW]; Indritz, *supra* note 20, at 1, 21, 43–44 (discussing how middle and upper-income renter experience with poor housing conditions strengthened the tenants' rights movement in the 1960s).

149. Martinez, *supra* note 22, at 251.

that linked a tenant's responsibility to pay rent with the right to continued possession of the land.[150] The doctrine existed to reflect the interests of the parties at the time of its adoption: "[t]he landlord wanted rent and the agrarian tenant wanted to ensure undisturbed possession of the property for the length of the term."[151] However, by the late 1800s, the doctrine became increasingly outdated as urban tenancy grew and interests shifted because "[t]enants no longer wanted the land and to be left alone, but instead sought safe and secure housing."[152] While tenant organizing worked throughout the first half of the 20th century to improve unsafe housing conditions and associated policies, it was not enough to overcome caveat emptor and significantly reduce slum-like conditions in rental housing.[153] In 1960, an estimated 10.6 million out of a total of 58.3 million units of housing were considered substandard.[154]

By the late 1960s, the tenants' rights movement had grown to be a "multi-class national movement" in the context of advocacy related to civil rights and welfare accessibility, though it was seen at the time as a "radical activity."[155] As the housing shortage worsened and the existing housing stock grew older, the tenants' rights movement grew from low, middle, and upper-income renter frustration due to the lack of mechanisms through which to improve poor housing conditions such as "exposed wiring or pipes, holes in the walls or floors . . . the stench and filth of uncollected garbage . . . [and] rats and cockroaches."[156] Even though most local governments implemented housing codes to establish health and safety standards by the late 1960s, municipal ability to enforce the standards was weak and inefficient.[157] Further, a significant power

150. *See* Campbell, *supra* note 21, at 795–96.

151. *Id.* at 796.

152. *Id.* at 797, 799 ("The historical foundations on which the *caveat emptor* and dependent covenants doctrines were based came under attack in the mid-1800s. The presumptions no longer held. The emphasis on land and the independence of covenants began to appear one-sided and subject to abuse.").

153. *See id.*

154. *See id.* at 804.

155. Indritz, *supra* note 20, at 1, 39 ("For these present times, though, tenant organizing remains a radical activity, threatening to the large and powerful real estate industry.").

156. *Id.* at 5; *cf.* Peter Dreier, *The Tenants' Movement in the United States*, 8 INT'L J. URB. & REG'L RSCH. 255, 257 (1984) (explaining that the tenants' right movement in the 1960s "developed in a context of rising expectations . . . . As the standard of living improved for most Americans, the poor became more aware of the gap between themselves and the affluent society").

157. Campbell, *supra* note 21, at 800–01; *see also* Dreier, *supra* note 156, at 255, 257 (explaining that tenants are not often seen as a "serious contender on the political scene" making advocacy and change difficult).

imbalance between renter and landlord flourished within the structure of caveat emptor as landlords successfully dodged attempts to meaningfully implement housing codes and maintain rental habitability.[158] Therefore, between the failure of caveat emptor to meet the needs of tenants and the municipal inability to adequately enforce housing codes, housing conditions and the treatment of tenants reached a breaking point.[159] Tenant advocacy and the resulting social pressure led the courts to step in and create the implied warranty of habitability[160] "in response to the ongoing failure of law and municipalities to adequately address substandard conditions in rental housing."[161] While premised on an imperfect comparison to the contractual sale of goods, the implied warranty of habitability shifted the landlord-tenant relationship from one rooted in the doctrine of caveat emptor to one rooted in private contracts.[162] Seen by academics and practitioners as a "revolutionary" change "strik[ing] at the core of the landlord-tenant relationship, both in legal and practical terms," the implied warranty of habitability addressed the inherent power imbalance between tenant and landlord by guaranteeing tenants the right to a habitable dwelling.[163] With support from housing codes, the implied warranty of habitability set a minimum expectation for housing conditions and placed "an obligation" to maintain minimum standards on landlords "as a matter of public policy."[164] After *Javins*

158. *See* Martinez, *supra* note 22, at 240–44 ("Bad housing conditions for low-income tenants are a very stark physical manifestation of an enduring truth for low-income tenants: landlords have power and tenants have almost none. . . . The implied warranty of habitability arose in the wake of the failure of property law and municipal housing code legislation to meaningfully incentivize landlords to maintain their rental properties with low-income tenants.").

159. *See* Campbell, *supra* note 21, at 804 (commenting that "[s]omething had to give" in the late 1960s in response to poor rental housing conditions).

160. *See* Martinez, *supra* note 22, at 248 (citing *Javins v. First Nat'l Realty Corp*., 428 F.2d 1071 (1970) as the seminal case to find a "non-waivable implied warranty of habitability in every residential lease"). See Richard H. Chused, *Saunders (a.k.a.* Javins*)* v. First National Realty Corporation, 11 GEO. J. ON POVERTY L. & POL'Y 191 (2004) for a discussion about the context leading to the decision in *Javins*.

161. Martinez, *supra* note 22, at 239; *see also* Paula A. Franzese, Abbott Gorin & David J. Guzik, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS L. REV. 1, 1 (2016) ("The implied warranty of habitability is an implicit promise that every residential landlord makes to provide tenants with premises suitable for basic human dwelling.").

162. Campbell, *supra* note 21, at 829–30.

163. Rabin, *supra* note 61, at 521; *see* Martinez, *supra* note 22, at 246 ("Reforms to housing law took on new urgency in the mid-1960s after urban riots were linked to bad housing conditions. It was in this context that the implied warranty of habitability was developed as a tool to protect tenants living in substandard conditions and promote important public policy goal of improving housing.").

164. *See* Campbell, *supra* note 21, at 800, 803.

v. First National Realty Corp., the seminal court decision recognizing the non-waivable implied warranty of habitability, adoption by other courts and legislatures became nearly universal across the country[165] and by 1972, the implied warranty of habitability became part of the Uniform Residential Landlord Tenant Act.[166]

While the merits and impact of the implied warranty of habitability remain outside the scope of this Note, the "revolutionary" shift in legal and societal perspective directed by courts and legislatures provides a powerful framework from which to base a shift in perspective in municipal approaches to unsheltered homelessness.

B. Comparing the Tenants' Rights Movement with the Crisis of Unsheltered Homelessness

While the relationship between tenants and landlords and the relationship between people experiencing homelessness and the municipalities in which they reside share limited crossover due to fundamental differences—including, but not limited to, the role of a contractual lease with dependent terms[167]—there are also inherent similarities between the tenants' rights movement and the unsheltered homelessness crisis of today.

Similar to how the outdated and unbalanced doctrine of caveat emptor provided the backdrop that hindered tenant progress through the 1960s, policies of criminalization—a response shown to be inefficient, costly, and potentially unconstitutional[168]—has hindered efforts to address unsheltered homelessness by making it more difficult for people experiencing homelessness to access housing.[169] In addition, similar to the renters who carried the tenants' rights movement in the 1960s, many people experiencing unsheltered homelessness are living in uninhabitable conditions without real recourse to improve their conditions due to the inaccessibility of shelters and the severe lack of affordable and

165. Martinez, *supra* note 22, at 251 (explaining that an idea that was once seen as "radical" became nearly universal as forty-nine states and the District of Columbia all adopted some version of the implied warranty of habitability).

166. *See id.* (citing UNIF. RESIDENTIAL LANDLORD & TENANT ACT §2.104 (UNIF. L. COMM'N 2015)).

167. *See id.* at 239, 242–43.

168. *See* discussion *supra* Part II, Sections A–B and accompanying notes.

169. *Compare* Campbell, *supra* note 21, at 796 (discussing the weaknesses of the doctrine of caveat emptor), *with* Rankin, *supra* note 13, at 108 (explaining how the repercussions from criminalization can negatively impact people experiencing homeless and future abilities to gain access to permanent housing).

supportive permanent housing throughout the United States.[170] When the courts began to rapidly adopt the implied warranty of habitability in the 1960s and 1970s, the judicial system had reached a watershed moment in response to the cries of relatively powerless tenants facing unfair treatment from landlords and the indifferent municipalities failing to address issues of housing habitability.[171] People experiencing unsheltered homelessness are similarly powerless against the unfair treatment from municipalities criminalizing them because of the public spaces they have been relegated to for life-sustaining activities. Therefore, just as the courts confronted the need to protect tenants in the wake of failing systems provided by private landlords and municipalities, the crisis of unsheltered homelessness has reached a similar watershed moment: so long as appropriate housing options for all remain inaccessible, municipalities must absorb a new obligation to pivot from criminalization and view neighbors experiencing homelessness as the city's special tenants, entitled to basic habitability rights.

IV. Treating Neighbors as Neighbors: the Creation of a Special Tenancy

The goal of this Note is not to advocate for the "right" to experience unsheltered homelessness, nor should unsheltered homelessness be accepted as an inherent part of the city environment. However, until cities can increase the supply of affordable housing and fully embrace the Housing First model, unsheltered homelessness will remain a reality in many municipalities.[172] Therefore, it is time for cities to shift away from expensive, inefficient, and potentially illegal criminalization policies and towards recognition that unsheltered homelessness is a wicked problem in need of a "revolutionary" approach.[173] Part IV

170. *See supra* Part I, Section C and accompanying notes (discussing the conditions faced by people experiencing unsheltered homelessness including limited shelter availability and inadequate housing supply).

171. *See* Martinez, *supra* note 22, at 246 (discussing the context in which judges and legislators stepped in to improve the status quo for tenants).

172. *See generally* JUNEJO, *supra* note 71, at 22 ("Encampments are not a solution to homelessness; they are a temporary and inadequate response. But the depth of the homelessness crisis in some areas of the country requires cities to embrace encampments as an interim measure to provide some degree of stability to people experiencing homelessness, but those cities should simultaneously redouble efforts to provide permanent housing.").

173. *See supra* Part II and accompanying notes (discussing the criminalization of people experiencing homelessness); *supra* Part 0 and accompanying notes (discussing how the unsheltered homelessness crisis parallels the tenants' rights

seeks to use the framework of the tenants' rights movement to briefly explore what a "revolutionary" approach could look like for cities. The goal of the new approach is not to supplant current innovative efforts pursued by cities, such as the programs outlined in Part II, but rather to replace the backdrop of criminalization practices. Using the blueprint from the tenants' rights movement, the stage for a "radical" change to the legal and practical relationship between cities and people experiencing homelessness seems to be set. It is now incumbent upon cities to treat neighbors experiencing homelessness as special tenants of the municipality who are entitled to live in a habitable environment, rather than nuisances subject to criminalization for existing.

A. Creating Habitability Standards and Defining a New Relationship

Similar to the tenants' rights movement, municipalities could start by adopting the equivalent of a housing code for instances of unsheltered homelessness.[174] With support from a modified housing code addressing conditions for those living outside, a new obligation to maintain minimum standards of habitability would be placed on cities "as a matter of public policy."[175] A minimum standard of habitability for people experiencing unsheltered homelessness could take many forms, depending on the geographic location and weather conditions. Standards could be informed by some of the most basic guarantees provided for in local housing codes, such as access to resources like restrooms, showers, and heat when temperatures reach a certain level.[176] With a habitability baseline informing city interactions with people experiencing homelessness—rather than interactions characterized by formal and informal criminalization—there could be more opportunity to break the cycle of poverty, build trust, and connect people experiencing homelessness with long-term housing and supportive services.

Similar to the tenants' rights movement, establishing a modified housing code may be ineffective if cities are not

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movement that resulted in a "revolutionary" shift in policy).

174. *See* Martinez, *supra* note 22, at 246 ("For all of its failings, however, the housing code movement did have one important consequence: it fostered the idea that landlords had the responsibility to maintain their rental dwellings as a matter of public policy.").

175. *Id.*

176. *See, e.g.*, MINNEAPOLIS, MINN. CODE OF ORDINANCES, art. IV, §§ 244.290, 244.430 (2021).

incentivized to enforce or adhere to the new obligations.[177] Just as the courts stepped in on behalf of tenants to correct the power imbalance between tenants and landlords, courts could similarly intervene to adjust the power distribution between people experiencing homelessness and municipalities.[178] While the specific mechanics of the implied warranty of habitability are unlikely to be informative—as they involve enforcing the dependent covenants of a contractual lease—the courts could engage in an evaluation similar to the one that provided for the rise of the implied warranty of habitability. The relationship between people experiencing homelessness and cities must be reevaluated to address evolving expectations of health and habitability, and a new, viable legal doctrine must be established to enforce the new relationship.[179]

B. Exploring Potential Challenges to a Special Tenancy

Yes, the stage is set for a "revolutionary" change to the relationship between cities and people experiencing homelessness, and yes, it may be seen as radical, unrealistic, or impossible. However, the same critiques were thrown at the tenants' rights movement just a few years prior to the nearly universal adoption of the implied warranty of habitability in rental housing.[180]

As explored in Part I, wicked problems call for "non-stovepiped" solutions that typically reflect the dominant stakeholder interests.[181] When it comes to unsheltered homelessness, the dominant stakeholders are people with traditional property ownership—businesses and homeowners—subsets of communities that value quick responses to the visibility of homelessness, regardless of the long-term impact.[182] Therefore, shifting away from criminalization and towards minimum habitability for people experiencing homelessness would likely run contrary to those dominant stakeholder interests. The shift in policy should be accommodated by community education about why

177. Campbell, *supra* note 21, at 801 (discussing the weaknesses of housing code enforcement prior to the implied warranty of habitability).

178. *See* Martinez, *supra* note 22, at 249 (explaining that the court in *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1080 (1970) noted "the power imbalance between landlords and tenants, as well as housing shortages and discrimination in the rental market and the society-wide negative impact of poor housing").

179. *See* Campbell, *supra* note 21, at 804.

180. *See* Martinez, *supra* note 22, at 251.

181. *See* Weber & Khademian, *supra* note 48 (explaining that these "wicked" problems require the participation of all different people and stakeholders to "serve as premise for cooperation").

182. HOUSING NOT HANDCUFFS, *supra* note 9, at 15 (describing the dominant stakeholders pushing for criminalization policies to address homelessness).

criminalization is ineffective in the long term and can no longer characterize municipal policy. Further, it is possible that maintaining minimum habitability standards for those living outside will improve the overall habitability of communities that are home to those experiencing unsheltered homelessness.[183]

While a city-based approach to exploring an alternative to criminalization is necessary because municipal codes and localized informal policies define criminalization in each city, it is also limiting. City boundaries could be abused by municipalities uninterested in investing in "revolutionary" modifications to the relationship between cities and people experiencing unsheltered homelessness.[184] To best implement a "revolutionary" approach to seeing people experiencing homelessness as special tenants within a community, it should be a regional approach to prevent cities from pushing individuals towards boundaries with certain resources.

Finally, defining what is "habitable" will be another challenge for cities and potentially the courts charged with evaluating a new legal doctrine defining the new relationship between cities and people experiencing homelessness. Just as the courts continue to struggle with defining habitability in terms of landlord-tenant law, habitability can be seen as an "evolutionary concept" that is susceptible to changes over time and based on the lived experiences of those charged with constructing the standards.[185]

Conclusion

As municipalities face a growing crisis of unsheltered homelessness, there must first be a call to invest in the proven and long-term solution: affordable and safe housing options. However, there is an interim reality currently characterizing cities throughout the United States because the inaccessibility of shelter beds and inadequate supply of housing leave many—more than 211,200 people in 2019[186]—to live in places not meant for human

183. *See generally* Emily Alpert Reyes, *$339,000 for a Restroom? L.A. Politicians Balk at the Cost of Toilets for Homeless People*, L.A. TIMES (June 10, 2019), https://www.latimes.com/local/lanow/la-me-ln-homeless-bathroom-restroom-feces-skid-row-pit-stop-20190610-story.html [https://perma.cc/2EDC-BWGE] (highlighting how investing in basic sanitation resources can improve the overall habitability of a community occupied by people experiencing homelessness).

184. *See generally* Jared Osborne, *Prosecution or Forced Transport: Manhattan Beach's Unconstitutional Banishment of the Homeless*, 93 S. CAL. L. REV. POSTSCRIPT 70 (discussing Manhattan Beach and the city's "potential transportation of the homeless out of its jurisdiction").

185. Campbell, *supra* note 21, at 810–20.

186. 2019 AHAR, *supra* note 3, at 8.

habitation. In response, cities are increasingly criminalizing those experiencing homelessness—both formally and informally—with inefficient and costly investment from law enforcement that tends to perpetuate the cycle of poverty. Further, criminalization policies make cities increasingly susceptible to constitutional claims related to the First, Fourth, Eighth, and Fourteenth Amendment rights of people experiencing unsheltered homelessness. The crisis of unsheltered homelessness is at a breaking point: even in places implementing innovative solutions to bridge the gap between unsheltered homelessness and permanent housing, the backdrop of criminalization hinders significant progress and takes away integral resources. Therefore, similar to the fundamental shift in legal and practical components defining the relationship between landlords and tenants in the 1960s, the time has come for cities to take on additional responsibility and seek out an alternative, "revolutionary" approach to unsheltered homelessness. So long as living outside is a reality faced by community members, cities must turn away from criminalization and towards seeing people experiencing unsheltered homelessness as the city's tenants in need of minimum standards of habitability.

Remote Work "Reasonable"? Why the COVID-19 Pandemic Calls for a Reinterpretation of the "Reasonable Accommodation" Standard, and How Companies Can Respond

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For many Americans, the news of a work-from-home order may have provided some level of apprehension, or excitement, followed by a slow ease into a new pattern of life where their feet hit the floor and ten minutes later, coffee in hand, they can open their computer and start their days. For at least some, this new pattern provided a welcome respite from the springtime commute—which at least in Minnesota is sometimes snowy, and often unpredictable—but for me it was welcome for an entirely different reason. I got my driver's license when I was twenty-one years old, not exactly the age most kids dream about driving. This was because I was born with cerebral palsy; its effect on my body made learning to drive a difficult and lengthy process. As you can imagine, there were several years in between turning sixteen and actually receiving my license where I was in situations in which individuals expected me to be able to drive, and I in turn had to have the challenging and often uncomfortable conversation about why that was not possible. This affected several areas of my life, including the jobs I took. For years, I chose where to apply to jobs primarily based on transportation logistics. Despite having my license now, waking up every morning this past summer and knowing I would not have to drive anywhere was still somewhat of a relief, and I suspect this was also the case for many people like me.

The disabled community is underrepresented in employment, and as companies look to adapt to a work-from-home culture, it

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creates an open question as to how a post-COVID-19 world will affect the disabled workforce.[1] At its passage, the Americans with Disabilities Act (ADA) estimated approximately forty-three million Americans to be disabled.[2] Since 2008, the Department of Labor has provided statistics on the rate of unemployment amongst individuals with disabilities versus able bodied individuals. Statistics from 2019 showed that 79.2% of individuals with a disability were not in the labor force at all, compared with 31.1% of individuals without a disability.[3] For 2020, the labor force and employment rates of individuals with disabilities showed that 20.5% of individuals with disabilities above the age of 16 were in the labor force: there was an employment to population ratio of 17.9% and an unemployment rate of 12.6%, versus 67.1% of individuals without disabilities above the age of 16 in the labor force during the same period, with an employment to population ratio of 61.8%, and an unemployment rate of 7.9% for individuals without disabilities.[4] Individuals with disabilities are entering the labor force and employed at one-third of the rate of individuals without disabilities; where we go from here and how courts—and subsequently employers—reinterpret reasonable accommodation to

1. *See* Nathaniel Meyersohn, *Workers with Disabilities are Especially Hard Hit in the Coronavirus Economy*, CNN BUS. (May 14, 2020), https://www.cnn.com/2020/05/14/business/disabilities-workers-grocery-stores-coronavirus/index.html [https://perma.cc/FZZ8-EJRL] (explaining that many intellectually impaired individuals have lost jobs in retail).

2. Americans with Disabilities Act, 42 U.S.C. § 12101 (2009). The purpose of the Act was in part to increase access to employment. *See also* Sutton v. United Air Lines, 527 U.S. 471, 484 (1999) (acknowledging Congress's finding that some 43 million Americans have one or more physical or mental disabilities).

3. U.S. BUREAU OF LAB. STATS., PERSONS WITH A DISABILITY, 2019, at 8 (2020), https://www.dol.gov/sites/dolgov/files/odep/pdf/dol-odep-2019-briefing-appended-submission.pdf [https://perma.cc/PC2N-CBRC].

4. *Compare Disability Employment Statistics*, U.S. DEP'T LAB., https://www.dol.gov/agencies/odep/research-evaluation/statistics [https://perma.cc/2HM3-HFR7], *with* Jaime Rall, James R. Reed & Amanda Essex, *Employing People with Disabilities*, NATIONAL CONF. OF STATE LEG. (Dec. 15, 2016), https://leg.mt.gov/bills/2019/Minutes/House/Exhibits/buh35a04.pdf [https://perma.cc/X8B3-E5FE] (highlighting that the disparities in employment remain high, in spite of state and local initiatives to promote work opportunities for individuals who are disabled by offering tax exempt status to business). See Minn. Stat. Ann. §§ 16C.16 et seq., Minn. Admin. Code §§ 1230.1400 et seq., Minn. Stat. Ann. § 43A.02, Minn. Stat. Ann. § 43A.09, Minn. Stat. Ann. § 43A.10, Minn. Stat. Ann. § 43A.19, and Minn. Stat. Ann. § 43A.191, for Minnesota state statutes offering benefits for hiring individuals who are disabled.

include telework,[5] or not, or somewhere in between, has the potential to change all this.[6]

This Note will consider the effects of the shift to telework on individuals who are disabled. Because the telework workforce consists primarily of management, financial, professional, and other corporate-oriented jobs,[7] I will consider the effects of telework policies primarily on these populations, though I acknowledge that there is a large portion of individuals who are disabled who work in the service industry.[8] This Note will consider both the benefits and the drawbacks of telework for a wide range of physically, mentally, and emotionally impaired individuals. Part I will introduce the ADA and focus on the history of reasonable accommodations for disabled workers in the corporate workplace. Part II will explore the benefits and drawbacks of making telework a reasonable accommodation—or of a long-term company policy in favor of telework—the prospect of continued telework offers benefits and drawbacks to both the employees it is meant to serve, and to their employers. After analyzing these benefits and drawbacks of telework in Part II, Part III will consider whether working from home will be a reasonable accommodation under the ADA moving forward. The relevant statutory language, caselaw, and Equal Employment Opportunity Commission (EEOC) guidances will be analyzed in answering this question.

This Note will not advocate for making telework a wholesale reasonable accommodation; rather, it suggests that a telework accommodation may be appropriate for some employee-employer relationships in at least some instances, and detrimental in other

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5. I will refer to telework interchangeably as either telework, work-from-home, or remote work. The terms are used interchangeably by case law, scholarly literature, and cultural sources, so my usage will track with the sources I am analyzing, but all terms refer to the same concept. Similarly, I will refer to disabilities as either "disabilities" or "impairments," and mental impairments as either "mental" or "psychological" throughout the paper. Again, these terms are often used interchangeably in the literature, amongst their respective pairs, and my usage will track with the sources I analyze.

6. *See* Lisa Schur & Douglas L. Kruse, *Coronavirus Could Revolutionize Work Opportunities for People with Disabilities*, CONVERSATION (May 5, 2020), https://theconversation.com/coronavirus-could-revolutionize-work-opportunities-for-people-with-disabilities-137462 [https://perma.cc/Z7DW-F54Q].

7. *See* Drew Desilver, *Before the Coronavirus, Telework Was an Optional Benefit, Mostly For the Affluent Few*, PEW RSCH. CTR. (Mar. 20, 2020), https://www.pewresearch.org/fact-tank/2020/03/20/before-the-coronavirus-telework-was-an-optional-benefit-mostly-for-the-affluent-few/ [https://perma.cc/NW6Z-UE3W] (noting that 24% of workers in "management, business, and financial" occupations had the ability to work from home).

8. *See* Meyersohn, *supra* note 1 (explaining that many intellectually impaired individuals have lost jobs in retail).

instances. Employers, employees, and co-workers should all be open to flexible work arrangements that make work accessible while not sacrificing working relationships or the quality of the work product individuals provide. Part IV will close with the implications of telework for the disabled community and provide suggestions on how employers should approach the accommodation conversation, regardless of whether they choose to make an accommodation or not.

I. History of Reasonable Accommodation

A. The ADA and the Reasonable Accommodation Requirement

The ADA was passed in 1990 to provide increased access to employment and public life for individuals with disabilities.[9] One of the most powerful ways that the ADA accomplishes this goal is through the reasonable accommodation standard.

The text of the ADA mandates that no covered entity shall discriminate against a **qualified individual** on the basis of **disability**, a qualified individual being one who can perform the **essential functions** of the job, with or without **reasonable accommodation**, unless it poses an **undue hardship** on the employer.[10] While the statute gives some direction on what constitutes a reasonable accommodation, such as job restructuring, modified work schedule, interpreters, and buying or modifying equipment or devices,[11] reasonable accommodations remain an issue at the forefront of public and legal consciousness.[12] Because reasonable accommodation is a somewhat nebulous term, it can be helpful to understand the term in context:

> **Qualified individual**: one who can perform the essential functions of the job with or without reasonable accommodation, unless accommodations would impose an undue hardship on the employer.[13]

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9. 42 U.S.C. § 12101 (2009).

10. 42 U.S.C. § 12112(a)–(b)(5)(A) (2009); 42 U.S.C. § 12111 (2009).

11. 42 U.S.C. § 12111(9)(B) (2009).

12. Leora Eisenstadt, *Our Work-From-Home World is Proving More Job Flexibility is Possible*, CHI. TRIB. (May 8, 2020), https://www.chicagotribune.com/opinion/commentary/ct-opinion-coronavirus-remote-working-20200508-s3ehs5x4tzhw3ctxvta2v4hl3m-story.html [https://perma.cc/U8ST-CG44]. Eisenstadt's op-ed was featured in the Chicago Tribune during the summer months of the COVID-19 pandemic.

13. 42 U.S.C. § 12111(8). Put another way: someone who is eligible for a job and who can bring an action against their employer for a reasonable accommodation to enable successful job performance.

a. **Essential functions** are determined on the basis of factors such as employer discretion, job description, time spent on performance, and the experience of past and present incumbents.[14]

b. **Undue hardship** is determined by factors such as cost and resources of the individual, employer, and facility.[15]

Disability: Under Title I an individual may be disabled for three possible reasons, but this paper focuses on individuals with a substantial limitation on (a) major life activity, (b) major bodily function.

In the early years the Court construed the term "disability" narrowly meaning many individuals were found not to be disabled. Following the ADA Amendments in 2008, the Court widened the definition of disability to provide for a wide breadth of coverage.[16] Increasingly individuals are found to be disabled but not qualified.[17] This is important insofar as the broad reach of the ADA means many individuals are eligible for, and stand to benefit from, a reasonable accommodation.

B. The In-Person Work Requirement

Prior to the famed case *Vande Zande v. Wisconsin Dept. of Admin.*, many courts—including the D.C. Circuit, Federal Circuit, and Fourth Circuit—had already affirmed, in cases like *Carr v. Reno*, *Law v. U.S. Postal Service*, and *Walders v. Garrett*, that coming to work regularly was either an "essential function," a "necessary element," or the bare requirement of performing a job successfully.[18] In *Vande Zande*, the Seventh Circuit rejected

14. *Id.*; *see also* Keith v. County of Oakland, 703 F.3d 918, 925–26 (6th Cir. 2013) (listing numerous factors that make a job function essential).

15. 42 U.S.C. § 12111(10)(B); *see also* Bryant v. Better Bus. Bureau, 923 F. Supp. 720, 735 (D.M.D. 1996) (defining undue hardship as "an action requiring [the employer to undertake a] significant difficulty or expense").

16. 42 U.S.C. § 12101(b).

17. Stephen F. Befort, *An Empirical Examination of Cost Outcomes Under the ADA Amendments Act*, *in* DISABILITY LAW CASES AND MATERIALS 98, 98-101 (Stephen F. Befort & Nicole Buonocore Porte eds., 2017); *cf.* Lloyd v. HA of Montgomery, 857 F. Supp. 2d 1252 (M.D. Ala. 2012). An example of a case decided soon after the amendments where the plaintiff was diagnosed with high blood pressure and asthma both conditions that are disabilities due to their effect on major bodily functions but may not have been disabilities prior to the amendments.

18. *See* Tyndall v. Nat'l Edu. Ctr. Inc., 31 F.3d 209, 213 (4th Cir. 1994) (citing to *Carr v. Reno,* 23 F.3d 525, 529 (D.C. Cir. 1994) (holding that "coming to work regularly" is an "essential function")); *see also* Law v. United States Postal Serv., 852 F.2d 1278, 1279–80 (Fed. Cir. 1988) (holding that attendance is a minimum function of any job); Walders v. Garrett, 765 F. Supp. 303, 310 (E.D.Va. 1991) ("[R]egular, predictable attendance is fundamental to most [jobs]."), *aff'd*, 956 F.2d 1163 (4th Cir. 1992).

telework as a reasonable accommodation on two grounds. First, the court, like many before it, accepted that regular physical attendance at work is an essential function of any job irrespective of the ability to telework.[19] Second, the court stressed that if an individual needed to work in a team, this needed to occur in person.[20] *Vande Zande* is particularly famous for delineating a balancing test for determining what constitutes a reasonable accommodation: an accommodation must be efficacious to the individual and "proportional" in terms of a cost-benefit analysis.[21] The case law following *Vande Zande* further legitimized the Seventh Circuit's reasoning.[22]

C. New Freedom Initiative Supported Accessibility

Not long after *Vande Zande* was decided in 1995, the George W. Bush Administration launched the New Freedom Initiative (NFI) in 2001.[23] The aim of the NFI was to increase educational and employment opportunities for disabled Americans via assistive technology.[24] In addition to signing the Assistive Technology Act Amendments in 2004, the NFI funded research into the status of, and attitudes towards, workers who are disabled.[25] In the NFI-funded Disability Case Research Consortium, researchers conducted interviews and focus groups at large companies including

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19. *See Tyndall*, 31 F.3d at 213 (citing to *Law*, 852 F.2d at 1279–80 (holding that "coming to work regularly" is an "essential function")). *But see* Robert Nichols & Caroline Melo, *Pandemic Telework May Undermine Employer ADA Defense*, LEXISNEXIS: LEXIS360 (Apr. 6, 2020), https://www.law360.com/articles/1259855/pandemic-telework-may-undermine-employer-ada-defense [https://perma.cc/85X6-ZTBD] (challenging the notion that working from home severely diminished the quality of the employee's performance).

20. Vande Zande v. Wisconsin Dept. of Admin., 44 F.3d 538, 544 (7th Cir. 1995). Subsequent cases have also stressed working in person when special equipment is involved. *See also* Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233, 1237 (9th Cir. 2012) (holding a 2006 part-time work plan reasonable).

21. *Vande Zande*, 44 F.3d at 543.

22. *Compare* Credeur v. Louisiana, 860 F.3d 785, 793–97 (5th Cir. 2017) (finding that allowing Credeur to work from home would be an unreasonable accommodation because it imposed an undue burden on her employer), *with* McMillan v. City of New York, 711 F.3d 120, 126–29 (2d Cir. 2013) (holding that allowing McMillan to arrive tardy, work through lunch, and stay late was not an undue hardship on the employer).

23. *See President's New Freedom Initiative*, WHITE HOUSE: PRESIDENT GEORGE W. BUSH (Feb. 1, 2001) https://georgewbush-whitehouse.archives.gov/infocus/newfreedom/ [https://perma.cc/9JCA-R69G].

24. *Id.*; *see also* Assistive Technology Act 29 U.S.C. § 3001(b) (2004) (stating the purpose of the Act is to improve the provision of assistive technology to individuals with disabilities).

25. *See President's New Freedom Initiative*, *supra* note 23; *see also* Rall et al., *supra* note 4 (noting a shift in companies' attitudes towards wanting more disabled individuals to work for them in light of the statutory changes in recent years).

Microsoft and Sears.[26] Researchers found that individuals who are disabled face a multitude of barriers even after finding work, including lower pay, less job security, less training, and less participation in decision making.[27] The research also revealed one of the reasons why accommodations are so important: inclusion of individuals who are disabled correlates positively with inclusion of other groups.[28] The research's key findings about how managers can approach the accommodation process are analyzed in Part IV.B.[29] This Note also analyzes the statutory text of the Assistive Technology Act Amendments and explores how the Act has spurred technology growth and inclusion in employment, particularly via state action.[30]

II. Visualizing Telework Long Term

If telework is to be considered as a potential reasonable accommodation in the future—which it almost certainly will be—then it is essential to consider both the impact of a teleworking workforce generally, as well as the implications of telework on the disabled population. I will begin by discussing the former[31] and then move to the latter.[32]

A. Telework Has Benefits for Employers While Addressing Next Generation Demands

Telework is a good financial investment for companies. Research has found that working from home reduces meeting time

26. DISABILITY CASE STUDY RSCH. CONSORTIUM, CONDUCTING AND BENCHMARKING INCLUSIVE EMPLOYMENT POLICIES, PRACTICES, AND CULTURE 10–15 (2008), https://www.dol.gov/sites/dolgov/files/odep/research/corporateculturefinalreport.pdf [https://perma.cc/F6DF-2BUE].

27. *Id.* at 9.

28. *Id.* at 6–7, 84.

29. *Id.* at 35–49.

30. *See infra* Part II.B; 29 U.S.C. § 3002(4); 29 U.S.C. § 3002(6)(B) (2015); *see also* Joy Relton, *The Assistive Technology Act of 2004*, AM. FOUND. FOR THE BLIND, https://www.afb.org/aw/6/1/14652 [https://perma.cc/9BQD-3NJN] (asserting the Act ensures the continued existence of significant funding for assistive technology); *cf.* Cherlynn Low, *Accessibility in Tech Improved in 2020, But More Must be Done*, ENGADGET (Dec. 23, 2020), https://www.engadget.com/accessibility-in-tech-2020-150002855.html [https://perma.cc/C2LM-Z2RJ] (exploring the plethora of accessibility features added to technology and tech platforms in the past several years).

31. *See infra* Part II.A–B.

32. *See infra* Part II.C.

and costs[33] and rent and ownership costs like utilities, cleaning, and taxes,[34] in addition to potential savings on overhead of up to $11,000 per year for each employee who teleworks half the time.[35] One implication of reduced costs is that more funds can be channeled towards accommodations. In a survey from The Conference Board, 55% of respondents whose companies were working remotely at the time of the survey believed their revenue would return to pre-pandemic levels within 12 months.[36] The U.S. Census Bureau found that nearly one-third of all U.S. workers worked from home during the pandemic and 98% of individuals surveyed expressed a desire to work from home or to generally have a more flexible schedule in the future.[37] During the COVID-19 pandemic, the employment rate fell markedly less in sectors where telework was feasible: a dip of 8% in teleworking sectors versus 21% in sectors where it was not feasible.[38] In the past, employers may have cited the cost of equipment as a reason to deny a telework accommodation.[39] Given

33. Nick Routley, *What Employers and Employees Really Think About Remote Working*, WORLD ECON. F. (June 3, 2020), https://www.weforum.org/agenda/2020/06/coronavirus-covid19-remote-working-office-employees-employers/ [https://perma.cc/E33C-Y942]; *see also* Xuimei Dong, *New Normal of Legal Telework Likely to Outlast the Pandemic*, LEXISNEXIS: LEXIS360 (July 24, 2020), https://plus.lexis.com/document/?pdmfid=1530671&crid=91a57213-65a6-4b99-aeb8-d2d074cfb2a8&pdactivityid=a4144f05-72ae-4e77-847d-2204abfa2aeb&pdtargetclientid=-None-&ecomp=p5qk&prid=424c74e3-c0a3-41fb-902a-24a72b762e7e [https://perma.cc/YBK2-LXLC]. Law firms are considering telework as a way to decrease their real estate footprint by moving some professionals to virtual workspaces permanently or indefinitely.

34. Baruch Silverman, *Does Working from Home Save Companies Money?*, BUSINESS.COM (June 16, 2020), https://www.business.com/articles/working-from-home-save-money/ [https://perma.cc/7MAP-C74W].

35. Routley, *supra* note 33.

36. *See Execs Expect Work Remote Trend to Continue*, BUS. FACILITIES (June 3, 2020), *https://businessfacilities.com/2020/06/even-after-covid-19-execs-expect-remote-work-trend-to-continue/* [https://perma.cc/5PLE-5KES] (citing THE CONFERENCE BOARD, FROM IMMEDIATE RESPONSES TO PLANNING FOR THE REIMAGINED WORKPLACE 3 (2020) https://conference-board.org/pdfdownload.cfm?masterProductID=20874 [https://perma.cc/UN6X-MCC8]). The survey suggests that these optimistic financial reports could be due to increased productivity. Companies with over 10% of their workforce working remotely were more likely to report increased productivity compared to 19% of companies where 10% or less of their employees were working remotely.

37. *See* Routley, *supra* note 33.

38. *See* Matthew Dey, Harley Frazis, Mark A. Loewenstein & Hugette Sun, *Ability to Work From Home: Evidence From Two Surveys and Implications for the Labor Market in the COVID-19 Pandemic*, U.S. BUREAU LAB. STAT.: MONTHLY LAB. REV. (June 2020), https://www.bls.gov/opub/mlr/2020/article/ability-to-work-from-home.htm [https://perma.cc/V4XC-9PBK].

39. *See generally* Vande Zande v. Wisconsin Dept. of Admin., 44 F.3d 538, 542 (7th Cir. 1995) (explaining the history of cost in relation to reasonable accommodations).

the potential to save so much on overhead costs and the wealth of laptops, monitors, and other telework equipment now readily available at comparatively cheap prices, it seems hard to imagine that telework could place an undue cost or operational burden on corporate employers.[40]

Although telework has gained traction in the wake of the pandemic, it was gaining popularity long before 2020.[41] Previously, desks in the U.S. were empty an average of 40–50% of working hours.[42] Even prior to the pandemic, there was a more than 100% increase in telework since 2005.[43] Surveys taken of Accenture and Ernst & Young employees from 2013 and 2015 respectively found flexible work arrangements to be amongst the top desires of employees.[44] These findings suggest teleworking will not only continue to skyrocket in popularity, but also that making telework-friendly professions like management, professional, or administrative jobs more accessible to the disabled will reduce job insecurity among that population.

The Executive Branch has attempted to do its part to spur the employment of individuals with disabilities. Signed into law in 2004, the Assistive Technology Act (ATA) is becoming particularly relevant in today's virtual world. The goal of the ATA is to increase availability of and access to assistive technology and to make individuals more productive, particularly in the workforce.[45] "Assistive technology device" is defined in the Act as "any item, piece of equipment, or product system, whether acquired commercially, modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities."[46] Assistive devices are also included as reasonable

40. Bryant v. Better Bus. Bureau, 923 F. Supp. 720, 736 (D.M.D. 1996) (finding that the cost of a TTY phone was $279, and the employer admitted this cost was not a factor in the firing); *see also* Low, *supra* note 30 (exploring the recent advances in accessible technology, many of which allow for synchronous communication); *see also* Routley, *supra* note 33 (explaining that the average employer saves up to $11,000 a year when employees telework at least part-time).

41. Peter J. Mateyaka, Melanie A. Rapino & Liana Christin Landivar, *Home-Based Workers in the United States: 2010*, U.S. CENSUS BUREAU (2012), https://www.census.gov/prod/2012pubs/p70-132.pdf [https://perma.cc/P4HK-HC6G] (finding work-from-home increased steadily from the late 1990s until 2010 and certain areas, including engineering and science occupations, increased significantly).

42. Kate Lister & Tom Harnish, *Telework and Its Effects in the United States*, *in* TELEWORK IN THE 21ST CENTURY 128 (Jon C. Messenger ed., 2019) (ebook).

43. *Id.* at 129.

44. *Id.* at 133.

45. 29 U.S.C. § 3002(6)(B) (2015).

46. 29 U.S.C. § 3002(4) (2015).

accommodations under the ADA.[47] The ADA and the ATA have the potential to work in tandem by creating equipment and products that increase telework capabilities; the more assistive devices that exist, are developed, or are integrated into our everyday technological landscape, the more likely disabled and previously disenfranchised workers will be able to become productive members of the workforce. In just one example of how the ATA has impacted accessibility, individuals in Missouri can receive training on assistive technology and then use that training to obtain jobs where they train individuals on basic computer use skills, including how to use word processors and how to surf the internet.[48] However, there is much left to do, and we should be mindful of creating and improving our technology as we shift to a virtual—and teleworking—world. A telework friendly company policy could lead to greater inclusion, be good for morale, and secure tax benefits.[49]

More recently, in July 2015, the National Conference of State Legislatures published a report on state and local government initiatives to include individuals with disabilities in employment.[50] Many states, Minnesota included, have offered tax breaks or preferred partnership status to companies that hit certain thresholds of disability employment.[51]

Beyond productivity, flexibility, lower overhead costs, and tax breaks, telework also shows potential to increase health and well-being: a survey of 2,050 individuals administered by Prudential in between April and May 2020 found 69% of respondents found more time for self-care if allowed to telework.[52] The increased ability to care for oneself has the potential to offset some of the negative emotions associated with telework. Furthermore, a 2018 paper on telework and physical activity found that telework is correlated with higher levels of physical activity, including more walking and biking.[53] In fact, teleworking four times a month is associated with

47. 42 U.S.C. § 12111(9)(B) (2012).

48. *See* Relton, *supra* note 30.

49. *See infra*, Part II.A; *see also* Rall et al., *supra* note 4 (highlighting the varied benefits of teleworking policies).

50. *See* Rall et al., *supra* note 4.

51. *Id.*; *see* MINN. STAT. § 16C.16; *see also* MINN. STAT. § 43A.19. Minnesota has also implemented affirmative action programs into state agencies.

52. Tom Ryan, *Is Remote Working Bad for Corporate Culture?*, RETAILWIRE (June 8, 2020), https://www.retailwire.com/discussion/is-remote-working-bad-for-corporate-culture/ [https://perma.cc/7SC4-BAZZ].

53. Sandip Chakrabarti, *Does Telecommuting Promote Sustainable Travel and Physical Activity?*, 9 J. TRANSP. & HEALTH 19 (2018), https://www.sciencedirect.com/science/article/abs/pii/S2214140517309258 [https://perma.cc/BAJ9-QCAT].

as much as 15% more walks per week and 44% higher odds of 30 minutes or more of physical activity.[54] As the older generations seek to stay in the workforce longer, telework has the added benefit for both employee and employer of making their continued work possible because it allows them flexibility in when and how to work and attend to their health.[55]

B. Potential Drawbacks of Telework for Employers and Employees

Putting efficiency and productivity, flexibility, tax breaks, and health benefits aside, widespread telework presents several legal challenges for employers, particularly when facing wage and hour and tax laws. Employers may find that employees are attracted to remote positions because they give the flexibility to move out of chaotic and expensive cities.[56] However, having employees that work outside the bounds of a company's particular city or state could create a host of liability issues for the employer—including a myriad of tax-reporting requirements to follow by state, the risk of being sued in any state where their employees now work, and minimum wage, or wage and hour statutes.[57] The Minnesota Supreme Court, for example, recently ruled that employers with their place of business outside of Minneapolis will still be subject to the Minneapolis Sick and Safe Time Ordinance for those employees who are now working in Minneapolis over 80 hours a year.[58]

An additional area of uncertainty is how long-term work-from-home might create or exacerbate various areas of social and

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54. *Id.* at 21.

55. Andrea Loubier, *Benefits of Telecommuting for the Future of Work*, FORBES (July 20, 2017), https://www.forbes.com/sites/andrealoubier/2017/07/20/benefits-of-telecommuting-for-the-future-of-work/?sh=2d9d099716c6 [https://perma.cc/TCE3-6UBC].

56. Amit Gautam, *How Will Long-Term Work-From-Home Impact Innovation, Collaboration and Mental Health?*, FORBES (Dec. 14, 2020), https://www.forbes.com/sites/forbestechcouncil/2020/12/14/how-will-long-term-work-from-home-impact-innovation-collaboration-and-mental-health/?sh=3681ff0e2c33 [https://perma.cc/G259-9PG6].

57. Stephen Miller, *Out-of-State Remote Work Creates Tax Headaches for Employers*, SHRM (June 16, 2020), https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/out-of-state-remote-work-creates-tax-headaches.aspx [https://perma.cc/U2VM-XRXK]; *see also* Bruce J. Douglas, *Working Remotely? Welcome to Minneapolis and its SST Ordinance*, NAT'L L. REV. (Sept. 18, 2020), https://www.natlawreview.com/article/working-remotely-welcome-to-minneapolis-and-its-sst-ordinance [https://perma.cc/F7VB-23G9] (discussing the application of a Minneapolis city ordinance to employers whose employees worked remotely in the city even if the employer did not have a physical presence there).

58. Douglas, *supra* note 57.

economic inequality. Prior to the pandemic, it was largely believed that women did and would benefit from the work-life balance that telework can seemingly provide.[59] However, it appears that women may suffer more from the increased responsibilities that come with having no boundaries between work and home life.[60] Specifically, it can affect their performance evaluations, since evaluations are increasingly based on subjective impressions of a person: the employee who works harder and longer, but with less contact with their supervisor, will likely be passed up for a promotion.[61] Though it is too early to say for certain, this tends to suggest that women may find telework more exhausting and less rewarding in the long run, which may lead to a split where women prefer in-person work and men are more likely to telework.[62]

Another challenge is the cost burden that work-from-home poses on employees, the cost of setting up and maintaining a home office via appropriate furniture and technology, and the cost of internet and phone bills associated with telework.[63] A Nulab survey conducted on 850 companies who worked from home during the pandemic found that the average cost employees spent on setting up their home office was $194, and it was on average $35 more for those who were not allowed to bring supplies and equipment home.[64] A larger portion of employers have contemplated giving reimbursements or financial support for technology than have actually done so at this point.[65] Companies like Twitter and Indeed have been offering stipends for home office equipment.[66] Buffer, a

59. Tomas Chamorro-Premuzic & Herminia Ibarra, *Why Killing the Office Won't Close the Gender Gap*, FAST CO. (June 27, 2020), https://www.fastcompany.com/90521873/why-killing-the-office-wont-close-the-gender-gap [https://perma.cc/CNE9-6QJW].

60. *Id.*

61. *Id.* (suggesting men are more likely to take extra time to build personal relationships with supervisors even in a virtual world).

62. *Id.* This article suggests that the presence of children is one factor that dictates the success of telework, so it is possible that as children go back to school, some of these gender disparities may decrease, and women may see more benefits from telework—though maybe not at pre-pandemic levels.

63. Annie Nova, *Working from Home? You Might Be Able to Expense a New Desk*, CNBC (June 8, 2020), https://www.cnbc.com/2020/06/03/companies-are-paying-for-their-workers-home-offices.html [https://perma.cc/VX72-C4E5].

64. Stephen Miller, *Is It Time For Employers to Reimburse Remote Workers' Expenses?*, SHRM (Sept. 11, 2020), https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/employers-may-overlook-reimbursing-remote-work-expenses.aspx [https://perma.cc/D6G4-7BYG].

65. *Id.* A July 2020 survey found 2 of 10 employers had provided resources to employees who contemplated working from home long term, but 2/3 of employers surveyed had plans to do so in the future.

66. Nova, *supra* note 63.

software company that has been teleworking since 2015, pays for initial office setup, an annual stipend for equipment, and internet bills.[67] Whether or not paying various bills is feasible or even reasonable will vary by employer, but for those planning to work largely or wholly remote going forward, it is key to consider how this decision impacts their workforce.

Two further drawbacks of work-from-home include Zoom fatigue[68] (which we have likely all experienced at this point) and the increasingly cumbersome collaboration process.[69] A recent survey by Netskope found that a sizeable chunk of respondents—68%—found their collaboration tools to be effective, but 59% found collaboration harder or saw no change in the virtual environment.[70] This issue of collaboration is important because it bears directly on the *Vande Zande* analysis—if collaborative tools are not effective virtually then telework could not be reasonable under the current framework. Furthermore, evidence suggests that a decrease in collaboration has also led to a decrease in innovation.[71] On the other hand, both Zoom fatigue and a cumbersome collaboration process actually have the potential to be beneficial to employers if handled correctly because they provide the opportunity to rethink how we work.

First, Zoom fatigue may cause managers to reconsider the need for a meeting and instead ask whether a simple email or instant message will do.[72] In 2019, CNBC published an article with the results of a Korn Ferry survey of 1,945 workers that revealed 67% of workers felt meetings kept them from getting their best work done.[73] A majority of respondents felt they "wasted" between one and five hours each week in meetings, with some even feeling they wasted more than ten hours a week in meetings.[74] On one hand,

67. *Id.*

68. *Working from Home: The Long-Term Effects on Employee Well-Being*, WELLRIGHT BLOG (Aug. 5, 2020), https://www.wellright.com/blog/long-term-effects-working-from-home-employee-well-being [https://perma.cc/3J7V-E3U3].

69. Gautam, *supra* note 56.

70. *Id.*

71. Adi Gaskell, *Productivity in Times of Covid*, FORBES (Dec. 8, 2020), https://www.forbes.com/sites/adigaskell/2020/12/08/productivity-in-times-of-covid/?sh=5f80650e1fa1 [https://perma.cc/EV4U-JYMW] (suggesting innovation drain can be countered by the right tools and training employees to work better remotely).

72. *Working From Home*, *supra* note 68.

73. Abigail Johnson Hess, *67% of Workers Say Spending Too Much Time in Meetings Distracts Them From Doing Their Job*, CNBC (Nov. 17, 2019, 9:30 AM), https://www.cnbc.com/2019/11/17/67percent-of-workers-say-spending-too-much-time-in-meetings-distracts-them.html [https://perma.cc/25RA-CUT3].

74. *Id.*

meetings are now our collaborative lifeline in a virtual world, but these survey results suggest that scheduling meetings with more intention has great potential for increasing productivity. Thirty-five percent of workers admitted they would attend a meeting even if they did not think it would be a productive use of their time.[75] It therefore becomes that much more important for employers to guard their meetings in a wholly virtual environment. Korn Ferry consultant Cathi Rittelmann suggests that the key to productive meetings is ensuring the (few) right people are invited and sending out a clear agenda ahead of time.[76]

Second, on the issue of collaboration, Buffer, one of the aforementioned companies providing stipends to employees for their remote work, relies heavily on asynchronous communication to create effective cross-company collaboration, especially across time zones.[77] The company suggests that written and direct communication has great benefits for clarity and efficiency.[78] Buffer focuses on real time meetings for social events, urgent matters, and relationship building.[79] Asynchronous communication is more inclusive because it takes the focus off the big personalities and loud talkers and equalizes the opportunity to speak.[80] One could imagine how this would empower individuals who are disabled—particularly the blind, deaf, or speech-impaired—to speak more often, because they do not have to compete with quicker and louder voices. The Buffer team also notes that asynchronous communication means everything is written down and searchable, reducing confusion or uncertainty about what was said.[81] While there is a definite drawback in the lack of regular face time with colleagues, the Buffer team suggests this can be alleviated with weekly video check-ins as opposed to constant video meetings.[82]

This simplistic view of asynchronous communication may not address matters around onboarding, managing interns, or other

75. *Id.*

76. *Id.*

77. Hailley Griffis, *Asynchronous Communication and Why It Matters For Remote Work*, BUFFER BLOG (Mar. 17, 2020), https://buffer.com/resources/asynchronous-communication/#:~:text=One%20remote%20work%20best%20practice,the%20same%20time%20for%20everyone [https://perma.cc/N7L7-R3BS].

78. *Id.*

79. *Id.*

80. *Id.*

81. Victoria Gonda, *What Happened When Our Team Switched to Only Asynchronous Meetings*, BUFFER BLOG (July 29, 2019), https://buffer.com/resources/asynchronous-meetings/ [https://perma.cc/95S2-K3U7].

82. *Id.*

situations where an employee is bound to have questions that may hinder their ability to even begin to be productive, but for teams who are well acquainted with their roles and each other, some asynchronous communication could be beneficial.

A final consequence of remote work for employers to consider is the impact of virtual work on reducing a sense of company culture. There is a diversity of conflicting data on the impact of telework on company culture, individual well-being, long-term productivity, and turnover rates.[83] This is likely due in part to the (relative) novelty of telework and the general split in generational attitudes between an older generation who may prefer in-person work and the younger workforce who increasingly demands telework.[84] Gallup has found that those who dislike remote work are five to ten percentage points less likely to feel recognized for their contributions, feel cared about by their fellow employees, and feel that their opinions count.[85] For individuals who prefer in-person work, remote work can result in 17% lower productivity and 24% higher turnover.[86] While Gallup suggests that individuals who work remotely may be disconnected from company culture,[87] there is little empirical data at this point to suggest what the long term

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83. *Compare* Sandi Mann & Lynn Holdsworth, *The Psychological Impact of Teleworking: Stress, Emotions and Health*, 18 NEW TECH. WORK & EMP. 3, 196 (2003) (discussing the negative emotional impact of teleworking and the increase in mental health symptoms of stress in teleworkers), *and* Tomas Chamorro-Premuzic, *4 Major Long-term Psychological Effects of Continued Remote Work*, FAST CO. (Aug. 31, 2020) https://www.fastcompany.com/90544975/4-major-long-term-psychological-effects-of-continued-remote-work [https://perma.cc/276Q-USC6] (suggesting prolonged remote work may increase loneliness, anxiety, and stress in teleworkers), *with* Loubier, *supra* note 55 (suggesting remote work can improve productivity and health while decreasing costs and employee turnover), *and* Lister & Harnish, *supra* note 42 (finding that the majority of U.S. workers feel the benefits of telework outweigh its negative aspects).

84. *See* Lister & Harnish, *supra* note 42, at 129, 133; *see also* Eisenstadt, *supra* note 12 (suggesting remote work appeals particularly to millennial workers who seek flexibility and work-life balance).

85. Jake Herway & Adam Hickman, *Remote Work: Is It a Virtual Threat to Your Culture?*, GALLUP (Aug. 25, 2020), https://www.gallup.com/workplace/317753/remote-work-virtual-threat-culture.aspx [https://perma.cc/RH4N-R7JC].

86. *Id. Compare id.*, *with* Loubier, *supra* note 55 (discussing a PGi survey that found that 80% of remote workers reported higher morale. This figure suggests that burnout may be occurring amongst older, or less tech capable populations, but it may be less likely to occur amongst the younger generation who demands telework).

87. *Compare* Herway & Hickman, *supra* note 85 ("Remote employees are seven percentage points less likely to see their connection to the mission of the company."), *with* Loubier, *supra* note 55 ("A study by Staples Advantage found 76% of telecommuters were willing to work overtime and felt more loyal to their company with the option for remote work and telecommuting.").

impacts of that disconnect might be,[88] and Gallup acknowledges that even without working remotely, 60% of employees could not agree on what their company stood for.[89] One fix, however, is to let go of the thought that every interaction has to be work-focused.[90] For some companies, this may mean creating a group message to share pet photos; for others, this could mean virtual pizza nights, movie nights, or just about anything else. These numbers are hard to interpret long term because the research is so varied, but the data seems to suggest that individuals who prefer teleworking are less likely to burn out, feel disconnected, and leave their company than those who do not enjoy telework. This suggests that companies may be healthiest long term if they can provide options that accommodate various working preferences.

C. Considering Ways for Employers to Accommodate Employees Post-COVID-19

As noted earlier, the rates of unemployment amongst the disabled population are alarmingly high.[91] This becomes even more concerning when considering that 50 million Americans, and 10% of the world's population, are disabled, making individuals who are disabled the largest minority group in both the United States and the world.[92] Furthermore, the tide towards telework has been changing for several years now. In their 2019 article on telework in the United States in the 20th century, Lister and Harnish estimate that 19.7% of Americans teleworked on a regular basis.[93] But if this

88. Gautam, *supra* note 56 (noting he has "yet to see the hybrid approach yield predictable results," and instead he has found "technical issues, fatigue, anxiety, and the absence of physical interaction negatively affect productivity and well-being . . .").

89. Herway & Hickman, *supra* note 85 (suggesting the "loss" of company culture caused by telework is actually a pre-existing weakness in the company's ethos).

90. Phil Lewis, *Make Sure That Remote Working Supercharges Your Culture—And Doesn't Stall It*, FORBES (Mar. 24, 2020, 7:17 AM), https://www.forbes.com/sites/phillewis1/2020/03/24/make-sure-that-remote-working-supercharges-your-culture-and-doesnt-stall-it/?sh=4581f20a4e8b [https://perma.cc/X6Q2-XZJW].

91. *Disability Employment Statistics*, *supra* note 4.

92. *Diverse Perspectives: People with Disabilities Fulfilling Your Business Goals*, U.S. DEP'T LAB.: OFF. DISABILITY EMP. POL'Y, https://www.dol.gov/agencies/odep/publications/fact-sheets/diverse-perspectives-people-with-disabilities-fulfilling-your-business-goals [https://perma.cc/5AEG-58XW]; *Factsheet on Persons with Disabilities*, UNITED NATIONS: ENABLE, https://www.un.org/disabilities/documents/toolaction/pwdfs.pdf [https://perma.cc/WS53-YSGL].

93. Lister & Harnish, *supra* note 42, at 129, 133; *see also* Speigner v. Wilkie, 31 Vet. App. 41, 43 (2019) (citing U.S. OFF. PERS. MGMT., STATUS OF TELEWORK IN THE

trend is to continue, it is essential that the corporate world learn how to accommodate all its workers.

i. Telework and the Capacity to Enfranchise: The Legal Field

Because the legal profession falls into the category of professional jobs that lend themselves to telework, it provides a good example for the potential for growth in inclusion in a variety of industries that are now teleworking. Additionally, the legal profession has been criticized in the past for its lack of accessibility. In 2009, Donald Stone published an article in the *Minnesota Journal of Law & Inequality* analyzing the then-current state of the profession for attorneys who are disabled.[94] Stone found only 7% of ABA members report having a disability, and those individuals reported rates of employment 6–9% lower than their able-bodied counterparts.[95] Furthermore, attorneys who are disabled are paid on average $12,000 less than their non-disabled counterparts.[96] Stone's Attorneys with Disabilities Survey questioned the hiring and management practices of 50 firms throughout the country, over half of which employed an attorney who was either mentally or physically disabled.[97] The most common accommodations included modified work schedules, accessible technology, accessible architecture, additional secretary support, and modification of equipment—but not telework.[98]

The ABA National Conference on Employment of Lawyers with Disabilities has offered telework as one way to accommodate lawyers who are disabled.[99] It seems probable that telework could be one way to increase the number of attorneys who are physically and mentally impaired in the profession. Stone noted specifically

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FEDERAL GOVERNMENT, REPORT TO CONGRESS, FISCAL YEAR 2017, at 31 (2019), https://www.telework.gov/reports-studies/reports-to-congress/2018-report-to-congress.pdf [https://perma.cc/722N-86JN]) (finding that by 2017, 21% of federal employees teleworked in some capacity).

94. Donald H. Stone, *The Disabled Lawyers Have Arrived; Have They Been Welcomed with Open Arms into the Profession? An Empirical Study of the Disabled Lawyer*, 27 LAW & INEQ. 93, 95–122 (2009).

95. *Id.* at 95.

96. *Id.*

97. *Id.* at 117.

98. *Id.* at 118. This survey was an unpublished online survey by the author attached to his paper in Appendix A.

99. *Id.* at 101–02 (referring to the findings of the AM. BAR ASS'N COMM'N ON MENTAL AND PHYSICAL DISABILITY L., THE NATIONAL CONFERENCE ON THE EMPLOYMENT OF LAWYERS WITH DISABILITIES: A REPORT FROM THE AMERICAN BAR ASSOCIATION FOR THE LEGAL PROFESSION (2006)). Stone's survey was conducted in 2007, one year after the ABA Report was published.

that despite the inclusion of attorneys with psychological impairments in the profession, there is still a debate over whether accommodations for lawyers with mental disabilities are in fact reasonable.[100] Individuals with physical and mental impairments potentially have a lot to gain and lose in a teleworking world.[101] Stone is not the only attorney to acknowledge a dearth of opportunities for individuals who are disabled. Danielle Liebl is an attorney with cerebral palsy who began her career at Reed Smith, and, as of the publication of this Article, now works at as an Associate Corporate Counsel at Amazon.[102] In an op-ed for Lexis360, she implored the legal profession to do more to accommodate individuals with disabilities like herself.[103]

In 2016, the Sixth Circuit granted Andrea Mosby-Meachem, an in-house attorney, a judgement against her employer for denying her an accommodation to work from home for ten weeks while on bedrest.[104] In contrast to their *EEOC v. Ford* decision three years earlier,[105] the court found the plaintiff had established physical presence was not essential, particularly because she had never needed to represent the company in court or depositions, and because in-house and outside counsel testified her work did not suffer at home.[106] Unlike the Sixth Circuit's earlier *Ford* decision, where the court stressed that an open telework policy may lead to employee abuse, the court did not take issue with the office attorneys flouting an official policy against telework.[107] The discrepancy between the two decisions can largely be accounted for by Mosby-Meachem's continued high quality of work.[108]

While *Mosby-Meachem* suggests that the legal profession may be moving in a more inclusive direction, there is still much to do to

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100. *Id.* at 98, 122.

101. *See infra* Part II.C.ii.1–2.

102. Danielle Liebl, *ADA Protects Lawyers with Disabilities, but We Must Do More*, LEXISNEXIS: LAW360 (Aug. 10, 2020, 3:40 PM), https://www.law360.com/articles/1299552/ada-protects-lawyers-with-disabilities-but-we-must-do-more [https://perma.cc/YF5W-N48Q].

103. *Id.*

104. Mosby-Meachem v. Memphis Light, Gas & Water Div., 883 F.3d 595, 599 (6th Cir. 2018).

105. Equal Emp. Opportunity Comm'n v. Ford Motor Co., 782 F.3d 753 (6th Cir. 2015).

106. *Mosby-Meachem*, 883 F.3d at 605.

107. *Compare id.* at 603–04 (finding that Mosby-Meachem was otherwise qualified to perform her job from home despite an official policy against telework), *with E.E.O.C. v. Ford*, 782 F.3d at 765 (arguing that allowing all disabled employees to telecommute on an unpredictable basis would undermine the purpose of the ADA).

108. *Mosby-Meachem*, 883 F.3d at 605.

make the professional world at large accessible. But if we can acknowledge that a problem exists, the next question is how do we fix it? Because of the nature of reasonable accommodations, the answer will vary based on the type of employer, the resources of the employer,[109] and the needs of the individual. As early as July 2020, several large law firms across the U.S. and the world—Dentons, Husch Blackwell, Hogan Lovells, and Covington & Burling, among others—began making the shift to providing options to attorneys and personnel to telework indefinitely regardless of disability status.[110]

However, it is important to consider a wide variety of experiences in judging the practical impacts of telework, specifically on individuals who are disabled. Individuals with mental (which may include emotional) and physical impairments, such as ADD, OCD, anxiety, and deafness, all have life experiences and obstacles which should be of central importance to their employers in deciding whether to continue to telework in whole or in part. I will analyze the potential impact of a telework accommodation on physical disabilities and mental disabilities in turn.

ii. Implications of Teleworking and Accommodations Across Impairments

The potential positive impact of telework on those with ambulatory impairments seems plainly obvious. In fact, individuals with physical disabilities have been, and will likely continue to, telework at higher rates than other individuals.[111] One possible reason for this tendency to telework is because it decreases dependence on others.[112] Despite modified work schedules being a statutory accommodation, courts have been inconsistent on whether rearranging work schedules to best accommodate an individual's

109. McMillan v. City of New York, 711 F.3d 120, 128 (2d Cir. 2013) (emphasizing that the ADA requires an individualized inquiry).

110. Dong, *supra* note 33.

111. Lisa A. Schur, Mason Ameri & Douglas Kruse, *Telework After COVID: A "Silver Lining" for Workers with Disabilities?*, 30 J. OCCUPATIONAL REHAB. 521, 523 (2020).

112. Annie Xu, Mark Chignell, Koichi Takeuchi, Naotsune Hosono & Takashi Tsuda, *Vocal Village Audioconferencing: A Collaborative SOHO Tool for Teleworkers with Physical Disabilities*, 2ND INT'L CONF. FOR UNIVERSAL DESIGN KYOTO 2006, July 2008, at 1–2.

transportation needs constitutes a reasonable accommodation.[113] In the past, courts have ruled that enabling a commute may be a reasonable accommodation, but a shift change to enable a family to pick an individual up from work is not.[114] An individual may be requesting a shift change for the same reasons that another employee is requesting an accommodation, but under the current distinction, it is possible that one could be allowed and the other denied depending on the posture of the employer and the attitude of the court. Because telework eliminates a commute, it eliminates any potential hazards individuals might face with driving, public transportation, parking, or other architectural barriers in the office.[115] Telework would therefore create an additional level of protection for individuals who are disabled.

1. Physical Impairments

There are many individuals who are disabled in ways that impact them physically or emotionally who may not be so fortunate in a post-COVID-19 world. Already, the media has latched on to the issues surrounding masks and the barrier masks create for lip readers, something that has presented reasonable accommodation issues in the past.[116] Telework does present unique challenges for individuals who are blind or deaf. Rooted in Rights is a blog focused on giving a voice to individuals with disabilities.[117] In one blog post, the author, Jess Gill, describes her own challenges with attempting to adjust to a world where we all wear masks, as she never learned to sign, she relies heavily on lip reading.[118] (Interestingly, Jess has an easier time hearing women than men.) Aside from having

113. 42 U.S.C. § 12111(9)(B); *compare* Regan v. Faurecia Auto. Seating, Inc., 679 F.3d 475, 479 (6th Cir. 2012) (holding that an employee's request for an altered work schedule was not a reasonable accommodation), *with* Colwell v. Rite Aid Corp., 602 F.3d 495, 498–502 (3d Cir. 2010) (holding that the ADA can obligate employers to accommodate employees' disability-related difficulties in getting to work).

114. *Compare Regan*, 679 F.3d at 480, *with Colwell*, 602 F.3d at 498–99.

115. *Colwell*, 602 F.3d at 499–500; *see also* Lyons v. Legal Aid Soc., 68 F.3d 1512, 1514 (2d Cir. 1995) (holding that an employee's request that her employer pay for a parking spot near her office was a reasonable accommodation); *see also* Stone, *supra* note 94, at 95 (focusing on accommodating lawyers with physical disabilities and/or mental health issues and discussing court decisions concerning reasonable accommodations).

116. *See* Southwestern Comm. Coll. v. Davis, 442 U.S. 397 (1979); *see also* Jess Gill, *Challenges of Being a Deaf Lip Reader During COVID-19*, ROOTED IN RIGHTS (Apr. 23, 2020), https://rootedinrights.org/the-challenges-of-being-a-deaf-lip-reader-during-the-covid-19-pandemic/ [https://perma.cc/E2XJ-M94S] (advocating for online meetings with closed captioning).

117. Gill, *supra* note 116.

118. *Id.*

interpreters available, Jess suggests texting or keeping a note pad to communicate with deaf individuals in person while wearing masks.[119] Another post provides a plethora of suggestions for adapting to deaf and blind coworkers.[120] Howard Rosenblaum, CEO of the National Association of the Deaf, noted that prior to the pandemic, videoconferencing platforms were largely inaccessible to deaf individuals.[121] Closed captioning and pinning users—such as interpreters—to the home screen are just a few of the strides these platforms have made in recent months.[122] Providing materials ahead of time and special headsets are additional accommodations which may help individuals who are deaf transfer to a telework world.[123] Ensuring the technology that a company uses is compatible with screen readers and describing images and videos may help blind individuals.[124]

The increased reliance on platforms like Zoom, WebEx, and Microsoft Teams naturally creates questions over who will bear the financial burden of making these platforms accessible in the future. While this is not the focus on this paper, it does raise an important question. If funding accessible features becomes the responsibility of each individual employer, the costs that employers have to pay for accessible platforms could increase the burden on employers and detract from their ability to make other accommodations. That responsibility could quite possibly turn various accommodations into an undue hardship.[125]

2. Mental Impairments

Beyond accommodating physical disabilities, employers should consider the potential benefits *and* costs that telework may have on individuals with mental or psychological impairments.

While there may be benefits to telework for individuals who are mentally or emotionally impaired, here the potential downsides also become more pronounced. One of the potential benefits of telework for individuals who take medication is that it may allow

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119. *Id.*

120. *See* Alaina Leary, *How to Make Virtual Meets Accessible*, ROOTED IN RIGHTS (Apr. 13, 2020), https://rootedinrights.org/how-to-make-your-virtual-meetings-and-events-accessible-to-the-disability-community/ [https://perma.cc/KEK9-U29Y].

121. Low, *supra* note 30.

122. *Id.*

123. *See* Leary, *supra* note 120.

124. *Id.*

125. Blake E. Reid, Christian Vogler & Zainab Alkebsi, *Telehealth and Telework Accessibility in a Pandemic-Induced Virtual World*, UNIV. COLO. L. REV., Nov. 9, 2020, at 16–19.

them to structure their daily schedule to avoid grogginess or other side effects of medication.[126] Individuals with anxiety disorder, obsessive compulsive disorder, and post-traumatic stress disorder may have more challenges with disruptions to daily life[127] because they may crave routine that is not conducive to asynchronous work schedules.[128] WebMD includes a web page on how individuals with ADHD should manage working from home, and on their page, WebMD acknowledges that the structure provided by an office and colleagues may have some benefits to those with the disorder.[129] This means employers may be able to play an important role in helping support individuals with mental and emotional impairments. The Department of Labor has suggested that positive reinforcement, frequent breaks, and regular meetings to prioritize tasks may help bring order to a remote work environment.[130] Reaching out to employees to discuss their preferred communicative method and using that method may be another way to provide structure and connectivity that is particularly helpful for individuals who are mentally impaired.[131]

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126. *See* Newstax Blogs, *Step 2: Mental Health*, LEXISNEXIS: LEXISBLOGS (Aug. 20, 2020, 2:01 AM), https://plus.lexis.com/document/?pdmfid=1530671&crid=e2bb4eb7-cb98-4261-a7c8-c8fcf8385748&pdactivityid=774e3e0d-791a-45d7-b39f-9a913961cf76&pdtargetclientid=-None-&ecomp=p5qk&prid=295c9476-f77f-4c7c-9472-34187f0db39d [https://perma.cc/NV5N-LYJ8] [hereinafter Step 2: Mental Health].

127. *See* Wolters Kluwer, ¶ *90, 123 What You Should Know About the ADA, the Rehabilitation Act, and COVID-19*, Apr. 17, 2020, at 2020 WL 2146074; *but see* Casey Shull, *Remote Work: A Solution for PTSD?*, DISTANT JOB (Aug. 31, 2018), https://distantjob.com/blog/remote-work-solution-for-working-with-ptsd/ [https://perma.cc/9SG3-FPBC] (highlighting the benefits remote recruiting can have for employees with PTSD and employers).

128. *See* JAN, *Accommodation and Compliance Series: Obsessive Compulsive Disorder*, ASK JAN, https://webcache.googleusercontent.com/search?q=cache:MQwXdDTXmTgJ:https://askjan.org/publications/Disability-Downloads.cfm%3Fpubid%3D1471117%26action%3Ddownload%26pubtype%3Dpdf+&cd=3&hl=en&ct=clnk&gl=us [https://perma.cc/QU2D-EWQ5]; *see also* Step 2: Mental Health, *supra* note 126 (suggesting employers can accommodate employees by providing them with a routine); Wolters Kluwer, *supra* note 127 (acknowledging that employees with certain mental health conditions might have a harder time dealing with disruptions resulting from the COVID-19 pandemic).

129. *Working From Home When You Have ADHD*, WEBMD (Apr. 22, 2020), https://www.webmd.com/add-adhd/work-from-home-adhd [https://perma.cc/99T7-FZSP].

130. *See Accommodations for Employees with Psychiatric Disabilities*, OFFICE OF DISABILITY EMP'T POL'Y, https://www.dol.gov/agencies/odep/program-areas/mental-health/maximizing-productivity-accommodations-for-employees-with-psychiatric-disabilities [https://perma.cc/46Y2-QUN3].

131. *See Employing People with Mental Health Disabilities*, SHRM, https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/mental-health-disabilities.aspx [https://perma.cc/3V25-CTRK].

Japanese studies of the effects of telework have found that teleworking can lead to decreased dependence on a team and as a result decreased trust of co-workers.[132] To treat this sense of isolation, the Japanese have created accessibility initiatives.[133] Studies found that increased accessibility led to better teamwork, increased self-confidence, and enjoyment of work, and increased understanding of how co-workers operate.[134] Perhaps employers should be cognizant of and open to requesting semi-regular in-person work of individuals who work on teams with mentally impaired co-workers. Such a request does not require employers to buy expensive equipment, it facilitates comradery, and it can play an important role in facilitating employee well-being without spending a dime.

III. Reinterpreting Reasonable Accommodation

Now that we have seen what a telework accommodation could look like, this begs the question—is it even supported by the law? Many believe that answer should be "yes" in a post-pandemic world.[135] While *Vande Zande* is often cited as establishing that physical presence in the office is an essential function of a job, many fail to remember Judge Posner's qualification that this in-person requirement may change with technology.[136] By 2017, 21% of all federal employees teleworked in some capacity.[137] Even under the *Vande Zande* standard, it is time to reexamine our view of reasonable accommodations.

Because the reasonable accommodation question is factored into the qualified standard, the existence of a reasonable accommodation is a particularly important step in enabling individuals who are disabled to become productive members of the workforce. The statutory text outlining reasonable accommodation focuses on physical accommodations such as appropriate equipment and devices and making physical spaces accessible, in addition to modified work schedules and job restructuring.[138] However,

132. Xu, *supra* note 112, at 1–2.

133. *Id.* at 1, 3.

134. *Id.* at 3, 7.

135. *See, e.g.*, Eisenstadt, *supra* note 12.

136. *Id.*; *see* Vande Zande v. Wisconsin Dept. of Admin., 44 F.3d 538, 544 (7th Cir. 1995) ("This will no doubt change as communications technology advances, but is the situation today.").

137. Speigner v. Wilkie, 31 Vet. App. 41, 43 (Vet. App. 2019).

138. 42 U.S.C. § 12111(9)(B).

recently, the courts have also read leaves of absence into this list.[139] While the text does not explicitly state that telework may be a reasonable accommodation, the trend of the courts suggests that telework may be included in the near future, not in a wholesale manner, but rather on a case-by-case basis. Updated EEOC guidances have also frequently recognized temporary telework as a reasonable accommodation,[140] lending further support to the possibility of a new reasonable accommodation.

A. Statutory Language and Caselaw Suggest a Shift Is Possible

Statutory language will always take precedence when considering whether a new interpretation of a statute is permissible.[141] The statute includes the following reasonable accommodations: "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations . . . ."[142] "[O]ther similar accommodations" leaves open the possibility for a multitude of accommodations. Arguably, job restructuring, as vague as it is, could be construed as inviting telework. In reality, the statute on its face does not clearly condone telework, and none of the listed accommodations are strikingly similar to telework. Therefore, the courts often justify telework not on a statutory interpretation ground, but rather because it is "reasonable," and its reasonableness is determined by what would or does not place an undue hardship, cost or otherwise, on either employees or the business.[143] What the caselaw suggests is that

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139. Stephen F. Befort, *The Most Difficult Reasonable Accommodation Issues: Reassignment and Leave of Absence*, *in* DISABILITY LAW CASES AND MATERIALS 174, 174 (Stephen F. Befort & Nicole Buonocore Porte eds., 2017); *see, e.g.*, Humphrey v. Memorial Hosp. Ass'n, 239 F.3d 1128, 1135 (9th Cir. 2011).

140. *See* U.S. EQUAL OPPORTUNITY. EMP'T COMM'N, REASONABLE ACCOMMODATIONS FOR ATTORNEYS WITH DISABILITIES (2006) [hereinafter Accommodations for Attorneys]; *see also* U.S. EQUAL OPPORTUNITY. EMP'T COMM'N, EEOC-NVTA-2009-3, PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT (2020) [hereinafter Pandemic Preparedness] (noting telework as a reasonable accommodation).

141. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184–90 (1978).

142. 42 U.S.C. § 12111(9) (2009); *see also* Rehrs v. Iams Co., 486 F.3d 353, 357 (8th Cir. 2007) (noting employee requested to be moved to a straight-shift rather than a rotational shift).

143. 42 U.S.C. § 12111(10)(A)–(B); *see* Bryant v. Better Bus. Bureau, 923 F. Supp. 720, 735–36 (D.M.D. 1996).

whether or not telework will become a reasonable accommodation in the future is not a question that can be answered in isolation; rather, it will be a fact-specific inquiry to the needs of the business, and to the needs of the particular employees and team structures in any given business.[144] In Part IV.B, "Approaching the Accommodation Conversation," statistics supporting why telework likely will not cause undue hardship for many employers going forward, either based on cost or effects on operation, will be presented.

B. Courts have waivered on Telework as a Reasonable Accommodation

Though it would be incorrect to assert that *Vande Zande* was the first case to suggest that physical presence is an essential function, that case seems to have solidified the idea.[145] Soon after *Vande Zande* was decided, the Sixth Circuit adopted the Seventh Circuit's standard in *Smith v. Ameritech* and rejected the request of a phone book salesman to work from home following a herniated disc over fears that telework would lower productivity.[146] Courts have continually found physical attendance to be an essential function of any job up until 2010 when the District of Pennsylvania declined to adopt the *Vande Zande* attendance standard as a per se rule.[147] Instead, that court found that where a request to work from home is backed by medical documentation and the plaintiff has shown they can replicate their work setup in a manner that is not overly costly, the plaintiff may have shown a reasonable accommodation.[148] In 2013, the Second Circuit declined to grant summary judgement to an employer when an employee was regularly tardy; instead, the Court offered the plaintiff the chance to show that work could be made up over lunch or after normal

144. *Bryant*, 923 F. Supp. at 736; *see also Rehrs*, 486 F.3d at 357 (finding that allowing Rehrs to work a straight day-shift would cause other workers to have to work harder, longer, and/or be deprived of opportunities, making the accommodation one not mandated by the ADA).

145. Eisenstadt, *supra* note 12; *see also* Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 544–45 (7th Cir. 1995) (citing Tyndall v. Nat'l Edu. Ctr. Inc., 31 F.3d 209, 213–14 (4th Cir. 1994)); Law v. United States Postal Serv., 852 F.2d 1278, 1279–80 (Fed. Cir. 1988); Langon v. Dept. of Health & Hum. Servs., 959 F.2d 1278 (Fed. Cir. 1998); Carr v. Reno, 23 F.3d 525, 529 (D.C. Cir. 1994) (holding that "coming to work regularly" is an "essential function" of any job).

146. Smith v. Ameritech, 129 F.3d 857, 860, 867 (6th Cir. 1997).

147. Bisker v. GGS Info. Sys., No. CIV. 1:CV-07-1465, 2010 WL 2265979, at *1–4 (D. Pa. June 2, 2010). This case came two years after the ADA Amendments which widen the standard for coverage.

148. *Id.* at 4.

hours without placing undue hardship on the employer.[149] In *McMillian*, the Second Circuit found the assumption that regular attendance is an essential function to be antithetical to the individualized inquiry of the ADA.[150] This trend toward more flexible work schedules was challenged when a Louisiana court found that a supervisory or supervised role—inherently requiring teamwork—suggested telework would not be feasible.[151]

However, some employers—and courts—may simply find that telework is incompatible with various work situations. In *Tyndall*, the Fourth Circuit emphasized that the beginning of a semester is a particularly pivotal time in the formation of a class and it was therefore considered inappropriate—at the time—to consistently allow the professor to begin the semester remotely.[152] More recently, the Sixth Circuit sided with the Ford Motor Company, finding an employee could not perform the essential functions of her job where three failed telework trial runs proved an employee could not meet the bare expectations of her job, and the employee's lack of productivity at home left her fellow employees with work to pick up.[153] Furthermore, the court accepted that many of the plaintiff's telework friendly duties were not central enough to her job to support a telework exemption.[154]

The current state of the law, however, suggests that *Credeur* and *Tyndall* will represent anomalies going forward. After performing his job entirely from home during COVID-19—much like professors did during the height of COVID-19[155]—a trauma center manager refused to return to in-person work in May, the Massachusetts court overseeing the case subsequently issued an injunction allowing the plaintiff to keep his job and work from home due to the irreparable harm that would come from loss of a job and health insurance, and previous successful completion of his job at home suggested work-from-home did not place an undue hardship

149. McMillan v. City of New York, 711 F.3d 122, 126–29 (2d Cir. 2013).

150. Mary Hancock, Note, *"Working From Home" or "Shirking From Home":* McMillian v. City of New York*'s Effect on the ADA*, 16 DUQ. BUS. L.J. 155–56, 162 (2013).

151. Credeur v. Louisiana, 860 F.3d 785, 793–95 (5th Cir. 2017).

152. Tyndall v. Nat'l Edu. Ctr. Inc., 31 F.3d 209, 213 (4th Cir. 1994).

153. EEOC v. Ford Motors, 782 F.3d 753, 759 (6th Cir. 2015).

154. *Id.* at 759.

155. Like any reasonable accommodation, telework must be considered within a fact specific inquiry of the operations of the employer. Whether a professor will be allowed to telework as a reasonable accommodation will depend on the operations of their specific employer, but *Peeples* appears to suggest that there will be a default in favor of allowing such an accommodation because so many professors across the country, and across disciplines have been able to work remotely for over a year.

on the company.[156] In practice, undue hardship can look like the inverse of reasonable accommodations,[157] and what is unduly burdensome or what constitutes a reasonable accommodation is also often determined by considering the impact on fellow workers or other impacted parties.[158] A shift change has been considered unreasonable in some circumstances because it would require each other employee to spend more time working the overnight shift.[159] Both reasonable accommodations and undue hardship must therefore be determined by an individualized inquiry.

C. EEOC Guidance Favors Reinterpretation

Even as telework is more widely accepted among the general population,[160] it remains to be seen if, and how, it will be embraced under the ADA. EEOC guidance has hinted at the possibility of a telework accommodation on many occasions but has continually acknowledged that it is up to each employer's discretion to determine what fits that employer's own needs and is therefore "reasonable."[161] It is worth noting that the Sixth Circuit was heavily critical of the EEOC's stance on telework in the *Ford Motors* decision.[162] Ford argued that the EEOC was urging that an employer with a telework policy should be prepared to allow employees to telework unpredictably up to 80% of the time, and the court urged this would have the negative effect of employers

156. Peeples v. Clinical Support Options, Inc., 487 F. Supp. 3d 56, 59–61, 66 (D. Mass. 2020).

157. Mark Weber, *Unreasonable Accommodation and Due Hardship*, *in* DISABILITY LAW CASES AND MATERIALS 135, 135–36 (Stephen F. Befort & Nicole Buonocore Porter eds., 2017).

158. US Airways v. Barnett, 535 U.S. 391, 396 (1985); *see also* Rehrs v. Iams Co., 486 F.3d 353, 357 (8th Cir. 2007) (holding that employer was not required to eliminate an essential function or create a new position to accommodate a disabled employee).

159. *Rehrs*, 486 F.3d at 357.

160. Lister & Harnish, *supra* note 42, at 129, 133; *see also* Routley, *supra* note 33 (stating that 98% of survey participants indicated a preference for having the option to work from home for the rest of their careers).

161. Pandemic Preparedness, *supra* note 140; *see also* U.S. EQUAL OPPORTUNITY EMP. COMM'N, EEOC-NVTA-2003-1, WORK AT HOME/TELEWORK AS A REASONABLE ACCOMMODATION (2003) [hereinafter Work at Home/Telework] (reiterating the EEOC's stance that employers are not required to offer telework as an accommodation for disabled employees unless the employer does already offer telework); *see also* U.S. Equal Opportunity Emp. Comm'n, *The COVID-19 Pandemic and Antidiscrimination Laws*, YOUTUBE (Mar. 30, 2020), https://www.youtube.com/watch?v=X50G7l41NKg [https://perma.cc/3MD7-RB67] [hereinafter COVID-19 Pandemic and Antidiscrimination Laws] (acknowledging telework will not automatically become a reasonable accommodation post-COVID-19 in a conference from late March).

162. *See* EEOC v. Ford Motors, 782 F.3d 753 (6th Cir. 2015).

reducing telework policies to avoid liability.[163] However, this employer discretion standard is in harmony with the *Ford Motors* court deferring to the employer's judgment that the employee's tasks simply did not demand telework.[164]

The EEOC, the body responsible for administering the ADA, has been at the forefront of advocating for a more flexible view of reasonable accommodations. As far back as 2003, the EEOC has been issuing guidances that suggest telework may be a reasonable accommodation in at least some circumstances,[165] and again in 2006 suggesting that a lawyer working from home a few days per week doing writing and document review may be reasonable for at least a period of time.[166] In late March 2020, the EEOC called a meeting to respond to the COVID-19 pandemic, and during the conference, which was streamed online, the EEOC responded to several questions about the potential for telework.[167] The EEOC acknowledged that when teleworking, the same accommodations required in the office may not be necessary when someone is at home.[168] The EEOC urged employers that interim accommodations may be appropriate and reassured them that post-telework would not automatically become a reasonable accommodation.[169] The EEOC and caselaw suggest, however, that granting an accommodation—even if temporary—may become evidence of a reasonable accommodation if the individual was able to perform all the essential functions of their job.[170] In a post-pandemic world, concerns about the efficacy of telework seem largely unfounded.

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163. *Id.* at 765–66.

164. *See id.* at 759.

165. *Compare* Work at Home/Telework, *supra* note 161 (suggesting telework should be available as an accommodation if an employer gives senior employees the option to telework, but seemingly refraining from endorsing telework as a standard accommodation even for periodic impairments), *with* Anne Cullen, *Employers Not Required to Allow Post-Virus Telework: EEOC*, LEXISNEXIS: LEXIS360 (Sept. 8, 2020, 4:09 PM), https://www.law360.com/articles/1308173/employers-not-required-to-allow-post-virus-telework-eeoc [https://perma.cc/N8VB-P8MK] (stressing that the pandemic does not make telework a reasonable accommodation automatically, but a case by case analysis may support an accommodation in some instances).

166. Work at Home/Telework, *supra* note 161. Unlike the previous guidance, this one seems to suggest employers without an existing telework policy should consider telework as an accommodation for some impairments.

167. *See* COVID-19 Pandemic and Antidiscrimination Laws, *supra* note 161.

168. *Id.*

169. *Id.*

170. *Id.*; *see* Skerski v. Time Warner Cable Co., 257 F.3d 273, 285–87 (3rd Cir., 2001); *see also* Newstax Blogs, *EEOC Addresses Telework as a Reasonable Accommodation*, LEXISNEXIS: LEXISBLOGS (Dec. 11, 2020, 11:20 AM),

IV. Telework will Likely Become a Reasonable Accommodation Absent an Undue Hardship

There are possibilities beyond a fully remote or wholly in-person schedule that may better balance the interests of all parties, particularly when individuals are working on teams. For example, in a pre-COVID-19 guidance the EEOC suggested that it would be reasonable to allow an attorney to work from home three days a week when only reviewing documents and taking client phone calls.[171] Furthermore, the *Tyndall* case suggests that when working with others, formation is a particularly delicate time during which an employer can be especially strict about requiring attendance.[172] It may therefore become commonplace for employers to require teams to meet periodically face to face, perhaps especially when onboarding new members, while still giving lots of flexibility about where employees may work in between.

A potential, but particularly murky, problem at this point is what might happen if the needs and rights of various employees clash: for example, one employee may need to work from home for medication or transportation reasons while another may need to work in the office for structure. We see this regularly in another context when religious rights clash with sexual orientation[173] or lifestyle choices.[174] While it is impossible to predict exactly how each employer will respond to this situation, it has the potential to complicate employment decisions in a manner which could certainly pose a challenge—on one hand, employers could respond by simply inquiring about an employee's accommodation needs and creating teams around those needs, but it may not always be realistic to structure teams in this manner. Employers could also face accusations of affirmative action type accommodations if they begin structuring work groups around the needs of singular disabled employees,[175] and employers being required to hire an individual to

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https://plus.lexis.com/document/?pdmfid=1530671&crid=9af84af9-386c-4755-99fc-66640b3fffcc&pdactivityid=33f6b580-3905-406a-bbd8-6ec58d32c9a7&pdtargetclientid=-None-&ecomp=p5qk&prid=51ba57c1-aa18-4072-8ef2-185f4c8f1d3f [https://perma.cc/7W8S-B7JL] (stating that if a disabled employee can perform their job at the same level of performance while working remotely during the COVID-19 pandemic, then the employer is less likely to be able to successfully argue that the employee cannot have telework as a future accommodation).

171. Accommodations for Attorneys, *supra* note 140.

172. Tyndall v. Nat'l Edu. Ctr. Inc., 31 F.3d 209, 213 (4th Cir. 1994).

173. *See* Masterpiece Cakeshop, Ltd., v. Colorado Civil Rights Comm., 138 S. Ct. 1719 (2018).

174. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

175. US Airways v. Barnett, 535 U.S. 391 (2002) (Scalia, J., dissenting).

work remotely or work in person for a particular position could unduly reduce their applicant pool. It is possible that this kind of burden on employees and operations could pose an undue hardship if it unduly restricts how others are able to work beyond their desires.[176] A proposal for an employer to adopt such a system would be subject to a fact specific inquiry as to whether it posed an undue hardship for that particular employer and therefore made teamwork based teleworking structures unreasonable.

Is this move to telework just the beginning of a changing of the tide?[177] Many believe that telework will be a reasonable accommodation going forward for two main reasons: (1) we simply have shown that working from home is possible,[178] and (2) empirical studies largely suggest that productivity does not drop at home, as the courts have often suggested, but rather even one day of work at home per week increases productivity.[179]

A. Vande Zande is Undue: For Most, Telework will not Pose an Undue Hardship

Vande Zande rested on two fundamental beliefs about the way we work. First, we cannot work—either with our team or our equipment—if we are not physically present in the same space at the same time.[180] More recent caselaw and the COVID-19 pandemic have already shown us that this claim that teamwork must be done

176. Rehrs v. Iams Co., 486 F.3d 353, 357 (8th Cir. 2007).

177. *Compare* Bisker v. GGS Info. Sys., No. CIV. 1:CV-07-1465, 2010 WL 2265979, at *1–4 (D. Pa. June 2, 2010) (stating that working from home can be a reasonable accommodation when the employee can still perform the essential functions of their job, explicitly rejecting the 7th circuit rule), *and* Smith v. Ameritech, 129 F.3d 857, 862 (6th Cir. 1997) (suggesting that working from home is not a reasonable accommodation when an employee cannot maintain the same quality of work), *with Execs Expect Work Remote Trend to Continue*, *supra* note 36 (stating that 77% of human resource executives anticipate that the number of employees working remotely at least three days a week will increase); *see also* Gill Press, *The Future of Work Post-COVID-19*, FORBES (July 15, 2020), https://www.forbes.com/sites/gilpress/2020/07/15/the-future-of-work-post-covid-19/#6ae129fa4baf [https://perma.cc/CCQ6-K2TG].

178. Dey et al., *supra* note 38; *see* Eisenstadt, *supra* note 12.

179. Hancock, s*upra* note 150, at 151, 165 (2013).

180. Vande Zande v. State of Wisconsin Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1995). This is not to say all jobs can be done remotely, but rather the corporate jobs considered in this paper largely can. *Cf.* Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233, 1237 (9th Cir. 2012). *Samper* stressed that the use of medical equipment was a factor in requiring physical presence of a nurse, but today telehealth companies are proliferating by offering phone and video consults and home visits with limited equipment, including Kavira Health, started by the author's brother *during* the COVID-19 pandemic. This suggests that even professions that quintessentially require equipment can be modified for telework long term.

in person simply is no longer true:[181] in some industries the percentage of teleworkers rose to as high as 86%.[182] Furthermore, with the rise in video-conferencing platforms, everyone, disabled or not, can communicate online instantaneously.[183] Second, productivity will not decrease,[184] implicitly negating an undue hardship.[185] Not only does modern teleworking actually largely increase productivity, it offers a variety of other benefits to employers and disabled employees alike.[186]

i. Teleworking Does Not Undermine Productivity

A recent Chinese study found teleworking individuals were on average more productive than their non-teleworking counterparts.[187] During the COVID-19 pandemic, a number of surveys were conducted testing the actual and perceived productiveness of employees based both on self-perception and manager perception.[188] One survey found that 47% of individuals felt more productive during the pandemic, while in another, 30% felt no change in their productivity, and only a minority felt less productive.[189] When surveying employers, 68% of employers

181. *See* Dey et al., *supra* note 38 (explaining that .31% employed in early March had switched to telework by early April); *see also supra* Part III.B (arguing that recent caselaw from the 2nd Circuit indicates a willingness by the courts to accept that workplaces are changing and that accommodations that were not at one time reasonable may become reasonable).

182. *See Disability Employment Statistics*, *supra* note 4.

183. Reid, *supra* note 125, at 18–19.

184. *Contra* Tim Lawrence & Brian Scheld, *Work-from-home Productivity Gains Seen Evaporating as Pandemic Grinds On*, S&P GLOBAL MARKET INTELLIGENCE (Sept. 10, 2020), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/work-from-home-productivity-gains-seen-evaporating-as-pandemic-grinds-on-60119373 [https://perma.cc/5KYL-NS44] (suggesting pandemic productivity gains are an illusion because productivity in many white collar jobs, like consulting, cannot be easily quantified like it could in coding where you can measure the lines of code written); *see* Bloom et. al., *Does Working From Home Work? Evidence from a Chinese Experiment*, 130 Q. J. ECON. 165, 185 (exploring increased productivity in a pre-pandemic study that lasted nine months).

185. *Vande Zande*, 44 F.3d at 545; *see also* Rehrs v. Iams Co., 486 F.3d 353, 357 (8th Cir. 2007) (stating that the impact on other employees must be taken into account when determining the reasonableness of an accommodation).

186. *See supra* Part II.A.

187. Schur et. al., *supra* note 111, at 523.

188. *See* Routley, *supra* note 33; *see also* Press, *supra* note 177 (stating that 47% of employee surveyed by Kentik reported feeling more productive while working from home); *Execs Expect Work Remote Trend to Continue*, *supra* note 36 (stating that 37% of companies that have more remote employees than pre-COVID-19 pandemic have reported increased productivity).

189. *See* Press, *supra* note 177.

reported either no change to productivity or an increase in productivity since telework began.[190] These statistics overwhelmingly suggest that both self- and manager-perceived productivity and actual productivity are higher when working from home, at least part-time, than the traditional office work model.[191]

B. Approaching the Accommodation Conversation

NFI-funded research discovered two particularly interesting outcomes with important implications for employers looking to increase diversity today: (1) individuals perceived less prejudice as a whole from their colleagues when their *managers* believed the benefits of accommodations outweighed the costs;[192] and (2) the respect managers gave to an accommodation request throughout the inquiry process was more important than the actual granting of a request in how satisfied employees were with their employer.[193] This tells us two things about the accommodation process moving forward. First, managers have a key role in promoting the inclusion of individuals who are disabled in the workplace. Second, strict adherence to a telework accommodation may not be necessary, either from an ADA standard, but also on an individual level: employees may be more willing to be flexible with their bosses if their bosses are respectful of them. In sum, mutual respect, not costly accommodations, is what will provide the greatest satisfaction regardless of how the law may change.[194]

NFI research also suggested that companies making accommodations for individuals who are disabled also tend to make more accommodations for non-disabled individuals.[195] This suggests that as we move to a likely more virtual world where individuals feel the strain of needing to be available all the time,[196]

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190. *See Execs Expect Work Remote Trend to Continue*, *supra* note 36.

191. Hancock, *supra* note 150, at 165.

192. DISABILITY CASE STUDY RSCH. CONSORTIUM, *supra* note 26, at 6.

193. *Id.* at 8.

194. *See* Ashley Shrew, *Let COVID-19 Expand Awareness of Disability Tech*, NATURE (May 5, 2020), https://www-nature-com.ezp1.lib.umn.edu/articles/d41586-020-01312-w [https://perma.cc/S88X-22W7]. Shrew is a researcher who is disabled. In suggesting how to approach post-COVID-19 accommodations she emphasizes that employers should be willing to listen to criticism instead of defaulting to convention.

195. DISABILITY CASE STUDY RSCH. CONSORTIUM, *supra* note 26, at 45.

196. Hancock, *supra* note 150, at 151, 165–66; *see also* Chris Westfall, *Mental Health and Remote Work: Survey Reveals 80% of Workers Would Quit Their Job for This*, FORBES (Oct. 8, 2020, 4:30 PM), https://www.forbes.com/sites/chriswestfall/2020/10/08/mental-health-leadership-survey-reveals-80-of-remote-workers-would-quit-their-jobs-for-this/?sh=6c9a35f33a0f [https://perma.cc/GBH7-447R] (stating that 4 out of 5 employees struggle with work-life balance while teleworking).

a focus on accommodating individuals who are disabled could also lead companies to a more flexible and balanced approach in handling the needs of all their employees.[197]

One way that employees could respond is by a framework similar to those adopted under the "right to request" laws that have begun to infiltrate Europe, Australia, and even parts of the United States.[198] These laws enable employees to request reduced working hours.[199] The German statute requires something akin to the interactive process required by the ADA,[200] and a safety valve for employers that allows them to reject accommodations for cost and operational burdens, similar to undue hardship.[201] These right to request laws were adopted first in Germany in 1967, and by the 1980s, they were utilized by as much as 45% of the population.[202] In the UK, these laws were initially resisted, but after their 2007 amendments, they cover wide swaths of workers and estimates say that as many as 90% of requests are honored by employers.[203]

Conclusion

This Note has traced the history of reasonable accommodations surrounding telework and executive initiatives to promote inclusion in the workforce. Courts have justified their denial of telework on three tenets: (1) physical presence was considered an essential function; (2) telework was preemptively thought to lower productivity; and (3) telework was thought not to be compatible with teamwork or the need to use equipment.[204] Recent caselaw has put in doubt the belief that physical presence is an essential function.[205] At the same time, recent studies on the

197. DISABILITY CASE STUDY RSCH. CONSORTIUM, *supra* note 26, at 45.

198. *An Interview with Professor Stephen Befort*, 28 MN J. INT'L L. 401, 411 (2019); *see generally* Paul D. Hallgren, *Requesting Balance: Promoting Flexible Work Arrangements with Procedural Right-to-Request Statutes*, 33 A.B.A. J. LAB. & EMP. L. 229, 234–39 (2018) (arguing that a right-to-request system would allow employees to have increased flexibility when determining their work schedule).

199. Hallgren, *supra* note 197, at 234.

200. *See ADA: Reasonable Accommodation/Interactive Process,* SHRM, https://www.shrm.org/ResourcesAndTools/tools-and-samples/exreq/Pages/Details.aspx?Erid=818 [https://perma.cc/QFT3-SULC].

201. Hallgren, *supra* note 197, at 234.

202. Robert C. Bird & Liz Brown, *The United Kingdom Right to Request as a Model for Flexible Work in the European Union*, 55 AM. BUS. L.J. 53, 57, 60 (2018).

203. *Id.* at 66, 68–70.

204. *See, e.g.*, Vande Zande v. State of Wisconsin Dept. of Admin., 44 F.3d 538, 544–45 (7th Cir. 1995).

205. Peeples v. Clinical Support Options, Inc., 487 F. Supp. 3d 56, 63 (D. Mass. Sept. 16, 2020).

efficacy of remote work have undermined the belief that telework reduces productivity.[206] Teleworking platforms have proven that individuals can in fact work in teams from remote locations.[207] Additionally, telework provides potential financial, accessibility, and talent acquisition benefits.[208] In sum, courts are nearly certain to begin to recognize telework as a reasonable accommodation in at least some capacities. While telework presents exciting opportunities for some individuals who are disabled, it also threatens to isolate others—disabled and not—from the workforce, or from their own companies and co-workers.[209] In order for any accommodation to become reasonable, it cannot unduly burden fellow workers, and so it is key that moving forward employers and employees keep an open mind as to what may in fact be a reasonable accommodation.[210] Employers should consider both the effects of telework on physically and mentally impaired individuals, as well as employees who are not disabled. To best accommodate everyone, employers should partner with technology platforms that offer accessible features, but they should also consider flexible work schedules to accommodate for partial in-person work.[211] Providing training on accommodations to all employees and supporting non-disabled employees' decision to telework may be one way of promoting a mutually beneficial workplace, but at the same time employers should remain free to choose the work format that works best for them and their teams. Some employers may choose to have teams or functions that move entirely remote,[212] but given the

206. *See* Hancock, s*upra* note 150, at 165; *see also Execs Expect Work Remote Trend to Continue*, *supra* note 36 (stating that 37% of companies have found that employee productivity has increased as more employees telework).

207. *See* Low, *supra* note 30.

208. *See* Routley, *supra* note 33; *see also* Low, *supra* note 30 (arguing that technological advances, such as Zoom, have made it easier for disabled individuals to participate in the workplace and education).

209. Shur, *supra* note 111, at 1–2.

210. McMillian v. City of New York, 711 F.3d 120, 128–29 (2d Cir. 2013) (giving McMillian the chance to prove that a modified work schedule was a reasonable accommodation); *see also* Hancock, *supra* note 150, at 162 (stating that advocates for changing perceptions of the traditional workplace have pushed Congress to revise employment and labor laws).

211. *See* Low, *supra* note 30; *see also* JAN, *supra* note 128, at 5 (stating that flexible schedules may help disabled employees who struggle with attentiveness and concentration); *see also* Gill, *supra* note 116 (stating that masks may make it difficult for individuals who rely on lip reading for communication); *see also* Leary, *supra* note 120 (urging event organizers to use technology to grant access to disabled individuals).

212. Dong, *supra* note 33.

practical limitations of a compartmentalized approach[213] it would be prudent to allow employers to take charge in adopting such a policy as opposed to thrusting it upon them. We have entered a new age of work, but that does not mean that we either need to or should entirely reinvent how all people work.

213. *See infra* Part IV (arguing that telework can be a reasonable accommodation when other employees will not be impacted by the accommodation, thus employers continue to have the capacity to deny accommodation requests when other employees would suffer).

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