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Constitutional Demotion

Teri Dobbins Baxter†

Introduction

Public trust in the government generally—and the Supreme Court specifically—has declined in the last few years and is currently at or near historically low levels.[1] While Americans of all races and across the political spectrum are losing faith in the government's ability to address new and ongoing crises, the reason for the skepticism differs. Some White Americans began losing faith in the 1960s when the government prioritized civil rights, support for the poor, and affirmative action.[2] They perceived these policies to unfairly benefit Black Americans and continued distrusting the government even after those policies were mostly abandoned.[3] Currently, a far-right segment of the Republican

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1. *See, e.g.*, Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP (Sept. 29, 2022), https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx [perma.cc/5G59-2L48] (reporting data on trust in the judicial branch by political party). Only 47% of respondents reported having "a great deal" or a "fair amount" of trust in the judicial branch. *Id.* "This represents a 20-percentage-point drop from two years ago, including seven points since last year, and is now the lowest in Gallup's trend by six points." *Id.* While 67% of Republicans trust the federal judiciary, only 46% percent of Independents and 25% of Democrats trust it. *Id.*; Megan Brenan, *Americans' Trust in Government Remains Low*, GALLUP (Sept. 30, 2021), https://news.gallup.com/poll/355124/americans-trust-government-remains-low.aspx [perma.cc/4Y6D-L2AC] (reporting survey results about trust in government).

> In the past few years, Americans' trust in the government's handling of domestic problems has not strayed far from the record low of 35% in 2019 . . . . Although it remains the most trusted of the three branches, Americans' trust in the judicial branch (headed by the U.S. Supreme Court) has dropped precipitously, to a nearly record-low 54%.

Brenan, *supra*.

2. *See* Alexandra Filindra, Noah J. Kaplan & Beyza E. Buyuker, *Beyond Performance: Racial Prejudice and Whites' Mistrust of Government*, 44 POL. BEHAV. 961, 967 (2022).

3. *Id.* at 962.

party seems to fear democracy itself[4] because they fear losing power and influence in an increasingly diverse country.[5]

Black Americans, women, and members of the LGBTQ+ community also fear losing the limited power they have acquired, but they also fear losing rights.[6] While White men always have been able to claim the full benefit of the rights conferred or protected by the Constitution, the same cannot be said of other groups.[7] Justice Kagan gives a concise description of the distribution of rights at the nation's founding:

> Democratic ideals in America got off to a glorious start; democratic practice not so much. The Declaration of Independence made an awe-inspiring promise: to institute a government "deriving [its] just powers from the consent of the governed." But for most of the Nation's first century, that pledge ran to white men only. The earliest state election laws excluded from the franchise African Americans, Native Americans, women, and those without property.[8]

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4. *See* Charles Homans, *How 'Stop the Steal' Captured the American Right*, N.Y. TIMES (July 19, 2022), https://www.nytimes.com/2022/07/19/magazine/stop-the-steal.html?te=1&nl=the-morning&emc=edit_nn_20220719 [perma.cc/KG7A-89JR] ("The insistence on America as a 'republic' but not a 'democracy' is a tendentious reading of James Madison popularized by the John Birch Society, the conspiratorial anti-communist organization — a justification for governing the country according to conservative values and policy prerogatives, even when the numerical majority of its people did not vote for them.").

5. *Id.*; *see also* Edward Lempinen, *Cecilia Hyunjung Mo: The Male Backlash Against Democracy is No Surprise*, BERKELEY NEWS (Nov. 18, 2022), https://news.berkeley.edu/2022/11/18/cecilia-hyunjung-mo-the-male-backlash-against-democracy-is-no-surprise/ [perma.cc/VUJ9-89ZC] (noting that "for white men, and especially working-class white men, [the gains experienced by people of color, women, and LGBTQ+ people] have often come at a perceived cost. Increasingly, [White men] are turning against democracy itself . . . .").

6. *See, e.g.*, Paul Gordon, *Supreme Court Term 2018-2019: An Ultra-Conservative Majority*, PEOPLE FOR AM. WAY (July 2019), https://www.pfaw.org/report/supreme-court-term-2018-2019-an-ultra-conservative-majority/ [perma.cc/T5PE-LKHZ] ("With the Court's fair-minded constitutionalists—Justices Ginsburg, Breyer, Sotomayor, and Kagan—in the minority, the ultra-conservatives are taking steps to cement their movement's political power and reverse many of the advances that protect our health, our jobs, and our most basic constitutional rights."); Ronald Brownstein, *The Supreme Court's 'Dead Hand*,' ATLANTIC (Feb. 11, 2022), https://www.theatlantic.com/politics/archive/2022/02/supreme-court-conservative-rulings/622050/ [perma.cc/7WB9-SU5A] ("[T]he GOP Court majority is moving at an accelerating pace to impose that coalition's preferences on issues such as abortion, voting rights, and affirmative action.").

7. *See, e.g.*, Christopher M. Richardson, *Op-Ed: Dobbs Isn't The First Time The Supreme Court Took Away Key Rights*, L.A. TIMES (July 15, 2022), https://www.latimes.com/opinion/story/2022-07-15/supreme-court-abortion-civil-rights [perma.cc/WEZ9-N23M] (noting that Black Americans gained constitutional and civil rights during the Reconstruction Era, only to lose them when Reconstruction was abandoned). "Instead of buttressing newly won rights for Black Americans, the conservative court effectively ended them." *Id.*

8. Brnovich v. Democratic National Party, 141 S. Ct. 2321, 2351–52 (2021) (Kagan, J., dissenting) (pointing out the disconnect between the country's ideals and its practices, particularly with respect to voting).

With only a fraction of the population allowed to participate in elections and decide on the laws that would govern everyone, the results reflect the beliefs, priorities, and interests of that exclusive group.[9]

Over the next 200 years, the Fifteenth and Nineteenth Amendments extended the right to vote to include every American citizen, and the Voting Rights Act removed roadblocks that prevented Black citizens and others from exercising that right.[10] In addition, the Supreme Court granted constitutional protection to affirmative action policies, privacy rights—including the right to make decisions about reproduction and sexual privacy[11]—and it expanded the right to marry to include same-sex couples.[12] All of these changes brought the country closer to the ideal of equality in all aspects of life. But recent partisan polarization, the death of Justice Ginsburg, the retirement of Justice Kennedy, and the addition of two conservative Justices to replace them have stoked fears of losing these rights that so many generations fought to secure.[13]

Unlike the concerns of White citizens—whose fears of losing significant power are not supported by evidence[14]—the fears of women, Black Americans, and the LGBTQ+ community are proving justified. The Supreme Court's new 6-3 conservative majority has indicated a willingness to weaken voting rights laws and has adopted a theory of constitutional interpretation that only recognizes constitutional rights that are mentioned in the text or are "rooted in the history and tradition" of this country.[15] The danger inherent in this approach—at least as it has been applied by the Court—is that this nation's history and traditions reflect the racist, sexist, and homophobic beliefs prevalent at that time.[16] Only recently has this country interpreted the Constitution in a way that

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9. *Id.* at 2326.

10. *Id.* at 2330, 2343.

11. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (holding married couples have a constitutional right to use contraceptives); Lawrence v. Texas, 539 U.S. 558 (2003) (recognizing a right to privacy for adult consensual sexual activity).

12. *See* Obergefell v. Hodges, 576 U.S. 644 (2015) (holding the right to marriage includes same-sex couples).

13. Brownstein, *supra* note 6.

14. *See* Katherine Schaeffer, *Racial, Ethnic Diversity Increases Yet Again with the 117th Congress*, PEW RSCH. CTR. (Jan. 28, 2021), https://www.pewresearch.org/fact-tank/2021/01/28/racial-ethnic-diversity-increases-yet-again-with-the-117th-congress/ [perma.cc/8BHG-327V] (noting that while there is more diversity in Congress, White men are still overrepresented); Richie Zweigenhaft, *Fortune 500 CEOs, 2000-2020: Still Male, Still White*, SOC'Y PAGES (Oct. 28, 2020), https://thesocietypages.org/specials/fortune-500-ceos-2000-2020-still-male-still-white/ [perma.cc/5SH5-DLDS] ("White men may have lost power, but they continue to be the dominant group in the corporate elite— they held 96.4% of the Fortune 500 CEO positions in 2000, and still hold 85.8% in 2020.").

15. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (holding that the Fourteenth Amendment Due Process Clause only protects rights that are "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty").

16. *See, e.g.*, *infra* Parts I, II.

protects the rights of previously excluded groups.[17] If the recent history of recognizing the rights people of all races, genders, and sexual orientations is insufficient for them to be considered "rooted in the nation's history and traditions," then those rights can be stripped away, and those groups can be returned to a state of inferior and inadequate constitutional protection.

This Article focuses on the exclusion of Black Americans from the protections of the original Constitution, and the limited constitutional rights afforded to women and LGBTQ+ Americans until the twentieth century.[18] It acknowledges roadblocks to enforcement of constitutional violations and examines how recent Supreme Court opinions and decisions have eroded and threaten to further erode rights of these groups. The Article ends with comments about how losing constitutional protection can affect the way that members of these groups view the Constitution, the system that it created, and their place within it.

I. The History of Constitutional Rights for People of African Descent

When it was initially ratified, the United States Constitution was of little value to people of African descent. The original Constitution not only allowed slavery, it prohibited Congress from abolishing the slave trade until 1808.[19] In addition, it included a fugitive slave clause that guaranteed the return of enslaved people who escaped into states that prohibited slavery.[20] In his opinion in *Dred Scott v. Sanford*, Justice Taney explained the status of people of African descent at that time:

> [T]hey were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power

17. *See, e.g.*, *infra* Section I.C.

18. While other groups have had their constitutional rights systematically violated, this Article focuses on several recent Supreme Court decisions that have called into question rights that these groups have fought so long to gain. It does not attempt to address the unique and complicated constitutional challenges of groups such as Native Americans, which are certainly deserving of attention.

19. "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person." U.S. CONST. art. I, § 9, cl. 1. Article V states "no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first . . . Clause[] in the Ninth Section of the first Article." *Id.* art. V.

20. "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due." *Id.* art. IV, § 2, cl. 3, *repealed by* U.S. CONST. amend. XIII, § 1.

> and the Government might choose to grant them.[21]

The Court then held that African descendants—whether free or enslaved—were not "people" as that term was used in the Constitution and, therefore, were not entitled to any constitutional protections.[22] Consequently, whatever virtues the Constitution possessed, it meant nothing to the large enslaved and free Black populations.

A. The Thirteenth and Fourteenth Amendments Make the Constitution Relevant to Black Americans

The Thirteenth Amendment ended slavery in most circumstances and should have ushered in an era of equality and empowerment for formerly enslaved and oppressed populations.[23] Instead, states found ways to maintain White supremacist policies and Black exploitation.[24] Convict leasing enabled local governments to take advantage of the loophole in the Thirteenth Amendment allowing involuntary servitude for those convicted of a crime.[25] Black Codes made it illegal to be unemployed or to leave one employer to work for another; imposed vague "vagrancy" laws; made it a crime to be "disrespectful" to White people; and criminalized a host of other actions that made it difficult to avoid breaking the law.[26] If accused of a crime, Black people were not allowed to testify against a White person in court, leaving Black defendants to be tried and convicted by all-White juries and judges.[27] Once convicted, the prisoner could be leased to plantation owners to work on the plantations—sometimes the very plantations on which they were formerly enslaved.[28] Because the plantation owners no longer had a property interest in the prisoners, they had no incentive to treat them

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21. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404–05 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

22. *Id.* at 404–05 (holding that people of African descent were not "people" or "citizens" as those terms were used in the U.S. Constitution).

23. U.S. CONST. amend. XIII.

24. Slaughterhouse Cases, 83 U.S. 36, 70 (1872) ("States in the legislative bodies which claimed to be in their normal relations with the Federal government . . . imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity."); *see also* Teri Dobbins Baxter, *Dying for Equal Protection*, 71 HASTINGS L.J. 535, 559–61 (2019) (discussing efforts to maintain White supremacy after ratification of the Thirteenth Amendment).

25. "Neither slavery nor involuntary servitude*, except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII (emphasis added).

26. Baxter, *supra* note 24, at 559–60.

27. *Slaughterhouse*, 83 U.S. at 70.

28. Baxter, *supra* note 24, at 561.

humanely and would literally work them to death.[29] Recognizing that abolishing slavery was not enough to ensure that freedom for Black Americans was more than just a nominal change of status, the Fourteenth Amendment was drafted and ratified.[30]

B. Narrow Interpretations Limit the Early Effectiveness of the Fourteenth Amendment

The Fourteenth Amendment was designed in part to overrule the *Dred Scott* decision—which held that people of African descent could not be citizens—and to address some of the tactics used by states to keep formerly enslaved people in a permanent lower class.[31] Among its most important provisions, the Equal Protection Clause prohibited denying anyone "equal protection of the laws."[32] However, the Supreme Court did little to enforce the equal protection mandate of the Fourteenth Amendment, holding instead that Congress lacked the power to enforce civil rights.[33] Instead, the Court held that the enforcement clause only authorized federal legislation aimed at "remedying" discriminatory laws or government policies.[34] The Court has also interpreted the Privileges and Immunities Clause so narrowly that it is nearly meaningless.[35] These

29. *Id.* ("Unlike slaveholders, who had the right to a slave's labor for the entirety of the slave's life, prisoners were only valuable until the end of their sentence, which removed any financial incentive for the 'employers' to treat the prisoners humanely or provide for their well-being beyond their term of service.").

30. *Id.* at 551–52.

31. *Slaughterhouse*, 83 U.S. at 70. "These circumstances . . . forced upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much." *Id.*

32. U.S. CONST. amend. XIV, § 1.

33. Section 5 of the Fourteenth Amendment grants Congress the "power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. However, the Supreme Court held that this section only allowed Congress to legislate in order to correct or nullify state action that violated the Fourteenth Amendment. The Civil Rights Cases, 109 U.S. 3, 11 (1883) (interpreting Congress' power under the enforcement clause narrowly).

34. *Id.* ("To adopt appropriate legislation for correcting the effects of such prohibited State laws and State acts, and thus to render them effectually null, void, and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it.").

35. *Slaughterhouse*, 83 U.S. at 74 (holding that the Fourteenth Amendment only protects privileges and immunities granted by the federal government or the Constitution and not civil rights—which are granted and regulated by the states); *Civil Rights Cases*, 109 U.S. at 11–12 (holding that the Privileges and Immunities Clause applies to state actors and not private actors). Since then, the Court has rarely mentioned the Fourteenth Amendment Privileges and Immunities Clause, and it has not been the exclusive source of any substantive rights. *See, e.g.*, Richard E. Levy, *An Unwelcome Stranger: Congressional Individual Rights Power and Federalism*, 44 U. KAN. L. REV. 61, 101 n. 37 (1995)

decisions significantly diminished Congress' ability to enact federal legislation to combat racial discrimination by private actors.[36] Most notably, the Court later held that laws mandating segregation did not violate the Equal Protection Clause, thus ensuring continued inequality for several more generations.[37]

While the Court acknowledged that the Fourteenth Amendment required states to treat Black citizens equally, state officials consistently failed to intervene or prosecute even the most blatant and violent attacks against Black Americans, including lynchings.[38] Nearly 5,000 lynchings have been documented from the end of Reconstruction to as recently as the 1950s, and the vast majority of the victims were Black.[39] Only a tiny fraction of perpetrators were prosecuted or convicted,[40] even when the lynchings took place in front of large crowds.[41] In sum, the requirement of equal protection of the laws was largely ignored.

("The Slaughter-House Cases . . . rendered the Privileges and Immunities Clause of the Fourteenth Amendment meaningless by limiting it to the rights of federal citizenship and then construing those rights narrowly."); John A. Powell & Stephen Menendian, *Little Rock and the Legacy of Dred Scott*, 52 ST. LOUIS U. L.J. 1153, 1175 (2008) ("With the exception of the reversal of *Plessy*, the conclusions of *Slaughterhouse* and the *Civil Rights Cases* remain substantially intact. As a consequence, our view of the Fourteenth Amendment remains unjustifiably narrow.").

36. *Civil Rights Cases*, 109 U.S. at 24–25 (holding that Congress has the power under the Fourteenth Amendment to restrain only state and not private actors).

37. Plessy v. Ferguson, 163 U.S. 537 (1896) ("[T]he enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment . . . .").

38. The Supreme Court held in *U.S. v. Cruikshank* that the Fourteenth Amendment did not give Congress authority to pass legislation punishing discrimination—even violence and murder—perpetrated by individuals. *United States v. Cruikshank*, 92 U.S. 542 (1875). "It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself." *Id.* at 553–54. Instead, it could only legislate in response to state action. Baxter, *supra* note 24, at 562–69 (citing EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR 4 (3d ed. 2017), https://eji.org/wp-content/uploads/2019/10/lynching-in-america-3d-ed-080219.pdf [perma.cc/9MC9-RENU]).

39. EQUAL JUST. INITIATIVE, *supra* note 38, at 27 (noting that Black Americans were not the only race of people to be lynched, but the ratio of White to Black lynching victims rose from 1:4 to 1:17 after 1900); *see also* Baxter, *supra* note 24, at 563 (discussing the rise of lynching after the end of Reconstruction and withdrawal of federal troops).

40. Baxter, *supra* note 24, at 567 ("Several southern states passed their own anti-lynching laws as proof that states were up to the task of protecting African Americans and that there was no need for federal intervention. However, those laws were not enforced and 'of all lynchings committed after 1900, only 1 percent resulted in a lyncher being convicted of a criminal offense.'").

41. EQUAL JUSTICE INITIATIVE, *supra* note 38, at 28 (describing "public spectacle lynchings"); *see also* Baxter, *supra* note 24, at 567 (quoting MANFRED BERG, POPULAR JUSTICE: A HISTORY OF LYNCHING IN AMERICA 146 (2011)) (explaining how law enforcement

Eventually Congress relied on the Commerce Clause as a source of its authority to enact civil rights legislation, and the Supreme Court upheld the Civil Rights Act of 1964, which outlawed racial discrimination in places of public accommodation.[42] Although Congress also claimed to have authority to enact the law under the enforcement clause of the Fourteenth Amendment, the Court concluded that "Congress possessed ample power" under the Commerce Clause and declined to consider whether it also had authority under the Fourteenth Amendment.[43] Other federal laws have been passed and upheld under Congress' spending power, such as those denying funding to schools that discriminate on the basis of race and sex.[44] Thus, the history and tradition of exclusion and discrimination were finally left behind as Congress passed and the Court upheld laws designed to ensure constitutional protection and opportunities for advancement for Black Americans who spent centuries fighting and advocating for them.

C. The Equal Protection Clause's Transformational Power

Even without the ability to enforce civil rights against private actors, the Equal Protection Clause has been used to effect major societal changes, including banning segregation in public schools,[45] striking down anti-miscegenation laws[46] and racially restrictive housing laws,[47]

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overwhelmingly ignored and failed to prosecute lynchers, even when the intent to lynch was announced ahead of time and the lynching took place in broad daylight in front of large crowds).

42. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (holding that Congress had authority under the Commerce Clause to enact the Civil Rights Act of 1964).

43. *Id.* at 250 ("This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone.").

44. *See, e.g.*, Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 640 (1999) (interpreting Title IX, which prohibits discrimination on the basis of sex, and noting that the Court has "repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause"); *see also* Barnes v. Gorman, 536 U.S. 181, 185 (2002) ("Title VI invokes Congress' power under the Spending Clause.").

45. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 495 (1954), *enforced* 349 U.S. 294 (1955) (holding that racially segregated schools "deprived [Black children] of the equal protection of the laws guaranteed by the Fourteenth Amendment").

46. Loving v. Virginia, 388 U.S. 1, 12 (1967) ("[R]estricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.").

47. Buchanan v. Warley, 245 U.S. 60, 82 (1917) (finding a Kentucky law unconstitutional when it prohibited Black Americans from living in majority White areas).

> That there exists a serious and difficult problem arising from a feeling of race hostility which the law is powerless to control, and to which it must give a measure of consideration, may be freely admitted. But its solution cannot be promoted by depriving citizens of their constitutional rights and privileges.

Id. at 80–81.

prohibiting the use of societal racial biases as grounds to remove a child from a parent's custody,[48] and allowing Black citizens to serve on juries.[49]

Yet the Equal Protection Clause has also been used as a shield to prevent transformational change. After centuries of excluding Black and other racial minority applicants, state schools began actively seeking to admit candidates to remedy past discrimination and to increase the diversity of their student bodies.[50] These policies were quickly challenged on the grounds that they discriminated against White applicants in violation of the Equal Protection Clause.[51]

While the Supreme Court has struck down policies that established a quota of minority applicants to be admitted,[52] it held that diversity of the student body was a compelling state interest and admissions policies that used race as one factor in a holistic review of the applicants were narrowly tailored to achieve that interest.[53] Challenges to policies at various schools have remained constant and the Court will decide another challenge in the 2022 term.[54] Many expect that the current Court will hold that the use of race as a factor in admissions violates the Equal Protection Clause.[55] If it does so, then a practice with the potential to help

48. Palmore v. Sidoti, 466 U.S. 429, 434 (1984) (holding racial biases in society cannot justify removing a child from its mother's custody). "Whatever problems racially mixed households may pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917." *Id.* (citing *Buchanan*, 245 U.S. at 81).

49. Strauder v. West Virginia, 100 U.S. 303, 310 (1879), *abrogated by* Taylor v. Louisiana, 419 U.S. 522, 95 S. Ct. 692 (1975) (holding that a West Virginia law that excluded Black citizens from juries "amounts to a denial of the equal protection of the laws to a colored man when he is put upon trial for an alleged offence against the State").

50. *See, e.g.*, Regents of Univ. of California v. Bakke, 438 U.S. 265, 266 (1978) (discussing U.C. Davis medical school program to admit students from economically and educationally disadvantaged communities, including ethnic minorities from such backgrounds).

51. *See id.* at 270. The U.C. Davis program was implemented in 1973 and Allen Bakke, a White applicant, filed suit in 1974 after his applications in 1973 and 1974 were both denied. *Id.* at 277. He alleged that the special admissions program discriminated against White applicants in violation of the Equal Protection Clause, the California Constitution, and the Civil Rights Act of 1964. *Id.* at 277–78.

52. *Id.* at 320 (applying strict scrutiny and holding that the "quota" imposed by the special admissions program was not necessary to achieve the school's interest).

53. Grutter v. Bollinger, 539 U.S. 306, 337 (2003) (upholding an admissions program that "engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.").

54. Students for Fair Admissions, Inc. v. Univ. of N. Carolina, 567 F. Supp. 3d 580 (M.D.N.C. 2021), *cert. granted*, 142 S. Ct. 896 (2022); Students for Fair Admissions, Inc. v. Pres. & Fellows of Harvard Coll., 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (2022). One of the questions to be decided is whether to overrule *Grutter*, 539 U.S. 306, and hold that institutions of higher education cannot use race as a factor in admissions.

55. Amy Howe, *Affirmative Action Appears in Jeopardy After Marathon Arguments*, SCOTUSBLOG (Oct. 31, 2022), https://www.scotusblog.com/2022/10/affirmative-action-

remedy centuries of discrimination, to enrich the educational environment of all students, and positively impact the lives of countless people will be outlawed.[56]

D. Evidentiary and Structural Hurdles to Remedying Equal Protection Violations

As important as the Equal Protection Clause is, there are evidentiary and structural hurdles to successfully litigating equal protection claims. The evidentiary hurdle stems from the Supreme Court's holding that a plaintiff in a racial discrimination suit must prove that the purpose or intent of the challenged law or practice was to discriminate.[57] Structural hurdles include immunities found in the Constitution and created by the courts.[58]

i. Disparate impact and the problem of proof

Although the Civil Rights Act itself has not been repealed, and 42 U.S.C. § 1983 provides a remedy for violations of the Equal Protection Clause, the Supreme Court has made it difficult to prove actionable discrimination.[59] In the past, states proudly declared their intent to discriminate against racial minorities.[60] Such proclamations are rare today. Instead, discrimination is often inferred by the impact of policies or practices.[61] However, it is not always enough to prove that a law, policy,

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appears-in-jeopardy-after-marathon-arguments/ [perma.cc/2F52-WSRT] ("[D]uring nearly five hours of oral arguments . . . the court's conservative majority signaled that it could be ready now, 19 years after Grutter, to end the use of race in college admissions"); *see also* Kevin R. Johnson, *Foreword:* Bakke *at 40: The Past, Present, and Future of Affirmative Action*, 52 U.C. DAVIS L. REV. 2239, 2240 (2019) ("The truth of the matter is that *Bakke*'s days may be numbered. The Supreme Court, with two new Justices appointed by President Trump, is poised to revisit the constitutionality of affirmative action." (footnote omitted)).

56. *See, e.g.*, Jennifer Jones, Bakke *at 40: Remedying Black Health Disparities Through Affirmative Action in Medical School Admissions*, 66 UCLA L. Rev. 522, 530 (2019) ("[T]he evisceration of racial remediation in the four decades since Bakke has done much more than perpetuate racial inequity in access to higher education. It's made Black access to healthcare more difficult to come by.").

57. *See* Washington v. Davis, 426 U.S. 229, 244–45 (1976) (holding that proof of discriminatory intent is necessary to establish a violation of the Equal Protection Clause).

58. *See supra* Section I.D.ii. (describing the principles of sovereign and qualified immunity established through federal caselaw and its interpretation of the Constitution, as well as the hurdles these immunities pose to constitutional rights).

59. *Washington*, 426 U.S. at 244–45.

60. United States v. State of Alabama, 628 F. Supp. 1137, 1140–41 (N.D. Ala. 1985), *rev'd*, 828 F.2d 1532 (11th Cir. 1987) (discussing the history of segregated schools in Alabama and noting that "[f]rom its beginnings until 1956, the University of Alabama . . . did not admit black students, pursuant to the ironclad custom and policy of the State of Alabama requiring segregation of the races in all spheres of life").

61. For example, in *Texas Department of Housing & Community Affairs v. Inclusive*

or practice has the *effect* of discriminating against a person or group; instead, they must prove an intent to discriminate.[62] This is often an impossible task.[63] As a consequence, very few claims of racial discrimination succeed.[64]

ii. Sovereign and qualified immunity hinder enforcement of constitutional rights

A right that is enshrined in the Constitution is presumably important. One might assume that if such a right is violated, there is a remedy available to compensate for or punish the violation. Often, that is not the case. In fact, the Constitution itself limits remedies available for such violations. The Eleventh Amendment's pronouncement of state sovereign immunity was ratified soon after the Supreme Court held in *Chisholm v. Georgia* that it had jurisdiction to hear a case brought by a citizen of South Carolina against the State of Georgia.[65] That ruling alarmed many who believed that sovereign states had immunity from suits brought by private citizens.[66] The Eleventh Amendment was quickly

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Communities Project, Inc., the plaintiffs alleged that the Texas agency responsible for distributing federal tax credits "caused continued segregated housing patterns by its disproportionate allocation of the tax credits, granting too many credits for housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods." 576 U.S. 519, 526 (2015). *See also, e.g.*, Davis v. Washington, 512 F.2d. 956, 960 (D.C. Cir. 1975), *rev'd* 426 U.S. 229 (1976) ("The cases hold, and we agree, that evidence establishing that significantly more blacks than whites fail a written entrance examination given to all applicants is sufficient, as a matter of law, to show the racially disproportionate impact of the examination.").

62. *Washington*, 426 U.S. at 244–45 ("[T]o the extent that [prior Court of Appeals decisions] rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement."). While disparate impact is not sufficient to prove racial discrimination under the Equal Protection Clause, several federal statutes impose liability for disparate impact without the need to prove discriminatory intent. *See Texas Dep't of Hous.*, 576 U.S. at 545–46 ("The Court holds that disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court's interpretation of similar language in Title VII and the ADEA, Congress' ratification of disparate-impact claims in 1988 . . . and the statutory purpose.").

63. Mario L. Barnes & Erwin Chemerinsky, *What Can* Brown *Do for You?: Addressing* McCleskey v. Kemp *As A Flawed Standard for Measuring the Constitutionally Significant Risk of Race Bias*, 112 NW. U. L. REV. 1293, 1307 (2018) ("In almost every area of law, the requirement for proof of discriminatory intent has frustrated the ability to use the Equal Protection Clause to remedy race discrimination.").

64. *See, e.g.*, *id.* at 1307–12 (illustrating how the intent to discriminate requirement has frustrated claims of racial discrimination in criminal sentencing, the death penalty, and school segregation).

65. Chisholm v. Georgia, 2 U.S. 419, 420 (1793).

66. *See, e.g.*, Hans v. Louisiana, 134 U.S. 1, 11 (1890) (noting that *Chisholm* "created such a shock of surprise throughout the country that, at the first meeting of congress thereafter, the eleventh amendment to the constitution was almost unanimously proposed, and was in

ratified to extend such immunity from suit in federal courts unless it was waived by the states.[67]

The doctrine of sovereign immunity was familiar to those in the founding era.[68] In the monarchy the new nation left behind, the monarch's decision could not be appealed, and it was often declared that the monarch was infallible.[69] The Supreme Court gave a different justification:

> Every government has an inherent right to protect itself against suits, and if, in the liberality of legislation, they are permitted, it is only on such terms and conditions as are prescribed by statute. The principle is fundamental, applies to every sovereign power, and but for the protection which it affords, the government would be unable to perform the various duties for which it was created. It would be impossible for it to collect revenue for its support, without infinite embarrassments and delays, if it was subject to civil processes the same as a private person.[70]

In addition to "embarrassment," concerns about depleting the public treasury formed an additional rationale for sovereign immunity.[71]

Some courts and scholars believe that the financial cost of judgments in lawsuits against sovereigns was not the only concern. They argue that such judgments "allocate[] public funds in a way that is

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due course adopted by the legislatures of the states"); Alden v. Maine, 527 U.S. 706, 706 (1999) ("The doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified. . . . This was also the understanding of those state conventions that addressed state sovereign immunity in their ratification documents.").

67. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."); *see* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468, 484 (1987) ("The reaction to *Chisholm* was swift and hostile. The Eleventh Amendment passed both Houses of Congress by large majorities in 1794. Within two years of the *Chisholm* decision, the Eleventh Amendment was ratified by the necessary 12 States.").

68. Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765, 773 (2008) (discussing the colonial understanding of sovereign immunity).

69. *Id.* at 771 ("[S]ince the King was the highest authority in the feudal judicial system, by definition, no appeal existed from his decisions."). *But see* Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 3–4 (1963) (citing LUDWIK EHRLICH, XII PROCEEDINGS AGAINST THE CROWN (1216–1377) 42 (Vinogradoff ed. 1921)) ("Indeed, it is argued by scholars on what seems adequate evidence that the expression 'the King can do no wrong' originally meant precisely the contrary to what it later came to mean. '[I]t meant that the king must not, was not allowed, not entitled, to do wrong . . . .' It was on this basis that the King, though not suable in his court (since it seemed an anomaly to issue a writ against oneself), nevertheless endorsed on petitions 'let justice be done,' thus empowering his courts to proceed.").

70. Nichols v. United States, 74 U.S. 122, 126 (1868); *see also* Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 458 (2016) (noting concerns about the ability of the government to function if subject to lawsuits and financial liability).

71. Florey, *supra* note 68, at 787–88.

primarily determined by the judiciary, not the democratic process, making it more difficult to abide by the principle of majoritarian rule and to maintain the proper boundaries needed to establish separation of powers."[72] While the above-stated concerns may seem reasonable, they do not take into consideration the lost legitimacy of a system in which victims of constitutional violations are left without adequate remedies.[73] The Court has also recognized federal immunity, which generally prohibits suits against the federal government;[74] tribal sovereign immunity;[75] and foreign sovereign immunity.[76]

The judicially-created doctrine of qualified immunity has had a much greater impact. "The doctrine of qualified immunity shields officers from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[77] Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[78] As a practical matter, this relieves police officers of liability they would otherwise face under 42 U.S.C. § 1983.[79] In recent years, a growing

72. *Id.* at 790.

73. *Id.* at 773–74. "For years, the doctrine of state sovereign immunity was generally neglected, and its impact was minimized through the Supreme Court's holding that Congress enjoyed broad power to abrogate the states' immunity." *Id.* (citing Pennsylvania v. Union Gas Co., 491 U.S. 1, 15–16 (1989), *overruled by* Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996)). More recent cases have limited Congress' ability to abrogate States' immunity. *See Seminole Tribe of Florida*, 517 U.S. at 72–73 (1996) ("Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." (footnote omitted)). However, the Court acknowledged that "through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment." *Id.* at 59.

74. Florey, *supra* note 68, at 777. Federal sovereignty is not mentioned in the Constitution, but it is an established doctrine that is largely justified on the same grounds as state sovereign immunity. *Id.* at 776–77. Congress has waived immunity in many federal statutes, including the Administrative Procedures Act, the Federal Tort Claims Act, and the Tucker Act (for non-tort claims). *Id.* at 778.

75. Like state and federal sovereign immunity, tribal sovereign immunity is based on tribes' sovereign status. *Id.* at 779.

76. *Id.* at 780.

77. City of Tahlequah v. Bond, 142 S. Ct. 9, 11 (2021) (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)).

78. Malley v. Briggs, 475 U.S. 335, 335 (1986).

79. The text of 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

number of scholars and judges have criticized this doctrine,[80] arguing that it is inconsistent with the text of 42 U.S.C. § 1983, which states that "every person" who violates constitutional rights "shall be liable."[81] Furthermore, the requirement that the violated rights be "clearly established" goes beyond the common law immunities that were recognized when section 1983 was passed.[82]

As Judge Steven R. Reinhardt has observed, the doctrines of sovereign and qualified immunity together result in a system often lacking in accountability.[83] He notes

> The problem is that, due to sovereign immunity protections for the federal government and state governments, and the need to prove an unlawful policy or custom to hold a municipality liable under § 1983, claims against law enforcement officers are often the only remedy for individuals who suffer violations of their constitutional rights. However, in the name of protecting these officers from being held formally accountable for "minor" errors made in the line of duty, the Court has through qualified immunity created such powerful shields for law enforcement that people whose rights are violated, even in egregious ways, often lack any means of enforcing those rights.[84]

Judge Reinhardt's summation explains how simply granting or acknowledging that constitutional rights exist is not the same as guaranteeing those rights will be enforced or that a remedy will be available when those rights are violated.

Government actors have incentives to protect the constitutional rights of members of the political majority and those who have power and

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80. *See, e.g.*, Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2095 (2018) ("In recent years, federal courts scholars have undermined some of the basic empirical and legal assumptions undergirding qualified immunity, and in 2017, [Justice Thomas] expressed a willingness to reopen this uncommonly stable doctrine." (footnote omitted)).

81. *See* Edward C. Dawson, *Replacing Monell Liability with Qualified Immunity for Municipal Defendants in 42 U.S.C. § 1983 Litigation*, 86 U. CIN. L. REV. 483, 529 (2018) ("[T]he qualified immunity defense itself has no basis in the text of § 1983.").

82. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment) (arguing that the doctrine may be justified with respect to common law immunities recognized in 1871 when § 1983 was enacted, but the "clearly established law" requirement unjustifiably extends the doctrine).

83. Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1245 (2015); *see also* Kimberly Kindy, *Dozens of States Have Tried to End Qualified Immunity. Police Officers and Unions Helped Beat Nearly Every Bill*, WASH. POST (Oct. 7, 2021) https://www.washingtonpost.com/politics/qualified-immunity-police-lobbying-state-legislatures/2021/10/06/60e546bc-0cdf-11ec-aea1-42a8138f132a_story.html [perma.cc/U646-8MGA] (describing how qualified immunity protects police officers who violate the rights of Black Americans and the power police unions have to thwart legislation that seeks to limit this immunity).

84. Reinhardt, *supra* note 83, at 1245 (footnote omitted).

influence.[85] There is less risk when violating the rights of those who are politically unpopular, or when violating politically unpopular laws. Those who wish to enforce unpopular laws, and the politically unpopular who wish to vindicate their own rights, may have to litigate knowing that they can only obtain injunctive relief with no personal liability or negative consequences for those who commit the violation.[86] The plaintiffs may also face backlash from those in the community—many of whom may be in positions of power or influence—who feel that the violation is justified or desirable.[87]

E. The Fifteenth Amendment and Voting Rights

After the Fifteenth Amendment was ratified, the newly enfranchised Black voters helped usher in a tidal wave of Black elected officials, including sixteen Black Congressmen.[88] In response, states employed many tactics that were facially neutral with respect to race but had the effect of making it difficult or impossible for Black citizens to vote.[89] In

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85. *See, e.g.*, Michael Kent Curtis & Eugene D. Mazo, *Campaign Finance and the Ecology of Democratic Speech*, 103 KY. L.J. 529, 535 (2015) (arguing that corporations and wealthy donors have disproportionate influence on politicians).

> [T]he Supreme Court interpreted the free speech system and the text of the Constitution to empower corporations to spend unlimited amounts of money from their corporate treasury funds to influence electoral contests. . . . Those who controlled corporate treasuries suddenly found that they could use the immense resources of a corporation to support compliant politicians and to target non-compliant ones.

Id.

86. *See, e.g.*, Erwin Chemerinsky, *How the Supreme Court Protects Bad Cops*, N.Y. TIMES (Aug. 26, 2014), https://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html [perma.cc/352N-WANH] (exploring the Supreme Court's upholding of the qualified immunity doctrine and its findings that government officers cannot be held liable even though the Constitution had been violated).

87. *Cf.* John S. Huntington & Lawrence Glickman, *America's Most Destructive Habit*, ATLANTIC (Nov. 7, 2021), https://www.theatlantic.com/ideas/archive/2021/11/conservative-backlash-progress/620607/ [perma.cc/WTJ7-BQKZ] (describing cycle of rebellion against political minorities who try to enforce or expand their rights). "Each time political minorities advocate for and achieve greater equality, conservatives rebel, trying to force a reinstatement of the status quo." *Id.*

88. *See National Voter Registration Act — Statutory Interpretation — Election Law —* Husted v. A. Philip Randolph Institute, 132 HARV. L. REV. 437, 442 (2018) (discussing the rise of Black political power during Reconstruction and subsequent voter suppression efforts). "After ratification of the Fifteenth Amendment in 1870, African Americans began to accrue considerable political power, at least relative to the past. During the Reconstruction Era, over one thousand black men won elected office, including the first sixteen black congressmen." *Id.*

89. *Id.* at 442–43 ("[T]he end of Reconstruction marked the arrival of a backlash, and a new era of voter suppression. Using a combination of legal provisions such as poll taxes and literacy tests--not to mention extrajudicial violence--states dramatically decreased black voter registration and turnout." (footnote omitted)); *see also* Shelby Cnty., Ala. v. Holder, 570

many places, those who attempted to vote faced threats or acts of violence.[90] As a consequence, although they had the right to vote as a matter of constitutional law, as a practical matter they remained disenfranchised for nearly ninety additional years.[91]

In 1966, Congress passed the Voting Rights Act "to address entrenched racial discrimination in voting, 'an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.'"[92] When it was enacted, Section 2 of the Act prohibited any state from enacting any "standard, practice, or procedure . . . imposed or applied . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ."[93] Section 5 required specific states (those specified in Section 4) to receive federal approval before making any changes in the law related to voting.[94] The states to which it applied were those "States or political subdivisions that had maintained a test or device as a prerequisite to voting as of November 1, 1964, and had less than 50 percent voter registration or turnout in the 1964 Presidential election."[95] The tests included literacy tests, knowledge tests, "good moral" requirements, and "the need for vouchers from registered voters."[96]

Congress had tried to address the problem by outlawing the tests and other state-imposed hurdles, but "litigation remained slow and expensive, and the States came up with new ways to discriminate as soon as existing ones were struck down. Voter registration of African-Americans barely improved."[97] Sections 4 and 5 were scheduled to expire after 5 years but were repeatedly amended and the expiration dates

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U.S. 529, 536–37 (2013) (outlining state tactics to prevent Black citizens from voting, including "literacy and knowledge tests, good moral character requirements, the need for vouchers from registered voters").

90. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 218–19 (2009) (Thomas, J., concurring and dissenting in part) (discussing the need for the Fifteenth Amendment, including the violence against Black voters). "Almost immediately following Reconstruction, blacks attempting to vote were met with coordinated intimidation and violence." *Id.* (citing L. MCDONALD, A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA 34 (2003)).

91. *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 217–22.

92. *Shelby Cnty.*, 570 U.S. at 535 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966)); *see* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973–1973bb-1).

93. Voting Rights Act, tit. I, § 2 (current version at 52 U.S.C. § 10301(a)).

94. *Shelby Cnty.*, 570 U.S. at 534–35.

95. *Id.* at 537 (citing Voting Rights Act, tit. I, § 4, *invalidated by* Shelby Cnty, 570 U.S. 529 (2013)).

96. *Id.* (citing Voting Rights Act, tit. I, § 4 (current version at 52 U.S.C. § 10303(c)).

97. *Id.* at 536 (citing *Katzenbach*, 383 U.S. at 313–14).

extended.[98] The amendments resulted in additional states and political divisions being subject to Sections 4 and 5.[99] In 2006 Congress renewed Sections 4 and 5 with an expiration date of 2031.[100]

In 2013, the Supreme Court heard *Shelby County v. Holder*, which challenged the constitutionality of Sections 4(b) and 5 of the Voting Rights Act.[101] While the Court acknowledged that the provisions "made sense" in 1966 and justified departure from the federalism principle requiring all states to be treated the same,[102] it believed that "[n]early 50 years later, things have changed dramatically."[103] The Court noted that the Voting Rights Act had been successful in addressing discrimination and improving voter turnout among racial minorities, and concluded that the coverage formula of Section 5 was no longer justified or constitutional.[104] In her dissent, Justice Ginsburg argued that the lack of discriminatory policies and improvements in voter turnout were precisely because of the preclearance requirement.[105]

In the years since the *Shelby County* decision, states previously subject to the preclearance requirement have implemented numerous laws affecting voting.[106] "Unsurprisingly, that decision has led to the enactment of a host of voter suppression tactics such as purging voter rolls, restricting voting rights of returning citizens, instituting onerous voter ID laws, limiting access to voting by mail, and other measures that disproportionately affect low-income and Black and [B]rown voters."[107]

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98. *Id.* at 538. For example, Congress "amended the definition of 'test or device' to include the practice of providing English-only voting materials in places where over five percent of voting-age citizens spoke a single language other than English." *Id.* That resulted in all of Arizona, Texas, and Alaska, and parts of California, Florida, Michigan, New York, North Carolina, and South Dakota to be subject to Section 5. *Id.*; *see also* Franita Tolson, *The Spectrum of Congressional Authority Over Elections*, 99 B.U. L. REV. 317 (2019).

99. *Shelby Cnty.*, 570 U.S. at 538.

100. *Id.* at 564–66 (Ginsburg, J., dissenting).

101. *Id.* at 529.

102. *Id.* at 546 (quoting *Katzenbach*, 383 U.S. at 308) (noting that the formula that determines which states and political subdivisions would be subject to Section 5 "accurately reflected those jurisdictions uniquely characterized by voting discrimination 'on a pervasive scale,' linking coverage to the devices used to effectuate discrimination and to the resulting disenfranchisement").

103. *Id.* at 547.

104. *Id.* at 557. Section 2 of the Voting Rights Act was not affected by the decision in *Shelby County*. *Id.* ("Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2.").

105. *Id.* at 590 (Ginsburg, J., dissenting) ("Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.").

106. Nancy Abudu, *Seven Years After* Shelby County vs. Holder, *Voter Suppression Permeates the South*, S. POVERTY L. CTR. (June 25, 2020), https://www.splcenter.org/news/2020/06/25/seven-years-after-shelby-county-vs-holder-voter-suppression-permeates-south [perma.cc/Y9YP-8586].

107. *Id.*

In 2021, the Court decided *Brnovich v. Democratic National Committee*, which interpreted Section 2 of the Voting Rights Act.[108] A previous version of the statute had been interpreted to require proof of discriminatory purpose,[109] but the Act was amended to state that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ."[110] This language allows plaintiffs to prove a violation based on the results of the policy instead of the intent.

In *Brnovich*, the Democratic National Committee (DNC) filed suit claiming that certain voting restrictions imposed by the State of Arizona violated Section 2 of the Voting Rights Act.[111] Specifically, they challenged the rule that votes cast in the wrong precinct would not be counted,[112] and the rule that limited those who could collect mail-in ballots to a small list of people.[113] The DNC "claimed that both the State's refusal to count ballots cast in the wrong precinct and its ballot-collection restriction 'adversely and disparately affect Arizona's American Indian, Hispanic, and African American citizens'" and that the ballot-collection restriction was "enacted with discriminatory intent."[114]

The Court upheld both election rules.[115] While it acknowledged the language in Section 2(a) that speaks to the impact of the regulation, it focused on the language of Section 2(b), which directs courts to consider whether the affected class had an equal *opportunity* to participate in the election.[116] The Court concluded that the challenged rules did not violate the Voting Rights Act, particularly in light of the state's interest in preventing voter fraud.[117]

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108. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2330 (2021).

109. *Id.* at 2332 (noting that the Court interpreted the original language of the Act to require proof of discriminatory purpose).

110. Voting Rights Act of 1965, Pub. L. No. 89-110, tit. I, § 2(a), 79 Stat. 437 (current version at 52 U.S.C. § 10301(a))

111. *Brnovich*, 141 S. Ct. at 2334.

112. *Id.* at 2330.

113. *Id.* ("[M]ail-in ballots cannot be collected by anyone other than an election official, a mail carrier, or a voter's family member, household member, or caregiver.").

114. *Id.* at 2334.

115. *Id.* at 2350.

116. *Id.* at 2337 (finding that "equal openness" is the touchstone). The Court considered five factors relevant to the opportunity to vote: (1) the size of the burden imposed by a challenged voting rule; (2) the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982; (3) the size of any disparities in a rule's impact on members of different racial or ethnic groups; (4) the opportunities provided by a State's entire system of voting; and (5) the strength of the state interests served by a challenged voting rule. *Id.* at 2338–39.

117. *Id.* at 2343–44.

Justice Kagan's dissent argued "that the Court has (yet again) rewritten—in order to weaken—a statute that stands as a monument to America's greatness . . . ."[118] Justice Kagan noted that the factors that the majority directed courts to consider are not found anywhere in the text of the Act, and all weigh in favor of upholding voter restrictions that might have a discriminatory effect.[119] Moreover, the dissent pointed out that the majority gave too much weight to the state's interest in preventing voter fraud.[120] While the Act had previously been interpreted to require proof that "a less biased law would not 'significantly impair [that] interest,'"[121] the *Brnovich* majority rejected that rule and instead gave more consideration to the importance of a state's interest.[122] This, along with the majority's determination that the restrictions were "modest" and "unremarkable,"[123]—conclusions disputed by the dissenting Justices[124]—led the Court to conclude that the restrictions did not violate the Act.[125]

Concerns about Section 2 of the Act resurfaced when the Court agreed to hear *Merrill v. Milligan*.[126] In that case, the Court will consider a challenge to the State of Alabama's 2021 redistricting map. The plaintiffs allege that the plan violates the Act because it created one majority-Black district and divides remaining majority-Black communities among the other six districts, thereby diluting the vote of Black citizens.[127] Opponents of the plan filed suit. The district court found that the plaintiffs were "substantially likely to establish that the Plan violates Section Two of the Voting Rights Act" and granted the petition for a preliminary injunction.[128] The district court directed the state legislature to draw a new plan.[129] Alabama filed a petition for certiorari in the Supreme Court, which the Court granted.[130]

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118. *Id.* at 2351 (Kagan, J., dissenting).

119. *Id.* at 2362 ("The list—not a test, the majority hastens to assure us, with delusions of modesty—stacks the deck against minority citizens' voting rights. Never mind that Congress drafted a statute to protect those rights—to prohibit any number of schemes the majority's non-test test makes it possible to save.").

120. *Id.* at 2370–71.

121. *Id.* at 2364 (quoting Houston Lawyers' Ass'n v. Att'y Gen. of Texas, 501 U.S. 419, 428 (1991)).

122. *Id.*

123. *Id.* at 2344.

124. *Id.* at 2362 (Kagan, J., dissenting).

125. *Id.* at 2348.

126. Merrill v. Milligan, 142 S. Ct. 879 (2022) (granting stay of preliminary injunction).

127. Caster v. Merrill, No. 2:21-CV-1536-AMM, 2022 WL 264819, at *1 (N.D. Ala. Jan. 24, 2022), *cert. granted before judgment sub nom. Merrill*, 142 S. Ct. 879.

128. *Id.* at *2.

129. *Id.* at *5.

130. *Merrill*, 142 S. Ct. 879.

While it is not clear how the Court will decide the case, some who are concerned about the future of the Voting Rights Act were alarmed by the Court's decision to grant Alabama's petition to stay the district court's injunction, thereby allowing the challenged redistricting map to be used for the 2022 elections.[131] The Court did not issue an opinion explaining its decision, but Justice Roberts wrote a dissenting opinion, stating that, in his view, "the District Court properly applied existing law in an extensive opinion with no apparent errors for our correction."[132] He noted confusion about proper application of Supreme Court precedent in voting dilution cases and agreed that the Court should grant the petition for certiorari, but would not have granted the petition to stay the district court injunction.[133]

Justice Kagan, joined by Justices Breyer and Sotomayor, wrote a dissenting opinion that also concluded that the district court properly applied existing precedent and further noted that the district court found that it was not even a close case.[134] Justice Kavanaugh responded in a concurring opinion and argued that the stay merely avoided the "chaos" that would ensue if Alabama had to draw a new map in such a short time before an election,[135] but Justice Kagan noted that the challenged map had been drawn in less than a week.[136] In any event, the decision to stay the district court's opinion has increased fears that the Court will change the test for voter dilution in a way that further weakens the Voting Rights Act's ability to ensure that racial minorities' voices are not diluted or silenced.[137]

II. Substantive Due Process, Privacy, and Liberty for Women and LGBTQ+ People

Women have made significant gains in education, business, and politics, but the progress has been slow. Women did not secure the right to vote until the Nineteenth Amendment to the Constitution in 1920.[138] Supreme Court decisions in the 1960s recognized constitutionally

131. *Id.* (granting stay of preliminary injunction).

132. *Id.* at 882 (Roberts, J., dissenting).

133. *Id.*

134. *Id.* at 883 (Kagan, J., dissenting).

135. *Id.* at 880 (Kavanaugh, J., concurring).

136. *Id.* at 883 (Kagan, J., dissenting).

137. *See, e.g.*, Kelly Mena & Fredreka Schouten, *Key States Making Moves to Change Election Laws and Voting Options*, CNN (Feb. 8, 2022), https://www.cnn.com/2022/02/08/politics/redistricting-election-lawsvoting/index.html [perma.cc/S5X9-QV8N] ("[T]he justices . . . announced they would revisit a portion of the landmark 1965 Voting Rights Act in the months ahead – sparking fears among voting rights activists that the court could erode a key provision of the law ahead of the next presidential election in 2024.").

138. U.S. CONST. amend. XIX.

protected privacy rights and gave women new power to make decisions about their bodies and reproduction.[139] This allowed them to take control of their health and delay having children, making it possible to take advantage of higher education and career opportunities at a much higher rate.[140] For Black women, it was a continuation of their liberation, since Black women's bodies had not been their own during slavery, when they were forced to bear children for the benefit of their enslavers.[141]

Those same privacy rights were the basis for finding constitutional protection for private sexual conduct between consenting adults and requiring states to allow same-sex couples to marry.[142] These rights were located in the Fourteenth Amendment's Due Process Clause, and the cases acknowledging these rights allowed LGBTQ+ members of society to form families and have those families formally recognized, respected, and protected by the government.[143] These rights are at risk under the current Court's view that only enumerated rights and rights "deeply rooted in this Nation's history and tradition" are deserving of constitutional protection.[144]

A. Women's Evolving Rights and Autonomy

White women have always been considered "people" as that term was used in the Constitution, but women had only limited constitutional protection and rights through the nineteenth century.[145] State laws regulated most aspects of society, and many state laws treated women as

139. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that a state prohibition on the use of contraceptives violated the constitutional right to privacy); *see also* discussion *infra* Section II.A.

140. *See* Kim Elsesser, *After* Roe v. Wade *Vote, Access To Contraception Could Be Under Scrutiny*, FORBES (May 3, 2022), https://www.forbes.com/sites/kimelsesser/2022/05/03/after-roe-v-wade-vote-access-to-contraception-could-be-under-scrutiny/?sh=419ff38c66a [perma.cc/W8LX-UWFY] (detailing studies that examine the impact contraception has had on women's careers and educational attainment); *see also* discussion *infra* Section II.A.

141. DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 22–55 (1997); Michele Goodwin, *No, Justice Alito, Reproductive Justice Is in the Constitution*, N.Y. TIMES (June 26, 2022), https://www.nytimes.com/2022/06/26/opinion/justice-alito-reproductive-justice-constitution-abortion.html [perma.cc/79PP-3W8V].

142. *See* discussion *infra* Section II.B.

143. *Id.*

144. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

145. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 422 (1857) (enslaved party) ("Women and minors, who form a part of the political family, cannot vote; and when a property qualification is required to vote or hold a particular office, those who have not the necessary qualification cannot vote or hold the office, yet they are citizens."), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

inferior citizens.[146] Women, especially married women, lacked rights necessary to support or make decisions for themselves.[147] They often lacked the right to vote or hold office and had no direct influence on the laws or politics of the time.[148]

Women's lack of power extended to their own bodies.[149] A man could not be convicted of raping his wife because "consent by the wife to sexual relationships with her husband is implicit in the marital contract."[150] In addition, because a married woman had no separate legal identity from her husband, he could not be convicted of raping "himself."[151] Laws regulating and banning birth control and abortion deprived women of the ability to choose whether and when to procreate.[152] Of course, Black women during slavery were considered

146. Katherine M. Schelong, *Domestic Violence and the State: Responses to and Rationales for Spousal Battering, Marital Rape & Stalking*, 78 MARQ. L. REV. 79, 86, 90 (1994) (describing the "subjugation and subordination" of women under English common law and the adoption of this common law in the United States during the nineteenth century). "Status and political power were acquired through the ownership of land. Since women were denied both, they inescapably were inferior citizens." *Id.* at 86.

147. Teri Dobbins Baxter, *Marriage on Our Own Terms*, 41 N.Y.U. REV. L. & SOC. CHANGE 1, 16 (2017) (explaining that married women lost the right to own or control their property, enter into contracts, or dispose of property in a will).

148. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 951 (2002) (noting that opponents of giving women the right to vote argued that "women were represented in the state through male heads of household and because enfranchising women would harm the marriage relationship"). "Women began seeking the right to vote under the federal Constitution during the drafting of the Fourteenth Amendment but did not secure recognition of this right until ratification of the Nineteenth Amendment over a half century later." *Id.*

149. *See* Baxter, *supra* note 147, at 17 (citing People v. De Stefano, 467 N.Y.S.2d 506, 512 (Cnty. Ct. N.Y., Suffolk Cnty.1983) (discussing historical justifications for the spousal rape exemption)) ("At common law, spouses were immune from liability for torts committed against the other spouse. For instance, a husband could not be guilty of raping his wife.").

150. *See, e.g.*, *id.* (describing historical justifications for the spousal rape exemption); People v. Damen, 193 N.E.2d 25, 27 (Ill. 1963) (explaining rationale for spousal rape exemption).

151. *Id.* (citing cases acknowledging that married women had no separate existence from their husbands). "At common law a valid marriage made the husband and wife one person in law. The legal existence of the woman was suspended, or merged in that of the husband." Henneger v. Lomas, 44 N.E. 462, 463 (Ind. 1896). This view of women no longer exists in any state. *See* Gregg Strauss, *Why the State Cannot "Abolish Marriage": A Partial Defense of Legal Marriage*, 90 IND. L.J. 1261, 1311 (2015) ("[T]he law has largely eliminated the fiction of legal unity and most of its remnants, including spousal immunity.").

152. *See, e.g.*, CONN. GEN. STAT. § 53-32 (1958) (repealed 1971) ("Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."). Section 54-196 provided: "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender." CONN. GEN. STAT. § 54-196 (1958) (repealed 1971).

merely property, and forced pregnancy was a means of increasing the enslaver's property.[153]

The Fourteenth Amendment Due Process Clause eventually emerged as the source of many important substantive rights, including the right to reproductive choice.[154] In 1965, the Court finally recognized a constitutionally protected right to privacy that included a married woman's right to use contraception.[155] Seven years later, that right was extended to single women.[156] The right to control procreation has allowed women to exercise autonomy over their own bodies, make medical decisions without unnecessary and intrusive state oversight or intervention, and ultimately to pursue educational and professional opportunities in record numbers.[157] In other words, these rights have proved invaluable in allowing women to achieve economic independence and to fully participate and succeed in every aspect of society.[158] Taking away those rights jeopardizes all of those accomplishments.

B. Sexual Privacy and Equality for LGTBQ+ Couples

As recently as 1986, the Supreme Court held in *Bowers v. Hardwick* that the laws criminalizing certain private, consensual, sexual acts—particularly acts between people of the same sex—did not violate the constitutional rights of homosexuals.[159] The Court held that its prior substantive due process decisions should not be read to include the right to engage in homosexual sodomy.[160] The Court's focus on homosexual activity was both puzzling and telling since the statute at issue prohibited

153. Goodwin, *supra* note 141 ("Black women's sexual subordination and forced pregnancies were foundational to slavery. If cotton was euphemistically king, Black women's wealth-maximizing forced reproduction was queen.").

154. Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding that women have a constitutionally protected right of privacy that included the right to use contraception).

155. *Id.* (holding that the law banning contraception "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees").

156. Eisenstadt v. Baird, 405 U.S. 438, 454 (1972) (holding that banning contraception for unmarried women but not married women violated the Equal Protection Clause). "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453 (emphasis added)

157. *See* Elsesser, *supra* note 140 (citing studies linking access to birth control and abortion to a dramatic rise of women in professional programs and high-powered careers).

158. *Id.* (citing a study finding "a direct link between access to contraception and a woman's salary").

159. Bowers v. Hardwick, 478 U.S. 186, 189 (1986) (challenging the constitutionality of a Georgia sodomy statute that criminalized oral and anal sex).

160. *Id.* at 192 (holding that no test for identifying fundamental rights "would extend a fundamental right to homosexuals to engage in acts of consensual sodomy").

sodomy regardless of the sex or sexual orientation of the participants.[161] After concluding that no fundamental rights were at issue, the Court applied rational basis scrutiny, concluded the moral objections of a majority of the Georgia electorate were a sufficient basis for criminalizing sodomy, and held that the statute was constitutional.[162]

Seventeen years later, the Court overruled *Bowers* in *Lawrence v. Texas*.[163] That case challenged a Texas statute prohibiting certain sexual acts only between people of the same sex.[164] The Court concluded the *Bowers* Court "misapprehended the claim of liberty there presented to it" and criticized the "historical premises relied upon by the majority and concurring opinions" relating to regulations of private sexual conduct.[165] The Court opined:

> The case [involves] two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.[166]

Twelve years later, the Court held the Due Process and Equal Protection Clauses required states to allow same-sex couples to marry.[167]

While substantive due process has always had its critics—including members of the current Court[168]—for nearly half a century the Court consistently protected privacy rights and provided a degree of confidence

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161. GA. CODE ANN. § 16–6–2 (1984) ("(a)(1) A person commits the offense of sodomy when he or she performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . . (b)(1) . . . [A] person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years . . . .").

162. *Bowers*, 478 U.S. at 196.

163. Lawrence v. Texas, 539 U.S. 558 (2003).

164. *Id.* at 563 ("The applicable state law is Tex. Penal Code Ann. § 21.06(a) (2003). It provides: 'A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.' The statute defines '[d]eviate sexual intercourse' as follows: '(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.' § 21.01(1).").

165. *Id.* at 567–68.

166. *Id.* at 578.

167. Obergefell v. Hodges, 576 U.S. 644 (2015).

168. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2301 (2022) (Thomas, J., concurring) ("Because any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' . . . ." (citation omitted)); *see also* discussion *infra* Section II.C.

that the Constitution was a powerful shield against government intrusion into the lives of people who were in the social and political minority.[169]

C. Overruling Roe v. Wade *and the Retreat from Substantive Due Process*

The Court's opinion in *Dobbs v. Jackson Women's Health Organization* casts doubt on the future of many rights protected under the substantive due process doctrine.[170] The opinion not only ruled that the right to have an abortion was not constitutionally protected,[171] it held that the Constitution did not protect privacy rights more generally, and further held that only those unenumerated rights that are "deeply rooted in this Nation's history and tradition"[172] and "essential to our Nation's 'scheme of ordered liberty'" are protected under the Fourteenth Amendment Due Process Clause.[173] The Court's highly controverted historical evidence to support its conclusion that abortion is not a part of the country's history and tradition is one flaw in the opinion.[174] Equally troubling is the Court's reasoning that casts doubt on other reproductive and privacy rights that have been upheld on the same or similar grounds that were rejected in *Dobbs*.[175]

The problem is the Court's choice to adopt a theory of constitutional interpretation that expressly relies on laws passed at a time in our nation's history when people of African descent, women, and other disfavored groups had no voice in the legislative process or outcome.[176]

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169. *See* Michael J. Higdon, *LGBTQ Youth and the Promise of the Kennedy Quartet*, 43 CARDOZO L. REV. 2385 (2022) (discussing how the "Kennedy Quartet" cases have protected adult sexual minorities' rights).

170. *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.").

171. *Id.* at 2242 (stating in overruling *Roe v. Wade* that "[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment").

172. *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

173. *Id.* at 2246 (quoting Timbs v. Indiana, 139 S. Ct. 682, 686 (2019)).

174. The dissenting opinion in *Dobbs* disputes the majority's sources and conclusions regarding the history of abortion rights. *Dobbs*, 142 S. Ct. at 2324 (Breyer, J., Sotomayor, J., Kagan, J., dissenting) ("[E]arly law in fact does provide some support for abortion rights. Common-law authorities did not treat abortion as a crime before 'quickening'—the point when the fetus moved in the womb. And early American law followed the common-law rule.").

175. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (holding a constitutional right to use contraceptives exists); Lawrence v. Texas, 539 U.S. 558 (2003) (recognizing a right to privacy for adult consensual sexual activity); Obergefell v. Hodges, 576 U.S. 644 (2015) (holding the right to marriage includes same-sex couples).

176. *See* discussion *supra* Part I, Section II.A.

As the dissenting opinion in *Dobbs* points out, the beliefs, opinions, and practices of those excluded groups are invisible to today's justices.[177]

> Those responsible for the original Constitution, including the Fourteenth Amendment, did not perceive women as equals, and did not recognize women's rights. When the majority says that we must read our foundational charter as viewed at the time of ratification (except that we may also check it against the Dark Ages), it consigns women to second-class citizenship.[178]

If the Court continues to rely on these same views when assessing other rights, it is likely to hold that the rights of privacy, bodily autonomy, and sexual privacy—at least as applied to women, children, and non-heterosexual couples—are not deeply rooted in the nation's history and tradition.[179]

In fact, Justice Thomas called on the Court to reconsider several of the Court's substantive due process cases. "[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*. Because any substantive due process decision is 'demonstrably erroneous,' we have a duty to 'correct the error' established in those precedents . . . ."[180] If the Court heeds Justice Thomas' suggestion, the hard-won rights of previously marginalized groups could be revoked, and women's continued participation in higher education and the professional sphere will be jeopardized.[181] This would not only affect women, but the entire American economy and society.[182] It would also risk the newly realized liberty and stability of LGBTQ+ couples and their children.[183]

III. Consequences of Constitutional Demotion

For Black Americans, women, LGBTQ+ Americans, and other racial, religious, and political minorities, the Constitution has never been enough to protect their rights—it was necessary but not sufficient.[184] A

177. *Dobbs*, 142 S. Ct. at 2324–25 (Breyer, J., Sotomayor, J., Kagan, J., dissenting).

178. *Id.* at 2325.

179. *Id.* at 2319 ("The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation.").

180. *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring) (internal citations omitted).

181. Elsesser, *supra* note 140.

182. *E.g.*, Kate Bahn & Annie McGrew, *A Day in the U.S. Economy Without Women*, AM. PROGRESS (Mar. 7, 2017), https://www.americanprogress.org/article/a-day-in-the-u-s-economy-without-women/ [perma.cc/3RV5-C8X3] (stating women contribute trillions of dollars to the nation's annual GDP).

183. Obergefell v. Hodges, 576 U.S. 644, 646 (2015) ("[C]hildren suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life.").

184. *See supra* Parts I, II. *See generally* Brownstein, *supra* note 6 (demonstrating that ideological beliefs of the Supreme Court Justices affect the rights granted to citizens).

combination of constitutional amendments, Supreme Court precedent, and federal legislation has resulted in tremendous strides towards equality and full participation in American society.[185] However, recent Supreme Court opinions threaten to drag each of these groups back to a time when they enjoyed fewer rights and less freedom than other groups.[186]

The Supreme Court's decision to make "history and tradition" the test for recognizing constitutional rights means that this country's history of racism, sexism, heteronormativity, and religious intolerance will define and limit the rights of many who have only recently been able to feel fully American, equally protected, and fully free.[187] Judging through that interpretive lens is a choice, and it is not the only option available. Nothing in the Constitution requires or even directly supports using centuries-old "history and tradition" to limit the rights it grants or protects.[188]

Judges can be faithful to the text of the Constitution while also supporting the ideals of equality, liberty, and justice that we claim to hold dear. Constitutional provisions could be interpreted in light of later amendments and large-scale societal shifts.[189] Rights for women and racial minorities could be determined by recognizing rights comparable or analogous to those historically and traditionally enjoyed by White men. The key is to look beyond the history and tradition of only a select group, which ignores the experiences of others and the evolution of our society as reflected in amendments to the Constitution.

The groups discussed in this Article know and have a collective memory of times before their rights were recognized. Their fear is not of an unknown or hypothetical threat, but of a return to their past. The right to vote and know that your vote will have weight equal to other citizens is a core value in a democratic society.[190] The right to make decisions about your body is key to being an independent and autonomous being.[191]

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185. *See supra* Parts I, II.

186. *See supra* Sections I.D, I.E, II.C.

187. *Id.*; *see also* Brownstein, *supra* note 6 ("[F]ar more young people than ever before openly identify in polls as part of the LGBTQ community.").

188. *Cf.* U.S. CONST. (making no mention of "history" or "tradition").

189. This approach is consistent with "living constitutional theory" but is not meant to advocate for that theory specifically. *See generally* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019) (discussing the debate between originalism and living constitutionalism).

190. *E.g.*, U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

191. *Cf.* Loving v. Virginia, 388 U.S. 1, 12 (1967) ("[C]lassifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, [are sure] to deprive all the State's citizens of liberty without due process of law.").

The ability to choose intimate partners and to marry and have that marriage recognized and respected is crucial to being an equal part of society.[192]

If fundamental rights are lost, there may be no reason to trust or respect the Constitution or the institutions it created. While concerns about a "second civil war" are—hopefully—overstated,[193] those who have fought for and enjoyed the benefits of constitutional protection are not likely to quietly accept demotion to second-class status.[194] State and federal laws that protect the rights of the groups affected by the Supreme Court decisions are important and welcome, but they cannot take the place of constitutional protection. In order to live up to the promise of the Constitution, the courts cannot continue to interpret it in a way that creates and perpetuates inequality for large swaths of the population.

Conclusion

Basic rights should not be limited to those living in a subset of states, and they should not be subject to repeal by a less accommodating Congress. The Constitution is supposed to set the baseline for the rights of all Americans, and it should be—and can be—interpreted in a way that accomplishes that objective. If the notion of justice is not an adequate motivator, reducing the threat of societal instability should be more than sufficient.

192. Obergefell v. Hodges, 576 U.S. 644, 647 (2015) (legalizing same-sex marriage in part because "new insights and societal understandings [of marriage] can reveal unjustified inequality").

193. *See, e.g.*, Michelle Goldberg, *Are We Really Facing a Second Civil War?*, N.Y. TIMES (Jan. 6, 2022), https://www.nytimes.com/2022/01/06/opinion/america-civil-war.html [perma.cc/Y4U2-3ZCP]; William G. Gale & Darrell M. West, *Is the U.S. Headed for Another Civil War?*, BROOKINGS (Sept. 16, 2021), https://www.brookings.edu/blog/fixgov/2021/09/16/is-the-us-headed-for-another-civil-war/ [perma.cc/7LZJ-TEXD]; *BU Historian Answers: Are We Headed for Another Civil War*, BU TODAY (Mar. 27, 2019), https://www.bu.edu/articles/2019/are-we-headed-for-another-civil-war/ [perma.cc/P8L6-7X32] (stating the United States is displaying pre-civil war signs).

194. Brownstein, *supra* note 6 ("How long will rising generations allow what Roosevelt called the 'dead hand' of a Court rooted in an earlier time to block their priorities?").

Don't Make Them Martyrs: Empowering Children in the Foster Care & Juvenile Justice Systems Through COVID-19 Vaccine Consenting Rights

Victoria Kalumbi†

Abstract

Traditionally, the law has created only narrow avenues for children's rights to be recognized and vindicated. The COVID-19 pandemic has changed and reminded adults what it means to be in control, and what rights we should have to live a full, engaged, and productive life. Children in the foster care and juvenile justice systems have such little control, autonomy, and freedom. As it relates to the pandemic, they are at a higher risk of contracting the disease as they are predominately from underrepresented and underserved communities. This Article explores whether COVID-19 might be the turning point for a change in how children's rights to bodily autonomy can be reviewed across areas of constitutional and state law. Ultimately, for novel vaccines, there should be a strong presumption in favor of the child's right to consent to immunizations. Allowing children to engage in such healthcare decisions will make them active participants in a system where things tend to happen to them. It will require a revolution in how the law views these young people, but this Author believes that these children deserve such a revolution.

†. J.D. 2022, Harvard Law School; B.A., 2015, Stanford University. Thank you to Professor Martha Minow and Professor Mark Tushnet for their insight, comments, and thoughts on drafts of this Note, and the *University of Minnesota Journal of Law & Inequality* Editors and Staff Members for their feedback and revisions. I also thank my mother, Christina Kalumbi, my siblings, and my family for their support and encouragement. I am grateful for the lessons I learned from working in foster care, including the patience, information, and guidance from my colleagues and supervisors from my foster care work, including Ms. Alexis Barber-Davis and Dr. Brenda Triplett. I remain inspired by the resilience, determination, and authenticity of the children and families with whom I had the honor to work.

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Introduction

The 2019-coronavirus disease (COVID-19) pandemic reshaped every aspect of life across the globe: politics, culture, education, and employment were only some components that were affected. While children were not initially "the face of [the] pandemic," they certainly "risk being among its biggest victims."[1] Children face adverse impacts on the health of themselves and their families, decreased access to education, increased risk of violence and exploitation, malnourishment, and instability.[2] As new variants have emerged, children remain at risk of life-altering outcomes as a result of contracting COVID-19.[3]

In the United States, children from historically marginalized communities are particularly vulnerable to the pandemic, its uncertainty, and its life-changing disruptions.[4] Children in the juvenile justice system and foster care system are at the mercy of authority figures from multiple systems: the judiciary; government officials who oversee their day-to-day health, safety, and well-being; parents or legal guardians who may retain control over their bodily autonomy and decision-making; and service providers who have access to their life stories. Given their increased vulnerability and the volatility in their lives, this Article focuses on the rights of youth in the foster care and juvenile justice systems.

The pandemic highlighted why a revitalization and re-conception of children's rights is desperately needed. As countries shut down for months at a time, there was a shift in how we conceptualize normalcy, childhood, community, family, and individual "rights."[5] Many adults

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* This paper will not refer to children as "foster care children," "juvenile delinquents," or similar phrases. Children and youth are children first, and should not be defined by their placement within a particular system.

1. *COVID-19 and Children*, UNICEF DATA (Mar. 2020), https://data.unicef.org/covid-19-and-children/ [https://perma.cc/4KZ8-ZVQV].

2. Id.

3. *E.g.*, Anna Edney, *Kids' Covid Hospitalizations Hit Record in U.S. Omicron Surge*, BLOOMBERG (Dec. 31, 2021), https://www.bloomberg.com/news/articles/2021-12-31/kids-covid-hospitalizations-reach-record-level-in-omicron-surge [https://perma.cc/9Y35-FV2S] (describing a record number of pediatric COVID-19 hospitalizations due to the Omicron variant).

4. The Author uses "marginalized," "underrepresented," and "historically marginalized" to refer to individuals who belong to communities that have been denied "consistent and systematic fair, just, and impartial treatment" and have been "systematically denied a full opportunity to participate in aspects of economic, social, and civic life" in the United States. *See* Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021). This includes individuals who are Black, Latine/Hispanic, Native American, indigenous, Asian American and Pacific Islanders, and other people of color.

5. *See, e.g.*, Patrick Van Kessel, Chris Barnonavski, Alissa Scheller & Aaron Smith, *In Their Own Words, Americans Describe the Struggles and Silver Linings of the COVID-19 Pandemic*, PEW RSCH. CTR. (Mar. 5, 2021), https://www.pewresearch.org/2021/03/05/in-their-own-words-americans-describe-the-struggles-and-silver-linings-of-the-covid-19-pandemic/ [https://perma.cc/3GQH-Z5HD] (providing personal accounts of the profound

fought vigorously for their communities and their "rights" to normalcy and consistency; they fought for public health recommendations for COVID-19 such as a reduction in capacity for in-person services,[6] wearing a mask or face covering to limit the spread of COVID-19,[7] and the transition to remote learning for their children.[8] Others advocated for their right to receive COVID-19 vaccines, while at the same time others protested against lockdowns and vehemently opposed vaccine mandates.[9] At the core of these competing demands seemed to be a desire to retain control: to ensure that one's individual rights, sense of self, personal health, and identity remained constant in the midst of uncertainty.

While adults are free to advocate for change, the legal, social, and political climate of the United States does not enable minors to exercise such rights to the same degree. Yet, COVID-19 has had and will continue to have a profound impact on children's learning, growth, development, and health.[10] These impacts can be even more pronounced for marginalized and underrepresented children.[11] Specifically, this Article examines how existing constitutional and statutory frameworks do not provide a uniform way for youth in the foster care or juvenile justice systems to affirmatively access—or refuse—a COVID-19 vaccine.[12]

Sadly, COVID-19 may not be the last pandemic in our lifetime.[13] In analyzing the rights of these young people to consent to the COVID-19

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impact of the COVID-19 pandemic on the lives of Americans).

6. *E.g.*, Danville Christian Acad. v. Beshear, 141 S. Ct. 527, 527–28 (2020) (denying application for injunctive relief against the Kentucky Governor's order to close secular and religious schools); Cassell v. Snyders, 990 F.3d. 539 (7th Cir. 2021) (deciding a case regarding a challenge to a ten-person limit on religious and other gatherings); Calvary Chapel Dayton Valley v. Sislak, 982 F.3d 1228 (9th Cir. 2020) (deciding a case regarding a challenge to emergency directives limiting gatherings of more than fifty people indoors).

7. *E.g.*, CT Freedom All., L.L.C. v. State Dep't Educ., No. HHDCV206131803S, 2021 Conn. Super. LEXIS 223, at *47 (Conn. Super. Ct. Mar. 8, 2021) (rejecting claim that the executive branch lacked power to order children to wear masks in schools); Parker v. Wolf, 506 F. Supp. 3d 271 (M.D. Pa. 2020) (denying motion seeking to prohibit a mask requirement instated by the Pennsylvania Department of Health).

8. *E.g.*, Aviles v. De Blasio, 2021 U.S. Dist. LEXIS 38930, at *2–4 (S.D.N.Y. Mar. 2, 2021) (denying motion for preliminary injunction to require government to reopen New York City schools for in-person instruction); Hernandez v. Grisham, 508 F. Supp. 3d. 893 (D.N.M. 2020) (rejecting constitutional and statutory challenges against remote learning during the COVID-19 pandemic).

9. *See, e.g.*, Thomas Carothers & Benjamin Press, *The Global Rise of Anti-Lockdown Protests—and What to Do About It*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Oct. 15, 2020), https://carnegieendowment.org/2020/10/15/global-rise-of-anti-lockdown-protests-and-what-to-do-about-it-pub-82984 [https://perma.cc/WW6X-F3LV].

10. *See infra* Section I.B.

11. *See infra* Parts I, II.

12. *See infra* Part III.

13. Michaeleen Doucleff, *Next Pandemic: Scientists Fear Another Coronavirus Could Jump*

vaccine—or a future novel vaccine arising out of similar circumstances—there should be a strong presumption in favor of their right to have affirmative access and the ability to consent. Legal and political avenues should be put in place to ensure that these young people have a stake in debates and discussions about public health and vaccination requirements.

Part I of this Article contextualizes the prevalence of COVID-19 among children in the United States, associated health complications, and the disproportionate impact on Black and Hispanic children. Part II explains why youth in foster care and those involved in the justice system are at particular risk for COVID-19. Part III outlines the importance of the COVID-19 vaccine and what is at stake for children who do not obtain the vaccine. Part IV articulates how children and advocates can argue for a right to the COVID-19 vaccine in the face of parental refusal. This Article concludes with policy recommendations to begin the process of patching the many holes in the concept of children's rights for vulnerable and underrepresented youth.

I. COVID-19 in Children in the United States

As of December 2022, the Centers for Disease Control and Prevention (CDC) reported a total of approximately 100 million cases of COVID-19 in the United States, and 1,083,279 deaths are attributed to COVID-19.[14] These immense numbers unfortunately include children, as children can be infected, get sick, and spread COVID-19 to others.[15] While tracking of COVID-19 cases in children has been more limited and inconsistent across states,[16] as of November 2022 there have been

From Animals to Humans, NPR (Mar. 19, 2021), https://www.npr.org/sections/goatsandsoda/2021/03/19/979314118/next-pandemic-scientists-fear-another-coronavirus-could-jump-from-animals-to-hum [https://perma.cc/6L29-ARPY].

14. *CDC COVID Data Tracker*, CDC, https://covid.cdc.gov/covid-data-tracker/#pediatric-data [https://perma.cc/Q3VL-QRM7].

15. *E.g.*, *COVID-19 in Children and Teens*, CDC, https://covid.cdc.gov/covid-data-tracker/#pediatric-data [https://perma.cc/AVW7-93N6]; Taylor Heald-Sargent, William J. Muller, Xiaotian Zheng, Jason Rippe, Ami B. Patel & Larry K. Kociolek, *Age-Related Differences in Nasopharyngeal Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) Levels in Patients With Mild to Moderate Coronavirus Disease 2019 (COVID-19)*, 174 JAMA PEDIATRICS 902, 902–03 (2020) (concluding that children ages five and under with mild to moderate COVID-19 have high amounts of viral RNA in their nasopharynx compared to older children and adults and can be drivers of COVID-19 in the general population); An Tang et al., *Detection of Novel Coronavirus by RT-PCR in Stool Specimen from Asymptomatic Child, China*, 26 EMERGING INFECTIOUS DISEASES 1337, 1337 (2020) (reporting on a child who was virus positive in stool specimens, indicating that children can spread the virus through feces).

16. *See* Sara Simon, *Inconsistent Reporting Practices Hampered Our Ability to Analyze COVID-19 Data. Here Are Three Common Problems We Identified*, COVID TRACKING PROJECT AT THE ATLANTIC (Apr. 8, 2021), https://covidtracking.com/analysis-updates/three-covid-19-

approximately 15 million reported case of COVID-19 in children; children represent approximately 18% of all cases.[17] Approximately 1,853 children aged seventeen and under have died due to COVID-19.[18]

A. COVID-19 Health Complications in Children

i. Physical Health Complications

Just as with adults, some children may have mild or no symptoms at all, and other children get severely ill.[19] Some children are more at risk than others. Children under age two, children with underlying conditions such as obesity, chronic lung disease, premature birth, and children who are Hispanic or Black have higher COVID-19 hospitalization rates.[20] Of the children who require hospitalization, the majority are not fully vaccinated or are not eligible for the COVID-19 vaccination.[21]

Multisystem Inflammatory Syndrome in Children (MIS-C) is a particular health concern for children who contract COVID-19.[22] MIS-C is "a rare but serious condition associated with COVID-19 in which different body parts become inflamed, including the heart, lungs, kidneys, brain, skin, eyes, or gastrointestinal organs."[23] As of November 2022, there have been 9,139 cases and 74 deaths due to MIS-C reported in the United States.[24] Most cases were in children and adolescents between ages five and thirteen.[25] Black and Hispanic children in particular "bear a disproportionate burden of [the] disease."[26] Over half of the reported

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data-problems [https://perma.cc/M39J-GSXX] (discussing problems in the collecting and publishing of COVID-19 case numbers).

17. *Children and COVID-19: State-Level Data Report*, AM. ACAD. PEDIATRICS, http://services.aap.org/en/pages/2019-novel-coronavirus-covid-19infections/children-and-covid-19-state-level-data-report/ [https://perma.cc/UZN2-H345] (Sept. 15, 2022) (reporting trends in data among child COVID-19 infections across U.S. states).

18. *CDC COVID Data Tracker*, *supra* note 14.

19. *COVID-19 in Children and Teens*, *supra* note 15.

20. *Special Considerations in Children*, NAT'L INST. HEALTH, https://www.covid19treatmentguidelines.nih.gov/special-populations/children/ [https://perma.cc/DV85-GZEK] (Aug. 8, 2022).

21. *Id.*

22. *Multisystem Inflammatory Syndrome in Children (MIS-C)*, CDC, [hereinafter *MIS-C*] https://www.cdc.gov/mis-c/index.html [https://perma.cc/3FZF-META]; Jun Yasuhara, Kae Watanabe, Hisato Takagi, Naokata Sumitomo & Toshiki Kuno, *COVID-19 and Multisystem Inflammatory Syndrome in Children: A Systematic Review and Meta-Analysis*, 56 PEDIATRIC PULMONOLOGY 837, 845 (2020) (describing the devastating effects of MIS-C in children and its prevalence in Black and Hispanic populations).

23. *MIS-C*, *supra* note 22.

24. *Id.*

25. *Id.*

26. Danielle M. Fernandes et al., *Severe Acute Respiratory Syndrome Coronavirus 2 Clinical Syndromes and Predictors of Disease Severity in Hospitalized Children and Youth*, 230 J. PEDIATRICS 23, 29 (2021), https://doi.org/10.1016/j.jpeds.2020.11.016 [https://perma.cc

MIS-C cases were Hispanic and Black children,[27] and numerous studies have indicated that patients with MIS-C are more likely to be Black or Hispanic.[28]

ii. Mental Health Complications

COVID-19 has had devastating effects on the mental and psychological health of children. The Surgeon General of the United States even issued an advisory on protecting youth mental health.[29] The pandemic altered the entire landscape of existence for children, including how they learned, built relationships, and could access the world around them in a meaningful way.

During the height of the pandemic, many states issued orders to quarantine, and these orders had profound impacts on school-aged children's mental health. These lockdowns "impose[d] immediate and lingering psychosocial impact[s] on children due to drastic change in their lifestyle, physical activity and mental excursions."[30] In 2021, school closures impacted over 91% of the world's student population.[31] These closures deprived children of an additional "home outside the home"—a space for them to interact with peers and teachers as they build relationships.[32] School closures increased anxiety and "result[ed] in disruption in routine, boredom and lack of innovative ideas for engaging in various academic and extracurricular activities."[33] Further, "not being able to play outdoors, not meeting friends and not engaging in the in-person school activities" caused decreased affect in some children.[34]

Young children are also not spared from the psychological impacts of the pandemic. Children ages three to six have been found to more often "manifest symptoms of clinginess and the fear of family members being

/XZG7-QCY4]; *MIS-C*, *supra* note 22.

27. *MIS-C*, *supra* note 22.

28. Fernandes et al., *supra* note 26, at 29.

29. OFF. SURGEON GEN., PROTECTING YOUTH MENTAL HEALTH: THE U.S. SURGEON GENERAL'S ADVISORY, U.S. DEP'T OF HEALTH & HUM. SERVS. (Dec. 7, 2021), https://www.hhs.gov/surgeon general/reports-and-publications/youth-mental-health/index.html [https://perma.cc/ TKU2-A5ZM].

30. Ritwik Ghosh, Mahua J. Dubey, Subhankar Chatterjee & Souvik Dubey, *Impact of COVID-19 On Children: Special Focus on the Psychosocial Aspect*, 72 MINERVA PEDIATRICA 226, 227 (2020), https://www.minervamedica.it/index2.php? show=R15Y2020N03A0226 [https://perma.cc/9QDN-PKVS].

31. Shweta Singh, Deblina Roy, Krittika Sinha, Sheeba Parveen, Ginni Sharma & Gunjan Joshi, *Impact of COVID-19 and Lockdown on Mental Health of Children and Adolescents: A Narrative Review with Recommendations*, 293 PSYCH. RSCH., Nov. 2020, at 1, 2, https://www.sciencedirect.com/science/article/pii/S016517812031725X [https://perma.cc/73PV-CK3G].

32. Ghosh et al., *supra* note 30, at 228.

33. Singh et al., *supra* note 31, at 2.

34. *Id.*

infected" with COVID-19 than children ages six to eighteen.[35] Children across age groups experienced increased irritability, clinging behavior, "disturbed sleep, nightmares, poor appetite, agitation, inattention and separation related anxiety."[36] Studies "indicate[d] that more than one-third of adolescents report high levels of loneliness and almost half of 18- to 24-year olds [were] lonely during lockdown."[37] Without a doubt, the COVID-19 pandemic and resulting nation-wide lockdowns deeply impacted the mental health of children to a degree that we are only beginning to grasp.

B. Racial Disparities

COVID-19 disproportionately affects Black and Hispanic children.[38] Studies have demonstrated that being in a minority racial/ethnic group is "significantly associated" with testing positive for COVID-19.[39] These racial disparities exist across geographic regions, including rural counties within the United States.[40] In addition to a higher incidence of COVID-19 in Black and Hispanic children, those who contract the virus are more likely to have more severe medical needs and require hospitalization. In one study, while only 20% of children with COVID-19 were hospitalized, 80% of the admitted children were Black.[41]

Researchers and scientists attribute the higher occurrence of COVID-19 in Black and Hispanic children to a number of factors, including biological risk and social and economic structures that place minority families at higher risk.[42] Many of these disparities are rooted in structural and systemic racism that shapes the health and wellness of minority

35. *Id.*

36. *Id.* (citation omitted).

37. Maria Elizabeth Loades et al., *Rapid Systematic Review: The Impact of Social Isolation and Loneliness on the Mental Health of Children and Adolescents in the Context of COVID-19*, 59 J. AM. ACAD. CHILD & ADOLESCENT PSYCH. 1218, 1218 (2020) (internal citations omitted), https://doi.org/10.1016/j.jaac.2020.05.009 [https://perma.cc/U8JW-WAPM].

38. *E.g.*, Monika K. Goyal, Joelle N. Simpson, Meleah D. Boyle, Gia M. Badolato, Meghan Delane, Robert McCarter & Denice Cora-Bramble, *Racial and/or Ethnic and Socioeconomic Disparities of SARS-CoV-2 Infection Among Children*, 146 PEDIATRICS 1, 4 (2020), https://pediatrics.aappublications.org/content/146/4/e2020009951 [https://perma.cc/3FZR-TMEZ] (discussing the disadvantages children of certain racial and/or ethnic and socioeconomic backgrounds face in regards to infection with COVID-19).

39. Sindhura Bandi, Michael Zev Nevid & Mahboobeh Mahdavinia, *African American Children Are at Higher Risk of COVID-19 Infection*, 31 PEDIATRIC ALLERGY & IMMUNOLOGY 861, 863 (2020); *see also MIS-C*, *supra* note 22.

40. *See* Kent Jason G. Cheng, Yue Sun & Shannon M. Monnat, *COVID-19 Death Rates Are Higher in Rural Counties with Larger Shares of Blacks and Hispanics*, 36 J. RURAL HEALTH 602, 606 (2020).

41. Bandi et al., *supra* note 39, at 863.

42. *Id.*

children and families.[43] COVID-19 risk factors, such as obesity and diabetes, are more prevalent in "[Black] children than their white counterparts."[44] Moreover, disparities in access to healthcare may result in Black families delaying treatment, which leads to further spreading the virus due to a decreased "awareness for preventive and cautionary practices."[45] The "long history of racist medical practices" also contributes to the Black community's "distrust in the health care system," while "Hispanic immigrants may fear deportation" by getting involved in the healthcare system.[46] Furthermore, children of Black and Hispanic parents likely face a higher risk of exposure to COVID-19 because these marginalized groups are overrepresented in essential service industries that require in-person contact.[47] Finally, structural and geographic barriers contribute to increased prevalence of COVID-19 among Black and Hispanic youth. These children and their families are more likely to rely on public transportation, live in crowded multifamily housing, and live in multigenerational households.[48]

C. Status of Vaccines for Children

The development of vaccines is ongoing, but as of June 2022, children ages six months and over may be vaccinated with Pfizer-BioNTech and Moderna vaccines.[49] The American Academy of Pediatrics (AAP) recommends that the COVID-19 vaccine should be administered to all eligible children.[50] The AAP also recommends that pediatric patients of all ages be included in trials and that all children and adolescents have access to vaccine distribution when approved.[51]

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43. Cheng et al., *supra* note 40, at 606; *e.g.*, David R. Williams, Jourdyn A. Lawrence & Brigette A. Davis, *Racism and Health: Evidence and Needed Research*, 40 ANN. REV. PUB. HEALTH 105, 105–25 (2019) (evaluating the evidence linking systemic racism to mental and physical health outcomes).

44. Bandi et al., *supra* note 39, at 863.

45. *Id.*

46. Cheng et al., *supra* note 40, at 607.

47. Goyal et al., *supra* note 38, at 5.

48. *Id.*

49. Press Release, FDA, Coronavirus (COVID-19) Update: FDA Authorizes Moderna and Pfizer-BioNTech COVID-19 Vaccines for Children Down to 6 Months of Age (June 17, 2022), https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-authorizes-moderna-and-pfizer-biontech-covid-19-vaccines-children [https://perma.cc/M2AV-X4DZ].

50. *E.g.*, Comm. Infectious Diseases, *COVID-19 Vaccines in Children and Adolescents*, 149 PEDIATRICS 1 (2021) [hereinafter *COVID-19 Vaccines in Children*], https://publications.aap.org/pediatrics/article/149/1/e2021054332/183385/COVID-19-Vaccines-in-Children-and-Adolescents?searchresult=1 [https://perma.cc/BJ9A-UZCC]; Comm. Infectious Diseases, *COVID-19 Vaccines in Children and Adolescents*, 148 PEDIATRICS 2 (2021), https://pediatrics.aappublications.org/content/148/2/e2021052336 [https://perma.cc/9NVB-SM3S].

51. *E.g.*, *COVID-19 Vaccines in Children*, *supra* note 50.

II. Challenges Facing Youth who are Justice-Involved and Youth in Foster Care

There are approximately 73 million youths under age eighteen in the United States.[52] Approximately 52% of youth are white, 15% are Black, 26% are Hispanic, and 1% are Native American.[53] Youth in the foster care system and those who are justice-involved have faced additional challenges during the COVID-19 pandemic. These youths are more vulnerable given their backgrounds: most are from historically marginalized racial groups, primarily Hispanic and Black; come from underserved areas; and often enter these respective systems with greater unmet medical needs.[54] Additionally, many youths leave these systems with unmet medical needs.[55] This part will provide an overview of the needs of children in foster care and those who are justice-involved and explain why they are particularly likely to benefit from the COVID-19 vaccine.

A. Youth in Foster Care

i. What Is the Foster Care System, and Who Is in It?

Foster care is one component of the child welfare system, which "is a group of services designed to promote the well-being of children by ensuring safety, achieving permanency, and strengthening families."[56] A

52. *Youth (0 To 17) Population Profile Detailed By Age, Sex, and Race/Ethnicity, 2019*, OFF. JUV. & DELINQ. PREVENTION (2020), https://www.ojjdp.gov/ojstatbb/population/qa01104.asp?qaDate=2019 [https://perma.cc/MT6T-WTS2].

53. *Id.*

54. *See, e.g.*, Elizabeth S. Barnert, Raymond Perry & Robert E. Morris, *Juvenile Incarceration and Health*, 16 ACAD. PEDIATRICS 99, 100 (2016), https://www.sciencedirect.com/science/article/pii/S1876285915002843 [https://perma.cc/Z3LP-69A9] (discussing the significant disparities in incarceration for Black and Hispanic youth in comparison to their white counterparts); *Racial Disproportionality and Disparity in Child Welfare*, U.S. DEP'T OF HEALTH & HUM. SERV., ADMIN. FOR CHILD. & FAMS., CHILDS.' BUREAU 1, 2 (2014) [hereinafter *Racial Disproportionality*] (analyzing racial disproportionality within the child welfare system and its primary impact on youth of color, specifically Black, Hispanic, and Native youth); Cheng et al., *supra* note 40, at 606.

55. *See* Barnert et al., *supra* note 55, at 101 ("Incarcerated youth have high rates of unmet physical, developmental, and medical needs . . . ."); Council on Foster Care, Adoption, & Kinship Care, Comm. on Adolescence & Council on Early Childhood, *Health Care Issues for Children and Adolescents in Foster Care and Kinship Care*, 136 PEDIATRICS, Oct. 2015, at e1131–32 [hereinafter *Health Care Issues*] ("Limited health care access and unmet health needs precede placement and often endure in foster care."); Stephanie Anne Deutsch & Kristine Fortin, *Physical Health Problems and Barriers to Optimal Health Care Among Children in Foster Care*, 45 CURRENT PROBLEMS IN PEDIATRIC & ADOLESCENT HEALTH CARE 286, 288 (2015).

56. *How the Child Welfare System Works*, DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMS., CHILDS.' BUREAU 1, 2 (2020). However, the stated purpose of the foster care system differs from its execution. Many scholars and experts view the child welfare system,

majority of families "become involved with the child welfare system because of a report of suspected child abuse or neglect . . . ."[57] Child Protective Services has the authority to remove children from their current parents or caregivers depending on the severity of the case and the alleged abuse or neglect.[58] Each child in foster care should have a permanency plan—a written, legal plan that describes the course of action for a child to achieve a safe, permanent home.[59] In most cases, the permanency plan will be aimed at achieving family reunification.[60] Federal law mandates that courts hold at least one permanency hearing annually in which the child's permanency plan is developed.[61]

In 2019, there were approximately 424,000 children in foster care.[62] Children's placements vary and include non-relative foster homes—the most prevalent placement—relative foster homes, group homes, institutions, and independent living.[63] The median amount of time that children spend in foster care is approximately 13.3 months.[64] Children of all races are represented in the foster care system; in 2019, approximately 44% of youth in foster care were white, 23% were Black, and 21% were Hispanic.[65] It is well documented that Black and Native American children are overrepresented in the child welfare system.[66] However, this "racial disproportionality is most severe and dramatic for African American children."[67]

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including foster care, as the family regulation or family policing system, explaining that the system is founded on "investigating, supervising, and disrupting politically marginalized families" and "has absorbed efforts to mitigate its abuses and continued to operate as a system of family regulation." Dorothy Roberts, *The Regulation of Black Families*, THE REGUL. REV. (Apr. 20, 2022), https://www.theregreview.org/2022/04/20/roberts-regulation-of-black-families [https://perma.cc/HM82-Q3W2].

57. *How the Child Welfare System Works*, *supra* note 56, at 2.

58. *Id.* at 5–6.

59. *See, e.g.*, *Case Planning for Families Involved with Child Welfare Agencies*, U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMS., CHILDS.' BUREAU 1, 1–4 (2018).

60. *How the Child Welfare System Works*, *supra* note 56, at 6.

61. *Id.*

62. U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMS., CHILDS.' BUREAU, CHILD WELFARE OUTCOMES 2019: REPORT TO CONGRESS 6 (2022).

63. *Id.* at 98.

64. *Id.* at 99.

65. *Id.*

66. *See, e.g.*, *Racial Disproportionality*, *supra* note 54, at 2; Robert B. Hill, A*n Analysis of Racial/Ethnic Disproportionality and Disparity at the National, State, and County Levels*, CASEY-CSSP ALL. FOR RACIAL EQUITY IN CHILD WELFARE 1, 1 (2007) (examining "racial and ethnic disproportionality and disparities for children" through an analysis of the child welfare system), https://www.aecf.org/m/resourceimg/aecf-AnalysisofRacialEthnic Disproportionality-2007.pdf [https://perma.cc/H625-25MH].

67. MARIAN HARRIS, RACIAL DISPROPORTIONALITY IN CHILD WELFARE xv (Colum. U. Press ed. 2014).

Indeed, Black and Native American children are overrepresented nationally at every single stage of the child welfare system—investigation, substantiation of investigations, and placement into foster care.[68] Once placed into foster care, Black and Hispanic children are less likely to be adopted or reunified with their families, remain in care longer, receive fewer services, and have less contact with child welfare caseworkers than their white counterparts.[69]

ii. Medical Needs

Children in the foster care system have higher rates of health problems than children not in the foster care system.[70] These health issues include higher rates of acute and chronic physical, mental, and developmental conditions.[71] This heightened rate is partially due to the fact that children enter the foster care system in poorer "mental and physical health relative to children in virtually every other type of family situation" and in comparison to children in economically disadvantaged families.[72] Approximately 30 to 80% of children in foster care have chronic health problems,[73] including psychological or behavioral, ophthalmologic, educational, dermatologic, and allergic conditions.[74] Youth in foster care also often have lapses in preventive or primary care and face an increased risk for sexually transmitted infections.[75]

Moreover, the longer children stay in foster care—and the increased number of placements they experience—the worse their health problems.[76] High rates of health problems continue even after children age out of the foster care system.[77] Children with a history of being in foster care tend to have lower self-efficacy and a higher likelihood of obesity, cardiovascular risk factors, and engaging in adverse health behaviors like smoking.[78] As not all reunifications or adoptions are successful, youth who re-enter foster care "comprise a distinct category of medical need and health risks."[79] A study of 392 school-aged students

68. Hill, *supra* note 66, at 1.

69. Tyrone C. Cheng & Celia C. Lo, *Racial Disparities in Access to Needed Child Welfare Services and Worker-Client Engagement*, 34 CHILD. & YOUTH SERVS. REV. 1624, 1624 (2012); HARRIS, *supra* note 67, at xvi.

70. *See, e.g.*, Deutsch & Fortin, *supra* note 55; *Heath Care Issues*, *supra* note 55.

71. *See* Deutsch & Fortin, *supra* note 55.

72. Kristin Turney & Christopher Wildeman, *Mental and Physical Health of Children in Foster Care*, 138 PEDIATRICS 1, 10 (2016).

73. Deutsch & Fortin, *supra* note 55, at 286.

74. *Id.* at 287.

75. *Id.*

76. *Id.* at 288.

77. *Id.*

78. *Id.*

79. *Id.*

reentering foster care showed that their medical history had worsened in seven areas: they had more "subspecialty clinic involvement, health concerns, hospitalizations, prescribed medications, medication allergies, sexual activity, and substance abuse."[80]

iii. COVID-19 and Youth in Foster Care

The pandemic has created numerous challenges for youth in foster care, both in terms of the dangers posed to their health and the difficulty of maintaining family relationships. As previously articulated, children in foster care tend to have poorer health that makes them much more susceptible to contracting COVID-19.[81] Moreover, since children in foster care are primarily minority youth, they are at a higher risk of COVID-19 and are more likely to have severe complications and require hospitalization.[82]

Additionally, the disruptions to court-mandated services, housing, employment, and basic needs as a result of the pandemic pose a significant threat to reunification. The transition to virtual services has made it more difficult for parents to meet their requirements for reunification.[83] For many families, visitation—a core part of a parent's reunification plan—switched to video or phone visits.[84] Some families saw their visits reduced by at least half since the start of the pandemic.[85] While some officials pushed for in-person visits to continue,[86] the increased vulnerability of youth in foster care makes in-person visits riskier for youth—as well as for their foster parents.[87] Losing access to these valuable, consistent visits likely negatively impacts the mental health and well-being of youth in care, who already face poorer mental health outcomes in comparison to their peers.[88] Particularly, young

80. Jill J. Fussell & Larry D. Evans, *Medical Status of School-Age Children Reentering Foster Care*, 14 CHILD MALTREATMENT 382, 385 (2009).

81. *See* discussion *supra* Section II.A.ii.

82. *See* discussion *supra* Section II.A.i.

83. Sarah Font, *The Impact of the COVID-19 Pandemic on Children in Foster Care*, PENN STATE SOC. SCI. RSCH. INST. (July 29, 2020), https://covid-19.ssri.psu.edu/articles/impact-covid-19-pandemic-children-foster-care [https://perma.cc/NDM3-JBR8]; *see also* Kristen Pisani-Jacques, *A Crisis for a System in Crisis: Forecasting from the Short- and Long-Term Impacts of COVID-19 on the Child Welfare System*, 58 FAM. CT. REV. 955 (2020) (discussing how virtual visitation has acted as a barrier to quality family time, yet quality family time leads to a greater likelihood of reunification).

84. Font, *supra* note 83.

85. Michelle Chen, *How Covid-19 Supercharged a Foster System Crisis*, THE NATION (Mar. 15, 2021), https://www.thenation.com/article/society/foster-care-covid/ [https://perma.cc/9CF8-X8ZX].

86. *See id.* (discussing how most Colorado counties are open for in-person visits and are seeking to identify measures that will comply with health guidance to allow these visits).

87. *See, e.g.*, Font, *supra* note 83.

88. *See Health Care Issues*, *supra* note 55, at e1132–33 (describing how many foster

children may not understand why they no longer see their parents on a consistent basis, and older children may suffer emotional harm due to this substantive change in the parent-child relationship.[89]

Despite guidance from the Children's Bureau—a division of the Department of Health and Human Services—that aimed to encourage judges and child welfare officials to relax the Adoption and Safety Family Act (ASFA) timelines for the termination of parental rights,[90] a Brooklyn legal aid group claimed that courts are moving forward with termination proceedings via virtual platforms.[91] Parents who lack the ability to maintain stable housing and work to meet the needs of their children as they seek to have them returned to their care must manage the stress of struggling to survive knowing the clock is ticking for them to retain their parental rights.[92]

Older adolescents in the foster care system face additional challenges. While many states have delayed requirements that mandate when youth must exit foster care, child welfare professionals note that many youths have been forced to leave foster care in the midst of a pandemic with decreased support and immense uncertainty.[93] In an April 2020 survey of older youth in the foster system, participants reported substantial challenges across all aspects of their safety and well-being, including significant issues related to "housing, food security, education, finances, employment, health/mental health, and personal connections during COVID-19."[94] For example, almost 10% reported they had been or were currently being forced to leave their living situation, over 15% were fearful of being forced to leave their living situation, and over 6%

children enter the foster care system with disproportionately higher mental health needs than their non-foster peers).

89. *See, e.g.*, Pisani-Jacques, *supra* note 83, at 956 ("When children and families do not maintain regular contract, it can deteriorate the attachment relationship, sometimes irreparably, and protract time spent in foster care."). The lack of contact between youth and parents may have a significant and long-lasting impact on attachment and citing the age of children as an important factor in attachment. *Id.* at 958–59.

90. Guidance Letter to Child Welfare Legal and Judicial Leaders, U.S. Dep't of Health & Hum. Servs., Admin. for Child. & Fams., Childs.' Bureau (Mar. 27, 2020); Guidance Letter to State and Tribal Child Welfare Leaders, U.S. Dep't of Health & Hum. Servs., Admin. for Child. & Fams., Childs.' Bureau (June 23, 2020). The State is instructed to file a petition to terminate the parental rights of a child's parents if the child has been in foster care for fifteen of the most recent twenty-two months. 42 U.S.C. § 675(5)(E) (2018).

91. Chen, *supra* note 85.

92. *Id.*

93. David Dodge, *Foster Care Was Always Tough. Covid-19 Made It Tougher*, N.Y. TIMES (Jan. 8, 2021), https://www.nytimes.com/2021/01/08/parenting/foster-care-coronavirus.html [https://perma.cc/6AWY-HR2B]; Pisani-Jacques, *supra* note 83, at 957 (describing how youth exiting foster care face increased struggles accessing housing and employment during the COVID-19 pandemic).

94. JOHANNA K.P. GREESON, SARA R. JAFFEE, SARAH WASCH & JOHN GYOURKO, THE EXPERIENCES OF OLDER YOUTH IN & AGED OUT OF FOSTER CARE DURING COVID-19 at 57 (2020).

reported that they had experienced homelessness due to a loss of housing since COVID-19.[95] This survey corresponds with youth advocate reports from across the United States that older teens "aging out" of foster care have become homeless or been forced to couch-surf at friends' homes because of the challenges of COVID-19.[96]

Further, because youth are frequently placed in non-kinship settings, it is not just their risk of COVID-19 that must be evaluated.[97] Foster parents tend to be older, and many may be at an increased risk of contracting COVID-19.[98] Furthermore, children placed in foster or group homes are often housed with multiple children from different families.[99] Having multiple children in one placement increases the potential for viral spread.[100] Foster parents have expressed concern about accepting new foster placements because of the increased risk of exposure, with some foster parents only accepting new placements "under the condition all visits would be conducted virtually or by phone."[101] In this way, COVID-19 has forced a precarious balancing of the risk of exposure to foster parents with the importance of parental visitation for reunification and children's well-being.

Moreover, there have been reports of a decline in available foster parents as the number of children in need of a home exceeds the number of available homes.[102] Foster parents who may have previously accepted a placement may not accept further placements due to the fallout from the pandemic—for example, those who have lost employment or suffered other financial constraints due to COVID-19 cannot serve as a resource.[103] Other issues, such as health care issues caused by a foster parent or family member of a foster parent contracting COVID-19, could lead foster parents previously open to visits unable to offer this care.[104] However, it

95. *Id.* at 20.

96. Eli Hager, *Coronavirus Leaves Foster Children With Nowhere to Go*, THE MARSHALL PROJECT (Mar. 24, 2020), https://www.themarshallproject.org/2020/03/24/coronavirus-leaves-foster-children-with-nowhere-togo?utm_medium=email&utm_source=govdelivery [https://perma.cc/F9LU-RMAC].

97. Font, *supra* note 82.

98. *Id.*

99. *Id.*

100. *Id.*

101. Ryan Hanlon, JaeRan Kim, Cossette Woo, Angelique Day, Lori Vanderwill & Elise Dallimore, *An Exploratory Study of the Impact of COVID-19 on Foster Parenting*, 27 CHILD & FAM. SOC. WORK 371, 377 (2022).

102. *See, e.g.*, Keir Chapman, *Foster Parent Shortage May Be Related to COVID-19*, 7 NEWS WWNY-TV (Aug. 4, 2020), www.wwnytv.com/2020/08/04/foster-parent-shortage-may-be-related-covid-/ [https://perma.cc/9NVF-UYNM] (explaining that officials in Watertown, New York experienced a shortage of available foster parents).

103. Dodge, *supra* note 93; *see* Hanlon et al., *supra* note 101, at 377.

104. *See, e.g.*, Hanlon et al., *supra* note 101, at 377 (describing how foster parents considered the health implications of COVID-19 when deciding whether to accept a new

should be noted that not all foster parents are hesitant about opening their home to children in the pandemic.[105] Unfortunately, there are still not enough willing foster parents to bridge the disparity between the number of foster parents and the number of foster children in need of home placements.[106]

B. Justice-Involved Youth

i. What Is the System, and Who Is Being Detained?

A juvenile delinquent is a person with an upper age limit of eighteen who "commits an act that is defined as criminal if committed by an adult."[107] Juveniles are referred to the courts for two types of cases: "[a]cts that would be illegal for adults are termed delinquent offenses, and violations of regulations that apply only to children are labeled status offenses."[108] Courts with juvenile jurisdiction processed 744,500 delinquency cases and "formally disposed" 97,800 status cases in 2018.[109]

The juvenile system process begins when an individual, typically a police officer, files a petition outlining the law or ordinance that the youth reportedly violated.[110] The youth may be arrested or provided with a summons to appear in court.[111] An intake division may also receive a complaint from various other sources (e.g., parents, school officials, community residents, or businesses), though most referrals to the juvenile justice system are from the police.[112] An intake division

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placement).

105. For example, in a 2020 survey of 600 resource parents in Los Angeles, 54% said they were "open to welcoming a new child into their home"—a higher rate than the average for potential parents willing to welcome a new child into their home. AUDRA LANGLEY, MATTHEW RUDERMAN, JILL WATERMAN & TODD FRANKE, UCLA PRITZKER CTR., THE IMPACT OF COVID-19 ON PARENTS 11 (2020), https://pritzkercenter.ucla.edu/wpcontent/uploads/2020/10/UCLA-Pritzker-Center_COVID-19-Impact-on-Foster-Youth-and-Families.pdf [https://perma.cc/9G4F-92M4].

106. Chapman, *supra* note 102.

107. PETER C. KRATCOSKI, LUCILLE DUNN KRATCOSKI & PETER CHRISTOPHER KRATCOSKI, JUVENILE DELINQUENCY: THEORY, RESEARCH, AND THE JUVENILE JUSTICE PROCESS 1 (Springer Int'l Publ'g ed., 2020). The literature in this field often uses terms such as "juvenile" and "juvenile delinquent," but these terms can be disparaging, dehumanizing, and stigmatizing. *See, e.g.*, Adam Jordan, *Risky Children: Rethinking the Discourse of Delinquency and Risk*, 51 J. THOUGHT 31, 31 (2017), https://www.jstor.org/stable/90010894 [https://perma.cc/TD94-S9PW] (describing how the word "delinquency" is "stigmatizing language used to marginalize youth and families").

108. KRATCOSKI ET AL., *supra* note 107, at 1.

109. SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUV. JUST., JUVENILE COURT STATISTICS 2018 at 6, 64 (2020).

110. KRATCOSKI ET AL., *supra* note 107, at 317.

111. *Id.*

112. *Id.* at 289–90; *Juvenile Justice System Structure & Process: Case Flow Diagram*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, [hereinafter *Case Flow Diagram*] https://www.ojjdp.gov/

determines if the court has jurisdiction and will determine whether to dismiss the case, handle the matter informally, or request formal intervention by the court.[113] For cases that will be handled judicially, arraignment is scheduled.[114] Following the arraignment, there will be an adjudication hearing and disposition.[115] During this time, a youth may be held at a detention center.[116] In 2018, approximately 26% of youth were detained during the processing of their case.[117] Most youth are released to the custody of their parents or legal guardians.[118]

Correctional facilities for youth vary depending on the type and length of stay. Short-term facilities include detention centers, shelter homes, reception, diagnostic centers, or adult jails.[119] Long-term secure facilities include training schools, ranches, farms, halfway houses, and group homes.[120] Approximately 27% of adjudicated youth are placed in a residential facility.[121] As of 2019, on any given day nearly 37,000 youth are held in residential placement facilities.[122]

Systemic and structural racism plagues every aspect of the juvenile justice system.[123] As of 2019, in all but eight states, the residential placement rate for Black youths exceeds the rate for all other racial/ethnic groups.[124] While youth of color are only 38% of the population, they account for almost 70% of young people in secure confinement.[125] Black youth are treated more harshly at every stage of the juvenile justice system. Although only 16% of Black youth are old enough to be detained, they "represent 28% of juvenile arrests, 37% of

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ojstatbb/structure_process/case.html [https://perma.cc/J85S-7R8T].

113. KRATCOSKI ET AL., *supra* note 107, at 290; *Case Flow Diagram*, *supra* note 112.

114. KRATCOSKI ET AL., *supra* note 107, at 317.

115. *Id.* at 318.

116. *Id.* at 291.

117. *Case Flow Diagram*, *supra* note 112.

118. KRATCOSKI ET AL., *supra* note 107, at 291.

119. *Id.* at 358.

120. *Id.* at 365.

121. *Case Flow Diagram*, *supra* note 112.

122. *Juveniles in Corrections: Demographics*, *One Day Count of Juveniles In Residential Placement Facilities, 1997-2019*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, https://www.ojjdp.gov/ojstatbb/corrections/qa08201.asp [https://perma.cc/T6LE-MAFX].

123. James Bell, *Toward a Fair and Equitable Public Safety Strategy for the New Century in* A NEW JUVENILE JUSTICE SYSTEM 23, 25 (2015).

124. *Juveniles in Corrections: Demographics*, *State Residential Placement Rates by Race/Ethnicity, 2017*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, https://www.ojjdp.gov/ojstatbb/corrections/qa08203.asp?qaDate=2017 [https://perma.cc/EDG5-CTLC] (identifying the eight states as Hawaii, Connecticut, Illinois, North Carolina, Rhode Island, Wyoming, Minnesota, and Nebraska).

125. Bell, *supra* note 123, at 26.

detained youth, and 58% of youth admitted to state adult prison."[126] Hispanic youth also face disproportionate outcomes—compared to white youth, they were "4% more likely to be petitioned, 16% more likely to be adjudicated delinquent, 28% more likely to be detained, 41% more likely to receive an out of home placement, and 43% more likely to be waived into the adult system."[127] In certain jurisdictions, Asians, Pacific Islanders, and Native Americans are also overrepresented in the juvenile justice system.[128]

ii. Medical Challenges

Youth in the juvenile justice system have significant healthcare needs relative to their peers in the same community. While some of their needs are influenced by their engagement in high-risk behaviors—behavior that may have contributed to their detention (e.g., violence and substance abuse)—many of their health problems stem from living in impoverished and abusive environments. Others have acquired health issues, such as hypertension and diabetes, "that are neglected or remain undiagnosed."[129] It must also be noted that socioeconomic status shapes medical access and outcomes for youth. There is a complex relationship and correlation between race, lower socioeconomic status, and poor health outcomes, which may explain why youth in the justice system have poorer health outcomes.[130] Approximately 93% of youth entering the juvenile justice system have at least one adverse childhood experience (ACE).[131] Accordingly, youth who enter a detention facility enter the system already facing systemic health inequalities and an increased likelihood for poorer outcomes.[132]

Research on youth in the juvenile justice system indicates that two-thirds of incarcerated youth have "physical health care needs including dental, vision, or hearing" issues.[133] Another study indicated that 46% of incarcerated youth had at least one "diagnosable medical condition requiring medical attention, with respiratory and sexually transmitted infections" being the most common.[134] Health complaints such as "headache, abdominal pain, back or joint pain, upper respiratory

126. *Id.* at 27.

127. *Id.*

128. *Id.* at 28.

129. AM. ACAD. PEDIATRICS, COMM. ON ADOLESCENCE, *Health Care for Youth in the Juvenile Justice System*, 128 PEDIATRICS 1219, 1220–21 (2011).

130. Barnert et al., *supra* note 55, at 100.

131. *Id.*

132. *Id.* at 101 (explaining that individuals exposed to a high number of ACEs may be more prone to risk-taking, adverse health outcomes, and incarceration).

133. *Id.*

134. *Id.*

symptoms, and sleep problems" are also more prevalent among detained youth relative to their non-detained peers.[135] The vast majority of incarcerated children meet the criteria for at least one psychiatric diagnosis.[136] Again, racial disparities dominate mental health diagnoses and treatment among the population—white youth have the highest rates of diagnosed psychiatric disorders, while Black youth have the lowest rate.[137] Further, "[a]mong detained youth with mental health disorders, minority youth are less likely to receive treatment than their non-Hispanic white counterparts."[138]

iii. COVID-19 and Justice-Involved Youth

Taken together, young people in the juvenile justice system have vulnerabilities that warrant individualized mental and medical health treatment. The COVID-19 pandemic may exacerbate underlying mental health challenges in youth due to "fear, social distancing, and disruptions in care, housing, schooling, and routine."[139] Youth who contract COVID-19 may experience isolation resembling solitary confinement, which has deleterious and harmful effects to young people in particular.[140] Moreover, states have taken steps to suspend visitation from family, which likely adds to the disruption and isolation that these youth experience.[141]

In response to the pandemic, states and agencies attempted to reduce the number of youths detained in correctional facilities by decreasing the number of youths that are detained at all (e.g., fewer arrests), facilitating earlier releases, and increasing the use of alternatives to confinement.[142] However, this has not addressed the main

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135. *Id.*

136. *Id.* at 101–02 ("Two-thirds of incarcerated boys and three-quarters of incarcerated girls meet criteria for at least 1 psychiatric diagnosis, with substance use, behavior disorders, and depression being the most prevalent. Roughly 27% of incarcerated youth have a severe mental disorder warranting immediate treatment.").

137. *Id.* at 102.

138. *Id.*

139. Elizabeth S. Barnert, *COVID-19 and Youth Impacted by Juvenile and Adult Criminal Justice Systems*, 146 PEDIATRICS 2 (2020), http://pediatrics.aappublications.org/lookup/doi/10.1542/peds.2020-1299 [https://perma.cc/JL94-RJ9S].

140. *Id.*

141. *Criminal Justice System Responses to COVID-19*, NAT'L CONF. STATE LEGISLATURES (Nov. 16, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/criminal-justice-and-covid-19.aspx [https://perma.cc/AE2T-VT93]; *see, e.g.*, Anya Kamenetz, *COVID-19 Lockdowns Have Been Hard on Youth Locked Up*, NPR (Mar. 29, 2021), https://www.npr.org/2021/03/29/979986304/covid-19-lockdowns-have-been-hard-on-youth-locked-up [https://perma.cc/9T2X-DJQE] (discussing the impact of COVID-19 lockdowns in juvenile detention centers in Louisiana).

142. Molly Buchanan, Erin D. Castro, Mackenzie Kushner & Marvin D. Krohn, *It's F**ing Chaos: COVID-19's Impact on Juvenile Delinquency and Juvenile Justice*, 45 AM. J. CRIM. JUST.

issue of the present COVID-19 spread among already incarcerated youths. In youth correctional facilities themselves, social distancing has been "virtually nonexistent" despite the fact that youth who are justice-involved are more likely to be at a higher risk of infection.[143]

Many states do not track the rate of COVID-19 in their juvenile detention facilities, making it hard to respond to trends relating to the prevalence of COVID-19.[144] As of March 31, 2022, approximately 3,936 youth in juvenile detention facilities had tested positive for COVID-19 across forty-one states, Washington D.C., Guam, and Puerto Rico.[145] Though still limited, researchers noted greater transparency in public facilities in comparison to private facilities, many of which did not report the prevalence of COVID-19.[146]

Finally, the staff who work at these detention facilities pose a significant risk of harm to the juveniles. Data has shown there has been a higher prevalence of COVID-19 among adult staff than incarcerated youth—given that in-person visitation was decreased due to the pandemic, it is likely that staff are responsible for the rates of COVID-19 among detained young people.[147] Additionally, state and local agencies relaxed hiring protocols, reallocated budgets, and changed shifts to combat instances in which essential employees become ill or quit, leaving facilities understaffed.[148] While beneficial to "employees' stamina, patience, and general mental health," leaving shifts to be covered by "untrained, temporary, or ill-fitting replacement personnel" risks disruption within facilities and increases the risk of exposure to the virus.[149]

III. Children's Voices in the Vaccine Debate

As adults in children's lives make choices on their behalf, where is it that the voice of children can be heard and elevated? Whether children seek to advance arguments against the COVID-19 vaccine or fight to be inoculated against the wishes of their parents, this Part will explore

578, 579–600 (2020), http://link.springer.com/10.1007/s12103-020-09549-x [https://perma.cc/2NC5-HWCQ].

143. *Id.* at 584.

144. *Id.* at 584–85.

145. Josh Rovner, *COVID-19 in Juvenile Facilities*, THE SENTENCING PROJECT (May 18, 2021), https://www.sentencingproject.org/publications/covid-19-in-juvenile-facilities/ [https://perma.cc/3RVW-BCXK].

146. *See* JOSH ROVNER, THE SENTENCING PROJECT, YOUTH JUSTICE UNDER THE CORONAVIRUS: LINKING PUBLIC HEALTH PROTECTIONS WITH THE MOVEMENT FOR YOUTH DECARCERATION 11, 19 (2020).

147. *See id.* at 11.

148. Buchanan, *supra* note 142, at 590.

149. *Id.*

timely debates surrounding politics, autonomy, and consent for these young people who are uniquely subject to regulations and requirements from government interventions. Just as COVID-19 challenged the social, legal, political, and scientific community, it also presented an opportunity to conceptualize children's rights in the context of competing, overarching authorities. At stake in the vaccine debate about COVID-19 is not only a child's bodily autonomy, but also their ability to be fully integrated with and participate in their community.

Youth in foster care and the juvenile justice system are likely to have an increased risk of contracting COVID-19.[150] Yet whether they can access the COVID-19 vaccine when they lack parental consent is a complex battle between biological or foster parents, courts, and government officials.

A. Who Can Consent?

Children who have not reached the age of majority typically do not have the right to consent to their own medical care.[151] The landscape for consent varies wildly across states. In some states, like Alabama, youth aged fourteen and over may consent to "any legally authorized medical, dental, health or mental health services for himself or herself,"[152] while youth in Rhode Island must be over age sixteen to consent.[153] Other states require a youth to live apart from their parents or be a parent of a child themselves.[154] There are three categories of youth who can make decisions regarding their health care: "exceptions based on specific diagnostic/care categories, the 'mature minor' exception, and legal emancipation."[155]

Children in foster care are not entitled to make their own medical decisions.[156] Forty-five states legally allow biological parents to make medical decisions on behalf of their child if their parental rights have not been terminated; however, the biological parents often do not make these

150. *See* discussion *supra* Part II.

151. *E.g.*, Jonathan M. Fanaroff, *Consent by Proxy for Nonurgent Medical Care*, 139 PEDIATRICS 1, 2 (2017); *see also State Laws that Enable a Minor to Provide Informed Consent to Receive HIV and STD Services*, CDC, https://www.cdc.gov/hiv/policies/law/states/minors.html [https://perma.cc/A857-KREZ] (Jan. 8, 2021) (indicating that forty-six states have an age of majority of eighteen; only Alabama, Mississippi, Nebraska, and Pennsylvania have a higher age of majority).

152. ALA. CODE § 22-8-4 (2013).

153. R.I. GEN. LAWS § 23-4.6-1(a) (2018).

154. *See e.g.*, N.M. STAT. § 24-7A-6.2 (2013).

155. Aviva L. Katz & Sally A. Webb, Comm. on Bioethics, *Informed Consent in Decision-Making in Pediatric Practice*, 138 PEDIATRICS 1, 4 (2016).

156. *See* Zach Strassburger, *Medical Decision Making for Youth in the Foster Care System*, 49 J. MARSHALL L. REV. 1103, 1112–13 (2016) (discussing the prevalence of state statutes that require either birth parents or foster parents to make decisions for children in foster care).

decisions.[157] In the majority of these states, someone other than the biological parent most commonly made medical decisions for the minor.[158] Every state allows for state officials or agents (e.g., caseworkers) to make some medical decisions on behalf of the child.[159] In twenty-two states, these state officials were the most frequent medical decision-maker for the minor.[160] Accordingly, the decision-maker on the medical needs of youth in foster care typically ends up being the caseworker, judge, foster parents, or some other state official.[161]

B. COVID-19 Vaccine Consent Laws

While all states allow minors to consent for services relating to sexually transmitted infections and diseases,[162] this view of consent has not been expanded to include consent for routine care like immunizations. As the pandemic became more politicized, states adopted a patchwork of consent laws for the COVID-19 vaccine, and most states require parental consent.[163] Indeed, forty-two states require parental consent for the COVID-19 vaccine.[164] In four states—Arkansas, Idaho, Tennessee, and Washington—providers may waive parental consent.[165] In San Francisco and Philadelphia, minors who are twelve and eleven years of age can provide sole consent for the COVID-19 vaccine.[166]

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157. *Id.* at 1112.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 1135.

162. NAT'L DIST. ATT'YS ASS'N, MINOR CONSENT TO MEDICAL TREATMENT LAWS, 8–10 (2013), https://ndaa.org/wp-content/uploads/Minor-Consent-to-Medical-Treatment-2.pdf [https://perma.cc/QK53-PQEQ].

163. Jeremey Loudenback, *California Juvenile Facilities See Continuing Covid Rise*, L.A. PROGRESSIVE (Jan. 24, 2021), https://www.laprogressive.com/juvenile-facilities-2/ [https://perma.cc/ZMZ7-D53E] (illustrating that young people under age eighteen in California detention centers need parental consent to receive the COVID-19 vaccine); Eileen Grench, *New York's Homeless, Foster and Jailed Teens Now Eligible for COVID Vaccine*, CHALKBEAT N.Y. (Feb. 24, 2021), https://ny.chalkbeat.org/2021/2/24/22299531/ny-homeless-foster-jailed-teens-covid-vaccine [https://perma.cc/KA7J-63YR] (showing that youth in foster care and juvenile detention centers in New York will need "written, informed parental consent" to receive the vaccine, unless they are pregnant, parenting, or are freed for adoption).

164. *State Parental Consent Laws for COVID-19 Vaccination*, KAISER FAM. FOUND. (Nov. 2021), https://www.kff.org/other/state-indicator/state-parental-consent-laws-for-covid-19-vaccination/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D#note-1 [https://perma.cc/564P-BPNA].

165. *Id.*

166. *Id.*

C. What Is at Stake for Youth Without a Covid-19 Vaccine?

As institutions continue to respond to COVID-19, it seems there will be a number of benefits beyond health safety that are more accessible to youth who are vaccinated. It is critical that youth be able to assert their right to a vaccine, as they are the ones who know what is at stake—their own health. In advancing a child-centric view of the law, it is the child's experience that should be at the center of the argument. For the COVID-19 vaccine, the social and health costs of remaining unvaccinated remain formidably high.

i. Education Access

Children in the foster care and juvenile justice systems must battle against disparities in educational access—disparities which a lack of vaccination may only exacerbate by decreasing educational opportunities.[167] Over 1,000 colleges and universities instituted a COVID-19 vaccine requirement for the 2021–2022 and 2022–2023 academic years.[168] Vaccine requirements for elementary and secondary schools remain uncertain.[169] In October 2021, California Governor Gavin Newsom announced that, once the FDA gave full approval for the COVID-19 vaccine, it would be required for in-person instruction for elementary, middle, and high school students.[170] California was the first state to

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167. *See generally* Austen McGuire, Joy Gabrielli, Erin Hambrick, Madelaine R. Abel, Jessy Guler & Yo Jackson, *Academic Functioning of Youth in Foster Care: The Influence of Unique Sources of Social Support*, 121 CHILD & YOUTH SERVS. REV. 1, 13–18 (Feb. 2021) (discussing obstacles to education unique to children in foster care, including performance in school and behavioral health); Julian Behen Kubek, Carly Tindall-Biggins, Kelsie Reed, Lauren E. Carr & Pamela A. Fenning, *A Systematic Literature Review of School Reentry Practices Among Youth Impacted by Juvenile Justice*, 110 CHILD & YOUTH SERVS. REV. 1, 1 (March 2020) (discussing school reentry practices for children affected by the juvenile justice system, including school barriers and individual and family risk factors).

168. *What Colleges Require the COVID-19 Vaccine?*, BESTCOLLEGES, https://www.bestcolleges.com/blog/list-of-colleges-that-require-covid-19-vaccine/ [https://perma.cc/AQ98-Z7DS] (Sept. 9, 2022); *see also* Elissa Nadworny & Sneha Dey, *Full FDA Approval Triggers More Universities to Require the COVID-19 Vaccine*, NPR (Sept. 1, 2021), https://www.npr.org/2021/09/01/1031385629/full-fda-approval-triggers-more-universities-to-require-the-covid-19-vaccine [https://perma.cc/J538-WT6U] (connecting FDA approval with increased college COVID-19 vaccine requirements).

169. *See States Address School Vaccine Mandates and Mask Mandates*, NAT'L ACAD. FOR STATE HEALTH POL'Y, https://www.nashp.org/states-enact-policies-to-support-students-transition-back-to-school/ [https://perma.cc/WQJ3-LVCQ] (Nov. 3, 2022) (noting ongoing development of vaccine requirement policies and mask mandates as pediatric COVID-19 cases increase and COVID-19 vaccine and booster shots becoming more widely available to young children).

170. *California Becomes First State in Nation to Announce COVID-19 Vaccine Requirements for Schools*, OFF. OF GOVERNOR GAVIN NEWSOM (Oct. 1, 2021), https://www.gov.ca.gov/2021/10/01/california-becomes-first-state-in-nation-to-announce-covid-19-vaccine-requirements-for-schools/ [https://perma.cc/QHR8-AW59].

announce an intent to implement such a requirement,[171] but several school districts in other states have also implemented vaccine requirements for their students.[172] Ultimately, the Newsom administration did not mandate the COVID-19 vaccine for children to attend school in the 2022–23 school year.[173] At the same time, at least twenty states have passed bills prohibiting a COVID-19 vaccine requirement in schools.[174]

As the pandemic waxes and wanes, many seek to return to "normal."[175] Schools will open and close, but even amidst the uncertainty, unvaccinated youth remain at the greatest risk.[176] Children in the foster care system and juvenile justice system will be at a distinct disadvantage should they contract COVID-19 given their increased health vulnerability.[177] Indeed, the debilitating long-term consequences of "long COVID" pose a lingering threat to children.[178] Even contracting COVID-19 will inevitably result in exclusion from school and activities, resulting in a disruption in normalcy, relationships, and educational access. Given that youth in the foster care and juvenile justice systems have poorer academic outcomes and attend schools with fewer resources, missing more school may have particularly detrimental effects.

For youth in the juvenile justice system, contracting COVID-19 can lead to increased isolation and burdensome maintenance of virtual learning. Prior to the pandemic, young people in the juvenile justice

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171. *Id.*

172. *States Address School Vaccine Mandates*, *supra* note 169; *see* Matt Zalaznick, *Vaccine Tracker: Schools in 14 States Now Require Students to Get COVID Shots*, DIST. ADMIN. (Nov. 15, 2021), https://districtadministration.com/schools-mandate-student-covid-vaccine-vaccination-tracker/ [https://perma.cc/P79M-2WME] (listing school districts across the country with COVID-19 vaccine requirements).

173. *See* Elizabeth Aguilera, *CDC Paves Way for California to Require School COVID Vaccines – But Lawmakers Have Given Up for Now*, CAL MATTERS (Oct. 27, 2022), https://calmatters.org/education/2022/10/california-vaccination-requirements/ [https://perma.cc/UW56-MCNW].

174. *States Address School Vaccine Mandates*, *supra* note 169.

175. *Cf.* OFF. OF THE SURGEON GEN., *supra* note 29, at 40 (referring to efforts to recover and rebuild after COVID-19).

176. COVID-19 vaccines help prevent or reduce the spread of COVID-19 among children and adults alike. *Cf.* Anna Christina Sick-Samuels & Allison Messina, *COVID Vaccine: What Parents Need to Know*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/covid19-vaccine-what-parents-need-to-know [https://perma.cc/3TGQ-BY9B] (June 22, 2022) (noting that COVID-19 vaccination helps prevent students from contracting severe illness from COVID-19 and its variants).

177. *See* discussion *supra* Part II.

178. *See* Scott Tong & Serena McMahon, *As Cases of Kids with Long COVID Rise, One Mom Warns: 'It Can Happen to Literally Anyone'*, WBUR (Feb. 8, 2022), https://www.wbur.org/hereandnow/2022/02/08/children-long-covid-pandemic [https://perma.cc/538L-AMZ9] (discussing the rising prevalence of long COVID among youth, which can trigger other, more serious symptoms than the initial COVID-19 infection itself).

system did not have equal access to internet.[179] This disadvantage persisted at the height of the pandemic. For example, because detained youth in New York City were learning primarily through worksheets and packets prior to the pandemic, the pandemic created a new need for technology.[180] Although youth in the juvenile justice system were eventually provided with technology (e.g., laptops or tablets), that technology could be taken away as punishment.[181] Accordingly, as restrictions loosen for other students, youth in the juvenile justice system who are unable to participate in in-person activities will be at a greater disadvantage in accessing educational programming.

Children in the foster care system had challenges accessing educational services in the same way as their non-foster care peers during the pandemic. They often lacked access to internet, which placed them behind their peers academically.[182] Depending on their residence (e.g., a homeless shelter), some youth in foster care do not even have access to WiFi.[183] While local governments have made efforts to increase accessibility to electronic hardware and WiFi, online learning also requires a stable internet connection, a space in which a youth can work quietly and without interruptions, and an adult who can supervise the child during the school day, all of which pose significant challenges for youth in foster care.[184]

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179. *See* JACOB AGUS-KLEINMAN, NINA SALOMON & JOSH WEBER, THE COUNCIL OF STATE GOV'TS JUST. CTR., ON TRACK: HOW WELL ARE STATES PREPARING YOUTH IN THE JUVENILE JUSTICE SYSTEM FOR EMPLOYMENT? 1, 4 (2019) ("[N]ine states do not even provide youth in secure facilities with access to the internet."); Eileen Grench, *Stuck on Mute: Kids in Juvenile Lockups Can't Be Seen or Heard by Teachers During Remote Learning*, THE CITY (Nov. 19, 2020), https://www.thecity.nyc/2020/11/19/21578814/kids-in-juvenile-lockups-cant-be-seen-or-heard-by-teachers-during-remote-learning [https://perma.cc/3CHD-2EUM] (describing delays in providing virtual classes to students in detention centers).

180. Grench, *supra* note 179.

181. *Id.*

182. Disparities in internet access predate the pandemic. One study in California indicated that only 21% of youth in foster care in urban areas and 4% of youth in foster care in rural areas had internet access. Martin do Nascimento, *Fostering Conversation: Spanning the Digital Divide*, RESOLVE MAG. (Apr. 22, 2020), https://resolvemagazine.org/2020/04/22/fostering-conversation-spanning-the-digital-divide/ [https://perma.cc/78MZ-3ZVZ]. However, some states, like California, have implemented programs to ensure access to internet and phones for current and former foster youth. Christopher Weber, *Youth in Foster Care to Get Free Smartphones, Internet Access in Pilot Program*, U.S.A. TODAY (Apr. 25, 2019), https://www.usatoday.com/story/tech/2019/04/25/smartphones-foster-kids-california-giving-free-phone-internet/3578978002/ [https://perma.cc/JP5V-CFCC].

183. *E.g.*, E.G. v. City of New York, No. 20-CV-09879, 2020 WL 7774346, at *2 (S.D.N.Y. Dec. 30, 2020) (explaining the lack of internet access for youth in New York City residing in homeless shelters which became noteworthy with the rise of virtual schooling during the COVID-19 pandemic).

184. *Cf.* Weber, *supra* note 182 (describing efforts in California to increase cellphone and internet access for children in foster systems).

ii. Home Placements and Access to Facilities

A foster child without a COVID-19 vaccine may have more difficulty accessing home placements. Foster parents are at a high risk of exposure to COVID-19 due specifically to their role as foster parents. For instance, caseworkers must conduct visits in the home where the child is residing, and foster parents risk exposure to COVID-19 from family visits if they take place in person.[185] Moreover, if children have in-person services or appointments, the risk of exposure to the foster parent increases.

Youth within the juvenile justice system may be subject to isolating settings within their respective placement without the protection of the vaccine. When outbreaks emerged previously, some young people were isolated and denied visitation with their families.[186] Access to placement with peers may be denied for youth who pose a health risk to others in their facility.

iii. Familial and Community Relationships

Youth who remain at high risk of COVID-19 may continue to lose opportunities to build or maintain relationships with peers, neighbors, and family. While virtual family visits theoretically remain an option, youth in the juvenile justice system reported that virtual visits to talk with family were not always available.[187] Indeed, some young people had to pay to speak to family beyond their allotted time.[188] Vaccinated children have a stronger case to make that they should be entitled to in-person visitation.

While some jurisdictions urged foster care agencies to continue in-person visitation despite the ongoing pandemic, there is no federal mandate requiring such in-person visitation to continue.[189] These formal

185. *Cf.* Font, *supra* note 83 (describing the vulnerability of foster parents to COVID-19 and the risks of viral spread in foster and group homes).

186. *See, e.g.*, Kamenetz, *supra* note 141 (recalling that Louisiana canceled in-person visits in juvenile detention centers for over a year in 2020 when the COVID-19 pandemic began).

187. *See, e.g.*, *id.* (discussing requirements that youth in detention pay for Zoom calls lasting beyond a certain amount of time).

188. *Id.*

189. *Cf.* Jerry Milner & David Kelly, *Top Federal Child Welfare Officials: Family is a Compelling Reason*, IMPRINT (Apr. 6, 2020), https://imprintnews.org/child-welfare-2/family-is-a-compelling-reason/42119 [https://perma.cc/7C3X-APT9]
(detailing how the associate commissioner of the U.S. Children's Bureau has a "strong preference that all measures be taken to continue in-person family time for children in foster care" but did not mandate in-person visitation); Melissa Jenco, *AAP: Safe, In-Person Visits Important for Children in Foster Care During Pandemic*, AAP NEWS (July 27, 2020), https://publications.aap.org/aapnews/news/7238/AAP-Safe-in-person-visits-important-for-children?autologincheck=redirected [https://perma.cc/2FD4-V65Y] (describing the American Academy of Pediatrics' 2020 interim guidance that encouraged in-person visitation with parents, siblings, and child welfare professionals).

visits are distinct from informal visits and opportunities to socialize with peers and friends. Children without a vaccine may lose out on opportunities to hang out with peers after school, play sports, or participate in other activities, and community events due to concerns they may contract COVID-19—even with requirements for social distancing and mask wearing in place.

IV. Shining a Light on Children: Advancing a Right to be Vaccinated & Overcoming Parental Barriers

As outlined above, there are compelling reasons as to why children should have access to the COVID-19 vaccine. The Supreme Court has noted that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[190] In practice, the protections afforded to children by the Constitution are much more limited as a matter of principle and case law.

The United States is a country of negative, not affirmative, rights.[191] Although the Due Process Clause protects fundamental rights and liberties, such rights must be "deeply rooted in this Nation's history and tradition"[192] and "implicit in the concept of ordered liberty."[193] The rights for youth in this analysis have been circumscribed to "reflect judicial concern for ensuring a reasonable 'fit' between legitimate state ends and the means adopted to advance them in cases predicated on distinctions between juveniles and adults."[194]

Parental rights as they pertain to children and families are vast. Parental rights extend to the right to have children,[195] the right to "direct

190. Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976).

191. *Cf.* Deshaney v. Winnebago Cnty. Dep't Soc. Servs., 489 U.S. 189, 196 (1989) ("Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.").

192. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (citing Moore v. East Cleveland, 431 U.S. 494, 503 (1997)).

193. *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325–26 (1937)). The unenumerated rights analysis consistently curtails the rights of youth. Children's rights are far from deeply rooted in this Nation's history. Underrepresented and Black children in particular stand to lose in this equation—there is no history to support the protection of fundamental rights when the history is rooted in racism and discrimination. *See* Terri Dobbins Baxter, *Constitutional Demotion*, 41 LAW & INEQ. (2023) (describing how the Supreme Court's emphasis on rights "deeply rooted in this Nation's history and tradition" excludes Black Americans).

194. Hutchins v. District of Columbia, 188 F.3d 531, 564 (D.C. Cir. 1999).

195. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

the education of [their] children,"[196] and the right to family integrity.[197] In comparison, children in the United States are left with few rights—constitutional jurisprudence has denied children an affirmative constitutional right to an education[198] or health care.[199]

International law provides minimal relief because the United States is the sole country in the world that has failed to ratify the Convention on the Rights of the Child.[200] The Convention on the Rights of the Child would provide a source for fundamental rights like the rights to life, healthcare, and education.[201] Without such a framework, children within the foster care and juvenile justice systems must rely on existing federal, state, and local laws and regulations to ground any affirmative rights. This Part will examine how youth can use the existing statutory and constitutional framework to advance their interests. Ultimately, this Article argues that there should be a strong presumption in favor of a youth's right to override the consent of their parents.

Absent a mandate compelling officials to provide the vaccine to youth in foster care or in the justice system, youth can still seek to obtain the COVID-19 vaccine in the face of parental refusal by relying on their state, federal, and statutory rights. There is no primary constitutional right to be vaccinated, but children can make the argument that they have the right to be vaccinated by connecting their other rights to being vaccinated. Specifically, youth and their advocates should consider incorporating arguments relating to the child's best interest through the state's power of *parens patriae*, the young person's right to education, and a right to normalcy to argue they should have access to this primary right: the right to make a decision regarding the COVID-19 vaccine. This Part also addresses counterarguments a child can make should their parent wish to assert a religious argument against the child being vaccinated.

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196. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925); *see also* Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (discussing the right of a parent's ability to have control over their child and to give their children a suitable education).

197. *E.g.*, Romero v. Brown, 937 F.3d 514, 520 (5th Cir. 2019) (quoting Wooley v. Baton Rouge, 211 F.3d 913, 924 (5th Cir. 2000)) (noting the need to balance the right to family integrity with state interests); Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) (recalling the right to preservation of family integrity).

198. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

199. *See* Erin C. Fuse Brown, *Developing a Durable Right to Health Care*, 14 MINN. J.L. SCI. & TECH. 439, 448 (2013) (asserting that because the right to health care is tied to health insurance access, and that because health services are unaffordable without health insurance, health care is currently not a federal right in the United States).

200. Megan Corrarino & Robert L. Bernstein, *U.S. Stands Alone: Not Signing U.N. Child Rights Treaty Leaves Migrant Children Vulnerable*, HUFFPOST (Oct. 13, 2016), https://www.huffpost.com/entry/children-migrants-rights_b_8271874 [https://perma.cc/C2A8-AR93].

201. Convention on the Rights of the Child, arts. 6, 24, 28, Nov. 20, 1989, 1557 U.N.T.S. 3.

A. Best Interests of the Child

Parens patriae is Latin for "parent of his or her country, [which describes] the state in its capacity as provider of protection to those unavailable to care for themselves."[202] The Supreme Court has limited parents' rights over their children by relying on the principle of *parens patriae*.[203] As *parens patriae*, states have an interest in preserving and promoting the welfare of children, and to further this interest they can require laws to protect children's health and well-being.[204]

For instance, in the context of providing medical treatment for young people in foster care, courts have authorized medical treatment over parental objection after analyzing "all relevant circumstances, *including the child patient's best interests, the benefits to be gained from the treatment, the adverse side effects associated with the treatment and any less intrusive* alternative treatments."[205] Similarly, for youth in the juvenile justice system, the court may make decisions for the child.[206] The court may also authorize another individual to make medical decisions on behalf of the child.[207]

While *parens patriae* will serve as a limit to parents' tremendous, repeatedly recognized authority over their children, courts may still seek to incorporate and limit children's rights even when the court has the statutory authority to grant the relief the child wants. For example, in the case *In re Athena Y.*, a mother appealed a family court's decision granting her children, ages thirteen and fifteen, the right to decide whether or not

202. *E.g.*, Glob. Travel Mktg., Inc. v. Shea, 908 So.2d 392, 399 (Fla. 2005) (quoting *Parens Patriae*, BLACK'S LAW DICTIONARY (8th ed. 2004)).

203. *E.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways."); Parham v. J.R., 442 U.S. 584, 630 (1979) (Brennan, J., concurring in part and dissenting in part) ("In our society, parental rights are limited by the legitimate rights and interests of their children.").

204. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 766 (1982) (quoting Lassiter v. Dept. Soc. Servs. Durham Cnty., 452 U.S. 18, 27 (1981)) ("[T]he State has an urgent interest in the welfare of the child . . . ."); *In re* A.A., 951 N.W.2d 144, 166–67 (Neb. 2020) ("Parens patriae means, in essence, that the State has a right to protect the welfare of its resident children . . . .[T]he State may impose through laws of neutral and general applicability certain educational requirements, restrictions on child labor, and compulsory vaccination, even when against the parents' wishes."); State *ex rel.* O'Sullivan v. Heart Ministries, Inc., 607 P.2d 1102, 1109 (Kan. 1980) ("Under the doctrine of parens patriae, the State has power to legislate for the protection of minor children within its jurisdiction.").

205. *See In re* Martin F., 820 N.Y.S.2d 759, 772 (N.Y. Fam. Ct. 2006) (quoting Rivers v. Katz, 67 N.Y.2d 485, 497 (N.Y. 1986)).

206. REBECCA GUDEMAN, NAT'L CTR. FOR YOUTH L., CONSENT TO MEDICAL TREATMENT FOR YOUTH IN THE JUVENILE JUSTICE SYSTEM: CALIFORNIA LAW—A GUIDE FOR HEALTHCARE PROVIDERS 5–6 (Nov. 2009).

207. *Id.*

to receive the COVID-19 vaccine.[208] The appellate court reversed and remanded, noting that statutes and regulations authorize minors to make only certain types of medical decisions, and consenting to vaccination—including the COVID-19 vaccination—over parental objection was not one of them.[209] Relying on the notion of judicial restraint, the court concluded it "should not intrude on the other two branches of government by expanding the rights of minors to make decisions in categories not included in those statutes or regulations . . . ."[210] Even though the Family Court is authorized "to do whatever is necessary and appropriate to ensure a child's welfare, including the power to direct surgery or other care over a parent's objection,"[211] the court must also avoid "assum[ing] the role of a surrogate parent and establish[ing] as the objective criteria with which to evaluate a parent's decision its own judgment as to the exact method or degree of medical treatment which should be provided, for such standard is fraught with subjectivity . . . ."[212] Here, there was insufficient procedural due process where the objecting parent was not allowed a hearing, and there was an insufficient factual basis to support the finding that the children were fully informed about the vaccine and had the capacity to consent.[213]

The appellate court's trepidation to affirm the trial court's authority to order the administration of the COVID-19 vaccine undermines the ability of children in foster care and other similar circumstances to get vaccinated. The court's intention not to override the rights of parents or impose judicially created, subjective, standards of ideal parenting barely acknowledges the rights of children. When legislation grants courts the sweeping ability to protect and advance children's health, safety, and well-being, a custom of judicial restraint seems misplaced. When the courts center the parent in their analyses, not the child, they deemphasize the importance of the child's interest, opinion of the vaccine, and capacity to consent.

Through their judicial opinions, courts have emphasized that children have a stake in decisions made regarding their bodies, and thereby provide a blueprint to advance children's rights. For example, in *Bellotti v. Baird*, the Supreme Court analyzed its jurisprudence regarding parents' rights when it came to the constitutionality of a state statute requiring parental consent for abortions.[214] Critically, the Court dedicated

208. *In re* Athena Y.,161 N.Y.S.3d 335, 337 (App. Div. 3d Dep't 2021).
209. *Id.* at 338.
210. *Id.* (internal citation omitted).
211. *Id.* at 339 (citing *In re* Sampson, 65 Misc. 2d 658, 665 (N.Y. Fam. Ct. 1970)).
212. *Id.* at 340 (quoting *In re* Hofbauer, 47 N.Y.2d 648, 656 (N.Y. 1979)).
213. *Id.* at 341.
214. Bellotti v. Baird, 443 U.S. 622, 637–39 (1979) (plurality opinion).

a considerable portion of its opinion to explaining why pregnant minors must have the right to demonstrate they are "mature enough and well enough informed to make [their] abortion decision" or to show that abortion is "in [their] best interests."[215] In finding that pregnant minors are entitled to a proceeding to demonstrate their maturity, the Court emphasized that a pregnant minor faces probable detriments because of an unwanted pregnancy, including in their education and emotional maturity.[216] While there has never been a constitutional right to vaccination—and unwanted pregnancy presents different detriments to minors—getting vaccinated is a time-sensitive matter during a pandemic,[217] and being denied access to the COVID-19 vaccine also poses unique risks to a minor's education, physical health, and emotional maturity.[218] By approaching COVID-19 vaccination in a similar manner using the logic in *Bellotti*, courts can strengthen the autonomy and capacity of young people and protect them against any harmful parental interests and state-imposed barriers to access. These young people must be allowed to demonstrate that vaccination is in their best interests.

The fact that youth subject to the criminal or foster care system have tumultuous—and often unpredictable—lived experiences is a compelling reason to provide them with access to the vaccine. A vaccine will enable them to fully enjoy their childhood in the controlled settings in which they live. Given that children in the foster care system and juvenile justice system face poorer health outcomes and are indeed likely to be at a higher risk of contracting COVID-19, medical health and public health considerations support allowing them to consent to their own vaccination.[219]

B. The Right to Education

If unvaccinated youth are excluded in school due to contracting COVID-19 or long COVID-19, they have a greater risk of receiving an inferior education.[220] Children in the foster care and juvenile justice systems are particularly vulnerable to educational disruptions.

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215. *Id*. at 643–44. While abortion is no longer a constitutional right after Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022), the Court's reasoning in *Bellotti* is still influential. The Court's analysis of why minors must be able to establish their maturity relies heavily upon the "unique nature of the abortion decision" rather than the constitutional right to seek an abortion. *Bellotti*, 443 U.S. at 642–44 (describing how a pregnant minor is faced with options and detriments that are "much different" than those facing a minor in other situations). Courts could still use this logic to examine the unique nature of the COVID-19 vaccine for children in foster care and those involved with the juvenile justice system.

216. *Bellotti*, 443 U.S. at 642.

217. *Cf. id.* at 643 ("[T]he abortion decision is one that simply cannot be postponed . . . .").

218. *See supra* Section III.A.

219. *See supra* Part II.

220. *See supra* Section III.C.i.

While all states have a constitutional right to establish public education[221]—and every state constitution requires the state legislature to do so[222]—the strength of this right and its characterization as fundamental varies dramatically across states. The text of a state constitution's education clause can provide a strong legal hook on which to base the strength of the right to education for minors in that state.[223] Approximately sixteen states have a fundamental right to education, while at least fourteen states expressly reject the right to a fundamental education.[224] Youth in states with a fundamental right to education may have the strongest basis on which to make an educational argument regarding their right to a vaccine. For example, a young person could argue that their inability to consent to their vaccination curtails their fundamental right to education by limiting their ability to engage in their education if they contract COVID-19 and become seriously ill or hospitalized. In comparison, youth in states where education is not a fundamental right will have a harder time arguing that they need to become vaccinated to participate in education because it is not a fundamental right and likely subject to a lower tier of scrutiny upon judicial review.

Even in states that do not have a fundamental right to education, children in the foster care and juvenile justice systems may still advance their arguments for the right to a full education. All states have compulsory age requirements for their free education,[225] so children who are required to go to schools where there is a higher risk of contracting COVID-19 must be able to choose the vaccine.

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221. Nicole Lawler, *The Right to Education in the United States and Abroad: A Comparative Analysis of Constitutional Language and Academic Achievement*, FED. LAW., March 2018, at 34, 35.

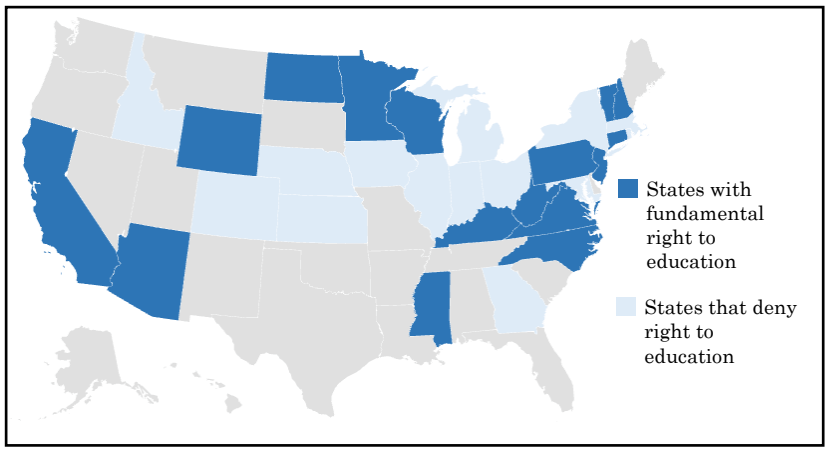
222. Katherine Twomey, *The Right to Education in Juvenile Detention Under State Constitutions*, 94 VA. L. REV. 765, 788 (2008).

223. *Id.*; *see also* Scott Dallman & Anusha Nath, *Education Clauses in State Constitutions Across the United States*, FED. RSRV. BANK OF MINNEAPOLIS (Jan. 8, 2020), https://www.minneapolisfed.org/article/2020/education-clauses-in-state-constitutions-across-the-united-states [https://perma.cc/H2PZ-VA84] (comparing and analyzing the language in the education clauses of state constitutions).

224. Robyn K. Bitner, *Exiled from Education:* Plyer v. Doe*'s Impact on the Constitutionality of Long-Term Suspensions and Expulsions*, 101 VA. L. REV. 763, 779 (2015); Barbara Fedders, *Schooling at Risk*, 103 IOWA L. REV. 871, 910 (2018); JAMES A. RAPP, EDUC. L. § 8.01, 10 n.68 (3d ed. 2022) (explaining several state courts held that education is not a fundamental right, including: Colorado, Iowa, Georgia, Idaho, Nebraska, Massachusetts, Michigan, and New York); RESTATEMENT (FIRST) OF CHILD. & THE L. § 5.10 (AM. L. INST., Tentative Draft No. 4, 2022) (listing states that have found education to be a constitutional right and those that have rejected it).

225. Cassidy Francies & Zeke Perez, Jr., *50-State Comparison: Free and Compulsory School Age Requirements*, EDUC. COMM'N OF THE STATES (Aug. 19, 2020), https://www.ecs.org/50-state-comparison-free-and-compulsory-school-age-requirements/ [https://perma.cc/S4M9-W254].

Figure 1. States with a Fundamental Right to Education[226]



Justice-involved youth housed in a detention facility face greater challenges using the right to an education to anchor their right to a vaccine, and their ability to use this right requires a state-by-state analysis on the strength of education clause in their given state. In most states, non-detained young people in the foster care system or justice-involved youth can rely on a state constitutional or statutory right to education to bolster their right to the COVID-19 vaccine,[227] but youth in the juvenile justice system generally have less access to a right to education.[228] Federal legislation, such as the Individuals with Disabilities

226. As of this writing, the states with a fundamental right to education include: Arizona, California, Connecticut, Kentucky, Minnesota, Mississippi, New Hampshire, New Jersey, North Carolina, North Dakota, Pennsylvania, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. *See* Bitner, *supra* note 224, at 766–67 n.15; RESTATEMENT (FIRST) OF CHILD. & THE L. § 5.10 (AM. L. INST., Tentative Draft No. 4, 2022). States without this right to education include Colorado, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Massachusetts, Michigan, Nebraska, New York, Ohio, and Rhode Island. Bitner, *supra* note 224, at 766–67 n.15; RESTATEMENT (FIRST) OF CHILD. & THE L. § 5.10 (AM. L. INST., Tentative Draft No. 4, 2022). Figure 1 created by author.

227. *See* EMILY PARKER, EDUC. COMM'N OF THE STATES, CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION (2016), https://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf [https://perma.cc/B8VH-JPMN] (reviewing the state constitutional rights to education in all fifty states). Washington, D.C. is not a state, so there is no state constitutional foundation for public education. *Id.* at 2.

228. *See*, *e.g.*, COUNCIL OF STATE GOV'TS, LOCKED OUT: IMPROVING EDUCATIONAL AND VOCATIONAL OUTCOMES FOR INCARCERATED YOUTH 14 (2015) (describing the lack of consistent funding frameworks across the country for accountability, data, and standards when it comes to education for states to provide educational services for young incarcerated people); *cf.* U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUST., GUIDING PRINCIPLES FOR PROVIDING HIGH-QUALITY EDUCATION IN JUVENILE JUSTICE SECURE CARE SETTINGS 2 (2014), https://www2.ed.gov/policy/gen/guid/correctional-education/guiding-principles.pdf [https://perma.cc/2FNY-YA52] (explaining guiding principles for education reform for youth in juvenile justice

Education Act and Every Student Succeeds Act, are meant to bolster accountability, monitoring, and educational access.[229] However, there remain many existing gaps between quality education and what education is available for incarcerated youth.[230] Further, while some state courts have held that states are bound to provide youth with an education while in the juvenile detention system,[231] others have held that these youth forfeit their right to education.[232]

Detained young people can assert that their inability to participate in limited educational offerings essentially amounts to a punishment. In some detention facilities, "[i]t is not uncommon for school to be canceled or students to be released early because of teacher shortages or inadequate numbers of custody staff to supervise the school."[233] Further, "[s]ome states do not have mechanisms to hire substitutes when teachers are ill or are attending professional development activities."[234] Due to teacher shortages, some teachers in juvenile detention facilities "contend with large class sizes and students who receive less than the state-mandated number of hours of school."[235] From 1975–2014, at least forty-eight class action lawsuits were filed against juvenile detention facilities in the United States alleging a failure to provide special education services.[236] These cases have had varying success in achieving reform for young people.[237] Accordingly, youth who are detained already have fewer educational resources. A young person who is incarcerated with COVID-19 will have even fewer opportunities to engage in the limited

systems). *See generally* Peter E. Leone & Pamela Cichon Wruble, *Education Services in Juvenile Corrections: 40 Years of Litigation and Reform*, 38 EDUC. & TREATMENT CHILD. 587, 587 (2015), https://www.jstor.org/stable/44684085 [https://perma.cc/T2GV-S9KG] (exploring the inadequate and inconsistent access to education guaranteed under the Individuals with Disabilities Education Act and Every Student Succeeds Act).

229. Individuals with Disabilities Education Act, Pub. L. No. 101-476 (codified as amended in scattered section of 20 U.S.C.); Every Student Succeeds Act, Pub. L. No. 114-95 (codified as amended in scattered sections of 20 U.S.C.).

230. *See* sources cited *supra* note 228.

231. *E.g.*, Tommy v. Bd. of Cnty. Comm'rs, 645 P.2d 697, 698 (Wash. 1982) (finding that the state's compulsory education law requires juvenile detention centers to provide free education to young people detained there); Tunstall v. Bergeson, 5 P.3d 691, 708 (Wash. 2000) (concluding that the Washington State Constitution requires a right to education for incarcerated young people).

232. *In re* R.M. v. Washakie Sch. Dist. No. One, 102 P.3d 868, 874 (Wyo. 2004) ("[T]he fundamental right to an opportunity for an education does not guarantee that a student cannot temporarily forfeit educational services through his own conduct . . . . The actual receipt of educational services is accordingly contingent upon appropriate conduct in conformity with state law and school rules.").

233. Leone & Wruble, *supra* note 228, at 591.

234. Id.

235. *Id.*

236. *Id.* at 592–93.

237. *See id.* at 593–95 (describing the outcomes of several class-action lawsuits based on failure to provide education).

educational offerings. For these young people, COVID-19 can be a punishment, barring them from reaping the benefits of their education.

For those youth who are detained and live in states with weaker constitutional protections for education, relying on the right to rehabilitation may be effective in accessing the COVID-19 vaccine. The purpose and foundation of the juvenile justice system was predicated on the notion that young people can be rehabilitated, and it is an oft-repeated sentiment in Supreme Court jurisprudence.[238] Many state statutes provide that the purpose of the juvenile justice system is to rehabilitate the young person,[239] and legal scholars argue that there is indeed a constitutional right to rehabilitation that has been recognized by some courts.[240] As this Article has elucidated, a lack of vaccination impacts a young person's ability to access education, and education is integral to rehabilitation and long-term health, stability, and safety.[241] Justice-

238. *See, e.g.*, *In re* Gault, 387 U.S. 1, 15–16 (1967) (analyzing the history of reform to the juvenile justice system and identifying that the purpose of the system is to treat and rehabilitate children, not to punish them); *cf.* Roper v. Simmons, 543 U.S. 551, 570 (2005) (explaining how youth's vulnerability and lack of control means young people "have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment").

239. *See* Rudolph Alexander, Jr., *Incarcerated Juvenile Offenders' Right to Rehabilitation*, 7 CRIM. JUST. POL'Y REV. 202, 205–10 (1995) (examining the constitutional basis for the right to rehabilitation and identifying state laws that implement this right). State statutes also emphasize that the purpose of the juvenile justice system is to ensure the youth has the services necessary for rehabilitation. *E.g.*, MASS. GEN. LAWS ch. 119, § 53 (2022) ("[Children] shall be treated, not as criminals, but as children in need of aid, encouragement and guidance."); NEB. REV. STAT. § 43-402 (2022) (explaining that one of the juvenile justice system's purposes is to "[p]romote the development and implementation of community-based programs designed to prevent unlawful behavior and to effectively minimize the depth and duration of the juvenile's involvement in the juvenile justice system"); N.J. STAT. ANN. § 2A:4A-21 (West 2020) ("Consistent with the protection of the public interest, to remove from children committing delinquent acts certain statutory consequences of criminal behavior, and to substitute therefor an adequate program of supervision, care and rehabilitation, and a range of sanctions designed to promote accountability and protect the public[.]"); 42 PA. CONS. STAT. § 6301(b)(2) (2022) ("Consistent with the protection of the public interest, to provide for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the *development of competencies to enable children to become responsible and productive members of the community*." (emphasis added)); WASH. REV. CODE § 13.40.010(2)(f) (2022) (stating that one of the purposes of the juvenile justice system is to "[p]rovide for the rehabilitation and reintegration of juvenile offenders").

240. *See, e.g.*, Martin Gardner, *Youthful Offenders and the Eighth Amendment Right to Rehabilitation: Limitations on the Punishment of Juveniles*, 83 TENN. L. REV. 455, 504 (2016) ("[J]uvenile offenders now appear to have a constitutional right to a meaningful opportunity for rehabilitation . . . .").

241. *See, e.g.*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, EDUCATION FOR YOUTH UNDER FORMAL SUPERVISION OF THE JUVENILE JUSTICE SYSTEM 1 (2019) ("[T]hose youth who do achieve higher levels of education while in the juvenile justice system are more likely to experience positive outcomes in the community once released . . . . Educational risks factors are associated with juvenile . . . recidivism." (internal citations omitted)).

involved youth may be able to argue that their statutory—and perhaps constitutional—right to rehabilitation is violated when they cannot access full education because of lack of vaccination.

C. The Right to "Normalcy"

Specific to young people in foster care, the idea of "normalcy" centers around children's participation in "normal" activities, including "visiting a friend's house, attending school field trips, having a part-time job, volunteering, participating in school clubs and teams, dating, going to the prom, attending faith-based activities, and learning to drive."[242] The purpose of normalcy is to provide opportunities for youth to become responsible and independent.[243] "Normal" activities are linked to improved educational outcomes, processing of negative emotions, relationships, and mentorship—these activities are considered the "hallmark of childhood and adolescence."[244]

Unfortunately, access to these types of "normal" activities has historically been limited for youth in foster care. This inaccessibility is in part due to the risk-averse nature of child welfare agencies, the geographic instability of youth in foster care, the concerns foster parents have regarding liability, and bureaucratic requirements in some regions that require friends' parents to undergo clearance processes before youth can have sleepovers in their homes.[245] Additionally, a large percentage of foster youth experience isolation from "normal" activities because of negative stereotyping surrounding foster care and their limited options outside of the foster home.[246]

Recently, several states have enacted statutory "reasonable and prudent parent" standards to help youth in foster care gain access to such activities.[247] These statutes generally make it easier for foster parents to grant permission for their foster children to participate in activities, as they can authorize participation without first getting permission from the court or the child's caseworker.[248] Additionally, in 2014, the Preventing Sex Trafficking and Strengthening Families Act explicitly addressed normalcy for youth in foster care, codifying a reasonable and prudent

242. Paul Jacobson, *Promoting "Normalcy" for Foster Children: The Preventing Sex Trafficking and Strengthening Families Act*, 81 MO. L. REV. 251, 254 (2016).

243. *Id.* at 255.

244. *Id.*

245. *Id.* at 256–57.

246. *Id.* at 256.

247. *Id.* at 259 ("In the last decade, a small number of states have addressed the difficulty of obtaining access to 'normal' activities for foster children by enacting statutory 'reasonable and prudent parent' standards. These standards are often known as 'normalcy laws.' Such laws have been passed in California, Florida, Ohio, Utah, and Washington.").

248. *Id.*

parent standard with the goal of "allowing children to experience normal and beneficial activities . . . ."[249] On this basis, youth who are at high risk for COVID-19 can argue that not receiving the vaccine denies them normalcy, as without the vaccine many youth may not be able to safely participate in normal activities. Children and their advocates must emphasize the importance of the vaccine to maintain relationships, build new relationships, stay involved the community, and live as close to a "normal" life as possible.

D. Freedom of Religion

Finally, children whose religious beliefs differ from their parents may be able to exercise their independent First Amendment rights to argue that they have a right to be vaccinated. Traditionally, courts have focused on the religious beliefs of parents and imputed these beliefs to the child,[250] but the Supreme Court has explicitly noted that children have the right to exercise their religion.[251] The Supreme Court has yet to address a situation in which the child's religious interest conflicts with their parent's religious interest.[252] The Court has also not defined the scope of this right for young people,[253] but it is "not accorded the same scope as an adult's right to free exercise."[254] Children's right to free exercise is limited by the state's interest in health and the parent's rights to control the upbringing of their child.[255]

However, Supreme Court precedent affirms that children are not completely at the whim of their parents when it comes to expressing religious beliefs. In *Prince v. Massachusetts*, a mother was convicted of violating a state labor law for engaging her child in street preaching.[256] The Court upheld the State's ability to regulate children and denied the mother's free exercise and equal protection claims.[257] The Court specifically addressed the rights of children to exercise their religion, stating that "[t]he rights of children to exercise their religion, and of

249. Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, §111 (a)(3), 128 Stat. 1919 (2014).

250. Kimberlee Wood Colby, *When the Family Does Not Pray Together: Religious Rights within the Family*, 5 HARV. J.L. & PUB. POL'Y 37, 53 (1982).

251. *See* Kelsi Brown Corkran, *Free Exercise in Foster Care: Defining the Scope of Religious Rights for Foster Children and Their Families*, 72 U. CHI. L. REV. 325, 338 (2005).

252. *Id.*

253. Colby, *supra* note 250, at 55 ("No other Supreme Court case [besides Prince v. Massachusetts, 321 U.S. 158 (1944)] has separately addressed the question of the scope of the child's right of free exercise of religion and no Supreme Court case has addressed the child's freedom of religion when the child's health was not threatened.").

254. *Id.* at 83.

255. *Id.*

256. 321 U.S. 158, 170–71 (1944).

257. *Id.*

parents to give them religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of state power voicing it, have had recognition here . . . ."[258]

The Court announced that "[p]arents may be free to become martyrs themselves. But it does not follow they are free . . . to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[259] Similarly, with the COVID-19 vaccine, a parent's choice should not always be imposed on their children, especially with the unknown, long-term health effects that can affect children who remain unvaccinated.[260]

Conversely, some of the Court's precedents have not been as generous when addressing a conflict between a parent and child. In *Wisconsin v. Yoder*, the Supreme Court upheld the Wisconsin Supreme Court's holding that the conviction of Amish parents who refused to send their children to school—in violation of compulsory school attendance laws—violated the Free Exercise Clause.[261] The majority refused to address the conflicts between children and parents, noting that its:

> [H]olding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary.[262]

The Court remained skeptical about the State's intrusion into controlling the religious upbringing of children and stated that there was "nothing in the record or in the ordinary course of human experience to suggest that non-Amish parents generally consult with children of ages 14–16 if they are placed in a church school of the parents' faith."[263]

In his scathing dissent, Justice Douglas noted that "[r]eligion is an individual experience[,]" and he would have addressed the religious liberty of two of the children who were not opposed to the high school requirement.[264] Most pertinently to Justice Douglas, "[i]t is the future of the student, not the future of the parents" that was impacted by the majority's decision, making it critical that the children "be given an opportunity to be heard."[265]

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258. *Id.* at 165.

259. *Id.* at 170.

260. *See, e.g.*, Tong & McMahon, *supra* note 178 (describing the long-term health effects of COVID-19 in youth).

261. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972).

262. *Id.* at 231.

263. *Id.* at 232.

264. *Id.* at 243 (Douglas, J., dissenting).

265. *Id.* at 245 (Douglas, J., dissenting).

Despite competing holdings in *Prince* and *Yoder*, the Supreme Court, on at least one occasion, held that children may have religious beliefs independent of their parents—beliefs that may award them rights and an opportunity to be heard. Between a parent who refuses the vaccine for their child on the basis of religious belief and a child who asserts no such beliefs, or holds opposing beliefs, a court may find that the child's religious beliefs should also be taken into account in assessing what is in their best interests.

V. Policy Recommendations

Despite establishing that children in the juvenile justice and foster care systems have mechanisms through which they can seek to obtain the COVID-19 vaccine when their parent or legal guardian refuses, there remain considerable barriers to access. Where there is medical consensus regarding the efficacy of a vaccine, and that vaccine would permit the youth to protect their health and allow them full access to education and other necessary services and community, there should be a strong presumption in favor of the child's right to consent to the immunization regardless of parental authorization. On the other hand, youth who do not consent should be entitled to state the basis of their objection and have that refusal be addressed and rebutted with countervailing data that is particular to their level of risk and exposure. Such a framework would ensure that the child's bodily autonomy and beliefs are respected. If some of the goals of the foster care and juvenile justice systems are to prepare youth to live independently, make informed decisions, and navigate the world, then the interests of society are best served by involving and praising the voices of youth in these decisions.

The existing states of the foster care and juvenile justice systems leave much room for reform, restructuring, and reconceptualization. Such reform cannot take place independently—it will require a revitalization of the educational, housing, employment, and health systems to treat and serve underrepresented, minority, and impoverished families. Until systematic changes take place, there are initiatives that can be implemented at the individual, local, and state levels.

Enforcing the individual rights of children requires that knowledge and enforcement mechanisms be accessible. Ideally, children in the foster care system and juvenile justice system would have access to an independent advocate who could represent their rights beyond the immediate proceedings they face. While juveniles are entitled to counsel under the Due Process Clause for delinquency proceedings,[266] only thirty-five states require children in child protective proceedings to have

266. *In re* Gault, 387 U.S. 1, 41 (1967).

independent counsel.[267] Of these states, only fifteen require "client-directed counsel under all reasonable circumstances."[268] Often, public defenders and providers of indigent legal services have massive caseloads that may lower their availability to oversee these types of arguments and proceedings.[269] The creation of a health advocate for youth who can appear in court or provide recommendations to a child's attorney on the specific topic of health needs could provide a direct right and forum for youth to speak about their health-related concerns.[270]

There is a robust need for education among children about their rights, as well as for adults who interact with youth. As of 2019, fifteen states have enacted a Foster Children's Bill of Rights to inform children of their rights in foster care.[271] Such bills enumerate rights that are guaranteed to youth in foster care by state or federal law.[272] Idaho's Youth in Care Bill of Rights was written by children, for children, and provides youth in foster care a mechanism to be advocates, to fight for their interests, and to share their findings with their peers.[273] Some states, such as Oregon, have an ombudsman to enforce the Foster Children's Bill of Rights by receiving, investigating, and resolving complaints regarding all parties involved in the foster care system.[274] An expansion of avenues that

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267. NOY DAVIS, AMY HARFELD & ELSA WEICHEL, A CHILD'S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED AND NEGLECTED CHILDREN 23 (4th ed. 2019), https://docs.wixstatic.com/ugd/2b5285_aa4a099876dd40ee853d6861e8ba8b5b.pdf [https://perma.cc/3GZ9-5BQ2] (listing the thirty-four states that require independent counsel for all children in abuse and neglect proceedings as of 2019). As of April 15, 2021, Arizona also mandates the appointment of an attorney to a child's case. *Kids in Foster Care to Have Own Attorneys Under New Arizona Law*, THE IMPRINT (Apr. 15, 2021), https://imprintnews.org/child-welfare-2/kids-foster-care-attorneys-arizona-law/53509 [https://perma.cc/2B64-ZYQ3]; *see also* Barbara J. Elias-Perciful, *The Constitutional Rights of Children*, 73 TEX. B.J. 750, 750 (2010) (advocating for the right to effective assistance of counsel for children in child protection cases).

268. DAVIS ET AL., supra note 267, at 7.

269. *See, e.g.*, Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 119 (1997) ("The caseloads maintained by most professionals working in these systems is too high to expect quality performance.").

270. *See* Strassburger, *supra* note 156, at 1140–41 (discussing why medical practitioners may make effective and independent decision-makers for youth in care).

271. *Foster Care Bill of Rights*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 29, 2019), https://www.ncsl.org/research/human-services/foster-care-bill-of-rights.aspx#Children [https://perma.cc/QX4J-AQFD].

272. *Id.*; *see also* Janice Beller, *Our Rights, Our Voice: Idaho Youth in Care Bill of Rights Empowers Youth to Become Their Own Advocates*, 63 ADVOC. 16, 17 (2020) ("The Youth in Care Bill of Rights, while it does not carry the full force and effect of law or judicial rule, is part of the standard of care for foster youth in Idaho."). Additionally, the Preventing Sex Trafficking and Strengthening Families Act requires state child welfare agencies to engage youth ages fourteen or older in the creation of their case plan, and the plan must describe their rights. Pub. L. No. 113-183, § 113(d), 128 Stat. 1919 (2014).

273. Beller, *supra* note 272, at 17.

274. Annette C. Hillman & Jennifer F. Kimble, *Role of the Juvenile Dependency Court—*

provide external mechanisms for youth to advocate and share information would protect their rights. For youth in the juvenile justice system, peer-mediated models of instruction have been shown to have some efficacy in learning outcomes and were the preferred method of instructional delivery for sampled youth.[275]

Finally, health-related issues—particularly relating to COVID-19—are not in the sole control of the adolescent. Any reluctance or unwillingness of foster parents and correctional staff to get vaccinated or use other protective health measures will have a considerable impact on the youths' abilities to protect themselves.[276] Local, state, and county officials should consider mandating health interventions for employees to protect children.

Conclusion

As a normative matter, not all children should have the absolute authority to make medical decisions independently without input from medical professionals, advocates, or whoever constitutes their family. What is missing from the law is a framework that advances the rights of children and young people as having a vested stake in making decisions that are central to their daily lives. Children in the foster care system and juvenile justice system lose so much autonomy, control, and freedom already. Their body remains the one constant in their lives, and any analysis and decision-making process that excludes them harms not only the individuals, but also our society. In so many components of the foster care and juvenile justice systems, things *happen* to the youth—they are *acted upon*. This Article focuses on the most vulnerable youth—as they are among those with the greatest need—and proposes mechanisms to make their voices heard as regards COVID-19 vaccinations. However, the rights to bodily autonomy and health should be emphasized for all young people. The COVID-19 pandemic has only highlighted the disparities that exist among youth. It is this Author's hope that it will lead our society to

Systems and Parties, *in* JUVENILE LAW: DEPENDENCY § 1.2 (2017).

275. *Cf.* Jade Wexler, Deborah K. Reed, Erin E. Barton, Marisa Mitchell & Erin Clancy, *The Effects of a Peer-Mediated Reading Intervention on Juvenile Offenders' Main Idea Statements About Informational Text*, 43 BEHAV. DISORDERS 290, 297–98 (2018). Using student teachers has also increased adolescents' understanding of sexual health practices. Anjali Shekar, Abby Gross, Ellen Luebbers & Jesse Honsky, *Effects of an Interprofessional Student-Led Sexual Education Program on Self-Efficacy and Attitudes About Sexual Violence in Youths in Juvenile Detention*, 33 J. PEDIATRIC & ADOLESCENT GYNECOLOGY 302, 305 (2020).

276. *See* ROVNER, *supra* note 146, at 9, 11; Rachel M. Burke et al., *Patterns of Virus Exposure and Presumed Household Transmission among Persons with Coronavirus Disease, United States, January–April 2020*, 27 EMERGING INFECTIOUS DISEASES 2323 (2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8386767/ [https://perma.cc/K7J7-Q5EJ] (describing the risks of transmission of COVID-19 within households).

solutions, radical change, and investment in these valuable, and underserved, members of our community.

Better than BIPOC

Meera E. Deo, JD, PhD *

Race and racism evolve over time, as does the language of antiracism. Yet nascent terms of resistance are not always better than originals. Without the deep investment of community engagement and review, new labels—like BIPOC—run the risk of causing more harm than good. This Article argues that using BIPOC (which stands for "Black, Indigenous, and People of Color") as a synonym for People of Color not only does a disservice to the People of Color history and legacy, but also is a dangerous example of virtue signaling that promises symbolic progress without meaningful change. Applying this thesis to the context of legal education using empirical data from law students and law faculty, it becomes evident that People of Color is the appropriate term to use when making comparisons to whites; similarly, Women of Color works best when considering *raceXgender* intersectionality. Furthermore, academics, advocates, and allies should recognize that while pursuing commonalities and drawing from shared experiences is often critical for political and strategic purposes, aggregating disparate groups under one umbrella, whatever term is used, risks obscuring marginalized populations. In these instances, we should be even more precise in naming each community individually, which serves the twin goals of promoting accuracy in reporting and furthering anti-subordination.

* The Honorable Vaino Spencer Professor of Law, Southwestern Law School; Director, Law School Survey of Student Engagement (LSSSE); Affiliated Faculty, American Bar Foundation (ABF). This Article benefitted from insights from Guy-Uriel Charles, Melissa Murray, Shoba Sivaprasad Wadhia, Kirsten Carlson, Elizabeth Mertz, Anil Kalhan, Victoria Sutton, Orin Kerr, Paul Gowder, Gautam Hans, Kaimipono Wenger, Fred Smith, Katrina Lee, Amy Kristin Sanders, Joel Sati, Luis Fuentes-Rohwer, Katie Eyer, Stacy Hawkins, Efrén Pérez, Lua Yuille, Marsha Griggs, Yuvraj Joshi, Jill Engle, Franita Tolson, Shaun Ossei-Owusu, and Cyra Akilah Choudhury. It also improved after presentations at the UC Davis School of Law 2021 Racial Justice Speaker Series and Rutgers Law School 2022 Colloquium Series. All errors and opinions are the author's.

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Introduction

Racial tensions in the United States are nothing new. In 2020, this racial conflict bubbled over into the streets as those supporting Black Lives Matter and opposing a long history of racist police violence congregated to demand justice.[1] The global pandemic continues to place additional stressors on communities of color, including individuals who have been disproportionately affected by and infected with COVID-19[2] as well as those who are front-line workers desperately trying to keep infections at bay.[3] At the same time, hate crimes decreased nationally overall, but rose significantly against Asian American targets.[4] Children have been separated from parents at the border while fleeing violence in Central America.[5] We witnessed a fraught election and political transition, complete with insurrectionists storming the U.S. Capitol.[6] States, cities, and the federal government have even curtailed academic freedom by imposing limits on racial discourse in learning environments.[7] It has been a difficult time, especially with regard to issues of race and racism.

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1. *See* Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Protest in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/7AQY-UV2U].

2. Leo Lopez III, Louis H. Hart III & Mitchell H. Katz, *Racial and Ethnic Health Disparities Related to COVID-19*, 325 JAMA 719, 719 (2021) ("Black, Hispanic, and Asian people have substantially higher rates of infection, hospitalization, and death compared with White people.").

3. Mae Anderson, Alexandra Olson & Angeliki Kastanis, *Women, Minorities Shoulder Front-Line Work During Pandemic*, ASSOCIATED PRESS (May 1, 2020), https://apnews.com/article/us-news-ap-top-news-ca-state-wire-pandemics-virus-outbreak-029ea874dc964697358016d3628429fa [https://perma.cc/YFF5-ZCZR].

4. Stop AAPI Hate released a report in August 2020 showing increases in hate crimes against Asian Americans and Pacific Islanders since March 2020. STOP AAPI HATE, STOP AAPI HATE NATIONAL REPORT (2020), http://www.asianpacificpolicyandplanningcouncil.org/wpcontent/uploads/STOP_AAPI_Hate_National_Report_3.19-8.5.2020.pdf [https://perma.cc/57A4-3T49]. Those increases continued throughout 2020 and into 2021. Kimmy Yam, *Anti-Asian Hate Crimes Increased by Nearly 150% in 2020, Mostly in N.Y. and L.A., New Report Says*, NBC NEWS (Mar. 9, 2021), https://www.nbcnews.com/news/asian-america/anti-asian-hate-crimes-increased-nearly-150-2020-mostly-n-n1260264 [https://perma.cc/5DNJ-NNPB].

5. Teo Armus & Maria Sacchetti, *The Parents of 545 Children Separated at the Border Still Haven't Been Found. The Pandemic Isn't Helping*, WASH. POST (Oct. 21, 2020), https://www.washingtonpost.com/nation/2020/10/21/family-separation-parents-border-covid [https://perma.cc/KWT2-CWKB].

6. Associated Press, *WATCH: U.S. Capitol Locked Down as Trump Supporters Clash With Police*, PBS NEWSHOUR (Jan. 6, 2021), https://www.pbs.org/newshour/politics/watch-live-u-s-capitol-locked-down-as-trump-supporters-clash-with-police [https://perma.cc/36GT-VU4W].

7. Executive Order 13950 "prohibits federal agencies, contractors and grant recipients from offering certain diversity training"—singling out Critical Race Theory specifically—and was the subject of litigation for allegedly violating free speech and allowing for ongoing

In addition to upheaval, there also has been resistance. Diverse groups have banded together to protest police violence against the Black community.[8] Officials at the local, state, and national levels have pushed for science to lead us out of the pandemic.[9] Community leaders and academics have also documented challenges and strategized solutions.[10]

On the one hand, these ebbs and flows are nothing new. Scholars in law, sociology, political science, racial and ethnic studies, and education have always grappled with questions of race and resistance.[11] Many have written extensively on the ongoing ways in which race affects life in the United States.[12] Others highlight the evolving nature of racism,

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workplace discrimination. Alexandra Olson, *Trump's Diversity Training Order Faces Lawsuit*, ASSOCIATED PRESS (Nov. 12, 2020), https://apnews.com/article/trump-diversity-training-lawsuit-naacp-4c426e9f14fcf0618eac5d457e0d2066 [https://perma.cc/UG8Q-9Q4Z]; *see, e.g.*, Brendan Farrington, *Florida Could Shield Whites from 'Discomfort' of Racist Past*, ASSOCIATED PRESS (Jan. 18, 2022), https://apnews.com/article/business-florida-lawsuits-ron-desantis-racial-injustice-3ec10492b7421543315acf4491813c1b [https://perma.cc/Z4ZM-7EQH]; Jenny Gross, *School Board in Tennessee Bans Teaching of Holocaust Novel 'Maus,'* N.Y. TIMES (Jan. 27, 2022), https://www.nytimes.com/2022/01/27/us/maus-banned-holocaust-tennessee.html [https://perma.cc/Z69K-GPTW]. This Executive Order has since been revoked. *See* Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021).

8. Buchanan et al., *supra* note 1; Angela Onwuachi-Willig, *The Trauma of Awakening to Racism: Did the Tragic Killing of George Floyd Result in Cultural Trauma for Whites?*, 58 HOUS. L. REV. 817, 818 (2021).

9. Courtney Vinopal, *What We've Learned about Leadership from the COVID-19 Pandemic*, PBS NEWSHOUR (Apr. 6, 2021), https://www.pbs.org/newshour/world/what-weve-learned-about-leadership-from-the-covid-19-pandemic [https://perma.cc/ML6U-YJHM]. Some of those efforts have also been met with resistance. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022) (per curiam) (overturning the Occupational Safety and Health Administration's vaccine mandate for U.S. workers).

10. STOP AAPI HATE, *supra* note 4; Persis Drell, *Additional Support for Eligible Untenured Faculty*, STAN. OFF. PROVOST (Jan. 19, 2022), https://provost.stanford.edu/2022/01/19/additional-support-for-eligible-untenured-faculty [https://perma.cc/HY48-HX4Q]; Danielle M. Conway, Danielle Holley-Walker, Kimberly Mutcherson, Angela Onwuachi-Willig & Carla D. Pratt, *Law Deans Antiracist Clearinghouse Project*, THE ASS'N OF AM. L. SCHS., https://www.aals.org/about/publications/antiracist-clearinghouse [https://perma.cc/GD6N-NSLN].

11. Conversations about racial/ethnic terminology are ongoing throughout the globe. Varying contexts result in disparate priorities and preferences regarding terminology and identity; thus, labels depend in part on culture and geography. *See, e.g.*, MOHAMED ADHIKARI, BURDENED BY RACE: COLOURED IDENTITIES IN SOUTHERN AFRICA (Mohamed Adhikari ed., 2009) (discussing "coloured" and "mixed-race" identities and how history, "class, locality, context, and ideology" impact understanding and use); Antonio Sérgio Alfredo Guimarães, *The Brazilian System of Racial Classification*, 35 ETHNIC & RACIAL STUD. 1157, 1158 (2012); NICO SLATE, *The Dalit Panthers: Race, Caste, and Black Power in India*, *in* BLACK POWER BEYOND BORDERS: THE GLOBAL DIMENSIONS OF THE BLACK POWER MOVEMENT 127 (Nico Slate ed., 2012); Peter J. Aspinall, *Ethnic/Racial Terminology as a Form of Representation: A Critical Review of the Lexicon of Collective and Specific Terms in Use in Britain*, 4 GENEALOGY 87 (2020) (discussing how racial and ethnic terminology can be seen as a form of representation and can have different meanings in popular culture and politics).

12. *See, e.g.*, MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (3d ed. 2015); ROBERT BLAUNER, RACIAL OPPRESSION IN AMERICA (1972); DERRICK BELL, FACES AT THE

recognizing that past "racial projects" will not necessarily be part of modern racism.[13] Sociologists Omi & Winant define racial formation as "the sociohistorical process by which racial identities are created, lived out, transformed, and destroyed."[14] Research utilizing a framework of Critical Race Theory (CRT) similarly warns that race and racism are evolving projects; as the groundbreaking scholarship of Professor Derrick Bell teaches us, "despite our best efforts to control or eliminate it, oppression on the basis of race returns time after time—in different guises, but it always returns."[15]

Along with the evolution of racism and resistance to it, language itself shifts over time.[16] Language matters for framing, context, and even in determining progress in social movements. "Names matter—never more so than when dealing with the identity of an oppressed minority."[17] Activists and advocates debate not only substance but also language, arguing that "illegal aliens" is a dehumanizing term for "undocumented residents" or that those who consider themselves "pro-life" are really "anti-choice."[18]

BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992); EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA (5th ed. 2018).

13. *See* OMI & WINANT, *supra* note 12, at 190 (describing how after the civil rights reforms in the 1960s, "existing racist projects were no longer sustainable and posed significant risks," so white supremacy took on new forms). "Racial projects are efforts to shape the ways in which human identities and social structures are racially signified, and the reciprocal ways that racial meaning becomes embedded in social structures." *Id.* at 13.

14. *Id.* at 109.

15. BELL, *supra* note 12, at 97. In *Racism Without Racists*, Bonilla-Silva suggests that the "new racism" that has emerged since the 1960s and "accounts for the persistence of racial inequality" has five key components: its "increasingly covert nature;" the avoidance of overt racial terminology; the "invisibility" of instruments used to perpetuate racism; the move to a racial agenda based in political issues that avoids direct racial references; and the return of racial practices found in the Jim Crow era of race relations. BONILLA-SILVA, *supra* note 12, at 18.

16. This Article begins with the increasingly accepted scholarly understanding of race as a fluid concept, recognizing it as socially constructed rather than biologically determined. *See* Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994) (drawing on research from various disciplines to "repudiate the idea that race is a fixed essence and instead locate[s] races within the cartography of other social constructions"). Similarly, while this Article highlights the importance of appropriate language, terminology can also be fluid. Thus, this Article uses both Black and African American, in addition to Native American and Indigenous. Latinx is used to refer to both men and women, though Latina is used to refer to women specifically and Latino to refer to men specifically. This is consistent with previous projects and methods.

17. SLATE, *supra* note 11, at 127.

18. Kevin R. Johnson, *"Aliens" and Other US Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIA. INTER-AM. L. REV. 263, 264 (1996); D. Carolina Nuñez, *War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 BYU L. REV. 1517, 1518–19 (2014); Amy Harmon, *'Fetal Heartbeat' vs. 'Forced Pregnancy': The Language Wars of the Abortion Debate*, N.Y. TIMES (May 22, 2019),

There are certainly those who have little interest in engaging with linguistic debates, preferring instead to simply use the preferred term. Yet there are not always clear guidelines or preferences to help allies say the right thing. The terms presented here are just three of many that have inspired debates on vocabulary, even among those who have shared goals regarding substance and outcomes.[19] This is why academic and community engagement with the terms is so critical, lest "woke" influencers or loud corporations lead the way.

Often, changing terms signal opportunities to increase power, co-opt language, or give voice to those have been marginalized or minoritized.[20] Determining appropriate labels "is about more than solving an ontological puzzle. Without [clear definitions], we risk categorizing a mix of individuals without this classification packing any real meaning for them."[21] Using appropriate terminology is critical for both insiders and outsiders: "Carefully selecting and using proper monikers does more than identify particular groups; it also signals pride in identity (when used by those from within the group) and respect for identity (when used by outsiders)."[22]

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https://www.nytimes.com/2019/05/22/us/fetal-heartbeat-forced-pregnancy.html?auth=login-email&login=email [https://perma.cc/K84V-SAR7] ("The battle over abortion has long been shaped by language.").

19. Several other terms have been debated, preferred by some pockets while resisted by others. Together, these indicate the importance of language, the interest in being specific and careful in our usage, and the power of terms to signal worth. As relevant examples, debates involving personal identity terminology have included the following: Latinx/Hispanic (*see* Lourdes Torres, *Latinx?*, 16 LATINO STUD. 283 (2018); Fernando M. Treviño, *Standardized Terminology for Hispanic Populations*, 77 AM. J. PUB. HEALTH 69 (1987)); queer/LGBTQ (*see* ANNAMARIE JAGOSE, QUEER THEORY (1996); D. Grant Campbell, José Augusto Chaves Guimarães, Fabio Assis Pinho, Daniel Martínez-Ávila & Francisco Arrais Nascimento, *The Terminological Polyhedron in LGBTQ Terminology: Self-Naming as a Power to Empower in Knowledge Organization*, 44 KNOWLEDGE ORG. 586 (2017)); Indigenous/Indian/Native American (*see* Michael Yellow Bird, *What We Want to Be Called: Indigenous Peoples' Perspectives on Racial and Ethnic Identity Labels*, 23 AM. INDIAN Q. 1 (1999)); Asian American/API/AAPI (*see* Naomi Ishisaka, *Why It's Time to Retire the Term 'Asian Pacific Islander*,' SEATTLE TIMES (Nov. 30, 2020), https://www.seattletimes.com/seattle-news/why-its-time-to-retire-the-term-asian-pacific-islander/ [https://perma.cc/VX7F-4NZ4]).

20. For a discussion on how advocates reclaimed the terms *dyke* and *crip* from slurs to powerful self-identifiers, see Meera E. Deo, *Why BIPOC Fails*, 107 VA. L. REV. ONLINE 115 (2021), https://www.virginialawreview.org/articles/why-bipoc-fails/ [https://perma.cc/NU39-MYKF].

21. EFRÉN O. PÉREZ, DIVERSITY'S CHILD: PEOPLE OF COLOR AND THE POLITICS OF IDENTITY 34 (2021).

22. Meera E. Deo, *Why Language Matters for Diversity, Equity, and Inclusion*, LSAC LAW:FULLY BLOG (July 12, 2021), https://www.lsac.org/blog/why-language-matters-diversity-equity-and-inclusion [https://perma.cc/46UC-WV2F].

As others have noted, "The study of language is not new to legal academia" and has been a central feature in CRT specifically.[23] Changes in terms are rarely linear; instead, the scatter plots of new language can signal wholesale change and progress in leaps and bounds, as well as potential setbacks.[24]

This Article examines one such line of terminology, starting with the label People of Color, adding intersectionality with Women of Color, and probing the new term BIPOC (referencing "Black, Indigenous, and People of Color"), ultimately concluding that BIPOC does more harm than good. What is even better than BIPOC is to be specific when referencing particular groups.[25]

Each term—People of Color, Women of Color, and BIPOC—seeks to explain challenges, opportunities, and broader experiences with racism in the United States.[26] Yet nascent terms are not always better than originals. Furthermore, the terms themselves should not drive empirical or theoretical investigations. Scholars should think carefully, and critically, about the purpose of any project as well as the data or argument being analyzed, using terms that best fit the specific agenda, data, goals, and actual groups discussed. Using the correct label is not only more precise and honest, but also serves broader antiracism efforts by giving voice to the particular communities affected, which are often otherwise overlooked, forgotten, or subsumed.[27]

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23. Nuñez, *supra* note 18, at 1518; Deo, *supra* note 20, at 121.

24. *See, e.g.*, BARBARA RANSBY, MAKING ALL BLACK LIVES MATTER: REIMAGINING FREEDOM IN THE TWENTY-FIRST CENTURY 97–98 (2018) (describing the evolution of the terminology used by the Black Lives Matter movement, in particular "unapologetically Black," which was used as a response to previous expressions of Black identity, which required "downplaying or apologizing for one's 'blackness'" and "expressing political and class loyalty, as a condition of acceptance by wealthy white counterparts").

25. This Article does not make recommendations for how individuals themselves should identify. Instead, it focuses squarely on which terms should be used in popular and academic discourse when discussing various racial and ethnic communities.

26. These three terms were chosen because People of Color and Women of Color currently enjoy widespread usage in the United States and abroad and BIPOC has the potential to become more popular in certain quarters although there is strong resistance in others. Though this Article focuses on umbrella terms incorporating various non-white groups, there are many other distinctions in language that could be relevant for groups and individuals, including Hispanic vs. Latino, or even Latino vs. Latina/o vs. Latinx, or for that matter African American vs. Black vs. ADOS (American Descendants of Slavery) or BAME (Black/Asian/Minority Ethnic). *See, e.g.*, Gabby Beckford, *Which is the Correct Term? Black vs. BIPOC vs. African American vs. POC vs. BAME*, PACKS LIGHT https://www.packslight.com/which-is-right-term-african-american-vs-black-vs-bipoc-vs-poc-vs-bame/ [https://perma.cc/MRD2-JLXZ].

27. *See, e.g.*, Victoria Sutton, *Native American Exclusion as a Form of Paper Genocide*, LSSSE INSIGHTS BLOG (July 17, 2020), https://lssse.indiana.edu/blog/guest-post-native-american-exclusion-as-a-form-of-paper-genocide [https://perma.cc/8NAM-MKTX] (describing the necessity of including Native Americans in "statistical data collection and reporting").

We should create new frameworks to conceptualize intersectional issues in various contexts.[28] The move to highlight Women of Color from within the larger People of Color label signaled the importance of centering gender in particular conversations about race; now, we must take that further. This Article argues that People of Color remains the best term to use when this group shares an experience different from whites, while Women of Color is important when prioritizing challenges driven by *raceXgender* (the compound effects of race and gender identities).[29] However, the use of BIPOC does not signal progress; instead, it is damaging on several fronts—both theoretical and practical.[30] Instead, we must do better than BIPOC as a synonym for People of Color in order to center the experiences of particular groups in appropriate contexts.[31]

The key is to start with data or arguments that are driven by the literature and framed by relevant theory; then we should match conclusions to appropriate language—rather than allowing terms to dictate projects or outcomes. Greater awareness of our particular priorities and the populations we study will determine the best language for the moment. Scholars should match each term with identities, priorities, and experiences.[32]

This Article has three interrelated proposals, the last of which is the primary thesis. First, it is important to critically examine existing frameworks surrounding the terms used to represent intersectionality and changing conceptions of race and gender; when appropriate, language should be updated to reflect goals and priorities. Second, terms should not dictate what data are used or which arguments are made; instead, language should be precise rather than overbroad or underinclusive when reporting findings and reaching conclusions. Linguistic categories should not be deployed without stringent consideration of their origins and their effects and appropriate uses; community engagement, approval, and adoption are critical to changes in

28. While this Article foregrounds raceXgender, terms should also be developed to account for intersectionality related to sexual orientation, socioeconomic status, disability, immigration background, and more.

29. *See infra* Section II.B.i (describing raceXgender in detail). RaceXgender bias refers to "the compound effects of devaluation based on both race and gender." Meera E. Deo, *The Culture of "raceXgender" Bias in Legal Academia*, *in* POWER, LEGAL EDUCATION, AND LAW SCHOOL CULTURES 240, 241 (Meera E. Deo, Mindie Lazarus-Black & Elizabeth Mertz, eds., 2019).

30. Deo, *supra* note 20, at 118.

31. Throughout this Article, the terms People of Color and Women of Color are capitalized when referring to the groups or terms themselves and presented in lower case when referencing the actual individuals involved in those groups.

32. This imagery is borrowed from Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, PEACE & FREEDOM, July/Aug. 1989, at 2; and Victoria Reyes, *Ethnographic Toolkit: Strategic Positionality and Researchers' Visible and Invisible Tools in Field Research*, 21 ETHNOGRAPHY 220 (2020) (discussing researchers' use of "visible" and "invisible" identities to position their discussions of different groups).

terminology, and strongly preferred to following elite, corporate-driven preferences.[33] Third, using BIPOC as a synonym for People of Color does a disservice to the People of Color history and legacy—though the nascent term should inspire scholars and advocates to disaggregate the data and carefully name the relevant racial groups involved in appropriate instances.

All three arguments are developed further in this Article in the context of legal education. While this Article necessarily focuses on definitions and an evolution of terms, it also makes a preliminary interrogation into the application to specific legal education contexts. Legal education has long been the site of struggles over race and racial categories—especially those involving educational diversity and affirmative action that have played out in numerous federal courts, in the court of public opinion, and on campuses throughout the country.[34] This investigation and the frameworks they instantiate are an essential contribution not only to theoretical foundations in CRT and elsewhere, but also to our understanding of how raceXgender shapes law student and law faculty experiences. Without terms that create a better framework for applying intersectional concepts to legal education, we cannot realize meaningful progress for the most vulnerable groups.

Consider, for instance, the five Black women leaders who spearheaded the Law Deans Antiracist Clearinghouse Project.[35] Their blueprint serves as a "guide [to] the many law schools issuing faculty resolutions committing themselves to becoming (more) *antiracist* as a signal of more meaningful progress in legal education."[36] The past few years have borne witness to a deepening commitment to antiracism—where neutrality is not sufficient but, as Ibram X. Kendi has taught us,

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33. Community engagement, review, and approval are critical to the use of terms by advocates, allies, and academics; BIPOC has not gone through this process. Amy Harmon, *BIPOC or POC? Equity or Equality? The Debate over Language on the Left*, N.Y. TIMES (Nov. 1, 2021), https://www.nytimes.com/2021/11/01/us/terminology-language-politics.html [https://perma.cc/8Y8T-Q2MD] ("One reason BIPOC has engendered both backlash and bewilderment . . . is because it seems to be an example of 'top-down language reform[]' . . . [because] few Black or Indigenous people use it, language scholars say.").

34. *See* Sweatt v. Painter, 339 U.S. 629 (1950); DeFunis v. Odegaard, 416 U.S. 312 (1974); Grutter v. Bollinger, 539 U.S. 306 (2003); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157 (1st Cir. 2020), *cert. granted*, 142 S. Ct. 895 (Jan. 24, 2022) (No. 20–1199); Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580 (M.D.N.C. 2021), *cert. granted*, 142 S. Ct. 896 (Jan. 24, 2022) (No. 21–707).

35. Conway et al., *supra* note 10. The five Black women who are leading the charge for the Law Deans Antiracist Clearinghouse Project are Danielle M. Conway (Penn State Dickinson Law), Danielle Holley-Walker (Howard Law), Kimberly Mutcherson (Rutgers-Camden Law), Angela Onwuachi-Willig (Boston University Law), and Carla D. Pratt (formerly the dean at Washburn Law and now at Oklahoma Law).

36. Deo, *supra* note 20, at 117 (citing Conway et al., *supra* note 10). See Conway et al., *supra* note 10 for a list of schools that issued faculty resolutions against racism and another list of those that issued solidarity and antiracism statements.

"One either allows racial inequities to persevere, as a racist, or confronts racial inequities, as an antiracist."[37] Similarly, we learn from the concept of *praxis* in CRT that theories of racial justice "must transcend the page to inspire 'theory-informed action.'"[38] We now see praxis at work, in real time, throughout legal education.

"The push for *antiracism* itself reflects an update in both language and priorities, signaling a shift from protecting diversity to promoting broader action-oriented change. In previous years, advocates were steadfastly focused on promoting racial diversity to advance racial justice."[39] More recently, scholars have pushed for those intent on promoting diversity to go further to accentuate inclusion, equity, and belonging.[40] In doing so, faculty, staff, and administrators have shifted their perspective to consider not only who is admitted but also the quality of the interactions and experiences of students of color once on campus.[41]

"A change in terminology does more than add to the lexicon; it also signals a change in priorities for those working towards racial justice."[42] At this moment of reckoning, we have the opportunity and responsibility to reexamine our language and the terms we use to name and claim racism and resistance. Advocates, allies, and academics must be sophisticated in their language use when discussing issues of race and racism.

Earlier work has explored why BIPOC fails as a new term.[43] This Article examines how the term is both overbroad and underinclusive, although language about race instead should be precise. BIPOC is overbroad because Black and Indigenous people are specifically foregrounded by the term, though not every example of race or racism readily applies, or applies equally, to these two groups. For instance, mass incarceration affects the Black community not only at disproportionate

37. IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 9 (2019). Note also already persistent stagnation and even backlash on the path to antiracism. Matt DiSanto, *Penn State Scraps Plans for Racial Justice Center*, STATECOLLEGE.COM (Oct. 27, 2022), https://www.statecollege.com/penn-state-scraps-plans-for-racial-justice-center/ [https://perma.cc/4LJ9-CZTS]; Meera E. Deo, *Progress and Backlash in our Unequal Profession*, 51 SW. L. REV. 310 (2022).

38. Deo, *supra* note 20, at 123 (quoting Chandra L. Ford & Collins O. Airhihenbuwa, *Critical Race Theory, Race Equity, and Public Health: Toward Antiracism Praxis*, 100 AM. J. PUB. HEALTH S30, S31 (2010)).

39. Deo, *supra* note 20, at 122; *see Bollinger*, 539 U.S. 306.

40. *See* Elizabeth Bodamer, *Do I Belong Here? Examining Perceived Experiences of Bias, Stereotype Concerns, and Sense of Belonging in U.S. Law Schools*, 69 J. LEGAL EDUC. 455 (2020); Meera E. Deo, *The End of Affirmative Action*, 100 N.C. L. REV. 237 (2021).

41. *See* MEERA E. DEO & CHAD CHRISTENSEN, IND. UNIV. CTR. FOR POSTSECONDARY RSCH., LSSSE 2020 ANNUAL SURVEY RESULTS: DIVERSITY & EXCLUSION (2020).

42. Deo, *supra* note 20, at 117.

43. *E.g.*, *id.* at 117–18 (considering whether BIPOC can be an effective term without intentional community engagement and while marginalizing certain racial groups).

but at stunningly inequitable rates. "'Black men are six times as likely to be incarcerated as white men,' a disparity larger than any other raceXgender group."[44] Thus, mass incarceration is not, and should not be labeled as, an issue affecting "the BIPOC community" because Indigenous people face unique causes and contexts for their lower levels of incarceration.[45] The term BIPOC is also underinclusive because it relegates Latino men—who are twice as likely to be incarcerated as white men—to an amorphous remnant category rather than naming them as a racial group managing this challenge.[46]

The term is thus underinclusive because it centers Black and Indigenous populations in every instance, including those in which they are, at most, peripheral. As such, even when they are at the center of a particular controversy, "Asian and Latin[x] Americans are often left to wonder whether they are covered by the 'POC' part of the acronym."[47] For instance, while hate crimes overall decreased by 7% between 2020 and 2021, those targeting people from Asian backgrounds rose by nearly 150%.[48] Attacks ranged from thousands of instances of racist verbal abuse to the horrific killing of six Asian American women working in Atlanta spas.[49] Political and media figures increased anti-Asian animosity by tying racism to COVID-19, calling it the "Chinese virus" or "Kung flu."[50] Because these attacks are the most recent iteration of "racial projects" in a long history of anti-Asian attacks in the United States, there is no reason to center Black and Indigenous communities in this context.[51] The BIPOC term would be underinclusive here because it fails to center or even

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44. *Id.* at 138 (quoting *Criminal Justice Facts*, THE SENT'G PROJECT (2020), [https://perma.cc/4Y2H-4VZY]). While African American and Latinx individuals together represent about 33% of the U.S. population, *see QuickFacts United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/RHI225221 [https://perma.cc/D9FS-E482], together they comprise 56% of the incarcerated population, and Black Americans alone comprise 33% of those incarcerated, *see* E. ANN CARSON, U.S. DEP'T OF JUST., PRISONERS IN 2019 (2020), https://bjs.ojp.gov/content/pub/pdf/p19.pdf [https://perma.cc/YGY3-A92L].

45. *See, e.g.*, DESIREE L. FOX, CIARA D. HANSEN & ANN M. MILLER, OVER-INCARCERATION OF NATIVE AMERICANS: ROOTS, INEQUITIES, AND SOLUTIONS (2022), https://safetyandjusticechallenge.org/wp-content/uploads/2022/07/OverIncarceration OfNativeAmericans.pdf [https://perma.cc/4BLB-PQ4F].

46. *At a Glance*, THE SENT'G PROJECT, https://www.sentencingproject.org/research/ detailed-state-data-tool/ [https://perma.cc/CR95-PZYW].

47. Harmon, *supra* note 33.

48. Yam, *supra* note 4.

49. Hannah Miao, *Lawmakers Call for Change in Covid Rhetoric Amid Rise in Violence Against Asian Americans*, CNBC (Mar. 18, 2021), https://www.cnbc.com/ 2021/03/18/lawmakers-call-for-change-in-covid-rhetoric-amid-violence-against-asianamericans.html?&qsearchterm=lawmakers%20call%20for%20change%20in%20covid%20rhetoric [https://perma.cc/62N7-YEJ6]; STOP AAPI HATE, *supra* note 4.

50. Miao, *supra* note 49.

51. *See supra* note 13 (describing racial projects).

mention the very population (Asian Americans) targeted by racism in the context of ongoing hate crimes.

Naming the main group(s) affected is key, as is clear in the straightforward examples of mass incarceration and contemporary hate crimes. Applying the thesis to the more complicated context of legal education, this Article asserts that 1) we must understand the experiences of People of Color vis-à-vis that of whites, 2) Women of Color have unique challenges as compared to both Men of Color and white women and should be centered in the raceXgender context, and 3) BIPOC is the wrong term to use when discussing people of color in any context. Furthermore, in each context, we must carefully examine different groups gathered beneath various umbrella groups so that those who face distinct barriers and opportunities are not always lumped together with the whole. Thus, in instances where more than one group is implicated, we should center the groups that are included in the data or are most salient to the issue at hand rather than using an umbrella group that renders them invisible.

Part I shares the historical and ongoing importance of using precise racial language in the white-normative context and culture of the United States. Part II introduces the origins and development of the terms animating this Article, starting with the development of "People of Color," adding the usage of "Women of Color," and introducing "BIPOC." It culminates in the assertion that instead of utilizing BIPOC as a synonym for People of Color, we should draw from its strength to prioritize particular groups at appropriate times. Part III applies the primary thesis—that careful usage of racial terms should be utilized for particular projects—to the context of legal education. Here, we see in detail how specific priorities and populations are best served when academics, advocates, and allies use appropriate terms in specific contexts; both quantitative and qualitative data revealing various challenges facing law students and law faculty illuminate when terms may be most useful or, conversely, harmful. The Conclusion examines the parameters of this thesis, including limitations and additional questions to continue this discussion, examining how and why we can do better than BIPOC.

I. Language, Law, and Race

Many theories of race, racial formation, and racial resistance can be applied directly to the label "People of Color."[52] Even before there was a People of Color title, there was power in whiteness and resistance to it in the United States.[53] In *Whiteness as Property*, Critical Race Theorist and law professor Cheryl Harris draws from the privileged social status of whiteness to argue that "whiteness as a theoretical construct evolved for the very purpose of racial exclusion [and is thus] built on both exclusion and racial subjugation."[54] As white dominance was anointed with the sanction of law, it was seen as the natural order—a "normal" feature of American life.[55] In conjunction with the power of whiteness, racism itself was sometimes rendered "relatively invisible—at least to those who do not experience" its negative effects.[56] When noticed, racism was considered an individual problem, the result of a few bad actors working within an otherwise just system.[57] With the normalization of whites sitting atop the racial hierarchy, American society remained "structured on racial subordination, [and] white privilege became an expectation."[58] The law, which many hoped would further equality, was instead used as an instrument to perpetuate the unequal racial status quo.[59]

Among the many examples of the law being deployed as a means of racial oppression is its role in defining, facilitating, and regulating the language of whiteness.[60] The Constitution itself codified the worth of

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52. *See, e.g.*, OMI & WINANT, *supra* note 12; JOE R. FEAGIN, SYSTEMIC RACISM: A THEORY OF OPPRESSION (2006); Chris K. Iijima, *Race as Resistance: Racial Identity as More Than Ancestral Heritage*, 15 TOURO L. REV. 497 (1999).

53. Note that whiteness itself is a fluid and modern construct, so much so that some ethnic groups that are today considered white in the United States—including descendants from Ireland, Italy, Greece, and Poland—were not treated as white when they first arrived as immigrants. *See, e.g.*, DAVID R. ROEDIGER, WORKING TOWARD WHITENESS: HOW AMERICA'S IMMIGRANTS BECAME WHITE (2018); NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995).

54. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1720–21, 1737 (1993) ("White identity and whiteness were sources of privilege and protection; their absence meant being the object of property.").

55. Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOCIO. REV. 465, 475 (1997) ("Racial phenomena are regarded as the 'normal' outcome of the racial structure of a society.").

56. MICHAEL K. BROWN, MARTIN CARNOY, ELLIOTT CURRIE, TROY DUSTER, DAVID B. OPPENHEIMER, MARJORIE M. SCHULTZ & DAVID WELLMAN, WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY 226 (2003).

57. Sociologists—and many others—consider racism not simply an individual problem, but one that has deep structural and systemic roots. *See* Bonilla-Silva, *supra* note 55, at 469; FEAGIN, *supra* note 52.

58. Harris, *supra* note 54, at 1730.

59. *Id.* at 1725 ("Whiteness at various times signifies and is deployed as identity, status, and property, sometimes singularly, sometimes in tandem.").

60. *See generally* IAN HANEY LOPEZ, WHITE BY LAW (2006) (exploring how the legal construction of race and rise of the racial ideology of "colorblind White dominance" employ

Black Americans as three-fifths of a white man—yet even that applied solely when considering taxation and legislative representation.[61] In 1857, the Supreme Court ruled in *Dred Scott v. Sandford* that Black Americans "are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the [accompanying] rights and privileges."[62] Even after the Civil Rights Amendments granted citizenship to Black Americans, promised them (still distant) Equal Protection rights, and allowed them the cursory right to vote, racial injustice remains enshrined in law.[63]

There were also legal mechanisms in place to continue the subjugation of racial groups besides Black Americans, again using racial terminology to maintain white privilege.[64] The Asian American experience is a prime example not only of those seeking the protections of American law by claiming whiteness but also of how whiteness itself was fluidly exercised by the law to maintain power among a preferred few.[65]

In the 1854 case of *People v. Hall*, the California Supreme Court extended to people of Chinese descent a state law preventing those who were "Black," "Mulatto," or "Indian" from testifying against whites, disregarding the testimony of three Chinese witnesses in a white man's prosecution for the death of a Chinese miner.[66] In this instance, the court preferred the miscarriage of justice that resulted from making "Chinese" synonymous with "Black" (or "Mulatto" or "Indian") to suggesting it could be equivalent or even comparable to "White."

Yet even when ostensibly working toward racial justice, courts have promoted white privilege. Justice Harlan's 1896 dissent in *Plessy v.*

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restrictive definitions of what counts as race and racism in the eyes of the law).

61. U.S. CONST. art. I, § 2, cl. 3; Raymond T. Diamond, *No Call to Glory: Thurgood Marshall's Thesis on the Intent of a Pro-Slavery Constitution*, 42 VAND. L. REV. 93, 108–09 (1989); Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191, 214–15, n.94 (2003) (arguing that the value of Black enslaved people had nothing to do with their humanity; instead, it was relevant only in apportioning white masters extra voting power as an early example of structural racism).

62. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404 (1856) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

63. Ellen D. Katz, *Enforcing the Fifteenth Amendment*, *in* THE OXFORD HANDBOOK OF THE U.S. CONST. 365–86 (Mark Tushnet, Mark A. Graber & Sanford Levinson eds., 2015).

64. *See* HANEY LOPEZ, *supra* note 60; STEVEN W. BENDER, GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION (2003).

65. Though this Article highlights the example of Asian Americans, most basic social science textbooks will include documentation of historical and ongoing racism against Native Americans, Latinos, and other people of color, too. *See* ANTHONY GIDDENS, MITCHELL DUNEIER, RICHARD P. APPELBAUM & DEBORAH CARR, INTRODUCTION TO SOCIOLOGY (Sasha Levitt et al. eds., 11th ed. 2018).

66. People v. Hall, 4 Cal. 399, 399 (1854) ("Section 14 of the Act Concerning Crime and Punishment provides, 'No Black, or Mulatto person, or Indian shall be allowed to give evidence in favor of, or against a White man.'").

Ferguson was meant to shame the majority upholding segregation through the "separate but equal" doctrine; yet, it nevertheless nonchalantly adhered to white supremacy, stating, "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time . . . ."[67] Justice Harlan further asserted that while *segregation* between Black and white should be ruled unconstitutional, the Court need not go as far as to promote actual *integration*.[68] He tempered his dissent of segregation with support for continuing the exclusion of "Chinamen," whom he called "a race so different from [whites] that . . . [they] are, with few exceptions, absolutely excluded from our country."[69] Even for Justice Harlan, who condemned his fellow Justices for facilitating the ongoing legal separation of white and Black Americans, segregation from Asians remained acceptable.

In these instances, and many others, courts and the law centered inquiries of race on maintaining white privilege. Attempts by immigrants at assimilation or inclusion into whiteness had little to do with shared culture or ancestry. Instead, these outsiders sought to be included in definitions of the term "white" to gain legal protection at a time when non-whites were denied the myriad of benefits afforded to whites.[70]

One hundred years ago, the Supreme Court ruled that Japanese immigrant Takao Ozawa was clearly not white—a term they held "synonymous with" Caucasian—and therefore could not gain citizenship.[71] The Court stated that "the federal and state courts, in an almost unbroken line, have held that the words 'white person' were meant to indicate only a person of what is popularly known as the Caucasian race," and because Ozawa "is clearly of a race which is not Caucasian," he could not be eligible for citizenship.[72]

Just one year later, however, the Court took great pains to navigate the fictions of a biologically-determined racial construct, concluding that those who are "Caucasian" are not necessarily "white" according to

67. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

68. *Id.*

69. *Id.* at 561; *see also* Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 156 (1996) (exploring Justice Harlan's "Chinese jurisprudence" and his consistent opposition to the constitutional rights of Chinese people and Chinese Americans).

70. WILLIAM J. ACEVES, WHO ARE PEOPLE OF COLOR? 8 (2021) (manuscript on file with author) ("[D]esignating someone as white or a person of color was a life-altering decision. The legal consequences of color were significant and would continue for centuries.").

71. Ozawa v. United States, 260 U.S. 178, 198 (1922). The etymology of the term "Caucasian" refers to those with ancestors from the Caucus mountains in Central Asia. *See, e.g.*, THE EDS. OF THE ENCYCLOPAEDIA BRITANNICA, CAUCASIAN PEOPLES, https://www.britannica.com/topic/Caucasian-peoples [https://perma.cc/RK2G-3EEL].

72. *Ozawa*, 260 U.S. at 198.

conventional conceptions or the law.[73] Bhagat Singh Thind, an immigrant from Northern India, convinced the district court that because his ancestors came from the Caucus mountains, he should be considered Caucasian and therefore legally white.[74] The Supreme Court pushed back, asserting that "'Caucasian' is a conventional word of much flexibility."[75] Although in *Ozawa* they had claimed that "Caucasian" and "white" were synonymous, they now concluded that the two words were actually "not of identical meaning."[76] Ultimately, the Court determined that Thind could not become an American citizen because he was not white according to phenotype or law, regardless of ancestry.[77]

Soon thereafter, the Court again tried to balance a fiction of biological race with the realities of American racism, this time in the elementary school context. In *Gong Lum v. Rice*, Martha Lum and her parents argued that with only white schools and "colored" schools to choose from in segregated Mississippi, a Chinese American schoolgirl should be granted the right to attend a white school, since clearly she was not Black.[78] Yet, in a unanimous decision, the Court disagreed, holding that while she was not technically Black, she most certainly was not white, and therefore could not expect to attend school with white children.[79] Even after policy changes resulted in Asian immigrants becoming eligible for citizenship, other forms of discrimination drawing directly from racism and xenophobia persisted.[80]

From that sordid history to contemporary times, state-sanctioned racism continues to disadvantage non-whites in virtually all facets of American life, from banking, to mass incarceration, to tax codes.[81] The

73. United States v. Thind, 261 U.S. 204, 208 (1923); HANEY LOPEZ, *supra* note 61, at 64.

74. *Thind*, 261 U.S. at 210; *see also* Vinay Harpalani, *Desicrit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 N.Y.U. ANN. SURV. AM. L. 77, 130 (2013) (summarizing the district court's ruling).

75. *Thind*, 261 U.S. at 208.

76. *Id.*

77. *Id.* at 209 ("It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today . . . .").

78. Gong Lum v. Rice, 275 U.S. 78, 81 (1927).

79. *Id.* at 82 (finding that pupils of "the brown, yellow and black races" belonged in "colored" schools).

80. *See generally* FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE 133–43 (2003) (discussing the racial problems that persist in the United States today); ERIKA LEE, THE MAKING OF ASIAN AMERICA: A HISTORY (2016) (telling the story of Asian Americans in the United States and the discrimination they faced throughout history); CATHY PARK HONG, MINOR FEELINGS: AN ASIAN AMERICAN RECKONING (2021) (sharing the racial and xenophobic problems Asian Americans experience growing up in the United States).

81. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 224–25 (2012) (discussing the problem of mass incarceration for People of Color). *See generally* MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP (2019) (explaining banking as one reason for the persistence of the racial

legal language of whiteness provided cover to extend benefits to a select few while excluding others based on phenotype, ancestry, or "common sense" notions.

The historical record reveals that the law has forged its own unsteady definitions of race and whiteness rather than relying on academic research or community engagement. Contemporary notions of antiracism are abundant in popular culture but virtually invisible in legal discourse.[82] Courts—as well as the law more generally—give scant attention to the importance of contextually grounding racial categories and the social construction of those labels.[83] To start to bridge this gap, we now turn to the origins and evolutions of the three terms highlighted in this Article.

II. The Origin and Evolution of Racial Terms

As racism evolved over the years, so did terms used to define, explain, and resist it. This Part introduces three terms in particular: People of Color, Women of Color, and BIPOC. In reviewing the origins and development of each term, we can better appreciate the appropriate context for usage.

A. People of Color

i. Strength and Solidarity Through Identity

While the origins are uncertain, the term People of Color likely initially referred to enslaved Black Americans.[84] It was first cited in the Oxford English Dictionary in 1796 in reference to "light-skinned people of mixed African and European heritage."[85] The term quickly became "well-established in the English-speaking world."[86] Although color and

wealth gap); DOROTHY A. BROWN, THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS AND HOW WE CAN FIX IT (2021) (explaining the inequities the United States tax system has on Black Americans).

82. *See* KENDI, *supra* note 37, at 234 (comparing racism to cancer and discussing how people deny racial inequity in policy).

83. *See generally* JONATHAN ROSA, LOOKING LIKE A LANGUAGE, SOUNDING LIKE A RACE: RACIOLINGUISTIC IDEOLOGIES AND THE LEARNING OF LATINIDAD (2019) (discussing the various Latinx categories created and how they shape Latinx identities).

84. ACEVES, *supra* note 70, at 6; Edward Yuen, *Social Movements, Identity Politics and the Genealogy of the Term 'People of Color,'* 19 NEW POL. SCI. 97 (1997); *see* JULIE WINCH, BETWEEN SLAVERY AND FREEDOM: FREE PEOPLE OF COLOR IN AMERICA FROM SETTLEMENT TO THE CIVIL WAR (THE AFRICAN AMERICAN EXPERIENCE SERIES) xiii (2014) (describing how enslaved Black Americans were classified as "colored persons" on the census during the Civil War era).

85. HOUGHTON MIFFLIN CO., THE AMERICAN HERITAGE GUIDE TO CONTEMPORARY USAGE AND STYLE 356 (2005); Sandra E. Garcia, *Where Did BIPOC Come From?*, N.Y. TIMES (June 17, 2020), https://www.nytimes.com/article/what-is-bipoc.html [https://perma.cc/4593-6WM3].

86. ACEVES, *supra* note 70, at 1 (citing WILLIAM GUTHRIE, A NEW SYSTEM OF MODERN

race are often related, though not synonymous, the term People of Color signals race by referencing skin color and phenotype.[87] At some point, "colored people" became synonymous with Black, as it was used in the creation of the National Association for the Advancement of Colored People (NAACP).[88] Over time, the term expanded to include others, such as those who are Latinx, Asian American, Native American, Arab American, etc.[89]

From its origins, People of Color has been a relational term of identity with strict boundaries denoting difference or "otherness."[90] People of Color is defined as different from the white (American) norm,[91] as well as "a phrase chosen by Black, Latin[x], Native American, and Asian and Pacific Islander activists . . . to actively decenter whiteness."[92]

Rather than using a term that focuses on *exclusion* from powerful groups, as with "non-white" or "minority," the term People of Color emerged in part "to counter the condescension implied in the other two."[93] Using the term "non-white" "identifies [individuals] by means of a negative and implies exclusion from a European commonality," whereas People of Color instead "substitutes a positive and emphasizes inclusion in a diverse group of peoples . . . ."[94] The People of Color term also utilizes "person first" language, highlighting the humanity of people described by

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GEOGRAPHY: A GEOGRAPHICAL, HISTORICAL, AND COMMERCIAL GRAMMAR; AND PRESENT STATE OF THE SEVERAL NATIONS OF THE WORLD 619–21 (1796); WILLIAM WINTERBOTHAM, AN HISTORICAL, GEOGRAPHICAL, COMMERCIAL AND PHILOSOPHICAL VIEW OF THE AMERICAN UNITED STATES, AND OF THE EUROPEAN SETTLEMENTS IN AMERICA AND THE WEST-INDIES 323–25 (1795); JEAN-PAUL RABAUT, THE HISTORY OF THE REVOLUTION OF FRANCE 191–94 (James White trans., 1792)).

87. Vinay Harpalani, *To Be White, Black, or Brown? South Asian Americans and the Race-Color Distinction*, 14 WASH. U. GLOB. STUD. L. REV. 609, 609 (2015); Angela R. Dixon & Edward E. Telles, *Skin Color and Colorism: Global Research, Concepts, and Measurement*, 43 ANN. REV. SOCIO. 405, 406 (2017); Salvador Vidal-Ortiz, *People of Color*, *in* ENCYCLOPEDIA RACE, ETHNICITY & SOCIETY 1037, 1037 (Richard T. Schaefer ed., 2008).

88. PATRICIA SULLIVAN, LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT 15 (2009).

89. *See* PÉREZ, *supra* note 21, at 33–36; Vidal-Ortiz, *supra* note 87, at 1038.

90. See Fredrik Barth, *Introduction* to ETHNIC GROUPS AND BOUNDARIES, 9–38 (Fredrik Barth ed., 1969) for an introduction to the classic "us" vs. "them" conception for ethnic boundaries. *See also* RICHARD ALBA, ETHNIC IDENTITY: THE TRANSFORMATION OF WHITE AMERICA 17 (1990); STEPHEN STEINBERG, THE ETHNIC MYTH: RACE, ETHNICITY, AND CLASS IN AMERICA 169 (2001); BEVERLY DANIEL TATUM, "WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?" AND OTHER CONVERSATIONS ABOUT RACE 22 (2003).

91. While People of Color is a global term, this Article discusses it in the American context, including the context of American whiteness, power, and privilege.

92. Andrea Plaid & Christopher Macdonald-Dennis, *'BIPOC' Isn't Doing What You Think It's Doing*, NEWSWEEK (Apr. 9, 2021), https://www.newsweek.com/bipoc-isnt-doing-what-you-think-its-doing-opinion-1582494 [https://perma.cc/EZ3P-SHTP].

93. CHRISTINE CLARK & TEJA ARBOLEDA, TEACHER'S GUIDE FOR IN THE SHADOW OF RACE: GROWING UP AS A MULTIETHNIC, MULTICULTURAL, AND "MULTIRACIAL" AMERICAN 17 (2000).

94. HOUGHTON MIFFLIN CO., *supra* note 85, at 356.

the term.[95] In this way, the move from "non-white" to "People of Color" signals a shift in power and preference—from exclusion to inclusion, from negative to positive.

Due in part to the rigid racial hierarchy that placed whites at the top and excluded people from other races, those from different backgrounds began recognizing the benefits of cooperation and coalition building between what had heretofore been disparate racial groups.[96] Scholars have documented how racially marginalized groups historically competed for marginal favors doled out by the white majority.[97] With the influx of immigrants arriving after the 1965 Immigration Act, came the opportunity for collaboration and connection instead.[98] During that time, pro-Black and pro-Brown groups found commonalities and reasons to band together through a shared non-white identity and accompanying legal and social exclusion from the full benefits of American life.[99]

Black Americans, Asian Americans, Native Americans, those from the Latinx community, and other non-whites that had been working separately to advance their own group interests recognized that they might achieve more by working together.[100] The possibility that collective

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95. Constance Grady, *Why the Term 'BIPOC' is So Complicated, Explained by Linguists*, VOX (June 30, 2020), https://www.vox.com/2020/6/30/21300294/bipoc-what-does-it-mean-critical-race-linguistics-jonathan-rosa-deandra-miles-hercules [https://perma.cc/CW2P-GX6F]. "Person-first" language is distinguished from "disability-first" or "identity-first" language, wherein the diagnosis, disability, or condition is used as the first descriptor of a person. Tara Haelle, *Identity-First vs. Person-First Language is an Important Distinction*, ASS'N OF HEALTH CARE JOURNALISTS: COVERING HEALTH (July 31, 2019), https://healthjournalism.org/blog/2019/07/identity-first-vs-person-first-language-is-an-important-distinction/ [https://perma.cc/JYL8-AQVN].

96. PAULA MCCLAIN & JESSICA D. JOHNSON CAREW, "CAN WE ALL GET ALONG?" RACIAL AND ETHNIC MINORITIES IN AMERICAN POLITICS 251–53 (7th ed. 2017). Also at this time, groups initially seen as non-white—including Italians and the Irish—became slowly incorporated into whiteness. *See* IGNATIEV, *supra* note 53, at 40, 79. *See generally* ROEDIGER, *supra* note 53 (recounting how various ethnic groups assimilated into a white United States). Even today there are debates about who counts as white—with some considering Jews a separate non-white ethnic identity and others counting them as a religious minority comprised primarily of white people. *See generally* KAREN BRODKIN, HOW JEWS BECAME WHITE FOLKS AND WHAT THAT SAYS ABOUT RACE IN AMERICA (1998) (arguing the process and reasons behind how the Jewish people in the United States became "white").

97. *See* MCCLAIN & CAREW, *supra* 96, at 27, 254; Carolyn Sorisio, *Introduction: Cross-Racial and Cross-Ethnic Collaboration and Scholarship: Contexts, Criticism, Challenges*, 38 MELUS 1, 2 (2013).

98. Claire Jean Kim & Taeku Lee, *Interracial Politics: Asian Americans and Other Communities of Color*, 34 POL. SCI. & POL. 631, 631 (2001).

99. Grady, *supra* note 95 (describing how in the 1960s and 70s, "groups like the Black Panther Party for Self Defense and the Brown Berets came together in solidarity as [P]eople of [C]olor, which was a new instantiation of the idea of people *having* color").

100. EDUARDO BONILLA-SILVA, WHITE SUPREMACY AND RACISM IN THE POST-CIVIL RIGHTS ERA 203 (2001) ("[T]he new civil rights movement must have a multiclass, multiracial minority group agenda."); *see also* MICHAEL DAWSON, BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS (1994) (discussing linked fate); Bonilla-Silva, *supra* note 55, at 472

unity could produce outcomes that were greater than the sum of their individual parts bound them together politically and strategically.[101] This coalition building continues today; even when their immediate interests do not converge, People of Color remain united in working toward the broader goal of a more antiracist future.[102]

Contemporary scholars also theorize and document a People of Color consciousness, one that co-exists with other deeply held racial identities.[103] Still today, "the emergence of a broader *person of color* identity underscores the adage of 'strength in numbers.'"[104] A People of Color consciousness mirrors decades of coalition building in other pan-ethnic and pan-racial groups.[105] For example, those who may have thought of themselves distinctly as Salvadoreans, Mexicans, Colombians, or Cubans abroad often willingly group together for political power in the United States with others already comfortable being part of a Latinx or Hispanic community.[106] Similarly, while nationalistic divisions permeate identity for those with ancestors from Korea, China, India, Pakistan, Japan, Vietnam, Sri Lanka, the Philippines, and other Asian countries, in the United States they choose at times to assemble under the Asian American banner for mutual support and strength.[107]

(describing how dark-skinned immigrants from Africa, Latin America, and the Caribbean "accepted the duality of their social classification as Black in the United States while retaining and nourishing their own cultural or ethnic heritage").

101. MCCLAIN & CAREW, *supra* note 96, at 246.

102. *E.g.*, Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 528–33 (1980) (describing racial interest-convergence in pursuing educational effectiveness).

103. Co-existing identities is not a new concept. The Civil Rights Movement saw significant connections between communities of color, as well as class solidarity, as evidenced in Martin Luther King Jr.'s Poor People's Campaign and Malcolm X's Afro-American liberation movement, both of which promoted unity. Drew Dellinger, *The Last March of Martin Luther King Jr.*, ATLANTIC (Apr. 4, 2018), https://www.theatlantic.com/politics/archive/2018/04/mlk-last-march/555953/ [https://perma.cc/G82B-XTJY]; Reiland Rabaka, *Malcolm X and/as Critical Theory: Philosophy, Radical Politics, and the African American Search for Social Justice*, 33 J. BLACK STUD. 145, 151–52 (2002).

104. Efrén Pérez, *(Mis)Calculations*, *Psychological Mechanisms, and the Future Politics of People of Color*, 6 J. RACE, ETHNICITY & POL. 33, 38 (2021); PÉREZ, *supra* note 21.

105. YEN LE ESPIRITU, ASIAN AMERICAN PANETHNICITY: BRIDGING INSTITUTIONS AND IDENTITIES 19–20 (1992) ("[T]he pan-Asian concept, originally imposed by non-Asians, became a symbol of pride and a rallying point for mass mobilization by later generations.").

106. *See* CRISTINA BELTRÁN, THE TROUBLE WITH UNITY: LATINO POLITICS AND THE CREATION OF IDENTITY (2010) (using key moments in U.S. Latinx political history to explore how Latinx electoral and protest politics have aimed to erase diversity in favor of images of commonality). At other times, they are lumped into groups even though they may prefer to remain separate until their distinct priorities are made clear, as in the 2020 election. Hilary Sonneland, *Chart: How U.S. Latinos Voted in the 2020 Presidential Election*, AMERICAS SOC'Y/COUNCIL AMERICAS (Nov. 5, 2020), https://www.as-coa.org/articles/chart-how-us-latinos-voted-2020-presidential-election [https://perma.cc/22PN-LGMT].

107. Viet Thanh Nguyen, *What the Asian-American Coalition Can Teach the Democrats*,

In his pathbreaking book *Diversity's Child: People of Color and the Politics of Identity*, Professor of Political Science and Psychology Efrén Pérez provides evidence to support his thesis that there exists "a sense of solidarity among [People of Color]" as a whole, even while individuals retain distinct ethnic and national identities.[108] In other words, "a person's sense of being African American, Asian American, or Latino is *nested under* this broader category, *people of color*."[109] Many individuals maintain their specific racial identity while also developing a broader sense of belonging in a community of People of Color. Thus, "the interface between racial identity and one's identity as a [person of color] can be understood as a relation between a subordinate and superordinate identity, where narrower racial groups are nested below the broader [People of Color] category."[110] In search of broader political power, "many of these disparate, unique racial and ethnic groups have now coalesced—by design and through elite action—into a larger mega-group, with African Americans, Asian Americans, Latinos, and others identifying, many times, as *people of color*."[111] The origins and evolution have thus prioritized identity and engagement with a People of Color identity primarily for purposes of political progress and mutual benefit, with added opportunities for social connection and solidarity.[112]

ii. Limitations of the Term

Although strength in numbers, political support, and social solidarity are clear benefits of the People of Color moniker, the term also has drawbacks. There may be tensions in the inevitability of conflict between an individual's personal racial/ethnic identity and a broader coalition-based People of Color identity.[113] This is especially true because the People of Color coalition is comprised of people from different

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N.Y. TIMES (Dec. 16, 2020), https://www.nytimes.com/2020/12/16/opinion/asian-american-democrats.html?referringSource=articleShare [https://perma.cc/G2ZY-7S2U] (stating both that "people in Asia do not typically imagine themselves as Asians, but rather tend to identify with specific nationalities or ethnicities" and that immigrants from Asia "have always become 'Asian-American' in response to anti-Asian racism"); Ishisaka, *supra* note 19 (reporting that the term "Asian American" is a direct rejection of the term "Oriental" and grew out of the civil rights movement of the 1960s); ESPIRITU, *supra* note 105, at 24 (describing certain labor movements as "inter-Asian solidarity"); *see* DINA G. OKAMOTO, REDEFINING RACE: ASIAN AMERICAN PANETHNICITY AND SHIFTING ETHNIC BOUNDARIES (2014).

108. PÉREZ, *supra* note 21, at 39.

109. Pérez, *supra* note 104, at 42.

110. PÉREZ, *supra* note 21, at 43.

111. Pérez, *supra* note 104, at 36.

112. ACEVES, *supra* note 70, at 33–34.

113. DAWSON, *supra* note 100, at 182 (describing how political views may differ among African Americans even though those views are most often compared to white Americans); Bonilla-Silva, *supra* note 55, at 469–70 (discussing the structural racial hierarchy in racialized social systems).

racial/ethnic groups that have "fractious political histories, goals, and aspirations."[114] When conflict between the two identities occurs, individuals must choose; according to Sociology Professor Eduardo Bonilla-Silva's research on in-group preferences, many individuals will likely prefer their own racial/ethnic group at the expense of not only their People of Color identity but of People of Color power more generally.[115]

Relatedly, the People of Color umbrella may conceal circumstances that are unique to particular groups, or that are not relevant or critical for others. As an example: "for many activists and linguists, it feels disingenuous to have a conversation about police brutality against 'people of color' when we know that police brutality disproportionately targets Black people."[116] Thus, including Asian Americans, for instance, in the People of Color umbrella as victims of police violence can be a distraction from what should be the main focus: anti-Black racism.

A related challenge is that preferring a People of Color identity runs the risk of subsuming other perspectives within the People of Color umbrella. Although Pérez does not expect "that individuals forget" their particular racial identity, he argues that "each of these categories becomes temporarily subsumed under the larger collective, *people of color . . . .*"[117] Yet even a willingness to "temporarily subsume" a strongly held personal identity forged from birth in service of an emerging identity concept may be too much to expect.[118] This is especially true when we consider marginal perspectives within the larger People of Color collective. Research has shown that "in achieving Latin[x] or Asian [American] unity, the unique perspectives and needs of the smaller groups who contribute to the whole, such as Cubans or Koreans, are often lost."[119] The interests of those who are overlooked within their own pan-ethnic community—such as South Asians in the larger Asian American umbrella—should not be overlooked under an even broader People of

114. PÉREZ, *supra* note 21, at 2.

115. *See, e.g.*, Bonilla-Silva, *supra* note 55, at 472 (describing how dark-skinned immigrants historically rejected their classification as "Black" in the United States out of preference for their own ethnic or cultural identity); BONILLA-SILVA, *supra* note 12, at 190–202 (finding that Latinx and Asian Americans continue to have negative racial attitudes about Black Americans); *see also* Henri Tajfel, M. G. Biling, R. P. Bundy & Claude Flament, *Social Categorization and Intergroup Behavior*, 1 EUR. J. SOC. PSYCH. 149, 172 (1971); HENRI TAJFEL, HUMAN GROUPS AND SOCIAL CATEGORIES: STUDIES IN SOCIAL PSYCHOLOGY (1981) (telling the story of individuals and their affiliations with larger social groups).

116. Grady, *supra* note 95; s*ee also* Deo, *supra* note 20, at 137–38.

117. PÉREZ, *supra* note 21, at 3.

118. *But see* MARK LILLA, THE ONCE AND FUTURE LIBERAL: AFTER IDENTITY POLITICS (2017) (suggesting Americans emphasize political commonalities above or even at the expense of personal identity).

119. PÉREZ, *supra* note 21, at 21.

Color umbrella.[120] There is also the concern that relying on the term People of Color misses intersectional attention and analysis, which we turn to next.

B. Women of Color

In response to gender-based marginalization within the larger feminist movement, as well as from within the People of Color community, many women identify instead of, or in addition to, People of Color as Women of Color.[121] Their preference for this term is based in part on their own peripheral (gendered) existence within both the People of Color identity group as well as the traditional (white) feminist movement.[122] The purposeful centering of intersectional identity is thus a key component. The origins, evolution, and limitations of the term are discussed next.

i. The Intersection of raceXgender

Just as distinct People of Color identities and organizations were formed due to their exclusion from benefits extended to whites, gender has marginalized women from both white and non-white communities since perhaps the dawn of time.[123] Women's voices, perspectives, and priorities are marginalized within communities of color—including pan-racial groups (e.g., People of Color) and individual racial groups (e.g., Latina).[124]

The very concern that minority groups within the larger People of Color umbrella would be ignored led to the creation of a separate umbrella identity: Women of Color. The Women of Color community adds

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120. *See* Jennifer Lee & Karthick Ramakrishnan, *Who Counts as Asian?*, 43 RACIAL & ETHNIC STUD. 1733 (2019) (describing the pattern of "South Asian exclusion" in which South Asians classify Indians and Pakistanis as Asian, while others, including Asian Americans, are significantly less likely to do so).

121. *See* ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE: BLACK WOMEN'S STUDIES (Akasha Gloria Hull, Patricia Bell-Scott & Barbara Smith eds., 2nd ed. 2015); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 604 (1990). *But see* Catharine A. MacKinnon, *From Practice to Theory, or What Is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 20 (1991) ("[T]o argue that oppression 'as a woman' negates rather than encompasses recognition of the oppression of women on other bases, is to say that there is no such thing as the practice of sex inequality.").

122. Adrien Katherine Wing, *Introduction* to CRITICAL RACE FEMINISM 7 (Adrien Katherine Wing, ed., 2d ed. 2003) (explaining that many proponents of Critical Race Feminism have not joined the mainstream feminist movement because of its "essentialization of all women, which subsumes the variable experiences of women of color under the experience of white middle-class women").

123. CATHARINE A. MACKINNON, BUTTERFLY POLITICS 11–22 (2017).

124. *See* Wing, *supra* note 122, at 1 ("Whether they be African American, Latina, Asian [American], or Native American, these women have failed to be successfully integrated into the mainstream.").

gender identity to People of Color to focus on the minority perspective within gender: women.[125] The decisive emphasis on what Kimberlé Crenshaw termed intersectionality—here, a combination of the two devalued identity groups of gender ("women") and race ("of color")—centers two heretofore marginalized groups in one powerful voice.[126] Additional research building on intersectionality introduces the concept of *raceXgender*, which reflects "the compound effects of devaluation based on both race and gender," showcasing how these two identity characteristics yield unique experiences for Women of Color.[127]

Volumes of research have explored how "[m]ainstream feminism has paid insufficient attention to the central role of white supremacy's subordination of women of color."[128] Even within CRT, which "constitutes a race intervention in leftist discourse and a leftist intervention in race discourse," issues of gender have not always been prioritized.[129] CRT scholar and Professor Richard Delgado notes that because "[f]eminism is white-themed, while civil rights discourse is largely geared toward the problems of men of color;" thus, a separate space is critical to document and address the needs of women of color.[130] Hence, the need for "a feminist intervention within CRT."[131]

Law professor and CRT foremother Patricia Williams reminds us that women have a different experience and legacy from men, even those sharing the same racial background; for instance, being "the object of property" means different things based on gender, which makes "reclaiming that . . . from which [one] ha[s] been disinherited" even more

125. There is increasing recognition of those who identify as neither a man nor a woman "with growing acceptance of gender-neutral pronouns, such as 'they, them, and theirs,' and recognition of a third-gender category by [a number of] U.S. states." Jessica Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 895 (2019). After conducting an analysis of the empirical data used in this Article, the author uncovered that there were no faculty in the Diversity in Legal Academia study who identified as non-binary and a very small number of students—1% of the full sample in 2019—who have done so since 2016 when LSSSE introduced the response option of "another gender identity" to a survey question about gender.

126. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 166–67 (1989). Others have written about similar concerns using the terms "multiple consciousness, cosynthesis, holism, interconnectivity, and multidimensionality." Wing, *supra* note 122, at 7.

127. Deo, *supra* note 29, at 241.

128. Wing, *supra* note 122, at 7; *see also* Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, 13 BOUNDARY 2, at 333 (1984) (explaining that feminist women of color use the term "colonization" to refer to white women's appropriation of their experiences).

129. Wing, *supra* note 122, at 5.

130. Richard Delgado, *Foreword* to CRITICAL RACE FEMINISM xiv (Adrien Katherine Wing ed., 2d ed. 2003).

131. Wing, *supra* note 122, at 7.

profound for women of color and Black women specifically.[132] Even in academia, a supposedly "liberal" bastion, there are raceXgender disparities including "formidable obstacles that Women of Color encounter on the road to tenure and promotion" and identity-based "tools that can be deployed to resist, fight back, and prevail."[133] The term Women of Color is thus "a solidarity definition, a commitment to work in collaboration with other oppressed women of color who have been minoritized."[134] There is also strength in the power of the collective to "recognize and honor the connections among body, mind, culture, and spirit" that are shared among women of color.[135]

ii. Constraints of Women of Color

While women of color deserve safe space, there are also times when the People of Color umbrella is a more powerful tool to reach stated goals.[136] Furthermore, in contexts where gender significantly impacts the experience of people even from the same racial background (i.e., criminal justice reform), the experiences of men of color should be prioritized within People of Color.[137]

Additionally, the Women of Color umbrella can obscure unique experiences of particular groups who gather underneath it.[138] As one important example, the racial history of attempted genocide combined with gender-based family expectations means that Native American women face unique challenges that differ not only from those that Native American men face (because of different gendered expectations) but also

132. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 216–17 (1992).

133. Yolanda Flores Niemann, Gabrielle Gutiérrez y Muhs & Carmen G. Gonzalez, *Introduction* to PRESUMED INCOMPETENT II: RACE, CLASS, POWER, AND RESISTANCE OF WOMEN IN ACADEMIA 7 (Yolanda Flores Niemann, Gabrielle Gutiérrez y Muhs & Carmen G. Gonzalez eds., 2020); Meera E. Deo, Unequal Profession: Race and Gender in Legal Academia (2019).

134. Grady, *supra* note 95 (quoting the remarks of Loretta Ross, the co-founder of SisterSong Women of Color Reproductive Justice Collective, as she discussed the creation of the term Women of Color at the 1977 National Women's Conference).

135. Angela P. Harris & Carmen G. González, *Introduction* to PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA 7 (Yolanda Flores Niemann, Gabrielle Gutiérrez y Muhs & Carmen G. González eds., 2012).

136. One example of how using "People of Color" would be effective is when considering the lack of corporate CEOs from diverse backgrounds. Richie Zweigenhaft, *Fortune 500 CEOs, 2000-2020: Still Male, Still White*, SOC'Y PAGES (Oct. 28, 2020), https://thesocietypages.org/specials/fortune-500-ceos-2000-2020-still-male-still-white [https://perma.cc/TTH4-BTHM]; *see* Afra Afsharipour, *Women and M&A*, 12 U.C. IRVINE L. REV. 359 (2022).

137. *See generally* AKIVA M. LEIBERMAN & JOCELYN FONTAINE, URB. INST., REDUCING HARMS TO BOYS AND YOUNG MEN OF COLOR FROM CRIMINAL JUSTICE SYSTEM INVOLVEMENT (2015) (discussing challenges facing boys and men who are African American, Latino, Native American, and Asian American); Deo, *supra* note 20, at 137.

138. At other times (e.g., the gendered upbringing of girls with dolls), the experiences of white women and women of color will be so similar that there will be no need to highlight race and scholars can write more broadly about gender.

those that other women of color face (because their communities have not suffered the same atrocities).[139] Subsuming all of these women within the category Women of Color can discount the unique experiences of women from particular groups, especially those that may otherwise be overlooked.[140]

C. BIPOC

i. What is BIPOC?

BIPOC is a relatively new label used by some anti-racism advocates and rejected by others. Because of the nascent nature of the term, there is little scholarship or other commentary that explains its origins or traces its evolution. This introduction to the moniker attempts to decipher where it started and how/why it has grown, though again the term is so new that its history is not completely clear. Similarly, while the contours have not yet been defined, it does depend on some relatively fixed boundaries and preferences that are explored in this Section.[141]

BIPOC is a synonym for People of Color that foregrounds Black ("B") and Indigenous ("I") people within the larger People of Color community.[142] By listing their letters first, the term centers two groups—Black and Indigenous—that proponents of BIPOC argue are critical for understanding the origins of race and racism in the United States.[143] Those who use BIPOC see Indigenous and Black Americans as sharing a common historical experience vis-à-vis whites; they therefore center these two communities linguistically and conceptually because they see them as fundamental to understanding the origins of all racial experiences in the United States.[144] Using the term BIPOC signals an explicit decision "to acknowledge that not all people of color face equal levels of injustice."[145] Employing a hierarchy of oppression among

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139. *See* SARAH DEER, THE BEGINNING AND END OF RAPE: CONFRONTING SEXUAL VIOLENCE IN NATIVE AMERICA 31–43 (2015) (linking the sexualization and related sexual violence against Native American women to their dispossession as a community).

140. *See* Sutton, *supra* note 27 (explaining the need for disaggregated data on Native Americans and Native American women).

141. The origins and limitations referenced here are less reliant on scholarly sources (since there are few) and more dependent on popular culture to navigate usage.

142. Garcia, *supra* note 85.

143. Grady, *supra* note 95 ("Some activists have responded by turning to the term 'BIPOC' in an attempt to center the voices of Black and Indigenous communities."); Deo, *supra* note 20, at 118.

144. The BIPOC Project states, "[w]e address how three pillars of racism—Native invisibility, anti-Blackness and white supremacy—are internalized and show up in mutually reinforcing, distinct, and specific ways within BIPOC spaces and impede our efforts to collaborate across difference." *Our Theory of Change*, THE BIPOC PROJECT, https://www.thebipocproject.org/our-approach [https://perma.cc/NE6F-V2RN].

145. Chevaz Clarke, *BIPOC: What Does it Mean and Where Does it Come From?*, CBS NEWS

communities of color, advocates of BIPOC purposefully prioritize the two groups that they argue are most affected by race and racism in the United States.[146] They do so by listing their initials both separately and first, followed by a remnant group: *and other People of Color*.[147]

In contrast to the origins of the People of Color and Women of Color monikers, proponents of BIPOC as a racial term openly resist calls for unity.[148] They do so because they believe that aggregating with others as People of Color contributes to "Native invisibility [and] anti-Blackness."[149] Instead, they argue that use of their new term serves to "center BIPOC most at the margins"—meaning that Black and Indigenous people are more marginalized than other communities of color and should therefore be foregrounded in the label.[150] Supporters of the BIPOC term argue that this is because "Black and Indigenous people are severely impacted by systemic racial injustices," apparently to greater degrees than other people of color and in all racial contexts.[151]

ii. The Dangers of BIPOC

Despite the reasons proponents share, there are significant shortcomings with using BIPOC. Three are discussed briefly here.[152] First,

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(July 2, 2020), https://www.cbsnews.com/news/bipoc-meaning-where-does-it-come-from-2020-04-02 [https://perma.cc/AFY3-W6J3].

146. *See* Deo, *supra* note 20, at 126.

147. *Id.* at 133 (citing NATIONAL NURSES UNITED, SINS OF OMISSION 5 (2020), https://www.nationalnursesunited.org/sites/default/files/nnu/documents/0920_Covid19_SinsOfOmission_Data_Report.pdf [https://perma.cc/XA6W-K5WP]).

148. THE BIPOC PROJECT, *supra* note 144, asserts the following: "We disrupt calls for 'unity' by making explicit dynamics of power across intersectional identities within a racial hierarchy underpinned by Native invisibility, anti-Blackness and white supremacy, and center BIPOC most at the margins."

149. *Id.*

150. *Id.*

151. Clarke, *supra* note 145.

152. While three related concerns are raised here, there are many other problems with the term BIPOC—starting with general confusion about what the acronym references. Apparently, some people think it references bisexual people of color. Garcia, *supra* note 85. Also, because the term is promoted largely on social media among "woke" elites and corporate entities, there has not been a process for community engagement of the BIPOC term. *See* Harmon, *supra* note 33. By contrast, People of Color and Women of Color were adopted by academics, advocates, and allies after considerable conversation and over the course of time. Grady, *supra* note 95. Additionally, BIPOC ignores the vital importance of multiracial and multiethnic communities—not only forgetting that people can be both Black and Indigenous, but that they can be, for example, Black and Asian American or Latinx and Native American. Are individuals from those communities contemplated within the BIPOC term? If so, are they part of the foregrounded Black and Indigenous label while the rest of their identity is relegated to the background? Furthermore, there are complex interactions between legal identity and cultural identity for Native Americans with some being legally recognized members of federal tribes without any particular cultural affiliation (and without an automatic shared racial identity) and others being steeped in culture and tradition without formal legal recognition or membership (though perhaps sharing a racial

although advocates assert that the term "seek[s] to intentionally reframe the Black/white binary,"[153] BIPOC arguably maintains the binary—simply adding the word "Indigenous" to the side of Black Americans, and relegating all other non-whites to an amorphous leftover category.[154] Second, by intentionally centering two groups, BIPOC by definition marginalizes other communities of color with significant and important histories of race and racism in the United States—including those from the Latinx, Asian American, and Arab American communities—while also prioritizing historical oppression over contemporary discrimination.[155] Third, the term promotes *virtue signaling*—using words or actions to suggest support for a cause for the primary purpose of showcasing moral superiority—without pushing for substantive change or drawing from the actual context of the issue at hand.[156] Each drawback is discussed in greater detail below.

1. Maintaining the Black/white Binary

There are times when centering Black and Indigenous experiences while keeping those of other People of Color apart makes sense. When Black and Indigenous communities have been marginalized and are central to the debate at issue, they should be highlighted. The horrors of forced migration or mandated assimilation of Native peoples and Black enslaved people are examples of when it is imperative for academics, advocates, and allies to center Black and Indigenous voices and experiences and name these two groups directly. In those instances, even the term People of Color would be inappropriate; so too would the term

identity with other Indigenous people). Hilary N. Weaver, *Indigenous Identity: What Is It, and Who Really Has It?*, 25 AM. INDIAN Q. 240 (2001); *see* Alex T. Skibine, *Culture Talk or Culture War in Federal Indian Law*, 45 TULSA L. REV. 89 (2013). These and other complexities are entirely missing from BIPOC's foundations and are not easily incorporated into its structure of preferring certain groups to others.

153. THE BIPOC PROJECT, *supra* note 144 ("We seek to intentionally reframe the Black/white binary . . . .").

154. "For much of the twentieth century and long before, American courts and even scholars assumed that people were either White or non-White, or in the alternative Black or non-Black." Meera E. Deo, *Affirmative Action Assumptions*, 52 U.C. DAVIS L. REV. 2407, 2417 (2019) (citing Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CAL. L. REV. 1213 (1997)).

155. Deo, *supra* note 20, at 127.

156. Cambridge Dictionary notes that virtue signaling "is the popular modern habit of indicating that one has virtue merely by expressing disgust or favour for certain political ideas or cultural happenings." *Virtue Signalling*, CAMBRIDGE ADVANCED LEARNER'S DICTIONARY AND THESAURUS, https://dictionary.cambridge.org/us/dictionary/english/virtue-signalling [https://perma.cc/D98F-7498]. This definition from Urban Dictionary is even more direct: "[t]o take a conspicuous but essentially useless action ostensibly to support a good cause but actually to show off how much more moral you are than everybody else." *Virtue Signalling*, URB. DICTIONARY, https://www.urbandictionary.com/define.php?term=Virtue%20Signalling [https://perma.cc/4LQA-FUZS].

BIPOC, as "other People of Color" have not endured the same horrors and the term would incorrectly reference them peripherally.

In many instances, however, BIPOC is even more ill-fitting as a stand-in for People of Color. For example, BIPOC is both awkward and incorrect when discussing xenophobia—more likely experienced by Asian American, Latinx, and other People of Color populations who are more likely to have immigrant backgrounds.[157] Furthermore, when Latinx, Asian American, Arab American, and other communities of color are purposefully pushed to the periphery, this signals *racial triangulation*—using these groups as a "buffer" separating whites from Black Americans which perpetuates the binary and divides groups that should be unified.[158] Similarly, those in power may draw on xenophobia in an attempt to pit communities with large populations of recent immigrants against those without as another strategy of divide-and-conquer that seeks to split the collective power of People of Color.[159]

2. Prioritizing Historical Oppression

Second, and relatedly, while historical context matters, it cannot have exclusive purchase of claims of racism or oppression. BIPOC begins by overstating a shared exclusive history between Black and Indigenous people, suggesting false parallels in the horrors of slavery as compared with attempted genocide and the dispossession of land and culture—both horrific, but not the same.[160] Furthermore, highlighting these two groups

157. *See* Efrén O. Pérez, *Xenophobic Rhetoric and its Political Effects on Immigrants and Their Co-Ethnics*, 59 AM. J. POL. SCI. 549 (2015); Wu, *supra* note 80, at 12–20 (noting that Asian and Latinx populations have higher rates of immigration and are more likely to be viewed as foreign).

158. Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & SOC'Y 105, 107 (1999).

159. *See* PHILIP KRETSEDEMAS, MIGRANTS AND RACE IN THE U.S.: TERRITORIAL RACISM AND THE ALIEN/OUTSIDE 28–36 (2014).

160. Some note that these two groups suffered at the hands of white supremacy without their own individual agency; Native people were here before white settlers and Black Americans were enslaved and brought against their will. *See, e.g.*, Erfan Moradi, *How 'Race' Came Into Being*, BERKELY NEWS (Sept. 25, 2020), https://news.berkeley.edu/2020/09/25/race-the-power-of-an-illusion-biological-or-social-determinants-of-race/ [https://perma.cc/J6GS-P594] (describing and linking to a docuseries about "how the story of race was created to rationalize the enslavement of Africans and the genocide of Indigenous people"). One could also draw parallels to the ancestors of Chicanos (Mexican Americans) who, like Native Americans, lived on this land before it was the United States. *See* Guadalupe T. Luna, *Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a "Naked Knife,"* 4 MICH. J. RACE & L. 39, 43–44 (1998). While refugees and asylees are obviously not enslaved in the same way as Black Americans were (though many are detained, including children removed from parents like Native children were, and continue to be), all are here less of their own free will and more because external forces pushed them out of their native lands. *See* Mark Trahant, *Indian Country Remembers the Trauma of Children Taken from Their Parents*, THE WORLD: INDIAN COUNTRY TODAY (June 19, 2018), https://www.pri.org/stories/2018-06-19/indian-country-remembers-trauma-children-

both prioritizes past (as compared to ongoing) discrimination and ignores commonalities of marginalization from white America shared by other People of Color. The experiences of Japanese internment and Latinx family separation/childhood detention are more recent race-based atrocities that have no place under the BIPOC banner because, by definition, neither Asian American nor Latinx experiences are spotlighted by the term though individuals from these groups disproportionately suffered through these experiences.[161]

Even membership in the two communities, Native American and Black, has different historical and contemporary realities. Since antebellum times, "the one-drop rule" has held that "anyone with as much of 'one drop' of Black heritage is automatically Black."[162] Yet, "the inverse logic applies when it comes to identifying as Indigenous: You have to prove that you have enough Indigenous heritage to belong in the group" as a formal legal citizen.[163] Furthermore, the U.S.-centric nature of the term BIPOC makes it virtually irrelevant globally.[164]

Purposefully prioritizing Black and Indigenous communities in every instance involving race also supports what some have called the *Oppression Olympics*—ranking the suffering of various groups resulting in "intergroup competition and victimhood" rather than racial solidarity

taken-their-parents [https://perma.cc/78CD-Z8QT] (comparing current family separation at the United States/Mexico border with separation of Native children from their families when sent to boarding schools). Others have argued that the term genocide applies to the Black American context too. Etienne C. Toussaint, *American Fugitive*, CURRENT AFFAIRS (Apr. 25, 2021), https://www.currentaffairs.org/2021/04/american-fugitive [https://perma.cc/YH5A-KBVN] (sharing the example of the Civil Rights Congress, arguing that "the U.S. government had violated international human rights law by sanctioning 'persistent, constant, widespread, [and] institutionalized' genocide of African Americans").

161. While these contemporary events are specific to the Asian American and Latinx communities, both share parallels with atrocities committed against Native Americans—before Native Americans were removed from ancestral lands, many were interned in camps; forced boarding school and adoption experiences predate modern family separation. Laura Rice, *For Survivors of Native American Boarding Schools, Family Separation is Nothing New*, TEX. STANDARD (June 26, 2018), https://www.texasstandard.org/stories/for-survivors-of-native-american-boarding-schools-family-separation-is-nothing-new [https://perma.cc/LF95-44GH].

162. Grady, *supra* note 95.

163. *Id.* Some have argued that "blood quantum" was purposefully used differently for various groups in order to maintain white privilege. *See, e.g.*, Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387, 387–88 (2006). Fewer Native Americans meant fewer contestations to land—prioritizing Native American assimilation. *Id.* In contrast, fewer Black enslaved people meant less free and later cheap labor—incentivizing whites to count more people as Black. *Id.* As Professor Kirsten Matoy Carlson wrote to the author in private correspondence, "The settler-colonial project actually depended on treating the two groups differently." Letter from Kirsten Matoy Carlson, Professor of L., Wayne State Univ., to author (2021) (on file with author).

164. *See, e.g.*, Grady, *supra* note 95.

and collective progress.[165] Solidifying a hierarchy of racial oppression cannot be the way forward.

3. Promoting Virtue Signaling

The term BIPOC reflects purely or primarily symbolic unity between Black and Indigenous communities, which Professor Derrick Bell and others would argue is not actual progress, and which today could be considered simply virtue signaling.[166] For groups to be at the center of a broader community of color, they must be represented in membership, leadership, and in the priorities of the group.[167] It is unclear whether BIPOC is the preferred term of Indigenous communities or individuals, let alone whether Native Americans use the term in their own advocacy or scholarship. Furthermore, the systematic invisibility—the "paper genocide" resulting from a lack of data on Native Americans—means it will be virtually impossible for Indigenous interests, preferences, priorities, or perspectives to be fully represented; while the name implies that the group has been centered, they instead remain excluded.[168]

Why "center" Native Americans in name if they are not included in substance? By foregrounding them in name only, BIPOC pretends to represent Indigenous people but actually contributes to their erasure by not including them in substance. This is an example of *virtue signaling*—pretending to center the experiences or preferences of a group to signal equity-driven principles while actually being indifferent to the goals of

165. ANGE-MARIE HANCOCK, SOLIDARITY POLITICS FOR MILLENNIALS: A GUIDE TO ENDING THE OPPRESSION OLYMPICS 4 (2011); *see also* Plaid & Macdonald-Dennis, *supra* note 92 (discussing the shortcomings of BIPOC, particularly in relation to the usage and history of the phrase People of Color).

166. BELL, *supra* note 12, at 18–19 (arguing that "symbolic progress" maintains the status quo by providing the oppressed with the illusion of progress without ceding real power). Furthermore, the political goals of Black vs. Indigenous populations are also divergent. Long before *Brown v. Board of Education*, Black Americans have prioritized integration and full inclusion. *But see* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (discussing the vein of Black activists pushing for equality, even if separate, over integration). Whereas Native American groups have purposefully resisted assimilation and fought to preserve their own separate spaces as sovereign nations. *See* VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 1–27 (1960); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 10–33 (1995).

167. Meera E. Deo, *Centering Marginalized Populations*, *in* ANTIRACIST LEADERSHIP (forthcoming 2023).

168. Sutton, *supra* note 27. Even published LSSSE findings do not always include disaggregated data on Native Americans because of the relatively small numbers of Native American law students in the United States., though the Diversity in Legal Academia data presented in this Article and published elsewhere includes a purposeful oversampling of Native Americans to fully include the variety of perspectives from that community. *See infra* Section III.B.i. Creative methods are key to inclusivity.

the group not being adequately represented.[169] It could also be considered *identity capitalism*—"efforts by ingroup members to benefit from outgroup members" by highlighting the outgroup's race, gender, or other identity characteristics primarily for show.[170] When the term Indigenous is named as important in BIPOC, this centers the speaker and their purported priorities rather than the needs of the group itself. It confirms the priorities of those who use the term as acting "to show how 'woke' they are, not because they value action."[171]

Some have argued that this very failure has occurred with advocates and scholars who use the term "Asian American and Pacific Islander" or "AAPI" in an attempt to be inclusive of Pacific Islanders when in actuality they are reporting data, analyses, findings, or the interests only of Asian Americans.[172] The same has been said of the inclusive term LGBTQIA+ which does not necessarily prioritize the experiences or outcomes of Transgender, Intersex, or Asexual populations.[173] The inclusion signaled by this term is simply an illusion. While foregrounding a group's name implies that the group has power, referencing the name without the group experience is not only inaccurate but actively maintains an unequal status quo. We should not make the same mistake by using BIPOC.

D. Better than BIPOC

This Article rejects adopting BIPOC as a synonym for People of Color. In instances where individual groups should be highlighted, the actual populations involved should be named and their experiences prioritized. If we move beyond the BIPOC term to consider what it stands for—the centering of particular groups—we can find inspiration. The

169. Urban Dictionary shares this definition of virtue signaling: "[t]o take a conspicuous but essentially useless action ostensibly to support a good cause but actually to show off how much more moral you are than everybody else." *Virtue Signalling*, *supra* note 156.

170. NANCY LEONG, IDENTITY CAPITALISTS: THE POWERFUL INSIDERS WHO EXPLOIT DIVERSITY TO MAINTAIN INEQUALITY 3 (2021).

171. Meera E. Deo, Book Review, 56 LAW SOC'Y REV. 311, 311 (2022) (reviewing LEONG, *supra* note 170).

172. Ishisaka, *supra* note 19. Some have included Pacific Islanders—or at least Native Hawaiians—with Indigenous populations while others have integrated them into the Asian American community. *See* ROBERT T. TERANISHI, ANNIE LE, ROSE ANN E. GUTIERREZ, RIKKA VENTURANZA, 'INOKE HAFOKA, DEMETURIE TOSO-LAFAELE GOGUE & LAVINIA ULUAVE, APIA SCHOLARS, NATIVE HAWAIIANS AND PACIFIC ISLANDERS IN HIGHER EDUCATION: A CALL TO ACTION 1 (2019) ("Although NHPIs [Native Hawaiians and Pacific Islanders] have been federally recognized as a separate racial category due to advocacy from the NHPI community, an underlying barrier to the study of the NHPI population has been data that aggregates NHPIs with Asian Americans.").

173. The LGBTQIA+ example is particularly salient as the term names overlooked groups (transgender, intersex, and asexual) though they, like Native Americans, are rarely included in data or priorities. *See, e.g.*, JULIE A. GREENBERG, INTERSEXUALITY AND THE LAW 101–03 (2012).

flexibility of mixing and matching various groups within the People of Color umbrella to fit particular instances or examples allows us to address racism with specificity. Matching the terms used with the data at hand is critical, though scholars should not begin with the *terms* in selecting the data or they risk hiding the very groups they seek to amplify.

For instance, when analyzing an issue affecting immigrants, advocates should use data collected from Latinx, Asian American, and other communities with long histories of immigration to the United States, specifying these groups as most likely to be affected by immigration policies and preferences.[174] When writing or speaking about original inhabitants of what is currently considered the American Southwest, we should specify our focus is on the Latinx and Indigenous communities that originally inhabited that land.[175]

There may be similar reasons for specificity beneath the Women of Color umbrella. In those instances, highlighting groups directly is preferable to discussing the issue as one broadly relevant to Women of Color as one entity. For example, significant medical complications among Black and Latina pregnant women implicate raceXgender bias specific to Black and Latina women, not People of Color or Women of Color, and certainly not BIPOC (which would relegate the Latina women centered in the data to the leftover part of the label).[176]

There may also be instances where it is important to both fully disaggregate the data and correspondingly name one or two particular race or raceXgender groups. While aggregating groups, pursuing commonalities, and drawing from shared experiences is often critical for political and strategic purposes, it is not always advisable. Police violence is one clear example that has yielded massive uprisings largely about how police interact specifically with Black men and Black women; while Latino men and others have also suffered the consequences of this violence, the issue of race-based police brutality is first and foremost an emergency targeting the Black community and should be presented as such.[177]

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174. Abbi Budiman, *Key Findings about U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/ [https://perma.cc/9Q9K-J2TL] ("By region of birth, immigrants from Asia combined accounted for 28% of all immigrants, close to the share of immigrants from Mexico (25%)."); Deo, *supra* note 20, at 139.

175. Chicanos within the Latinx community as well as Native Americans have claims to land in the West and Southwest from hundreds of years before Columbus arrived. Luna, *supra* note 160, at 40; Angelique EagleWoman, *Tribal Hunting and Fishing Lifeways and Tribal State Relations in Idaho*, 46 IDAHO L. REV. 81, 82 (2009).

176. Leila Goldstein, *Latina and Black Pregnant Women Show High Rates of COVID-19 in Southwest Ohio*, WOSU PUB. MEDIA (July 14, 2020), https://radio.wosu.org/post/latina-and-black-pregnant-women-show-high-rates-covid-19-southwest-ohio#stream/0 [https://perma.cc/WN37-H629].

177. Black Americans represent a full 22.5% of those killed by police in 2020, and 23.6%

Pretending that there is a crisis of police violence affecting People of Color or Women of Color or BIPOC eclipses the centrality of the Black body in this fight.

Previous scholarship has suggested both theoretical and practical explanations for why BIPOC fails.[178] Questions about whether to always center Black and Indigenous communities in conversations about people of color, concerns about virtue signaling, and highlighting historical atrocities over contemporary ones raise theoretical issues with using the BIPOC term.[179] There are also a range of contexts—from health disparities to mass incarceration, family separation to police violence—where it is obvious that either Black and Indigenous communities should not be lumped together or should not be centered in discussions about communities of color.[180]

The next Part of this Article delves more deeply into one particularly complex context: legal education. While it may not be initially obvious how and why language matters in legal education, the data explored below reveal that being specific with terminology, referencing the groups who have the most to lose, and ensuring they are represented beyond name is the best way forward.

III. Applying Racial Terms to Legal Education

With a clearer understanding of the terms and the antiracism efforts served by being precise in our language about race, we can now consider how various terms apply to different contexts. The Introduction of this Article shared simple examples of Black mass incarceration and anti-Asian hate crimes to illustrate the over- and under-inclusiveness of BIPOC.[181] Legal education is a useful and more nuanced canvas for this experiment, as it brings into one physical space People of Color (whom we can compare to whites), Women of Color (whom we can compare to Men of Color, as well as white women), and also (instead of using the BIPOC term) separate racial or even raceXgender groups.

In the law school environment, faculty and students are tested and expected to succeed though all have different backgrounds, experiences, and outcomes. Through the examples shared in this Part, we learn that there may be instances where People of Color is the best term to use,

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of those killed in 2021, but they represent only 13.6% of the U.S. population. MAPPING POLICE VIOLENCE, https://mappingpoliceviolence.org/ [https://perma.cc/T9YX-ZLRT] (Nov. 15, 2022); Deo, *supra* note 20, at 137–38.

178. Deo, *supra* note 20, at 127–39.

179. *Id.* at 127–31.

180. *Id.* at 131–39.

181. *See* discussion *supra* Introduction.

because their collective experience differs significantly from whites.[182] At other times it will be critical to engage with intersectionality "and the compound effects of . . . raceXgender . . . to highlight experiences that are specific to women of color faculty [and students] in an environment centered around and focused on white men."[183] In those instances, we can consider the umbrella group of Women of Color. In other instances still, the specific groups affected—the individual racial or even raceXgender groups most relevant to the matter at hand—should be named directly and highlighted purposefully. Each of these is better than BIPOC.

This Part draws on empirical data collected from law students as well as from law faculty to explore when to use People of Color, contexts where Women of Color may be more appropriate, and times when individual groups should be featured directly. The first Section presents quantitative (survey) data, illustrating how reliance strictly on numbers can hide the experiences of smaller populations. Aggregating qualitative (interview) data can mask experiences of less powerful groups as well. The second Section shares qualitative data in the form of quotes collected after analyzing patterns from study participant interviews, giving agency to the voices of marginalized populations that strive at times to be included in larger groups but at other times to be named and recognized for their unique experiences.[184]

In each Section, the goal of precision in data analysis and dissemination goes hand-in-hand with furthering anti-racism efforts by using appropriate racial terminology. Though the two priorities of accuracy and anti-racism are distinct, each is served by avoiding BIPOC and instead matching the issue at hand to the identities involved.

A. Law Students

i. Data from LSSSE

This Section applies the Article's thesis—that academics, advocates, and allies should use the terms People of Color, Women of Color, and those specific to each racial group involved in any given project rather

182. This is especially true in predominantly white institutions/campuses (PWIs) as compared to historically Black colleges and universities/institutions (HBCUs). The LSSSE survey draws on data from both PWIs and HBCUs while participants in the Diversity in Legal Academia study are from PWIs exclusively. It may be that different campus contexts also draw out various nuances between People of Color, Women of Color, and BIPOC, though that is beyond the scope of this Article. *Annual Results*, LSSSE, https://lssse.indiana.edu/annual-results/ [https://perma.cc/RE42-CMMY].

183. Deo, *supra* note 29, at 242.

184. For a more detailed understanding of the methods involved in the qualitative findings presented here, see MEERA E. DEO, UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA 171–74 (2019).

than BIPOC—to the law student context, utilizing data from the Law School Survey of Student Engagement (LSSSE). LSSSE measures the effect of law school on law students, with the understanding that the more invested students are, the better their outcomes.[185] For almost twenty years, LSSSE has partnered with law schools to conduct an annual survey of law students, asking about demographics, experiences, preferences, attitudes, and more.[186] LSSSE staff then share results with individual law schools, offering comparisons to "peer schools" and national averages.[187] LSSSE also conducts analyses to identify and share findings on various trends in legal education, publishing results on the LSSSE Insights Blog as well as in various reports.[188] Recent LSSSE Reports include: *Success with Online Education*, *The COVID Crisis in Legal Education*, *The Changing Landscape of Legal Education*, *Diversity & Exclusion*, *The Cost of Women's Success*, and *Relationships Matter*.[189]

LSSSE houses the largest dataset on law students in the country, with almost 400,000 responses collected since 2004 and opportunities to disaggregate by race, gender, first-gen status, debt level, and other characteristics.[190] The project shares longitudinal trends—including on debt, diversity, and overall satisfaction—in addition to offering assistance to academics and scholars interested in furthering their own research using LSSSE data.[191] The findings presented in this Section on both debt and diversity are drawn from LSSSE data highlighting how quantitative data connect with the terms People of Color, Women of Color, and other racial labels that are better than BIPOC.

ii. Debt Differentials

Investigating debt reveals how relying on People of Color vs. Women of Color vs. a more specific term serves to highlight different priorities. The term People of Color may drive us to do a simple analysis by race—comparing debt loads of People of Color to those of white

185. GEORGE D. KUH, JILLIAN KINZIE, JENNIFER A. BUCKLEY, BRIAN K. BRIDGES & JOHN C. HAYEK, NAT'L POSTSECONDARY EDUC. COOP., WHAT MATTERS TO STUDENT SUCCESS: A REVIEW OF THE LITERATURE 31–40 (2006); TERRELL L. STRAYHORN, COLLEGE STUDENTS' SENSE OF BELONGING 124–39 (2d ed. 2018).

186. *LSSSE Survey: The LSSSE Survey Tool*, LSSSE, https://lssse.indiana.edu/about-lssse-surveys/ [https://perma.cc/56Y8-52LL].

187. *Id.*

188. *See LSSSE Insights Blog*, LSSSE, https://lssse.indiana.edu/insights/ [https://perma.cc/8X4X-2BK4]; *Annual Results*, *supra* note 182.

189. See *id.* for access to LSSSE Reports.

190. For more about LSSSE, see *Who We Are*, LSSSE, https://lssse.indiana.edu/who-we-are [https://perma.cc/ZB4J-PHUF].

191. *See* MEERA E. DEO, CHAD CHRISTENSEN & JAKKI PETZOLD, IND. UNIV. CTR. FOR POSTSECONDARY RSCH., LSSSE SPECIAL REPORT: THE CHANGING LANDSCAPE OF LEGAL EDUCATION: A 15-YEAR LSSSE RETROSPECTIVE (2020).

students. While this analysis is useful when looking broadly and only at race, it masks the complex raceXgender dynamics at play as well as the ways in which different groups within People of Color (e.g., Asian Americans vs. Black Americans) have different debt realities.[192]

The LSSSE 2015 and 2016 Annual Reports, which focused on debt and scholarships, revealed not only rising debt levels but debt disparities based on race and gender.[193] Similarly, the American Bar Association found that within twenty years, "median tuition increased almost 6-fold at private law schools and more than 12-fold at public law schools."[194] These increases outpaced inflation during the same years while living expenses and book costs grew as well. LSSSE data reveal that almost 90% of law students graduate with educational debt.[195] While increased debt is common to students overall, disparities persist once we disaggregate the data.

1. People of Color

How do People of Color fit into this larger trend of increasing debt? Analyzing debt based solely on People of Color vs. whites yields interesting results. Clearly, "racial and ethnic wealth disparities in the U.S. have broad implications on student debt trends."[196] LSSSE data show that higher percentages of students of color than whites owe over $200,000 on educational loans upon law school graduation.[197] Longitudinal research from LSSSE has documented that this is an ongoing trend, with law students of color carrying higher debt loads than whites for years and with widening disparities in recent years.[198] In 2019, just over one-third (35%) of white students expected to graduate with over $100,000 in loans, compared to roughly *half* (49%) of students of color.[199] Conversely, 76% of all students who have *no* educational debt are white.[200]

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192. Intersectionality could go further here by examining *raceXclass*—the compound effects of race combined with socioeconomic status—which would likely also yield interesting results otherwise hidden beneath aggregate data based on race or class alone.

193. AARON N. TAYLOR, CHAD CHRISTENSEN & LOUIS M. ROCCONI, IND. UNIV. CTR. FOR POSTSECONDARY RSCH., LSSSE 2015 ANNUAL SURVEY RESULTS: HOW A DECADE OF DEBT CHANGED THE LAW STUDENT EXPERIENCE (2016); AARON N. TAYLOR & CHAD CHRISTENSEN, IND. UNIV. CTR. FOR POSTSECONDARY RSCH., LSSSE 2016 ANNUAL SURVEY RESULTS: LAW SCHOOL SCHOLARSHIP POLICIES: ENGINES OF INEQUALITY (2017).

194. TAYLOR, CHRISTENSEN & ROCCONI, *supra* note 193, at 6.

195. *Id.*

196. *Id.* at 12.

197. MEERA E. DEO & CHAD CHRISTENSEN, IND. UNIV. CTR. FOR POSTSECONDARY RSCH., LSSSE 2019 ANNUAL REPORT: THE COST OF WOMEN'S SUCCESS 9 (2019).

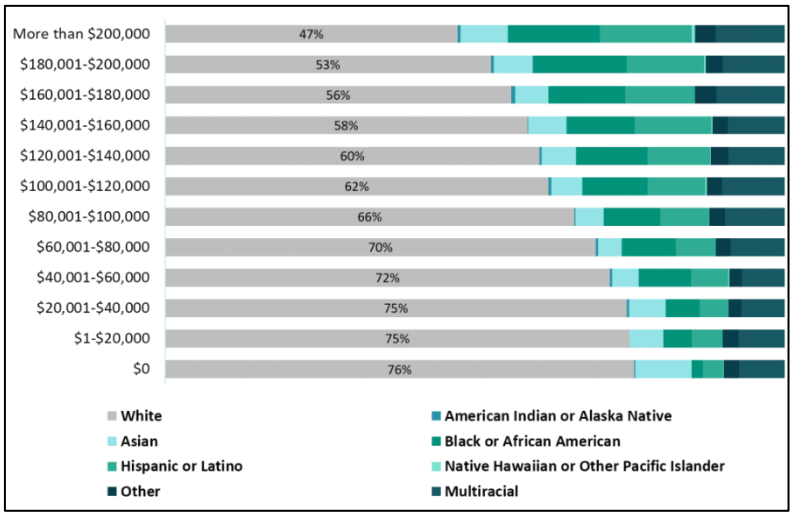
198. DEO ET AL., *supra* note 191, at 10–11.

199. *Id.* at 10.

200. *See infra* Figure 1.

Research on law school scholarships also shows that students of color are more likely to receive need-based aid than whites, and still the overall debt loads of students of color remain significantly higher than those of white students.[201] Thus, there are important disparities based solely on race that are revealed when analyzing debt loads for People of Color compared to whites. When considering debt, the term People of Color is both empirically supported and in line with broader racial justice efforts that make race-based comparisons with whites.

Figure 1. Educational Debt by Race (LSSSE, 2019)



2. Women of Color

We must also look within People of Color to see whether and how the combination of raceXgender changes the narrative. In the context of student debt, there are certainly gender disparities under the People of Color umbrella. Important raceXgender realities involving debt are masked when considering People of Color alone, marking the need to analyze the data by gender and utilize the term Women of Color in this instance. LSSSE data found not only that people of color carry more law school debt than whites, but also that women overall have heavier debt burdens than men, within every racial group.[202] Combining data on Native Americans, Black Americans, Asian Americans, and Latinx

201. TAYLOR & CHRISTENSEN, *supra* note 193, at 10 ("Black respondents were the most likely recipients of need-based scholarship aid; white respondents were least likely.").

202. DEO & CHRISTENSEN, *supra* note 197, at 9 ("Among those who expect to graduate from law school with over $160,000 in debt are 19% of women and 14% of men[;] . . . 7.9% of women will graduate from law school owing over $200,000 as compared to 5.5% of men.").

populations, higher percentages of Women of Color (23%) graduate with over $160,000 in law school debt, as compared with Men of Color (18%), white women (15%), and white men (12%).[203] Looking specifically at raceXgender reveals that women borrow more for law school than men, even controlling for race.[204]

Combining data on racial inequities with gender disparities reveals that Women of Color as an aggregate group have more debt than Men of Color, white men, or white women. Without looking specifically at this raceXgender intersection, this compound inequity would not be obvious, but instead hidden by how race and gender independently affect debt. Instead, recognizing both race and gender promotes efforts toward equity as well as accuracy in data reporting.

3. Better than BIPOC: Naming Specific Groups

Disaggregating the data even further by specific race and gender groups is particularly instructive in the law school debt context. Just as grouping together all People of Color masks gender disparities, it also conceals differences between unique communities of color. By considering how levels of debt intersect with specific racial groups as well as gender, we see that not all People of Color or even all Women of Color have similar levels of debt. While reporting on debt for People of Color or Women of Color can be helpful, we should also use precise language by naming the groups most affected. This serves the anti-subordination efforts discussed earlier, avoiding virtue signaling and prioritizing equity-based solutions targeting the groups most affected; it also preserves accuracy in reporting on data.

A full 53% of Black students and 57% of Latinx students expect to graduate law school over $100,000 in debt, while 43% of Black students report debt over $120,000.[205] Combining Black and Latinx students with Asian Americans—40% of whom expected to graduate owing over $100,000—would have diluted the disparities between Black and Latinx students as compared with whites (whose debt levels are similar to Asian Americans).[206] Furthermore, while white and Asian American students have comparable rates of merit-based awards, "Black and Latin[x] respondents were least likely" to receive them.[207] Although higher percentages of Native American women (8.5%) than men (6.0%) graduate with the highest debt levels of over $200,000, these statistics

203. *Id.* More detailed original survey data analysis using 2019 LSSSE data is also included here, beyond what is revealed in the cited report.

204. *Id.*

205. TAYLOR & CHRISTENSEN, *supra* note 193, at 12.

206. *Id.*

207. *Id.* at 9.

are not at the same startling levels as for Black women or Latina women.[208] Looking *within* People of Color is therefore critical to understanding and addressing distinct racial challenges.

We cannot simply state this as a BIPOC issue, as debt loads for Latinas are actually higher than for any other group, and Indigenous women have lower debt levels than both Latinas and Black women.[209] In these and other instances, disaggregating data further by raceXgender and naming the groups appropriately is critical. A larger percentage of Latinas (16%) borrow at the highest levels ($200,000+) to attend law school, followed by Black women (14%). Comparing these data with Latino men (12%) and Black men (7.3%) reveals a gender disparity between people from the same racial background that would otherwise be hidden.[210] Similarly, we can compare differences in debt load between Latinas and Black women with the debt load of Asian American women—only 7.7% of whom borrow over $200,000.[211] In this instance, there is a synergy in the experiences of Latinas and Black women; aggregating their data with Asian American and Native American women in order to expound on the Women of Color experience would mask the severity of their debt burden and overstate the debt loads of others. Because the two groups that share similarities are Latinas and Black women, the term BIPOC would be especially inappropriate in this instance, both because Latinas are not even included in the title and Indigenous people are. Instead, we must do better than the term BIPOC to consider a deeper purpose: highlighting the experiences of the most relevant marginalized groups. With regard to debt, those groups are Latinas and Black women.

Table 1. Students with Over $200,000 in Educational Debt, by raceXgender (LSSSE, 2019)

	Native American	Asian American	Black	Latinx	White
Women	0%	7.7%	14%	16%	5.5%
Men	0%	9.9%	7.3%	12%	4.3%

208. The 2019 LSSSE Annual Survey Results touches on raceXgender debt disparities, DEO & CHRISTENSEN, *supra* note 197, though these results on particular groups (Native Americans, Women of Color, Men of Color, etc.) are original data analysis done for this Article specifically.

209. *Id.*

210. *Id.* at 9; *see infra* Table 1.

211. DEO & CHRISTENSEN, *supra* note 197, at 9.

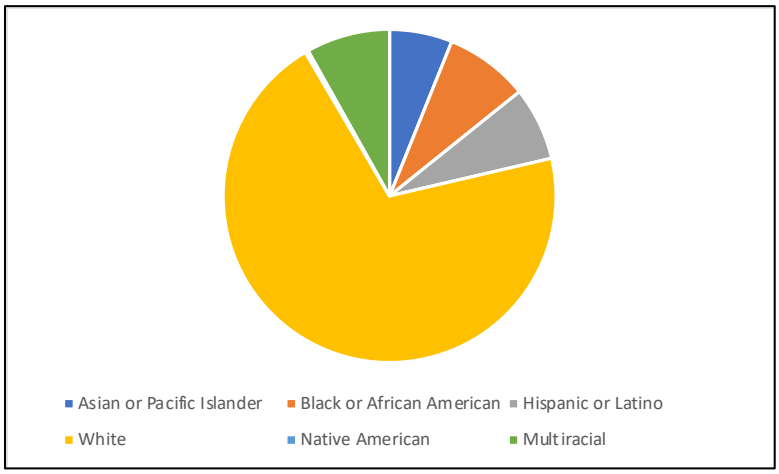
iii. Experiences with Diversity and Inclusion

As with debt levels, there are experiences shared by People of Color regarding diversity vis-à-vis whites. Because Women of Color have unique experiences as compared even with Men of Color it also is helpful to disaggregate by raceXgender and, when doing so, to use the Women of Color label. There are also reasons to delve *within* the People of Color category to examine the experiences of particular racial groups and highlight those as separate even from the People of Color category as a whole. It would serve neither empirical accuracy nor racial justice to assume that any two groups—Black and Indigenous, for BIPOC—have similar experiences and lump them together while marginalizing other People of Color.

1. People of Color

More People of Color are in law school today than ever before. Over the past fifteen years, the percentage of white students has declined from 83% to 70% of all students as the share of non-whites increased.[212] Today, law students of color include 8% who are Black, 7% Latinx, 6% Asian or Pacific Islander, under 1% Native American, and 9% multiracial.[213]

Figure 2. Law Students by Race (LSSSE, 2020)



212. DEO ET AL., *supra* note 191, at 7.
213. *See infra* Figure 2.

While structural diversity—the raw numbers of students of color in law school[214]—has increased, to maintain and build on diversity, schools must also practice inclusion: the practice of making non-traditional participants feel welcome, such that they engage fully and participate freely.[215] One important aspect of inclusion is creating a sense of community.

There are important ways in which People of Color have different experiences from whites with regard to inclusion, which makes the People of Color moniker appropriate in this context. Among law students, 28% of whites "very much" believe their school "emphasizes the importance of 'creating an overall sense of community among students'" though "smaller percentages of students of color feel similarly."[216] Similarly, a full 31% of white law students "strongly agree" they are part of the law school community, though "lower percentages of students of color do."[217] These troubling data suggest that students of color are less integrated into campus life than their white classmates and that People of Color in law school share similar experiences of exclusion as compared to white students.

"Students of color are also more likely than their [w]hite classmates to think their schools do 'very little' to ensure students are not stigmatized based on various identity characteristics, including race/ethnicity, gender, religion, and sexual orientation."[218] Again, similarities among People of Color and distinctions between students of color and white students signal the benefit of sharing data on People of Color as a whole, especially to highlight disparities between them as a group compared with whites. This correctly reflects the groups in the data while also promoting racial equity.

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214. Structural diversity refers to the "numerical representation of individuals with diverse backgrounds." Meera E. Deo, Maria Woodruff & Rican Vue, *Paint by Number? How the Race and Gender of Law School Faculty Affect the First-Year Curriculum*, 29 CHICANA/O-LATINA/O L. REV. 1, 7 n.21 (2010) (citing Sylvia Hurtado, Jeffrey F. Milem, Alma R. Clayton-Pedersen & Walter R. Allen, *Enacting Diverse Learning Environments: Improving the Climate for Racial/Ethnic Diversity in Higher Education*, 26 ASHE-ERIC HIGHER EDUC. REP. SERIES 8 (1999)).

215. *See* Ella Washington & Camille Patrick, *3 Requirements for a Diverse and Inclusive Culture*, GALLUP (Sept. 17, 2018), https://www.gallup.com/workplace/242138/requirements-diverse-inclusive-culture.aspx [https://perma.cc/4YBA-U9CQ] ("Inclusion refers to a cultural and environmental feeling of belonging. It can be assessed as the extent to which employees are valued, respected, accepted and encouraged to fully participate in the organization."); Deo, *supra* note 40, at 276–77.

216. DEO & CHRISTENSEN, *supra* note 41, at 8.

217. *Id.* at 9.

218. *Id.* at 10.

2. Women of Color

While the People of Color label is helpful in discussing diversity and inclusion in law school, it is important to also consider gender. Although there are higher percentages of students of color in law school today, this progress is somewhat interrupted by gender disparities in inclusion; this again underscores the importance of going beyond People of Color to consider data and language representing Women of Color. If we peek under the People of Color umbrella, there are significant distinctions between Women of Color and Men of Color in law school necessitating the use of Women of Color as a data point and advocacy tool to share unique raceXgender experiences regarding diversity and inclusion.

For instance, "women of color are more likely than men from their same racial/ethnic backgrounds to feel that they are not part of the campus community."[219] Fewer than one-quarter (23%) of women of color "strongly agree" that they are part of the institutional community, compared to almost one-third (31%) of men of color.[220] Among students who "strongly agree" that they are valued by their institutions are just 22% of Women of Color, compared to 29% of Men of Color, 31% of white men, and 26% of white women.[221] Collapsing Women of Color into the People of Color category would have excluded their lower sense of being valued and included.

Additionally, Women of Color have unique insights into laws and policies most relevant to their lives. LSSSE data show that "while 32% of [w]hite men believe their schools do 'very much'" to share information on anti-discrimination and harassment, Women of Color students disagree in greater numbers than even Men of Color and white women.[222] While it is never prudent to dismiss disaggregated raceXgender experiences of Women of Color, they are especially relevant when considering the very issues of discrimination and harassment that affect Women of Color disproportionately and differentially, as documented even in early works on intersectionality.[223] Thus, naming Women of Color in this context promotes their advancement while also accurately reporting the data.

3. Better than BIPOC: Naming Specific Groups

While People of Color and Women of Color are useful terms, they may mask important disparities *within* those groups when it comes to diversity and inclusion; in these instances, it is important to disaggregate

219. *Id.* at 9.
220. *Id.*
221. *Id.* at 8.
222. *Id.* at 13.
223. *See* Crenshaw, *supra* note 126.

the data by each racial group. Doing so and using the relevant language—People of Color, Women of Color, and the actual groups involved (e.g., Black)—reveals distinctions that are otherwise hidden beneath umbrella terms.

As one example, only 21% of Native American and Black law students see themselves as part of their law school community—compared to 31% of their white classmates, 25% of multiracial students, 26% of Asian Americans, and 28% of Latinx students.[224] Here, specifying Black and Native American exclusion would be more appropriate than using People of Color since their experience is distinct even from other People of Color (namely students who are Asian American, Latinx, or multiracial).[225]

We can also consider intersectionality in this context, looking at individual raceXgender groups rather than Women of Color as one group. Black women are least likely to "strongly agree" that they are part of the campus community—only 20%, compared to 25% of Latinas, 23% of Asian American women and multiracial women, and 29% of white women.[226] This shows the difference between Black women Latinas is about the same as that between Latinas and white women. Combining all statistics on Women of Color in this instance would both obscure the experience of Black women and signal a similarity between Black women and Latinas when in fact the experiences of Latinas may be more similar to those of their white women classmates.

224. DEO & CHRISTENSEN, *supra* note 41, at 9.

225. Here, it would still be more useful to use specific "Black and Indigenous" than to use the BIPOC label because the latter assumes some commonality between "Black, Indigenous, and other People of Color" when in fact the data highlight differences *between* Black and Indigenous groups on the one hand and other People of Color on the other.

226. DEO & CHRISTENSEN, *supra* note 41, at 9; *see infra* Table 2.

Table 2. Level of Agreement with being Part of the Campus Community, by Race and Gender (LSSSE, 2020)

	Asian American		**African American**		**Latinx**		**White**		**Multiracial**	
	Men	*Women*	*Men*	*Women*	*Men*	*Women*	*Men*	*Women*	*Men*	*Women*
Strongly disagree	4.8%	4.1%	6.8%	11%	6.3%	5.2%	6.7%	4.1%	6.2%	7.4%
Disagree	17%	20%	8.5%	24%	11%	24%	13%	14%	20%	20%
Agree	48%	54%	56%	46%	47%	47%	47%	52%	45%	50%
Strongly Agree	30%	23%	29%	20%	36%	25%	34%	29%	29%	23%

When considering both debt and diversity, the People of Color term serves a purpose if the goal is to show distinctions between this large umbrella group as compared to white students. Yet, Women of Color may be an even more useful data point and moniker when considering distinctions from Men of Color. Furthermore, we should name specific groups (e.g., Black women or Asian Americans) to fully explore the unique

experiences of each group as compared to the larger constituency of People of Color or Women of Color. Using clear language that connects with the data and the community is both more effective and more correct than using the term BIPOC.

B. Law Faculty

The law faculty context can also distill distinctions between labels for various groups. There will be times when it is appropriate to use People of Color—such as when considering differences between white professors and all others. Elsewhere, scholars should use Women of Color—for example, when raceXgender priorities are important in the data or argument. When neither People of Color nor Women of Color will tell the full story, particular groups should be named individually (e.g., Latina faculty), both to advance equity and to maintain empirical integrity.

i. Data from DLA

The various experiences of law professors provide a unique canvas to explore effective usage of People of Color, Women of Color, and separate race and raceXgender groups. The Diversity in Legal Academia (DLA) study collected quantitative and qualitative data from almost 100 U.S. law professors, with particular attention to raceXgender.[227] Data collection followed a painstaking sampling process to ensure broad representation with regard to race/ethnicity, gender, region, school selectivity, tenure status, leadership, and more.[228] Sixty-three women of color participated in the study—including women who are Black, Latina, Native American, Middle Eastern, Asian American, and multiracial; the sample also includes thirty white women, white men, and men of color to allow for comparison and contrast.[229] Every participant completed an online survey and participated in an in-depth interview with the author of this Article.[230]

227. DEO, *supra* note 184; Deo, *supra* note 29. The study included tenured and tenure-track faculty teaching doctrinal courses but, consistent with existing empirical research, did not feature professors who specialize in legal writing, clinics, academic skills, bar preparation, library sciences, or other non-traditional but critical areas of law teaching and scholarship. Nevertheless, their experiences are likely represented, especially as women of color are concentrated in these positions, which also have less security, status, and pay than others. *See* Renee Nicole Allen, Alicia Jackson & DeShun Harris, *The "Pink Ghetto" Pipeline: Challenges and Opportunities for Women in Legal Education*, 96 U. DET. MERCY L. REV. 525 (2019).

228. DEO, *supra* note 184, at 172–73; Deo, *supra* note 29, at 243.

229. Deo, *supra* note 29, at 243.

230. *Id.* at 244.

Numerous articles and a book drawing from the DLA data have explored a multitude of topics and findings, including pathways to academia and leadership,[231] faculty insights on educational diversity,[232] and relationships with colleagues and students.[233] While those works were necessarily limited by a focus on women of color, this Article goes deeper by examining counter-narratives and distinctions between groups within Women of Color rather than only commonalities. This Article draws from data on intersectional—raceXgender—experiences with bias in student evaluations as well as challenges with work/life balance to reveal how terms like People of Color and Women of Color add clarity and further community. Naming individual groups is also critical in contexts where the People of Color or Women of Color umbrella would obscure the experiences of sub-groups.

Qualitative data are presented in the form of quotes from respondents to the study, giving voice to their lived experiences while protecting confidentiality and anonymity by using pseudonyms.[234] Showcasing this methodology (in addition to the quantitative data shared for law students) underscores how even interview analyses can mask minority experiences if the data are not conveyed accurately and in pursuit of equity efforts.

ii. Bias in Student Evaluations

Research shows that student evaluations are not adept at measuring excellence in teaching, regardless of discipline.[235] Instead, they echo existing biases in terms of race, gender, and raceXgender.[236] As such, it is a useful backdrop to consider racialized terms. As we think through

231. *See* Meera E. Deo, *Trajectory of a Law Professor*, 20 MICH. J. RACE & L. 441 (2015).

232. *See* Meera E. Deo, *Faculty Insights on Educational Diversity*, 83 FORDHAM L. REV. 3115 (2015).

233. *See* Meera E. Deo, *The Ugly Truth about Legal Academia*, 80 BROOK. L. REV. 943 (2015).

234. This Article draws from original empirical research conducted through the DLA study, as well as from LSSSE. There are no citations for the DLA data shared or for some of the LSSSE data because these findings are presented here for the first time based on original data analysis, not drawn from other published sources. Requirements from Institutional Review Board protocols and the protection of human research subjects state that all transcripts will remain on file with the author while dissemination of the data is ongoing. They will not be shared with others or released to the public to maintain the confidentiality and anonymity of research participants.

235. For an excellent literature review and original analysis on student evaluations, see Sylvia R. Lazos, *Are Student Teaching Evaluations Holding Back Women and Minorities?: The Perils of "Doing" Gender and Race in the Classroom*, *in* PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA 167–69 (Gabriella Gutiérrez y Muhs et al. eds. 2012).

236. *See* Meera E. Deo, *A Better Tenure Battle: Fighting Bias in Teaching Evaluations*, 31 COLUM. J. GENDER & L. 7 (2015); Lazos, *supra* note 235.

new frameworks and consider which data or arguments to use for particular projects, we should carefully consider usage of each term to make sure the conclusions are appropriate. Otherwise, we distract from the larger goal of antiracism while harming overlooked communities.

1. People of Color

Because people of color face racial bias in law teaching, including in student evaluations, it is a useful term to use in contrast to the experience of whites. These race-based challenges stem in part from the low numbers of people of color in law teaching, who account for under 15% of all law professors.[237] Thus, "racial bias also ties together the experiences of men of color and women of color" into a broad People of Color experience.[238] Law schools on predominantly white campuses (as compared to HBCUs) are widely accepted as spaces that were created by and for white men and remain centered on the white normative experience.[239] For this reason, non-whites have rarely felt fully welcomed or accepted either as students or as faculty.[240]

DLA data reveal numerous examples confirming the white-centered space of legal academia, resulting in an analogous set of experiences for People of Color. Brianna, a Black woman professor and administrator who participated in the DLA study, is familiar with research on student evaluation bias affecting People of Color and other non-traditional faculty. She ties it directly to "the ways in which students are hypercritical and scrutinize you more" if you are a person of color. A multiracial male professor named Ed recalls, "[T]he students second-guessed everything that I had done, so they wanted a recall on the exam and they demanded explanations." Anticipating similar classroom confrontations and the negative evaluations that generally plague faculty of color, a Latino Assistant Professor named Jorge says, "I met with a teaching coach last year, one-on-one, every week for the full year." These are all examples of

237. Although the Association of American Law Schools no longer publishes law faculty data, their statistics are available at Deo, *supra* note 233, at 962.

238. Deo, *supra* note 29, at 242.

239. Renee Nicole Allen, *From Academic Freedom to Cancel Culture: Silencing Black Women in the Legal Academy*, 68 UCLA L. REV. 364, 366 (2021); Nancy E. Dowd, Kenneth B. Nunn & Jane E. Pendergast, *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. FLA. J.L. & PUB. POL'Y 11, 12 (2003). Men also participate in class more than women. Jakki Petzold, *Classroom Participation by Gender Identity*, UNDERSTANDING LEGAL EDUC. BLOG (July 20, 2018), https://lssse.indiana.edu/blog/classroom-participation-by-gender-identity/ [https://perma.cc/QQ3Q-R2YS].

240. Shaun Ossei-Owusu, *For Minority Law Students, Learning the Law Can Be Intellectually Violent*, ABA J. (Oct. 15, 2020), https://www.abajournal.com/voice/article/for_minority_law_students_learning_the_law_can_be_intellectually_violent [https://perma.cc/Q7LL-5HJM]; Meera E. Deo, *Diversity and Exclusion Within Legal Education*, *in Racism, Regulation, and the Administrative State*, REGUL. REV. 3 (2020).

people of color who experienced or expected student challenges in the classroom based on their racial identity. Their collective experience as People of Color facing pushback from students, despite being professors (those with ostensible authority in the classroom) warrants use of the term in this context in comparison to whites who did not share in this experience.

Patricia understands her students expect "a white male professor," since most professors are white men; however, as a Black professor, she notes, "[T]hat's just not a model that I can follow." Stuart, a Native American professor, says many of his colleagues trot out "the same old crap from [the movie] *Paper Chase*," following the lead of Professor Kingsfield in scaring students into shape. Stuart says they assert some version of, "one-third of you doesn't deserve to be here; you're going to flunk the bar exam; and you're not going to be a good lawyer." Stuart thinks "that's horrible," but knows most students expect it; more nurturing faculty of color are an aberration from the white norm. In this sense the People of Color experience is relatively uniform, especially in contrast to the white male norm of law teaching. The racialized law school context makes use of the People of Color term appropriate (as well as empirically accurate to aggregate racial groups) when comparing their experience to those of their white faculty colleagues.

2. Women of Color

Gender biases are also another barrier to success for Women of Color. When considering the raceXgender perspective, gender distinctions become apparent, even within the People of Color community. As a result, it can be useful to name Women of Color specifically and share their relatively similar experience as distinct from those of men of color.[241]

Melissa, a Native American professor, has experienced raceXgender bias first-hand, noting, "I don't think that women of color fit the mold of the *Paper Chase* professor." She echoes Stuart's assertion that students expect white male faculty, so her own raceXgender identity creates a compound disadvantage. Women of color—distinct even from men of color—face a presumption of incompetence, with pushback from students in the classroom as well as raceXgender bias evident in student evaluations.[242] A Black woman professor named April has faced this from literally day one; she recalls, "I'm presumed incompetent; it's true. The

241. There are also distinctions from white women, more of which are explored in DEO, *supra* note 184.

242. This raceXgender bias has been well documented in two separate volumes as well as other research. Flores Niemann et al., *supra* note 133, at 7; Harris & Gonzalez, *supra* note 135, at 7.

very first year I came to teach I recall the very first day [students] were looking at me and going, 'Who the fuck is this [Black woman]? That's the teacher? [Sigh.]' It was horrible." The misery for April began with the realization that both her race and gender worked against her. Alicia, a Latina professor, suggests women of color accept that some students will see them this way: "the presumption of incompetence is normal and across the board and you're going to face it every day of your life even after you're tenured, even after you're a full professor. So, you're going to have to [find] strategies to deal with it. It's not going away." In her first few years of teaching, a Black professor named Susan received "[t]he worst teaching evaluations of anyone who had ever taught at the law school." These "abysmal" evaluations included vicious comments: "they called me racist because I incorporated Critical Race Theory into the classroom, and I talked about race and from their perspective talking about race meant that you were racist; you shouldn't be talking about that." Imani, a Black professor, endured a similar experience, noting, "You know if the professor is a female of color and she's bringing up certain Critical Race Theory topics in class, you get backlash from that." The compound challenges based on race and gender result in a unique Women of Color-centered phenomenon.

Virtually all women of color in the DLA sample recall comments on student evaluations focused on their physical appearance rather than their pedagogical approach. Again, men of color do not experience this in the classroom—they are neither presumed incompetent nor scrutinized for how they look. Lumping Women of Color into the People of Color category could mask the specific gender-based bias they experience. Trisha, a Black woman professor, notes how numerous times "[students make] inappropriate personal comments about my appearance" on evaluations. Carla, a Latina professor, is forthright about how appearance plays into evaluations, noting, "As a woman there is a constant kind of student concern with my looks." She laughs it off, saying, "I know my hotness factor is low," but she is aware that in addition to her teaching competency, "another element on which I get graded [on student evaluations is] am I 'attractive.'" June, a Black professor, remembers "negative course evals that say racist or sexist things." She even mentioned that she had students write, "'I came to class because I wanted to see what you were going to wear.'" Because men of color are not generally judged on their looks or dress, this is not a broad People of Color phenomenon.[243] Thus, noting this as a Women of Color experience is appropriate given the specific raceXgender context.

243. Similarly, while white women are also more likely than white men to face student confrontations in the classroom, they do not experience the same level of raceXgender pushback and presumption of incompetence facing Women of Color.

Critical students anonymously attack Women of Color in evaluation comments that go beyond the superficial. For instance, June recalls a comment that read: "'I know we have to have affirmative action. But do we have to have this woman?'" The raceXgender implications in those words are profound. They hinge on a stigma and inferiority associated with those hired (or admitted) through affirmative action—here, based on both race and gender; they also assume that June's raceXgender identity is divorced from or decreases her merit.[244] The student brings gender into the picture directly, questioning whether "this woman" should have been hired, and implying that even other race-based "affirmative action hires"—though not ideal compared to white male faculty hired through merit—would be preferable to June. The race and gender implications of being a woman of color stand out and should be disaggregated from People of Color as a whole, promoting raceXgender equity as well as empirical accuracy.

3. Better than BIPOC: Naming Specific Groups

Each label improves our understanding that bias in student evaluations is a concern for all People of Color, and for Women of Color in more specific raceXgender-based ways. The People of Color term reveals race-based realities not experienced by white faculty while Women of Color suffer gender-based evaluation comments that are not shared by men, even men of color. Looking even deeper within categories, it becomes clear that even more specific terminology can be useful. Different raceXgender identities result in very different experiences that are not fully encapsulated by the terms People of Color or even Women of Color.

While People of Color as a whole, and Women of Color in particular, face student challenges to their competence, Black women are more likely than any other raceXgender group to be dismissed as substandard. Keisha and another Black woman were hired at the same time at the same institution; over the course of the year, many students commented negatively on the raceXgender identity of the two hires, including as Keisha remembers: "'You hired two Black women this year and that is the downfall of the law school.'"

244. For more on the redefinition of merit, see Janice Austin, *The Means to an End: Narrative Expression of Working Recognition*, *in* DOROTHY EVENSEN & CARLA PRATT, THE END OF THE PIPELINE: A JOURNEY OF RECOGNITION FOR AFRICAN AMERICANS ENTERING THE LEGAL PROFESSION (Dorothy Evensen ed. 2012) (describing how law school admissions should look "beyond the numbers" of the LSAT and undergraduate GPA to identify individuals worthy of consideration); Meera E. Deo, *Looking Forward to Diversity in Legal Academia*, 29 BERKELEY J. GENDER L. & JUST. 352, 362 n.54 (2014).

While Women of Color are hyper-scrutinized for their appearance, Blackness is tied directly to a presumption of incompetence. A Black female professor named Danielle shared a teaching evaluation comment that read, "'She's Black. Enough said.'" Danielle immediately understood this bias was something impossible to fight against, noting, "I'm being evaluated based upon things that have nothing to do with my teaching, like skin color." Her Blackness is assumed to make her inferior—a different experience from those of Men of Color (even Black men) and non-Black Women of Color alike.

While students also regularly comment on the appearance of Asian American women professors (in that sense, a common experience for all Women of Color), it is not to suggest they are incompetent so much as to view them as sexual objects. Annie recalls that in the early years of her law teaching career she received "a lot of comments about my appearance" on student evaluations—as do many Women of Color as a whole. However, the specifics of those gendered comments are unique to her racial background as an Asian American, distinct from other Women of Color. Annie remembers one comment that read, "'She flips her hair over her shoulder too much.'" Clearly, this has nothing to do with Annie's pedagogical approach or teaching effectiveness. It also surprised Annie because, she confided, "Actually, I'm not a coquettish person. I really don't know how to flirt, and I think this student was interpreting me as being flirtatious." Though also about her appearance, this comment is distinct from the comments Black women receive about physical appearance connected to (in)competence. Instead, as an Asian American woman, Annie is viewed as a sexual object instead of a national scholar. Lumping together the experiences of Black and Asian American women without giving individual agency to each would be inaccurate empirically and stymie efforts toward raceXgender equity.

Asian American men, on the other hand, rarely receive comments about their competence or looks, even when they themselves worry their youthful appearance could lead to student challenges. Jack was concerned about how his identity might affect student interactions because, as he says, "I think it's hard to appear before students, especially as a junior faculty and as a minority. And I look really young." Yet he faced no pushback and received no comments about his appearance. Vijay similarly was concerned about how students would perceive him because, he says, "I look young." To counter that, all he did was "wear a suit." He also recalled no challenges or confrontations from students in the classroom or comments on his appearance on evaluations—a distinct contrast from Asian American women, regardless of how they present themselves in class.

Black male professors are more likely to face outright defiance and other forms of bias tied to their raceXgender—different from Black women and from other Men of Color. Grouping Men of Color together or combining their experience with Women of Color, or even Black women, would diminish the overall findings. The language used should instead specify Black men, since they are the raceXgender group affected. Dwayne, a senior Black male scholar, notes that he received "very good teaching evaluations" even from early in his career—likely because he routinely "spent 18-hour days preparing" for class. He also purposefully cultivated a reputation, noting:

> I think particularly with the male students, the fact that you're a couple of steps ahead of them is important [because] they look at that like [you're] king of the hill. It's probably a part of the male ego where you're always trying to test the person at the top.

Whether caused by "male ego" or because a Black man was teaching them, students tested him, and he was ready. He even discovered one white male student had petitioned the Associate Dean to switch out of Dwayne's first-year course because he "did not want to take instruction from a Black person." The student's request was denied.

Michael also navigates disrespect based on his raceXgender as a Black man. One semester, he remembers, "I had a student who would routinely show up five or ten minutes late and he would have to walk behind me [at the podium] to get to his chair," disrupting and distracting the class. Students purposefully and openly confronted his authority in different ways than they challenged Women of Color, even Black women, professors.

Ryan has experienced even more dramatic forms of raceXgender bias directed at him as a Black man. While he earns positive numerical scores on evaluations, some comments are steeped in bias against Black men—not People of Color, not Black people in general, but Black men. We should not pretend that his experience is representative of People of Color or of Black people generally; his identity as a *Black man* is what generates this response. During Ryan's first year teaching as a lateral hire, he remembers students complaining in evaluations that "I was a racist and a sexist, and all these other things that were complete nonsense. And the very next year I won the teaching award." He understands that students are resistant to hearing about sensitive issues, especially from him, noting: "here is this Black guy making you think about racism and sexism and putting it on the table every day; that can be very disturbing to students who never had those conversations and don't want to think about those things." Would they respond differently to a white man, or a white woman, or an Asian American woman sharing this material? Perhaps. Some of these experiences are similar to what Black women and other Women of Color experience. But Ryan's evaluation comments

reflected the students' discomfort, especially because, as he knows, "in evaluations . . . they can be anonymous." Ryan's students did not attack his personal appearance, as they do for Women of Color; instead, they built on stereotypes of Black male criminality and aggression. Ryan recalls, "Even one student commented [that she was a woman and] I made her afraid in the classroom." Students did not make similar fear-based remarks about professors from other raceXgender backgrounds—not about Black women, other Men of Color, or any other Women of Color. As such, this experience should be named directly as applying to Black men not only because this is what the data reveal, but also to respect their reality.

Native American women have a different experience still. Perhaps because of the very small numbers of Native Americans on campus as either faculty or students, many tend to band together for community. Most Native American professors enjoy, as Jennifer says and does, "a really wonderful experience" with students overall. They have close relationships with students, especially Native American students who, as Erin notes and experiences, "are just really appreciative" of having a Native American professor.[245] Stuart similarly has "an incredible close relationship with a small number of students" because of their shared Native American identity. Greater openness and flexibility often develop between Native American professors and students who see few others from their background on campus. For instance, Erin was counseled before she began law teaching that she "should be very rigid and very professional," establishing clear boundaries between herself and her students, though that did not feel authentic to her. She recalls that her students responded poorly to her posturing; she recalls, "[T]here were a lot of 'jokes' about me having a chip on my shoulder" and perceiving her "as being very cold." She quickly "loosened up" and "realized that in order to be a professor I didn't have to be quite so isolated or not have interactions with students." Mia, also a Native American professor, started off somewhat stilted; once she decided, "I'm not trying to be someone I'm not or be something I'm not," her students appreciated and rewarded her for it. Lumping Native American law professors with other People of Color or even with Black professors to fit the BIPOC term would

245. This is likely due to how Native American individuals and culture have been largely rendered invisible. Having an opportunity to group together with others identifying as Native American provides faculty and students alike with an opportunity to openly express group pride, solidarity, and share cultural traditions with one another and externally. AM. INDIAN COLL. FUND, CREATING VISIBILITY AND HEALTHY LEARNING ENVIRONMENTS FOR NATIVE AMERICANS IN HIGHER EDUCATION 2, 4, 9 (2019) (proposing that to combat "invisibility [which] is in essence the modern form of racism used against Native Americans," institutions of higher education should designate "a place on college campuses that fosters [Native American students'] sense of belonging and importance in their campus community").

therefore dilute their unique experiences as well as the very different experiences of Black and Asian American faculty. Going beyond the term to the nuances behind it—naming relevant groups individually—is the best way forward.

iii. Navigating Work/Life Balance

The final arena discussed in this Article as relevant to language and race is work/life balance. Many people of color face challenges juggling their personal and professional lives. Women of Color encounter unique barriers even as compared to Men of Color. Looking specifically at data collected from particular groups within the Women of Color umbrella reveals that obstacles specific to one raceXgender group may not apply as readily to others. Thus, they should be named separately so as not to conflate their unique experiences.

1. People of Color

Many DLA faculty of color participants share challenges navigating work/life balance that are distinct from those of whites. A Latino professor named Fermin says, "I treat every day as a workday." He says, "I worked about 80 hours a week. I come in every day around 8:00 [am] and stay at least until 7:00 [pm], [though I do] leave early on Friday afternoons and Saturday afternoons." He notes of he and his partner. "We split the chores and so I go grocery shopping and she goes and gets the laundry. I get the meds and she goes to the bank, and things like that." Fermin is aware that his schedule does not include much time for social interaction, physical activity, or leisure, admitting, "I'm not sure I recognize balance. I probably don't have it, but I'm very happy doing what I'm doing." Many People of Color faculty similarly lack balance.

Raising children complicates work/life balance. Jack, who has a newborn at home, notes, "I feel like I'm just figuring it out and getting sleep where I can." He is especially grateful that he has job security, stating, "I'm not sure I would have been able to do it pre-tenure." His wife, though, has just started an academic position in a different department at the same university, forgoing opportunities elsewhere in order to work at Jack's institution.[246] Though they use university-subsidized childcare, Jack says, "It's a difficult time [and still] feels hard." Dwayne notes, "In the past, everything was balanced toward my work." His wife, he says, "took care of the home life and all which freed me up to really focus on my work." While Dwayne says, "I found time for my family," he would still sneak in work, editing articles "during halftime" even when attending his

246. This gender-based loss of professional opportunities is discussed at length in DEO, *supra* note 184, at 12–34.

children's sporting events. People of Color, as compared to whites, are working constantly, whether or not they have children or are the *default parent*.[247]

2. Women of Color

Haley, a multiracial female professor, is doing Dwayne's job and his wife's job, noting, "I'm always out of balance. I have no social life. Whenever I'm not at school—and I've been doing twelve-hour days lately—I'm chauffeuring my child." Haley's example reveals how gender-based expectations create unique challenges for women of color. Because women of color carry more service burdens at work and also greater responsibilities at home, they have more to juggle. If we ignored that reality and reported data only on People of Color, we would miss the important gender-based dynamics at play. Reporting on this as simply "women's experiences" would ignore the racial dynamics at play. Instead, both in terms of empirical accuracy and equity goals, we must examine gender combined with race.

A Black woman professor named Kayla notes that while holding extra meetings with students creates "heightened stress" on her time, she cannot shrug off the "burden associated with being one of two or three women of color on my faculty." She says, "The word is out that I am accessible [so] I've definitely had more demands on my time." These demands come not only from students in her classes, but even from others whom, she notes, simply would "like me to formally and informally mentor them."[248] Student demands on her time are greater because she is a Woman of Color.

Though Carla negotiated for research leave years in advance, an administrator reneged on their deal just weeks before the start of term, telling her she was needed as Chair of a committee. Looking back, Carla realizes, "It was really shocking, but I dealt with it by saying . . . well, I dealt with it with my ordinary strategy, which was to say, 'Okay.'" For over two decades in law teaching, Carla has acquiesced to every service demand made, noting, "If someone said, 'Do this,' I did that. If someone

247. The default parent in a two-parent household is "the one responsible for the emotional, physical and logistical needs of the children." M. Blazoned, *The Default Parent*, HUFFINGTON POST (Oct. 28, 2014), http://www.huffingtonpost.com/m-blazoned/the-default-parent_b_6031128.html [https://perma.cc/7F68-MEEL]; *see also* Lindsey, *A Letter from the Backup Parent to the Default Parent*, THE MOTHERCHIC BLOG (Nov. 5, 2014), https://themotherchic.com/2014/11/05/letter-default-parent-back-parent/ [https://perma.cc/ZG6V-UWA2]; M., *The Default Parent Resume*, M. BLAZONED BLOG (Feb. 15, 2016), http://www.mblazoned.com/the-default-parent-resume [https://perma.cc/CTK5-6Z7T].

248. Service demands on Women of Color have increased even further during the pandemic. *See* Meera E. Deo, *Investigating Pandemic Effects on Legal Academia*, 89 FORDHAM L. REV. 2467, 2486–87 (2021).

said, 'Teach that,' I taught that. If someone said, 'You'll teach at 8am,' I taught at 8am. If someone said, 'You'll teach summer school,' I taught summer school." She could not "risk saying no because then the gossip would start up: 'She's difficult.' 'She's not a team player.'" Despite the extra service and positive attitude, she notes, "I did not get compensated." The raceXgender-based expectations Carla faced are common to Women of Color throughout legal academia. As Men of Color do not face similar demands of *academic caretaking* and other related service obligations, using the People of Color moniker here would be disingenuous and incorrect.[249]

Women of Color also are more likely to be the default parent at home. Natalie, a multiracial woman professor, shares a common experience: "I cook, I make major parenting decisions like how to discipline, I buy all the clothes." She realizes, "I'm more like the boss of it. If I tell [my husband] to do something, he will do it. I take charge of the domestic realm just because I'm too impatient to let him fumble through it." Men of Color do not say the same about themselves. Helen, an Asian American professor, cannot focus entirely on work even when she is on campus. While her husband is "helpful around the house by doing laundry and doing dishes," family life is always on Helen's mind. She notes that "in terms of occupying mental space . . . my children take up [a lot] in the course of my day as I'm trying to think, 'Do their clothes fit?' 'Do they need snow boots?' You know, that sort of stuff." Because her husband is not carrying the *mental load*, these details are "not in his mind [which] frees him up to think about other things in a way that I am not able to."[250] Pretending this was a problem facing People of Color as a whole would ignore the gender-based dynamic; this is a challenge specifically facing Women of Color.

Women of Color are doing more not just at work and with their own children, but also with extended family and in the community. Annie, who started teaching decades ago, notes, "With my generation there was still very much an unwritten but very strong norm that you kept your family and your work life separate." That led her to prioritize work above family because she was "afraid of not being taken seriously at work." Now, she regrets some of those decisions, wondering, "Why did I go to that [faculty] meeting instead of going to the end of the year band award ceremony

249. Women and especially women of color perform more internal service duties at work than their colleagues, leading some to consider them caretakers at work as well as at home. *See* Cassandra M. Guarino & Victor M. H. Borden, *Faculty Service Loads and Gender: Are Women Taking Care of the Academic Family?*, 58 RES. IN HIGHER EDUC. 672, 690 (2017).

250. The "mental load" refers not only to the daily toil of keeping track of all the things that need to get done, but also how "the scope and volume of managing this many lives and details comes with a surprisingly huge emotional and mental exhaustion that is unique to the default parent." M. Blazoned, *supra* note 247.

where my daughter was getting an award?" Annie's personal responsibilities extended past her own household. Because her father also lived alone nearby, she recalls, "I was going over to his house to clean and cook and chop [vegetables] once a week or more" in addition to "trying to do things with my kids." None of the men of color in the DLA sample reported similar extended family responsibilities—these obligations are specific to Women of Color, and thus Women of Color should be specified as the relevant group.

April is overcommitted in a way that is familiar for most Women of Color. She shares:

> The list of things I have to do is long. I have a husband, two children, and a dog. I have a mother, a sister, [and five other relatives] who have all moved [nearby] in the last ten years. Every one of them needs something. I am an active church member. I am the lawyer for all the little church ladies: this one needs a divorce, this one needs a will, this one needs a this, this one's husband is dying and she needs a power of attorney. I have all of those obligations. I have a depressed and oppressed African American community. I try and help them when I can. I am a member of a sorority and a service organization, and I participate actively in those things as well. I got a lot of shit going on all the time.

While People of Color as a whole struggle with work/life balance, it is Women of Color specifically—distinct from Men of Color—who are busy serving others at work, at home, and in the community. As such, we should be clear that this is an experience unique to Women of Color and both center and name them directly.

3. Better than BIPOC: Naming Specific Groups

While most people of color struggle with work/life balance and women of color are busy navigating additional gender-based pressures, particular raceXgender communities face distinct challenges and opportunities. Native American women in the DLA sample support their children, partners, and communities while also working impossible hours. Jennifer says, "I need to do a better job with balance." Referencing herself and her husband, she notes, "We're both workaholics." Melissa is uncomfortable with the term, but recognizes its application, saying, "I don't know that I like this label, but I would probably be a workaholic." Similarly, Erin notes that she's "so busy because I pretty much work all the time, like there's no day off." Laura also says:

> While I do work long hours . . . [m]y kids became part of it. They sat through part of the bar review course in the back of the room. They waited in my office for me at times. They became part of it and I talked to them about what was going on.

Native American women professors are therefore distinct from People of Color and even Women of Color, in that they both work

constantly and incorporate their children into their work. Aggregating them with other Women of Color or with Black faculty specifically (using the BIPOC moniker) would dilute their lived experience and inaccurately reflect the data.

One clear distinction between Women of Color from different backgrounds relates to support: Asian American women professors are more likely to *receive* support from extended family (including monetary support from parents), whereas Black women are often the breadwinners in their immediate families and also *provide* financial support to others.[251]

Aarti, Vivian, and Smita are illustrative as Asian American women professors who rely on extended family for support. Aarti is the primary earner in her immediate family and relies heavily on her parents and in-laws for support, noting, "Both sets of parents give us a lot of financial support, a lot more financial support than I thought I would be getting." She is grateful, accepting that "they want to help us make it work." Vivian relies on extended family for emotional support. She notes, "I'm really lucky my sister lives in town with [her] kids." Both Vivian's sister and her father are part of the "primary core" of her support system. Smita has a similarly supportive extended family network, noting, "I rely on my parents and my brother and my children . . . for emotional support." Smita and her husband split childcare and household duties, alternating days to stay late at work and wrangle their children at home. Smita appreciates that this gives her the flexibility to take "that time in the afternoon to sit down and spend time with them and play with them and help them with homework." The tradeoff, she notes, is that "once they go to sleep, I end up turning on my computer again and doing more work at night." Her parents have often "come and taken care of the kids" when Smita and her husband have overlapping work travel. Smita shares that her parents even "check with us ahead of time before they book their vacations being like, 'Do you have any conferences during this time because we'll switch the days?'" She knows not everyone is so fortunate, stating, "I've been very grateful and touched by the amount of generosity they have extended towards us." This opportunity to draw support *from* family is most pronounced in data collected from Asian American women—though not representative of People of Color or even Women of Color.

While many of the Black women in the DLA sample are also close with extended family, few rely on them for high levels of support. Instead, many Black women academics *provide* financial, emotional, and even legal support to others. Before joining academia, while Susan was working at a large corporate law firm, she and her husband "were

251. As a counternarrative, two Asian American women faculty have partners who are stay-at-home fathers with primary caretaking responsibilities for their children.

supporting three households." She states, "The reality is we both came from poverty so we had additional responsibilities that other families didn't have, and we didn't have a down payment from Mommy and Daddy for the mortgage and we didn't have support in law school so we had debt from getting our education." Alexandra, a Black professor, carries the financial load for her entire extended family, noting, "I'm the primary breadwinner . . . . My husband does work but he makes one-third of what I do. And I don't come from a family that has the financial resources to help us financially." Alexandra says she currently has "[s]mall financial obligations to my husband's mother," and anticipates them growing. As additional financial responsibilities to extended family are "on the horizon, [this] informs my decisions." She elaborates:

> So, for example, we would love to buy a house. We need more space [as] there is no good place for me to work at home. We are renting a tiny two-bedroom [apartment] right now. But I'm uncomfortable dumping all of our savings into a down payment when we have aging parents and we have my mother-in-law basically on welfare . . . . I know we are going to have to help [her financially in the future].

Financial pressures add to Alexandra's overall anxiety and workload because the inability to invest in a workspace or outside childcare means more work for her. She adds, "I never feel balanced by the day. I don't go through my day thinking, 'OK, I did a particularly good job balancing everything.' I consistently feel like something had to give on that particular day." Overall, Alexandra stresses, "I'm much more tempered in my financial decisions because I know it's not just about me."

In these ways, the experiences of Black women faculty differ significantly not only from Black men and other People of Color but also from others in the Women of Color community. Similarly, Asian American women have unique experiences as compared to their Asian American male counterparts as well as other Women of Color. Combining either group under a People of Color or Women of Color label would mask these important differences in the data and impede advocacy efforts. It is therefore critical to name them individually, matching their experiences to the terms we use to define them.

Conclusion

The People of Color moniker serves a purpose. There are many ways in which those who fit within the People of Color community in the United States have collective experiences. Thinking just of legal education, law students of color have different experiences from whites when it comes to debt levels and experiences with diversity. Law faculty of color also share similarities with student evaluations and work/life balance that differ from the white norm.

Disaggregating by gender within the People of Color umbrella to examine the Women of Color experience reveals additional insights. For law students, debt loads of Women of Color are often higher even than for Men of Color, and experiences with diversity have both a racial and a gender dimension. Similarly, Women of Color law faculty face raceXgender-based challenges on student evaluations referencing a presumption of incompetence and in work/life balance with caretaking expectations that differ from those of men.

Deeper investigations reveal that the term BIPOC as a synonym for People of Color adds little value but causes both confusion and division by centering two groups of People of Color—Black and Indigenous—that may not be at the center of the discussion at hand. Instead, it would be better to use purposeful language about the groups at the heart of the data and argument. Sometimes neither the term People of Color nor the label Women of Color can tell the full story; other times, it can even eclipse important narratives for particular groups. In those instances, it is best to be specific about which communities are involved or affected. Black women and Latinas have higher levels of debt not only than other People of Color but even than other Women of Color and Black and Latino men. Asian American women faculty are more likely to draw from extended family resources than Black men or Latina women or even Asian American men. Writing simply about People of Color or even about Women of Color would erase the experiences of groups that may be unique even under those larger umbrellas.

Beyond legal education, the thesis for this new theoretical framework should also be tested in a variety of other contexts. Usage of People of Color, Women of Color, or specifically naming groups rather than using BIPOC or even other broad monikers should be applied to frameworks as diverse as political engagement, workplace harassment, elementary school integration, diversity in corporate boards, and more. Different situations will naturally call for particular groups to be named and studied directly; that context, regardless of the terms currently en vogue, should drive the data used and arguments made in any endeavor.

If BIPOC becomes more broadly accepted, advocates and scholars should only employ the term when both Black and Native Americans truly are at the center of the project or data; otherwise, progress is purely symbolic—literally, in name only. A better strategy is to be specific about the race and gender of the groups central to our agendas and name them directly as comprising the heart of our work.

The umbrella serves a purpose. It shelters people together through the storm. But people may stand in distinct groups even underneath the umbrella—and for good reason. It is critical that we not only appreciate the People of Color umbrella for the solidarity and strength it provides,

but also look beneath it to consider the Women of Color experience as distinct from men, and even name otherwise hidden racial or raceXgender groups when their experiences merit individualized attention. Centering the same two racial groups in every racialized circumstance is both dishonest and a detraction from antiracism goals. Being specific, pursuing precision, and matching identities to issues—all of these are better than BIPOC.

The Continued Relevance of Domestic Partnerships in the Post-*Obergefell* United States

Grace J. Anderson†

Introduction

Ashley and James met while attending college and, after a three-year relationship, got married in 2020. They live together, share their incomes, and are expecting their first child. Meanwhile, their friends Jess and Sarah are same-sex partners who have been in a committed relationship for five years. They share a townhome and are planning to use artificial insemination to have children in the next few years. However, they do not feel comfortable marrying for a few reasons: first, because they are morally opposed to entering an institution that, for most of its history, excluded same-sex couples and provided a structure conducive to the oppression of women, and second, because Jess wants to pay off her student debt before making a legal commitment with financial implications. Finally, Ashley and James' other friend Nick is asexual, and lives with Amanda, with whom he is in a committed platonic partnership. Amanda is in the process of adopting a child, and Nick plans to co-parent the child with Amanda.[1]

The variety of living situations and relationships in Ashley and James' friend group is baffling to their older family members, who are friends with other married couples whose most complex family stories involve divorce and remarriage.[2] They have plenty of questions about

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1. Examples inspired by Diana Adams, *Equality for Unmarried America: Expanding Legal Choice for America's Diverse Families*, 4 CHARLOTTE L. REV. 231, 239–43 (2013); JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 45–47 (Oxford Univ. Press, 2014); Angela Chen, *How to Build a Three Parent Family*, THE ATLANTIC (Sept. 22, 2020), https://www.theatlantic.com/family/archive/2020/09/how-build-three-parent-family-david-jay/616421/ [https://perma.cc/YR9H-2UNW].

2. *See* Julianna Horowitz, Nikki Graf & Gretchen Livingston, *Marriage and Cohabitation in the U.S.*, PEW RSCH. CTR. (Nov. 2019), https://www.pewresearch.org/social-trends/2019/11/06/marriage-and-cohabitation-in-the-u-s/ [https://perma.cc/LT4S-HXB7] (stating that cohabitation is more common and accepted among younger generations).

cohabitation without the intention to marry and platonic co-parenting, many of which involve legal issues—what would happen to their friends' children if the biological parent were to unexpectedly suffer an accident and die or become permanently hospitalized? Could the child's non-biological parent make legal decisions for the child? What would happen to one partner's financial resources and property if the couple were to break up? Now interested in finding answers to these questions, Ashley and James begin to research what rights unmarried partners have in the United States.

The vast majority of potential legal issues arising between Jess and Sarah or Nick and Amanda are not governed by family law—in other words, the same law is applied to them that would be applied between any two unrelated, unmarried people.[3] However, Ashley and James discover that if either of these couples entered a domestic partnership—a legal status that unmarried partners can register for in some states, cities, or counties in the United States—they could attain a number of legal rights that married couples have.[4] Ashley and James let their friends know about this option, and they are all excited to learn more. However, the group is quickly overwhelmed by the complexities of current domestic partnership laws. The law seems to be different in every state and city, and both sets of unmarried couples worry that if they entered a domestic partnership, the rights they would acquire would change or disappear if they wanted to move.[5] Also, both sets of unmarried couples find that the domestic partnership law in their state is not ideal for their situations. Jess and Sarah find that a domestic partnership in their state imposes all the financial burdens of marriage onto domestic partners.[6] These burdens were a reason they chose not to marry in the first place. Nick and Amanda previously agreed that if Amanda enters a committed romantic relationship with somebody else, Nick would still be considered

3. *See* LESLIE J. HARRIS, JUNE CARBONE, LEE E. TEITELBAUM & RACHEL REBOUCHÉ, FAMILY LAW 228 (6th ed. 2018) ("Traditionally, if a couple lived together without being ceremonially married . . . they were at best roommates and at worst outlaws."). *But see* UNIF. COHABITANTS' ECON. REMEDIES ACT, prefatory note (UNIF. L. COMM'N 2021) ("As cohabitation and its acceptance have changed over the years, so too have available claims and remedies . . . that derive from cohabitation."); Marvin v. Marvin, 577 P.2d 106, 122 (Cal. 1976) (recognizing the potential rights between unmarried cohabitants).

4. *See generally* Robin Cheryl Miller, *Validity of Governmental Domestic Partnership Enactment*, 74 A.L.R. 439 (summarizing cases illustrating the variety of domestic partnership laws and protections around the country).

5. *See generally* NAT'L CTR. FOR LESBIAN RTS., MARRIAGE, DOMESTIC PARTNERSHIPS, AND CIVIL UNIONS: SAME-SEX COUPLES WITHIN THE UNITED STATES (2020), https://www.nclrights.org/wp-content/uploads/2015/07/Relationship-Recognition.pdf [https://perma.cc/YQL8-2JZQ] (providing a state-by-state overview of relationship recognition).

6. *See, e.g.*, CAL. FAM. CODE § 297 (Deering 2021) (establishing that domestic partners in California have the same rights and duties as married partners).

by the family as one of the child's parents. But under state law, if Amanda married or entered into a domestic partnership with this potential romantic partner, Nick would lose his domestic partnership rights.[7]

Though partnerships and families are now more diverse in structure than at any other point in American history,[8] current family law in the United States is overwhelmingly focused on the law of marriage and divorce. Options such as domestic partnerships are limited in their availability,[9] and the lack of availability disadvantages many of today's unmarried partners.[10] Unfortunately, these issues are getting worse, not better, in many states.[11] However, if domestic partnership law is reformed and widely passed in all jurisdictions, domestic partnerships would be an opportunity for unmarried partners to gain legal validation of their partnership and families. Domestic partnerships, far from being obsolete after the national legalization of same-sex marriage, can be a useful tool for unmarried partners to attain legal protections that promote security and stability within their families without incurring the risks and burdens associated with formal marriage.[12] To best ensure that domestic partnership laws are available to all that they would benefit, state legislatures should consider and adopt a uniform domestic partnership law which recommends the expansion of domestic partnerships to opposite-sex partners and partnerships of more than two people.

I. Background

A. The Changing Structure of Marriage and Family in the United States

The idea of the "American Family Unit," exemplified by a "breadwinner" father and "homemaker" mother, is no longer the

7. *See, e.g.*, *id.* (requiring that both individuals are not in a marriage or other domestic partnership before entering a domestic partnership).

8. Horowitz et al., *supra* note 2.

9. *See* NAT'L CTR. FOR LESBIAN RTS., *supra* note 5 (demonstrating that domestic partnerships and civil unions are not available in many states).

10. Adams, *supra* note 1 (explaining that, though many unmarried couples do not wish to take on the responsibilities of marriage, a lack of domestic partnership systems deprives them of legal validation for their family).

11. *See, e.g.*, Terese J. Singer, *Wisconsin Ends Domestic Partnership Registration*, MILWAUKEE DIVORCE LAW. BLOG (Oct. 30, 2018), https://www.milwaukeedivorcelawyer blog.com/wisconsin-ends-domestic-partnership-registration/ [https://perma.cc/PH9G-WT2P] (detailing Wisconsin's termination of its domestic partnership registry). *See generally* Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509 (2016) (summarizing state decisions to terminate domestic partnership statutes or convert domestic partnerships into marriages).

12. Adams, *supra* note 1, at 240.

universal view of family life in the United States.[13] Changing family structures in the United States, brought on by both social and economic trends of the last half-century, have led to lower rates of marriage and an increase in nontraditional family structures, especially for marginalized groups such as low-income families and the LGBTQ+ community.[14] Recent statistics on family structure show that compared to past decades, today's Americans are delaying or completely forgoing marriage. The marriage rate in the United States in 2018, 6.5 marriages per 1,000 people, was the lowest rate ever recorded by the Vital Statistics Division of the CDC; the highest rate, reported in 1972, was 10.5 marriages per 1,000 people.[15] As the rate of marriage has decreased, the number of unmarried partners choosing to cohabitate has risen steadily over past decades.[16] As of 2019, more Americans have lived with an unmarried partner at some point in their lives (59%) than have been married (50%), and the majority of Americans approve of cohabitation for unmarried partners.[17]

Falling marriage rates and higher rates of cohabitation have also affected the home lives of American children. The percentage of children who live with both parents (whether they are married or not) has fallen from 85.2% in 1970 to 68.9% in 2018.[18] As both the rate of cohabitation and the average age of marriage have risen,[19] it is not surprising that the rate of children living with two unmarried parents has likewise steadily risen over the last decade.[20] Single-parent families are also on the rise. As of 2018, 27% of children live with one parent (compared to 11% in

13. CARBONE & CAHN, *supra* note 1, at 13–14.

14. *See id.*, at 46 (stating that social and economic trends have led to a lower marriage rate in lower socioeconomic groups); Megan M. Sweeney, *Two Decades of Family Change: The Shifting Economic Foundations of Marriage*, 67 AM. SOCIO. REV. 132 (2002) (explaining that the greater number of women entering the workforce has contributed to falling marriage rates and the rising age of first marriage in the United States); PEW RSCH. CTR., PARENTING IN AMERICA: OUTLOOK, WORRIES, ASPIRATIONS ARE STRONGLY LINKED TO FINANCIAL SITUATION 15–26 (2015) (exploring some of the social and economic trends that have contributed to the growing complexity and diversity of family structures).

15. Sally C. Curtin & Paul D. Sutton, *Marriage Rates in the United States*, NAT'L CTR. FOR HEALTH STAT. (2020), https://www.cdc.gov/nchs/data/hestat/marriage_rate_2018/marriage_rate_2018.htm#:~:text=From%201982%20to%202009%2C%20marriage,of%20the%201900%E2%80%932018%20period [https://perma.cc/KUM3-68BX].

16. Horowitz et al., *supra* note 2.

17. *Id.* (reporting that 69% of Americans believe it is acceptable for unmarried couples to live together before marriage, regardless of their intention to become married in the future).

18. Wendy Wang, *The Majority of U.S. Children Still Live in Two Parent Homes*, INST. FOR FAM. STUD. (Oct. 4, 2018), https://ifstudies.org/blog/the-majority-of-us-children-still-live-in-two-parent-families [https://perma.cc/QX5B-VN6P].

19. Horowitz et al., *supra* note 2.

20. Wang, *supra* note 18.

1970).[21] Additionally, in single-parent families, it has become more common for a child to live with their parent's unmarried partner.[22]

Scholars working in social sciences have noted that two economic and social trends in the country have contributed most to the recent patterns of marriage and family structure. First, scholars note the entry of women into the workforce, which has given women a new autonomy and ability to provide for their children without the help of a male partner, and second, they identify the growing inequality within the class system in the United States.[23] Today, women's employment and contribution to family income is not only normal but a desired trait in a partner, and at times, a real or perceived necessity for family survival.[24] In the modern marriage market, a woman's ability to contribute to the financial well-being of her family is considered before she enters a marriage, and women also have greater autonomy to forgo marriage if they feel they can support themselves and their children better without marrying their partner.[25] Unmarried cohabitants or parents may feel that they do not have the financial stability that is culturally required to marry.[26] This pressure is, unsurprisingly, most common in individuals who are in the lower economic class and have lower levels of educational attainment.[27]

Alongside economic factors, the feminist and LGBTQ+ movements in the 1970s and beyond have emphasized an "ascendant" view of marriage, which focuses on the love, companionship, and support that a partner can provide over the differentiation of roles and child rearing.[28] Many partners have discovered this type of relationship can be achieved outside of marriage—in fact, Pew researchers found that 84% of Americans feel that marriage is not essential to live a fulfilling life.[29] Further, married and cohabitating partners both cite love as the primary reason for marrying or moving in together.[30] While some partners simply do not feel that marriage is necessary to express their love and commitment, others do not feel comfortable engaging in an institution that has historically excluded the LGBTQ+ community and oppressed

21. *Id.*
22. *Id.*
23. CARBONE & CAHN, *supra* note 1, at 46.
24. Sweeney, *supra* note 14, at 134.
25. *Id.*; CARBONE & CAHN, *supra* note 1, at 46.
26. CARBONE & CAHN, *supra* note 1, at 46; Sweeney, *supra* note 14, at 134.
27. CARBONE & CAHN, *supra* note 1, at 19–20; Horowitz et al., *supra* note 2.
28. Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 91 (Feb. 2014).
29. Horowitz et al., *supra* note 2.
30. *Id.*

women.[31] Some partners decide not to marry because they are uncomfortable with the social and cultural significance put on marriage and feel this is inappropriate for the nature of their relationship.[32] Finally, polyamorous partners are altogether excluded from entering a marriage.[33]

After decades of social and economic change in the United States, the country is left with a wide range of family structures as opposed to the common and idealized "American Family" of the 1960s and before. Partners are marrying later or not at all, and children are more likely to be raised in single-parent, blended, or cohabitating families.[34] Law professors June Carbone and Naomi Cahn point out that current family law, which centers married partners, is outdated for the modern state of marriage and families in the United States.[35] In order to provide legal protection outside of legal marriage, family law must adapt to find solutions for unmarried partners. One such solution is the domestic partnership. Though first established for same-sex couples before same-sex marriage was legalized, this system of establishing legal rights and duties for partners can be expanded to include all unmarried partners who wish to gain legal protections for themselves and their families.[36]

B. Beginnings of Domestic Partnership Law

Domestic partners can be understood as "nonmarital life partners."[37] Some states, counties, and cities offer domestic partnerships as a legal status that an unmarried couple may enter to be afforded some of the rights and benefits given to married couples in that jurisdiction.[38] Beyond this basic concept, the term domestic partnership is almost impossible to define concisely, as the requirements for entering into a domestic partnership, the rights afforded to domestic partners, and the legal duties of domestic partners vary in nearly every jurisdiction in

31. Adams, *supra* note 1, at 240.

32. *Id.* at 241.

33. *Id.* at 242; *see also Cambridge Becomes 2nd U.S. City to Legalize Polyamorous Domestic Partnerships*, POLYAMORY LEGAL ADVOC. COAL. (Mar. 9, 2021), https://static1.squarespace.com/static/602abeb0ede5cc16ae72cc3a/t/6047c7f856dc6d6501ec8e10/1615316984759/2021-03-09+PLAC+Press+Release+revised.pdf [https://perma.cc/5TJU-SU5B] (describing the disadvantages faced by polyamorous partners due to lack of legal recognition).

34. Horowitz et al., *supra* note 2; Wang, *supra* note 18.

35. CARBONE & CAHN, *supra* note 1, at 183.

36. Adams, *supra* note 1, at 245.

37. Miller, *supra* note 4, at [*1a] n.2.

38. *Id.* at [*1b]; *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, FINDLAW (2021), https://www.findlaw.com/family/marriage/same-sex-marriagecivil-unions-and-domestic-partnerships.html [https://perma.cc/5DAY-ZCL5]; *see* NAT'L CTR. FOR LESBIAN RTS., *supra* note 5 (providing a state-by-state overview of domestic partnership).

which domestic partnerships exist.[39] Further, many jurisdictions allow for unmarried couples to enter into a civil union—a legal status very similar to a domestic partnership. Often, civil unions are thought to give unmarried couples more legal rights and duties than domestic partnerships, but as the rights and duties of domestic partners vary so highly between jurisdictions,[40] the comparison is not so straightforward.

Domestic partnerships began in the 1980s and 1990s as a method for same-sex partners to attain some of the rights afforded to married couples before the legalization of same-sex marriage.[41] During this time, LGBTQ+ activists in California began advocating for the passage of domestic partnership ordinances in individual municipalities.[42] Drawing on the anti-discrimination ordinance passed in San Francisco in 1978, which prohibited discrimination on the basis of sexual orientation for housing and employment, these activists reasoned to politicians that denying hospital and prison visitation and employee benefits granted to spouses to committed same-sex couples was also discrimination on the basis of sexual orientation.[43]

Instead of lobbying for same-sex marriage, activists developed the idea for a legal status of domestic partners, which would allow partners to register and obtain benefits. After facing several rejections in the 1980s—with little victories achieved in smaller, progressive California cities like West Hollywood—the cities of San Francisco and Los Angeles both established domestic partner registries in 1991 and 1993, respectively.[44] Activism surrounding domestic partnerships in California inspired work in other states. In 1999, Vermont became the first state to establish civil unions statewide,[45] while California's statewide domestic partnership law was still being negotiated in the state legislature.[46]

Early domestic partnership laws in Los Angeles, San Francisco, and eventually the State of California, required a couple registering for a domestic partnership to share a common residence and assume responsibility for one another's basic living expenses—a relatively high

39. FINDLAW, *supra* note 38; *see* NAT'L CTR. FOR LESBIAN RTS., *supra* note 5.

40. *See* NAT'L CTR. FOR LESBIAN RTS., *supra* note 5 (summarizing the jurisdictional requirements for civil unions and domestic partnerships across the United States).

41. NeJaime, *supra* note 28, at 104; *see also* CAL. FAM. CODE § 297 (Deering 2021) (explaining through legislative notes that the act was created "to help California move closer to fulfilling the promises of inalienable rights . . . by providing all caring and committed couples, regardless of their gender or sexual orientation, the opportunity to obtain essential rights, protections, and benefits . . . and to further the state's interest in promoting stable and lasting family relationships").

42. NeJaime, *supra* note 28, at 114–21.

43. *Id.* at 114–17.

44. *Id.* at 144.

45. Nat'l Ctr. for Lesbian Rts., *supra* note 5, at 20–21.

46. *See* NeJaime, *supra* note 28, at 149–53.

standard compared to future iterations of California's domestic partnership law and domestic partnership laws in other states.[47] This high standard reflected the emphasis that activists put on the marriage-like quality of a domestic partnership. The framing of domestic partnerships as similar to, or a step toward, same-sex marriage both reflected the wishes of many activists and assuaged politicians' fears that the definition of domestic partner would be too broad and cost businesses inordinate amounts of money in extending benefits to the domestic partners of employees.[48]

While some proponents of domestic partnership laws intended for these laws to be passed as a step towards same-sex marriage, others saw domestic partnerships as a queer institution separate from the institution of marriage and did not wish for LGBTQ+ communities to embrace marriage.[49] The Gay Liberation Front, as well as many lesbian activists, spoke of marriage as the root of oppression for women and LGBTQ+ individuals.[50] Marriage was characterized as an institution which pushed heteronormativity and subordination of women, and many activists believed that the LGBTQ+ community should "attack the marriage system."[51] For activists of this opinion, a domestic partnership was a separate system entirely that would celebrate and embody the equal partnership of same-sex partners.[52] Though the "pro-marriage" goal eventually gained traction in the LGBTQ+ community, and state legislatures and courthouses took steps towards marriage equality, this was never the universal goal of LGBTQ+ activists.[53] As same-sex marriage was legalized in several states and was making progress towards federal legalization in the Supreme Court, LGBTQ+ legal scholars warned that a sole focus on marriage would lead to the retraction of other legal means of recognition for couples who did not want to get married.[54] After the federal legalization of same-sex marriage in 2015, these warnings came to fruition in many states.

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47. *Id.* at 140–41; CAL. FAM. CODE § 297 (Deering 2021) (showing that in 2003 California removed the requirement that domestic partners must live together and be responsible for each other's living expenses).

48. *See* NeJaime, *supra* note 28, at 140 (reporting that the original legislation was revised to ensure that it was not used by relatives or friends).

49. *E.g.*, *id.* at 104–12.

50. *Id.* at 95.

51. *Id.*

52. *Id.*

53. *Id.* at 104 (stating that "LGBT leaders in the 1980s and early 1990s debated whether the movement should view marriage as a long-term goal" amid differing opinions on marriage).

54. *See* Adams, *supra* note 1 (arguing that legislatures should not ignore the rights of unmarried partners).

C. Domestic Partnership Law After Obergefell v. Hodges

On June 26, 2015, the Supreme Court announced one of its most famous decisions in *Obergefell v. Hodges*, when it ruled that same-sex marriage is a constitutional right protected by the Fourteenth Amendment.[55] The very case that achieved marriage equality for the LGBTQ+ community, however, became the impetus for the restriction and reversal of rights for domestic partners in several states.[56] States' and municipalities' differing responses to domestic partnership law post-*Obergefell* is the result of a difficult question: if domestic partnership statutes primarily exist to protect the rights of same-sex couples, and now same-sex couples in all states can choose to marry, should domestic partnerships still be an option for unmarried couples? States approached this issue in vastly different ways. For example, while Wisconsin ended its domestic partnership registry and Washington converted civil unions into legal marriages,[57] California continued to see the use for domestic partnership statutes and ordinances even after same-sex partners' rights could be protected by marriage, and it expanded these statutes to encompass a variety of unmarried partners regardless of sexual orientation.[58] The following Sections provide examples showing the various ways in which states and cities are responding to the changing view of partnerships and marital relationships. This section also previews the proposed uniform legislation drafted to address the lack of standards governing unmarried partners across states.

i. Rolling Back and Closing Registries: The Wisconsin Approach

Wisconsin, which had originally passed its domestic partnership legislation in 2009,[59] officially closed the domestic partnership registry in April of 2018, with the important caveat that couples who were registered as domestic partners would retain this legal status.[60] Wisconsin's domestic partnership law only allowed for same-sex couples to register for benefits.[61] After the right to marry opened up to same-sex couples, the number of domestic partnerships registered in Wisconsin

55. Obergefell v. Hodges, 576 U.S. 644 (2015).

56. Matsumura, *supra* note 11, at 1509.

57. *See* Christopher S. Krimmer, *Imminent Demise: Register for Domestic Partnership Status Before It Disappears on April 1*, INSIDE TRACK (Feb. 7, 2018), https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=10&Issue=2&ArticleID=26139# [https://perma.cc/ECE8-RRVP]; *see* Matsumura, *supra* note 11, at 1523.

58. *See* S.B. 30, 2019 Leg., Reg. Sess. (Cal. 2019) (amending California's domestic partnership statute to remove the requirement that persons be of the same sex to enter into a domestic partnership).

59. *See* WIS. STAT. § 770.01–18 (2009).

60. *Id.* § 770.07; Singer, *supra* note 11.

61. WIS. STAT. § 770.05 (2009).

dropped dramatically from thousands in 2009 and hundreds per year following that, to only forty couples registering in 2015.[62] This decrease in domestic partnership registries following the adoption of same-sex legal marriage is presumed to be the reason that Wisconsin closed the registry.[63] Critics of this decision say that domestic partnerships provided partners who did not wish to marry with legal protections that would now become wrongfully unavailable to future unmarried partners in the state.[64] Christopher Sean Krimmer, writing for the Wisconsin Bar's weekly newsletter, opined that the statute should instead be expanded to include unmarried adult partners regardless of their sexual orientation.[65] New Jersey, Rhode Island, and Vermont also took the same approach as Wisconsin.[66]

ii. Converting Domestic Partnerships and Civil Union to Marriages: The Washington Approach

Washington State passed its domestic partnership law in 2007, which was akin to California's in that it was essentially "marriage by a different name."[67] However, after legalizing same-sex marriage in 2012, the State closed its domestic partnership registry to all partnerships in which both partners were under the age of sixty-two.[68] Instead of allowing partners who were already registered as domestic partners to retain the rights that had been established under the law, Washington gave current domestic partners the choice to either dissolve their legal relationship and lose all rights afforded under the domestic partnership statute or apply for a marriage license.[69] If the partners failed to make this decision by June 10, 2014, their domestic partnership would automatically convert into a marriage.[70] Connecticut, Delaware, and New Hampshire—which used to allow for civil unions—also followed this Washington approach after the legalization of same-sex marriage in their jurisdiction.[71]

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62. Krimmer, *supra* note 57.
63. *See id.*; Singer, *supra* note 11.
64. *See* Singer, *supra* note 11.
65. Krimmer, *supra* note 57.
66. *See* NAT'L CTR. FOR LESBIAN RTS., *supra* note 5, at 15, 18, 20–21.
67. Matsumura, *supra* note 11, at 1522; *see* Domestic Partnership Act, WASH. REV. CODE §§ 26.60.010–26.60.901 (2007).
68. Matsumura, *supra* note 11, at 1522–23.
69. *Id.*
70. *Id.*
71. *See* NAT'L CTR. FOR LESBIAN RTS., *supra* note 5, at 6–7, 15.

iii. Expanding Rights to Heterosexual Couples: The California Approach

California has a unique history of domestic partnership statutes, being among the first states to adopt a domestic partnership law in response to municipal ordinances and activism from the LGBTQ+ community.[72] Same-sex marriage was legalized in California in 2008, after which the domestic partnership registry remained open.[73] California reaffirmed its belief in protecting the rights of unmarried couples in 2019 when the legislature passed Senate Bill 30, which amended its domestic partnership statute to allow heterosexual couples to register.[74] The Senate Report regarding the bill acknowledges the Domestic Partnership Act's history in protecting the rights of same-sex couples, but also states that the exclusion of heterosexual couples from registering as domestic partners deprives these couples of an opportunity to their "preferred means of formalizing their relationship and expressing their love."[75]

iv. Expanding Rights to Non-Traditional Families Made Up of More Than Two Committed Partners: The Recent Response from Sommerville and Cambridge

In June 2020 and March 2021, respectively, the cities of Sommerville, Massachusetts and Cambridge, Massachusetts passed ordinances allowing more than two people to register as domestic partners.[76] The definition of a domestic partnership in Cambridge still requires these partners to be "in a relationship of mutual support, caring, and commitment and intend to remain in such a relationship" and to "consider themselves to be a family."[77] The Cambridge ordinance was passed with input from the Polyamory Legal Advocacy Coalition, which stated in a later press release that this decision would help not only polyamorous couples and their families, but also "non-nuclear" families including multi-parent families, families where multiple generations live

72. NeJaime, *supra* note 28, at 112.

73. *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (holding that same-sex marriage is a right under the Constitution of California).

74. S.B. 30, 2019 Leg., Reg. Sess. (Cal. 2019).

75. S. JUDICIARY COMM., REPORT ON DOMESTIC PARTNERSHIP: PERSONS UNDER 62 YEARS OF AGE, S.B. 30, 2019 Leg., Reg. Sess., at 1 (Cal. 2019).

76. *See* Ellen Barry, *A Massachusetts City Decides to Recognize Polyamorous Relationships*, N.Y. TIMES (July 1, 2020), https://www.nytimes.com/2020/07/01/us/somerville-polyamorous-domestic-partnership.html [https://perma.cc/8XT6-CSZN]; POLYAMORY LEGAL ADVOC. COAL., *supra* note 33.

77. CAMBRIDGE, MASS., MUN. CODE OF ORDINANCES ch. 2.119.020 (2021).

in the same household and assist with child rearing, and step-family relationships.[78]

v. Proposed Uniform Legislation from the Uniform Law Commission

In response to the need for uniformity in law governing unmarried partners, the Uniform Law Commission created the Uniform Cohabitants' Economic Remedies Act (UCERA).[79] Published in 2021, UCERA is yet to be introduced as a bill in any state's legislature.[80] This Act's purpose is "to remove bars to claims so that cohabitants are treated as other litigants under applicable state law and are not precluded from bringing claims solely because their relationship is possibly sexual and certainly nonmarital."[81] This Act does not create any special status for unmarried cohabitants, and is not an act which establishes a domestic partnership or civil union system.[82] Instead, UCERA would govern litigation of express and implied contracts and equitable relief claims between unmarried cohabitants upon separation.[83] Though a helpful step for unmarried partners undergoing separation, it does not create any rights for unmarried partners during their relationship and is not an adequate replacement for a domestic partnership system.[84]

II. Analysis

A. Domestic Partnerships are a Viable Tool for Unmarried Partners to Protect Their Rights as a Family Unit

Unmarried partners should have the choice to attain certain rights given to married couples, both because of the right to make choices about intimate relationships and because it is in the state's best interest to provide a method to promote family stability to unmarried partners and their children.[85] Domestic partnership laws are a viable way for

78. POLYAMORY LEGAL ADVOC. COAL., *supra* note 33.

79. UNIF. COHABITANTS' ECON. REMEDIES ACT (UNIF. L. COMM'N 2021).

80. *Uniform Cohabitants' Economic Remedies Act*, UNIF. L. COMM'N https://www.uniformlaws.org/committees/community-home?communitykey=c5b72926-53d2-49f4-907c-a1cba9cc56f5#LegBillTrackingAnchor [https://perma.cc/ZN7K-D4U4] (Feb. 15, 2023) (tracking legislative action for UCERA).

81. UNIF. COHABITANTS' ECON. REMEDIES ACT, §3 cmt. ¶ 1 (UNIF. L. COMM'N 2021).

82. *See id.* at prefatory note.

83. *Id.*

84. *See infra* Section III.C.i.

85. *See* Matsumura, *supra* note 11 (raising constitutional concerns upon state's changing domestic partnership law); Gregg Strauss, *The Positive Right to Marry*, 102 VA. L. REV. 1691 (2016) (arguing that constitutional rights surrounding choices about marriage

unmarried couples to attain these rights and benefits without incurring burdens associated with the social and legal status of marriage.[86] In addressing the legal benefits and burdens of domestic partnership laws, it is important to note that the lack of uniformity among domestic partnership statutes from various jurisdictions renders it impossible to analyze these statutes in a way that is applicable to unmarried partners living in every jurisdiction with a domestic partnership system in place.[87] Instead, this Section uses examples from existing and theoretical domestic partnership acts to demonstrate their practical use in improving the legal protection of unmarried partners.

i. Potential rights and benefits gained by unmarried partners through domestic partner registration

The rights of domestic partners vary from jurisdiction to jurisdiction and fall on a spectrum from not marriage-like to marriage-like.[88] On one extreme, California's current domestic partnership statute gives domestic partners the same "rights, protections and benefits" as married spouses.[89] Other systems, such as Wisconsin's former domestic partnership registry, explicitly limit the rights of domestic partners as compared to those of legal spouses.[90]

During the course of a domestic partnership, legislation can ensure that domestic partners are entitled to the same benefits under their employers as married couples. In certain states and municipalities, these rights apply only to domestic partnerships where one or both partners are employees of the state or city.[91] Under California's expansive domestic partnership regime, the laws passed require all employers to extend the same benefits to an employee's domestic partner as they would to an employee's spouse.[92] These employer rights include (depending on the employer's policy for spouses) access to an employer's healthcare provider for domestic partners, a leave of absence upon the death of a partner, and/or sick leave to care for an injured or sick

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can be framed as power rights) [https://perma.cc/LYE8-LQ34]; Adams, *supra* note 1 (stating that marriage is not essential to creating a stable family, and rather, non-traditional partners can create stable families with the help of domestic partnership laws).

86. *See* Adams, *supra* note 1 (exploring domestic partnerships as a method for unmarried partners to attain legal recognition and rights).

87. *See* NAT'L CTR. FOR LESBIAN RTS., *supra* note 5 (summarizing the jurisdictional requirements for domestic partnership statutes across the United States)

88. *Id.*

89. *See* CAL. FAM. CODE § 297 (West 2020).

90. Singer, *supra* note 11.

91. *See* CAMBRIDGE, MASS., MUN. CODE OF ORDINANCES ch. 2.119 (2021).

92. *See* CAL. FAM. CODE § 297 (West 2020).

partner.[93] The potential to access these rights and abilities could improve the financial situation of unmarried partners, and provide an unmarried partner with care and comfort upon grief, illness, and injury.

Aside from employer benefits, further protections upon the unexpected injury or death of a partner commonly included among domestic partnership statutes are medical visitation and decision-making rights,[94] the right to inherit property from a deceased partner,[95] and the right to sue on behalf of a deceased partner in an action for wrongful death.[96] These rights give an unmarried partner, who may be closer to their partner than members of their family who would receive these rights without a domestic partnership in place, the ability to make decisions that are best for their partner and ensure financial stability in case of a tragedy.

In terms of child custody and childcare, many domestic partnership statutes assume that after a domestic partnership has been terminated by death or dissolution, the former partner has no special legal right to custody or care of the child.[97] Cambridge's domestic partnership ordinance provides a domestic partner with access to the school records of their partner's children, access to personnel records regarding concerns about the child, and grants them the ability to remove the child from school in the event of an emergency or illness.[98] However, the ordinance specifies that after a partnership is terminated, so too are these rights.[99] Wisconsin's previous domestic partnership statute gave no mention to the rights of a domestic partner in regards to their partner's legal child, including any rights after the partnership has terminated.[100] However, California—characteristically broad in its scope of rights afforded to domestic partners—states that the rights of former or surviving partners are the same in regard to their partner's child as those of former or surviving spouses.[101]

93. *Id.*

94. *See, e.g.*, CAMBRIDGE, MASS., MUN. CODE OF ORDINANCES ch. 2.119 (2021) (granting medical visitation rights to domestic partners).

95. Singer, *supra* note 11.

96. *Id.*

97. *See, e.g.*, CAMBRIDGE, MASS. MUN. CODE OF ORDINANCES ch. 2.119 (2021) (omitting special rights or status to a child after the partnership has been terminated by separation or death).

98. *Id.*

99. *See id.*

100. *See* WIS. STAT. § 770 (2009).

101. *See* CAL. FAM. CODE § 297 (West 2020).

ii. Burdens Imposed on Registered Domestic Partners Range from Minimal to Extensive Depending on the Controlling Law

As the rights provided to domestic partners increase towards a resemblance of the rights granted to married couples, so too do the burdens imposed by a domestic partnership. While California gives the same rights to domestic partners as they do to married spouses, so too does the State impose the same responsibilities onto domestic partners as they do for spouses.[102] In jurisdictions where the rights of domestic partners are less extensive than those of spouses, the burdens are also less extensive. For instance, domestic partners in Wisconsin do not have to go through divorce proceedings upon dissolution of a domestic partnership, and they are additionally not presumed to be responsible for their partner's debts.[103]

B. Current Deficiencies in Domestic Partnership Law Raise Constitutional Questions and do not Align with the State's Duty to Protect Family Units

Unmarried partners have the right, grounded in a constitutional right to privacy, to choose not to marry. On its face, this statement is not controversial—after all, the State is hardly forcing couples down the aisle without their consent. The debate is instead to what extent a state's legislature or courts should be involved in unmarried partners' relationships. In not marrying, committed and long-term partners in many jurisdictions who feel that marriage is not an appropriate option for them are not afforded any rights based on their relationship.[104] The post-*Obergefell* response from states that do not have domestic partnership or similar systems in place seems to be, "Sorry, that's not the State's business. If you would like these rights, you can always make the choice to marry." This response raises constitutional concerns in certain contexts and further ignores the long-held governmental interest in "promoting stable and lasting family relationships."[105]

i. Legal Debates Regarding the Extent to which the Constitutional Right to Privacy Protects the Right to Establish Domestic Partnerships

The right to privacy and freedom surrounding one's personal decisions about intimate relationships has driven Supreme Court

102. *Id.*
103. *See* Singer, *supra* note 11.
104. *See, e.g.*, NAT'L CTR. FOR LESBIAN RTS., *supra* note 5.
105. *See* CAL. FAM. CODE § 297 (West 2020).

decisions expanding the right to marry, and the flowery prose within these cases frames the importance of personal choice in family decision-making in the context of choosing to marry.[106] The toppling of the right for unmarried couples to access employer and healthcare benefits raises an interesting constitutional question surrounding whether the right *not* to marry exists. Language from the Supreme Court could suggest that a right to make decisions pertaining to marriage without government interference extends to all decisions about marriage, such as the right to forgo it altogether.[107] The California Judges Association addressed this concern in the report preceding the passage of Senate Bill 30, which amended California's domestic partnership statute to allow for heterosexual couples to register as domestic partners:

> In light of the U.S. Supreme Court ruling in 2015 to make marriage legal for all, it follows that domestic partnerships should be broadened as well. Whether two people decide to enter into a marriage or domestic partnership is a personal decision and one that should be available to all, no matter one's age or sexual orientation.[108]

Despite debates on the right not to marry and recognition of this right as the driving force of Senate Bill 30, no court case to date has successfully established a constitutional right to enter a domestic partnership.[109] One constitutional hurdle to overcome is that most constitutional rights are "negative" rights, which prevent government interference into personal liberties and freedoms, whereas a right to establish domestic partnerships may be a positive right that entitles individuals to government benefits.[110] This same argument was used by opponents of same-sex marriage as a constitutional right, including Justices Thomas and Roberts in their dissent in *Obergefell*, who argued that unlike privacy rights such as freedom of speech, which prevent the State from interfering in a citizen's personal choices, the right to marry instead is a right which requires the government to act to establish legal rights and duties.[111] In critique of this logic, author Gregg Strauss instead posits that the right to marry is better understood as a "power" right, not a positive right.[112] He explains that the right to marry is the right to

106. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 666 (2015) ("[D]ecisions concerning marriage are among the most intimate that an individual can make.").

107. *Id.*

108. S. JUDICIARY COMM., REPORT ON DOMESTIC PARTNERSHIP: PERSONS UNDER 62 YEARS OF AGE, S.B. 30, 2019 Leg., Reg. Sess., at 3 (Cal. 2019).

109. Matsumura, *supra* note 11, at 1512.

110. *Id.* at 1529; Strauss, *supra* note 85 (comparing negative rights such as the right to freedom of speech and religion to the right to marry).

111. Strauss, *supra* note 85, at 1692–93 (citing Obergefell v. Hodges, 576 U.S. 644 (2015) (Roberts, J., dissenting)).

112. *Id.* at 1694.

establish a legal relationship with its associated obligations and benefits without state interference, and that this right is grounded in the Constitution's commitment to equal liberty.[113] Though only applied to marriage in his article, this reasoning could be used to establish the right for unmarried partners to establish a domestic partnership.

Current legal debates over whether the right to establish domestic partnerships is grounded in the Constitution also address situations in which domestic partnership status is retracted in a jurisdiction. Author Kaiponanea T. Matsumura points out that the denial of rights previously available under a domestic partnership law could coerce a couple into marriage.[114] This is especially true where a couple loses rights after a domestic partnership system is terminated in a state (which occurred in Arizona) or where a state automatically converts a domestic partnership or civil union into a marriage unless the couple opts out and loses previous benefits (which occurred in Washington).[115] Matsumura argues that, because the decision not to marry involves constitutional issues of privacy and choice, state infringements to this choice, such as the Washington approach of converting civil unions into marriages without the partners' participation, infringe on partners' Fourteenth Amendment rights.[116] In this context, the right implicated by potential plaintiffs is a negative right—opposing state interference in their previously established legal relationship—rather than the "power" right discussed by Strauss. Because of the more established precedent regarding protection of negative rights, unmarried partners whose previously attained benefits have been taken away in their jurisdiction have a distinct and potentially more successful constitutional claim.[117]

The constitutional law surrounding the rights of unmarried partners to enter a domestic partnership and the legality of retracting domestic partner benefits that were previously established have not been successfully established in the courts, and whether these rights exist is still being analyzed by legal scholars.[118] There are potential policy bases for establishing a system of domestic partnership law in the United States beyond unresolved but valid constitutional concerns, the most promising of which is the State's continued interest in promoting stable family relationships.

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113. *Id.* at 1695.

114. Matsumura, *supra* note 11, at 1547.

115. *Id.* at 1521–22.

116. *Id.* at 1547.

117. *Id.* ("These conversions threaten the values of autonomy and stability and therefore present a strong case for the application of a right not to marry.").

118. *See id.*; Strauss, *supra* note 85 (arguing that there is a limited right to not marry and that there is a positive right to marry, respectively).

ii. Establishing a Means for Legal Protection for Unmarried Partners Furthers the State's Interest in Protecting and Maintaining Stable Family Relationships

Every day, state and federal courts protect the rights of family units. In countless judicial decisions, including those involving the right to marry, this country reaffirms its continued compelling interest in guarding the legal rights of children and family units.[119] For instance, one of the policy bases cited in *Obergefell v. Hodges* was that legal marriage "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."[120] Courts most often frame this interest in the context of marriage, even when judging cases of property division and parental rights at the end of a long-term non-marital relationship.[121] Author Albertina Antognini analyzed case law pertaining to unmarried partners and concluded that courts judge the rights of unmarried partners based on the extent to which their relationship resembles a marriage.[122] However, the State could promote stable family relationships through the use of domestic partnership statutes and ordinances, if only they are willing to recognize that stable family relationships have the potential to exist outside of marriage.[123]

Despite the shift towards a variety of non-traditional family models, studies suggest that children living in "stable" family environments (defined as living with two married parents) go on to attain higher levels of education and career success than their peers who grew up in "unstable" families.[124] Organizations which support conservative family values have interpreted this data to mean that cohabitation is bad for children's development, with the Institute for American Values claiming in a study that "[c]hildren are less likely to thrive in cohabiting

119. This is a rather broad proposition. See MINN. STAT. § 518.17 (2022), for a concrete example of the State's interest in the "best interests of the child" and the rights afforded to married couples during and after a marriage. *See also* Adams, *supra* note 1, at 234 (noting that legal marriage creates 1,138 legal rights and responsibilities under federal law). This impacts family law legislation. *See, e.g.*, CAL. FAM. CODE § 297 ("This act is intended to . . . further the state's interests in promoting stable and lasting family relationships . . . .").

120. Obergefell v. Hodges, 576 U.S. 644, 667 (2015).

121. *See* Albertina Antognini, *The Law of Nonmarriage,* 58 B.C. L. REV. 1 (2017); Courtney M. Cahill, *Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 ARIZ. L. REV. 43 (2012).

122. Antognini, *supra* note 121, at 6.

123. Indeed, courts have called for legislative attempts to update law governing cohabitants. *See*, UNIF. COHABITANTS' ECON. REMEDIES ACT (UNIF. L. COMM'N 2021) (citing Blumenthal v. Brewer, 69 N.E.3d 834, 838 (Ill. 2016)) ("Significantly, the [Illinois] court suggested that the appropriate source for change was the state legislature, not the courts.").

124. Adams, *supra* note 1, at 243–44 (citing INST. FOR AM. VALUES, WHY MARRIAGE MATTERS, THIRTY CONCLUSIONS FROM THE SOCIAL SCIENCES (3d. ed. 2011)).

households, compared to intact, married families."[125] Later, the National Marriage Project put out a press release based on this study.[126] Though the study acknowledges that marriage rates have fallen in lower income communities and that economic factors are linked to educational attainment,[127] the National Marriage Project claims that traditional marriage can benefit these communities by rebuilding family stability and characterizes the "intact, biological, married family" as the "gold standard" for family life.[128]

This interpretation of the data surrounding educational attainment and career success is explicitly suggested for use by legislatures and courts to justify their support of marriage and/or the exclusion of unmarried couples and their families.[129] However, the relationship between the marital status of parents and the future success of children may be one of correlation, not causation. Because individuals who are part of a lower economic class or have less educational attainment are less likely to marry, the lesser economic security of the cohabitating couple may be the cause of both their choice not to marry as well as the lower levels of achievement their children experience.[130] In fact, the study conducted by the Institute for American Values makes several conclusions about the wellbeing of children who grow up with unmarried parents that could be better explained by lower socioeconomic status, such as these children being more likely to engage in criminal behavior, try drugs, or have children as teenagers.[131] In suggesting marriage as a solution for lower class communities, the authors of the study merely report statistics about the happiness, health, and economic security outcomes of married couples as opposed to analyzing the reasons why partners choose not to marry or the legal benefits enjoyed by married partners.[132]

As cohabitation itself is likely not the cause of family instability, the State should promulgate policies which strive to improve family stability outside of merely promoting marriage as the solution to a family's problems. Giving legal benefits to unmarried partners through a domestic partnership status is a way to increase economic stability by ensuring

125. INST. FOR AM. VALUES, WHY MARRIAGE MATTERS, THIRTY CONCLUSIONS FROM THE SOCIAL SCIENCES 7 (3d. ed. 2011) [https://perma.cc/K2QH-QD7J].

126. Press Release, Nat'l Marriage Project, New NMP Report: Cohabitation Eclipses Divorce as Key Risk Factor for Children in America (Aug. 16, 2011).

127. INST. FOR AM. VALUES, *supra* note 125, at 23–27.

128. Press Release, Nat'l Marriage Project, *supra* note 126.

129. INST. FOR AM. VALUES, *supra* note 125, at 7, 20.

130. *See* CARBONE & CAHN, *supra* note 1, at 83–84.

131. INST. FOR AM. VALUES, *supra* note 125, at 16–17, 30, 37–38.

132. *See id.* (briefly mentioning, but failing to analyze, the effect of socioeconomic factors on both marriage rates and health outcomes for children).

that unmarried partners can receive employment benefits and inheritance rights.[133] Domestic partnership also increases family stability outside of economic factors, such as by providing hospital and prison visitation rights, guaranteed leave of absence to care for an ailing partner, and the right to be involved in the education and medical care of a partner's children.[134] A domestic partnership can improve these non-economic factors of family stability without requiring partners to risk the financial burdens associated with marriage.

C. Ideal Domestic Partnership Law for Today's Unmarried Partners

Domestic partnership laws should be created in jurisdictions where none exist and bolstered in jurisdictions with existing domestic partnership systems to protect the rights of unmarried partners. Laws should be made more uniform to address the issue of the wide variation in domestic partnership law across jurisdictions. Unmarried partners have their own unique situations and reasons as to why marriage is not an appropriate choice for them, so the requirements for entering a domestic partnership should not exclude anyone based on sexual orientation. Further, the law should not require a partner's relationship to resemble a marriage to enter a domestic partnership. Finally, domestic partnership law should ideally establish limited rights and responsibilities for partners as compared to marriage.

i. The Need for Uniformity in Domestic Partnership Statutes Across the United States

The current variation of domestic partnership law across jurisdictions makes life difficult for unmarried partners who wish to move. For example, domestic partners in California—a state which establishes all of the legal rights and obligations of legal marriage for domestic partners—would lose all of these rights upon moving to Alabama, a state which does not provide for domestic partnerships.[135] Even if partners moved to another state with a domestic partnership system, the state law likely would have different requirements, rights, and responsibilities.[136] This variation creates confusion for partners who

133. FINDLAW, *supra* note 38; *see, e.g.*, CAMBRIDGE, MASS., MUN. CODE OF ORDINANCES ch. 2.119 (2021) (providing employment benefits to domestic partners).

134. *See, e.g.*, CAMBRIDGE, MASS., MUN. CODE OF ORDINANCES ch. 2.119 (2021) (providing non-economic benefits to domestic partners like hospital visitation rights, correctional facility visitation rights, and rights regarding the education of a partner's children).

135. *See* AM. COLL. OF TRUST & EST. COUNS., DOMESTIC PARTNERSHIP SURVEY 1 (William P. LaPiana ed. 2012), https://www.actec.org/assets/1/6/LaPiana-Domestic-Partnership-Chart.pdf?hssc=1 [https://perma.cc/N7WL-4MLM].

136. *See, e.g.*, *id.* (surveying jurisdictional requirements and rights across states).

have established or are considering entering into a domestic partnership.[137]

One potential solution to remedy the legal system's inconsistent treatment of unmarried partners is the Uniform Law Commission's proposed legislation, UCERA.[138] Though UCERA is helpful for cohabitants who have separated, it is an imperfect solution—or at least only a small part of the whole solution—to the question of the legal treatment of unmarried partners under the law as a whole. Even if UCERA were passed in all jurisdictions, it would not be a sufficient replacement for a potential universal domestic partnership law. Because UCERA does not govern domestic partnerships, it does not include any rights to make medical decisions on behalf of a partner, visitation at a hospital or prison, or standing to sue for wrongful death of a partner.[139] Contract-based claims and claims for equitable relief are more accessible under UCERA, so economic benefits could be easier to attain after a partnership ends.[140] However, this economic relief would only occur upon a dispute between the cohabitants or upon the termination of the relationship, so partners are placed in a win-or-lose scenario to obtain relief.[141] Providing economic benefits to partners during the course of a partnership through access to employer healthcare is not included in UCERA. Though UCERA is not contrary to the goals of unmarried partners in the United States, an additional act should be passed which establishes an opt-in status to enable unmarried partners to gain affirmative rights during the course of a partnership.

To ensure that domestic partners and their families can move across state lines without losing the rights granted to them in their original jurisdiction, each state should have domestic partnership laws; these laws should convey a uniform set of regulations for the requirements of domestic partners. This uniform regulation could be achieved through promulgation of a uniform domestic partnership code similar to UCERA by an organization such as the American Law Institute, American Bar Association, or Uniform Law Commission. This hypothetical Uniform Domestic Partnership Act (UDPA) should aim to

137. *See* Adams, *supra* note 1, at 236.

138. *See supra* Section II.C.v (setting out the purposes of UCERA).

139. UNIF. COHABITANTS' ECON. REMEDIES ACT § 3 (UNIF. L. COMM'N 2021) ("This [act] applies only to a contractual or equitable claim between cohabitants concerning an interest, promise, or obligation arising from contributions to the relationship.").

140. *See id.* § 4(a) ("An individual who is or was a cohabitant may commence an action on a contractual or equitable claim that arises out of contributions to the relationship.").

141. *See id.* § 6(c) ("A claim for breach of a cohabitants' agreement accrues on breach and may be commenced . . . during cohabitation or after termination of cohabitation."); *id.* § 7(b) ("An equitable claim based on contributions to the relationship accrues on termination of cohabitation[.]").

create an opt-in status for unmarried partners. This status could award certain rights and duties that would support family stability for a wide range of marriage-averse partners. Achieving this ultimate goal would be a lengthy process, likely requiring years of activism to push uniform law organizations to research and draft a uniform code.[142] The specific definitional elements, rights, and duties imposed by this hypothetical UDPA legislation are discussed in the following Sections.

ii. Requirements for Entering into a Domestic Partnership Under Hypothetical Uniform Legislation

Due to the variety of partners who may benefit from domestic partnership laws, the requirements for entering a domestic partnership should be broad. Current domestic partnership laws tend to require that domestic partners resemble a married couple. For example, some jurisdictions require that partners be "in a relationship of mutual support, caring and commitment and intend to remain in such a relationship;" "reside together;" be "each other's sole domestic partner;" and "consider themselves to be a family."[143] However, jurisdictions such as California have removed requirements that domestic partners must live together and be responsible for one another's basic living expenses.[144] This signals a shift to a more expansive view of what domestic partnerships in the state look like.[145]

UCERA's definition of unmarried cohabitants provides guidance on how to establish an inclusive definition for domestic partners. The Act defines unmarried cohabitants as "two individuals not married to each other who live together as a couple after each has reached the age of majority or been emancipated."[146] Individuals who are too closely related to legally enter a marriage in their jurisdiction are excluded from this definition.[147] Though the phrase "who live together as a couple" is concerning given the variety of living situations unmarried partners may find themselves in, UCERA clarifies that this phrase is not meant to

142. *Frequently Asked Questions*, UNIF. L. COMM'N, https://www.uniformlaws.org/aboutulc/faq [https://perma.cc/TQ9D-DWS5] (describing the process of drafting a uniform code).

143. CAMBRIDGE, MASS., MUN. CODE OF ORDINANCES ch. 2.119 (2021).

144. The California Domestic Partner Rights And Responsibilities Act of 2003, A.B. 205, 2003 Leg., Reg. Sess., (Cal. 2005) (repealing the requirements that domestic partners must share a residence and be responsible for each other's basic finances).

145. *See* CAL. FAM. CODE § 297 (West 2020) (defining domestic partners as "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring").

146. UNIF. COHABITANTS' ECON. REMEDIES ACT § 2(1) (UNIF. L. COMM'N 2021).

147. *Id.*

require unmarried cohabitants to share a common residence.[148] Instead, whether potential claimants meet this definition "is a factual question that will be determined based on the unique circumstances of the cohabitants' relationship."[149] Further, living together as a couple under UCERA does not require that the cohabitants have a sexual relationship, and two individuals can qualify as cohabitants even if one or both are married to another individual.[150]

UCERA's definition—although helpful in most regards for establishing a definition for domestic partners under the hypothetical UDPA—has two flaws which should be changed for UDPA. First, UCERA does not apply to more than two cohabitants.[151] Under UDPA, more than two partners should be able to opt into a domestic partnership status as to not exclude polyamorous partners.[152] Second, the fact-based determination of the phrase "who live together as a couple"—though better than a strict requirement that the partners share a common residence—could allow the judicial trend of determining the validity of a non-marital relationship through its comparison to an ideal of marriage to continue.[153]

The ideal definition of domestic partners under the hypothetical UDPA should not implicitly draw comparisons with marriage. Instead, the only definitional requirements should be that the partners are at or above the age of majority, are not related in a way that would bar them from entering a marriage, and that all partners agree to the rights and duties they would undertake by entering a domestic partnership. Intentionally left out of this definition is any requirement that the partners share a common residence or are financially responsible for each other's living expenses, as well as any requirement having to do with the nature of the relationship between the partners (except the requirement that the relationship is not familial). Though ideally domestic partners should share a deep connection regardless of romantic or sexual attraction and be committed to the wellbeing of their partner, leaving these vague, fact-based requirements out of the definition of domestic partners prevents judicial actors from judging a relationship against the standards of an ideal of marriage. Finally, this definition should not exclude partners

148. *Id.* § 2(1) cmt.

149. *Id.*

150. *Id.*

151. *Id.* § 2 ("'Cohabitant' means each of *two* individuals . . . .") (emphasis added).

152. *See* discussion *supra* Section I.C.iv.

153. *See* Antognini, *supra* note 121, at 10–11, 59–60 (explaining how courts may revert to the traditional form of marriage and noting the prevalence of judges making decisions on non-marital relationships based on factors like sexual relations, domestic work, or sharing the same residence).

based on gender composition or the number of partners who wish to opt-in.

This proposed definition of domestic partners, which does not include requirements based on the financial or living situations of the partners or the nature of their relationship, is ideal for many unmarried partners today. Financial concerns are a prevailing reason that unmarried couples choose not to marry, so requiring domestic partners to be responsible for housing and living expenses for one another makes a domestic partnership an equally risky choice for these partners.[154] Domestic partnerships should also be available to the wide variety of unconventional partnerships that exist in the United States, including partners of all gender identities and partners whose bond does not include a romantic or sexual relationship.[155] Eliminating restrictions on domestic partnership law that exclude polyamorous partnerships would continue the legacy of domestic partnership as a system outside of marriage in which queer partnerships can be validated and thrive.[156] Providing domestic partnerships only to same-sex couples ignores both the practical benefits of domestic partnerships for all unmarried partners and the reality that opposite-sex couples could morally oppose marriage for the same reasons as same-sex couples.[157]

The few restrictions on the hypothetical UDPA's definition of domestic partners—that the partners have reached the age of majority, are not married to one another, and are not too closely related to prevent them from being married in the state where they reside—are put in place for practical reasons. Requiring partners to have reached the age of majority follows from the near universal legal premise that minors are incompetent to enter into a contract or legal relationship.[158] Next,

154. *See* CARBONE & CAHN, *supra* note 1 (exploring how economic concerns explain changing marriage patterns).

155. *See* Adams, *supra* note 1, at 248 ("Partnerships should not be limited to couples that cannot marry, but instead, should include any two committed people who will take responsibility for one another.").

156. *See id.* at 239–40 ("While shut out of the institution of marriage, creativity flourished in the gay community, inspiring the rest of our society with examples of more than two individuals living together as a family . . . . Gay couples, as well as straight couples . . . created polyamorous triads of three partners."); *see also* FINDLAW, *supra* note 38 (describing how the Harvard Law School LGBTQ+ Advocacy Clinic and Chosen Family Law Center partnered with mental health professionals and lawyers to create the Polyamory Legal Advocacy Coalition, which drafted and passed a domestic partnership ordinance aimed at recognizing and protecting polyamorous families and relationships).

157. *See* Adams, *supra* note 1, at 239–41 (describing the benefits of domestic partnership law for partners regardless of sexual orientation and detailing a number of reasons as to why partners, regardless of sexual orientation, may oppose marriage).

158. *See, e.g.*, Cheryl B. Preston & Brandon T. Crowther, *Infancy Doctrine Inquiries*, 52 SANTA CLARA L. REV. 48 (2012) (providing a summary of the infancy doctrine under common law, the rationale underlying the doctrine, and the jurisprudential development of the doctrine).

prohibiting domestic partners from being legally married to one another is a practical matter based on the rights and duties imposed on married couples. Entering into a domestic partnership while already married would provide neither additional rights nor protections that marriage did not already provide, and requiring that domestic partners not be married would prevent legal disputes over what legislation and precedent would govern a potential dispute in court over the relationship.

Though the first two requirements are straightforward and do not contradict commonly held viewpoints about domestic partnership law, the third—that domestic partners cannot have a familial relationship that would prevent them from entering a marriage—is slightly more controversial. The existing domestic partnership laws surveyed for this Article contain the requirement that domestic partners cannot have a close familial relation.[159] However, the Polyamory Legal Advocacy Coalition calls for the legal protection of non-nuclear families, including "single parents supported by relatives" and "multi-generational families."[160] Though legal protections for non-traditional household structures which include relatives should be explored through further scholarship, the hypothetical UDPA bars family members from entering into domestic partnerships to attempt to prevent the common argument that these laws are liable to be applied too broadly.[161]

iii. Balancing the Legal Rights and Duties of Domestic Partners

To best serve unmarried partners who nevertheless wish to enter a legal commitment, domestic partnership laws should serve as a middle ground between the legal rights and duties imposed on married couples and the absence of legal rights and duties imposed upon individuals in a non-marital relationship. Just as domestic partnership law should not require partners to have a relationship that resembles traditional marriage to enter a domestic partnership, it should not impose the same rights and responsibilities as marriage. Domestic partnership laws that impose on cohabitants the same rights and responsibilities as marriage—such as California's—are impractical for the post-*Obergefell* era, where all

159. *See, e.g.*, CAL. FAM. CODE § 297(b)(2) (West 2020) ("The two persons are not related by blood in a way that would prevent them from being married to each other in this state."); WIS. STAT. § 770.05(4) (2018) ("The 2 individuals are not nearer of kin to each other than 2nd cousins, whether of the whole or half blood or by adoption."); WASH. REV. CODE § 26.60.030(5)(a) ("The persons are not nearer of kin to each other than second cousins, whether of the whole or half blood computing by the rules of the civil law[.]").

160. FINDLAW, *supra* note 38.

161. *See, e.g.*, James M. Donovan, *An Ethical Argument to Restrict Domestic Partnerships to Same-Sex Couples*, 8 L. & SEXUALITY 649, 650 (recounting arguments against domestic partnership bills on the grounds that they are too "expansive" and broadly extend benefits).

partners who are prepared to take on these responsibilities have the choice to marry.[162]

The hypothetical UDPA would ideally include medical decision-making power, visitation rights for hospitals and prisons, the right to sue for wrongful death of a domestic partner, and rights to register with a domestic partner's child's school to receive educational information about the child and remove the child from school in case of emergency or illness.[163] Rights to employer benefits given to the spouses of employees are slightly more complicated. A system like California's—in which all domestic partners have the same eligibility for their partner's employer healthcare policies as a legal spouse—promotes financial and familial stability, but it may strain small employers and create legal disputes based upon organizational beliefs or religious affiliations.[164] Following Wisconsin's approach to domestic partnerships before the registration closed in 2018, UDPA should include rights to join a domestic partner's state employer healthcare plan and encourage, but not require, private companies to extend similar benefits to the domestic partners of employees as they do for spouses.[165]

As stated in the definition of domestic partners under UDPA, domestic partners are not required to be responsible for each other's living expenses.[166] The low responsibility that domestic partners have for each other's finances is proportional to the financial benefits they could receive under UDPA. Not included in UDPA is the ability to jointly file taxes, to inherit from a deceased partner, or to benefit from support payments after separation akin to spousal support that can be received after a divorce. For the two-thirds of unmarried cohabitants that cite financial concerns as a reason for delaying or forgoing marriage,[167] a system in which there is no potential for financial liability to a previous domestic partner assuages the fear that by gaining certain rights and benefits from a domestic partnership, one is in danger of incurring a

162. *See* CAL. FAM. CODE § 297 (West 2020) (imposing on cohabitants the same rights and responsibilities as marriage).

163. *See, e.g.*, CAMBRIDGE, MASS., MUN. CODE OF ORDINANCES ch. 2.119 (2021).

164. *See, e.g.*, NeJaime, *supra* note 28, at 119 (providing a historical account of how politicians' concerns about the potential cost of domestic partnership and its impact on businesses prevented initial attempts at passing domestic partnership legislation in Los Angeles); *Religious Groups Weigh in on Domestic Partner Benefits Idea*, MYSA NEWS (Aug. 29, 2011) https://www.mysanantonio.com/news/local_news/article/Religious-groups-weigh-in-on-domestic-partner-2146537.php [https://perma.cc/E9KF-H2F4] (describing how a religious coalition opposed an initiative to extend benefits to the domestic partners of city employees).

165. WIS. STAT. § 40.51(2m)(a) (2016) (amended 2022).

166. *See* discussion *supra* Section III.C.ii.

167. Horowitz et al., *supra* note 2.

financial burden in the future.[168] Not including claims for support payment from an ex-domestic partner, though preventing financial resources for one partner, protects the other partner from financial burdens they did not wish to take on. Similarly, though a lack of inheritance rights to a deceased domestic partner is a potential hurdle to financial stability after losing one's partner, the exclusion of inheritance rights also prevents a partner from inheriting the debt of their deceased partner.[169] The exclusion of these financial benefits for domestic partners is further warranted because if domestic partners were to receive all possible financial benefits with none of the risks or burdens—like inheriting a deceased partner's assets but not their debt—domestic partners would be receiving preferential treatment under the law as compared to married spouses or those with no legal relationship-based status.

Upon termination of a domestic partnership—either through separation of the partners or death to one of the partners—domestic partners would have little responsibility to the other partner. However, they would also have few options to recover from an ex-partner. Since the proposed UDPA does not include any right to financial support of an ex-partner, any claims between the partners would be brought in court under common law principles (or UCERA, if it were to be passed in the jurisdiction where the partners reside). The only right to bring a claim that would be affected by UDPA is the right to sue on behalf of oneself and the estate of a deceased partner in a claim for wrongful death. Following dissolution of a domestic partnership, any remaining rights, such as the right to state employer healthcare plans and rights to visit children of a domestic partner in medical settings or access school and medical records, should be terminated.

The proposed UDPA would almost certainly be opposed by some on the grounds that too many people would be able to opt into domestic partnership status, even despite restrictions on family members entering into a domestic partnership. Lawmakers may worry that roommates or friends with no intention to care and support each other long term will use the system to gain financial benefit such as access to insurance. However, the proposed rights gained for domestic partners under UDPA are not primarily related to finances of the partners and instead aim to promote partner and familial stability through non-monetary means. Nonetheless, it is true that under UDPA, two people with no intention of

168. Matsumura, *supra* note 11, at 1515.

169. *Id.* (citing Steve Branton, *After Gay Marriage Ruling, What Financial Steps Should Couples Take?*, CHRISTIAN SCI. MONITOR (July 3, 2015), http://www.csmonitor.com/Business/Saving-Money/2015/0703/After-gay-marriage-ruling-what-financial-steps-should couples-take [https://perma.cc/MWH4-DLGA]).

maintaining a long-term relationship of care and commitment may enter a domestic partnership; through this status, one partner could gain access to another partner's state employer healthcare plan. Though this does not comport with the spirit of domestic partnership law, it is important to note that the intentions of a couple entering legal marriage are not closely analyzed and criticized by lawmakers.[170] The risk of individuals entering a domestic partnership with impure intentions is outweighed by the need to create a system without implicit comparisons to marriage and which does not impose more scrutiny on domestic partners than it does on married couples.

Conclusion

Domestic partnership law in the United States is in a state of flux. Laws vary between states and even cities, and jurisdictions with domestic partnership laws have taken different approaches on how to treat domestic partnerships after the legalization of same-sex marriage.[171] Additionally, the restrictions on who can enter a domestic partnership as well as the burdens imposed by the law in many jurisdictions are impractical and provide little benefit for many of today's unmarried couples.[172] For unmarried partners post-*Obergefell*, such as Sarah and Jess, and Nick and Amanda—discussed in the Introduction to this Article—an accessible domestic partnership system which establishes some legal rights to partners without imposing the same practical duties as a marriage would improve familial stability and provide rights essential to a partnered life. However, current domestic partnership law must be reformed and made uniform in all states to ensure that it can benefit all unmarried partners who may wish to become domestic partners.

170. Adams, *supra* note 1, at 246.

171. *See* NAT'L CTR. FOR LESBIAN RTS., *supra* note 5.

172. *See supra* Part III (describing how definitional requirements and financial ramifications of domestic partnership status can be improved to increase accessibility of domestic partnership law through new legislation).

"Vancouver's Favourite Country Music Pub," Single Room Occupancy Hotels, and the Context of International Frameworks: Mapping Vancouver's Urban Law and Cultural Policy

Sara Ross†

Introduction

The public and private spaces of cities, their design, and the urban law and policy that shapes the lived spaces within cities provides a potent example of overlapping and often contested heritage(s) and heritage spaces that may have built heritage merit, may carry a high intangible value as gathering spaces for art, culture, and performance, or may be both characterized by their tangible and intangible heritage merit.[1] The layers of diverging, contested, or interwoven heritage within the same urban spaces can diverge in what they mean to a group, community, or individual. They may represent significant moments of architectural grandeur, cultural capital, celebration, significant moments of horror that teeter within desires to forget their existence, or they may also represent a space for future cultural flourishing and community growth. Heritage space within a city may be less conventional than existing legal frameworks for assessing cultural heritage, value, or merit permit, and heritage assets can take numerous shapes involving sight, sound, smell, movement, and so on. This expanded and more inclusive manner of understanding the many iterations of what heritage can be in a city and what heritage spaces can signify for the many urban denizens

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1. U.N. Educ., Sci. & Cultural Org. [UNESCO], *New Life for Historic Cities: The Historic Urban Landscape Approach Explained*, at 5, 9, 11, UNESCO Doc. CLT/2013/WS/11 (2013) [hereinafter UNESCO (2013)], https://whc.unesco.org/uploads/activities/documents/activity-727-1.pdf [https://perma.cc/RD2J-LF7K].

and stakeholders who find meaning and community within the "third places" of a city, creates a complex web within which urban law and policy must navigate.[2]

In addition to the mechanics of heritage preservation assessments and processes (and the laws and legislation surrounding cultural heritage protection) cities are increasingly developing neighbourhood plans and strategic cultural plans that engage with and shape how cultural heritage is understood, protected (or not protected), encouraged, or even strategically commodified in a city and neighbourhood. Whether or not these plans ultimately accomplish their purported goals is still unclear. Focusing on the case of Vancouver, Canada, this Article will explore the role of local cultural policy documents and cultural plans in localizing international frameworks and calls to action for the inclusive management, sustainable (re)development, and navigation of dissonant and overlapping cultural heritage spaces at the local city and neighbourhood level.[3] After a general description of Vancouver, this Article will first give a brief overview of applicable international frameworks for inclusive heritage management and preservation. It will then describe a number of neighbourhoods within Vancouver's Eastside and examine Vancouver's *Downtown Eastside Plan*.[4] Finally, it will turn to Vancouver's newly adopted cultural plan for 2020–2029, *Culture|Shift: Blanketing the City in Arts & Culture*, its associated documents, and how these documents navigate urban cultural heritage matters and some of the "third places" of Vancouver's Downtown Eastside. This analysis aims to identify the particular policies that take strides towards localizing the international frameworks for inclusive heritage management and preservation introduced earlier in the Article.[5]

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2. *See* RAY OLDENBURG, THE GREAT GOOD PLACE: CAFÉS, COFFEE SHOPS, BOOKSTORES, BARS, HAIR SALONS AND OTHER HANGOUTS AT THE HEART OF A COMMUNITY (2nd ed. 1997) (describing and exploring the importance of "third places"); UNESCO, General Conference Res. 36C/41(I), annex, Recommendation on the Historic Urban Landscape (Nov. 10, 2011) [hereinafter UNESCO (2011)] (recommending urban heritage conservation strategies, including managing historic areas within their broader urban contexts); LAURAJANE SMITH, USES OF HERITAGE (2006) (challenging traditional conceptions of heritage and proposing that heritage is a social, cultural, and political process); VIŠNJA KISIĆ, GOVERNING HERITAGE DISSONANCE: PROMISES AND REALITIES OF SELECTED CULTURAL POLICIES (Vicky Anning, Diane Dodd & Bas Lafleur eds., 2016) (examining heritage dissonance); SARA GWENDOLYN ROSS, LAW AND INTANGIBLE CULTURAL HERITAGE IN THE CITY (2020) (addressing the role and protection of intangible cultural heritage in the urban context).

3. *See, e.g.*, KISIĆ, *supra* note 2 (exploring the navigation of heritage dissonance using cultural policies and specific policy tools).

4. CITY OF VANCOUVER, DOWNTOWN EASTSIDE PLAN (2015) [hereinafter DTES PLAN].

5. CITY OF VANCOUVER, CULTURE|SHIFT: BLANKETING THE CITY IN ARTS & CULTURE—VANCOUVER CULTURE PLAN 2020-2029 (2019).

I. International Guiding Documents for Inclusive Urban Heritage Policies

A) Unesco's Recommendation on the Historic Urban Landscape

Within the broader framework of international sustainable urban development goals, the United Nations Educational, Scientific and Cultural Organization's (UNESCO) "Recommendation on the Historic Urban Landscape" (HUL Recommendation) emphasizes localizing the inclusive approaches to cultural heritage contained within the document—the "HUL Approach."[6] Instead of focusing on replacing existing frameworks for heritage conservation, the HUL Recommendation is a tool upon which member states can draw from for implementing heritage policies that better incorporate an intergenerational and inclusive understanding of culture, cultural diversity, and both intangible as well as tangible built heritage.[7] The HUL Recommendation encourages a methodology centered around a "balance" approach towards heritage and culture in the urban context and which engages a holistic, interdisciplinary, and inclusive understanding of a city's heritage assets.[8] This understanding of heritage assets involves a weighing of tangible and intangible heritage concerns; divergent interests in preserving the past alongside awareness of present and future (re)development concerns; the array of diverse perspectives, cultures, and stakeholders within a city whose interests and views can overlap and/or conflict within the same space; and also balances the different roles (and jurisdiction) of the various levels of government involved—local, regional, and national/federal—alongside international interests.[9] The HUL Recommendation also highlights the potential complementarity of different development

6. *See* UNESCO (2011), *supra* note 2, ¶¶ 13, 22, 24, 25; WORLD HERITAGE TRAINING & RSCH. INST. FOR THE ASIA & THE PAC. REGION, CITY OF BALLARAT, TONGJI UNIV., FED'N UNIV. AUSTL., HUL GUIDEBOOK: MANAGING HERITAGE IN DYNAMIC AND CONSTANTLY CHANGING URBAN ENVIRONMENTS 9 (2016) [hereinafter HUL GUIDEBOOK]; International Conference on World Heritage and Contemporary Architecture – Managing the Historic Urban Landscape, *Vienna Memorandum and Decision*, 4 ¶31, UNESCO Doc. WHC-05/15.GA/INF.7 (Sept. 23, 2005).

7. *See e.g.*, HUL GUIDEBOOK, *supra* note 6, at 9, 11 (describing how the HUL Approach integrates environmental, social, and cultural concerns into urban development by recognizing the interconnectedness of these values in creating heritage); UNESCO (2012), *supra* note 2, ¶¶ 5, 12 (noting how the HUL Approach recognizes the need to integrate urban heritage conservation strategies with the human environment to ensure these interventions work with the region's heritage in harmony).

8. UNESCO (2011) *supra* note 2, ¶ 11; *see also* UNESCO (2013), *supra* note 1, at 9, 11.

9. UNESCO (2013), *supra* note 1, at 9; UNESCO (2011), *supra* note 2, ¶¶ 11, 13, 22–23, 25.

objectives engaged in a city space.[10] In all, this inclusive balancing approach is framed as an invaluable recipe for sustainable urban development that equitably acknowledges culture, diversity, and the human right to culture at the municipal level.

Applying the HUL Approach is to look beyond traditional views of the historic center of a city in order to incorporate a broader conception of the city's historic characteristics, as well as the broader spatial reality of the diverse historic elements of a city.[11] The HUL Approach recognizes "layers" that have accumulated over time in a city,[12] or the "whole-life" or "whole history perspective" of a space.[13] These layers include the seen and unseen cultural and community infrastructure within a city and its built environment; the cultural practices, diversity, social values, and identities of a city's population; its geomorphology, hydrology, open spaces, and topography; and a city's general urban structure and economic processes.[14]

Steps in implementing the HUL Approach can be sorted into seven central action items which engage both traditional and innovative tools that are adaptable to the local contexts. These include: (1) undertaking a holistic assessment of the city's natural, cultural, and human resources; (2) applying participatory planning methods and stakeholder consultations to decision-making processes regarding conservation aims and actions; (3) assessing the vulnerability of urban heritage to socioeconomic pressures, as well as the impacts that climate change has had and will continue to have on urban heritage; (4) integrating urban

10. UNESCO (2011), *supra* note 2, ¶ 18; *see also* UNESCO (2013), *supra* note 1, at 9.

11. *See* UNESCO (2013), *supra* note 1, at 12–13; UNESCO (2011), *supra* note 2, ¶¶ 5, 8–9. However, as a cautionary note, while the HUL Approach provides a useful model for conceptualizing and localizing an inclusive and expansive understanding of cultural heritage, it has also been critiqued for its vulnerability in its potential utilization within heritage commodification processes. *See, e.g.*, Tolina Loulanski, *Revising the Concept for Cultural Heritage: The Argument for a Functional Approach*, 13 INT'L J. CULTURAL PROP. 207, 228 (2006); Matthew Hayes, *The Coloniality of UNESCO's Heritage Urban Landscapes: Heritage Process and Transnational Gentrification in Cuenca, Ecuador*, 57 URB. STUD. 3060, 3065–69 (2020). These processes can lead to the comparative valorization of certain iterations, expressions, and understandings of intangible cultural heritage over others. *See* Hayes, *supra*, at 3070–73. This valorization can offset the original aims of the HUL Approach.

12. UNESCO (2013), *supra* note 1, at 12–13; UNESCO (2011), *supra* note 2, ¶¶ 5, 8–9.

13. For more on this perspective, see Carolyn Gibbeson, After the Asylum: Place, Value and Heritage in the Redevelopment of Historic Former Asylums (2018) (Ph.D. thesis, Newcastle University) (on file with Newcastle University School of Arts and Cultures) [hereinafter Gibbeson, *After the Asylum*]; Carolyn Gibbeson, *Not Always Nice: The Effect of a Whole-Life Perspective on Heritage and Redevelopment*, 12 J. URB. REGENERATION & RENEWAL 32 (2018) [hereinafter Gibbeson, *Not Always Nice*].

14. *See, e.g.*, UNESCO (2013), *supra* note 1, at 12–13; UNESCO (2011), *supra* note 2, ¶¶ 5, 8–9.

heritage values and their vulnerability status into the wider framework of city development processes and decision-making; (5) prioritizing policies and actions specific to conservation and development, which also includes good stewardship; (6) establishing the appropriate partnerships and local management frameworks; and (7) developing mechanisms for coordinating the various activities between different actors and stakeholders.[15]

Finally, for the sake of prioritizing actionability, a flexible toolkit intended to evolve over time is outlined within the guiding documents for implementing the HUL Approach.[16] This locally-adaptable toolkit can be divided into four interdependent general categories: (1) community engagement tools; (2) knowledge and planning tools; (3) regulatory systems; and (4) financial tools.[17] These four categories incorporate the importance of learning about and recognizing diverse and divergent local histories, cultural significance(s), and heritage viewpoints. The identification and inclusion of associated stakeholders must then engage these parties in intercultural dialogue, mediation, and negotiation with the objective of developing broader consensus-based cultural heritage goals, actions, planning, and regulation that can draw on international—as well as local—public and private funding and financing mechanisms in order to safeguard tangible and intangible heritage assets from a broad base of diverse heritage viewpoints.[18]

B) UN-Habitat and the New Urban Agenda

Subsequent to the 2015 adoption of the 2030 Agenda for Sustainable Development and the associated 17 Sustainable Development Goals, the United Nations Conference on Housing and Sustainable Urban Development (Habitat III) led to the adoption of the New Urban Agenda (NUA) in late 2016.[19] This international standard-

15. *E.g.*, UNESCO (2013), *supra* note 1, at 16; HUL GUIDEBOOK, *supra* note 6, at 11, 13; *see also* UNESCO (2011), *supra* note 2, ¶¶ 22–24 (discussing tools that can be used in implementing the HUL Approach, including the cooperation of public and private stakeholders through formal partnerships).

16. HUL GUIDEBOOK, *supra* note 6, at 14–15.

17. *Id.* at 14–15; *see also* UNESCO (2011), *supra* note 2, ¶¶ 22–24 (describing how these tools should be adapted to local contexts by stakeholders implementing them).

18. *See, e.g.*, HUL GUIDEBOOK, *supra* note 6, at 14–15; UNESCO (2011), *supra* note 2, ¶¶ 22–25; Jonathan S. Bell, *The Politics of Preservation: Privileging One Heritage over Another*, 20 INT'L J. CULTURAL PROP. 431 (2013); BRIAN GRAHAM, G.J. ASHWORTH & J.E. TUNBRIDGE, A GEOGRAPHY OF HERITAGE: POWER, CULTURE & ECONOMY 217–19 (Anke Ueberberg ed., 2000).

19. *E.g.*, *United Nations Conference on Human Settlements – Habitat I Vancouver, Canada, 31 May-11 June 1976*, *United Nations: Confs. | Habitat*, UNITED NATIONS, https://www.un.org/en/conferences/habitat/vancouver1976 [https://perma.cc/M7A8-JT95]; *see* G.A. Res. 71/256, New Urban Agenda (Jan. 25, 2017).

setting action blueprint draws on the HUL Recommendation and also lays out specific goals for the next twenty years pertaining to the urban environment. The NUA prioritizes responsive, context-appropriate municipal legal frameworks that work towards greater urban equality, justice, and inclusivity within urban governance and decision-making processes.[20]

Considering the ongoing inequalities that persist in most cities, including Vancouver, the NUA crafts a basis for cities to consider how their legal frameworks can be shifted to better address local human and cultural rights. The "right to the city" for a wide diversity of urban denizens is centrally important to the NUA, and this necessitates engagement with the many diverse and meaningful spaces of culture and cultural heritage in the city.[21] As the formative Habitat III Issue Papers highlighted in advance of the NUA's adoption, the "[s]ocial inclusion of disadvantaged groups, particularly in the redevelopment of urban areas and cultural spaces, can be facilitated through wider recognition of their cultural identity."[22]

Once again, in the spirit of balancing divergent and overlapping interests, the NUA notes that the "potential disruptive impacts of urban development" should be reconciled with the use, value, and sustainability of cultural heritage assets, and that local communities should be involved in this process.[23]

20. G.A. Res. 71/256, New Urban Agenda, ¶¶104, 126 (Jan. 25, 2017).

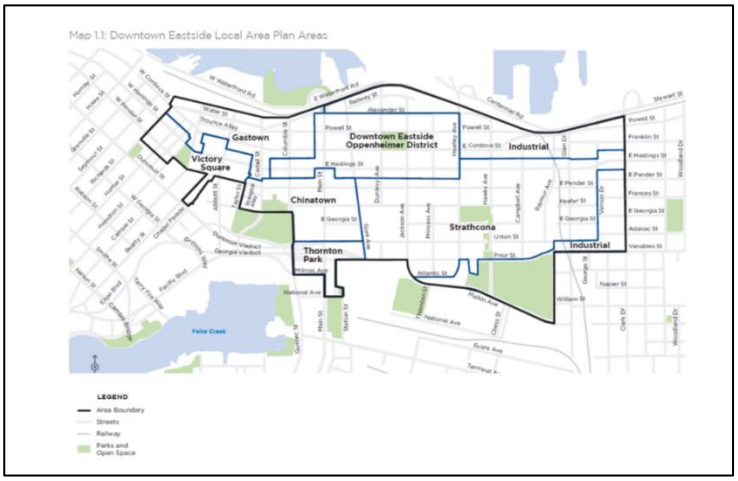
21. *Id.* ¶ 11 (describing the "right to the city" as "a vision of cities for all, referring to the equal use and enjoyment of cities and human settlements, seeking to promote inclusivity and ensure that all inhabitants, of present and future generations, without discrimination of any kind, are able to inhabit and produce just, safe, healthy, accessible, affordable, resilient and sustainable cities and human settlements to foster prosperity and quality of life for all").

22. U.N.-Habitat & U.N. Dep't of Econ. & Soc. Affs., *Urban Rules and Legislation*, *in* U.N. Conference on Housing and Sustainable Urban Development, *Habitat III Issue Papers*, 41–46 (May 31, 2015).

23. G.A. Res. 71/256, New Urban Agenda, ¶¶ 124–125 (Jan. 25, 2017).

II. Vancouver's Downtown Core, Neighbourhoods, and Local Area Plans

Figure 1. Map of Downtown Eastside Depicting Local Plan Areas



Vancouver's Downtown Eastside Plan (DTES Plan) includes a number of diverse and distinct sub-areas, including Chinatown, Strathcona, Industrial Area, Thornton Park, Victoria Square, Gastown, and the Oppenheimer District.[24] Vancouver's Downtown Eastside presents a case study of the difficulties faced in operationalizing the HUL Approach and in carrying out the balancing approach to managing divergent interests in a historic urban landscape. As Vancouver's DTES Plan notes, the area is "home to some of Vancouver's oldest neighbourhoods and the historic heart of the city."[25] Competing visions and stakeholder interests are bound up within its streets, buildings, and spaces. While the area carries interest for developers aware of Vancouver's tight housing market and the artist presence in the area that has made it popular for a subsequent wave of gentrification, rejuvenation, redevelopment, and rising property values.[26] Those who currently call the area home do not necessarily see the same future for

24. *See* DTES PLAN, *supra* note 4, at 4 (providing the map depicted in Figure 1). For figures depicting the Downtown Eastside via aerial imaging and dividing the area into sub-areas and neighborhoods, see *infra* Appendix: Figures 2, 3.

25. DTES PLAN, *supra* note 4, at 17.

26. *See, e.g.*, *id.* at 10, 110, 112 (summarizing the DTES Plan's intention for artist presence in the area).

the area and are wary of the displacement that results as previously marginalized areas of the urban landscape are retaken by a city.[27] Even a rapid, superficial visual experience of the space reveals the bubbling realities of housing precarity, Vancouver's (as well as Canada and North America's) drug use crisis, opioid overdose epidemic, alternative spatiotemporal life patterns, ill-equipped mechanisms for supporting community mental and physical health, and the informal economy.[28]

A) Gastown and the Oppenheimer District

At all times, East Hastings Street teems with life, community, trade, found furniture, makeshift temporary housing, and garbage alongside a chaotic, irreverent, determined spirit. The street betrays the mechanics of urban marginalization, addiction, precarity, and a dearth of safe, warm, and available options to spend the day or night. Walking through the area, two empty, boarded-up, and condemned single-room occupancy hotels (SROs), the Regent Hotel and the Balmoral Hotel, dominate the portion of the Oppenheimer District where East Hastings Street spatially bends and becomes West Hastings Street. Both structures carry heritage value yet are simultaneously heavy with the toll taken by years spent operated by accused slumlords.[29] These buildings continue to await their ultimate tangible fate subsequent to their recent closure and eventual expropriation by the city.[30]

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27. *Id.* at 10, 110.

28. *See, e.g.*, John Kurucz, *How Do You Explain Vancouver's Downtown Eastside to Tourists? It's Complicated . . .*, VANCOUVER IS AWESOME (Aug. 19, 2019), https://www.vancouverisawesome.com/courier-archive/news/how-do-you-explain-vancouvers-downtown-eastside-to-tourists-its-complicated-3105503 [https://perma.cc/WJR5-PT9Y] (describing how tourists encounter open drug use and individuals experiencing homelessness, mental health crises, and addiction issues in the Downtown Eastside).

29. *See, e.g.*, The Canadian Broadcasting Corporation, *Sahota Family Pleads Guilty, Agrees to $150K Fine Over Bylaw Violations in 2 Hotels*, CBC NEWS (Apr. 22, 2019), www.cbc.ca/news/canada/british-columbia/sahota-family-guilty-bylaw-violations-1.5106793 [https://perma.cc/K2RQ-WB3B]; Wendy Stueck & Mike Hager, *For Low-Income Residents in Vancouver, a Different Kind of Real Estate Crisis*, THE GLOBE & MAIL (Mar. 18, 2019), www.theglobeandmail.com/canada/british-columbia/article-for-low-income-residents-in-vancouver-a-different-kind-of-real-estate [https://perma.cc/8V68-YWJL]; *see also* James Farrer, *Grimy Heritage: Organic Bar Streets in Shanghai and Tokyo*, 3 BUILT HERITAGE 76, 76 (2019) (discussing how spaces that are derelict and "grimy" can also serve "important social functions as spaces of creativity and community formation").

30. *See, e.g.*, Kendra Mangione, *Expropriation Notices Filed for Balmoral, Regent SRO Hotels*, CTV NEWS (Jan. 30, 2018), bc.ctvnews.ca/expropriation-notices-filed-for-balmoral-regent-sro-hotels-1.4033717 [https://perma.cc/H7JU-BDC4]; James McElroy, *Vancouver Council Votes Unanimously to Expropriate 2 DTES Hotels for $1 Each*, CBC NEWS (Nov. 6, 2019), www.cbc.ca/news/canada/british-columbia/regent-balmoral-council-vote-value-1.5349259 [https://perma.cc/NM3M-5JJN]; Mike Hager & Frances Bula, *Vancouver Paid*

Located in the same area as these two heavy buildings is North America's first legal supervised drug consumption site, Insite.[31] Run by Vancouver Coastal Health, street drug users are provided with clean injection paraphernalia and booths where they can inject previously-attained illicit drugs under the supervision of trained healthcare workers who are able to swiftly intervene in the case of an overdose.[32]

Next to the Oppenheimer District sits Gastown. Designated as a National Historic Site in 2009, Vancouver's oldest municipal neighbourhood and commercial center is known for its heritage assets.[33] It is also known for, as Destination Vancouver—an organization whose mandate is to support Vancouver's tourism industry—notes, its "historic charm."[34] As a year-round tourist attraction, its proximity to a nearby cruise ship terminal ensures that its well-maintained cobblestone streets are full to the brim with people during the summer months. Gastown also attracts locals and new residents interested in purchasing or living in a condo in a historic, vibrant part of Vancouver, or simply spending time exploring Gastown's tourist-oriented boutiques, and carefully curated galleries, bars, and restaurants. As Destination Vancouver suggests, "[i]t's a gathering place for stylish locals and an ideal neighbourhood to explore on foot."[35] That is, however, as long as one does not follow the bend in Hastings Street where West turns to East and Gastown turns into the Oppenheimer District just half a block past Carrall Street. The visual contrast between the Oppenheimer District can be jarring, as the environment of Hastings Street is flipped on its head and suddenly transforms from well-kept designated heritage buildings, shops, and model examples of mixed-use development to abandoned SROs and temporary street encampments, found objects, and

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More Than $7.5-Million for Decrepit Hotels Owned by Sahota Family, THE GLOBE & MAIL (Dec. 11, 2020), www.theglobeandmail.com/canada/british-columbia/article-vancouver-paid-more-than-75-million-decrepit-hotels-sahota-family [https://perma.cc/XS6L-XVW2]; *see also* Gibbeson, *After the Asylum*, *supra* note 13; Gibbeson, *Not Always Nice*, *supra* note 13.

31. *See Insite*, P.H.S. CMTY. SERVS. SOC'Y, https://www.phs.ca/program/insite/ [https://perma.cc/ZD2S-9KKE].

32. *Id.*

33. *Gastown Historic District National Historic Site of Canada*, PARKS CAN.: DIRECTORY OF FED. HERITAGE DESTINATIONS, https://www.pc.gc.ca/apps/dfhd/ [https://perma.cc/F8KT-ZTE6] (type "Gastown" into "Keyword" search bar; then click "Search;" then follow hyperlink under "Results").

34. *See, e.g.*, *Gastown Neighbourhood Guide*, DESTINATION VANCOUVER, www.destinationvancouver.com/vancouver/neighbourhoods/gastown [https://perma.cc/FMJ7-KQCN].

35. *Id.*

groups of people gathered sitting, reclining, or just boisterously hanging out along the sidewalks.[36]

Right before the bend in Hastings Street is a block that displays the clearest transformation from the Oppenheimer District into Gastown. At the end of the first block where East Hastings transforms into West Hastings, a remaining open SRO that is now primarily for older adults—the Grand Union Hotel—stands next to a fenced-off community garden. The old brick building's bleak windows sport a tattered assortment of mismatched and limp yellowed and coloured curtains in various states of disrepair that line up above its hotel bar with a sign proclaiming the pub to be "Vancouver's Favourite Country Music Pub." Having once housed the Miner's Liberation League nearly a hundred years ago, the pub's historic layers have seen it house a variety of communities over the years.[37] These days, when the bar is open for business—as advertised—the venue frequently presents country music on its small, simple, elevated corner stage fronted by a small dance floor. During those times, it is filled with a motley crew of people: a varied demographic of friends, strangers, and those in between. Some of these people dance wildly and blissfully on the dance floor to the live country music often performed by a sole musician on the no-frills stage; others sit alone at the bar holding some of Vancouver's least expensive and most straightforward alcoholic beverages in hand; others chat animatedly with friends at the simple tables around the space, or sit quietly. Yet other small, curious, but vastly outnumbered groups wander away from the neighbouring Gastown cocktail lounges to come to the pub, attracted by the easily reified "dive bar" and gritty spectacle.[38] The pub can serve as a "third realm" space for live music and for community from the surrounding streets and SRO rooms above.[39]

On the same block but across the street, a "greasy spoon" style diner named "Save on Meats" has been shifted into—as reviews of those who have eaten there describe it—a surprisingly "charming" retro diner.[40] Proudly advertising its niche corporate identity as Canada's first

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36. *See* Nick Blomley, *Property, Pluralism and the Gentrification Frontier*, 12 CAN. J.L. & SOC'Y 187 (1997); Justin McElroy, *The Biggest Change in the Downtown Eastside Isn't the Crime or Homelessness. It's the Geography.*, CBC NEWS (Aug. 21, 2019), www.cbc.ca/news/canada/british-columbia/dtes-vancouver-statistics-anecdotes-1.5253897 [https://perma.cc/8653-325K].

37. MARK LEIER, REBEL LIFE: THE LIFE AND TIMES OF ROBERT GOSDEN, REVOLUTIONARY, MYSTIC, LABOUR SPY 35 (2nd ed. 2013).

38. *See, e.g.*, Farrer, *supra* note 29 (explaining the social functions of "grimy heritage").

39. *See, e.g.*, OLDENBURG, *supra* note 2 (explaining the concept of third spaces).

40. *See, e.g.*, Katherine Burnett, *Restaurants that Changed Vancouver: Save-on-Meats*, SPACINGVANCOUVER (Oct. 17, 2012), http://spacing.ca/vancouver/2012/10/17/restaurants

certified B Corporation diner and butcher,[41] Save on Meats is located in a brick heritage building built in 1891 along—what its Vancouver Heritage Foundation plaque describes as—the "once bustling Hastings Street corridor."[42] Certification as a "B Corporation" means a for-profit company meets the "highest standards of verified, overall social and environmental performance, public transparency and legal accountability."[43] Established in 1957, Save on Meats was one of only a few businesses in the area that managed to weather the economic downturn of Hastings Street.[44] As its heritage plaque also notes, Save on Meats proudly maintains an iconic neon sign featuring flying pigs that dominates its exterior—one of the last remaining iconic neon signs along Hastings Street.[45] The diner was featured on three different reality television shows ("The Big Decision," "Gastown Gamble," and "Diners, Drive-Ins and Dives"), though it has since closed to the public and turned its focus on providing free meals and tokens to local vulnerable communities.[46]

Save on Meats is not alone on the side of the street facing the Grand Union Hotel and the fence enclosed community garden. It shares the block with assorted businesses, including a newer and already-popular moderately-priced Moroccan restaurant, a café and a raucous no-frills karaoke, live metal, and punk bar that is below the former three-story Palace Hotel (also a former SRO) that once housed the infamous brothel operated by Kiyoko Tanaka-Goto until her internment alongside other Japanese Canadians by the Government of Canada during World War II.[47] It is also joined by the old Cosmopolitan Hotel—purchased by the Central City Foundation (CCF)—that now has what CCF describes as forty-two safe rooms above the first floor.[48] It has been

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-that-changed-vancouver-save-on-meats/ [https://perma.cc/77MY-S9KC].

41. *See* B Lab, *Save on Meats*, www.bcorporation.net/en-us/find-a-b-corp/company/save-on-meats [https://perma.cc/M6HL-7ZK9].

42. *See Save on Meats*, PLACES THAT MATTER, www.placesthatmatter.ca/location/save-on-meats [https://perma.cc/82A5-56XE].

43. Michael Bell, *What is a Certified B Corporation?*, DELAWAREINC.COM, https://www.delawareinc.com/blog/what-is-a-certified-b-corporation/ [https://perma.cc/U945-48LM].

44. *Save on Meats*, *supra* note 42.

45. *Id.*

46. *Id.*; *Save on Meats*, https://saveonmeats.ca/ (last accessed Jan. 28, 2023).

47. *See Nikkei Legacy Project*, LEAVING HOME: THE LIVES OF JAPANESE PICTURE BRIDES, https://www.discovernikkei.org/en/journal/2016/11/22/leaving-home/ [https://perma.cc/CG9F-DRQD].

48. *See Cosmopolitan Hotel*, CENT. CITY FOUND., www.centralcityfoundation.ca/about-us/social-purpose-real-estate/the-cosmopolitan-hotel [https://perma.cc/C9DT-QJZR].

repurposed by the Vancouver Women's Health Collective—a women-only health and wellness center for vulnerable individuals from Vancouver's Downtown Eastside.[49]

On the next block, heading further west down West Hastings Street, away from East Hastings Street, sits the old Woodward's Building that used to house the department store which went bankrupt and closed in 1993.[50] Originally built in 1903, Woodward's was an anchor of Vancouver's shopping district and provided important local employment.[51] While the historic building has since been partially demolished and has now been transformed into a mixed-use combination of market and non-market housing units, assorted corporate service locations, stores, shops, restaurants, and part of Simon Fraser University's downtown campus, the initial redevelopment of the building was stalled for years.[52] During the years it was vacant, it eventually became a center of local resistance and protest by community activists, actors, and stakeholders over its future use which, it was hoped, would contain social housing.[53] A short-lived squat of the building in 2002 was followed by the erection of a tent city outside of the building until its eventual removal by police.[54]

The struggle over the future of the Woodward's Building is just one of the sites where competing visions and stakeholder interests have arisen, and continue to arise, in relation to the future of the area and the historic spaces implicated. These clashing stakeholder interests, goals, and views continue to move further along Hastings Street and have continued to surface with conflicts over condo developments and other market-oriented, mixed-use spaces.[55] These conflicting interests continue to arrive as (re)development moves along East Hastings and

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49. *Id.*

50. *Woodward's*, H.B.C. HIST. FOUND., https://www.hbcheritage.ca/history/acquisitions/woodwards-stores-ltd [https://perma.cc/7FH2-7SQW].

51. *Id.*

52. *See* Kristen Gagnon, *Inclusivity as Architectural Program: A Reflection on Vancouver's Woodward's Redevelopment Five Years On*, ARCH DAILY (Dec. 22, 2014), https://www.archdaily.com/580467/inclusivity-as-architectural-program-a-reflection-on-vancouver-s-woodward-s-redevelopment-five-years-on [https://perma.cc/D6VK-ELNZ].

53. *See* Akshay Kulkarni, *20 Years After Woodsquat, The Protest That Began at an Old Vancouver Department Store Continues to Resonate*, CBC NEWS (Sept. 17, 2022), https://www.cbc.ca/news/canada/british-columbia/woodsquat-retrospective-2022-1.6586412 [https://perma.cc/H6EB-DHSA].

54. *See id.*; *Activists Want Action Now That Woodward's Squat is Over*, CBC NEWS (Dec. 15, 2002), https://www.cbc.ca/news/canada/activists-want-action-now-that-woodward-s-squat-is-over-1.331071 [https://perma.cc/6UX8-FPR6].

55. *See* Gagnon, *supra* note 52.

crosses the rough dividing line described above between the Oppenheimer District and Gastown.[56]

Only a few blocks after West Hastings turns into East Hastings, the informal economy along East Hastings operates alongside social life on the streets and is especially visible as the street transitions into a nighttime setting. In addition to the open trade of illegal drugs, vendors lay other wares down on outstretched blankets or tarps—a very different kind of "night market" than Metro Vancouver's sanctioned formal night markets that are popular tourist destinations. In the description of this complex local informal economy, the DTES Plan acknowledges that it is "related to the survival livelihoods of at least half of its residents who are dependent on Income Assistance and pensions."[57] The DTES Plan also notes that "[a]ctivities that make up this realm include self-employment through micro-enterprise, binning, vending, bartering and volunteering for income supplementation."[58] Recognizing the realistic value of the area's longstanding informal economy to its residents, and attempting to balance these interests with redevelopment interests that conflict with the visual manifestation and chaotic characteristics of this informal economy, the DTES Plan notes that "[t]he street market is an example of a community-based economic initiative bringing substantial opportunities for residents and a more permanent home for such vending markets is being sought."[59]

B) Vancouver's Strathcona Neighbourhood and Hogan's Alley

Next to the Downtown Eastside neighbourhood is Vancouver's oldest residential neighbourhood, Strathcona, though the distinct boundaries between the two neighbourhoods are murky.[60] Some of the area has experienced an influx of development interest and revival, while many other parts are in a comparative state of disrepair and neglect.[61] The stark differences between these structures and the

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56. *See* Blomley, *supra* note 36; NEIL SMITH, THE NEW URBAN FRONTIER: GENTRIFICATION AND THE REVANCHIST CITY (1996).

57. DTES PLAN, *supra* note 4, at 22.

58. *Id.*

59. *Id.*

60. *See Strathcona*, CITY OF VANCOUVER, https://vancouver.ca/news-calendar/strathcona.aspx#:~:text=%7C,History,identical%20apartments%20buildings%20and%20townhouses [https://perma.cc/YRZ9-F6TJ].

61. *Compare, e.g.*, *Assembly In Strathcona, East Vancouver*, VANCOUVER NEW CONDOS, https://www.vancouvernewcondos.com/properties/assembly-in-strathcona-east-vancouver/ [https://perma.cc/V7Q6-AMQT] (describing a new community of city homes being developed in Strathcona neighborhood), *with* Bridgette Watson, *Strathcona Residents Take to The Streets Calling For Government Help For Homeless people*, CBC NEWS

growing number of newly-renovated, designated heritage houses are a visual representation of the realities of economic disparity within the area.

The history of Strathcona is dotted with various extensive urban renewal initiatives, property expropriation, and demolition and development proposals which were characterized by institutionalized racism and disproportionately affected and displaced socioeconomically marginalized communities in Vancouver.[62] For example, at the time of its displacement, Hogan's Alley—an alley and T-shaped intersection officially known as Park Lane—was the only Black community in Vancouver.[63] Hogan's Alley was a core cultural and community center for Vancouver's Black population from the early 1900s until the early 1970s, when it was eventually expropriated and demolished to make way for the City to build a new viaduct.[64] This demolition crystalized the dearth of recognition by the City of the important community space held within Hogan's Alley and its cultural heritage value that had been under threat during years of City-initiated (re)development and urban renewal initiatives that paid no attention to community voices or well-being.[65]

C) Chinatown in Vancouver

Also next to Vancouver's Downtown Eastside—again with only approximately defined borders—is Chinatown, another neighbourhood that demonstrates the daily realities of Vancouver's housing crisis, opioid overdose crisis, and overarching redevelopment and displacement pressures.[66] A large number of distinct buildings contribute to the marked visual aesthetic of Chinatown. The neighbourhood has served as a community hub to the growing local

(Sept. 29, 2020), https://www.cbc.ca/news/canada/british-columbia/strathcona-protest-1.5742948 [https://perma.cc/R9VF-6M4T] (describing an encampment of hundreds of homeless individuals near Strathcona Park).

62. *See, e.g.*, Stephanie Allen, Fight the Power: Redressing Displacement and Building a Just City for Black Lives in Vancouver (June 12, 2019) (unpublished manuscript) (on file with author); AYDA AGHA, PERPETUAL AFFORDABILITY AND COMMUNITY CONTROL OF LAND, CANADIAN HOUSING AND RENEWAL ASSOCIATION CONGRESS SESSION SERIES 6 (2018).

63. *See What was Hogan's Alley*, HOGAN'S ALLEY SOC'Y, https://www.hogansalleysociety.org/about-hogans-alley/ [https://perma.cc/YLJ8-FMZ3]; Allen, *supra* note 62.

64. *What was Hogan's Alley*, *supra* note 63.

65. *See* Allen, *supra* note 62, at 25–42; *see also* AGHA, *supra* note 62 (discussing the role of rezoning and expropriation).

66. *See, e.g.*, Ayilya Thampuran, *"Post-Apocalyptic Scenes": Poor Tourist Reviews Hurt Chinatown Businesses*, DAILY HIVE: URBANIZED (Aug. 12, 2022), https://dailyhive.com/vancouver/poor-reviews-hurting-struggling-chinatown [https://perma.cc/9458-V3BA] (detailing problems with homelessness and drug use in Chinatown).

Chinese community, established even before Vancouver was incorporated in 1886.[67] The numerous restaurants and eateries that sprung up in the area to cater to the local population have provided a strong business presence in the neighbourhood.[68] While the physical boundaries of Chinatown have largely remained the same over time, not unlike Chinatowns throughout most of North America, Vancouver's Chinatown community faces increasing displacement pressures through rising costs of rent and living expenses.[69] These pressures are felt acutely by small businesses such as the local restaurants and eateries that do not necessarily have a profit margin to enable themselves to survive the rising costs of remaining in the neighbourhood.[70] Heritage Vancouver and Canada's National Trust, for example, have each placed Vancouver's Chinatown on their endangered places list.[71]

At the provincial level, Vancouver's Chinatown was designated as a historic district in 1971 under the old Historic Sites Protection Act, which has since been replaced by the Heritage Conservation Act.[72] This designation included the "heritage value" of buildings and properties that were vacant or occupied, which enabled the protection of the neighbourhood as a historic district.[73]

At the federal level, Chinatown was designated as a National Historic Site of Canada in June 2010 on account of "its physical fabric, its development as a self-segregated enclave, due in part to racially motivated hostility elsewhere in the city prior to the Second World War, and its ongoing uses [that] reflect the many contributions and struggles of Chinese Canadians throughout most of their history in this country."[74]

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67. *See, e.g.*, PAUL YEE, SALTWATER CITY: AN ILLUSTRATED HISTORY OF THE CHINESE IN VANCOUVER 17 (4th ed. 2006).

68. *Id.*; Eva Li, Peter S. Li & Li Zong, *Profile of Small Businesses Among Chinese in Vancouver*, 48 CANADIAN ETHNIC STUD. 53, 53 (2016).

69. *See* BETHANY LI, ANDREW LEONG, DOMENIC VITIELLO & ARTHUR ACOCA, ASIAN AM. LEGAL DEF. & EDUC. FUND, CHINATOWN THEN AND NOW: GENTRIFICATION IN BOSTON, NEW YORK, AND PHILADELPHIA (2013).

70. *Id.*

71. *See, e.g.*, *2018 Top 10 Watch List*, HERITAGE VANCOUVER, http://heritagevancouver.org/category/top10-watch-list/2018 [https://perma.cc/PH5C-L8EH]; *2016 Top 10 Endangered Places List*, NAT'L TRUST FOR CAN., https://nationaltrustcanada.ca/nt-endangered-places/vancouvers-chinatown [https://perma.cc/SP7E-YK8C]; *see also* LESLIE SHIEH & JESSICA CHEN, CHINATOWN, NOT COFFEETOWN: AUTHENTICITY AND PLACEMAKING IN VANCOUVER'S CHINATOWN 37 (2018).

72. *See Vancouver's Chinatown National Historic Site of Canada*, PARKS CAN.: DIRECTORY OF FED. HERITAGE DESIGNATIONS, www.pc.gc.ca/apps/dfhd/page_nhs_eng.aspx?id=12951 [https://perma.cc/HV54-BYGB]; Heritage Conservation Act, R.S.B.C. 1996, c 187 (Can.).

73. Heritage Conservation Act, R.S.B.C. 1996, c 187 (Can.).

74. *See Vancouver's Chinatown National Historic Site of Canada*, *supra* note 72.

Turning back to the local level mechanics of what meaningful cultural heritage engagement and protection requires in the context of localizing international guiding frameworks like the HUL Recommendation, at the municipal level the policies that shape the ability for cultural heritage to flourish in a context-specific manner are of key importance, as the majority of heritage conservation occurs at the local level.[75] Vancouver's new cultural plan, discussed subsequently, acknowledges the important role played by underrepresented communities who, over the years, have mobilized to advocate to have their voices and narratives heard and to be included in the shaping of neighbourhood spaces.[76]

An example of a community being included in the shaping of their neighbourhood space is the Vancouver Chinatown Revitalization Committee (Committee).[77] This Committee was assembled in 2001 in response to the area's economic decline.[78] The Committee included stakeholder groups experiencing economic decline and, notably, also included both youth groups and family associations in order to access a variety of narratives that reached beyond commercial interests in the neighbourhood and represented a holistic view of social and cultural interests and needs in the neighbourhood.[79] This work, combined with engagement with the City, ultimately resulted in the 2002 *Chinatown Vision*[80] and the 2012 *Chinatown Neighbourhood Plan & Economic Revitalization Strategy*.[81] Chinatown Vision sought to protect and encourage the flourishing of the neighbourhood's history, community, and its tangible and intangible spaces through a diversity of economic and cultural initiatives.[82]

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75. *See, e.g.*, MINISTRY OF TOURISM, PARKS, CULTURE AND SPORT, HERITAGE CONSERVATION BRANCH, COMMUNITY HERITAGE PROGRAMS: A GUIDE FOR MUNICIPALITIES 3 ("With their planning and regulatory authority, and their familiarity with community values and issues, municipal governments are well-positioned to be leaders in conserving and developing these valuable [social, economic, and environmental benefits that come from protecting historic places].").

76. CITY OF VANCOUVER, CULTURE|SHIFT, *supra* note 5, at 16.

77. *See Chinatown Revitalization: In Depth*, CITY OF VANCOUVER, https://vancouver.ca/home-property-development/chinatown-revitalization-in-depth.aspx#history [https://perma.cc/5H4T-S547].

78. *Id.*

79. *See* CITY OF VANCOUVER, LAND USE AND DEVELOPMENT POLICIES AND GUIDELINES, CHINATOWN VISION DIRECTIONS (2002).

80. *See* Jessica Chen-Adams, Chinatown Revitalization Program: Chinatown Vision (2002).

81. CITY OF VANCOUVER, CHINATOWN NEIGHBOURHOOD PLAN & ECONOMIC REVITALIZATION STRATEGY (2012).

82. *See* CHEN-ADAMS, *supra* note 80.

A second phase of Chinatown Vision turned to the expansion of intergenerational engagement, housing concerns, and economic revitalization initiatives that were intended to build on Chinatown's identity as a social and cultural hub for the community.[83] The second phase also included a city-sanctioned, three-year Chinatown Community Plan that focused on strategic rehabilitation of built structures, intensification of housing stock in the neighbourhood, parking access, and revised approaches to community development for Chinatown as well as the Downtown Eastside.[84]

Despite Chinatown's heritage designated status at the municipal, provincial, and federal level in Canada, grassroots mobilization to pursue an application for UNESCO World Heritage designation for Chinatown highlights an important element of understanding cultural heritage in the neighbourhood.[85] The many intangible cultural heritage elements of the neighbourhood—such as culinary spaces and traditions, sights, sounds, and scents—are not necessarily captured within existing dominant legal frameworks for heritage preservation which largely surround the notion of built-heritage merit. A salient layer revealed by the issue of cultural heritage protection in Chinatown is how a focus on tangible elements of cultural heritage can ultimately contribute to an erosion and displacement of the intangible elements—such as culinary culture and culinary spaces. Where a key component of intangible cultural heritage preservation in a neighbourhood such as Vancouver's Chinatown requires active participation in passing down customs, practices, and techniques from one generation to the next, the act of preservation is more complex than with tangible cultural heritage preservation.[86]

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83. *See* JESSICA CHEN-ADAMS & HELEN MA, CHINATOWN COMMUNITY PLAN: PROGRESS REPORT (2006) (explaining the potential for Chinatown to play a social and cultural role for the community).

84. *Id.*

85. *See* MARY CLARE ZAK, HISTORICAL DISCRIMINATION AGAINST CHINESE PEOPLE IN VANCOUVER 8–9 (2017); *World Heritage Status Would Make Vancouver's Chinatown Permanent Symbol of Resilience, B.C. Says*, CBC NEWS (Sept. 17, 2018), https://www.cbc.ca/news/canada/british-columbia/world-heritage-status-would-make-vancouver-s-chinatown-permanent-symbol-of-resilience-b-c-says-1.4826844 [https://perma.cc/68V5-BMEW].

86. *See, e.g.*, Bill Ivey, *Issues in Intangible Cultural Heritage*, *in* ACCESS IN THE FUTURE TENSE 34, 35–36 (Council on Libr. & Info. Res. ed., 2004).

III. Vancouver's Downtown Eastside Plan and Heritage Spaces in the Downtown Eastside

An example of the differential treatment of heritage spaces in Vancouver is visibly apparent as one walks by the empty boarded historic buildings like the Regent Hotel and the Balmoral Hotel SROs, and past the Grand Union Hotel, to the well-kept heritage buildings of Gastown. As the DTES Plan itself notes, the Vancouver Heritage Register includes only about 20% of all registered heritage buildings across the city.[87] This figure is significantly out-of-date and only accounts for currently-registered heritage buildings.[88] It also largely relies on traditional notions of what constitutes heritage and merits previous heritage protection and acknowledgment.[89] The DTES Plan notes the need to update the Register both with more complete inclusion of existing tangible heritage spaces and greater inclusion of less tangible moments bound up in the spaces of a city.[90]

As for plans for better intangible and tangible management of heritage spaces and places, the DTES Plan identifies two incentive-based heritage conservation programs: the Heritage Building Rehabilitation Program and the Heritage Façade Rehabilitation Program.[91] The DTES Plan, however, acknowledges the geographic limitations of these programs, as they include only Gastown, Chinatown, Victory Square, and Hastings Street Corridor.[92] Nonetheless, the DTES Plan proposes adapting these programs to provide support for building owners' tangible and intangible conservation efforts throughout the Downtown Eastside area and to better acknowledge the area's tangible and intangible heritage value.[93]

Specifically, the DTES Plan identifies the local legal and policy tools available to the City of Vancouver to incentivize better and more inclusive heritage preservation. For example, the use of variances and relaxing existing regulations are highlighted as particularly useful tools for incentivizing heritage preservation, alongside grants and property tax exemptions.[94] Further, the DTES Plan identifies "the creation and transfer of heritage amenity density" as another key tool.[95] These

87. DTES PLAN, *supra* note 4, at 136.
88. *Id.*
89. *Id.*
90. *Id.* at 136, 140, 172.
91. *Id.* at 136, 140.
92. *Id.* at 136.
93. *Id.* at 136, 140.
94. *Id.* at 172.
95. *Id.*

transferable heritage density bonuses involve the use of rezoning to allocate community amenity contributions—development-related investment gathered from property developers—to the purchase of heritage amenities.[96] Here, a developer might agree to legally protect and rehabilitate a heritage building that is on the development site in exchange for an increase in density of the proposed development project. However, the ability to transfer this bonus is an important element; it permits a developer to transfer the density bonus from a "donor" site to another "receiver" site where there may be a greater potential for development—as long as both sites are within designated areas or zones.[97]

Developed over a two-year period, the DTES Plan represents a significant effort by the city to gain local knowledge about the distinct characteristics of the sub-areas that make up what is often broadly categorized as Vancouver's Downtown Eastside. Largely through the Local Area Planning Process (LAPP) Committee, an understanding of "place" and the important "places" that exist within the Downtown Eastside neighbourhood were prioritized in developing the DTES Plan.[98] This prioritization accompanied the LAPP Committee's emphasis on the importance of developing the DTES Plan with an implementation strategy that addresses both the social and physical aspects of a neighbourhood in a coordinated manner.[99] While the Downtown Eastside is brimming with tangible heritage, buildings, and places, its people and their historic and community roots in the neighbourhood are a key asset of the area.[100]

In line with the HUL Recommendation, the DTES Plan expands on and summarizes its understanding of "place" for a community by noting that "[e]ach community's sense of place can often be linked to significant historical events, spiritual connections to previous generations, diverse faiths, access to resources, the physical environment and built form."[101] Further, the DTES Plan acknowledges that "[s]pecial and valuable places

96. *Id.* at 170, 172.

97. *Incentives for Developers: Transferable Heritage Density Bonuses*, CITY OF VANCOUVER https://vancouver.ca/home-property-development/density-incentives-for-developers.aspx [https://perma.cc/47LX-9BQF].

98. *See* DTES PLAN, *supra* note 4, at 26 (describing how in creating the DTES Plan, the LAPP Committee would "reach out to as much of the DTES community as possible to document what is important to everyone"); *see also id.* at 37–58 (detailing the "places and people of the Downtown Eastside").

99. *Id.* at 26.

100. *Id.* at 37.

101. *Id.*

are often connected by important walking routes and streets."[102] Within these explanations, the DTES Plan unpacks additional specifics of the local context where—at least in writing—a concerted effort is made to balance the acknowledgement of and the links between tangible and intangible heritage in the city.[103] The fact that this understanding of "place" serves as the backbone of the DTES Plan would appear to be taking great strides towards the goals and approaches that are articulated by the HUL Recommendation.[104]

The social impact report that led to the development of the DTES Plan emphasized the existence of many community assets of critical importance for residents and, in line with the HUL Approach, noted that these assets are not only physical buildings; these assets include people, places, and other intangibles, "such as feeling safe and connecting with one's own culture."[105] The report noted the "many vulnerable groups living in the neighbourhood who are struggling with complex challenges including homelessness, poverty, housing issues, unemployment, drug use, crime, loss of affordable retail and restaurants in the neighbourhood, poor nutrition and food insecurity."[106] While the report explained that, "[o]verall, residents value a sense of belonging, feeling accepted and being at home within the neighbourhood while having essential health and social services close by," it also situated this within the context of "the fears low income residents have around gentrification, being displaced, discriminated against and losing their critical connections and assets."[107]

Also in line with the HUL Approach—at least on paper—the DTES Plan discusses the balancing of interests that will need to take place as it comes into effect.[108] A balance of competing interests must be struck in order to mitigate the risks that future development, actions, policies, and land use change pose for current vulnerable residents.[109] Part of this effort will require ongoing monitoring and evaluation of the potential public benefits alongside the change and social impacts that will also

102. *Id.*

103. *See id.* at 37–58.

104. *See* UNESCO (2011), *supra* note 2, ¶ 5 (noting the need for "identifying, conserving and managing historic areas within their broader urban contexts, by considering the interrelationships of their physical forms, their spatial organization and connection, their natural features and settings, and their social, cultural and economic values.").

105. DTES PLAN, *supra* note 4, at 9; *see* CITY OF VANCOUVER, DOWNTOWN EASTSIDE SOCIAL IMPACT ASSESSMENT: REPORT (2014).

106. DTES PLAN, *supra* note 4, at 9.

107. *Id.*

108. *Id.* at 34.

109. *Id.* at 10.

result.[110] While the DTES Plan is set out within a thirty-year timeframe, ten-year "targets"—the Social Impact Objectives—are proposed in order to compliment ongoing monitoring and evaluation of the Plan's achievements, effects, changes, and so on.[111] Of the nine listed objectives, four are of particular relevance to the culture and heritage of the community space of Downtown Eastside. These objectives seek to:

- Ensure diverse development that is respectful of heritage assets, surrounding scale, urban pattern, and social and community context.
- Improve the overall quality, accessibility, and inclusiveness of the public realm in the DTES, recognizing the uniqueness of each sub-area.
- Maintain the diversity of existing businesses and commercial uses and support affordable commercial spaces for social enterprises, micro enterprises and small businesses providing low-cost goods and services for residents.
- Retain, preserve, and celebrate local heritage, arts and culture for all.[112]

The DTES Plan includes the "city-wide principle of enhancing culture, heritage, and creativity within the city."[113] To this end, planning within the Downtown Eastside should strive to ensure that:

- The arts, cultural, and heritage assets of the area are identified, and key assets are protected;
- The local creative economy is strengthened;
- Community arts and artists are supported and celebrated; and
- The area's diverse cultural heritage is recognized and celebrated (including Aboriginal, Japanese-Canadian, Chinese-Canadian, labour movement, etc.).[114]

Nonetheless, the DTES Plan frames much of how place is situated in the document through the language of "placemaking".[115] Placemaking does not necessarily effectively incorporate the value of "keeping" and what can be thought of as "placekeeping", which is something that the community expressed strongly during the community engagement process.[116] Placemaking, as a culture-based (re)development strategy and ideally a collaborative stakeholder process, can certainly have many

110. *Id.*
111. *Id.* at 11.
112. *Id.*
113. *Id.* at 15.
114. *Id.*
115. *Id.* at 39.
116. *Id.* at 39, 58, 63–79; *see also* U.N.-Habitat, Convention on Biological Diversity, U.N.-Women, *Public Space*, *in* U.N. Conference on Housing and Sustainable Urban Development, *Habitat III Issue Papers*, 80–85 (May 31, 2015).

positive benefits.[117] But a prioritizing of the placemaking lens can also lead to a coding of spaces targeted for placemaking as previously "dysfunctional" or "decrepit," which in this context carries with it a tendency to displace the more marginal, transgressive, and/or vulnerable stakeholders within the space in question.[118] Placekeeping, on the other hand, can more effectively identify the intangible heritage characteristics of a place or space and shift the focus from what is not there or is perceived to be lacking, deficient, or problematic to a focus on what already exists and can be preserved or nourished.[119] While the DTES Plan incorporates many aspects of placekeeping, its value-framing, once operationalized into concrete redevelopment plans, will require careful attention regarding the Plan's effects on equitable intangible (as well as tangible) heritage protection for all involved stakeholders.

IV. Inclusive Urban Heritage Policies, Politics, and Vancouver's New Cultural Plan: *Culture | Shift*

A key objective of Vancouver's strategic cultural plans is policy alignment that integrates the city's cultural ecology and cultural heritage objectives into its municipal planning processes, decisions, and resulting laws and legislation. The city plans to achieve these goals through the incorporation of culture and cultural heritage matters into land-use planning, local area plans, housing policy, and work towards local sustainable development and diverse community engagement.[120] Vancouver's new ten-year cultural plan for 2020–2029, *Culture|Shift: Blanketing the City in Arts and Culture*, was presented by Vancouver city staff to City Council on September 10, 2019.[121] In addition to the presentation, there was time for members of the public to discuss how they had been engaged in the development of the plan, their thoughts on its final version, and how the plan would be implemented in the future.

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117. *See, e.g.*, Sara Ross, *Protecting Urban Spaces of Intangible Cultural Heritage and Nighttime Community Subcultural Wealth: A Comparison of International and National Strategies, The Agent of Change Principle, and Creative Placekeeping*, 7 W.J. LEGAL STUD. 1 (2017); SHOSHANAH GOLDBERG-MILLER, PLANNING FOR A CITY OF CULTURE: CREATIVE URBANISM IN TORONTO AND NEW YORK 4 (2017).

118. Ross, *supra* note 117, at 4, 9.

119. *Id.*

120. *See, e.g.*, CITY OF VANCOUVER, CULTURE|SHIFT, *supra* note 5, at 18.

121. *Regular Council Meeting Minutes*, CITY OF VANCOUVER (Sept. 10, 2019), https://council.vancouver.ca/20190910/documents/regu20190910min.pdf [https://perma.cc/5Z25-5A4Q]. See BRANSILAV HENSELMANN, *CULTURE|SHIFT: BLANKETING THE CITY IN ARTS AND CULTURE*, VANCOUVER CULTURE PLAN 2020-2029 (2019), for the information that was presented to the City Council.

Public attendees spoke largely in favour of the plan and its development.[122]

Vancouver's first cultural plan was in place between 2008 and 2018 and, as many cultural plans set out to do, it worked towards establishing the economic, social, and environmental value of culture.[123] It also prioritized culture as an element of sustainability to be considered within decision-making leading up to the development of city policies.[124] As the preamble to the new cultural plan describes, the prior cultural plan and its associated documents "generated increased investment that stabilized cultural sectors during times of economic flux and recession."[125] This investment was helpful for creating interest and the realistic potential for preserving urban cultural heritage as part of sustainable urban (re)development, whether this was through, for example, partnerships that were generated to promote local cultural tourism or otherwise.[126] But there were other effects as well. As the new cultural plan describes, over the years that the first cultural plan was in place, various communities expressed concern that this plan also resulted in a particular formula of cultural planning intended to "regenerate" or "revitalize" the city in a manner that led to increased gentrification pressures.[127] These pressures can ultimately result in the displacement of local people and communities as well as local businesses and organizations.[128]

In addition, these communities identified discrimination that was embedded into the processes and methods of that plan, including a lack of acknowledgment of or support for marginalized and underrepresented cultures and communities.[129] In response to these concerns, the new cultural plan draws inspiration from other cultural plans—for example, of Auckland and Sydney—in order to engage in what the new plan describes as more "[c]ontemporary approaches" that "attempt to engage and represent more diverse publics."[130] As the new cultural plan acknowledges,

> These shifts are credited to underrepresented communities who mobilized to advocate for more equitable inclusion. These

122. *See Regular Council Meeting Minutes*, *supra* note 121 (noting that sixteen public attendees spoke in support of the recommendations).

123. CITY OF VANCOUVER, CULTURE|SHIFT, *supra* note 5, at 16.

124. *Id.*

125. *Id.* at 20.

126. *Id.*

127. *Id.*; *see also*, McElroy, *supra* note 31.

128. *See, e.g.*, CITY OF VANCOUVER, CULTURE|SHIFT, *supra* note 5, at 20.

129. *Id.* at 16.

130. *Id.* at 20.

> communities pushed for more complicated narratives that leave room for generative forms of critique and failure, and ways to harness urban development to root existing local culture, people, and cultural assets in a place.[131]

This advocacy regarding prior iterations of and eras of cultural planning paradigms also led to the renaming of the new cultural plan—originally known as Vancouver's "Creative City Strategy"—to its current name: "CULTURE|SHIFT."[132] A more inclusive and community-defined understanding of culture and cultural heritage is interconnected with this shift in paradigms in a manner that represents strides towards the localization of the HUL Recommendations.

Turning to some of the new aims for cultural heritage identification and management for the city that appear within the new cultural plan for Vancouver, one goal is to "Prioritize Intangible Cultural Heritage and Promote Cultural Redress."[133] This goal aims to better recognize the diversity of cultural heritage and cultural landscapes of communities that have historically been marginalized within Vancouver. In working towards this goal, some of the identified initiatives narrow in specifically on identifying new forms of supporting cultural heritage in these communities, and others broaden mechanisms for understanding cultural knowledge, practices, and spaces that are associated with a community's cultural heritage.[134] The new cultural plan narrows in on examples of future support, including:

> - Work with interdepartmental partners to support research [and] engagement required for development at Hogan's Alley as a key action to advance cultural redress for Black communities [and] communities of the African diaspora.
> - Support the development of Chinatown intangible cultural asset mapping [and] management [and] UNESCO designation.
> - Support the work to celebrate the past [and] plan for the future of the Punjabi Market [another heritage area in Vancouver].
> - Support the Japanese Canadian community in exploring space opportunities [and] preservation of tangible [and] intangible cultural heritage. [Japantown is located within the Downtown Eastside.][135]

In addition, Vancouver's City Heritage Program is specifically identified as the area where these objectives might be operationalized through "heritage statements, incentives, registry [and] other

131. *Id.*
132. *Id.* at 17.
133. *Id.* at 11 (implementing Strategic Direction 3 "Cultural Equity and Accessibility").
134. *Id.* at 63.
135. *Id.*

mechanisms."[136] These tools can be used to "further support new approaches to intangible [and] tangible cultural heritage."[137]

In line with the HUL Recommendations—and in the vein of a more inclusive approach to heritage identification and preservation—is the *Cultural Infrastructure Plan: Making Space for Arts and Culture*.[138] This document—associated with Vancouver's new cultural plan—narrows in on the space-related actions needed to operationalize the new cultural plan.[139] Drawing on a 2018 report,[140] the Cultural Infrastructure Plan states that "[t]here is an opportunity to expand the current City definition of 'heritage' to include broader cultural, place-based, and values-based assessments of built and intangible community assets."[141] In identifying this opportunity, the Cultural Infrastructure Plan proposes in particular that "protection efforts should add important cultural spaces to the City's Heritage Registry in order to leverage existing heritage incentives including: grants for seismic upgrades, amenity shares, increased density, development cost levy exemptions, and tax abatement as incentives to preserve cultural spaces."[142]

The Cultural Infrastructure Plan also reiterates one of the key recommendations from the 2018 report, recommending that

> The City [] prioritize the preservation of arts and cultural spaces, including production spaces, music and performance spaces that hold or foster specific cultural heritage traditions, intangible cultural assets and industrial land used for art production and other industrial uses. The present gap in preservation efforts may risk the loss of spaces that are sorely needed and heavily utilized.[143]

The document further describes a new approach for the city regarding cultural heritage protection that "is about managing historic places and cultural neighbourhoods in ways that allow for change, yet at the same time reflects, honours, and carries-forward the values of a specific place."[144] The Cultural Infrastructure Plan further emphasizes the importance of prioritizing cultural heritage, equity, and redress in order to "support the ongoing vitality of cultural heritage and

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136. *Id.*

137. *Id.*

138. CITY OF VANCOUVER, MAKING SPACE FOR ARTS AND CULTURE: VANCOUVER CULTURAL INFRASTRUCTURE PLAN (2019).

139. *Id.*

140. BRANISLAV HENSELMANN & ALIX SALES, MAKING SPACE FOR ARTS AND CULTURE: 2018 CULTURAL INFRASTRUCTURE PLAN (2018).

141. *Id.* at 23.

142. *Id.*

143. *Id.* at 17.

144. *Id.* at 23.

recognition of cultural redress in neighborhoods where communities have suffered from discriminatory policies and actions, including expropriation of land and property."[145] It notes, for example, this process as a step to follow the City of Vancouver's apology for historical discrimination experienced by Vancouver's Chinese population.[146]

The *Vancouver Music Strategy* also accompanies Vancouver's new cultural plan.[147] It proposes further exploration for "expanding cultural heritage designation to include non-traditional music spaces."[148] This strategy aims to protect the ongoing existence and infrastructure surrounding music venues and music culture, communities, and their practice in Vancouver.[149] Protecting these music spaces speaks to an important component of intangible cultural heritage for many communities.[150]

Conclusion

International frameworks for equitable and sustainable heritage management provide a vision, important guidance, and courses of action for cultural heritage in cities. However, it is localization within a city's urban policies that brings meaningful change at the everyday, neighbourhood level. It is here where streetscapes are experienced by the denizens of a city; the daily experience of a city and how culture and heritage are navigated can be marginalizing, empowering, or somewhere in between. Local cultural heritage policies that are increasingly appearing within community and neighbourhood development plans—a city's strategic cultural plans or directions, and other similar documents—are key spaces where what is espoused within, for example, UNESCO's HUL Recommendation, can be applied.

Frequently, application at this level of government can result in more effective and context-appropriate policies for local cultural heritage interests than broader federal or provincial (or state) policies. This Article turned to a number of local contexts and neighbourhoods within Vancouver's downtown core, and examined where and how

145. *Id.* (promoting the plan's second goal: "Prioritize Cultural Heritage, Equity and Accessibility").

146. *Id.*

147. CITY OF VANCOUVER, VANCOUVER MUSIC STRATEGY: DRAFT FINAL REPORT (2019).

148. *Id.* at 38.

149. *See id.* at 5, 10.

150. *See generally* SPRINGERBRIEFS, MUSIC AS INTANGIBLE CULTURAL HERITAGE: ECONOMIC, CULTURAL, AND SOCIAL IDENTITY (Blanca de-Miguel-Molina, Virginia Santamarina-Campos, María de-Miguel-Molina & Rafael Boix-Doménech eds., 2021) (exploring how music is an intangible cultural resource).

heritage spaces were engaged within a number of Vancouver's local plans and policy documents. These plans and policies ultimately shape the existence, treatment, and experience of cultural heritage spaces in these neighbourhoods.

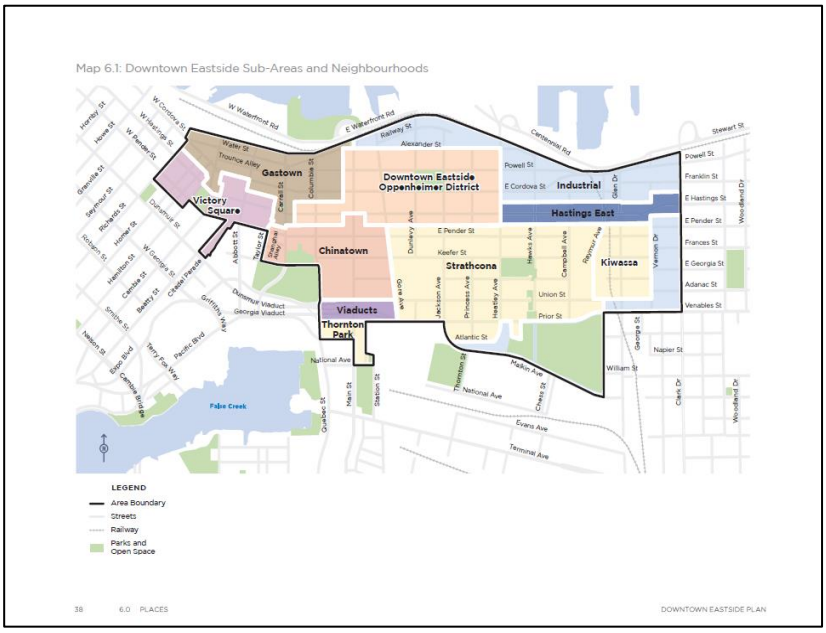
As this Article demonstrates, important strides in localizing elements of the HUL Recommendation and the NUA appear throughout the document. The processes and methodology applied in developing these documents represent significant improvements in accessing the wide diversity of stakeholders within the affected communities—notably where traditionally marginalized voices are slowly beginning to figure more prominently than before. Yet there is room for improvement; documents, policies, and their development is only the first step within cities such as Vancouver. It remains to be seen when and how these policies, goals, and strategies will be fully implemented, and what the results will be in the years to come.

Appendix

Figure 2. Aerial Imaging of Downtown Eastside[151]

151. DTES PLAN, *supra* note 4, at 16.

Figure 3. Map Depicting Downtown Eastside Sub-Areas and Neighbourhoods[152]



152. *Id.* at 38.

Minnesota's Mandatory Court Surcharge and the Failure of the Fee-for-Service Criminal Justice System

Jake Polinsky†

Introduction

In 2014, Ebony was thirty-six and living in Ferguson, Missouri.[1] She had amassed about $2,000 in fines and fees due to traffic tickets and was having trouble paying this debt off.[2] Unfortunately for Ebony, the Ferguson Municipal Court's primary tool for collecting on outstanding fines and fees when someone missed a payment was to issue an arrest warrant.[3] Therefore, when Ebony was unable to pay off all her fines, Ferguson police arrested her and put her in jail for a week—about two weeks after she had given birth to her son.[4] Ebony was the victim of a common practice in Ferguson, wherein the Department of Justice found that the city's law enforcement and municipal court coordinated to target the Black community with excessive fines and fees for minor offenses to raise money for the city's budget.[5]

Ferguson, though one of the most egregious examples, is not alone in this practice. The U.S. Commission on Civil Rights has found that states and municipalities across the country have increased their reliance on fines and fees for minor offenses that disproportionately target low-income and BIPOC (Black, Indigenous, and People of Color) communities

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1. Joseph Shapiro, *In Ferguson, Court Fines and Fees Fuel Anger*, NAT'L PUB. RADIO (Aug. 25, 2014), https://www.npr.org/2014/08/25/343143937/in-ferguson-court-fines-and-fees-fuel-anger [https://perma.cc/7D2T-ZPQV].

2. *Id.*

3. U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 54–58 (2015).

4. Shapiro, *supra* note 1.

5. *See* U.S. DEP'T OF JUST., *supra* note 3.

to generate greater revenue for their budgets.[6] Minnesota is no exception. Take, for instance, a violation for driving with expired tabs.[7] This violation carries with it a fine of $30.[8] A defendant who pleads guilty to this offense must pay substantially more than just $30, however.[9] When a defendant pleads guilty there is also a Court Surcharge of $75 and a law library fee as high as $15 depending on the county.[10] This can balloon further if someone is late in paying the court, as there is a $5 late fee after thirty days and a $25 late fee after sixty days.[11] Thus, the cost of this minor violation can quickly swell up to $150 for an indigent defendant unable to pay.

The bulk of this cost, the $75 Court Surcharge, is not a fine related to culpability, but rather it is a fee applied to all criminal convictions which raises money to support the state court system.[12] Ramsey County Manager of Safety and Justice, Scott Williams, described the system as "an ongoing pattern where, 'Oh, we have a tough budget year — we have a number of tough budget years — we have a budget hole to fill. How do we fill this? Well, we can add some fees.'"[13] Despite the benefits the whole community receives from a functioning criminal justice system, policies like the Court Surcharge promote a view that the cost of a functioning criminal justice system should fall squarely on the shoulders of the low-income, BIPOC communities who are policed and arrested at disproportionate rates.[14] Further, fee-for-service criminal justice is antithetical to the purposes of punishment which help guide the system to more just and socially beneficial results.[15]

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6. U.S. COMM'N ON C.R., TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR 72 (2017).

7. Jessie Van Berkel, *Minnesota's Criminal Justice Fees Often Fall Hardest on Poor*, STAR TRIB. (May 2, 2021), https://www.startribune.com/minnesota-s-criminal-justice-fees-often-fall-hardest-on-poor/600050762/?refresh=true [https://perma.cc/R9A9-KVMS].

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. MINN. STAT. § 357.021, subd. 6 (2021).

13. Van Berkel, *supra* note 7.

14. *See* Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jenson, Amy Shoemaker, Vignesh Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi Shroff & Sharad Goel, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 740–42 (2020); THE SENT'G PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 2–6 (2018); ASHLEY NELLIS, THE SENT'G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 5 (2021).

15. Highlighted in more depth in Section III.B, the purposes of punishment are retribution, specific deterrence, general deterrence, rehabilitation, and incapacitation. These are the principles that guide policy makers and courts in determining what the proper punishment for different crimes and different defendants should be. *See* Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67 (2005).

Though Minnesota has taken some steps to recognize the negative effects of fee-for-service criminal justice—namely by amending the Court Surcharge so that judges may waive or decrease the surcharge based on a defendant's financial situation instead of the surcharge being mandatory[16]—this Article posits that this was a missed opportunity. Rather than tie funding to guilty pleas at all, the Court Surcharge should be fully repealed to firmly move away from the fee-for-service court system that has a disproportionately negative effect on low-income and BIPOC communities.[17]

Part I of this Article outlines the national background of fee-for-service criminal justice and the negative impact it has on low-income and BIPOC communities across the country. Part II delves into the history of Minnesota's Court Surcharge specifically. Part III analyzes the negative impact of the Court Surcharge in Minnesota, explains why it is a poor criminal justice policy that does not serve the purposes of punishment, and concludes by providing recommendations for how the state could better fund its court system.

I. National Background

A. Fee-for-Service Criminal Justice

The criminal justice system that first developed in the American colonies was a for-profit model where amateur law enforcement individuals received rewards from the government and private parties for enforcing the law.[18] This model continued in the late eighteenth and early nineteenth centuries before the advent of modern professional policing in the mid-nineteenth century.[19] The punishments for defendants under this system were fines, whipping, or death.[20] In the early nineteenth century, the criminal justice system moved away from these modes of punishment in favor of imprisonment.[21] Reformists such as the Pennsylvania Quakers believed that imprisonment better served the purposes of punishment, as it provided an opportunity to rehabilitate

16. *See infra* Part II.

17. *See* Van Berkel, *supra* note 7.

18. Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1182 (2014).

19. *Id.* ("State and local governments developed fee schedules, specifying the monetary benefit tied to solving different crimes. Naturally, law enforcement focused on better-paying crimes at the expense of less remunerative ones. Private party rewards, tied to the value of the property allegedly stolen, also shaped enforcement priorities. In such a system, murders received less attention than robberies and theft, because the latter offered more financial benefit.").

20. R. Barry Ruback & Mark H. Bergstrom, *Economic Sanctions in Criminal Justice*, 33 CRIM. JUST. & BEHAV. 242, 242 (2006).

21. *Id.*

criminals and turn them into contributing members of society.[22] Fines, on the other hand, were seen as having little value as a punishment tool because they lack influence on affluent defendants while being difficult to enforce against low-income defendants.[23] Leading model penal codes and sentencing standards such as the National Commission on Reform of Federal Criminal Laws (1971), the American Law Institute's Model Penal Code (1962), the National Council on Crime and Delinquency Model Sentencing Act (1977), and the American Bar Association Standards Relating to Sentencing Alternatives and Procedures (1978) all roundly rejected the use of economic sanctions as a punishment tool.[24]

This Reformist model, meant to rehabilitate offenders, led to an ever-increasing incarcerated population, with the prison population increasing from 91,669 in 1925 to 353,167 by 1981.[25] In the 1980s and 90s, a variety of new punishment methods meant to be less intrusive than prison—such as house arrest, boot camps, and electronic home monitoring—began to be utilized.[26] Despite this pivot in punishment, the United States' incarcerated population continued to grow, increasing by over 63% between 1990 and 2014.[27]

With this continued growth in the incarcerated population came substantial increases in criminal justice system expenditures.[28] While in 1982 the United States spent $388 per capita on criminal justice expenditures, in 2015, that number had grown to $937 per capita.[29] As of 2016, the total direct governmental cost of the criminal justice system is about $295.6 billion.[30] These cost increases spurred policymakers across the country to argue that those convicted of crimes, rather than

22. Dominic S. Depersis & Alfred Lewis, *The Development of American Prisons and Punishment*, 12 INT'L J. HUM. RTS. 637, 642 (2008).

23. Sally T. Hillsman, *Fines and Day Fines*, 12 CRIME & JUST. 49, 53–54 (1990).

24. *Id.* at 52.

25. U.S. DEP'T OF JUST., PRISONERS 1925–81, at 2 (1982) (reporting that the United States' modern mass incarceration accelerated most sharply in the 1970s, as the incarceration rate—the number of prisoners per 100,000 citizens—increased from 96 in 1970 to 153 in 1981).

26. Ruback & Bergstrom, *supra* note 20, at 243.

27. *See Key Statistics: Total Correctional Population*, BUREAU OF JUST. STAT. (May 11, 2021), https://bjs.ojp.gov/data/key-statistics [https://perma.cc/PB99-3DY5].

28. COUNCIL OF ECON. ADVISERS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 2 (2015) ("Between 1993 and 2012, total real annual criminal justice expenditures grew by 74 percent from $157 to $273 billion, and local spending comprised approximately half of total expenditures. State corrections expenditures represent 7 percent of the total State general funds on average, and 11 States spent more on corrections than higher education in 2013.").

29. PATRICK LIU, RYAN NUNN & JAY SHAMBAUGH, THE HAMILTON PROJECT, NINE FACTS ABOUT MONETARY SANCTIONS IN THE CRIMINAL JUSTICE SYSTEM 5 (2019).

30. SHELLEY S. HYLAND, JUSTICE EXPENDITURE AND EMPLOYMENT EXTRACTS, 2016 – FINAL (2021) (noting $142.5 billion is for police protection, $88.5 billion is for corrections, and $64.7 billion is for the judicial and legal systems).

taxpayers, should pay for the criminal justice system.[31] An Iowa sheriff at the time said, "if they are violating the law, then they should be the ones to pay for it."[32] One private consultant to government agencies across the country described it as a "very easy [decision] for jurisdictions to pass the cost on to the offender . . . . No one wants to raise taxes on the public. Politicians — it's the last thing they want to do."[33] In turn, states and courts across the country have turned to fines and fees as a source of revenue.[34] Today, economic sanctions are imposed on a significant majority of criminally convicted individuals across the country.[35]

Evidence has shown that the imposition of fines and fees as a tool for revenue generation is highly ineffective due to the cost of collecting court debt and punishing those who do not pay what they owe.[36] In Santa Clara, California, for example, the cost of collecting juvenile administrative fees was 112% of the actual revenue collected.[37] More disturbing were the results of a recent study regarding a new $200 surcharge imposed on those convicted of misdemeanors in Milwaukee.[38] The study found that when you calculate the small amount of money

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31. COUNCIL OF ECON. ADVISERS, *supra* note 28, at 2.

32. Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, BRENNAN CTR. FOR JUST. (July 31, 2014), https://www.brennancenter.org/our-work/research-reports/paying-your-time-how-charging-inmates-fees-behind-bars-mayviolate#co_footnote_F30404910944_1 [https://perma.cc/3Y93-29F3].

33. Joseph Shapiro, *Measures Aimed at Keeping People Out of Jail Punish the Poor*, NAT'L PUB. RADIO (May 24, 2014), https://www.npr.org/2014/05/24/314866421/measures-aimed-at-keeping-people-out-of-jail-punish-the-poor [https://perma.cc/36C7-Y5JQ].

34. *See* COUNCIL OF ECON. ADVISERS, *supra* note 28, at 2; Thomas A. Garrett & Gary A. Wagner, *Red Ink in the Rearview Mirror: Local Fiscal Conditions and the Issuance of Traffic Tickets*, 52 J.L. & ECON. 71, 71 (noting that a study of data in North Carolina counties from 1990 to 2003 "reveal[ed] that a 10 percent decrease in negative revenue growth results in a 6.4 percent increase in the growth rate of traffic tickets"); U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015) (finding that the City of Ferguson, its police, and court officials worked together for years to maximize revenue through increasing fines and the enforcement of finable offenses).

35. Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOCIO. 1753, 1756 (2010).

36. *See* MATTHEW MENENDEZ, MICHAEL F. CROWLEY, LAUREN-BROOKE EISEN & NOAH ATCHISON, BRENNAN CTR. FOR JUST., STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES: A FISCAL ANALYSIS OF THREE STATES AND TEN COUNTIES, (2019) (finding that, on average, jurisdictions across the country spend $0.41 for every dollar of fines and fees they collect; this number is even worse when factoring in the cost of incarceration for failure to pay, with jail costs in Bernalillo County, New Mexico representing up to 98% of collection costs).

37. BERKELEY L. POL'Y ADVOC. CLINIC, MAKING FAMILIES PAY: THE HARMFUL, UNLAWFUL, AND COSTLY PRACTICE OF CHARGING JUVENILE ADMINISTRATIVE FEES IN CALIFORNIA 18, 22 (2017) (explaining that these administrative fees included "$30 per day for juvenile detention, $14 per day for electronic monitoring, and $280 per hour for legal representation").

38. Tyler Giles, *The (Non)Economics of Criminal Fines and Fees* (Fines & Fees Just. Ctr. Working Paper, 2021).

actually collected, the negative impact on recidivism, and the negative impact on already socially disadvantaged groups, the $200 fee increase resulted in a net economic cost of $2,214 per misdemeanor case.[39]

Courts may have the power to impose monetary sanctions, but defendants are often unable to pay these high court debts.[40] In Ferguson, Missouri, for example, the Justice Department found that the court issued 9,007 arrest warrants in fiscal year 2013 alone, in substantial part because it issued warrants for failures to pay without making ability-to-pay determinations.[41] Though many states do not properly track court debt, or even track it at all, we know that the national court debt total is at a minimum $27.6 billion.[42] This number is certainly much higher than $27.6 billion, as in California alone—one of the few states with complete data on accumulated court debt—there was $12.3 billion in unpaid fines and fees as of 2016.[43] All in all, state and local governments were only able to generate $14.9 billion in revenue from forfeitures and fines in 2017, a number that pales in comparison to the $295.6 billion spent on the criminal justice system.[44]

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39. *Id.* at 5 (basing the net economic cost on a calculation of the increase in revenue collected per case on average—$19.89—minus the resulting increase in recidivism); *id.* at 29 (finding that the increase in recidivism was largely driven by violent crimes and drug crimes and derived based off the empirical literature on the total costs of crime that "the expected recidivism cost of the surcharge is about $1,640 per offense").

40. *See* Katharine Beckett & Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL'Y 509, 516–17 (highlighting that legal debtors in Washington State still owed 77% of their court debt); COUNCIL OF ECON. ADVISERS, *supra* note 28, at 5 ("Florida and Maryland collected 14 percent and 17 percent of certain types of fees assessed, respectively. Additionally, the collection rate was zero in half of sentenced felonies in Washington over three years, and a large majority of sentenced cases had only collected 20 percent of funds charged.").

41. U.S. DEP'T OF JUST. C.R. DIV., *supra* note 34, at 55–58.

42. BRIANA HAMMONS, FINES & FEES JUST. CTR., TIP OF THE ICEBERG: HOW MUCH CRIMINAL JUSTICE DEBT DOES THE U.S. REALLY HAVE? 5 (2021) (noting that the results were restricted because only twenty-five states were able to provide data on court debt, and of those twenty-five, only nine states were able to provide complete data).

43. ANITA LEE, LEGIS. ANALYST'S OFF., THE 2017–18 BUDGET: GOVERNOR'S CRIMINAL FINE AND FEE PROPOSALS, https://lao.ca.gov/reports/2017/3600/Criminal-Fine-Fee-030317.pdf [https://perma.cc/Q2GQ-5693].

44. Aravind Boddupalli, *Fines and Forfeitures and Racial Disparities*, TAX POL'Y CTR. (Aug. 14, 2020), https://www.taxpolicycenter.org/taxvox/fines-and-forfeitures-and-racial-disparities [https://perma.cc/A2Q7-DC9N]; HYLAND, *supra* note 30.

B. The Disproportionate Negative Impact of Fee-for-Service Criminal Justice on BIPOC and Low-Income Communities

i. Burden on Low-Income Communities

Fees and fines are often small in isolation, but when accumulated, they can build up to hundreds or thousands of dollars for defendants.[45] While a few hundred-dollar economic sanction may not be a big deal for a person of means, for low-income individuals, it can become an insurmountable cost.[46] In a survey of formerly incarcerated individuals and their families by twenty-three community-based organizations in fourteen states, 48% of families said they were unable to afford the costs of incarceration.[47] A failure to pay can result in further fines and possibly imprisonment, preventing rehabilitation and trapping defendants in a cycle of poverty.[48] The Supreme Court has held that a defendant cannot be imprisoned solely because their indigency prevents them from paying an economic sanction.[49] Despite this ruling, judges across the country rarely hold hearings to determine a defendant's ability to pay before imposing economic sanctions, and defendants regularly wind up imprisoned for failure to pay their court debt.[50] Even when not

45. *See* ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY (2010); *House File 306: Hearing Before the Minn. H. Judiciary Fin. & Civ. L. Comm.*, 92nd Leg., 2021-2022 Reg. Sess. (Mar. 9, 2021) [hereinafter *Judiciary Fin. Hearing*] (eliciting testimony from a Hennepin County Public Defender that the total amount owed for a ticket with fees and fines is often over $800 for her clients).

46. *See, e.g.*, *Nearly 60% of Americans Can't Afford Common Unexpected Expenses*, BANKRATE (Jan. 12, 2017), https://www.bankrate.com/pdfs/pr/20170112-January-Money-Pulse.pdf [https://perma.cc/K2B5-8VXX] (finding that nearly six in ten Americans do not have enough money saved up for a $500 car repair or a $1,000 emergency room bill).

47. SANETA DEVUONO-POWELL, CHRIS SCHWEIDLER, ALICIA WALTERS & AZADEH ZOHRABI, ELLA BAKER CTR., FORWARD TOGETHER & RSCH. ACTION DESIGN, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 7, 9 (2015) (specifying that this number jumped to 58% among poor families with "poor" being characterized as families making less than $15,000 a year).

48. *See* Alexandra Shookhoff, Robert Constantino & Evan Elkin, *The Unintended Sentence of Criminal Justice Debt*, 24 FED. SENT'G REP. 62 (2011); Beckett & Harris, *supra* note 40, at 517 (showing that criminal justice debt reduces household income, forcing individuals to choose between essential household items; creates a long term debt that defendants are stuck paying off for years; garnishment of wages to pay the debt creates a disincentive to work; and the inability to pay and threat of criminal sanctions encourages some defendants to go on the run).

49. Williams v. Illinois, 399 U.S. 235, 241–42 (1970) ("[O]nce the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency."); Bearden v. Georgia, 461 U.S. 660, 672–73 (1983) ("[D]epriv[ing] the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine . . . would be contrary to the fundamental fairness required by the Fourteenth Amendment.").

50. MENENDEZ ET AL., *supra* note 36, at 9; Harris et al., *supra* note 35, at 1761.

imprisoned, having a warrant issued for a failure to pay keeps individuals from feeling free to go to places where they might interact with police and prevents them from accessing a variety of welfare programs, such as food stamps (Temporary Assistance for Needy Families) and federally assisted housing.[51]

ii. Burden on BIPOC Communities

The weight of the economic burden from fines and fees is felt most severely by BIPOC communities. To start, BIPOC communities in the United States are policed and ticketed at disproportionate rates.[52] Further, BIPOC individuals are arrested at higher rates than white individuals.[53] Even as crime rates decreased between 1999 and 2015, the racial disparities in arrests increased from 5.48 Black individuals for every white individual to 9.25.[54] BIPOC individuals also face disparities in the harsh sentences they receive.[55] The United States Sentencing Commission found that Black males received prison sentences that were

51. Alice Goffman, *On the Run: Wanted Men in a Philadelphia Ghetto*, 74 AM. SOCIO. REV. 339, 353 (2009) ("Young men who are wanted by the police find that activities, relations, and localities that others rely on to maintain a decent and respectable identity are transformed into a system that the authorities make use of to arrest and confine them. The police and the courts become dangerous to interact with, as does showing up to work or going to places like hospitals."); Harris et al., *supra* note 35, at 1762.

52. Pierson et al., *supra* note 14 (analyzing around 221 million traffic stops across the country and finding that Black and Hispanic drivers were more likely to be stopped than white drivers, Black drivers were less likely to be pulled over at night when their race was hidden by a "veil of darkness," and there was a lower bar for searching Black and Hispanic drivers' cars); LAUREN NOLAN, WOODSTOCK INST., THE DEBT SPIRAL: HOW CHICAGO'S VEHICLE TICKETING PRACTICES UNFAIRLY BURDEN LOW-INCOME AND MINORITY COMMUNITIES (2018) (discovering that in Chicago, tickets were about 40% more likely to be issued to drivers from zip codes with higher-than-average minority populations than to those in non-minority zip codes).

53. *See* THE SENT'G PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM (2018) (highlighting that Black Americans make up 27% of arrests as of 2016, double their share of the total population); ACLU, THE WAR ON MARIJUANA IN BLACK AND WHITE (2013) (finding that Black individuals are on average 3.73 times more likely to be arrested for marijuana possession than white individuals, despite using marijuana at similar rates); PREETI CHAUHAN, ADAM G. FERA, MEGAN B. WELSH, ERVIN BALAZON & EVAN MISSHULA, JOHN JAY COLL. OF CRIM. JUST., TRENDS IN MISDEMEANOR ARRESTS IN NEW YORK 25–27 (2014) (finding that Black and Hispanic New Yorkers made up 82% of misdemeanor arrests while accounting for only 51% of the city's population over sixteen years old).

54. Beth Redbird & Kat Albrecht, *Racial Disparity in Arrests Increased as Crime Rates Declined* 8 (Nw. Inst. for Pol'y Rsch., Working Paper No. 20–28, 2020).

55. *See, e.g.*, TUSHAR KANSAL, THE SENT'G PROJECT, RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE 2 (2005) (reviewing studies on sentencing to find that Black and Latino males are subjected to "particularly harsh sentencing" comparatively; that Black and Latino defendants have worse outcomes than white defendants "with regard to legal-process related factors such as the 'trial penalty,' sentence reductions for substantial assistance, criminal history, pretrial detention, and type of attorney"; and that Black and Latino defendants receive more severe sentences than comparably situated white defendants for less serious offenses, such as drug and property crimes).

19.1 times longer than similarly situated white males and were 21.2% less likely to receive a non-government sponsored downward departure or variance.[56] Overall, Black Americans are incarcerated in state prisons at five times the rate of white Americans, and Latinx Americans are incarcerated at 1.3 times the rate of white Americans.[57]

When it comes to fines and fees, the disproportionate effect the criminal justice system has on BIPOC communities intersects with the vast disparity in wealth between white and BIPOC families across the country.[58] A study of the municipalities with the largest imposition of criminal fines found that their defining characteristic from the rest of the country was having large Black populations.[59] Within these municipalities, it is BIPOC communities, and particularly Black communities, who get most heavily sanctioned.[60] The amount of court fines and fees collected from white, higher-income communities in these cities is proportionally much smaller than what is collected from low-income, BIPOC communities.[61] Even when accounting for higher poverty rates, BIPOC communities have been found to have higher court debt burdens than white communities.[62] This traps individuals in court debt,

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56. GLENN R. SCHMITT, LOUIS REEDT & KEVIN BLACKWELL, U.S. SENT'G COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (2017).

57. NELLIS, *supra* note 14, at 5.

58. Neil Bhutta, Andrew C. Chang, Lisa J. Dettling & Joanne W. Hsu, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Sept. 28, 2020), https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm [https://perma.cc/EFD2-GUQ2] (revealing that white families have a median and mean family wealth of $188,200 and $983,400 respectively; Black families have a median and mean wealth of $24,100 and $142,500 respectively; and Hispanic families have a median and mean wealth of $36,100 and $165,500).

59. Dan Kopf, *The Fining of Black America*, PRICEONOMICS (June 24, 2016), https://priceonomics.com/the-fining-of-black-america/ [https://perma.cc/J99W-GL87] ("Among the fifty cities with the highest proportion of revenues from fines, the median size of the African American population—on a percentage basis—is more than five times greater than the national median.").

60. MATHILDE LAISNE, JON WOOL & CHRISTIAN HENRICHSON, VERA INST. OF JUST., PAST DUE: EXAMINING THE COSTS AND CONSEQUENCES OF CHARGING FOR JUSTICE IN NEW ORLEANS 18 (2017) (highlighting that in New Orleans, out of $3.8 million in economic sanctions imposed in 2015, $2.7 million was charged to Black residents).

61. Ray Downs, *ArchCity Defenders: Meet the Legal Superheroes Fighting for St. Louis' Downtrodden*, RIVERFRONT TIMES (Apr. 24, 2014), https://www.riverfronttimes.com/stlouis/archcity-defenders-meet-the-legal-superheroes-fighting-for-st-louis-downtrodden/Content?oid=2505869 [https://perma.cc/YFF7-8Z97] ("Pine Lawn is 96 percent black, and its per capita income a measly $13,000. In 2013 the city collected more than $1.7 million in fines and court fees. That same year, the affluent west-county suburb of Chesterfield, with a population of 47,000 (about fifteen times bigger than Pine Lawn) and a per capita income of $50,000, collected just $1.2 million from municipal fines, according to statistics compiled by the state.").

62. Kate K. O'Neill, Ian Kennedy & Alexes Harris, *Debtors' Block: How Monetary Sanctions Make Between-Neighborhood Racial and Economic Inequalities Worse*, 8 SOCIO.

with one study finding that the mean court debt for formerly incarcerated Black men was 222% of their estimated average annual earnings after incarceration.[63] This debt has long-term negative effects on low-income and BIPOC communities. A study of Washington State found that there was a positive relationship between a community's court debt burden and its poverty rate.[64]

II. Minnesota's Court Surcharge

Under Minnesota Statute section 357.021, courts must impose a $75 surcharge on everyone "convicted of any felony, gross misdemeanor, misdemeanor, or petty misdemeanor offense, other than a violation of a law or ordinance relating to vehicle parking, for which there shall be a $12 surcharge."[65] The Court Surcharge is imposed only once per case, so someone convicted of multiple offenses would have to pay just one $75 surcharge.[66] It is a funding tool rather than a penalty, with 1% going to training peace officers at the Department of Natural Resources for game and fish law enforcement, and the rest going to the state general fund.[67] The Court Surcharge has increased over time, going from $25 when it was passed in 1999 to its current level of $75 in 2009.[68] It was originally passed to address a budget shortage in the state.[69] In line with this history, the last Court Surcharge increase was passed as part of a $708 million package filled with fee-for-service increases in the court system to trim the court budget by 2%.[70]

These increases all came under the governorship of Tim Pawlenty, a major proponent of fee-for-service government who believes that government services should be paid by those who use them rather than through taxes.[71] Governor Pawlenty's philosophy was spelled out by

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RACE & ETHNICITY 43, 51 (2021).

63. Harris et al., *supra* note 35, at 1776.

64. O'Neill et al., *supra* note 62, at 51.

65. MINN. STAT. § 357.021, subd. 6 (2021).

66. *Id.*

67. *Id.* at subd. 7.

68. ALEXES HARRIS, BETH HUEBNER, KARIN MARTIN, MARY PATILLO, BECKY PETTIT, SARAH SHANNON, BRYAN SYKES, CHRUS UGGEN & APRIL FERNANDES, LAURA & JOHN ARNOLD FOUND., MONETARY SANCTIONS IN THE CRIMINAL JUSTICE SYSTEM 101 (2017) (noting the Court Surcharge has gone from $25 in 1999, to $35 in 2002, to $60 in 2004, to $72 in 2006, and finally to $75 in 2009).

69. *E.g.*, *Judiciary Fin. Hearing*, *supra* note 45 (statement of Rep. Paul Novotny, Member, H. Comm. on Judiciary Fin. & Civ. L.).

70. Dennis Lien, *Minnesota Senate Approves User-Fee Increases in Court System*, PIONEER PRESS (Nov. 13, 2015), https://www.twincities.com/2009/04/21/minnesota-senate-approves-user-fee-increases-in-court-system/ [https://perma.cc/5NKC-UTHF].

71. Michael Khoo, *Minnesota: Land of the Fee*, MINN. PUB. RADIO (June 29, 2003), http://news.minnesota.publicradio.org/features/2003/06/30_khoom_fees/ [https://perma.cc/96KG-2JAB].

David Strom, the legislative director for a leading advocacy group that sponsored Pawlenty's no-new-taxes pledge.[72] Strom defended the increased use of fees by saying that "[w]e charge taxes to pay for general goods. And we charge fees to pay for particular goods for particular individuals. And, in general, we try to make those fees match, more or less, the costs of the service that we're providing."[73]

In 2021, the state legislature amended section 357.021 as part of a series of criminal justice reforms.[74] Section 357.021, subd. 6(c) originally stated "[t]he court may not waive payment of the surcharge required under this subdivision. Upon a showing of indigency or undue hardship upon the convicted person or the convicted person's immediate family, the sentencing court may authorize payment of the surcharge in installments."[75] Now, the statute allows courts to "reduce the amount or waive the payment of the surcharge required under this subdivision on a showing of indigency or undue hardship upon the convicted person or the convicted person's immediate family."[76] The legislature also added that the surcharge may be replaced by the performance of community work service.[77]

The amendment was proposed by Representative Cedrick Frazier, who emphasized the importance of giving judges the power to consider a defendant's economic circumstances before imposing the Court Surcharge.[78] Multiple members of the legislature questioned why the amendment did not go further and said they would be interested in repealing the Court Surcharge altogether.[79] Representative Johnson, for instance, started his questioning by stating, "I want to thank you again for this bill. I love it. The problem is it doesn't go far enough."[80] Despite Representative Frazier saying he would be interested in pursuing this bolder legislation, nothing came of these concerns, as Committee Chair

72. *Id.*

73. *Id.*

74. H.F. 63, 92nd Leg., 1st Spec. Sess. (Minn. 2021).

75. MINN. STAT. §357.021, subd. 6(c) (2008) (amended 2021).

76. MINN. STAT. §357.021, subd. 6(b) (effective July 1, 2021).

77. *Id.*

78. *House File 306: Hearing Before the Minn. H. Pub. Safety & Crim. Just. Reform Fin. & Pol'y Comm.*, 92nd Leg., 2021–2022 Reg. Sess. (Feb. 9, 2021) [hereinafter *Pub. Safety Hearing*] (statements of Rep. Cedrick Frazier, Member, H. Comm. on Pub. Safety & Crim. Just. Reform Fin. & Pol'y); *Judiciary Fin. Hearing*, *supra* note 45 (statements of Rep. Cedrick Frazier, Member, H. Comm. on Judiciary Fin. & Civ. L.).

79. *Pub. Safety Hearing*, *supra* note 78 (statement of Rep. Brian Johnson, Member, H. Comm. on Pub. Safety & Crim. Just. Reform Fin. & Pol'y); *Judiciary Fin. Hearing*, *supra* note 45 (statement of Rep. Paul Novotny, Member, H. Comm. on Judiciary Fin. & Civ. L.).

80. *Judiciary Fin. Hearing*, *supra* note 45 (statement of Rep. Brian Johnson, Member, H. Comm. on Judiciary Fin. & Civ. L.).

Becker-Finn said the cost of fully repealing the Court Surcharge would be $31 million.[81]

III. Analysis

A. Minnesota's Court Surcharge and Fee-for-Service Criminal Justice System Negatively Impacts Minnesota's BIPOC and Low-Income Communities

The fee-for-service criminal justice model has proven just as inequitable and damaging in Minnesota as it has been across the country. In fiscal year 2020, the state and local governments of Minnesota collected over $91 million in fines, fees, and surcharges assessed for criminal and traffic cases.[82] More than a third of this money came from the Court Surcharge.[83] On top of what was actually collected, there is over $140 million of outstanding court debt still owed by convicted defendants.[84] As seen in other jurisdictions, this court debt is difficult to collect, with the Second District Court reporting a collection rate of only 20%.[85]

The weight of these economic sanctions is felt most heavily by Minnesota's BIPOC and low-income communities. For starters, there are vast disparities between the arrests of BIPOC and white Minnesotans for low-level offenses.[86] Though Black Minnesotans are only about 5% of the

81. *Judiciary Fin. Hearing*, *supra* note 45 (statement of Rep. Jamie Becker-Finn, Comm. Chair, H. Comm. on Judiciary Fin. & Civ. L.).

82. Van Berkel, *supra* note 7 (noting that this number was tens of millions of dollars lower than in most years because the courts delayed some payments due to the COVID-19 pandemic).

83. *Id.*

84. *Id.*

85. PFM'S CTR. FOR JUST. & SAFETY FIN., REDUCING RELIANCE ON CRIMINAL FINES & FEES 19 (2019).

86. *ACLU Releases Data Showing Racial Disparities in Low Level Arrests in Minneapolis*, ACLU MINN. (Oct. 27, 2014) [hereinafter *ACLU*], https://www.aclu-mn.org/en/press-releases/aclu-releases-data-showing-racial-disparities-low-level-arrests-minneapolis [https://perma.cc/L7N4-E7QQ] (according to Minneapolis Police Department data recorded between 2004 and 2012, Black Minnesotans are 11.5 times more likely than white Minnesotans to be arrested for marijuana possession; 8.86 times more likely to be arrested for disorderly conduct; 7.54 times more likely to be arrested for vagrancy; and 16.39 times more likely to be arrested for curfew/loitering); Jennifer Mayerle, *Nuisance Data Reveals Racial Disparities in Arrests and Citations in Minneapolis*, CBS MINN. (Nov. 5, 2021), https://minnesota.cbslocal.com/2021/11/05/nuisance-data-reveals-racial-disparities-in-arrests-and-citations-in-minneapolis/ [https://perma.cc/5759-3XRP] (discussing a report from the Police Conduct Oversight Commission which found that while Minneapolis's population is 63% white and 19% Black, only 17% of those arrested or cited for misdemeanors were white compared to 47% who were Black); INST. ON METRO. OPPORTUNITY, THE MINNESOTA STATEWIDE RACIAL PROFILING STUDY 1 (2003) ("If officers in the participating jurisdiction had stopped drivers of all racial/ethnic groups at the same rate, approximately 18,800 fewer Blacks, 5,800 fewer Latinos and approximately 22,500 more Whites would

state's population, they account for 36% of the state's prison population.[87] Native Americans make up 1.3% of the state's population but 9% of its prison population.[88] A major reason for this discrepancy is disproportionate levels of policing, as a state-funded study found that BIPOC drivers are stopped and searched at higher rates than white drivers despite the fact that white drivers were more likely to be in possession of contraband.[89] Seemingly race-neutral policing policies utilized in Minnesota such as CODEFOR—crime mapping used to deploy officer patrols to crime "hot spots"—contribute to this discrepancy, as they have police disproportionately spending their time in neighborhoods where the population is primarily BIPOC.[90] Within these over-policed neighborhoods, Black Minnesotans report being subjected to more police scrutiny than their white neighbors.[91]

There is also a vast economic disparity between white and BIPOC Minnesotans.[92] While the state's poverty rate is only 9.6%, the poverty rate for BIPOC individuals in Minnesota is more than 20%.[93] Across a series of socioeconomic status measures from the 2000 census, the ratio of disadvantaged Black Minnesotans to white Minnesotans was higher than the national average in every category.[94] Black and Native American

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have been stopped in the sixty-five jurisdictions in 2002.").

87. Christopher Magan, *Minnesota's Worsening Racial Disparity: Why it Matters to Everyone*, PIONEER PRESS (Apr. 29, 2016), https://www.twincities.com/2016/04/29/minnesotas-racial-disparities-worsening-why-and-why-it-matters/ [https://perma.cc/Z68R-3P8Q].

88. *Id.*

89. INST. ON METRO. OPPORTUNITY, *supra* note 86.

90. COUNCIL ON CRIME AND JUST., REDUCING RACIAL DISPARITY WHILE ENHANCING PUBLIC SAFETY: KEY FINDINGS AND RECOMMENDATIONS 6 (2006).

91. *See* Michell S. Phelps, Amber Joy Powell & Christopher E. Robertson, *Over-Policed and Under-Protected: Public Safety in North* Minneapolis, UNIV. OF MINN. CTR. FOR URB. & REG'L AFFS.: CURA REPORTER (Nov. 17, 2020), https://www.cura.umn.edu/research/over-policed-and-under-protected-public-safety-north-minneapolis [https://perma.cc/875Q-NQCP] ("You can't go outside on the street or take your kids to the park without being harassed by the police. And when there was a serious crime, like a shooting or a murder, they wouldn't show up . . . But any other day they'll show up just to harass you and racially profile you . . . .").

92. *See* MINN. DEP'T OF EMP. & ECON. DEV., MINNESOTA DISPARITIES BY RACE REPORT (2020) ("Minnesota's median household income was $70,315 in 2018, but varied widely by racial groups. The median household income for American Indian households was $35,148, less than half that of white households. Black or African American households also had median incomes less than half those of whites. Except for Asians, all other households of color in the state also had substantially lower household incomes than Whites.").

93. *Id.*

94. Richard S. Frase, *What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations*, 38 CRIME & JUST. 201, 231 (finding the percent of high school graduates ages twenty-five and over black/white ratio – 1.94; percent living in a different U.S. house in 1995 – 1.48; percent unemployed, of population 16 and over – 3.04; percent unemployed, of labor force 16 and over – 3.28; median household income – 0.60; median family income – 0.53; per capita income – 0.56; percent of families below poverty – 6.18;

Minnesotans are homeless at about 17 times the rate of white Minnesotans.[95] Considering the disparities in policing and economic status, it is unsurprising that the Minnesota ZIP codes with the largest percentage of license suspensions for failure to pay a fine or appear at a court date closely correlate with the ZIP codes that have higher percentages of BIPOC individuals and people living in poverty.[96] The Court Surcharge may apply to everyone convicted of a criminal offense in the state, but it is hitting BIPOC and low-income communities harder, worsening already unacceptable levels of inequality.

B. Fee-for-Service Criminal Justice Is a Misguided Public Policy That Does Not Serve the Purposes of Punishment

As detailed above, in terms of actually collecting revenue, fee-for-service criminal justice is incredibly ineffective.[97] It costs counties on average 121 times more to collect revenue from fines and fees than what it costs the IRS to collect taxes.[98] The fee-for-service model should be rejected not just for its ineffectiveness as a tool for collecting revenue, but also because it is a poor public policy choice contrary to the purposes of punishment.

The purposes of punishment are largely categorized as utilitarian or retributive. Utilitarian purposes, including rehabilitation, incapacitation, specific deterrence, general deterrence, and denunciation, aim to use punishment to prevent future crimes from being committed by the defendant being sentenced and/or by others in the community.[99] Under the retribution theory, defendants should be punished proportionally to the severity of their crime, judged by factors such as their blameworthiness and the seriousness of the crime they have committed.[100]

Fee-for-service criminal justice serves next to no utilitarian purpose. First, an underlying principle of utilitarian punishment is that particular defendants have elevated risks of committing further

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percent of individuals below poverty – 4.37).

95. Greta Kaul, *Across a Range of Measures, Minnesota's American Indians Fare Worse Than Other Groups. So Why Isn't It Talked About More?*, MINNPOST (Oct. 10, 2018), https://www.minnpost.com/politics-policy/2018/10/across-a-range-of-measures-minnesotas-american-indians-fare-worse-than-other-groups-so-why-isnt-it-talked-about-more/ [https://perma.cc/WP9R-5NK4].

96. Van Berkel, *supra* note 7.

97. MENENDEZ ET AL., *supra* note 36; Beckett & Harris, *supra* note 40, at 516–17 (finding that legal debtors in Washington State still owed 77% of their court debt); COUNCIL OF ECON. ADVISERS, *supra* note 28, at 5 (revealing that in multiple states the vast majority of court debt goes uncollected).

98. MENENDEZ ET AL., *supra* note 36, at 9.

99. JAMES Q. WILSON, THINKING ABOUT CRIME 146 (rev. ed. 1983).

100. Frase, *supra* note 15, at 73.

crimes.[101] For low-level offenders hit particularly hard by fee-for-service court fees, such as Minnesota's Court Surcharge, the evidence does not support this underlying principle.[102] The defendants who are punished with these fees often are not less law-abiding, but rather more heavily policed.[103] Second, fines and fees do nothing to incapacitate or rehabilitate defendants, as they do not physically restrain someone from committing further crimes, nor do they do anything to address the problems a defendant may have that are causing them to commit further crimes.[104] As discussed earlier, fines and fees can leave a defendant with substantial court debt which can trap them in poverty and may increase their risk of recidivism.[105] In fact, the study of the newly imposed $200 surcharge on misdemeanor convictions in Milwaukee found that Wisconsin's new surcharge had increased the likelihood of defendants committing a future felony offense within two years of sentencing.[106]

As a special or general deterrent, it is possible that fees may have some effect, but research points towards the certainty of punishment having a greater deterrent effect than the severity of punishment.[107] Even if court fees may have a deterrent effect due to their severity, this effect vacillates and is limited by the fact that defendants with higher incomes can more easily pay the fees while low-income defendants are often never capable of paying these costs.[108] Considering this reasoning, it makes sense that the National Commission on Reform of Federal Criminal Laws (1971) concluded that "fines are to be discouraged . . . unless some affirmative reason indicates that a fine is peculiarly appropriate."[109]

Not only does fee-for-service criminal justice not contribute to utilitarian punishment purposes, the very notion of these punishment purposes and their benefits contradicts the idea that just those who are punished by the criminal justice system should pay for it. The purpose of incapacitation is to prevent "crime by imprisoning high-risk offenders, thus physically restraining them from committing further crimes against the public."[110] General deterrence and denunciation "are designed to

101. WILSON, *supra* note 99, at 146.

102. *ACLU*, *supra* note 86.

103. *Id.*; Mayerle, *supra* note 86; INST. ON METRO. OPPORTUNITY, *supra* note 86.

104. WILSON, *supra* note 99, at 146.

105. Shookhoff et al., *supra* note 48; Beckett & Harris, *supra* note 40.

106. Giles, *supra* note 38, at 4.

107. *See* A. von Hirsch, A.E. Bottoms, E. Burney & P-O Wikström, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research*, 39 ALTA. L. REV. 597, 602 (2001) (citing A. VON HIRSCH, ANTHONY E. BOTTOMS, ELIZABETH BURNEY & P-O WIKSTROM, CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH 34–37 (1999)).

108. Hillsman, *supra* note 23, at 52–53.

109. *Id.* at 52.

110. Frase, *supra* note 15, at 70.

prevent future crimes by members of the public at large . . . ."[111] Utilitarian punishment purposes are thus a "general good" serving the whole community by preventing crime, rather than a "particular good[] for particular individuals."[112] The criminal justice system is a classic example of a public good, a service that is non-excludable because it benefits everyone in a community regardless of whether they specifically pay for it or not and non-rivalrous because one individual's enjoyment of the service does not detract from another's enjoyment.[113] Rather than fund the criminal justice system with inefficient collection measures such as fees and fines that fall only on those convicted of crimes, governments should collectively fund the system through taxes which reflect the collective benefit to public safety.

Fee-for-service criminal justice further undermines the retributive aims of punishment. Instead of reflecting a defendant's blameworthiness or the seriousness of their crime, these fees designed to finance the criminal justice system can decrease trust in and thus the legitimacy of the criminal justice system.[114] For one, defendants feel the imposition of fees serves as a second punishment on top of their criminal punishment.[115] This feeling is exacerbated by the fees accumulating and being too much for defendants to reasonably pay.[116] This debt accumulation leads defendants to feel they are being extorted, not justly punished.[117] By collectively financing this public good rather than placing

111. *Id.* at 71.

112. Khoo, *supra* note 71.

113. Daniel J. D'Amico, *The Social Provision of Punishment and Incarceration*, 76 AM. J. ECON. & SOCIO. 1107, 1110 (2017). *See generally* Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387, 387 (1954) (developing a distinction between "private consumption goods," wherein consumption can be divided between individuals, and "collective consumption goods," where one individual's consumption of the good does not subtract from any other individual's consumption of the good).

114. Breanne Pleggenkuhle, Kimberly R. Kras & Beth M. Huebner, *Twice Punished: Perceived Procedural Fairness and Legitimacy of Monetary Sanctions*, 37 J. CONTEMP. CRIM. JUST. 88, 97 (2020) ("Collectively, the required nature of [legal financial obligations] felt punitive because they seemed disproportionate to the initial punishment they received and were often assigned to them without transparency.").

115. *Id.*; Mary Pattillo & Gabriela Kirk, *Pay Unto Caesar: Breaches of Justice in the Monetary Sanctions Regime*, 4 UCLA CRIM. JUST. L. REV. 49, 65 (2020) ("I'm the one gotta do the jail time and why should I have to pay?").

116. Pleggenkuhle et al., *supra* note 114, at 100–01 ("Participants felt that the system was set up to see them fail because compliance and payment were prioritized over rehabilitation."); Pattillo & Kirk, *supra* note 115, at 64 ("Retributive justice is overwhelmed by the impossibility of complying with this form of punishment, which is more burdensome for those who cannot pay.").

117. Pattillo et al., *supra* note 115, at 69 ("When they threaten my life with the county [jail], I pay them some money . . . . They tell me all the time, they'll petition to revoke my probation and then you go to court, and if they revoke you, they be like, 'We going to offer you 180 days [in county jail] unless you pay this amount.' I'm fixing to pay this amount because I don't want to do 180 days.").

the cost on predominantly low-income individuals, we could thus increase the effectiveness of actual retributive punishments.

C. The State Legislature Took a Half-Measure Because It Failed to Rebuke the Fee-for-Service Criminal Justice Model

Minnesotans and individuals in all parts of the United States were shocked and forced to contend with the racial inequities of the criminal justice system when George Floyd was killed by Minneapolis police officer Derek Chauvin in May of 2020.[118] While some actions to reshape policing standards were passed by the State Legislature in 2020, the police killing of Daunte Wright, another unarmed Black man, brought greater urgency for reform.[119] The resulting bill that was passed was Omnibus Public Safety Bill H.F. 63, a compromise reform and budget bill that left many legislators who had been pushing for serious structural reform disappointed.[120]

A purported strength of H.F. 63, however, was its measures focused on reducing fines and fees, particularly the amendment creating discretion in the imposition of the Court Surcharge.[121] The Court Surcharge amendment passed as introduced by Representative Frazier, who said that he was unsure if he would vote for the bill due to its lack of substantive reform.[122] A closer examination of the Court Surcharge reveals it to be just as lacking as the rest of the bill in substantive reform.

Section 357.021, subd. 6 still requires the surcharge to be imposed "on every person convicted of any felony, gross misdemeanor, misdemeanor, or petty misdemeanor offense . . . ."[123] H.F. 63 changed the language of section 357.021, subd. 6 so that courts "may reduce the

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118. Alex Altman, *Why the Killing of George Floyd Sparked an American Uprising*, TIME (June 4, 2020), https://time.com/5847967/george-floyd-protests-trump/ [https://perma.cc/D33Z-ST83]; Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/CPS3-E43L] (estimating that 15 to 26 million people in the United States participated in protests over the killing of George Floyd).

119. Walker Orenstein, *How the Killing of Daunte Wright is Affecting Police Reform Efforts at the Minnesota Legislature*, MINNPOST (Apr. 13, 2021), https://www.minnpost.com/state-government/2021/04/how-the-killing-of-daunte-wright-is-affecting-police-reform-efforts-at-the-minnesota-legislature/ [https://perma.cc/V9RR-V2JK].

120. H.F. 63, 92nd Leg., 1st Spec. Sess. (Minn. 2021); Walker Orenstein, *Minnesota Lawmakers Reach Deal on Public Safety; Bill Includes Restrictions on No-Knock Warrants, Requirements for Responding to Mental Health Crises*, MINNPOST (June 27, 2021), https://www.minnpost.com/state-government/2021/06/minnesota-lawmakers-reach-deal-on-public-safety-bill-includes-restrictions-on-no-knock-warrants-requirements-for-responding-to-mental-health-crises/ [https://perma.cc/C88A-B6YX].

121. Orenstein, *supra* note 119.

122. *Id.*

123. MINN. STAT. § 357.021 (2021).

amount or waive payment of the surcharge . . . on a showing of indigency or undue hardship."[124] "May" is defined as "[w]hat is within a person's discretion to do or not to do."[125] Courts have at times interpreted "may" to have the same meaning as "shall" where "a statute directs the doing of a thing for the sake of justice or the public good."[126] Courts largely interpret "may" as permissive, however, because a legislature could simply use the word "shall" if it intended an action to be mandatory.[127] A permissive interpretation of the use of "may" in section 357.021, subd. 6 is supported by the legislative history of the amendment, as Representative Frazier repeatedly emphasized that the importance of the language change was to give judges discretion over the Court Surcharge.[128]

Thus, while a court "may reduce the amount or waive payment of the surcharge . . . on a showing of indigency or undue hardship . . . ," the amended statute does not require the court to do this.[129] In fact, the amended statute does not require any inquiry into the defendant's economic status.[130] This is concerning considering that researchers who observed over 1,000 court proceedings in seven jurisdictions found that courts rarely, if ever, held hearings on a defendant's ability to pay.[131] There may be many judges who utilize the new language of section 357.021, subd. 6 to the benefit of low-income defendants, but nothing in the amended language of the statute requires courts to consider a defendant's ability to pay.

What scant case law there is regarding the Court Surcharge would seem to support a judge's decision to ignore the discretion the State Legislature has given them. The Court of Appeals has held that because the Court Surcharge is mandatory, it is to be assessed even if it was never discussed or agreed to in the plea agreement.[132] In reviewing a different fine, the Court of Appeals explicitly found that a statute giving courts the

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124. *Id.*

125. *May*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Stephen Michael Sheppard ed., Desk ed. 2012).

126. *Id.*

127. Louisville & Ind. R.R. Co. v. Ind. Gas Co., 792 N.E.2d 885, 892 (Ind. Ct. App. 2003); R.S.L. Funding, L.L.C. v. Alford, 239 Cal. App. 4th 741, 745–46 (2015).

128. *Judiciary Fin. Hearing*, *supra* note 45 (statements of Rep. Cedrick Frazier, Member, H. Comm. on Judiciary Fin. & Civ. L.); *Pub. Safety Hearing*, *supra* note 78 (statements of Rep. Cedrick Frazier, Member, H. Comm. on Pub. Safety & Crim. Just. Reform Fin. & Pol'y).

129. MINN. STAT. § 357.021 (2021).

130. *Id.*

131. MENENDEZ ET AL., *supra* note 36, at 9.

132. State v. Edwards, No. A10-1742, 2011 Minn. App. LEXIS 829, at *5–6 (Aug. 29, 2011); Morris v. State, No. A14-0170, 2014 Minn. App. LEXIS 1019, at *4–5 (Sept. 15, 2014).

discretion to consider indigency or undue hardship does not require a court to consider these factors.[133]

Even if a court is willing to exercise the discretion granted to it by the amended language, how does it determine that a defendant is indigent or will be subject to undue hardship by imposing the full Court Surcharge? The Supreme Court has come closest to defining this standard by saying that the proper inquiry is whether a defendant could pay the costs "'and still be able to provide himself and dependents with the necessities of life.'"[134] The Court has also found, however, that a certain amount of financial hardship from criminal trials and convictions is inevitable.[135]

Under Minnesota law, a defendant is deemed indigent for the purposes of public defender eligibility if they receive means-tested governmental benefits, or they can meet the burden of proving through financial verification of their assets that they are unable to afford counsel.[136] Showing indigency can prove difficult depending on the judge. The Minnesota Supreme Court has held that the income and willingness of people close to the defendant, such as a cohabitating partner, to contribute should be considered, along with the liquidity of assets such as a home.[137]

A recent study looked into how judges in Washington State interpreted and implemented changes in the law requiring courts to waive or reduce fees if a defendant would be unable to pay them.[138] Researchers found that due to the prioritizing of efficiency in courtrooms, some judges were quick to waive fees while others were quick to impose them, with both sides spending little time looking into the financial situations of defendants before making a decision.[139] A lack of regulatory oversight—something missing from H.F. 63—also hampered consistent implementation of the new law across the state.[140] Though many judges may be more than willing to waive or reduce the Court Surcharge, there will certainly be some judges across the state who determine that while a defendant may be poor, they are not poor enough show "indigency or undue hardship."

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133. State v. Alama, No. C4-95-1494, 1995 Minn. App. LEXIS 1479, at *3 (Minn. Ct. App. Dec. 5, 1995).

134. Adkins v. E.I. DuPont de Nemours Co., 372 U.S. 331, 339 (1948).

135. *See* Fuller v. Oregon, 417 U.S. 40 (1974).

136. MINN. STAT. § 611.17 (2021).

137. *See* State v. Jones, 772 N.W.2d 496 (Minn. 2009); *In re* Stuart, 646 N.W.2d 520 (Minn. 2002).

138. Tyler Smith, Kristina J. Thompson & Michelle Cadigan, *Sensemaking in the Legal System: A Comparative Case Study of Changes to Monetary Sanction Laws*, 8 RUSSELL SAGE FOUND. J. SOC. SCIS. 63 (2022).

139. *Id.* at 76.

140. *Id.* at 78.

Sensing these issues of discretion and showing economic hardship, multiple legislators at committee hearings questioned why the amendment did not go further.[141] Representative Donald Raleigh proposed that a period should be inserted after "[t]he court may reduce the amount or waive payment of the surcharge required under this subdivision," as he believed this would provide judges more discretion instead of tying them to a showing of "indigency or undue hardship."[142] Representative Frazier responded that he was interested in any proposals that would grant judges more discretion in waiving the surcharge, but he did not address whether the language "on a showing of indigency or undue hardship" in section 357.021, subd. 6 restricted this discretion in his view.[143]

At multiple committee hearings, several legislators from the opposing party proposed even more drastic change, asking why the surcharge was not being appealed altogether.[144] They even offered to cosponsor a surcharge repeal with Representative Frazier.[145] Representative Frazier repeatedly responded that he would be interested in pursuing this legislation with them.[146] Committee Chair Jamie Becker-Finn ended discussion of completely eliminating the surcharge, however, saying fully repealing the surcharge would cost the state $31 million.[147]

This rationale by Chair Becker-Finn for avoiding substantive reform was both misguided and inaccurate. If she cited this figure from 2020 collections, then she was citing the amount of money collected under the old language of the statute where the Court Surcharge was imposed with no exceptions.[148] It is difficult to estimate how much this figure would decrease, considering how much court debt from low-income defendants

141. *Judiciary Fin. Hearing*, *supra* note 45 (statement of Rep. Paul Novotny, Member, H. Comm. on Judiciary Fin. & Civ. L.); *id.* (statement of Rep. Brian Johnson, Member, H. Comm. on Judiciary Fin. & Civ. L.); *Pub. Safety Hearing*, *supra* note 78 (statement of Rep. Brian Johnson, Member, H. Comm. on Pub. Safety & Crim. Just. Reform Fin. & Pol'y).

142. *Pub. Safety Hearing*, *supra* note 78 (statement of Rep. Donald Raleigh, Member, H. Comm. on Pub. Safety & Crim. Just. Reform Fin. & Pol'y) (referencing the standard used to waive or remove the Court Surcharge in MINN. STAT. § 357.021, subd. 6(b) (2021)).

143. *Id.* (statement of Rep. Cedrick Frazier, Member, H. Comm. on Pub. Safety & Crim. Just. Reform Fin. & Pol'y).

144. *Id.* (statement of Rep. Brian Johnson, Member, H. Comm. on Pub. Safety & Crim. Just. Reform Fin. & Pol'y); *Judiciary Fin. Hearing*, *supra* note 45 (statement of Rep. Paul Novotny, Member, H. Comm. on Judiciary Fin. & Civ. L.).

145. *Judiciary Fin. Hearing*, *supra* note 45 (statement of Rep. Brian Johnson, Member, H. Comm. on Judiciary Fin. & Civ. L.).

146. *Id.* (statements of Rep. Cedrick Frazier, Member, H. Comm. on Judiciary Fin. & Civ. L.).

147. *Id.* (statement of Rep. Jamie Becker-Finn, Comm. Chair, H. Comm. on Judiciary Fin. & Civ. L.).

148. Van Berkel, *supra* note 7 (reporting that the Court Surcharge accounted for about a third of the $91 million Minnesota collected from fines, fees, and other assessments in 2020).

is already uncollectible, but if the amendment to section 357.021, subd. 6 provides any real benefit to low-income Minnesotans, the amount collected from the Court Surcharge should be lower than the number Chair Becker-Finn cited. Regardless of the accuracy of this statement, it is misguided in that it endorses the fee-for-service model of criminal justice. As Representative Brian Johnson noted when commenting on the bill, states have a constitutional responsibility to fund the courts, but this economic burden should be shared by everyone, not just those cited for offenses.[149]

D. Recommendations

There are a variety of reforms, both big and small, that Minnesota could take to make up for the loss of funding from fully repealing the Court Surcharge. Abolishing the Court Surcharge would lead to, at most, a decrease in funding of $31 million for the state.[150] To put this number in perspective, Minnesota's fiscal year 2022–2023 Budget included $102.3 billion in total spending[151] and $51.8 billion in general-fund spending over the course of the two-year period.[152] Further, the State currently projects to have a budget surplus of $11.605 billion for the fiscal year 2022–23 Biennium.[153] Though $31 million is no small number for a state government, taken in context of the state budget as a whole, it is not an insurmountable number incapable of being met through funding mechanisms other than a regressive fee system.

i. Reducing Reliance on Fees

For one, reducing the state's reliance on fees will save money as there is a cost to collecting court debt.[154] It is primarily the role of the State to collect court debt, but Ramsey County found that even with the small amount of fees it collects the county could save $87,463 annually if

149. *Judiciary Fin. Hearing*, *supra* note 45 (statement of Rep. Brian Johnson, Member, H. Comm. on Judiciary Fin. & Civ. L.).

150. *Id.* (statement of Rep. Jamie Becker-Finn, Comm. Chair, H. Comm. on Judiciary Fin. & Civ. L.).

151. *State Fiscal Briefs Project: Minnesota*, URB. INST. (Sept. 2022), https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/projects/state-fiscal-briefs/minnesota [https://perma.cc/4Q72-4ZKT].

152. *November 2022 Forecast General Fund Spending by Major Area (FY 1990–2027)*, MINN. OFF. OF MGMT. & BUDGET (Nov. 2022), https://mn.gov/mmb-stat/documents/budget/operating-budget/forecast/nov-2022/nov22-gf-spend-by-major-area.pdf [https://perma.cc/567D-835Z].

153. MINN. MGMT. & BUDGET, BUDGET AND ECONOMIC FORECAST 4 (2022).

154. COUNCIL OF ECON. ADVISERS, *supra* note 28 (finding there is a high cost to collection which can substantially detract from, or even surpass, the fees and fines collected in many states—the 2006 fee revenue of $21 million in Washington State only amounted to a $6 million net gain, for instance).

it reduced its reliance on fines and fees by eliminating the Community Corrections staffer position charged with managing fee collections.[155] The State would save money on personnel by decreasing its reliance on fees, along with the material cost of sending non-payment notifications.[156]

The State would also save on the indirect costs associated with the criminal justice system's handling of those who cannot pay their court debt.[157] The costs differ by jurisdiction, but they can include personnel and operational costs of holding court hearings, arrest and detention, and extending a defendant's probation for failure to pay fees.[158] Further, while research on this topic is limited, there are some indications that the accumulation of criminal debt can increase recidivism, adding costs throughout the criminal justice system.[159] By repealing the Court Surcharge, the State would save on these indirect costs, lessening the impact of losing the funding it provides.

ii. Law Library Reform

There are also some small actions that could be taken to make up for the potential loss from eliminating the Court Surcharge. Ramsey County, for instance, would save $567,000 annually if it consolidated its county library with the state library.[160] The State could also charge law firms a higher fee for accessing the state law library, as the current fee is only $85 a year.[161]

iii. Criminal Justice Reform

One of the most effective ways to replace lost funds from repealing the Court Surcharge would be for the State to take decisive steps in criminal justice reform. In 2019, the ACLU released a report listing recommendations for reducing mass incarceration in Minnesota.[162] The proposed reforms included fully legalizing marijuana; eliminating cash bail, except for rare cases where a person "poses a serious, clear threat to

155. PFM'S CTR. FOR JUST. & SAFETY FIN., *supra* note 85, at 21.

156. *Id.*

157. COUNCIL OF ECON. ADVISERS, *supra* note 28, at 5 ("[I]n Rhode Island in 2008, 2,446 individuals were incarcerated for unpaid debts at an average cost of $505 per commitment, and in 13 percent of cases the cost of incarceration alone exceeded the debt assessed.").

158. PFM'S CTR. FOR JUST. & SAFETY FIN., *supra* note 85, at 21.

159. *Id.*; Alex R. Piquero & Wesley G. Jennings, *Research Note: Justice System–Imposed Financial Penalties Increase the Likelihood of Recidivism in a Sample of Adolescent Offenders*, 15 YOUTH VIOLENCE & JUV. JUST. 325 (finding that the recidivism rate in a cohort of juveniles was higher for those with criminal debt than for those juveniles without criminal debt).

160. PFM'S CTR. FOR JUST. & SAFETY FIN., *supra* note 85, at 26.

161. *Id.*

162. *ACLU-MN Releases Study to Sharply Reduce Mass Incarceration*, ACLU OF MINN. (Nov. 7, 2019), https://www.aclu-mn.org/en/press-releases/aclu-mn-releases-study-sharply-reduce-mass-incarceration [https://perma.cc/DSR8-ACNC].

others" capping probation terms and expressly prohibiting the extension of probation for wealth-based conditions; and prohibiting the revocation of probation for technical violations.[163] The ACLU estimated that if these reforms were enacted by 2025, they would decrease Minnesota's prison population by 5,484 individuals, saving the state over $41 million.[164]

iv. Taxation

The lost $31 million could also be made up for, and then some, by tax increases on the state's highest earners. In 2021, Governor Walz's budget proposal called for creating a fifth-tier income tax bracket for individuals making over $500,000 and couples making over $1 million.[165] This tax increase would affect only the top 0.7% of filers—about 21,000 households—increasing their taxes by $8,072 on average while raising an additional $403 million for the state.[166] Governor Walz also proposed a new capital gains tax of 1.5% on profits between $500,000 and $1 million and 4% on transactions that are over $1 million.[167] This would raise another $486 million for the state.[168] These tax increases would be a more just way to finance the state's criminal justice system—a public good from which all society benefits—rather than the current regressive fee-for-service system in which the poorest community members bear the cost.

California took this collective approach to the financing of criminal justice when it reformed its fee system in 2020.[169] Assembly Bill 1869 was the first bill in the nation to abolish the assessment and collection of twenty-three criminal administrative fees across the state.[170] To make up for lost revenue, the bill created an annual apportionment of $65 million from the state's general fund.[171] California showed that when there is

163. *Id.*

164. *Id.*

165. Briana Bierschbach, *Tax Increase on Minnesota's Highest Earners Renews Fair Share Debate*, STAR TRIB. (Feb. 13, 2021), https://www.startribune.com/tax-increase-on-minnesota-s-highest-earners-renews-fair-share-debate/600022904/ [https://perma.cc/YF5L-SG92].

166. *Id.*

167. *Id.*

168. Peter Callaghan, *Walz's Revised Budget Maintains Tax Hike on High-Earners, Corporations*, MINNPOST (Mar. 18, 2021), https://www.minnpost.com/state-government/2021/03/walzs-revised-budget-maintains-tax-hike-on-high-earners-corporations/ [https://perma.cc/CP4Z-6NLJ].

169. *Governor Newsom Signs the Families Over Fees Act!*, THE FIN. JUST. PROJECT S.F. (Sept. 25, 2020), https://sfgov.org/financialjustice/newsletters/governor-newsom-signs-families-over-fees-act [https://perma.cc/MU9H-4XYP].

170. *Id.*

171. Assem. B. 1869 ch. 92, 2019–2020 Reg. Sess. (Cal. 2020).

collective will to address the inequities that fee-for-justice policies perpetuate, funding deficiencies can be solved.

Conclusion

For decades, states across the country have pursued a policy of making the defendants who are criminalized by the justice system pay for their use of the system through a variety of fees. These fees saddle defendants with court debt, decrease trust in the justice system, increase recidivism, rarely serve the purposes of punishment, and cost nearly as much to collect as they bring into the state. Though not the highest fee, the Court Surcharge is the most pervasive fee in Minnesota. While it is laudable that the State took some action by giving judge's discretion to consider a defendant's financial situation, this was only a half measure. It is questionable to what degree judges will utilize this newfound discretion, and the surcharge imposition continues to endorse the merits of fee-for-service criminal justice. It is time for Minnesota to take a true step forward by repealing the Court Surcharge, as the cost of the criminal justice system must be shared by every citizen, not just the most socioeconomically disadvantaged.

The Applicability of Minnesota's Workers' Compensation Laws to Undocumented Workers

Cedar Weyker†

Introduction

Minnesota has a long history of immigration and has emerged as a leader in some regards. For the majority of the twentieth century, Europeans made up the majority of immigrants to Minnesota, but now more than 90% of immigrants that come to Minnesota come from non-European countries.[1] Today, Minnesota has the highest population of Karen, Somali, and Hmong individuals in the United States.[2] In 2018, Minnesota had the highest number of refugees per capita in the entire country.[3] Although anti-immigrant discrimination and xenophobic rhetoric exists in Minnesota,[4] the facts show that immigrants continue to contribute to the success of the state.[5]

Immigrants bolster Minnesota's economy. In fact, if not for immigrants, Minnesota's population would have begun to decline by

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1. Peter Warren, *What Are the Top Five Immigrant Groups in Minnesota?*, STAR TRIB. (Mar. 26, 2021), https://www.startribune.com/minnesota-immigration-countries-top-five-mexico-somalia-india-laos-vietnam/600032203/ [https://perma.cc/PDP6-L22T].

2. Sheila Mulrooney Eldred & Ibrahim Hirsi, *Looking Back at Minnesota's Refugee History*, MPLS.ST.PAUL MAG. (Dec. 19, 2021), https://mspmag.com/arts-and-culture/looking-back-at-minnesotas-refugee-history/ [https://perma.cc/7E73-HWTY].

3. Amanda Ostuni, *Minnesota Refugee Resettlement*, BORGEN MAG. (Apr. 1, 2020), https://www.borgenmagazine.com/minnesota-refugee-resettlement/ [https://perma.cc/562R-BZZE].

4. *See, e.g.*, *id.* ("[T]here is still significant systemic racial inequity in Minnesota. . . . Tensions have risen in recent years thanks to increased politicization of refugee resettlements[,] . . . [due to] incorrect information . . . [and] misconceptions[.]").

5. *See generally* BILL BLAZAR, RACHEL BORDELON & PAUL DANIELS, MINN. CHAMBER FOUND., THE ECONOMIC CONTRIBUTIONS OF IMMIGRANTS IN MINNESOTA (2021), https://www.mnchamber.com/sites/default/files/The%20Economic%20Contributions%20of%20Immigrants%20in%20Minnesota%203.23.21.pdf [https://perma.cc/RD7W-UV6D] (showing that immigrants contribute to the economy of the United States by being consumers, workers in key industries, taxpayers, and entrepreneurs).

2001.[6] In Minnesota, immigrants contributed more than $12.4 billion in spending power and more than $2 billion in state and local taxes in 2019.[7] African immigrants alone contribute upwards of $200 million in state and local taxes[8]—and wield $1.6 billion in spending power—per year.[9] In fact, foreign-born workers participate in the Minnesota labor force at a higher rate than U.S.-born workers.[10] Entire industries—such as agriculture, food manufacturing, and health care—depend on the labor of foreign-born workers.[11]

Unauthorized immigrants also contribute to Minnesota's economy.[12] In 2016, undocumented immigrants made up 2% of the Minnesota workforce.[13] In 2018, undocumented immigrants paid over $300 million in taxes, with $108.8 million going to Minnesota state and local governments.[14] However, when undocumented immigrants work in Minnesota, they often fill low-wage jobs that other Minnesotans do not want.[15] Consequently, undocumented workers face more hazardous work conditions than their authorized counterparts.[16]

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6. *Id.* at 2.

7. *Id.* at 7, 9.

8. BRUCE P. CORRIE, THE ECONOMIC POTENTIAL OF AFRICAN IMMIGRANTS IN MINNESOTA 3 (2015).

9. *Id.* at 13.

10. BLAZAR ET AL., *supra* note 5, at 7.

11. *Id.* at 16.

12. This Article will use "unauthorized" and "undocumented" workers interchangeably to refer to noncitizens who live or work in the United States without authorization. This choice was made because no human is "illegal." *See, e.g.*, Lauren Gambino, *'No Human Being is Illegal': Linguists Argue Against Mislabeling of Immigrants*, THE GUARDIAN (Dec. 6, 2015), https://www.theguardian.com/us-news/2015/dec/06/illegal-immigrant-label-offensive-wrong-activists-say [https://perma.cc/RX8F-TMKN]; ACLU IMMIGRANTS' RTS. PROJECT, ISSUE BRIEF: CRIMINALIZING UNDOCUMENTED IMMIGRANTS 1 (Feb. 2010), https://www.aclu.org/sites/default/files/field_document/FINAL_criminalizing_undocumented_immigrants_issue_brief_PUBLIC_VERSION.pdf [https://perma.cc/B6FC-4TAP] (explaining that simply being present in the United States in violation of federal immigration law is not criminalized). For a discussion regarding the variety of terms used to describe undocumented immigrants, see Jonathan Kwan, *Words Matter: Illegal Immigrant, Undocumented Immigrant, or Unauthorized Immigrant?*, MARKKULA CTR. FOR APPLIED ETHICS (Feb. 11, 2021), https://www.scu.edu/ethics/focus-areas/immigration-ethics/immigration-ethics-resources/immigration-ethics-blog/words-matter-illegal-immigrant-undocumented-immigrant-or-unauthorized-immigrant/ [https://perma.cc/MWT5-3MQ5].

13. AM. IMMIGR. COUNCIL, IMMIGRANTS IN MINNESOTA (2020), https://www.americanimmigrationcouncil.org/research/immigrants-in-minnesota [https://perma.cc/9SSE-FKRL].

14. BLAZAR ET AL., *supra* note 5, at 9.

15. Dave Beal, *Immigration Reform: Minnesota's Changing Face of Labor*, MINNPOST (Aug. 7, 2013), https://www.minnpost.com/twin-cities-business/2013/08/immigration-reform-minnesotas-changing-face-labor/ [https://perma.cc/WWH9-L4CT].

16. Paul Holdsworth, *America's (Not So) Golden Door: Advocating for Awarding Full Workplace Injury Recovery to Undocumented Workers*, 48 U. RICH. L. REV. 1369, 1370–71

This Article will explore the ways in which Minnesota's workers' compensation laws have safeguarded the rights of undocumented workers and will also suggest ways in which courts and the legislature can expand protections. First, this Article will explain the background of workers' compensation law in Minnesota, the heightened risk of workplace injury associated with working without authorization, and the federal response to unauthorized labor. Next, it will analyze current Minnesota statutes and case law and suggest ways to extend coverage and broaden protections.

I. Background

A. History of Workers' Compensation in Minnesota

During industrialization, Minnesota workers grappled with increasingly dangerous working conditions. For example, in 1910, the *Duluth News-Tribune* featured an article about the death of a sawmill worker in Hibbing, Minnesota.[17] After his clothing was caught in a pulley, the worker was "wound around" the wheel of a machine and crushed before anyone could turn the machine off.[18] Before the advent of workers' compensation law, injured workers could sue their employers via tort law, ask for assistance from charitable organizations, hope that their employers would pay for their medical bills or recuperation out of the goodness of their heart, or rely on previously purchased private insurance.[19] Employees had the burden of proving that their employers had been negligent,[20] and employers could raise several common law defenses that made litigation difficult for workers.[21] Often, workers had to wait for the outcome of a jury trial and spend much of their award on attorney and court fees.[22]

(2014) ("Even if these individuals successfully make it across the border, they still face the increasingly difficult road to socioeconomic prosperity. That road frequently begins with the harsh reality that the vast majority of available work is in some of the most dangerous professions in the country, with the frighteningly high possibility of death, or at minimum, the high probability of a debilitating workplace injury during employment." (foonotes omitted)).

17. *See* Robert Asher, *The Origins of Workmen's Compensation in Minnesota*, MINN. HIST., Winter 1974, at 142.

18. *Id.*

19. *Id.* at 143.

20. Thomas F. Coleman, *Fundamentals of Workers' Compensation in Minnesota*, 41 WM. MITCHELL L. REV. 1289, 1292 (2015).

21. Asher, *supra* note 17, at 143 n.4 (explaining that employers often used three defenses: first, that another employee was responsible for the injury in some way; second, that the employee had contributed to their injury with their own negligence; and third, that the employee had assumed the risk of injury when they agreed to the job).

22. *Id.* at 143.

Workers' compensation laws are a relatively new development in the history of the United States. State workers' compensation statutes emerged nationwide within a few short years in the 1910s.[23] The emergence of these statutes marked a major milestone in U.S. labor law in that they established a strict liability standard between workers and employers which replaced negligence tort liability for workers' injuries.[24] Interestingly, the new state laws were beneficial to employers and employees alike. Workers received expanded workplace insurance coverage and avoided having to bring their suit to court under negligence law.[25] The security of no-fault liability increased "postaccident payments by between 75 and 200 percent."[26] On the other hand, workers' compensation laws enabled employers to limit their liability through *ex ante* contracting—a practice that many state courts had previously refused to recognize.[27] Workers' compensation laws also allowed employers to avoid going to court in an increasingly hostile legal climate. At the turn of the century, litigation skyrocketed as judges trended towards ruling in favor of injured workers, and employers' liability insurance premiums went through the roof.[28]

By 1909, organized labor unions, employers, and insurance agencies agreed that it was time for a change, and their advocacy resulted in the creation of the non-partisan Minnesota Employees' Compensation Commission.[29] Minnesota adopted its workers' compensation statute in 1913.[30] The goal of the Minnesota's workers' compensation system is to make the process as stable and predictable as possible.[31] It is a strict-liability, no-fault system,[32] which means that most cases are handled administratively, outside of court. The type of relief covered under workers' compensation statutes normally includes medical benefits, lost wage benefits, and vocational rehabilitation.[33] If there is a dispute about benefits, an administrative law judge (ALJ) will hear all parties' arguments, and the employer or worker may appeal the ALJ's holding to

23. Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900–1930*, 41 J.L. & ECON. 305, 306 (1998).

24. *Id.* at 305.

25. *Id.* at 314.

26. *Id.* at 309.

27. *Id.* at 312, 314.

28. Asher, *supra* note 17, at 144.

29. *Id.* at 145.

30. Fishback & Kantor, *supra* note 23, at 320 tbl.2.

31. MINN. H.R. RSCH. DEP'T, WORKERS' COMPENSATION INFORMATION BRIEF 2 (1998), https://www.house.leg.state.mn.us/hrd/pubs/workcomp.pdf [https://perma.cc/P4QU-PEK3].

32. *See* Coleman, *supra* note 20, at 1292.

33. *See* Holdsworth, *supra* note 16, at 1375–76.

a state workers' compensation appeals board.[34] Parties may then appeal the board's decision to the state court of appeals.[35]

Most workers' compensation claims are governed by state law and procedures and are thus highly variable.[36] Employers are required to purchase workers' compensation insurance depending on how many people they employ and other statutorily defined factors. The number of employees covered by workers' compensation varies by state. In Minnesota, for example, there is no minimum number of employees that an employer must have before they are required to have insurance.[37] Under section 176.031 of the Minnesota Statutes, employers in Minnesota must obtain insurance to compensate injured workers and their dependents or self-insure.[38] If employers fail to insure, injured employees may pursue an outside action for damages, as the uninsured employer has essentially failed to opt in to the no-fault workers' compensation system.[39] In Texas, however, employers can choose whether to get workers' compensation coverage.[40] Above all, "[i]t is the 'police powers of the state' under which workers' compensation laws are authorized, and they will not be preempted by federal law 'except by the clear and manifest intent of Congress.'"[41]

B. The Risk of Working Without Authorization

All workers are better off if undocumented immigrants are covered by state workers' compensation policies. According to the National Employment Law Project, poor coverage of undocumented immigrants under workers' compensation laws may actually encourage the

34. *Id.* at 1376.

35. *Id.*

36. Brooke Sikora Purcell, *Undocumented and Working: Reconciling the Disconnect Between U.S. Immigration Policy and Employment Benefits Available to Undocumented Workers*, 43 U.S.F. L. REV. 197, 205 (2008).

37. MINN. DEP'T LAB. & INDUS., *Work Comp: Who Needs Workers' Compensation Coverage?*, https://www.dli.mn.gov/business/workers-compensation/work-comp-who-needs-workers-compensation-coverage [https://perma.cc/9TJ4-P3MD]; MINN. STAT. § 176.181, subd. 2 (2022) ("Every employer . . . liable under this chapter to pay compensation shall insure payment of compensation with some insurance carrier authorized to insure workers' compensation liability in this state . . . .").

38. MINN. STAT. § 176.031 (2022).

39. *See id.* ("If an employer . . . fails to insure or self-insure liability for compensation to injured employees and their dependents, an injured employee, or legal representatives or, if death results from the injury, any dependent may elect to claim compensation under this chapter or to maintain an action in the courts for damages on account of such injury or death.").

40. TEX. DEP'T OF INS., *Employer Resources*, https://www.tdi.texas.gov/wc/employer/index.html [https://perma.cc/K859-NZQM].

41. David B. Torrey, Lawrence D. McIntyre & Justin D. Beck, *Recent Developments in Workers' Compensation and Employers' Liability Law*, 56 TORT TRIAL & INS. PRAC. L.J. 515, 521 (2021) (footnotes omitted).

employment of unauthorized workers.[42] If employers know that they will not have to pay out when an undocumented worker gets injured, they have an incentive to hire unauthorized workers to save money. Subsequently, employers may "become lax in workplace safety, knowing [they] would suffer no consequences if [their] employees were injured at work."[43] This outcome will inevitably worsen workplace safety for all employees in the United States.[44]

However, despite the possibility of a universal decline in workplace safety, empirical evidence supports the idea that undocumented workers suffer from more hazardous workplaces than other workers.[45] Many studies that report on the occupational hazards of unauthorized workers focus on the largest subset of undocumented workers: Latin American immigrants. A 2015 article in the American Journal of Industrial Medicine references a 2009 study that notes that more than 75% of unauthorized workers in the United States are Latin American.[46] In their study for the Center for Migration Studies of New York, Matthew Hall and Emily Greenman focus exclusively on the workplace safety of Mexican and Central American undocumented immigrants after noting that Mexican and Central American noncitizens alone comprise approximately two-thirds of undocumented immigrants in the United States.[47] However, it is difficult to find or impute national data on the fatality rates of undocumented workers in general.[48] As a result, much of the literature on undocumented immigrants' working conditions centers the experiences of Latin American immigrants.

In a 2008 Center for Disease Control and Prevention report, researchers found that foreign-born Latin American immigrants were fatally injured at work at two to three times the rate of U.S.-born employees.[49] Undocumented Mexican and Central Americans (MCAs)

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42. DEBORAH BERKOWITZ, NAT'L EMP. L. PROJECT, UNINTENDED CONSEQUENCES OF LIMITING WORKERS' COMP BENEFITS FOR UNDOCUMENTED WORKERS 2 (2017), https://www.nelp.org/publication/unintended-consequences-limiting-workers-comp-benefits-undocumented-workers/ [https://perma.cc/B7Z8-5E5C].

43. Rajeh v. Steel City Corp., 813 N.E.2d 697, 703 (Ohio. Ct. App. 2004).

44. BERKOWITZ, *supra* note 42, at 3 ("Employers who expose undocumented workers to risks of injuries on the job also expose their co-workers to such risks.").

45. Matthew Hall & Emily Greenman, *The Occupational Cost of Being Illegal in the United States: Legal Status, Job Hazards, and Compensating Differentials*, 49 INT'L MIGRATION REV. 406, 406 (2015) (noting that, due to data limitations, empirical evidence on the status of undocumented workers is sparse).

46. Michael A. Flynn, Donald E. Eggerth & C. Jeffrey Jacobson, Jr., *Undocumented Status as a Social Determinant of Occupational Safety and Health: The Workers' Perspective*, 58 AM. J. INDUS. MED. 1127, 1128 (2015).

47. Hall & Greenman, *supra* note 45, at 408.

48. Flynn et al., *supra* note 46, at 1128.

49. *Id.*

have the highest occupational fatality and hazard rate—10.68%—among less-skilled male workers based on race and legal status.[50] Specifically, undocumented MCAs "have the highest levels of occupational hazard on five of the seven measured dimensions."[51] The five categories in which undocumented MCAs had the highest risk are: "occupational fatality, greater exposure to physical strain, greater exposure to environmental conditions and to heights, and higher levels of repetitive motions (i.e., recurring hand movements)."[52] Among female workers, female undocumented MCAs have the highest levels of physical strain and environmental exposure.[53]

Some of this increased risk is likely due to the fact that undocumented immigrants are more concentrated in the food preparation, agriculture, construction, and cleaning industries, which are generally more dangerous than the average white-collar job.[54] The reasons for this overrepresentation are manifold. In a 2009 study, undocumented workers were noted to be more willing to perform riskier job duties because they fear losing their job and have less options available to them.[55] Without work authorization, employment opportunities are limited, and the inability to speak or understand English further restricts available options.[56]

As of 2019, the Migration Policy Institute estimated that there were 81,000 undocumented noncitizens in Minnesota.[57] The number of undocumented immigrants in Minnesota has increased exponentially since 1990, when it was estimated that there were only 15,000 undocumented immigrants in the state.[58] Of the approximately 81,000 undocumented noncitizens in Minnesota, it is estimated that 53,000 were employed in the following industries: 19% in accommodation and food services, 16% in manufacturing, 13% in "professional, scientific,

50. Hall & Greenman, *supra* note 45, at 421 tbl.2 (finding that the occupational fatality and hazard rate among less-skilled workers is 10.529% for documented MCAs, 8.271% for U.S.-born Latinos, 9.023% for U.S.-born non-Latino whites, and 8.049% for U.S.-born non-Latino Blacks).

51. *Id.* at 421.

52. *Id.* at 421–22.

53. *Id.* at 422.

54. Pia M. Orrenius & Madeline Zavodny, *Do Immigrants Work in Riskier Jobs*?, 46 DEMOGRAPHY 535, 536 (2009).

55. *Id.* at 536.

56. *Id.* at 544 ("The regression results indicate that workers with worse English ability tend to be in riskier jobs.").

57. *Profile of the Unauthorized Population: Minnesota*, MIGRATION POL'Y INST., https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/MN [https://perma.cc/R9W9-P228].

58. *Unauthorized Immigrant Population Trends for States, Birth Countries and Regions*, PEW RSCH. CTR. (June 12, 2019), https://www.pewresearch.org/hispanic/interactives/unauthorized-trends/ [https://perma.cc/7REV-CNM4].

management, administrative, and waste management services," 10% in construction, and 9% in "health services and social assistance."[59] Of this unauthorized immigrant population, 58% are from Mexico and Central America, 15% are from Asia, 14% are from Africa, 8% are from South America, and 5% are from Europe.[60] It is incumbent upon Minnesota to safeguard its workplaces to ensure the health of every resident, regardless of work authorization or nationality. Unfortunately, federal legislators and those in charge of national immigration consistently refuse to extend certain workplace protections to undocumented workers.

C. Federal Regulation of Undocumented Workers—Hoffman *at the Intersection of Immigration and Labor Law*

The Immigration Reform and Control Act of 1986 (IRCA) is the pioneering national legislation at the intersection of employment and immigration law. Before IRCA, federal immigration law did not prohibit the employment of undocumented workers.[61] However, the economic recessions of the 1970s and 80s created uncertainty for the American worker.[62] Directly before IRCA's enactment, "American sentiment reflected an anti-immigrant attitude that was grounded in the assumption that the undocumented immigrant population extant in the United States adversely impacted the 'economic, social, and political well-being of the nation.'"[63] Several different interest groups began to pressure legislators to respond through legislation establishing employer sanctions.[64] After several years of failed bills and heated negotiations, Congress passed IRCA—amending the Immigration and Nationality Act—as part of a more comprehensive immigration reform package.[65]

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59. MIGRATION POL'Y INST., *supra* note 57.

60. *Id.*

61. Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 198 (2007).

62. Adam L. Lounsbury, *A Nationalist Critique of Local Laws Purporting to Regulate the Hiring of Undocumented Workers*, 71 ALB. L. REV. 415, 419 (2008).

63. *Id.* (quoting HELENE HAYES, U.S. IMMIGRATION POLICY AND THE UNDOCUMENTED: AMBIVALENT LAWS, FURTIVE LIVES 32 (2001)); *see also* H.R. REP. NO. 99-682, at 46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650 ("Employment is the magnet that attracts aliens here illegally or, in the case of nonimmigrants, leads them to accept employment in violation of their status. Employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment.").

64. *See* Wishnie, *supra* note 61, at 200 (discussing the viewpoints of various interest groups including labor groups, business groups, civil rights groups, and environmental groups regarding the benefits and dangers of prohibiting employers from hiring unauthorized workers).

65. *Id.* at 202.

Under IRCA, *employers* face criminal and civil sanctions for failing to comply with federal immigration law.[66] IRCA requires that most employers examine employee identification and employment authorization to ensure that employees are eligible to work in the United States.[67] To encourage employers to participate in the recordkeeping and verification requirements, IRCA establishes that "good faith compliance" with recordkeeping requirements is an affirmative defense for employers accused of violating the legislation.[68] "[T]he system can be viewed as a stepwise progression of civil penalties aimed at achieving compliance with IRCA, while reserving criminal penalties for employers who are flagrant and persistent violators of the Act."[69] Like many federal acts, IRCA includes a clause that explicitly preempts state and local law.[70] Although many employers used this preemption clause to argue that undocumented workers were not covered under workers' compensation laws, in the years following the passage of IRCA most states found that preemption did not apply to workers' compensation laws and undocumented workers were covered under the state workers' protection statutes.[71]

The Supreme Court's *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board* opinion reignited the debate regarding whether or not unauthorized workers are entitled to compensation under both federal and state statutes.[72] Despite the fact that the case does not directly address workers' compensation, the ruling has had an immense effect on the applicability of compensation laws to undocumented workers.[73] Hoffman Plastic hired Jose Castro, an undocumented worker, in 1988

66. *See* 8 U.S.C. § 1324a (making it illegal to knowingly hire, recruit, or refer for employment an individual unauthorized to work in a certain field due to their immigration status).

67. *See* 8 U.S.C. § 1324a(b)(1).

68. *See* 8 U.S.C. § 1324a(b)(6); *see also* H.R. REP. NO. 99-682, at 57 ("The Committee intends that the act of establishing 'good faith' compliance could be shown by proof of the employer's, referrer's or recruiter's review of the documents specified in the legislation and retention of the verification forms, inclusive of the employee's attestation.").

69. Lounsbury, *supra* note 62, at 422–23.

70. 8 U.S.C. § 1324a(h)(2) ("The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.").

71. Gregory T. Presmanes & Seth Eisenberg, *Hazardous Condition: The Status of Illegal Immigrants and Their Entitlement to Workers' Compensation Benefits*, 43 TORT TRIAL & INS. PRAC. L.J. 247, 251 (2008).

72. *See* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

73. *See generally* Oliver T. Beatty, *Workers' Compensation and Hoffman Plastic: Pandora's Undocumented Box*, 55 ST. LOUIS U. L.J. 1211 (2011) (describing how *Hoffman Plastic*'s finding—that federal immigration laws supersede labor laws—is used as an affirmative defense by employers in state workers' compensation cases involving undocumented workers).

after Castro presented false paperwork.[74] After Hoffman illegally fired Castro for union organizing, the National Labor Relations Board (NLRB) ordered Hoffman to give Castro backpay.[75] In a close 5-4 decision, the Court held that Castro could not receive backpay because his undocumented status meant that he was never entitled to wages in the first place.[76] Justice Rehnquist wrote for the majority:

> We therefore conclude that allowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations. However broad the Board's discretion to fashion remedies when dealing only with the [National Labor Relations Act], it is not so unbounded as to authorize this sort of an award.[77]

In his dissent, Justice Breyer wrote that, on the contrary, the award of backpay for an undocumented worker does *not* conflict with national immigration policy.[78] Instead, it "reasonably helps to deter unlawful activity that *both* labor laws *and* immigration laws seek to prevent" by removing incentives to hire unauthorized workers (in order to avoid paying for workers' compensation).[79] Immigration law does not conflict with labor law, he urged; instead, the labor market benefits from coverage of undocumented workers.[80]

However, employers used the *Hoffman* ruling to claim that IRCA expressly or implicitly preempted awarding benefits to *all* undocumented workers.[81] Fortunately, most state case law has established that the *Hoffman* ruling does not preclude workers' compensation benefits for undocumented workers.[82] Nevertheless, varying applications and interpretations of workers' compensation laws often leave undocumented workers with more questions than answers. Some states,

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74. *Hoffman Plastic*, 535 U.S. at 140–41.

75. *Id.*

76. *Id.* at 148–49.

77. *Id.* at 151–52.

78. *Id.* at 153 (Breyer, J., dissenting).

79. *Id.*

80. *See id.* at 153–56 (highlighting that the majority's ruling on implied preemption reduces employer liability and creates a perverse incentive for employers to violate labor laws and hire more undocumented workers, undermining the objectives of both immigration and labor laws).

81. *See, e.g.*, Ruben J. Garcia, *Ten Years after Hoffman Plastic Compounds, Inc. v. NLRB: The Power of a Labor Law Symbol*, 21 CORNELL J.L & PUB. POLY 659, 673 (2012) (finding that *Hoffman* has been used to justify and incentivze employer misconduct).

82. *See, e.g.*, Beatty, *supra* note 73, at 1236–37 (writing that New York case law draws from Breyer's dissent in *Hoffman* to find that "there is no conflict between labor and immigration policies, and even if there were, properly effectuated labor laws are the solution to immigration problems").

for example, disqualify undocumented workers from compensation if they have used fraudulent documentation to obtain employment.[83] Other states specify that undocumented workers do not meet the definition of "employee" under state workers' compensation statutes, making them ineligible for coverage.[84] The varying degrees of coverage for undocumented workers in different jurisdictions means that workers must navigate a minefield of confusing case law and statutory definitions to determine whether they are even able to collect different kinds of workers' compensation benefits.

On June 27, 2013, the United States Senate passed S. 744, a bill with holistic immigration reform provisions.[85] If passed into law, S. 744 could have broadened workers' compensation protections to include undocumented workers. The bill would have amended the Immigration and Nationality Act's section pertaining to the "Unlawful Employment of Aliens" to read: "all rights and remedies provided under any Federal, State, or local law relating to workplace rights, including but not limited to back pay, are available to an employee despite—(i) the employee's status as an unauthorized alien during or after the period of employment."[86] Such a bill would have supported enhanced workplace rights for undocumented immigrants, especially the right to "recover in full for a workplace injury."[87] Unfortunately, the House refused to consider S. 744, and the bill died.[88]

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83. *See, e.g.*, Doe v. Kansas Dep't of Hum. Res., 90 P.3d 940 (Kan. 2004) (finding that an undocumented worker who had lied about her identity to gain employment was not entitled to workers' compensation benefits because she made a false and misleading statement in violation of state law); Sanchez v. Eagle Alloy, Inc., 658 N.W.2d 510, 512 (Mich. Ct. App. 2003) (reversing an award of weekly wage-loss benefits to an undocumented worker because presenting fraudulent identification constituted the "commission of a crime" that absolved the employer of the duty to pay).

84. *See, e.g.*, IDAHO CODE § 72-1366(19)(a) (2021) (noting that "aliens" cannot collect workers' compensation benefits unless they are "lawfully admitted"); WYO. STAT. ANN. § 27-14-102(a)(vii) (2022) (including only authorized "aliens" in its list of covered employees).

85. Holdsworth, *supra* note 16, at 1381; *see* Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3101 (2013).

86. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 3101(a)(8)(A) (2013).

87. Holdsworth, *supra* note 16, at 1382.

88. Philip E. Wolgin, *2 Years Later, Immigrants Are Still Waiting on Immigration Reform*, CTR. FOR AM. PROGRESS, (June 24, 2015), https://www.americanprogress.org/article/2-years-later-immigrants-are-still-waiting-on-immigration-reform/ [https://perma.cc/8P55-9RFD].

II. Legal Analysis

A. Minnesota Should Change its Statutory Definition of Employee to Explicitly Include Undocumented Workers

Undocumented workers are not excluded from workers' compensation coverage under Minnesota statute, but they are not explicitly included under the definition of employee either.[89] Nevertheless, in *Gonzalez v. Midwest Staffing Group, Inc.*, the Workers' Compensation Court of Appeals (WCCA) interpreted Minnesota's statutory language to be inclusive of undocumented workers.[90] Minnesota's workers' compensation statute states that "'[e]mployee' means any person who performs services for another for hire including the following," and then enumerates twenty-five different kinds of employees covered by the Act.[91] The WCCA explained that "the language 'including the following' as used in this statute means 'for example' and should not be construed to exclude classifications not itemized."[92] To bolster this interpretation, the WCCA noted that another section in the same statutory chapter provides that "except as excluded by this chapter all employers and employees are subject to the provisions of this chapter."[93] The statute explicitly excludes farmers and "members of their family who exchange work with other farmers in the same community."[94]

The WCCA declined to exclude "undocumented aliens" from the category of covered workers so as not to usurp the legislature's statutory power.[95] Using this interpretation of the statute, the court found that Gonzalez, an undocumented worker, was an employee for the purposes of workers' compensation.[96] At this time, no WCCA decisions have contradicted this interpretation. In fact, the Minnesota Supreme Court affirmed this interpretation in *Correa v. Weymouth Farm, Inc.*, in 2003.[97]

In his *Correa* majority opinion, Justice Page cited section 645.16 of the Minnesota Statutes, which states that "when the words of a law are clear and free from all ambiguity, the letter of the law shall not be

89. *See* MINN. STAT. § 176.011, subd. 9 (2022) (including "alien" in the definition of "employee" but not specifying whether an "alien" means a person authorized to work in the United States).

90. *See* Gonzalez v. Midwest Staffing Grp., Inc., 59 W.C.D. 207, 1999 WL 297157, at *2 (Minn. Work. Comp. Ct. App. Apr. 6, 1999).

91. MINN. STAT. § 176.011, subd. 9 (2022).

92. *Gonzalez*, 1999 WL 297157, at *2.

93. *Id.* at *3 (citing MINN. STAT. § 176.021, subd. 1 (2022)).

94. MINN. STAT. § 176.011, subd. 9(b) (2022).

95. *Gonzalez*, 1999 WL 297157, at *3.

96. *Id.*

97. Correa v. Waymouth Farms, Inc., 664 N.W.2d 324, 329 (Minn. 2003).

disregarded under the pretext of pursing its spirit."[98] In other words, by not explicitly excluding undocumented workers from its definition of "employee," the Minnesota legislature unambiguously includes undocumented workers in its list of covered employees. Other states share this interpretation that "alien" includes both documented and undocumented immigrants.[99]

However, a judicial interpretation of vague statutory language provides little permanent certainty and falls short of the language used in other states' statutes. The Minnesota legislature should formalize *Gonzalez*'s and *Correa*'s interpretation of section 176.011 to preclude any argument that the statute's use of "alien" implicitly excludes unauthorized aliens. Does the word "alien" refer to authorized aliens only or to both authorized and unauthorized immigrants? The federal definition of "alien" in the Immigration and Nationality Act is "any person not a citizen or national of the United States."[100] This definition is broad and includes both those with and without authorized legal status.[101] Minnesota should make it explicitly clear that undocumented workers are covered by the workers' compensation statute.

Other states expressly include undocumented workers in their statutory definitions of "employee." The Utah workers' compensation statute, for example, expressly includes "aliens and minors, whether legally or illegally working for hire" in its definition of covered employees.[102] In Florida, the statute states that "'[e]mployee' means any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment . . . whether lawfully or unlawfully employed, and includes, but is not limited to, aliens and minors."[103]

Minnesota can avoid the uncertainty of whether the word "alien" includes undocumented workers altogether by removing this word in all of its statutes. In recent years, lawmakers and legal scholars have moved away from using the term because of its potentially offensive connotation. In the fall of 2021, California Governor Gavin Newsom signed a law that

98. *Id.* (citing MINN. STAT. § 645.16 (2002)).

99. *See, e.g.*, Moyera v. Quality Pork Int'l, 825 N.W.2d 409, 416 (Neb. 2013) (finding that the definition of "alien" includes both documented and undocumented immigrants).

100. 8 U.S.C. § 1101(a)(3).

101. *Cf.* ACLU IMMIGRANTS' RTS. PROJECT, *supra* note 12 (explaining that simply being present in the United States in violation of federal immigration law is not criminalized, although entering without inspection or reentering the United States after a prior removal can carry criminal sanctions).

102. UTAH CODE ANN. § 34A-2-104(1)(b)(ii) (West 2019).

103. FLA. STAT. § 440.02(15)(a) (2022).

removes "alien" from all state statutes.[104] The word is considered degrading, and Assemblywoman Liz Rivas stated that the word is often "used in place of explicitly racial slurs to dehumanize immigrants."[105] In April of 2021, the Biden Administration published memoranda ordering United States immigration enforcement agencies to replace the term "illegal alien" with "undocumented noncitizen."[106] As Tae Johnson, the acting director of the United States Immigration and Customs Enforcement (ICE), indicated, it is time to adopt language that "respect[s] the humanity and dignity" of immigrants.[107]

B. Minnesota Must Provide Explicit Guidance Regarding How Undocumented Workers Can Comply with Employment Requirements for Wage Loss Benefits

Minnesota has four principal wage replacement programs that serve to assist workers who have reduced income due to a workplace injury.[108] Three of the four programs require recipients to return to work at some point in time, a requirement that may prove difficult for undocumented workers who technically cannot find legal employment under IRCA.[109]

The first of Minnesota's wage replacement programs, *Temporary Total Disability* (TTD), is available to injured workers who are temporarily unable to work due to a work-related injury.[110] Benefits end when the worker returns to work, is cleared to return to work but turns down gainful employment, fails to undertake a diligent job search, or does not cooperate with the rehabilitation programs.[111] Unlike those who receive TTD benefits, recipients of *Temporary Partial Disability* (TPD) benefits can still work with their injury.[112] An employee may qualify for TPD if they are employed but earning less than what they were earning

104. Adam Beam, *California to Replace the Word 'Alien' from Its Laws*, ASSOCIATED PRESS (Sept. 24, 2021), https://apnews.com/article/immigration-california-race-and-ethnicity-racial-injustice-gavin-newsom-c216fbc31c14829fa86a0c46e4b9e0fd [https://perma.cc/TR3C-2JGM].

105. *Id.*

106. Joel Rose, *Immigration Agencies Ordered Not to Use Term 'Illegal Alien' Under New Biden Policy*, NPR (Apr. 19, 2021), https://www.npr.org/2021/04/19/988789487/immigration-agencies-ordered-not-to-use-term-illegal-alien-under-new-biden-polic [https://perma.cc/XA4Y-H476].

107. *Id.*

108. MINN. H.R. RSCH. DEP'T, *supra* note 31, at 4–7.

109. *Id.*

110. *See* MINN. STAT. § 176.101, subd. 1 (2022).

111. MINN. H.R. RSCH. DEP'T, *supra* note 31, at 7–8; *see* MINN. STAT. § 176.101, subd. 1 (2022) (listing a complete set of circumstances in which TTD benefits shall cease under the statute).

112. *See* MINN. STAT. § 176.101, subd. 2 (2022).

at the time of the injury.[113] Recipients can only collect TPD benefits for a limited amount of time.[114]

Permanent Partial Disability (PPD) benefits compensate injured workers for the permanent loss of function of certain body parts.[115] Individuals are assigned an "impairment rating" that assigns a percentage of disability to the worker depending on how much of the worker's bodily function is impaired.[116] These benefits replace TTD benefits after the 130-week TTD maximum is reached.[117]

Finally, there are two types of *Permanent Total Disability* (PTD) in Minnesota.[118] First, workers can receive PTD benefits if they are permanently injured to such a degree that they are unable to return to regular work.[119] Injuries must fall within certain categories outlined in section 176.101 of the Minnesota Statutes, such as the loss of both eyes.[120] The second type of PTD is available to workers who are totally and permanently incapacitated to a certain extent but who can still secure "sporadic employment resulting in an insubstantial income."[121] Information regarding undocumented workers' access to wage replacement benefits is scarce in Minnesota due to the lack of published WCCA decisions. There are no published cases that address an undocumented worker's right to permanent total or partial disability benefits.[122]

Minnesota's most important case regarding wage replacement benefits is *Correa v. Waymouth Farms, Inc*.[123] In *Correa*, the Minnesota Supreme Court's holding responded directly to *Hoffman*.[124] Fernando Correa was an undocumented worker who injured his back while

113. MINN. STAT. § 176.101, subd. 2(b) (2022).

114. *Id.* (stating that the maximum amount of time that TPD benefits can be received is 275 weeks—or approximately five years and three months—and that TPD benefits cannot be collected more than 475 weeks after the injury).

115. *See* MINN. STAT. § 176.101, subd. 2a (2022) (establishing a compensation schedule for permanently injured workers and setting conditions for payment).

116. MINN. STAT. § 176.101, subd. 2a(a) (2022).

117. MINN. STAT. § 176.101, subd. 2a(b) (2022); *see also* MINN. DEP'T LAB. & INDUS., AN EMPLOYEE'S GUIDE TO THE MINNESOTA WORKERS' COMPENSATION SYSTEM 3 (2020), https://www.dli.mn.gov/sites/default/files/pdf/eeguide2wc.pdf [https://perma.cc/M3WH-4J8S] (stating that an individual cannot receive more than 130 weeks of TTD benefits unless they are in a work retraining program).

118. Thomas M. Domer & Michael R. Johnson, *A Comparison of Wisconsin and Minnesota Workers' Compensation Claims*, 41 WM. MITCHELL L. REV. 1350, 1387–88 (2015).

119. MINN. DEP'T LAB. & INDUS., *supra* note 117, at 4.

120. MINN. STAT. § 176.101, subd. 5(1) (2022).

121. *Id.* at subd. 5(2).

122. Charles M. Cochrane, *Undocumented Aliens and Workers Compensation*, *in* 20TH ANNUAL WORKERS' COMPENSATION INSTITUTE 11–12 (2005).

123. Correa v. Waymouth Farms, Inc., 664 N.W.2d 324 (Minn. 2003).

124. *See id.* at 330–31.

employed at Waymouth Farms.[125] He was subsequently terminated after the employer learned that he was not authorized to work in the United States.[126] He received TTD benefits for a time but had a hard time finding new work with such a severe injury.[127] Waymouth Farms moved to terminate his TTD benefits because, as they saw it, Correa was "medically released to work but could not, as an unauthorized alien, legally work in the United States."[128] Waymouth also asserted that Correa's undocumented status prevented him from conducting a reasonably diligent job search as a matter of law under section 176.101 of the Minnesota Statutes.[129]

The Minnesota Supreme Court disagreed and held that Correa was entitled to coverage under the plain language of the Minnesota Workers' Compensation Act.[130] In his majority opinion, Justice Page held that the Minnesota Workers' Compensation Act was not preempted by IRCA because IRCA does not prohibit undocumented workers from seeking or accepting employment.[131] In so finding, the court rejected Waymouth's assertion that federal immigration policy prohibits states from awarding workers' compensation to undocumented workers.[132] Instead, Justice Page highlighted Justice Breyer's dissent in *Hoffman* that denying compensation to undocumented individuals runs counter to federal immigration policy, as it gives employers an incentive to hire unauthorized workers.[133] In short, the court concluded that "unauthorized aliens are entitled to receive temporary total disability benefits conditioned on a diligent job search."[134]

Correa is an oft-cited, seminal decision that rejects the notion that *Hoffman* preempts the applicability of state compensation statutes to undocumented workers.[135] Unfortunately, it leaves several questions unanswered. First, Justice Page declined to consider the policy question that Waymouth Farms raised: does IRCA policy prevent undocumented

125. *Id.* at 326–28.
126. *Id.* at 326.
127. *Id.*
128. *Id.* at 327.
129. *Id.*; *see* MINN. STAT. §176.101, subd. 1(g) (2022).
130. *Correa*, 664 N.W.2d at 330.
131. *Id.* at 329.
132. *Id.* at 330.
133. *Id.* at 331.
134. *Id.*
135. *See, e.g.*, Bollinger Shipyards, Inc. v. Dir. of Off. of Worker's Comp. Programs, 604 F.3d 864, 872 (5th Cir. 2010) (citing *Correa* and concluding that "aliens" are employees under the Longshore and Harbor Workers' Compensation Act); Fritz Ebinger, *Exposed to the Elements: Workers' Compensation and Unauthorized Farm Workers in the Midwest*, 13 DRAKE J. AGRIC. L. 263, 283 (2008) ("Minnesota is the only [midwestern] state that has ruled in favor of unauthorized workers' compensation coverage.").

workers from performing a diligent job search?[136] As discussed above, TTD benefits end if a worker fails to make a diligent job search.[137] Does this requirement automatically bar undocumented workers—who cannot legally accept any job—from ever collecting TTD benefits? Justice Page avoided the question, opining that because IRCA does not preclude state workers' compensation and because undocumented workers are covered under the state statute, the court need not specifically address whether undocumented individuals could conduct a diligent job search.[138] Second, even if the court eventually holds that undocumented immigrants *can* conduct diligent job searches, the *Correa* decision still does not provide any guidance as to how undocumented workers can *prove* they have conducted a diligent job search.

The lack of clarity on employment requirements has led to decisions that run contrary to the idea that undocumented workers can receive compensation. In *Rivas v. Car Wash Partners*, Minnesota's WCCA denied TTD benefits to Jerson Rivas.[139] Rivas was injured prior to the first pay period, and his employer had not yet verified his work authorization.[140] After being released from the hospital, the employer extended him a job offer consistent with the new accommodations Rivas needed, but he conditioned the offer upon authorization to work in the United States.[141] Rivas never responded to the offer. Because Rivas had technically refused the offer for employment, the WWCA found that Rivas was disqualified from receiving TTD benefits from his previous employer:

> [A]s we see it, the issue on appeal is whether an unauthorized alien is eligible for temporary total disability benefits when he refuses an offer of gainful employment because of his immigration status. That issue was not considered or addressed in Correa, and, after review of the record and the applicable statute, we conclude that the compensation judge properly denied the claimed benefits.[142]

In dissent, Judge David A. Stofferahn, noted that "the result of the majority's decision will be to effectively bar many injured aliens from the receipt of temporary total disability benefits. . . . Despite Correa, the result here is to conclude that illegal aliens are not entitled to temporary total disability benefits . . . ."[143] This decision left Rivas without a remedy for

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136. *Correa*, 664 N.W.2d at 331. *But cf.* Cochrane, *supra* note 122, at 10 (explaining that several jurisdictions have found that undocumented workers are unable to perform a diligent work search when they lack authorized status).

137. MINN. STAT. § 176.101, subd. 1(g) (2022).

138. *Correa*, 664 N.W.2d at 331.

139. Rivas v. Car Wash Partners, 2004 WL 1444564, at *3 (Minn. Work. Comp. Ct. App. June 4, 2004).

140. *Id.* at *1.

141. *Id.*

142. *Id.* at *2.

143. *Id.* at *5.

his injuries. If Rivas cannot provide valid work authorization to continue employment—a requirement to receive TPD[144]—but his injuries are not serious enough to constitute temporary *total* disability, what recourse does he have?

Other states have grappled with the question of how job search requirements should apply to undocumented workers. In *Reinforced Earth Co. v. Workers' Compensation Appeal Board*, for example, the Supreme Court of Pennsylvania found that, although the claimant, Astudillo, was technically entitled to receive total disability benefits under Pennsylvania's workers' compensation statute, employers are automatically entitled to suspend those benefits if the claimant is undocumented.[145] The court reasoned that if the worker is undocumented, the loss of their earning potential is ultimately due to their immigration status, not their injury.[146] *Reinforced Earth* influenced another Pennsylvania case, *Mora v. Compensation Appeal Board*.[147] In *Mora*, the court suspended the undocumented claimant's TPD benefits using the logic in *Reinforced Earth* that "loss of earning power need not be shown because it is going to be presumed that Claimant cannot work in this country and there can be no way to measure his/her earning power."[148]

In *Martines v. Worley & Sons Construction*, the Georgia Court of Appeals affirmed the denial of TTD benefits for Merced Martines.[149] After Martines was injured on the job, Worley & Sons transferred him to a delivery driver position but soon discovered that he did not have a valid driver's license because he was undocumented.[150] The superior court found that Martines's "refusal of work" was unjustified and reversed his award of benefits.[151] The court of appeals found that, instead of a physical limitation, "[h]is inability to perform the job stems rather from his legal inability to acquire the necessary Georgia driver's license."[152] Nevertheless, the court of appeals affirmed the ruling because Martines

144. MINN. STAT. § 176.101, subd. 2(b) (2022) ("Temporary partial compensation may be paid only while the employee is employed . . . .").

145. Reinforced Earth Co. v. Workers' Comp. Appeal Bd. (Asudillo), 810 A.2d 99, 108 (Pa. 2002) (finding that the employer does not need to show that the employee refused valid jobs or failed to conduct a job search to terminate their benefits—the employer only has to show that the employee is undocumented).

146. *Id.*

147. *See* Mora v. Workers' Comp. Appeal Bd. (DDP Contracting Co.), 845 A.2d 950 (Pa. Commw. Ct. 2004).

148. *Id.* at 954.

149. Martines v. Worley & Sons Constr., 1628 S.E.2d 113, 114 (Ga. Ct. App. 2006).

150. *Id.* at 114.

151. *Id.*

152. *Id.* at 117.

failed to present evidence that his employer's failure to verify his work status meant that his refusal of work as a delivery driver was justified.[153]

In the Pennsylvania and Georgia cases mentioned above, undocumented workers were ultimately denied benefits because their undocumented status prevented them from meeting certain statutory employment requirements. In each case, the court reached this conclusion despite finding that undocumented individuals were generally covered under the state compensation statute. Does *Rivas v. Car Wash Partners* suggest that the same logic is acceptable in Minnesota? Although *Correa* held that undocumented workers are covered under the statute, *Rivas* nonetheless found that Rivas's inability to accept legal work due to his undocumented status could prevent him from receiving TTD benefits.[154] How should Minnesota reconcile general coverage of undocumented individuals with the practical improbability of performing a diligent job search or finding modified work without legal status?

Oregon case law provides a compelling answer. In *Alanis v. Barrett Business Services*, the Oregon Court of Appeals said that undocumented workers are entitled to TPD benefits "based on the difference, if any, between the pre-injury wage and the wage of the physician-approved modified job."[155] This benefit is provided "whether or not the job is offered and available and irrespective of the inability to work due to the undocumented status."[156] Minnesota should apply its wage replacement statute to undocumented workers in a similar way. Instead of calculating temporary disability for injured undocumented immigrants based on actual wages—wages that they may or may not be able to receive after it comes to light that they lack work authorization—employers should pay undocumented workers based on the reduction in income they *would have* received *but for* their undocumented status.[157] That way, workers still receive compensation and employers are still held responsible for workplace injuries, a policy that benefits all Minnesota workers.

C. Minnesota Should Ban Retaliatory Discovery Requests Concerning Immigration Status

The vast majority of states prohibit retaliation against injured workers for filing compensation claims.[158] This prohibition is a public

153. *Id.* at 116–17.

154. Rivas v. Car Wash Partners, 2004 WL 1444564, at *2 (Minn. Work. Comp. Ct. App. June 4, 2004).

155. Alanis v. Barrett Bus. Servs., 39 P.3d 880, 881 (Or. Ct. App. 2002).

156. *Id.*

157. Hernandez v. SAIF Corp., 35 P.3d 1099, 1101 (Or. Ct. App. 2001).

158. Donald J. Campbell, *Retaliatory Discharge of Injured Workers: Relief Is Available for*

policy exception to the general principle of at-will employment, which allows employers to terminate employees for any reason.[159] As the Deputy Assistant Secretary for the Occupation Safety and Health Administration wrote in his March 2012 Memorandum: "[i]f employees do not feel free to report injuries or illnesses, the employer's entire workforce is put at risk."[160] In Minnesota, an employee can recover for retaliation if an employer discharges, threatens to discharge, or intentionally obstructs an employee seeking workers' compensation benefits.[161] Minnesota has emerged as a leader in undocumented retaliation protections in some ways, but more is needed to encourage workers to report unsafe workplaces.

Retaliation is a major concern for undocumented workers, as they are in a particularly vulnerable position. Many undocumented workers procure fake identification in order to obtain employment, and several states have criminal statutes prohibiting the use of false information in workers' compensation claims.[162] The Southern Poverty Law Center reports that it receives frequent calls from workers who were fired after sustaining workplace injuries.[163] Under the Trump administration, employers and insurers increasingly reported undocumented employees for false identification in order to avoid paying for workers' compensation.[164] For example, after Florida passed a law making it a crime to use false information in a workers' compensation claim, insurers began reporting undocumented workers who filed claims with false identification.[165] A quarter of those individuals arrested were then detained by ICE or deported.[166]

Employees Who Are Fired for Exercising Their Legal Rights, 35 TRIAL 26, 28 (1999), https://www.thefreelibrary.com/Retaliatory+discharge+of+injured+workers.-a056909658 [https://perma.cc/47R8-YHCQ].

159. *Id.* at 27.

160. RICHARD E. FAIRFAX, OCCUPATIONAL SAFETY & HEALTH ADMIN., EMPLOYER SAFETY INCENTIVE AND DISINCENTIVE POLICIES AND PRACTICES (2012), https://www.osha.gov/laws-regs/standardinterpretations/2012-03-12-0 [https://perma.cc/72AG-5HAS].

161. MINN. STAT. § 176.82, subd. 1 (2022).

162. *See* RONALD W. MORTENSEN, CTR. FOR IMMIGR. STUD., ILLEGAL, BUT NOT UNDOCUMENTED: IDENTITY THEFT, DOCUMENT FRAUD, AND ILLEGAL EMPLOYMENT (2009), https://cis.org/Report/Illegal-Not-Undocumented [https://perma.cc/MXD8-RJYZ].

163. MARY BAUER, S. POVERTY L. CTR., UNDER SIEGE: LIFE FOR LOW-INCOME LATINOS IN THE SOUTH 14 (2009), https://www.splcenter.org/20090331/under-siege-life-low-income-latinos-south [https://perma.cc/VD64-VE3M].

164. Deborah Berkowitz, Laura Huizar & Rebecca Smith, *Protecting Injured Immigrant Workers from Retaliation*, NAT'L EMP. L. PROJECT (Oct. 3, 2017), https://www.nelp.org/publication/protecting-injured-immigrant-workers-from-retaliation/ [https://perma.cc/Z7JM-MKSX].

165. Michael Grabell, *They Got Hurt at Work—Then They Got Deported*, NPR (Aug. 16, 2017), https://www.npr.org/2017/08/16/543650270/they-got-hurt-at-work-then-they-got-deported [https://perma.cc/GK26-J44F].

166. *Id.*

The Florida statute makes it illegal to "knowingly make, or cause to be made, any false, fraudulent, or misleading oral or written statement for the purpose of obtaining or denying any benefit or payment under this chapter."[167] Minnesota's compensation fraud statute, on the other hand, contains two important pieces of statutory language that seem to preclude the interpretation given to Florida's statute. First, the statute requires the intent to defraud: "[a]ny person who, with intent to defraud, receives workers' compensation benefits to which the person is not entitled by knowingly misrepresenting, misstating, or failing to disclose any material fact is guilty of theft."[168] Although undocumented workers often present false documentation, there is no evidence to suggest that they do so with the purpose of fraudulently obtaining workers' compensation. Rather, the purpose of the false documents is to obtain employment. Second, the statute only applies if the individual providing false documentation "is not entitled" to workers' compensation.[169] Thus, undocumented workers will not be in violation of the statute unless they attempt to collect on a false claim of injury.

In 2017, Minnesota issued an opinion that was heralded as "a victory for undocumented workers."[170] In *Sanchez v. Dahlke Trailer Sales, Inc.*, an undocumented worker was placed on an indefinite leave of absence after he injured himself while operating a sandblaster.[171] The Minnesota Supreme Court was tasked with determining whether the forced leave of absence constituted a "discharge" under section 176.82 of the Minnesota Statutes, since the term is not defined in the statute.[172] The court held that the determinative factor was "whether [the supervisor] intended the leave to be permanent."[173] Since there was no way for Sanchez to return to work while he remained undocumented, and it was doubtful that Dahlke would rehire Sanchez even if his work status changed, a factfinder could determine that the effect of the layoff was to permanently bar Sanchez from returning.[174] The court affirmed the denial

167. FLA. STAT. § 440.105(4)(b)(1) (2022).

168. MINN. STAT. § 176.178, subd. 1 (2022).

169. *Id.*

170. Emma R. Denny, *Undocumented Workers Gain Minnesota Supreme Court Victory in Decision for Compensation Benefits Rights*, HALUNEN L. (Sept. 25, 2017), https://www.halunenlaw.com/undocumented-workers-gain-minnesota-supreme-court-victory-in-decision-for-compensation-benefits-rights/ [https://perma.cc/6X8A-L73N].

171. Sanchez v. Dahlke Trailer Sales, Inc., 897 N.W.2d 267, 271 (Minn. 2017).

172. *Id.* at 273 ("The question here is whether Dahlke discharged Sanchez. Dahlke argues that placing Sanchez on unpaid leave until he can provide legitimate work documents does not qualify as a discharge. The workers' compensation statute does not define 'discharge' or 'discharging.'").

173. *Id.* at 275.

174. *Id.* at 274–75.

of Dahlke's motion for summary judgment.[175] Some have claimed that this decision will make retaliation claims more transparent and easier to litigate.[176]

Importantly, the court held that IRCA did not preempt Minnesota's anti-retaliation statute.[177] Dahlke protested that IRCA prohibits the continued employment of an "alien" once an employer has discovered that the "alien" lacks work authorization.[178] Justice Chutich, however, writing for the majority, insisted that it was possible to comply with both IRCA and the retaliation statute—if Sanchez had been discharged because of his undocumented status instead of his workplace injury, Dahlke would not have been in violation of either statute.[179]

The District Court of Tennessee, Eastern Division came to a similar conclusion as *Sanchez* regarding anti-retaliation preemption.[180] The district court found that the defendant violated Tennessee's anti-retaliation law by firing an undocumented worker after he made a workers' compensation claim.[181] The court noted that it was "not physically impossible" to comply with both IRCA and workers' compensation statutes.[182] The district court found that "[a]n employer in Tennessee is fully able to both comply with IRCA and refrain from discharging employees in retaliation for filing a workers' compensation claim."[183]

Despite the strong legal precedent that Minnesota has set, the state continues to struggle with retaliation issues. In 2018, Ricardo Batres, a contracting operator, was charged with several labor-related felonies.[184]

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175. *Id.* at 278.

176. *See* Denny, *supra* note 170 ("Following the Sanchez decision, it will now be easier for employees in Minnesota to show that they were discharged for seeking workers' compensation benefits. It will also be more difficult for employers to get away with firing an employee by labeling a termination as an 'indefinite, unpaid' suspension."); Brandon Wheeler, *MN Supreme Court Recognizes Workers' Comp Retaliation Suit Filed by Undocumented Worker*, 27 NO. 6 MINN. EMP. L. LETTER 4 ("While employers do not have an affirmative duty to employ undocumented workers, companies seeking to discharge an unauthorized worker must make clear that their intent to do so is based solely on the worker's unauthorized status, not a retaliatory reason.").

177. Wheeler, *supra* note 176.

178. 8 U.S.C. § 1324a(a)(2).

179. Sanchez v. Dahlke Trailer Sales, Inc., 897 N.W.2d 267, 276 (Minn. 2017).

180. *See* Torres v. Precision Indus., Inc., 437 F. Supp. 3d 623 (W.D. Tenn. 2020), *aff'd as modified*, 995 F.3d 485 (6th Cir. 2021).

181. *Id.*

182. *Id.* at 642.

183. *Id.* at 643.

184. Paul Walsh, *Charges: Twin Cities Contractor Threatened to Report His Undocumented Workers if They Complained*, STAR TRIB. (Sept. 28, 2018), https://www.startribune.com/charges-twin-citis-contractor-threatened-to-report-his-undocumented-workers-if-they-complained/494386221/?refresh=true [https://perma.cc/8RU5-J2WD].

Batres forced his workers, many of whom were undocumented, to work in unsafe conditions and threatened to have them deported if they went to the hospital.[185] The threat of using a worker's immigration status as a defense to compensation claims leaves undocumented workers in a precarious position.

Some scholars claim that the discovery process in workers' compensation cases stands as an obstacle to anti-retaliation efforts.[186] After *Hoffman Plastic Compounds, Inc. v. NLRB*, employers began to use the discovery process to implicitly threaten undocumented workers and retaliate against them for their claims.[187] During workers' compensation proceedings, some employers request documentation of a worker's authorization to work in the United States in order to use their employee's undocumented status as a defense to liability.[188] State retaliation statutes make it illegal for employers to call ICE on employees who report workplace injuries but cannot protect immigrants from having their status questioned in court proceedings.[189] The result of these discovery requests is that undocumented immigrants often "opt-out" of pursuing compensation claims.[190] Since IRCA requires employers to verify employees' work authorization at the time of hiring,[191] these discovery requests cannot be justified. Federal courts recognize that, when information requested in discovery would injure a party, the requesting party must show that the harm it will suffer without the information outweighs the injury it will cause the opposing party.[192]

In contrast, in state workers' compensation adjudications, employers "now pose status-based questions to immigrant employees as a matter of course."[193] Minnesota should ban such discovery requests during workers' compensation claims in order to safeguard the rights

185. *Id.* (quoting charges filed against Batres in Hennepin County District Court, "[w]hen workers were injured, [Batres] told his employees that they would lose their jobs and be deported if they sought medical attention").

186. *See, e.g.*, Keith Cunningham-Parmeter, *Fear of Discovery: Immigrant Workers and the Fifth Amendment*, 41 CORNELL INT'L L.J. 27, 46–47 (2008).

187. *Id.* at 42; *see* Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

188. *See* Flores v. Albertsons, Inc., No. CV-0100515, 2002 WL 1163623, at *5 (C.D. Cal. Apr. 9, 2002) ("Defendant argues that documents related to Plaintiffs' immigration status are relevant to this action because such information may limit Defendant's liability for back pay."); Rivera v. NIBCO, Inc., No. CVF-99-6443-AWI-SMS, 2001 WL 1688880, at *2 (E.D. Cal. Dec. 21, 2001), *aff'd and remanded*, 364 F.3d 1057 (9th Cir. 2004) (stating that the defendant's discovery request concerning the plaintiff's work status was properly denied by the magistrate judge).

189. Cunningham-Parmeter, *supra* note 186, at 47.

190. *Id.* at 45.

191. *See* 8 U.S.C. § 1324a(b)(1).

192. *See, e.g.*, Flynn v. Goldman, Sachs & Co., No. 91 Civ. 0035, 1993 WL 362380, at *1 (S.D.N.Y. Sept. 16, 1993).

193. Cunningham-Parmeter, *supra* note 186, at 43.

reaffirmed in *Sanchez*.[194] One potential solution is a retaliation *per se* rule that would prohibit employers from inquiring into a worker's immigration status at any point after the employee files a workers' compensation claim.[195] This idea is supported by the fact that many courts have held that immigration status has no relevance to liability for workplace injuries.[196]

Such a rule would align with Minnesota's public policy under the Minnesota Human Rights Act (the Act).[197] The Act states that "[i]t is the public policy of this state to secure for persons in this state, freedom from discrimination . . . in employment."[198] The Act also notes that it is an unfair employment practice to discriminate against an individual with respect to compensation and employment conditions.[199] Notably, in section 363A.08, subd. 4 of the Act, it says that it is an unfair practice for employers to "seek and obtain for purposes of making a job decision, information from any source that pertains to the person's race, color, creed, religion, national origin, sex," and marital status, among other categories.[200] In order to safeguard the principles espoused by the Act, workers' compensation law should also include a provision that makes it illegal to "seek and obtain" information regarding immigration status.

Once an employer offers someone a job, they must verify the individual's work authorization status by filing an Employment Eligibility Verification (I-9) form with United States Citizenship and Immigration Services.[201] All employers are required to comply regardless of the number of people they employ.[202] During this process, employers must examine the employee's identification documents and are permitted to copy these documents for their records.[203] Therefore, there is no logical reason why undocumented workers should provide their immigration status during discovery.

Ultimately, an anti-retaliation statute means nothing if employers can use another mechanism (namely, a phone call to ICE) to threaten and intimidate workers. In reality, some employers may not even consider

194. *See* Sanchez v. Dahlke Trailer Sales, Inc., 897 N.W.2d 267 (Minn. 2017).

195. Roxana Mondragón, *Injured Undocumented Workers and Their Workplace Rights: Advocating for a Retaliation Per Se Rule*, 44 COLUM. J.L. & SOC. PROBS. 447, 475 (2011).

196. *Id.* at 477.

197. MINN. STAT. § 363A (2022).

198. MINN. STAT. § 363A.02, subd. 1(a)(1) (2022).

199. MINN. STAT. § 363A.08, subd. 2(3) (2022).

200. MINN. STAT. § 363A.08, subd. 4(a)(2) (2022).

201. MINN. DEP'T EMP. & ECON. DEV. & BALLARD SPAHR L.L.P., AN EMPLOYER'S GUIDE TO EMPLOYMENT LAW ISSUES IN MINNESOTA 16 (14th ed. 2018), https://mn.gov/deed/assets/an-employers-guide-to-employment-law-issues-in-minnesota-14th-ed-2018_ACC_tcm1045-133700.pdf [https://perma.cc/Z25T-ZW86].

202. *Id.*

203. *Id.* at 18–19.

anti-retaliation sanctions such as fines to be much of a deterrent.[204] If ICE works faster than state prosecutors, the employer may never have to pay.

D. Minnesota Should Ensure that Undocumented Workers are Eligible for Vocational Rehabilitation

Vocational rehabilitation is another element of workers' compensation available to injured employees under state statute. In Minnesota, the goal of these programs is to "restore the injured employee so the employee may return to a job related to the employee's former employment or to a job in another work area which produces an economic status as close as possible to that the employee would have enjoyed without disability."[205]

In Minnesota, an injured worker may be eligible for vocational rehabilitation if they need help returning to work after a workplace injury and their previous employer is unable to offer appropriate employment given the employee's new work restrictions.[206] Workers may request vocational rehabilitation from their employer's insurer, who must then notify the employee of their right to request a rehabilitation consultation.[207] The employer must then provide a qualified rehabilitation consultant, who will determine if rehabilitation is warranted.[208] Afterward, a rehabilitation plan is created under subd. 4 of section 176.102.[209] Plans may require "modifying job duties . . . finding work with a different employer . . . or training for a new job."[210] Retraining is one element of vocational rehabilitation which involves "a formal course of study through a school program designed to assist an injured worker's return to suitable gainful employment."[211]

Some jurisdictions have held that, due to the goal of vocational rehabilitation being the return of workers to employment, vocational rehabilitation benefits are unavailable to those who lack work

204. *See* Tom Spiggle, *Why Workplace Abuse Plagues Undocumented Workers*, FORBES (Aug. 22, 2019), https://www.forbes.com/sites/tomspiggle/2019/08/22/why-workplace-abuse-plagues-undocumented-workers/?sh=2d05cd9d49b2 [https://perma.cc/4XVJ-NU7B] ("An employer may be willing to risk a comparatively small fine to help send a message to anyone else who might be thinking complaining [sic] about a violation of employment laws.").

205. MINN. STAT. § 176.102, subd. 1(b) (2022).

206. MINN. DEP'T LAB. & INDUS., *supra* note 117, at 5–6.

207. MINN. STAT. § 176.102, subd. 4 (2022).

208. *Id.*

209. MINN. STAT. § 176.102, subd. 4 (2022).

210. MINN. DEP'T LAB. & INDUS., *Claim Process -- Rehabilitation Benefits*, https://www.dli.mn.gov/business/workers-compensation/claim-process-rehabilitation-benefits [https://perma.cc/5KUH-TR7E].

211. MINN. DEP'T LAB. & INDUS., *supra* note 117, at 6.

authorization.[212] In *Tarango v. State Industrial Insurance System*, for example, the Supreme Court of Nevada held that the State Industrial Insurance System (SIIS), a state agency, "is precluded from providing vocational training pursuant to state law."[213] The court noted that there were no alternative options; under the Nevada state policy for vocational rehabilitation, SIIS would be required to rehabilitate Tarango, so he could return to his old role or a similar one, "thereby caus[ing] an employer to violate IRCA by hiring Tarango."[214]

Similarly, in *Del Taco v. Workers' Compensation Appeals Board*, the California Second District Court of Appeals held that "an injured employee is not entitled to vocational rehabilitation benefits where the employee is unable to return to work solely because of immigration status."[215] The court of appeals noted that because the injured worker was violating federal law while remaining in the United States, "Del Taco should not be penalized for obeying the law and [the] worker should not be rewarded for disobeying the law."[216] Additionally, many states explicitly prohibit undocumented noncitizens from accessing vocational rehabilitation by statute or regulation.[217]

Limited case law expressly authorizes vocational rehabilitation for undocumented noncitizens if they would be eligible "but for" their undocumented status. In *Rodriguez v. Integrity Contracting*, the Louisiana Third Circuit Court of Appeal affirmed a workers' compensation judge's award of vocational rehabilitation as long as the jobs would be available to the worker "***but for** his illegal status*."[218] Similarly, in *Gayton v. Gage Carolina Metals Inc.*, the North Carolina Court of Appeals found that, insofar as the use of vocational rehabilitation conflicts with federal employment law, it should not be provided for undocumented

212. *See* PRAC. L. LAB. & EMP., EMPLOYMENT PROTECTIONS AND REMEDIES FOR UNDOCUMENTED WORKERS 7 ("Most states agree that undocumented workers are not eligible for vocational rehabilitation services that may be available under a state's workers' compensation law."); *see also* 8 U.S.C. § 1324a (stating that it is illegal to employ unauthorized "aliens").

213. Tarango v. State Indus. Ins. Sys., 25 P.3d 175, 179 (Nev. 2001).

214. *Id.* at 180.

215. Del Taco v. Workers' Comp. Appeals Bd., 94 Cal. Rptr. 2d 825, 827 (2000).

216. *Id.* at 1442.

217. *See, e.g.*, OKLA. ADMIN. CODE § 612:10-7-24.1(g) (2022) (stating that vocational rehabilitation is only available to citizens and authorized immigrants); HAW. CODE R. § 17-401.1-7(h)(3)(C) (LexisNexis 2022) (requiring documentation that indicates that an "alien" is permitted to work before providing vocational rehabilitation services because "the individual cannot benefit from VR services in terms of an employment outcome so long as the individual is not permitted to work"); 172.00.13 CODE ARK. R. § 007 (LexisNexis 2019) (stating unequivocally that "[i]llegal [i]mmigrants . . . are not eligible for VR services").

218. Rodriguez v. Integrity Contracting, 38 So.3d 511, 521 (La. Ct. App. 2010).

workers.[219] However, the court noted that "several vocational rehabilitation practices are available to defendants which would not violate federal law."[220] Vocational rehabilitation encompasses a wide variety of services, including "counseling, job analysis, analysis of transferable skills, job-seeking skills training, or vocational exploration."[221] The court suggested that a vocational counselor might help the plaintiff search for jobs that he would qualify for "but for" his unauthorized status.[222] The employer's burden is to return "the employee to a state where 'but for' the illegal status, the employee could obtain employment."[223]

Another possibility—allowing undocumented workers to participate in rehabilitation programs that focus on retraining for a different job market—may effectively avoid conflicts with IRCA.[224] For example, the Arkansas Workers' Compensation Commission noted that "other states have indicated that vocational retraining is appropriate where intended to return the injured employee to work in a country where he can work legally."[225] The Nebraska Supreme Court noted that the reason for its denial of vocational rehabilitation in *Ortiz v. Cement Products, Inc.*, was that the claimant "testified that he will not be returning to Mexico, but, rather, intended to remain in this country."[226] In other words, if Ortiz had expressed interest in returning to Mexico—where he could legally apply skills learned in a vocational rehabilitation program—the court may have ruled the other way. Unfortunately, in *Moyera v. Quality Pork International*, the Nebraska Supreme Court clarified its position post-*Ortiz*, writing that it is "irrelevant" whether the employee plans to return to their country of origin or remain in the United States.[227]

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219. Gayton v. Gage Carolina Metals Inc., 560 S.E.2d 870, 873 (N.C. Ct. App. 2002); *see also* Robert I. Correales, *Workers' Compensation and Vocational Rehabilitation Benefits for Undocumented Workers: Reconciling the Purported Conflicts Between State Law, Federal Immigration Law, and Equal Protection to Prevent the Creation of a Disposable Workforce*, 81 DENVER L. REV. 347, 375 (2003) ("California and North Carolina have been able to navigate the conflicts between vocational rehabilitation and IRCA by carefully separating the components of vocational rehabilitation into job placement programs and training programs.").

220. *Gayton*, 560 S.E.2d at 873.

221. *Id.*

222. *Id.*

223. *Id.* at 874.

224. *See* Correales, *supra* note 219, at 375 (contending that job retraining in the context of vocational rehabilitation does not conflict with IRCA).

225. Anastacio Alvarez v. Hall Mfg. Inc., No. F701790, 2009 WL 4993041, at *8 (Ark. Work. Comp. Comm'n Dec. 22, 2009).

226. Ortiz v. Cement Prod., Inc., 708 N.W.2d 610, 613 (Neb. 2005).

227. Moyera v. Quality Pork Int'l, 825 N.W.2d 409, 418 (Neb. 2013).

Either way, the unauthorized worker is precluded from receiving retraining under vocational rehabilitation.[228]

In contrast, other jurisdictions have found that retraining-based vocational rehabilitation programs are valid as long as the noncitizen intends to return to a country where they may work legally.[229] In *Economy Packing Co. v. Illinois Workers' Compensation Commission*, the Illinois First District Appellate Court affirmed the arbitrator's finding that the claimant was not eligible for vocational rehabilitation.[230] However, this decision was due to the claimant's extreme disability not her undocumented status.[231] In fact, the Commission held that "a [claimant] is entitled to rehabilitation services that are needed to provide [the claimant] with the physical and occupational skills necessary to enable her to resume working in any country where she would be legally entitled to work."[232] Similarly, in *Foodmaker, Inc. v. Workers' Compensation Appeals Board*, the Second District Court of Appeals of California wrote in a footnote that "the Board has held that rehabilitation services for an immigrant may be tailored to the job market in her native country."[233]

In Minnesota, "[t]here is no case that holds that an employer and insurer are obligated to provide vocational rehabilitation services or retraining to an illegal alien employee, at least if the employee continues to reside in the United States."[234] Nor is there a Minnesota statute or regulation that expressly forbids vocational rehabilitation for undocumented workers. Subpart 9 of the Minnesota Administrative Rules' definitions provision states that "'[e]ligible individual' means a person who is eligible for vocational rehabilitation services as provided by Code of Federal Regulations, title 34, section 361.42(a)."[235]

Section 361.42 of the Code of Federal Regulations does not explicitly refer to alienage or the eligibility of noncitizens.[236] It dictates that states must "conduct an assessment for determining eligibility and priority for services"[237] in accordance with the basic requirements, which are: a determination of a physical or mental impairment, a determination that

228. *Id.*

229. *See* NEB. REV. STAT. § 48-162.01(3)(a) (2022) (listing priorities involved in creating a vocational rehabilitation plan—the highest priority being to "[r]eturn to the previous job with the same employer").

230. Econ. Packing Co. V. Ill. Workers' Comp. Comm'n, 901 N.E.2d 915 (Ill. App. Ct. 2008).

231. *Id.* at 919.

232. *Id.*

233. Foodmaker, Inc. v. Workers' Comp. Appeals Bd., 78 Cal. Rptr. 2d 767, 779 n.13 (1998) (citation omitted).

234. Coleman, *supra* note 20, at 1297.

235. MINN. R. 3300.5010, subp. 9 (2015).

236. 34 C.F.R. § 361.42(a) (2023).

237. *Id.* § 361.42.

the impairment constitutes a significant impediment to employment, and a determination by a vocational counselor that vocational rehabilitation is required to "prepare for, secure, retain, advance in, or regain employment."[238] The achievement-of-employment-outcome requirement only specifies that individuals "must intend to achieve an employment outcome that is consistent with the applicant's unique strengths, resources, priorities, concerns, abilities, capabilities, interests, and informed choice," and, importantly, does not require that the individual intend to be employed in the United States.[239]

The Minnesota Department of Labor should create specific regulations that dictate the protocol for providing undocumented workers with vocational rehabilitation benefits. Unauthorized employment status does not negate the fact that an employee deserves to be made whole after a workplace injury. As Deborah Berkowitz—the Director of the National Employment Law Project's Worker Safety and Health Program—noted, "[w]orkers' compensation is an insurance system that works best if all workers are covered."[240] By tailoring retraining programs to job conditions in an injured employee's country of origin, employers and insurance companies can ensure that they comply with both federal and state law.

Eventually, Minnesota must choose whether or not it will join the minority of states that are willing to flexibly administer vocational rehabilitation programs to those who may not be able to legally return to work in this country.[241] If Minnesota was to side with the states that broadly disallow vocational rehabilitation benefits, it would unnecessarily complicate workers' compensation claims for undocumented noncitizens and signify a step away from the holding in *Correa*.[242] As previously discussed, the *Correa* court held that "the statutory provision governing temporary total disability does not exclude unauthorized aliens from receiving temporary total disability benefits conditioned on a diligent job search."[243] Under Minnesota statute, TTD benefits end if the total disability ends and the worker does not diligently begin looking for work.[244] Thus, just like vocational rehabilitation, TTD functions to return the injured worker to employment. *Correa* holds that undocumented noncitizens are eligible for TTD benefits even if they

238. *Id.* § 361.42(a)(1)(i)–(iii).

239. *Id.* § 361.42(a)(4).

240. BERKOWITZ, *supra* note 42, at 2.

241. *See, e.g.*, Rodriguez v. Integrity Contracting, 38 So. 3d 511, 521 (La. Ct. App. 2010); Gayton v. Gage Carolina Metals Inc., 560 S.E.2d 870, 873 (N.C. Ct. App. 2002).

242. *See* Correa v. Waymouth Farms, Inc., 664 N.W.2d 324 (Minn. 2003).

243. *Id.* at 330.

244. MINN. STAT. § 176.101(g) (2022).

cannot legally be employed, reasoning that "[t]he focus of the IRCA is on preventing employers from hiring unauthorized aliens. . . . [T]he IRCA does not prohibit unauthorized aliens from seeking or accepting employment in the United States."[245] It follows that IRCA does not preempt workers from retraining in preparation for future employment through vocational rehabilitation programs. Minnesota should extend the same reasoning found in *Correa* to vocational rehabilitation for consistency.

Conclusion

In the absence of clear federal guidance, it is up to the states to implement strong workers' compensation laws that cover every worker. Minnesota has a relatively small undocumented population compared to other states,[246] but that has not stopped it from joining the conversation regarding labor laws' applicability to unauthorized workers. In landmark cases such as *Correa v. Waymouth Farms* and *Sanchez v. Dahlke*, the Minnesota Supreme Court has championed the rights of undocumented Minnesotans in the pursuit of safer workplaces for all.

Minnesota has emerged as a leader in some areas, but more work needs to be done to protect undocumented workers from exploitation by the workers' compensation system. Minnesota must change its use of the word "alien" in its statutory definition of "employee" to prevent confusion and avoid offense. Minnesota must clarify the application of wage replacement benefits to undocumented workers who cannot legally find modified employment or continue working. Minnesota must actively prevent retaliation by disallowing discovery requests regarding a claimant's immigration status, and it must expand the applicability of vocational rehabilitation to individuals without work authorization.

245. *Correa*, 664 N.W.2d at 329.

246. BRYAN BAKER, U.S. DEP'T OF HOMELAND SEC., OFF. OF IMMIGR. STAT., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2015–JANUARY 2018, at 5 (Jan. 2021), https://www.dhs.gov/sites/default/files/publications/immigration-statistics/Pop_Estimate/UnauthImmigrant/unauthorized_immigrant_population_estimates_2015_-_2018.pdf [https://perma.cc/J5GJ-2YZN] (reporting that California has more than 2,600,000 unauthorized immigrants; Texas has more than 1,900,000; and Florida has 660,000).

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