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Storied Pasts: Credibility and Evolving Norms in Asylum Narratives 1989–2018

Abigail Stepnitz†

Abstract

This Article develops a framework for understanding the emergence and evolution of structural and substantive norms in asylum narratives over time. First, I offer a historical framework which shows how these norms evolve as a result of combined legal, political, cultural, and institutional changes. Institutional norms are infused with politics. Due to this politicization, they undergo processes of bureaucratization and change in response to imperatives and opportunities presented by social and cultural shifts in the way asylum is framed. Second, drawing on a sample of 120 affirmative asylum claims filed between 1989 and 2018, I offer an empirical analysis which reveals the rise of a contemporary system in which competing demands on asylum stories severely limit how those seeking protection can communicate about their experiences. The result is a legal and institutional environment in which asylum seekers must respond to demands for increasing conformity to institutional expectations about how experiences are narrated by adhering to a progressively more formalized, legally, and institutionally legible structure for narrating experiences of persecution or fear.

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Table of Contents

"In today's normal world, which by convention and contrast we call from time to time 'civilized' or 'free,' one almost never encounters a total linguistic barrier, that is, finds oneself facing a human being with whom one must absolutely establish communication or die, and then is unable to do so." – Primo Levi[1]

"The exclusion from this country of the morally, mentally, and physically deficient is the principal object to be accomplished by the immigration laws." – Frank Sargent, Commissioner General of Immigration[2]

Introduction

In the United States, despite significant growth and standardization since its conception in the 1950s, the legal and administrative architecture that makes up the asylum process remains heavily politicized, sensitive to cultural changes, and discretionary. The complexity of asylum adjudication processes reflects a legally and culturally fraught space in which law, discretion, and culture create imperfect institutional contexts to evaluate asylum seekers' truths.

Sitting at the heart of determining eligibility for asylum—an outcome that for many means the difference between life and death—is the importance of telling a credible story. Asylum seekers must convince decision-makers that they have a credible story of persecution or a credible fear of being harmed if they are returned to their country of origin.[3] Asylum seekers are generally able to tell these stories in two ways: through written narratives, also called declarations, which accompany an asylum claim,[4] and through oral evidence, given either during interviews

1. PRIMO LEVI, THE DROWNED AND THE SAVED 88 (Raymond Rosenthal trans., Summit Books 1988) (1986).

2. U.S. BUREAU OF IMMIGR., ANNUAL REPORT OF THE COMMISSIONER OF IMMIGRATION 62 (1907).

3. *See, e.g.*, 8 U.S.C. § 1158; 8 U.S.C. § 1225; 8 C.F.R. § 208.9 (2022); 8 C.F.R. § 208.30 (2022); *Questions and Answers: Credible Fear Screening*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/questions-and-answers-credible-fear-screening [https://perma.cc/4W7S-39R3].

4. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL 6 (Oct. 12, 2022) https://www.uscis.gov/sites/default/files/document/forms/i-589instr.pdf [https://perma.cc/JFP4-WSFV] [hereinafter I-589 INSTRUCTIONS]; *Obtaining Asylum in the United States*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/obtaining-asylum-in-the-united-states [https://perma.cc/68TP-43RJ]; *Asylum Manual*, IMMIGR. EQUAL. https://immigrationequality.org/asylum/asylum-manual/application-process-preparing-the-asylum-declaration/ [https://perma.cc/VY8N-RE2Z].

or in courtrooms.[5] Having a narrative that a decision-maker perceives to be credible is "fundamental," and is, in many cases "the deciding factor."[6]

Despite its importance to the asylum process, neither the institutional environment in which claims are adjudicated, nor the claims themselves reveal a singular, stable vision of what it means to construct a credible narrative. Being perceived as credible is essential, yet credibility is almost impossible to define. Rather, credibility in asylum cases is an institutional logic. It is central to the governance of asylum—imbedded in the policies, practices, discourses, and technologies deployed by the State to control asylum seekers specifically, and migrants generally.[7] The shifting expectations for asylum narratives and the ways that narrators attempt to meet those expectations reveal an important tension in law. The inherent ambiguity in credibility offers a powerful and politically responsive way to shape and control asylum.

Those who seek protection must have narratives that do more than simply recount true events. They must adhere to shifting political, legal, and cultural tests of credibility. In this Article, I argue that credibility in asylum is not given definition, but it is given meaning, power, and possibility through the asylum process. This imbuing of meaning happens as institutional norms are infused with politics, undergo processes of bureaucratization, and evolve in response to imperatives and opportunities presented by social and cultural shifts in the way asylum is framed. The substance of credibility then takes shape in the narratives of those seeking protection. In this Article, I focus on the affirmative asylum process, wherein claims are filed by individuals who are not already facing removal or other immigration enforcement.[8] These asylum seekers must navigate a complex administrative adjudication process in which one would recognize few of the procedural or substantive protections that might be expected in a legal proceeding with life and death outcomes.

This Article develops a framework for understanding the emergence and evolution of structural and substantive norms in asylum narratives in this politically charged and highly discretionary legal and institutional environment. It further analyzes the extent to which competing and shifting pressures shape and constrain the way that protection claims can be communicated. I offer a historical framework for

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5. *See* 8 C.F.R. § 1208.30 (2022); *Obtaining Asylum in the United States*, *supra* note 4; *Credible Fear Screening*, *supra* note 3.

6. U.S. CITIZENSHIP & IMMIGR. SERVS., RAIO DIRECTORATE OFFICER TRAINING: CREDIBILITY 10 (2016) [hereinafter 2016 TRAINING].

7. *See, e.g.*, Anna Triandafyllidou, *Beyond Irregular Migration Governance: Zooming in on Migrants' Agency*, 19 EUR. J. MIGRATION & L. 1–10 (2017) (introducing case studies that examine how migration control and management affect irregular migration by focusing on migrants as the main agents of the migration process).

8. Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 208(a) (2022).

understanding both how credibility operates *top-down* in the discretionary asylum landscape, and *bottom-up* through individuals' attempts to craft credible narratives that make their lives and experiences legally and institutionally legible.[9] To reveal this bottom-up approach, I present empirical analysis of 120 affirmative asylum claims filed in the United States between 1989 and 2018.

My analysis reveals how, in the pursuit of credibility, asylum claims increasingly conform to institutional expectations of narration. Over time, these claims have adhered to a progressively more formalized, legally and institutionally legible structure for narrating experiences of persecution or fear. Yet, to maintain credibility, claims rooted in distinct types of persecution diverge substantively, reflecting bottom-up attempts to tell credible stories about certain types of violence.

This Article proceeds in six sections. I begin in Part I by situating the project in the literatures on asylum, narrative, and institutions. In Part II, I discuss the emergence and theoretical significance of credibility and how it is given meaning, power, and possibility through institutional and narrative norms. In Part III, I offer a historical framework for understanding the cultural landscapes in which asylum was developed. This framework also situates the legal and organizational developments that gave rise to both the ideological orientation of and material structures that make up the asylum system. In Part IV, I discuss my empirical data and methods. In Part V, I present the findings of my content analysis of 120 affirmative asylum narratives filed between 1989 and 2018, which include four categories of experiences underpinning the claims: LGBT identity; sexual and gender-based violence (SGBV); political opposition; and displacement as a result of revolutionary civil conflict. This analysis allows us to see the evolution of these narrative norms *on the ground*. Finally, in Part VI, I conclude by discussing my findings and their relevance for both the study of immigration and asylum, as well as for future work on the intersection between institutions, law, and culture.

I. Seeking and Narrating Asylum

Upon arrival in the United States, asylum seekers undergo screening that is ostensibly intended to determine whether they have a "credible fear" of persecution.[10] From the beginning of the process, the asylum seeker must make their pain and fear cognizable by establishing and performing their "truth" across different social and cultural contexts. Whether one meets this first legal test, then, operates in some ways like other statuses given shape by immigration law. Immigration law is a

9. *See* discussion *infra* Section IV.B.

10. 8 C.F.R. § 208.30 (2022).

powerful structural force capable of shaping all aspects of immigrants' lives. From housing,[11] to educational attainment and trajectories,[12] to social integration and support,[13] immigration policy has the power to create—and destroy—immigrants' social and political statuses.

The bulk of existing research on the U.S. asylum process tends to focus on defensive claims and on courtroom interactions, both of which come at the end of the legal process and occur only for some claimants.[14] These cases may seem more interesting or important as they come with higher error cost. As one Immigration Judge put it, asylum hearings are akin to trying "[d]eath penalty cases in a traffic court setting,"[15] where the risk of removal is imminent; the success rates are low[16] and vary

11. *See, e.g.*, Anita I. Drever & Sarah A. Blue, *Surviving Sin Papeles in Post-Katrina New Orleans: An Exploration of the Challenges Facing Undocumented Latino Immigrants in New and Re-Emerging Latino Destinations*, 17 POPULATION, SPACE & PLACE 89 (2011) (discussing obstacles faced by undocumented immigrants due to their limited access to things such as financial institutions in the United States, social and economic safety nets, and transportation); Emily Greenman & Matthew Hall, *Legal Status and Educational Transitions for Mexican and Central American Immigrant Youth*, 91 SOC. FORCES 1475 (2013) (investigating how the legal status of Mexican and Central American immigrant youth impacts educational attainment).

12. *See* Roberto G. Gonzales, *Learning to Be Illegal: Undocumented Youth and Shifting Legal Contexts in the Transition to Adulthood*, 76 AM. SOC. REV. 602 (2011) (examining the impact that transitioning to adulthood, and thus from a protected to an unprotected status, impacts undocumented Latinx young adults); Cecilia Menjívar, *Educational Hopes, Documented Dreams: Guatemalan and Salvadoran Immigrants' Legality and Educational Prospects*, 620 ANNALS AM. ACAD. POL. & SOC. SCI. 177 (2008) (focusing on the effects that an "ambivalent legal status" has on Guatemalan and Salvadoran immigrants' experience with the education system in the United States).

13. *See* ALICE BLOCH, NANDO SIGONA & ROGER ZETTER, SANS PAPIERS: THE SOCIAL AND ECONOMIC LIVES OF YOUNG UNDOCUMENTED MIGRANTS (2014) (exploring the lived experiences of various undocumented migrant groups in the United Kingdom in the context of the theoretical and policy debates surrounding undocumented migration).

14. *See, e.g.*, *Obtaining Asylum in the United States*, *supra* note 4 (differentiating the process for affirmative versus defensive asylum claims, where defensive claims deal with immigration courts and affirmative claims only work with U.S. Citizenship and Immigration Services).

15. Dana Leigh Marks, *Immigration Judge: Death Penalty Cases in Traffic Court*, CNN (June 26, 2014), https://www.cnn.com/2014/06/26/opinion/immigration-judge-broken-system [https://perma.cc/KK3P-SSFS].

16. According to data from Transactional Records Access Clearinghouse (TRAC), from January 2001 to February 2023, immigration courts across the country made 712,480 decisions in affirmative and defensive asylum cases and granted asylum or other relief in 303,203 cases, just under 43%. *Asylum Decisions*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/asylum/ [https://perma.cc/5HNN-PSGN].

considerably by judge[17] and location;[18] and the overlap between civil law and functional trappings of criminal law is thrown into particularly stark relief. Courtrooms—in both the cultural imagination and, to an extent, legal reality—imbue proceedings with adversarial friction. What happens in front of a judge carries a sense of urgency that does not necessarily come through in "non-adversarial"[19] interviews with administrators in drab government buildings.

Yet most asylum claims are not heard in courtrooms, and, arguably, courtrooms are not where much of the damage can be done to claimants. The bureaucratic part of the system that takes place before a claimant is ever in front of an Immigration Judge is where "slow violence" is perpetrated against asylum seekers.[20] This "attritional," violence happens "gradually and out of sight" and is "typically not viewed as violence at all."[21]

Administrative decisions affect a greater number of affirmative asylum applicants[22] than those made by Immigration Judges. For example, in fiscal year (FY) 2018, facing a backlog of more than 300,000 claims, monthly workflow reports published by the United States Citizenship and Immigration Services (USCIS) indicate that Asylum Officers adjudicated 69,189 affirmative asylum claims.[23] Asylum Officers granted 30% of these claims, and a further 31% were refused, found to be ineligible for consideration, withdrawn or otherwise discontinued.[24] The remaining 39% of claims were referred for consideration by an

17. For example, as of October 2022, denial rates in Houston vary by judge from 79.7% (Bao Nguyen & Joshua Osborn, JJ.) to 100% (Bruce Imbacuan, J.); rates in San Francisco vary from 1.0% (Paul Defonzo, J.) to 95.1% (Anthony Murry, J.). *Judge-by-Judge Asylum Decisions in Immigration Courts FY 2017-2022*, TRAC IMMIGR. (Oct. 26, 2022), https://trac.syr.edu/immigration/reports/judge2022/ [https://perma.cc/4QWX-56KD].

18. From January 2001 through April 2022, asylum applicants were granted some form of relief, on average, 70% of the time in New York City, 60% of the time in San Francisco, 12% of the time in Houston, and 11% in Atlanta. Drever & Blue, *supra* note 11.

19. U.S. CITIZENSHIP & IMMIGR. SERVS., RAIO DIRECTORATE – OFFICER TRAINING: INTERVIEWING – INTRODUCTION TO THE NON-ADVERSARIAL INTERVIEW 3 (2019).

20. ROB NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR 2 (2013); Lucy Mayblin, Mustafa Wake & Mohsen Kazemi, *Necropolitics and the Slow Violence of the Everyday: Asylum Seeker Welfare in the Postcolonial Present*, 54 SOCIO. 107, 111 (2020).

21. Mayblin et al., *supra* note 20 (internal quotations omitted) (citing Thom Davies & Arshad Isakjee, *Ruins of Empire: Refugees, Race and the Postcolonial Geographies of European Migrant Camps*, 102 GEOFORUM 214, 214 (2019)).

22. Data provided herein refers to primary applicants. Each application may have multiple dependents.

23. Author analyzed data from March to September 2019 as provided by USCIS in U.S. CITIZENSHIP & IMMIGR. SERVS., ASYLUM OFFICE WORKLOAD (Sept. 2019), https://www.uscis.gov/sites/default/files/document/data/PEDAffirmativeAsylumStatisticsFY2019.pdf [https://perma.cc/694W-MB9S].

24. *Id.*

Immigration Judge.[25] In that same year, Immigration Judges decided 6,007 affirmative cases, about 8.5% as many as USCIS.[26] Even the full court caseload of 42,000 affirmative and defensive cases still only amounts to 60% as many cases as are decided by USCIS.[27]

The second quarter of FY 2019 data published by USCIS no longer provided as much detail about affirmative asylum processing.[28] This new format shows only asylum approvals and denials.[29] In FY 2019 USCIS completed 78,600 asylum applications,[30] approved 19,945 applications, and denied 630 applications.[31] While no specific data are given regarding the number referred to Immigration Judges, historical trends suggest that a significant percentage, if not all of 58,025 completed cases were referred to Immigration Judges. In 2019, Immigration Judges heard 8,208 affirmative cases, or just under 10.5% as many as USCIS.[32] The backlog of asylum applications at the end of FY 2019 was listed as 325,514.[33] Data from 2020 and later are heavily affected by the COVID-19 pandemic and enforcement of Title 42,[34] which prevents many individuals from filing affirmative claims.[35]

These data reveal that the asylum office also has a gate-keeping function, deciding whose claims will be granted, whose will be rejected, and who will have another chance in front of a judge. Cases that are not referred but are otherwise rejected by USCIS cannot be appealed.[36] A

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25. *Id.*

26. *Id.*

27. *See Asylum Decisions*, *supra* note 16.

28. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., NUMBER OF SERVICE WIDE FORMS FISCAL YEAR TO DATE, BY QUARTER, AND FORM STATUS FISCAL YEAR 2019 (2020), https://www.uscis.gov/sites/default/files/document/reports/Quarterly_All_Forms_FY2019Q4.pdf [https://perma.cc/MH55-WDLB].

29. A caveat reads "[a]lthough this report includes approvals and denials, it does not include referrals to an Immigration Judge which comprise a large portion of the workload for asylum applications. Further, forms received, approved, denied, and pending counts will differ from counts reported in previous quarters due to processing delays and the time at which the data are queried." *Id.*

30. U.S. CITIZENSHIP & IMMIGR. SERVS., 2020 USCIS STATISTICAL ANNUAL REPORT: FY 2016-2020, at 20 (2021).

31. *Asylum Decisions*, *supra* note 16.

32. *Id.*

33. *Id.*

34. 42 U.S.C. § 265.

35. 2020 STATISTICAL ANNUAL REPORT, *supra* note 30, at 9–10 ("The reduced number of affirmative asylum applications filed may be due in part to travel restrictions and the COVID-19 pandemic. Affirmative asylum completions were impacted in FY 2020 due to COVID-19 and social distancing guidelines. To protect USCIS employees and immigration benefit applicants, all of the USCIS field and asylum offices were closed to the public from March 18 through June 3, 2020.").

36. *See Types of Affirmative Asylum Decisions: Final Denial*, U.S. CITIZENSHIP & IMMIGR.

claimant can file a motion requesting their file be reopened or reconsidered, but this request is discretionary.[37] The test for reconsideration is misapplication of law or policy, and for a case to be reopened, a claimant must show new facts.[38] Denied requests cannot be appealed, though further requests can be made for discretionary reconsideration.[39]

As for the narration of asylum claims, we know that applicants' stories are shaped by the social and political context in which they are created and considered.[40] The narratives that fit comfortably into the articulated legal categories of persecution[41] will have to do less cultural work.[42] This sentiment is particularly true if the content of the claimant's struggle is well-documented publicly, such as being a combatant in a recognized conflict zone; a vocal participant in political situations; or

SERVS., https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/types-of-affirmative-asylum-decisions [https://perma.cc/DQ4W-ZXZU] (May 31, 2022) (stating that you cannot appeal an Asylum Officer's final decision to deny an affirmative asylum application).

37. *See* Reopening or reconsideration, 8 C.F.R. § 103.5(a) (2022).

38. *Id.* § 103.5(a)(2)–(3).

39. *See id.* § 103.5(a)(6); *Types of Affirmative Asylum Decisions: Final Denial*, *supra* note 36.

40. *See* Susan Bibler Coutin, *The Oppressed, the Suspect, and the Citizen: Subjectivity in Competing Accounts of Political Violence*, 26 LAW & SOC. INQUIRY 63 (2001) (analyzing the "notions of political subjectivity" that have played a role in Salvadoran immigrants' efforts to obtain political asylum or other legal status in the United States); Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility, and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 75 (2016) (examining the challenges faced by trauma survivors seeking asylum and how lawyers, in drafting declarations, may inadvertently increase the likelihood of an adverse decision).

41. As noted above, the legal categories are experience of or "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." I-589 INSTRUCTIONS, *supra* note 4, at 3.

42. *See, e.g.*, Shuki J. Cohen, *Measurement of Negativity Bias in Personal Narratives Using Corpus-Based Emotion Dictionaries*, 40 J. PSYCHOLINGUISTIC RSCH. 119 (2011) (measuring negativity bias using "positive and negative dictionaries of emotion words" in the context of autobiographical narratives); Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action*, 14 VA. J. SOC. POL'Y & L. 119 (2006) (discussing prevalent opposition to asylum based on gendered violence because of a fear of skyrocketing asylum claims and how such a fear is unfounded); Katherine E. Melloy, *Telling Truths: How the REAL ID Act's Credibility Provisions Affect Women Asylum Seekers*, 92 IOWA L. REV. 637 (2006) (discussing how unreliable credibility evidence, the REAL ID Act of 2005's instruction for judges to assess applicants' "demeanor and candor," and highly deferential appellate review works against women seeking asylum); Sara L. McKinnon, *Citizenship and the Performance of Credibility: Audiencing Gender-Based Asylum Seekers in U.S. Immigration Courts*, 29 TEXT & PERFORMANCE Q. 205 (2009) (discussing how judges evaluate applicants' credibility performances in the context of women seeking asylum due to gendered violence, and arguing that positive outcomes are increasingly contingent on the performance of conventions, such as good speech and narrative rationality).

having scars, injuries, and other relevant diagnoses.[43] These struggles can often be given more importance than existing legal documentation,[44] such as other similarly-constructed asylum claims. Narratives that fall outside the established body of law must do more evidentiary and communicative work, and they must produce more corroborating documents or witnesses to "sell" their suffering,[45] especially where asylum narratives are based in experiences of torture.[46]

II. Meaning Making and Institutional Asylum Governance

Since the asylum system began, it has been consistently imbued with meaning, drawn externally (from political and cultural forces) and internally (by the legal and institutional frameworks for processing and evaluating claims). It is this interaction between endogenous and exogenous forces that allows the modern asylum system to emerge as a tool for institutional asylum governance. Providing insight into the forces that shape and limit the way that asylum stories can be told, I develop a theory of how categories are assigned meaning in asylum processes. I draw on institutional theory to show how law, culture, and institutions shape and are shaped by the way asylum seekers communicate about their experiences, and I use empirical data to show how this is evidenced through the ways affirmative asylum claims are narrated over time.

A. Institutional Logics and Practices

The desire to tie adjudication to a seemingly stable legal test is a reflection of both a material practice and a symbolic construction that provides an organizational governing principle: the desire to determine

43. *See, e.g.*, Didier Fassin & Estelle D'Halluin, *The Truth from the Body: Medical Certificates as Ultimate Evidence for Asylum Seekers*, 107 AM. ANTHROPOLOGIST 597 (2005) (discussing how asylum seekers in France are increasingly subject to examinations of their physical and psychological traumas, in addition to their autobiographical narratives, leading to medical authorities taking precedence over asylum seekers' words); Didier Fassin & Carolina Kobelinsky, *How Asylum Claims Are Adjudicated: The Institution as a Moral Agent*, 53 REVUE FRANÇAISE DE SOCIOLOGIE 657 (2012) (examining how, in France, "changes in the moral economy of asylum and a shift from trust to suspicion are reflected in the local justice practices founded on the principles of independence and the fairness of the institution").

44. *See, e.g.*, Coutin, *supra* note 40, at 80–88 (describing the narratives presented to U.S. asylum officials of violence suffered by successful, and unsuccessful, Salvadorans and Guatemalans seeking political asylum).

45. *E.g.*, Miriam Ticktin, *Selling Suffering in the Courtroom and Marketplace: An Analysis of the Autobiography of Kiranjit Ahluwalia*, 22 POL. & LEGAL ANTHROPOLOGY REV., May 1999, at 24, 33–37.

46. *See* Tobias Kelly, *Sympathy, and Suspicion: Torture, Asylum, and Humanity*, 18 J. ROYAL ANTHROPOLOGICAL INST. 753 (2012) (discussing the assessment of claims of torture in the context of the British asylum process).

who is desirable and to exclude from eligibility anyone who is not.[47] Evaluating narratives is central to the material work done by Asylum Officers and, therefore, to asylum eligibility. However, this process of narration—both what is expected and what is produced—is not only shaped by law and institutional policy. Culture shapes the institutional goals that arise from a focus on narrating persecution in ways that appease legal and political goals and definitions. Institutional goals do not arise in a vacuum. Legal and political notions such as desirability, worth, risk, and harm inform the way that decision-making proceeds at the organizational and individual level. Those seeking asylum then, must employ "strategies of action" informed by their perception of not just what is legally required but what is culturally expected.[48]

Narrative markers privileged by asylum adjudication—such as credibility, consistency, and conceptual notions like plausibility—are imperfect and subjective.[49] A highly discretionary process like asylum decision-making is subject to political and cultural influence. In this context, publicly available meanings facilitate patterns of action,[50] and culture is especially likely to fill in spaces where organizations do not provide clear guidance on what is considered "rational" or "legitimate."[51] Asylum Officers will, like all of us, fall back on culture when they need to make decisions and the best course of action is unclear. As asylum

47. *See* Roger Friedland & Robert Alford, *Bringing Society Back In: Symbols, Practices, and Institutional Contradictions*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 232 (Walter W. Powell & Paul J. DiMaggio eds., 1991) (describing institutional orders, transformations, contradictions, and logic as contributing to a symbolic construction from which Western societies structure themselves).

48. Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AM. SOCIO. REV. 273, 278, 281 (1986) (postulating that culture is a "tool kit" that one draws upon to define their "strategies of action"); JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS 40–46 (1989) (describing how "clusters of beliefs and norms that characterize political institutions are formed and change" and that individuals will see what they want to see); RICHARD W. SCOTT & JOHN W. MEYER, INSTITUTIONAL ENVIRONMENTS AND ORGANIZATIONS: STRUCTURAL COMPLEXITY AND INDIVIDUALISM 68 (Diane S. Foster ed., 1994) ("Institutions are symbolic and behavioral systems containing representational, constitutive, and normative rules together with regulatory mechanisms that define a common meaning system and give rise to distinctive actors and action routines."); JOSEPH R. GUSFIELD, THE CULTURE OF PUBLIC PROBLEMS 40 (1981) ("The character of perception and conceptualization inherent in the symbolic categories we utilize deeply influences our experience of reality and our actions.").

49. *See, e.g.*, 8 U.S.C. § 1158(b)(1)(B)(iii) (explaining that a trier of fact may base credibility determinations on "the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account," and "the consistency between the applicant's or witness's written and oral statements," among other things).

50. Swidler, *supra* note 48, at 283.

51. John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOCIO. 340, 345 (1977) (explaining that organizations must incorporate the societal landscape in order to be perceived as legitimate).

claimants cannot expect those determining their claims to have access to the cultural information relevant to understanding the reality in which they lived and made decisions, they must instead turn to modes of shared understanding.

Credibility is a necessary, albeit not sufficient, part of the asylum decision-making calculus. Not only does it give shape to decision-makers' discretion, but it informs the extent to which other legal remedies may be available. An asylum seeker who files their petition more than twelve months after arriving in the country may seek a waiver,[52] for example, whereas an asylum seeker facing an adverse credibility determination may only take their chances in front of a judge.[53]

Like all qualitative bases of exclusion or removal in the United States, credibility works in concert with those more fixed legal levers, including: filing an application completely and on-time;[54] ensuring there is no non-political criminal history;[55] and avoiding previous unlawful presence bars,[56] evidence of asylum claims elsewhere, or passage through so-called "safe third countries"[57] that would preclude asylum eligibility. While credibility is a piece of the larger puzzle, it also informs the evaluation of each piece.

B. Credibility in Theory and Practice

Narrative construction is the product of a dialectic of *system* and *practice*.[58] Asylum seekers employ available symbols in the practice of narrating their lives to achieve a particular goal: to be recognized as credible and granted refugee status. Those successful narratives or narrative elements are then reproduced by other claimants until the symbols and the practice are entirely and necessarily mutually reinforcing.[59] The symbols, and the practice of reproducing them, are mutually reliant on one another to be sustained and transformed, just as the asylum narratives and the asylum system become similarly interdependent.

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52. *5. The One-Year Filing Deadline*, IMMIGR. EQUAL.: ASYLUM MANUAL, https://immigrationequality.org/asylum/asylum-manual/immigration-basics-the-one-year-filing-deadline/ [https://perma.cc/K9WD-S453]; 8 U.S.C. § 1158 (a)(2)(D).

53. *See* 8 U.S.C. § 1158 (b)(1)(B)(iii).

54. *Id.* § 1158(a)(2)(B).

55. *See id.* § 1158(b)(2)(A).

56. *See id.* § 1182(a)(9)(B).

57. *See id.* § 1158(a)(2)(A), (C).

58. *Cf.* William H. Sewell, *Concepts of Culture*, *in* BEYOND THE CULTURAL TURN: NEW DIRECTIONS IN THE STUDY OF SOCIETY AND CULTURE 47, 52 (Lynn Hunt & Victoria Bonnell eds., 1999) (describing culture as a dialectic of system and practice).

59. *See id.* at 47.

Neo-institutional theorists provide a helpful basis for understanding the complex ways in which law becomes culturally and structurally embedded in organizations like USCIS.[60] Scholars exploring the symbolic and strategic effect of the law in an institutional or organizational setting have pointed to the intersection of culture and institutions,[61] identifying the "mutually constitutive relation between material practices and symbolic constructions."[62] As such, legal change and organizational change are mutually constitutive.[63]

Governmental organizations, such as those that shape the asylum system, are active in formulating policy and deciding how it will be implemented.[64] Their ability to shape law and policy directs the allocation of resources and power to those schemas that best align with the cultural worldview and strategies of action that they support.[65] Governmental organizations are then able to claim institutional practices that discursively align with public preferences and beliefs—and in turn exercise their power to reinforce those views. The symbolic and strategic

60. *See* SCOTT & MEYER, *supra* note 48, at 12; Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOCIO. 479, 495–99 (1997) (explaining the culturalist perspective as it relates to symbolic constructions, materialist perspective, and the impact of the law and culture on organizational settings); THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 83, 83–88 (Walter W. Powell & Paul J. DiMaggio eds., 1991) (explaining how neo-institutional theory has impacted organization theory).

61. Calvin Morrill, *Culture and Organization Theory*, 619 ANNALS AM. ACAD. POL. & SOC. SCI. 15, 28–29 (2008).

62. John W. Mohr & Vincent Duquenne, *The Duality of Culture and Practice: Poverty Relief in New York City, 1888–1917*, 26 THEORY & SOC'Y 305, 306 (1997); *see also* Meyer & Rowan, *supra* note 51 (arguing that the structure of organizations reflects socially constructed reality).

63. *See* Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOCIO. 1401, 1402 (1990) ("[L]aw and the legal environment foster change in organizational governance."); Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOCIO. 1531, 1535 (1992) (explaining that the law, in combination with societal norms and culture associated with the law, creates a "legal environment" which impacts organizational change); Meyer & Rowan, *supra* note 51, at 347–50.

64. Meyer & Rowan, *supra* note 51, at 351 ("[G]overnmental agencies remain committed to these organizations, funding and using [schools and hospitals] almost automatically year after year."); *see also* Donileen R. Loseke, *The Study of Identity as Cultural, Institutional, Organizational, and Personal Narratives: Theoretical and Empirical Integrations*, 48 SOCIO. Q. 661, 668–69 (2007).

65. Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, HASTINGS L.J. 861, 884 (1991) (citing Harlan Hahn, *Public Policy and Disabled Infants: A Sociopolitical Perspective*, 3 ISSUES L. & MED. 3, 14–15 (1987)) ("[P]ublic policy is a reflection of pervasive and dominant preferences, attitudes, and values."); Edelman & Suchman, *supra* note 60, at 503; Morrill, *supra* note 61, at 15, 32 (finding that "these cultural schemas influenced the allocation of opportunity and compensation in the financial services field, placing women in disadvantaged positions"); *see also* Loseke, *supra* note 64, at 668–69.

effect of law in governmental settings highlights the extent to which culture shapes and informs these institutions.[66]

To be found credible in the affirmative asylum process, claimants must present accounts that detail their specific life history and reflect broader cultural and legal metanarratives. Research on effective narratives points to the necessity of an identifiable plot with recognizable characters;[67] a clear connection between events over time;[68] an obvious allusion to a meaning or a "moral;"[69] and expectations around how narrators display situation-appropriate levels of reason, emotion, and self-evaluation.[70] These factors are central to our ability to perceive stories as legible and judge them credible.[71]

For most claimants, crafting a legible and credible narrative will mean balancing the need to meet legal tests about persecution, while also tapping into cultural stereotypes and assumptions about important factors such as poverty, agency, and desirability. This narrative building is not unique to asylum, of course. We all build our own narratives out of the stories that surround us in dynamic and fluid ways.[72] Stories also follow narrative rules, both structural and epistemological, which vary depending on context, power, and place.[73] A story told in church is not the same as one told to a newspaper reporter, which is not the same as one told to a judge. We need other people's stories to know which elements of our own stories are important, to provide a basis for change or comparison, and to assist in judgments of truth, relatability, and

66. *See* Meyer & Rowan, *supra* note 51.

67. Loseke, *supra* note 64, at 665.

68. William Labov & Joshua Waletzky, *Narrative Analysis: Oral Versions of Personal Experience*, *in* ESSAYS ON THE VERBAL AND VISUAL ARTS 12 (June Helm ed., 1967) (using real-life examples of stories told by individuals to analyze and conclude the characteristics of an effective narrative).

69. Loseke, *supra* note 64, at 675; Patricia Ewick & Susan Silbey, *Narrating Social Structure: Stories of Resistance to Legal Authority*, 108 AM. J. SOCIO. 1328, 1341 (2003).

70. *See* CATHERINE RIESSMAN, NARRATIVE ANALYSIS (Judith L. Hunter ed., 1993).

71. *See* Labov & Waletzky, *supra* note 68; Ewick & Silbey, *supra* note 69, at 1351 (explaining that drawing upon one's cultural and social experience increases the likelihood that their story will be accepted by the audience as genuine); *see also* Francesca Polletta, Pang Ching Bobby Chen, Beth Gharrity Gardner & Alice Motes, *The Sociology of Storytelling*, 37 ANN. REV. SOCIO. 109 (2011) (describing which elements of narratives increase and decrease credibility).

72. Ewick & Silbey, *supra* note 69, at 1343.

73. *See, e.g.*, FRANCESCA POLLETTA, IT WAS LIKE A FEVER: STORYTELLING IN PROTEST AND POLITICS 2–3 (2006) (discussing the different forms storytelling must take given the context in which they are told); W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE (Quid Pro Books 2014) (1981) (discussing the impact of narratives on jurors in the courtroom).

meaning.[74] Owing to the law's unique relationship to precedent, I argue that legal stories are particularly reliant on a stock of existing, effective templates. Both the law itself and other legal stories become a resource from which to draw when individuals construct and characterize social meanings, identities, and actions.[75] Through the telling and retelling of these stories, we not only entrench the canonical status of some, but we also reinforce normative messages and conclusions.[76] For asylum seekers, all these rules, conventions, and styles become additional barriers to communicating their experiences.

To be found credible, asylum seekers are required to meet not only a range of legal tests, but also key cultural tests of legibility and deservingness. Accessing and making use of these cultural tools requires translating asylum seekers' experiences—many of which are distant from those of the decision-maker—into tangible, intelligible forms of private, subjective harm, and legal, objective persecution. The impact and efficacy of asylum seekers' stories hinges on their ability to build a knowable, plausible "world" and to direct the decision-maker towards a shared interpersonal reality in which the asylum seeker is credible and worthy of protection.[77]

74. *See* James P. Leary, *White Guys' Stories of the Night Street*, 14 J. FOLKLORE INST. 59 (1977) (describing how a subculture, including language and ways of storytelling, developed based on other members of the subculture).

75. Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC. REV. 11 (2005) (describing how in the field of employment, workers learning about the law helps workers construct their story and case, and motivates them to bring claims against their employers); Loseke, *supra* note 69, at 673–75 (describing how people use their understandings of formula stories to evaluate their own experiences and constructive narrative identities); KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS 99–108 (Johns Hopkins Univ. Press ed., 1988) (describing how victims of discrimination feel when their rights have been violated and how their perception of the law impacts the actions they take to preserve their rights); Kim Lane Scheppele, *Just the Facts, Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y. L. SCH. L. REV. 123, 157–162 (1992) (describing the impact of using a legal perspective in cases of domestic violence and rape); POLLETTA, *supra* note 70, at 164–65 (explaining that Mexico's ruling party used Emilio Zapata's assassination as an ideological resource, allowing activists fifty years later to attack the government for betraying his legacy). *But see* Scheppele, *supra*, at 12 (explaining that lawyers also use "ordinary storytelling" to characterize actions).

76. *See* POLLETTA, *supra* note 70, at 14.

77. Talia Shiff, *Reconfiguring the Deserving Refugee: Cultural Categories of Worth and the Making of Refugee Policy*, 54 LAW & SOC. REV. 102, 115–17 (2020) (providing a brief history of who was deemed worthy of protection in U.S. history).

III. Narrative and Credibility in Law, Politics, and Practice: A Historical Framework

Asylum is still a relatively young legal concept, introduced in what would eventually become its contemporary legal form in the early 1950s.[78] As a matter of explicit law and policy, asylum has only been institutionally formalized in the United States since the 1980s.[79] In this Part, I discuss the broader social, political, and cultural landscape in which the asylum system was developed from World War II (WWII) to the present. This part is not an exhaustive history of the legislative or political history of the asylum system,[80] rather it is a framework for considering the evolution of the role of narratives and narrative credibility. There are many approaches one could take to develop such a framework. The one offered below is informed by this Article's main analytic goal: to foster an understanding of the way credibility facilitates the institutionalization of changing cultural norms by combining a *top-down* institutional analysis with *bottom-up* empirical data from asylum claims.

Situating the evolution of asylum in historical context is important because it contextualizes legal and administrative shifts in a discussion of relevant social, political, and cultural changes over time. In many ways, the historical narrative is a top-down story about how powerful actors in law and politics use credibility as a tool of asylum governance and create organizational structures, incentives, and processes that align with and further those actors' ideological or organizational goals.

While the United States developed considerable law and policy around controlling, limiting, and excluding migrant populations in the early 20th century, the country did little to acknowledge or regulate immigration specifically for humanitarian reasons.[81] The few relevant provisions that were developed at that time favored protection of religious minorities and excluded those fleeing political persecution because of fears of importing radical ideological views.[82] In practical

78. *See* sources cited *infra* notes 85–89 and accompanying text.

79. *See* discussion *infra* Section III.A.i.

80. *See, e.g.*, MAE NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 167–201, 227–64 (1st ed. 2004); ARISTIDE ZOLBERG, A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA 243–336 (2006); DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007) (discussing how contrary to popular belief, the United States did not welcome immigrants with open arms); JEFFREY S. KAHN, ISLANDS OF SOVEREIGNTY: HAITIAN MIGRATION AND THE BORDERS OF EMPIRE (2019) (detailing the path toward asylum in the United States for Haitian migrants at sea).

81. *See* MATTHEW E. PRICE, RETHINKING ASYLUM: HISTORY, PURPOSE, AND LIMITS 54–55 (2009); *Refugee Timeline*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/refugee-timeline [https://perma.cc/TK2Z-FRZJ].

82. *See* STEPHEN H. LEGOMSKY, *Refugees, Asylum and the Rule of Law in the USA*, *in*

terms, humanitarian policies developed in this era relied heavily on temporary grants of what is known as humanitarian "parole," a discretionary status that does not provide a path to permanent residency.[83]

In the run-up to WWII, faced with mounting evidence of the persecution of European Jewish communities in particular, both public opinion and public policy opposed formalizing a process for recognizing those in need of admission to the United States for humanitarian reasons.[84] However, in 1951, much of the world sought to create an international framework that could help prevent some of the human rights violations that occurred during the war.[85] The Geneva Convention on the Status of Refugees established the fundamental tenets for international and, eventually, domestic refugee and asylum law and policy.[86] The protections in the 1951 Convention formed, and continue to form, the bedrock of individual countries' domestic asylum frameworks.[87] The Convention affords protection to those who cannot safely return to their country of origin or last habitual residence because of a well-founded fear of persecution in that country.[88] Such persecution must be *on account* of one of the enumerated protected grounds: race, nationality, religion, political opinion, or membership in a "particular

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REFUGEES, ASYLUM SEEKERS AND THE RULE OF LAW: COMPARATIVE PERSPECTIVES 122, 124 (Susan Kneebone ed., 2009) (citations omitted) (describing how political persecution was excluded as a grounds for asylum in the early 1930s); PRICE, *supra* note 81, at 54–55 (referring to the Immigration Act of 1917, in which Congress exempted those fleeing religious persecution from a literacy test requirement but did not exempt those fleeing political persecution, as "lawmakers feared that the beneficiaries of such an exemption would be radicals").

83. *See Parole of Hungarians (1956-57), Cubans (1959-62), Chinese (1962)*, IMMIGR. HISTORY, https://immigrationhistory.org/item/parole-of-hungarians-1956-cubans-1960-chinese-1962/ [https://perma.cc/BE88-SHAJ] (describing how parole was used to temporarily admit refugees during the 1950s and 60s); Anita Casavantes Bradford, *"With the Utmost Practical Speed": Eisenhower, Hungarian Parolees, and the "Hidden Hand" Behind US Immigration and Refugee Policy, 1956–1957*, 39 J. AM. ETHIC HISTORY, Winter 2020, at 5 (discussing how President Eisenhower used parole—authorized under Section 212(d)(5) of the Immigration and Nationality Act of 1952—to admit 38,000 refugees from December 1956 to May 1957); *see also White House Statement Concerning the Admission of Additional Hungarian Refugees.*, THE AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/white-house-statement-concerning-the-admission-additional-hungarian-refugees [https://perma.cc/6D4W-9APU] (announcing President Eisenhower's intent to use parole to admit refugees).

84. LEGOMSKY, *supra* note 82, at 124 ("[A]s late as April 1939, some 83 per cent of the American people were opposed to admitting Jewish refugees."); *see also* SAUL S. FRIEDMAN, NO HAVEN FOR THE OPPRESSED: UNITED STATES POLICY TOWARD JEWISH REFUGEES, 1938-1945, at 31 (2017).

85. *See* U.N. REFUGEE AGENCY, CONVENTION AND PROTOCOL RELATING TO THE STATUS OF REFUGEES 2 (2010), https://www.unhcr.org/media/28185 [https://perma.cc/5MRA-DA8W].

86. *Id.* at 5.

87. *Id.* at 4–5.

88. *Id.*

social group."[89] However, the United States never ratified the Convention.[90]

Over the next two decades, the United States passed a series of temporary and geographically-specific measures designed to protect particular refugee populations, specifically those displaced by WWII in Europe and Asia.[91] Despite ratifying the 1967 Protocol (which expanded the Refugee Convention's scope to all parts of the world),[92] the United States, driven by Cold War politics, still focused its protection efforts on those fleeing communism.[93] As such, the United States facilitated only ad hoc conditional entry, and it failed to pass legislation containing *non-refoulement* provisions[94] or pathways to permanent residence for refugees.[95]

A. Formalizing Institutional Responses

i. Inconsistent Application of Screening Architecture

While the 1970s did give rise to the early legal and administrative asylum "screening architecture"—concepts, procedures, statutes, and guidance documents that laid the groundwork for the complex system now in place—they were not applied consistently in all places or for all claimants.[96] Formal procedures for claiming asylum were introduced into domestic law with passage of the 1980 Refugee Act.[97] However, such legislation made little material difference when it came to processing claims. A December 1982 internal report by the Immigration and Naturalization Service (INS) suggested that despite the Act's provisions,

89. *Id.* at 14.

90. *See* LEGOMSKY, *supra* note 82, at 124 (citation omitted).

91. *See, e.g.*, *id.* (describing a 1965 statute which allowed 6% of immigrant visas to be awarded to those fleeing "persecution in either a 'communist-dominated' country or a country in the Middle East"); *Refugee Timeline*, *supra* note 81 (summarizing the "ad hoc programs" designed to admit refugees during this time).

92. *See* G.A. Res. 2198 (XXI), Protocol Relating to the Status of Refugees (Dec. 16, 1966).

93. *See, e.g.*, *Rebecca Hamlin, Ideology, International Law, and the INS: The Development of American Asylum Politics 1948–Present*, 47 POLITY 320, 322–24 (2015); LEGOMSKY, *supra* note 82, at 124–25; GIL LOESCHER & JOHN A. SCANLAN, CALCULATED KINDNESS: REFUGEES AND AMERICA'S HALF-OPEN DOOR, 1945 TO THE PRESENT (2d ed. 1998) (discussing the development of U.S. refugee policy after WWII and how the Cold War deeply influenced this development); Gregg A. Beyer, *Establishing the United States Asylum Officer Corps: A First Report*, 4 INT'L J. REFUGEE L. 455, 457–58 (1992).

94. "Non-refoulement" is a core legal principle in international humanitarian protection which prohibits the expulsion of a person to a county or territory where their "lives or freedom may be threatened." Guy S. Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers*, 26 VA. J. INT'L L. 897, 902–03 (1985).

95. *See Refugee Timeline*, *supra* note 81 (summarizing the "ad hoc programs" designed to admit refugees and lack of permanent pathways to residence).

96. *See* KAHN, *supra* note 80, at 135–84.

97. Refugee Act of 1980, Pub. L. No. 96-102, 94 Stat. 102.

"few guidelines" existed for making decisions.[98] One study found that "[n]o consistent application or coherent view of legal doctrine governed the outcome of these decisions; many of the cases granted were approved on the basis of theories rejected in other cases in which asylum was denied."[99]

Even at this relatively early stage in the emergence of an institutional framework for deciding asylum claims, both the centrality of credibility determinations and their vulnerability to political interference were recognized. David Martin, an architect of the 1980 Refugee Act, acknowledged that asylum decision-making rested on "uniquely elusive grounds" and "revolve[d] critically around a determination of an applicant's credibility," noting that it was likely that "political considerations" would intrude on decision-making.[100]

In this same period, government and private sector-driven American imperialism around the world was laying the groundwork for mass displacement. In particular, anti-democratic political and economic interventions across Latin America,[101] support for the oppressive regime of "Papa Doc" Duvalier in Haiti,[102] and intervention in the Vietnam War led to the displacement of hundreds of thousands of people.[103] A significant majority of these displaced people would eventually seek to resettle in the United States.[104] Pressure on the new system ballooned instantly. By 1983, there was a backlog of more than 170,000 cases—mostly Cubans, Central Americans, Haitians, and Iranians.[105] As the asylum framework emerged, it became a vector for expressing political power and ideology. The adjudicative framework was not just susceptible to, but designed to be infused with, the politics of the contemporaneous

98. *See* Deborah E. Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 437 n.8 (1992) (citing IMMIGR. & NATURALIZATION SERV., ASYLUM ADJUDICATION: AN EVOLVING CONCEPT AND RESPONSIBILITY FOR THE IMMIGRATION AND NATURALIZATION SERVICE (1982) (internal INS study)).

99. *Id.* at 452.

100. David A. Martin, *The Refugee Act of 1980: Its Past and Future*, 3 MICH. J. INT'L L. 91, 115 (1982).

101. NOAM CHOMSKY, TURNING THE TIDE: U.S. INTERVENTION IN CENTRAL AMERICA AND THE STRUGGLE FOR PEACE 96–110 (1985); Marc Edelman & Andrés León, *Cycles of Land Grabbing in Central America: An Argument for History and a Case Study in the Bajo Aguán, Honduras*, 34 THIRD WORLD Q. 1697, 1701 (2013).

102. *See* Gilburt Loescher & John Scanlan, *Human Rights, U.S. Foreign Policy, and Haitian Refugees*, 26 J. INTERAM. STUD. WORLD AFFS. 313 (1984).

103. CHOMSKY, *supra* note 101, at 306.

104. ZOLBERG, *supra* note 80, at 347.

105. Peter Grier, *'Yearning to Breathe Free,' Thousands Seek, Few Get Asylum in US*, THE CHRISTIAN SCI. MONITOR (Oct. 13, 1983), https://www.csmonitor.com/1983/1013/101317.html [https://perma.cc/CX8J-ASGD].

political regime.[106] Both individual asylum seekers and the entire system suffered under this prioritization of anti-communist sentiment over human rights.[107]

ii. The Rise of Rule-Based Standards

As the system shifted away from the ideological coherence that had driven a focus on communism during the previous three decades, the 1990s brought drastic changes to the asylum processing system. In 1990, a so-called "final rule" created specially-trained Asylum Officers and formalized the application procedures largely still in effect today.[108] The system created two paths for claiming asylum: (1) affirmatively, wherein individuals seek asylum before they are involved in any other immigration proceedings, or (2) defensively, wherein they raise an asylum claim in response to removal.[109]

Attempts to formalize and improve fairness led to standard claim-processing guidelines. A series of memos and interim rules allowed an asylum processing system to take shape legally and organizationally.[110] The affirmative procedures required an individual to submit a written application, called an I-589, and allowed, though did not require, them to provide various supporting documents to corroborate their claim.[111] Generally, they also needed to submit to at least one in-person interview with an Asylum Officer.[112]

Applicants were, and still are, permitted to be represented by legal counsel at this stage of the asylum process, but not in an advocacy capacity.[113] During the entire process, claimants bore the legal burden of

106. *See* Loescher & Scanlan, *supra* note 102.

107. *See, e.g.*, Loescher & Scanlan, *supra* note 102 (describing the violation of the human rights of Haitian refugees in this era).

108. Aliens and Nationality; Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30674 (July 27, 1990) (codified at 8 C.F.R. pts. 3, 103, 208, 236, 242, 253) [hereinafter *Asylum and Withholding of Deportation*]; Beyer, *supra* note 93.

109. *See Asylum and Withholding of Deportation*, *supra* note 108.

110. *See, e.g.*, Press Release, U.S. Dep't of Just., Asylum Reform: Five Years Later: Backlog Reduced and Number of Non-Meritorious Claims Drops (Feb. 1, 2000), https://www.uscis.gov/sites/default/files/document/news/Asylum.pdf [https://perma.cc/G5W6-6TZ2].

111. *See* U.S. CITIZENSHIP & IMMIGR. SERVS., I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL (2022) https://www.uscis.gov/sites/default/files/document/forms/i-589.pdf [https://perma.cc/JFP4-WSFV].

112. I-589 INSTRUCTIONS, *supra* note 4.

113. 8 C.F.R. § 292.1 (2022). In fact, lawyers play more of an observational role, generally asking questions if there are areas of the claim the Asylum Officer did not address or referring to submitted evidence. *See, e.g.*, NAT'L IMMIGR. JUST. CTR., BASIC PROCEDURAL MANUAL FOR ASYLUM REPRESENTATION AFFIRMATIVELY AND IN REMOVAL PROCEEDINGS 39 (2016). They may also make a short closing statement. *See, e.g.*, *id.* at 38.

establishing asylum eligibility.[114] They could qualify based on past persecution *or* a well-founded fear of future persecution on account of a protected ground.[115] Additionally, individuals had to demonstrate how an objective basis for their fear intersected with their own subjective experience or fear of harm—a concept referred to as "nexus."[116] Finally, their cases needed to warrant a favorable exercise of discretion,[117] and meet a "reasonable possibility" standard.[118] The Asylum Officer had to believe it was reasonably possible that a claimant experienced the persecution they claimed or would experience such persecution in the future.

While there is no articulated guidance for evaluating asylum claims in the published policy documents of the time, internal documents shed perhaps the best light on how this procedure was first operationalized. Documents in my sample show a checklist of categories used to evaluate claims, focusing on submitted documents and the claimants' written and oral testimony. As can be seen in Figure 1, below, the categories for evaluating testimony were Specific/Generalized; Consistent with I-589/Inconsistent with I-589; Convincing/Unconvincing; and Credible/Not Credible. A January 1992 memo from then INS Head of Asylum, Gregg Beyer, would formalize the parameters of Asylum Officers' assessments for the first time.[119] They were listed as "internal consistency," "detail," "plausibility," and "demeanor."[120]

114. *See* Establishing asylum eligibility, 8 C.F.R. § 208.13(a) (2022).

115. *See, e.g.*, U.S. CITIZENSHIP & IMMIGR. SERVS., NEXUS AND THE PROTECTED GROUNDS TRAINING MODULE (2019), https://www.uscis.gov/sites/default/files/document/foia/Nexus_minus_PSG_RAIO_Lesson_Plan.pdf [https://perma.cc/3YBF-SVUG].

116. *Id.* at 10–11.

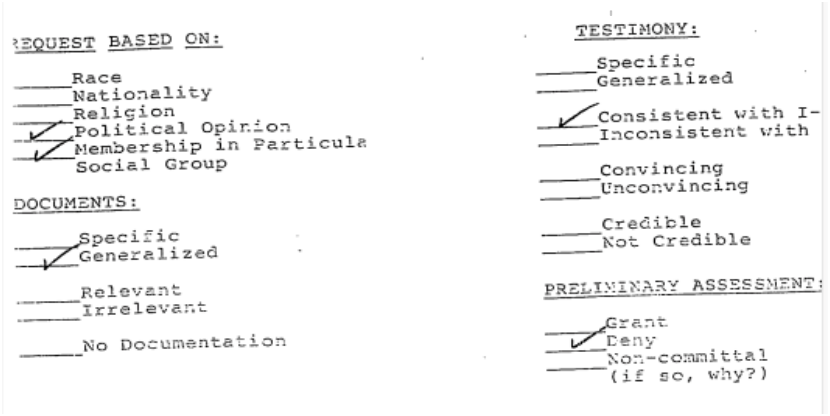
117. U.S. CITIZENSHIP & IMMIGR. SERVS., ASYLUM DIVISION AFFIRMATIVE ASYLUM PROCEDURES MANUAL (AAPM) (2012), https://www.aila.org/File/DownloadEmbeddedFile/57216 [https://perma.cc/8TR6-9CSE].

118. *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987).

119. *See* KAHN, *supra* note 80, at 183 n.83.

120. *Id.*

Figure 1. Categories For Evaluating Credibility – Early 1990s[121]



REQUEST BASED ON:

_____Race
_____Nationality
_____Religion
__✓__Political Opinion
__✓__Membership in Particula Social Group

DOCUMENTS:

_____Specific
__✓__Generalized

_____Relevant
_____Irrelevant

_____No Documentation

TESTIMONY:

_____Specific
_____Generalized

__✓__Consistent with I-
_____Inconsistent with

_____Convincing
_____Unconvincing

_____Credible
_____Not Credible

PRELIMINARY ASSESSMENT:

_____Grant
__✓__Deny
_____Non-committal
_____(if so, why?)

Other changes at this time included a formal differentiation between past and future persecution; the extension of grants of permanent, rather than temporary, residence for those granted asylum; and the ability to seek work authorization while a claim was processed.[122] While these early changes suggest the emergence of a somewhat humanitarian ideological approach, this approach would change through the 1990s as the system increasingly reflected competing views about the nature and function of asylum and suspicion of potential for abuse.[123]

iii. Seeking Fairness Through Administrative Efficiency

In 1994, as the number of new claims grew to 150,000 per year, the INS proposed a new rule that would facilitate "expeditious removal" for asylum seekers whose claims were unsuccessful.[124] In 1995 and 1996, a series of "asylum reforms" sought to increase administrative efficiency in decision-making by streamlining documentation.[125] Additional reforms brought in under the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) sought to disincentivize so-called "frivolous" claims by barring eligibility for anyone who claimed asylum after more

121. The Author uncovered this form during archival research. It was utilized during the early 1990s, though the precise timeframe in which this exact form was used is unknown.

122. CONG. RSCH. SERV., R45539, IMMIGRATION: U.S. ASYLUM POLICY 11–12 (2019).

123. *See infra* Section III.A.iii.

124. David A. Martin, *The 1995 Asylum Reforms*, CTR. FOR IMMIGR. STUD. (May 1, 2000), https://cis.org/Report/1995-Asylum-Reforms [https://perma.cc/SQ7C-J884] (stating that before 1995, if an Asylum Officer did not approve a case, they provided lengthy, written denial letters, and that the 1995 reforms replaced this with a brief checklist and a referral to the immigration court).

125. *Id.*

than one year in the United States, creating a delay of at least 180 days before an applicant could apply for a work permit, and introducing the option of expedited removal for those who did not establish a credible fear.[126] The IIRAIRA also officially established expedited removal.[127] During this same window, the government also sought to decrease asylum applications by increasing the number of border guards, sensors, and detection or prevention mechanisms, particularly along the border between the United States and Mexico.[128] Those in favor of the changes, and of limiting asylum overall, heralded them as a success: new applications declined from 150,000 in 1995 to 35,000 in 1999, and the backlog also decreased.[129]

During this period, public opinion and policy motivations began to shift away from a view of asylum seekers and refugees as individuals in need of refuge in a country with a proud history of offering sanctuary, to one which was increasingly concerned about pressures on and potential abuses of the system.[130] Key among these concerns were potential threats to national security and abuse of the asylum system as a "backdoor" way to secure work authorization or to enter the United States with the intention of living without documents.[131]

B. Reinforcing a Legal Fortress

i. Operationalizing a Politics of Exclusion

The decade following the passage of IIRAIRA showed a move away from competing ideological claims to one in which the system is operationalized. As previously noted, by the mid-1990s somewhat of a cultural consensus was reached about asylum seekers. While the system retained some elements of humanitarianism, its primary function at the

126. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA), Pub. L. No. 104-208, 110 Stat. 3009, § 604(a) (codified as amended at 8 U.S.C. § 1158(a)(2)(B)) (one-year filing deadline); *id.* § 601(a) (codified as amended at 8 U.S.C. § 1101(a)(42)) (defining refugee); 8 C.F.R. § 208.4(a) (2022) (regulations for the one-year application deadline and its limited exceptions).

127. IIRAIRA, § 302(a) (codified as amended at 8 U.S.C. § 1225(b)(1)(B)(iii)(I–II)) (providing for expedited removal for asylum seekers who do not establish a credible fear).

128. ANDREW I. SCHOENHOLTZ, PHILIP G. SCHRAG & JAYA RAMJI-NOGALES, LIVES IN THE BALANCE: ASYLUM ADJUDICATION BY THE DEPARTMENT OF HOMELAND SECURITY 25 (2014).

129. Martin, *supra* note 124; *see also* RUTH ELLEN WASEM, CONG. RSCH. SERV., R41753, ASYLUM AND "CREDIBLE FEAR" ISSUES IN U.S. IMMIGRATION POLICY 3 (2011).

130. Drew DeSilver, *U.S. Public Seldom Has Welcomed Refugees Into Country*, PEW RSCH. CTR. (Nov. 19, 2015), https://www.pewresearch.org/fact-tank/2015/11/19/u-s-public-seldom-has-welcomed-refugees-into-country/ [https://perma.cc/N42R-YRSD].

131. John M. Goshko, *Revised Political Asylum System Shows Promise in Early Stages*, WASH. POST (July 9, 1995), https://www.washingtonpost.com/archive/politics/1995/07/09/revised-political-asylum-system-shows-promise-in-early-stages/e71b5512-66d7-484b-89a3-4509567e5b56/ [https://perma.cc/7679-X9TL].

time was seen as protecting the state against threats of abuse from would-be economic migrants, criminals, and terrorists.[132] The continued implementation of these policies saw both new claims and the backlog fall steadily. By 1997, new applications had dropped to almost two and a half times lower (55,000) than their peak in 1995 (150,000).[133] The backlog decreased from 464,000 pending affirmative asylum claims in 2003 to roughly 55,000 by the end of 2006, to just more than 6,000 pending claims in 2010.[134]

It was also during this decade that the first claim processing guidance was published.[135] Along with lesson plans for Asylum Officers trained at the time, documents from this time shed light on how a framework for the assessment of credibility was central to the formalization process. Asylum Officers are instructed to assess whether facts—both material to the claim and generally known—support the claim, and whether the claim includes sufficient detail, in particular sensory detail, to indicate firsthand knowledge of the events.[136] Claims are also to be assessed for plausibility, defined as whether the facts asserted by the applicant "conform to the objective rules of reality."[137] Lastly, consistency over time and candor, or a quality of being "open, sincere and honest" are also considerations, though they are more relevant in the evaluation of spoken testimony during interviews.[138] These metrics—facts, detail, plausibility, consistency, and candor—formed the structural framework for establishing credibility.

ii. Asylum Processing in the Department of Homeland Security

In 2003, asylum processing was given a new home in USCIS under the newly created Department of Homeland Security (DHS), and measures were taken to increase the already significant discretion given

132. *Id.*

133. WASEM, *supra* note 129, at 3.

134. *Id.* at 9.

135. *See, e.g.*, KAHN, *supra* note 80, at 183 n.83; *INS Issues Guidelines from Women's Asylum Claims*, AM. IMMIGR. LAWS. ASS'N, https://www.aila.org/infonet/ins-guidelines-from-womens-asylum-claims [https://perma.cc/95LV-PZN5] (showing a memorandum from May 26, 1995, which provided guidance on the adjudication of women's asylum claims based on gender); *Sexual Orientation and Asylum*, AM. IMMIGR. LAWS. ASS'N, https://www.aila.org/infonet/ins-sexual-orientation-and-asylum [https://perma.cc/CRX2-QEQX] (showing a document from April 4, 1996, which provided guidance on asylum claims based on sexuality); *INS Guidelines for Children's Asylum Claims*, AM. IMMIGR. LAWS. ASS'N, https://www.aila.org/infonet/ins-guidelines-for-childrens-asylum-claims [https://perma.cc/9A34-VH9S] (presenting a document from December 10, 1998, which instituted guidance for children's asylum claims).

136. *See* 2016 TRAINING, *supra* note 6.

137. *Id.* at 51.

138. *Id.* at 70.

to Asylum Officers in their application of the existing guidelines.[139] Crucially, the already-established concerns about terrorism, first raised in the mid-1990s, allowed most post-9/11 legal responses to be absorbed into existing mechanisms, including those raised in the 2005 REAL ID Act.[140] These provisions further increased the burden of proof, expecting asylum seekers to provide "corroborating evidence" of their experiences, to prove their persecutor's "central" motives, and introducing "demeanor" as an additional axis along which to assess credibility.[141]

Throughout the 2000s, more than 2.4 million people were removed from the United States,[142] and pressure again mounted on the asylum system. By the end of 2013, the asylum case backlog had ballooned to more than 40,000, with 28,000 of those claims filed in 2013 alone.[143] Beginning in the summer of 2014, those seeking asylum were increasingly women, children, and families fleeing violence in Central America.[144]

This is also the period during which the profile of those entering and seeking to enter the country, particularly at the United States-Mexico Border, began to change. In 2010, the top countries of origin for affirmative asylum seekers were China, Mexico, Haiti, Ethiopia, and Nepal.[145] By and large these countries were also those with the most asylum seekers granted status,[146] with the exception of Mexico (it was 18th).[147] By 2014 the picture shifted considerably. While China remained

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139. Kate Aschenbrenner, *Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum*, 45 U. MICH. J.L. REFORM 595, 611 (2012).

140. *See* Melloy, *supra* note 42.

141. *Id.* at 650–51.

142. Ana Gonzalez-Barrera & Jens Manuel Krogstad, *U.S. Immigrant Deportations Declined in 2014, But Remain Near Record High*, PEW RSCH. CTR. (Aug. 31, 2016), https://www.pewresearch.org/fact-tank/2016/08/31/u-s-immigrant-deportations-declined-in-2014-but-remain-near-record-high/ [https://perma.cc/EM44-LCXJ].

143. Cheri Attix, *The Affirmative Asylum Backlog Explained*, AM. IMMIGR. LAWS. ASS'N (Apr. 2, 2014), https://www.immigrantjustice.org/ sites/immigrantjustice.org/files/AILA _Explanation%20of%20the%20Affirmative%20Asylum%20Backlog_4.2.14.pdf [https://perma.cc/9U9M-N2LZ].

144. Jonathan T. Hiskey, Abby Córdova, Diana Orcés & Mary Fran Malone, *Understanding the Central American Refugee Crisis*, AM. IMMIGR. COUNCIL (Feb. 1, 2016), https://www.americanimmigrationcouncil.org/research/understanding-central-american-refugee-crisis [https://perma.cc/9QS6-HX3F].

145. DORIS MEISSNER, FAYE HIPSMAN & T. ALEXANDER ALEINIKOFF, THE U.S. ASYLUM SYSTEM IN CRISIS: CHARTING A WAY FORWARD 11 (2018), https://www.migrationpolicy.org/research/us-asylum-system-crisis-charting-way-forward [https://perma.cc/NZD7-BW62].

146. Monica Li & Jeanne Batalova, *Refugees and Asylees in the United States*, MIGRATION POL'Y INST. (Aug. 23, 2011), https://www.migrationpolicy.org/article/refugees-and-asylees-united-states-2010 [https://perma.cc/5LMX-GGHM].

147. *See* OFF. OF IMMIGR. STAT., 2010 YEARBOOK OF IMMIGRATION STATISTICS (2011), https://www.dhs.gov/sites/default/files/publications/ois_yb_2010.pdf [https://perma.cc/VK5U-QB4A].

at the top of the list of countries of origin for affirmative asylum seekers, the remaining top four countries were all in Latin America: Mexico, Guatemala, El Salvador, and Venezuela.[148] From 2010 to 2016, as Latin American countries dominated the top countries of origin from which asylum seekers arrived, the chances of being granted affirmative asylum at initial decision[149] fell from a nearly 40% grant rate to just over 10%.[150]

The Obama Administration responded to the increase in volume of affirmative asylum applications with the introduction of additional measures to process these claims quickly,[151] catalyzing the erosion of the standardized procedural protections established in the previous decades. The complex and ultimately fruitless attempts at comprehensive reform during this era reflect the increasing tensions, not just between parties and elected representatives, but across the country as well. Between 2013 and 2016, marked politicization of attitudes towards immigrants was increasingly evident, especially along major political party lines.[152] By early 2016, rhetoric about immigration emerged as a focus in the presidential election, with then-candidate Donald Trump in particular focusing on threats posed by refugees.[153]

iii. A Functional Ban on Asylum

The Trump Administration brought increased attention to the U.S. asylum system. A combination of administrative changes, such as prioritizing newly-arrived asylum seekers' claims first—an attempt to avoid allowing those waiting years to benefit from work authorization in the meantime[154]—and larger, more structural changes to the way the

148. MEISSNER ET AL., *supra* note 145, at 10–11.

149. This figure is only affirmative claims and only at the initial administrative decision made by USCIS, not outcomes for cases referred to immigration court or beyond.

150. In 2010, asylum seekers filed 28,442 affirmative claims of which 11,244 were granted. MEISSNER ET AL., *supra* note 145, at 11 tbl.1; OFF. OF IMMIGR. STAT., *supra* note 143, at 43 tbl.16. In 2016, 114,993 affirmative claims were filed and 11,457 were granted. MEISSNER ET AL., *supra* note 145, at 11 tbl.1; OFF. OF IMMIGR. STAT., 2019 YEARBOOK OF IMMIGRATION STATISTICS 43 tbl.16 (2020).

151. Jennifer Chan, *Rocket Dockets Leave Due Process in the Dust*, NAT'L IMMIGR. JUST. CTR. (Aug. 11, 2014), https://www.immigrantjustice.org/staff/blog/rocket-dockets-leave-due-process-dust [https://perma.cc/4YS9-T9NW].

152. Bradley Jones, *Americans' Views of Immigrants Marked by Widening Partisan, Generational Divides*, PEW RSCH. CTR. (Apr. 15, 2016), https://www.pewresearch.org/fact-tank/2016/04/15/americans-views-of-immigrants-marked-by-widening-partisan-generational-divides/ [https://perma.cc/32HY-636B].

153. *See* Michèle Lamont, Bo Yun Park & Elena Ayala-Hurtado, *Trump's Electoral Speeches and His Appeal to the American White Working Class*, 68 BRIT. J. SOCIO. S153 (2017).

154. *Affirmative Asylum Interview Scheduling*, U.S. CITIZENSHIP & IMMIGR. SERVS. (May 31, 2022), https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/affirmative-asylum-interview-scheduling [https://perma.cc/N7XJ-VFMA] (describing how priority will

United States engages with the international protection system broadly,[155] radically changed the legal and social climate around asylum. Credibility came under increasing scrutiny as Trump Administration officials took aim at asylum seekers, accusing them of lying. In mid-2019, then-President Trump stated, erroneously, "[t]he biggest loophole drawing illegal aliens to our borders is the use of fraudulent or meritless asylum claims to gain entry into our great country."[156]

Chief among the Trump Administration's efforts to reduce asylum were the negotiation of several so-called "safe third-country" agreements in Central America, designed to facilitate the removal of asylum seekers from the United States to other countries where their claims could be considered,[157] and the highly controversial Migrant Protection Protocols (MPP), more commonly referred to as the "Remain in Mexico" program.[158] Taken together, these measures are often referred to, more bluntly, as an "asylum ban."[159] The effect of these policies has been to drastically reduce the ability to seek asylum at the U.S.-Mexico Border, placing those waiting in border towns in significant danger, those in the

be given to the "most recently filed affirmative asylum applications" and that the "aim is to deter individuals from using asylum backlogs solely to obtain employment authorization by filing frivolous, fraudulent or otherwise non-meritorious asylum applications"); *cf.* Gregg A. Beyer, *Reforming Affirmative Asylum Processing in the United States: Challenges and Opportunities*, 9 AM. U. INT'L L. REV. 43, 69–70 (1994) (noting that the purpose of asylum reforms which decoupled work authorization and asylum was to reduce incentives for filing spurious claims to obtain access to the labor market).

155. *See, e.g.*, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80274 (Dec. 11, 2020) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, 1235) (overhauling the asylum system and imposing new bars on relief).

156. *President Donald J. Trump is Working to Stop the Abuse of Our Asylum System and Address the Root Causes of the Border Crisis*, THE WHITE HOUSE: FACT SHEETS (Apr. 29, 2019), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-working-stop-abuse-asylum-system-address-root-causes-border-crisis [https://perma.cc/5P8M-623W].

157. Tania Karas, *How Trump's Bilateral Deals with Central America Undermine the U.S. Asylum System*, PUB. RADIO INT'L (Oct. 2, 2019), https://www.pri.org/stories/2019-10-02/how-trump-s-bilateral-deals-central-america-undermine-us-asylum-system [https://perma.cc/NHZ5-SJEM].

158. Press Release, Dep't Homeland Sec., Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration (Dec. 20, 2018), https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration [https://perma.cc/Y8NH-RWP8]; *Know Your Rights: Migrant Protection Protocols & "Remain in Mexico,"* NAT'L IMMIGR. JUST. CTR., https://immigrantjustice.org/know-your-rights/know-your-rights-migrant-protection-protocols-remain-mexico [https://perma.cc/L2SW-8YKR].

159. *See, e.g.*, *What You Need to Know About Trump's Asylum Ban*, AM. FRIENDS SERV. COMM. (Nov. 26, 2018), https://afsc.org/news/what-you-need-know-about-trumps-asylum-ban [https://perma.cc/XXY9-QUFR]; *Important Changes for Asylum Seekers Under the Trump Administration*, IMMIGR. EQUAL., https://immigrationequality.org/legal/legal-help/asylum/important-changes-for-asylum-seekers-under-the-trump-administration/ [https://perma.cc/SK52-TNDN]] (June 3, 2020).

United States in long-term detention, and raising significant concerns about violence and a lack of due process.[160]

To date, this era reflects the most significant attempt to restructure the asylum system since the early 1990s. Even as many of these changes remain part of ongoing legal challenges,[161] much of the effort to reduce access to asylum persists under the Biden Administration, with no sign of slowing.[162] It is clear that this era is characterized by deeply ideological arguments about asylum and an all but total abandonment of any of the humanitarian principles which remained, to greater and lesser extents, during the previous eras.

IV. Narrating Asylum: An Empirical Analysis of Claims

The asylum system has, as evidenced in earlier parts of this Article, always been highly discretionary and centered on assessments of elusive criteria. It is the claims themselves that have generated the material form and content of what it looks like to claim asylum and to narrate experiences or fear of persecution. These narratives reveal how claims draw on available cultural resources—those that reflect the ideological orientations of the asylum system at the time of which they apply—and what aspects remain constant, what variations develop, and what becomes institutionalized in an enduring way. The narratives overlap and diverge in important ways, shaping and limiting what is "tellable" and what is not,[163] resulting in the emergence and evolution of norms relating to both narrative structure and substance within asylum petitions.

Situating the evolution of asylum in a historical context is important because it contextualizes legal and administrative shifts in a discussion of relevant social, political, and cultural changes over time. In many ways, the historical narrative is a top-down story about how powerful actors in

160. Jonathan Blitzer, *How the U.S. Asylum System Is Keeping Migrants at Risk in Mexico*, NEW YORKER (Oct. 1, 2019), https://www.newyorker.com/news/dispatch/how-the-us-asylum-system-is-keeping-migrants-at-risk-in-mexico [https://perma.cc/MZJ8-YCU7].

161. *E.g.*, Nicole Narea, *The Supreme Court Has Delivered a Devastating Blow to the US Asylum System*, VOX (Sept. 12, 2019), https://www.vox.com/policy-and-politics/2019/9/12/20861765/supreme-court-ruling-asylum-rule-southern-border [https://perma.cc/5YQY-MUMV].

162. Azadeh Erfani & Jesse Franzblau, *Recycling Trump's Asylum Bans & Expanding Title 42: How Biden's New Policies Threaten to Undermine Asylum Rights for Generations to Come*, NAT'L IMMIGR. JUST. CTR. (Jan. 9, 2021), https://immigrantjustice.org/staff/blog/recycling-trumps-asylum-bans-expanding-title-42-how-bidens-new-policies-threaten [https://perma.cc/6GBN-RPZX]; Adam Isacson, *How the Biden Administration May Keep Asylum Out of Reach After Title 42*, ADVOC. FOR HUM. RTS. IN THE AMS.: COMMENTARY (Feb. 17, 2021), https://www.wola.org/analysis/biden-asylum-after-title-42/ [https://perma.cc/E6C7-JCP5].

163. *See* Diane E. Goldstein & Amy Shuman, *The Stigmatized Vernacular: Where Reflexivity Meets Untellability*, 49 J. FOLKLORE RSCH. 113 (2012).

law and politics govern asylum with organizational structures, incentives, and processes that align with and further those actors' ideological or organizational goals. In the sections that follow, I combine a discussion of the social, political, and legal changes taking place within and around the asylum system with an analysis of individual narratives.

My analysis reveals how both the institutional requirements for claiming asylum and what it looks like to narrate persecution have changed considerably over time. By evaluating the historical evolution of the asylum system and combining it with a close reading of the narratives of asylum seekers, I demonstrate how asylum narratives reflect the creation of new strategies of action that integrate structural requirements and evolve to accommodate broader cultural and legal understandings of asylum. This interaction between the top-down changes to law and policy and the bottom-up strategies employed by individuals reveals the ongoing power of culture to inform what ideas and actions are successful during periods of change, and the power of law to shape which approaches and understandings are institutionalized.

A. Data and Methods

i. Data Collection

To document and discuss these narrative changes, I employed content analysis of a stratified random sample of documents created in the preparation of 120 asylum claims filed between 1989 and 2018 by nationals of 33 countries.[164] To be included in the sample, claims had to meet the following criteria: the asylum seeker had to be over the age of eighteen when they filed; the case had to be closed; the asylum seeker had to have had the benefit of legal representation throughout the process; and the file had to contain at a minimum the information necessary to complete the questions asked on an I-589 and some form of written declaration, and the written documents had to be sufficiently legible.

164. This sample is part of a larger sample of archival documents relating to the preparation of over 4,000 claims collected at non-profit legal service providers in the United States during 2018. The original sample was reduced by applying the following criteria: cases had to be closed and claimants had to have been adults with the benefit of legal representation throughout the process, and written narratives or declarations had to be legible enough to be analyzed. These criteria resulted in a smaller archive of documents prepared in support of just over 1,000 asylum cases, which I then open-coded for primary experiences of violence or persecution. This produced forty specific ways to characterize violence, which I stratified into four broad categories which emerged from the data: political opposition; sexual and gender-based violence (SGBV); lesbian, gay, bisexual or transgender (LGBT) identity; and those who fled revolutionary conflicts in Central America during the late 1980s and early 90s. *See infra* Figure 2. From my final sample of 120, I randomly sampled 30 cases from each of these four broad categories. I then cleaned, anonymized, and coded these documents in the software package MaxQDA.

This data set is large and provides access to types of documents that are historically harder to access. However, it does have its limitations. As previously noted, all documents were prepared with individuals who had access to a lawyer. Having legal representation is a distinct advantage in the asylum process, and attorneys, as I discussed earlier, play a role in the development of all claim materials, including narratives and declarations.[165] Asylum seekers who have an attorney are 20% more likely to be granted asylum by USCIS[166] and five times more likely to be granted status by an Immigration Judge.[167] However, limiting the sample in this way was an unavoidable consequence of analyzing a large but accessible set of diverse documents.[168]

Lawyers also play a significant role in shaping and drafting narratives, of course, but unless they are engaging in unethical behavior, they do not construct them from scratch. Lawyers, and often legal assistants and volunteers, are important actors who facilitate the process of narration by framing the biographical inquiry to elicit the nature and level of information and detail required to meet the fluctuating standards.[169] They are not, however, the storytellers. Instead, their input tends to focus more heavily on the legal framing of the entire claim, such as determining if someone who was subjected to gendered violence during conflict would be more likely to succeed by foregrounding particular legal questions.[170] They also seek out and prepare supporting evidence, such as psychological assessments, other forms of medical evidence, and expert testimony attesting to conditions in the claimant's country.[171] They manage the coordination, documentation, and presentation of the claim.[172] For asylum seekers, the rules, conventions, and styles required in narrating their experiences can become additional barriers to accessing protection. As such, lawyers are instrumental in overcoming barriers, such as cultural difference in presentation of

165. *See* sources cited *supra* note 113 and accompanying text.

166. SCHOENHOLTZ ET AL., *supra* note 128, at 133.

167. *Who is Represented in Immigration Court?*, TRAC IMMIGR. (Nov. 28, 2017), https://trac.syr.edu/immigration/reports/491/ [https://perma.cc/SJA4-Z6NV].

168. There are, to the best of my knowledge, no large repositories of asylum files which permit research access outside of legal service providers, and any files that could otherwise be collected may not have been as complete or covered as wide a range of claims in terms of country of origin, year of filing, or characteristics of the claimants.

169. Amy Shumam & Carol Bohmer, *Representing Trauma: Political Asylum Narrative*, 117 J. AM. FOLKLORE 394, 398 (2004).

170. *See* Ilene Durst, *Lost in Translation: Why Due Process Demands Deference to the Refugee's Narrative*, 53 RUTGERS L. REV. 127, 172 (2000).

171. *Id.*

172. *Id.*

experiences,[173] the limits of understanding a process in a language which you do not speak,[174] and the effects of criminological frames often projected onto asylum stories.[175]

ii. Sampling Frame

The sampling frame consisted initially of 4,800 available cases. Of these, just over 40% (1,983) met the requirements outlined earlier. I then conducted exploratory content analysis and stratified the cases into segments based on persecution type as articulated in the claimant's I-589 application. While many claimants describe a range of harms or types of persecution, cases are stratified based upon the articulation of the *central* experience or fear of persecution that animates their claim. This is distinct from the formal grounds enumerated in the Convention—race, religion, nationality, political opinion, or membership in a particular social group—as almost all claimants invoke multiple grounds.[176] Indeed, only nine claims in the sample invoke a single legal category, with the majority invoking two, and one-third invoking three or more. The categories of political opinion and membership in a particular social group co-occur most frequently, regardless of the nature of the violence experienced.

I argue that it is these categories of violence which emerge from the claims themselves that provide a meaningful analytic framework for understanding the stories in the sample. This stratification strategy is not designed to reveal the legal categories of persecution as enumerated in the Convention and in domestic asylum law and policy. Rather, it is designed to bring into focus the ways that the stories are constructed and told. It is an emergent structure, one which revealed itself as the data were coded, illuminating the significant role played by the nature of violence experienced in the construction of asylum narratives. In brief, people may make legal claims based on their political opinion, but they do not *tell stories* of political opinion—they tell stories of experience. They recount police brutality, illegal detention, rape, stalking, lost jobs and farms, harassed family members, torture, and lost relationships. This phenomenon is unsurprising given the complicated demands for

173. *Id.*; Michel-Acatl Monnier, *The Hidden Part of Asylum Seekers' Interviews in Geneva, Switzerland: Some Observations About the Socio-Political Construction of Interviews Between Gatekeepers and the Powerless*, 8 J. REFUGEE STUD. 305, 305 (1995); Anthony Good, *Witness Statements and Credibility Assessments in the British Asylum Courts*, *in* CULTURAL EXPERTISE AND LITIGATION: PATTERNS, CONFLICTS, NARRATIVES 94, 114 (Livia Holden ed., 2011).

174. COSTAS DOUZINAS & ADAM GEARY, CRITICAL JURISPRUDENCE: THE POLITICAL PHILOSOPHY OF JUSTICE 72 (2005).

175. *See* Michael Welch & Liza Schuster, *Detention of Asylum Seekers in the UK and USA: Deciphering Noisy and Quiet Constructions*, 7 PUNISHMENT & SOC'Y 397 (2005).

176. U.N. REFUGEE AGENCY, *supra* note 85.

combinations of personal trauma and collective identity in the process of determining eligibility and credibility. Attempts to understand stories, then, must necessarily look for emergent categories beyond the legal structure.

For example, a total of twenty-three narratives in my sample focus substantively on political revolution, either because the applicant was involved as a combatant, assumed erroneously to be a combatant or a supporter, or because they were displaced as a result of revolutionary conflict. Legally these claims sit at the intersection of political opinion—often either an articulated political position, such as advocating for local land ownership, or membership in a specific political party—and/or membership in a particular social group (PSG); and in some cases, race or ethnicity, including indigeneity. Claiming membership in a PSG is especially common in claims based on social categories not specifically captured in Convention grounds,[177] such as engaging in labor organizing. This intersectionality is the legal architecture of a claim rooted in the causes and consequences of political revolution, but it tells us nothing of the individual's experience.

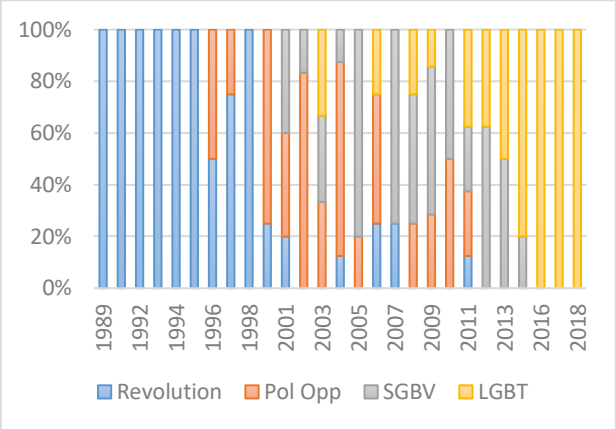
Additionally, this same constellation of legal components—political opinion, PSG, and race—is seen in cases with a substantive focus on sexual and gender-based violence. In these cases, women in particular are constructed as both politically opposed to gender-based violence and personally targeted because of a local climate which tolerates, or even supports, such abuse. This climate is often exacerbated in the case of women who are indigenous or part of underrepresented or targeted ethnic groups. But in both categories—political revolution or sexual and gender-based violence—the substance of the stories themselves is always the unique nature of violence.

I employed initial exploratory content coding for all mentions of experiencing violence. This revealed forty highly-specific violence types, which I then consolidated into four main categories: (1) political opposition (such as being a member of an opposition or minority political party, or involvement in other forms of political opposition, such as being a member of a labor union or political social movement); (2) sexual and gender-based violence (including domestic violence, rape, female genital cutting, and forced marriage); (3) LGBT violence (persecution on account of sexuality or gender identity); and (4) displacement specifically of revolutionary armed conflict. I then sampled thirty claims randomly within each segment. As can be seen below in Figure 2, claims are not evenly distributed over time. The changing number of claims over time is a function of the types of violence and persecution causing displacement

177. *Id.*

at various times, the evolution of judicial responses to claims which then open or close legal doors for further claims, and, as I will detail in the following section, a result of changes to the asylum process.

Figure 2. Claims by Type 1989–2018



The volume of claims is also not evenly distributed over time, with claims before 1996 constituting the smallest part of the sample (n=18). The small relative number of claims during this period is due in part to the capacity of my data collection sites in the late 1980s and early 90s. They were much smaller then and able to serve relatively fewer asylum seekers. Additionally, many records were hand-written and stored in hard copy, leading to more illegible or incomplete files for this era.

iii. Coding

I approached the narratives with a method inspired by sociologist Mark Suchman's approach, in which he understands "contracts as social artifacts."[178] Like contracts and other artifacts, asylum narratives are "both technical systems and communities of discourse," with material uses enabling practical technologies and cultural meanings that "act not as technologies but as symbols."[179]

After collecting, anonymizing, and categorizing all narratives by type, I used the qualitative data analysis software MaxQDA to code and analyze the data. I used the narratives to develop coding categories for

178. Mark C. Suchman, *The Contract as Social Artifact*, 37 LAW & SOC'Y REV. 91, 92–93 (2003).

179. *Id.* at 92.

interpretation.[180] Employing a grounded theory analytic-inductive approach, I coded the narratives by identifying analytic categories and themes as they emerged from the data.[181] To innovate and modify existing theories, I systematically coded narratives in dialogue with one another, and alongside close readings of salient themes in the sociology, law, migration, and culture literatures.[182] Grounded theory coding involves two phases: first, conducting *initial coding* to determine what the data suggests about narrating asylum, remaining open to the theoretical possibilities that might emerge; and second, using *focused coding* to pinpoint and develop the most salient categories that emerged.[183] The second round of coding was motivated by the institutional categories that emerge from documents, such as training manuals and other guidance to decision-makers. These categories capture, in part, the institution's own understanding of how asylum claims should be narrated.

The primary purpose of the coding scheme was to identify the content and changes over time to narrative substance and structure. Coding focused both on the substantive ways experiences of violence and persecution are described, as well as lexical and grammatical patterns that provide insight into how claimants interpret and make sense of the law and world around them.[184] Structurally, I coded for word length; formality; word choice; presence of explicitly legal language; and presence of explicit commentary on legal tests, such as timeliness, eligibility, credibility, truth, or similar concepts. Substantively, I coded for descriptions of violence (physical, emotional); specific types of harm (forced marriage, threats to kill); temporality (narrating experiences or narrating whole lives); level of detail, especially sensory detail; internal consistency as evidenced by information provided by the claimant in other parts of the process; external consistency evidenced by reference to expert or other third-party sources; and alignment with relevant ideological or cultural scripts (such as opposition to communism). I also coded for references to memory, trauma, and agency or power in decision-making.

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180. *See* KRISTIN LUKER, SALSA DANCING INTO THE SOCIAL SCIENCES: RESEARCH IN AN AGE OF INFO-GLUT 80–83 (2008); David A. Snow, Calvin Morrill & Leon Anderson, *Elaborating Analytic Ethnography: Linking Fieldwork and Theory*, 4 ETHNOGRAPHY 181, 193 (2003).

181. *See* BARNEY G. GLASER & ANSELM L. STRAUSS, THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH 237–51(2009); KATHY CHARMAZ & RICHARD G. MITCHELL, *Grounded Theory in Ethnography*, *in* HANDBOOK OF ETHNOGRAPHY 160–74 (Paul Atkinson et al., eds., 2001).

182. Stefan Timmermans & Iddo Tavory, *Theory Construction in Qualitative Research: From Grounded Theory to Abductive Analysis*, 30 SOCIO. THEORY 167, 175 (2012); Stefan Timmermans & Iddo Tavory, *Advancing Ethnographic Research Through Grounded Theory Practice*, THE SAGE HANDBOOK OF GROUNDED THEORY 493, 496–97 (2007).

183. CHARMAZ & MITCHELL, *supra* note 181.

184. *See* JOHN J. GUMPERZ, DISCOURSE STRATEGIES (1982).

B. Shifting Norms, Shifting Narratives

i. Navigating Informality in Early Asylum Narratives

The overt role of politics, and in particular anti-Communist ideas, is evident in early asylum narratives. Documents in my sample relating to claims prepared between 1989 and 1996 (n=18) reflect only stories of political opposition and displacement as a result of revolutionary civil conflict. These early cases shed light on the emergence of the asylum narrative form as an attempt to create and develop a claim in the absence of detailed top-down guidance.

Structurally, these narratives are brief, with an average length of under one thousand words, and they tend to focus concretely on the events or circumstances that led directly to the need for asylum. In some ways these claims adhere to a narrower interpretation of legal requirements. The substance of these narratives also reveals the power of the explicit ideological demands made on the process at the time. It is perhaps unsurprising that these narratives reflect attempts to align claimants' views and actions with the mainstream anti-Communist and ideology dominant at the time. For example, these narratives from Eduardo[185] in 1990, a Salvadoran, and Lorenzo in 1993, a Nicaraguan, reflect the narrow ideological focus and expression of personal political beliefs, as well as a largely unedited structure:

> By this means I address to you in my most sincere and respectuous way with the purpose to show the following. The Communist Guerrillas of my country tried to recruit me to fight with them. I was approached by a group of men, who had hidden fire-arms and told me I should join them to fight to gain liberty in our Country. That our Country was under the control of the imperialist Americans. I told them I couldn't, they told me if I did not join, I was a traitor and deserved to be eliminated. (Eduardo)
>
> I never wanted the Communist system but the Somoza's Government was killing the young Nicaraguan people so, I joint the people of Nicaragua to get out the Somoza's regime. After the Sandinistas got into power [they] wanted the communist system into Nicaragua, and thousands of International Communists got into Nicaragua. I had problems since the I when I started to defend and protect the young people that I knew. They were democratic and not Somocistas. At the time I become an enemy of the Sandinistas also because of my political ideas, that were and are democratic and believe in liberty and freedom (Lorenzo)

These narratives are also presented in a less formal manner, and most (n=10) include phrasing that suggests an acute awareness of the discretionary nature of decision-making. For example, Lorenzo's narrative finishes with "God BLESS AMERICA, that is the only one that can

185. All names have been changed.

give the peace and protection we need." Others make it clear they are "respectfully" seeking asylum, or as Victor, a Salvadoran claiming in 1995 writes, "I fervently wish that I be granted political asylum."

While seventeen of the eighteen cases in this part of the sample are from Latin America, there is one West African case which invokes many of the same concepts as the others even though the context is quite different. In preparing a 1996 declaration, a young Nigerian man, Osawe, discusses why he joined an opposition party, noting that he believed the party would improve the share of political power, would "maintain democracy," and would give "all people a voice in government."

The fact that these data represent only two of the claim types is also interesting. On the one hand, civil conflicts in Central America were displacing large numbers of individuals, especially to California, but there are claims in this part of the sample that discuss experiences of violence that could have led to a different framing. For example, the two claims in this part of the sample from women recount sexual violence as evidence of political persecution by the guerrillas, but their claims focus on the political aspects, rather than the gendered nature, of their experiences. These sentiments are extremely common, as are characterizations of Communist groups as "anti-American," anti-freedom, and anti-prosperity. The political opportunity structure of the time made centering resistance to Communism particularly effective and legible and may even have elevated other forms of persecution, such as gender-based violence, from a presumption of private harm into a solidly public example of persecution.

ii. Rising to the Challenge of Formalization

The reforms of the 1990s had significant structural and substantive effects on the way that asylum narratives evolved over the next two decades. Early narratives, constructed less in the shadow of law and policy guidance than in the absence thereof, now began to reflect both institutional adjudication needs and prevailing cultural and political logics about how to tell stories of persecution, fear, and eligibility.

Structurally, these narratives expanded considerably, moving from a narrative focused on the relatively discreet description of experiencing or fearing persecution to a whole-life narrative that provides significantly more detail. By the late 1990s, nearly 90% of narratives begin with the claimant's early life. In fact, one-third begin with the exact same phrase: "I was born." This phrase serves as a sort of "once upon a time" to begin the narratives. By 2000, the average declaration tripled in length to about 3,000 words, and typically exceeded 4,500 words by 2008.

Other indicators of the shift to a whole-life structure include discussions of domestic life, such as information about family size,

structure, and relationships; specific mention of access or lack thereof to formal education and work experience; significant cultural markers such as weddings or funerals; and attempts to demonstrate personality. Narratives are woven through with statements about or examples of desirable personality traits, such as "I always had a lot of friends," "my siblings and I were always good students," or "it was a happy marriage." These whole-life markers imbue the narratives with both the weight of a life—with all its many relationships, obligations, and experiences—and an emotional sense of how it was lived.

While the structural change from persecution-specific to whole-life narrative is consistent across claim types, the narrative content provides a window into claim-type specific differences. Beginning in the late 1990s, a combination of proliferating global contexts giving rise to a variety of types of persecution and an expanding judicial and policy-driven framework for constructing a wider variety of harms and fears under the Convention's categories allowed the asylum process to tolerate greater substantive "incoherence"—that is, there are more ways to narrate an asylum claim, and greater flexibility in how experiences are presented. This institutionalization of type-specific ways to claim asylum emerges alongside expectations that claims retain sufficient elements of the standard form to be legible. This tension manifests in greater levels of substantive coherence within claim types and a tighter adherence to the enumerated metrics—facts, detail, plausibility, and candor.

One example of greater substantive coherence is how LGBT and sexual and gender-based violence (SGBV) narratives are more likely to focus on the long-term effects of having experienced violence or trauma. These claims tend to focus on the consequences of persecution and how claimants live with persistent levels of fear and anxiety. These claimants are presented as "in need of saving" and frame a grant of asylum as integral to safety and recovery from trauma and abuse.

Karen from the Democratic Republic of Congo focused on her ongoing fear, describing the United States as a place she can be at peace:

> I don't want to sleep during the night because I am afraid of my nightmares which feel so real. I often wake up screaming, sweaty and short of breath. I am tired of living a life where I am constantly scared, where I have to hide. I want to live in peace.

For other claim types, especially political opposition claims, narratives focus instead on the individuals as agentic and risk-taking and constructing their actions, as necessary. Yonas from Ethiopia worked as a political activist for a pro-democracy party, and acknowledged the risks he took and decisions he was able to make, stating:

> I knew that as I became more and more vocal about what the Ethiopian government did to my cousin, my own life was at risk. So I decided to leave my beloved soccer, my wife, my family whom I may

> never see again to seek asylum and save my life.

These claimants are constructed as being at risk, but not necessarily as being as vulnerable as the SGBV or LGBT claims.

Claims also reveal a significant increase over time in reliance on the submission of additional evidence to establish facts and speak to the plausibility of certain experiences. Until 1997, only four narratives made reference to reliance on external documentation. However, in the following decade supporting documents were mentioned in forty-one of the fifty-two filed cases, rising to forty-seven of fifty-one from 2009 to 2018. Country of origin information is by far the most common and is referenced in nearly 70% (n=82) of cases in the sample and over 90% (n=68) by 2004.

These country-of-origin documents are many claimants' best chance at demonstrating the plausibility of their experiences, fears, and actions. USCIS describes facts as plausible if they conform with "objective rules of reality,"[186] but the fact is that most Asylum Officers do not share an objective reality with those whose narratives they encounter and evaluate. For those seeking asylum, these documents become a way of corroborating facts, establishing consistency with information that is already accepted, and demonstrating the plausibility of your own account.

Narratives also show evidence of increasing levels of detail, in particular sensory detail, which is recognized by USCIS as a key indicator of a credible account.[187] Before 1996, only three (of eighteen) narratives referred to sensory experiences; by 2008, just over 70% (n=39) referred to more than one thing seen, heard, smelled, felt, tasted, or touched during an experience of persecution (n=38). Sensory detail is most often used to describe experiences of fear, deprivation, or torture, or to describe the ongoing mental and physical health consequences of such experiences. This detail serves both to enrich the account itself, and to bolster the validity of the claim, often by emphasizing the inevitability, pervasiveness, or severity of the experience. Yaro from Kenya described his experience of torture, stating:

> On about four separate occasions, I was taken to a room that was nearly ankle deep in water. There were several raised rubber mats on which policemen stood while I had to stand in the water. One officer held my hands behind my back while another two officers applied live electrical wires to my ankles. The pain was incredible throughout my whole body. My heart sped up. My mind became

186. 2016 TRAINING, *supra* note 6, at 24.

187. *Id.* at 16 ("It is reasonable to assume that a person relating a genuine account of events that he or she has experienced will be able to provide a higher level of detail, especially sensory detail, about that event than he or she could if the account were not genuine.").

> disoriented. It was a terrible shock.

Sensory detail is often also used to enhance narratives when other concrete facts cannot be recalled, or perhaps were never known to the claimant, such as in the narrative of Bashim from Turkmenistan:

> I don't have a sure idea of the time. It seemed like the beating went on for a long time, but it was probably about twenty minutes. Periodically they would force me to stand up so that they could karate chop me on the back of my neck. A few times they broke ammonia capsules in front of my nose to revive me.

As demonstrated above, patterns emerge in the way that violence and experiences are narrated, highlighting ongoing reliance on tropes and stereotypes about who should claim asylum, how those people can and should behave, and what kinds of experiences warrant an offer of permanent residence.

iii. Resisting Political and Personal Exclusion

From late 2008, the narratives began to reveal this institutionalization by type, but also a return of stronger ideological forces shaping the system. The styles and habits, namely the comprehensive structure and the adherence to the explicit metrics, do not fall away from the narratives. Instead, these narratives reveal attempts to connect unique, detailed experiences of violence with overarching ideological positions in ways that had not been as common since the early focus on Communism. In effect, we see the strategies and tools developed and institutionalized in the previous two periods acting as cultural resources to shape the current highly structured and highly ideological form.

One example of this more explicitly ideological turn is evident in narratives based on SGBV or LGBT identity, because both reveal a resurgence of conventional gender role stereotypes. For example, in the SGBV narratives there is a shift in the way that women describe experiences of and, crucially, responses to violence. They remain highly structured and detailed, yet almost universally include a passage describing how the women resisted violence. This expectation of resistance is now a relic in other areas of U.S. law. As late as the 1970s, for example, it was not uncommon in rape prosecutions to expect a victim to evidence "utmost resistance"[188] to being sexually assaulted.[189] Women's

188. Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 8 n.50 (1977) (first citing Reidhead v. State, 250 P. 366, 366 (Ariz. 1926); then citing Starr v. State, 237 N.W. 96, 97 (Wis. 1931)).

189. *Id.*

resistance in particular was seen as a kind of proxy for virtue, alongside other requirements, such as timely complaint.[190]

Beginning as early as the 1960s, these expectations started to fall away in rape prosecutions, driven at least in part by an acknowledgement that the crime of sexual assault is defined by the actions of a perpetrator, not of a victim.[191] As such, the return of this kind of language to SGBV asylum claims in the late 2000s is suggestive not of a reflection of evolving legal approaches, but a regressive cultural attitude towards women, credibility, and the power dynamics involved in sexual violence.

Evidence of standardization of women's responses to that violence first emerged in late 2008 and is illustrated by the tensions around representations of rape and sexual assault and female genital cutting. Esther from Liberia recounts her physical resistance as she was sexually assaulted by a solider, stating "I struggled to move my body any way I could . . . . I tried to keep my legs closed but I couldn't. I was too tired and in too much pain. Finally, I stopped resisting." Similarly, Femke, a young woman from Burkina Faso describes resisting ceremonial genital cutting:

> When I was 7 years old, my family arranged for me to undergo the ritual. The ceremony was performed at my grandmother's house with a group of 11 girls. I tried to run away, but I could not run very fast because of [a problem with] my leg, and some boys caught me. There are always boys there to catch girls who try to run away.

LGBT narratives increased significantly after 2010. Only two LGBT claims were prepared before 2009 and more than half (n=17) were filed in 2015 or later. These narratives represent the system's increasing openness to claims based in sexuality and gender identity (particularly so in California), and yet these narratives emerge in a form that reflects traditional gender stereotypes. One particularly common narrative trend is the characterization of realizing one's sexuality in childhood because of a preference for traditionally male or female toys, hobbies, or clothing. Marcos, a gay man from Colombia notes, "When I was little, I preferred to play with the girls rather than the boys. I liked to play indoor games with my hands inside the house or inside the school. I did not like to play soccer or other sports." Similarly, Fernanda, a lesbian from Brazil, describes noticing that there was something "different" about her around age six noting, "I liked to play with my brother's toys, and I did not like spending time with the other girls around me. Instead, I preferred to hang out with the boys, playing soccer and with toy cars." This "when did you know were gay" trope of noticing difference in childhood, or having an internal

190. *See* Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 815 (1991); John Dwight Ingram, *Date Rape: It's Time for No to Really Mean No*, 21 AM. J. CRIM. L. 3, 11 (1994).

191. Eric Sandoval, *The Case for an Affirmative Consent Provision in Rape Law*, 94 N.D. L. REV. 455, 460–62 (2019).

moment of coming out to oneself, before experiencing any persecution or fear thereof seems to be a narrative expectation for an LGBT asylum narrative, despite being entirely irrelevant from the standpoint of legal interpretation. Notably, in narratives in which a heterosexual relationship is central to a claimant's experience of violence, there are no instances in my sample of anyone being asked, or voluntarily offering, when they knew they were straight.

Further, ideological shifts are evident in the rise of narratives in which individuals either disavowed Islam or go to great lengths to explain their faith and how they practice it, even though religious persecution is not central to these claims, but instead are raised in political opposition cases. In these cases, claimants can reject a fundamentalist approach to Islam while also expressing that their own views align with an idealized American value of religious tolerance. Mariam from Mali describes the following:

> The way that I believe in Islam is different from my father. The Koran does not say that girls must not go to school. Girls must be able to learn the Koran and must practice Islam. My father believes that girls must cover their entire bodies, and not even show any hair. I believe that my father practices such strict Islam so that he can be recognized in society as being very correct. I do not believe that is the right way to practice Islam.

These narratives reveal how recent claims strive to situate individuals as adhering to traditional values regarding gender and sexuality. This practice demonstrates a deeper and more ideological entrenchment of the type-specific institutionalization of claims. These narratives reflect the highly structured nature of the system, paired with a shift toward the kind of ideological coherence last seen during the most fevered years of perceived threats from and staunch opposition to Communism. Currently, we again see explicit ideological demands being made on the system, but with a shift to all but eradicate structural opportunities to incorporate these demands into the existing institutional framework. Whereas the competing ideologies and cultural strategies of the 1980s and early 1990s gave way to increased focus on structure and accountability, this era seems poised to dismantle the existing structures without replacement.

Conclusion: Making Asylum Possible

Credibility is not given definition, but it is given meaning, power, and possibility through the asylum process. This happens as institutional norms are infused with politics, undergo processes of bureaucratization, and evolve in response to imperatives and opportunities presented by social and cultural shifts in the way asylum is framed. The substance of credibility takes shape in the narratives of those seeking protection. In

this way, it is the existence of the entire system: the individual, the institution, and the interaction between them that makes credibility, as an ambiguous category, possible.

My analysis shows how both the institutional requirements for claiming asylum and what it looks like to narrate persecution have changed considerably over time. By evaluating the historical evolution of the asylum system and combining it with a close reading of the narratives of asylum seekers, I demonstrate how asylum narratives reflect the creation of new strategies of action that integrate structural requirements and evolve to accommodate broader cultural and legal understandings of asylum and credibility. This interaction between the top-down changes to law and policy and the bottom-up strategies employed by individuals reveals the ongoing power of culture to inform what ideas and actions are successful during periods of change, and the power of law to shape which approaches and understandings are institutionalized.

In our contemporary moment, asylum has been in many respects reduced to a debate about fundamental questions of truth, membership, and violence. In the asylum system, laws and policies granting or denying protection become agents not just of a discrete administrative corner of the state, but of cultural change itself. Given the robust cultural space occupied by the law, and the complex set of practices that surround adopting, altering, or dispensing with legal change, it is perhaps more likely that these seemingly administrative adjustments are the best evidence of a new cultural model that is likely to "take root and thrive,"[192] making their impact more likely to endure in the long-term.

This analysis is also relevant for considering the interplay between culture and institutions in immigration control more broadly. When the law in particular institutionalizes some strategies of action, it can and does have a power effect on other cultural actors, especially those that are more distant from the locus of ideological power or change. For example, an institutional culture which permits the kind of contemporary efforts we see to distrust, demonize, and exclude asylum seekers from the legal process is connected to a rise in armed border militias taking matters into their own hands.[193] The ideological view that migrants cannot be trusted is not only culturally, but practically cascaded from the institutional space of law and policy into the more pedestrian spaces of everyday life. This is how myths become political truths: when the

192. Swidler, *supra* note 48, at 280.

193. Simon Romero, *Militia in New Mexico Detains Asylum Seekers at Gunpoint*, N.Y. TIMES (Apr. 18, 2019), https://www.nytimes.com/2019/04/18/us/new-mexico-militia.html [https://perma.cc/GT4V-ZY4P].

principles of social organization are brought into harmony with the new foundational ideology.[194]

As much as the legal system might suggest that asylum seekers need to do nothing more than document and verify objective realities, the fact remains that, as essayist Elaine Scarry writes, other people's pain is inherently "unshareable" and therefore beyond both denial and confirmation.[195] Physical markers like bullet wounds are proxies for pain, not proof of it. We want these stories to make other people's pain and fear real in part because we want the truth to matter.

Stories matter critically, not only because people who have suffered loss or trauma are understandably eager to access limited resources and assistance, but because those with the power to judge these narratives and provide access to new national membership are eager to access the "truth" of atrocity. Concerns related to knowledge and credibility in the context of refugees and asylum seekers are real and pressing, in part because our ability to understand and respond to the kinds of atrocities and human rights violations depends on knowing, as best we can, what is happening in both nature and scale, when, where, and to whom. And yet, as long as the process remains political and discretionary, responses to both individual claims and collective experiences of violence and persecution will be imperfect at best and, at worst, will become merely another tool of an immigration governance system built on exclusion, violence, and death.

194. William H. Sewell, *Historical Events as Transformations of Structures: Inventing Revolution at the Bastille*, 25 THEORY & SOC. 841, 874 (1996).

195. ELAINE SCARRY, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD 11–12 (1985).

The Slow Race: Achieving Equity Through Legislative and Agency Minority Impact Statements

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Abstract

The Iowa Legislature enacted the nation's first minority impact statement legislation in 2008. This legislation came after a study by Marc Mauer from the Sentencing Project ranked Iowa as the worst state in the country for racially disproportionate incarceration. Former Iowa State Representative Wayne Ford championed this legislation in Iowa, which has since become a national model for minority impact statement legislation due to its mandatory legislative triggers, partnership with an established state data collection warehouse, and record of roughly 200 minority impact statements drafted since 2008. Today, there are eight states across the country that follow this model. But how effective has minority impact statement legislation really been over the past fifteen years?

This Article is the first analysis of all eight states that have enacted impact statement legislation. It discusses which legislative provisions are working, and which are precluding the legislation from being effective. This Article also evaluates the drafting history of legislation enacting minority impact statements in all eight states to determine the efficacy of each enacted bill. Further, this Article details the legislative history in each state surrounding enactment to determine bipartisan or partisan support. Lastly, this Article highlights the growing need for federal legislation on minority impact statements and the specific actions taken by the Biden Administration to aid in alleviating negative minority impact.

†. Jancy Nielson is a May 2022 graduate from Drake University Law School with certifications in Legislative Practice and Public Service. Nielson's studies focused on the disparate impact legislative measures may have on various racial, ethnic, and gender groups. I would like to thank former Representative Wayne Ford for being such an encouraging mentor and allowing me to learn from his invaluable experience while growing a passion of my own for this movement.

Table of Contents

Introduction

Minority impact statements serve as an integral tool for state and federal legislators. Often compared to environmental impact statements or fiscal notes, minority impact statements are analyses of the projected impact certain legislation will have on minority populations.[1] Minority populations generally include individuals of different races and ethnicities, but they sometimes also include individuals of varying genders and socioeconomic statuses. The intent behind minority impact statements is to provide state and federal legislators with data and analysis regarding predicted impact to inform the decision-making process around halting or passing certain legislation.[2] Minority impact statements are crucial, as even the most well-intentioned bills could have a negative impact on minorities that could go unnoticed without such analysis. Little in-depth research has been published on neither the key differences and efficacy of each state's enacted statutory language, nor about prominent concerns voiced by state elected officials interested in proposing legislation. This Article seeks to provide a greater research record and dive deeper into what these minority impact statements are. The intention of the Article is to present and evaluate all available information surrounding each state's actions in the subject, how well it is working in practice, and the concerns presented by states interested in proposing such legislation.

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1. *See, e.g.*, Elaine S. Povich, *Black Lives Matter, Pandemic Inequalities Drive Racial Impact Laws*, PEW (Nov. 5, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/11/05/black-lives-matter-pandemic-inequalities-drive-racial-impact-laws [https://perma.cc/5QEC-C74T].

2. *See, e.g.*, Nicole D. Porter, *Racial Impact Statements*, SENT'G PROJECT (June 16, 2021), https://www.sentencingproject.org/reports/racial-impact-statements/ [https://perma.cc/7928-GLHF]; Press Release, Congressman Ritchie Torres, Rep. Torres Introduces the Racial Impact Statement Act of 2022 (Sept. 9, 2022), https://ritchietorres.house.gov/posts/rep-torres-introduces-the-racial-impact-statement-act-of-2022 [https://perma.cc/WVY6-QEAF].

I. Historic Overview

The minority impact statement movement emerged in 2007 when Marc Mauer, former Executive Director of the Sentencing Project, and Ryan King, former Policy Analyst, reported that Iowa was the worst state in the nation for Black incarceration compared to white incarceration.[3] This report deeply disturbed former Democratic Iowa State Representative Wayne Ford. Following publication of the report, Representative Ford flew Mauer to Iowa for meetings with local and state officials that focused on the creation of a minority impact statement to further assess the disparity.[4] These meetings ultimately produced the nation's first minority impact statement legislation, introduced in 2008 as House File 2393.[5]

Although Representative Ford held the luxury of a Democratic trifecta in 2008 (a Democratic governor and both houses of the legislature being held by Democratic majority), he encountered some opposition from his own party.[6] Legislative negotiations resulted in women and disabled individuals being included in Iowa's codified definition of "minority," along with racial and ethnic minority-identifying populations.[7] On April 17, 2008, one day after being sent to former Governor Chet Culver's desk, the nation's first piece of legislation requiring a minority impact statement was signed into Iowa state law.[8]

This Article will evaluate why Iowa's language remains a national model despite notable flaws, whether partisan politics play a role in enacting this language, and the key differences in statutory language between states in which minority impact statement legislation is

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3. *See* MARC MAUER & RYAN S. KING, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY (2007) (finding that while the national average rate of incarceration was 5.6 Black people per one white person, Iowa had an incarceration rate of nearly 14 Black people per one white person); *see also* PAIGE M. HARRISON & ALLEN J. BECK, PRISON AND JAIL INMATES AT MIDYEAR 2005 (2007) (providing incarceration rates based on data from the Bureau of Justice Statistics bulletin).

4. *See* Wayne Ford, *The History and Accomplishments of the Iowa Minority Impact Statement*, 24 J. GENDER RACE & JUST. 20, 21 (2021).

5. *Id.* at 21; *see* H.F. 2393, 82d Gen. Assemb., Reg. Sess. (Iowa 2008).

6. Former Iowa State Representative Wayne Ford has expressed these difficulties in conversations with the Author and other stakeholders during various speaking engagements.

7. *See* TRISTAN GAHN, BRYAN PORTER & ANTHONY DOPP, NAT'L JUV. JUST. NETWORK, THE PROMISE OF RACIAL IMPACT STATEMENTS: FINDINGS FROM A CASE STUDY OF MINORITY IMPACT STATEMENTS IN IOWA 8 (2020). In conversations with the National Juvenile Justice Network ("NJJN"), Representative Ford shared the procedural hurdles and negotiations that took place to garner broad base support.

8. *See, e.g.*, Marty Ryan, *Minority Impact Statements in Iowa: History and Continuing Efforts*, BLEEDING HEARTLAND (July 3, 2020), https://www.bleedingheartland.com/2020/07/03/minority-impact-statements-in-iowa/ [https://perma.cc/KJ5Y-5B5J]; *see also* IOWA CODE § 2.56 (2023).

enacted.[9] Differences will be evaluated based upon three categories: (1) the scope of who is included under each bill; (2) when and how these statements are triggered in the legislative process; and (3) whether mandatory information included in each analysis is specified.

Iowa remains a national model for four reasons. The first is quantity. With almost 200 minority impact statements drafted to date, Iowa has more impact statements than most states.[10] The second is the statute's language, which includes a mandatory trigger in the legislative process.[11] The third is the inclusion of a specific codified definition for "minority" that includes women and people living with disabilities, among other historically disadvantaged racial and ethnic groups.[12] Finally, the fourth reason this legislation is effective is the strategic implementation and utilization of the Justice Data Warehouse for data collection.[13] This Article will discuss the importance of these elements, as a lack of any of these elements—particularly a lack of mandatory trigger or data collection mechanism—illustrates the surprising inefficacy in other jurisdictions to date.

Enacting minority impact statement legislation has been a slow race. Since the movement's emergence fifteen years ago, eight states have enacted a minority impact statement bill, with a majority being passed within the past five years.[14] The recent movement to enact this legislation arose from George Floyd's murder, the subsequent trial of Derek Chauvin, and the numerous social reckoning events that have flared the conversation regarding social and racial justice.[15] States are also racing to propose statutory language after the Biden Administration took office

9. Notably, many states have differing names for these statements, including "minority impact statements," "racial impact statements," "racial and ethnic impact statements," and "demographic notes." The list of varying names grows when accounting for states that have proposed but not enacted legislation. This Article will generally employ the term "minority impact statement" except when talking specifically about a state that utilizes different terminology.

10. *See* GAHN ET AL., *supra* note 7, at 8 (demonstrating that between 2009 and 2019, there were 176 qualifying bills identified, 19 of which did not have a minority impact statement attached. There have been numerous minority impact statements drafted between publication in 2019 and 2023, with rough estimates being just below 200 impact statements drafted to date). NJJN analyzed 164 bills; 12 of the 176 qualifying bills were not included in this analysis for unknown reasons.

11. H.F. 2393, 82d Gen. Assemb., Reg. Sess. (Iowa 2008); IOWA CODE § 2.56(1) (2023).

12. H.F. 2393 § 3; IOWA CODE § 8.11(2)(b) (2020) ("'Minority persons'" includes individuals who are women, persons with a disability, African Americans, Latinos, Asians or Pacific Islanders, American Indians, and Alaskan Native Americans.").

13. *See* Ford, *supra* note 4, at 25–26.

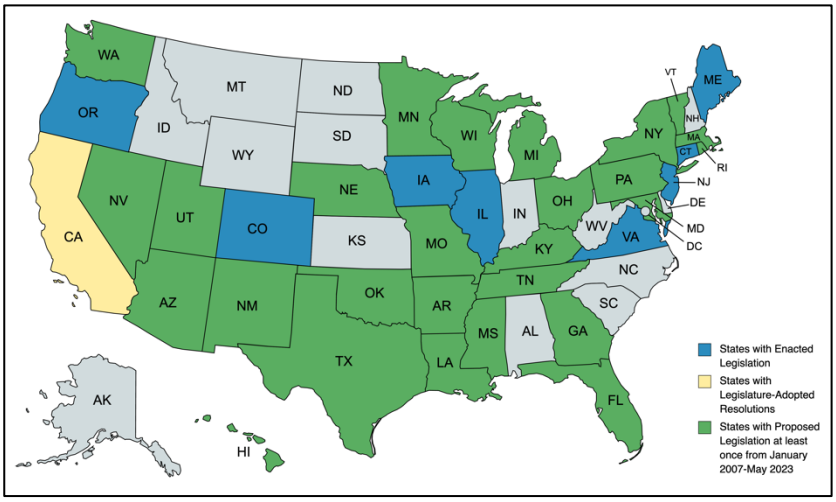
14. See *infra* Appendix for the Author's novel research and tracking of minority impact statement legislation.

15. *See* Povich, *supra* note 1.

and set forth its policy agenda, including racial and ethnic equity measures.[16]

Figure 1 illustrates the national legislative landscape as of May 2023.[17] To date, eight states have enacted language; twenty-eight states have proposed legislation at least once between 2007 and May 2023; and fourteen states have never proposed legislation on this subject matter.[18] This Article analyzes the eight states that have enacted legislation: Oregon, Colorado, Iowa, Virginia, New Jersey, Connecticut, Illinois, and Maine, signified in blue in Figure 1.

Figure 1. Minority Impact Statement Legislative Landscape[19]



To briefly summarize the relevant actions in other states that fall short of actually enacting legislation regarding minority impact statements: Maryland and Minnesota have established innovative statewide pilot programs providing for minority impact analysis

16. See *infra* Sections V.A–B for a discussion of the Biden Administration's racial and ethnic equity policy agenda. Legislative partners revealed in conversations with the Author that this policy agenda influenced the adoption of minority impact legislation.

17. From January 2020 to February 2022, the Author worked with former Iowa State Representative Wayne Ford as a legal research assistant for the Wayne Ford Equity Impact Institute. The Institute is based upon the historic language Representative Ford passed in 2008. Representative Ford tasked the Author with researching all fifty states' legislative history in proposing this language under the myriad of names noted above from 2007 to February 2022, which this Author has kept current as of May 2023.

18. *See infra* Appendix.

19. Map created by Author using mapchart.net.

procedures without a formal legislative process.[20] Florida formally partnered with Florida State University for further study on drafting procedures and data collection mechanisms; establishing a partnership like this is a trend that has caught significant interest in other states, as partnering with local colleges or universities can limit costs and/or political opposition.[21] California passed a House Resolution providing for informal processes to be implemented within interested state legislative committees; this Article analyzes language officially signed into law by Governor Gavin Newsom.[22]

The following research provides an in-depth analysis of each state's enacted language and the components that distinguish it from the others. It further provides an initial evaluation of the efficacy of each piece of legislation, which has never been published to date.[23] Lastly, it provides recommendations for statutory language based upon research and conversations with state elected officials, followed by analysis of current federal action.

II. State Legislative Overview and Analysis

Iowa became the first state in the nation to enact minority impact statement language in 2008.[24] Connecticut followed by enacting its language one month later.[25] A five-year lull followed, with Oregon becoming third in the country to enact language in 2013.[26] Another five-year lull ensued, then New Jersey's language was enacted in 2018,[27] followed by quicker enactment from the remaining four states. Colorado

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20. *See* Wood, *supra* note 8; Porter, *supra* note 2.

21. *See Assessing the Statewide Racial/Ethnic Impact of Proposed Criminal Justice Legislation in Florida*, FLA. STATE UNIV., COLL. CRIMINOLOGY & CRIM. JUST. (2019), https://criminology.fsu.edu/center-for-criminology-and-public-policy-research/center-general-projects/assessing-statewide-racialethnic-impact-proposed-criminal-justice-legislation-florida [https://perma.cc/QUM2-WG67]; Press Release, ACLU Fla., Statement on Florida Senate's Partnership with FSU's College of Criminology and Criminal Justice to Provide Racial Impact Statements for Criminal Justice Reform Bills (Nov. 5, 2019), https://www.aclufl.org/en/press-releases/aclu-florida-statement-florida-senates-partnership-fsus-college-criminology-and [https://perma.cc/N5P8-S6N7] (announcing partnership between Florida Senate and College of Criminology and Criminal Justice).

22. H.R. 39, St. Assemb., 2021–2022 Reg. Sess. (Cal. 2021) (enacted).

23. Further research regarding efficacy and specific language elements is in early stages with collaboration between the Wayne Ford Equity Impact Institute and Dr. Rebecca Fix, PhD, of Johns Hopkins University's Bloomberg School of Public Health.

24. *See* Ford, *supra* note 4, at 25.

25. H.B. 5916, Gen. Assemb., Reg. Sess. (Conn. 2008); CONN. GEN. STAT. ANN. § 2-24b (West 2023).

26. S.B. 463, 77th Leg. Assemb., 1st Sess. (Or. 2013).

27. S. 677, 218th Leg., 1st Sess. (N.J. 2018).

enacted language in 2019, becoming the fifth state in the nation to do so.[28] Most recently, Illinois,[29] Maine,[30] and Virginia[31] enacted language in 2021. Virginia was the first state in the historical South to enact minority impact statement language.

Fifteen years have passed since minority impact statement legislation first passed in 2008, and differences in key statutory language components, procedural triggers, and data capacity have resulted in Iowa drafting more than fifteen times as many minority impact statements as the other four states combined that enacted language prior to 2021.[32]

A. Enacted Bill Analysis

This Section serves to evaluate the most notable statutory language differences among each state's legislation. In-depth textual research into each state identified six main differences: (1) subject areas of legislation included; (2) mandatory versus requested procedural triggers; (3) existence of procedural limitations; (4) whether there is a statutory definition of the populations included; (5) whether specific methodologies used by drafters have to be included in the statement; and arguably the most important for efficacy, (6) data retrieval mechanisms or lack thereof.

i. Iowa

Iowa's minority impact bill came from the 2008 Iowa Legislative Session as House File 2393.[33] Concerning the first key difference between enacted bills, Iowa's statutory language applies to criminal justice bills as well as state grant applications.[34] The inclusion of state grant applications establishes a commonality with only one other enacted state: Oregon.[35] However, the procedural triggers for these subject areas establish Iowa as the nation's leader in minority impact statements.

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28. H.B. 19-1184, 72d Gen. Assemb., 1st Reg. Sess. (Colo. 2019) (describing an impact statement as a "Demographic Note"); COLO. REV. STAT. § 2-2-322.5 (2019).

29. H.B. 0158, 102nd Gen. Assemb., Reg. Sess. (Ill. 2021); 25 ILL. COMP. STAT. 83/110 (2021).

30. L.D. 2, 130th Leg., 1st Sess. (Me. 2021); ME. STAT. tit. 2, § 201 (2021).

31. H.B. 1990, Gen. Assemb., Spec. Sess. I (Va. 2021); VA. CODE ANN. § 30-19.1:13 (2022).

32. Maine, Illinois, and Virginia are not included as their statutory language was enacted in 2021, with data unavailable until the conclusion of the end of the 2022 legislative session. There is no publicly available data on how many drafts have been done in the 2022 or 2023 legislative sessions.

33. *See* H.F. 2393, 82d Gen. Assemb., Reg. Sess. (Iowa 2008).

34. *Id.* §§ 1, 3; IOWA CODE § 2.56 (2023); IOWA CODE § 8.11 (2020).

35. *See* S.B. 463, 77th Leg. Assemb., 1st Sess. (Or. 2013).

Iowa was the first of only two states that enacted mandatory trigger language.[36] This crucial mandate provides that when any bill, resolution, or amendment is proposed that adjusts penalties, provides for new penalties, or changes parole, sentencing, or probation procedures, a minority impact statement "*shall* be attached."[37] Further, the legislation requires attachment prior to debate on the floor of either chamber.[38] Therefore, a bill must be voted out of committee before the procedure triggers an impact statement to be written and attached. Identical mandatory language applies to state grant application processes: each state grant application "*shall* include a minority impact statement."[39] Significantly, Iowa places no limitation on the number of impact statements to be drafted per legislative session nor a limitation on which elected officials are allowed to request a drafted statement due to such mandatory language. Thus, Iowa is seemingly not afflicted with procedural clutter that could lead to inefficacy.

What further sets Iowa apart is that the mandatory language is coupled with a specific codified definition of "minority persons." Iowa Code Section 8.11(2)(b) includes the following populations in the definition of "minority persons": women, people with disabilities, African Americans, Latinos, Asians or Pacific Islanders, American Indians, and Alaskan Native Americans.[40] While other enacted states defer to census qualifications for minority populations or do not include a definition at all,[41] Iowa clearly sets forth the population groups to be included within the impact statements.

Another key difference between Iowa and other states is that Iowa requires the following data be included during the state grant application process: any disproportionate or unique impact on minorities; any rationale for the existence of organizations with such an impact on minority populations; and evidence of consultation with representatives of the minority population upon whom the organization would have an

36. H.F. 2393 § 1; IOWA CODE § 2.56(1) (2023); *see also* S. 677, 218th Leg., 1st Sess. § 2 (N.J. 2018) (directing the Office of Legislative Services to draft a racial and ethnic impact statement before any bill relating to criminal justice is voted on).

37. IOWA CODE § 2.56(1) (2023).

38. *Id.*

39. *Id.* § 8.11 (emphasis added).

40. *Id.* § 8.11(2)(b).

41. *See, e.g.*, S.B. 256, 2018 Reg. Sess. (Conn. 2018) (showing the Connecticut bill does not include a definition for covered populations); L.D. 2, 130th Leg., 1st Sess. (Me. 2021) (showing language including the term "historically disadvantaged racial populations"); S. 677, 218th Leg., 1st Sess. (N.J. 2018) (showing language including adults and juveniles of racial and ethnic backgrounds, but does not provide a definition); S.B. 463, 77th Leg. Assemb., 1st Sess. (Or. 2013) (does not include a definition); H.B. 1990, Gen. Assemb., Spec. Sess. I (Va. 2021) (showing language deferring to racial and ethnic disparities without identifying which populations are affected).

impact.[42] The statutory language does not require any methodologies be included in analyses on criminal justice legislation, which has led to the State's impact statements becoming less extensive over time.[43]

Finally, the Iowa legislation has key differences from other states' data collection mechanisms. Iowa's utilization of, and collaboration with, the Justice Data Warehouse (JDW) is a key element that no other state possesses. This nationally renowned warehouse allows legislators to quickly and easily pull criminal justice statistics for minority impact statements.[44] The JDW receives data and statistics from the Iowa Judicial Branch and the Iowa Department of Corrections.[45] Statistical data categories include race, ethnicity, juvenile age groups, adult age groups, offense class, offense subtypes, and judicial districts.[46] Data retrieval mechanisms such as the JDW are crucial for enacting effective impact statement language. Without them, efficacy is incredibly limited.[47]

Recently, Iowa legislators sought to expand the language of the statute. Representative Ako Abdul-Samad proposed House File 194 in the 2023 Legislative Session, which would have provided for minority impact statements to be attached to any appropriations bill before debate on the floor of either chamber.[48] The bill was referred to the Appropriations Committee, where it died via adjournment *sine die* on May 4, 2023, without a hearing.[49] If House File 194 had passed, Iowa would have been the first state to specifically include appropriations bills under minority impact statement requirements, although Colorado requires analyses of economic outcome disparities.[50]

Mandatory language, specific codified definitions for covered populations, and a clear mechanism for data collection make Iowa's

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42. H.F. 2393 §3.

43. The term "methodologies" within this context is used to detail at which data points analysts are looking at, which data collections they are using, and how they are retrieving data within larger state agency databases (such as if any filters are used or narrowed by location, age, race, etc.).

44. *Justice Data Warehouse*, IOWA DEP'T OF HUM. RTS., https://humanrights.iowa.gov/cjjp/justice-data-warehouse [https://perma.cc/H8PP-6YHJ] (Mar. 6, 2023); *see also Iowa's Statistical Analysis Center Research and Data Projects*, BUREAU OF JUST. STAT., https://bjs.ojp.gov/funding/awards/2020-86-cx-k017 [https://perma.cc/BS65-NLJ3] (detailing financial award to support criminal justice data collection).

45. IOWA DEP'T OF HUM. RTS., *supra* note 44.

46. *Id.*

47. *See, e.g.*, *infra* Section II.B.iii (detailing the limited success of Connecticut's minority impact statement legislation and connecting this failure to the lack of a centralized data repository system); *infra* notes 201–204 and accompanying text (describing the limitations of New Jersey's data retrieval mechanisms and the corresponding effect on efficacy).

48. H.F. 194, 90th Gen. Assemb., 1st Sess. (Iowa 2023).

49. *Id.*

50. *See* H.B. 19-1184, 72d Gen. Assemb., 1st Reg. Sess. (Colo. 2019); COLO. REV. STAT. § 2-2-322.5 (2019).

approach a national model and illustrate why it has published almost 200 minority impact statements since its passage in 2008.[51]

ii. Connecticut

Connecticut became the second state to enact minority impact statement language with the passage of House Bill 5933, introduced by the Judiciary Committee using the terminology "racial and ethnic impact statement."[52] House Bill 5933 applies only to criminal justice bills and, more specifically, "bills and amendments that could, if passed, increase or decrease the pretrial or sentenced population of the correctional facilities in [the] state."[53] As enacted in 2008, the Connecticut statute provided that a racial and ethnic impact statement "*shall* be prepared" with respect to these eligible bills.[54] There were no limitations on the number of statements that may be requested per legislative session.

Notably, the passage of Senate Bill 256 on June 1, 2018, expanded the statutory language to allow *any* legislator to request a drafted racial and ethnic impact statement.[55] This amendment made Connecticut the first state to require the creation of statements in such a manner. Procedural deadlines prohibit making requests "later than ten days after the deadline for the committee that introduced the bill to vote to report favorably under the joint rules," and regarding amendments, requests "shall be made at least ten days prior to the deadline for adjournment sine die of the regular session."[56] Therefore, the only trigger for production in Connecticut is via request by any member of the General Assembly within the time constraints described above.

The procedure for producing statements was initially set via Senate Joint Resolution 1 (S.J. 1), providing for the joint rules of both chambers.[57] Notably, S.J. 1 sets forth methods for data collection and other required methodologies. Its broad data collection language states that the Office of Legislative Research and the Office of Fiscal Analysis "may, in the preparation of such statement, consult with any person or agency including, but not limited to, the Judicial Branch, the Office of Policy and Management, the Department of Correction and the Connecticut

51. *See* GAHN ET AL., *supra* note 7, at 8.

52. H.B. 5933, 2008 Reg. Sess. (Conn. 2008); *see also* 2008 Conn. Legis. Serv. P.A. 08-143 (West); CONN. GEN. STAT. ANN. § 2-24b (West 2008).

53. CONN. GEN. STAT. ANN. § 2-24b(a) (West 2008).

54. *Id.* The statute also provided that the procedure for preparing and drafting these statements must be recommended by January 1, 2009.

55. S.B. 256, 2018 Reg. Sess. (Conn. 2018); *see also* 2018 Conn. Legis. Serv. P.A. 18-78 (West); CONN. GEN. STAT. ANN. § 2-24b (West 2023).

56. CONN. GEN. STAT. ANN. § 2-24b(a) (West 2023).

57. S.J. Res. No. 1, 2009 Reg. Sess. (Conn. 2009).

Sentencing Task Force."[58] Broad and unspecified language surrounding data collection very likely caused the historical lack of impact statement production in the state. However, Connecticut does delineate which pieces of information need to be included, such as:

> (A) [w]hether [a] bill would have a disparate impact on the racial and ethnic composition of the correctional facility population and an explanation of that impact, (B) that it cannot be determined whether the bill would have a disparate impact on the racial and ethnic composition of the correctional facility population, or (C) that the offices cannot determine within the time limitation specified in Rule 13(c) whether the bill would have a disparate impact . . . .[59]

Request-centered language like Connecticut's quickly became the norm, and every subsequent state-enacted statute has contained such language (besides New Jersey). This new norm explains in part why every state besides Iowa has drafted so few minority impact statements. Even further, a lack of data collection mechanisms has proven to be the other primary concern for how effective the legislation will be.[60]

iii. Oregon

After repeated attempts to enact legislation in every session since 2007,[61] former Oregon State Senator Chip Shields found success during the 2013 Legislative Session.[62] Senate Bill 463, partly titled "Racial and Ethnic Impact Statement," was finally signed into law on July 1, 2013.[63]

Senate Bill 463 provided the first expansion into additional subject areas, including for recipients of human services, along with criminal justice and state grant applications.[64] However, Oregon's statutory language also follows a request-based structure,[65] which allows limitations to persist. Oregon was the first state to require one member

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58. *Id.* at 32:945–48.

59. *Id.* at 32:948–33:956.

60. See *infra* Section II.B for a detailed discussion of the efficacy of minority impact statement legislation.

61. *See* H.B. 2933, 74th Legis. Assemb., Reg. Sess. (Or. 2007); H.B. 2352, 75th Legis. Assemb., Reg. Sess. (Or. 2009); H.B. 3086, 76th Legis. Assemb., Reg. Sess. (Or. 2011); S.B. 654, 76th Legis. Assemb., Reg. Sess. (Or. 2011); H.B. 2053, 76th Legis. Assemb., Reg. Sess. (Or. 2011).

62. S.B. 463, 77th Legis. Assemb., Reg. Sess. (Or. 2013).

63. *See 2013 Session: Senate Bill 463*, OREGONIAN: YOUR GOV'T, https://gov.oregonlive.com/bill/2013/SB463/ [https://perma.cc/G9C9-9VPP]. The January 2, 2018 sunset provision contained in Senate Bill 463 was cured by the passage of House Bill 2238. H.B. 2238, 79th Gen. Assemb., Reg. Sess. (Or. 2017); *see also* OR. REV. STAT. § 137.683–685 (2023).

64. *See* S.B. 463 §§ 1(1)(a)–(b), 1(2)(a)–(b), 4(1).

65. *Id.* § 1(2); OR. REV. STAT. § 137.683(2)(a) (2023); OR. REV. STAT. § 137.685(1)(a) (2023).

of the Legislative Assembly from each major political party to sign a written request for drafting a statement for a bill.[66]

Concerning the existence of specified definitions, Oregon provides partial definitions for the people covered under the statute. These include definitions of "criminal offender population" and "recipients of human services."[67] Notably, "recipients of human services" includes persons within the juvenile court system or receiving child welfare,[68] which makes Oregon the first state to include juveniles. Further, the statute does not define the races and ethnicities included in analysis. Statutory definitions for "minority persons" within the state grant application code section mirror those of Iowa, but nothing in the statute indicates that such definitions or verbiage also apply to the racial and ethnic impact statement language.[69]

However, Oregon added an important element for clarity: requiring the inclusion of specific data points in drafted statements. Those data points and analysis requirements are as follows:

> (3) A racial and ethnic impact statement must be impartial, simple and understandable and must include, for racial and ethnic groups for which data are available, the following:
>
> (a) An estimate of how the proposed legislation would change the racial and ethnic composition of the criminal offender population or recipients of human services;
>
> (b) A statement of the methodologies and assumptions used in preparing the estimate; and
>
> (c) If the racial and ethnic impact statement addresses the effect of proposed legislation on the criminal offender population, an estimate of the racial and ethnic composition of the crime victims who may be affected by the proposed legislation.[70]

Including this language is paramount for the production of quality impact statements that will serve as a tool for state legislators, community partners, and constituents. A lack of this language in other jurisdictions has lessened the impact of these statements over time. Concerning the data retrieval mechanisms within Oregon's statutory language, the Criminal Justice Commission—which houses a Statistical Analysis Center[71]—is tasked with drafting these statements.[72] However, there are no specific provisions in the statute for data collection.

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66. S.B. 463 § (1)(2).

67. *Id.* § 1(1).

68. *Id.* § 1(1)(b).

69. *Id.* § 4(5)(a).

70. *Id.* § 1(3)(a)–(c).

71. *See Equity Dashboard: 2015-2019 Race, Ethnicity, and Gender Demographic Dashboard*, STAT. ANALYSIS CTR. CJC RSCH. DEP'T, https://www.oregon.gov/CJC/SAC/Pages/equity-dashboard.aspx [https://perma.cc/R9UK-DVZJ].

72. S.B. 463 § 1(2), 77th Legis. Assemb., Reg. Sess. (Or. 2013).

Oregon proposed numerous amendments to expand their original language. In 2015, efforts to include all education bills[73] proved fruitless, with the amendment dying early in the committee process.[74] In 2019, legislators proposed to include sexual orientation and other demographic information as part of the legislative impact that must be considered,[75] but this bill also failed in committee.[76] During the 2021 Session, one proposed bill would have required "[a] public hearing to consider ways to eliminate or mitigate estimated negative impact on traditionally marginalized groups" for bills with a negative impact statement attached to them.[77] Another bill attempted to modify the statutory language to allow two members of the legislative assembly who are not from the same major political party to request an impact statement.[78] Both bills died in committee upon adjournment.[79] To date, House Bill 2991, if passed, would have been the first mandate requiring a legislative response to a documented minority impact.

Thus, efficacy issues, which are discussed in greater depth later in this Article, can be attributed to limiting procedural language, lack of adequate statutory definitions for people covered, and lack of specified methodologies and data points to be considered.

iv. New Jersey

On January 16, 2018, the New Jersey Legislature approved Senator Ronald Rice's proposed Senate Bill 677,[80] establishing New Jersey as the

73. *See* S.B. 633, 78th Legis. Assemb., Reg. Sess. (Or. 2015) (expanding "Oregon Criminal Justice Commission requirement to create racial and ethnic impact statement to include proposed legislation relating to education policy").

74. *See 2015 Regular Session: SB 633*, https://olis.oregonlegislature.gov/liz/2015R1/Measures/Overview/SB0633 [https://perma.cc/NNT8-78NC] (showing the bill died in committee).

75. *See* H.B. 2635, 80th Legis. Assemb., Reg. Sess. (Or. 2019) (stating that reports are necessary on how legislative changes would ensure funds are effectively serving "[l]esbian, gay, bisexual, transgender, queer and other minority gender identity communities").

76. *See 2019 Regular Session: HB 2635*, https://olis.oregonlegislature.gov/liz/2019R1/Measures/Overview/HB2635 [https://perma.cc/59ZA-PGW6] (showing the bill died in committee).

77. H.B. 2991, 81st Legis. Assemb., Reg. Sess. (Or. 2021).

78. H.B. 3270, 81st Legis. Assemb., Reg. Sess. 9:20–21 (Or. 2021); *2021 Regular Session: HB 3270*, https://olis.oregonlegislature.gov/liz/2021R1/Measures/Overview/HB3270 [https://perma.cc/NS5N-YZ8D].

79. *See 2021 Regular Session: HB 2991*, https://olis.oregonlegislature.gov/liz/2021R1/Measures/Overview/HB2991 [https://perma.cc/D8SX-P7ND]; *2021 Regular Session: HB 3270*, https://olis.oregonlegislature.gov/liz/2021R1/Measures/Overview/HB3270 [https://perma.cc/NS5N-YZ8D].

80. S.B. 677, 217th Leg., 1st Sess. (N.J. 2016).

fourth state to enact racial impact statement language.[81] Senate Bill 677 requires the use of "racial and ethnic impact statements" to criminal justice bills *and* regulations affecting sentencing.[82] New Jersey remains the only state to apply minority impact statement language to state agency rulemaking processes.

New Jersey's statutory language mirrors Iowa's language in an important regard; New Jersey so far is the only other state to have mandatory procedural triggers for impact statements, rather than producing them only upon request. New Jersey's statute *requires* an impact statement for any bill, resolution, or amendment that "may result in an increase or decrease in the State's adult and juvenile pretrial detention, sentencing, probation, or parole populations" before either chamber of the legislature may take a vote on the bill.[83] The mandatory nature of this procedural trigger is further made clear with the language that "[t]he Legislative Services Commission *shall* direct the Office of Legislative Services to prepare a racial and ethnic community criminal justice and public safety impact statement for *each* proposed criminal justice bill" that falls under the statute's requirements.[84]

Further, agencies must also issue a racial and ethnic impact statement concerning the nature and extent of the impact a proposed rule would have on pretrial detention, sentencing, probation, or parole policies; this statement is required in the initial notice of the proposed rule.[85] Finally, a section of Senate Bill 677 requiring the Criminal Sentencing and Disposition Commission to review the impact statement pursuant to the proposed rule during the public comment and meet with the agency prior to adoption if an adverse impact were reported period was amended out of the final version of the bill.[86]

Concerning codified definitions, New Jersey is the second state after Oregon to include juvenile justice language. While the statutory language specifies that proposals are to consider adults and juveniles in the criminal justice context in the drafting of impact statements,[87] no clear codified definition section exists setting forth which populations or groups of incarcerated people are covered by the statute.

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81. *See Bill S677 ScaAca w/GR (3R): Session 2016-2017*, N.J. LEG., https://njleg.state.nj.us/bill-search/2016/S677 [https://perma.cc/2TPF-HHDV] (showing that the bill was approved on January 16, 2018); N.J. STAT. ANN. §§ 2C:48B-1, B-2 (West 2018).

82. *See* § 2C:48B-1(h)–(i).

83. *See* § 2C:48B-1(g)–(h).

84. N.J. STAT. ANN. § 52:11-57.1(a) (West 2018) (emphasis added).

85. § 2C:48B-2.

86. *See* S.B. 677, § 3(b), 217th Leg., 1st Reg. Sess. (N.J. 2016).

87. § 2C:48B-1(g).

New Jersey's statute critically includes a requirement for specific information to be included in the racial and ethnic impact statements:

> [1] a statistical analysis of how the change in policy would affect racial and ethnic minorities, [2] the impact of the change in policy on correctional facilities and services for racial and ethnic minorities, [3] the estimated number of criminal and juvenile justice matters involving racial and ethnic minorities adjudicated each year, and [4] the anticipated effect of the change in policy on public safety in racial and ethnic communities in the State and for victims and potential victims in those communities.[88]

However, this methodology lacks efficacy, because New Jersey fails to provide a process for data collection to gather such information.

v. Colorado

Colorado's House Bill 19-1184, co-authored by Representatives Leslie Herod and Yadira Caraveo, marks the most unique and expansive bill enacted into law as of 2021.[89] The first aspect that makes it unique is the use of the term "demographic notes," which broadens the people included in the statements beyond the previous "minority" or "racial and ethnic" impact statement headings.[90] Colorado seeks to address broader disparities within the state, expanding covered subject areas to include "economic[s], employment, health, education, [and] public safety outcomes."[91] The statute also clearly defines specific classes of individuals beyond the scope of more traditional minority or racial and ethnic impact statement populations. Colorado's statute factors in "socioeconomic status, race, ethnicity, sex, gender identity, sexual orientation, disability, [and] geography" into disparate impact analyses.[92] Thus, this statutory language is the most expansive inclusion of subgroups within proposed or enacted measures, even after the conclusion of the 2021 Legislative Session.

Colorado uses a production-upon-request process, as previously seen in Connecticut and Oregon. Colorado goes a step further, however, by limiting the members who can request the drafting of statements to the following positions: "the speaker of the house of representatives, the minority leader of the house of representatives, the president of the senate, and the minority leader of the senate."[93] Colorado places additional limitations on requests by allowing each of these four

88. § 52:11-57.1(b).

89. H.B. 19-1184, 72d Gen. Assemb., 1st Reg. Sess. (Colo. 2019); *see also* COLO. REV. STAT. § 2-2-322.5 (2019).

90. *See* § 2-2-322.5(1)(a).

91. *Id.* § (1)(b).

92. *Id.*

93. *Id.* § (2)(b).

individuals only five requests per regular legislative session, meaning they may only collectively request a maximum of twenty statements each session.[94] To request beyond the allotted number requires the discretion of the Director of Research of the Legislative Council.[95] This numbered cap on impact statements is the first of its kind enacted. It unfortunately seems to have sparked a trend in more recent bills, including Virginia's enacted legislation in 2021.[96]

Before work can begin on creating a demographic note, yet another procedural requirement occurs once a request for such a note is made. The requestor, the sponsor of the bill, and the Legislative Council must first meet to discuss whether a note can practically be done for the proposed bill.[97] If they find that it cannot be practically done, then the requesting leader may use that request toward another bill.[98] Limiting procedures such as these may be desirable to highly partisan states, as they can help quell the ongoing fear that drafting entities will be overwhelmed or that elected officials' power may be diminished.

Lastly, Colorado's statute provides for data collection, mandating "[e]ach state department, agency, or institution" to provide information toward demographic note production.[99] While providing for timeframes established by the legislative council to produce information,[100] this statutory language is still problematic, as it necessitates a piecemeal collection of data from agencies, which are left with wide discretion in reporting data.

vi. Illinois

Illinois' "Racial Impact Note Act" began as a standalone bill introduced every year from 2016 through 2020.[101] However, in 2021, the provision was only introduced within a larger omnibus health care and

94. *Id.*
95. *Id.*
96. *See infra* Section II.A.viii.
97. § 2-2-322.5(2)(c).
98. *Id.*
99. *Id.* § (3)(a).
100. *Id.* § (3)(b).
101. *E.g.*, S.B. 1798, 99th Gen. Assemb., Reg. Sess. (Ill. 2016); S.B. 0697, 100th Gen. Assemb., Reg. Sess. (Ill. 2017); H.B. 5877, 100th Gen. Assemb., Reg. Sess. (Ill. 2018); H.B. 5194, 100th Gen. Assemb., Reg. Sess. (Ill. 2019); H.B. 4428, 101st Gen. Assemb., Reg. Sess. (Ill. 2020). In 2016, House Bill 1437, the Criminal Diversion Racial Impact Data Collection Act, was signed into law. 2016 Ill. Legis. Serv. 099-0666 (West). This law required data reporting on the "racial and ethnic composition" of "adults diverted from the criminal justice system before the filing of a court case." *Id.* § 5. The Act was repealed on December 31, 2020. *Id.* § 20.

human services bill.[102] Finally, with the signing of House Bill 158 on April 27, 2021,[103] Illinois became one of three states to enact minority impact statement legislation in the 2021 Session alone.[104]

Illinois' statutory language provides for the production of a racial impact note upon request of any member of the legislature.[105] However, Illinois's five-day production time constraints[106] are similar to, yet more stringent than, Connecticut's ten-day deadline,[107] which has proven to be ineffective.[108] To account for bills that may require a more complex analysis—and therefore would likely require more time—Illinois' statute allows for an extension to be requested by the responding agency.[109]

Illinois also specifically delineates which agencies are responsible for the production of data in various circumstances.[110] For instance, "[i]f a bill concerns arrests, convictions, or law enforcement, a statement shall be prepared by the Illinois Criminal Justice Information Authority specifying the impact on racial and ethnic minorities."[111]

Additional requirements include a procedural trigger in which the note must be prepared and produced prior to the second reading in the chamber in which it was introduced.[112] Procedural triggers such as this are crucial so that the information may be properly considered by the legislative body prior to robust floor debate. What sets Illinois apart, however, is the enumeration of what must be included within a racial impact note:

> Each racial impact note must include, for racial and ethnic minorities for which data are available: (i) an estimate of how the proposed legislation would impact racial and ethnic minorities; (ii) a statement of the methodologies and assumptions used in preparing the estimate; (iii) an estimate of the racial and ethnic composition of the population who may be impacted by the proposed legislation, including those persons who may be negatively impacted and those

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102. *See, e.g.*, H.B. 159, 102d Gen. Assemb., Reg. Sess. (Ill. 2021); H.B. 158, 102d Gen. Assemb., Reg. Sess. (Ill. 2021).

103. *See* H.B. 158; 25 ILL. COMP. STAT. 83/110 (2021).

104. Virginia and Maine also enacted legislation.

105. 25 ILL. COMP. STAT. 83/110-5 (2021).

106. *Id.* at 110-10.

107. *See supra* note 56 and accompanying text.

108. *See infra* Section II.B.iii (describing the inefficacy of Connecticut's minority impact statement legislation).

109. 25 ILL. COMP. STAT. 83/110-10(a) (2021).

110. *Id.* at 110-10(b).

111. *Id.* This section also parses when the Department of Corrections, Department of Commerce and Economic Opportunity, the Illinois Community College Board, the Illinois State Board of Education, the Illinois Board of Higher Education, or any other agency that may be affected by this Act—provided for in a catchall provision—are responsible for the production of a racial impact note. *Id.*

112. *Id.* at 110-5.

> persons who may benefit from the proposed legislation; and (iv) any other matter that a responding agency considers appropriate in relation to the racial and ethnic minorities likely to be affected by the bill.[113]

However, House Bill 158 did not provide a definition for which racial and ethnic minorities are covered under the bill. While Illinois' statutory language is concerning because of the five-day production deadline, lack of definitions for individuals covered under the statute, and the discretionary request-driven language, Illinois is the first state to require education, commerce, and economic development bills be analyzed through a racial and ethnic impact lens.[114]

vii. Maine

Representative Rachel Talbot Ross jumpstarted the 2021 Legislative Session by proposing Legislative Document 2, which provides for "racial impact statements."[115] This bill was the first time statutory language for racial and ethnic impact statements was proposed in Maine. It was enacted in the spring of 2021.[116]

What differentiates Maine from other states is that Maine's law provided for the creation of a process pilot program to study the best method of establishing racial impact statements.[117] The report regarding a racial impact statement process was submitted in December 2021 for the legislature to follow during the 2022 Legislative Session.[118] A sunset provision also applied to Maine's statutory language, however, allowing the Legislative Council to recommend expansion or elimination of racial impact statements by December 15, 2022.[119] On October 27, 2022 the 130th Legislative Council voted unanimously to recommend that the 131st Legislature continue the Racial Impact Statement Pilot Project.[120] It was recommended the following six elements be included:

> 1. That, early in the First Regular Session of the 131st Legislature, joint standing committees identify those bills for which the

113. *Id.*

114. *See id.* at 110-10(b). While Colorado's statutory language spans any subject matter area, their "demographic note" language analyzes bills under a much wider array of populations, rather than analyzing the specific impact to racial and ethnic populations. *See supra* Section II.A.v.

115. L.D. 2, 130th Leg., 1st Reg. Sess. (Me. 2021).

116. *See* ME. REV. STAT. ANN. tit. 2, § 201 (2021).

117. *See* 2021 Me. Legis. Serv. Ch. 21, Sec. 2 § 2 (West).

118. OFF. OF POL'Y & LEGAL ANALYSIS, LEGISLATIVE COUNCIL SUBCOMMITTEE TO IMPLEMENT A RACIAL IMPACT STATEMENT PROCESS PILOT (2021).

119. *See* 2021 Me. Legis. Serv. Ch. 21, Sec. 2 (West).

120. 130TH ME. STATE LEG. LEGIS. COUNCIL, LEGISLATIVE COUNCIL MEETING SUMMARY 2–3 (2022).

> committee, prior to beginning work on the bills, requests preparation of a Racial Impact Statement ("RIS") over the course of the interim;
>
> 2. That each joint standing committee that votes to request an RIS for a bill or bills transmit to the Presiding Officers the RIS request(s) in a manner to be prescribed by the Presiding Officers;
>
> 3. That a bill for which an RIS request has been approved by the Presiding Officers not be scheduled for hearings or work sessions until the RIS is completed, and be included in the Carry-Over Order passed at the end of the First Regular Session;
>
> 4. That the Executive Director identify savings in the legislative accounts for the Legislature to contract with research organizations to perform the analysis necessary to prepare the RIS for the identified and approved bills;
>
> 5. That in order to prepare RIS, research organizations with whom the Legislature contracts perform qualitative analysis by, among other methods, engaging with and eliciting input from impacted communities; and
>
> 6. That researchers performing the qualitative and quantitative analysis be authorized and encouraged to engage and communicate together and with legislators to identify and refine those avenues of inquiry that will provide information most relevant to the needs of the Legislature.[121]

The 131st Legislature was also recommended to support the introduction of legislation to clarify the Racial Impact Statement Process.[122]

While the implementation of these recommendations would enhance the current law, there are multiple reasons why Maine's legislation may still not be effective. First, the legislation does not specify which information to include within minority impact statements. Second, the only procedural trigger included is that legislators are to draft statements upon request of a legislative committee.[123] Third, proposals must produce information from various state entities in a "timely manner."[124] This provision appears to mimic Colorado's data collection language, but it does not define what a reasonable amount of time is or which state entities are included. Lastly, the limited definition provides that "racial impact statement" means "an assessment of the potential impact that legislation could have on historically disadvantaged racial populations."[125] The legislation's definition does not clearly specify whether disadvantaged ethnicities are included within this definition.

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121. *Id.* at 3.
122. *Id.*
123. ME. REV. STAT. ANN. tit. 2, § 201(2) (2021).
124. *Id.*
125. *Id.* § 1(b).

The Legislative Council's Subcommittee to Implement a Racial Impact Statement Process Pilot released a final report in December 2021 establishing specific areas for the pilot process to examine.[126] The subcommittee, in partnership with the Permanent Commission on Racial, Indigenous and Maine Tribal Populations, and the University of Maine System (hereinafter "the research team"), selected seven bills carried over from the 2021 Legislative Session for which to draft minority impact statements.[127] The analysis framework created by the research team included five different questions that minority impact statements must answer:

> 1. What problem is this policy/legislation addressing?
> 2. Is the problem the legislation is addressing one that is worse or exacerbated for historically disadvantaged racial populations?
> 3. What factors contribute to or compound racial inequities around this problem?
> 4. More specifically, what policies, institutions, or actors have shaped these inequalities, disparities, and/or disparate impacts?
> 5. If inequities are exacerbated, what actors, at what levels of influence, could reduce these inequities?[128]

The final report provided a thorough look into the thought process and considerations of the Subcommittee in expanding production requirements for racial impact statements.[129] Not only must the analysis answer these five questions, but when a conclusion is not feasible, the research team recommends including a description of limitations or barriers that impeded this conclusion and "whether relevant regional or national trends exist which may provide helpful information."[130] Including expanded explanations of both methodologies used and barriers present is an innovative approach that would bolster the effectiveness of minority impact statements by providing a greater level of detail.

viii. Virginia

House Bill 1990, authored by Delegate Lashrecse Aird, solidified Virginia as the first state in the historical South to enact "racial and ethnic impact statements."[131] Like Maine, Virginia enacted this minority impact

126. OFF. OF POL'Y & LEGAL ANALYSIS, *supra* note 118.

127. *Id.* at subd. I; L.D. 270, 130th Leg., 2d Sess. (Me. 2021); L.D. 372, 130th Leg., 2d Sess. (Me. 2021); L.D. 1574, 130th Leg., 2d Sess. (Me. 2021); L.D. 1693, 130th Leg., 2d Sess. (Me. 2021); L.D. 982, 130th Leg., 2d Sess. (Me. 2021); L.D. 1068, 130th Leg., 2d Sess. (Me. 2021); L.D. 965, 130th Leg., 2d Sess. (Me. 2021).

128. OFF. OF POL'Y & LEGAL ANALYSIS, *supra* note 118, at i–ii, 5.

129. *See id.* at 5.

130. *Id.* at 6.

131. *See* H.B. 1990, Gen. Assemb., Spec. Sess. I (Va. 2021); VA. CODE § 30-19.1:13(B).

statement legislation the first time it was proposed. Virginia racial and ethnic impact statements only apply to criminal justice bills.[132]

There are some significant procedural limitations in Virginia's statute. Namely, only the Chair of the House Committee for Courts or Justice or the Chair of the Senate Committee on the Judiciary may request a racial and ethnic impact statement.[133] Further, both of these individuals get only three requests per regular session.[134] There is neither specific language establishing what information is to be included in such statements nor definitions for which populations are covered. Similar to Colorado, state agencies are required to provide data upon request of the Joint Legislative Audit and Review Commission.[135] These agencies must "expeditiously provide" the requested data, but no exact timeframe is provided, and the exact data that needs to be collected is not specified.[136]

B. Efficacy of Minority Impact Statements

Evaluating the six key differences in the currently enacted language provides a critical foundation for analysis of each statute's efficacy.[137] The following procedural elements have led to widespread inefficacy: limitations on the number of requests that may be made; limitations as to who may request statements; requiring a formal request rather than having a mandatory procedural trigger; lack of clearly defined populations covered under the legislation; and lack of clarification on which data points need to be included for analysis.

The number of statements produced is one crucial indicator of the effectiveness of minority impact statement legislation. This Article fills a gap in previous analyses by providing data on each state's impact statement production. The data reveal that Iowa has drafted almost 200 minority impact statements from 2009 to 2019, while additional analysis needs to be done on statements filed from 2020 to 2023.[138] Connecticut, Oregon, Colorado, and New Jersey have published a total of twelve impact statements in the same time frame, nine of which came from Colorado during the 2020 through 2023 legislative sessions alone.[139]

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132. § 30-19.1:13(B).

133. *See id.*

134. *Id.* § 30-19.1:13(D).

135. *Id.* § 30-19.1:13(E).

136. *See id.*

137. The following analysis will exclude Illinois and Virginia due to the lack of publicly available data on any production history; it will also exclude Maine, as Maine is undergoing its pilot project.

138. GAHN ET AL., *supra* note 7, at 8.

139. Colorado's statutory language also provides for analysis outside of racial and ethnic populations, so not all nine statements published concerned racial or ethnic disparities.

The lag in productivity appears to be linked to a lack of legislative education on minority impact statement procedure. This lag has led to almost completely ineffective legislation in numerous states. As a result, national organizations look to Iowa as a research model,[140] with the state garnering such a robust data set from which to analyze and provide further recommendation.

i. 2020 National Juvenile Justice Network Report Analyzing Iowa's Robust Number of Minority Impact Statements

The National Juvenile Justice Network (NJJN), collaborating with the University of Iowa College of Law's Community Empowerment Law Project, used Iowa as a case study to measure the effectiveness of state minority impact statements.[141] This team reviewed every bill with an attached minority impact statement drafted by the Fiscal Services Division within the Legislative Services Agency between 2009 and 2019 to determine the degree to which the statements were impacting legislative decision-making as intended.[142] Their research categorized the statements' impact as either having a negative effect, having an unknown effect, having minimal effect, having no effect, or having a positive effect on minority populations as defined by state statute.[143] Out of 164 impact statements analyzed, NJJN found that 41 bills had a negative impact, 52 had an unknown effect, 18 had a minimal effect, 23 had no effect, 11 had a positive effect, and 19 qualified bills never had a statement attached to them.[144]

Based upon these statistics, NJJN illuminated key takeaways that should be considered in Iowa, other enacted states, and states proposing language. First, to provide for a more informed legislative body and electorate, minority impact statements should be available to all stakeholders as early in the legislative process as possible, and "preferably before lobbyists, advocates, and constituents must express support for or opposition to a bill."[145]

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140. *See, e.g.*, GAHN ET AL., *supra* note 7 (presenting NJJN's report on Iowa as a research model); ASHLEY NELLIS, THE SENT'G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 7, 10 (2021), https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf [https://perma.cc/8PDL-5CTJ] (providing the Sentencing Project's analysis of Iowa's minority impact statements).

141. *See* GAHN ET AL., *supra* note 7.

142. *Id.* at 5, 8.

143. *Id.* at 8.

144. *Id.*

145. *Id.* at 10 (finding that, due to Iowa's procedure being triggered only after a bill has been voted out of committee, there is limited information for the public to form an opinion on the matter and inform their elected representatives on their position, thus lessening the depth of discussion possible between the electorate and their elected officials).

Second, minority/racial impact statements should maintain a consistent and comprehensive analysis.[146] The research revealed that Iowa's minority impact statements began as two to three paragraphs of analysis but eroded over time to now be roughly two to three sentences in length.[147] In addition, the more recent statements limited their analysis to Black Iowans only, which excluded analysis for women, people with disabilities, and other people of color or ethnicities as provided under the Iowa Code.[148] Even further, within the ten-year time span that this study examined, 52 bills were concluded to have an unknown effect on minority populations, 31 of which were published in the 2018 and 2019 sessions alone.[149] Thus, even in a state like Iowa that has such a high production rate of minority impact statements, the extent of useful analysis or attention to quality analysis has sorely diminished over time.

The third takeaway from NJJN's study was that minority impact legislation should mandate that a bill cannot be enacted if it is determined to have a negative impact on minority communities.[150] Since minority impact statements currently serve only as tools that may be used, mostly without any mandate in place, they do not block legislation with negative impacts nor spur legislation with positive or neutral impacts; this allows demonstrably inequitable legislation to be enacted without further consideration.[151]

At the conclusion of this case study, NJJN set forth recommendations on how to ensure greater efficacy in minority impact statements. Two notable recommendations were ensuring that juveniles are included as a population of interest, and emulating New Jersey by including state agency regulations within the scope of minority impact statement requirements.[152] Recommendations regarding procedural elements that should be enumerated in model minority impact legislation included: making statements "available to the public before public committee hearings begin[;]" establishing a standardized procedure with defined impact categories for analysis (i.e., negative, positive, or no impact) to ensure meaningful and consistent statements; requiring annual reports encapsulating how many statements were produced, their respective impact categories, and how many of each category were attached to bills that were ultimately signed into law; requiring that statements include an explanation of methodology used to determine impact, such as in Oregon;

146. *Id.* at 11.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 16.
151. *Id.*
152. *Id.*

and requiring detailed and comprehensive analysis of the specific bill beyond census data on the state's general population.[153] Notably, two of NJJN's recommendations could revolutionize impact statements: prohibiting legislation with negative impacts from being enacted to ensure a mechanism for accountability and oversight; and including retroactive language to allow opportunities to determine the impact of current law versus proposed legislation.[154]

ii. Efficacy in Iowa

Again, Iowa's history with minority impact statements began with Marc Mauer and Ryan King's research piece identifying Iowa as the state with the highest ratio of Black-to-white incarceration in the country.[155] Black-to-white incarceration ratios are critical as a standardized measurement for comparing state incarceration disparities. Incarceration ratios are found by comparing the racial breakdown of prison population numbers to the general state population racial representation.[156] In 2007, when Mauer and King published their national data, Iowa's Black-to-white incarceration ratio was 13.6 to 1.[157]

By 2016, Iowa's Black-to-white incarceration ratio declined to 11 to 1—a slight but notable improvement.[158] While the drop in incarceration disparities cannot be directly connected to the passage of minority impact legislation, and although the NJJN study also noted ways in which Iowa is failing to use minority impact statements to their fullest potential, this decline "underscores minority impact statements as a tool to help educate decision makers about disparities."[159] Further, recent data from 2019 indicates Iowa's ratio is 9.3 to 1.[160] While the improvement is slow, Iowa transitioned from being the worst state in the country for disparate incarceration rates to being tied for fifth in just over a decade.[161]

Iowa's minority impact statement statute is still contentious over a decade since its enactment. In the 2021 Legislative Session, Senate File 342[162] illuminated how, through amendments, lawmakers can

153. *Id.*

154. *Id.* at 16–17.

155. MAUER & KING, *supra* note 3, at 10.

156. *See* Marc Mauer, *Incarceration Rates in an International Perspective*, OXFORD RSCH. ENCYCLOPEDIA (2017), https://doi.org/10.1093/acrefore/9780190264079.013.233 [https://perma.cc/WH6Z-QDGX].

157. MAUER & KING, *supra* note 3, at 10.

158. GAHN ET AL., *supra* note 7, at 13 (citing NELLIS, *supra* note 140).

159. *Id.*

160. NELLIS, *supra* note 140, at 10.

161. *Id.*

162. S.F. 342, 89th Gen. Assemb., Reg. Sess. (Iowa 2021).

circumvent the requirements of impact statements while avoiding accountability. Iowa law requires that:

> *Prior to debate* on the floor of a chamber of the general assembly, a correctional impact statement *shall be attached* to any bill, joint resolution, or amendment which proposes a change in the law which *creates a public offense, significantly changes an existing public offense or the penalty for an existing offense*, or changes existing sentencing, parole, or probation procedures.[163]

However, in the case of Senate File 342, this statutory procedure was avoided. Senate File 6 began as a bill pertaining to officer disciplinary actions, specifically concerning discharging or disciplining officers whose names were included on a *Brady* list.[164] The Judiciary Committee approved Senate File 6 on February 11, 2021, wherein it was renumbered Senate File 342,[165] and it passed unanimously in the Senate on March 8, 2021.[166] However, lawmakers amended the bill again in the same year to overhaul entire sections of Iowa Code including, among others, Section 723.4, which defines and provides penalties for "disorderly conduct."[167] This section was amended to add:

> 2. A person commits a serious misdemeanor when the person, without lawful authority or color of authority, obstructs any street, sidewalk, highway, or other public way, with the intent to prevent or hinder its lawful use by others.
>
> 3. A person commits an aggravated misdemeanor when the person commits disorderly conduct as described in subsection 2 and does any of the following:
>
> *a.* Obstructs or attempts to obstruct a fully controlled-access facility on a highway, street, or road in which the speed restriction is controlled by section 321.285, subsection 3, or section 321.285, subsection 5.
>
> *b.* Commits property damage.
>
> *c.* Is present during an unlawful assembly as defined in section 723.2.
>
> 4. A person commits a class "D" felony when the person commits disorderly conduct as described in subsection 2 and does any of the following:

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163. IOWA CODE § 2.56(1) (2023) (emphasis added).

164. S.F. 6, 89th Gen. Assemb., Reg. Sess. (Iowa 2021). *Brady* lists, or *Giglio* lists as they are sometimes called, are lists maintained by prosecutorial or law enforcement offices containing the names and details of law enforcement officers who have sustained incidents of untruthfulness, criminal convictions, candor issues, or some other type of issue placing their credibility into question when testifying in court.

165. *See Bill Information: S.F. 6*, IOWA LEG.: BILLBOOK, https://www.legis.iowa.gov/legislation/BillBook?ba=SF%206&ga=89 [https://perma.cc/RBG4-TZP3].

166. *See Bill Information: S.F. 342*, IOWA LEG.: BILLBOOK, https://www.legis.iowa.gov/legislation/BillBook?ba=SF%20342&ga=89 [https://perma.cc/Z5VH-EMB3].

167. *See* S-3158, 89th Gen. Assemb., Reg. Sess. (Iowa 2021) (House Amendment).

> *a.* Is present during a riot as defined in section 723.1.
>
> *b.* Causes bodily injury.
>
> 5. A person commits a class "C" felony when the person commits disorderly conduct as described in subsection 2 and the person causes serious bodily injury or death.[168]

Other statutory modifications included adding unmarked law enforcement vehicles to a statutory provision regarding eluding law enforcement,[169] and adding assaults involving a laser to Iowa Code Section 708.1.[170] Even further, enhancements to Iowa Code Section 723.1 provided for increasing riot penalties from an aggravated misdemeanor to a class "D" felony,[171] and increasing the penalty for unlawful assembly from a simple to an aggravated misdemeanor in Iowa Code Section 723.2.[172] All of the aforementioned provisions either added a new public offense or altered existing public offenses, which should have automatically triggered the production of a minority impact statement.

Iowa's minority impact statement law requires that the statement be filed prior to a bill's consideration on the floor of the originating chamber so that the data may be thoughtfully considered and help inform debate and subsequent voting on a proposed bill. Yet Senate File 342, as amended, passed the Iowa House of Representatives on April 14, 2021 by a vote of 63 yays to 30 nays with no minority impact statement filed.[173] A minority impact statement was finally filed on April 19, 2021,[174] five days after the floor debate in the House. Thus, contrary to state law,[175] there was no minority impact statement to consider prior to either debate in the House or the Senate. Incorrect application of Iowa Code Section 2.56, subsection 6, providing that a *revised* correctional impact statement shall not delay action on a bill,[176] allowed for partisan politics to circumvent state law and led to enactment despite procedural defects.[177]

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168. *Id.* § 25 (amending IOWA CODE § 723.4 (2021)).

169. *Id.* § 16 (amending IOWA CODE § 321.279 (2021)).

170. *Id.* § 19 (amending IOWA CODE § 708.1(2) (2021)).

171. *Id.* § 39 (amending IOWA CODE § 723.1 (2021)).

172. *Id.* § 40 (amending IOWA CODE § 723.2 (2021)).

173. *See* H.R. JOURNAL, 89TH GEN. ASSEMB., REG. SESS. 959 (Iowa 2021), https://www.legis.iowa.gov/docs/publications/HJNL/20210414_HJNL.pdf#page=9 [https://perma.cc/VB6U-AHXY].

174. *See* LEG. SERV. AGENCY, FISCAL NOTE: SF 342 — PUBLIC SAFETY OMNIBUS (Iowa 2021), https://www.legis.iowa.gov/docs/publications/FN/1219256.pdf [https://perma.cc/HLF8-KZ38].

175. *See* IOWA CODE § 2.56(1) (2023).

176. *Id.*

177. State Representative Mary Wolfe most clearly sets forth the issue that no original correctional impact statement was filed prior to debate on the proposed amendment creating new penalties and enhancing other penalties, as required by state law. *See House Video*, THE IOWA LEG., at 5:50 (Apr. 14, 2021),

Iowa's statute does not provide remedies for the failure to file a minority impact statement according to statutory procedures. In the case of Senate File 342, it is unclear whether the filing of a minority impact statement prior to the Senate's floor debate satisfied the state statute for purposes of challenging the bill's legality, even though an impact statement was not filed prior to the House of Representative's floor debate. Due to this uncertainty, the State needs to clarify whether the minority impact statement must be filed before the first floor debate is held on the bill.

Aside from Senate File 342 and the procedural issues it illuminated, an enacted bill from 2021 demonstrated the effectiveness of minority impact statements. Firearms omnibus bill House File 756 provided various alterations to existing acquisition and possession of firearms laws, notably removing the requirement of obtaining a permit prior to purchasing a handgun in the State of Iowa.[178] Such alteration of criminal penalties triggered the production of a minority impact statement. The fiscal note containing such analysis was published on March 16, 2021,[179] and initial floor debate in the House of Representatives occurred on March 17, 2021.[180] Date specificity is crucial for analysis, as current statutory language mandates production of a minority impact statement prior to debate on either floor of the legislature.[181] The fiscal note containing the minority impact statement was published the day before debate on the floor of the House of Representatives, thus complying with statutory procedure.

Notably, analysis from this fiscal note showed positive impacts to minority disparate incarceration rates within Divisions I and II of the bill, and Divisions III, IV, and V had no estimated impact to minority populations.[182] On April 2, 2021, Governor Reynolds signed House File 756, enacting its positive impacts to minorities and reductions in

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https://www.legis.iowa.gov/dashboard?view=video&chamber=H&clip=h2021041404230 0075&dt=2021-04-14&offset=2205&bill=SF%20342&status=i [https://perma.cc/327J-22BE]. Opposition from the moving party argued that Iowa Code section 2.56(6) prohibited the delay of a bill due to the production of a correctional impact statement. This grossly misapplies state law, in that subsection 6 pertains to the filing of *revised* correctional impact statements, not original impact statements as is the issue in this case. Therefore, misapplication of state law by partisan politics led to the unlawful debate and vote of an amendment that became enacted law.

178. *See* H.F. 756, 89th Gen. Assemb., Reg. Sess. (Iowa 2021).

179. *See* LEG. SERV. AGENCY, FISCAL NOTE: HF 756 — FIREARMS OMNIBUS (LSB1852HV) (2021), https://www.legis.iowa.gov/docs/publications/FN/1217197.pdf [https://perma.cc/UN2H-3FS8].

180. *See* Iowa Leg., *Bill Information: S.F. 342*, https://www.legis.iowa.gov/legislation/BillBook?ga=89&ba=hf756 [https://perma.cc/MWE4-WF94].

181. IOWA CODE § 2.56(1) (2023).

182. FISCAL NOTE: HF 756 — FIREARMS OMNIBUS, *supra* note 179, at 3–5.

disparity in incarceration rates.[183] This bill shows the success of minority impact statements.

While this example illustrates one successful outcome due to minority impact statement processes, the overall decline in efficiency and quality in recent years cannot be understated. A majority of recent impact statements have claimed an "unknown impact" due to insufficient data,[184] thereby decreasing their efficacy and quality analysis. Without proper data, legislators "are making decisions about legislation even though they lack critical information on a criminal bill's potential impact on minority communities, completely undermining the intent of the law."[185] Over the past decade, the quality of impact statements in Iowa has also been declining.[186] The majority of recent impact statements have consisted of merely a three-sentence conclusory paragraph.[187] This rote language often refers legislators to a "Minority Impact Statement" census memo released at the beginning of each session by the Legislative Services Assembly, but this memo is incredibly generic.[188] These declines can likely be attributed to a lack of legislative education on the purpose and use of minority impact statements as a tool, shorter analysis over time due to insufficient data, and lack of public knowledge about these statements. Notably, since a minority impact statement must be produced prior to a floor debate—and there is no centralized location where filed minority impact statements can be found—constituents do not have the time or ability to contact their elected officials and provide comment on proposed legislation before it is voted upon.

Despite decreasing efficiency, again, Iowa's incarceration disparities have improved since the enactment of minority impact statement legislation.[189] Having automatic trigger language for production of minority impact statements and access to a centralized data warehouse are likely the two most critical factors providing foundation for the success Iowa has found with reducing incarceration disparities. Automatic procedural trigger language—in Iowa, requiring production of a statement prior to floor debate in the originating chamber—is crucial

183. *See* H.F. 756, 89th Gen. Assemb., Reg. Sess. (Iowa 2021).

184. GAHN ET AL., supra note 7, at 11 ("Over the past ten years, there have been fifty-two bills with 'unknown' impact on minority communities . . . . Thirty-one of the fifty-two unknown impact statements – more than sixty percent – have been published within the past two years.").

185. *Id.* at 11–12.

186. *Id.*

187. *See id.* at 11 ("[F]rom 2009 to 2019, the length of the analysis of Iowa's minority impact statements sharply decreased from two to three paragraphs to two to three sentences.").

188. *Id.*

189. *See* sources cited *supra* notes 158–161 and accompanying text.

to eliminate politically-charged decision-making on which bills get an impact statement, as can be seen with language providing for production only upon request by legislative members. Having access to a centralized data warehouse is also crucial to eliminate lag time or fragmented data coming from various agencies. Having both automatic procedural trigger language and a centralized data warehouse informing impact statement analysis is crucial for ensuring that the quantity and the quality of produced impact statements comply with the intent to reduce disparities. While other enacted states may have mandatory language or access to data, only Iowa has both.

From the enactment of minority impact statement legislation in 2008 to 2019, Iowa improved from being the worst state for disparate racial incarceration ratios to tied for fifth.[190] During this time, it has drafted almost 200 impact statements.[191] This correlation suggests that while minority impact statements clearly cannot singlehandedly solve incarceration disparities, they are a crucial legislative tool to provide education and highlight disparities—if the right statutory components are implemented.

iii. Efficacy in Connecticut

Although Connecticut enacted minority impact statement language over a decade ago, very few statements have been produced. One of the only racial and ethnic impact statements[192] drafted in the state was attached to Substitute House Bill 6581 within the 2009 Legislative Session.[193] The bill enhanced penalties to the sale or possession of drugs near school zones, day care centers, or public housing projects.[194] However, the bill's racial and ethnic impact statement was incomplete due to insufficient data. Specifically, the insufficient data led to the boundary maps for the specified zones to not be updated in sufficient time for quality analysis to be done.[195] Having such stringent time constraints for analysis in this case led to one of the few racial and ethnic impact statements produced in Connecticut being entirely inadequate.

There is no evidence of Connecticut having a centralized repository for data collection. The only specification for data collection procedure

190. NELLIS, *supra* note 158, at 10.

191. *See* GAHN ET AL., *supra* note 7, at 8.

192. *See* CHRISTOPHER REINHART, DRUG ZONE MAPS FOR SHB 6581 RACIAL AND ETHNIC IMPACT STATEMENT (2009). https://www.cga.ct.gov/2009/rpt/2009-R-0184.htm [https://perma.cc/Z8ZA-27NF].

193. S.H.B. 6581, 2009 Reg. Sess. (Conn. 2009).

194. *Id.*

195. REINHART, *supra* note 192 ("We were not able to update these maps to show the affect of the bill's changes on individual towns within the time frame for producing the racial and ethnic impact statement.")

comes from Senate Joint Resolution 1, in that it provides that the Office of Legislative Research and the Office of Fiscal Analysis *may* consult with any person or agency.[196] However, there is no provision accounting for agency response. Such lack of data procedures, combined with insufficient time to complete helpful and meaningful analysis and ambiguous and discretionary request-centered language, are likely the driving factors behind Connecticut's dearth of minority impact statements.

iv. Efficacy in Oregon

Similarly, there have been minimal requests for a racial and ethnic impact statement in Oregon since its statute became effective in 2014.[197] During the 2020 Legislative Session, one request for production came in response to a ballot initiative—the Drug Addiction Treatment and Recovery Act—which was to appear on voter's 2020 ballots.[198]

The quality of the analysis in the impact statement for the ballot measure is notable. Consisting of a six-page analysis on methodology used to determine the impact, this report compared statistics under current law and projections under the new initiative, the reduction in incarceration among each minority population, and the projected differences in incarceration disparities for each affected charging category (misdemeanor or felony).[199] It contained statistical models and graphs to illustrate the impact of current law and the projected impact of the new law.[200] If used consistently, this extensive analysis could serve as a national model to be implemented in other jurisdictions.

However, further expansion of Oregon's data retrieval mechanism needs to be implemented to fully utilize its potential in providing quality information for impact statement analysis. Oregon tasks the Oregon Criminal Justice Commission—which houses a Statistical Analysis

196. S. J. Res. No. 1, 2009 Reg. Sess. (Conn. 2009).

197. *See* Hillary Borrud, *Oregon Lawmakers Request First-Ever Racial Impact Analysis for Drug Decriminalization Initiative*, OREGONIAN (July 25, 2020), https://www.oregonlive.com/news/2020/07/oregon-lawmakers-request-first-ever-racial-impact-analysis-for-drug-decriminalization-initiative.html [https://perma.cc/8FFA-9AV8] ("[A]fter seeking the Criminal Justice Commission analyses on 'a handful' of bills in 2015, lawmakers stopped seeking the reports, according to the commission's interim Executive Director Ken Sanchagrin. Until now, they have not requested a racial and ethnic impact analysis on a ballot measure.").

198. *See id.* (discussing Initiative Petition 44, otherwise known as the 2020 Drug Addiction and Treatment Recovery Act).

199. CRIM. JUST. COMM'N, RACIAL AND ETHNIC IMPACT STATEMENT HISTORICAL DATA (2019), https://www.oregon.gov/cjc/CJC%20Document%20Library/AdultCJSystemRacialandEthnicStatementBackground.pdf [https://perma.cc/Y8XV-7VQB].

200. *See id.* at 3–7.

Center—with drafting minority impact statements.[201] Even if the Criminal Justice Commission utilizes the statistical data at its disposal, such data only includes probation and local control intakes, in addition to prison intakes.[202] These two categories may only be filtered by county and gender; they show data for Asian/Pacific Islanders, Black Americans, Latinx people, Native Americans, and Whites.[203] No year-by-year isolated analysis is available, as the equity dashboard shows compiled data for 2015 through 2019.[204] Despite these limitations, the quality of analysis shown via the impact statement for the 2020 ballot initiative demonstrates how consequential these entities can be.

Lastly, while Oregon's statutory language requires preparation of an impact statement upon the request of one member from each major political party, there is no data on the Criminal Justice Commission's website, the Secretary of State's website, or the state legislature's website that memorializes any previous statement requests—aside from the ballot initiative request from 2020. Former Senator Lew Frederick, original co-author of the bill, has attributed the dearth of requests to a lack of education within the legislative body.[205]

v. Efficacy in New Jersey

New Jersey has also only produced one racial and ethnic impact statement since its statute was enacted in 2018.[206] Similar to Oregon,[207] this statement was drafted in relation to a proposed constitutional amendment legalizing marijuana that was a ballot measure in November 2020.[208] The primary issue is that this impact statement, while provided to legislators prior to debate, is not published anywhere on the legislature's website or elsewhere online.[209] New Jersey enacted statutory language that any impact statement on a proposed agency rule must be published in the New Jersey Register.[210] However, there is no

201. *See* OR. CRIM. JUST. COMM'N, STAT. ANALYSIS CTR., EQUITY DASHBOARD, https://www.oregon.gov/CJC/SAC/Pages/equity-dashboard.aspx [https://perma.cc/R9UK-DVZJKB8F-77RR].

202. *Id.*

203. *Id.*

204. *Id.*

205. Borrud, *supra* note 197.

206. Ashley Balcerzak, *In Two Years, NJ Wrote Only One 'Racial Impact Statement' to Study Criminal Justice Disparities*, NORTH JERSEY (Aug. 4, 2020), https://www.northjersey.com/story/news/new-jersey/2020/08/04/nj-crafted-only-one-racial-impact-statement-examine-disparities/5530310002/ [https://perma.cc/3L5A-XTBM].

207. *See supra* notes 197–198.

208. Balcerzak, *supra* note 206.

209. *See id.*

210. N.J. STAT. ANN. § 52:14B-4(a)(1) (West 2018).

such language mandating similar legislative disclosure, and thus, that impact statement is not available to the general public. Therefore, analysis into its conclusions and subsequent efficacy cannot be determined. Further, Governor Christie's veto over-broadened the six criteria of analysis so that implementation has proven near impossible.[211]

Thus, although New Jersey has mandatory trigger language, there is no centralized data collection mechanism, the mandatory data requirements are too broad to implement, and the data are not published anywhere for the public to engage with its analysis. These factors again illustrate the necessity for *both* mandatory language *and* data collection mechanisms.

vi. Efficacy in Colorado

Colorado has effectuated the most transparent and efficient disclosure system regarding drafted demographic notes. The state's legislative website brilliantly provides a page devoted to demographic notes, including a table of all notes drafted for the 2021 Legislative Session, with a search function for previous sessions.[212]

Since Colorado's legislation went into effect at the beginning of 2020, the State has produced nine demographic notes.[213] In 2020, one demographic note was produced, attached to a bill limiting mobile electronic devices while driving.[214] Within the 2021 Legislative Session, demographic notes were attached to four bills: Student Equity Education Funding Programs; Standardized Health Benefit Plan Colorado Option; Sustainability of the Transportation System; and Income Tax.[215] Demographic notes from the 2021 session were around ten to thirteen pages in length, detailing the impact to every demographic subcategory to the extent possible.[216] During the 2022 Legislative, two demographic notes were produced, both with a lengthy analysis.[217] Finally, in the 2023

211. Balcerzak, *supra* note 206.

212. *See Demographic Notes*, COLO. GEN. ASSEMB: LEGIS. COUN. STAFF., https://leg.colorado.gov/agencies/legislative-council-staff/demographic-notes [https://perma.cc/3CQ9-VPE2].

213. *Id.*

214. *Previous Session Demographic Notes*, COLO. GEN. ASSEMB.: LEGIS. COUNCIL STAFF, https://leg.colorado.gov/agencies/legislative-council-staff/previous-session-demographic-notes [https://perma.cc/UAT9-K97G]; LEG. COUNCIL STAFF, FINAL DEMOGRAPHIC NOTE FOR SB 20-065 (2020).

215. *See Previous Session Demographic Notes*, *supra* note 214.

216. *See* LEGIS. COUNCIL STAFF, FINAL DEMOGRAPHIC NOTE FOR HB 21-1311 (2021); LEGIS. COUNCIL STAFF, FINAL DEMOGRAPHIC NOTE FOR SB 21-037 (2021); LEGIS. COUNCIL STAFF, FINAL DEMOGRAPHIC NOTE FOR SB 21-260 (2021); LEGIS. COUNCIL STAFF, FINAL DEMOGRAPHIC NOTE FOR HB 21-1232 (2021).

217. *See* LEGIS. COUNCIL STAFF, DEMOGRAPHIC NOTE FOR HB 22-1064 (2022); LEGIS. COUNCIL STAFF, DEMOGRAPHIC NOTE FOR HB 22-1021 (2022).

Legislative Session, two demographic notes have been created.[218] However, these analyses were nine and eight pages in length respectively and quite detailed.[219] Colorado's dedication to quality analysis needs to be specified in any bill language moving forward.

Of the four demographic notes produced during 2021, two revealed a decrease in socioeconomic status and racial and ethnic disparities,[220] and two revealed indeterminate impact statuses due to the nature of health care variables (but still provided a detailed analysis which included all available data points).[221] Of the bills for which these four demographic notes were produced in the 2021 session, one bill detailing a decrease in disparity was enacted,[222] and the two bills providing for an indeterminate impact were enacted.[223] However, no bills detailing a negative impact were enacted, thus solidifying a more neutral efficacy.

Notably, Colorado remains the only state that provides for public comment on demographic notes, and it provides an email address for constituents to submit their public comments.[224] Colorado further provides the option to subscribe to a mailing list that sends email notifications when demographic analyses are being prepared and again when they are available for review.[225] Features like this are innovative and crucial for engaging the voter base with information about demographic notes; these features allow for opinions to be vocalized, which upholds the heartbeat of our democracy.

Overall, Colorado has produced more demographic notes in the past four years than every other enacted state combined,[226] aside from Iowa.[227] Further, Colorado provides the most detailed reports of any of the enacted states, with clear disclosure mechanisms and allowance for public involvement. Thus, although Colorado has a more expansive reach with its legislation and does not contain mandatory language, its reports

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218. *Previous Session Demographic Notes*, *supra* note 214.

219. *See* LEGIS. COUNCIL STAFF, DEMOGRAPHIC NOTE FOR HB 23-1063 (2023); LEGIS. COUNCIL STAFF, DEMOGRAPHIC NOTE FOR HB 23-1112.

220. *See* LEGIS. COUNCIL STAFF, FINAL DEMOGRAPHIC NOTE FOR HB 21-1311 (2021); LEGIS. COUNCIL STAFF, FINAL DEMOGRAPHIC NOTE FOR SB 21-037 (2021).

221. *See* LEGIS. COUNCIL STAFF, FINAL DEMOGRAPHIC NOTE FOR SB 21-260 (2021); LEGIS. COUNCIL STAFF, FINAL DEMOGRAPHIC NOTE FOR HB 21-1232 (2021).

222. *See* LEGIS. COUNCIL STAFF, FINAL DEMOGRAPHIC NOTE FOR HB 21-1311 (2021).

223. *See* LEGIS. COUNCIL STAFF, FINAL DEMOGRAPHIC NOTE FOR SB 21-260 (2021); LEGIS. COUNCIL STAFF, FINAL DEMOGRAPHIC NOTE FOR HB 21-1232 (2021).

224. *Demographic Notes*, *supra* note 212.

225. *Id.*

226. *See Previous Session Demographic Notes*, *supra* note 214; *see also Demographic Notes*, *supra* note 212 (stating the Legislative Council Staff must prepare demographic analyses for up to twenty bills every year).

227. GAHN ET AL., *supra* note 7, at 7 (noting that demographic findings are incorporated into "approximately 170 fiscal notes per year" and an annual "Minority Impact Statement" restating general census data is released every year).

are of utmost quality, and states should consider emulating Colorado moving forward.

III. Challenges and State Officials' Concerns

Four main concerns have repeatedly been raised in conversations with state officials looking to propose minority impact statement language.[228] The most pervasive concern is whether this statutory language will be effective. The National Juvenile Justice Network's study[229] and this Author's research begins the evaluation of the efficacy of minority impact statements.

Concerns surrounding a state's ability or likelihood to enact minority impact statement legislation due to the partisan politics of the state are common among state officials and stakeholders.[230] Another significant concern shared with the Author in conversations with various state officials is not just a lack of data collection mechanisms, but concerns about data collection entities in general. Lastly, state officials are hesitant over what their reactions should be if a statement concludes a negative minority impact.

Prior to 2019—when racial justice issues gained increasing attention and urgency[231]—the data show enactment of racial impact statement legislation was remarkably bipartisan. The data also show specific examples of bipartisan utilization as recently as the 2021 legislative session in jurisdictions with request-driven legislation. Finally, this Part presents and evaluates alternative methods states are turning to for data collection.

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228. The concerns identified in this section were raised repeatedly in interviews conducted by the Author with state legislators across the country.

229. *See* GAHN ET AL., *supra* note 7 (analyzing the efficacy of minority impact statements in Iowa).

230. Various state legislators expressed this inhibition to the Author during interviews. *Cf.* Ryan J. Foley, *Racial-Impact Law Has Modest Effect in Iowa*, DES MOINES REG. (Jan. 21, 2015), https://www.desmoinesregister.com/story/news/politics/2015/01/21/racial-impact-law-effect-iowa-legislature/22138465/ [https://perma.cc/23CD-HUPY] (expressing Republican Representative Chip Baltimore's concerns that impact statements can be "political tool[s]"); Elaine S. Povich, *Black Lives Matter, Pandemic Inequalities Drive Use of Racial Impact Statements in State Policy*, USA TODAY (Nov. 7, 2021), https://www.usatoday.com/story/news/nation/2021/11/07/states-consider-use-racial-impact-statements-policy/6330281001/ [https://perma.cc/XHM6-3TWT] (including critics' concerns that demographic impact statements are unnecessary, discriminatory, and unconstitutional).

231. *See, e.g.*, Audra D.S. Burch, Amy Harmon, Sabrina Tavernise & Emily Badger, *The Death of George Floyd Reignited a Movement. What Happens Now?*, N.Y. TIMES (Apr. 20, 2021) ("The moment of collective grief and anger [after George Floyd's murder in May 2020] swiftly gave way to a yearlong, nationwide deliberation on what it means to be Black in America.").

A. Partisan or Bipartisan Passage in Enacted States

A prevalent concern state legislators say they face when proposing minority impact statement legislation is that it is "too partisan" or that it will never pass in their state because "X" political party is the majority.[232] Contrarily, however, the data presented in Table 1 illustrates that Iowa, Connecticut, Oregon, New Jersey, and Maine garnered significant bipartisan support for their legislation. It was only beginning in 2019 that states such as Colorado and Virginia showed vote counts almost strictly along party lines.[233]

Table 1. Minority Impact Statement Legislation Vote Breakdown by Chamber and Political Party[234]

State	**House of Representatives / General Assembly**	**Senate**
Iowa (2008)[235]	Yes: 54 (D), 45 (R) No: 0 (D), 0 (R) Absent: 1 Abstaining: 0	Yes: 29 (D), 18 (R) No: 0 (D), 2 (R) Absent: 1 Abstaining: 0
Connecticut (2008)[236]	Yes: 94 (D), 32 (R) No: 1 (D), 10 (R) Absent: 14 Abstaining: 0	Yes: 23 (D), 13 (R) No: 0 (D), 0 (R) Absent: 0 Abstaining: 0
Connecticut (2018)[237]	Yes: 77 (D), 27 (R) No: 2 (D), 42 (R) Absent: 2 Abstaining: 0	Yes: 23 (D), 13 (R) No: 0 (D), 0 (R) Absent: 0 Abstaining: 0

232. This is a sentiment expressed by various state legislators to the Author during interviews.

233. Partisanship increased generally across a myriad of subjects during this time and through the present day when this Article is published. *See, e.g.*, PEW RSCH. CTR., IN A POLITICALLY POLARIZED ERA, SHARP DIVIDES IN BOTH PARTISAN COALITIONS (2019) (discussing broadening partisan gaps on political values generally and noting that the second widest partisan difference in 2019 involved racial attitudes).

234. Vote counts and political party affiliation compiled manually by the Author. Political party affiliation indicated as Democrat (D) or Republican (R).

235. H.F. 2393, 82d Gen. Assemb., Reg. Sess. (Iowa 2008).

236. H.B. 5916, Gen. Assemb., 2008 Reg. Sess. (Conn. 2008).

237. S.B. 256, 2018 Reg. Sess. (Conn. 2018).

Oregon (2013)[238]	Yes: 33 (D), 25 (R) No: 0 (D), 1 (R) Absent: 1	Yes: 15 (D), 9 (R) No: 1 (D), 5 (R) Absent: 0
New Jersey (2018)[239]	Yes: 50 (D), 16 (R) No: 0 (D), 3 (R) Absent: 6 Abstaining: 5	Yes: 23 (D), 13 (R) No: 0 (D), 0 (R) Absent: 4 Abstaining: 0
Colorado (2019)[240]	Yes: 41 (D), 0 (R) No: 0 (D), 23 (R) Absent: 1 Abstaining: 0	Yes: 19 (D), 1 (R) No: 0 (D), 15 (R) Absent: 0 Abstaining: 0
Illinois (2021)[241]	Yes: 72 (D), 0 (R) No: 0 (D), 41 (R) Absent: 4 Abstaining: 0	Yes: 39 (D), 2 (R) No: 0 (D), 16 (R) Absent: 2 Abstaining: 0
Maine (2021)[242]	* No Vote Breakdown Provided	Yes: 22 (D), 3 (R) No: 0 (D), 7 (R) Absent: 3 Abstaining: 0
Virginia (2021)[243]	Yes: 54 (D), 8 (R) No: 0 (D), 36 (R) Absent: 2 Abstaining: 0	Yes: 20 (D), 0 (R) No: 1 (D), 17 (R) Absent: 1 Abstaining: 0

Despite not exhibiting bipartisanship in the enactment of its legislation, Colorado illustrates bipartisanship in the use of minority impact statements. Colorado held a Democratic trifecta at the time of enactment, with Democrats holding the majority in both houses of the

238. S.B. 463, 77th Leg. Assemb., 1st Sess. (Or. 2013).
239. S. 677, 218th Leg., 1st Sess. (N.J. 2018).
240. H.B. 19-1184, 72d Gen. Assemb., 1st Reg. Sess. (Colo. 2019).
241 H.B. 158, 102d Gen. Assemb., 1st Sess. (Ill. 2021).
242. L.D. 2, 130th Leg., 1st Sess. (Me. 2021).
243. H.B. 1990, Gen. Assemb., Spec. Sess. I (Va. 2021).

state legislature and having a Democratic Governor.[244] While the Republican caucus voted strictly against this legislation,[245] their caucus has almost exclusively reaped the benefits ever since. Three out of the four demographic notes requested in the 2021 Legislative Session came from the Republican caucus, one of which provided for "Student Equity Education Funding Programs."[246] While these notes pertained to transportation, student equity, and standardized health plans, all of them projected a positive impact to varying demographic groups.[247] Thus, Colorado's request-driven language has predominantly been used by the party that strictly opposed enacting the language in the first place.

However, partisan politics in this Author's home state of Iowa should not be ignored. This partisanship notably came to light in analysis of Senate File 342 in 2021.[248] As previously noted, this bill passed in the House of Representatives without a minority impact statement attached[249] despite one being required by state law.[250] Although this incident was an example of how mandatory statutory language may be circumvented, successful passage of a firearms omnibus bill showed how implementation of this legislation does not need to be tainted by partisan politics. House File 756, a Republican-led piece of legislation, provided numerous provisions for the possession and acquisition of certain firearms,[251] which garnered a projected overall positive impact on minorities.[252] This bill garnered some bipartisan support in the House.[253] Minority impact statements are not enacted to thwart the opposing political party's agenda. They are in place to ensure that any unintended impact on minorities is considered before legislation is passed.

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244. *See* April Simpson, *New Democratic Majorities Lead to Rush of Bills — and Conflict*, PEW (July 29, 2019), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/07/29/new-democratic-majorities-lead-to-rush-of-bills-and-conflict [https://perma.cc/R8Z7-2VVC].

245. *See* HB19-1184, COLO. GEN. ASSEMB., https://leg.colorado.gov/content/hb19-1184vote5b87f8 [https://perma.cc/E47H-TTWC] (providing the vote count for H.B. 19-1184, Colorado's enacting legislation for minority impact statements).

246. House Bill 21-1232, Senate Bill 21-260, and Senate Bill 21-037 came from the Republican Caucus. *See Previous Session Demographic Notes*, *supra* note 212.

247. *See id.*

248. *See* S.F. 342, 89th Gen. Assemb., 1st Sess. (Iowa 2021).

249. *See supra* notes 162–177 and accompanying text.

250. IOWA CODE § 2.56 (2023).

251. H.F. 756, 89th Gen. Assemb., 1st Sess. (Iowa 2021).

252. *See* LEGIS. SERVS. AGENCY, FISCAL NOTE HF 756 — FIREARMS OMNIBUS 5 (2021) (outlining that all sections of the bill will have no minority impact or a positive minority impact).

253. *See* STATE OF IOWA, HOUSE JOURNAL: WEDNESDAY, MARCH 17, 2021, at 752–53 (2021) (listing the legislators who voted to pass House FIle 756, including legislators from both political parties).

Thus, while current messaging around minority impact statement legislation is inherently partisan, historically that has not always been the case. Enacting this legislation has historically been overwhelmingly bipartisan, though recent increasing political polarization may continue to undermine this bipartisanship. Further, Colorado and Iowa demonstrate how both parties benefit from enacting this kind of legislation. Minority impact statements provide additional analysis and knowledge of how legislation will affect *every* elected official's constituents, regardless of political party affiliation. Thus, minority impact statement legislation should not be viewed as a political issue, but a dedication to one's constituents that due consideration will be given to the effects of proposed legislation.

B. Data Collection and Drafting Entities

Iowa is uniquely situated by virtue of the Justice Data Warehouse (JDW).[254] The JDW provides a data collective from which criminal justice statistics may be quickly and easily pulled for minority impact statements.[255] Not all states have the luxury of this centralized data repository, and thus must rely on sources like U.S. Census data, data from the FBI, crime reports, and local police information to compile necessary data points for analysis.[256] The need to search for data in scattered locations causes concern for states wishing to implement minority impact statement legislation that do not have a data collection mechanism in place.[257]

Due to this data collection difficulty, collaboration with local universities or academic institutions to conduct the necessary data analysis is becoming more popular. Examples of this include the Florida Senate officially partnering with Florida State University to analyze and provide minority impact statements on proposed criminal justice legislation,[258] and the Maryland General Assembly partnering with Bowie State University and the University of Baltimore in a pilot program to add

254. *See Justice Data Warehouse*, IOWA DEP'T OF HUM. RTS., https://humanrights.iowa.gov/cjjp/justice-data-warehouse [https://perma.cc/H8PP-6YHJ].

255. *See id.*

256. *See, e.g.*, *Pilot Program to Examine Bills for Racial Disparity*, WMDT (Feb. 3, 2021), https://www.wmdt.com/2021/02/pilot-program-to-examine-bills-for-racial-disparity/ [https://perma.cc/7TYE-VC7M].

257. This hesitation was expressed to the Author during interviews with various legislators across the country.

258. *Assessing the Statewide Racial/Ethnic Impact of Proposed Criminal Justice Legislation in Florida*, *supra* note 21. The College of Criminology & Criminal Justice at Florida State University will be able to collect and analyze "publicly-available state demographic and criminal justice system data" to produce these reports. *Id.* at 9.

racial impact statements during the legislative process.[259] Similarly, the Nebraska State Legislature worked with Creighton University to study the feasibility of implementing racial impact statements in Nebraska.[260] The Arkansas legislature has tried to establish a partnership with the University of Arkansas-Little Rock William H. Bowen School of Law, along with the Policy Program of Hendrix College Arkansas, for data collection and production of impact statements.[261] Currently, Florida and Maryland are the only two states with official partnerships with universities to conduct data collection and analysis, and this trend will likely continue.

Mounting hesitation among elected officials also surrounds the drafting entity charged with authoring impact statements.[262] Thus, states are turning toward partnerships with local law schools or public policy academic programs to draft the impact statements themselves, not just collect and analyze the data necessary for the statements.[263] For example, the Louisiana legislatures launched a three-month pilot program in March 2022 with the Southern University Law Center to have law students help legislators prepare racial impact statements.[264] In Nebraska, the Social Sciences Data Lab at Creighton University produced four draft minority impact statements as part of the study regarding the implementation of minority impact statements.[265] For a pilot program in Maine, the legislature will work with the Permanent Commission on Racial, Indigenous and Maine Tribal Populations and the University of Maine System to conduct analyses and prepare racial impact statements.[266] However, while these partnerships may work in an initial study context, they likely will not provide longevity unless the academic institutions enter into an ongoing partnership with the state. Further, more research needs to be conducted on the efficacy of these partnerships.

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259. *Pilot Program to Examine Bills for Racial Disparity*, *supra* note 256 (noting that Bowie University's main objective in the partnership is data collection).

260. *See* SUE CRAWFORD & TONY VARGAS, LR 217 INTERIM STUDY REPORT: THE FEASIBILITY OF PREPARATION AND CONSIDERATION OF RACIAL IMPACT STATEMENTS ON LEGISLATION, app. (2020) (reporting that the Creighton University Social Sciences Data Lab relied in part upon data it collected and analyzed from the Nebraska Crime Commission and the U.S. Census).

261. *See, e.g.*, S.B. 237, 91st Gen. Assemb., 1st Sess. (Ark. 2017). This legislation died in the Arkansas House Judiciary Committee.

262. This hesitation has been expressed to the Author during interviews with state legislators across the country.

263. *See, e.g.*, *supra* note 21 and accompanying text (detailing such a partnership in Florida).

264. *Racial Impact Study Overview*, S. UNIV. L. CTR., https://www.sulc.edu/page/racialimpactstudy [https://perma.cc/8JFL-5T84]; H.R. 164, 2021 Leg. Sess. (La. 2021).

265. CRAWFORD & VARGAS, *supra* note 260, at app.

266. OFF. OF POL'Y & LEGAL ANALYSIS, LEGISLATIVE COUNCIL SUBCOMMITTEE TO IMPLEMENT A RACIAL IMPACT STATEMENT PROCESS PILOT 5 (2021).

Accordingly, elected officials must keep an eye toward which state agency will be tasked with drafting impact statements. For instance, Iowa relies upon the non-partisan Legislative Services Agency;[267] Connecticut employed the Office of Fiscal Analysis and Office of Legislative Research;[268] Oregon assigned the Oregon Criminal Justice Commission;[269] New Jersey employs their Office of Legislative Services;[270] Colorado tasked their Staff of the Legislative Council;[271] a subcommittee of Maine's Legislative Council chose to work with the Permanent Commission on Racial, Indigenous, and Maine Tribal Populations, as well as the University of Maine System, to draft impact statements during a pilot project;[272] and Virginia assigned their Joint Legislative Audit and Review Commission for their drafting needs.[273]

The primary concern with charging a state agency with drafting these statements is that there will be such an influx in statements to be drafted that it will overwhelm the agency.[274] The procedural language that the state chooses to trigger the drafting of an impact statement is imperative to assessing this concern. For instance, Iowa's legislation effectively requires that bills must first be voted out of committee before they require a minority impact statement.[275] Not all filed bills are even guaranteed a committee hearing,[276] so this is not an overwhelming

267. IOWA CODE § 2.56(3) (2023).

268. *See* OFF. OF LEG. RSCH., PUBLIC ACT SUMMARY: PA 17-78—SB 256 1.

269. OR. REV. STAT. § 137.683(2)(a) (2022).

270. *See* S. 677, 218th Leg., 1st Sess. (N.J. 2018).

271. *See* H.B. 19-1184, 72d Gen. Assemb., 1st Reg. Sess. (Colo. 2019).

272. OFF. OF POL'Y & LEGAL ANALYSIS, *supra* note 266; L.D. 2, 130th Leg., 1st Reg. Sess. (Me. 2021).

273. H.B. 1990, Gen. Assemb., Spec. Sess. I (Va. 2021).

274. This hesitation was expressed to the Author in interviews conducted with various state legislators.

275. GAHN ET AL., *supra* note 7, at 7; *see* IOWA CODE § 2.56(2)(a) (2023) ("When a committee of the general assembly reports a bill, joint resolution, or amendment to the floor, the committee shall state in the report whether a correctional impact statement is or is not required.").

276. In Iowa, all bills must be assigned a subcommittee of three members (two from the majority party and one from the minority party); however, there is no requirement to actually schedule a subcommittee meeting. *See, e.g.*, IOWA CONSTITUTIONAL AND LEGISLATIVE RULE PROVISIONS OF CONSEQUENCE TO THE DRAFTING AND STAFFING FUNCTIONS OF THE LEGAL SERVICES DIVISION OF THE LEGISLATIVE SERVICES AGENCY, at B.3.b.i (2013). Neglecting to schedule a subcommittee meeting is a common tactic used to kill bills early in the process, as this Author has witnessed in practice as a full time government agency liaison.

drafting demand. In other states, such as Maryland[277] and Nebraska,[278] every bill is guaranteed a committee hearing. These jurisdictions would not want to use legislative language that requires a statement once a bill is voted out of committee, as it could elicit an overwhelming number of impact statements to be drafted. Thus, state officials can alleviate the potential volume via the procedural language chosen in impact statement legislation.

While partnering with local academic institutions is a new and innovative occurrence, more research needs to be done to evaluate the effectiveness of this process. State officials' concerns over data collection mechanisms and overwhelming drafting work are legitimate and should be considered before any minority impact legislation is proposed.

C. Legislative Response to a Negative Impact

Conversations this Author had with various state officials showed a growing concern over whether the production of a minority impact statement with a negative impact would mean they automatically had to vote against the proposed measure. While it may not be realistic that mandates be included requiring that legislation not be passed if there is a negative impact reported, there are additional mechanisms that should be considered to provide for a more informed discussion surrounding proposed legislation with negative findings. Such mechanisms could include requiring an attached statement explaining why a certain bill was passed even though it projected a negative impact to minorities; requiring an attached minority impact statement for any eligible bill sent to the Governor; or even providing for an additional round of committee hearings to address the proposed negative impact to minority populations.

The purpose of minority impact statements is to provide legislators with a tool to address any unintended or unknown impacts to minority populations. The purpose is also to provide the public with a greater voice and consideration in their respective statehouses. Transparency, due care, and consideration of the impact on constituents are the primary focuses of this type of legislation. Therefore, these statements are a powerful tool that may be used by legislators of any party to make sure legislation is crafted and passed with educated consideration.

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277. *See The Legislative Process: How a Bill Becomes a Law*, GEN. ASSEMB., https://msa.maryland.gov/msa/mdmanual/07leg/html/proc.html#:~:text=Senate%20Standing%20Committees%20%26%20House%20Standing,33%3B%20House%20Rule%2033 [https://perma.cc/5DQE-38E3].

278. *See Committees*, NEB. LEG., https://nebraskalegislature.gov/committees/committees.php#:~:text=With%20the%20exception%20of%20a,hearing%20by%20a%20legislative%20committee [https://perma.cc/RGP6-HU6F].

IV. Recommendations

The emergence and continued progress of minority impact statements produces hope and a good foundation from which to expand. It is imperative that all states strongly consider the recommendations set forth by the National Juvenile Justice Network in their 2020 research piece out of Iowa.[279] For Iowa specifically, in addition to the recommendations contained in the NJJN case study, another recommendation is to bolster the data sets within the JDW. Further research and collaboration with the JDW is needed to form a more detailed and rich analytical process, one that actually informs legislators about the impact of the legislation they are passing.[280]

Further efficacy research needs to be conducted in Iowa, starting with an audit of all published impact statements to date, their noted impact, and where they ended up in the legislative process. Research into any bills that failed to have a minority impact statement attached would be beneficial for determining efficacy—or a lack thereof—in practice. Lastly, a retroactive evaluation comparing projected minority impact with subsequent data after enactment would provide another critical look into this language's efficacy.

Expanding legislative and community stakeholder education needs to be addressed immediately before more states begin enacting minority impact statement statutory language. Workshops with legislators, community partners, and lobbyists on what impact statements are, how they are drafted, where the data must come from, mechanisms that are feasible within their respective legislative processes, as well as mechanisms for when a statement produces a projected negative impact need to be conducted prior to proposing legislation.

After broad education, states must consider data collection mechanisms conducive to their respective jurisdictions. It cannot be left to individual state agencies to produce information at the request of the legislature, as there is too great a risk of skewed data and a muddied legislative process. To streamline the process, a centralized data warehouse like Iowa's JDW would provide the greatest benefit to states moving forward. It cannot be emphasized enough that data collection measures should be addressed in detail before minority impact statement language is proposed, otherwise it can be all but guaranteed that the statute will not be effective.

Another key recommendation is to include methodologies and specified points for analysis within each impact statement so that they do

279. *See* discussion *supra* Section II.B.i.

280. *See supra* notes 184–188 (discussing the decline in efficiency and quality of Iowa's minority impact statements).

not become bleak and unhelpful—as exemplified by recent Iowa impact statements.[281] Including methodologies and specified analyses into each point outlined in the statute provides more information to elected officials to pass the fairest and most equitable legislation possible. States should look at Oregon's[282] and Colorado's[283] drafted statements for quality examples. Colorado's statute includes more subject areas than all other enacted states, so employing identical or similar analytical measures as these demographic notes would create more quality impact statements.

Requiring public disclosure of minority impact statements would also support the original intent of this movement. Mechanisms for public disclosure and transparency would best be modeled after Colorado's state legislature website and public comment section.[284] Consistent with NJJN's recommendation, constituents should be provided ample opportunity to participate in the legislative process.[285] This level of participation requires the production and publication of impact statements earlier in the legislative process so constituents feel empowered to contact their representatives should they desire to do so.[286]

While the movement for minority impact statements is slightly over a decade old, it proves to be a slow race to enactment. It is not enough to simply get relevant language enacted into state law anymore; this legislation needs to have mechanisms for efficiency and sufficient use. States need to carefully consider each piece of the pie, starting primarily with data collection, then moving to where in the legislative process a statement needs to be triggered, measures for public disclosure, and standardized messaging that does not characterize the legislation as partisan. While minority impact statement legislation has made a significant positive impact in many states, its effectiveness can, and must, be improved.

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281. GAHN ET AL., *supra* note 7, at 12; discussion *supra* Section II.B.ii.

282. *See supra* text accompanying note 70 (discussing Oregon's minority impact legislation).

283. *See supra* discussion Section II.B.vi (discussing Colorado's minority impact legislation).

284. *See supra* note 212 and accompanying text (highlighting how Colorado's website provides a page devoted to demographic notes).

285. GAHN ET AL., *supra* note 7, at 11.

286. *See, e.g.*, *id.* (describing how Iowa requires minority impact statements after committee hearings, so the public does not have as robust of a chance to participate in the legislative process).

V. Federal Action

While this Article has focused on state action—where most of the minority impact statement activity has occurred—federal action cannot be overlooked. There are several avenues where a federal minority impact statement is critical in accomplishing equity on a national level. The Biden Administration has announced an equity agenda,[287] which is the first presidential action to be taken putting equity analysis at the forefront of federal rulemaking and legislation since the emergence of minority impact statements in 2008. This Part analyzes the executive order and its implications for federal movement on minority impact statements. Lastly, this Article conducts the first analysis of the Wayne Ford Racial Impact Statement Act of 2022, the recently proposed Congressional language on the federal level.[288]

A. The Biden Administration: Executive Order 13985

President Biden's first executive order after taking office was Executive Order 13985, "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government."[289] He stated that "[e]qual opportunity is the bedrock of American democracy," and that "[e]ntrenched disparities in our laws and public policies, and in our public and private institutions, have often denied that equal opportunity to individuals and communities."[290] Most pointedly, the directive stemming from the Biden Administration is that:

> It is therefore the policy of my Administration that the Federal Government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality. Affirmatively advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government. Because advancing equity requires a systematic approach to embedding fairness in decision-making processes, executive departments and agencies (agencies) must recognize and work to redress inequities in their policies and programs that serve as barriers to equal opportunity.[291]

Advancing equity shall be done via an assessment of the effect of agency policies on historically underserved populations—"each agency must assess whether, and to what extent, its programs and policies

287. Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021) (announcing the Administration's goal of "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government").

288. Wayne Ford Racial Impact Statement Act of 2022, H.R. 8795, 117th Cong. (2022).

289. Executive Order 13,985, 86 Fed. Reg. at 7009.

290. *Id.*

291. *Id.*

perpetuate systemic barriers to opportunities and benefits for people of other underserved groups."[292]

Specific populations were defined within the executive order. The term "equity" means "the consistent and systematic fair, just, and impartial treatment of all individuals," and this definition specifically includes "Black, Latin[x], and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color."[293] It also encompasses non-racial/ethnic populations, such as "members of religious minorities, lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality."[294] "[U]nderserved communities'' means "populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life," and this definition notes that these communities are exemplified by the list identified in the definition of equity.[295]

In his executive order, President Biden set forth a priority to identify equity assessment methods. One such process is a partnership of the Director of the Office of Management and Budget (OMB) with the heads of agencies.[296] In this partnership, the Director must (1) "study methods for assessing whether agency policies and actions create or exacerbate barriers to full and equal participation by all eligible individuals;" (2) "identify the best methods, consistent with applicable law, to assist agencies in assessing equity with respect to race, ethnicity, religion, income, geography, gender identity, sexual orientation, and disability;" and (3) "consider whether to recommend that agencies employ pilot programs to test model assessment tools and assist agencies in doing so."[297]

Following the study above—by July 20, 2021—the Director of OMB was required to deliver a report to President Biden "describing the best practices identified by the study" and providing recommendations for the expansion of those best practices across the Federal Government.[298] The findings of this report[299] are discussed in the following section.

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292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.* at 7010.
297. *Id.*
298. *Id.*
299. SHALANDA D. YOUNG, OFF. OF MGMT. & BUDGET, STUDY TO IDENTIFY METHODS TO ASSESS EQUITY: REPORT TO THE PRESIDENT 8 (2021).

The Executive Order further placed a call to action for all agencies to select a certain portion of the agency's programs and policies "for a review that will assess whether underserved communities and their members face systemic barriers in accessing benefits and opportunities available pursuant to those policies and programs."[300] The Executive Order required such a review and a report be provided to the Assistant to the President for Domestic Policy (APDP), within 200 days.[301] The report had to include the following:

> (a) Potential barriers that underserved communities and individuals may face to enrollment in and access to benefits and services in Federal programs;
>
> (b) Potential barriers that underserved communities and individuals may face in taking advantage of agency procurement and contracting opportunities;
>
> (c) Whether new policies, regulations, or guidance documents may be necessary to advance equity in agency actions and programs; and
>
> (d) The operational status and level of institutional resources available to offices or divisions within the agency that are responsible for advancing civil rights or whose mandates specifically include serving underrepresented or disadvantaged communities.[302]

While there are numerous provisions within Executive Order 13985 that lay the foundation for equitable policy making within federal agencies, Section Nine notably establishes the Equitable Data Working Group.[303] This group was established because most federal datasets were not "disaggregated by race, ethnicity, gender, disability, income, veteran status, or other key demographic variables."[304] The Equitable Data Working Group then released a report in April 2022 identifying their vision for the collection of equitable data.[305] The report made five key recommendations: (1) "make disaggregated data the norm while protecting privacy;" (2) "catalyze existing federal infrastructure to leverage underused data;" (3) "build capacity for robust equity assessment for policymaking and program implementation;" (4) "galvanize diverse partnerships across levels of government and the research community;" and (5) "be accountable to the American public."[306]

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300. Executive Order 13,985, 86 Fed. Reg. at 7010.

301. *Id.* As a result of the 200 day deadline imposed by the executive order, these reports were due Monday, August 9, 2021.

302. *Id.*

303. *Id.* at 7011.

304. *Id.*

305. ALONDRA NELSON & MARGO SCHWAB, EQUITABLE DATA WORKING GRP., A VISION FOR EQUITABLE DATA: RECOMMENDATIONS FROM THE EQUITABLE DATA WORKING GROUP 3–4 (2022).

306. *Id.* at 5, 7, 8, 10, 11.

The potential impact of these recommendations is still unfolding.[307] Even at the federal level, data collection proves to be one of the most predominant hurdles to performing substantive analyses on demographic impacts from legislation or agency action.

B. Office of Management and Budget Study of Agency Processes: Findings and Recommendations

On July 20, 2021, the Office of Management and Budget submitted its report to the Biden Administration outlining key areas of promising standards already in practice.[308] It also identified processes that need to be addressed to further the whole-Government equity charge within Executive Order 13985.[309]

As of May 2023, numerous federal departments and agencies have published Equity Action Plans.[310] While various federal agencies and organizations have employed an equity assessment tool that fits their respective missions,[311] one agency has already implemented an agency equivalent to a minority impact statement. The Department of Health and Human Services (HHS) employs Equity Impact Assessments that provide a systematic examination of how underserved populations will be affected by proposed actions or decisions.[312] Currently, HHS is the only example where this minority impact statement-style process is being employed at the federal level. While this style of assessment may not fit the processes and framework of all federal agencies, it has provided a valuable insight and opportunity for public commentary throughout the notice-and-comment stage at both the federal and state levels.[313] Therefore, more agencies should adopt similar measures.

One of the OMB's supported recommendations includes continuing "to identify methods, consistent with applicable law, to assess equity and

307. *See, e.g.*, Notice of Request for Information, 87 Fed. Reg. 54259 (Sept. 9, 2022) (providing notice of a request from the Office of Science and Technology Policy for information that will help the agency support the equitable data efforts described in Executive Order 13985 and the Equitable Data Working Group's April 2022 report).

308. YOUNG, *supra* note 299, at 4.

309. *Id.*

310. *See Advancing an Equitable Government*, PERFORMANCE.GOV, https://www.performance.gov/equity/ [https://perma.cc/8AY5-FNR2] (noting that over ninety federal agencies have submitted Equity Action Plans to the OMB). Each individual Department's Equity Action Plan, and a categorization by topic area, is available online. *See Advancing Equity and Racial Justice Through the Federal Government*, WHITEHOUSE.GOV, https://www.whitehouse.gov/equity/ [https://perma.cc/7QRS-CSNN].

311. YOUNG, *supra* note 299, at 46–48.

312. *Id.* at 46.

313. *See, e.g.*, U.S. DEP'T OF HEALTH & HUM. SERVS., HHS EQUITY ACTION PLAN 3–4 (2022) (describing the early accomplishments of HHS's Equity Action Plan).

improve programs."[314] Accomplishing this goal requires further exploration of methods to measure equity within "public policy, data science, and organizational change management" structures.[315] Most importantly, OMB recommends prioritizing investment in the "expertise, capacity, and capabilities needed to measure and advance equity through improved data collection and analysis."[316] Thus, data collection remains a top priority at both the state[317] and federal level.

C. Implications of Not Having Federal Legislation Relating to Racial Equity Data Collection : Minority Undercounting in Official 2020 Census Data

The implications of not having federal legislation relating to robust data collection on issues of racial equity is illustrated by the 2020 Census data, which shows disproportionalities in how minorities are counted. The Official 2020 Census Data showed a continued trend of undercounting Black, Latinx, and Native American people, while overcounting those who identified as white.[318] Data showed that Black or African American people alone, or in combination populations, "had a statistically significant undercount of 3.30%."[319] While statistically significant on its own, it is not statistically different from the 2010 undercount rate of 2.06%.[320] The Hispanic or Latinx population "had a statistically significant undercount rate of 4.99%", which was determined to be statistically different from the "1.54% undercount in 2010."[321] Therefore, Latinx Americans were left out of the 2020 Census at more than three times the rate of a decade earlier. On the other hand, Asian Americans had "an overcount rate of 2.62. This is statistically different from 0.00% in 2010."[322] Lastly, the non-Hispanic white population had "a statistically significant overcount rate of 1.64%," which is statistically

314. YOUNG, *supra* note 299, at 50.

315. *Id.*

316. *Id.* at 51.

317. *See supra* Section III.B (discussing the main concerns of legislators with regard to data collection).

318. Hansi Lo Wang, *The 2020 Census Had Big Undercounts of Black People, Latinos and Native Americans*, NPR (Mar. 11, 2022), https://www.npr.org/2022/03/10/1083732104/2020-census-accuracy-undercount-overcount-data-quality [https://perma.cc/5A48-E7YS].

319. Press Release, U.S. Census Bureau, Census Bureau Releases Estimates of Undercount and Overcount in the 2020 Census, (May 10, 2022), https://www.census.gov/newsroom/press-releases/2022/2020-census-estimates-of-undercount-and-overcount.html [https://perma.cc/Q9ZU-6DRS].

320. *Id.*

321. *Id.*

322. *Id.*

different from the 2010 overcount rate of 0.83%.[323] Thus, white, non-Hispanic Americans were overcounted at almost double the rate as in 2010.

Notably, this racial/ethnic undercounting was also coupled with alarming undercount rates of children. Children under the age of five showed a statistically significant undercount of 2.79% in 2020, compared to 0.72% in 2010.[324]

The 2020 Census occurred during the COVID-19 pandemic, inevitably causing difficulties in collecting census data;[325] however, many important decisions are nonetheless made based on census data. For instance, redistricting, reallocation of congressional seats, and Electoral College votes are all contingent upon census data.[326] The Census Bureau took great care to emphasize that census results are "fit to use" for such purposes.[327] However, what is perhaps most alarming is that this data is also used for "distribution of an estimated $1.5 trillion each year in federal money to communities for health care, education, transportation and other public services."[328] Without federal legislation that mandates data collection on issues of racial equity, the over and undercounting of different racial/ethnic populations may continue, perpetuating inequities in the various arenas in which census data is relied upon.

D. House Bill 8795: The Wayne Ford Racial Impact Statement Act of 2022

Congress has now taken its first official action to address these equity issues by introducing federal minority impact statement language. Representative Ritchie Torres (NY-15) introduced Congress's first minority impact statement legislation on September 9, 2022.[329] The bill is under the namesake of former Iowa Representative Wayne Ford,

323. *Id.*

324. *Id.*

325. *See, e.g.*, Ceci A. Villa Ross, Hyon B. Shin & Matthew C. Marlay, *Pandemic Impact on 2020 American Community Survey 1-Year Data*, U.S. Census Bureau: Census Blogs (Oct. 27, 2021), https://www.census.gov/newsroom/blogs/random-samplings/2021/10/pandemic-impact-on-2020-acs-1-year-data.html [https://perma.cc/FRS6-UMU3-] (discussing the impact of the COVID-19 pandemic on the collection of Census data, especially for communities of color).

326. *See, e.g.*, Hansi Lo Wang, Connie Hanzhang Jin & Zach Levitt, *Here's How The 1st 2020 Census Results Changed Electoral College, House Seats*, NPR (Apr. 26, 2021), https://www.npr.org/2021/04/26/983082132/census-to-release-1st-results-that-shift-electoral-college-house-seats [https://perma.cc/8PPY-53Z7] (discussing representative changes as a result of Census 2020 data).

327. Lo Wang, *supra* note 318.

328. *Id.*

329. Wayne Ford Racial Impact Statement Act of 2022, H.R. 8795, 117th Cong. (2022).

author of the nation's first state minority impact statement.[330] The bill currently awaits further action from the House Committee on the Judiciary.[331]

The bill requires collaboration between the Comptroller General of the United States, the Sentencing Commission, and the Administrative Office of the United States Courts in preparing minority impact assessments to Congress.[332] A procedural trigger requires that analysis of covered bills or joint resolutions be submitted prior to any consideration on the floor of either legislative body.[333] Identical analyses shall be prepared and published alongside notice-and-comment procedures prior to publication of a new rule in the Federal Register.[334]

As with state legislation, the definition section is critical for efficacy of a federal statute. House Bill 8795 defines "covered bill or joint resolution" as "a bill or joint resolution that is referred to the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary of the House of Representatives or the Subcommittee on Criminal Justice and Counterterrorism of the Committee on the Judiciary of the Senate."[335] Such a bill or joint resolution necessitates a minority impact statement if it:

> (i) establishes a new crime or offense;
>
> (ii) could increase or decrease the number of persons incarcerated in Federal penal institutions;
>
> (iii) modifies a crime or offense, or the penalties associated with a crime or offense established under current law; or
>
> (iv) modifies procedures under current law for pretrial detention, sentencing, probation, and post-prison supervision.[336]

Crucially, the definition also includes bills or joint resolutions that apply to youth or juveniles.[337]

The term "covered rule" means a rule that:

> (A) could increase or decrease the number of persons incarcerated

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330. *See Rep. Torres Introduces the Racial Impact Statement Act of 2022*, RITCHE TORRES (Sept. 9, 2022), https://ritchietorres.house.gov/posts/rep-torres-introduces-the-racial-impact-statement-act-of-2022 [https://perma.cc/V2RF-NHCS].

331. *H.R.8795 - Wayne Ford Racial Impact Statement Act of 2022*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/8795?s=1&r=4 [https://perma.cc/8F2W-WUCM].

332. H.R. 8795 § 3(a).

333. *Id.*

334. *Id.* § 3(b).

335. *Id.* § 3(g)(1)(A).

336. *Id.*

337. *Id.* Only two states, Oregon and New Jersey, have included juveniles in their statutes. *See supra* notes 68 and 88 and accompanying text. However, those states are facing other efficacy issues that preclude any analyses of whether inclusion of juveniles is having the intended effect.

> in Federal penal institutions;
>
> (B) modifies a crime or offense or the penalties associated with a crime or offense established under current law; or
>
> (C) modifies procedures under current law for pretrial detention, sentencing, probation, and post-prison supervision.[338]

A catchall provision also exists for bills or joint resolutions that are not referred to the Subcommittee on Crime, Terrorism, and Homeland Security. The provisions provides that bills or joint resolutions shall be treated as a covered bill if:

> (i) the bill or joint resolution is considered in the House of Representatives pursuant to a rule reported by the Committee on Rules; and
>
> (ii) the bill or joint resolution would have been referred to such Subcommittee upon introduction if the text of the bill or joint resolution as introduced in the House were identical to the text of the bill or joint resolution as considered in the House pursuant to the rule.[339]

This catchall provision serves as a crucial deterrent to attempting to circumvent the legislation by introducing relevant bills in other committees.

Minority impact statements require detailed impact projections on "pretrial, prison, probation, and post-prison supervision populations."[340] Such analyses must state: (1) whether there would be a negative, positive, minimal, or unknown impact on such populations, as well as if there would be no impact; (2) the impact on correctional facilities and services, including operation costs, and whether incarceration populations would increase or decrease; and (3) whether such populations would be impacted based upon "race, ethnicity, disability, gender, and sexual orientation."[341]

Fiscal impact estimates detailing potential federal "expenditures on construction and operation of correctional facilities for the current fiscal year and 5 succeeding fiscal years" must also be included.[342] Lastly, analyses of any other significant factors affecting the cost and impact of the covered bill on the criminal justice system, and "a detailed and comprehensive statement of the methodologies and assumptions" used to create the minority impact statement must be included.[343]

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338. H.R. 8795 § 3(g)(2). The definition of "covered rule" also includes youths and juveniles. *Id.*

339. *Id.* § 3(g)(1)(B).

340. *Id.* § 3(d)(1).

341. *Id.*

342. *Id.* § 3(d)(2).

343. *Id.* § 3(d)(3) and (4).

The Wayne Ford Racial Impact Statement Act of 2022 requires public availability of minority impact statements by mandating the Comptroller General publish each statement on the website of the Government Accountability Office.[344] It also mandates the sponsor of a covered bill or joint resolution to "submit such minority impact statement for publication in the Congressional Record."[345] Provisions requiring the Comptroller General to prepare an annual assessment reflecting the "cumulative effect of all relevant changes in the law,"[346] and processes allowing for a minority impact statement to be prepared upon request (rather than the automatic trigger),[347] also provide Congressional members greater flexibility and access to real-time information to keep equity at the center of our laws moving forward.

Until this legislation passes and completed minority impact statements can be analyzed, the main concern at the federal (and state) level remains data collection. The federal government retains access to the most comprehensive databases via each federal agency, but there is no acknowledgment or process for data collection within the preamble or text of the Wayne Ford Racial Impact Statement Act of 2022. Lack of data collection or agency collaboration mechanisms remains the kryptonite for effective state statutes, and that concern remains with this inaugural federal language. However, the inclusion of juveniles within covered populations presents a critical opportunity to evaluate legislation impacting one of the most vulnerable populations. Also, keeping transparency and public access at the forefront of this movement is critical for creating an engaged and informed electorate.

Conclusion

Piecemeal data and information regarding the movement for minority impact statements has led to a severe lack of knowledge surrounding the benefits, considerations, and efficacy of having enacted statutory language. A lack of centralized research and data has resulted in inaccurate analyses and a fractured national picture on the status of minority impact statement legislation. A complete history of state action, both enacted and proposed, is crucial to understanding how to move forward. Therefore, reference to the Appendix can provide valuable knowledge regarding what other states have proposed, how many times they have attempted to pass legislation, and citations to their statutory language, should states be interested in what similar jurisdictions are

344. *Id.* § 3(f)(1).
345. *Id.* § 3(f)(2).
346. *Id.* § 3(e).
347. *Id.* § 3(c).

drafting. The Appendix also provides contact information for respective state representatives filing this language across the country.

Minority impact statement legislation holds promise at both the state and federal level. A history of bipartisan support, bipartisan utilization in request-driven jurisdictions, and the slow reduction of disproportionate incarceration rates, as shown in Iowa, serves as a strong foundation from which to build upon for even greater efficacy. However, the recommendations presented throughout this Article, along with those made by the National Juvenile Justice Network, need to be closely considered by states with enacted legislation as well as states proposing legislation. The next phase needs to not only focus on expanding the number of jurisdictions using minority impact statement processes, but also on improving the provisions currently enacted to unlock the full potential of this legislation.[348]

Appendix[349]

Color-Code Key to Appendix

Enacted Legislation
No Proposed Legislation
2023 Proposed Legislation
2018–2022 Proposed Legislation
2013–2017 Proposed Legislation
2006–2012 Proposed Legislation
Enacted or Proposed House Resolution

348. To accomplish these recommendations, Wayne Ford, CEO and Director of the Wayne Ford Equity Impact Institute, provides a unique and robust skill set for accomplishing legislative goals. Author of the nation's first minority impact statement, Mr. Ford has built an institute in his name and uses the historic language enacted over a decade ago as the foundation from which to progress this movement. He and his team have compiled the most comprehensive research database surrounding any legislative action taken on this language and have been working with state and federal officials, national research institutions, and community partners to enact this legislation in more jurisdictions and expand education of this legislative tool. For more information about the Institute, please contact the Author.

349. This Article's Appendix is an updated, color-coded breakdown of each state's legislative action as of May 2023. This includes all bill numbers, which year the bill was proposed, where it ended up in the legislative process, and who brought the bill. The color-coding illustrates five-year intervals to track which time periods states have been most active. If a state proposes legislation falling within more than one five-year interval, the color code is determined based upon the most recent proposal year. A color-code key is provided at the beginning of the Appendix.

State	Legislative Action	Legislator Contact Information
Alabama	N/A	N/A
Alaska	N/A	N/A
Arizona	**2014** S.B. 1417, 51st Leg., 2d Reg. Sess. (Ariz. 2014) (died in committee) **2017** S.B. 1503, 53d Leg., 1st Reg. Sess. (Ariz. 2017) (died in committee) **2020** S.B. 1363, 54th Leg., 2d Reg. Sess. (Ariz. 2020) (died in committee) **2021** S.B. 1710, 55th Leg., 1st Reg. Sess. (Ariz. 2021) (died in committee)	Senator Juan Mendez (D) – Maricopa Email: Jmendez@azleg.gov Phone: (602) 926-4124
Arkansas	**2013** S.B. 1093, 89th Gen. Assemb., Reg. Sess. (Ark. 2013) (*sine die* adjournment) **2015** S.B. 604, 90th Gen. Assemb., Reg. Sess. (Ark. 2015) (*sine die* adjournment) **2017** S.B. 237, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) (*sine die* adjournment - fair amount of legislative action before it failed after the third reading)	Senator Joyce Elliot (D) Email: Joyce.Elliott@senate.ar.gov Phone: (501) 603-9546
California	**2021–2022** H.R. 39, 2021–2022 Reg. Sess. (Cal. 2021) (enacted on July 5, 2021) S.B. 17, 2021–2022 Reg. Sess. (Cal. 2021) (died on the inactive file Nov. 30, 2022) *The California State Interagency Team Workgroup to Eliminate Disparities and Disproportionality has also researched and established a Racial Impact Statement tool for the state to use.	Assembly Member Mike Gipson (D) Legislative Aid: Brianna Leon Email: Brianna.Leon@asm.ca.gov

State	Legislative Action	Legislator Contact Information
Colorado	**2017** H.B. 17–1191, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2017) (indefinitely postponed in Senate Finance Committee) **2019** H.B. 19-1184, 72d Gen. Assemb., 1st Reg. Sess. (Colo. 2019) (enacted – "Demographic Notes")	Representative Leslie Herod (D) – Denver Email: illia.herod.house@state.co.us Phone: (303) 866-2959 Rep. Yadira Caraveo (D) – Denver surrounding area Email: adira.caraveo.house@state.co.us Phone: (303) 866-2918 Senator Angela Williams (D) – Denver Email: angela.williams.senate@state.co.us Phone: (303) 866-4864
Connecticut	**2008** S.H.B. 5933, Gen. Assemb., Reg. Sess. (Conn. 2008) (enacted) H.B. 5916, Gen. Assemb., Reg. Sess. (Conn. 2008) **2017** S.B. 482, Gen. Assemb., Reg. Sess. (Conn. 2017) **2018** S.B. 256, Gen. Assemb., Reg. Sess. (Conn. 2018) (enacted)	Co-sponsors of S.B. 256 included: Sen. Gary A. Winfield; Sen. Kevin D. Witkos; Sen. Terry B. Gerratana; Rep. Juan R. Candelaria; Rep. Andrew M. Fleischmann; Rep. Patricia Billie Miller; Rep. Hilda E. Santiago; Sen. Kevin C. Kelly; Sen. Catherine A. Osten; Sen. Bob Duff; Sen. George S. Logan; and Sen. Mae Flexer.
Delaware	N/A	N/A
Florida	**2014** S.B. 336, Reg. Sess. (Fla. 2014) (died in Judiciary Committee) H.B. 237, Reg. Sess. (Fla. 2014) (died in Government Operations Subcommittee) **2015** H.B. 1303, Reg. Sess. (Fla. 2015) (died in Government Operations Subcommittee) **2017** H.B. 1188, Reg. Sess. (Fla. 2017) (died in Judiciary Committee)	Senator Randolph Bracy (D) – Orlando Phone: (407) 297-2045

State	Legislative Action	Legislator Contact Information
Florida	**2019** Partnership with Florida State University	
Georgia	**2023** S.R. 293, Gen. Assemb., Reg. Sess. (Ga. 2023) (died in chamber) H.B. 233, Gen. Assemb., Reg. Sess. (Ga. 2023) (died in committee)	Senator Sonja Halpern (D) - Atlanta Email: sonya.halpern@senate.ga.gov Phone: (404) 463-1351 Rep. Kim Schofield (D) – Southeast Atlanta Area Email: kim.schofield@house.ga.gov Phone: (404) 656-0298
Hawaii	**2009** H.B. 1487, 25th Leg., Reg. Sess. (Haw. 2009) (carried over to 2010 session) S.B. 560, 25th Leg., Reg. Sess. (Haw. 2009) (carried over to 2010 session)	Rep. Faye Hanohano Email: rephanohano@Capitol.hawaii.gov Phone: (808) 586-6530 Sen. Will Espero Email: senespero@capitol.hawaii.gov Phone: (808) 586-6361
Idaho	N/A	N/A
Illinois	**2011** 20 ILL. COMP. STAT. 5025/1–20 (2011) (Racial and Ethnic Impact Research Task Force enacted) **2013** H.B. 3245, 98th Gen. Assemb., Reg. Sess. (Ill. 2013) (*sine die* adjournment) **2015** S.B. 0568, 99th Gen. Assemb., Sess. (Ill. 2015) (*sine die* adjournment) **2016** H.B. 1437, 99th Gen. Assemb., Sess. (Ill. 2015) (enacted 2016) **2017** S.B. 0691, 100th Gen. Assemb., Sess. (Ill. 2017) (*sine die* adjournment) **2018** H.B. 5877, 100th Gen. Assemb., Sess. (Ill. 2018) (*sine die* adjournment)	Rep. Camille Lilly - (D) Oak Park Email: staterepcamilleylilly@gmail.com Phone: (217) 782-6400 and (773) 473-7300 Rep. Elizabeth Hernandez (D) – Cicero Email: repehernandez@yahoo.com Phone: (217) 782-8173 and (708) 222-5240 Rep. Linda Chapa LaVia (D) - Aurora Email: RepChapaLaVia@gmail.com Phone: (217) 558-1002 and (630) 270-1848

State	Legislative Action	Legislator Contact Information
Illinois	**2019** H.B. 5194, 100th Gen. Assemb., Sess. (Ill. 2019) (*sine die* adjournment) **2020** H.B. 4428, 101st Gen. Assemb., Sess. (Ill. 2020) (*sine die* adjournment) **2021** H.B. 0159, 102d Gen. Assemb., Sess. (Ill. 2021) (carried over) H.B. 0158, 102d Gen. Assemb., Sess. (Ill. 2021) (enacted) **2023** H.B. 3941, 103rd Gen. Assemb., Sess. (Ill. 2023) (referred to Rules Committee on Mar. 10, 2023)	
Indiana	N/A	N/A
Iowa	**2021** H.F. 478, 89th Gen. Assemb., Reg. Sess. (Iowa 2021) (died in the first funnel on Mar. 5, 2021) **2023** H.F. 194, 90th Gen. Assemb., Reg. Sess. (Iowa 2023) (referred to Appropriations committee)	Rep. Ako Abdul-Samad (D) - Des Moines Email: ako.abdul-samad@legis.iowa.gov Phone: (515) 281-3221
	2008 H.F. 2393, 82d Gen. Assemb., Reg. Sess. (Iowa 2008) (enacted)	Former Rep. Wayne Ford
Kansas	N/A	N/A
Kentucky	**2019** S.B. 45, Gen. Assemb., 2019 Reg. Sess. (Ky. 2019) (died in committee) **2020** S.B. 97, Gen. Assemb., 2020 Reg. Sess. (Ky. 2019) (died in committee) **2021** S.B. 155, Gen. Assemb., 2021 Reg. Sess. (Ky. 2021) (died in committee)	Sen. Gerald Neal (D) Email: Gerald.Neal@lrc.ky.gov Home phone: (502) 776-1222 Work phone: (502) 584-8500 Sen. Reginald Thomas (D) Email: Reginald.Thomas@lrc.ky.gov Phone: (502) 564-8100 ext. 608

State	Legislative Action	Legislator Contact Information
Kentucky	**2022** S.B. 103, Gen. Assemb., 2022 Reg. Sess. (Ky. 2022) (died in committee)	
Louisiana	**2021** H.R. 164, St. Leg., Reg. Sess. (La. 2021) (rejected following House floor debate June 7, 2021)	Rep. Edward "Ted" James (D) Email: james.ted@legis.la.gov Phone: (225) 343-3633
Maine	**2021** L.D. 2, 130th Leg., 1st Reg. Sess. (Me. 2021) (enacted Mar. 17, 2021) L.D. 132, 130th Leg., 1st Spec. Sess. (Me. 2021) (enacted July 15, 2021)	Rep. Rachel Talbot Ross (D) - Portland Email: Rachel.TalbotRoss@legislature.maine.gov Phone: (207) 653-3953 Rep. Craig Hickman (D) - Winthrop Email: Craig.Hickman@legislature.maine.gov Phone: (207) 377-3276
Maryland*	**2019** H.B. 1016, Gen. Assemb., Reg. Sess. (Md. 2019) (died in committee) **2020** Montgomery County begins implementing impact statements in local government actions (*see Racial Equity and Social Justice*, Economic Impact Statements, and Climate Assessments, MONTGOMERY CNTY. COUNCIL, https://www.montgomerycountymd.gov/olo/impact-statements.html [https://perma.cc/GP6S-XZ84])	Speaker of the House, Adrienne A. Jones (D) - Baltimore Co. Email: adrienne.jones@house.state.md.us Phone: (410) 655-3090 President of the Senate, Bill Ferguson (D) - Baltimore Cty. Email: bill.ferguson@senate.state.md.us Phone: (410) 841-3600 Delegate Jazz Lewis (D) – Prince George's Co. Email: jazz.lewis@house.state.md.us Phone: (410) 841-3691

State	Legislative Action	Legislator Contact Information
Maryland*	**2021** Enacted a pilot program *Maryland has not enacted legislation but has launched a pilot program for Racial Equity Impact Notes. *See Pilot Program to Examine Bills for Racial Disparity*, WMDT (Feb. 3, 2021), https://www.wmdt.com/2021/02/pilot-program-to-examine-bills-for-racial-disparity/ [https://perma.cc/7TYE-VC7M]. **2022** H.B. 1077, Gen. Assemb., Reg. Sess. (Md. 2022) (died in committee)	
Massachusetts	**2022** S. 798, 192d Gen. Ct., Reg. Sess. (Mass. 2022)	Senator Joan B. Lovely (D) - Second Essex Email: Joan.Lovely@masenate.gov Phone: (617) 722-1410
Michigan	**2020** H.B. 6477, Mich. Leg., Reg. Sess. (Mich. 2020) (died in Judiciary Committee) **2022** H.B. 6340, Mich. Leg., Reg. Sess. (Mich. 2022) (died in Appropriations Committee)	Rep. Felicia Brabec (D) Email: FeliciaBrabec@house.mi.gov Phone: (517) 373-1792
Minnesota	**2008** Sentencing Guidelines Commission began drafting "demographic statements" on legislation, though this is not a formal law **2020** S.F. 108, 91st Leg., 1st Spec. Sess. (Minn. 2020) (died in Rules and Administration committee)	Representative Jamie Long (D) - Minneapolis Email: rep.jamie.long@house.mn Phone: (651) 296-5375 Senator Senator Scott Dibble (D) - Minneapolis Email: General email form Phone: (651) 296-4191

State	Legislative Action	Legislator Contact Information
Minnesota	**2022** H.F. 754, 92d Leg., Reg. Sess. (Minn. 2022) (died in Public Safety and Criminal Justice Reform Finance and Policy committee) H.F. 2297, 92d Leg., Reg. Sess. (Minn. 2022) (carried over from 2021 Regular Session). S.F. 2081, 92d Leg., Reg. Sess. (Minn. 2022) (carried over from 2021 Regular Session) **2023** S.F. 3267, 93rd Leg., Reg. Sess. (Minn. 2023) (referred to Jobs and Economic Development committee on Apr. 14, 2023)	Senator John Marty (D) - St. Paul Email: General email form Phone: (651) 296-5645 Senator Bobby Joe Champion (D) - Minneapolis Email: sen.bobby.champion@senate.mn Phone: (651) 296-9246 Senator Kari Dziedzic (D) - Minneapolis Email: General email form Phone: (651) 296-7809
Mississippi	**2014** S.B. 2561, Miss. Leg., Reg. Sess. (Miss. 2014) (died in committee) **2015** S.B. 2499, Miss. Leg., Reg. Sess. (Miss. 2015) (died in committee) **2017** H.R. 14, Miss. Leg., Reg. Sess. (Miss. 2017) (died in committee) **2018** H.R. 7, Miss. Leg., Reg. Sess. (Miss. 2018) (died in committee) H.R. 11, Miss. Leg., Reg. Sess. (Miss. 2018) (died in committee) **2019** H.C. 51, Miss. Leg., Reg. Sess. (Miss. 2019) (died in committee) H.R. 11, Miss. Leg., Reg. Sess. (Miss. 2019) (died in committee)	Rep. Kabir Karriem (D) - Lowndes Email: kkarriem@house.ms.gov Capitol phone: (601) 359-3339 Work phone: (662) 328-3063

State	Legislative Action	Legislator Contact Information
Mississippi	**2019** H.R. 7, Miss. Leg., Reg. Sess. (Miss. 2019) (died in committee) **2020** H.R. 22, Miss. Leg., Reg. Sess. (Miss. 2020) (died in committee) H.R. 23, Miss. Leg., Reg. Sess. (Miss. 2022) (died in committee) **2021** H.R. 11, Miss. Leg., Reg. Sess. (Miss. 2021) (died in committee) **2022** H.R. 8, Miss. Leg., Reg. Sess. (Miss. 2022) (died in committee) **2023** H.R. 14, Miss. Leg., Reg. Sess. (Miss. 2023) (died in committee)	
Missouri	**2009** H.B. 309, 95th Gen. Assemb., 1st Reg. Sess. (Mo. 2009) (died in Special Standing Committee on General Laws)	Former State Senator Jamilah Nasheed (D) - St. Louis *New contact information not available
Montana	N/A	N/A
Nebraska	**2018** L.R. 458, 105th Leg., 1st Reg. Sess. (Neb. 2018) (died in special committee) **2019** L.R. 217, 106th Leg., 1st Reg. Sess. (Neb. 2019) (died in committee) **2021** LB. 657, 107th Leg., 1st Reg. Sess. (Neb. 2021) (indefinitely postponed)	Senator Tony Vargas (D) - Omaha Email: tvargas@leg.ne.gov Phone: (402) 471-2721 Senator Machaela Cavanaugh (D) - Omaha Email: mcavanaugh@leg.ne.gov Phone: (402) 471-2714 Senator Terrell McKinney (D) - Omaha Email: tmckinney@leg.ne.gov Phone: (402) 471-2612

State	Legislative Action	Legislator Contact Information
Nebraska	**2022** L.B. 814, 107th Leg., 1st Reg. Sess. (Neb. 2022) (indefinitely postponed) **2023** L.B. 54, 108th Leg., 1st Reg. Sess. (Neb. 2023) (referred to Executive Board Jan. 9, 2023)	Senator Matt Hansen (D) - Lincoln Email: mhansen@leg.ne.gov Phone: (402) 471-2610
Nevada	**2021** S.B. 302, 81st Sess. (Nev. 2021) (died in committee)	Senator Pat Spearman (D) - Las Vegas Email: Pat.Spearman@sen.state.nv.us
New Hampshire	N/A	N/A
New Jersey	**2014** S. 2053, 2014–2015 Sess. (N.J. 2014) (died after introduction) **2016** A. 3677, 2016–2017 Sess. (N.J. 2016) (died after first committee meeting, substituted by S. 677) **2018** S. 677, 2016–2017 Sess. (N.J. 2018) (introduced in the 2016 Session, enacted on Jan. 16, 2018)	Senator Ronald Rice (D) Email: general email intake form Phone: (973) 371-5665 Senator Shirley Turner (D) Email: general email intake form Phone: (609) 323-7239 Assemblyman Benjie Wimberly (D) Email: general email intake form Phone: (973) 925-7061 Senator Troy Singleton (D) Email: general email intake form Phone: (856) 234-2790 Assemblyman Jamel Holley (D) Email: general email intake form Phone: (908) 327-9119 and (908) 624-0880

State	Legislative Action	Legislator Contact Information
New Jersey		Assemblywoman Cleopatra Tucker (D) Email: general email intake form Phone: (973) 926-4320 Assemblywoman Shavonda Sumter (D) Email: general email intake form Phone: (973) 925-7063 Assemblywoman Annette Quijano (D) Email: general email intake form Phone: (908) 327-9119 and (908) 327-9119
New Mexico	**2007** H.J.M. 31, Leg., Reg. Sess. (N.M. 2007) (postponed indefinitely) **2021** S.B. 55, Leg., Reg. Sess. (N.M. 2021) (*sine die* adjournment) S.B. 81, Leg., Reg. Sess. (N.M. 2021) (*sine die* adjournment)	Senator Bill O'Neill (D) - Bernalillo County Email: oneillsd13@billoneillfornm.com Phone: (505) 450-9263 Rep. Sheryl Stapleton (D) - Benarlillo County Email: sheryl.stapleton@nmlegis.gov Phone: (505) 265-6089 Senator William Soules (D) - Doña Ana County Email: bill.soules@nmlegis.gov Phone: (575) 640-0409
New York	**2017–2018** S. 5921, St. Sen., 2017–2018 Leg. Sess. (N.Y. 2017) (referred to Investigations and Government Operations Committee) A. 7519, St. Assemb., 2017–2018 Leg. Sess. (N.Y. 2017) (companion bill to S. 5921)	Senator Kevin Parker (D) Email: parker@nysenate.gov Phone: (718) 629-6401 and (518) 455-2580

State	Legislative Action	Legislator Contact Information
New York	**2019–2020** S. 4388, St. Sen., 2019–2020 Leg. Sess. (N.Y. 2020) (referred to Investigations and Government Operations Committee) A. 3422, St. Assemb., 2019–2020 Leg. Sess. (N.Y. 2020) (companion bill to S. 4388) **2021–2022** S. 4745, St. Sen., 2021–2022 Leg. Sess. (N.Y. 2022) (carried over from 2021; referred to Investigations and Government Operations Committee) A. 4348, St. Assemb., 2021–2022 Leg. Sess. (N.Y. 2022) (carried over from 2021; referred to Investigations and Government Operations Committee) **2023–2024** S. 5690, St. Sen., 2023–2024 Leg. Sess. (N.Y. 2023) (in committee) A. 293, St. Assemb., 2023–2024 Leg. Sess. (N.Y. 2023) (in committee) (companion bill to S. 5690)	Assemblywoman Latrice Walker (D) - Email: WalkerL@nyassembly.gov Phone: (518) 455-4466 and (718) 342-1256 Senator Luis Sepúlveda (D) Email: sepulveda@nysenate.gov Phone: (518) 455-2511 and (718) 991-3161 Legislative Director Email: Anthony@nysenate.gov Director of Operations Email: royees@nysenate.gov
North Carolina	N/A	N/A
North Dakota	N/A	N/A
Ohio	**2015–2016** H.B. 519, 131st Gen. Assemb., Reg. Sess. (Ohio 2016) (died in State Government Committee) **2017–2018** H.B. 645, 132d Gen. Assemb., Reg. Sess. (Ohio 2017) (died in Criminal Justice Committee)	Rep. Stephanie Howse (D) Email: General Email Intake Form Phone: (614) 466-1414 Rep. Jeffrey Crossman (D) Email: General Email Intake Form Phone: (614) 466-3485

State	Legislative Action	Legislator Contact Information
Ohio	**2019–2020** H.B. 690, 133rd Gen. Assemb., Reg. Sess. (Ohio 2019) (died in Criminal Justice Committee) **2021–2022** H.B. 345, 134th Gen. Assemb., Reg. Sess. (Ohio 2021) (died in Criminal Justice Committee).	
Oklahoma	**2019** S.B. 253, 57th Leg., 1st Reg. Sess. (Ok. 2019) (died in Rules Committee) **2020** S.B. 1184, 57th Leg., 2d Reg. Sess. (Ok. 2020) (died in Rules Committee) **2021** S.B. 209, 58th Leg., 1st Reg. Sess. (Ok. 2021) (died in Rules Committee)	Senator George Young (D) - Oklahoma City Email: George.Young@oksenate.gov Phone: (405) 521-5531 Rep. Emily Virgin (D) - Norman Email: General Email Phone: (405) 557-7323
Oregon	**2015** S.B. 633, 78th Legis. Assemb., Reg. Sess. (Or. 2015) (died in Education Committee) **2019** H.B. 2635, 81st Legis. Assemb., Reg. Sess. (Or. 2019) (died in Judiciary Committee) **2021** H.B. 2991, 81st Legis. Assemb., Reg. Sess. (Or. 2021) (died in Rules Committee) H.B. 3270, 81st Legis. Assemb., Reg. Sess. (Or. 2021) (died in Rules committee)	Senator Lew Frederick (D) - Portland Email: Sen.LewFrederick@oregonlegislature.gov Phone: (503) 986-1722

State	Legislative Action	Legislator Contact Information
Oregon	**2022** H.B. 4107, 81st Legis. Assemb., Reg. Sess. (Or. 2022) (died in Ways and Means committee) **2007** H.B. 2933, 74th Legis. Assemb., Reg. Sess. (Or. 2007) (died in Judiciary Committee) **2009** H.B. 2352, 75th Legis. Assemb., Reg. Sess. (Or. 2009) (died in Public Safety subcommittee) **2011** H.B. 3086, 76th Legis. Assemb., Reg. Sess. (Or. 2011) (died in Human Services Committee) S.B. 654, 76th Legis. Assemb., Reg. Sess. (Or. 2011) (died in Ways and Means Committee) H.B. 2053, 76th Legis. Assemb., Reg. Sess. (Or. 2011) (died in Ways and Means Committee) **2013** H.B. 3405, 77th Legis. Assemb., Reg. Sess. (Or. 2013) (died in Rules Committee at adjournment) S.B. 463, 77th Legis. Assemb., Reg. Sess. (Or. 2013) (enacted July 1, 2013)	
Pennsylvania	**2015–2016** S.B. 424, Gen. Assemb., Reg. Sess. (Penn. 2015) (died in Judiciary Committee)	Senator Vincent Hughes (D) Email: hughes@pasenate.com Phone: (215) 879-7777 and (717) 787-7112

State	Legislative Action	Legislator Contact Information
Pennsylvania	**2017–2018** S.B. 206, Gen. Assemb., Reg. Sess. (Penn. 2017) (died in Judiciary Committee) **2019–2020** S.B. 1197, Gen. Assemb., Reg. Sess. (Penn. 2019) (died in State Government Committee) **2021–2022** S.B. 79, Gen. Assemb., Reg. Sess. (Penn. 2021) (died in State Government Committee) H.B. 1888, Gen. Assemb., Reg. Sess. (Penn. 2021) (died in Judiciary Committee) S.B. 1261, Gen. Assemb., Reg. Sess. (Penn. 2022) (died in Aging and Youth Committee) **2023–2024** S.B. 79, Gen. Assemb., Reg. Sess. (Penn. 2023) (referred to State Government Committee Jan. 19, 2023)	
Rhode Island	**2021** H.B. 6484, Gen. Assemb., Reg. Sess. (R.I. 2021) (died in State Government & Elections committee) **2022** H.B. 7735, Gen. Assemb., Reg. Sess. (R.I. 2022) (withdrawn at sponsor's request) H.B. 7736, Gen. Assemb., Reg. Sess. (R.I. 2022) (State Government & Elections committee recommended measure be held for further study)	Rep. Liana Cassar (D) Email: rep-cassar@rilegislature.gov

State	Legislative Action	Legislator Contact Information
Rhode Island	**2023** S.B. 636, Gen. Assemb., Reg. Sess. (R.I. 2023) (referred to Judiciary Committee)	
South Carolina	N/A	N/A
South Dakota	N/A	N/A
Tennessee	**2023** S.B. 0939, 113th Gen. Assemb., 1st Reg. Sess. (Tenn. 2023) (referred to State and Local Government Committee Feb. 6, 2023)	
Texas	**2009** S.B. 164, 81st Leg., Reg. Sess. (Tex. 2009) (died in Administration Committee) **2021** S.B. 108, 87th Leg., Reg. Sess. (Tex. 2021) (died in Administration Committee) (companion bill to H.B. 710) H.B. 710, 87th Leg., Reg. Sess. (died in State Affairs Committee) H.B. 1459, 87th Leg., Reg. Sess. (Tex. 2021) (died in State Affairs committee)	Rep. Jasmine Crockett (D) Email: General Email Form Phone: (512) 463-0586 Rep. Garnet Coleman (D) Email: General Email Form Phone: (512) 463-0524 and (713) 520-5355 Senator Royce West (D) Email: General Email Form Phone: (512) 463-0123 and (214) 467-0123
Utah	**2020** H.B. 224, 63rd St. Leg., Gen. Sess. (Utah 2020) (died in committee) **2021** H.B. 90, 64th St. Leg., Gen. Sess. (Utah 2021) (died in the House)	Rep. Jennifer Dailey-Provost (D) Email: jdprovost@le.utah.gov Phone: (385) 321-7827

State	Legislative Action	Legislator Contact Information
Vermont	**2019** H. 381, Gen. Assemb., Reg. Sess. (Vt. 2019) (died in Committee on Rules) **2021** H. 247, Gen. Assemb., Reg. Sess. (Vt. 2021) (died in Committee on Government Operations)	Rep. Barbara Rachelson (D) - Chittenden Email: brachelson@leg.state.vt.us Phone: (802) 828-2228 Rep. Kevin "Coach" Christie (D) - Hartford Email: kchristie@leg.state.vt.us Phone: (802) 828-2228
Virginia	**2021** H.B. 1990, Gen. Assemb., Spec. Sess. I (Va. 2021) (signed by Governor Mar. 18, 2021)	Del. Lashrecse D. Aird (D) Email: DelLAird@house.virginia.gov Phone: (804) 698-1063 Additional Sponsors: Del. Hala S. Ayala (D); Del. Lamont Bagby (D); Del. Jeffrey M. Bourne (D); Del. Betsy B. Carr (D); Del. Elizabeth R. Guzman (D); Del. Dan I. Helmer (D); Del. Mark L. Keam (D); Del. Kaye Kory (D); Del. Mark H. Levine (D); Del. Delores L. McQuinn (D); Del. Marcia S. "Sia" Price (D); Del. Sam Rasoul (D); and Del. Ibraheem S. Samirah (D).
Washington	**2015–2016** S.B. 5752, H.B. 2076, St. Leg., 2015–2016 Reg. Sess. (Wash. 2015) (died in Government Operations & Security) H.B. 2076, St. Leg., 2015–2016 Reg. Sess. (Wash. 2016) (died in State Government) H.B. 2376, St. Leg., 2015–2016 Reg. Sess. (Wash. 2016) (Section 125 within Budget Bill has impact statement language)	Rep. My-Linh Thai (D) Email: my-linh.thai@leg.wa.gov Phone: (206) 333-4107 Rep. Gerry Pollet Email: gerry.pollet@leg.wa.gov Phone: (206) 307-0409

State	Legislative Action	Legislator Contact Information
Washington	**2017–2018** S.B. 5588, St. Leg., 2017–2018 Reg. Sess. (Wash. 2017) **2021–2022** S.B. 5274 , St. Leg., 2021–2022 Reg. Sess. (Wash. 2021) H.B. 1264, St. Leg., 2021–2022 Reg. Sess. (Wash. 2021) (introduced in 2021 Regular Session, reintroduced and retained in 2022 Regular Session)	Sen. Bob Hasegawa (D) Email: bob.hasegawa@leg.wa.gov Phone: (360) 786-7616 Sen. Jeannie Darneille (D) Email: j.darneille@leg.wa.gov Phone: (360) 786-7652
West Virginia	N/A	N/A
Wisconsin	**2013–2014** A.B. 752, 2013–2014 St. Leg., Reg. Sess. (Wis. 2014) (*sine die* adjournment) S.B. 538, 2013–2014 St. Leg., Reg. Sess. (Wis. 2014) (*sine die* adjournment) **2015–2016** A.B. 260, 2015–2016 St. Leg., Reg. Sess. (Wis. 2016) (*sine die* adjournment) S.B. 172, 2015–2016 St. Leg., Reg. Sess. (Wis. 2016) (*sine die* adjournment)	Senator Tim Carpenter (D) - Milwaukee Email: Sen.Carpenter@legis.wisconsin.gov Phone: (608) 266-8535
Wyoming	N/A	N/A

Litigating Innocence: Why Systemic Reforms Are Needed to Exonerate Innocent, *Pro Se* Individuals

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Introduction

Thanks to the rise in official exonerations since the 1980s and the work of organizations like the Innocence Project[1] and the National Registry of Exonerations,[2] no one can, in good faith, deny that innocent people are wrongfully convicted and imprisoned in the United States. Some studies even estimate that as many as 5–15% of convictions are wrongful, meaning thousands of individuals in the United States are factually innocent yet facing incarceration with the lasting and devastating effects of a prison sentence.[3]

Despite this growing awareness, only 3,250 official exonerations have occurred since 1989.[4] For decades, the "Great Writ"—the writ of federal habeas corpus—provided a mechanism through which innocent persons could overturn unlawful convictions by state courts.[5] However, federal legislation passed in 1996, known as the Antiterrorism and

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1. The Innocence Project represents wrongfully convicted individuals and works to free innocent people. *About*, THE INNOCENCE PROJECT, https://www.innocenceproject.org/about/ [perma.cc/9WP5-T34K]. The organization also completes work to prevent wrongful convictions from happening. *Id.*

2. The National Registry of Exonerations collects, tracks, and provides information about exonerations of criminal defendants across the United States. See *Our Mission*, THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/mission.aspx [perma.cc/W25M-PR3R], for more information.

3. Stephanie Roberts Hartung, *Missing the Forest for the Trees: Federal Habeas Corpus and the Piecemeal Problem in Actual Innocence Cases*, 10 STAN. J.C.R. & C.L. 55, 73 (2014).

4. Dustin Cabral, *Exonerations by State*, THE NAT'L REGISTRY OF EXONERATIONS (Jan. 9, 2023), http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx [perma.cc/J9US-8NJH].

5. For a discussion on the history of habeas corpus in the United States, see Lynn Adelman, *Who Killed Habeas Corpus*, DISSENT MAG. (2018), https://www.dissentmagazine.org/article/who-killed-habeas-corpus-bill-clinton-aedpa-states-rights [perma.cc/LKQ3-K98M].

Effective Death Penalty Act (AEDPA),[6] combined with narrow judicial interpretations of that statute, have led many to conclude that the "Great Writ is dead."[7]

For factually innocent defendants, at least, that seems to be the case.[8] Federal habeas corpus is no longer the saving grace through which wrongfully convicted people can hope to obtain release. Prior to AEDPA's enactment, a prisoner was ultimately released in 1.8% of total habeas corpus cases.[9] However, more recently, a 2012 study showed that in non-capital cases, federal courts granted habeas corpus release in only 0.82% of cases.[10] In particular, *pro se* defendants face the greatest obstacles in proving their innocence and obtaining relief, often having to reinvestigate decades-old cases and file complicated legal appeals entirely on their own.[11]

As the federal courts have effectively closed their doors to innocent, *pro se* defendants, states have attempted to create mechanisms to address the issue of wrongful convictions.[12] Unfortunately, the number of individuals able to access relief barely scratches the surface of innocent persons behind bars.[13]

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6. 28 U.S.C. § 2254.

7. *E.g.*, Gilbert v. United States, 640 F.3d 1293, 1336 (11th Cir. 2011) (Hill, J., dissenting) (discussing how a defendant's sentence was upheld due to procedural reasons, despite the court acknowledging that his sentence was enhanced in error).

8. Factually innocent defendants means those who factually did not commit the crimes for which they are convicted, rather than legally innocent defendants, who may have unjustified, extreme, or erroneous sentences. While the current state of post-conviction proceedings harms both types of defendants, for the purposes of this Article, the Author focuses on factually innocent defendants.

9. Diane P. Wood, *The Enduring Challenges for Habeas Corpus*, 95 NOTRE DAME L. REV. 1809, 1821 n.85 (2020). Most of these successes were from death penalty cases. *See* Hartung, *supra* note 3, at 69.

10. Wood, *supra* note 9, at 820 n.76.

11. This Article focuses on *pro se* individuals. Within the context of this Article, *pro se* refers to those who may have had counsel at trial or on direct appeal but lack representation for state post-conviction proceedings and federal habeas appeals. This Article focuses on these unrepresented individuals because post-conviction and habeas appeals are usually the first time where a defendant may introduce evidence beyond the trial record. Thus, they are forced to reinvestigate their cases on their own. This Article also largely refers to these individuals as "defendants" regardless of the current procedural posture of their cases.

12. Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 656 (2005) (discussing new state statutes that allow for post-conviction testing of biological evidence in innocence cases); *see also* Justin Brooks, Alexander Simpson & Paige Kaneb, *If Hindsight is 20/20, Our Justice System Should Not Be Blind to New Evidence of Innocence: A Survey of Post-Conviction New Evidence Statutes and a Proposed Model*, 79 ALB. L. REV. 1045 (2016) (discussing states, such as California, with statutes that allow for convictions to be overturned based on new evidence).

13. *Compare* Hartung, *supra* note 3, at 72 (estimating that up to 15% of convictions are wrongful convictions of the innocent), *with* Cabral, *supra* note 4 (reporting only just over

This Article examines the impossible circumstances *pro se* defendants face when trying to prove their innocence through federal and state post-conviction proceedings. In particular, it focuses on the challenges they face in developing evidence of their innocence and finding a court that will allow them to present it. Furthermore, this Article examines proposed solutions to address wrongful convictions and argues that, absent substantial systemic reform, these solutions are inadequate to solve this issue.

As federal habeas corpus was traditionally the final hope for innocent state prisoners, Part I of this Article begins by examining the current landscape of federal habeas corpus and its "innocence gateway," and explores how courts across the country have interpreted what successful passage through that gateway requires. Additionally, this Part discusses state post-conviction proceedings, new statutes for innocent defendants, and the barriers state processes pose to innocent individuals. Part II analyzes how these limitations particularly impact and harm *pro se* defendants seeking release based on their factual innocence. Finally, Part III examines potential solutions and argues that a combination of radical reforms, including conviction review and the right to post-conviction counsel, are necessary to solve this crisis of innocence.

I. Background

A. How AEDPA Changed Federal Habeas Review

To understand the challenges *pro se* defendants face in litigating their innocence, it is necessary to understand AEDPA's pitfalls and the basic framework of federal habeas corpus litigation. In habeas corpus proceedings, state prisoners present their claims of constitutional violations to the federal courts. Until the 1990s, federal habeas corpus provided defendants, albeit with limitations, a way to have a federal court "independently review the merits" of those constitutional claims.[14] Starting in the 90s, the U.S. prison population began to increase, with state prison populations doubling by 2007.[15] With the number of federal habeas petitions rising, and due to concerns regarding delay, perceived abuse of the writ of habeas corpus, and increasing time between death sentences and executions, Congress proposed legislation that aimed at

3,300 exonerations of the wrongfully convicted since 1989). State and federal post-conviction procedures fail "to identify and remedy wrongful convictions far too frequently." Hartung, *supra* note 3, at 72.

14. *See* Adelman, *supra* note 5.

15. Hartung, *supra* note 3, at 67.

increasing finality in state judgments.[16] Despite the protests of habeas and criminal justice experts, Congress passed AEDPA in 1996.[17]

AEDPA severely limited prisoners' ability to get relief by putting in place both procedural and substantive limitations on federal courts' review. First, AEDPA created an exhaustion requirement, meaning that state prisoners must first bring their constitutional claims to state courts.[18] If they fail to do so, the claim may be procedurally defaulted; once defaulted, claims are typically ineligible for review by a federal court.[19] Second, AEDPA forbids successive habeas corpus petitions.[20] Under this rule, claims mentioned in a prior habeas petition must be dismissed.[21] Additionally, claims not previously presented must be dismissed unless they fit into "one of two narrow exceptions."[22] Finally, AEDPA enacted a one-year statute of limitations, giving prisoners only one year from the end of their state collateral review[23] to file their habeas petition.[24] If claims are not timely filed, they can be dismissed as procedurally defaulted.[25] Furthermore, petitions that contain both defaulted and not defaulted claims can be dismissed.[26]

Substantively, AEDPA created a deferential standard in favor of state courts, even if their decisions are erroneous. Federal courts must defer to state court rulings "that are based on incorrect interpretations of federal constitutional law as long as such interpretations [are] . . . 'reasonable.'"[27] Furthermore, AEDPA limited what federal law could even qualify for relief. Federal courts may not grant relief on any authority except clearly established Supreme Court precedent.[28]

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16. *Id.*

17. For a more thorough discussion of the political impetus behind federal habeas corpus, including the passage of AEDPA and the innocence movement, see *id.* at 67–70. Before AEDPA was passed in 1996, only thirty individuals had been exonerated due to DNA evidence reform in the 1990s. *Id.*

18. 28 U.S.C. § 2254(b)(1)(A).

19. CHARLES DOYLE, CONG. RSCH. SERV., RS22432, FEDERAL HABEAS CORPUS: AN ABRIDGED SKETCH 4 (2010).

20. *See* 28 U.S.C. § 2244(b)(1).

21. DOYLE, *supra* note 19.

22. *Id.* at 2. These exceptions are that the claim "relies on a newly announced constitutional interpretation made retroactively applicable" or that "it is predicated upon newly discovered evidence, not previously available through the exercise of due diligence, which together with other relevant evidence establishes by clear and convincing evidence that but for the belatedly claimed constitutional error no reasonable factfinder would have found the applicant guilty." *Id.* at 2–3.

23. See *infra* notes 42–44 and accompanying text for a discussion of collateral review.

24. 28 U.S.C. § 2244(d)(1); *see infra* Section I.B.

25. DOYLE, *supra* note 19.

26. *Id.*

27. Adelman, *supra* note 5.

28. *Id.*

The Court's decision in *Cullen v. Pinholster* was even more disastrous for federal habeas petitioners, as it limited the types of evidence that could be presented to a federal court.[29] The Court held that federal courts are limited to the record that was before the state court that adjudicated a petitioner's claims on the merits.[30] This holding means that petitioners in federal court cannot present new evidence that has emerged since their state proceedings. For *pro se* defendants who often require longer periods of time to investigate their case, this holding can bar them from ever having all the evidence in their case considered by a court.[31]

In May 2022, the Court further limited petitioners' ability to gain relief in federal court. *Shinn v. Ramirez* overturned relief for two petitioners on Arizona's death row, Barry Lee Jones and David Ramirez.[32] In doing so, the Court held that under AEDPA, federal courts may not hold evidentiary hearings or even consider evidence beyond the state court record based on the fact that petitioner's state post-conviction counsel were ineffective.[33] Therefore, if a petitioner has ineffective trial counsel who fails to investigate and develop a record of their innocence, as well as post-conviction counsel who fails to do so, they will not be permitted to conduct such evidentiary development in federal court.[34]

Despite these procedural and substantive hurdles, defendants are not guaranteed the right to legal counsel for federal habeas proceedings. While capital defendants—defendants facing the death penalty—are guaranteed counsel, those who receive lesser sentences must either hire their own counsel or proceed *pro se*.[35] This fact is why 90% of non-capital federal habeas petitions involve *pro se* litigants.[36] Without counsel, *pro se* defendants are left to navigate the complicated landmine of federal habeas corpus alone, while simultaneously attempting to gather evidence to prove their innocence.

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29. Cullen v. Pinholster, 563 U.S. 170 (2011).

30. *Id.* at 181.

31. *See* Hartung, *supra* note 3, at 80–82 (discussing AEDPA's statute of limitations and how it creates piecemeal appeals in federal habeas litigation).

32. Shinn v. Ramirez, 142 S. Ct. 1718 (2022).

33. *Id.* at 1739–40.

34. *Id.*

35. *Id.* at 28–29 (citing 18 U.S.C. § 3599(a)(2)).

36. Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-the-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219, 1223 (2012). For a discussion of the demographics of *pro se* defendants, see *infra* Section I.D of this Article.

B. Litigating Innocence at the State Level

AEDPA requires that a state prisoner fully exhaust their claims first in their state's courts before filing their federal habeas petition.[37] If they fail to do so, their federal habeas claims can be dismissed as procedurally defaulted.[38] In order to understand why innocent *pro se* defendants face an impossible burden in obtaining federal habeas relief, it is necessary to have a basic understanding of the state appellate process.[39]

After a conviction in the trial court, a defendant then moves on to their direct appeal. Direct appeal claims are limited to procedural errors that happened at trial and the trial record, meaning these appeals cannot include any new evidence.[40] Therefore, any relevant evidence discovered after the trial, even if it points to a defendant's innocence, would not be admissible at this stage of appeals. At this level of the appellate process, defendants are guaranteed the right to counsel.[41]

If a defendant fails on direct appeal, they then move to their state's collateral appeal, which is often called post-conviction review or state habeas. At this stage in the appellate process, defendants are usually no longer guaranteed the right to counsel, although some states do appoint counsel.[42] These post-conviction claims allow for the presentation of new evidence; in fact, some states allow newly discovered evidence to serve as grounds for post-conviction relief.[43] However, states also enact their own procedural and substantive limitations on relief, including strict statutes of limitations and high standards for evidence of innocence.[44]

Some states also have mechanisms for convicted persons to file motions for new trials based on newly discovered evidence.[45] However, these motions must usually be filed at the trial court level, meaning prisoners may be asking for a new trial from the very judge that convicted or sentenced them.[46] Some scholars have noted the opportunity for prejudice and bias in this process, as well as political pressure to uphold

37. 28 U.S.C. § 2254(b)(1) (stating that a writ for habeas corpus "shall not be granted" unless the applicant has exhausted their remedies in state court, with limited exceptions).

38. *See id.* § 2254(b)(2).

39. See Hartung, *supra* note 3; Medwed, *supra* note 12; Brooks et al., *supra* note 12; Brandon L. Garrett, *Judging Innocence*, 100 COLUM. L. REV. 55, 101 (2007), for more thorough analyses of state-level post-conviction issues.

40. Hartung, *supra* note 3, at 59.

41. *Id.* at 88.

42. *Id.* at 87–88.

43. Medwed, *supra* note 12, at 665.

44. *Id.* at 676.

45. *Id.* at 679.

46. *Id.*

convictions in states where judges are elected.[47] Furthermore, defendants are not usually provided counsel in order to file these types of motions.[48]

The process described above is procedurally complicated, and *pro se* prisoners may not be able to develop the evidence required to prove their innocence and obtain relief in state post-conviction proceedings.[49] Furthermore, these problems were exacerbated post-AEDPA by states' efforts to make their own appellate processes more restrictive by limiting appeals and cutting funding for public defense.[50] Notably, in his 2011 book, Professor Brandon Garrett at Duke University School of Law conducted a study of the first 250 exoneration cases in the United States.[51] In these cases, every defendant's claim of innocence was rejected by state courts.[52] This fact shows state courts' reluctance to consider claims of actual innocence and their interest in upholding their courts' convictions for the purposes of finality and the preservation of jury verdicts.[53]

Yet states have created some mechanisms for innocent defendants to obtain relief. All states have some type of post-trial relief based on claims of newly discovered evidence.[54] Some states also allow for motions for new trials based on new evidence or for new post-conviction, collateral proceedings.[55] However, these avenues for relief often contain high legal and factual standards, statutes of limitations, and bars on discovery and evidentiary hearings.[56]

A mistake at the state appellate level could mean that a defendant's constitutional claims will never be reviewed by a federal court on the

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47. Hartung, *supra* note 3, at 62; *see also infra* Section II.B.iii (discussing how state judicial and prosecutorial elections might affect appellate outcomes).

48. Daniel Givelber, *The Right to Counsel in Collateral, Post-Conviction Proceedings*, 58 MD. L. REV. 1393, 1393 (1999) ("Hornbook constitutional law tells us that the state has no obligation to provide counsel to a defendant beyond his first appeal as of right.").

49. *See infra* Section II.A.

50. Radley Balko, *Opinion: Why We Can't Trust the States to Prevent Wrongful Convictions*, WASH. POST (Aug. 9, 2021), https://www.washingtonpost.com/opinions/2021/08/09/why-we-cant-trust-states-prevent-wrongful-convictions/ [perma.cc/6EVE-4TBW].

51. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 6–7 (2011).

52. *Id.* at 202.

53. *See* Medwed, *supra* note 12, at 664–65 ("[S]tate courts have traditionally viewed newly discovered evidence claims with disdain, fearing the impact of such claims on the finality of judgments and the historic role of the jury as the true arbiter of fact, and harboring doubts about the underlying validity of new evidence." (footnotes omitted)).

54. *Id.* at 665 ("[E]very state provides for a motion for a new trial on the basis of newly discovered evidence.").

55. *Id.* at 659.

56. *Id.* (discussing state post-conviction procedures available to defendants who lack DNA evidence).

merits, due to AEDPA's rules regarding exhaustion and procedural default.[57] However, federal habeas corpus does provide a final hope for innocent defendants who may have made fatal mistakes during their state appellate proceedings—the actual innocence gateway.

C. The Actual Innocence Gateway: The Wrongfully Convicted's Last Chance

Functionally, the actual innocence gateway is just that—a pathway that allows a defendant to obtain federal review of their procedurally defaulted or otherwise barred claims.[58] The gateway does not provide an independent avenue for relief; it simply allows a federal court to consider claims that it otherwise could not.[59]

The actual innocence gateway's standard was first established in *Murray v. Carrier* and later clarified in *Schlup v. Delo*.[60] In *Schlup*, the Supreme Court held that prisoners may access the gateway and argue the merits of their constitutional claims if they can present "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error."[61] The Court stressed that such cases of actual innocence are "extremely rare," and thus set a high standard for evidence of innocence.[62] A defendant must present evidence that makes it "more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."[63]

Thus, an actual innocence gateway claim requires "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not

57. As discussed earlier in this Article, even if a defendant properly files all of their state appeals, AEDPA's deference to state court decisions may still preclude relief for factually innocent prisoners. *See generally* Brent E. Newton, *A Primer on Post-Conviction Habeas Corpus Review*, THE CHAMPION (2005), https://www.nacdl.org/Article/June2005-APrimerOnPost-ConvictionHabeas [perma.cc/S95F-TRT5] (providing background on AEDPA and state habeas corpus review).

58. While the gateway initially only allowed review of procedurally defaulted claims, the decision in *Perkins* expanded the gateway to also allow review of claims barred due to AEDPA's statute of limitations. McQuiggin v. Perkins, 569 U.S. 383 (2013). However, filing an untimely petition can be used as a factor in determining the reliability of a defendant's claims of innocence. *See also* Schlup v. Delo, 513 U.S. 298, 332 (1995).

59. *See* Herrera v. Collins, 506 U.S. 390, 404 (1993) ("[T]his body of our habeas jurisprudence makes clear that a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.").

60. *See* Murray v. Carrier, 477 U.S. 478 (1986); *Schlup*, 513 U.S. 298.

61. *Schlup*, 513 U.S. at 316.

62. *Id.* at 321.

63. *Id.* at 327.

presented at trial."[64] Circuit courts have interpreted this phrase differently, though, and have created separate standards for what types of new evidence they will consider when reviewing an actual innocence gateway claim.[65]

The more widely used "newly presented" standard allows defendants to present any evidence that was not presented at trial.[66] This standard would allow for a variety of evidence in actual innocence gateway litigation, including evidence not presented due to trial counsel's ineffectiveness, evidence unknown to trial counsel or the defendant at the time of trial, and evidence that was excluded by the trial court judge.[67] For example, this standard would allow for newly discovered forensic evidence, testimony from the defendant that was not offered at trial, or even recanted testimony from important witnesses. Currently, the "newly presented" standard has been adopted by the Second, Sixth, Seventh, Ninth, and Tenth Circuits.[68]

The Third, Fifth, and Eighth Circuits, however, follow a "due diligence" standard, which states that courts will only consider evidence "new" for the purposes of the actual innocence gateway if the evidence was not available at trial through the exercise of due diligence by the defendant or their counsel.[69] Unlike the "newly presented" standard, this approach only allows evidence that was unknown, and could not have been discovered through due diligence, at the time of trial.70 Evidence that was excluded due to trial counsel's ineffectiveness or due to a trial judge's decision cannot be considered for the purposes of the actual innocence gateway under this standard.[71] This standard would require, for example, new witnesses or police officers

64. *Id.* at 324.

65. The majority of circuits follow the two approaches next discussed in this Article: the "newly presented" and the "due diligence" standards. However, some outlier approaches persist. For example, in *Rica v. Ficco*, the First Circuit seemed to follow a "newly presented" standard, but it ultimately denied relief to the defendant because evidence presented at trial competed with evidence presented in the actual innocence gateway petition. Rica v. Ficco, 803 F.3d 77, 84–85 (1st Cir. 2015).

66. For an in-depth analysis of the various evidentiary standards used by circuit courts for the actual innocence gateway, and an argument in support of the "newly presented" standard, see Jay Nelson, *Facing up to Wrongful Convictions: Broadly Defining "New" Evidence at the Actual Innocence Gateway*, 69 HASTINGS L.J. 711 (2008). While this Article acknowledges that the "newly presented" standard is more favorable to *pro se* defendants, this Author argues that both standards are particularly insurmountable for innocent, *pro se* defendants.

67. *Id.* at 720.

68. *See, e.g.*, *id.* at 718–19. Minnesota state courts also appear to follow this standard. *See* MINN. STAT. § 590.01, subdiv. 1a (2022); Rainier v. State, 566 N.W.2d 692, 695 (Minn. 1997) (discussing new forensic evidence).

69. Nelson, *supra* note 66, at 718–20.

70. *Id.* at 712–13.

71. *Id.*

who engaged in misconduct at the time of the trial to come forward.[72] It may even necessitate new forensic evidence, further burdening *pro se* defendants.[73]

Moreover, as discussed previously regarding *Cullen* and *Shinn*, AEDPA and the Supreme Court have further restricted the development of new evidence in federal courts.[74] Section 2254(e)(2) also states that if a petitioner "has failed to develop the factual basis of a claim in State court proceedings, the [federal] court shall not hold an evidentiary hearing . . . unless the applicant shows" that the claim falls within a few narrow exceptions.[75] These exceptions are if "the claim relies on . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court;" the claim includes facts that could not have been discovered previously through due diligence; or "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[76] Thus, a prisoner would need to already have strong evidence of their innocence in order to gain an evidentiary hearing or have an underlying constitutional claim based on a new rule that is both constitutionally based and retroactively applied. Part II of this Article discusses how evidentiary development is particularly difficult for innocent, *pro se* defendants, making the "due diligence" standard adopted by these circuit courts much less favorable to these types of petitioners.

D. The Demographics of Pro Se *Defendants*

While it is difficult to ascertain the exact demographics of non-capital, *pro se*, habeas corpus petitioners, some data does exist on these defendants. As discussed earlier, 90% of non-capital habeas petitions involve *pro se* prisoners.[77] *Pro se* defendants are also more likely to be indigent and people of color.[78] For example, Black Americans are incarcerated in state prisons at nearly five times the rate of White

72. *Id.* at 723.

73. *See infra* Part II.

74. *See supra* text accompanying notes 29, 32.

75. 28 U.S.C. § 2254(e)(2).

76. *Id.*

77. *See* Uhrig, *supra* note 36 and accompanying text.

78. *See* Tasha Hill, *Inmates' Need for Federally Funded Lawyers: How the Prison Litigation Reform Act,* Casey, *and* Iqbal *Combine with Implicit Bias to Eviscerate Inmate Civil Rights*, 62 UCLA L. REV. 176, 182, 188–89, 194 (2015) (describing how people of color, specifically Black and Hispanic individuals, are overrepresented in the prison system due to "systemic bias," and almost 95% of inmates are indigent).

Americans.[79] Latinx persons are incarcerated in state prisons at 1.3 times the rate of White individuals.[80] Furthermore, Black and Hispanic individuals are more likely to receive life sentences, and life sentences without parole, which means that people of color are more likely to serve long sentences that may need to proceed to habeas corpus appeals.[81]

Further, LGBTQ+ people "are incarcerated at a rate two to three times that of the general population."[82] These individuals face sexual violence within prisons at a higher rate than other inmates, meaning they may be forced to live in segregated or solitary confinement while incarcerated, which could further limit their ability to access their prisons' already limited resources.[83]

Individuals with mental disabilities are also disproportionately represented in prisons; in fact, the majority of those incarcerated struggle with mental illnesses or other issues.[84] Of state prisoners, 56% have mental health problems, and around 24% have at least one symptom of a psychotic disorder.[85] Further, nearly four in ten state prisoners reported having a disability of some kind, including physical, mental, and intellectual disabilities.[86]

Incarcerated individuals are also more likely to be indigent. Nearly 95% of prisoner-initiated suits are filed *in forma pauperis*.[87] Additionally, those who had significant incomes prior to their incarceration may become indigent due to notoriously low wages within prisons and prison and court fees.[88]

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79. ASHLEY NELLIS, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 4 (2021), https://www.sentencingproject.org/reports/the-color-of-justice-racial-and-ethnic-disparity-in-state-prisons-the-sentencing-project/ [perma.cc/NL9X-4TQW].

80. *Id.* at 5.

81. Alison Walsh, *The Criminal Justice System Is Riddled with Racial Disparities*, PRISON POL'Y INITIATIVE (Aug. 15, 2016), https://www.prisonpolicy.org/blog/2016/08/15/cjrace/ [perma.cc/Y6MH-LY53].

82. Hill, *supra* note 78, at 189.

83. *Id.* at 189–92.

84. *Id.* at 190–91.

85. *Id.* at 191.

86. LAURA M. MARUSCHAK & JENNIFER BRONSON, U.S. DEP'T OF JUST. BUREAU OF JUST. STATS., DISABILITIES REPORTED BY PRISONERS (2016), https://bjs.ojp.gov/content/pub/pdf/drpspi16st.pdf [perma.cc/E6DL-C56T].

87. Hill, *supra* note 78, at 194 n.102 (quoting Sharone Levy, *Balancing Physical Abuse by the System Against Abuse of the System: Defining "Imminent Danger" Within the Prison Litigation Reform Act of 1995*, 86 IOWA L. REV. 361, 371 (2000)). *In forma pauperis* describes the manner in which indigent individuals are "permitted to disregard filing fees and court costs." *In forma pauperis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

88. *Id.* at 195 (discussing how commissary costs, prison fees, and other expenses consume prisoners' meager wages).

Moreover, individuals associated with one or more of these marginalized communities may also face incarceration at higher rates.[89] These statistics demonstrate that *pro se* defendants are among the most vulnerable and disadvantaged communities in the United States. They may face race or sex discrimination, severe resource limitations, and even physical and mental disabilities that could impact their success in both reinvestigating their cases and filing successful state and federal habeas appeals.[90] Furthermore, these identities may cause them to face bias from the very judges who will decide their fates.[91] When analyzing how the actual innocence gateway and its evidentiary standards impact *pro se* defendants, it is both necessary and illuminating to keep these statistics in mind to fully understand the impossible challenges they may face in proving their innocence.

II. Analysis

A. Investigating Innocence: Why Pro Se *Defendants Struggle to Prove Their Cases*

New evidence is necessary to support most post-conviction claims.[92] Definitions of new evidence vary based on the type of claim a defendant raises and the jurisdiction in which the defendant resides. For the most part, new evidence is evidence that was discovered after a defendant's conviction.[93] Some states place an additional requirement of "due diligence" on this new evidence, similar to that imposed by some circuits in their interpretation of the *Schlup* actual innocence gateway.[94] This requirement means that, in order to be "new," the evidence must not have been discoverable at the time of trial if the defendant or their attorney had exercised due diligence.[95]

Whether this evidence was simply not presented at trial or whether it was known to a defendant and their counsel, this new evidence will require some sort of investigation to uncover or properly compile into a

89. *Id.* at 186.

90. *Id.* at 184–94.

91. *Id.* at 183 (describing, for example, how implicit bias may affect judges reviewing pleadings by *pro se* litigants).

92. Medwed, *supra* note 12, at 665 (explaining how both motions for new trials and petitions for post-conviction relief may require new evidence); *see, e.g.*, Brooks et al., *supra* note 12 (describing new evidence standards in post-conviction statutes across the United States).

93. Brooks et al., *supra* note 12, at 1056.

94. *Id.* at 1066–70 (discussing which states' new evidence statutes require due diligence); *see also supra* Sections I.B–C (discussing the different interpretations of "new evidence" used by the federal circuits).

95. Brooks et al., *supra* note 12, at 1051–53.

legal filing. Innocent, *pro se* defendants face incredible obstacles in reinvestigating their cases while incarcerated, and thus may not ever be able to succeed during state post-conviction or federal habeas proceedings.

For example, in *McQuiggin v. Perkins*, Floyd Perkins, an innocent man convicted of a murder in Flint, Michigan, relied on the assistance of his friends and family to help in the investigation and collection of evidence in his case, including affidavits from witnesses.[96] Even with their assistance, Perkins failed to file his habeas corpus petitions according to AEDPA's strict requirements.[97] Perkins took eleven years to file his federal habeas petition.[98] His trial and post-conviction counsel failed to properly develop the factual record in his case, leaving him to rely on friends and family, who lacked legal training, to do so while he was incarcerated.[99]

First, many innocent defendants know nothing about the crime for which they were convicted. Unless the defendant was present and just not the offender, or unless the defendant witnessed some other aspect of the crime, they will not know the factual details of a crime.[100] What they know about a crime will be limited to what was presented at their trial.[101] This information asymmetry gives *pro se*, innocent defendants a very limited starting point for reinvestigating their cases. For an innocent person, the day of the crime may have been an ordinary day. They may not remember what they did on that fateful day. If they do remember, their memories may be incomplete because it is likely that many years will have elapsed since the incident occurred.[102] Unfortunately, for innocent defendants, the truth "may not make a very good story."[103] But a court requires not only a good story, it requires a story supported by new evidence that

96. Tiffany Murphy, *'But I Still Haven't Found What I'm Looking For': The Supreme Court's Struggle to Understand Factual Investigations in Federal Habeas Corpus* 5 (Univ. of Ark. Sch. of L., Working Paper No. 15–8, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2644022 [perma.cc/R5ZY-LG2B].

97. *Id.*

98. *Id.* at 7.

99. *Id.* at 7–8.

100. Jeffrey D. Stein, *Opinion: How to Make an Innocent Client Plead Guilty*, WASH. POST (Jan. 12, 2018), https://www.washingtonpost.com/opinions/why-innocent-people-plead-guilty/2018/01/12/e05d262c-b805-11e7-a908-a3470754bbb9_story.html [perma.cc/679F-G2Q7].

101. *Id.*

102. *How Eyewitness Misidentification Can Send Innocent People to Prison*, INNOCENCE PROJECT (Apr. 15, 2020), https://innocenceproject.org/how-eyewitness-misidentification-can-send-innocent-people-to-prison/ [perma.cc/NJ8Q-HUEF] (describing how memory deteriorates over time and why memories can become distorted).

103. Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 513 (2000) (explaining the experience of criminal defense attorneys who represent innocent clients).

sufficiently proves the wrongfully convicted person's innocence to the court.

Thus, an innocent defendant may start with what was presented at their trial as their factual basis for their search for new evidence. However, the truth given at trial may not be accurate or even complete. The National Registry of Exonerations states that, out of all of the official exonerations since 1989, 54% have involved misconduct by government officials significant enough to contribute to the individual's wrongful conviction.[104] This misconduct may include perjury by police officers at trial, fabricated evidence, concealed exculpatory evidence, and witness tampering.[105] Thus, an innocent person's knowledge from their trial may not be helpful in terms of finding new evidence or reinvestigating their case. In fact, what was presented at their trial may even hinder their investigations, causing them to rely on false information or fail to consider important, but concealed, evidence.[106]

In fact, the leading cause of wrongful convictions is perjury.[107] When witnesses, victims, or government officials lie, not only are defendants wrongfully convicted, but these lies impact their ability to reinvestigate their case.[108] Furthermore, courts often look unfavorably upon witness recantations when examining post-conviction petitions.[109] Unfortunately for defendants, this fact may mean that even if a defendant is able to procure a recantation, that evidence may not be sufficient for a court to grant relief.

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104. SAMUEL R. GROSS, MAURICE J. POSSLEY, KAITLIN JACKSON ROLL & KLARA HUBER STEPHENS, GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT: THE ROLE OF PROSECUTORS, POLICE, AND OTHER LAW ENFORCEMENT 1 (2020).

105. *See id.* at 1–3.

106. Brian Gregory, Brady *Is the Problem: Wrongful Convictions and the Case for "Open File" Criminal Discovery*, 46 U. S.F. L. REV. 819, 828–30 (2012) (describing how prosecutors and judges must speculate on the importance of evidence to a defendant, and how suppressed evidence may impact a defendant's case).

107. *Perjury*, INNOCENCE PROJECT NEW ORLEANS, https://ip-no.org/what-we-do/advocate-for-change/shoddy-evidence/perjury/ [perma.cc/JAS7-4UZ2].

108. *2019 Exoneration Report: Official Misconduct and Perjury Remain Leading Causes of Wrongful Homicide Convictions*, DEATH PENALTY INFO. CTR. (Apr. 3, 2020), https://deathpenaltyinfo.org/news/2019-exoneration-report-official-misconduct-and-perjury-remain-leading-causes-of-wrongful-homicide-convictions [perma.cc/8ED7-AGKG] (stating how perjury, false accusations, and official misconduct are often major causes of wrongful convictions); *Why Do Wrongful Convictions Happen?*, KOREY WISE INNOCENCE PROJECT, https://www.colorado.edu/outreach/korey-wise-innocence-project/our-work/why-do-wrongful-convictions-happen [perma.cc/BGZ5-AXYK] (describing how perjury and official misconduct impacted wrongful conviction cases).

109. ALEXANDRA E. GROSS & SAMUEL R. GROSS, WITNESS RECANTATION STUDY: PRELIMINARY FINDINGS (2013), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1090&context=other [perma.cc/T273-D2LE] (describing how courts often do not deem a witness' recantation significant or relevant enough for exoneration unless there is significant corroborating evidence).

Even if an innocent defendant has an accurate and adequate factual basis to begin their search for new evidence, they are necessarily hampered by their incarceration. Prisoners' ability to communicate with the outside world is severely limited by prison telephone, mail, and visitation systems.[110] Since many *pro se* defendants are also indigent, the price of telephone calls and postage may mean a defendant is unable to communicate with witnesses, legal experts, forensic specialists, and even loved ones who would be able to assist with their cases.[111] For example, in Minnesota, the Department of Corrections charges $0.75 for a fifteen-minute, in-state call from a state prison.[112] However, Minnesota inmates only earn, on average, between $0.25 and $2.00 per hour for prison jobs.[113] With these meager wages, defendants must also pay for various prison fees, commissary, and other needs they or their families may have, if there is no one else who can financially support the defendant.[114] They must also pay for the cost of hiring experts, whose opinions may be the new evidence needed to prove their innocence.[115] Prison officials may also limit a prisoner's time on telephones. For example, in New York state prisons, the ability to make a phone call is purely one of "privilege" subject to restriction.[116] These restrictions mean that innocent defendants may not be guaranteed the ability to conduct necessary phone interviews with individuals important to their case. Furthermore, these calls are monitored and often recorded by law enforcement and prison officials.[117] Prisons may also limit who prisoners can contact. Some facilities only allow prisoners to contact individuals on approved lists.[118]

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110. *See* JORDAN KUSHNER, JODY CUMMINGS, R. ANTHONY JOSEPH, STEPHEN M. LATIMER, ANDREW CAMERON, RICHARD F. STORROW, PATRICIA A. SHEEHAN & MICHAEL SLOYER, THE JAILHOUSE LAWYER'S MANUAL 642–73 (12th ed. 2020).

111. *See, e.g.*, *id.*

112. Mariah Zell & Kathryn Quinlan, *Inmates Need Access to Affordable Communication*, MINNPOST (Mar. 24, 2021), https://www.minnpost.com/community-voices/2021/03/inmates-need-access-to-affordable-communication/ [perma.cc/9UU7-U3XD].

113. *Id.*

114. *See, e.g.*, Beatrix Lockwood & Nicole Lewis, *The Hidden Cost of Incarceration*, THE MARSHALL PROJECT (Dec. 17, 2019), https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration [https://perma.cc/AU23-5S8L] (describing prisoners' expenses).

115. Expert witnesses may charge fees of more than $1,000 per hour. *See* Dean Narcisco, *Expert Witnesses Like Those in Husel Trial Can Be Costly, But Can Sway Jury, Attorneys Say*, COLUMBUS DISPATCH (Apr. 1, 2022), https://www.dispatch.com/story/news/crime/2022/04/01/expert-witnesses-can-cost-thousands-but-can-sway-trial-outcomes/7210172001/ [perma.cc/B523-9LKX].

116. *What You Need to Know About Communication with People in Custody*, THE LEGAL AID SOC'Y (Nov. 2019), https://legalaidnyc.org/get-help/bail-incarceration/what-you-need-to-know-about-communication-with-people-in-custody/ [perma.cc/F6JE-W2EK].

117. *Id.*; KUSHNER ET AL., *supra* note 110, at 672.

118. *What You Need to Know About Communication with People in Custody*, *supra* note 116.

Mail can also be limited. For example, while prisoners may be able to send a few letters for free each week, other postage would require payments that indigent defendants cannot afford.[119] Furthermore, there are strict limitations on the types of mail that prisoners can receive, including page limits. In Minnesota, for example, incoming mail is limited to sixteen ounces per item, and photographs received are limited to twenty photos per mailing.[120] Prison staff may also check the contents of some mail.[121]

These prison-implemented restrictions make investigations difficult for innocent, *pro se* defendants, but they are not the only barriers. By the time an innocent person is filing post-conviction or habeas petitions, they may have been incarcerated for years, even decades.[122] This time away from their communities isolates the defendants.[123] They may lose contact with their friends and families.[124] This loss of connection may mean that incarcerated defendants cannot find individuals crucial to proving their innocence. Witnesses important to their case, victims, or even the real perpetrators may move or pass away.[125] Without support from the outside world, the innocent person may not be able to conduct interviews, collect affidavits and other documents, or gather leads.

An individual's defense attorney for a post-conviction appeal has far more access to reinterview crucial witnesses from trial.[126] They may travel to the local courthouse to gather documents from the case file. They may canvas the neighborhood in which a crime occurred, talk to residents, and gather contact information for those who have since moved away. They must hire experts on witness identification or talk to forensic scientists about evidence in the case. Unlike their incarcerated

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119. KUSHNER ET AL., *supra* note 110, at 645.

120. *Contact*, MINN. DEP'T OF CORR., https://mn.gov/doc/family-visitor/send/#:~:text=Incoming%20mail%20is%20limited%20to,must%20have%20the%20backing%20removed [perma.cc/7BV5-NZAL].

121. *Id.*

122. *See, e.g.*, Smith, *supra* note 103, at 507–09 (describing the legal process of appealing a wrongful conviction and the investigative efforts a lawyer and her students undertook for an inmate who had been in prison for over a decade by the time of her appeal).

123. *See, e.g.*, Melissa Li, *From Prisons to Communities: Confronting Re-Entry Challenges and Social Inequality*, AM. PSYCH. ASS'N (2018), https://www.apa.org/pi/ses/resources/indicator/2018/03/prisons-to-communities [https://perma.cc/Z5HW-ESKL] ("A consequence of incarceration is that relationships with families and the broader community are strained.").

124. *Id.*

125. *E.g.*, Smith, *supra* note 103, at 490 (indicating that the likely perpetrator of the offense for which an individual was wrongfully convicted died before he could be contacted during appeal).

126. *See, e.g.*, *id.* at 507–09 (describing how a law school professor and their students reinterviewed witnesses during an investigation into an incarcerated, innocent defendant's case).

clients, attorneys can travel, even across the country, to track down witnesses, surprise them and gain new information, and obtain signed affidavits that can be used in later legal filings.[127] They could even go to the crime scene.[128] All of these actions are likely impossible for an incarcerated defendant.

Furthermore, many of the crimes for which innocent people are convicted are violent, traumatic crimes to both victims and their communities. Out of the 3,367 exonerations tracked by the National Registry for Exonerations, around 60% of those convictions were for child sex abuse, sexual assault, or homicide.[129] This statistic does not include other potentially violent crimes, such as physical assault, arson, or robbery.

In order to reinvestigate and gather new evidence, an innocent, *pro se* defendant may be forced to reach out to victims, their families, and their communities to ask questions about likely one of the most traumatic events in their lives. Some of those individuals may believe in the defendant's guilt; therefore, they may not be willing to speak to the defendant or anyone in the defendant's support system.[130] Such contact may even be viewed as harassment or witness tampering by the courts or by law enforcement, who may also doubt the defendant's innocence.[131]

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127. *Id.*

128. *E.g.*, *id.* at 509.

129. *Exonerations By Year and Type of Crime*, THE NAT'L REGISTRY FOR EXONERATIONS (Jan. 25, 2023), https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year-Crime-Type.aspx [perma.cc/C6BN-NBRC].

130. The wrongful conviction of Adnan Syed, made famous by the podcast *Serial*, is an example of the tension between wrongfully convicted individuals and victims and their families. *See Serial*, SERIAL PRODS., https://serialpodcast.org/ [https://perma.cc/G4J8-EUX7]. Despite the fact that Syed's conviction was vacated, and despite evidence pointing to alternative suspects, Hae Min Lee's family have appealed the decision to overturn his conviction. Alex Mann, *Adnan Syed Case: Attorneys for Hae Min Lee's Brother Escalate Allegations Ahead of Oral Arguments in Appeal*, BALT. SUN (Jan. 24, 2023), https://www.baltimoresun.com/news/crime/bs-md-ci-cr-adnan-syed-case-hae-min-lee-brother-appeal-allegations-increase-20230124-y4ta3bct5fawliqbckcy3x7bpy-story.html [perma.cc/WZ3D-SHWK]. They are also asking the appeals court to reinstate his murder charges. *Id.*

131. In the Adnan Syed case, Syed's advocate, family friend Rabia Chaudry, discovered after Syed's trial that he had an alibi witness his attorney never contacted. *See* Nicky Woolf, *Key Witness in Serial Case Asia McClain Says Prosecutor Suppressed Testimony*, GUARDIAN (Jan. 20, 2015), https://www.theguardian.com/tv-and-radio/2015/jan/20/key-witness-adnan-syed-serial-asia-mcclain [perma.cc/F4NX-ED97].This witness, Asia McClain, agreed to Chaudry's request to sign an affidavit. *Id.* Years later, McClain was contacted by a private investigator in Syed's case. *Id.* After this contact, McClain contacted the prosecutor on the case, Kevin Urick, who convinced her not to participate in an upcoming post-conviction hearing in Syed's case. *Id.* At that hearing, prosecutor Urick then testified falsely under oath that McClain signed the affidavit under duress and that Syed's family was harassing her. *Id.* McClain has publicly stated that these comments by the prosecutor were false. *Id.* However, this case shows the danger a wrongfully convicted person and their family can face if they attempt to contact witnesses in their case. *Id.*

Moreover, as previously noted, a defendant may be limited by their prison in who they can contact.[132]

Finally, a defendant must do more than collect evidence of their factual innocence in order to gain their release at the federal habeas level. The actual innocence gateway is only a means through which procedural default can be excused. To be successful in federal habeas, innocent defendants must also gather evidence of an underlying constitutional claim, such as ineffective assistance of counsel or prosecutorial misconduct.[133] The Supreme Court has stated that prisoners in both federal and state facilities have the right to visit law libraries in order to prepare their legal filings.[134] However, prisoners have claimed in federal court that state prison law libraries are inadequate in helping them prepare their appeals.[135] Yet, the Supreme Court has also made it more difficult for inmates to succeed on these claims.[136] Furthermore, AEDPA's procedural and substantive complexities will most likely mean that without the assistance of legal experts, any filings made by *pro se*, innocent defendants will be inadequate.[137]

These barriers are why statutes of limitations and high evidentiary standards in AEDPA and state post-conviction statutes are so damaging and unreasonable for *pro se*, innocent defendants. Even with monetary resources, the support of friends and family, access to a law library, and adequate communications with the outside world, an innocent defendant may never be able to gather the necessary evidence to obtain relief. *Pro se*, innocent defendants must master AEDPA, state post-conviction review, and all their complexities, as well as the legal standards of their constitutional claims, within short statutory time periods. For prisoners who have not received a legal education, relief is likely impossible.[138]

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132. KUSHNER ET AL., *supra* note 110, at 645.

133. Herrera v. Collins, 506 U.S. 390, 400 (1993) ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation[.]").

134. Bounds v. Smith, 430 U.S. 817, 828 (1977). *But see* Hill, *supra* note 78, at 194–97 (discussing *Bounds* and prisoners' remaining difficulties in filing *pro se* petitions in federal courts).

135. Hill, *supra* note 78, at 196–97.

136. *Cf.* Jonathan Abel, *Ineffective Assistance of Library: The Failings and the Future of Prison Law Libraries,* 101 GEO. L.J. 1171, 1206–10 (2013) (describing how Lewis v. Casey, 518 U.S. 343 (1996), heightened the standing requirement for claims that the State failed to provide adequate law library facilities and limited the types of claims that inmates could bring).

137. EVE BRENSIKE PRIMUS, LITIGATING FEDERAL HABEAS CORPUS CASES: ONE EQUITABLE GATEWAY AT A TIME 1–2 (2018), https://acslaw.org/wp-content/uploads/2018/07/July-2018-Primus-Issue-Brief-Habeas-Corpus.pdf [perma.cc/82FK-6ST5] (stating that only 0.29% of non-capital state prisoners obtain federal habeas relief).

138. *Id.*; NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT:

B. Absent Repealing AEDPA, Proposed Reforms to Federal Habeas Corpus Are Inadequate for Pro Se *Defendants*

By the mid-1990s, both federal courts and Congress began limiting the availability of relief for federal habeas petitioners.[139] Motivating AEDPA's creation was the case of Timothy McVeigh—the Oklahoma City bomber who killed 168 people in April 1995—who asked to waive all legal proceedings and be executed.[140] However, his execution was delayed when a stay of execution was granted to allow him to litigate issues potentially contained within disclosed FBI documents.[141] Although AEPDA would affect all habeas petitioners, the bill was politically sold as a measure that would reduce extended post-conviction review of death penalty cases and accelerate executions.[142] However, only 2% of all federal habeas petitions filed each year are capital cases.[143]

Yet this desire to decrease abuse of the writ may have just shifted the burden of post-conviction litigation to state courts. To fully exhaust their claims at the state level, so as not to fail due to procedural default at federal habeas, a defendant may need to file multiple petitions in state court.[144] If additional evidence is found during federal habeas, they may also need to return to state court to fully develop that claim.[145] The desire to reduce federal habeas litigation could be increasing costs and appeals at the state post-conviction level.

Scholars have proposed numerous reforms to federal habeas corpus that would help innocent and unconstitutionally imprisoned individuals gain relief.[146] Yet absent repeal of AEDPA and a return to previous federal habeas jurisprudence, these reforms fail to address the specific difficulties that *pro se*, innocent defendants face. The following sections address different aspects of these reforms and why they are inadequate for these types of petitioners.

HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 at 9–10 (2007), https://www.ojp.gov/pdffiles1/nij/grants/219558.pdf [perma.cc/3XE4-JCWY] (describing how most habeas petitions after AEDPA are dismissed or denied).

139. PRIMUS, *supra* note 137, at 4; James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 412–13 (2001).

140. *See* Liebman, *supra* note 139, at 412.

141. *Id.*

142. *Id.* at 414.

143. *Id.* at 414 n.8.

144. *See* PRIMUS, *supra* note 137, at 4–6 (describing procedural default rules in federal habeas).

145. *Id.* at 4–5.

146. *See, e.g.*, *id.* at 2–3 (describing possible reforms to federal habeas corpus); Hartung, *supra* note 3, at 82–107 (arguing potential reforms to federal habeas corpus).

i. The Innocence Gateway and Its Evidentiary Standards

Federal circuits have interpreted the "new evidence" requirement for the actual innocence gateway differently.[147] The standard adopted by the majority of federal courts, what this Article refers to as the "newly presented" standard, simply requires that new evidence be any evidence that was not presented at trial.[148] Certainly, this standard is more favorable to *pro se* defendants, innocent defendants, and some have proposed adopting this standard nationwide to help factually innocent defendants.[149] This standard allows them to present evidence that was excluded by a trial judge or even evidence that ineffective counsel failed to produce or investigate.[150] Yet this standard still does not fully remedy the difficulties a *pro se* defendant would face in attempting to gather evidence or compile their habeas petition, such as a dearth of resources, access to witnesses, and legal knowledge.[151]

For example, if a defendant had an alibi witness for the time of the crime that was not presented at trial, that information could later be used under this standard in their actual innocence gateway claim. On the other hand, under the "due diligence" standard discussed below, this evidence would not be available for an actual innocence gateway claim, because the defendant or their ineffective counsel could have presented this information at trial.[152]

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147. *See supra* Section I.C.; Nelson, *supra* note 66 (discussing the textual support for different standards of interpretation).

148. *See* Nelson, *supra* note 66.

149. *Id.* at 720.

150. *Id.* at 720–25.

151. *See supra* Section II.A.

152. A situation like this famously happened in the Adnan Syed case, featured on the podcasts *Serial* and *Undisclosed*. *See Serial*, *supra* note 130; *Undisclosed*, https://undisclosed-podcast.com/episodes/season-1/ [https://perma.cc/9EMH-87Z3]. When he was in high school, Syed was convicted of killing his friend and ex-girlfriend, Hae Min Lee, on January 13, 1999. *E.g.*, Emma Dibdin, *A Complete Timeline of the Case Against Adnan Syed*, HARPER'S BAZAAR (Mar. 31, 2019), https://www.harpersbazaar.com/culture/film-tv/a26721305/adnan-syed-case-trial-timeline/ [perma.cc/E59Z-6F2F]. A classmate, Asia McClain, claimed to have seen and had a conversation with Syed in the school library at the time of the murder. *E.g.*, Beatrice Verhoeven, *'Serial' Witness Asia McClain on the Last Time She Saw Adnan Syed: 'He Didn't Seem to Be Jealous*,*'* THE WRAP (Mar. 17, 2019), https://www.thewrap.com/serial-alibi-witness-asia-mcclain-last-time-she-saw-adnan-syed-jealous/ [https://perma.cc/85Y7-VKK5]. However, Syed's attorney failed to contact McClain or any other potential alibi witnesses, and McClain's testimony was not presented at trial. *Id.* Only through the post-trial efforts of Syed's family friend and advocate, Rabia Chaudry, was an affidavit obtained from McClain. *Id.* Syed presented this information in his state post-conviction appeals, which he lost in 2019. *Id.* Syed was later released due to the work of his attorney and a sentencing review unit in Baltimore in September 2022 after serving twenty-three years in prison. Michael Levenson, *Judge Vacates Murder Conviction of Adnan Syed of 'Serial*,*'* N.Y. TIMES (Sept. 19, 2022), https://www.nytimes.com/2022/09/19/us/adnan-syed-murder-conviction-overturned.html [perma.cc/K6F9-WBUQ].

The "due diligence" standard states that the only evidence considered "new" for the purposes of the actual innocence gateway is that which was not available at trial and could not have been discovered earlier through due diligence.[153] This standard excludes any evidence that was not presented at trial due to decisions by the judge, and even more detrimentally, it places the harm of an attorney's mistake on the defendant.[154] If a trial defense attorney makes a poor strategic decision or fails to investigate a key aspect of an innocent person's defense, that failure may prevent a defendant from ever presenting that evidence as part of their actual innocence gateway claim.[155] But "due diligence" does not only apply to a defendant's attorneys; it also applies to a defendant personally.[156] For many defendants, though, their ability to participate in their defense may be restricted by pre-trial incarceration, which can present the same investigative barriers as incarceration after a wrongful conviction.[157] Before trial, if a defendant is not able to pay the bail set in their case, they may not be able to help their defense attorney in gathering evidence and witnesses.[158] A 2000 study even showed that conviction rates may be higher for those who were detained pre-trial than those who had been released.[159] Additionally, those charged with more serious offenses, who face longer sentences if wrongfully convicted, may be those least likely to be released before trial.[160] Thus, a defendant's pre-trial incarceration may isolate them and make them unable to accomplish the "due diligence" required by this standard.

Theoretically, one type of evidence that would fit within the "due diligence" standard is newly discovered forensic evidence. However, evidence from a case remains in the custody of the government even after

153. Nelson, *supra* note 66, at 719 (quoting the Eighth Circuit's interpretation of the standard).

154. *Id.* at 722–23, 725.

155. *Id.* at 725.

156. *Id.* at 720–21; *see also* Shinn v. Ramirez, 142 S. Ct. 1718, 1734 (2022) (explaining how prisoners are at fault for not developing the state court record for their case, in addition to their post-conviction attorneys).

157. *See* Diana D'Abruzzo, *The Harmful Ripples of Pretrial Detention*, ARNOLD VENTURES (Mar. 24, 2022), https://www.arnoldventures.org/stories/the-harmful-ripples-of-pretrial-detention [perma.cc/4WRR-3H8X] (noting that individuals not incarcerated pre-trial are able to participate in their own defense).

158. Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1130 (2005).

159. *Id.* at 1131 (discussing a 2000 study of state felony defendants in urban counties).

160. *See* THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP'T OF JUST. BUREAU OF JUST. STATS., PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS (2007), https://bjs.ojp.gov/content/pub/pdf/prfdsc.pdf [perma.cc/3Q2V-LEGT].

trial, meaning that a defendant may need to fight in court for access to evidence relevant to their case.[161]

While the "newly presented" standard may be more favorable to innocent, *pro se* defendants, both standards are inadequate for these types of prisoners. In fact, the actual innocence gateway itself is not an effective remedy for wrongfully convicted persons. At its core, the gateway only ensures that a defendant's constitutional claims can be reviewed on their merits.[162] If their constitutional claims are not substantial enough, or if a petitioner is unable to gather adequate evidence to support an underlying constitutional claim, an innocent prisoner could still be denied relief.[163]

ii. AEDPA's Statute of Limitations Prevents Complete Habeas Petitions

In *McQuiggin v. Perkins*, the Supreme Court extended the actual innocence gateway to excuse default for petitions filed after AEDPA's one-year statute of limitations.[164] This holding means that federal habeas petitioners who file after this deadline may be able to access the innocence gateway and have their constitutional claims considered on their merits.[165] However, the Supreme Court instructed that a defendant's delay in filing their petition should be considered when weighing evidence of their innocence.[166]

This means that defendants must not only present new evidence to federal courts, but they must explain why that evidence could not have been presented at trial or before the current proceedings.[167] Furthermore, the statute of limitations forces defendants to either file early, meaning their petitions are potentially incomplete, or they can wait until they have gathered all the necessary evidence of their innocence, but the statute of limitations may have expired by that point.[168]

Some have argued that in order to fairly interpret *Perkins* and its exception to the statute of limitations, courts must allow petitioners to

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161. *E.g.*, *Access to Post-Conviction DNA Testing*, INNOCENCE PROJECT, https://innocenceproject.org/causes/access-post-conviction-dna-testing/ [perma.cc/3R48-RJ9R]. For other issues with state post-conviction statutes, see Section II.C.

162. Schlup v. Delo, 513 U.S. 298, 313–15 (1995).

163. *Id.* (describing that the innocence gateway allows for review of a constitutional error claim and does not create an independent ground for relief for innocence).

164. *See* McQuiggin v. Perkins, 569 U.S. 383 (2013).

165. *Id.*

166. *Id.* at 399.

167. Murphy, *supra* note 96, at 32–33.

168. *Id.* at 34 ("Evidence does not arrive in one clump but often is uncovered piece by piece[.]").

articulate efforts they or their counsel made in gathering evidence.[169] Courts must also fully appreciate and consider the obstacles petitioners face as a result of prison life.[170] Finally, courts must also consider petitioners' intellectual and mental abilities, as well as their education level, in deciding whether surpassing the statute of limitations weighs unfavorably against petitioners' innocence.[171]

However, these solutions, while certainly more favorable to defendants within AEDPA's limitations, still fail to address the fact that AEDPA's statute of limitations focuses unnecessarily on the finality of improper convictions and serves no purpose in the context of innocent, *pro se* defendants. What purpose is served by a court admonishing or potentially forcing innocent persons to remain in prison, simply because they could not gather sufficient evidence within AEDPA's time constraints? The efforts surrounding these petitioners' legal filings and their occupancy in prisons are a waste of judicial and corrections resources; the limitations serve no cause other than to preserve a wrongful conviction for a conviction's sake.[172]

iii. The Politicization of the State System: AEDPA's Deference to State Judgments and Factual Determinations Is Contrary to the Purpose of Federal Habeas Corpus

Historically, federal habeas corpus served as an opportunity for state prisoners to challenge their state convictions and allow their constitutional claims to be considered by impartial Article III judges.[173] When AEDPA passed in 1996, the legislation created significant deference to state court judgments and determinations of fact.[174] Proponents of the bill argued that federal review of state convictions was no longer as necessary, as states could be trusted to ensure that wrongful convictions would not happen.[175]

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169. *Id.* at 36.

170. *Id.* at 37.

171. *Id.* at 37–39.

172. Brooks et al., *supra* note 12, at 1075 ("[I]t does not make sense to have limits on the presentation of evidence. The cost of incarceration continues to rise each year. There may be some financial benefits in restricting filings by inmates, but these savings are dramatically overwhelmed by the cost of corrections. In addition, there is the moral question of incarcerating someone for a crime that new evidence can disprove. . . . Society is certainly not served by restricting the ability to bring that evidence to light by . . . time restrictions on evidence." (footnotes omitted)).

173. *See*, *e.g.*, Adelman, *supra* note 5 ("Nevertheless, even with the impediments the Court created, a state prisoner generally had the right to have a federal court independently review the merits of her or his constitutional claim. And a federal court had the authority and, in fact, the duty, to grant a writ of habeas corpus if a prisoner was in custody as a result of a constitutional violation.").

174. *See supra* Part I.

175. Balko, *supra* note 50.

However, as discussed in the following sections, states have failed to do so, and AEDPA's trust in state courts was misplaced. Post-conviction procedures have become more complicated, and high legal standards have made it nearly impossible for innocent, *pro se* defendants to gain relief. For example, in Missouri in 2001, a prosecutor infamously argued that innocence was not enough, and a defendant should still be executed despite his theoretical innocence.[176] Furthermore, state prosecutors routinely fight the testing of physical evidence in defendants' cases and defend wrongful convictions, even before the Supreme Court.[177] Government misconduct is one of the leading causes of wrongful convictions, with estimates projecting that 54% of wrongful convictions involve misconduct by government officials, including prosecutors, judges, and police officers.[178] AEDPA's deference to state decisions ignores these issues and goes against the spirit of federal habeas corpus review.

Furthermore, state judicial processes are particularly vulnerable to political influence. In many states and localities, judges, prosecutors, and sheriffs are elected.[179] These are the very people charged with investigating, prosecuting, and adjudicating crimes. When these public officials are up for re-election, they must often prepare to face criticism that they are "soft on crime" or not doing enough to protect their communities.[180] This political pressure means that public officials may be pressured to preserve convictions, particularly in high-profile cases

176. *See id.*

177. *See* sources cited *supra* note 130. These cases have even been argued before the Supreme Court. In 2021, the Supreme Court heard the case of Barry Jones, an Arizona prisoner sentenced to death who was granted relief through the actual innocence gateway by the federal district court. *See* Balko, *supra* note 50. The Ninth Circuit affirmed this decision. Before the Court, prosecutors argued that evidence of his innocence should not be considered under AEDPA for procedural reasons. *Id.* Thus, even before the Supreme Court, prosecutors argue that even if a defendant has convincing evidence of their innocence, they should be punished and even executed in spite of it. *Id.*

178. *See* Gross et al., *supra* note 104, at 11.

179. *Id.* at 155.

180. *See, e.g.*, Astead W. Herndon, *They Wanted to Roll Back Tough-on-Crime Policies. Then Violent Crime Surged.*, N.Y. TIMES (Feb. 18, 2022), https://www.nytimes.com/2022/02/18/us/politics/prosecutors-midterms-crime.html [perma.cc/PQT8-F2ZL] (discussing how progressive prosecutors are facing political pressures and even recall efforts because many U.S. cities are experiencing increases in violent crime); *see also* Nikki Rojas, *Looking at Role of Prosecutors, Politics in Mass Incarceration*, HARV. GAZETTE (Dec. 8, 2021), https://news.harvard.edu/gazette/story/2021/12/looking-at-role-of-prosecutors-politics-in-mass-incarceration/ [perma.cc/78JF-Y6AF] (citing a working paper by a doctoral candidate at Harvard Law School which found causal evidence that prosecutions and sentences increase in prosecutorial election years, and that these election effects were larger when local prosecutor races were contested).

involving murder, sexual assault, or vulnerable victims.[181] These are the same types of cases that appear to be the most common among wrongful convictions.[182]

Thus, when faced with the prospect of an election, and the potential overturning of a high profile, provocative case in their community, many prosecutors and judges may be more likely to uphold the conviction, even in the face of evidence of innocence, due to these political pressures.[183] Absent repeal of AEDPA and a return to independent federal review of state convictions, this aspect of AEDPA's regime will continue to punish innocent state prisoners whose exonerations may be prevented by the effects of local and state politics.

C. State Solutions to Wrongful Convictions Ignore Pro Se *Defendants' Investigative Barriers*

i. New Evidence Claims in State Courts

All states now have forms of post-trial relief available to defendants based on newly discovered evidence, including motions for new trials, collateral post-conviction procedures, and new evidence statutes.[184] These statutes usually require newly discovered evidence that proves a defendant's innocence under high legal and evidentiary standards.[185] However, judges are usually hesitant to grant release on these types of

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181. *See* Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 AM. J. POL. SCI. 334 (2002) (explaining, after studying techniques voters may use when deciding whether to re-elect prosecutors, "an optimal voter strategy is always to reelect prosecutors who obtain convictions"); *see also* KATE BERRY, BRENNAN CTR. FOR JUST., HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES 1–2 (2015) https://www.brennancenter.org/our-work/research-reports/how-judicial-elections-impact-criminal-cases [perma.cc/77AA-DT8W] (surveying various empirical studies that all found that "the pressures of upcoming re-election . . . make judges more punitive toward defendants in criminal cases" and that elected judges reverse fewer death penalty convictions than appointed judges); Michael Hardy, *Kim Ogg Blames Rising Crime on Houston Judges. 14 of Her Prosecutors Are Vying to Unseat Them.*, TEX. MONTHLY (Mar. 2022), https://www.texasmonthly.com/news-politics/harris-county-judicial-elections-ogg/ [perma.cc/ZA6M-8V85] (describing how Harris County, Texas, District Attorney Kim Ogg and her office criticized elected judges, and even ran against them in judicial elections, because those judges set lower bail amounts for criminal defendants).

182. *Exonerations by Year and Type of Crime*, *supra* note 129 (showing that the most common crimes among the official exonerations are sexual assault, child sex abuse, homicide, and drug possession and sale).

183. *See* BERRY, *supra* note 181, at 10–11 (citing studies from the 1990s and the 2010s that suggest upcoming elections may make judges less willing to overturn capital sentences).

184. *See* Medwed, *supra* note 12 (discussing the history of new evidence claims and state habeas procedures).

185. *Id.* at 659; *see also* Brooks et al., *supra* note 12 (surveying new evidence statutes across the United States, their requirements, and the legal and factual standards that defendants must meet to gain relief).

fact-based claims because of issues concerning finality, the role of juries as determiners of fact in our criminal system, and doubts about the reliability of new evidence—particularly non-forensic evidence.[186]

These types of claims may also have short statutes of limitations. For example, in Ohio, a defendant has only four months from the date of the verdict to file a claim, while in Oregon that time limit is just ten days after the entry of judgment.[187] Some states have longer statutes of limitations, with some allowing up to five years to file a new evidence claim, while only two states—New Jersey and New York—have no statute of limitations.[188]

For *pro se*, innocent defendants, claims based on new evidence are unlikely to succeed for a variety of reasons. First, these types of claims for relief based on new evidence are usually filed with the original trial judge, the very person who sentenced the innocent person.[189] This reality may mean that biased state judges, who may have an interest in not overturning their own sentences and convictions, may not be likely to grant relief.[190] If these judges presided over the trial, they may also have their own impressions of the evidence of the case that could impact their willingness to grant relief.[191] For example, if a new witness comes forward and states that someone else committed the crime, a judge in this position may be more inclined to believe witnesses they personally heard at the trial, such as victims.[192] Since many state judges are elected, they may also face political pressure to preserve convictions in particularly high-profile or provocative cases.[193]

Second, the statute of limitations that govern these types of claims are particularly problematic when considered in light of the fact that many defendants are not guaranteed counsel for these types of post-conviction motions. As previously discussed, *pro se* defendants, especially those who are incarcerated, face significant barriers in reinvestigating their cases.[194] Contacting victims or witnesses may result in witness

186. Medwed, *supra* note 12, at 664–65.

187. Brooks et al., *supra* note 12, at 1070–75 (surveying the statute of limitations for states' new evidence claims).

188. *Id.*

189. Medwed, *supra* note 12, at 659–60.

190. *Id.* at 699–700.

191. *Id.*

192. *See id.* at 663–64 (providing the example of a new evidence claim in which the judge discounted a victim's post-trial, positive identification of a different suspect by stating that the victim was simply too afraid to positively identify the defendant at the time of trial).

193. *See* BERRY, *supra* note 181 (describing the influence of criminal convictions in state judge election campaigns due to concerns of appearing "soft on crime").

194. *See supra* Section II.A. *See generally* Smith, *supra* note 103 (detailing the case of Patsy Kelly Jarrett and the legal and evidentiary barriers she encountered in her failed habeas and clemency petitions).

tampering or harassment allegations.[195] The realities of incarceration prevent the *pro se* defendants from contacting new witnesses, tracking down leads, and even visiting the crime scenes.[196] Many of these defendants are also limited in financial resources that could help them hire experts and investigators.[197] These obstacles mean that *pro se* defendants will need substantially more time to gather evidence of their innocence, if they are even able to do so. Thus, the statute of limitations might prevent *pro se* defendants from ever gaining relief through these types of state post-conviction claims.

Third, many of these statutes have high legal and factual standards that may be impossible for *pro se* defendants to meet. For example, many of them have "due diligence" requirements, which may limit what evidence a defendant can present.[198] More problematic, though, are the high legal standards accompanying these claims. The majority of states require that the new evidence, if presented at trial, probably or more likely than not would have changed the result of the trial.[199] This is a higher standard than other constitutional claims for post-conviction relief, such as ineffective assistance of counsel.[200] Other states have an even higher standard, requiring "clear and convincing evidence" that the result would have been different or "clear and convincing evidence" that the defendant is innocent or not guilty beyond a reasonable doubt.[201]

These standards require *pro se*, innocent defendants to gather significant evidence of their innocence from behind bars. Furthermore, because of the procedural complexities of these claims, defendants with limited mental or intellectual abilities may not be able to compile a sufficient legal filing for the court. For example, these defendants must not only craft a convincing story of their innocence, but they must also educate themselves on the requirements of the standard of proof for their jurisdiction. Additionally, they must appropriately present their evidence to the state court, which may be difficult considering that some jurisdictions are hesitant to grant evidentiary hearings.[202] The decision to grant or not grant an evidentiary hearing is also within the discretion of

195. *See supra* text accompanying note 131.

196. *See* Smith, *supra* note 103.

197. *See* Hill, *supra* note 78, at 195.

198. *See supra* Section II.C.i (discussing "due diligence" standards in the context of the actual innocence gateway in federal habeas corpus). State due diligence requirements operate similarly, requiring that new evidence only encapsulates evidence that could not have been uncovered pre-conviction by a defendant or their attorney if they exercised due diligence. *See* Brooks et al., *supra* note 12.

199. *Id.* at 1058–60.

200. *Id.*

201. *Id.* at 1060–62.

202. Medwed, *supra* note 12, at 681.

the trial court; appeals of these types of decisions may not be possible or favorable to defendants.[203] Thus, a *pro se* defendant's ability to master these procedural hurdles may make the difference in whether they are able to present adequate evidence of their innocence to support these types of claims.[204]

ii. Post-Conviction DNA Testing Statutes

Every state now has a post-conviction DNA statute, though many are limited in scope and substance and may not allow for the testing of a defendant's evidence.[205] For example, some statutes place the burden on the wrongfully convicted person to prove that, if tested, the DNA will implicate another individual, effectively forcing a *pro se* defendant to solve the crime while incarcerated.[206] Furthermore, this would require a prisoner to file a motion in court in order to test their evidence, which may include complicated legal standards, court fines, and other burdens for indigent and *pro se* defendants.[207] Many of these statutes are also limited to DNA and do not include other types of forensic analysis,[208] even though biological evidence is not available in 80–90% of all cases.[209] Moreover, the number of potential wrongful convictions with DNA evidence is likely to decrease as DNA testing becomes more frequent and available in pre-trial stages.[210]

Even if a defendant does have biological evidence that could be tested in their case, they may still face a significant obstacle—the prosecutor. Prosecutors are the gatekeepers of the evidence in a defendant's case; if prosecutors agree to test the evidence, no further

203. *Id.* at 663–64 (discussing an attempt to appeal the denial of an evidentiary hearing in state court, in which the appellate court affirmed the trial court's decision because the judge had "providently exercised its discretion").

204. *See supra* Part I (discussing the demographics of *pro se* defendants. These individuals may have mental and intellectual disabilities, lack of access to educational resources, and other barriers imposed by incarceration that may make them unable to navigate complicated post-conviction proceedings).

205. *Access to Post-Conviction DNA Testing*, *supra* note 161.

206. *Id.*

207. *Id.* (describing various statutes and how prisoners can request the DNA in their case be tested); Olivia Fields, *A DNA Test Might Help Exonerate This Man. A Judge Won't Allow It.*, THE MARSHALL PROJECT (Mar. 18, 2019), https://www.themarshallproject.org/2019/03/18/a-dna-test-might-help-exonerate-this-man-a-judge-won-t-allow-it [perma.cc/K38E-6P3L] (examining a case where a judge in North Carolina refused to allow DNA testing despite evidence of innocence); Bruce A. Green & Ellen Yaroshefky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 509–16 (2009) (explaining prosecutorial discretion in post-conviction cases and how prosecutors can decide whether or not to agree to test evidence in a case).

208. Brooks et al., *supra* note 12, at 1054.

209. Medwed, *supra* note 12, at 656.

210. *Id.* at 657 (noting that the availability of DNA before trial will decrease the number of post-conviction innocence claims based on DNA).

court proceedings may be needed. However, prosecutors often dispute testing in potential innocence cases.[211]

For example, prosecutors have recently fought requests for additional DNA testing in the infamous West Memphis Three case.[212] In 1994, Damien Echols, Jason Baldwin, and Jessie Miskelley—then teenagers themselves—were convicted of the murder of three eight-year-old boys whose bodies were found near West Memphis, Arkansas.[213] In 2011, the three men were released from prison due to favorable forensic testing and an Alford plea, which allowed them to maintain their innocence but plead guilty in exchange for time served.[214] The men took the plea, in part, because Echols was sentenced to death and facing a looming execution date.[215] At the time of the plea, the prosecutors and the three men agreed that if further DNA testing became possible, the men would be able to seek that testing.[216] However, in 2022, prosecuting attorney Keith L. Chrestman denied their request for more testing, forcing Echols and his attorney to file a motion in court.[217]

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211. For more examples of prosecutors resisting defendants' efforts to test physical evidence, see for example Adrian Sainz, *Prosecutor Fights Death Row Inmate's DNA Testing Request*, AP NEWS (July 30, 2020), https://apnews.com/article/tennessee-memphis-e8989cf6b24d914d99c82e276b07713b [perma.cc/2W5C-WVAF]; *Florida Attorney General Fights to Block DNA Testing that Local Prosecutor Approved for Two Prisoners Who Have Been on Death Row More Than Four Decades*, DEATH PENALTY INFO. CTR. (June 9, 2021), https://deathpenaltyinfo.org/news/florida-attorney-general-fights-to-block-dna-testing-that-local-prosecutor-approved-for-two-prisoners-who-have-been-on-death-row-more-than-four-decades [perma.cc/C9CA-PPRW]; Lara Bazelon, *The Innocence Deniers*, SLATE (Jan. 10, 2018), https://slate.com/news-and-politics/2018/01/innocence-deniers-prosecutors-who-have-refused-to-admit-wrongful-convictions.html [perma.cc/6DAL-XNWL].

212. Bill Bowden, *Damien Echols' Attorneys: Prosecutor Wrong to Deny New DNA Testing in West Memphis Three Case*, ARK. DEMOCRAT GAZETTE (Feb. 22, 2022), https://www.arkansasonline.com/news/2022/feb/22/damien-echols-prosecutor-wrong-to-deny-new-dna/ [perma.cc/9QLF-44ZR].

213. George Jared, *Judge Denies Advanced DNA Testing in West Memphis 3 Case*, KUAR (June 23, 2022), https://www.ualrpublicradio.org/local-regional-news/2022-06-23/judge-rejects-new-evidence-testing-in-west-memphis-3-case [perma.cc/DSV7-CWA3].

214. Bowden, *supra* note 212. In some wrongful conviction cases, prosecutors offer plea deals known as *Alford* pleas, which allow defendants to maintain their innocence while also pleading guilty. However, these types of deals prevent wrongfully convicted persons from receiving compensation. *See* VICE, *Innocence Ignored: The Alford Plea Prevents Compensation for the Wrongfully Convicted*, YOUTUBE (Oct. 29, 2018), https://www.youtube.com/watch?v=KG3zGzY2hsk [https://perma.cc/LKF2-7BFY].

215. Suzi Parker, *After 18 Years, "West Memphis 3" Go Free on Plea Deal*, REUTERS (Aug. 19, 2011), https://www.reuters.com/article/us-crime-westmemphis3-arkansas/after-18-years-west-memphis-3-go-free-on-plea-deal-idUSTRE77I54A20110819 [perma.cc/W8RK-EG4J] ("Baldwin resisted the deal at first because he felt it would negate attempts to clear his name and prove his innocence, he said. When asked why he finally agreed, Baldwin said it was for his friend on Death Row. 'They were trying to kill Damien,' he said.").

216. *Id.*

217. Bowden, *supra* note 212.

Before these recent court filings, West Memphis officials had claimed that the evidence in the case had been lost or destroyed in a fire, making it unavailable for further DNA testing.[218] These city officials—including the Police Chief, Michael Pope—misled Echols' legal team about the status of the evidence.[219] Despite their claims that the evidence was destroyed, when it was inspected by Echols' legal team, it was carefully catalogued and preserved.[220] Echols' legal team had only been able to inspect the evidence at the West Memphis Police Department because of a court order.[221] Echols continues to litigate new DNA testing in his case.[222]

Even if prosecutors and police departments preserve evidence, act in good faith, and allow defendants access to the evidence, forensic testing may not be possible or valuable. On average, it takes nearly eleven years post-conviction to exonerate a person.[223] Many of these cases may involve old evidence that was not preserved properly at the time of the crime due to a lack of awareness of the significance of forensic evidence.[224] Therefore, by the time innocent *pro se* defendants test the evidence in their case, it may be too degraded to provide adequate results for exoneration.[225]

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218. *E.g.*, Joyce Peterson, *New Access to Evidence Thought Destroyed in 1993 'West Memphis Three' Case*, ACTION NEWS 5 (Dec. 21, 2021), https://www.actionnews5.com/2021/12/22/new-access-evidence-thought-destroyed-1993-west-memphis-3-case/ [perma.cc/V923-8RXC].

219. *See id.* (discussing how McClendon and Pope denied being the reason for the delay in accessing evidence, yet Damien Echols' legal team had been told evidence had been destroyed in a fire, only to find it catalogued after a court order allowed Echols' lawyers to inspect the evidence); Sarah Polus, *Evidence Believed Lost in West Memphis Three Case Found at Police Department*, THE HILL (Dec. 23, 2021), https://thehill.com/homenews/state-watch/587211-evidence-believed-to-be-lost-in-west-memphis-3-case-reportedly-found-at/ [https://perma.cc/8XVL-XQLY] (claiming that Pope was "not truthful" and that his resignation after the evidence was discovered was related to this case); Lara Farrar, *West Memphis Three to Get Hearing This Week on New DNA Testing*, ARK. DEMOCRAT GAZETTE (June 20, 2022), https://www.arkansasonline.com/news/2022/jun/20/west-memphis-three-to-get-hearing-this-week-on/ [https://perma.cc/7ZQ4-LASM] ("[Prosecuting attorney] Chrestman confirmed the evidence might no longer exist. That turned out to not be the case . . . .").

220. *See* sources cited *supra* note 219.

221. *E.g.*, Peterson, *supra* note 218.

222. Michael Buckner, *Echols Appeals Denial to DNA Test Evidence in West Memphis Three Case*, THV 11 (Aug. 2, 2022), https://www.thv11.com/article/news/crime/damien-echols-appeals-denial-test-evidence-west-memphis-three/91-d0eb2c51-d26c-4a32-8b6b-715dd1afedaa [perma.cc/4MTC-LXQD] (describing Echols' efforts to obtain DNA testing, including a pending appeal on a trial court's denial of testing).

223. Maitreya Badami, *Why Do Exonerations Take So Long?*, SANTA CLARA UNIV. SCH. OF L.: N. CAL. INNOCENCE PROJECT (Nov. 7, 2016), https://law.scu.edu/experiential/northern-california-innocence-project/why-do-exonerations-take-so-long/ [perma.cc/QZQ5-FWPJ].

224. Medwed, *supra* note 12, at 656–57 (emphasis omitted).

225. *Id.*

Furthermore, even DNA evidence that excludes a defendant may not be enough for a court to grant relief. For example, in many rape cases, after DNA testing shows that sperm found in the victim did not come from the defendant, prosecutors may argue that the DNA came from an unidentified co-perpetrator or a consensual lover from before the crime, "even when the *theory at trial was that there was only one attacker*."[226] This means that even in the face of DNA evidence, courts may not grant relief because that evidence does not convincingly point to the defendant's innocence according to the prosecutor's new theory of the case.[227]

Moreover, if a defendant can test the evidence in their case, they may still need the assistance of forensic scientists or other experts.[228] Since most *pro se* defendants are indigent, many will not be able to afford to pay these experts for their time and analyses.[229] Thus, a defendant may not succeed in their claim because they could not afford the assistance needed. Limitations in their ability to research experts and contact them may also hinder defendants' use of experts in their proceedings.[230] Yet any delay in pursuing the physical evidence in their case could nevertheless be seen as failing to act with the sometimes-required due diligence.

iii. Executive Clemency and Pardons

Some have suggested that executive clemency serves as the fail-safe to catch the cases of innocence that may not receive relief from state or federal courts.[231] However, declining clemency rates suggest that this option is simply not enough to protect innocent defendants, particularly *pro se* individuals.[232] Capital cases, where defendants are typically provided with the assistance of counsel, provide damning statistics on the decreasing use of clemency. From 1900 to 1973, governors granted

226. Brooks et al., *supra* note 12, at 1063.

227. *Id.* (stating that a "clear and convincing" standard for evidence of innocence would mean that relief would not be possible in this type of situation).

228. *DNA's Revolutionary Role in Freeing the Innocent*, INNOCENCE PROJECT (Apr. 18, 2018), https://innocenceproject.org/dna-revolutionary-role-freedom/ [perma.cc/5YNG-7YNW] (describing how the Innocence Project began using DNA in exonerations, what the process is for getting DNA tested, and examples of exonerations that used DNA evidence).

229. *Cf. You Can Free the Innocent*, INNOCENCE PROJECT (Sept. 11, 2009), https://innocenceproject.org/you-can-free-the-innocent/ [perma.cc/D3JD-7H8Q] (stating that the Innocence Project spends around $8,500 on DNA testing in an average case).

230. *See, e.g.*, *supra* text accompanying note 111; *cf.* Jonathan Abel, *supra* note 136 (discussing the history of and legal issues surrounding prison law libraries, and critiquing the ineffectiveness of these libraries in providing inmates with access to the courts).

231. Medwed, *supra* note 12, at 717.

232. Austin Sarat, *With Julius Jones' Commutation, Cruelty Is the Point*, SLATE (Nov. 19, 2021), https://slate.com/news-and-politics/2021/11/julius-jones-commutation-is-cruelty-masquerading-as-mercy.html [perma.cc/2CGG-D9XK].

clemency in 20% to 25% of death penalty cases; however, from 1973 to 2020, commutations were only granted in 0.02% of cases.[233]

These statistics suggest bleak prospects for *pro se* defendants. First, capital cases are typically the most high-profile of cases, which means they may receive more media attention and public support than the cases in which *pro se* defendants are involved.[234] Second, many capital defendants are represented by counsel in their clemency petitions, whereas *pro se* defendants are left to plead their cases on their own.[235] Additionally, lacking access to legal counsel may mean that *pro se* prisoners lack the knowledge needed to present a compelling clemency petition.[236] Third, the nature of their incarceration means that *pro se* defendants may struggle to generate public interest in their cases; restrictions on their ability to communicate with the outside world generally makes it more difficult for these prisoners to contact journalists and other media figures who could help pressure governors into granting their clemency requests.[237]

Finally, both parole boards and executive officers have been known to punish prisoners who refuse to accept responsibility for their

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233. *Id.*

234. *See, e.g.*, Amir Vera & Dakin Andone, *Oklahoma Governor Grants Clemency to Julius Jones, Halting His Execution*, CNN (Nov. 19, 2021), https://www.cnn.com/2021/11/18/us/julius-jones-oklahoma-execution-decision/index.html [perma.cc/3SRY-PUVD] (describing a last-minute grant of clemency before an execution after "widespread attention" following a documentary, an online petition, protests, statements from celebrities, and news conferences); Gaige Davila, *With 1 Month Until Execution, Melissa Lucio Seeks Clemency from Death Row*, HOUS. PUB. MEDIA (Mar. 25, 2022), https://www.houstonpublicmedia.org/articles/news/criminal-justice/2022/03/25/421916/with-1-month-until-execution-melissa-lucio-seeks-clemency-from-death-row/ [perma.cc/YP58-EJHT] (stating how Lucio's case received significant attention following a documentary released two years before clemency proceedings); Lillian Segura & Jordan Smith, *Facing His Eighth Execution Date, Richard Glossip Asks for Clemency*, THE INTERCEPT (Jan. 2, 2023), https://theintercept.com/2023/01/02/richard-glossip-execution-clemency/ [perma.cc/VG2N-LDUK] (detailing years of media efforts on behalf of Mr. Glossip, including documentaries, reporting from various news sources, and other advocacy efforts by Glossip and his legal team); *see also* Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585 (2004) (describing how media sources cover death penalty cases and play a part in shaping public opinion in covered cases).

235. Harbison v. Bell, 556 U.S. 180, 182–83 (2009) (holding that federal law allows for appointment of counsel to represent clients sentenced to death during their state clemency proceedings).

236. *Id.* at 193–94 (quoting Hain v. Mullin, 436 F.3d 1168, 1175 (Ca. 2006) (en banc)) ("[T]he work of competent counsel during habeas corpus representation may provide the basis for a persuasive clemency application. . . . Harbison's case underscores why it is 'entirely plausible that Congress did not want condemned men and women to be abandoned by their counsel at the last moment and left to navigate the sometimes labyrinthine clemency process from their jail cells.'").

237. KUSHNER ET AL., *supra* note 110, at 664–65.

convicted crimes.[238] Individuals who maintain their innocence may not be released because of their refusal to show remorse for these crimes.[239] For example, a recent bill passed in the Oklahoma House of Representatives would limit what the Pardon and Parole Board can consider; under this law, the Board could not grant clemency based on claims of innocence to individuals sentenced to death.[240] This conundrum places innocent prisoners in an impossible situation: either lie by accepting responsibility and plead for mercy, or maintain their innocence at the expense of their freedom.

III. Solutions

The decline in the Great Writ's effectiveness in freeing the innocent and the difficulties posed by state post-conviction procedures make it clear that the crisis of wrongful convictions in the United States will not be solved by piecemeal reforms. While some of the solutions posed by practitioners and researchers in this field may help defendants represented by counsel—lowering procedural hurdles, eliminating statutes of limitations, and slightly loosening legal standards of proof—these proposals do nothing to address the other barriers that innocent, *pro se* prisoners face.[241] These reforms do not give *pro se* prisoners investigative resources or tools, nor do they provide them with the education that will allow them to properly communicate their appeals to the courts. Furthermore, they fail to acknowledge that *pro se* defendants are trying to prove their innocence and navigate a court system while living the daily traumas associated with long-term incarceration.[242]

Meanwhile, the problem of wrongful convictions continues to grow in the face of inadequate reforms. One study estimates that nearly 0.5% to 1% of those convicted are innocent, while other studies place that estimate between 5% and 15%.[243] Very conservatively, that means tens

238. *See* Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491, 513–30 (2008).

239. *See, e.g.*, Tom Robbins, *He Says He's No Murderer. That's Why He's Still in Prison.*, N.Y. TIMES (Dec. 4, 2021), https://www.nytimes.com/2021/12/02/nyregion/joseph-gordon-parole-murder.html [perma.cc/B6G5-2NP4] (discussing the case of Joseph Gordon, who was denied parole five times, in part, for maintaining his innocence).

240. Tyler Boydston, *Bill to Reform Oklahoma Pardon and Parole Board Passes Committee*, ABC 7 NEWS (Mar. 2, 2022), https://www.kswo.com/2022/03/02/bill-reform-oklahoma-pardon-parole-board-passes-committee/ [perma.cc/B6BA-CFQD].

241. Hartung, *supra* note 3, at 89–91 (describing how piecemeal litigation of innocence claims prevents relief).

242. Katie Rose Quandt & Alexi Jones, *Research Roundup: Incarceration Can Cause Lasting Damage to Mental Health*, PRISON POL'Y INITIATIVE (May 13, 2021), https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/ [perma.cc/MXG3-TSD2].

243. Hartung, *supra* note 3, at 72.

of thousands of people have been falsely convicted in the United States.[244] However, since 1989, the National Registry for Exonerations has only identified 3,355 exonerations.[245] This discrepancy demonstrates the failure of our judicial system in righting wrongful convictions. Declining clemency rates further show that executive officers cannot be trusted to fill in these gaps left by the judiciary.[246]

Both federal and state courts' failure to exonerate the wrongfully convicted demonstrates the need for a larger-scale solution. Such a solution would almost necessarily require political action and systemic reforms. This final Part discusses potential solutions and actions that can be taken by legislatures to finally—and fully—address the crisis of wrongful convictions.

A. Guaranteeing a Right to Effective Assistance of Post-Conviction Counsel

The most obvious solution to help *pro se* defendants in proving their innocence is providing them with effective counsel for their post-conviction proceedings. Providing counsel would significantly help with defendants' ability to investigate their cases, navigate post-conviction options for relief, and help them connect with media outlets and community groups that can raise awareness about their case.[247] In fact, providing counsel would lessen many of the investigative barriers discussed earlier in this Article, because counsel would be able to reinterview witnesses, even victims, and chase down new leads from outside prison walls. Such a right to counsel has indeed been contemplated by courts and legislatures before.[248]

However, providing post-conviction counsel as a right to all defendants may financially burden states or compromise our legal system's interest in the finality of convictions.[249] But as discussed

244. *How Many Innocent People are in Prison?*, INNOCENCE PROJECT (Dec. 12, 2011), https://innocenceproject.org/how-many-innocent-people-are-in-prison/ [perma.cc/FSQ4-C7BW].

245. Cabral, *supra* note 4.

246. Austin Sarat, *Can Finality Be More Important Than Justice Even If It Means Executing the Innocent?*, JUSTIA: VERDICT (May 31, 2022), https://verdict.justia.com/2022/05/31/can-finality-be-more-important-than-justice-even-if-it-means-executing-the-innocent [perma.cc/92XV-472P].

247. Givelber, *supra* note 48, at 1409.

248. The Supreme Court has recognized the possibility of a right to post-conviction counsel when a constitutional claim can only be raised in collateral proceedings. *See* Martinez v. Ryan, 566 U.S. 1 (2012); Trevino v. Thaler, 569 U.S. 413, 413–14 (2013). Furthermore, most states with the death penalty provide counsel as a right to capital defendants in at least some of their appeals. *See* Givelber, *supra* note 48, at 1396.

249. *See* Sarat, *supra* note 246 (discussing how the Supreme Court's ruling in *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022), prioritized finality over justice).

previously, *pro se* defendants are virtually unable to conduct any adequate investigation into their cases, face high evidentiary and constitutional standards in post-conviction proceedings, and are unlikely to succeed on appeal without the assistance of counsel.[250] Thus, an emphasis on finality may preserve courts' and states' resources, but it does not achieve justice, provide faith in our legal system, or create closure for victims and their loved ones. Providing counsel to defendants during post-conviction proceedings would more likely ensure that their appeals are timely and presented in the proper format to the court, which may reduce successive and inadequate petitions by *pro se* defendants.

While the number of appeals may increase if a right to post-conviction counsel is recognized, these appeals would also likely be more complete and targeted, as formerly *pro se* defendants would now have the benefits of full investigations and the legal expertise of their counsel in narrowing down which claims should be presented to the court.[251] Such an improvement in the quality of appeals may actually promote finality by giving courts access to a meaningful and thorough examination of a defendant's claims, rather than the piecemeal claims that a *pro se* defendant would be able to present without counsel.[252]

As discussed, though, an innocent defendant's journey through the legal system is not always a favorable one. While having the assistance of counsel will enormously benefit *pro se* defendants, it does not guarantee them relief. For example, from December 2021 until December 2022, only 6.6% of criminal appeals across all the federal appellate circuits resulted in a reversal of the conviction—including both represented and unrepresented defendants.[253]

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250. *See supra* Section II.A; Givelber, *supra* note 48, at 1409 ("The [Supreme] Court has never suggested that a prisoner will do as well representing himself as he would if represented by competent counsel . . . .").

251. *Cf.* Powell v. Alabama, 287 U.S. 45, 68–69 (1932) (describing the importance of legal "counsel at every step in the proceedings" and how crucial legal expertise is to being successful at court); *Martinez*, 566 U.S. at 11–12 ("Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. . . . To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney.").

252. *See* Hartung, *supra* note 3, at 90–91 (describing how *pro se* prisoners often must make their habeas corpus claims via multiple successive petitions, and courts view these petitions in isolation instead of seeing the full picture of a defendant's claims); *cf.* Medwed, *supra* note 12, at 695–99 (proposing that simplifying state procedures for claims of newly discovered evidence could help both innocent petitioners and the state, and would eliminate the need for multiple successive petitions from inmates).

253. *Table B-5–U.S. Courts of Appeals Statistical Tables For the Federal Judiciary (December 31, 2022)*, U.S. COURTS, https://www.uscourts.gov/statistics/table/b-5/statistical-tables-federal-judiciary/2022/12/31 [https://perma.cc/7PTU-NGHD0.

B. Adequately Funding Public Defense—Before and After Trial

The chronic underfunding of public defense systems is no secret, but a well-funded public defense system could save innocent defendants both before and after conviction.[254] Public defense systems receive their funding in a variety of ways; some are entirely county- or state-funded, and others receive portions of their funding from both sources.[255] Studies show that county-based funding can lead to disparities in quality of representation, and state-based funding has stagnated in recent years.[256]

This underfunding has led public defense systems to be overworked and understaffed; "only 27 percent of county-based and 21 percent of state-based public defender offices have enough attorneys to adequately handle their caseloads."[257] This burden on public defenders has created a culture in which failing to thoroughly investigate cases and encouraging clients to plead guilty—rather than a culture of zealous advocacy in litigation—is normalized.[258] Furthermore, public defender offices also struggle with a dearth of support staff, such as paralegals and investigators, who usually assist in reinvestigating cases, interviewing witnesses, and collecting important records and documents.[259] The lack of funding also causes public defenders to be undertrained,[260] which may prevent these attorneys from learning about new investigatory techniques, changes in forensic science, and methods of proving a client's innocence.

It is worth noting that these same resource-related issues do not impact prosecutor's offices in the same way. In many jurisdictions across the country, prosecutors make substantially more money than their public defender counterparts do, despite having similar years of experience.[261] Prosecutor's offices usually have more support staff than

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254. *See, e.g.*, Phil McCausland, *Public Defenders Nationwide Say They're Overworked and Underfunded*, NBC NEWS (Dec. 11, 2017), https://www.nbcnews.com/news/us-news/public-defenders-nationwide-say-they-re-overworked-underfunded-n828111 [perma.cc/6LTB-ZD3W] (describing how public defender programs have been underfunded and targeted for budget cuts nationwide since the 1980s, yet stronger indigent defense systems would lead to fewer wrongful convictions and more exonerations).

255. *See* BRYAN FURST, BRENNAN CTR. FOR JUST., A FAIR FIGHT: ACHIEVING INDIGENT DEFENSE RESOURCE PARITY 6–7 (2019), https://www.brennancenter.org/our-work/research-reports/fair-fight [perma.cc/9JXY-ULDV] (footnote omitted) (discussing the resource disparity facing public defense offices across the country).

256. *Id.*

257. *Id.* at 1.

258. *Id.* at 3–4.

259. *Id.* at 9.

260. *Id.* at 3.

261. *Id.* at 8–9 (noting that public defenders with less than three years of experience in the Fourth Judicial District in Florida annually earn $10,000 less than their prosecutor counterparts with the same experience, and junior defenders in Colorado's First Judicial District make $15,000 less).

public defender offices, including full-time investigators.[262] This resource disparity undermines the fundamentals of our adversarial system; it deprives defendants of the opportunity for a fair trial and appellate process "since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled."[263]

One factor that leads to wrongful convictions is inadequate defense. A large-scale empirical research project compared cases of wrongful convictions where individuals were later exonerated with "near miss" cases in which factually innocent defendants were nearly convicted of a crime they did not commit.[264] This study showed a statistically significant increase in likelihood of wrongful conviction when defense counsel did not present a strong defense, including if the attorney lacked the funds for experts and other resources at trial.[265] While this study did not find a statistical difference between private counsel and public defenders or court-appointed counsel, it did find a difference in wrongful conviction rate dependent on whether an individual's defense had adequate funding.[266]

Increasing funding and resources for public defense may reduce wrongful convictions. As recently as 2019, there has been proposed federal legislation that would expand public defense funding to states that "improve data collection, set reasonable workload limits based on statewide data, and institute pay parity between public defenders and prosecutors."[267]

Increasing funding will also allow for more post-conviction representation. As discussed previously, one argument against guaranteeing the right to effective post-conviction counsel to all defendants involves the increased resources it would require.[268] However, increasing funding for public defense systems overall could allow for more post-conviction representation of defendants who would otherwise have to bring their appeals *pro se*.

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262. *Id.* at 9.

263. Strickland v. Washington, 466 U.S. 668, 685 (1984) (citations omitted).

264. *See* Jon B. Gould, Julia Carrano, Richard A. Leo & Katie Hail-Jares, *Innocent Defendants: Divergent Case Outcomes and What They Teach Us*, *in* WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE 73, 73–74 (Marvin Zalman & Julia L. Carrano, eds., 2014).

265. *Id.* at 77, 83.

266. *Id.* at 83–84.

267. Furst, *supra* note 255, at 10 (discussing the Equal Defense Act, proposed by then-Senator Kamala Harris in 2019, which has yet to be enacted).

268. *See supra* note 248 and accompanying text.

Furthermore, an increase in funding for post-conviction public defense would help alleviate burdened innocence projects.[269] Innocence organizations often face low budgets, which can significantly impact their success in freeing wrongfully convicted individuals.[270] The costs of litigating a defendant's claims usually falls on the defendant and the innocence organization representing them, and exonerations are costly endeavors.[271] The funding that innocence organizations receive also comes with restrictions that go beyond caseload allowances; for example, some innocence organizations can only handle cases with DNA, while others only represent defendants in non-DNA cases.[272] Depending on *pro se* defendants' geographical location, finding an innocence organization with the funding and ability to take their case may be virtually impossible.[273]

Finally, increasing public defense funding will not only reduce wrongful convictions at the trial court level and increase exonerations for the wrongfully convicted, but may also potentially save states and taxpayers millions of dollars in litigation and settlements. According to a 2018 study, state and municipal governments at that time had paid more than $2.2 billion in compensation due to wrongful convictions;[274] this amount did not include money spent by governments in litigating criminal appeals by those innocent defendants.[275] This money could surely be better spent by funding public defense, which would both prevent wrongful convictions and help correct them prior to spending years litigating post-conviction claims.

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269. Innocence projects are non-government organizations who represent wrongfully convicted persons and litigate on their behalf. *See* Steven A. Krieger, *Why Our Justice System Convicts Innocent People, and the Challenges Faced by Innocence Projects Trying to Exonerate Them*, 14 NEW CRIM. L. REV. 333 (2011) (providing information on the development and structure of innocence projects). These organizations are limited in funding and resources and can only take on certain cases. *E.g.*, *id.* at 382–84.

270. *Id.* at 371–73.

271. *Id.* at 372 n.234 (noting that the average exoneration cost is $333,239 and that non-DNA cases are more expensive to litigate than DNA exonerations).

272. *E.g.*, *id.* at 363 ("[T]he Innocence Project only accepts cases in which the prisoner could be freed through DNA evidence.").

273. *See Explore the Numbers: Innocence Project's Impact*, INNOCENCE PROJECT, https://innocenceproject.org/exonerations-data/ [perma.cc/6JDM-ZU2G] (stating that the Innocence Project has only achieved successes in thirty-two U.S. states and the District of Columbia); *see also Network Member Organization Locator and Directory*, THE INNOCENCE NETWORK, https://innocencenetwork.org/directory [https://perma.cc/74SS-5R2L] (identifying innocence project organizations in thirty-five U.S. states, and indicating that the majority of these states only have one innocent project).

274. NAT'L REGISTRY OF EXONERATIONS, MILESTONE: EXONERATED DEFENDANTS SPENT 20,000 YEARS IN PRISON, 4, 10–11 (2018) (citing Jeffrey S. Gutman & Lingxiao Sun, *Why is Mississippi the Best State in Which to be Exonerated? An Empirical Evaluation of State Statutory and Civil Compensation for the Wrongly Convicted*, 11 NE. L. REV. 694 (2019)).

275. *See id.* at 4–5.

C. Conviction Integrity Units and Independent Innocence Commissions

For *pro se* defendants in particular, though, a more cost-effective solution that could provide more timely relief is expanding the use of conviction integrity units (CIUs). These units, which operate as divisions within prosecutorial offices, seek to "prevent, identify, and remedy false convictions."[276] These units are often tasked with reinvestigating cases and are made up of both attorneys and investigators.[277] CIUs have had some success in overturning large numbers of wrongful convictions.[278] For example, within three years, the CIU in Wayne County, Michigan, achieved the release of thirty men who should never have been convicted.[279]

What makes these units so successful in obtaining relief is that they are led by the very people with the discretion to continue fighting appeals—prosecutors themselves. During the appellate process, prosecutors can simply choose to dismiss charges once a defendant has succeeded on appeal; they can also join defense attorneys before the court in asking for a defendant's exoneration.[280] These units also have access to prosecutors' and law enforcement's internal files and evidence.[281] Considering that an estimated 50% of wrongful convictions involve official misconduct, including in some cases the withholding of material evidence from defense attorneys,[282] unfettered access to these files may make the crucial difference in proving some individual's innocence. For *pro se* defendants, having a CIU investigate their case could

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276. *Conviction Integrity Units*, THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx [perma.cc/C2YA-AGTT] (June 14, 2022).

277. *Id.*; Steve Friess, *Inside the Wayne County Prosecutor's Unit That's Exonerated 30 Innocent Convicts in 3 Years*, HOUR DETROIT (Oct. 14, 2021), https://www.hourdetroit.com/political-topics/inside-the-wayne-county-prosecutors-unit-thats-exonerated-30-innocent-convicts-%E2%80%A8in-3-years/ [perma.cc/RX4M-GK5F].

278. *See Conviction Integrity Units*, *supra* note 277 (listing each CIU in the United States and providing links to information on their reported exonerations).

279. Friess, *supra* note 277.

280. For example, in Adnan Syed's case, the State moved to vacate his conviction. Alex Mann & Lee O. Sanderlin, *Baltimore Prosecutors Move to Vacate Adnan Syed Conviction in 1999 Murder Case Brought to National Fame in 'Serial' Podcast*, BALT. SUN (Sept. 14, 2022), https://www.baltimoresun.com/news/crime/bs-md-ci-cr-prosecutors-move-to-vacate-adnan-syed-sentence-20220914-uinmd6pa45cqbfj4fwyvac2tb4-story.html [perma.cc/JY6G-YKFK].

281. Josie Duffy Rice, *Do Conviction Integrity Units Work?*, THE APPEAL (Mar. 22, 2018), https://theappeal.org/do-conviction-integrity-units-work-a718bbc75bc7/ [perma.cc/2YAM-U58E].

282. Jessica Brand, *The Epidemic of Brady Violations: Explained*, THE APPEAL (Apr. 25, 2018), https://theappeal.org/the-epidemic-of-brady-violations-explained-94a38ad3c800/ [perma.cc/VYN3-J8FT].

correct the deficiencies caused by the defendant's inability to conduct their own investigation; a CIU would have the complete, original investigatory file, as well as the resources to correct inadequacies in that original investigation.

Having the support of a CIU and its prosecutorial office would be particularly helpful to *pro se* defendants facing more difficult evidentiary standards, such as in those jurisdictions that require new evidence that could not have been discovered at the time of trial.[283] Due to the time passed since trial, the failures of their trial counsel, and the impossibility of investigating their own cases while incarcerated,[284] these defendants may simply be unable prove their innocence or obtain relief without the assistance of a CIU.[285] There may be no evidence in their case left to find that would satisfy the court. Additionally, even if these defendants were provided with effective post-conviction counsel, they would still face a heavy burden in court when trying to litigate their innocence. They would still need to potentially prove an underlying constitutional claim, or if filing in state court, may face a biased judge or equally strict evidentiary requirements.[286] Having the support of a CIU, combined with a prosecutorial office's authority, may make the pivotal difference in these defendants obtaining relief.

However, many localities seemingly use CIUs as political "window dressing," establishing units that never exonerate a single wrongfully convicted individual.[287] For example, the National Registry for Exonerations has identified fifty-three CIUs across the country with *zero* exonerations.[288] Critics have pointed out that other CIUs may simply choose the most obvious wrongful convictions—or those that have already been investigated by other attorneys, organizations, or

283. *See generally* Brooks et al., *supra* note 12 (describing legal standards for claims involving new evidence and difficulties in litigating these types of cases).

284. *See supra* Section II.A.

285. *Cf.* Mallory Emma Garvin, In the Interest of Justice: The Gold Standard for Conviction Integrity Units 9 (2023) (unpublished article) (on file with Seton Hall Law), https://scholarship.shu.edu/cgi/viewcontent.cgi?article=2313&context=student_scholarship [https://perma.cc/H3TE-PHA9] (describing how the Philadelphia CIU launched a partnership with a nonprofit law office to represent *pro se* applicants after discovering the systemic prosecutorial and police abuses that had occurred in cases handled by the Philadelphia District Attorney's office).

286. *See* Medwed, *supra* note 12, at 664–66, 699–715.

287. THE NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2017, at 15 (2018), https://www.law.umich.edu/special/exoneration/Documents/ExonerationsIn2017.pdf [perma.cc/RC2T-5AMY].

288. *Conviction Integrity Units*, *supra* note 276; *see also* Rice, *supra* note 281 (finding that of thirty-three CIUs examined in 2018, twelve had never exonerated a single person, and five others had only exonerated one person).

journalists—to pursue.[289] Furthermore, CIUs are often not adequately insulated from the political pressures within their jurisdictions.[290] For example, in 2022, Virginia's new attorney general, Jason Miyares, fired everyone in the office's CIU, effectively ending the office's work on its wrongful conviction cases.[291] In the same year in Ohio, five members of the Cuyahoga County Prosecutor Office's CIU resigned, stating that the unit was "mere window dressing, with no real substantive impact."[292]

Therefore, in order to be truly effective, established CIUs must strive to be as unbiased towards prosecution as possible. Some scholars have recommended that these units be as separate from the prosecutorial office as possible.[293] The most successful CIUs across the country have done just that by selecting individuals who had not previously prosecuted in the same jurisdiction. For example, Philadelphia District Attorney Larry Krasner created Philadelphia's CIU in 2018.[294] The unit was created to be independent, reporting directly to Krasner,[295] who served as a public defender then as a civil rights attorney for nearly thirty years before becoming Philadelphia's District Attorney.[296] Krasner recruited Patricia Cummings to lead the unit; before coming to Philadelphia,

289. Rice, *supra* note 281; Christopher Ketcham, *Above the Law: On the Prospects of Prosecutorial Reform*, 23 COUNTERPUNCH, no. 4, 2016, at 12, 16, https://fij.org/fij_website/wp-content/uploads/2016/09/Ketcham_-prosecutorial-reform.pdf [perma.cc/K9NQ-X525]; THE NAT'L REGISTRY OF EXONERATIONS, *supra* note 287, at 15.

290. *See* Rice, *supra* note 281 ("The truth is that CIUs' biggest asset is also their biggest obstacle. On the one hand, these units have incomparable access to district attorneys' internal evidence, and have better access to other law enforcement agencies. But because CIUs are part of the DA's office, they are often incentivized to protect their own."); THE NAT'L REGISTRY OF EXONERATIONS, *supra* note 287, at 15 ("The variability in the performance of CIUs reflects the fact that they are internal organizational choices of the elected prosecutors who create them.").

291. C.J. Ciaramella, *New Virginia Attorney General Fires Entire Conviction Integrity Unit*, REASON (Jan. 21, 2022), https://reason.com/2022/01/21/new-virginia-attorney-general-fires-entire-conviction-integrity-unit/ [perma.cc/PYU2-BVAV].

292. Cory Shaffer, *Outside Members of Cuyahoga County Prosecutor's Conviction Integrity Unit Resign Over Years of Inactivity*, CLEVELAND.COM (Nov. 21, 2022), https://www.cleveland.com/court-justice/2022/11/outside-members-of-cuyahoga-county-prosecutors-conviction-integrity-unit-resign-over-years-of-inactivity.html [perma.cc/9WY3-48XK].

293. *See, e.g.*, Barry C. Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705, 710–12 (2017) (advocating for the creation of independent institutions to investigate wrongful convictions).

294. PHILA. DIST. ATTY'S OFF., OVERTURNING CONVICTIONS—AND AN ERA: CONVICTION INTEGRITY UNIT REPORT JANUARY 2018–JUNE 2021, at 6, https://github.com/phillydao/phillydao-public-data/blob/main/docs/reports/Philadelphia%20CIU%20Report%202018%20-%202021.pdf [https://perma.cc/CU8T-BF4D].

295. *Id.*

296. *Meet Larry*, LARRY KRASNER FOR DIST. ATT'Y, https://krasnerforda.com/meet-larry [perma.cc/66DC-ZB9Y].

Cummings ran the Dallas County CIU.[297] This team of Krasner and Cummings shows the importance of mitigating bias in CIUs: neither of them had prosecuted cases in Philadelphia, and therefore, should have less of a political or personal interest in upholding the cases they received to review. Since 2018, the unit has exonerated twenty-nine individuals[298] and helped gain at least twenty-three commutations.[299]

The CIU in Wayne County, Michigan, took a similar approach. CIU Director Valerie Newman chose to only hire attorneys for the unit who had never served as Wayne County Prosecutors.[300] Newman herself was chosen to lead the unit because of her reputation as one of Michigan's "most ferocious wrongful conviction crusaders."[301] In its first three years, the CIU exonerated thirty individuals.[302]

Choosing prosecutors who have never served within the same jurisdiction as their CIU may make the difference between a unit that exists only in name and a truly effective unit that frees the wrongfully convicted. This careful selection of an "outsider" may also protect the unit—and its applicants—from political pressures and bias.[303]

Furthermore, in order to effectively serve *pro se* individuals, the application process for assistance from CIUs must be simplified, with incarcerated individuals in mind.[304] *Pro se* individuals should not be

297. Garvin, *supra* note 285, at 8.

298. *Public Data Dashboard: Exonerations*, PHILA. DIST. ATTY'S OFF., https://data.philadao.com/Exonerations.html [https://perma.cc/89LS-RG8L].

299. PHILA. DIST. ATTY'S OFF., *supra* note 294, at 9.

300. Friess, *supra* note 277.

301. *Id.*

302. *Id.*

303. *See* Rice, *supra* note 281.

304. *Cf.* Garvin, *supra* note 285, at 13 ("Some [CIUs] provide digital forms, others have easily accessible applications online, and still, others require an applicant to write a letter to the office requesting an application. On this point, it is important to note that there is also a significant difference among CIUs as to how accessible their application is for the public to find. Additionally, there is a difference in how the applications are constructed, some being more complex or more difficult to understand than others." (footnote omitted)). Incarcerated individuals may lack access to the internet and email, which means that CIU applications may need to be in paper format. *See* Diana Kruzman, *In U.S. Prisons, Tablets Open Window to the Outside World*, REUTERS (July 18, 2018), https://www.reuters.com/article/us-usa-prisons-computers/in-u-s-prisons-tablets-open-window-to-the-outside-world-idUSKBN1K813D [perma.cc/3PP3-D2QA] (explaining that even though some incarcerated individuals may have access to tablets, they are not connected to the internet and only allow exchanges with approved individuals); *cf.* Abel, *supra* note 136 (describing the inadequacies of prison law libraries). They may also lack the funds needed to send mail. *See, e.g.*, *General Mail & Email*, OHIO DEP'T OF REHAB. & CORR., https://drc.ohio.gov/visitation/general-mail-and-email/general-mail-and-email [https://perma.cc/LM77-XW2R] (stating that prisoners only can send one free letter per month). To address these issues, CIUs should create simple application forms, no longer than a few pages, that are available at all prisons within their region. CIUs may also want to explore ways of receiving these applications at

expected to provide ample evidence of their innocence in these applications. The onus should instead be placed on the CIU to investigate these cases post-application to determine eligibility for exoneration. If an application is rejected, a CIU should also be required to inform the applicant of the reasons why, including recommendations for improving their application, if possible. Such measures would help *pro se* applicants improve subsequent applications, if needed, or at least explain the alleged deficiencies.

To avoid the inherent conflicts of placing a CIU within a prosecutorial office, legislatures can create independent innocence commissions outside of prosecutorial offices to handle the reinvestigation of potential wrongful convictions.[305] By creating an independent commission, the legislature can remove the possibility of harmful bias that plagues some CIUs[306] and also include perspectives of a variety of professionals within the criminal justice system.[307] These commissions may be more likely to recognize systemic errors within a locality's justice system and be able to recommend reforms and policies to prevent wrongful convictions in the future.[308] However, few states have established independent innocence commissions that reinvestigate cases; by 2017, only North Carolina had established such a commission.[309]

By locating these commissions outside of prosecutor offices, however, a legislature runs the risk of enabling prosecutors and law enforcement to withhold evidence. For example, in the early 2010s, the Nassau County District Attorney, Kathleen Rice, began reinvestigating the

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no cost to the incarcerated individual. CIUs also need to ensure that incarcerated individuals who need assistance in writing and filling out the forms have access to such resources.

305. *See* Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of "Innocence Commissions" in America*, 86 JUDICATURE, no. 2, Sept.–Oct. 2002, at 98, 98–105 (2002) (proposing the creation of innocence commissions and detailing the essential elements of such a commission).

306. *See supra* notes 289–292 and accompanying text.

307. Scheck & Neufeld, *supra* note 305, at 105 ("Innocence commissions should be transparent, publicly accountable bodies, composed of diverse, respected members of the criminal justice community and the public.").

308. *See id.* ("Innocence commissions should be seen as a capstone reform because they have the capacity, through the recurring perusal of wrongful convictions, to provide a consistent, powerful impetus to remedy systemic defects that bring about wrongful convictions.").

309. Scheck, *supra* note 293, at 711 ("But so far, only one state, North Carolina, has made a serious effort at setting up an institution that reinvestigates cases to determine if they are wrongful convictions; most other 'innocence commissions' have been reports by bar associations or state legislatures reviewing known exonerations as a basis for policy reform."); *see A Neutral, Fact-Finding State Agency Charged with Investigating Post-Conviction Claims of Innocence*, THE N.C. INNOCENCE INQUIRY COMM'N, https://innocencecommission-nc.gov/ [https://perma.cc/G4YN-T6LV].

case of Jesse Friedman.[310] Friedman, along with his father, had been convicted of sexually abusing numerous children while they participated in computer classes at the Friedman home.[311] Documentarian Andrew Jarecki profiled the case in his 2003 documentary, "Capturing the Friedmans."[312] Friedman was released on parole in 2001; in 2010, the United States Court of Appeals for the Second Circuit issued a scathing opinion, stating that Friedman may have been wrongfully convicted.[313] In response to this court decision, Kathleen Rice created a four-person panel of advisors—including Barry Scheck, founder of the Innocence Project—to oversee the review of Friedman's case.[314] The final report eventually concluded that Friedman's conviction was justified.[315] However, Scheck later supported Friedman's motion to overturn his conviction, stating that evidence was withheld from the advisory panel, including prosecution files, police reports, and other documents.[316] Scheck also said that the panel was given limited access to Friedman himself.[317]

While the panel in the Friedman case was not an independently formed body, the issues with its review show the concerns that such commissions may face. Even in a high-profile case that is widely covered by journalists and recommended for review by a federal judge, prosecutors may still withhold evidence to preserve convictions. Therefore, innocence commissions must be given full access to both police and prosecutorial evidence storage facilities, as well as their files, to avoid these types of issues.

These commissions must also be sufficiently insulated from local politics to be successful. As noted previously, wrongful convictions can result in state and local governments having to pay substantial compensation to exonerated individuals.[318] This expense may provide an incentive to avoid exonerations to avoid both negative press and the significant financial burden of paying these individuals. *Pro se* defendants—who lack counsel, resources, and perhaps other supporters

310. Peter Applebome, *Reinvestigating the Friedmans*, N.Y. TIMES (June 15, 2013), https://www.nytimes.com/2013/06/16/nyregion/reinvestigating-the-friedmans.html [perma.cc/HTU7-BMCW].

311. *Id.*

312. *Id.*

313. *Id.*; Friedman v. Rehal, 618 F.3d 142, 159–60 (2d Cir. 2010) ("The record here suggests 'a reasonable likelihood' that Jesse Friedman was wrongfully convicted.").

314. Scott Foundas, *'Capturing the Friedmans' Subject Seeks to Overturn 1988 Conviction*, CHI. TRIB. (June 24, 2014), https://www.chicagotribune.com/entertainment/ct-xpm-2014-06-24-sns-201406241855reedbusivarietyn1201245697-20140624-story.html [perma.cc/3YGK-VA26].

315. *Id.*

316. *Id.*

317. *Id.*

318. *See* NAT'L REGISTRY OF EXONERATIONS, *supra* note 274, at 4.

who can advocate on their behalf—may be particularly at risk to these types of abuses.

In February 2022, San Francisco District Attorney Chesa Boudin partnered with State Assemblymember Marc Levine to introduce a bill that would establish Innocence Commission Pilot Programs in California.[319] These programs would include panels of experts, chosen by the district attorneys in three counties, that would review wrongful conviction claims.[320] This legislation aims to build upon the San Francisco District Attorney's Innocence Commission,[321] which reviews wrongful conviction claims by incarcerated persons within San Francisco.[322]

The San Francisco Innocence Commission includes a six-member team of experts who volunteer to review these cases, including a retired judge, a medical expert, and a public defender.[323] The Commission has the power to issue subpoenas and the power to compel production of documents and testimony to help investigate cases.[324] After reviewing the case and conducting reinvestigation if necessary, the Commission votes whether or not to vacate the conviction.[325] If the majority votes to vacate, the Commission prepares a memorandum that serves as the basis to overturn the conviction.[326] However, the district attorney retains the final decision-making power, though they are supposed to give "great weight" to the Commission's determination.[327] Having this ultimate authority in the district attorney may not properly insulate the work of the Commission, as a district attorney may face political pressure as a result of being in an elected position.

However, Boudin and Levine's proposed bill—Assembly Bill 2706—requires that district attorney's offices track specific metrics and

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319. Vanguard Administrator, *DA Boudin Partners with Assemblymember Levine to Introduce New Approach to Addressing Wrongful Convictions*, THE DAVIS VANGUARD (Mar. 3, 2022), https://www.davisvanguard.org/2022/03/da-boudin-partners-with-assembly member-levine-to-introduce-new-approach-to-addressing-wrongful-conviction/ [perma.cc/996C-8LNX]; *see* A.B. 2706, 2021–2022 Assemb., Reg. Sess. (Cal. 2022). Months later, Chesa Boudin was removed from office through a recall process, despite no evidence tying his reform efforts to a rise in crime rates. Sam Levin, *Where Did It Go Wrong for Chesa Boudin, San Francisco's Ousted Progressive DA?*, GUARDIAN (June 9, 2022), https://www.theguardian.com/us-news/2022/jun/08/chesa-boudin-san-francisco-recall-analysis [perma.cc/7HN5-SMV2].

320. Vanguard Administrator, *supra* note 319.

321. *Id.*

322. *Policy: The Innocence Commission*, S.F. DIST. ATT'Y, https://www.sfdistrictattorney.org/policy/innocence-commission/ [perma.cc/EC5K-BPMU].

323. *Id.*

324. Vanguard Administrator, *supra* note 319.

325. *Policy: The Innocence Commission*, *supra* note 322.

326. *Id.*

327. *Id.*

report them quarterly to the Attorney General's Office.[328] This transparency may prevent these commissions from becoming "window dressing" that does not result in any exonerations or meaningful review.[329] Yet the bill also stresses that the district attorney retains discretion over whether to file the Commission's findings with the court, and that the court must afford the district attorney's decision "great deference."[330] Furthermore, the members of the panels of experts are appointed by the district attorney,[331] which may allow a district attorney acting in bad faith to appoint members more likely to uphold convictions.

In order to make these commissions more impartial and insulated from local politics, it may be more beneficial for a district attorney to have a single vote within the commission. Their vote could have no more weight than any other member, and the members of the commission could be chosen through more impartial means. For example, Barry Scheck and Peter Neufeld—founders of the Innocence Project—have suggested that the membership of such a commission could be selected in a variety of ways: through legislative enactment, executive order, appointment by a state's chief judicial officer, or through the formation of an interdisciplinary group by a non-profit organization.[332] If the district attorney was included within this structure, the commission would still be politically accountable to the public because the public would be able to directly vote for at least one member of the commission—the district attorney—as well as their state judges who will review the commission's recommendations. In whatever manner its membership is chosen, the commission's final recommendation should be binding on the district attorney to ensure that the commission is effective.

With both CIUs and innocence commissions, the question of whether and to what extent these bodies' decisions are binding on courts routinely arises.[333] For example, Philadelphia's CIU "can only make recommendations as supported by law and fact to the judge, who is the final decisionmaker."[334] This CIU has received criticism from judges when

328. Vanguard Administrator, *supra* note 319.

329. *See id.*

330. *Id.*

331. *Id.*

332. Scheck & Neufeld, *supra* note 305 (proposing a model for innocence commissions that is similar to the National Transportation Safety Board, which investigates transportation accidents and operates independently from the Federal Aviation Administration, where members are appointed by the President with the advice and consent of the Senate).

333. *See, e.g.*, *id.* at 104 ("The findings and recommendations of innocence commissions should not be binding in any subsequent civil or criminal proceeding, although the factual record created by the commission can be made available to the public.").

334. PHILA. DIST. ATTY'S OFF., *supra* note 294, at 15.

it recommends that convictions be vacated.[335] In Missouri, the state supreme court initially refused to hear the case of Kevin Strickland, despite the fact that county and federal prosecutors, Kansas City Mayor Quinton Lucas, members of the team that originally convicted Strickland, and the Midwest Innocence Project all believed in his innocence.[336] After significant public pressure, Strickland was exonerated after a three-day evidentiary hearing in November 2021.[337] Similar issues occurred in the case of Lamar Johnson, when a Missouri judge denied a petition for a new trial that had been made at the prosecutor's request and was based on a CIU's findings that the prosecutor's office engaged in serious misconduct.[338] When creating CIUs and innocence commissions, legislatures should make the exoneration recommendations of these bodies binding upon the courts or afford them significant deference in order to ensure the release of wrongfully convicted individuals.

Conclusion

The issues with federal habeas corpus and state post-conviction proceedings are many. Simply put, these proceedings fail to adequately protect innocent, *pro se* defendants who are particularly vulnerable to wrongful convictions and ill-equipped to prove their innocence once incarcerated. Furthermore, these mechanisms for post-conviction review—based on the extreme disparity between estimated numbers of innocent prisoners and official exonerations—are clearly failing to solve the crisis of wrongful convictions.[339]

To fully address wrongful convictions within our justice system, we must go beyond habeas reform and judicial appeals. Such a solution will

335. *Id.* at 15–17.

336. *Missouri Supreme Court Declines to Hear Kevin Strickland Case; Jackson County Prosecutor Vows to Pursue Justice*, KMBC NEWS (June 2, 2021), https://www.kmbc.com/article/missouri-supreme-court-declines-to-hear-kevin-strickland-case-jackson-county-prosecutor-jean-peters-baker-vows-to-pursue-justice/36607780# [https://perma.cc/5ECV-DHTK]; *see also* Luke Nozicka, *Kansas City Man is Innocent in 1978 Murders and Should be Released, Prosecutors Say*, KAN. CITY STAR (Jan. 11, 2022), https://www.kansascity.com/news/local/crime/article249595653.html [perma.cc/PQS8-TKLV].

337. Editorial Board, *Opinion: This Innocent Man Spent 43 Years in Prison. He Will Get Zip From the State That Fought His Release.*, WASH. POST (Dec. 3, 2021), https://www.washingtonpost.com/opinions/2021/12/03/kevin-strickland-innocent-released-will-get-nothing/ [perma.cc/G8UZ-4TLH]. The delay in Strickland's exoneration was also due to a state law that prohibited local prosecutors from correcting wrongful convictions; Strickland's case was the first of its kind brought under the new Missouri law. *Id.*

338. Meagan Flynn, *Prosecutors Say He's Been Wrongfully in Prison for 24 Years. But a Judge Won't Allow a New Trial.*, WASH. POST (Aug. 27, 2019), https://www.washingtonpost.com/nation/2019/08/27/wrongly-imprisoned-years-st-louis-lamar-johnson/ [perma.cc/VP5F-CY8C].

339. *See supra* text accompanying note 13.

require an overhaul of our system, a bolstering of public defense, and the guarantee of review of potential wrongful convictions. Furthermore, any review of convictions must be accessible to *pro se* individuals, who may face barriers due to incarceration that prevent them from communicating effectively with outside organizations and from investigating their cases. Together, these reforms may help save innocent, *pro se* defendants from spending decades incarcerated for crimes they did not commit; more importantly, they may prevent these types of convictions from occurring in the first place.

No Rain Coming in the Drought on Farmworker Labor Protections: *Cedar Point Nursery v. Hassid*'s Destruction of Traditional Takings Law and Labor Protections for U.S. Farmworkers

Mercedes Guadalupe Molina†

Introduction

When I was younger, my mom would pack my siblings and I in the car and drive an hour outside of Dallas to a small, crooked home in Foreston, Texas where my great Aunt Eugenia—or "Auntie" as we called her—lived. Since most of my grandparents passed away before I was born, I looked to Auntie as a grandparent-figure. Our visits were spent helping Auntie cook too many tortillas and listening to stories about her and my grandparents' childhoods. For hours I'd watch her hunch over the counter, her thick, scarred hands rolling out tortillas as she recounted the hard work she endured as a child farmworker. Though her knuckles and joints would swell, she kept working the dough, and told us how she began working in the fields when she was just five years old.

Auntie picked cotton, the primary crop in this part of Texas. She talked about how she was always behind in school and how at first, the thorns made the palms of her hands bleed, though over time, she developed thick callouses. "Thank the lord for those callouses," she would say. Without fail she would stop to giggle at the memory of how fast she could pick and how, no matter how hard he tried, my grandfather could never keep up. She was always so proud of this feat.

Auntie's stories were some of the first glimpses into the early lives of my grandparents and the world of the estimated 2.4 million farmworkers in the United States.[1] These workers are undoubtedly the backbone of the U.S. economy—keeping the general population fed—but

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1. *Who We Serve*, FARMWORKER JUST., https://www.farmworkerjustice.org/about-farmworker-justice/who-we-serve/ [https://perma.cc/MW8Z-8AXV].

are subject to some of the most grueling work conditions for extremely low wages. In fact, farm work is one of the most dangerous industries in the United States.[2] Despite the hazards of this work, farmworkers are excluded from all federal worker protections, and state protections for these workers are far and few between.[3]

With the California Agricultural Labor Relations Act (ALRA), California is currently one of the only states that has farmworker-specific legislation to address farmworkers' exclusion from the National Labor Relations Act (NLRA).[4] The ALRA has been in place for over fifty years as a result of the, at times violent, struggle of civil rights groups fighting for the human rights of farmworkers.[5] However, the efficacy of these protections has been called into question following the Supreme Court's 2021 ruling in *Cedar Point Nursery v. Hassid*, when the Court found a clause of the ALRA that provided access to commercial growers' property for farmworker union organizers to be an unconstitutional taking under the Fifth Amendment.[6]

This Article argues the Supreme Court's decision in *Cedar Point* was wrongly decided by the Court and that the consequences of that decision will be disastrous for the rights of farmworkers. Part I gives background information on the ALRA, conditions of farmworkers, and the Takings Clause of the Fifth Amendment. It describes how the *Cedar Point* ruling departs from the Supreme Court's traditional framework of the Takings Clause. Section II.A discusses the inconsistencies of this ruling with previous rulings related to federal labor protections under the NLRA. This section also argues that the Court's precedent surrounding the NLRA supports upholding the ALRA's access clause. Section II.B then discusses

2. Farmworkers suffer the highest incidence of heat-related illness among all outdoor workers in any industry. SARAH BRONWEN HORTON, THEY LEAVE THEIR KIDNEYS IN THE FIELDS: ILLNESS, INJURY, AND ILLEGALITY AMONG U.S. FARMWORKERS 3 (Robert Borofsky ed., 2016). Farmworkers also suffer physical injuries and other illnesses related to the chronic stressors of farm work at high rates, such as chronic joint pain, back injuries, hypertension, cardiovascular disease, and more. *See id.* at 96–123. Additionally, farmworkers are subject to high rates of fumigation- related illness from crop pesticides. According to the Center for Disease Control (CDC), there have been 833 cases of acute pesticide poisoning across 12 states among agricultural workers recorded between 2007 and 2011. GEOFFREY M. CALVERT ET AL., NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, CDC, ACUTE OCCUPATIONAL PESTICIDE-RELATED ILLNESS AND INJURY—UNITED STATES, 2007–2011, at 13 (2016). However, this is far from a complete picture. The agricultural industry is comprised of many individuals who are uninsured, immigrants, and non-English speaking, meaning many cases of illness likely go unreported. *See id.* at 13–14 (describing why data likely underestimates rates of acute occupational pesticide-related illness).

3. *See* discussion *infra* Section I.A.

4. *See* Philip L. Martin, *A Comparison of California's ALRA and the Federal NLRA*, 37 CAL. AGRIC. 6, 6 (1983) (discussing the differences between the ALRA and the NLRA); discussion *infra* Section I.A.

5. *See* discussion *infra* Section I.A.

6. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021).

how the Court upholds the right to exclude in a way that not only values this right above all other property rights but also erodes decades of precedent. This treatment not only creates major issues for the field of property law, but it also has serious implications for the rights of workers. Finally, Section II.C discusses the effect of the *Cedar Point* ruling on the workplace and civil rights of farmworkers. This section argues that the ruling renders the few labor/civil rights protections in place for farmworkers nonexistent by eliminating the access clause. The Court's ruling in *Cedar Point* upholds the economic interests of wealthy and exploitative landowners and commercial farmers over the rights of one of the most vulnerable worker populations in our country. Without national efforts to support this population, the future for civil rights and farmworkers' rights is in grave danger due to this ruling.

I. Background

A. California Agricultural Labor Act and the Continued Fight for Farmworker Rights

The agricultural industry demands a large labor force to keep up with production of the very necessary food supply.[7] Due to the lack of control over the market value, growers have long understood that one area where they can maximize profits is through decreasing the cost of labor.[8] Efforts to decrease the cost of labor have meant more than just decreasing pay, however. As the population of the United States ballooned in the early 20th century and farmers began diversifying their crops, the agriculture industry shifted from small family farms relying on their own hands for labor to large commercial farms requiring more inexpensive labor.[9]

Two major pieces of federal legislation—the NLRA and the Fair Labor Standards Act (FLSA)—were passed during the 1930s New Deal Era in an effort to empower workers and create safer working conditions.[10] Unfortunately, both pieces of legislation excluded farmworkers.[11] While the official reasoning for this exclusion notes a concern for the U.S. food supply chain[12] and a concern for a

7. *See, e.g.*, ANN AURELIA LÓPEZ, THE FARMWORKERS' JOURNEY 96 (U. Cal. Press ed., 2007) (describing how California's agribusiness is "uniquely dependent" upon the labor of farmworkers); *Farm Labor*, USDA ECON. RSCH. SERV., https://www.ers.usda.gov/topics/farm-economy/farm-labor/#size [https://perma.cc/55TM-M4KX] (describing the essential role of hired farmworkers).

8. LÓPEZ, *supra* note 7, at 96.

9. *Id.* at 94–96, 98–99.

10. *Id.* at 100–01.

11. *Id.*

12. Some members of Congress noted that the nature of agricultural work created

"disproportionate representation of rural people" in policy,[13] it is widely understood that the decision was racially motivated.[14] Historically, farmworkers were primarily Black Americans.[15] Entering the second half of the 20th century, the farmworker population became increasingly foreign, represented by primarily Mexican and Filipino immigrants.[16] Therefore, by excluding the agricultural sector from labor protections, the federal government permitted the exploitation of this large portion of workers—most of whom were immigrants and people of color. Exclusion meant these workers' employment could be conditioned on long work hours, low pay, unsafe working conditions and more with little to no penalties to the employer.[17] One New York politician warned that excluding farmworkers from the NLRA would guarantee "a continuance of virtual slavery until the day of revolt."[18] That revolt happened in 1965, when Delano grape farmworkers in the Coachella Valley of California organized an unprecedented agricultural labor strike.[19]

The Delano Grape Strike was one of the most prominent labor strikes in American history, involving over 7,000 California farmworkers.[20] Through the organizational efforts of the Agricultural Workers Organizing Committee (AWOC) and the National Farm Workers Association (NFWA)—two organizations that would later form the United Farm Workers (UFW)[21]—the strike produced a nationwide

concerns for disruptions of the food supply chain. Martin, *supra* note 4, at 6. If farmworkers made the decision to strike during harvesting season, they could jeopardize profits of growers for the entire year. *Id.* This unequal balance in bargaining power was seen as extremely unfair to the growers. *Id.*

13. Kamala Kelkar, *When Labor Laws Left Farm Workers Behind—And Vulnerable to Abuse*, PBS NEWSHOUR: NATION (Sept. 18, 2016), https://www.pbs.org/newshour/nation/labor-laws-left-farm-workers-behind-vulnerable-abuse [https://perma.cc/5N44-GZKE]. Leon Keyserling was the original drafter of the NLRA and served as a legislative aide for Senator Wagner, the Senator who carried the bill. Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 121 (2011) (citing Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIA. L. REV. 285, 296–300 (1987)). In a later interview, Keyserling noted the exclusion of agricultural workers was politically necessary because including the high rural representation would make the bill unlikely to pass. *Id.* at 121–22 (citing Casebeer, *supra*, at 334).

14. Perea, *supra* note 13, at 121; *see* Kelkar, *supra* note 13.

15. *See* Perea, *supra* note 13, at 100–01.

16. *See id.* at 134; LÓPEZ, *supra* note 7, at 98; Kelkar, *supra* note 13.

17. *See, e.g.*, Kelkar, *supra* note 13.

18. Perea, *supra* note 13, at 121 (quoting H.R. REP. No. 74-969, at 28 (1935) (statement of Rep. Marcantonio)).

19. *See* LÓPEZ, *supra* note 7, at 103–05.

20. *Id.* at 104.

21. *A Latinx Resource Guide: Civil Rights Cases and Events in the United States – 1962: United Farm Workers Union*, LIBR. OF CONGR., [hereinafter *United Farm Workers Union*] https://guides.loc.gov/latinx-civil-rights/united-farm-workers-union [https://perma.cc

consumer boycott of table grapes, wine grapes, and lettuce.[22] After almost five long years, the strike resulted in a successful wage increase and other benefits for the mostly Mexican and Filipino workforce.[23]

Unfortunately, as Delano and subsequent strikes crippled the agriculture industry, strikers were often met with violence perpetrated by employers and law enforcement.[24] In an effort to quell the strikes and resulting violence, the California Legislature passed the California Agricultural Labor Relations Act of 1975 (ALRA), which gave California agricultural workers the right to self-organization and prevented employers from interfering with that right.[25]

To achieve the ALRA's purpose of "ensur[ing] peace in the agricultural fields by guaranteeing justice for all agricultural workers and stability in labor relations,"[26] the California Legislature sought to ensure the protections could be utilized by farmworkers in practice, rather than just theory. To do so, the California Agricultural Labor Relations Board (ALRB)[27] promulgated an access provision that allowed a "right of access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support."[28] Under the ALRA, access by organizers requires prior written

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22. LÓPEZ, *supra* note 7, at 104 (citations omitted).

23. Robert A. Wright, *Farm Workers Union Signs First Table-Grape Contract with Two California Growers*, N.Y. TIMES (Apr. 2, 1970), https://www.nytimes.com/1970/04/02/archives/farm-workers-union-signs-first-tablegrape-contract-with-two.html [https://perma.cc/2BQ5-LXJT] (announcing the wage increases; contributions to health, welfare, and economic redevelopment funds; and prohibition of certain pesticides included in the agreement to end the strike).

24. *See El Malcriado Special Edition: Stories from the 1965 – 1970 Delano Grape Strike*, UNITED FARM WORKERS (Sept. 17, 2005), https://ufw.org/research/history/el-malcriado-special-edition-stories-1965-1970-delano-grape-strike/ [https://perma.cc/8RF4-QE7K] ("Abuse, contempt and violence against strikers were commonplace."); *cf. United Farm Workers Union*, *supra* note 21 ("Subsequent boycotts and strikes against lettuce and strawberry growers occurred during the following years [after the Delano Grape strike]. Strikes often led to law enforcement intervention, where farmworkers were beaten, jailed, or replaced by non-citizen laborers.").

25. *See* Phillip Martin & Bert Mason, *California's ALRA and ALRB After 40 Years*, ARE UPDATE, Mar.–Apr. 2017, at 9, 9.

26. *Id.*

27. *See Fact Sheet – English*, AGRIC. LAB. RELS. BD. (2021), https://www.alrb.ca.gov/forms-publications/fact-sheets/fact-sheet-english/ [https://perma.cc/6K5J-7GT5] ("The Agricultural Labor Relations Board (ALRB) is the state agency established to enforce the [ALRA]. The members of the Board are appointed by the Governor and confirmed by the California State Senate. The Board interprets and enforces the Act by deciding the rights of parties to labor disputes. The General Counsel, who is also appointed by the Governor, is independent of the Board and has exclusive authority to investigate unfair labor practice charges and to determine if a complaint should issue. If a complaint issues, the General Counsel's staff presents the case before an administrative law judge, whose decision may be appealed to the Board.").

28. CAL. CODE REGS. tit. 8, § 20900(e) (2021).

notice to the ALRB and service to the employer—at which time access can be disputed.[29] Further, access is limited to up to two organizers per thirty-person work crew;[30] up to four, thirty-day periods in one calendar year;[31] and each access can last up to one hour during break times or outside of work hours.[32] The access should be granted only during peak growing seasons.[33] While the rules are strict and the protections are limited, the ALRA is necessary to prevent further abuse of farmworker populations.

Today, farmworkers are some of the nation's most exploited workers. Farmworkers in the United States work extremely long hours of very intensive physical labor in the grueling elements. While at work, farmworkers frequently suffer physical injuries,[34] high incidences of heat stroke,[35] and chemical poisoning from pesticides sprayed on crops.[36] Farmworkers also suffer other illnesses at high rates caused by chronic stressors of their work, such as hypertension and cardiovascular disease.[37] Despite these known hazards, the industry fosters a profit-driven environment that does not place a priority on the safety of its workers and even discourages workers from speaking up when they are ill or injured.[38] This toxic atmosphere almost requires farmworkers to break down their bodies, only to barely scrape by financially. In 2019, the average annual salary for California farmworkers was $27,550—a wage

29. *Id.* § 20900(e)(2) ("For the purpose of facilitating voluntary resolution by the parties of problems which may arise with access, the notice of intent to take access shall specify a person or persons who may reach agreements on behalf of the union with the employer concerning access to his/her property.").

30. *Id.* § 20900(e)(4)(A).

31. *Id.* § 20900(e)(1)(A).

32. *Id.* §§ 20900(e)(3)(A)–(B).

33. *See* Martin & Mason, *supra* note 25, at 8 (describing how the ALRA only allows representation elections when "at least 50 percent of normal peak employees [are] at work and elections must be held within seven days after the . . . Board receives a valid petition from a union requesting an election."). Due to the migratory nature of many farmworkers, this provision, in combination with access requirements, results in access being most effective during peak growing seasons to meet the requisite workforce number for an election.

34. *See* HORTON, *supra* note 2, at 98–111.

35. *See id.* at 17–45.

36. *See* CALVERT ET AL., *supra* note 2.

37. *See* HORTON, *supra* note 2, at 97–108.

38. Too often the farm work industry is focused on harvesting the maximum amount of crop in the least amount of time. *See, e.g.*, HORTON, *supra* note 2, at 24, 44–45. Employers prioritize efficient workdays over the need for breaks. *Id.* at 29, 44–45 This has caused many employers to forego warnings to acclimate workers to hotter temperatures, a crucial practice that can prevent heat-related illness and death. *Id.* at 33. Workers who are unable to keep up with this extreme pace due to injury or otherwise are frequently subject to lower wages (in the case of contract workers) or even loss of jobs. *Id.* at 24. Once a worker earns a reputation for being "lazy" or "weak" at one commercial farm, other employers are reluctant to give them another opportunity. *Id.* at 22, 27–28.

that puts all families on an extremely tight budget and most families below the federal poverty line.[39] Health insurance, of course, is often not included, and the bulk of farmworkers are uninsured.[40] All of these factors combined with the high incidence of migratory work due to different growing seasons, as well as the large incidence of non-English speaking and immigrant populations represented in farm work, illustrates the extremely vulnerable position farmworkers hold in our economy.

B. Takings Clause (Generally)

This Article focuses on the improper ruling of the Supreme Court in *Cedar Point Nursery v. Hassid*.[41] However, to understand the ruling and the Court's failure in *Cedar Point*, it is necessary to have a general understanding of the Takings Clause. The Takings Clause is a constitutional protection under the Fifth Amendment which prohibits the federal government from seizing individual citizens' property without providing just compensation.[42] Where there is a "straightforward condemnation action," like eminent domain, there is no question of whether or not a taking has occurred, and the government must provide just compensation under the Fifth Amendment.[43] However, issues arise where there is an implicit taking through some sort of government action that restricts or interferes with an individual citizen's use of their property.[44] Historically, the Supreme Court has recognized two categories of implicit takings: regulatory takings and per se takings.[45] This section will briefly describe these two categories to provide a basis for the discussion of the *Cedar Point* ruling in the next section.

The first category of takings, regulatory takings, occur when the government establishes laws or regulations that restrict the use or

39. Brief of Amici Curiae California Rural Legal Assistance, Inc., California Rural Legal Assistance Foundation, Farmworker Justice, and California Catholic Conference in Support of Respondents at 13, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (No. 20-107) [hereinafter Brief of California Rural Legal Assistance].

40. SARA ROSENBAUM & PETER SHIN, GEO. WASH. UNIV., KAISER COMMN'N ON MEDICAID & THE UNINSURED, MIGRANT AND SEASONAL FARMWORKERS: HEALTH INSURANCE COVERAGE AND ACCESS TO CARE 1 https://www.kff.org/wp-content/uploads/2013/01/migrant-and-seasonal-farmworkers-health-insurance-coverage-and-access-to-care-report.pdf [https://perma.cc/8FES-LX49].

41. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021).

42. U.S. CONST. amend. V.

43. *See* JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL H. SCHILL & LIOR JACOB STRAHILEVITZ, PROPERTY: CONCISE EDITION 627–28 (Wolters Kluwer Legal & Regul. U.S. ed., 2nd ed. 2017).

44. *Id.*

45. *Id.* at 125.

enjoyment of the property in some way.[46] This concept was established in *Pennsylvania Coal Co. v. Mahon*, when the Supreme Court found government regulations on a coal company's mining rights, which had been properly obtained, constituted an implicit taking.[47] The *Pennsylvania Coal* ruling invalidated the law at issue and allowed the company's mining to continue.[48] Unfortunately, the Court did not outline a clear standard for determining *when* a government regulation constitutes a taking, saying only that "if regulation goes too far it will be recognized as a taking."[49] The decision focused heavily on an evaluation of the "diminution in value" of the land caused by the regulation, but left many questions as for how to balance that loss in value of the property with the government's interest in regulation of the land for a specific purpose.[50] It was not until 1978, in *Penn Central Transportation Co. v. City of New York*, that the Court provided greater clarity on what constitutes an implicit taking by articulating a multifactor balancing test.[51] In *Penn Central*, the Court balanced (1) the "economic impact of the regulation on the claimant;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) "the character of the governmental action;" taking into account the Taking Clause's purpose of fairness and justice in compensation for the burden of governmental action.[52] This balancing must consider whether the regulation prevents a harm to the general public and whether the regulation secures an "average reciprocity of advantage,"[53] or fair burden on the individuals given the larger benefits resulting from the regulation.[54] Since *Penn Central*, the Court has ascribed to the multifactor balancing test in its

46. *Id.* at 635.

47. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

48. *See id.* at 413–14.

49. *Id.* at 415.

50. *See id.* at 413–14, 419.

51. *See* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

52. *Id.* at 124.

53. *Pa. Coal Co.*, 260 U.S. at 422. While the majority in *Penn Central* did not use the explicit language "average reciprocity of advantage," it essentially described this factor as part of its examination into how "a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" *Penn Central*, 438 U.S. at 127–28.

54. *See id.* at 123–28. It should also be noted that "average reciprocity of advantage" is an extremely vague legal term that has been debated by legal scholars since its use in *Pennsylvania Coal Co.* without a clear definition. *See* William W. Wade & Robert L. Bunting, *Average Reciprocity of Advantage: "Magic Words" or Economic Reality—Lessons from Palazzolo*, 39 URB. L. 319 (2007). For the purposes of this Article, this term will be understood as a "validator of police power impairment of private property rights to improve public welfare." Thomas A. Hippler, *Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine: The Principles of "Noxious Use," "Average Reciprocity of Advantage," and "Bundle of Rights" from* Mugler *to* Keystone Bituminous Coal, 14 B.C. ENV'T AFFS. L. REV. 653, 672 (1987).

analyses of regulations when considering whether they constitute an implicit taking under the Fifth Amendment.[55]

The second category of implicit takings established by the Court—per se takings—occur when there is a categorical rule that the specific type of use by government constitutes a taking.[56] Since per se takings are categorical rules—defined by the Supreme Court—they are not subject to the default *Penn Central* balancing test.[57] The Supreme Court has been careful in its identification of these categorical rules, setting them sparingly and under strict circumstances.[58] The Court's established categorical rules deal with permanence, physicality, and *complete* diminution of economic value, and can be separated into two distinct categories: (1) when "the government directly appropriates private property for its own use"[59] and (2) when the government "causes a permanent physical occupation of property."[60]

As to the latter "permanent physical occupation" category, the Court found in *Loretto v. Teleprompter Manhattan CATV Corp*. that a city ordinance requiring apartments to allow for the installation of permanent cable boxes on their rooftops constituted a per se taking.[61] The ruling hinged on both the permanence and physicality of the cable box occupation.[62] The *Loretto* Court described its holding as "very narrow,"[63] and the Court has indeed subsequently interpreted this "permanent physical occupation" category of takings narrowly.[64]

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55. *See, e.g.*, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 528–29 (2005) ("[R]egulatory takings challenges are governed by *Penn Central* . . . *Penn Central* identified several factors—including the regulation's economic impact on the claimant, the extent to which it interferes with distinct investment-backed expectations, and the character of the government action—that are particularly significant in determining whether a regulation effects a taking." (internal citation omitted)).

56. DUKEMINIER, *supra* note 43, at 659.

57. *Id.* at 653, 659.

58. Legal scholars have pointed out the relatively new innovation of per se takings, finding that their identification is extremely unclear and is not supported by historical government actions. John D. Echeverria, *What Is a Physical Taking?*, 54 U.C. DAVIS L. REV. 731, 731 (2020) (discussing the inconsistencies in per se takings law and advocating for a more simplified approach which ignores the economic impact on the landowner and looks only at whether exploitation or invasion of privacy has occurred).

59. Horne v. Dep't of Agric., 576 U.S. 350, 357 (2015) (quotation omitted).

60. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2073 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434–35 (1982)).

61. *Loretto*, 458 U.S. at 421.

62. *Id.* at 426–42.

63. *Id.* at 441.

64. *See* Yee v. City of Escondido, 503 U.S. 519, 531–32 (1992) (holding a rent control ordinance that applied to owners of a mobile home park was not a "permanent physical occupation" and did not constitute a taking); *see also* FCC v. Fla. Power Corp., 480 U.S. 245 (1987) (finding *Loretto* did not apply to challenge against the rate at which utility could charge cable television companies using its poles set by the FCC).

Later, in *Lucas v. South Carolina Coastal Council*, the Court found that a local ordinance which prevented a landowner from building any new permanent structures on his land was a taking because it "prohibit[ed] all economically beneficial use of [the] land."[65] While the ordinance in *Lucas* was aimed at protecting the area from erosion caused by the shoreline,[66] it meant that the owners of the shoreline property could not use the property for personal or commercial development or operations as the ordinance prohibited the owners from building new structures. In being unable to develop the land, the owners were essentially left with a vacant plot in an extremely profitable commercial area. Because the regulation left landowners with an extremely limited use of the land, the Court found this to be a taking.[67] In its opinion, however, an exception was carved out to allow for restrictions that came from "background principles" of a state's nuisance law.[68] The aforementioned cases set the traditional framework for how takings are understood in property law.

C. How Cedar Point *Changed the Traditional Takings Framework*

In June of 2021, the Supreme Court issued a ruling in *Cedar Point Nursery v. Hassid*[69] that completely tore apart the previously understood takings framework. The case dealt with an access clause in the ALRA.[70] The access clause in question recognized the difficulty labor organizers faced in reaching farmworkers—many of whom are migrant workers, non-English speaking, and immigrants—and legally provided extremely limited access to these workers while at their work place.[71] The access clause was challenged by commercial growers—Cedar Point Nursery and Fowler Packing Company—after UFW members utilized the access clause to lawfully enter the growers' property under the ALRA.[72]

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65. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

66. *Id.* at 1037.

67. *Id.* at 1027–31.

68. DUKEMINIER, *supra* note 43, at 674.

69. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021).

70. See *supra* notes 25–32 and accompanying text for a description of the ALRA's access clause.

71. *See supra* notes 25–32 and accompanying text.

72. The complaint alleges that UFW organizers entered Petitioners' property outside of the parameters of the access clause by not giving notice. *Cedar Point*, 141 S. Ct. at 2069–70. While the details of this allegation are inconsequential to the decision, it should be noted that, in its amicus brief, UFW disputes these allegations saying they acted within the access clause by giving sufficient prior notice to the Petitioners before entering their property. Brief for United Farm Workers of America as Amicus Curiae in Support of Respondents at 15–16, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (No. 20-107) [hereinafter Amicus Brief for United Farm Workers]. UFW further contends that their organizers were prevented from entering the premises in violation of the access clause of the ALRA. *Id.*

The growers argued that the access clause of the ALRA itself was unconstitutional under the Fifth Amendment, as it created a per se taking "by appropriating without compensation an easement for union organizers to enter their property."[73] This is completely inconsistent with the previous framework of the Takings Clause. In fact, that is exactly what the District Court said when it denied the growers' motion for a preliminary injunction and dismissed the complaint, saying the access clause did not allow public access in a way that was continuous and permanent, so it could not be a per se taking.[74] This ruling was affirmed by both the Court of Appeals[75] and the Ninth Circuit.[76]

In June 2021, despite the growers' obvious inconsistencies with the established takings framework, the Supreme Court held that the access clause of the ALRA constituted a per se taking.[77] Instead of defaulting to the multifactor balancing test established in *Penn Central*, the Court treated the access clause as a categorical rule, or per se taking, thereby upholding the right to exclude third parties from one's land.[78]

The Court had never before upheld the right to exclude as a categorical rule. In fact, the Court had repeatedly held the opposite, finding that certain needs outweigh a property owner's right to exclude.[79] The Court has consistently found that commercial firms cannot assert a right to exclude if that access is related to the commercial regulation of the firm.[80] This concept has been the basis for upholding all access provisions which give weight to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Occupational Safety & Health Act, United States Department of Agriculture, Food and Drug Administration, and many more regulatory agencies.[81] In the absence of all other labor

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73. *Cedar Point*, 141 S. Ct. at 2070.

74. Cedar Point Nursery v. Gould, No. 1:16-cv-00185-LJO-BAM, 2016 U.S. Dist. LEXIS 51819, at *15–17 (E.D. Cal. Apr. 18, 2016).

75. The Court of Appeals was a divided panel but ultimately affirmed. Cedar Point Nursery v. Shiroma, 923 F.3d 524 (2019).

76. The Ninth Circuit affirmed and denied rehearing en banc. Cedar Point Nursery v. Shiroma, 956 F.3d 1162 (2020).

77. *Cedar Point*, 141 S. Ct. at 2072.

78. *Id.*

79. *See, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (finding that Title II, pertaining to racial discrimination in public accommodations affecting commerce, does not rise to the level of a taking in violation of the Fifth Amendment); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980) (finding that an exercise of the right of free expression and petition does not constitute a taking in violation of the Fifth Amendment, as it does not "unreasonably impair" the value of property and, therefore, is not outweighed by a landowner's right to exclude).

80. *See* Brief of Amici Curiae National Employment Law Project et al. in Support of Respondents at 4–7, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (No. 20-107).

81. *See* discussion *infra* Section II.B; *see also* 42 U.S.C. § 12182(b) (prohibiting discrimination on the basis of disability in places of public accommodation, including

protections, the entrance of union organizers is therefore vital to the accountability of these large commercial growers.[82] Even though the opinion seemingly carves out an exception for government agencies—something that seems far from a guarantee given the twisted legal reasoning of *Cedar Point*, and the now extremely precarious nature of the takings doctrine—it is still inconsistent with precedent that has established that "neither property rights nor contract rights are absolute . . . . Equally fundamental with the private right is that of the public to regulate it in the common interest."[83]

In its opinion, the Court unequivocally agreed with the growers' argument that the access provision created an easement, and therefore a per se taking.[84] However, in its determination of whether the right of access was an easement, the Court gave little weight to the nature of those holding the right of access—that is, whether the access right is attached to a neighboring piece of land or whether the access right is held by a person or group of people.[85] Historically, the Court has placed considerable weight on the nature of those holding the right of access when making takings determinations,[86] but this Court's analysis ignored this distinction entirely. As with other logic of the *Cedar Point* opinion, this omission is extremely inconsistent with property law principles and Supreme Court precedent.[87]

II. Analysis

This analysis outlines the ways the *Cedar Point* ruling is detrimental to the rights of farmworkers and how the ruling is inconsistent with

private property such as businesses that are generally open to the public, under the Americans with Disabilities Act); 29 U.S.C. § 657(a) (authorizing Occupations Safety and Health Association inspections of workplaces to ensure compliance with the Occupational Safety and Health Act standards); 21 C.F.R. § 58.15(A) (authorizing employees of the Food and Drug Administration "to inspect the facility"); 21 C.F.R. § 812.145(a) (authorizing the Food and Drug Administration access "to enter and inspect any establishment where devices are held (including any establishment where devices are manufactured, processed, packed, installed, used, or implanted or where records of results from use of devices are kept)").

82. *See* discussion *infra* Section II.C.

83. Nebbia v. New York, 291 U.S. 502, 510 (1934).

84. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2068 (2021).

85. *Id.*; DUKEMINIER, *supra* note 43, at 485–86 ("[E]asements give easement owners the right to make some specific use . . . of land that they do not own. An easement appurtenant gives that right to whomever owns a parcel of land that the easement benefits . . . . Easements appurtenant require both a *dominant tenement* (or estate) and a *servient tenement*.").

86. *See* DUKEMINIER, *supra* note 43, at 485–86 (explaining how courts consider who is benefiting from the use of an easement when deliberating the type of easement or how to allocate property use generally with easements).

87. *See infra* Section II.B.

property law and labor law precedent. In Section A, this Article outlines previous cases surrounding the NLRA and points to how this precedent strongly supports the ALRA's access provision. Specifically, this section breaks down the "necessity" showing required by the NLRA and identifies how the ALRA follows these same principles through its access provision even without an explicit necessity requirement. Section B discusses the inconsistencies of *Cedar Point* with property law precedent which is careful to assign government actions as per se takings and which does not support the Court's upholding of the "right to exclude" above other property law principles. This section argues that, based on leading takings case law, the *Cedar Point* Court should have utilized the multifactor balancing test in its analysis of the ALRA's access provision. Finally, Section C identifies the impact this ruling will have, and is likely already having, on the very limited protections for farmworkers in California. The section briefly outlines the bleak future of civil rights and labor rights for this population due to the inaction of federal and state governments. This Article concludes that this ruling plainly is bad for civil rights, workplace rights, the regulatory state, and, of course, farmworkers.

A. Cedar Point *Is Not in Line with Protections Afforded to Workers Covered Under the NLRA*

Like the ALRA, the NLRA provides for nonemployee union organizer access.[88] The Court has recognized this right to access in all takings case law where the issue has been presented, saying access that is "necessary to facilitate the exercise of employees' § 7 rights [to organize under the National Labor Relations Act]"[89] and access that is limited to "the duration of the organiz[ing] activity" should be permitted.[90] Because the ALRA was meant to correct the exclusion of farmworkers from the NLRA, the ALRA drafters largely attempted to mirror NLRA protections; the only significant differences in the ALRA reflect the seasonal nature of agriculture work.[91] For example, because approximately 19% of farmworkers are foreign migrant workers, gaining access to them is more

88. *See* National Labor Relations Act, 29 U.S.C. § 152.

89. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434 n.11 (1982) (alteration in original) (quotation omitted) (distinguishing labor cases which allow for access to private property by union organizers from what constitutes as a permanent physical occupation).

90. *Id.* (quotation omitted).

91. Brief of the American Federation of Labor & Congress of Industrial Organizations as Amicus Curiae in Support of the Emps. at 8–9, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (No. 20-107) [hereinafter Amicus Brief of the American Federation of Labor] (first citing *Loretto*, 458 U.S. at 434–35; and then quoting Central Hardware Co. v. NLRB, 407 U.S. 539 (1972)).

difficult for labor organizers than in many other industries where workers have some sort of home base.[92] Even more, issues of language barriers, literacy skills, uncertain work hours, and employer-regulated housing and transportation create greater obstacles to organization than in most other industries. [93] The California Legislature understood that, due to the aforementioned obstacles, access by nonemployee organizers is in fact necessary to fully realize the right to self-organization.[94] Accordingly, the legislature did not require a showing of necessity,[95] but it did limit the access right more strictly than the NLRA.[96] As a practical matter, therefore, the encroachment on farmers' property rights created by the access clause is arguably less than the intrusions sanctioned by the NLRA in other workspaces. The following paragraphs highlight the extremely limited components of the ALRA's access provision.

The ALRA imposes restrictions that only allow for labor organizers to enter an employer's workplace for the purpose of organizing.[97] That access is also limited to breaks and time outside of work hours, such as before or after work;[98] these restrictions alone are enough to dissuade

92. Amicus Brief for United Farm Workers, *supra* note 72, at 3.

93. These barriers to organization are especially true for H-2A visa farmworkers and undocumented farmworkers. Undocumented, recently documented, and guestworker farmworkers are often weary of raising any kind of issues in the workplace due to a fear of retaliation by their employer. *See* Alexis Guild & Iris Figueroa, *The Neighbors Who Feed Us: Farmworkers and Government Policy—Challenges and Solutions*, 13 HARV. L. & POL'Y REV. 157, 158–59 (2018). This fear means these workers will often withstand horrendous conditions, such as working while injured, working through unsafe temperatures, working among pesticides, or working without water or restroom breaks. *Id.* Because H-2A visa workers and guestworkers are living in the United States with a temporary visa, they are often in a situation where employers control almost all aspects of their lives, including housing and transportation. *Id.* It is not uncommon for employers to abuse this type of power. When these workers speak up against their employers, they run the risk of retaliation in housing and transportation, threats to their job, and even deportation. This type of reluctance to report has been noted as a significant barrier by labor organizing groups. *See* Margaret Gray & Shareen Hertel, *Immigrant Farmworker Advocacy: The Dynamics of Organizing*, 41 POLITY 409, 426 (2009) ("The system of undocumented workers makes them so vulnerable that it would be really hard for them to believe that they could get something from being organized and being part of [a grassroots organization representing farmworkers' interests].").

94. Guild & Figueroa, *supra* note 93, at 172–73.

95. The NLRA requires a showing of necessity for nonemployee union organizers to gain access to an employer's property. *See* Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 205 (1978). The necessity requirement is a way the Court has protected the landowners' right to exclude in light of regulations which require employers to allow entrance of the nonemployee union organizers to the employer's property. *See id.* Specifically, the necessity requirement states that, "[t]o gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation." *Id.* The ALRA does not have this same requirement. CAL. CODE REGS. tit. 8, § 20900(e).

96. Amicus Brief of the American Federation of Labor, *supra* note 91, at 2.

97. CAL. CODE REGS. tit. 8, § 20900(e).

98. *Id.* §§ 20900(e)(3)(A)–(B).

organizing, as farmworkers tend to work long twelve-hour shifts,[99] sometimes beginning in the dead of night.[100] Additionally, the access is further limited to up to three hours a day, in one-hour time periods, for only four thirty-day periods out of the calendar year.[101] Because the purpose of entrance is most often to select a collective bargaining representative through employee signatures, the access is limited *further* to peak growing seasons.[102] This seasonal limitation is because the ALRA requires signatures from a majority (more than 50%) of workers to file an election petition for a collective bargaining representative and peak growing season is the only time a majority population is present on a farm.[103] The NLRA, on the other hand, only requires signatures from 30% of the employees to file an election petition.[104] Not only are these restrictions more stringent than the NLRA's access allowance, but they make it nearly impracticable to exercise the access clause.

Due to the seasonal nature of work, it is difficult for union organizers to meet this majority requirement to file a petition for election. Many farmworkers stay at one work site for only weeks at a time.[105] This frequent movement combined with the high rate of farmworkers employed by a third-party contractor cause additional issues to the organizers' ability to meet the election petition signature requirement.[106] Finally, issues of literacy, language, and access to technology prevent organizers from meeting this requirement via other means, such as mail or digital communication.[107] As a practical matter, therefore, nonemployee union organizers exercise their access rights under the ALRA in very limited ways.[108]

It must be understood that this process is *the only permissible way* farmworkers are able to form a bargaining relationship with their

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99. Auntie frequently recounted how she would work from sun-up to sun-down.

100. *See Night Work: A Growing Trend in Western Agriculture?*, UC DAVIS W. CTR. FOR AGRIC. HEALTH & SAFETY (Mar. 7, 2019), https://aghealth.ucdavis.edu/news/night-work-growing-trend-western-agriculture [https://perma.cc/253B-T9Z8].

101. CAL. CODE REGS. tit. 8, §§ 20900(e)(3)(A)–(B).

102. *See* Amicus Brief of the American Federation of Labor, *supra* note 91, at 9–10 (citing Henry Moreno, 3 ALRB No. 40, at 5 (1977)).

103. *Id.*

104. National Labor Relations Act, 29 U.S.C. §§ 159(c), (e).

105. Amicus Brief of the American Federation of Labor, *supra* note 91, at 4.

106. Since 2007, the agricultural industry has seen a sharp increase in the hiring of farmworkers through third-party labor contractors. Amicus Brief of California Rural Legal Assistance, *supra* note 106, at 16. In some counties, the number of farmworkers who are hired by a third-party contractor is 50% or more. *Id.*

107. *Id.* at 10.

108. Due to the listed obstacles and limitations of the ALRA's access clause, most union organizers are only able to utilize their access rights once a year. Amicus Brief of the American Federation of Labor, *supra* note 91, at 22.

employers.[109] Without the access clause, the ALRA holds no teeth. Again, the Court has recognized the significance of access to the workplace for nonemployee union organizers in *NLRB v. Babcock & Wilcox Co*., finding that "the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize."[110] Access to workers is necessary because "[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self- organization from others."[111] The reality is that workers are unlikely to learn about work-related things, such as workplace rights, outside of work. Additionally, as is the case for farmworkers, there are significant barriers to contacting workers outside of the workplace to inform them of their workplace rights.[112]

However, even where a showing of necessity is required—as is the case for the NLRA—the Court has found that necessity is met in circumstances where workers are hard to reach.[113] A showing of necessity for nonemployee organizers to gain access to a workspace was first established in *Babcock*, where the Court explained its understanding that self-organization in a workplace does not come with the same interference as organizing by nonemployees.[114] While *Babcock* did not explicitly limit Section Seven of the NLRA to showings of necessity, the Court did so later in *Central Hardware Co. v. NLRB*[115] and *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*.[116]

With these same principles in mind, the Court directly addressed the necessity requirement in *Lechmere, Inc. v. NLRB* and established examples where that requirement would be automatically met.[117] While *Lechmere* respected the narrow tailoring of *Babcock*'s interpretation of Section Seven of the NLRA, the Court pointed out that *Babcock* did not

109. *See* CAL. LAB. CODE § 1159 (2022) ("[O]nly labor organizations certified pursuant to this part shall be parties to a legally valid collective-bargaining agreement.").

110. NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956).

111. *Id.* at 113.

112. *See, e.g.*, *supra* notes 92–93 and accompanying text.

113. *See Babcock*, 351 U.S. at 113 ("[I]f the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property."); Amicus Brief of the American Federation of Labor, *supra* note 91, at 15–16 (citing Lechmere, Inc. v. NLRB, 502 U.S. 527, 539 (1992)).

114. *See Babcock*, 351 U.S. at 113.

115. Central Hardware Co. v. NLRB, 407 U.S. 539, 544–45 (1972) ("[T]he allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employee's [§] 7 rights.").

116. Sears, Roebuck & Co. v. San Diego Cnty. Dist. of Carpenters, 436 U.S. 180, 205 (1978) ("To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation.").

117. *See* Lechmere, Inc. v. NLRB, 502 U.S. 527, 533–35, 539–40 (1992).

completely close the door to these workers, but instead identified an exception in per se cases of necessity.[118] Specifically, the Court identified instances where the location of a workplace and living place of employees was "*beyond the reach* of reasonable union efforts to communicate with them."[119] The whole point of this exception was to protect the rights of workers who were isolated due to their employment. That isolation was enough to meet the necessity requirement of the NLRA's access provision. In its own analysis, the *Lechmere* Court pointed to workers at logging camps, mining camps, and mountain resort hotels, whom it found were in sufficiently difficult-to-reach circumstances that made access for nonemployee organizers *necessary*.[120] Given the *Babcock*, *Central Hardware*, *Sears*, and *Lechmere* analyses, farmworkers sufficiently meet this necessity threshold.

This point of precedent—recognizing that difficulty of access justifies access rights—was made by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) in its amicus brief, but the point remained unaddressed by the majority opinion in *Cedar Point*.[121] In addition to the demographics of workers that make organizing difficult,[122] the reality is that farmworkers are also often difficult to reach by purely geographic measures. Farmworkers work in remote areas.[123] Often, farmworkers live on property owned by their employer or in hotels or apartments provided by their employers.[124] These work and living arrangements are comparable to those of loggers, miners, and mountain resort hotel employees for whom the Court has recognized access regulations as necessary.[125] This living situation is exactly the kind of necessity identified by the *Lechmere* Court and recognized by the California Legislature in its drafting of the ALRA. By ignoring these facts, the majority in *Cedar Point* has disregarded labor law precedent in a way that has seriously diminished the limited rights afforded to California farmworkers.

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118. *See id.* at 533–34.

119. *Id.* at 539 (citing *Babcock*, 351 U.S. at 113).

120. *Id.* at 539–40 (internal citations omitted).

121. *See* Amicus Brief of the American Federation of Labor, *supra* note 91, at 14–15 (citing *Lechmere*, 502 U.S. at 539 (1992)).

122. *See supra* note 93 and accompanying text.

123. *Housing*, NAT'L FARM WORKER MINISTRY, https://nfwm.org/farm-workers/farm-worker-issues/housing/ [https://perma.cc/D3WD-S5HL].

124. *Id.*

125. *See Lechmere*, 52 U.S. at 539–40 (1992) (listing these occupations as examples where employees were outside the reach of reasonable union attempts to communicate with employees).

B. Cedar Point *Prioritizes the Right to Exclude to the Detriment of Actual Property Law*

The *Cedar Point* majority focuses on the right to exclude to the detriment of the traditional regulatory Takings Clause framework. As previously noted, *Penn Central* established a multifactor balancing test that has been utilized by the Court in making determinations of takings that are not outright.[126] These factors include: (1) the "economic impact of the regulation on the claimant;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) "the character of the governmental action;" taking into account the Taking Clause's purpose of fairness and justice in compensation for the burden of governmental action.[127] The majority in *Cedar Point* argues, however, that *Penn Central*'s factors do not apply.[128] The Court instead held that the noncontinuous presence of labor organizers on a grower's property is a per se taking due to its interference with the owner's right to exclude.[129] This twisting of precedent gaslights legal scholars by arguing that the traditional takings framework does not distinguish between intermittent and continuous use.[130] To support their less-than-intellectually-honest framework, the majority incorrectly interprets rulings like *Loretto*,[131] *Nollan v. California Coastal Commission*,[132] and *PruneYard Shopping Center v. Robbins*[133]—all of which actually

126. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–28 (1978); *see also* discussion *supra* Section I.B.

127. *Penn Central*, 438 U.S. at 124.

128. *See* Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074–77 (2021).

129. *Id.*

130. *Id.* at 2074.

131. *E.g.*, *id.* (internal citations omitted) ("To begin with, we have held that a physical appropriation is a taking whether it is permanent or temporary. Our cases establish that 'compensation is mandated when a leasehold is taken and the government occupies property for its own purposes, even though that use is temporary.' The duration of an appropriation—just like the size of an appropriation, see *Loretto*, 458 U.S. at 436–437, 102 S.Ct. 3164—bears only on the amount of compensation."). *But see* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 n.12 (1982) ("The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical *invasion* is a taking . . . . [S]uch temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property.").

132. *See Cedar Point*, 141 S. Ct. at 2075 ("[W]hile *Nollan* happened to involve a legally continuous right of access, we have no doubt that the Court would have reached the same conclusion if the easement demanded by the Commission had lasted for only 364 days per year."). *But see* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 832 (1987) ("We think a 'permanent physical occupation' has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.").

133. *E.g.*, *Cedar Point*, 141 S. Ct. at 2076 ("The Board and the dissent argue

emphasized the importance of permanency and continuance in identifying per se takings.

The majority's application of takings precedent is baseless. Even in *Penn Central*, the Court found that New York's Landmarks Law, which imposed an architectural limit on Penn Central's ability to build on their property in a certain way, did not amount to a taking just because the property owner was unable to exploit *one stick*[134] in the bundle of property rights due to the regulation.[135] In fact, the *Penn Central* Court found such logic to be "quite simply untenable."[136] In the case of *Cedar Point*, this *one stick* is represented by the right to exclude. Based on *Penn Central*—the seminal case of takings law—the right to exclude *alone* should not be sufficient to constitute a taking. The Court should have looked to the *Penn Central* factors for its analysis.

The majority refuses to apply *Penn Central*, however.[137] Further, it does little in the way of distinguishing how this one property right at issue, the right to exclude, rises to the level of a per se taking, whereas the one property right at issue in *Penn Central* does not. After all, both cases dealt with *only* one stick in the bundle of rights. The *Cedar Point* Court itself is unable to identify any actual distinctions between the importance of the two sticks at issue in the cases, offering only a refrain that the right to exclude is a "fundamental element of the property right[s]" as its explanation for this ruling.[138]

Recognizing that repetition is not the most convincing tool for this inaccurate reading of takings law, the majority utilizes a dictionary to offer the slightest support to its twisted analysis. Relying on the most literal meaning of the word "appropriation," the majority says the access clause's phrasing "to *take* access" constitutes appropriation, and

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that *PruneYard* shows that limited rights of access to private property should be evaluated as regulatory rather than *per se* takings. We disagree." (internal citation omitted)). *But see* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83–84 (1980) ("Here the requirement that appellants permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants' property rights under the Taking Clause . . . . Appellees were orderly, and they limited their activity to the common areas of the shopping center. In these circumstances, the fact that they may have 'physically invaded' appellants' property cannot be viewed as determinative.").

134. In relation to property law, the term "bundle of sticks" is a metaphor used to understand the basic aspects of property ownership. Audrey McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law*, 2011 WIS. L. REV. 855, 874–75 (2011).

135. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130 (1978).

136. *Id.*

137. *Cedar Point*, 141 S. Ct. at 2072.

138. The Court used this phrasing multiple times. *See id.* at 2072, 2077 (citing Kaiser Aetna v. United States, 444 U.S. 164, 179–80 (1979)).

therefore is a taking.[139] This surface level analysis side-steps the dissent's inquiry into the true meaning of the word "appropriate," where Justice Breyer notes the access clause in fact does not "take from the owners a right to invade . . . [or] give the union organizations the right to exclude anyone."[140] So what is *actually* being appropriated from the Petitioners, according to the majority?

As admitted by the Chief Justice in the majority opinion, takings (both regulatory and per se) have most often dealt with a specific property interest being physically taken by the government via "a servitude or an easement."[141] The Petitioners themselves claim there is an easement at issue throughout their petition for certiorari, falsely characterizing the access right as an easement.[142] But the access right is not an easement at all. An easement must be explicitly granted, but there is nothing in the ALRA that identifies the access right as an easement and no mention of the type of activity allowed by the ALRA's access right in California's statutes surrounding easements.[143] Further, when looking to the State of California's definition of an easement in gross, there are inconsistencies with transfer and burden requirements that cannot be overlooked.[144]

The majority itself recognizes this lack of support for the Petitioners' assertion that there is an easement, noting both the omission in California's property law and the state's authority in defining property principles as the "creatures of state law."[145] However, they disregard the state definition of an easement and subtly waive the traditional requirements of an easement, calling the instant case "a slight mismatch from state easement law."[146] The majority even goes as far as waiving the traditional view that something as substantial as an easement or servitude is necessary to trigger the Takings Clause.[147] Instead, the majority argues that any type of incursion on someone else's land—without distinction for how substantial the intrusion, the length of time it lasts, or who commits the intrusion—should be considered a per se

139. *Id.* at 2077.

140. *Id.* at 2083 (Breyer, J., dissenting).

141. *Id.* at 2073.

142. *See* Petition for Writ of Certiorari at *3, Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (No. 20-107).

143. *See* CAL. CIV. CODE § 801 (West 2023).

144. The Court states that the ALRB called out these inconsistencies, noting that California law requires transferability and a burden to a particular parcel of property. *Cedar Point*, 141 S. Ct. at 2075. The access provision, however, "may not be transferred, [and] does not burden any particular parcel of property." *Id.*

145. *Id.* at 2075–76.

146. *Id.* at 2076.

147. *Id.*

taking.[148] Not only does this flippant disregard for the details basically eliminate an entire category of takings—regulatory takings—but, when viewed alongside takings precedent and the Petitioners' arguments, it creates confusion surrounding the role easements and servitudes play in takings determinations, if one at all.

The Supreme Court's careless explanation, or lack thereof, as to whether the access right conveys an easement paves the way for a finding that easements can run appurtenant to non-tangible, non-property, such as an employment relationship. In its amicus brief to the Court, UFW expressed this concern, arguing "the Access Regulation does not grant an easement because it allows access to the workers—not to particular property . . . . An easement must be appurtenant to land, not to workers."[149] This point is also made by the AFL-CIO in their amicus brief, stating that "[t]he access permitted by the regulation is keyed to specific aspects of the employment relationship, *not* to any special attribute of, or appurtenance to, the property."[150] Allowing an easement to run appurtenant to an employment relationship presents serious questions of the rights of workers in relation to an owner's property—all under the guise of protecting property rights.

Even disregarding this theory that the Court's analysis allows for an easement to an employee, the majority's opinion has similar results under the per se framework, as per se takings case law often relies heavily on economic value deprivation.[151] While the Petitioners did not necessarily make a claim of *complete deprivation*, precedent combined with the majority's casual reference to the importance of the economic interests of property owners[152] again seem to assert that a property owner has some sort of property interest in the labor on their land. Under this logic, allowing union organizers to speak with laborers means landowners are losing time when these workers could be working. It follows, then, that through the lens of a traditional per se understanding, the access clause results in economic deprivation or diminution of economic value of the land. Accounting for this economic loss seemingly creates a property interest of the growers in the farmworkers themselves. While the majority is careful to not over-apply the economic deprivation

148. *Id.*

149. Amicus Brief for United Farm Workers, *supra* note 72, at 19.

150. Amicus Brief of the American Federation of Labor, *supra* note 91, at 19 (emphasis added).

151. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1077 (1992) (Souter, J., statement) (explaining that a per se taking can be found where there is a "complete deprivation" of economic value of the property interest at issue); *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982) (explaining that a per se taking can be found where a government action "empt[ies] the [property] right of any value").

152. *Cedar Point*, 141 S. Ct. at 2073–74.

principle—probably because this logic alludes too much to modern-day slavery—this reading does follow from per se takings precedent and the Court's analysis. In ruling for the Petitioners, the majority plants the seeds for reliance on similar future readings, which will have disastrous effects for the rights of workers everywhere and leaves a stench in the practice of property law.

C. Cedar Point *Is Detrimental to the Civil Rights of Farmworkers, Many of Whom Are Immigrants of Color*

It cannot be overstated how few protections farmworkers are afforded both at the federal and state levels. Farmworkers are not subject to the NLRA or most provisions of the FLSA.[153] That means they are exempt from federal protections of unionization, minimum wage, overtime pay, work day and hour restrictions, and even most child labor protections.[154] Farmworkers often do not receive workers' compensation, health insurance, or disability insurance.[155] In fact, California's ALRA is one of the only labor protection laws of its kind for farmworkers in the United States and, even then, it is less regulatory in nature than federal protections, as it provides protections only for the unionization rights of farmworkers. Still, its protections are not even afforded to all of California's farmworkers.[156] Farmworkers who work as contractors—a growing trend in the agricultural industry—do not qualify for ALRA protections.[157]

Now, with the elimination of the crucial access provision to the ALRA, farmworkers have been thrust back into the dark days of the industry, destroying many of the gains of farmworkers' rights movements.[158] Organizing workers for the purposes of collective bargaining will be nearly impossible considering the aforementioned obstacles—the migratory patterns of work, the long and unpredictable

153. *See U.S. Labor Law for Farm Workers*, NAT'L FARM WORKER MINISTRY (Aug. 2018) https://nfwm.org/farm-workers/farm-worker-issues/labor-laws/ [https://perma.cc/C5NP-7Q7H].

154. *Id.*; *U.S. Labor Law for Farmworkers*, FARMWORKER JUST., https://www.farmworkerjustice.org/advocacy_program/us-labor-law-for-farmworkers/ [https://perma.cc/64KN-3B2P].

155. AM. PUB. HEALTH ASSOC., IMPROVING WORKING CONDITIONS FOR U.S. FARMWORKERS AND FOOD PRODUCTION WORKERS (2017), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2018/01/18/improving-working-conditions [https://perma.cc/8QJ3-QV64].

156. Amicus Brief of California Rural Legal Assistance, *supra* note 106, at 16–17.

157. *Id.* at 17. There has been a significant rise in agricultural labor contractors in recent decades, with contractors outnumbering traditional employees in the California counties with the highest farmworker populations. *Id.*

158. Recall that the ALRA was the product of years of advocacy by UFW and other labor organizations. *See* discussion *supra* Section I.A.

schedules, the limited access to technology, the hard-to-reach homes of workers, the literacy barriers, etc.—to organizing, which prompted creation of the access clause in the first place. Now, without union organizers having access to workers at their workspace, these barriers will be amplified. This destruction will undoubtedly result in less contact with union organizers and less options for fighting abuses in the workplace. The Supreme Court's decision has effectively eliminated all safeguards for California farmworkers and has left them open for further abuse.[159]

To make matters worse, there is a complete lack of urgency by the federal government and other states to pass or enforce any sort of protections for farmworkers. Indifference and intransigence on the part of policymakers concerning this issue will all but ensure further exploitation of farmworkers in the United States. The principal federal employment law for farmworkers in the United States is the Migrant and Seasonal Agricultural Worker Protection Act of 1983.[160] While this law requires disclosure of the terms of employment at the time of recruitment, imposes licensing requirements, and requires farmworker housing to meet certain safety standards,[161] it has proven ineffective at combating many abuses.

Take, for example, the current fight over farmworker housing conditions in the State of Texas. In a letter to the Inter-American Commission on Human Rights from June 2020, Texas RioGrande Legal Aid (TRLA) detailed how the Occupational Safety and Health Administration has "failed to enact any enforceable standards or even to conduct on-site inspections" of federally required farmworker housing.[162] The group went on to call this an "egregious and blatant violation" of human rights.[163] Efforts for accountability at the legislative

159. While farmworkers are subject to some safety regulations like state occupational safety and health departments and the Migrant and Seasonal Agricultural Worker Protection Act of 1983, reporting issues through these mechanisms is often unfruitful. *See, e.g.*, *infra* notes 161–64 and accompanying text. History has shown that the largest gains for increased wages, safety, and dignity in agricultural work has come from the actions of union organizing and collective bargaining. NAT'L FARM WORKER MINISTRY, *supra* note 153. Without the access provision, the ALRA loses much of its efficacy. And, without any new legislative protections at the federal or state level, this loss returns California farmworkers to the dark days of the pre-farmworker rights movement.

160. *Migrant and Seasonal Agricultural Worker Protection Act (MSPA)*, U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/agriculture/mspa [https://perma.cc/X292-N742].

161. *Id.*

162. Press Release, Tex. RioGrande Legal Aid, TRLA and Southern Migrant Legal Services Urge Greater Human Rights Protections for Food and Farm Workers (June 26, 2020), https://www.trla.org/press-releases-1/trla-and-southern-migrant-legal-services-urge-greater-human-rights-protections-for-food-and-farm-workers [https://perma.cc/DBP9-DPH2].

163. *Id.*

level, spearheaded by Latino legislators with personal family histories of farm work, have also proven unsuccessful.[164]

But Texas is no exception to legislatures that refuse to pass protections for farmworkers. For the past six years, the Florida Legislature has failed to pass heat illness prevention bills.[165] Recently, California's Governor Newsom "vetoed a bill that would have streamlined the process for farm[workers] to elect labor representation."[166] Even at the federal level, there has been little to no movement on introduced legislation to protect farmworkers from heat illness,[167] provide them with the ability to file for immigration protections,[168] or even to improve protections for child agricultural workers.[169] Additionally, efforts to extend complete NLRA and FLSA protections to farmworkers have not even been considered by Congress in recent years. The future of farmworker legislative protection is bleaker now more than ever with the Supreme Court's ruling in *Cedar Point*.

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164. During the 86th Legislative Session, Texas State Representative Ramon Romero, Jr., filed House Bill 40 and House Bill 50. *See* H.B. 40, 86th Leg., Reg. Sess. (Tex. 2019) https://capitol.texas.gov/billlookup/Text.aspx?LegSess=86R&Bill=HB40 [https://perma.cc/AV28-3J33]; H.B. 50, 86th Leg., Reg. Sess. (Tex. 2019) https://capitol.texas.gov/tlodocs/86R/billtext/pdf/HB00050I.pdf#navpanes=0 [https://perma.cc/84CT-WQTJ]. These bills were meant to address the issue of deplorable migrant farmworker housing conditions by providing for a study as well as penalties for growers who were receiving state dollars for farmworker housing but not meeting housing standards. State Representative Diego Bernal had filed the bill in previous sessions. House Bill 50 was re-introduced by Representative Romero, Jr., in both the 87th and 88th legislative sessions. *See* H.B. 862, 87th Leg., Reg. Sess. (Tex. 2021); H.B. 883, 88th Leg., Reg. Sess. (Tex. 2023).

165. Sam Bloch, *Florida Farm Workers Endure 116 Dangerously Hot Working Days Every Growing Season. Laws to Protect Them Have Failed Three Years in a Row*, THE COUNTER (July 7, 2020), https://thecounter.org/florida-laws-fail-to-protect-farm-workers-unsafe-working-days-due-to-heat/ [https://perma.cc/ZZC5-PPKJ].

166. *Newsom Vetoes Farmworker Organizing Bill*, BUS. J. (Sept. 23, 2021), https://thebusinessjournal.com/newsom-vetoes-farmworker-organizing-bill/ [https://perma.cc/2WFQ-24EM].

167. Press Release, House, Senate Democrats Introduce Heat Stress Legislation to Protect Farm Workers, Comm. on Educ. & Lab. (Mar. 26, 2021), https://bobbyscott.house.gov/media-center/press-releases/house-senate-democrats-introduce-heat-stress-legislation-protect-farm [https://perma.cc/3FFE-ARLM]; *see also US HR2193 Asunción Valdivia Heat Illness and Fatality Prevention Act of 2022*, BILL TRACK 50, https://www.billtrack50.com/billdetail/1353707 [perma.cc/L289-LAYM].

168. Nicole Narea, *The House Passed a Bipartisan Bill That Could Legalize 325,000 Unauthorized Immigrants*, VOX (Dec. 12, 2019), https://www.vox.com/2019/10/31/20938968/bipartisan-agriculture-farmworker-legalization-immigrant-bill-house-pass [https://perma.cc/7N6D-J5GE].

169. *See* LEE TUCKER, FINGERS TO THE BONE: UNITED STATES FAILURE TO PROTECT CHILD FARMWORKERS (Lois Whitman & Michael McClintock eds., 2000), https://www.hrw.org/report/2000/06/02/fingers-bone/united-states-failure-protect-child-farmworkers# [https://perma.cc/GR7C-L5MV].

Conclusion

When I remember Auntie, I remember the joy I felt spending time with her in her little crooked home. I remember her many stories of my grandparents and of my mother's childhood. I remember her small laugh, her bright lipsticks, and her delicious food—there was always so much food. But I also remember her telling me, as a five- or six-year-old, that she had to work twelve-hour days, from sunrise to sundown. I remember her telling me how excited she was for me to go to school, something she had to stop doing at a very early age due to the disruption of harvest seasons. I remember how she could touch a hot plate without even noticing because of the thickness of the skin on her hands from scarring. I remember the way she would ice her hands because the joints of her fingers would swell from rheumatoid arthritis, no doubt from years of difficult work. And I remember thinking to myself how very different our lives were.

The *Cedar Point* ruling is not only legally inconsistent, but also devastating to the farmworker community. In one opinion, the Court abolished all previous conceptions of takings law and the Fifth Amendment, deliberately undercutting the already sparse labor protections afforded to farmworkers in the United States. Further, the Court called into question previous rulings surrounding federal labor protections for all industries and left open the door for a legal justification to further abuses of laborers. The reprehensible desire to uphold property rights in the face of human rights abuses paves a dark path for U.S. labor and civil rights law.

The Invisible Danger in Plain Site: Ending the Practice of Building Housing in Exposure Zones

Adam J. Mikell†

Introduction

"Safe, affordable housing is a basic necessity for every family. Without a decent place to live, people cannot be productive members of society, children cannot learn, and families cannot thrive."[1] Adequate housing, or the lack thereof, affects every person every day. At its core, housing is a fundamental human need[2] with inelastic demand, yet for millions of people, this need and demand has not been fulfilled.[3] With the cost of rent continuing to rise faster than the average worker's wages,[4] millions of cost-burdened and severely cost-burdened[5] renters' housing

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1. U.S. DEP'T OF HEALTH & HUM. SERVS. & U.S. DEP'T OF HOUS. & URB. DEV., HEALTHY HOUSING REFERENCE MANUAL 1-1 (2006) [hereinafter HEALTHY HOUSING] (quoting Tracy Kaufman).

2. *See* Saul McLeod, *Maslow's Hierarchy of Needs*, SIMPLY PSYCH. (Apr. 4, 2022), https://www.simplypsychology.org/maslow.html [https://perma.cc/6H9M-WCRA] ("Physiological needs . . . are biological requirements for human survival, e.g., air, food, drink, [and] shelter . . . ."); *see also* Abraham H. Maslow, *A Theory of Human Motivation*, 50 PSYCH. REV. 370, 373 (1943) ("Undoubtedly these physiological needs are the most prepotent of all needs. What this means specifically is, that in the human being who is missing everything in life in an extreme fashion, it is most likely that the major motivation would be the physiological needs rather than any others.").

3. ANDREW AURAND, DAN EMMANUEL, IKRA RAFI, DAN THREET & DIANE YENTEL, NAT'L LOW INCOME HOUS. COAL., OUT OF REACH: THE HIGH COST OF HOUSING 4 (2021) ("For most low-wage workers, decent rental housing is unaffordable.").

4. *E.g.*, *id.* at 4–5 (2022) ("While wages have been stagnant or slow to rise, rents continue to climb. In 45 states and the District of Columbia, median gross rents increased faster than median renter household income between 2001 and 2018." (internal citation omitted)); Alicia Mazzara, *Rents Have Risen More Than Incomes in Nearly Every State Since 2001*, CTR. ON BUDGET & POL'Y PRIORITIES (Dec. 10, 2019), https://www.cbpp.org/blog/rents-have-risen-more-than-incomes-in-nearly-every-state-since-2001 [https://perma.cc/66R7-U7RD].

5. A household that spends over 30% of its income on housing costs is considered

options are extremely limited, and they are forced to settle for *available* housing rather than safe, affordable housing, even if the available housing puts their health in jeopardy.[6] Moreover, this safety concern is only an issue if a person can even afford to pay for inadequate housing in the first place. The ever-increasing disparity between staggering rents and low wages predictably ensures that the lowest-earning individuals in the country cannot even afford unsafe or otherwise inadequate housing. Over half a million Americans are currently experiencing homelessness,[7] and "housing unaffordability" is a key factor in this crisis.[8]

Most practitioners focused on solving the affordable housing[9] shortage focus their attention on the question of how to increase the

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cost-burdened, and a household that spends over 50% is considered severely cost-burdened. *E.g.*, Peter J. Mateyka & Jayne Yoo, *Share of Income Needed to Pay Rent Increased the Most for Low-Income Households From 2019 to 021*, U.S. CENSUS BUREAU (Mar. 2, 2023), https://www.census.gov/library/stories/2023/03/low-income-renters-spent-larger-share-of-income-on-rent.html [https://perma.cc/K3SN-5UR8]. These burdens create difficult tradeoffs for households when it comes to meeting basic needs—particularly for severely cost-burdened households. "When the majority of a paycheck goes toward the rent or mortgage, it makes it hard to afford doctor visits, healthy foods, utility bills, and reliable transportation to work or school." *Severe Housing Cost Burden**, CNTY. HEALTH RANKINGS & ROADMAPS, https://www.countyhealthrankings.org/explore-health-rankings/county-health-rankings-model/health-factors/physical-environment/housing-and-transit/severe-housing-cost-burden?year=2023 [https://perma.cc/BH3X-PSW7].

6. *See* HEALTHY HOUSING, *supra* note 1, at 1; OFF. OF TRANSP. & AIR QUALITY, EPA, NEAR ROADWAY AIR POLLUTION AND HEALTH: FREQUENTLY ASKED QUESTIONS (2014) [hereinafter NEAR ROADWAY AIR POLLUTION]; Jim Buchta, *Twin Cities 'Housing Unaffordability' Leaves Few Options for Lowest Income Families*, STAR TRIB. (Oct. 23, 2021), https://www.startribune.com/twin-cities-housing-unaffordability-leaves-few-options-for-low-income-families/600109270/ [https://perma.cc/KEJ9-AN4A].

7. *State of Homelessness: 2023 Edition*, NAT'L ALL. TO END HOMELESSNESS, https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness/ [https://perma.cc/96P9-U4BB].

8. Buchta, *supra* note 6; *see also* JOSH BIVENS, ECON. POL'Y INST., THE ECONOMIC COSTS AND BENEFITS OF AIRBNB 2 (2019) ("[E]ven small changes in housing supply (like those caused by converting long-term rental properties to Airbnb units) can cause significant price increases. High-quality studies indicate that Airbnb introduction and expansion in New York City, for example, may have raised average rents by nearly $400 annually for city residents."); Heather Vogell, *When Private Equity Becomes Your Landlord*, PROPUBLICA (Feb. 7, 2022), https://www.propublica.org/article/when-private-equity-becomes-your-landlord [https://perma.cc/JBY7-XRRE] ("[Private equity] firms use economies of scale to more aggressively squeeze profits from their buildings than traditional landlords usually do.").

9. According to the U.S. Department of Housing and Urban Development (HUD), "[a]ffordable housing is generally defined as housing on which the occupant is paying no more than 30 percent of gross income for housing costs, including utilities." *Glossary of Terms to Affordable Housing*, U.S. DEPT. OF HOUS. & URB. DEV. (Aug. 18, 2011) https://archives.hud.gov/local/nv/goodstories/2006-04-06glos.cfm [https://perma.cc/ZQ2Q-WK4V]. Of course, HUD's definition, and similar parameters related to Low Income Housing Tax Credits, must be used in certain contexts. However, this Article is focused on traffic-related indoor air pollution, and these pollutants do not pick and choose who to harm

housing supply to meet the demand.[10] In the United States, housing is seen as a commodity, not a human right.[11] This framework is why most of the strategies deployed in an effort to equilibrate supply and demand focus on economic theories and financial returns for the investor,[12] rather than taking a "people first" approach rooted in social and environmental justice and public health.[13] As a result, the interest in the quality of the affordable housing supply has arguably taken a backseat in the race to build a way out of this shortage.[14] Careless land use policies make it so

based on a person's monthly rent or income. Getting caught up in categorizing the housing based on exact monetary thresholds distracts from the true issue, which is that roadway pollution disproportionately burdens those whose financial situations prevent them from paying higher rents to live in a safer, healthier location. Accordingly, I will use the term "affordable housing" in a more colloquial sense rather than HUD's technical definition.

This Article also uses the term "low-income" in an informal sense. Again, this Article is primarily concerned with a person's proximity to the roadway and their inability to afford housing away from major roadways. Like "affordable housing," definitions for "low-income" often provide a certain income threshold used for determining eligibility for certain benefit programs or tax incentives. But because proximity to the roadway will have a more direct role on the pollution-related health risks than a person's income level will, nobody should be excluded from this conversation because of the technical aspects of a definition. Thus, the public health protections that this Article advocates for also extend to someone with an average or above average income, but because they are not disproportionately burdened by the pollution, they are not the primary focus of the Article's discussion.

10. *See, e.g.*, Ron J. Feldman & Mark L.J. Wright, *Star Tribune Op-Ed: Affordable Housing Crisis Demands More Supply*, FED. RSRV. BANK OF MPLS. (Oct. 18, 2018), https://www.minneapolisfed.org/article/2018/star-tribune-op-ed-affordable-housing-crisis-demands-more-supply [https://perma.cc/HSP7-TVKQ].

11. *Compare* Maria Massimo, *Housing as a Right in the United States: Mitigating the Affordable Housing Crisis Using an International Human Rights Law Approach*, 62 B.C. L. REV. 273, 274 (2021) (asserting that housing is treated as a commodity), *and* Lindsey v. Normet, 405 U.S. 56, 74 (1972) ("Absent constitutional mandate, the assurance of adequate housing . . . [is] legislative, not judicial, functions."), *with* ERIC TARS, NAT'L LOW INCOME HOUS. COAL., ADVOCATES' GUIDE '21: A PRIMER ON FEDERAL AFFORDABLE HOUSING & COMMUNITY DEVELOPMENT PROGRAMS & POLICIES 1–12 (2021) ("In 2020, we saw the election of a president and vice-president who, for the first time since Franklin Roosevelt, come into office on a platform explicitly affirming housing as a right.").

12. *See* MAGGIE MCCARTY, LIBBY PERL & KATIE JONES, CONG. RSCH. SERV., RL34591, OVERVIEW OF FEDERAL HOUSING ASSISTANCE PROGRAMS AND POLICY (2019) (describing the various programs and policies that are supposed to increase the supply of affordable housing or provide direct rental assistance to low-income renters).

13. Allan C. Ornstein, *Social Justice: History, Purpose and Meaning*, 54 SOC'Y 541, 546 (2017) ("A socially just society cannot forget or ignore people in need, nor leave the majority of its people behind. It must put people first—not property nor profits. It must be willing to examine and reexamine its beliefs and philosophy on a regular basis.").

14. *Contra* Amy Forbes, Doug Champion & Maribel Garcia Ochoa, *California Governor Newsom Signs Three Important New Bills into Law Impacting Residential Zoning and Development*, GIBSON, DUNN & CRUTCHER L.L.P. (Oct. 25, 2021), https://www.gibsondunn.com/california-governor-newsom-signs-three-important-new-bills-into-law-impacting-residential-zoning-and-development/ [https://perma.cc/NM7U-X66A] (noting that an agency can deny a housing project if it "makes a written finding that [the] project would create a specific, adverse impact upon public health and

that even if more affordable housing becomes available to those who need it most, people cannot rely on that housing to keep them safe and healthy. This reality is evidenced by developers throughout the country who build housing developments adjacent to major roadways and the governments who allow, if not require, it to happen.[15]

Residential buildings within 500 feet of a major roadway—"exposure zones"[16]—expose residents to extremely high levels of dangerous indoor air pollutants long-known to cause adverse respiratory and cardiovascular effects, along with a myriad of other ailments impacting daily quality of life and life expectancy.[17] Indoor air pollution is a silent, often-invisible killer all over the world,[18] and in the United States low-income renters and people of color are most severely

safety . . . without a feasible way to mitigate such impact"). Though laws streamlining the permitting process may technically include ways to deny a project for health reasons, the fact that housing has been, and continues to be, built in exposure zones suggests that such provisions will be used infrequently in practice.

15. *See* Tony Barboza & Jon Schleuss, *L.A. Keeps Building Near Freeways, Even Though Living There Makes People Sick*, L.A. TIMES (Mar. 2, 2017), https://www.latimes.com/projects/la-me-freeway-pollution/ [https://perma.cc/HD48-EKA4]; *Downtown Community Plan Update/New Zoning Code for Downtown Community Plan*, L.A. CITY PLAN., https://planning.lacity.org/development-services/eir/downtown-community-plan-updatenew-zoning-code-downtown-community-plan [https://perma.cc/3RX2-D62R] (requiring a focus on building alongside transit corridors); *Proximity to Major Roadways*, U.S. DEPT. OF TRANSP. (Aug. 24, 2015), https://www.transportation.gov/mission/health/proximity-major-roadways [https://perma.cc/YV4A-VZ3N]; CAL. AIR RES. BD., CAL. ENV'T PROT. AGENCY, AIR QUALITY AND LAND USE HANDBOOK: A COMMUNITY HEALTH PERSPECTIVE 4, tbl.1-1 (2005) [hereinafter LAND USE HANDBOOK]. There is not a uniform definition of "major roadway," so for the purposes of this Article, "major roadways" are heavily traveled roadways that carry, at a minimum, approximately 100,000 to 125,000 vehicles per day in an urban area. By definition, an exposure zone implies that the roadway in question is a "major roadway." Accordingly, any time a term such as "freeway" or "highway" is used in this Article, the term is being used interchangeably with "major roadway."

16. LAND USE HANDBOOK, *supra* note 15, at 4, tbl.1-1 (discouraging "siting new sensitive land uses within 500 feet of a freeway").

17. *E.g.*, Carlyn J. Matz, Marika Egyed, Robyn Hocking, Shayesta Seenundun, Nick Charman & Nigel Edmonds, *Human Health Effects of Traffic-Related Air Pollution (TRAP): A Scoping Review Protocol*, 8 SYSTEMATIC REVS. 1 (2019) (describing how TRAP exposure impacts a person's health); Joshua S. Apte, Michael Brauer, Aaron, J. Cohen, Majid Ezzati & C. Arden Pope III, *Ambient $PM_{2.5}$ Reduces Global and Regional Life Expectancy*, ENV'T SCI. & TECH. LETTERS 546, 546 (2018) ("Exposure to ambient fine particulate matter ($PM_{2.5}$) air pollution causes important adverse health outcomes that result in premature death . . . .").

18. *Seven Things You Should Know About Household Air Pollution*, U.N. ENV'T PROGRAMME (Aug. 17, 2021), https://www.unep.org/news-and-stories/story/seven-things-you-should-know-about-household-air-pollution [https://perma.cc/WR9Y-62F6] ("Every year, nearly 4 million people die prematurely from indoor air pollution.").

impacted.[19] There are several causes of indoor air pollution.[20] Some indoor air pollution results from personal choices, and its causes are rather obvious, like smoking indoors.[21] However, other causes have far less to do with an individual's habits, and everything to do with their inability to move away from the danger surrounding them.[22]

For nearly a century, local governments have enjoyed judicial deference in zoning matters, justified because of the cities' obligation to "protect and provide for the welfare of their citizens."[23] With this abundance of autonomy, local governments have knowingly and intentionally sited exceptionally polluted lands for residential uses that are more likely to serve already-vulnerable communities.[24] There is no way to fully know the motivations behind each individual decision to approve an exposure zone for residential use; some local officials may genuinely believe that this undesirable land is the city's best chance at quickly increasing its housing supply, and the decision outweighs the health risks the exposure zone creates.[25] Others might be responding to pressure from homeowners who push back against proposals for high-density affordable housing developments in their neighborhood out of fear it will "change the character of existing neighborhoods."[26] No matter the reasoning, or where it falls within one's perception of morality, what

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19. *Disparities in the Impact of Air Pollution*, AM. LUNG ASS'N (Nov. 17, 2022) [hereinafter *Impact of Air Pollution*] https://www.lung.org/clean-air/outdoors/who-is-at-risk/disparities [https://perma.cc/XCA9-X6TK].

20. Lauren Ferguson, Jonathon Taylor, Michael Davies, Clive Shrubsole, Phil Symonds & Sani Dimitroulopoulou, *Exposure to Indoor Air Pollution Across Socio-Economic Groups in High-Income Countries: A Scoping Review of the Literature and a Modelling Methodology*, 143 ENV'T INT'L, Oct. 2020, at 1, 1 (describing some of the main sources of indoor air pollution).

21. *See* Yingmeng Ni, Guochao Shi & Jieming Qu, *Indoor $PM_{2.5}$, Tobacco Smoking and Chronic Lung Diseases: A Narrative Review*, 181 ENV'T RSCH., Nov. 2019, at 1.

22. *See* Barboza & Schleuss, *supra* note 15 (interviewing two people who were stuck living in a freeway-adjacent location with extreme indoor pollution and who could not afford to move); Sabrina Imbler, *Kill Your Gas Stove*, ATLANTIC (Oct. 15, 2020), https://www.theatlantic.com/science/archive/2020/10/gas-stoves-are-bad-you-and-environment/616700/ [https://perma.cc/K76H-DTGH] ("Cooking on a gas stove unleashes some of the same fumes found in car exhaust. If those fumes are not vented outside the house, they linger and sneak into [your] lungs . . . . [C]ooking on a gas stove is not a matter of individual preference. Renters have little control over what appliances they use . . . .").

23. Alex Ritchie, *Fracking in Louisiana: The Missing Process/Land Use Distinction in State Preemption and Opportunities for Local Participation*, 76 LA. L. REV. 809, 829 (2016).

24. *See* Angela Caputo & Sharon Lerner, *House Poor, Pollution Rich: Thousands of Public Housing Residents Live Near the Most Polluted Places in the Nation—and the Government Has Done Little to Protect Them*, AM. PUB. MEDIA REPS. (Jan. 13, 2021), https://www.apmreports.org/story/2021/01/13/public-housing-near-polluted-superfund-sites [https://perma.cc/J3SV-ASMU].

25. *See* Feldman & Wright, *supra* note 10 (asserting that the primary solution needed to reverse the affordability crisis is private development).

26. Dwight Merriam, *The Great "Yes in My Back Yard" (YIMBY) Movement: Driven by the Gig Economy*, 29 J. AFFORDABLE HOUS. & CMTY. DEV. L. 57, 58 (2020).

is clear is that time and time again this nation's politicians ignore decades of research that has consistently arrived at the following conclusion: housing should not be built within 500 feet of a major roadway.[27]

Each passing year, this body of research finding a correlation between indoor pollution and proximity to major roadways expands, further weakening the argument of those who support placing residential developments in exposure zones. Some notable and recent studies have detailed the connection between traffic-related air pollution (TRAP) and the cognitive function of children and adolescents,[28] childhood asthma,[29] and dementia.[30] This research raises the question of why city officials and developers continue with this practice at all. It is not as if housing officials are oblivious to the dangers posed by the sites they are deeming suitable for residential use. A telling example comes from Dennis Yates, Chino's former mayor and a member of the region's air quality board, during his interview at a groundbreaking ceremony for an apartment building not even 200 feet from the freeway.[31] Despite choosing to approve the project, he acknowledged that because of the poor air quality, "he 'personally wouldn't live there.'"[32] Not everyone is fortunate enough to have that choice, including many of Mayor Yates's constituents.[33]

Those who live far from exposure zones may find the magnitude of this problem difficult to grasp. To better put the issue into perspective, a 2013 study estimated that over 11 million Americans—a number roughly

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27. *E.g.*, LAND USE HANDBOOK, *supra* note 15, at 8–11 (providing recommendations to avoid siting residential uses alongside major roadways); *see also* U.S. DEP'T OF TRANSP., *supra* note 15 ("Increasing the distance from the road to more than . . . 500 feet[] might decrease concentrations of some air pollutants by at least 50%.").

28. *See* Chloe Stenson, Amanda J. Wheeler, Alison Carver, David Donaire-Gonzalez, Miguel Alvarado-Molina, Mark Nieuwenhuijsen & Rachel Tham, *The Impact of Traffic-Related Air Pollution on Child and Adolescent Academic Performance: A Systematic Review*, 155 ENV'T INT'L, June 2021, at 1 (finding that TRAP may worsen child academic performance).

29. *See* Haneen Khreis & Mark J. Nieuwenhuijsen, *Traffic-Related Air Pollution and Childhood Asthma: Recent Advances and Remaining Gaps in the Exposure Assessment Methods*, 14 INT'L J. ENV'T RSCH. & PUB. HEALTH 312 (2017) (finding that new research methods improve researchers' understanding of the connection between TRAP exposure and childhood asthma).

30. *See* Kimberly C. Paul, Mary Haan, Yu Yu, Kosuke Inoue, Elizabeth Rose Mayeda, Kristina Dang, Jun Wu, Michael Jerrett & Beate Ritz, *Traffic-Related Air Pollution and Incident Dementia: Direct and Indirect Pathways Through Metabolic Dysfunction*, 76 J. ALZHEIMERS DISEASE 1477 (2020) (finding a connection between TRAP and incident dementia).

31. *See* Barboza & Schleuss, *supra* note 15.

32. *Id.*

33. *See id.* ("Jeremiah Caleb, who spent years battling black road dust and illness while living in an apartment next to the [freeway], said he and his wife were relieved when she landed a nursing job—a second income that allowed them to move to a less-polluted neighborhood about a mile from any freeway . . . . 'We got lucky. But for most people . . . They're stuck because that's what they can afford.'").

equal to Ohio's population[34]—live in an exposure zone.[35] In the years since that study was conducted, that number has risen, and it will continue to rise if elected officials remain idle.[36] As this Article will soon describe in more detail, the ongoing disparity related to poor air quality exposure does not persist because of a lack of legal authority;[37] it persists because of the way policymakers have "construct[ed] notions of deservedness"[38] to justify prioritizing economic interests over the health of low-income and minority citizens. Those who are interested in quickly finding solutions to alleviate the affordable housing shortage and are opposed to any new zoning restrictions must separate this Article from the truism that some housing is better than no housing.[39] The scope of this Article zeroes in on proposing a necessary zoning restriction, but it should not be construed as an endorsement for halting construction of affordable housing elsewhere. If anything, this proposal should spur policymakers, developers, and other stakeholders in the residential housing industry to revisit other viable housing and land use proposals that may have been turned down for political reasons. Until the very last plot of vacant, non-exposure zone land has been filled, until the last city has modernized its single-family zoning plans to promote "denser, smaller housing units,"[40] until our buildings cannot be built any taller,[41] and until our millions of currently vacant units have been put to better

34. *See Annual Estimates of the Resident Population for the United States, Regions, States, District of Columbia, and Puerto Rico: April 1, 2020 to July 1, 2021*, U.S. CENSUS BUREAU (Dec. 2021), https://data.census.gov/cedsci/table?tid=PEPPOP2021.NST_EST2021_POP&hidePreview=false [https://perma.cc/AX8B-VBWM].

35. *See Proximity to Major Roadways*, *supra* note 15.

36. Barboza & Schleuss, *supra* note 15 ("The Southern California Assn. of Governments . . . has projected that the population within 500 feet of a freeway will increase by a quarter million people [in and around Los Angeles] by 2035.").

37. *See infra* Section III.A.

38. Prentiss A. Dantzler & Jason D. Rivera, *Constructing Identities of Deservedness: Public Housing and Post-WWII Economic Planning Efforts*, 39 LAW & INEQ. 443, 460 (2021).

39. *Cf.* Hanna Brooks Olsen, *'Beggars Can't Be Choosers' Is Not Sound Public Policy*, REAL CHANGE (May 19, 2019), https://www.realchangenews.org/news/2019/05/29/beggars-can-t-be-choosers-not-sound-public-policy [https://perma.cc/4D9K-VX3S] ("The people who are making the rules or, in the case of city council races, who want to make the rules, have never stepped foot in an overnight shelter, let alone slept in one . . . . But if we're being honest, most of the new emergency shelter in recent memory has been created more for the comfort of the housed than those who need housing. To say we've done it — 35 new beds! Don't ask what we consider a 'bed!' — and leave it at that.").

40. Merriam, *supra* note 26, at 61.

41. *See also* Remi Jedwab, Jason Barr & Jan Brueckner, *Cities Without Skylines: Worldwide Building-Height Gaps and Their Implications* 1 (CESifo, Working Paper, Paper No. 8511, 2020) (suggesting that "stringent building-height regulations" contribute to "relatively large welfare losses").

use,[42] it is simply incorrect to claim that there are no locations to place new, affordable housing besides in exposure zones. Increasing the affordable supply of housing and constructing safe, equitable housing should not be treated as mutually exclusive actions.

Part I of this Article provides background information on the long history of racism in housing and how this racism has shaped the country's neighborhoods and attitude of "deservedness."[43] Part II provides background information necessary for understanding the risks of living alongside major roadways. Part III analyzes the proposal to prohibit the irresponsible practice of siting exposure zones for residential uses, arguing that this proposal is the most effective solution for bringing health equity into housing. This Article's proposal favors the notion that "[i]f zoning and land use policies got us into this mess, they have the potential to get us out of it."[44]

I. Background: Socioeconomics and Racism

When discussing virtually all housing-related issues—and more specifically this country's housing shortage—the role that socioeconomic status plays in determining who is most impacted by inadequate housing cannot be overlooked. Living in an exposure zone is dangerous for people at any income level, but to speak about this issue so broadly, as if everyone is equally at risk of experiencing pollution-related health effects, does not accurately explain the problem.[45] Simply put, people with lower socioeconomic statuses are more likely to live in exposure zones than their wealthier counterparts,[46] and conversations regarding health risks and reform within our built environment must properly reflect who bears the burden of government inaction.[47] With that in mind,

42. *See* Julie Gilgoff, *Pandemic-Related Vacant Property Initiatives*, 29 J. AFFORDABLE HOUS. & CMTY. DEV. L. 203, 207–14 (2020); David Zahniser, *Mayor Bass Orders List of Vacant City Properties Where Homeless Housing Could Be Built*, L.A. TIMES (Feb. 11, 2023), https://www.latimes.com/california/story/2023-02-11/bass-order-list-of-vacant-city-property-for-homeless-housing [https://perma.cc/ASK4-MLLY].

43. *See* Dantzler & Rivera, *supra* note 38, at 443.

44. ANA ISABEL BAPTISTA, TISHMAN ENV'T & DESIGN CTR., LOCAL POLICIES FOR ENVIRONMENTAL JUSTICE: A NATIONAL SCAN 11 (2019).

45. *See* Joe Purtell, *Low-Income California Communities Enact Plan to Fight Disproportionate Air Pollution*, NBC NEWS (Apr. 7, 2020), https://www.nbcnews.com/news/us-news/low-income-california-communities-enact-plan-fight-disproportionate-air-pollution-n1172421 [https://perma.cc/SA43-4ZYY].

46. *Id.*; Ferguson et al., *supra* note 20, at 8 ("High outdoor pollutant concentrations are often a proxy for areas of low [socioeconomic status], as location near congested roads can cause land price to depreciate, attracting purchase by lower-income individuals and local councils for social housing.").

47. *See* Caputo & Lerner, *supra* note 24 (discussing how inadequate government responses put the health of low-income renters living near Superfund sites, such as places where hazardous waste is improperly managed, at risk).

we can view this disparity from an even narrower lens to best understand who takes on the lion's share of the pollution burden.

Analyzing socioeconomic inequities also calls for an examination of the relationship between race and socioeconomic status. That people of color are overrepresented within low-income populations is a well-documented, consistent reality of this country.[48] Throughout American history, race, particularly for African Americans, has been a more direct determinant of housing outcomes than socioeconomic status ever was.[49] Thus, a more tailored discussion on racism and housing is pertinent background information on why current housing and public health inequities exist and why social and environmental justice theories need to be given the center stage to remedy these problems.

A. Racism in Housing

Understanding why the current disproportionate impact exists requires an acknowledgment of the decades of racism that intentionally shaped this nation's cities. The notion that the existing inequity is not primarily due to the blatantly racist, but now illegal, laws is incorrect. Inequity persists largely because the United States is limited in its ability to directly reverse decades of *de jure* racial segregation.[50] Richard Rothstein summarizes the history of racism in housing with a particular

48. John Creamer, *Poverty Rates for Blacks and Hispanics Reached Historic Lows in 2019, Inequalities Persist Despite Decline in Poverty for All Major Race and Hispanic Origin Groups*, U.S. CENSUS BUREAU (Sept. 15, 2020), https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html [https://perma.cc/2Y9T-V73T].

49. Katie Nodjimbadem, *The Racial Segregation of American Cities Was Anything but Accidental*, SMITHSONIAN MAG. (May 30, 2017), https://www.smithsonianmag.com/history/how-federal-government-intentionally-racially-segregated-american-cities-180963494/ [https://perma.cc/BC3Y-MHFJ].

50. *See id.* ("[T]he current state of the American city is the direct result of unconstitutional, state-sanctioned racial discrimination."); Susan Smith Richardson, *How Does America Reverse Years of Racist Housing Policies?*, CTR. FOR PUB. INTEGRITY (Dec. 9, 2020), https://publicintegrity.org/inside-publici/newsletters/the-moment/how-does-america-reverse-years-of-racist-housing-policies-redlining/ [https://perma.cc/DZ3K-HMTH] (interviewing Richard Rothstein who "think[s] there is presently no political support for the kinds of policies that are necessary to redress segregation. . . . There is no political support for opening up white suburbs. There's no political support for the kinds of programs that would prevent massive dislocation of African Americans who are living in gentrifying communities. There's no political support for stabilizing desegregation in the communities experiencing white flight."); Tex. Dep't of Housing & Cmty. Affs. v. Inclusive Cmtys. Project Inc., 576 U.S. 519, 540 (2015) ("[D]isparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the [Fair Housing Act], for instance, if such liability were imposed based solely on a showing of a statistical disparity. Disparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies.") (citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

focus on the African American community, as they have been subjected to the most severe housing injustices:

> Racial segregation in housing was not merely a project of southerners in the former slaveholding Confederacy. It was a nationwide project of the federal government in the twentieth century, designed and implemented by its most liberal leaders. Our system of official segregation was not the result of a single law that consigned African Americans to designated neighborhoods. Rather, scores of racially explicit laws, regulations, and government practices combined to create a nationwide system of urban ghettos, surrounded by white suburbs. Private discrimination also played a role, but it would have been considerably less effective had it not been embraced and reinforced by government.[51]

For decades, numerous government-sanctioned strategies were used to segregate neighborhoods and prevent African Americans and other racial and religious minorities from achieving upward mobility.[52] For example, the government provided public housing in the 1930s and 1940s as industrial cities experienced housing shortages due to the massive number of workers migrating to assist with manufacturing needs during World War II.[53] Many of these cities were predominately white prior to World War II, and in an effort to preserve this, local officials ensured that public housing was segregated or altogether refused to build public housing for African Americans, relegating them to live in slums further from their workplaces and public services.[54] Unsurprisingly, the public housing reserved for whites was of better quality and was often able to satisfy the white workers' demand.[55] The same could not be said for the limited public housing available to African Americans at the time.[56]

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51. RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA at XII (2017).

52. *Id.*; *see* Raj Chetty, Nathaniel Hendren, Patrick Kline & Emmanuel Saez, *Where Is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States* 35–36 (Nat'l Bureau of Econ. Rsch., Working Paper No. 19843, 2014) ("More racially segregated areas have less upward mobility. . . . Segregation of poverty has a strong negative association with upward mobility, whereas segregation of affluence does not. . . . These results suggest that the isolation of low-income families (rather than the isolation of the rich) may be most detrimental for low income children's prospects of moving up in the income distribution.").

53. Terry Gross, *A 'Forgotten History' of How the U.S. Government Segregated America*, NPR (May 3, 2017), https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america [https://perma.cc/B6K9-V7UA]; ROTHSTEIN, *supra* note 51, at 5.

54. *See, e.g.*, ROTHSTEIN, *supra* note 51, at 5–6 (describing how Richmond, Virginia was predominantly white before World War II, and the local housing authority established segregated facilities and housing after an influx of African American workers).

55. *Id.*

56. *Id.*

Along with segregated public housing, racial covenants were another way the United States government and white property owners ensured that neighborhoods would be segregated.[57] The covenants became particularly popular after 1926, when the U.S. Supreme Court validated their use in *Corrigan v. Buckley*.[58] Real estate developers and homeowners used racial covenants in property conveyances to prevent, for example, the "premises [from being] . . . conveyed, mortgaged or leased to any person or persons of Chinese, Japanese, Moorish, Turkish, Negro, Mongolian or African blood or descent."[59] Other covenants were even more blunt, stating that the property may only be "resold, leased, rented or occupied . . . by persons of the Aryan race."[60] Through private property transactions, a hidden system of American apartheid was built during the 20th century.[61]

Racial covenants were effective at segregating many neighborhoods, but they did so on a transaction-by-transaction basis. Impatient segregationists wanting to spread inequality on a grand scale decided they needed other tools which would apply to whole cities rather than individual transactions. They found their solution in the 1930s with redlining.[62] The government, in tandem with banks, used redlining to deny home loans to people living in majority-minority neighborhoods.[63] In justifying this practice, the Federal Home Loan Bank Board relied on the belief that "judging African Americans to be poor credit risks because they were black was not a racial judgment but an economic one."[64] Other

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57. *See What Is a Covenant?*, UNIV. OF MINN.: MAPPING PREJUDICE, https://mappingprejudice.umn.edu/racial-covenants/what-is-a-covenant [https://perma.cc/X37G-MMKT].

58. *See* Corrigan v. Buckley, 271 U.S. 323 (1926) (holding that racial covenants were not unconstitutional under the Fifth, Thirteenth, or Fourteenth Amendments); *Historical Shift from Explicit to Implicit Policies Affecting Housing Segregation in Eastern Massachusetts*, THE FAIR HOUS. CTR. OF GREATER BOS., https://www.bostonfairhousing.org/timeline/1920s 1948-Restrictive-Covenants.html [https://perma.cc/EQW8-UW58].

59. *What Is a Covenant?*, *supra* note 57.

60. *Aryans Only Neighborhood*, SEATTLE C.R. & LAB. HIST. PROJECT, UNIV. OF WASH., https://depts.washington.edu/civilr/covenants_Aryans.htm [https://perma.cc/NTC6-LKQ4].

61. *See, e.g.*, Kirsten Delegard & Kevin Ehrman-Solberg, *"Playground of the People"? Mapping Racial Covenants in Twentieth-Century Minneapolis*, OPEN RIVERS: RETHINKING THE MISSISSIPPI, Spring 2017, at 72, 73; Dist. 10 Como Cmty. Council, *Much of Como was 'Whites Only*,*'* COMO PARK (2021), https://district10comopark.org/much-of-como-was-whites-only/ [https://perma.cc/AGC7-SXL5].

62. Abdallah Fayyad, *The Unfulfilled Promise of Fair Housing*, ATLANTIC (Mar. 31, 2018), https://www.theatlantic.com/politics/archive/2018/03/the-unfulfilled-promise-of-fair-housing/557009 [https://perma.cc/ALE4-3CA4].

63. Shawna Doughman, Wells Fargo v. City of Oakland*: A Matter of Proximate Cause*, 51 GOLDEN GATE U. L. REV. 11, 12 n.11 (2021) (citing City of Oakland v. Wells Fargo & Co., 972 F.3d 1112, 1118 (9th Cir. 2020)).

64. ROTHSTEIN, *supra* note 51, at 108.

federal agencies with a role in underwriting bank profits and reviewing loan applications made similar arguments in a thinly veiled attempt to distract from their overtly discriminatory practices.[65] Redlining's ability to uphold *de jure* segregation was technically put to an end in 1968 with the passing of the Fair Housing Act, but in many cities, current mortgage loan patterns still fall into the same redlined zones from the past.[66]

B. Exclusionary Zoning

Of all the policies regularly associated with institutionalized segregation, exclusionary zoning is one of the practices that has been the hardest to dismantle. Exclusionary zoning does not refer to any single policy—it is a general category of land use regulations employed to restrict certain types of uses from being adopted in a particular area.[67] As such, exclusionary zoning is not inherently good or bad; such a determination depends on how governments use this tool. When the practice was first introduced in the 19th century, cities routinely used it to address nuisances and other legitimate health and safety concerns, but it did not take long for local officials to realize that exclusionary zoning would be incredibly effective at "discriminat[ing] against people of color and [] maintain[ing] property prices in suburban and, more recently, urban neighborhoods."[68] Nowadays, exclusionary zoning is most frequently associated with the latter use, and the impacts of the regulations still have a hold on nearly every city.

Some of the specific exclusionary zoning practices that contributed to segregation "include minimum lot size requirements, minimum square footage requirements, prohibitions on multi-family homes, and limits on the height of buildings."[69] At first look, these practices do not have any

65. *Id.* ("[Federal Deposit Insurance Corporation] chairman Erle Cocke asserted that it was appropriate for banks under his supervision to deny loans to African Americans because whites' property values might fall if they had black neighbors.").

66. *See* Kriston Capps, *How the Fair Housing Act Failed Black Homeowners*, BLOOMBERG (Apr. 11, 2018), https://www.bloomberg.com/news/articles/2018-04-11/50-years-after-the-fair-housing-act-redlining-persists [https://perma.cc/XA9N-UK3K]. Redlining also inspired another form of discrimination known as "reverse redlining." ROTHSTEIN, *supra* note 51, at 109. Reverse redlining, the practice of "excessive marketing of exploitative loans in African American communities," was tolerated by banks' regulators for much of the early 2000s and was an important cause of the 2008 housing and financial collapse. *Id.* Reverse redlining is also known as issuing "predatory loans." Doughman, *supra* note 63, at 12 n.12 (citing *City of Oakland*, 972 F.3d at 1118).

67. *See* Cecilia Rouse, Jared Bernstein, Helen Knudsen & Jeffrey Zhang, *Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market*, THE WHITE HOUSE (June 17, 2021), whitehouse.gov/cea/blog/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market/ [https://perma.cc/UNV4-S5Z9] (explaining the history of exclusionary zoning laws).

68. *See id.*

69. *Id.*

obvious signs of racism or discrimination. This was deliberate. Notable judicial and legislative actions—like the Supreme Court's ruling against an explicitly discriminatory exclusionary zoning law in 1917[70] and President Johnson's signing of the Fair Housing Act several decades later[71]—slowly prevented the most blatant forms of racist zoning practices from being implemented, but the Supreme Court did not hold that the use of exclusionary zoning in general was unconstitutional.[72] As a result, federal, state, and local authorities have used exclusionary zoning laws to "[contribute] to the same patterns of segregation as pre-*Buchanan v. Warley* policies" for several decades, and these practices have had a lasting influence on the racial and economic makeup of American cities.[73] Zoning regulations unnecessarily limiting new residential construction through minimum lot size requirements and other similar requirements and restrictions keep housing unaffordable and promote income segregation that results in distinct "areas of concentrated poverty and concentrated wealth,"[74] all while appearing facially neutral.[75]

In recent years, exclusionary zoning practices have come under fire from leading Democrats and Republicans alike.[76] There have been some victories for "pro-housing growth" supporters;[77] for example, several

70. Buchanan v. Warley, 245 U.S. 60, 82 (1917) ("We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law. That being the case the ordinance cannot stand.").

71. *See* Elliott Anne Rigsby, *Understanding Exclusionary Zoning and Its Impact on Concentrated Poverty*, THE CENTURY FOUND. (June 23, 2016), https://tcf.org/content/facts/understanding-exclusionary-zoning-impact-concentrated-poverty/?agreed=1&session=1 [https://perma.cc/N2QE-JT9N] (summarizing the history of "actions by the federal government that limited legal housing discrimination").

72. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 271 (1977).

73. *See, e.g.*, Rigsby, *supra* note 71 (arguing that "the Fair Housing Act provides a loophole for discrimination that confines low-income people to certain neighborhoods by systematically preventing them . . . from moving into areas of [sic] with access to opportunity."); Sarah Zeimer, *Exclusionary Zoning, School Segregation, and Housing Segregation: An Investigation into a Modern Desegregation Case and Solutions to Housing Segregation*, 48 HASTINGS CONST. L.Q. 205, 209–12 (2020) (describing various tactics similar to, or used alongside, exclusionary zoning laws that resulted in housing discrimination, including racial covenants, Federal Housing Authority policies, redlining, and blockbusting); Chetty et al., *supra* note 52; *see also* DANIEL SHOAG & PETER GANONG, HUTCHINS CTR. ON FISCAL & MONETARY POL'Y AT BROOKINGS, WHY HAS REGIONAL INCOME CONVERGENCE DECLINED? (2016) (attributing the rate of convergence's slowdown "to increasingly tight land use regulations in wealthy areas").

74. Rigsby, *supra* note 71.

75. David Schleicher, *Exclusionary Zoning's Confused Defenders*, 2021 WIS. L. REV. 1315, 1317 (2021).

76. *Id.* at 1318–19.

77. *Id.* at 1318.

states and cities have ended single-family zoning, a task that many would have once considered impossible.[78] It is too early to know just how much of an impact these reforms will have—ending single family zoning is very different from actually mandating the construction of infill multifamily developments—but it is an important first step in changing the way the country views solutions to the housing shortage. At the same time, however, many other state or local officials have fiercely resisted zoning reform and appear set on doing so for as long as they remain in office.[79]

II. Air Pollution and Exposure Zones

A. Race, Roadways, and Public Health

The group of traffic-related air pollutants that are most relevant to this Article are "the six criteria air pollutants (carbon monoxide, lead, nitrogen dioxide, ozone, particulates ($PM_{2.5}$ and PM_{10}), and sulfur dioxide)."[80] Though their emissions are not limited to sources of transportation, these pollutants have a significant presence within the category of "traffic-related air pollution."[81] Global findings show that exposure to TRAP is detrimental to one's health,[82] with adverse health effects ranging from "exacerbation of asthma, . . . reduced lung function, [and] myocardial infarction,"[83] to premature death by way of "ischemic

78. *See* Richard D. Kahlenberg, *How Minneapolis Ended Single-Family Zoning*, THE CENTURY FOUND. (Oct. 24, 2019), https://tcf.org/content/report/minneapolis-ended-single-family-zoning/ [https://perma.cc/M9MH-S6MM].

79. Schleicher, *supra* note 75, at 1319–20.

80. ROBERT V. PERCIVAL, CHRISTOPHER H. SCHROEDER, ALAN S. MILLER & JAMES P. LEAPE, ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 451 (9th ed. 2021).

81. *See* Matz et al., *supra* note 17, at 1 ("The mixture of vehicle exhausts, secondary pollutants formed in the atmosphere, evaporative emissions from vehicles, and non-combustion emissions (e.g., road dust, tire wear) is referred to as traffic-related air pollution (TRAP)."). Though TRAP is a broad category that consists of more pollutants than the six criteria pollutants, because of the relevance of the six criteria pollutants, the two terms may be used interchangeably for the purposes of this Article. If it is material to distinguish other pollutants that are within the category of TRAP but are not a criteria pollutant, a clear distinction will be made.

82. *See, e.g.*, Apte et al., *supra* note 17; Ivan C. Hanigan, Richard A. Broome, Timothy B. Chaston, Martin Cope, Martine Dennekamp, Jane S. Heyworth et al., *Avoidable Mortality Attributable to Anthropogenic Fine Particulate Matter ($PM_{2.5}$) in Australia*, 18 INT'L J. ENV'T RSCH. & PUB. HEALTH (2020) ("[T]he GBD report from 2020 ranked air pollution as the 4th highest risk factor for mortality, with 6.67 million attributable deaths during the period 1990–2019."); *Public Health and Environment*, WORLD HEALTH ORG. https://www.who.int/data/gho/data/themes/public-health-and-environment [https://perma.cc/WZW3-VHN] (estimating that, globally, 3.2 million annual deaths are caused by household air pollution and 4.2 million deaths are caused by ambient air pollution).

83. Matz et al., *supra* note 17.

heart disease, strokes, [and] lung cancer."[84] Unsurprisingly, researchers observe a positive correlation between one's proximity to a TRAP source and the occurrence and severity of adverse health effects.[85] The consensus among these experts—both in the United States and the international public health community[86]—is that people should avoid spending significant time within about 500 feet of exposure zones.[87]

Despite such recommendations, an EPA report found that at least 45 million people in the United States live, work, or attend school "within 300 feet of a major road, airport[,] or railroad."[88] In 2014, the year the

84. Apte et al., *supra* note 17, at 546; *see also id.* ("Exposure to ambient fine particulate matter ($PM_{2.5}$) air pollution causes important adverse health outcomes that result in premature death . . . .").

85. *E.g.*, NEAR ROADWAY AIR POLLUTION, *supra* note 6, at 1–2 ("Individually and in combination, many of the pollutants found near roadways have been associated with adverse health effects."); HEALTH EFFECTS INST. PANEL ON THE HEALTH EFFECTS OF TRAFFIC-RELATED AIR POLLUTION, HEI SPECIAL REP. 17, TRAFFIC-RELATED AIR POLLUTION: A CRITICAL REVIEW OF THE LITERATURE ON EMISSIONS, EXPOSURE, AND HEALTH EFFECTS ix–xv (2010) (detailing the adverse health effects of traffic-related air pollution).

86. *See, e.g.*, Henrik Brønnum-Hansen, Anne Mette Bender, Zorana Jovanovic Andersen, Jan Sørensen, Jakob Hjort Bønløkke, Hendriek Boshuizen, Thomas Becker, Finn Diderichsen & Steffen Loft, *Assessment of Impact of Traffic-Related Air Pollution on Morbidity and Mortality in Copenhagen Municipality and the Health Gain of Reduced Exposure*, 121 ENV'T INT'L 973 (2018) (explaining the benefits of reducing exposure to traffic emissions).

87. *E.g.*, LAND USE HANDBOOK, *supra* note 15, at 10 (recommending that the State should "[a]void siting new sensitive land uses within 500 feet of a freeway, urban roads with 100,000 vehicles/day, or rural roads with 50,000 vehicles/day" and various other existing uses that create particularly poor air quality up to 1,000 feet away); NEAR ROADWAY AIR POLLUTION, *supra* note 6, at 2 ("Research findings indicate that roadways generally influence air quality within a few hundred meters – about 500-600 feet downwind from the vicinity of heavily traveled roadways or along corridors with significant trucking traffic or rail activities. This distance will vary by location and time of day or year, prevailing meteorology, topography, nearby land use, traffic patterns, as well as the individual pollutant."); *see also* HEALTHY HOUSING, *supra* note 1 (observing that indoor air quality is often worse than outdoor air quality, and because people spend approximately 90% of their time indoors, indoor air pollution poses a greater risk than previously thought). *But see* Tony Barboza, *Freeway Pollution Travels Farther Than We Thought. Here's How to Protect Yourself*, L.A. TIMES (Dec. 30, 2017), https://www.latimes.com/local/california/la-me-freeway-pollution-what-you-can-do-20171230-htmlstory.html [https://perma.cc/Z836-RW9N] ("It's not only your distance from traffic, but other details such as wind patterns, freeway design, the time of day and the types of cars, trucks and buildings around you that determine the risk . . . . Avoid sites within 500 feet — where California air quality regulators warn against building — or even 1,000 feet. That's where traffic pollution is generally highest . . . ."); Michael Brauer, Conor Reynolds & Perry Hystad, *Traffic-Related Air Pollution and Health in Canada*, 185 CANADIAN MED. ASS'N J. 1557, 1557 (2013) (defining an "elevated exposure zone" as the 500 meters on either side of a highway, which is an area over three times larger than the measures for exposure zones used in most United States studies and policies); HEALTH EFFECTS INST., *supra* note 85, at ix ("[T]he Panel identified an exposure zone within a range of up to 300 to 500 [meters] from a major road as the area most highly affected by traffic emissions (the range reflects the variable influence of background pollution concentrations, meteorologic conditions, and season) . . . .").

88. NEAR ROADWAY AIR POLLUTION, *supra* note 6, at 1; *see* Jamie Smith Hopkins, *The*

report was published, this figure was equivalent to approximately 14.1% of the country's population.[89] Though the report did not measure how many people spend the better part of their day within 500 feet of major TRAP sources, intuitively, that total number includes several million more people than what the EPA's research accounted for in the range of 300 feet or less.

In the United States, the burden of TRAP is not shared equally; it is disproportionately placed on people with lower incomes.[90] While people in higher income brackets may enjoy the flexibility of choosing where to live, thereby freely avoiding exposure zones, that luxury is not shared by all. A city's decision to site land in these exposure zones for housing has a major influence on low-income renters' health.[91] Consistent with this Article's earlier discussion on the correlation between socioeconomic status and race, knowing that people of a lower socioeconomic status are at a greater risk of pollution-related health issues implies that people of color are disproportionately impacted as well.[92] In addition to this correlation, an even more direct reason exists to explain why people of color, and African Americans in particular, are more likely to be subjected to the poorest air quality within a city: segregation as a result of the U.S. interstate highway system. During the country's mid-20th century highway construction boom, urban freeways were routinely planned to

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Invisible Hazard Afflicting Thousands of Schools, THE CTR. FOR PUB. INTEGRITY (Feb. 17, 2017), https://publicintegrity.org/environment/the-invisible-hazard-afflicting-thousands-of-schools/ [https://perma.cc/T4R6-7CBV] ("Nearly 8,000 U.S. public schools lie within 500 feet of highways, truck routes and other roads with significant traffic . . . .").

89. *See National Population Totals and Components of Change: 2010-2019*, U.S. CENSUS BUREAU (Oct. 8, 2021), https://www.census.gov/data/datasets/time-series/demo/popest/2010s-national-total.html [https://perma.cc/G9BL-3YJL] (estimating that the United States' population was 318,301,008 people in 2014).

90. *Impact of Air Pollution*, *supra* note 19; *see* NEAR ROADWAY AIR POLLUTION, *supra* note 6, at 1, 3 (finding that "[a]ir pollutants . . . are found in higher concentrations near major roads" and that "people of low socioeconomic status are among those at higher risk for health impacts from air pollution near roadways").

91. *Cf.* David Dayen, *Why the Poor Get Trapped in Depressed Areas*, NEW REPUBLIC (Mar. 18, 2016), https://newrepublic.com/article/131743/poor-get-trapped-depressed-areas [https://perma.cc/T2X7-W3N8] (explaining that it is difficult for someone living in poverty to move to areas with more opportunities because of the added costs of moving to a new city, such as renting a moving van, or needing to put down a security deposit in addition to paying rent for that month). Dayen's article is useful for understanding why a low-income renter with concerns about their health due to TRAP exposure is not necessarily able to move to a city that has affordable housing in less polluted areas.

92. *Impact of Air Pollution*, *supra* note 19 ("Poorer people and some racial and ethnic groups are among those who often face higher exposure to pollutants and who may experience greater responses to such pollution . . . . Recent studies . . . found that those who live in predominately black or African American communities suffered greater risk of premature death from particle pollution than those who live in communities that are predominately white . . . . Low socioeconomic status consistently increased the risk of premature death from fine particle pollution among 13.2 million Medicare recipients studied in the largest examination of particle pollution-related mortality nationwide.").

bulldoze directly through low-income and minority communities.[93] This was not a one-off occurrence—it was public policy that "segregate[ed] Black neighborhoods from white neighborhoods," destroyed thousands of businesses, displaced thousands of people from their homes, and trapped entire neighborhoods in a cycle of poverty.[94] With highways still existing as a physical and metaphorical barrier for numerous African American and other minority neighborhoods, "concentrated poverty and racial segregation . . . continues to impede economic mobility and access to opportunity," all while exposing generations of residents in these communities to some of the worst TRAP in their city.[95]

B. TRAP in California

California's congested freeways,[96] shortage of nearly one million rental homes "affordable and available for extremely low-income renters,"[97] and the exceptionally poor air quality in many of its cities,[98] often places the state at the center of the discussion on residential uses in

93. Ashley Halsey III, *A Crusade to Defeat the Legacy of Highways Rammed Through Poor Neighborhoods*, WASH. POST (Mar. 29, 2016), tinyurl.com/47mb5jnc [https://perma.cc/A7ZP-AKTB].

94. *Id.*; Deborah N. Archer, *Transportation Policy and the Underdevelopment of Black Communities*, 106 IOWA L. REV. 2125, 2135–41 (2021) ("The passage of the Federal-Aid Highway Act of 1956 facilitated the highway construction and the destruction of Black communities. Federal and state highway builders purposely targeted Black communities to make way for massive highway projects . . . . [and] disproportionately displaced and destroyed Black homes, churches, schools, and businesses, sometimes leveling entire communities.").

95. Archer, *supra* note 94, at 2133–34, 2139–41 ("Thus, segregative transportation policy not only cuts off Black communities from economic growth, education, and public safety, but endangers lives."); Chetty et al., *supra* note 52, at 35 ("More racially segregated areas have less upward mobility."); Alana Semuels, *How to Decimate a City*, ATLANTIC (Nov. 20, 2015), https://www.theatlantic.com/business/archive/2015/11/syracuse-slums/416892 [https://perma.cc/2BTP-VRXZ] ("Over the past decade, the concentration of poverty in . . . American cities has increased, even as the nation has become wealthier and pulled itself out of a damaging recession . . . . As upper- and middle-class residents moved to the suburbs, the very poor remained in the city, and increasingly saw themselves surrounded by more poor people.").

96. Rex Crum, *We're Not the Worst State, but Just How Bad Is California for Drivers?*, SANTA CRUZ SENTINEL (Jan. 21, 2020), https://www.santacruzsentinel.com/2020/01/21/were-not-the-worst-state-but-just-how-bad-is-california-for-drivers-2/ [https://perma.cc/W29D-LWUR] ("California has the highest percentage of rush hour traffic congestion . . . .").

97. *Housing Needs by State: California*, NAT'L LOW INCOME HOUS. COAL., https://nlihc.org/housing-needs-by-state/california [https://perma.cc/D43R-5UGN] (demonstrating a shortage of over 1,000,000 rental homes affordable and available for extremely low-income renters).

98. Martin Wisckol, *'Vicious Cycle' Fuels Southern California Air Pollution, the Worst in the U.S.*, ORANGE CNTY. REG. (Oct. 6, 2021), https://www.ocregister.com/2021/10/05/vicious-cycle-fuels-southern-california-air-pollution-the-worst-in-the-u-s/ [https://perma.cc/WUR7-U2UE] (discussing some of the factors that contribute to poor air quality in California).

exposure zones. It is true that air pollution's deleterious effects pay no mind to state lines, but due to California's unique factors and robust history of legislative attempts to minimize TRAP's effects, this Article takes a more specific look at the state to evaluate what strategies might work as a foundation for addressing air pollution disparities in housing, and what strategies are more likely to fail.

California Air Resource Board's (CARB) independent research is consistent with the greater scientific community's findings on TRAP and exposure zones, estimating that California's inability to meet its statewide $PM_{2.5}$ standards resulted in over 9,300 preventable deaths between 2004 and 2006.[99] More recent estimates show that "[i]f $PM_{[2.5]}$ were reduced to background levels," approximately 7,200 premature deaths, 5,200 emergency room visits, and nearly 2,000 other hospitalizations would be avoided.[100] California is no exception to the pattern of people of color being disproportionately impacted by poor air quality. Statewide, people of color are exposed to greater levels of $PM_{2.5}$ than white Californians.[101] Furthermore, wealth is a major determinant of pollution exposure—even within higher income brackets—and the lowest-income households also live in areas more heavily polluted than the state average.[102] The Union of Concerned Scientists' finding that "those with the highest incomes live where $PM_{2.5}$ pollution is 13 percent below the state average" is not surprising, and further drives home the point that such disparities are not mere coincidence.[103]

With the widespread availability of data on traffic exposure-related health risks, unambiguous and consistent residential siting recommendations from CARB,[104] and regulatory mandates that adopt HUD's minimum requirement that "[a]ll project sites must be free from

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99. *See California Healthy Places Index*, PUB. HEALTH ALL. OF S. CAL., https://policies.healthyplacesindex.org/clean-environment/fine-particulate-matter-(pm2.5)/about [https://perma.cc/82V7-W6VM] (providing data suggesting the connection between fine particulate matter and adverse health outcomes); *cf.* Brauer et al., *supra* note 87, at 1157 ("Estimates suggest that there are 21[,]000 premature deaths attributable to air pollution in Canada each year, nearly 9 times higher than the number of deaths due to motor vehicle collisions.").

100. *Health & Air Pollution*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/resources/health-air-pollution#:~:text=The%20California%20Air%20Resources%20Board,as%20children%20and%20the%20elderly [https://perma.cc/GF2X-65VD].

101. UNION OF CONCERNED SCIENTISTS, INEQUITABLE EXPOSURE TO AIR POLLUTION FROM VEHICLES IN CALIFORNIA 1–2 (2019) ("On average, African American, Latino, and Asian Californians are exposed to more $PM_{2.5}$ pollution from cars, trucks, and buses than white Californians. These groups are exposed to $PM_{2.5}$ pollution 43, 39, and 21 percent higher, respectively, than white Californians . . . .").

102. *Id.* at 2 ("The lowest-income households in the state live where $PM_{2.5}$ pollution is 10 percent higher than the state average . . . .").

103. *Id.*

104. LAND USE HANDBOOK, *supra* note 15, at 4.

severe adverse environmental conditions,"[105] it seems irresponsible that California continues to allow and fund the construction of affordable housing units directly along freeways without a genuine effort to find feasible, safe alternatives.[106]

III. Analysis

The best solution for protecting citizens from the most dangerous amount of TRAP is also the most straightforward: federal or state governments must prohibit the construction of all residential developments within 500 feet of a major roadway.[107] Keeping the extensive history of exclusionary zoning laws' use for segregating cities in mind, as well as the current housing and homelessness crises, a new proposal to prohibit residential development in any way might seem doomed from the start, no matter how clear the health risks to the future tenants are.[108] Indeed, such pessimism would likely be justified if it were up to local governments to independently enact and enforce zoning laws to achieve this proposal's goal. After all, local officials are under pressure to find a solution to the housing shortages and homelessness crisis within their cities.[109] Barring future residences alongside freeways is likely to drive away developers who want to buy cheap land[110] and bring on the

105. CAL. DEP'T HOUS. & CMTY. DEV., HOUSING FOR A HEALTHY CALIFORNIA art. I, § 102(h) (2019).

106. *See* Tony Barboza & David Zahniser, *California Officials Say Housing Next to Freeways Is a Health Risk — But They Fund It Anyway*, L.A. TIMES (Dec. 17, 2017), https://www.latimes.cm/local/california/la-me-freeway-homeless-housing-20171217-htmlstory.html [https://perma.cc/RQ9Q-9M2X] ("California's decision to subsidize low-income housing near freeways alarms some health scientists, who point to years of studies that link roadway pollution with a growing list of illnesses — and billions in healthcare costs. They say air filters and other mitigation measures are not enough to protect residents . . . .").

107. Barboza & Schleuss, *supra* note 15 ("Health officials say that . . . the only way to solve the problem is for city and county officials to stop residential building near freeways. And that, say legal experts, is well within their authority.").

108. LAND USE HANDBOOK, *supra* note 15, at 4 (explaining that, despite its recommendation to "[a]void siting new sensitive land uses within 500 feet of a freeway . . . . [l]and use agencies have to balance other considerations, including housing and transportation needs, economic development priorities, and other quality of life issues.").

109. Barboza & Schleuss, *supra* note 15 ("[E]lected officials and business groups argue that Los Angeles is so thoroughly crisscrossed by freeways that restricting growth near them is impractical and would hamper efforts to ease a severe housing shortage. In some cases, city officials are paving the way by re-zoning industrial land along freeways and other transportation corridors [for residential uses]."); *see* Austin Sanders, *Austin Looks for Routes Out of Its Homelessness Crisis*, AUSTIN CHRON. (July 9, 2021), https://www.austinchronicle.com/news/2021-07-09/austin-looks-for-routes-out-of-its-homelessness-crisis/ [https://perma.cc/W7U2-2RKL] ("Under pressure, the city experiments with fast and sustainable strategies[.]").

110. *Cf.* Christian Britschgi, *Developers Halt Projects, Mayor Demands Reform After St.*

scorn of NIMBYs (which stands for "Not in my backyard"),[111] who fear low-income housing appearing in their neighborhoods.[112] By appeasing wealthy investors and homeowners, city officials send a clear signal that regardless of whatever housing reforms they may have promised in their campaigns, they will not follow through if it is at the expense of the homeowners' vote[113] or if it will make them the scapegoat for slowing economic growth when developers choose to invest in more developer-friendly cities.[114]

To be clear, it is not as if city officials are unaware of the health risks exacerbated by their inaction; they are making a conscious decision to prioritize private development over public health and social justice. When Eric Garcetti, Mayor of Los Angeles, was interviewed at the "groundbreaking for a freeway-adjacent apartment project . . . [,]he said he opposes any restrictions on how many homes can be built near

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Paul Voters Approve Radical Rent Control Ballot Initiative, REASON FOUND. (Nov. 10, 2021), https://reason.com/2021/11/10/developers-halt-projects-mayor-demands-reform-after-st-paul-voters-approve-radical-rent-control-ballot-initiative/ [https://perma.cc/F9WD-G62J] (quoting multiple developers who are reevaluating whether they will continue to build multifamily housing in St. Paul after a voter-proposed rent control initiative was approved in an election).

111. *NIMBY (Not in My Backyard)*, HOMELESS HUB, https://www.homelesshub.ca/solutions/affordable-housing/nimby-not-my-backyard [https://perma.cc/APD8-R3H8] ("NIMBY, an acronym for "Not In My Backyard," describes the phenomenon in which residents of a neighbourhood designate a new development (e.g. shelter, affordable housing, group home) or change in occupancy of an existing development as inappropriate or unwanted for their local area."); *see* Conor Dougherty, *Twilight of the NIMBY*, N.Y. TIMES (Jun. 5, 2022), https://www.nytimes.com/2022/06/05/business/economy/california-housing-crisis-nimby.html [https://perma.cc/4XLP-S8BD] ("[NIMBY's] connotation has harshened as rent and home prices have exploded. NIMBYs who used to be viewed as, at best, defenders of their community, and at worst just practical, are now painted as housing hoarders whose efforts have increased racial segregation, deepened wealth inequality and are robbing the next generation of the American dream.").

112. *See* Dougherty, *supra* note 111; Jeremy Robitaille & Rachel G. Bratt, *Fear of Affordable Housing: Perception vs. Reality*, SHELTERFORCE (Oct. 10, 2012), https://shelterforce.org/2012/10/10/fear_of_affordable_housing_perception_vs-_reality/ [https://perma.cc/MK2P-N8S7]; *see* Samuel H. Kye, *The Persistence of White Flight in Middle-Class Suburbia*, 72 SOC. SCI. RSCH. 38, 48 (2018) (analyzing research "suggest[ing] that white flight and racial turnover may be slowly re-emerging not in poor urban neighborhoods, but rather in their suburban, middle-class counterparts").

113. *See* Richard D. Kahlenberg, *Tearing Down the Walls: How the Biden Administration and Congress Can Reduce Exclusionary Zoning*, THE CENTURY FOUND. (Apr. 18, 2021), https://tcf.org/content/report/tearing-walls-biden-administration-congress-can-reduce-exclusionary-zoning/ [https://perma.cc/PZF3-FVZ9] (describing the political consensus that certain housing policies are "politically untouchable" if it will lose the support of "upper-middle-class, mostly white homeowners"); Chris Salviati, *Renters vs. Homeowners at the Ballot Box -- Will America's Politicians Represent the Voice of Renters?*, APARTMENT LIST (Oct. 30, 2018), https://www.apartmentlist.com/research/renter-voting-preferences [https://perma.cc/U8MT-YLA6] ("Renters are less likely than homeowners to be voting eligible, and even among eligible voters, just 49% of renters cast a ballot in 2016, compared to 67% of homeowners.").

114. *See* Britschgi, *supra* note 110.

freeways."[115] Despite assuring the public that he "take[s] this stuff very seriously," he justified the project's approval by citing the city's constricted housing market.[116] Notably, former Los Angeles City Councilman José Huizar, a once-vocal opponent of building within exposure zones,[117] ended his career in disgrace after being accused of accepting over $1.5 million in bribes from the real estate developers who contribute to the kinds of housing inequity that he claimed he wanted to remedy.[118] Huizar is not the only politician guilty of illegally catering to developers. While the bribes are often an attempt to achieve preferential treatment unrelated to the specific issue of building in exposure zones, the lengths some real estate developers will go to get their way and to entrench their influence in local governments cannot be brushed aside.[119] To what extent illegal kickbacks are responsible for inequitable land use regulation is unknown. This Article does not suggest that most developers or local government officials are corrupt, but public corruption occurs with enough regularity to at least warrant skepticism

115. Barboza & Schleuss, *supra* note 15.

116. *Id.*

117. *Id.* ("Los Angeles City Councilman José Huizar, who lives several hundred feet from Interstate 5, said freeway pollution is such an urgent and complex problem that he wants the city to establish buffer zones. He called for a 'comprehensive, citywide study of development near freeways that would analyze all impacts of limiting development around freeways.'").

118. *Huizar Corruption Scandal Reveals Need for Reform in Housing Practices*, ABUNDANT HOUS. L.A. (July 6, 2020) [hereinafter *Huizar Corruption Scandal*] https://abundanthousingla.org/huizar-corruption-scandal-reveals-need-for-reform-in-housing-practices/ [https://perma.cc/SC8N-4HBM] ("One notable detail in the investigation was Councilmember Huizar's approval of a reduction in the number of affordable units required in an Arts District development."). Huizar recently pled guilty to the charges against him. Press Release, U.S. Att'y's Off., Cent. Dist. of Cal., Former Los Angeles City Politician José Huizar Pleads Guilty to Racketeering Conspiracy and Tax Evasion Charges (Jan. 20, 2023), https://www.justice.gov/usao-cdca/pr/former-los-angeles-city-politician-jose-huizar-pleads-guilty-racketeering-conspiracy [https://perma.cc/FDC4-HRSX].

119. *See Huizar Corruption Scandal*, *supra* note 118 ("The problem of undue influence over land use decisions is not just limited to Councilmember Huizar; it is an endemic issue that has clouded City Hall for decades."); Callum Borchers, *Former Boston Official John Lynch Sentenced to 40 Months in Bribery Case*, WBUR (Jan. 24, 2020), https://www.wbur.org/news/2020/01/24/john-lynch-sentence-bribery [https://perma.cc/2LVN-RCA7] ("A longtime city employee, ... Lynch admitted taking [$50,000] from a real estate developer, in exchange for attempting to influence a key vote by a member of the city's Zoning Board of Appeal."); *Real Estate Developer Convicted of Bribing Two Former Dallas City Council Members*, INFORNEY (June 29, 2021), https://www.inforney.com/crime/real-estate-developer-convicted-of-bribing-two-former-dallas-city-council-members/article_88067a02-d93d-11eb-ad32-87186e471d1d.html [https://perma.cc/WR24-YL52] (discovering that two city councilmembers, including the chair of Dallas's Housing Committee, accepted bribes "to authorize a real estate development loan and . . . an award of a 9 percent tax credit . . . despite the fact that [the development] failed to meet the city's enumerated multifamily housing priorities").

of *some* local officials' motivations when they continuously allow their most vulnerable constituents to be placed in harm's way.[120]

Corruption aside, cities recognize and respond to the threat of air pollution differently from one another.[121] Therefore, another benefit of a federal or state mandate is consistency and efficiency,[122] rather than the typical piecemeal voting approach which frustrates developers and slows the housing market's growth.[123] This solution will not be without challenges. Although there are several ways the federal government influences land use,[124] zoning is primarily a matter for local governments—and to a less direct extent, state governments—to

120. *See Official Corruption Prosecutions Have Increased*, TRAC REPS. (May 4, 2021), https://trac.syr.edu/tracreports/crim/646/ [https://perma.cc/J4JU-UEJA] ("The latest available data from the Department of Justice show that during the first six months of FY 2021 the government reported 236 new official corruption prosecutions. If this activity continues at the same pace, the annual total of prosecutions will be 472 for this fiscal year. This estimate is up 38 percent over the past fiscal year."); *A Handful of Unlawful Behaviors, Led by Fraud and Bribery, Account for Nearly All Public Corruption Convictions Since 1985*, NAT'L INST. OF JUST. (June 5, 2020), https://nij.ojp.gov/topics/articles/handful-unlawful-behaviors-led-fraud-and-bribery-account-nearly-all-public [https://perma.cc/P768-C2ZX] ("The researchers noted a nexus between heightened corruption risk and public service at the state and, especially, local levels. They pointed out that public officials serving on government boards and councils, as well as in elected office . . . were often employed part time, undertrained, and undersupervised [sic]. The report on corrupt behavior types said that the 'lack of professionalism' in the public officials' roles and expectations 'provided the space to exploit opportunities to enrich themselves.'").

121. *Compare* Barboza & Schleuss, *supra* note 15 (finding that new residential buildings are being constructed alongside freeways despite health officials' warnings), *with* Joseph Geha, *Fremont City Council Rejects Warm Springs Housing Development Proposed Near Freeway*, MERCURY NEWS (Apr. 21, 2021), https://www.mercurynews.com/2021/04/21/fremont-city-council-rejects-warm-springs-housing-development-proposed-near-freeway/ [https://perma.cc/9VMF-AHWL] (explaining how the Freemont City Council unanimously rejected a proposal for a housing development alongside a freeway because of the known dangers it would pose to the residents).

122. *Cf.* BARLOW BURKE, ANN M. BURKHART & THOMAS P. GALLANIS, FUNDAMENTALS OF PROPERTY LAW 804 (5th ed. 2020) (describing how modern land use law has resulted in every state delegating "the power to zone to cities," meaning that most land use decisions do not require uniformity within a state or within the country).

123. *See* Roderick M. Hills Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 116–17 (2015).

124. ORG. FOR ECON. COOP. & DEV., LAND-USE PLANNING SYSTEMS IN THE OECD: COUNTRY FACT SHEETS 220 (2017) ("Despite its lack of direct powers regarding land-use planning on non-federal lands, the federal government exercises considerable influence over land use. First, it has enacted environmental legislation that influences land-use decision making . . . . Fourth, it has signed treaties that influence or govern land use on Native American tribal land. Fifth, it constructs and funds federal roads. Sixth, it provides fiscal incentives to state and local governments for specific projects. Seventh, it provides tax incentives to individuals, for example to encourage single-family homeownership through tax deductions on mortgage interests. Eighth, it provides limited housing support for low income households . . . . Tenth, US constitutional principles such as due process, equal protection, and takings limitations impose restrictions on land-use planning.").

control,[125] and local officials are unlikely to willingly give up any ability to make zoning decisions in their cities.[126]

A. Past Attempts at Limiting New Construction in Exposure Zones: California's Senate Bill No. 352

Some might expect that such a sweeping restriction on development is too radical to get political support, but the proposal is not as far-fetched as one might initially think. In 2003, California banned the construction of new schools if the proposed site was within 500 feet of a major roadway.[127] For all intents and purposes, this Article is proposing the same regulation, merely aimed at a different use. Taking a look at where California's law failed in practice demonstrates the need for a stronger law that does not give local governments the opportunity to exploit loopholes.

This school-siting legislation was clear; the effects of TRAP are not shared equally across the state's students, and the state has access to more than enough research to make an informed decision to protect people's health. Section 1 reads:

> The Legislature finds and declares all of the following:
>
> (a) Many studies have shown significantly increased levels of pollutants, particularly diesel particulates, in close proximity to freeways and other major diesel sources. A recent study of Los Angeles area freeways measured diesel particulate levels up to 25 times higher near freeways than those levels elsewhere. Much of the pollution from freeways is associated with acute health effects, exacerbating asthma and negatively impacting the ability of children to learn.
>
> (b) Cars and trucks release at least forty different toxic air contaminants, including, but not limited to, diesel particulate, benzene, formaldehyde, 1,3-butadiene and acetaldehyde. Levels of these pollutants are generally concentrated within 500 feet of freeways and very busy roadways.
>
> (c) Current state law governing the siting of schools does not specify whether busy freeways should be included in environmental impact reports of nearby "facilities." Over 150 schools are already estimated to be within 500 feet of extremely high traffic roadways.

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125. *Cf.* Ritchie, *supra* note 23 (explaining the state-local zoning conflicts as it relates to regulating fracking).

126. Dan Walters, *Cities Try to Thwart State's Push for Housing*, CALMATTERS (Feb. 7, 2022), https://calmatters.org/commentary/2022/02/cities-try-to-thwart-states-push-for-housing/ [https://perma.cc/GTZ2-PMC3] ("[There is a] political and legal war over housing, pitting the state of California against its 400 cities . . . .The state enacts laws and regulations aimed at compelling cities to accept more affordable housing construction, particularly to serve low- and moderate-income families, and cities counter with local laws and regulations to evade their housing quotas.").

127. *See* CAL. EDUC. CODE § 17213 (West 2023); CAL. PUB. RES. CODE § 21151.8 (West 2023).

> (d) A disproportionate number of economically disadvantaged pupils may be attending schools that are close to busy roads, putting them at an increased risk of developing bronchitis from elevated levels of several pollutants associated with traffic. Many studies have confirmed that increased wheezing and bronchitis occurs among children living in high traffic areas.
>
> (e) It is therefore the intent of the Legislature to protect school children from the health risks posed by pollution from heavy freeway traffic and other nonstationary sources in the same way that they are protected from industrial pollution.[128]

Though it took more than two decades for any state to do so, Senate Bill 352 implemented the recommendation of a 1977 study commissioned by the Federal Highway Administration.[129] The study observed a wide variety of adverse impacts on students due to their school's proximity to a major roadway, and it recommended strategies for reducing the harms that included "the possible closure or relocation of the school facility."[130] However, from a public health perspective, drafters of this California bill left a serious loophole: a clause allowing schools to bypass the development prohibition if the school district cannot find a suitable alternative site.[131] As a result, new schools continue to get added to sites near highways, undermining the main goal of the law.[132]

That being said, it would not be entirely fair to cast the bill's exception as a loophole for school districts to intentionally and routinely abuse, as the reality is that many districts constantly face massive budget deficits that limit their ability to acquire a safer site for constructing new schools.[133] Also, like most states that have a long history of favoring

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128. 2003 Cal. Legis. Serv. Ch. 668 (S.B. 352) (West).

129. *See* LESLIE J. WELLS, RICHARD SHAPIRO & ROBERT W. FELSBURG, SCHOOLS LOCATED NEAR HIGHWAYS: PROBLEMS AND PROSPECTS 14 (1977).

130. *Id.*

131. *See* CAL. EDUC. CODE § 17213(c)(2)(D) (West 2023).

132. Evelyn Larrubia, *Schools Still Rise Close to Freeways*, L.A. TIMES (Sept. 24, 2007), https://www.latimes.com/archives/la-xpm-2007-sep-24-me-freeways24-story.html [https://perma.cc/DZC8-BU7R] ("Despite . . . [Senate Bill 352] and mounting evidence that road pollutants harm children's lungs, the Los Angeles Unified School District is in the process of adding seven new schools to the more than 70 already located close to highways. . . . School board President Monica Garcia, in whose district both pending schools are located, said through a spokesman that she was concerned about children's health, but that she would support the new campuses if the district was able to mitigate the dangers.").

133. *See, e.g.*, Emily Hoeven, *California School Are Running Out of Money*, CALMATTERS (Oct. 19, 2021), https://calmatters.org/newsletters/whatmatters/2021/10/california-schools-funding/ [https://perma.cc/3TBT-J2WS] (discussing the limited financial resources for California school districts and the need for budget cuts to critical programs now or in the future); *TCF Study Finds U.S. Schools Underfunded by Nearly $150 Billion Annually*, THE CENTURY FOUND. (July 22, 2020), https://tcf.org/content/about-tcf/tcf-study-finds-u-s-schools-underfunded-nearly-150-billion-annually/?agreed=1

single-family zoning, California's resulting sprawl of low-density neighborhoods—occupying an overwhelming majority of the available land in the state—has naturally had the consequence of inflating land prices.[134] When a school district is underfunded—which is, at least in part, a reflection of the rate of poverty in the district[135]—it becomes that much harder to afford a plot of land large enough for a school in any location but the least desirable ones.[136] The parallels to California's attempted school-siting legislation and the regulation proposed in this Article are numerous. Though it was not overwhelmingly effective once enacted, the power of hindsight makes it easy to see why that was the case, and how a housing bill with a similar goal and framework could be strengthened in the future.

The school siting issue is even more extreme nationwide. Twenty percent of new schools are built in exposure zones.[137] It is difficult to estimate what this percentage would be if other states, especially states not plagued by limitations as extreme as California's lack of available space, had similar laws in place. However, even if all other states had laws analogous to California's Senate Bill 352, long-observed socioeconomic disparities would likely appear in school siting decisions just as they always have in other aspects of urban planning: wealthier school districts

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[https://perma.cc/JZ9X-7KK6] ("The United States is underfunding its K-12 public schools by nearly $150 billion annually . . . . School districts with high concentrations of Latinx and Black students are much more likely to be underfunded than majority white districts, and face much wider funding gaps, an average deficit of more than $5,000 per student, the analysis finds.").

134. *See* Alexander von Hoffman, *Single-Family Zoning: Can History Be Reversed?*, JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV. (Oct. 5, 2021), https://www.jchs.harvard.edu/blog/single-family-zoning-can-history-be-reversed [https://perma.cc/ZJ94-MFR2] (condemning single-family zoning for its role in "creating suburban sprawl"); M. Nolan Gray, *Single-Family Zoning Is Dead in California. Now What?*, PAC. RSCH. INST. (Nov. 1, 2021), https://www.pacificresearch.org/single-family-zoning-is-dead-in-california-now-what/ [https://perma.cc/6ECA-SDVR] ("In big California cities like San Jose and Los Angeles, single-family zoning covers 94 and 62 percent of all residential areas, respectively. In smaller, more affluent suburbs—think Palo Alto or La Cañada Flintridge—virtually all residential land will be subject to single-family zoning.").

135. *E.g.*, Lauren Camera, *In Most States, Poorest School Districts Get Less Funding*, U.S. NEWS (Feb. 27, 2018), https://www.usnews.com/news/best-states/articles/2018-02-27/in-most-states-poorest-school-districts-get-less-funding ("School districts with the highest rates of poverty receive about $1,000 less per student in state and local funding than those with the lowest rates of poverty.").

136. *See* Hopkins, *supra* note 88 (noting that schools are often built on inexpensive land, such as land in exposure zones). At least twenty-seven states require a minimum number of acres for the site of a new school. Thus, underfunded school districts in these states must prioritize cheap land even more than they already would without the acreage requirement, as there are generally fewer options that meet the acreage requirement. Angie Schmitt, *America Builds Too Many Schools by Highways*, STREETSBLOG USA (Feb. 21, 2017), https://usa.streetsblog.org/2017/02/21/america-builds-too-many-schools-by-highways/ [https://perma.cc/CGH4-ZGHU].

137. *See* Hopkins, *supra* note 88.

still have the means to build schools in areas that are not exposure zones. Therefore, both the requirements and the exceptions to laws like Senate Bill No. 352 would not be likely to significantly impact the locations where many new schools are built.

Notably, New York's Legislature passed a fundamentally identical bill in 2022, but it was vetoed by Governor Kathy Hochul.[138] She claimed she was "fully in support of the laudable goal" of combatting environmental injustice and protecting the health of the children in her state, but she felt the bill was "overly restrictive" despite the sponsors' best efforts to make amendments that would give city officials the leeway they initially seemed to be looking for.[139] In New York, approximately one in three students attend school near a major roadway.[140] "Around 80 percent of the state's students who attend these schools are students of color, and 66 percent are low-income."[141]

B. Health Impact Assessments

Those who are wary of the strong stance taken in this Article, but who also recognize that health equity needs to be given more consideration in the land use decision-making process, might feel more comfortable supporting a greater usage of Health Impact Assessments (HIAs) before immediately moving to enact strict zoning restrictions. Though these assessments can have many benefits, they are not a strong enough tool to address the present issue efficiently. An HIA is transdisciplinary; it is defined as "a combination of procedures, methods, and tools by which a policy, program, or project may be judged as to its potential effects on the health of a population, and the distribution of those effects within the population."[142] The assessments are widely used in other countries but have taken longer to be adopted by United States agencies and practitioners.[143] Housing-specific HIAs are not

138. Robert Harding, *Hochul Vetoes Bill to Block New NY Schools From Being Built Near Highways*, AUBURNPUB (Jan. 4, 2023), https://auburnpub.com/news/local/govt-and-politics/hochul-vetoes-bill-to-block-new-ny-schools-from-being-built-near-highways/article_0dfd4c1c-cfac-5c9d-914e-829ba1920d0a.html [https://perma.cc/NDA5-62D7].

139. *Id.*

140. *Id.*

141. Lanessa Owens-Chaplin & Simon McCormack, *NY's Step Towards Environmental Justice*, NYCLU (Jul. 5, 2022), https://www.nyclu.org/en/news/nys-step-towards-environmental-justice?utm_medium=website&utm_source=archdaily.com [https://perma.cc/34BS-44AA].

142. Andrew L. Dannenberg, Rajiv Bhatia, Brian L. Cole, Sarah K. Heaton, Jason D. Feldman & Candace D. Rutt, *Use of Health Impact Assessment in the U.S.: 27 Case Studies, 1999–2007*, 34 AM. J. PREVENTATIVE MED. 241, 241 (2008) (quotation omitted).

143. Jason Corburn & Rajiv Bhatia, *Health Impact Assessment in San Francisco:*

commonplace, but similar to the overall use of HIAs in the United States, they are slowly gaining traction.[144] Supporters of this tool argue that its increased usage will prove beneficial in "foster[ing] a rights-based approach to health."[145] Research has shown that when non-health policies—such as land-use and zoning laws—create a burden on an individual's or community's health, "those burdens 'disproportionately affect[] the already disadvantaged.'"[146] HIAs ensure that assessments of health impacts are also equity-focused, lending credibility to their supporters' position.[147] Despite those general points aligning with the overall theme of this Article, relying on HIAs is not the correct solution for the specific issue at hand.

There are multiple reasons why HIAs are not a better option than a total prohibition of residential zoning in exposure zones. First and foremost, HIAs are voluntary in the vast majority of jurisdictions.[148] If the argument is to merely provide more support and awareness for housing HIAs as they exist in their current form, there is no basis to believe that the housing sector will be inclined to go through the process any more than it already is. An HIA can take anywhere "from six weeks to a year to complete and cost $10,000 to $200,000,"[149] so it is not surprising that developers do not volunteer to go through this process for each of their projects. However, even if HIAs became mandatory for every project proposed in an exposure zone, that requirement would still fail to ensure significant progress toward achieving health equity because standalone HIAs are generally unenforceable.[150] Thus, if the HIA ultimately concludes that the proposed location should not be sited for residential use due to

Incorporating the Social Determinants of Health into Environmental Planning, 50 J. ENV'T PLANNING & MGMT. 323, 324 (2007) ("Health Impact Assessment (HIA) is an evolving practice, now widely used in Europe, Canada and Australia . . . . However, in the US the practice of HIA is new and largely untested in city planning.").

144. Emily Bever, Kimberly T. Arnold, Ruth Lindberg, Andrew L. Dannenberg, Rebecca Morley, Jill Breysse & Keshia M. Pollack Porter, *Use of Health Impact Assessments in the Housing Sector to Promote Health in the United States, 2002–2016*, J. HOUS. & BUILT ENV'T 1277, 1279 (2021).

145. Christina S. Ho, *Legislating a Negative Right to Health: Health Impact Assessments*, 50 SETON HALL L. REV. 643, 705 (2020).

146. *Id.* at 656 (citing Eileen O'Keefe & Alex Scott-Samuel, *Human Rights and Wrongs: Could Health Impact Assessment Help?*, 30 J.L. MED. & ETHICS 734, 735 (2002)).

147. *Id*. at 655–56.

148. *See Health Impact Assessment*, CDC, https://www.cdc.gov/healthyplaces/hia.htm [https://perma.cc/748W-MBMU].

149. THE PEW CHARITABLE TRS. & ROBERT WOOD JOHNSON FOUND., HEALTH IMPACT ASSESSMENT: BRINGING PUBLIC HEALTH DATA TO DECISION MAKING 2 (2010).

150. *See* Corburn & Bhatia, *supra* note 143, at 327 (discussing how there is not one common approach to HIAs, and how HIAs have been most successful in influencing policy decisions when decision-makers were involved in the creation and implementation of the HIA and when there was an institutional commitment to and a statutory framework for the HIA).

air quality concerns, the developer could choose to ignore the advice and carry on with the project as planned or with whatever inadequate modifications they are willing to make. Perhaps that sounds cynical, but since the majority of city officials and developers already actively choose to go against the decades of available research on this issue, it is reasonable to expect the same pattern would continue regardless of the slight procedural hiccup caused by a mandatory HIA.[151] This expectation is especially true absent some other incentive or requirement binding developers to the HIA determination. In essence, the HIA would merely become another expense for developers to budget for—almost like a sin tax[152]—but would not have a major impact on their overall plan.

Even if a stronger variation of an HIA was presented—one that was mandatory for residential development proposals in exposure zone *and* was embedded in an already required environmental review to create a legally enforceable obligation[153]—it still does not solve the issue as effectively as an outright ban of development in exposure zones. An HIA performed in good faith simply cannot determine that placing a residential use in an exposure zone is safe because, for decades, independent and government-sponsored research has found the exact opposite.[154] Accordingly, the presumption is that every mandatory HIA's findings would direct the developer to identify a different, less-polluted site for their project. In this scenario, the developer would either have to comply or abandon their project altogether. Overall, the result is desirable and consistent with this Article's goals of keeping residences out of exposure zones. However, this proposal renders this hypothetical housing HIA as nothing more than a resource-wasting formality until developers eventually accept (likely after extensive, costly litigation) that no proposals for residential construction in exposure zones will be approved after an HIA review is completed. While HIAs can certainly play

151. *See, e.g.*, Barboza & Schleuss, *supra* note 15 (describing how Chino officials ignored a letter from the South Coast air district "warning that freeway pollutants would threaten the health of residents" if they allowed an apartment to be built approximately 100 feet from a major road).

152. *See generally* THE PEW CHARITABLE TRS., ARE SIN TAXES HEALTHY FOR STATE BUDGETS? (2018) (discussing sin taxes).

153. *See Integrating Health Impact Assessments via Environmental Policy Acts*, The NETWORK FOR PUB. HEALTH (Jan. 9, 2017) https://www.networkforphl.org/news-insights/integrating-health-impact-assessments-via-environmental-policy-acts/ [https://perma.cc/S3EQ-RC3C] (discussing potential ways to incorporate HIAs into legally required environmental reviews).

154. *But see* Bever et al., *supra* note 144, at 1289 (providing an example of a developer implementing an HIA's recommendations for a proposed low-income senior housing project that was next to a highway, including the addition of particulate air filter and sealed bay windows, but noting that HIAs do not guarantee recommended actions be taken). This Article's position is that such additions are potentially the best available solutions for existing buildings, but not for new developments.

an important role in expanding health equity throughout the country in connection with a variety of projects, they lack any compelling features that justify their use here instead of a total prohibition of siting exposure zones for residential use.

Practitioners familiar with the National Environmental Policy Act (NEPA)[155] and equivalent state environmental laws[156] will recognize some similarities between HIAs and environmental impact statements (EIS). An EIS might be required when a developer uses federal or state tax dollars as part of the financing for their project that is considered a "major federal action," meaning that it "significantly affect[s] the quality of the human environment."[157] Typically, an EIS is used when a project is expected to result in humans impacting the environment,[158] rather than the environment impacting humans—as is the case when residential uses are built in exposure zones. Like HIAs, EISs are not required by all municipalities, and "[i]t is unrealistic to expect [those] municipalities that do not now require [EIS] to start doing so in order to address environmental justice concerns."[159] Even if they were required, another troubling element of NEPA-type laws is that while their review processes have occasionally shown success in stopping the construction of residential developments, this success does not necessarily occur out of concern for the environment or the health of the would-be tenants of the proposed project. Instead, many scholars accuse these review processes of being abused by NIMBYs to prevent affordable housing developments from entering their neighborhoods.[160] Though not everyone agrees that

155. *See, e.g.*, *What is the National Environmental Policy Act?*, EPA (Oct. 26, 2022), https://www.epa.gov/nepa/what-national-environmental-policy-act [https://perma.cc/Z4AK-FLGX].

156. *See* Patrick Marchman, "Little NEPAs": State Equivalents to the National Environmental Policy Act in Indiana, Minnesota and Wisconsin (Sept. 2012) (Capstone, Duke Environmental Leadership Program of the Environment at Duke University) https://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/5891/P.%20Marchman%20Little%20NEPAs_Final_w%20endnotes.pdf [https://perma.cc/J4CG-T28D].

157. Tiffany Middleton, *What Is an Environmental Impact Statement?*, ABA (Mar. 2, 2021), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/teaching-legal-docs--what-is-an-environmental-impact-statement-/ [https://perma.cc/S7PW-NY8U].

158. *Id.*

159. NAT'L ACAD. OF PUB. ADMIN. FOR THE U.S. EPA, ADDRESSING COMMUNITY CONCERNS: HOW ENVIRONMENTAL JUSTICE RELATES TO LAND USE PLANNING AND ZONING 46 (2003) (quoting Michael B. Gerrard, ENVIRONMENTAL JUSTICE AND LOCAL LAND USE DECISION-MAKING, *in* TRENDS IN LAND USE LAW FROM A TO Z: ADULT USES TO ZONING (Patricia Salkin, ed., 2001)).

160. JENNIFER L. HERNANDEZ & DAVID FRIEDMAN, IN THE NAME OF THE ENVIRONMENT: LITIGATION ABUSE UNDER CEQA, HOLLAND & KNIGHT 29 (2015), https://www.hklaw.com/en/insights/publications/2015/08/in-the-name-of-the-environment-litigation-abuse-un [https://perma.cc/7ER7-FAD8] ("What's most shocking, however, is that these abusive litigation tactics are being undertaken in the name of 'the

the abuse is as prevalent as some of the existing research suggests, it is important to question if strengthening already controversial federal and state environmental reviews is the best way to address building in exposure zones, or if it risks adding another avenue for NIMBYs to manipulate and prevent otherwise viable projects from being approved.

C. Electric Vehicle Counterargument

An ancillary counterargument used by opponents of exposure zone development restrictions focuses on the roads rather than the housing. The position hinges on the fact that modern emissions standards continue to make a vehicle's emissions less harmful to its surroundings.[161] That fact, combined with the increased support for zero emission vehicle (ZEV) mandates,[162] should theoretically result in a lower risk of adverse health effects from TRAP.[163] If that holds true, the counterargument concludes that prohibiting growth in exposure zones is an overreaction. However, there are a number of issues with this position.

The first issue is one that is often overlooked. It is true that ZEVs do not create as much TRAP as an internal combustion engine vehicle (ICE), but "[s]witching to zero-emission vehicles only gets rid of tailpipe-generated pollution. It does nothing to reduce non-exhaust pollutants, including dust from brake pads and tires that contains toxic metals, rubber, and other compounds that are kicked up into the air."[164] This reality is not an argument against ZEVs—there are numerous benefits associated with reducing the number of ICE vehicles on the road[165]—but

environment'—when in fact the environment, jobs, affordable housing, public parks, and a broad range of other important social and political priorities are derailed, delayed, or made far more costly by CEQA litigation abuse."); *see also* James Brasuell, *Leaked Settlement Shows How NIMBYs "Greenmail" Developers*, CURBED L.A. (Jan. 3, 2013), https://la.curbed.com/2013/1/3/10295162/leaked-settlement-shows-how-nimbys-greenmail-developers-1 [https://perma.cc/CU5M-ENEF] (describing an instance in which local homeowners in the La Miranda Avenue Neighborhood Association successfully challenged developers' plans to build new condos in the area).

161. *See* Barboza, *supra* note 87 (noting that regulators believe "decades of tough clean-air rules have slashed tailpipe emissions" and reduced risks of living near freeways).

162. *See, e.g.*, Stephen Edelstein, *Which States Follow California's Emission and Zero-Emission Vehicle Rules?*, GREEN CAR REPS. (Mar. 7, 2017), https://www.greencarreports.com/news/1109217_which-states-follow-californias-emission-and-zero-emission-vehicle-rules [https://perma.cc/RAM8-VTZF] (noting that over a dozen states have adopted California's strict emissions standards).

163. *See* Barboza & Schleuss, *supra* note 15 ("California air regulators acknowledge that decades of strict vehicle emissions standards have slashed tailpipe emissions, and they say air quality along freeways will continue to improve as the state transitions to cleaner vehicles and fuels.").

164. Barboza, *supra* note 87.

165. *E.g.*, *How Zero Emission Vehicles Can Support Governments to Achieve a Green Recovery*, THE CLIMATE GRP. (Sept. 3, 2020), https://www.theclimategroup.org/our-

a reminder that ZEVs are not a perfect fix for people living in exposure zones.

Second, it is far from settled that ZEV mandates will be enacted on a federal level or that states can even enforce such mandates regardless of whether a federal law is passed.[166] Granted, industry trends[167] and support from the Biden administration[168] understandably boosts confidence that ZEVs and other categories of electric or hybrid vehicles will continue to grow in demand, but such reasons alone cannot guarantee that ZEVs will ever be used widely enough to reduce TRAP in exposure zones to an equitable level. Furthermore, even if ZEV mandates are deemed enforceable, it will take at least over a decade before 100% of new vehicle sales are ZEVs,[169] and likely longer given that currently less than a third of the states have tried to adopt such mandates.[170] All the while, more people will continue to move to new or existing affordable

work/news/how-zero-emission-vehicles-can-support-governments-achieve-green-recovery [https://perma.cc/PM3Y-SW4K] (explaining several advantages of an increased use of ZEVs including stimulation of the job market, improvement of air quality, and improvement of public health).

166. *See* Thomas M. Donnelly, *Challenges to Safer Affordable Fuel-Efficient Vehicles Rule Keep Coming*, JONES DAY (July 2020), https://www.jonesday.com/en/insights/2020/07/challenges-to-safer-affordable-fuelefficient-vehicles-rule-keep-coming [https://perma.cc/DA9S-TVGY] (describing arguments of petitioners in Union of Concerned Scientists v. NHTSA, No. 19-1230 (D.C. Cir. 2022), which focus on their belief that the EPA lacks the authority to deny California waiver from the federal Clean Air Act to set more stringent GHG standards and a ZEV program, and that the Clean Air Act does not permit other states to adopt or enforce California's stringent emission standards); PERCIVAL ET AL., *supra* note 80, at 474–79 (describing the recent legal battles in connection with California's ZEV program); *see also* Hopkins, *supra* note 88 ("A nationwide changeover to vehicles that don't pollute would be the ultimate fix, but that won't come soon. Even a thus-far successful federal mandate to reduce the worst of that pollution, from big rigs and other diesel trucks, is still roughly a dozen years away from taking full effect — when today's kindergartners graduate from high school. That's because diesel engines are long-lived. Several million trucks on the road predate the standards, and no federal rules require them to be retrofitted.").

167. *See* Robert Walton, *Global EV Sales Rise 80% in 2021 as Automakers Including Ford, GM Commit to Zero Emissions: BNEF*, UTIL. DIVE (Nov. 12, 2021), https://www.utilitydive.com/news/global-ev-sales-rise-80-in-2021-as-automakers-including-ford-gm-commit-t/609949/ [https://perma.cc/8NL7-8U8H] ("The uptake in electric vehicles is occurring faster than previously thought, driven by government decarbonization policies, falling battery prices and a growing number of models offered by automakers. . . .").

168. *See* Exec. Order No. 14,037, 86 Fed. Reg. 43583 (Aug. 5, 2021).

169. *See Governor Newsom's Zero-Emission by 2035 Executive Order (N-79-20)*, CAL. AIR RES. BD. (Jan. 19, 2021), https://ww2.arb.ca.gov/resources/fact-sheets/governor-newsoms-zero-emission-2035-executive-order-n-79-20 [https://perma.cc/5MCZ-QLRR] (describing California Governor Newsom's plan to reach zero emissions by 2035 through the sale of ZEVs).

170. *See* Donnelly, *supra* note 166 (noting that only thirteen states have adopted GHG emission and zero-emissions vehicle standards).

housing in exposure zones,[171] and thousands of those people will die prematurely with the promised benefits of ZEVs failing to materialize in time.[172]

Third, ZEV mandates would only apply to the sale of *new* vehicles.[173] Once again, assuming that ZEV laws can be enforced, that still does not mean that every vehicle in use in 2030 or 2035—the years that various federal and state mandates are supposed to go into effect—will be a ZEV. There is nothing stopping the owner of an ICE vehicle from continuing to use their vehicle long after the ZEV mandate goes into effect. Further, the current ZEV mandates do not prevent someone from purchasing a secondhand ICE vehicle after 2035.[174] At this point, predictions of the percentage of ICE vehicles owned in 2035 and beyond are highly speculative, standing in stark contrast to the demonstrable estimates of premature deaths linked to TRAP.

To reiterate, these critiques of being overly reliant on ZEVs to solve the issue of residential development in exposure zones should not cause one to lose confidence in the overall benefits of ZEVs, but rather should encourage recognition of the urgency of the housing concerns. Taking actions to protect the health of millions of Americans—many of them among the most vulnerable in the nation—is long overdue. Opting to count on a currently unreliable and unproven strategy that, as a best-case scenario, will take decades before its impacts are fully realized, is not an acceptable alternative to taking immediate action. Adopting this Article's proposal now does not mean that it must stay in place in perpetuity. In the future, if there is measurable proof that the areas currently considered exposure zones no longer pose the same health risks due to the increased usage of ZEVs, it may very well be worth revisiting the proposed restrictions in those areas. However, it will likely be decades before that conversation can occur.

D. Existing Residential Uses in Exposure Zones

Up until this point, a critical piece of this issue has gone unaddressed: what should be done about the millions of residences currently located in exposure zones? This issue is a challenging one, and under the position taken in this Article, it lacks a perfect answer. The

171. *E.g.*, Barboza & Schleuss, *supra* note 15 ("The population near Los Angeles freeways is growing faster than elsewhere in the city as planners push developers to concentrate new housing near transportation hubs.").

172. *See* Barboza, *supra* note 87 (noting that in California alone, diesel particulate matter causes over 1,000 premature deaths each year).

173. CAL. AIR RES. BD., *supra* note 169; Exec. Order No. 14,037, *supra* note 168.

174. *Zero-Emission Vehicle Program*, CAL. AIR RES. BD., https://ww2.arb.ca.gov/our-work/programs/zero-emission-vehicle-program [https://perma.cc/T37S-V7U7].

premise of this Article is that exposure zones create severe public health risks that must be prioritized over the financial interests of private developers or local officials' political motivations. This Article's proposal adheres to that premise regarding future residential development, but it is completely impractical to try to apply the prohibition retroactively as well—the notion of displacing over 11 million people from their homes[175] in the name of public health is painfully ironic, not to mention likely a violation of a host of laws and regulations.

It may be too late to undo the past decisions which allowed these buildings to be in their current, unsafe locations, but residents living in exposure zones are not entirely without hope for a healthier living space. For example, although not a perfect solution, some studies show that certain types of air filtration systems can keep a greater amount of TRAP from entering a building than many current systems.[176] Other research advocates for sealed windows and other exterior repairs to buildings so that pollutants cannot enter as easily.[177] If these kinds of repairs give tenants the greatest likelihood of improving the quality of their air without being displaced, then states should explore enforcement of these options through building codes or other mandates.[178] Enforcement will not be without challenges; there will likely be pushback from developers if they are required to invest thousands, if not millions, of dollars into updating their entire portfolios.[179] There is also an issue of enforcement and accountability. Do states have adequate resources to identify

175. U.S. DEPT. OF TRANSP., *supra* note 15 (referencing a 2013 study conducted by the CDC that identified that roughly 11 million people in the United States live within 500 feet from a major highway).

176. *See* Vannan Kandi Vijayan, Haralappa Paramesh, Sundeep Santosh Salvi & Alpa Anil Kumar Dalal, *Enhancing Indoor Air Quality – The Air Filter Advantage*, 32 LUNG INDIA 473, 478 (2015) ("Reduction in particulate matter and allergens is achieved successfully through efficient air filters.").

177. *See* Bever et al., *supra* note 144, at 1289 (providing an example of a developer implementing an HIA's recommendations for a proposed low-income senior housing project that was next to a highway, including the addition of particulate air filter and sealed bay windows).

178. *Cf.* Brooke Staggs, *Are Southern California Students and Teachers Breathing Clean Air?*, ORANGE CNTY. REG. (Mar. 5, 2023), https://www.ocregister.com/2023/03/05/are-southern-california-students-and-teachers-breathing-clean-air/ [https://perma.cc/F9J6-MN83] ("For starters, there's no centralized agency to oversee school indoor air quality. State and local air quality districts focus on outdoor air, so questions about indoor air often bounce between various state departments and local agencies. School districts are left to inspect and police themselves. Also, loopholes in the new state law allow many schools — particularly older campuses, which often serve the neediest students — to avoid meeting the new standards if they don't have heating, ventilation and air conditioning, or HVAC systems, at all, or if their systems aren't strong enough to push air through upgraded filters.").

179. *See id.; see also* NICHOLAS W. TAYLOR, JENNISON K. SEARCY & PIERCE JONES, COST SAVINGS FROM ENERGY RETROFITS IN MULTIFAMILY BUILDINGS, MACARTHUR FOUND. 2 (finding that the average cost of retrofitting an apartment's HVAC system was $4,359 per unit).

noncompliant landlords and contractors? Given the number of buildings already existing with code violations,[180] what percentage of landlords can realistically be expected to comply with additional requirements that affect their bottom line? Would a noncompliant building be condemned, potentially displacing hundreds of people at a time?[181] Policymakers need to ask themselves these questions when thinking about how genuine and effective their hypothetical solutions are. Despite the legitimate concerns of effectiveness, it is reassuring that some cities have passed ordinances requiring improved ventilation and monitoring. For example, California State Senate Bill 375 was passed and later amended by Ordinance 224-14 to require more consistency with the California Environmental Quality Act (CEQA).[182] The amendment:

> [I]ncluded a mandatory disclosure and monitoring of ventilation systems, improved air pollutant modeling with the aid of health data to create Air Pollutant Exposure Zones, and a requirement for updated, enhanced ventilation systems designed to protect against fine particulate matter. Article 38 now applies to any Sensitive Use building located on a site within an Air Pollutant Exposure Zone that is either newly constructed, undergoing a major alteration, or the subject of an application for a Planning Department-permitted change of use.[183]

This ordinance is a step in the right direction and indeed might be one of the only solutions for existing developments. Yet the ordinance also risks exacerbating other issues by incentivizing landlords to hold off on unrelated long-overdue renovations so as to avoid doing anything that could be classified as a major alteration. Furthermore, cities with even the most progressive ordinances for existing residences in exposure zones have not banned new residential construction in such areas despite clearly recognizing the risk of TRAP exposure,[184] so there remains significant work to be done to get cities to fully commit to getting ahead of the issue. Until it is undeniably certain that these air filtration systems can reduce air pollution to levels that demonstrate true equality, it should only be treated as one of the better available remedies to improve existing

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180. *Cf.* INT'L CODE COUNCIL & NAT'L ASS'N OF HOMEBUILDERS, COMMON CODE NONCOMPLIANCE SURVEY REPORT (2019) (finding that over 60% of new construction has code violations).

181. *Cf.* Leif Greiss, *Bush House Hotel Residents Displaced When Building Was Condemned Have Been Rehoused, Quakertown Announces*, MORNING CALL (Nov. 12, 2021), https://www.mcall.com/news/local/mc-nws-bush-house-hotel-rehoused-20211112-ulb5f5ez3bcdlfizwq7a4qufuq-story.html [https://perma.cc/W7FD-7UEH] (describing the process of removing residents of a condemned building and finding temporary housing).

182. ANNA ISABEL BAPTISTA, TISHMAN ENV'T & DESIGN CTR., LOCAL POLICIES FOR ENVIRONMENTAL JUSTICE: A NATIONAL SCAN 30 (2019).

183. *Id.*

184. *See id.* (discussing local policies for environmental justice across the country).

buildings, not as a justification for continuing to build new projects in exposure zones.[185]

Perhaps promulgating codes regarding the use of better air filtration systems and windows can make it easier for tenants to succeed on claims of personal injury analogous to "sick building syndrome"[186] or a breach of the implied warranty of habitability.[187] Unfortunately, even if the claims would survive, the threat of litigation may not be enough to encourage landlords to act urgently to meet new building standards. If a tenant does not know their rights and has limited access to legal services, a landlord is more likely to get away with operating a noncompliant building.[188] Ultimately, fixing the air quality in the current housing market is a highly complex issue that goes beyond the scope of this Article, but public officials must not neglect it if they are serious about improving health equity in their cities. Finding alternative solutions that keep residents in their current homes is not a matter of siding with private interests over public health, it is a matter of avoiding the creation of what would surely become a new, massive public health crisis in an attempt to solve an ongoing one.[189] Indeed, it seems it is a matter of political will, not a lack of legal precedent,[190] that stands in the way of

185. *See id.* at 30–31 (showing support for stronger stances against residential development in exposure zones).

186. *See Indoor Air Quality; Legal and Liability Issues*, FINDLAW (Aug. 28, 2017), https://corporate.findlaw.com/human-resources/indoor-air-quality-legal-and-liability-issues.html [https://perma.cc/T4S6-ML26] (describing the nature of personal injury claims related to indoor air pollution, such as sick building syndrome, building related illness, and multiple chemical sensitivity); Michael T. Pyle, *Environmental Law in an Office Building: The Sick Building Syndrome*, 9 J. ENV'T L. & LITIG. 173 (1994) (explaining that sick building syndrome deals with building related illness felt by up to 20% of individuals who work in an office) (citing findings from two 1993 bills).

187. *See, e.g.*, Wade v. Jobe, 818 P.2d 1006 (Utah 1991) (holding that implied warranty of habitability applies to residential leases, that special damages can be recovered when a landlord's breach of the implied warranty of habitability results in personal injury to tenants, and that tenants can withhold rent when the implied warranty of habitability is breached by the landlord); Brigid Kelly, *Building a Radical Shift in Policy: Modifying the Relationship Between Cities and Neighbors Experiencing Unsheltered Homelessness*, 40 LAW & INEQ. 177, 202–05 (2022) (discussing the history and elements of the implied warranty of habitability).

188. *Cf.* Sejal Govindarao, *How an Eviction Prevention Program Emerged After the Moratorium Ended*, ABC NEWS (Apr. 19, 2022), https://abcnews.go.com/Politics/eviction-prevention-program-emerged-moratorium-ended/story?id=83922544 [https://perma.cc/FX89-JE5B] ("[Tenants] have no way of getting [their housing] back, they have no way of fighting against a landlord who has used something that's improper.").

189. *See* Selena Simmons-Duffin, *How the Housing Crisis Collides with Public Health*, NPR (Oct. 20, 2021), https://www.npr.org/2021/10/20/1047735078/how-the-housing-crisis-collides-with-public-health [https://perma.cc/VF45-8HAL] (discussing the connection between a lack of access to affordable housing and increased public health issues).

190. In other scenarios involving pollution impacting residential uses, nuisance law might provide an avenue for plaintiffs to enjoin certain uses that interfere with their use and

government officials placing the value of saving human lives over securing votes from NIMBYs and real estate developers.[191]

Conclusion

As the United States' housing crisis continues to grow, it is clear that governments and developers need to cooperate to create solutions that will alleviate the affordable housing shortage. It is imperative that whatever solutions are employed in the future have a "people-first" approach; environmental justice and public health concerns deserve just as much consideration in this discussion as financial analyses and economic theories. For far too long, TRAP exposure risks have been brushed aside by decisionmakers who are unlikely to live in exposure zone themselves. But decades of peer-reviewed research consistently and conclusively demonstrate that living in exposure zones has a wide range of adverse health effects, causes thousands of premature deaths annually, and disproportionately impacts lower-income and minority communities. The remedy to this injustice is procedurally quite simple: ban new construction of residential developments in exposure zones. The legal authority for adopting this proposal is well-established, but what is lacking is the political motivation to put such authority to use. This Article recognizes the resistance some governments may have against enacting a strict residential zoning prohibition when they are already experiencing an extreme housing crisis within their cities and states, but as a country, we cannot allow ourselves to continue to try remedying one set of housing and public health injustices by building our way into another. So long as housing is allowed to be built in exposure zones, that is exactly what will continue happening.

enjoyment of their home, but forcing an existing feed lot to move away from later-developed residential buildings is hardly analogous to moving an entire stretch of freeway. Accordingly, nuisance law is unlikely to be able to protect tenants already living next to a freeway. *See* Fagerlie v. City of Willmar, 435 N.W.2d 641, 643, 644 n.2 (Minn. Ct. App. 1989) (finding that offensive odors from particulate matter can form the basis for nuisance claims).

191. *See* Barboza & Schleuss, *supra* note 15 ("'If there's a political will to protect people from this type of development then cities certainly know how to use zoning to accomplish that,' said James Kushner, an expert in land-use, development and urban planning at Southwestern Law School.").

The Court's One-Way Street: *L.S. ex rel. Hernandez v. Peterson*'s Missed Opportunity to Expand Children's Constitutional Rights

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Introduction

After the massacre at Marjory Stoneman Douglas High School in Parkland, Florida, fifteen students who were present at the school shooting filed a civil rights action in U.S. district court.[1] This case—*L.S. ex rel. Hernandez v. Peterson*—provided an opportunity for the court to expand children's constitutional rights by finding that students have a right to protection while on school grounds.[2] Instead, a district court in Florida—later affirmed by the Eleventh Circuit[3]—held that schools have no duty to protect their students, thereby restricting children's rights and leaving students impacted by gun violence on school grounds with limited constitutional protections.[4] By disregarding the plaintiffs' vulnerable positions as *children*—who are beyond their parents' safety nets and unable to protect themselves—the *Hernandez* courts failed to expand protections where they are so desperately needed.

Children's constitutional rights are often minimized to avoid unreasonable interference with the liberty interests of parents and guardians in directing the upbringing of their children.[5] Similarly, the State is allowed to control children's conduct, thereby restricting their

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1. *See* L.S. *ex rel.* Hernandez v. Peterson (*Hernandez I*), No. 18-CV-61577, 2018 WL 6573124 (S.D. Fla. Dec. 13, 2018), *aff'd*, 982 F.3d 1323 (11th Cir. 2020).

2. *See id.*

3. *See* L.S. *ex rel.* Hernandez v. Peterson (*Hernandez II*), 982 F.3d 1323 (11th Cir. 2020).

4. *Hernandez I*, 2018 WL 6573124, at *3.

5. *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (enjoining officials from enforcing an act that required children to attend public schools as it interfered with parents' rights to control their children's education); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that a Nebraska statute prohibiting the teaching of languages other than English violated constitutional Due Process in part because it interfered with parents' rights to control their children's education).

rights, to further its interest in the welfare of children.[6] However, at times when parents do not have the power to protect their children—such as when children are at school—the State's interest in child welfare should expand to compensate for this increased vulnerability.[7] Expanding and solidifying children's constitutional rights can serve as a necessary defense against governmental practices that place them at risk of danger from which neither they nor their parents can provide safeguards.

This Article argues that the courts should have used *Hernandez I* and *II* to expand children's substantive Due Process rights under the Fourteenth Amendment. *Hernandez I* and *II* provided the opportunity for the courts to mandate that schools have a duty to protect, and it was a violation of children's constitutional rights to rule otherwise. Part I analyzes the facts and procedural history in *Hernandez I* and *II* to emphasize the numerous governmental blunders that occurred during the school shooting, which highlights why a heightened standard of review is a necessity in the case. Part I also considers the disappointing holdings of the district court in *Hernandez I* and the Eleventh Circuit in *Hernandez II*, which failed to advance children's rights by expanding substantive Due Process protections when given the opportunity. This part then dives deeper into the case law cited by *Hernandez I* and *II* and highlights what the courts *should have* held. Part II discusses the judiciary's pattern of restricting children's constitutional rights and the opportunities that exist for these rights to be broadened—though these are rarely pursued. Part III concludes with a proposed child-centric framework and heightened standard of review that must be adopted. This framework would ensure the subjective characteristics of children—like their vulnerability while on school property—are considered, and greater protections provided. If children's constitutional rights can be restricted to safeguard them, these rights must also be expanded in situations where children require greater constitutional protections.

I. Missteps and Blunders in *Hernandez*

A. Overview

On February 14, 2018, Nikolas Cruz entered his former high school, Marjory Stoneman Douglas, in Parkland, Florida (Parkland).[8] Cruz

6. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 167 (1944) (reaffirming states' power to enforce child labor laws, even over the religious objections of parents).

7. State *ex rel.* T.L.O., 428 A.2d 1327, 1333 (Juv. & Dom. Rel. Ct. 1980) ("[P]ublic school officials are to be considered governmental officers."), *vacated*, 448 A.2d 493 (N.J. Super. Ct. App. Div. 1982), *rev'd sub nom.* State *ex rel.* T.L.O. v. Engrud, 463 A.2d 934 (N.J. 1983), *rev'd sub nom.* New Jersey v. T.L.O., 469 U.S. 325 (1985).

8. *Hernandez I*, 2018 WL 6573124, at *1.

carried a duffel bag and backpack filled with magazines and a legally purchased AR-15 semi-automatic rifle.[9] After proceeding to the 1200 building, Cruz began a six-minute rampage that ended with seventeen students and school staff dead, and seventeen others injured.[10]

School staff were warned that Cruz was a risk to student safety following his expulsion for "disciplinary reasons" in 2017.[11] Andrew Medina, a school monitor, recognized Cruz as a danger and considered calling a "Code Red"—the procedure which would have ensured safety protocols had gone into effect—to warn students and staff members after seeing him on campus prior to the shooting.[12] However, Medina "only radioed a colleague to report a suspicious person entering the school grounds with a backpack."[13] After the shooting began, Medina still failed to initiate a Code Red, as he did not see a gun when Cruz entered the school.[14] In fact, Cruz killed more than eleven individuals before any emergency code was issued.[15]

Scot Peterson, a trained law enforcement school resource officer, did not enter the school building even while children and teachers were inside being shot at by Cruz.[16] Peterson was consequently accused of retreating while victims remained under attack.[17] He was ultimately arrested and charged with neglect of a child, culpable negligence, and perjury.[18] Similarly, Police Captain Jan Jordan, the commander of the scene, was accused of repeatedly "prevent[ing] emergency responders from entering the 1200 building to confront Cruz or render aid to victims."[19] Captain Jordan resigned in the months following the shooting.[20]

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9. *Teen Gunman Kills 17, Injures 17 at Parkland, Florida High School*, A&E TELEVISION NETWORKS (Feb. 6, 2019) [hereinafter *Teen Gunman Kills 17*] https://www.history.com/this-day-in-history/parkland-marjory-stoneman-douglas-school-shooting [https://perma.cc/LC8P-WU4H].

10. *Hernandez I*, 2018 WL 6573124, at *1.

11. *Teen Gunman Kills 17*, *supra* note 9.

12. *Id.*; *see also* Tonya Alanez, Paula McMahon & Anne Geggis, *"That's crazy boy." School Watchman Recognized but Didn't Stop Shooter Before Parkland Massacre*, SUN SENTINEL (June 1, 2018), https://www.sun-sentinel.com/news/crime/fl-florida-school-shooting-campus-monitor-20180619-htmlstory.html [https://perma.cc/976F-N7KZ].

13. *Hernandez I*, 2018 WL 6573124, at *1.

14. *Id.*

15. *Teen Gunman Kills 17*, *supra* note 9.

16. *Hernandez I*, 2018 WL 6573124, at *1.

17. *Teen Gunman Kills 17*, *supra* note 9.

18. *Id.*

19. *Hernandez I*, 2018 WL 6573124, at *1.

20. Jamiel Lynch, *Police Captain in Charge During Parkland Shooting Resigns from Department*, CNN (Nov. 20, 2018), https://www.cnn.com/2018/11/20/us/parkland-shooting-captain-resigns/index.html [https://perma.cc/4UHU-Z8VW].

Fifteen students who were present during the Parkland school shooting brought suit against Andrew Medina, Scot Peterson, Captain Jordan, as well as Superintendent Robert Runcie, Sheriff Scott Israel, and Broward County.[21] The students alleged psychological injuries and argued "that Israel, Runcie, and the County either have a policy of allowing 'killers to walk through a school killing people without being stopped,'" or that their training for individuals expected to respond to such situations—including Medina, Peterson, and Jordan—was so inadequate they should be liable for violations of the plaintiffs' substantive Due Process rights under the Fourteenth Amendment.[22] Specifically, the plaintiffs claimed their "clearly established right to be [free] from deliberate indifference to substantial known risks and threats of injury" was violated when the defendants failed to protect them from Cruz.[23] Several other claims were also asserted, including one by plaintiff T.M., who argued his Fourth Amendment right to be free from unreasonable search and seizure was violated when he was detained in the school office, had his backpack searched, and had his personal belongings seized on the morning of the shooting.[24] In response, the defendants filed motions to dismiss for reasons including failure to state a claim, qualified immunity, lack of standing, and the complaint being a "shotgun pleading."[25] Notably, the defendants argued that "Plaintiffs' Due Process claim fails because there is no constitutional duty to protect students from harm inflicted by third parties."[26]

The district court held that no Fourteenth Amendment violations occurred, granting the motions to dismiss filed by Medina, Runcie, Israel, Jordan, and the County, and granting in part and denying in part the motion to dismiss filed by Peterson.[27] The district court held that,

> [I]n the context of substantive Due Process, "it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted

21. *Hernandez I*, 2018 WL 6573124, at *1.

22. *Id.*

23. *Id.* at *3.

24. *Id.* at *2.

25. *Id.* at *2. See Joseph Fabush, *11th Circuit Clarifies How Not to Write a Shotgun Complaint*, FINDLAW, https://www.findlaw.com/legalblogs/eleventh-circuit/11th-circuit-clarifies-how-not-to-write-a-shotgun-complaint/ [https://perma.cc/8757-UKR6] (Aug. 10, 2021), for an explanation of shotgun pleading in the Eleventh Circuit. Plaintiffs had incorporated two claims of constitutional violation into a single count of the complaint. *Hernandez I*, 2018 WL 6573124, at *2.

26. *Hernandez I*, 2018 WL 6573124, at *3.

27. *Id.* at *11.

by *other means*."[28]

Therefore, even if the defendants had "intentionally disregarded warnings about Cruz, plaintiffs' § 1983 claim fails because they [could not] assert the violation of a constitutional right."[29] The district court went on to state that, "[e]ven in the face of such a senseless tragedy, this Court must respect and adhere to the caution against expanding substantive Due Process outside the realm of its proper application," citing the Supreme Court's warning to avoid traversing into the "unchartered area [that is] scarce and open-ended."[30] However, the district court could not hold that plaintiff T.M.'s search and seizure was justified or reasonable under the circumstances, thereby rejecting Peterson's claim of qualified immunity.[31]

The district court reiterated that, "[w]hile schoolchildren do not shed their constitutional rights when they enter the schoolhouse, Fourth Amendment rights are different in public schools than elsewhere; the reasonableness inquiry cannot disregard the schools' custodial and tutelary responsibility for children."[32] Moreover, the district court held, in general, "[a] student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety . . . [and] [s]ecuring order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults."[33] In other words, although students possess constitutional rights while they are on school property, these rights are restricted with the intent of protecting these children and providing more avenues of control to school officials. However, these protections and responsibilities lapse when students are put at risk of a known threat by a third party, providing no duty to school officials, and thereby unduly restricting children's constitutional rights.

On appeal, the Eleventh Circuit acknowledged that substantive Due Process is a legal concept "untethered from the text of the Constitution"[34] and capable of expansion, but noted that the Supreme Court has warned against using the Fourteenth Amendment to support "novel" federal

28. *Id.* at *5 (emphasis added) (citing DeShaney v. Winnebago Cnty. Dept. of Soc. Servs., 489 U.S. 189, 200 (1989)).

29. *Id.*

30. *Id.* (citing Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992)).

31. *Id.* at *8.

32. *Id.* at *6 (citing Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 829–30 (2002)).

33. *Id.* at *7 (citing *Earls*, 536 U.S. at 830–31).

34. *Hernandez II*, 982 F.3d 1323, 1329 (11th Cir. 2020) (quoting Echols v. Lawton, 913 F.3d 1313, 1326 (11th Cir. 2019)).

cases.[35] This is especially relevant when considering that the Fourteenth Amendment—and the Constitution as a whole—make no explicit reference to children, leaving its application in these scenarios entirely up to the court.[36] The Eleventh Circuit recognized that substantive Due Process claims have been expanded to protect children from "intentional, obviously excessive corporal punishment" in schools and could also include "non-custodial claim[s] of deliberate indifference."[37] However, the court found the students' claims to be lacking and dismissed the appeal.[38] Rather than choosing to expand constitutional protections to children under the control of school officials, the Eleventh Circuit reaffirmed that children's rights are a one-way street, capable only of restriction, not expansion.[39]

On appeal from a motion to dismiss, the Eleventh Circuit had to accept the students' factual allegations in the *Hernandez I* complaint as true.[40] The court therefore accepted the fact that there were many "government blunders" before and during the shooting.[41] In addition to the facts above, the court acknowledged that the Broward County Sheriff's Office failed to act on the "many dozens of calls" it received warning of Cruz's dangerous propensities.[42] It also acknowledged that the defendants were aware of Parkland's inadequate security and made no effort to improve it.[43] Moreover, Peterson, who was "in charge of school security, was nicknamed 'Rod'—short for 'retired on duty'—for his 'lackadaisical'" approach to policing and student safety.[44] Despite this, the Eleventh Circuit rejected the students' argument that the school's conduct was not only incompetent, but also unconstitutional.[45] The court ultimately held that "students were not in a custodial relationship with the officials and [had] failed to allege conduct by the officials that [was] 'arbitrary' or 'shock[ed] the conscience.'"[46]

35. *Id.* (citing Neal *ex rel*. Neal v. Fulton Cnty. Bd. of Educ., 229 F.3d 1069, 1074 (11th Cir. 2000)).
36. *See* U.S. CONST. amend. XIV.
37. *Hernandez II*, 982 F.3d at 1331.
38. *Id.* at 1333.
39. *See id.*
40. *Id.* at 1327.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 1326–27.
46. *Id.*

B. Treating Children like Adults: Applying the Adult Doctrine

Children in school are not in a custodial relationship with the State.[47] Ordinarily, in the public school system, there are no custodial relationships even if officials are aware of "potential dangers or have expressed an intent to provide aid on school grounds."[48] The Eleventh Circuit in *Hernandez II* acknowledged that *Hasenfus v. LaJeunesse*—a case involving a fourteen-year-old's suicide attempt on school property—leaves open the matter that, while schools do not have a general duty to protect students, a specific duty to protect may exist in "narrow circumstances."[49] However, the court simultaneously argued that *Nix v. Franklin County School District* forecloses this argument.[50] The facts of *Nix* vary substantially from the facts of *Hernandez I* and *II*: in *Nix*, the parents of a high school student who died from electrical shock during a voltage-reading demonstration in electromechanical class brought an action against the school district, teacher, principal, and superintendent, alleging violations of their son's Due Process rights.[51] The *Nix* court ultimately determined that the school teacher had repeatedly warned students of the dangers associated with touching live wires and held that the teacher's alleged "deliberate indifference" in this situation did not "shock the conscience."[52]

The Eleventh Circuit's application of *Nix* in *Hernandez II* did not tell the whole story. In *Nix*, the Eleventh Circuit had stated its "holding is a narrow one; it would not necessarily control, say, a similar accident in a 4th-grade classroom, or even other types of seriously harmful behavior occurring in a high-school class."[53] The *Nix* court made clear that the conscience-shocking standard is context-specific; when a government official's acts "fall between the poles of negligence and malign intent," which includes acts that are reckless or grossly negligent, the court must make a "closer call" to determine if the act, considering the totality of the circumstances at the time of the act and without the benefit of hindsight, shocks the conscience.[54] The Eleventh Circuit in *Hernandez II* quoted an excerpt from *Nix* stating "that deliberate indifference is insufficient to constitute a due-process violation in a non-custodial setting."[55] However,

47. *See id.* at 1329 (citing Nix v. Franklin Cnty. Sch. Dist., 311 F.3d 1373, 1378 (11th Cir. 2002)).
48. *Id.* (citing Wyke v. Polk Cnty. Sch. Bd., 129 F.3d 560, 569–70 (11th Cir. 1997)).
49. *Id.* at 1329–30 (citing Hasenfus v. LaJeunesse, 175 F.3d 68, 72 (1st Cir. 1999)).
50. *Id.* at 1330 (citing *Nix*, 311 F.3d at 1378).
51. *Nix*, 311 F.3d at 1374–75.
52. *Id.* at 1378.
53. *Id.* at 1378–79.
54. *Id.* at 1376–77.
55. *Hernandez II*, 982 F.3d at 1330 (quoting *Nix*, 311 F.3d at 1377).

the *Nix* court had been describing case law rejecting deliberate indifference in "claims of government employees arising out of unsafe working conditions" inherent to the employee's job.[56] The *Nix* court then described prior cases that decided whether acts of school officials against high school and college students shocked the conscience and gave rise to a constitutional violation.[57] Since *Hernandez II* did not involve the limited context of a government employee injured by unsafe conditions inherent in a job, nor were the students accidentally harmed when an experiment in their high-school science class went wrong, *Nix* did not require dismissal of the Parkland students' claim at the pleading stage.[58]

The Eleventh Circuit in *Hernandez II* repeatedly applied case law that had been decided on facts relating to adult plaintiffs,[59] yet disregarded cases involving child plaintiffs that were potential avenues for the expansion or alteration of children's constitutional rights.[60] The court also disregarded its own previous holdings that could have supported an expansion of rights. For example, *White v. Lemacks* was a case brought by adult plaintiffs who were attacked and brutally beaten by an inmate while working as nurses in a jail infirmary.[61] The plaintiffs brought suit against a sheriff and a deputy, as well as Clayton County, Georgia, for substantive Due Process violations under the Fourteenth Amendment.[62] Here, the Eleventh Circuit held that the arbitrary or conscience-shocking standard had not been met and, thus, plaintiffs had failed to allege a violation of substantive Due Process.[63] The court in *White* stated that a person not in custody who is harmed because too few resources were devoted to their safety and protection seldom, if ever, has a cognizable claim under the Due Process Clause.[64] Nonetheless, it still left the door open for narrow exceptions to be carved—an opportunity that both the district court and the Eleventh Circuit in *Hernandez I* and *II* failed to probe. By citing *White* in *Hernandez II*, the Eleventh Circuit

56. *Nix*, 311 F.3d at 1377.

57. *Id.*

58. *Id.*

59. *See Hernandez II*, 982 F.3d at 1329–31.

60. *See, e.g.*, Doe v. N.Y.C. Dep't of Soc. Servs, 649 F.2d 134, 141 (2d Cir. 1981) (finding that a governmental custodian's inaction in failing to investigate or remove a child plaintiff who alleged abuse in her foster home could have violated the child's constitutional rights); Taylor *ex rel.* Walker v. Ledbetter, 818 F.2d 791, 792 (11th Cir. 1987) (finding that governmental custodian's failure to act to protect or prevent child abuse in foster placement could constitute a constitutional violation).

61. White v. Lemacks, 183 F.3d 1253, 1254 (11th Cir. 1999).

62. *Id.* at 1254–55.

63. *Id.* at 1259.

64. *Id.* at 1258.

therefore acknowledged that even if it could contemplate exceptions, it did not see a reason to do so.[65]

C. Treating Children as Adults: The Failure to Subjectivize Children and Expand Their Rights

The courts in *Hernandez I* and *II* failed to recognize that the inaction of state officials can be just as harmful as action. Instead of relying on better-reasoned dissents that subjectivize the children at issue, they continued to apply precedent that denies children the rights that they so desperately need to stay safe in the school context.

For instance, the district court in *Hernandez I* relied heavily on *DeShaney v. Winnebago County Department of Social Services* to justify its holding that the constitutional rights of the Parkland students were not violated.[66] The action in *DeShaney* was brought on behalf of a child plaintiff who was regularly beaten by his father.[67] The defendants were "social workers and other local officials who received complaints that the child was abused by his father" and had reason to believe the allegations were true, but who nonetheless did not act to remove the petitioner from his father's custody.[68] Ultimately, the child was so viciously beaten that he fell into a life-threatening coma and suffered severe, life-long brain damage.[69] The complaint alleged that respondents had deprived the plaintiff of his liberty without Due Process—in violation of his rights under the Fourteenth Amendment—by failing to protect him against a risk of violence at his father's hands of which they knew or should have known.[70] The Supreme Court affirmed summary judgment for the defendants, reasoning that the plaintiff's father, not the State, caused the plaintiff's injury and that no duty exists for state actors to prevent such harm.[71] According to the Supreme Court, the purpose of the Due Process Clause of the Fourteenth Amendment is to protect the people from the State, not to ensure the State protects people from each other.[72]

The *DeShaney* majority argued that there was no "special relationship" created or assumed by the State that would give rise to an affirmative duty to the petitioner.[73] The Court distinguished cases in

65. *Hernandez II*, 982 F.3d at 1330.

66. *Hernandez I*, No. 18-CV-61577, 2018 WL 6573124, at *4–5 (S.D. Fla. Dec. 13, 2018), *aff'd*, 982 F.3d 1323 (11th Cir. 2020); *see* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

67. *DeShaney*, 489 U.S. at 189.

68. *Id.*

69. *Id.* at 191–93.

70. *Id.* at 193.

71. *Id.* at 195–96.

72. *See id.*

73. *Id.* at 197.

which a special relationship giving rise to an affirmative duty was found in the context of incarcerated prisoners and involuntarily committed mental patients.[74] One such case was *Youngberg v. Romeo*, in which the thirty-three-year-old plaintiff was admitted to a state facility for care, where he was injured at least sixty-three times both by other residents and through his own violence.[75] The Court found that he had "constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests" under the Due Process Clause.[76] In *DeShaney*, the Court found substantive Due Process "requires the State to provide involuntarily committed mental patients with such services as are necessary to ensure their 'reasonable safety' from themselves and others," and this duty arose from the committed individual's dependence on the State.[77] The *DeShaney* majority used *Youngberg* to summarize that "it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause."[78] However, the *DeShaney* Court's reliance on *Youngberg* appears misplaced, as the plaintiff in *Youngberg* did not challenge his *commitment* to the hospital—the State's affirmative act of restraint.[79] Rather, the plaintiff "argue[d] that he ha[d] a constitutionally protected liberty interest in safety, freedom of movement, and training within the institution; and that petitioners infringed these rights by *failing to provide* constitutionally required conditions of confinement."[80] It was the State's *inaction*, not its affirmative action, that formed the basis of Youngberg's complaint.

Rather than relying on the *DeShaney* majority to justify rejecting the Parkland students' action, the district court in *Hernandez I* should have considered Justice Brennan's dissent to understand why greater protections for children are so desperately needed. In *DeShaney*, Justice Brennan disagreed with the majority for "its failure to see that inaction can be every bit as abusive of power as action, [and] that oppression can result when a State undertakes a vital duty and then ignores it."[81] Similar to *DeShaney*, *Hernandez I* is first and foremost about inaction and the

74. *Id.* at 202–03.
75. Youngberg v. Romeo, 457 U.S. 307, 309–10 (1982).
76. *Id.* at 324.
77. *DeShaney*, 489 U.S. at 199 (summarizing the holding of *Youngberg*, 457 U.S. 307).
78. *Id.* at 200 (citing *Youngberg*, 457 U.S. at 314–25).
79. *Id.* at 206 (Brennan, J., dissenting).
80. *Id.* (alteration and emphasis in original).
81. *See id.* at 212.

failure for state officials to protect the Parkland students.[82] The district court, however, improperly rejected this characterization—failing to grasp how inaction can be just as abusive of power as action—and instead focused exclusively on whether defendants had a constitutional duty to protect the Parkland students.[83] The Eleventh Circuit similarly focused on whether officials *acted* with deliberate indifference, failing to see that it was their unreasonable *inaction* that denied the children's rights.[84]

Similar to individuals being civilly committed and removed from outside aid sources like in *Youngberg*, the fact that Parkland officials separated students from sources of aid and then failed to replace these safeguards makes the defendants in *Hernandez* culpable.[85] Justice Brennan's dissent in *DeShaney* recognized that "'the State's knowledge of [an] individual's predicament [and] its expressions of intent to help him' can amount to a 'limitation . . . on his freedom to act on his own behalf' or to obtain help from others."[86] Moreover, Justice Brennan's dissent interpreted *Youngberg* "to stand for the much more generous proposition that, if a State cuts off private sources of aid and then refuses aid itself, it cannot wash its hands of the harm that results from its inaction."[87]

Applied to the facts of *Hernandez*, Parkland, like other public schools, prevents outside aid while simultaneously failing to provide aid itself.[88] Take, for example, the inability for students to hire private security companies or have their parent or guardian by their side during school hours. Students are not provided the ability to make private decisions concerning their safety in the public school context, thereby leaving the duty of protection resting solely on the limited, and often insufficient, resources provided by the school.[89] As such, if a school takes

82. *Hernandez I*, No. 18-CV-61577, 2018 WL 6573124, at *1 (S.D. Fla. Dec. 13, 2018), *aff'd*, 982 F.3d 1323 (11th Cir. 2020) (summarizing plaintiffs' complaints about school officials' inaction on the day of the shooting).

83. *Id.* at *4 ("Plaintiffs frame their claim as arising from the actions, or inactions, of defendants. However, viewed properly, the claim arises from the actions of Cruz, a third party, and not a state actor. Thus, the critical question the Court analyzes is whether defendants had a constitutional duty to protect Plaintiffs from the actions of Cruz.").

84. *Hernandez II*, 982 F.3d 1323, 1330–32 (11th Cir. 2020). The Eleventh Circuit did not cite *DeShaney* in its opinion.

85. *See Hernandez I*, 2018 WL 6573124, at *5.

86. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 207 (1989) (Brennan, J., dissenting).

87. *Id.*

88. *See Hernandez I*, 2018 WL 6573124, at *1 (detailing the failures of the defendants in securing the school or protecting the children).

89. For example, schools may not have adequate active-shooter plans, sufficient funding to implement security upgrades, or crisis assessment/prevention programs. It must also be acknowledged that greater school security measures do not necessarily increase student safety. *See*, *e.g.*, Everytown Research & Policy, *How to Stop Shootings and Gun*

steps to protect the welfare of children—such as restricting their constitutional rights—in order to address their status as a vulnerable population unable to adequately protect themselves, the school should be held liable for its failure to act in instances where the school's protections were, alas, *insufficient*.

Schools cannot take steps to further the protection of children and then suddenly decide these protections end at an arbitrarily constructed point.[90] Nor should a court decide the *Hernandez* defendants are not liable simply because they were not the ones who pulled the trigger and ended so many lives on February 14, 2018.[91] In this case, their inaction was "every bit as abusive of power as action."[92] As Justice Brennan forewarned, the holding affirmed in *Hernandez II* "construes the Due Process Clause to permit a State to displace private sources of protection and then, at the critical moment, to shrug its shoulders and turn away from the harm that it has promised to try to prevent" and interprets—incorrectly—the Constitution as being "indifferent to such indifference."[93] As soon as school officials saw Cruz on campus and recognized a danger existed, this recognition should have triggered a fundamental duty to protect the students who were at risk.[94] The Eleventh Circuit and district court "fail[ed] to recognize this duty because it attempt[ed] to draw a sharp and rigid line between action and inaction."[95] The courts in *Hernandez* should have instead considered the subjective characteristics of the Parkland case and utilized the Due

Violence in Schools: A Plan to Keep Students Safe, EVERYTOWN FOR GUN SAFETY SUPPORT FUND (Aug. 19, 2022), https://everytownresearch.org/report/how-to-stop-shootings-and-gun-violence-in-schools/ [https://perma.cc/QP3L-VMKR] (detailing measures that could prevent gun violence in schools); Katie Reilly, *Schools Are Spending Billions on Safety Measures to Stop Mass Shootings. It's Not Clear They Work*, TIME (June 16, 2022), https://time.com/6187656/school-safety-mass-shootings/ [https://perma.cc/WFD9-JKRU] (reporting on studies indicating that visible security measures and school resource officers do not ensure children's safety and may actually have negative impacts); Jolie McCullough & Kate McGee, *Texas Already "Hardened" Schools. It Didn't Save Uvalde*, TEX. TRIB. (May 27, 2022), https://www.texastribune.org/2022/05/26/texas-uvalde-shooting-harden-schools/ [https://perma.cc/R3XB-XC6G] (noting that increased security in schools has not been shown to prevent violence and can be detrimental to students). This reality reiterates that schools may not be capable of adequately protecting students, necessitating the need for increased legal protections.

90. *See DeShaney*, 489 U.S. at 210 (Brennan, J., dissenting).

91. *See Hernandez II*, 982 F.3d 1323, 1331 (11th Cir. 2020) (finding the students failed to state a claim for relief because they did not allege "any official acted with the purpose of causing harm").

92. *See DeShaney*, 489 U.S. at 211–12 (Brennan, J., dissenting).

93. *See id.* at 212.

94. *Id.*

95. *Id.* at 213.

Process Clause of the Fourteenth Amendment to establish greater protections for children.[96]

The district court and Eleventh Circuit overlooked the many opportunities to expand children's Due Process rights under the Fourteenth Amendment in *Hernandez*. The Eleventh Circuit acknowledged that Due Process rights are "untethered from the text of the Constitution," and capable of expansion, but failed to utilize their power to expand it.[97] Moreover, because children are not explicitly mentioned in the Constitution, it is up to the courts and legislature to decide when to expand or restrict their rights. The Parkland shooting requires greater protections to be afforded to children, and *Hernandez II* emphasizes that the Eleventh Circuit had the power to mandate that a duty is owed to students. By holding otherwise, the Eleventh Circuit ignored the students' status as *children* and the unique needs their status entails. Courts must acknowledge that justice requires the expansion of children's rights in situations where neither they nor their parents can provide adequate safeguards, and mandate that school settings are one such circumstance where this need exists.

II. The Judicial Pattern of Restricting Children's Rights Under the Idea of "Protection"

Courts have repeatedly emphasized the importance of children's education, so much so that they have made the rare decision to expand children's rights in this area in comparison to those of adults. For example, as the landmark case involving children's education, *Brown v. Board of Education of Topeka*, stated, education is a "principal instrument in awakening the child to cultural values, in preparing [them] for later professional training, and in helping [them] to adjust normally to [their] environment."[98] *Brown* emphasized that, without education, "it is doubtful that any child may reasonably be expected to succeed in life."[99] *Plyler v. Doe*, another monumental children's right case, reiterated that "[p]ublic education has a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage: the deprivation of education takes an inestimable toll on the social, economic,

96. *See id.* (opining that when faced with the choice to read precedential cases on the Fourteenth Amendment broadly or narrowly, the better interpretation is one that conforms with the "dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging").

97. *Hernandez II*, 982 F.3d at 1329 (citing Echols v. Lawton, 913 F.3d 1313, 1326 (11th Cir. 2019)).

98. Brown v. Bd. of Ed. of Topeka, 347 U.S. 483, 493 (1954), *enforced*, 349 U.S. 294 (1955).

99. *Id.*

intellectual, and psychological well-being of the individual, and poses an obstacle to individual achievement."[100]

The Supreme Court has emphasized that "education is perhaps the most important function of state and local governments."[101] However, this acknowledgement begs a critical question—if education is so important for a child's future, why did the courts in *Hernandez* fail to take action and ensure children are sufficiently protected to *have* a future? On February 14, 2018, fourteen students were attending Parkland to obtain an education, in line with the compulsory public school attendance laws, and they had their futures cut short.[102] Just as children's rights are not a one-way street, neither is education—if children are required to attend school, they must also receive expanded constitutional protections while they are there.[103]

A. Restrictions on Fourth Amendment Rights

Children's rights are commonly constrained while on school property to both protect them and further governmental control. For example, in *New Jersey v. T.L.O.*, the Supreme Court established that children's Fourth Amendment rights are restricted while on school grounds.[104] Here, the Court held no constitutional violation had occurred after a student's purse was searched by school officials without the student's consent or a search warrant.[105] The Court reasoned that, although schoolchildren have "legitimate expectations of privacy," a balance must be struck between the student's constitutional rights "and the school's equally legitimate need to maintain an [orderly] environment."[106] To find this balance, the Court held that restrictions normally placed upon state authorities must be eased in the school context.[107] Specifically, *T.L.O.* held "that school officials need not obtain a warrant before searching a student who is under their *authority*."[108] Thus,

100. Plyler v. Doe, 457 U.S. 202, 203 (1982).

101. *Id.* at 222; *see also id.* at 222–23 ("Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.").

102. *See Hernandez II*, 982 F.3d 1323 (11th Cir. 2020); FLA. STAT. § 1003.21 (noting that Florida requires children between the ages of six and sixteen to attend school).

103. *See Plyler*, 457 U.S. at 221 (noting that though it is societally important, "[p]ublic education is not a 'right' granted to individuals by the Constitution," and is instead created by the state for the purposes of substantive Due Process).

104. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (holding that searches of property in public schools need not be based on probable cause but rather a mere reasonableness standard).

105. *Id.* at 327–28.

106. *Id.* at 340.

107. *Id.*

108. *Id.* (emphasis added).

the Court ultimately determined that children's Fourth Amendment rights must be restricted compared to those of adults to preserve school control and protect other students.[109]

Several states have also restricted student's rights by allowing school officials to conduct nonconsensual and warrantless locker searches.[110] In *People v. Overton*, the New York Court of Appeals held that students retain "exclusive possession of [their] locker only vis-a-vis other students," not school officials.[111] Moreover, the court broadly held that school officials have both a right and a *duty* to inspect student lockers.[112] The United States Court of Appeals for the Tenth Circuit reiterated this right, holding in *Zamora v. Pomeroy* that the use of police dogs and subsequent warrantless search of a student's locker was constitutional.[113] The Tenth Circuit reasoned that schools retain control of lockers and can search them under "reasonable" suspicion without violating students' Fourth Amendment rights.[114]

B. Restrictions on First Amendment Rights

Children's First Amendment rights are also restricted in comparison to adults' First Amendment rights. In *Bethel School District No. 403 v. Fraser*, a student brought suit against his school after he was disciplined for the language he used in his nomination speech at a student assembly.[115] The district court held that the school's sanctions violated the First Amendment, "that the school's disruptive-conduct rule [was] unconstitutionally vague and overbroad, and that the removal of respondent's name from the graduation speaker's list violated the Due Process Clause of the Fourteenth Amendment."[116] However, the Supreme Court disagreed, holding that while adults making what the speaker considers a political point cannot be prohibited from using an offensive form of expression, it does not follow that the same latitude must be permitted to children in a public school.[117] The Supreme Court held it is appropriate for a public school to protect minors by limiting their exposure to "vulgar and offensive spoken language," even if it is done at the expense of children's constitutional rights.[118]

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109. *See id.* at 325–26.
110. *See* People v. Overton, 24 N.Y.2d 522 (1969).
111. *Id.* at 524.
112. *Id.*
113. *See* Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981).
114. *Id.* at 670.
115. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
116. *Id.* at 679.
117. *Id.* at 682.
118. *Id.* at 683–86.

Similarly, in *Hazelwood School District v. Kuhlmeier*, student members of the school's newspaper brought suit against the school district and school officials for an alleged violation of their First Amendment rights.[119] In *Hazelwood*, the students had written articles discussing students' experiences with pregnancy and the impact of divorce on students at the school.[120] The principal rejected these stories, arguing the articles' "references to sexual activity and birth control were inappropriate for some of the younger students," and parents should be able to respond to the comments on divorce before publication.[121] Accordingly, these articles were deleted.[122] The Supreme Court rejected the students' claim, holding that First Amendment rights of public school students "are not automatically coextensive with the rights of adults in other settings,"[123] and must be "applied in light of the *special characteristics* of the school environment."[124] Further, the Supreme Court repeated that "a school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school."[125]

These cases reiterate that children's rights can be restricted in comparison to the rights of adults if the restrictions are made with the intent to protect them.

C. Expanding Substantive Due Process Rights Using the State-Created Danger Doctrine

Multiple circuit courts have held that schools can suspend students without many provisional safeguards, like notices or hearings, without violating the students' constitutional rights.[126] These holdings place another restriction on children's rights in comparison to the general Due

119. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

120. *Id.* at 263.

121. *Id.* at 263–64.

122. *Id.* at 264.

123. *Id.* at 266 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

124. *Id.* (emphasis added) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969)).

125. *Id.* (citations omitted) (quoting *Bethel Sch. Dist.*, 478 U.S. at 685).

126. *See, e.g.*, Jahn v. Farnsworth, 617 F. App'x. 453, 461–62 (6th Cir. 2015) (holding that the suspension of a child without notifying parents did not violate Due Process rights); Breeding *ex rel.* C.B. v. Driscoll, 82 F.3d 383 (11th Cir. 1996) (holding that verbal discussion with grandparents and student was sufficient Due Process for suspension); Palmer *ex rel.* Palmer v. Merluzzi, 868 F.2d 90 (3d Cir. 1989) (holding that student was not entitled as a matter of Due Process to notice of charge behind suspension); Farrell v. Joel, 437 F.2d 160, 163 (2d Cir. 1971) (holding that student was not entitled to any notice of suspension). Similarly, the Fifth Circuit in *Sweet v. Childs* held children's rights can be restricted through suspensions without first providing minimal Due Process, if the suspensions are utilized to preserve school order and protect other students. Sweet v. Childs, 518 F.2d 320, 321 (5th Cir. 1975).

Process standard afforded to adults, in which notice and an opportunity to be heard are essential components.[127] In *Goss v. Lopez*, the Supreme Court held that students facing temporary suspension from public school were entitled to protection under the Due Process Clause only in connection with suspensions of up to ten days.[128] These cases highlight that, while children's rights are not entirely diminished by state authority, their Due Process rights are nonetheless limited in regard to suspensions.

However, courts can hold parties accountable when suspensions increase a risk of harm to students. The ability to expand constitutional barriers was reiterated by the Tenth Circuit in *Chavez ex rel. Armijo v. Wagon Mound Public Schools*.[129] Here, a special education student attending a public school was suspended and driven home—without parental notification and in violation of school disciplinary policy—where he later died by suicide.[130] The Tenth Circuit rejected the defendants' qualified immunity claims, holding that although state actors are not normally responsible for actions of third parties, there are exceptions.[131]

The two exceptions identified by the Tenth Circuit are the "special relationship doctrine" and the "state-created danger theory."[132] The first exception "exists when the state assumes control over an individual sufficient to trigger an affirmative duty to provide protection to that individual."[133] The danger creation theory, on the other hand, "provides that a state may also be liable for an individual's safety 'if it created the danger that harmed the individual.'"[134] Utilizing the second exception—the danger creation theory—the Tenth Circuit held the student's Due Process rights under the Fourteenth Amendment had been violated because he was part of a protected group; the school placed him at substantial risk of immediate and proximate harm; the risk was obvious or known; the school acted recklessly in conscious disregard of that risk; and the conduct was viewed, in total, as conscience-shocking.[135]

Armijo clearly establishes that while courts generally provide decreased Due Process rights to children in schools, they can find a special relationship or state-created danger doctrine applies, and thus, require greater Due Process and hold schools liable for increasing the risk

127. *See* sources cited *supra* note 126.

128. Goss v. Lopez, 419 U.S. 565, 583–94 (1975).

129. Chavez *ex rel*. Armijo v. Wagon Mound Pub. Schs., 159 F.3d 1253 (10th Cir. 1998).

130. *Id.* at 1253.

131. *Id.* at 1260.

132. *See id.* (internal quotations omitted) (quoting Liebson v. N.M. Corr. Dep't, 73 F.3d 274, 276 (10th Cir. 1996)).

133. *Id.* (internal quotations omitted) (quoting *Liebson*, 73 F.3d at 276).

134. *Id.*

135. *Id.* at 1263–64.

of harm to students.[136] Under these doctrines, schools have a duty to protect students in situations involving a known risk and, although this expansion of children's rights is rare, it is completely appropriate in certain situations.[137] Comparisons can be drawn readily between *Hernandez* and *Armijo*. Notably, the *Armijo* court held that the school in question had "some knowledge" that the student was "suicidal and distraught;" that the decision to suspend the student placed him at "substantial risk of serious, immediate and proximate harm;" and that this decision caused him to "become distraught and to threaten violence."[138] In finding this, the *Armijo* court rejected the principal and counselor's motion for summary judgment, as a trier of fact could reasonably find both parties increased the risk of harm to the student.[139] The courts could have applied this doctrine in *Hernandez* and found that the Parkland defendants' decision to suspend Cruz; failure to call some type of Code Red when danger was perceived; knowledge of the dozens of calls received that warned of Cruz's dangerous propensities; and utter lack of adequate security similarly increased the plaintiffs' risk of harm by consciously disregarding the risk Cruz posed to Parkland students and staff.[140]

Countless instances exist where children's constitutional rights are restricted in comparison to those of adults, especially while on school grounds. However, if we accept a court's ability to expand Due Process rights under the Fourteenth Amendment—especially in the educational context—combined with the importance placed upon education, it becomes clear why it was wrong for the district court and Eleventh Circuit to rule that no constitutional avenue exists for the affected students in *Hernandez*. As the dissent in *T.L.O.* stated, the existence of a special relationship between school authorities and students is demonstrated by the tradeoff between restricting children's rights for more expanded school control.[141] A standard of reasonableness must be created to fit this special relationship.

The courts in *Hernandez* failed to provide the same constitutional rights to students placed at a significant risk on school property as is provided to "an out-of-school juvenile suspected of a violation of law, or

136. *Id.* at 1264.

137. *See id.* at 1262–63.

138. *Id.* at 1264.

139. *Id.*

140. *See Hernandez I*, No. 18-CV-61577, 2018 WL 6573124, at *1 (S.D. Fla. Dec. 13, 2018), *aff'd*, 982 F.3d 1323 (11th Cir. 2020) (describing school officials' "numerous shortcomings in the official response to the shooting").

141. State *ex rel.* T.L.O., 448 A.2d 493, 493–94 (N.J. Super. Ct. App. Div. 1982) (Joelson, J.A.D., dissenting), *rev'd sub nom.* State *ex rel.* T.L.O. v. Engrud, 463 A.2d 934 (N.J. 1983), *rev'd sub nom.* New Jersey v. T.L.O., 469 U.S. 325 (1985).

even to an adult suspected of the most heinous crime."[142] By effectively disregarding the Due Process Clause, the Eleventh Circuit applied the "diminished standard of reasonableness in such a way as to render the protection of the Fourth Amendment virtually unavailable to juveniles in public schools."[143] The plaintiffs in *Hernandez* are legally required to attend school until the age of sixteen and lack the agency to register in a private school, where they are more often granted greater protection.[144] These children do not have the capacity to protect themselves, are separated from their parent's safety net, and are already subjected to restricted constitutional rights in order to further state control—including lessened First, Fourth, and Fourteenth Amendment rights.

However, not all vulnerabilities can be mitigated by restricting children's constitutional rights—some require an expansion of rights when children are less able than adults to protect themselves. The Parkland case did not involve vulgar speeches,[145] unwarranted locker searches,[146] or overly detailed newspaper articles that required paternalistic restrictions by school officials.[147] Rather, this case involved a dangerous former student and negligent school security which placed students at risk of a threat from which only the school could offer protection.[148] The Eleventh Circuit in *Hernandez II* should have recognized that the same special relationship present in *T.L.O.* also existed in Parkland and taken the opportunity to expand children's substantive Due Process protections to ensure that students are protected from gun violence while on school property in the future.

III. The Need for a Child-Centric Framework and Heightened Standard of Review to Abolish the One-Way Street

As illustrated by the Parkland tragedy and case law cited above, children desperately need a child-centric framework and heightened standard of review to expand their constitutional protections while on school property.[149] A heightened standard of review is required for adults

142. *See id.* at 494.

143. *Id.*; *see Hernandez II*, 982 F.3d 1323, 1333 (11th Cir. 2020) (affirming the dismissal of the student's complaint and effectively disregarding the Due Process Clause).

144. *See* M. Danish Shakeel & Corey DeAngelis, *Can Private Schools Improve School Climate? Evidence from a Nationally Representative Sample*, 12 J. SCH. CHOICE 426 (2018).

145. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683–86 (1986).

146. *See* People v. Overton, 24 N.Y.2d 522, 524 (1969).

147. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 263–64 (1988).

148. *Teen Gunman Kills 17*, *supra* note 9.

149. Intermediate scrutiny, for example, is a heightened standard of review applied to classifications on the basis of gender. *See, e.g.*, Harrison v. Kernan 971 F.3d 1069 (9th Cir.

based on race[150] or gender,[151] for example, but one is sorely missing to fit the specific needs of children in the public school system who lack the agency to protect themselves. A child-centric framework that subjectivizes children and scrutinizes State action towards them separately from adults could expand constitutional avenues in specific situations by establishing a duty to protect. As *Plyler v. Doe* rightfully held, the Government cannot impose life-long hardship on children for matters beyond their control while relegating them to an underclass without special constitutional sensitivity and a heightened standard of review.[152] In stark contrast, in affirming the dismissal of the plaintiffs' claims in *Hernandez II*, students present at the Parkland shooting were relegated to an underclass from which the defendants cannot absolve themselves—an underclass the Eleventh Circuit cannot rightfully ignore.

Courts often overlook children's unique concerns and base their decisions on the characteristics, social constructions, or controversies of adults.[153] By applying the same arbitrary or conscious-shocking standard to cases involving either adults or children, courts create the misperception that children require no greater protections than adults. This approach directly contradicts holdings in cases discussed above involving child plaintiffs in which their rights are restricted explicitly because children require greater protections than adults. As discussed earlier, the Eleventh Circuit emphasized in *Nix* that the arbitrary or conscious-shocking standard is case-specific and must be analyzed subjectively.[154] If the Eleventh Circuit in *Hernandez II* had analyzed the plaintiffs as *children*, it could have recognized that schools represent a unique setting which requires an expansion of children's rights and

2020). Since gender is viewed as immutable, like an individual's age or status as a minor, this could be an adequate standard of review for cases involving children. Moreover, *Plyler*, a children's education case, applied intermediate scrutiny. Plyler v. Doe, 457 U.S. 202, 218 (1982). Alternatively, an entirely new heightened standard of review could be created for children, centered around their subjective qualities and greater need for protection.

150. The Court applies the strict scrutiny standard of review for race-based classifications. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that racial classifications are "constitutional only if they are narrowly tailored measures that further compelling governmental interests").

151. The Court applies the intermediate scrutiny standard of review for gender-based classifications. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1996) (internal citations omitted) (requiring classifications based on gender to serve "important governmental objectives," and for the classification to be "substantially related to the achievement of those objectives").

152. *Plyler*, 457 U.S. at 226.

153. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 20–23 (1973) (relying on case law involving indigent adult plaintiffs in holding that public-school financing system challenged in a class action brought on behalf of school children did not violate the Fourteenth Amendment).

154. Nix v. Franklin Cnty. Sch. Dist., 311 F.3d 1373, 1376–78 (11th Cir. 2002); *see also* discussion *supra* Section I.B.

heightened standard of review. By refusing to do so, the arbitrary and conscience shocking standard was incorrectly applied. This failure underscores the need for a new, child-centric standard.

A. Reworking the State-Created Danger Doctrine: Proposals and Issues

Although sparse scholarship exists in this area of constitutional law, there are some existing proposals to reformulate the state-created danger doctrine. One such proposal argues that the existing standard punishes governments for their failure to use coercive police power when that failure results in a third-party causing harm.[155] This proposal argues that these applications create "a national tort-like regime that incentivizes more aggressive policing and other state interventions under the guise of enforcing the Due Process Clause."[156] To combat this situation, the proposal suggests reworking the state-created danger doctrine to reflect the following: "(1) a person acting under color of law uses or invokes force to constrain private action (2) in a way that exposes another to a danger (3) that would not have existed but for state action."[157] This proposal shifts the application solely to cases in which coercive government power exposes a person to danger that they would not otherwise face.[158] Moreover, it suggests a shift away from aggressive state intervention in everyday life by lessening the State's duty to provide affirmative protection.[159] If this alternative state-created danger doctrine is applied to the facts in *Hernandez*, it is possible that the school would be deemed liable because (1) it restricted students' ability to act on a foreseeable danger in a place where they were legally required to be (2) which resulted in students' exposure to a school shooting, (3) a danger that would not have existed but for the school's dismissal of countless warnings and failure to adequately protect the children. However, this proposed doctrine fails to take a subjective view of children as a protected class, like the conscience-shocking standard, and ultimately has the capacity to be incorrectly applied to cases involving children.

The proposed state-created danger doctrine may be useful in certain cases, as it "remov[es] the bar to recovery for those harmed by government coercion who cannot prove the necessary mental state of the relevant state actor,"[160] but it misses the mark for child-centered cases.

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155. *See* Matthew Pritchard, *Reviving DeShaney: State-Created Dangers and Due Process First Principles*, 74 RUTGERS U.L. REV. 161 (2021).

156. *Id.* at 161.

157. *Id.* at 202.

158. *See id.*

159. *Id.* at 172.

160. *Id.* at 165.

No equitable constitutional avenue is created simply by reworking an already existing standard without explicitly addressing the specific needs of children and the unique characteristics that differentiate them from adults. If a different framework is applied to children when determining whether their rights should be restricted—for example, their liberty interests weighed against a school's need for control—then an alternative framework must also be created for those instances where children require greater constitutional protections than adults. A child-centric framework formulated to address their unique needs, characteristics, social constructions, and controversies would serve as a necessary defense against governmental practices and implement the requisite safeguards.

B. A New "Authority" Standard to Establish Liability

The Supreme Court has recognized that the substantive Due Process framework is unrestricted by the text of the Constitution and capable of expansion when justice demands it.[161] A child-centric framework that modifies the arbitrary or conscience-shocking standard in school environments would enable more equitable treatment. Likewise, an alternative standard to the custodial relationship test can and should be established. Although it is well established that schoolchildren are not in a custodial relationship with the state, a court can still determine another relationship exists. For example, a court can establish when public school students are under the "authority" of school officials, the school officials have a duty to protect them from reasonably foreseeable dangers. Considering this "authority" standard is already utilized when determining whether children's rights can be restricted to further their protection on school grounds, it should be equally applicable to situations requiring the expansion of rights.[162]

Courts must acknowledge that the "special characteristics" of children that justify restricting their rights in the school environment also entitle them to special protections[163]—it's a two-way street. By creating an entirely new child-centric framework with a heightened standard of review, the Due Process Clause can be utilized to expand children's rights in specific instances without the risk of over-broadening the Constitution. In the context of *Hernandez*, a new framework would allow a court to reasonably determine that the plaintiffs were under the authority of

161. *See, e.g.*, Younberg v. Romeo, 457 U.S. 307, 320 (1982) ("In determining whether a substantive right protected by the Due Process Clause has been violated, it is necessary to balance 'the liberty of the individual' and 'the demands of an organized society.'" (internal quotations omitted)).

162. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325, 339–41 (1985).

163. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988).

school officials; a foreseeable danger existed and/or the school rendered the harm more likely to occur; and the school had an obligation to prevent harm and life-long hardship that was beyond the plaintiffs' control. This test is loosely based on Justice Brennan's dissent in *DeShaney*, which opined that liability should exist when: (1) the state renders a child more vulnerable to danger, or, (2) the state undertakes a vital duty and then fails to act or abandons the duty.[164] Justice Brennan's dissent, like this proposed framework, suggests removing the "rigid line between action and inaction" to emphasize that the failure to act can be every bit as abusive as the former action.[165] By recognizing that the "Constitution *is* indifferent to such indifference," this proposed child-centric framework establishes why liability should follow when a state "displace[s] private sources of protection and then, at the critical moment . . . shrug[s] its shoulders and turn[s] away from the harm that it has promised to try to prevent."[166] The *Hernandez* plaintiffs deserved more from the defendants, the court, and the Constitution.

The courts in *Hernandez* had ample opportunity to use the suit brought about by this tragic event as the impetus to establish a duty for school officials to protect children who are unable to protect themselves. *Hernandez II* was a missed opportunity for the Eleventh Circuit to establish a heightened standard of review that is not based on race or gender—but rather, one that is solely constructed for children in the public school system who lack the agency to protect themselves. Children's constitutional rights are repeatedly restricted in comparison to those of adults because of the rationale that children require greater protections and greater controls, as demonstrated in the context of First Amendment and Fourth Amendment rights.[167] However, just as courts can restrict rights, they also have the capacity to expand them. The Eleventh Circuit in *Hernandez II* failed to view the plaintiffs as children and acknowledge that, just as children's rights can be restricted to protect them, these rights must also be expanded in situations where children require greater protections in comparison to adults. Children require safeguards in schools, and it is within the Court's power to expand substantive Due Process under the Fourteenth Amendment to establish that school officials have an obligation to protect them on school property.

164. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 210–212 (1989) (Brennan, J., dissenting).

165. *Id.* at 212.

166. *Id.* (emphasis added).

167. *See supra* Sections II.A–B.

Conclusion

The Parkland tragedy provided an opportunity to expand children's constitutional rights by establishing schools have a duty to protect students from dangers existing on school property. The district court and Eleventh Circuit, however, dismissed this opportunity and left students affected by school gun violence without a constitutional avenue for relief.[168] Children's constitutional rights are often minimized to avoid unreasonable interference with the liberty interests of their parents and guardians to direct the upbringing of their children as they choose.[169] However, at times when parents do not have the power to protect their children, the State's interest in child welfare should expand to compensate for children's increased vulnerability. Expanding and solidifying children's constitutional rights can serve as a necessary defense against governmental practices that place them at risk of a danger from which neither they nor their parents can provide safeguards.

As the *Hernandez* facts demonstrate, numerous governmental blunders put the Parkland students at danger of something from which only the school could protect them.[170] The Due Process Clause of the Fourteenth Amendment provides courts with the ability to expand protections if justice so requires. Here, the courts should have recognized that both the Constitution and case law allow for an expansion of rights by establishing that the defendants owed the plaintiffs a duty, which was violated. In comparison to those of adults, children's rights are consistently restricted in order to protect them and further state control.[171] These restrictions, in addition to the importance placed on education by the courts, demonstrate that children have unique legal needs that distinguish them from adults. Courts must acknowledge that routes to establish greater protections for children are not a one-way street; sometimes protecting children requires the expansion of rights. The public school environment is one situation where children lack the means to protect themselves and require expanded constitutional rights to offset this vulnerability.

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168. *See Hernandez I*, No. 18-CV-61577, 2018 WL 6573124 (S.D. Fla. Dec. 13, 2018), *aff'd*, 982 F.3d 1323 (11th Cir. 2020).

169. *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (affirming an order enjoining officials from enforcing an act requiring children to attend public schools and thus interfering with parents' rights to control their children's education); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that a Nebraska statute prohibiting the teaching of languages other than English violated constitutional Due Process, in part by interfering with parents' rights to control their children's education).

170. *See Hernandez I*, 2018 WL 6573124, at *1 (describing school officials' "numerous shortcomings in the official response to the shooting").

171. *See, e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683–86 (1986); People v. Overton, 24 N.Y.2d 522, 524 (1969); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 263–64 (1988).

By establishing a child-centric framework and heightened standard of review based upon the subjective qualities of children, substantive Due Process can be utilized to expand children's rights while attending public schools. A new framework would allow courts to reasonably determine that, when students are under the authority of school officials and a foreseeable danger exists and/or the school renders the harm more likely to occur, the school has an obligation to prevent harm and life-long hardship existing beyond the students' control. The Constitution should not be indifferent to indifference; if a school takes steps to protect children, it cannot exile compassion and arbitrarily decide when its duty to protect ceases—especially when it is the only entity capable of establishing adequate protection.[172] As such, it was a violation for the district court and the Eleventh Circuit in *Hernandez* to disregard children's desperate calls for greater protections.[173] Courts must consider children as *children* to appreciate their distinct needs and recognize the same opportunity exists to extend constitutional protections as to restrict them, especially in situations where the protection of children is paramount.

172. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).

173. *See, e.g.*, *Hernandez I*, 2018 WL 6573124, at *1.

Closing the Reproductive Divide: Expanding Access to Fertility Services Beyond the White Nuclear Family

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Table of Contents

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Introduction

As the World Health Organization has recognized, "infertility is a global health issue."[1] Millions of Americans are dealing with infertility issues, which can lead to significant secondary impacts including social, mental, and physical harm.[2] Despite the gravity of harms that can result from infertility, and the range of treatment options available, many people forgo treatment.[3] In fact, access to fertility services varies significantly by demographic group.[4] As will be detailed in the following discussion, fertility services are currently dominated by comparatively older white women with higher incomes.[5] Barriers in accessing fertility services are the result of both established laws excluding coverage for particular groups of people[6] and implicitly sanctioned discrimination by the health care system and its stakeholders.[7] This Article explores both forms of discrimination and argues that access should be expanded to reach currently excluded groups. In furtherance of this argument, this Article discusses one potential solution, the proposed Access to Infertility Treatment and Care Act,[8] but critiques the most recent framework of this proposed legislation. While many advocates support the Access to Infertility Treatment and Care Act, there is almost no literature critiquing

1. *Infertility*, WORLD HEALTH ORG., https://www.who.int/health-topics/infertility#tab=tab_1 [https://perma.cc/M2UT-9EQH].

2. Ethics Comm. of the Am. Soc'y for Reprod. Med., *Disparities in Access to Effective Treatment for Infertility in the United States: An Ethics Committee Opinion*, 116 FERTILITY & STERILITY 54, 54 (2021).

3. *Id.*

4. *Id.*

5. *See* discussion *infra* Section I.B.

6. *See* discussion *infra* Part III.

7. *See* discussion *infra* Part IV.

8. *See* The Access to Infertility Treatment and Care Act, S. 2352, 117th Cong. (2021); H.R. 4450, 117th Cong. (2021).

its shortcomings. This Article seeks to provide these needed critiques so that the law can meaningfully address disparities in fertility services.

Part I provides a background on infertility, fertility treatments, and existing disparities in access to and success of fertility services. Part II argues that access to currently excluded groups should be expanded and justifies this view by borrowing from the existing literature in this area. Part III then explores the ways in which insurance laws can perpetuate existing disparities and reify the notion that fertility services are intended to promote the white, nuclear family. Part IV then examines other, more implicit forms of discrimination caused by socioeconomic and historical forces. Lastly, Part V discusses the potential for the proposed Access to Infertility Treatment and Care Act to address disparities in fertility services, but it also highlights certain flaws and suggests changes that will make the legislation more effective if enacted.

I. Background on Infertility and Disparities

A. Background on Infertility and Fertility Treatments

Infertility is a disease of the reproductive system.[9] Approximately one in four women in the United States have difficulty becoming pregnant or carrying their child to term,[10] amounting to over 43 million women suffering from fertility issues.[11] In addition, 9.4% of men report having fertility issues.[12] Further, single people and LGBTQIA+ couples often face issues getting pregnant without medical intervention.[13] Despite the impact of infertility on a significant portion of the U.S. population, it is an

9. *E.g.*, *Infertility*, *supra* note 1.

10. *Infertility FAQs*, CDC (Apr. 26, 2023), https://www.cdc.gov/reproductivehealth/infertility/index.htm#:~:text=Yes.,to%20term%20(impaired%20fecundity). [https://perma.cc/56JN-H4EV] (stating that about 19% of married women 15 to 49 years of age are infertile, and approximately 26% have difficulty becoming pregnant or carrying a pregnancy to term); *see also* ANJANI CHANDRA, CASEY E. COPEN & ELIZABETH HERVEY STEPHEN, U.S. DEP'T HEALTH & HUM. SERVS., INFERTILITY AND IMPAIRED FECUNDITY IN THE UNITED STATES, 1982–2010: DATA FROM THE NATIONAL SURVEY OF FAMILY GROWTH 15 (2013) (finding among married women 15 to 44 years of age, between 2006 and 2010, 6% were infertile and 12% had difficulty becoming pregnant or carrying a pregnancy to term). Unfortunately, much of the literature and data in this area is framed in the context of the gender binary. The Author has tried to use more inclusive language where possible but uses the binary framework when discussing data points collected in this manner.

11. *Cf. QuickFacts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/SEX255221 [https://perma.cc/3VL4-QVRV] (indicating that as of 2022, there are an estimated 168,310,216 women in the United States).

12. CHANDRA ET AL., *supra* note 10, at 18. This figure also encompasses fertility issues experienced by a man's partner in certain circumstances if the man is living with or married to a woman. *Id.* at 18 n.1.

13. Ethics Comm. of the Am. Soc'y for Reprod. Med., *Access to Fertility Treatment Irrespective of Marital Status, Sexual Orientation, or Gender Identity: An Ethics Committee Opinion*, 116 FERTILITY & STERILITY 326, 336 (2021).

issue that is largely ignored by state and federal policymakers.[14] Focus on reproductive health has mostly centered around abortion and contraception debates, leaving people with infertility issues in limbo.[15]

However, many options exist for people who cannot get pregnant without medical intervention or have difficulties becoming pregnant.[16] Diagnosis of infertility can involve a number of tests, such as semen analyses, lab tests, and physical examinations by a physician.[17] Treatments range from varying one's daily activities, to use of medication, surgery, or assisted reproductive technology (ART).[18] ART is defined as "all fertility treatments in which either eggs or embryos are handled."[19] One common form of ART is in vitro fertilization (IVF), which involves retrieving eggs from a person, fertilizing those eggs outside the body, and placing the fertilized egg(s) in utero.[20]

Despite their usefulness, fertility treatments can be extremely costly.[21] In 2023, one IVF cycle costs between $15,000 to $30,000.[22] While IVF is "the most effective form of [ART],"[23] several rounds of IVF are often needed for a person to become pregnant, exponentially increasing costs.[24] Many people are also required to attempt different types of treatment before receiving more invasive or costly fertility

14. Nitya Rajeshuni, *Infertility: A Plague Gone Unnoticed*, STAN. J. PUB. HEALTH (Mar. 25, 2013), https://web.stanford.edu/group/sjph/cgi-bin/sjphsite/infertility-a-plague-gone-unnoticed/ [https://perma.cc/7EPU-H77D].

15. *Id.*

16. *See Fertility Treatments*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/pregnancy/fertility-treatments [https://perma.cc/DR7H-KJ65].

17. Gabriela Weigel, Michelle Long & Alina Salganicoff, *Coverage and Use of Fertility Services in the U.S.*, KAISER FAM. FOUND. (Sept. 15, 2020), https://www.kff.org/womens-health-policy/issue-brief/coverage-and-use-of-fertility-services-in-the-u-s/ [https://perma.cc/KYY5-4RAA].

18. *E.g.*, *Infertility*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/infertility/diagnosis-treatment/drc-20354322 [https://perma.cc/QMC6-9VT3].

19. *What is Assisted Reproductive Technology?*, CDC, https://www.cdc.gov/art/whatis.html [https://perma.cc/F7FW-AX44]. ART does not encompass fertility treatments such as insemination where only sperm is being handled. *Id.*

20. *E.g.*, *In Vitro Fertilization (IVF)*, MAYO CLINIC, https://www.mayoclinic.org/tests-procedures/in-vitro-fertilization/about/pac-20384716 [https://perma.cc/5JJ8-H8D9].

21. *See* Weigel et al., *supra* note 17.

22. Marissa Conrad, *How Much Does IVF Cost?*, FORBES HEALTH (Mar. 7, 2023), https://www.forbes.com/health/family/how-much-does-ivf-cost/ [https://perma.cc/VJQ7-Z7MV]; *see also* Alex K. Wu, Anobel Y. Odisho, Samuel L. Washington, Patricia P. Katz & James F. Smith, *Out-of-Pocket Fertility Patient Expense: Data from a Multicenter Prospective Infertility Cohort*, J. UROLOGY (2014) (finding that in 2014, the average out-of-pocket cost for IVF was $19,234).

23. *In Vitro Fertilization (IVF)*, *supra* note 20.

24. Weigel et al., *supra* note 17. Over a decade ago, a study in Northern California found that the average total cost of IVF was $61,377 for persons using their own eggs and $72,642 for persons using a donor egg. *Id.*

treatments.[25] For example, a person may have to try taking medication to improve their chance of pregnancy before resorting to treatment like IVF.[26] These treatments can quickly become incredibly expensive for individuals trying to become pregnant.

B. Disparities in Fertility Services

Significant disparities exist in the rates that different demographic groups seek fertility services.[27] Scholar Dorothy Roberts has argued that modern fertility treatments "reflect and reinforce the racial hierarchy" in the United States.[28] People seeking medical advice tend to be higher-income white women above the age of thirty-five with private insurance.[29] One recent study found that fertility patients also tended to have a bachelor's or master's degree.[30] A separate study indicated that while Black, Latinx, and white women who sought out medical assistance were given fertility advice at comparable rates, only 47% of Black and Latinx women were tested for infertility.[31] In contrast, 62% of white women reported being tested.[32] Women of color also often wait longer to obtain medical advice, which may decrease their chances of becoming pregnant.[33] In one study, 14.7% of Black patients stated that their race was a barrier to receiving treatment, compared to 0% of white patients, 5.1% of Latinx patients, and 5.4% of Asian patients.[34] In addition to racial and ethnic disparities in treatment, studies have also demonstrated that people with disabilities, people identifying as LGBTQIA+, and people with low incomes obtain fertility treatments at low rates.[35]

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25. *Id.*

26. *See id.*

27. Ethics Comm. of the Am. Soc'y for Reprod. Med., *supra* note 2, at 55–57.

28. Dorothy E. Roberts, *Race and the New Reproduction*, 47 HASTINGS L.J. 935, 937 (1996).

29. Weigel et al., *supra* note 17.

30. Isabel Galic, Olivia Negris, Christopher Warren, Dannielle Brown, Alexandria Bozen & Tarun Jain, *Disparities in Access to Fertility Care: Who's In and Who's Out*, 2 FERTILITY & STERILITY REPS. 109, 111 (2021). Another study found that 80.8% of women with college degrees experiencing infertility sought treatment, compared to 33.1% of women with a high school degree or less experiencing infertility. Lisa Rapaport, *U.S. Women with Less Income, Education Often Lack Access to Infertility Care*, REUTERS (July 17, 2019), https://www.reuters.com/article/us-health-infertility-disparities/u-s-women-with-less-income-education-often-lack-access-to-infertility-care-idUSKCN1UC2GB [https://perma.cc/F9KH-98QY].

31. Weigel et al., *supra* note 17.

32. *Id.*

33. Ethics Comm. of the Am. Soc'y for Reprod. Med., *supra* note 2, at 55.

34. Galic et al., *supra* note 30, at 113.

35. CTR. FOR REPROD. RTS., ENSURING EQUITABLE ACCESS TO INFERTILITY CARE IN THE UNITED STATES: GUIDING PRINCIPLES FOR POLICIES MANDATING INSURANCE COVERAGE 1 (2020), https://reproductiverights.org/ensuring-equitable-access-to-infertility-care-in-the-united-states-guiding-principles-for-policies-mandating-insurance-coverage/

Disparities also exist in fertility treatment success rates.[36] A study comparing success rates between white and Black patients found that Black patients experienced miscarriages at rates of 28.9%, compared to 14.6% for white patients.[37] Black patients also had pregnancy rates and live birth rates of 24.4% and 16.9% respectively, compared to 36.2% and 30.7% for white patients.[38] Certain conditions that are more common among Black and Latinx patients, such as tubal factor infertility, may also reduce the success of fertility treatments if doctors do not treat the underlying condition first.[39] Because practitioners in states without insurance laws that mandate coverage of fertility services may be less likely to address underlying conditions before providing fertility treatment, people in these states may face even lower success rates.[40]

II. Expanding Access to Fertility Services

Given the clear disparities in access to fertility services, this Article argues that access should be expanded to groups currently excluded from such services due to explicit and implicit sanctioned forms of discrimination. However, the question remains whether fertility services are the types of services that we should promote. This Article argues that access to fertility services should be increased for several reasons. First, infertility is a disability, and its treatment should be seen as essential rather than elective. Second, denying access to fertility treatments causes other, more amorphous harms. Finally, given the inequities involved, increasing access to fertility services is necessary to promote social justice. The following section elaborates on these arguments and potential criticisms of expanded access using the existing literature in this area.

A. Rationales for Expanding Access

While fertility services are often seen as a luxury, infertility is arguably a disability under the Americans with Disabilities Act (ADA).[41] Law professor Nizan Geslevich Packin has argued that infertility is a disability, making this determination based in part on the effect of

[https://perma.cc/3XA6-TRCU].

36. Iris G. Insogna & Elizabeth S. Ginsburg, *Infertility, Inequality, and How Lack of Insurance Coverage Compromises Reproductive Autonomy*, 20 AMA J. ETHICS 1152, 1154 (2018).

37. *Id.*

38. *Id.*

39. *See id.* at 1155 (describing tubal factor infertility and disparities in treatment).

40. *Id.*

41. Nizan Geslevich Packin, *The Other Side of Health Care Reform: An Analysis of the Missed Opportunity Regarding Fertility Treatments*, 14 SCHOLAR 1, 54–55 (2011).

infertility on one's reproductive system.[42] Given that reproduction is a major life activity under the ADA,[43] infertility should not be dismissed as a personal problem with which one simply has to live.

Further, Packin also bases her analysis on the social stigma that people experience when dealing with infertility and the secondary effects of infertility, such as depression and anger.[44] These secondary effects can be comparable to those experienced by people with other serious conditions like cancer and heart disease.[45] Many people experiencing infertility also suffer from disenfranchised grief—"intense grief that others perceive as a minor loss."[46] Disenfranchised grief can be caused by different experiences, such as losing a relationship that is not socially recognized, or when a culture or community does not view one's loss as significant.[47] Scholars such as ART expert Judith Daar note that medical societies have advocated for framing infertility as a disease.[48] By relabeling the issue, we may be able to reduce the stigma of infertility that causes some people to avoid treatment.[49] Without broader recognition of infertility as a disability, many people suffering its effects will continue to feel unheard or stigmatized.

Daar also emphasizes the harm caused to prospective parents when they are denied fertility services.[50] In particular, prospective parents experiencing infertility could be left childless if they are denied treatment.[51] While adoption may be an alternative for some people, the same groups that are excluded from fertility services may also be excluded from adoption networks.[52] This harm supports expanding access to fertility treatments. Moreover, it is also important to recognize that people who do not experience infertility issues are generally able to have as many children as they would like, while those who experience added challenges must subject themselves to the will of third parties.[53]

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42. *Id.*

43. *E.g.*, Bragdon v. Abbott, 524 U.S. 624, 638–39 (1998).

44. *See* Packin, *supra* note 41, at 54–55.

45. Amelia Swanson & Andrea Mechanick Braverman, *Psychological Components of Infertility*, 59 FAM. CT. REV. 67, 68 (2021).

46. *Id.* at 68.

47. *See id.* at 68–69.

48. Judith Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 30 (2008).

49. *Id.* at 30–31.

50. *See id.* at 49–62.

51. *Id.* at 50–51.

52. *Id.* at 51.

53. *Cf. id.* at 56–57 ("The burdens of ART treatment denials impose short-term economic and long-term physical and psychological injury to individuals whose ability to procreate rests largely in the hands of physician providers. The affront to personhood is especially grave when one considers that no similar screening mechanism exists for natural

Denying people access to fertility services, and thus limiting their right to have children, may also harm one's dignity.[54]

As previously noted, access to fertility services is currently split along socioeconomic lines.[55] Given these clear divides, forgoing the use of such services cannot merely be understood as a choice. Rather, the current system creates barriers that favor certain groups of people while marginalizing people who often belong to historically oppressed groups.[56] We should not be comfortable with continuing such clear unequal treatment. As race, gender, and legal scholar Dorothy Roberts argued:

> Reproductive liberty must encompass more than the protection of an individual['s] choice to end [their] pregnancy. It must encompass the full range of procreative activities, including the ability to bear a child, and it must acknowledge that we make reproductive decisions within a social context, including inequalities of wealth and power. Reproductive freedom is a matter of social justice, not individual choice.[57]

Thus, we should look beyond the narrow framing of fertility services as elective and understand the broader rights and social harms at stake—this understanding reveals the necessity of increasing access to those currently excluded from such services.

B. Critiques of Increased Access

Policies to increase access to fertility services may primarily benefit communities that are already the usual recipients of such services.[58] Dorothy Roberts raised similar concerns in a 1995 article, wherein she noted that emerging reproductive technologies predominantly allow affluent white people to continue their family lines, legitimizing "an oppressive social hierarchy."[59] She also noted that services like surrogacy may not only commodify the womb, but also devalue Black women by exploiting their wombs in a manner akin to slavery.[60]

However, over a decade later, Roberts revisited her concerns with reproductive technologies.[61] She found that the fertility industry "no

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conception. Fertile prospective parents whom society may adjudge 'unfit' because of their social status are free to procreate without interference by the State or private actors.").

54. *Id.* at 57–59.

55. *See* discussion *supra* Section I.B.

56. *See* Daar, *supra* note 48, at 38–43.

57. DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY 6 (1997).

58. *See* discussion *infra* Part III.

59. Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 235, 244–45 (1995).

60. *Id.* at 249–52.

61. Dorothy E. Roberts, *Race, Gender, and Genetic Technologies: A New Reproductive Dystopia?*, 34 SIGNS 783, 784–88 (2009).

longer appeals to an exclusively white clientele."[62] While whiteness has remained the focus of the industry, and Roberts remains cautious of these technologies, she notes that fertility services have diversified and that increased availability of services like genetic screening have made it possible for people with low incomes to receive such services.[63]

More recently, Professor Khiara M. Bridges similarly raised concerns that surrogacy arrangements could reinforce racial hierarchies and socioeconomic disparities.[64] For members of historically marginalized groups dealing with various sources of oppression, fighting for access to surrogacy might seem indulgent.[65] Despite these risks, however, Bridges argues that surrogacy should not be prohibited, and that doing so would not fix existing disparities.[66] Instead, she suggests the need to support and learn from marginalized groups, challenge hierarchical understandings of family relationships, and dismantle discriminatory adoption and foster laws.[67] Just as with surrogacy laws, limiting access to other forms of fertility services will not remedy existing disparities, and in fact, will likely create more inequity. Given that those who predominantly use fertility services are people with relatively greater privilege,[68] it is highly unlikely that advocates will be able to stop continued use of these services. Instead, comparatively older and higher-income white women will continue to benefit from fertility services, while many others will be forced to remain childless or pursue alternative avenues like adoption.[69] Based on this rationale, access to fertility services should be further expanded rather than reduced, while other tools are used to simultaneously lessen disparities in access.

A related concern about ART is that increasing access to fertility services over-emphasizes the importance of genetic connections to one's children.[70] U.S. society often views a "shared genetic identity" as creating a special type of relationship between parent and child.[71] The weight that U.S. society places on this connection can be seen in our laws that afford certain parental rights based on a genetic tie.[72] For example, legal maternity has historically been presumed based on the act of birth and

62. *Id.* at 787.
63. *Id.* at 788–92.
64. Khiara M. Bridges, *Compensated Surrogacy in the Age of Windsor: Windsor, Surrogacy, and Race*, 89 WASH. L. REV. 1125, 1127 (2014).
65. *Id.* at 1150.
66. *Id.* at 1152.
67. *Id.* at 1152–53.
68. *See* discussion *supra* Section I.B.
69. *See* Daar, *supra* note 48, at 40, 50.
70. Roberts, *supra* note 59, at 239.
71. *Id.* at 215.
72. *See id.* at 252–55.

genetic connection.[73] This phenomenon also plays out in custody battles between adoptive and biological parents[74] and instances where fertility clinics use the wrong genetic material.[75] Both society and the law may presuppose a parental connection based solely on a genetic connection.

Given that we may already overestimate the extent to which our genetic connections define who we are,[76] increasing access to fertility services may further promote these ideals. However, this is not something that should prevent increased access to currently excluded groups. People without fertility issues are not scrutinized for their desire to have genetically-related children.[77] Holding people experiencing such issues to a different standard seems neither logical nor fair.[78] Just like people without fertility issues, people experiencing infertility should have the choice to either have genetically-related children or have children through other means (or both). Moreover, as discussed earlier, it is highly unlikely that maintaining the status quo or even attempting to discourage fertility services will decrease their use.[79] Increased access, along with other remedial measures, provides the best chance for decreasing disparities.[80]

III. Insurance Laws as Gatekeepers to Access

Cost is one of the biggest obstacles for people seeking fertility treatments.[81] Most people seeking IVF have to pay the full cost of the treatment because they do not have health insurance, or because their insurance plan does not cover fertility treatment, specifically excludes IVF, or only covers diagnosis of infertility.[82] The need for multiple rounds

73. *See id.* at 253–54 (detailing how an automatic social and legal relationship is formed between a mother and the child she birthed).

74. *See id.* at 212–13 (describing the contentious custody case between the adoptive and biologic parents of "Baby Jessica").

75. *See* Raizel Liebler, *Are You My Parent? Are You My Child? The Role of Genetics and Race in Defining Relationships After Reproductive Technological Mistakes*, 5 DEPAUL J. HEALTH CARE L. 15, 21–28 (2001).

76. Roberts, *supra* note 59, at 222–33 (linking the prioritization of genetic ties to efforts to establish racial classifications and hierarchies in U.S. society).

77. Lori B. Andrews & Lisa Douglass, *Alternative Reproduction*, 65 S. CAL. L. REV. 623, 628 (1991).

78. *Id.*

79. *See* Roberts, *supra* note 61, at 784–86 (explaining that low-income people and people of color have been historically discouraged from using fertility services yet increasingly use them); Weigel et al., *supra* note 17 ("The CDC finds that use of IVF has steadily increased since its first successful birth in 1981." (citation omitted)).

80. *See* Ethics Comm. of the Am. Soc'y for Reprod. Med., *supra* note 2, at 55 (noting the vitality of improved access and utilization in combination with further demographic research and treatment).

81. *See id.* at 54.

82. *Id.* at 55.

of treatment in some cases can make treatment cost-prohibitive.[83] In addition, treatments like IVF are more costly if donor eggs or sperm are used, which imposes a heavier financial burden on LGBTQIA+ couples.[84] There are also external costs, such as missing work for treatments, which can place a particularly heavy toll on people with low incomes who are trying to become pregnant.[85] In fact, one study found that 70% of women incurred debt from their IVF treatments.[86] Further, the racial wealth gap may also cause reliance on one's ability to pay for services to act as a proxy for race to a certain extent.[87]

Insurance laws mandating coverage of particular health benefits seek to reduce costs for patients and improve access to services.[88] Several states have implemented mandates requiring insurers to cover or offer fertility services.[89] However, while state mandates have improved access and outcomes of fertility treatments, disparities in such treatments persist in these states.[90] The increased use of fertility services is largely attributed to comparatively older white women with higher incomes and levels of education.[91]

Persistent disparities may be caused, in part, by limitations built into state laws, such as waiting periods and marriage requirements.[92] A 2019 study found that comprehensive mandates—defined as mandates that require coverage of four or more cycles of IVF—increased use of IVF, while "limited mandates" have not had a substantial effect on IVF usage.[93] Moreover, given racial disparities in public and private insurance usage,[94]

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83. Weigel et al., *supra* note 17.

84. *Id.*

85. *Id.*

86. Ethics Comm. of the Am. Soc'y for Reprod. Med., *supra* note 2, at 55.

87. JUDITH DAAR, THE NEW EUGENICS: SELECTIVE BREEDING IN AN ERA OF REPRODUCTIVE TECHNOLOGIES 86 (2017).

88. *See* Sheree L. Boulet, Jennifer Kawwass, Donna Session, Denise J. Jamieson, Dmitry M. Kissin & Scott D. Gross, *US State-Level Infertility Insurance Mandates and Health Plan Expenditures on Infertility Treatments*, 23 MATERNAL & CHILD HEALTH J. 623, 624 (2019).

89. Weigel et al., *supra* note 17.

90. *See* CTR. FOR REPROD. RTS., INFERTILITY AND IVF ACCESS IN THE UNITED STATES: A HUMAN RIGHTS-BASED POLICY APPROACH 5 (2020), https://reproductiverights.org/fact-sheet-infertility-and-ivf-access-in-the-united-states-a-human-rights-based-policy-approach/ [https://perma.cc/GK7C-7U9T].

91. Ethics Comm. of the Am. Soc'y for Reprod. Med., *supra* note 2, at 56; CTR. FOR REPROD. RTS., *supra* note 90.

92. DAAR, *supra* note 87, at 87.

93. Boulet et al., *supra* note 88, at 628–29.

94. KATHERINE KEISLER-STARKEY & LISA N. BUNCH, U.S. CENSUS BUREAU, HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2020, at 6 (2021), https://www.census.gov/content/dam/Census/library/publications/2021/demo/p60-274.pdf [https://perma.cc/T7YD-7E4Z] ("In 2020, Blacks had the highest rate of public coverage (41.4 percent) followed by Hispanics (35.9 percent), non-Hispanic Whites (33.8 percent), and Asians (27.0 percent). In the same year, non-Hispanic Whites had the highest rate of private coverage (73.9 percent),

state mandates that only regulate private plans may not be effective in significantly increasing access for members of BIPOC communities.[95] This section analyzes particular insurance provisions and how they center the standard of the white nuclear family and perpetuate disparities in access to fertility treatment.

A. Analysis of Coverage of Fertility Services by State

Private insurance plans are often subject to state regulation mandating coverage of certain services. Nineteen states currently require some level of coverage for fertility treatment or diagnosis, fourteen of which include an explicit provision for IVF coverage.[96] Two of these states, California and Texas, require group insurers to offer coverage for fertility treatments, but group policyholders can decide whether or not to include this benefit in the plans they offer.[97]

The scope and amount of coverage varies widely between states.[98] Narrowly-crafted state insurance laws can exclude certain groups from coverage, making treatment unattainable for many prospective parents.[99] For example, marriage requirements historically excluded LGBTQIA+ couples, and they also adversely impact non-married persons whether they are single or in a non-marital relationship with someone with whom they would like to have a child.[100] Arkansas law, for instance, requires insurance companies to cover IVF[101] but only if a person seeking

followed by Asians (72.4 percent), Blacks (54.6 percent), and Hispanics (49.9 percent).").

95. DAAR, *supra* note 87, at 86–87.

96. *Insurance Coverage by State*, RESOLVE: NAT'L INFERTILITY ASS'N, https://resolve.org/what-are-my-options/insurance-coverage/infertility-coverage-state/ [https://perma.cc/8CMW-37KJ]; *see also infra* Appendix. This discussion focuses on coverage of fertility diagnosis and treatment. It does not include a discussion on coverage of fertility preservation services such as cryopreservation (i.e., preserving cells or other parts of the body to be used in the future). *See Cryopreservation*, NAT'L CANCER INST., https://www.cancer.gov/publications/dictionaries/cancer-terms/def/cryopreservation [https://perma.cc/N4M8-QYYR]. While differences in coverage of these services also raise concerns, a detailed discussion is outside the scope of this Article. In addition, Louisiana's insurance law regarding fertility services only provides that coverage cannot be denied for "diagnosis and treatment of a correctable medical condition otherwise covered by the policy, contract, or plan solely because the condition results in infertility." See LA. STAT. ANN. § 22:1036 (2001). Thus, it is not included in this count.

97. Weigel et al., *supra* note 17.

98. *See State Laws Related to Insurance Coverage for Infertility Treatment*, NAT'L CONF. ST. LEGS. (Mar. 12, 2021), https://web.archive.org/web/20220306021615/ https://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws.aspx [perma.cc/5G4N-EPBK].

99. *See* Weigel et al., *supra* note 17.

100. Four states have restrictions based on marital status. *See infra* Appendix (Arkansas, Hawaii, Maryland, and Texas).

101. ARK. CODE ANN. § 23-85-137 (2016).

IVF is using their spouse's sperm.[102] Some states also use a heteronormative definition of infertility or require same-sex couples to pay out-of-pocket for fertility treatments for a certain period of time prior to being considered infertile.[103] For example, California's mandate defines infertility as "(1) the presence of a demonstrated condition recognized by a licensed physician and surgeon as a cause of infertility, or (2) the inability to conceive a pregnancy or to carry a pregnancy to a live birth after a year or more of regular sexual relations without contraception."[104] If two cis-women sought coverage under the California statute, they likely would be unable to do so unless their sexual orientation was classified as a "condition"[105]—an outcome that seems unlikely and potentially problematic. A state's definition of infertility may also be unduly restrictive, even if not using a heteronormative framework. For example, a Maine bill, which ultimately did not become law, included an exemption from coverage for people whose infertility was caused by a sexually transmitted disease.[106]

Age restrictions are also relatively common. Four states currently impose some type of age limitation on coverage.[107] Rhode Island, for example, limits coverage of infertility diagnosis and treatment to women ages twenty-five to forty-two.[108]

Other provisions do not necessarily explicitly exclude certain groups but may do so in practice. For example, state caps on costs or number of treatments may negatively impact groups that experience more difficulty achieving successful treatment outcomes.[109] Eleven states currently either limit the number of treatments that a person may receive or cap the cost of treatment.[110] For instance, Arkansas regulations allow

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102. 054-00-001 ARK. CODE R. § 5(B) (LexisNexis 1991).

103. *See* Dan Avery, *Gay Couples Face Added Hurdle When Trying to Start a Family: Insurance Policies*, NBC NEWS (Dec. 17, 2020), https://www.nbcnews.com/feature/nbc-out/gay-couples-face-added-hurdle-when-trying-start-family-insurance-n1251394 [https://perma.cc/A4HW-YMMQ] (describing how a same-sex male couple was denied insurance coverage for egg retrieval because the couple did not meet the insurer's infertility requirements); *see also* First Amended Complaint ¶¶ 2, 8, 29–30, 34–35, Goidel v. Aetna Life Ins., Co., No. 1:21-cv-07619 (S.D.N.Y. filed Sep. 13, 2021) (alleging Aetna's definition of "infertility," which mirrors the state definition, and corresponding out-of-pocket cost determinations discriminate against LGBTQIA+ people). Eight states currently have such heteronormative definitions. *See infra* Appendix (California, Connecticut, Delaware, Illinois, Massachusetts, New Hampshire, Rhode Island, and Utah).

104. CAL. INS. CODE § 10119.6(b) (2014).

105. *Id.*

106. DAAR, *supra* note 87, at 87.

107. *See infra* Appendix (Connecticut, Delaware, New Jersey, and Rhode Island).

108. 27 R.I. GEN. LAWS § 27-18-30(a) (1989).

109. *See* discussion *supra* Section I.B.

110. *See infra* Appendix (Arkansas, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, New Jersey, New York, Rhode Island, and Utah).

insurers to place a lifetime cap on IVF coverage of $15,000,[111] while Hawaii provides for one-time coverage of IVF.[112] California's law, previously discussed, explicitly excludes IVF from covered fertility treatments.[113] Exclusion of coverage for IVF may similarly harm people who have substantial difficulties getting pregnant, as it is the most effective form of ART and thus may help people become pregnant when other treatment options are unsuccessful.[114]

Waiting periods may negatively impact older prospective parents, since delaying treatment may make it less likely that such treatment will be successful.[115] Moreover, since people of color may be more likely to delay seeking fertility services, they may face the brunt of these exclusionary policies.[116] Four states that mandate coverage for fertility services currently impose a waiting period.[117] Hawaii, for example, requires that both the person seeking treatment and their spouse be considered infertile for at least five years prior to treatment, unless the infertility is caused by one of four enumerated conditions.[118]

B. Scope of State Insurance Mandates

Even if a state adopts a comprehensive mandate requiring coverage of fertility services, such mandates do not extend to all policies within the state's boundaries.[119] For example, the Massachusetts insurance mandate, considered an inclusive policy, only covers 36.3% of "reproductive aged women."[120] Most insurance mandates only regulate private insurance plans.[121] This excludes Medicare and Medicaid, which are two of the three most common types of insurance.[122] The other

111. 054-00-001 ARK. CODE R. § 06 (LexisNexis 1991).

112. HAW. REV. STAT. § 431:10A-116.5(a) (1987).

113. CAL. INS. CODE § 10119.6(a) (2014).

114. *See In Vitro Fertilization (IVF)*, *supra* note 20; AM. SOC'Y FOR REPROD. MED., AGE & FERTILITY: A GUIDE FOR PATIENTS 4 (2012), https://www.reproductivefacts.org/globalassets/rf/news-and-publications/bookletsfact-sheets/english-fact-sheets-and-info-booklets/Age_and_Fertility.pdf [https://perma.cc/HZ8Q-AXWG].

115. *See id.*

116. *See* Ethics Comm. of the Am. Soc'y for Reprod. Med., *supra* note 2, at 55.

117. *See infra* Appendix (Arkansas, Connecticut, Hawaii, and Texas).

118. HAW. REV. STAT. § 431:10A-116.5(a)(4) (2013).

119. *See* DAAR, *supra* 87, at 91.

120. Katherine Koniares, Alan S. Penzias & Eli Adashi, *Has the Massachusetts Infertility Mandate Lived Up to Its Promise?*, 112 FERTILITY & STERILITY e41, e41–42 (2019).

121. *See State Insurance Mandates and the ACA Essential Benefits Provisions*, NAT'L CONF. ST. LEGS. (Apr. 12, 2018), https://web.archive.org/web/20221217214734/https://www.ncsl.org/research/health/state-ins-mandates-and-aca-essential-benefits.aspx [https://perma.cc/8JEW-9266].

122. *See* Sydney Garrow, *What Is Private Health Insurance?*, EHEALTH (Oct. 27, 2022), https://www.ehealthinsurance.com/resources/individual-and-family/what-is-private-health-insurance [https://perma.cc/2US8-TTV6].

common type of insurance is an employer-sponsored health plan.[123] Employer-sponsored health plans are private insurance plans that employers offer to their employees.[124] Under these arrangements, employers will choose the particular plans that they would like to offer and may also pay a portion of the employees' premiums.[125] Despite the prevalence of these plans, certain employer-sponsored health plans may also be exempt from state mandates.[126]

There are three common types of employer-sponsored health plans: fully-insured, self-insured, or level-funded.[127] If an employer adopts a fully-insured plan, it pays a fixed monthly premium to an insurance company, which is used to cover claims for health benefits.[128] The premiums are put into a pool with other employers, and any claims filed within those employers' policies are paid out from the collective pool.[129] In contrast, if an employer self-insures a plan, the employer pays the insurance company the expected cost of covering its employees' medical claims along with administrative fees, and the employer will usually get a rebate if it does not spend the full amount.[130] The level-funded plan is essentially a modified self-insured plan that allows employers to pay fixed monthly premiums based on their anticipated costs of coverage.[131]

Self-insured plans are exempt from complying with state-mandated health benefits because the federal Employee Retirement and Income Security Act (ERISA) preempts such plans from certain state laws regulating insurance.[132] While there are mandated health benefits for self-insured plans, they come from the federal level rather than the state

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123. *Id.*

124. *Employer vs. Individual Health Insurance Plans*, MED. MUT., https://www.medmutual.com/for-individuals-and-families/health-insurance-education/health-insurance-basics/employer-vs-individual-health-insurance.aspx [https://perma.cc/5ALK-T3FP].

125. *Id.*

126. *See* KAISER FAM. FOUND., EMPLOYER HEALTH BENEFITS: 2020 ANNUAL SURVEY 161, 165 (2020), https://files.kff.org/attachment/Report-Employer-Health-Benefits-2020-Annual-Survey.pdf [https://perma.cc/2EA3-SLHF].

127. Kelsey Waddill, *3 Types of Funding for Employer-Sponsored Health Plan Claims*, HEALTH PAYER INTEL. (Apr. 8, 2021), https://healthpayerintelligence.com/news/3-types-of-funding-for-employer-sponsored-health-plan-claims [https://perma.cc/T35P-UVTK].

128. *Self-Insured vs. Fully Insured*, SOC'Y FOR HUM. RES. MGMT. (Sept. 1, 2009), https://www.shrm.org/hr-today/news/hr-magazine/pages/0909wellsc.aspx [https://perma.cc/WGL9-59K4].

129. *A Self-Funded Plan Can Be Part of Your Strategy to Lower Health Care Costs*, AETNA, https://www.aetna.com/employers-organizations/self-insurance-plans.html [https://perma.cc/4XJW-GD4L].

130. *Self-Insured vs. Fully Insured*, *supra* note 128.

131. *Staying on the Level: Keeping Your Level-Funded Plan Compliant*, HUB INT'L LTD. (Mar. 20, 2019), https://www.hubinternational.com/products/employee-benefits/compliance-bulletins/2019/03/level-funded-plans/ [https://perma.cc/EN5G-MD95].

132. FMC Corp. v. Holliday, 498 U.S. 52, 64–65 (1990).

level.[133] Because level-funded plans are considered a form of self-insured plans, they are also exempt from state-mandated insurance benefits.[134] This exemption is substantial, as self-insured and level-funded plans make up a significant amount of the insurance market.[135] 67% percent of people covered by an employer-sponsored health plan are covered by a self-insured plan.[136] In addition, 31% of people working in companies with less than two hundred employees are covered either by a self-insured plan or a level-funded plan.[137] Because of ERISA preemption, state mandates requiring plans to cover fertility treatment or diagnosis do not reach a large swath of insureds.

In addition, many state laws exempt religious organizations from covering fertility treatments.[138] Employers who have below a certain number of employees may also be exempt from coverage requirements.[139] Likewise, states may make mandates applicable to certain types of plans or exempt certain plans.[140] For example, New York requires large group policies to cover three rounds of IVF, exempting small group plans and plans from the individual market.[141]

Even in states with seemingly mandated fertility benefits, employers may read the law narrowly and decline to provide such benefits.[142] In these cases, employers are often betting that employees will decline to challenge the legality of the employer's policy given the risks of such action.[143]

C. Access to Fertility Services in Mandate States

Despite their many limitations, state-mandated coverage of fertility services has caused use of such services to almost triple.[144] Studies focused on IVF use have also noted better health outcomes for both parents and babies in states with mandated coverage.[145] Prospective

133. *See* Louise Norris, *What Is Self-Insured Health Insurance?*, VERYWELL HEALTH (Mar. 19, 2023), https://www.verywellhealth.com/what-is-self-insured-health-insurance-and-how-is-it-regulated-4688567 [https://perma.cc/Z7E6-WKBC].

134. *Staying on the Level: Keeping Your Level-Funded Plan Compliant*, *supra* note 131.

135. *See* KAISER FAM. FOUND., *supra* note 126, at 161, 165.

136. *Id.* at 161.

137. *Id.* at 165.

138. *See State Laws Related to Insurance Coverage for Fertility Treatment*, *supra* note 98.

139. *See id.*

140. *See e.g.*, N.Y. INS. LAW § 3221 (McKinney 1984).

141. *See id.*

142. *Infertility Treatment & In Vitro Fertilization – IVF – Insurance Coverage Issues*, ADVANCED FERTILITY CTR. CHI., https://advancedfertility.com/fertility-treatment/affording-care/fertility-insurance/ [https://perma.cc/82UX-XM86].

143. *Id.*

144. Ethics Comm. of the Am. Soc'y for Reprod. Med., *supra* note 2, at 56.

145. *Id.*

parents in mandate states were more likely to transfer fewer embryos during IVF treatment compared to those in states with no mandate.[146] Because of the high cost of treatment, people are incentivized to transfer more embryos at once, hoping this will improve the chances of becoming pregnant.[147] However, transferring multiple embryos increases the chance of a multiple birth, which increases the risk of complications.[148] Reducing the financial pressure of treatment gives prospective parents more flexibility to transfer significantly fewer embryos, promoting parental and fetal health.[149] Although state regulation has its benefits, the current regime continues to exclude people of color, people with comparatively lower incomes and/or education levels, single people, and LGBTQIA+ couples.

IV. Socioeconomic and Historical Barriers Causing Disparities in Access

While insurance laws with limitations represent explicitly sanctioned barriers to fertility services, implicitly sanctioned discrimination prevents access to fertility services as well. This Part analyzes some of these barriers and their impact on different groups in accessing fertility services.

A. Provider Discrimination

Medical providers themselves may discriminate against people who they do not believe should be having children.[150] For example, Guadalupe T. Benitez was denied intrauterine insemination by doctors who claimed their religious beliefs prevented them from treating lesbian patients.[151] Benitez sued the clinic for sexual orientation discrimination under

146. Press Release, Am. Soc'y for Reprod. Med., State Insurance Mandates Have a Positive Impact on Fertility Treatment Success (Oct. 17, 2021), https://web.archive.org/web/20220930033510/https://www.asrm.org/news-and-publications/news-and-research/press-releases-and-bulletins/state-insurance-mandates-have-a-positive-impact-on-infertility-treatment-success/ [https://perma.cc/AH4C-SURJ].

147. CTR. FOR REPROD. RTS., *supra* note 90, at 5.

148. *Id.*

149. Ethics Comm. of the Am. Soc'y for Reprod. Med., *supra* note 2, at 56.

150. *See* DAAR, *supra* note 87, at 79, 99–100, 132 (noting that medical professionals may make judgments of parental fitness based on their assumptions of certain BIPOC communities or people with disabilities); *see also* Roberts, *supra* note 59, at 240–41 ("[F]ertility clinics routinely deny their services to single women, lesbians, women with genetic disorders, and women who are not considered good mothers."); CTR. FOR REPROD. RTS., *supra* note 90, at 6 ("Provider bias has also been documented against persons who are HIV positive, have an intellectual disability, or are bipolar.").

151. N. Coast Women's Care Med. Grp. v. San Diego Cnty. Superior Ct., 189 P.3d 959, 963–64 (Cal. 2008).

California law.[152] Although the court ultimately concluded that the right to religious freedom and the right to exercise free speech did not exempt the doctors from such law, her victory took nearly a decade.[153] Given that fertility treatments may become less successful as one ages,[154] such a delayed win is hardly a victory.

People with disabilities may also face barriers created by individuals who think such a person is unfit to parent because of their disability. Kijuana Chambers's story is especially telling, and unfortunately not unique.[155] Chambers was a blind woman who sought fertility treatments from a Colorado fertility clinic.[156] The clinic deemed her unfit to parent because of her blindness.[157] Chambers ultimately sued the clinic, alleging that it had violated the ADA and Section 504 of the Rehabilitation Act of 1976.[158] The clinic claimed that they also had concerns with Chambers's personal hygiene and mental state, and argued that "[the] case [was] about the moral and ethical responsibility of a physician."[159] The court dismissed Chambers's ADA claim, finding "sufficient evidence that a reasonable jury could have concluded that [the clinic] did not discriminate against Chambers *solely* on the basis of her blindness."[160] As Professor Kimberly M. Mutcherson notes, the system for seeking fertility services allows providers to make normative judgments about who is fit to parent based on "amorphous concerns about the parenting skills of the patient and the best interests of the potential child."[161]

Providers may also offer different care to patients based on race. Primary care physicians can refer patients of color to infertility specialists at lower rates compared to white patients and may also "deliberately steer Black patients away from reproductive technologies."[162] A person's source of income may also prevent them from receiving fertility services. In one study, almost half of the doctors surveyed indicated that they

152. *Id.* at 964.

153. *See id.* at 962.

154. AM. SOC'Y FOR REPROD. MED., *supra* note 114.

155. NAT'L COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN 167 (2012), https://www.ncd.gov/sites/default/files/Documents/NCD_Parenting_508_0.pdf [https://perma.cc/K49G-KY72].

156. *Id.*

157. DAAR, *supra* note 87, at 132.

158. Chambers v. Melmed, 141 F. App'x 718, 719–20 (10th Cir. 2005).

159. *Blind Woman Loses Fertility Lawsuit*, NBC NEWS (Nov. 21, 2003), https://www.nbcnews.com/id/wbna3541401 [https://perma.cc/TK5L-UFDJ].

160. *Chambers*, 141 F. App'x at 724 (emphasis added).

161. *See* Kimberly M. Mutcherson, *Disabling Dreams of Parenthood: The Fertility Industry, Anti-Discrimination, and Parents with Disabilities*, 27 LAW & INEQ. 311, 311–12 (2009).

162. DAAR, *supra* note 87, at 91 (quoting Roberts, *supra* note 28, at 940).

would decline treating a patient who receives public assistance.[163] Like cost, use of public assistance to determine who receives treatment disproportionately excludes members of BIPOC communities.[164] Lastly, white patients are often diagnosed with infertility conditions that IVF can overcome, while Black patients experiencing infertility are more likely to be diagnosed with pelvic inflammatory disease, a condition that is frequently treated using sterilization.[165]

B. Location and Advertisement of Fertility Services

Fertility clinics are disproportionately located in higher income areas, creating a geographic barrier to these services.[166] The need for frequent visits during treatment also worsens the impact of geographic barriers.[167] In addition, fertility clinic advertisements perpetuate the notion that fertility treatment is a white service.[168] A 2013 study found that 97.28% of clinics included in the study featured white babies on their website.[169] Of those clinics, 62.93% featured white babies exclusively, compared to 1.02% of websites featuring either only Black babies or only Asian babies, and 0.34% featuring only Latinx babies.[170] These disparities may cause prospective white parents to feel more welcome at fertility clinics while marginalizing prospective parents of color.[171] These figures may also indicate that fertility clinics are targeting prospective white parents and perpetuating racist narratives regarding parental fitness.[172]

C. Cultural and Social Barriers

Cultural and social barriers also inhibit access to fertility treatment for members of many historically marginalized groups.[173] Black women have been stereotyped as being hyper-fertile or being "baby-making machines."[174] However, research shows that married Black women are

163. *Id.* at 102.

164. *Id.*

165. *Id.* at 95.

166. John A. Harris, Marie N. Menke, Jessica K. Haefner, Michelle H. Moniz & Chithra R. Perumalswami, *Geographic Access to Assisted Reproductive Technology Health Care in the United States: A Population-Based Cross-Sectional Study*, 107 FERTILITY & STERILITY 1023, 1023 (2017).

167. *Id.*

168. *See* DAAR, *supra* note 87, at 101.

169. Jim Hawkins, *Selling ART: An Empirical Assessment of Advertising on Fertility Clinics' Websites*, 88 IND. L.J. 1147, 1169 (2013).

170. *Id.*

171. *Id.* at 1169–70.

172. *Id.* at 1170.

173. DAAR, *supra* note 87, at 93.

174. Alexia Fernández Campbell & Nat'l J., *Five Myths About Women of Color, Infertility, and IVF Debunked*, ATLANTIC (Sept. 3, 2015), https://www.theatlantic.com/politics/archive/

almost two times more likely to have infertility issues compared to married white women.[175] In discussing her struggles and the stigma behind seeking treatment for infertility, Reverend Stacey Edwards-Dunn describes pouring her life savings into fertility treatments before being diagnosed as having a single fallopian tube and a unicornuate uterus.[176] She emphasizes the failures of the medical system to properly diagnose Black patients and the secrecy of infertility in the Black community that stems from racist assumptions of fertility.[177]

The racist history of the U.S. health care system may also contribute to mistrust and consequent avoidance of the system by members of historically marginalized groups.[178] One of the most prominent examples of this behavior was the U.S. Public Health Service (USPHS) Syphilis Study at Tuskegee.[179] This study began in 1932 and followed about 600 Black men, most of whom were diagnosed with syphilis, over the course of forty years.[180] Despite penicillin being accessible and the "treatment of choice for syphilis" by 1943, the men were not treated and were left to suffer until a 1972 exposé revealed the details of the study.[181] The men never gave informed consent to participate in the study.[182] Many of the participants were "poor and illiterate," and the USPHS provided incentives to participate.[183]

Unfortunately, the USPHS syphilis study was far from the only example of researchers' exploitation of BIPOC reproductive health. In the 1950s, eugenicists crafted and executed a plan involving widespread sterilization and the experimental use of contraception on Puerto Rican women to develop a low-cost birth control pill.[184] One of the researchers felt that "Puerto Ricans and others living in poverty should be wiped out to make room for more 'fit' members of the population, and birth control

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2015/09/five-myths-about-women-of-color-infertility-and-ivf-debunked/432711/ [https://perma.cc/M96L-GEQX].

175. *Id.*

176. *Fighting for Fertility*, PBS (May 12, 2021), https://www.pbs.org/wgbh/nova/video/fighting-for-fertility/ [https://perma.cc/S9D7-S9JJ].

177. *Id.*

178. *See* DAAR, *supra* note 87, at 93.

179. *See The U.S. Public Health Service Syphilis Study at Tuskegee*, CDC, https://www.cdc.gov/tuskegee/timeline.htm [https://perma.cc/TG4U-RFA7].

180. *Id.*

181. *Id.*

182. *Id.*

183. Marcella Alsan & Marianne Wanamaker, *Tuskegee and the Health of Black Men*, 133 Q.J. ECON. 407, 414 (2018) (quoting JAMES H. JONES, BAD BLOOD: THE TUSKEGEE SYPHILIS EXPERIMENT (1992)).

184. *See* Erin Blakemore, *The First Birth Control Pill Used Puerto Rican Women as Guinea Pigs*, HISTORY (Mar. 11, 2019), https://www.history.com/news/birth-control-pill-history-puerto-rico-enovid [https://perma.cc/WR86-8C23].

was part of that vision."[185] In fact, the United States blatantly imposed restrictions on reproduction for people of color and other marginalized groups during the eugenics movement to "stav[e] off the birth of 'undesirables.'"[186]

Members of BIPOC communities also face worse health outcomes compared to white people, which can increase mistrust of the health care system.[187] On average, Black and Indigenous women are approximately two to three times more likely than white women to die either during pregnancy or from complications arising from pregnancy.[188] When narrowing the discussion to women over thirty years old, Black and Indigenous women are about four to five times more likely to face such outcomes.[189] BIPOC patients may face better health outcomes and achieve better communication if they visit a doctor who looks like them.[190] Having a doctor with a similar background can also help patients develop a sense of security and trust.[191] Unfortunately, fertility specialists are overwhelmingly white,[192] which leaves patients of color with little choice when looking for such a connection.

V. Improving an Imperfect Solution: The Access to Infertility Treatment and Care Act

State insurance laws have not significantly reduced barriers to accessing fertility treatments for members of currently excluded groups.[193] Moreover, while these laws may address issues of cost for those included in their coverage, they fail to address implicitly sanctioned barriers to access, such as geographical or cultural limitations. A bill introduced in the 117th Congress, the Access to Infertility Treatment and Care Act (the Act), sought to fill some of the gaps left by state

185. *Id.*

186. *See* DAAR, *supra* note 87, at 93, 28–53.

187. *See* Emily E. Petersen, Nicole L. Davis, David Goodman, Shanna Cox, Carla Syverson, Kristi Seed, Carrie Shapiro-Mendoza, William M. Callaghan & Wanda Barfield, *Racial/Ethnic Disparities in Pregnancy-Related Deaths — United States, 2007–2016*, 68 MORBIDITY & MORTALITY WKLY. REP. 762, 762 (2019).

188. *Id.*

189. *Id.*

190. *See* Austin Frakt, *Bad Medicine: The Harm That Comes from Racism*, N.Y. TIMES (July 8, 2020), https://www.nytimes.com/2020/01/13/upshot/bad-medicine-the-harm-that-comes-from-racism.html [https://perma.cc/3U48-84T9].

191. Verónica Zaragovia, *Trying to Avoid Racist Health Care, Black Women Seek Out Black Obstetricians*, NPR (May 28, 2021), https://www.npr.org/sections/health-shots/2021/05/28/996603360/trying-to-avoid-racist-health-care-black-women-seek-out-black-obstetricians [https://perma.cc/L3P8-DJ76].

192. DAAR, *supra* note 87, at 102–03; *see also* Michael A. Thomas, *Making an African American REI Physician: A Story of Mentorship*, 116 FERTILITY & STERILITY 281, 282–83 (2021) (describing the lack of Black male doctors in obstetrics and gynecology).

193. *See* discussion *supra* Section III.C.

legislatures.[194] However, this formulation of the Act still would have been an imperfect solution. Iterations of this bill have been introduced in multiple sessions of Congress, and thus will likely be introduced in the future.[195] However, while many advocates were in favor of this proposed legislation,[196] there is almost no existing literature critiquing the Act or suggesting potential improvements to its provisions. This Part explains the provisions of the most recently introduced version of the Act and provides suggestions for creating a more inclusive and effective law.

A. The Terms of the Access to Infertility Treatment and Care Act

The Access to Infertility Treatment and Care Act was most recently introduced in the U.S. House and Senate in July of 2021.[197] The Act recognizes the prevalence of infertility in the United States and the limits of the current legislative regime in affording people meaningful access to fertility treatments.[198] Given these findings, this version of the proposed Act would have required insurers to cover fertility treatments, including non-experimental ART procedures and other services deemed appropriate.[199] This iteration of the proposed Act defines infertility as "a disease, characterized by the failure to establish a clinical pregnancy," either "after 12 months of regular, unprotected sexual intercourse," or "due to a person's incapacity for reproduction either as an individual or with his or her partner, which may be determined after a period of less than 12 months of regular, unprotected sexual intercourse, or based on medical, sexual and reproductive history, age, physical findings, or diagnostic testing."[200]

Under its most recent formulation, the Act would apply to insurers offering individual or group plans, along with Federal Employees Health Benefits Program (FEHBP) plans for federal employees, TRICARE plans for military members, veterans plans administered by the United States Department of Veterans Affairs (VA), and state Medicaid plans.[201]

194. *See* Access to Infertility Treatment and Care Act, H.R. 4450, 117th Cong. (2021).

195. *See* Access to Infertility Treatment and Care Act, H.R. 2803, 116th Cong. (2019); Access to Infertility Treatment and Care Act, H.R. 5965, 115th Cong. (2018).

196. *See, e.g.*, *Booker, DeLauro Re-Introduce Bill to Increase Access to Infertility Treatment*, CORY BOOKER (July 16, 2021), https://www.booker.senate.gov/news/press/booker-delauro-re-introduce-bill-to-increase-access-to-infertility-treatment [https://perma.cc/M2S7-L2GH] (announcing re-introduction of the bill with a list of co-sponsors and endorsing organizations).

197. *See* Access to Infertility Treatment and Care Act, H.R. 4450, 117th Cong. (2021).

198. *Id.* § 2.

199. *Id.* § 3(a). The most recent version of the proposed Act would also require coverage for iatrogenic infertility, which is infertility due to a medical service such as chemotherapy. *Id.* However, discussion of this provision is beyond the scope of this Article.

200. *Id.*

201. *See id.* §§ 3–7.

Notably, the most recent version of the proposed Act does not limit its reach to larger group plans or fully-insured plans,[202] as many state plans do.[203] It would also impose limits on cost-sharing.[204] For group and individual plans, cost-sharing cannot be greater than what is imposed for "similar services" or have any limits that are "different from limitations imposed with respect to such similar services."[205] Notably, the most recent iteration of the Act would prohibit cost-sharing of fertility treatments for state Medicaid plans.[206] It would also prohibit insurers from offering incentives to avoid coverage of fertility treatment or otherwise discouraging use of such services.[207]

The passage of this Act would make fertility treatments available to a much larger segment of the U.S. population. It would replace the current patchwork of state laws with a uniform nationwide framework. Moreover, its provisions would reach most of the plans that state mandates currently exempt or cannot regulate—namely, state Medicaid plans, certain federally-sponsored plans, self-insured plans, and small group employer-based plans.[208] Senators who sponsored the most recent version of the proposed Act noted that "[t]hese important and life-changing services strengthen families and should be accessible and affordable for all."[209] The proposed Act was also endorsed by several advocacy organizations, including prominent entities in reproductive health policy such as RESOLVE: The National Infertility Association, the American Society for Reproductive Medicine, and the Society for Assisted Reproductive Technology.[210] However, despite the Act's apparent breadth, its most recent formulation may not remedy all barriers to

202. *See id.* § 3(a).

203. *See* discussion *supra* Section III.B.

204. H.R. 4450 §§ 3–7.

205. *Id.* § 3(a).

206. *Id.* § 7(a).

207. *Id.* § 3(a).

208. *See id.* §§ 3–7; *see also* discussion *supra* Section III.B (describing the different types of insurance plans and how ERISA and religious exemptions can supersede state mandates). While the Act would presumably apply to plans offered by religious organizations as well, such organizations would likely challenge the mandate given similar battles over coverage of contraceptives. *See* Timothy S. Jost, *Supreme Court Excuses Organizations with Religious or Moral Objections from Covering Workers' Birth Control*, COMMONWEALTH FUND (July 9, 2020), https://www.commonwealthfund.org/blog/2020/supreme-court-excuses-organizations-religious-or-moral-objections-covering-workers-birth [https://perma.cc/N6NZ-MRLU] (describing the issue of compliance with the mandate by employers that object to contraceptive use on moral or religious grounds as "the most litigated Affordable Care Act (ACA) issue"). However, the Act would still provide significantly more Americans with coverage for fertility services, thus it should not be abandoned if a religious exemption is required.

209. *Booker, DeLauro Re-Introduce Bill to Increase Access to Infertility Treatment*, *supra* note 196.

210. *Id.*

access discussed previously in this Article. The following section elaborates on issues that the most recently introduced iteration of the Act failed to address and suggests revised and additional provisions for future re-introduction of the Act that will ensure inclusivity.

B. A Model for Improving the Access to Infertility Treatment and Care Act

While the most recent iteration of the Act is a step in the right direction to addressing disparities in fertility services, it would not provide a comprehensive solution to the multiple barriers to care previously discussed. First, some provisions may continue to exclude certain groups or may limit covered services. Second, the most recent iteration of the Act did not address factors other than cost that may cause people to avoid seeking fertility services.[211]

i. Exclusionary Aspects of the Most Recent Version of the Act

The language of the most recent iteration of the Act is certainly more inclusive compared to several state mandates. For example, its definition of infertility allows provider discretion "based on medical, sexual and reproductive history, age, physical findings, or diagnostic testing," which may allow for coverage of LGBTQIA+ individuals who cannot typically achieve pregnancy through unprotected sex, or allow coverage for single persons who desire to become pregnant.[212] This inclusion is a significant improvement from the gendered or heteronormative language employed by many state laws.[213] Still, legislators could improve the terms of the Act in several ways.

First, the definition of infertility could be made more inclusive. Despite the expansiveness of the Act's definition in its most recent iteration, use of the term "disease" may allow insurers to avoid coverage for people whose infertility is "*caused*" by their sexual orientation or gender identity.[214] Moreover, given that scientists are only recently recognizing the injury and trauma that can come from labeling same-sex preferences as a mental disability,[215] language like "disease" should be removed to avoid reinforcing these outdated and harmful beliefs.

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211. *See* H.R. 4450.

212. *Id.* § 3(a).

213. *See* discussion *supra* Section III.A; *see also infra* Appendix (listing the eight states that have restrictive definitions of infertility).

214. H.R. 4450 § 3(a).

215. *See* Daniel Trotta, *U.S. Psychoanalysts Apologize for Labeling Homosexuality an Illness*, REUTERS (June 21, 2019), https://www.reuters.com/article/us-usa-lgbt-stonewall-psychoanalysts/u-s-psychoanalysts-apologize-for-labeling-homosexuality-an-illness-idUSKCN1TM169 [https://perma.cc/Q2J7-DRZ8].

Additionally, the Act's definition of infertility in its most recent iteration did not include a provision allowing people over a certain age to seek treatment earlier after failed attempts to conceive through unprotected sex.[216] Although the second prong of the definition allows for provider discretion, older patients may face pushback by providers or insurance companies if such an exception is not explicitly written into the law.[217] Given that the success of fertility treatments can decrease as one ages,[218] barriers to access could prevent older patients from seeking services in time to achieve results. Thus, Congress should adopt a shorter time period for establishing infertility for patients over a certain age. Congress can follow guidance from state mandates that require only six months of unprotected sex for women over the age of thirty-five.[219] However, such a provision must be crafted more inclusively and avoid gendered language, such as by substituting "person" or "patient" for "women."[220]

Next, despite the most recent iteration of the Act's broad applicability to FEHBP, TRICARE, VA, and state Medicaid plans, it would not apply to Medicare plans.[221] Medicare is a federally sponsored program that covers people over the age of sixty-five and people with disabilities.[222] As previously mentioned, it is also one of the largest providers of insurance.[223] The federally-sponsored program currently only covers "[r]easonable and necessary services" to treat infertility,[224]

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216. H.R. 4450 § 3.

217. *Cf.* First Amended Complaint *supra* note 103, ¶¶ 51–53, 66–69 (alleging that Aetna continued to deny coverage of fertility treatments despite guidance from the New York Department of Financial Services clarifying the scope of New York's mandated coverage of fertility benefits); *see also* N.Y. DEP'T FIN. SERVS., INSURANCE CIRCULAR LETTER NO. 3, HEALTH INSURANCE COVERAGE OF INFERTILITY TREATMENTS REGARDLESS OF SEXUAL ORIENTATION OR GENDER IDENTITY (2021), https://www.dfs.ny.gov/industry_guidance/circular_letters/cl2021_03 [https://perma.cc/D99Q-8FU3] ("[S]ince the definition of infertility expressly contemplates coverage for infertility treatment earlier than 12 months, issuers should be mindful that, with respect to some individuals, earlier evaluation and treatment may be justified. It has come to the Department's attention that some issuers may be requiring some individuals to incur costs, due to their sexual orientation or gender identity, that heterosexual individuals do not incur in order to meet the definition of infertility.").

218. *See* AM. SOC'Y FOR REPROD. MED., *supra* note 114.

219. *See infra* Appendix.

220. *See* Lynne Bowker, *Terminology and Gender Sensitivity: A Corpus-Based Study of the LSP of Infertility*, 30 LANGUAGE IN SOC'Y 589 (2001); Emily Hill, *The Fight to Stop Gendered Language*, RACONTEUR (Mar. 12, 2020), https://www.raconteur.net/healthcare/fertility/gendered-language-infertility/ [perma.cc/2GQU-AJEB].

221. *See* H.R. 4450.

222. *What's the Difference Between Medicare and Medicaid?*, U.S. DEP'T HEALTH & HUM. SERVS., https://www.hhs.gov/answers/medicare-and-medicaid/what-is-the-difference-between-medicare-medicaid/index.html [https://perma.cc/W359-KVBC].

223. *See* discussion *supra* Section III.B.

224. CTRS. FOR MEDICARE & MEDICAID SERVS., NO. 100-02, MEDICARE BENEFIT POLICY MANUAL § 20.1(B) (2019).

which does not include IVF or, in most cases, drugs to stimulate or increase fertility.[225] While Congress may have determined that people over the age of sixty-five either would be unlikely to use fertility services or that the costs of offering such services would outweigh the benefits, the primary issue is the exclusion of people with certain disabilities from the protections of the Act. Given the current limitations on coverage of fertility services imposed by Medicare, along with discrimination that people with disabilities may face in accessing such services,[226] Congress should prioritize increasing access for those who receive such coverage.

Lastly, the most recent iteration of the Act would only require coverage of fertility treatments for most insurance plans,[227] rather than *mandating* coverage of infertility diagnosis and treatment. While many plans currently cover services needed to diagnose infertility,[228] such coverage is not universal. For people who do not have plans that cover infertility diagnostic services, the out-of-pocket costs for these services may act as another barrier to access. Although providers and insurers may interpret the term "treatment" as encompassing diagnosis, for the reasons noted previously, an explicit provision to clarify this will ensure that patients do not face unjust delays or denials in coverage.

ii. Addressing Factors Other Than Cost

While cost is a major barrier to accessing fertility services, it is not the only one. As previously discussed, people may be discriminated against by providers who deem them unfit to parent, may face geographical barriers, or may be dissuaded from seeking fertility services based on cultural or societal norms.[229] Congress should attempt to address these non-monetary barriers as well in the Act.

Although patients are already protected from discrimination in health care settings,[230] Congress should include an explicit provision in the Act prohibiting such discrimination in the provision of fertility

225. 42 U.S.C. § 1396r-8(d)(2)(B); *Does Medicare Cover Fertility Treatments?*, MEDICARE.ORG, https://www.medicare.org/articles/does-medicare-cover-fertility-treatments/ [https://perma.cc/CDK9-BFEW].

226. *See* discussion *supra* Section IV.A.

227. *See* Access to Infertility Treatment and Care Act, H.R. 4450, 117th Cong. § 3–7 (2021).

228. *Infertility Treatment & In Vitro Fertilization – IVF – Insurance Coverage Issues*, *supra* note 142.

229. *See* discussion *supra* Part IV.

230. MaryBeth Musumeci, Jennifer Kates, Lindsey Dawson, Alina Salganicoff, Laurie Sobel & Samantha Artiga, *The Trump Administration's Final Rule on Section 1557 Non-Discrimination Regulations Under the ACA and Current Status*, KAISER FAM. FOUND. (Sept. 18, 2020), https://www.kff.org/racial-equity-and-health-policy/issue-brief/the-trump-administrations-final-rule-on-section-1557-non-discrimination-regulations-under-the-aca-and-current-status/ [https://perma.cc/8GAR-TW2P].

services. Such a provision would be similar to Section 1557 of the Affordable Care Act, which adds to and incorporates the protections of other anti-discrimination laws.[231] As the federal Department of Health and Human Services noted, while its final rule implementing Section 1557 "incorporate[s] long-standing principles and protections of civil rights law," it "provides additional guidance in areas for which application of these principles may not be as familiar."[232] Having a similar provision in the Act will remind insurers and providers of their obligations under federal civil rights law and will allow them to understand their obligations in the more specific context of fertility services.

Given that decreasing cost may not limit the geographic barriers of getting to and from fertility clinics, Congress should provide financial incentives for providers to establish clinics in currently underserved areas. Fertility clinics are currently located in predominantly higher income areas.[233] This arrangement is likely convenient for the majority of their existing clientele—upper-income white women.[234] However, traveling to upper-income neighborhoods for treatment will still impose significant costs, such as transportation costs and time, on members of currently excluded groups.[235] In addition, prospective patients may continue to avoid visiting these centers due to feeling like they do not belong in a particular neighborhood or area.[236] Establishing clinics in currently underserved areas could reduce these costs and potential anxieties. Moreover, visiting a fertility specialist in one's own neighborhood may help to lessen issues of mistrust, which also prevent some prospective patients from seeking health care.

In addition to increasing the number of clinics in underserved neighborhoods, Congress should also increase funding for students looking to pursue careers in medicine as a means of increasing trust in the health care system. There are significant benefits for BIPOC patients to have doctors who look like them.[237] However, most physicians are white,[238] and racial disparities can be especially stark among fertility

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231. *Id.*

232. *Section 1557: Frequently Asked Questions*, U.S. DEP'T HEALTH & HUM. SERVS., https://www.hhs.gov/civil-rights/for-individuals/section-1557/1557faqs/index.html [https://perma.cc/M2FV-S7YE].

233. *See* discussion *supra* Section IV.B.

234. *See* discussion *supra* Section I.B.

235. Harris et al., *supra* note 166, at 1026.

236. *See* Hawkins, *supra* note 169, at 1169–70 (discussing the effects of the high frequency of white babies appearing in fertility clinic marketing).

237. *See* sources cited *supra* notes 190–91 and accompanying text.

238. *Diversity in Medicine: Facts and Figures 2019*, ASS'N AM. MED. COLLS., https://www.aamc.org/data-reports/workforce/interactive-data/figure-18-percentage-all-active-physicians-race/ethnicity-2018 [https://perma.cc/EGH7-6424].

specialists.[239] One doctor suggests addressing this problem by increasing exposure to the medical field through pipeline programs.[240] Advocates can also work to reduce barriers to higher education and encourage members of currently underrepresented backgrounds to apply to medical programs.[241] For example, St. George's University attempts to reduce barriers for low-income students interested in medicine through its City Doctors Scholarship Program.[242] This program allows students to attend medical school for free or reduced rates if they commit to working at a public hospital in the New York City metropolitan area after graduation.[243] While pipeline programs, scholarship programs, and similar efforts may help to reduce racial, economic, and other disparities among physicians, they also impose significant costs.[244] Congress should support further development of such programs by making additional funding available. While this solution may seem tangential to the goal of increasing access to fertility services, it would promote systemic change that would help to achieve this goal in the long-term.

The latter two proposals would require time to be fully implemented and to generate meaningful changes in access to fertility services. However, this hurdle should not stop Congress from taking these actions. All structural changes take time to implement, and without proper structural change, smaller solutions fail to address the full scope of a problem. While reducing the cost of fertility services will help more members of currently excluded groups access such services, full equity cannot be realized without structural changes. By reforming the Act to address smaller- and larger-scale issues, Congress can take a significant step to reducing disparities in fertility services.

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239. *ASRM Task Force on Diversity, Equity and Inclusion Statement of Interest and Concern*, AM. SOC'Y FOR REPROD. MED. (Nov. 30, 2020), https://www.asrm.org/globalassets/asrm/asrm-content/about-us/pdfs/asrm-dei-task-force-report-11-30-2020.pdf [https://perma.cc/WP4W-XCGS].

240. *The Importance of Diversity in Health Care: Medical Professionals Weigh In*, ST. GEORGE'S UNIV.: MED. SCH. BLOG (Aug. 19, 2021), https://www.sgu.edu/blog/medical/pros-discuss-the-importance-of-diversity-in-health-care/ [https://perma.cc/U7FZ-S3JW].

241. *Diversity in Healthcare and the Importance of Representation*, UNIV. OF SAINT AUGUSTINE FOR HEALTH SCIS.: BLOG (Mar. 1, 2021), https://www.usa.edu/blog/diversity-in-healthcare/ [https://perma.cc/A8BX-VCFE].

242. G. Richard Olds, *How to Diversify America's Doctor Workforce*, FORTUNE (Feb. 7, 2021), https://fortune.com/2021/02/07/black-hispanic-doctors-diversity-medicine/ [https://perma.cc/9G8Y-222C].

243. *Id.*

244. *See More Than $1.5 Million in "CityDoctors" Scholarships Awarded to Students Committed to Practicing Primary Care at NYC Health + Hospitals*, NYC HEALTH + HOSPITALS (Apr. 4, 2017), https://www.nychealthandhospitals.org/pressrelease/twelve-students-awarded-1-5-million-in-citydoctors-scholarships/ [https://perma.cc/WFZ4-ZFYF].

Conclusion

Clear disparities exist in access to fertility services. These disparities are caused by both explicitly and implicitly permitted forms of discrimination. To remedy these disparities, we must increase access to groups currently excluded from fertility services. Previously introduced federal legislation provides a promising framework to do so, but it is lacking in several respects. In light of the considerations raised in this Article, Congress should reassess its most recent version of the Access to Infertility Treatment and Care Act and reintroduce the Act with the changes described earlier to ensure that the Act's implementation will effect meaningful change. This reassessment should involve not only changes to the financing of fertility services, but also more structural changes aimed at improving access to such services.

Appendix: Common Provisions in State Infertility Mandates

Insurance Provision	**States with Insurance Provision**	**Number of States (% of Mandate States)**
Provision Mandating Some Coverage for Fertility Services ("Mandate" States)	Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Montana, New Hampshire, New Jersey, New York, Ohio, Rhode Island, Texas, Utah, West Virginia[245]	19
Caps On Number or Cost of Treatments	Arkansas,[246] Colorado,[247] Connecticut,[248] Delaware,[249] Hawaii,[250] Illinois,[251] Maryland,[252] New Jersey,[253] New York,[254] Rhode Island,[255] Utah[256]	11 (64.71%)

245. *See Insurance Coverage by State*, *supra* note 96.

246. 054-00-001 ARK. CODE R. § 6 (LexisNexis 2022) ($15,000).

247. COLO. REV. STAT. § 10-16-104(23)(b) (2023) (covers three oocyte retrievals).

248. CONN. GEN. STAT. § 38a-509 (2023) (various limits depending on type of procedure).

249. DEL. CODE ANN. tit. 18, § 3342 (2018(i)(2)(i) (2023) (six egg retrievals).

250. HAW. REV. STAT. § 431:10A-116.5 (2013) (one time IVF treatment).

251. 215 ILL. COMP. STAT. 5/356m (b)(1)(B) (West 2022) (for plans that include pregnancy benefits, up to four oocyte retrievals, "except that if a live birth follows a completed oocyte retrieval, then 2 more completed oocyte retrievals shall be covered").

252. MD. CODE ANN., INS. § 15-810(e) (LexisNexis 2023) (three rounds of IVF per live birth and lifetime cap of $100,000).

253. N.J. STAT. ANN. § 26:2J-4.23(a) (West 2023) (four egg retrievals).

254. N.Y. INS. LAW § 3221 (McKinney 2023) (three cycles of IVF for large group plans, no mandate for other types of plans).

255. 27 R.I. GEN. LAWS § 27-18-30(g) (2023) (insurers may impose cap of $100,000).

256. UTAH CODE ANN. § 49-20-418(2)(b) (LexisNexis 2022) ($4,000).

Mandate Only Applies to Certain Types of Insurance Plans (Does Not Include Plans Excluding Medicare or Medicaid)	Arkansas,[257] California,[258] Delaware,[259] Illinois,[260] Maryland,[261] Montana,[262] New Hampshire,[263] New Jersey,[264] New York,[265] Ohio,[266] Rhode Island,[267] Texas,[268] Utah,[269] West Virginia[270]	14 (73.68%)
Spousal requirements	Arkansas,[271] Hawaii,[272] Maryland,[273] Texas[274]	4 (23.53%)

257. 054-00-001 ARK. CODE R. § 4 (LexisNexis 2022) (applies only to "individual, group or blanket disability insurance polic[ies]").

258. CAL. HEALTH & SAFETY CODE § 1374.55(a) (Deering 2023) (excludes health maintenance organizations (HMOs)).

259. DEL. CODE ANN. tit. 18, § 3556(i)(6) (2023) (excludes individual and small group plans (under 50 employees)).

260. 215 ILL. COMP. STAT. 5/356m (a) (West 2022) (excludes individual and small group plans (under 25 employees)).

261. MD. CODE ANN., INS. § 15-810(c)(1) (LexisNexis 2023) (excluding small group plans "for which the Administration has determined that in vitro fertilization procedures are not essential health benefits.").

262. MONT. CODE ANN. § 33-31-102 (2021); MONT. ADMIN. R. 6.6.2508 (1987) (only applies to HMOs).

263. N.H. REV. STAT. ANN. § 417-G:2(IV) (2023) (excludes Small Business Health Options Program (SHOP) plans and certain Affordable Care Act (ACA) transition plans).

264. N.J. STAT. ANN. § 26:2J-4.23(a) (West 2023) (excludes small group plans (under 50 employees)). Additionally, there is no provision applicable to individual plans.

265. N.Y. INS. LAW § 3221(k)(6)(C) (McKinney 2023) (does not cover IVF, gamete intrafallopian tube transfers (GIFT), or zygote intrafallopian tube transfers (ZIFT) for individual and small group plans).

266. OHIO REV. CODE ANN. § 1751.01(a)(1)(i) (West 2023) (only mandates coverage for health insuring corporations).

267. 27 R.I. GEN. LAWS § 27-18-30(f) (2023) (excludes individual plans).

268. TEX. INS. CODE ANN. § 1366.003 (West 2021); *id.* § 1366.002 (only applies to private group plans).

269. UTAH CODE ANN. § 49-20-418(2) (LexisNexis 2022) (pilot program applicable to state employees only).

270. W. VA. CODE § 33-25A-2 (2022) (applying only to HMOs); W. VA. CODE R. § 151-01 Attachment A (July 1, 2022) (state employee plan does not cover "[s]ervices intended to enhance fertility or to treat or [sic] sterility").

271. 054-00-001 ARK. CODE R. § 5(b) (LexisNexis 2022) ("[T]he patient's oocytes [sic] are fertilized with the sperm of the patient's spouse . . . .")

272. HAW. REV. STAT. § 431:10A-116.5 (2013) (patient and spouse must have a history of infertility and "[t]he patient's oocytes are fertilized with the patient's spouse's sperm").

273. MD. CODE ANN., INS. § 15-810 (LexisNexis 2023). While this statute is crafted broadly, it seems to equate the terms "married" and "unmarried" with "not-single" and "single," i.e., it requires unmarried patients to either have a specified medical condition or undergo three rounds of artificial insemination prior to coverage for IVF. *Id.* § 15-810(d)(4).

274. TEX. INS. CODE ANN. § 1366.005 (West 2021) (patient and spouse must have a history

Waiting periods	Arkansas,[275] Connecticut,[276] Hawaii,[277] Texas[278]	4 (23.53%)
Excludes IVF or other service	California,[279] New York[280]	2 (11.76%)
Restrictive definition of infertility	California,[281] Connecticut,[282] Delaware,[283] Massachusetts,[284] New Hampshire,[285] Rhode Island,[286] Utah[287]	7 (36.84%)

of infertility and IVF is only covered if "fertilization of the patient's oocytes is made . . . with the sperm of the patient's spouse").

275. 054-00-001 ARK. CODE R. § 5(c) (LexisNexis 2022) (two years unless patient has certain enumerated medical conditions).

276. CONN. GEN. STAT. § 38a-509 (2023) (must be policyholder for at least twelve months).

277. HAW. REV. STAT. § 431:10A-116.5(a)(4) (2013) (five years unless patient has certain enumerated medical conditions).

278. TEX. INS. CODE ANN. § 1366.005(3) (West 2021) (five years unless patient has certain enumerated medical conditions).

279. CAL. HEALTH & SAFETY CODE § 1374.55(a) (Deering 2023).

280. N.Y. INS. LAW § 3221(k)(6)(C) (McKinney 2023) (excludes ZIFT and GIFT).

281. CAL. INS. CODE § 10119.6 (West 2023) ("'[I]nfertility' means either (1) the presence of a demonstrated condition recognized by a licensed physician and surgeon as a cause of infertility, or (2) the inability to conceive a pregnancy or to carry a pregnancy to a live birth after a year or more of regular sexual relations without contraception.").

282. CONN. GEN. STAT. § 38a-509 (2023). ("'[I]nfertility' means the condition of an individual who is unable to conceive or produce conception or sustain a successful pregnancy during a one-year period or such treatment is medically necessary.").

283. DEL. CODE ANN. tit. 18, § 3556(i)(1)(b) (2023) ("'Infertility' means a disease or condition that results in impaired function of the reproductive system whereby an individual is unable to procreate or to carry a pregnancy to live birth . . . .").

284. MASS. GEN. LAWS ch. 176A, § 8K (2023) ("'[I]nfertility' shall mean the condition of an individual who is unable to conceive or produce conception during a period of 1 year if the female is age 35 or younger or during a period of 6 months if the female is over the age of 35.").

285. N.H. REV. STAT. ANN. § 417-G:1(V) (2023) ("'Infertility' means a disease, caused by an illness, injury, underlying disease, or condition, where an individual's ability to become pregnant or to carry a pregnancy to live birth is impaired, or where an individual's ability to cause pregnancy and live birth in the individual's partner is impaired.").

286. 27 R.I. GEN. LAWS § 27-18-30 (2023) (defining infertility as "the condition of an otherwise presumably healthy individual who is unable to conceive or sustain a pregnancy during a period of one year").

287. UTAH CODE ANN. § 49-20-418 (LexisNexis 2022) (coverage if "(i) the patient's physician verifies that the patient or the patient's spouse has a demonstrated condition recognized by a physician as a cause of infertility; or (ii) the patient attests that the patient is unable to conceive a pregnancy or carry a pregnancy to a live birth after a year or more of regular sexual relations without contraception").

Age restrictions	Connecticut,[288] Delaware,[289] New Jersey,[290] Rhode Island[291]	4
Gender Restrictions	Rhode Island[292]	1

288. CONN. GEN. STAT. § 38a-509 (2023) (allows insurer to limit coverage after forty).

289. DEL. CODE ANN. tit. 18, § 3342(i)(3)(c) (2023) (egg retrieval must occur before patient is forty-five and egg transfer must occur before age fifty).

290. N.J. STAT. ANN. § 26:2J-4.23(a) (West 2023) (must be under forty-five).

291. 27 R.I. GEN. LAWS § 27-18-30(a) (2023) (covers ages twenty-five to forty-two).

292. *Id.* (covers only women).

Keep Your Hands Off My Fingerprints: How State Constitutionalism Can Stop On-Site Fingerprinting Dragnets

Roger Antonio Tejada†

Introduction

On August 15, 2011, Denishio Johnson, a fifteen-year-old Black boy, looked at his reflection in a car window before waiting patiently at the bus stop on Burton Street Southeast for his friend.[1] The bus stop was right outside the parking lot of the Michigan Athletic Club (MAC) in Denishio's hometown of Grand Rapids, Michigan.[2] The MAC staff called the police on Denishio.[3] Shortly thereafter, a police officer, Elliot Bargas, drove up to Denishio and asked for his name and birth date.[4] Bargas then proceeded to check Denishio's person, take his fingerprints—without permission—photograph his face and multiple parts of his body—without permission—handcuff him, and place the teenage boy in the back of a police squad car.[5] The police eventually released Denishio once his mother confirmed his identity.[6] Denishio's photographs and fingerprints were processed and remain on file with the Grand Rapids Police Department (GRPD).[7]

Nearly a year later, on May 31, 2012, Keyon Harrison, a sixteen-year-old Black boy, was walking home from school in Grand Rapids when

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1. Johnson v. VanderKooi, 903 N.W.2d 843, 848–49 (Mich. Ct. App. 2017), *rev'd in part*, 918 N.W.2d 785 (Mich. 2018), *rev'd*, 983 N.W.2d 779 (Mich. 2022).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* at 843–50.

6. *Id.*

7. Plaintiffs-Appellants' Brief at *12–13, Johnson v. VanderKooi, 983 N.W.2d 779 (Mich. 2022) (Nos. 160958, 160959), 2021 WL 4942035 [hereinafter Pls.-Appellants' Brief to Supreme Court].

he met a friend who was struggling to carry his belongings, including a class project, and wheel his bike along at the same time, so Keyon helped by offering to carry his friend's project.[8] As the two parted ways at Union Avenue and Fulton Street,[9] Keyon handed the project back to his friend.[10] Keyon continued to the park, hoping to chase birds on the remainder of his walk home.[11] Within moments of the friends' paths diverging, Captain VanderKooi of the GRPD stopped Keyon because he was acting "suspicious."[12] After asking Keyon what he was doing and not being satisfied with his answer, VanderKooi ordered subordinate officers to search Keyon's backpack and person, finding nothing but school materials.[13] Nonetheless, VanderKooi ordered a subordinate officer to photograph and fingerprint the scared teenage boy before letting him go.[14] Keyon's fingerprints were submitted for processing and currently remain in the GRPD's files.[15]

These stories are illustrative of the hundreds of individuals—a disproportionate number of whom are Black—stopped by the GRPD in 2011 and 2012 alone.[16] The actual number of individuals stopped in Grand Rapids is substantially higher than accessible records, as the on-site photographing and fingerprinting program has existed for decades.[17] The on-site fingerprinting that Denishio and Keyon were subjected to may not have physically hurt them, but it sent a clear message: your person and privacy are less worthy of protection than your white counterparts.[18] When encounters like Denishio's and Keyon's do not end

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8. *Id.* at *9.

9. Plaintiff/Appellant's Brief on Appeal at *1, Johnson v. VanderKooi, 983 N.W.2d 779 (Mich. 2022) (Nos. 160958, 160959), 2016 WL 9331512 [hereinafter Pl./Appellant's Brief to Appellate Court].

10. Pls.-Appellants' Brief to Supreme Court, *supra* note 7, at *1.

11. Pl./Appellant's Brief to Appellate Court, *supra* note 9, at *1.

12. Harrison v. VanderKooi, No. 330537, 2017 WL 2262889, at *1 (Mich. Ct. App. May 23, 2017), *rev'd in part sub nom.* Johnson v. VanderKooi, 918 N.W.2d 785 (Mich. 2018), *rev'd*, 983 N.W.2d 779 (Mich. 2022).

13. *Id.* at *1–2.

14. Pls.-Appellants' Brief to Supreme Court, *supra* note 7, at *10–11.

15. *Id.* at *11.

16. Dan Korobkin & Aaron M. Aksoz, *Grand Rapids' Fingerprinting Policy Is a Constitutional Nightmare. Michigan's Top Court Can End It*, ACLU (May 21, 2021), https://www.aclu.org/news/privacy-technology/grand-rapids-fingerprinting-policy-is-a-constitutional-nightmare-michigans-top-court-can-end-it/ [https://perma.cc/3KR8-7W7L] (reporting that approximately 329 Black individuals were stopped in 2011 and 2012 by the GRPD for its "photograph and print" policy, making up 75% of all individuals stopped).

17. *See id.* ("For more than 30 years, Grand Rapids, Michigan police have engaged in the egregious, unconstitutional practice of detaining people on the street and then fingerprinting and photographing anyone who isn't carrying an ID, all without a warrant.").

18. *See id.*; Sirry Alang, Donna McAlpine, Ellen McCreedy & Rachel Hardeman, *Police*

in the State killing Black and Brown people like they did in the case of George Floyd and countless others,[19] they are less likely to make the news and attract national attention, despite their lasting negative effects on communities of color.[20] However, these seemingly trivial encounters are indicative of the hundreds of years of insidious, racialized surveillance that undergird State violence against Black and Brown bodies.[21] Worse yet, even amidst a growing movement calling for police accountability and reform,[22] the surveillance of Black bodies is an ominously expanding system.[23] The Supreme Court's jurisprudence has, for decades, enabled

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Brutality and Black Health: Setting the Agenda for Public Health Scholars, 107 AM. J. PUB. HEALTH 662, 663 (2017).

19. *See, e.g.*, Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html [https://perma.cc/BC5S-U46W]; German Lopez, *Philando Castile Minnesota Police Shooting: Officer Cleared of Manslaughter Charge*, VOX (June 16, 2017), https://www.vox.com/2016/7/7/12116288/minnesota-police-shooting-philando-castile-falcon-heights-video [https://perma.cc/Z2PT-7QU5] (noting that the jury found the police officer who killed Philando Castile, a Black man, not guilty on the charge of manslaughter); Richard A. Oppel, Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Dec. 12, 2022), https://www.nytimes.com/article/breonna-taylor-police.html [https://perma.cc/Q26B-TJTN] (reporting community outrage in response to the police shooting and killing of Breonna Taylor, a Black woman). On average, police officers kill about three people per day. *See Fatal Force*, WASH. POST (Feb. 9, 2022), https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ [https://perma.cc/V8L5-CNPM] (presenting a database listing all people killed by police since 2015, and noting that, on average, police shoot and kill more than 1,000 people every year).

20. *See* Alang et al., *supra* note 18 (detailing how fatal injuries, adverse physiological responses, racist public reactions, financial strain, and systematic disempowerment are byproducts of police brutality which cause poor health outcomes in Black communities).

21. *See* SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 9, 13 (2015) (arguing that Blackness is a "key site through which surveillance is practiced" and is informed by the history of surveillance of Black life during slavery); Andrea Dennis, *Mass Surveillance and Black Legal History*, AM. CONST. SOC'Y: EXPERT F. (Feb. 18, 2020), https://www.acslaw.org/expertforum/mass-surveillance-and-black-legal-history [https://perma.cc/9MC8-XCGN] ("Government monitoring and suppression of Black speech and conduct has been an essential feature of American society far before the public at large realized the potential dangers of widespread surveillance.").

22. *See, e.g.*, Eric Westervelt, *Cops Say Low Morale and Department Scrutiny Are Driving Them Away from the Job*, NPR (June 24, 2021), https://www.npr.org/2021/06/24/1009578809/cops-say-low-morale-and-department-scrutiny-are-driving-them-away-from-the-job [https://perma.cc/JAY6-VU7J] (discussing the impacts of "historic calls for police accountability, reform and attempts at racial reckoning" on police departments).

23. *See* Korobkin & Aksoz, *supra* note 16; Nicol Turner Lee & Caitlin Chin, *Police Surveillance and Facial Recognition: Why Data Privacy Is Imperative for Communities of Color*, BROOKINGS (Apr. 12, 2022), https://www.brookings.edu/research/police-surveillance-and-facial-recognition-why-data-privacy-is-an-imperative-for-communities-of-color/#top90 [https://perma.cc/U224-LDWL] (discussing the disproportionate impact the rise in the use of facial recognition and other surveillance technologies will have on communities of color).

this increase of police power at the expense of Americans'—particularly Black Americans'—civil rights and liberties.[24]

This Article argues that "functional state constitutionalism"[25] serves as a vehicle to provide greater protections against on-site fingerprinting in the United States' ever-expanding surveillance infrastructure. Part I discusses the Fourth Amendment and search and seizure jurisprudence related to on-site fingerprinting; it also outlines the concept of state constitutionalism and the role that state constitutions should and do play in protecting civil rights and liberties. Part II then details the photograph and fingerprinting program run by the GRPD as an example of increasingly complex dragnets.[26] It then analyzes limitations of Fourth Amendment challenges, grounded by the arguments in *Johnson v. VanderKooi*, a case that challenged the GRPD program and was recently decided by the Michigan Supreme Court.[27] This analysis reveals how federal search and seizure jurisprudence may not be the right place to stop fingerprinting dragnets, even if they prevailed in this particular case.[28] Lastly, Part III analyzes how state constitutionalism has been used in search and seizure law to date and explains why this approach is likely inadequate to stop on-site fingerprinting dragnets. Part III outlines how functional state constitutionalism can stymie the proliferation of fingerprinting dragnet programs through its emphasis on the role of state courts in our federalist system.

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24. *See* ERWIN CHEMERINSKY, PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS 39–58 (2021); MARK TUSHNET, TAKING BACK THE CONSTITUTION: ACTIVIST JUDGES AND THE NEXT AGE OF AMERICAN LAW 79–98, 113–32 (2020) (detailing how the U.S. Supreme Court's protection of civil liberties has changed over time).

25. See *infra* Section I.B.ii.3 for a discussion of functional state constitutionalism. *See also* James A. Gardner, *State Constitutional Rights as Resistant to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1004 (2003) [hereinafter Gardner, *State Constitutional Rights*] ("[T]he identification and enforcement of state constitutional rights can serve as a mechanism by which state governments can resist and, to a degree, counteract abusive exercises of national power."); JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 123–32 (2005) [hereinafter GARDNER, INTERPRETING STATE CONSTITUTIONS] (arguing that state courts should interpret their constitutions with the purpose of fulfilling their role of protecting liberty and defending against federal domination).

26. Christopher Slobogin, *Government Dragnets*, 73 LAW & CONTEMP. PROBS. 107, 109 (2010) (defining government dragnets as "programmatic government efforts to investigate, detect, deter, or prevent crime or other significant harm by subjecting a group of people, most of whom are concededly innocent of wrongdoing or of plans to engage in it, to a deprivation of liberty or other significant intrusion"); *see infra* Section II.A (describing dragnets).

27. Johnson v. VanderKooi, 954 N.W.2d 524 (Mich. 2021), *rev'd*, 983 N.W.2d 779 (Mich. 2022).

28. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757–58 (1994).

I. The Fourth Amendment, Search and Seizure, and the Role of State Constitutionalism

Part I provides the necessary background on both Fourth Amendment search and seizure doctrine and state constitutionalism. To that end, Section I.A reviews relevant Fourth Amendment law that impacts the constitutionality of on-site fingerprinting. Subsection I.A.i begins with the history and framing of the Fourth Amendment. Subsection I.A.ii delineates the two most relevant doctrines to on-site fingerprinting: investigative stops, which are a notable exception to the Fourth Amendment's warrant requirement, and the "reasonable expectation of privacy" doctrine. Then, since there is no explicit Supreme Court jurisprudence regarding on-site fingerprinting, Subsection I.A.iii reviews Supreme Court dicta on the topic. Next, Section I.B explains state constitutionalism's origin and past uses, and it then outlines more recent scholarship on the role state constitutionalism can and should play.

A. While the Fourth Amendment as Conceived Would Not Allow On-Site Fingerprinting, Supreme Court Jurisprudence Suggests Federal Constitutional Law Will Allow It

i. The Origin of the Fourth Amendment

The need for protection from government overreach predates the Constitution itself. In fact, these overreaches were a catalyst for the American Revolution and the Constitution that followed.[29] Thus, to appropriately understand the expected realm of the Fourth Amendment, it is appropriate—if not crucial—to begin in precolonial times.[30] The history leading up to the drafting of the Fourth Amendment deeply impacted the form the provision took on.

English Parliament gave customs officers the power to search and seize individuals and their property without any judicial oversight through writs of assistance.[31] The unchecked discretion cultivated abuse,[32] fomenting one of the central frictions that catalyzed the

29. *See* JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 31 (1966).

30. Amar, *supra* note 28, at 757–59; *see also* Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 649 (noting that "history will often be relevant" when engaging in constitutional construction to answer "disputed questions of constitutional interpretation"). *See generally* Jack M. Balkin, *Arguing About the Constitution: Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145 (2018) (discussing the link between theories of constitutional interpretation and constitutional construction).

31. Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on* Terry *"Stop and Frisk,"* 50 OKLA. L. REV. 451, 453 (1997).

32. *Id.* at 454; *see also* AKHIL REED AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION 1760-1840, at 12 (2021) ("Armed with a writ of assistance . . . a customs officer in Britain could enter and search, forcibly if necessary, any manner of building.").

American Revolution.[33] Leading up to the Revolution, protests and legal battles ensued around the states, leading legislators to create several search and seizure provisions.[34] The state provisions informed, if not outright framed, the discussion of search and seizure doctrine at the Constitutional Convention.[35] In fact, James Madison's original draft of what would become the Fourth Amendment borrowed heavily from the Massachusetts equivalent;[36] Madison's draft read:

> The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.[37]

Like its Massachusetts predecessor, the federal provision had a parallel two-clause formulation. This formulation ensured that the "reasonableness" clause retained independent substantive content, while the "warrant clause" required objective judicial officers to issue warrants as an *additional* safeguard.[38] Initially, the House Committee reviewing the provision attempted to remove the "unreasonable searches and seizures" language.[39] However, Egbert Benson, a Federalist New York Representative, objected.[40] If combined into one clause, the "unreasonable searches and seizures" language could be construed to only limit searches and seizures resulting from deficient warrants, thereby severely limiting its breadth.[41] Using his leadership role in the House, Benson ensured the amendment maintained its current, parallel two-clause form, including the unreasonable search and seizure

33. Richard M. Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L. & CRIMINOLOGY 393, 397 n.44 (1963). For example, James Otis—a lawyer, legislator, and political activist—decried the use of writs of assistance in a speech before the Massachusetts State House; following this speech, John Adams wrote: "Then and there was the first scene of the first Act of opposition to the Arbitrary claims of Great Britain. Then and there the child Independence was born." Leonard W. Levy, *Origins of the Fourth Amendment*, 114 POL. SCI. Q. 79, 84–86 (1999).

34. Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 219–23 (1993).

35. Levy, *supra* note 33, at 98–99.

36. *Id.* at 94.

37. *See* 1 ANNALS OF CONG. 434–35 (1789).

38. Levy, *supra* note 33, at 99 ("The entire provision was split into two parts separated by a semicolon. The first part fixed the right of the people and laid down the standard against unreasonable searches and seizures. The second part required probable cause for the issue of a specific warrant.").

39. Leagre, *supra* note 33, at 397; Levy, *supra* note 33, at 99.

40. Leagre, *supra* note 33, at 397.

41. *Id.*; David Gray, *Fourth Amendment Remedies as Rights: The Warrant Requirement*, 96 B.U. L. REV. 425, 459–60 (2016).

language.[42] The Fourth Amendment of the U.S. Constitution provides, in its entirety, that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[43]

Therefore, like the original provisions denouncing writs of assistance, the Fourth Amendment requires probable cause *and* a judicial warrant to ensure proper protection against searches and seizures.

ii. Relevant Fourth Amendment Law: The "*Terry*-stop" and "Reasonable Expectation of Privacy" Doctrines

The Supreme Court has accepted the Framers' two-clause formulation and interpreted these clauses in various cases, resulting in three distinct inquiries for any case involving the Fourth Amendment: first, whether there was a search;[44] second, whether a warrant was required for the search;[45] and third, whether the search was reasonable.[46]

All searches, with or without a warrant, are subject to the reasonableness requirement.[47] The Supreme Court has held that warrantless searches are presumptively unconstitutional.[48] However,

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42. Leagre, *supra* note 33, at 398; Saleem, *supra* note 31, at 454 (noting that because the framers "feared an arbitrary, capricious and overreaching government," they created additional requirements for the issuance of warrants: probable cause, oath or affirmation, and a particular description of whatever was to be seized).

43. U.S. CONST. amend. IV.

44. *See, e.g.*, Katz v. United States, 389 U.S. 347, 351 (1967) (articulating the reasonable-expectation-of-privacy standard for what constitutes a search under the Fourth Amendment); United States v. Jones, 565 U.S. 400, 406–07 (2012) (trespassing upon the areas enumerated by the Fourth Amendment constitutes a search).

45. *See, e.g.*, Gray, *supra* note 41, at 426–29 (discussing the warrant requirement and its exceptions).

46. *See, e.g.*, Chimel v. California, 395 U.S. 752, 765 (1969) (describing what constitutes "reasonableness").

47. *See id.* at 760–62.

48. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 20 (1968) (internal citations omitted) ("We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, or that in most instances the failure to comply with the warrant requirement can only be excused by exigent circumstances."); *Katz*, 389 U.S. at 357 (1967) (internal citations omitted) ("Searches conducted without warrants have been held unlawful notwithstanding facts unquestionably showing probable cause, for the Constitution requires that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police. Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth

searches absent a warrant are permissible where the Supreme Court has established an exception,[49] including instances where there are exigent circumstances that relax the warrant requirement.[50]

Despite the narrowness of protective search and seizure doctrine generally, the Supreme Court has created several exceptions that allow government intrusion, driven by two phenomena. First, as noted, the Court has created myriad exceptions to the warrant requirement.[51] Second, the Court's jurisprudence has increasingly emphasized balancing the "reasonableness" of a search instead of requiring probable cause and

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Amendment—subject only to a few specifically established and well-delineated exceptions."). It is also useful to consider the Court's framing in *McDonald v. United States*:

> "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals."

McDonald v. United States, 335 U.S. 451, 455–56 (1948).

49. These exceptions are numerous and include searches that are consented to, searches incident to arrest, vehicle searches under many circumstances, plain view searches, and a pat-down search for weapons if a police officer believes an individual is acting suspiciously. *See, e.g.*, Arizona v. Gant, 556 U.S. 332, 338 (2009) ("Among the exceptions to the warrant requirement is a search incident to a lawful arrest."); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (citing Davis v. United States, 328 U.S. 582, 593–84 (1946)) ("It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent."); United States v. Harris, 390 U.S. 234 (1968) (holding that a warrantless inventory search of an automobile is constitutional), *overruled in part by Chimel*, 395 U.S. 752; Cooper v. California, 386 U.S. 58 (1967) (holding that a warrantless search of an impounded car was reasonable); Hudson v. Palmer, 468 U.S. 517, 526 (1984) ("[T]he Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell."); *see also* Robert D. Dodson, *Ten Years of Randomized Jurisprudence: Amending the Special Needs Doctrine*, 51 S.C. L. REV. 258, 259–69 (2000) (outlining the historical development of the special needs doctrine and providing examples of when the doctrine has been utilized, including searches at the border; searches of prisoners, parolees, and probationers; and searches when national security has been threatened).

50. *E.g.*, Missouri v. McNeely, 569 U.S. 141, 149 (2013) (internal citations omitted) ("A variety of circumstances may give rise to an exigency sufficient to justify a warrantless search, including law enforcement's need to provide emergency assistance to an occupant of a home, engage in 'hot pursuit' of a fleeing suspect, or enter a burning building to put out a fire and investigate its cause.").

51. *See* sources cited *supra* notes 49–50 and accompanying text; *see also* California v. Acevedo, 500 U.S. 565, 582–83 (1991) (Scalia, J., concurring) ("[T]he 'warrant requirement' ha[s] become so riddled with exceptions that it [is] basically unrecognizable . . . . There can be no clarity in this area unless we make up our minds, and unless the principles we express comport with the actions we take."); Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1666 (2012) (estimating that just over 1% of the total number of searches conducted by law enforcement are conducted with a search warrant).

a warrant.[52] Both of these phenomena are evidenced in the on-site fingerprinting context.

One notable exception carved out of the Fourth Amendment's protection is the *Terry* investigative stop.[53] Common examples of an investigative stop include a police officer pulling over the driver of a vehicle for a traffic stop or stopping an individual on the sidewalk to ask a few questions related to a nearby crime.[54] Police departments in the United States "have likely conducted investigative stops since the early days" of their departments in the mid-1800s.[55] Nearly a century later, "the investigative stop had already become a core crime prevention tool" whereby officers would stop and interrogate individuals without probable cause under the pretense of the individual being "suspicious."[56] But at what point is this interaction a search or seizure subject to Fourth Amendment protection? The constitutionality of this procedure was undecided until *Terry v. Ohio*.[57]

The Supreme Court's *Terry* decision was a watershed moment in the devolution of the Fourth Amendment.[58] In *Terry*, the Court considered whether an officer's stop and frisk of three men without probable cause

52. Sam Kamin & Justin Marceau, *Double Reasonableness and the Fourth Amendment*, 68 U. MIA. L. REV. 589, 602 (2014) ("In context after context, the criminal procedure decisions of the Burger and Rehnquist Courts abandoned the clear rules of probable cause and a warrant in favor of an increasingly free-wheeling form of reasonableness balancing."); *id.* at 610–11 ("[A]ll indications are that the Supreme Court is not just accelerating its use of groundless reasonableness, but that totality of the circumstances balancing has become the new normal in Fourth Amendment adjudication."); *see also* Thomas Y. Davies, *Can You Handle the Truth? The Framers Preserved Common-Law Criminal Arrest and Search Rules in "Due Process of Law"—"Fourth Amendment Reasonableness" Is Only a Modern, Destructive, Judicial Myth*, 43 TEX. TECH. L. REV. 51, 56–57 (2010) ("Indeed, there is ample evidence that Fourth Amendment reasonableness is only a modern judicial myth . . . . [T]he right-of-center majority that has dominated the Court for the last four decades has used 'reasonableness' to justify the evisceration of constitutional limits on government arrest and search authority.").

53. *See* Terry v. Ohio, 392 U.S. 1, 35 (1968).

54. Editorial, *Train the Police to Keep the Peace, Not Turn a Profit*, N.Y. TIMES (Nov. 20, 2021), https://www.nytimes.com/2021/11/20/opinion/police-traffic-stops-deaths.html [perma.cc/6HX9-TVTJ] ("Traffic stops are far and away the most common point of contact between people and the law . . . . [T]here are tens of millions of such stops each year[.]"); *see also* INT'L ASS'N OF CHIEFS OF POLICE L. ENF'T POL'Y CTR., ARRESTS AND INVESTIGATORY STOPS 1–8 (2019) (providing police agencies with concrete guidance and directives by describing the manner in which actions, tasks, and operations are to be performed in the context of arrests and investigatory stops).

55. Ben Grunwald & Jeffrey A. Fagan, *The End of Intuition-Based High Crime Areas*, 107 CAL. L. REV. 345, 355 (2019).

56. *Id.* at 355–56.

57. *Terry*, 392 U.S. 1.

58. *See, e.g.*, Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 385 (1988) (discussing how the *Terry* decision unjustifiably expanded the scope of the reasonableness test).

or a warrant violated the Fourth Amendment.[59] The Court determined there was no violation; it held that a warrantless search without probable cause was allowed as long as there was an articulable basis for suspecting criminal activity and the officer had a reasonable belief that a crime was about to occur.[60] Further, a frisk was allowed if the officer reasonably believed the person to be armed and dangerous.[61] Therefore, the Court watered down the Fourth Amendment's reasonableness requirement by focusing on the reasonable suspicion standard.[62] Since this *Terry*-stop exception to the warrant requirement was created, and since the Court began emphasizing reasonableness rather than probable cause in investigative stops, federal courts have allowed increased intrusion, "longer detentions[,] and increased police force."[63]

In assessing reasonableness, the Court balances "on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests."[64] Applying this balancing test, the Court in *Maryland v. King*, for example, held that obtaining arrestees' DNA is a "reasonable" search under the Fourth Amendment because it served a legitimate state interest and was not so invasive as to require a warrant.[65] In other words, the use of the reasonableness standard has been applied by the Court "to allow government intrusions of an individual's privacy interests without a warrant or probable cause."[66] However, because the *King* holding was in the arrest context, which does require probable cause,[67] it is unclear exactly how *King* would apply to on-site fingerprinting situations *without* probable cause.

On-site fingerprinting also implicates an individual's privacy interests. The trespass doctrine previously dominated the Court's conception of what constitutes a search under the Fourth Amendment.[68]

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59. *Terry*, 392 U.S. at 6–7.

60. *Id.* at 30.

61. *Id.*

62. *See* Lucas Issacharoff & Kyle Wirshba, *Restoring Reason to the Third Party Doctrine*, 100 MINN. L. REV. 985, 1029–30 (2016).

63. Saleem, *supra* note 31, at 460; *see also id.* at 455–56 ("The Court . . . expanded the reasonableness clause of the Fourth Amendment to allow government intrusions of an individual's privacy interests without a warrant or probable cause.").

64. Wyoming v. Houghton, 526 U.S. 295, 300 (1999); *see also* Maryland v. King, 569 U.S. 435, 448 (2013) (weighing privacy interests against governmental interests in Fourth Amendment case involving buccal swabs).

65. *King*, 569 U.S. at 465–66.

66. Saleem, *supra* note 31, at 456.

67. *King*, 569 U.S. at 449–56.

68. *See* Ric Simmons, *From Katz to Kyllo: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 HASTINGS L.J. 1303, 1305 (2002)

However, the Court has now long included a complementary reasonable expectation of privacy doctrine to define a search, as crystallized in *Katz v. United States*.[69] In *Katz*, the Court created a two-prong test to determine when a person has a reasonable expectation of privacy.[70] To be protected under *Katz*, a person has to exhibit "an actual (subjective) expectation of privacy" and the "expectation of privacy [must be] one that society is objectively prepared to recognize as 'reasonable.'"[71] Importantly for the analysis of the relationship between on-site fingerprinting and the reasonable expectation of privacy, Justice Stewart wrote for the *Katz* majority that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protections. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[72] On-site fingerprinting, by its very nature, occurs in public, raising questions of whether an individual has *knowingly exposed* their fingerprints to the public.

iii. The Fourth Amendment and Fingerprinting

Fingerprinting technology was incorporated into the United States criminal justice system shortly after its creation in the late 1800s and has since become a cornerstone in the administration of justice.[73] The use of fingerprinting advances many governmental interests, including public safety.[74] Courts rarely question the technology's accuracy and

(stating that, under the trespass doctrine, "a government surveillance was a 'search' if and only if the law enforcement agents (or their devices) trespassed on the property interests of the defendant"); LAURA HECT-FELELLA, BRENNAN CTR. FOR JUST., THE FOURTH AMENDMENT IN THE DIGITAL AGE 4 (2021) (detailing how the Fourth Amendment protects against physical intrusion of private spaces); United States v. Jones, 565 U.S. 400, 405 (2012) ("Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century."); *see also* Olmstead v. United States, 277 U.S. 438 (1928) (holding that wiretapping is not a search or seizure because Olmstead's property rights were not violated); Goldman v. United States, 316 U.S. 129 (1942) (holding that the use of a detectaphone to hear conversations in another room was not a search or seizure under the trespass doctrine). *But see* Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 77 (2004) (claiming the Court's decisions through the early twentieth century equally discussed privacy and property).

69. Katz v. United States, 389 U.S. 347, 348 (1967) (finding that the trespass doctrine's emphasis on property rights was overly narrow).

70. *Id.* at 360–61 (Harlan, J., concurring).

71. *Id.* at 361 (Harlan, J., concurring). In *Katz*, entering a phone booth created a "temporarily private place" where the defendant reasonably expected privacy; therefore, the FBI's recording of his phone call violated Katz's Fourth Amendment rights. *Id.*

72. *Id.* at 351–52 (majority opinion) (citations omitted).

73. *See* Jessica M. Sombat, *Latent Justice: Daubert's Impact on the Evaluation of Fingerprint Identification Testimony*, 70 FORDHAM L. REV. 2819, 2827–37 (2002) (outlining the development of fingerprinting as a science and its general acceptance in the justice system).

74. Robert Molko, *The Perils of Suspicionless DNA Extraction of Arrestees Under*

admissibility.[75] Courts have concluded that there is no Fourth Amendment violation in taking fingerprints "in the case of prisoners, probationers[,] and supervised releasees."[76] This is reasonable, courts have argued, largely because "these individuals have a diminished expectation of privacy."[77] Notably, the Supreme Court never directly addressed the constitutionality of fingerprinting incident to lawful arrest, as the practice became normalized in the United States before the development of modern Fourth Amendment jurisprudence.[78] Yet, many courts have upheld the use of fingerprinting because fingerprints are used solely for identification purposes and, potentially through that identification, solving crimes, which is an important government interest.[79]

The Supreme Court's holdings have not yet explicitly addressed the constitutionality of fingerprinting in *on-site* stop scenarios.[80] However,

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California Proposition 69: Liability of the California Prosecutor for Fourth Amendment Violation? The Uncertainty Continues in 2010, 37 W. ST. U. L. REV. 183, 193 (2010) (footnotes omitted) (discussing the governmental interests that fingerprinting advances such as: "1) the need to immediately and accurately identify the arrestees; 2) the ability to solve past and future crimes efficiently and accurately; 3) the need to exonerate innocent individuals; 4) the need to protect innocent individuals from even becoming suspects; 5) the need to prevent future crimes before they occur; 6) the need to protect public safety by more quickly identifying recidivist offenders and 7) the public interest in solving crimes as promptly as possible.").

75. *See, e.g.*, Stevenson v. United States, 380 F.2d 590, 592 (D.C. Cir. 1967) ("The accuracy of fingerprint identification is a matter of common knowledge."); United States v. Gonzalez, No. L-88-510, 1988 WL 139473, at *1 (S.D. Tex. Nov. 14, 1988) (quoting Davis v. Mississippi, 394 U.S. 721 (1969)) (discussing how fingerprint evidence obtained through an illegal arrest will only be suppressed if the fingerprints "provide the sole basis for probable cause").

76. Molko, *supra* note 74, at 194.

77. *Id.*; *cf.* Maryland v. King, 569 U.S. 435, 465 (2013) (extending this line of reasoning to obtaining DNA during the booking process).

78. Adrienne N. Kitchen, *Genetic Privacy and Latent Crime Scene DNA of Nonsuspects: How the Law Can Protect an Individual's Right to Genetic Privacy While Respecting the Government's Important Interest in Combatting Crime*, 52 CRIM. L. BULL., at *12 (2016) (quoting United States v. Kincade, 379 F.3d 813, 874 (9th Cir. 2004) (Kozinski, J., dissenting)) ("The Supreme Court has never determined the constitutionality of fingerprint collection or analysis because fingerprinting was common prior to 'the modern era of Fourth Amendment jurisprudence.'"); *see also id.* (quoting *King*, 569 U.S. at 479 (Scalia, J., dissenting)) ("No authority supports the assertion that taking fingerprints was constitutional before the FBI's fingerprint database.").

79. *Id.*; *King*, 569 U.S. at 448–49.

80. On-site fingerprinting is like an investigatory stop, with the caveat that the fingerprinting process becomes a part of the stop. *See supra* Section I.A.ii (describing investigatory stops in the context of the Fourth Amendment). In other words, during the stop, a police officer presses an individual's fingers onto a fingerprint inkpad before pressing them onto a fingerprint card, thereby capturing their unique imprint. *See, e.g.*, GRAND RAPIDS POLICE, MANUAL OF PROCEDURES: FIELD INTERROGATIONS 8-1.8(f)(3)–(6) (2016), https://public.powerdms.com/GRANDRAPIDS/documents/89557 [https://perma.cc/M93D-XQ5D] (describing the process by which fingerprints are taken by Michigan law enforcement during a "field interrogation").

Supreme Court dicta indicates that the Court may likely find that on-site fingerprinting is constitutional. First, though the Supreme Court has not directly answered whether fingerprinting in itself constitutes a search,[81] it has indicated in dicta that it is not. For example, in *Davis v. Mississippi*, while the Court did not directly hold that the taking of fingerprints constitutes a search under the Fourth Amendment, it suggested that "[d]etention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search."[82] A few years later, the Court cited *Davis* for the proposition that fingerprinting did not implicate a search.[83] The lack of clear Supreme Court precedent has led courts to split on whether fingerprinting constitutes a search under the Fourth Amendment.[84]

Second, the Court has also suggested that detention solely for the purposes of fingerprinting an individual does not necessarily constitute an unreasonable seizure. In *Davis*, the Court opined that "[d]etentions for the sole purpose of obtaining fingerprints" could "under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense."[85] Further, in *Hayes v. Florida*, the Court noted in dicta that:

> There is . . . support in our cases for the view that the Fourth Amendment would permit seizures for the purpose of fingerprinting, if there is reasonable suspicion that the suspect has committed a criminal act, if there is a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime, and if the procedure is carried out with dispatch.[86]

The Supreme Court's whittling away of Fourth Amendment protection against searches and seizures in the fingerprinting context will likely apply to on-site fingerprinting whenever the Court squarely faces this issue. It seems likely that on-site fingerprinting will not constitute a search, and the seizure from detaining an individual to conduct the fingerprinting will in many cases be found reasonable.

With this background on how the Supreme Court has read the Fourth Amendment in the fingerprinting context, the following section considers the role that state supreme courts have played in expanding

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81. *See supra* note 78; *King*, 569 U.S. at 477 (Scalia, J., dissenting) ("The Court does not actually say whether it believes that taking a person's fingerprints is a Fourth Amendment search, and our cases provide no ready answer to that question.").

82. Davis v. Mississippi, 394 U.S. 721, 727–25 (1969).

83. United States v. Dionisio, 410 U.S. 1, 14 (1973) (quoting *Davis*, 394 U.S. at 727).

84. *See* Johnson v. VanderKooi, 983 N.W.2d. 779, 795 (Welch, J., concurring).

85. *Davis*, 394 U.S. at 727.

86. Hayes v. Florida, 470 U.S. 811, 817 (1985).

jurisprudence beyond the Supreme Court's reading, and it prefaces possible future uses of state constitutionalism.

B. State Constitutionalism's Origin, Past Uses, and Possible Future Uses

i. State Constitutionalism's Origin and Past Uses

Many rights recognized in the colonies and state constitutions served as a template for the rights recognized in the Bill of Rights to the U.S. Constitution.[87] Consequently, interpretations of state constitutional provisions often predate interpretations of the federal Constitution. However, for a long period, many state courts accepted and applied the Supreme Court's interpretation of federal constitutional matters in state cases.[88] For nearly a century after the United States' founding, there was limited jurisprudential experimentation by state courts.[89]

However, in 1977, Justice Brennan noted that the Supreme Court "has condoned both isolated and systematic violations of civil liberties."[90] Seeing this "breach," he asked state courts to intercede and interpret their state constitutions more broadly than the Supreme Court interpreted parallel provisions of the U.S. Constitution.[91] To defend this position, Justice Brennan noted that "[p]rior to the adoption of the federal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions."[92] Given this fact, the Supreme Court and state courts alike have repeatedly recognized that U.S. Supreme Court holdings on

87. Joseph Blocher, *What State Constitutional Law Can Tell Us About the Federal Constitution*, 115 PENN. ST. L. REV. 1035, 1036 (2011).

88. *Id.* at 1036–37.

89. *Id.*

90. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977); *see also* John Kincaid, *Foreword: The New Federalism Context of the New Judicial Federalism*, 26 RUTGERS L.J. 913, 914–15 (1995) (quoting Suzanna Sherry, *Foreword: State Constitutional Law: Doing the Right Thing*, 25 RUTGERS L.J. 935 (1994)) ("[W]hen Justice William J. Brennan 'first suggested [in 1977] that lawyers turn to state courts and state constitutions, he did so fearing that an increasingly conservative federal judiciary would decline to protect liberty as vigorously in the past.'").

91. Brennan, *supra* note 90, at 503–04 ("With federal scrutiny diminished, state courts must respond by increasing their own."); *see also* David C. Brody, *Criminal Procedure Under State Law: An Empirical Examination of Selective New Federalism*, 23 JUST. SYS. J. 75, 75 (2002) (citations omitted) ("Justice Brennan, in his now famous *Harvard Law Review* essay, called on state courts to 'step into the breach' left by the Burger Court's rights-narrowing decisions.").

92. Brennan, *supra* note 90, at 501 (citation omitted); *see also* Valerie L. Snow, *State Constitutions and Progressive Crimmigration Reform*, 23 U. PA. J.L. & SOC. CHANGE 251, 258 (2020) (citation omitted) ("[M]any rights recognized in the colonies and states during the seventeenth and eighteenth centuries served as a template for the rights recognized in the Bill of Rights to the U.S. Constitution.").

constitutional protections serve as a "floor" for rights and protections, whether jurisprudential or legislative, and states can exceed those minimum protections.[93] This is particularly true when state courts "appeal to their state constitution's unique history and distinct clauses to vindicate rights on unique grounds."[94]

Since Justice Brennan's call to action, "many state courts have, in fits and starts, come to play the role of rights innovators—recognizing important rights and protections well before the U.S. Supreme Court does so, or extending rights beyond [the] Court's baseline requirements"[95] on multiple civil rights and liberties issues.[96] This development in state constitutionalism has been called New Judicial Federalism (NJF),[97] whereby "state supreme courts rely on their own constitutions to recognize rights that were *more protective* than those recognized by the United States Supreme Court under the Federal Constitution."[98]

ii. State Constitutionalism's Possible Future Uses

State constitutionalism can re-erect boundaries that the Supreme Court has eroded, and the vast majority of state supreme courts have done just that.[99] Given the fact-intensiveness of criminal cases, state

93. Thomas M. Hardiman, *New Judicial Federalism and the Pennsylvania Experience: Reflections on the* Edmunds *Decisions*, 47 DUQ. L. REV. 503, 505–06 (2009); Robert F. Williams, *The State of State Constitutional Law, the New Judicial Federalism and Beyond*, 72 RUTGERS U. L. REV. 949, 954 (2020).

94. Snow, *supra* note 92, at 258.

95. *Id.* at 252 (citing John Dinan, *State Constitutional Amendments and American Constitutionalism*, 41 OKLA. CITY U. L. REV. 27, 27 (2016)). As early as 1988, there were over 400 independent state constitutional decisions. David Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection,"* 13 VT. L. REV. 221, 221 (1988).

96. *See* Snow, *supra* note 92, at 252–53 (footnotes omitted) (listing "marriage equality, school funding, capital punishment, criminal procedure and search and seizure doctrine, legislative redistricting, and property rights" as examples of state constitutionalism doctrine being used to expand rights and protections); Brody, *supra* note 91, at 76.

97. Williams, *supra* note 93, at 951. As NJF has aged and become less "new," scholars have begun referring to the enduring phenomenon as simply state constitutionalism. *See id.* at 975–76 (describing how NJF brought attention to state constitutions and has become an enduring element of state constitutionalism). This Article typically refers to state constitutionalism throughout, except for when introducing the topic of NJF or in direct quotations.

98. *Id.* at 951. It is important to note that there has been considerable disagreement about *how* to interpret state constitutions. *See infra* Section I.B.ii.

99. Brody, *supra* note 91, at 79 ("Overall, forty-one . . . states provided protections greater than those required by the U.S. Constitution in at least one doctrinal area."). However, unsurprisingly, not all state supreme courts have been equally active. Of the cases where state supreme courts have expanded civil rights and liberties beyond the federal constitutional floor, a disproportionate number have taken place in Alaska, California, Florida, and Massachusetts. *Id.* at 77. Even decades ago, much closer to the genesis of the

constitutionalism has been especially prominent in this field,[100] including substantive search and seizure law specifically.[101] For example, states have rejected Supreme Court jurisprudence related to surveillance, search warrants, the plain view doctrine, arrests, home entries, bodily intrusions, consent, searches after arrest, *Terry*-line cases, automobile searches, and administrative and regulatory searches.[102]

However, "the state constitutional search and seizure decisions have not developed new and independent approaches to the law. Despite considerable rejection of Supreme Court results, there has been little in the way of independent search and seizure doctrine."[103] That is to say that even when state high courts reject Supreme Court holdings, they tend to follow the lines of inquiry used by the Supreme Court.[104] Put simply, their divergence is in outcome, not necessarily process.[105] Ultimately, "New Federalism is marked by a *selective* revolt against certain portions of search and seizure law."[106] For example, despite the uniqueness of the *Terry* stop doctrine, "no state appears to reject *Terry* principles."[107]

This selective revolt may be in part because Justice Brennan's call for state constitutionalism lacked "a theory of interpretation to guide state courts in deciding when they should depart from federal constitutional decisions."[108] Further, while Justice Brennan pushed for the authority of states to construe their constitutions differently, he did not indicate that states should consider an *independent basis* for departing from federal constitutional decisions.[109] Justice Brennan's conception of state constitutionalism therefore both invited and constrained state courts' interjection into the discussion of constitutionally protected rights.[110]

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state constitutionalism "revolution," courts were not very revolutionary. Instead, multiple studies found that state supreme courts followed federal analysis the majority of the time. GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 46 (citing studies which show states followed Supreme Court analysis 69% of the time and followed the Court's holdings in nearly 70% of all cases).

100. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 124 (2009). *See generally* BARRY LATZER, STATE CONSTITUTIONS AND CRIMINAL JUSTICE (1991) (exploring the effects of state constitutionalism on different individual rights within criminal law).

101. LATZER, *supra* note 100, at 51–88.

102. *Id.*

103. *Id.* at 73.

104. *Id.*

105. *Id.*

106. *Id.* at 74.

107. *Id.* at 66.

108. Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1312 (2017).

109. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 177 (2018).

110. *See id.*

In the years following Brennan's call for state constitutionalism, three prominent theories of state constitutional interpretation have emerged.

1. The Secondary Approach

The most prominent theory of state constitutional interpretation is the "interstitial" or "secondary" approach.[111] "Under the interstitial approach, the court asks first whether the right being asserted is protected under the federal constitution. If it is, then the state constitutional claim is not reached. If it is not, then the state constitution is examined."[112] In other words, in the secondary approach, state constitutional law is relegated to a second-tier status, considered only after its primary counterpart of federal constitutional law has been examined.

Under this approach, a court would diverge from federal precedent for one of three reasons: flawed analysis, structural differences between the state and federal governments, or distinctive state characteristics.[113] However, "reliance on debates about the meaning of a federal guarantee is not apt to dignify the state constitutions as independent sources of law."[114] That is to say, if state constitutions are merely another tool for analyzing the federal Constitution, it denigrates any conception of them as another source of protections for our rights. It implies that state constitutions are superfluous, which goes against the very principles of federalism.[115] Indeed, the purpose of horizontal and vertical fragmentation of our government was to divide power sufficiently to ensure it could and would not accumulate in the hands of a single tyrant.[116] The subdivision of power among distinct and separate state and federal courts incorporates a structural and institutional level of security for people's rights.[117] Folding together, if not outright subsuming, state courts' theory of rights into the federal conception takes away this "double security" whereby "different governments . . . controul [sic] each

111. *Id.* at 182.

112. State v. Sanchez, 350 P.3d 1169, 1174 (N.M. 2015).

113. SUTTON, *supra* note 109, at 182. Some other state courts have attempted to develop their own criteria for when to stray from Supreme Court reasoning and precedent. These include differences in the text, the state's constitutional history, preexisting state law, structural differences in the constitutions, matters of particular state or local concern, and documents from the state's constitutional convention(s). Liu, *supra* note 108, at 1314.

114. SUTTON, *supra* note 109, at 177.

115. *Id.* at 182.

116. *See* THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob Ernest Cooke ed., 1961).

117. *See* THE FEDERALIST NO. 51, at 351 (James Madison or Alexander Hamilton) (Jacob Ernest Cooke ed., 1961).

other."[118] Put simply, the secondary approach to constitutional interpretation undermines the Constitution's core federalist principle of a divided government.

2. The Primacy Approach

As opposed to the secondary approach, Court of Appeals judge and state constitutionalism scholar Jeffrey Sutton calls for state courts to focus on their state constitution first—the "primacy approach."[119] State courts should use their "distinct state texts and histories[,] and draw[] their own conclusions from them."[120] In doing so, they can break away from the "unfortunate myth that federal constitutional law remains front and center—the first line of inquiry—leaving state constitutional law as a second thought."[121] With the "primacy" approach, state supreme court justices can offer the level of protection for individual liberty rights that they believe is warranted.[122] Importantly, this perspective allows for ongoing constitutional debate that "modulates the timing, process, and substance of individual-rights enforcement" across the nation.[123]

However, the "primacy approach" may be too limited, as it unnecessarily restricts the ability of state and federal courts across the country to inform each other's readings and conceptions of constitutional principles. Under Sutton's approach, state courts should diverge based on differences between the state and federal text or history.[124] For the constitutional dialogue that Sutton envisions, however, it would be more useful for state and federal courts to engage "in a *single* discourse, interpreting similar texts or principles in their respective constitutions within a common historical tradition or common framework of constitutional reasoning."[125] By having state and federal courts grapple with similar texts and principles, state courts' decisions would be most impactful because they would not be "readily cabined or distinguished on

118. *Id.*

119. SUTTON, *supra* note 109, at 181 (internal quotations omitted) ("[A]pplication of the state constitution is logically prior to review of the effect of the state's total action under the Federal Constitution and indeed first in time and first in logic. By adhering to this natural sequence, state courts claim the rightful independence of their state constitutions.").

120. *Id.* at 177. State courts can bring to bear "all the traditional tools of constitutional analysis: text, structure, history, controlling state precedent, and the values of the state polity." GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 44.

121. SUTTON, *supra* note 109, at 178.

122. *Id.* at 183.

123. Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1310 (2019) (reviewing SUTTON, *supra* note 109).

124. *Id.*

125. *Id.* at 1304.

state-specific grounds."[126] "Although state constitutionalism may benefit from 'first-principle inquiries' into 'local language, context, and history,' . . . our system of judicial federalism contemplates redundancy in interpretive authority . . . ."[127] This redundancy is justified not simply because different judges may interpret text differently, but because it serves the crucial federalist principle of vertically disaggregated power.[128]

3. The Functional Approach

An alternative theory of state constitutional interpretation—the functional approach—incorporates elements of Sutton's primacy theory, while encouraging an explicit discourse between state and federal courts. The functional approach emphasizes that, for federalism to work, state and national governments serve different functions, and it is therefore "inevitable that their respective constitutions . . . should also serve somewhat different functions."[129] This approach posits that one of the core functions of state courts, like their federal counterparts, is to monitor and resist actions of their analogues in order to protect the public.[130] They can achieve this goal by construing state constitutions to guarantee greater rights than the corresponding federal Constitutional provision provides.[131] Just like the primacy approach, state courts can do so without following or even acknowledging federal constitutional law.[132]

Crucially, the functional theory of state constitutionalism posits that it can be proper to consider a decision's "federalism effects," and these effects can "furnish a legitimate normative ground on which to rest a construction of the state constitution."[133] In other words, state high court judges need not limit their divergence from federal precedent to different text, history, and structure.[134] What's more, they can construe provisions with the goal of creating a specific impact on federalism, even if other tools of constitutional interpretation indicate a different outcome.[135] To be clear, the primacy approach of considering the state text, framers'

126. *Id.* at 1330 (citing Liu, *supra* note 108, at 1321–22) ("Although state constitutions vary in their language and content, the recurring cross-pollination of constitutional concepts indicates that state constitutions are both sources and products of a shared American legal tradition.").

127. *Id.* at 1338 (quoting SUTTON, *supra* note 109, at 177).

128. *Id.*; *see also supra* notes 116–118 and accompanying text.

129. GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 18.

130. *See id.* at 18–19.

131. *Id.* at 19. Additionally, "they may resist national power indirectly by construing the state constitution in ways that facilitate resistance by other organs of state government." *Id.*

132. *Id.* at 20.

133. *Id.* at 195.

134. *Id.*

135. *Id.*

intent, and legislative history would still be used, and federal and sister courts' reasoning could be referenced, but these analyses would be supplemented by the state supreme court considering how its decision would impact current and future abuses of power and intrusions on civil liberties.[136] By interpreting their constitutions functionally, state courts best situate themselves to ensure their holdings can fill gaps left by their federal counterparts.[137]

In summary, there are three overlapping, yet distinct theories of state constitutional interpretation: the secondary, primacy, and functional approaches. The secondary approach looks to state constitutional law only after state courts find that the federal counterpart does not resolve the issue.[138] The primacy approach, as the name suggests, flips this sequence, and state courts begin their analysis with the state constitution.[139] This method allows state courts to provide the level of protection they deem appropriate, irrespective of how the Supreme Court has interpreted the right in question. The functional approach goes a step further and asks state courts to explicitly consider their role in the American federalist structure. In doing so, the functional approach allows state courts to follow suit of the primacy approach and not consider federal constitutional law, or to explicitly consider how federal constitutional law falls short of protecting individuals' rights. Accordingly, this Article joins scholarship suggesting that functional interpretation is the theory state courts should apply when construing constitutional text. Moreover, this Article bolsters this contention by showcasing the importance of the functional approach by focusing on a specific case study: the legality of on-site fingerprinting in Michigan.

II. Racialized Dragnets, On-site Fingerprinting, and Where Federal and State Constitutional Law Fail

This Part uses a case study to showcase the importance of state constitutionalism in the context of the Fourth Amendment. Section II.A details what dragnets are and how increasingly complex dragnets disproportionately impact communities of color, especially as technology continues to advance at lightning speed. Section II.B outlines how various investigatory stop policies have been used as dragnets, including the GRPD investigatory stop policy, which innovatively adds the additional dragnet of on-site fingerprinting to its investigative stops. Section II.C

136. *Id.* at 195–97.

137. See *infra* Section II.C.iii for a case study of state constitutionalism. See *infra* Part III for a discussion of the role functional state constitutionalism can take in the future of law enforcement dragnets.

138. GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 44.

139. *Id.*

demonstrates how Fourth Amendment jurisprudence on fingerprinting does not provide adequate protection for the privacy interests in one's fingerprints through a review and analysis of the arguments in *Johnson v. VanderKooi*, a case challenging the GRPD photograph and fingerprint program.[140] Lastly, Section II.D shows how state constitutionalism can fail if it only focuses on the primacy and secondary approaches of state constitutional interpretation.

A. Dragnets Meet Technological Advancement

Dragnets are "programmatic government efforts to investigate, detect, deter, or prevent crime or other significant harm by subjecting a group of people, most of whom are concededly innocent of wrongdoing or of plans to engage in it, to a deprivation of liberty or other significant intrusion."[141] Thanks to the Supreme Court's acquiescence, modern-day law enforcement liberally incorporates and relies on dragnets.[142] For example:

> *Without any individualized suspicion or judicial preclearance*, criminal offenders must submit to strip searches and swabs for DNA analysis, school children must undergo drug testing, motorists are stopped at roadblocks and checkpoints, and pedestrians in our major cities are monitored by camera systems. Data mining programs covertly sweep through hundreds of thousands of records containing all sorts of personal information upon little or no showing of cause. And everyone's personal effects are uniformly scanned and searched at borders, airports, and various other major travel hubs.[143]

Notwithstanding their common usage, these dragnets "pose serious threats to liberty and social stability."[144] Perversely, dragnets incentivize pretextual police action.[145] As previously discussed, the Supreme Court has allowed an investigative stop exception to the warrant requirement as long as there is "reasonable suspicion."[146] However, police departments have abused this discretion and amassed information from large swaths of communities while claiming they suspect *individuals* of nefarious action.[147] For example,

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140. *See* Johnson v. Vanderkooi, 983 N.W.2d 779 (Mich. 2022).

141. Slobogin, *supra* note 26, at 110.

142. *Id.*

143. *Id.* at 108 (emphasis added).

144. *Id.* at 109.

145. *Id.* at 125 ("[B]ecause they are so easy to justify, dragnets provide tempting opportunities for pretextual police actions."). Worse yet, this pretext is not limited to individual spheres of privacy, leading to increasingly complex and overlapping networks of intrusion. *Id.*

146. *See supra* Section I.A.ii; Terry v. Ohio, 392 U.S. 1 (1968).

147. Slobogin, *supra* note 26, at 126 ("[D]ragnets can be disguised as actions based on

> [O]fficers rely on countless other factors in justifying the hundreds of thousands of stops they conduct each year, and officers may very likely be applying some of those factors unfaithfully as well. That's particularly true for softer factors, like suspicious bulges and furtive movements, which officers frequently cite as bases for stops.[148]

These subjective factors are likely vulnerable to cognitive distortion and bias, especially in the context of race or threatening situations.[149] Concerningly, these dragnets are likely to proliferate[150] due to technological advances and "the advent of profiling science mak[ing] dragnets even more tempting to government officials."[151] In turn, dragnet policies have extended from those convicted of violent felonies to those convicted of non-violent felonies,[152] and in the case of the Grand Rapids Police Department, to those merely stopped and frisked.[153]

The negative consequences of dragnets are hard for many law-abiding citizens to conceive. Is it not a good thing that law-abiding citizens' information is being used to catch the bad guys? This line of thinking has a fair amount of logic. However, as the Framers pointed out, is there not something odd about all individuals being treated like

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individualized suspicion. For instance, the federally funded program Operation Pipeline is *designed* to use traffic violations, which all of us commit all of the time, as means of obtaining consent or otherwise gaining authorization to search the car that is stopped, and the purpose behind many antiloitering statutes is to give police authority to arrest people believed to be affiliated with gangs.").

148. Grunwald & Fagan, *supra* note 55, at 398 (footnote omitted).

149. *Id.* at 398 n.157; *see also* Andrew R. Todd, Kelsey C. Thiem & Rebecca Neel, *Does Seeing Faces of Young Black Boys Facilitate the Identification of Threatening Stimuli?*, 27 PSYCH. SCI. 384, 384 (2016) ("[P]articipants had . . . more difficulty identifying nonthreatening stimuli after seeing [images of] Black faces than after seeing White faces . . . ."); Richard R. Johnson & Mark A. Morgan, *Suspicion Formation Among Police Officers: An International Literature Review*, 26 CRIM. JUST. STUD. 99, 100, 107–09 (2013) (discussing how officers use racial characteristics and non-verbal cues in developing suspicion about suspects on the street).

150. Slobogin, *supra* note 26, at 109 ("[G]eneral-warrant-type operations are likely to increase astronomically in the near future . . . .").

151. *Id.* at 121; *see also id.* at 109 (describing the impetus behind the increasing enticement as: "First, technological advances—cameras equipped with zoom and nightscope capacity, computers that can process millions of records in minutes, detection equipment that can see through clothes—have made dragnets more efficient, effective, and economical, or at least government officials think so. Second, concerns about national security, heightened since September 11, 2001, make such dragnets even more alluring than usual. Third, the dragnet mentality dovetails with government's infatuation with profiling . . . .").

152. *Id.* at 123 (citing State v. Martin, 955 A.2d 1144 (Vt. 2008)). Further, "programs aimed at arrestees are probably not far behind." *Id.* (citing United States v. Pool, No. 09-10303, 2010 WL 3554049 (9th Cir. Sept. 14, 2010)).

153. *See infra* Section II.C.

criminals in the hope of finding a smaller subsection of the population that is actually committing crimes?[154] As the Supreme Court has noted:

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. *This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law.* The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.[155]

Many are able to turn a blind eye because they do not feel the weight of these privacy intrusions. Instead, the brunt of this burden is felt by communities of color—whether they are a Latinx person who lives near the U.S.-Mexico Border, an Arab-American trying to travel by airplane, or a Black person simply trying to walk home.[156]

B. Examples of How Investigative Stop Dragnets Disproportionately Impact Communities of Color

Case law and Department of Justice (DOJ) investigations alike reveal that police departments across the country disproportionately violate the Fourth Amendment rights of Black people and of people of color more generally. In *Floyd v. City of New York*, plaintiffs brought a putative class action against New York City alleging that the city's stop-and-frisk policy violated their Fourth and Fourteenth Amendment rights against unreasonable searches and seizures.[157] At the core of this claim was the assertion that officers stop Black and Hispanic people more frequently

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154. *See* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 51 (Da Capo Press 1970) (1937); THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 323, 326 (Jonathan Elliot ed., 2d ed. 1836).

155. McDonald v. United States, 335 U.S. 451, 455–56 (1948) (emphasis added).

156. *See* Slobogin, *supra* note 26, at 107, 124–25 (internal citations omitted) ("Many readers may feel perfectly secure from this kind of pressure in their lives. But imagine you are a Mexican American in Southern California who is subjected to document checks on major highways far from the border, or a student who has your blood drawn or urine checked because you want to play in the school band. Or imagine you are an inner-city resident subject to routine checkpoint stops as you walk around your own neighborhood, or an Arab American who is tracked on camera or through digital means, singled out at travel centers, and subject to FBI interviews because a data-mining program indicates that you fit a terrorist profile."); *cf. Surveillance City: NYPD Can Use More Than 15,000 Cameras to Track People Using Facial Recognition in Manhattan, Bronx and Brooklyn*, AMNESTY INT'L (June 3, 2021), https://www.amnesty.org/en/latest/news/2021/06/scale-new-york-police-facial-recognition-revealed/ [https://perma.cc/BKS9-H393] (detailing how the most surveilled neighborhood in New York City has residents who are nearly 90% people of color, and 54.4% are Black residents specifically).

157. Floyd v. City of New York, 959 F. Supp. 2d 540, 583 (S.D.N.Y. 2013).

due to racial discrimination.[158] Ultimately, a comparative statistical analysis validated the plaintiff's claims: the New York Police Department (NYPD) engaged in rampant violations of Blacks' and Hispanics' Fourth Amendment rights over a decade—the magnitude of which "will almost certainly never be known."[159] Statistical evidence indicated that the best predictor for the rate of stops was the racial composition of a given geographical unit, with the NYPD carrying out more stops in areas with a greater number of Black and Hispanic residents.[160] Despite thorough and consistent notice of constitutional problems, New York City's decade-long stop-and-frisk program continued, violating the Fourth Amendment rights of tens of thousands of Black and Latinx individuals.[161]

Similarly, a DOJ investigation into the Ferguson Police Department (FPD) found that Black people are more likely to be stopped, searched, arrested, and subjected to violence.[162] FPD reported 11,610 vehicle stops between October 2012 and October 2014; Black individuals accounted for 85% of those stops despite making up only 67% of the population.[163] In the same two-year period, Black people were the subjects of 97% of *Terry* stop searches, constituted 92% of cases where both passengers were asked to exit a vehicle during a search, and were five times as likely to have a search that lasted more than thirty minutes.[164] Even after controlling for non-race-based variables, Black individuals remained 2.07 times more likely to be searched, be issued citations, and be arrested.[165] As expected, disproportionate targeting is only exacerbated when officers have a high degree of discretion.[166]

Moreover, a DOJ inquiry into the Baltimore Police Department (BPD) found rampant abuses of Black citizens' Fourth Amendment rights.[167] Nearly half of BPD stops occurred in "two small, predominately African-American districts that contain only 11 percent of the City's population."[168] The pattern of racially targeted stops is especially

158. *Id.*

159. *Id.*

160. *Id.* at 589.

161. *Id.* at 572.

162. C.R. DIV., U.S. DEP'T OF JUST., THE FERGUSON REPORT: DEPARTMENT OF JUSTICE INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 63–64 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/V5HN-Y7UJ].

163. *Id.* at 64.

164. *Id.* at 65.

165. *Id.*

166. *See id.* at 65–67.

167. *See* C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (2016), https://www.justice.gov/crt/file/883296/download [https://perma.cc/JB6M-KN4T].

168. *Id.* at 4.

pronounced in the pedestrian context: "BPD stopped African-American residents three times as often as white residents after controlling for the population of the area in which the stops occurred."[169] Despite significant variation in district composition, the proportion of Black individuals stopped exceed their share of population in each of BPD's nine districts.[170] Notably, "[o]ne African-American man in his mid-fifties was stopped 30 times in less than [four] years," not one of which resulted in a citation or criminal charge.[171]

In sum, the Baltimore Police Department, like its counterparts in New York and Ferguson, was found to routinely racially discriminate leading up to and during stops, often using stops as a key method to racially profile Black men. While this data is not exhaustive, it demonstrates a harrowing commonality between the abuses of police departments in three jurisdictions,[172] with Grand Rapids, Michigan likely appropriately added to the list.

Much like their New York, Ferguson, and Baltimore counterparts, the GRPD disproportionately uses investigatory stops on Black people. However, their policy and customs go a step further and allow police officers to photograph and fingerprint individuals who do not have identification when an officer questions them.[173] For over thirty years, GRPD has implemented this photograph and fingerprint program, also known as "photograph and print," or "P&P" for short.[174] Under this policy, GRPD officers may perform a P&P while "writing a civil infraction or appearance ticket" or "in the course of a field interrogation or a stop if appropriate based on the facts and circumstances of that incident."[175] Notably, GRPD officers "are *not* required to make a probable cause determination before performing" the procedure[176]—despite the Fourth Amendment's clear language on the issue. This standard holds true even when these individuals were not charged with a crime or arrested and even when there was no evidence of criminal activity.[177]

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169. *Id.* at 5.

170. *Id.*

171. *Id.*

172. *Cf.* "*Get on the Ground!": Policing, Poverty, and Racial Inequality in Tulsa, Oklahoma*, HUM. RTS. WATCH (Sept. 12, 2019), https://www.hrw.org/report/2019/09/12/get-ground-policing-poverty-and-racial-inequality-tulsa-oklahoma/case-study-us# [https://perma.cc/XPJ4-DBSR] (reporting on the negative impact of policing on Black communities in Tulsa, Oklahoma, including finding that "black people, even regardless of wealth or poverty, disproportionately receive aggressive treatment by police").

173. Pls.-Appellants' Brief to Supreme Court, *supra* note 7, at *8.

174. *Id.* at *3.

175. *Id*. at *8–9 (citation omitted).

176. *Id.* at *9 (citation omitted) (emphasis added).

177. *Id.* (describing the process that comes after a "photograph and print" is collected);

Facing public backlash after a lawsuit was filed regarding the P&P policy, the GRPD claimed their program has been mostly discontinued, as they changed their policy to require "highly suspicious" rather than "suspicious" behavior.[178] In other words, it has not been discontinued. Instead, it has swapped one squishy, undefined standard for another—both subject to officers' wide discretion. If the GRPD's behavior is acceptable, it would suggest a blueprint for other cities: photograph and fingerprint Black communities for as long as possible,[179] store the information gathered by the dragnet in perpetuity,[180] offer to largely discontinue the program while still allowing abundant discretion to officers,[181] and then continue to amass a repository of fingerprints without so much as a *mea culpa*.[182]

Put simply, the police can disguise dragnets like fingerprinting by claiming an individual was "suspicious" and possibly linked to a crime, thereby creating the "need" to take and log their fingerprints. If left unchecked, this dragnet, combined with new fingerprinting technology, will spread.[183] This spread will likely once again be at the expense of communities of color.[184]

C. Johnson v. VanderKooi *Suggests Federal Constitutional Law May Not Protect Against Fingerprinting Dragnets*

With this explanation of why fingerprinting dragnets like the GRPD's are worrisome and should be stopped, this section analyzes the arguments made in *Johnson v. VanderKooi*, the case challenging the

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see also Police Photograph and Fingerprint Without Probable Cause, ACLU MICH. https://www.aclumich.org/en/cases/police-photograph-and-fingerprint-without-probable-cause [https://perma.cc/CV4J-3D3R] (explaining that the "photographing and printing" procedure has been used on about "1,000 people per year, many of whom are African American youth").

178. Ryan Boldrey, *Case Against Grand Rapids Police for Targeting Black Youth Heads to Michigan Supreme Court*, MICH. LIVE (Mar. 1, 2021), https://www.mlive.com/news/grand-rapids/2021/03/case-against-grand-rapids-pd-for-targeting-black-youth-heads-to-michigan-supreme-court.html [https://perma.cc/9QM8-NLCW]; Bryce Huffman, *GRPD Says It Won't Go Back to Old "Photos and Prints" Policy Despite Favorable Court Ruling*, MICH. RADIO (Nov. 25, 2019), https://www.michiganradio.org/post/grpd-says-it-wont-go-back-old-photos-and-prints-policydespite-favorable-court-ruling [https://perma.cc/K4DJ-YGSA].

179. Boldrey, *supra* note 178 ("[T]hree out of four instances where the practice is put to use by Grand Rapids Police officers involve innocent Black teens.").

180. *See Police Photograph and Fingerprint Without Probable Cause*, *supra* note 177.

181. Boldrey, *supra* note 178.

182. *See Mea culpa*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining mea culpa as "[a]n acknowledgment of one's mistake or fault").

183. *Cf.* Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 104 (2008) (describing how, if allowed, espionage networks can spread and become commonplace to the point of infiltrating your home under existing Fourth Amendment law).

184. *Cf.* Lee & Chin, *supra* note 23 (describing increasing law enforcement surveillance technologies and their effects on communities of color).

GRPD's photograph and fingerprint program, to demonstrate how the Supreme Court's search and seizure jurisprudence may not be enough to stop fingerprinting dragnets in all circumstances.[185] This uncertainty demonstrates the need for state constitutionalism to fill the gap.

i. Background

Denishio Johnson and Keyon Harrison, two of the teenagers who were subjected to the GRPD "photograph and print" program,[186] brought § 1983 claims[187] against the city for violating their rights under the Fourth Amendment.[188] On remand, the Court of Appeals concluded that the challenged policy did not violate Plaintiffs' Fourth Amendment right to be free from unreasonable search and seizures because the on-site photograph and fingerprint program was based on reasonable suspicion during a valid *Terry* stop.[189] This substantive holding was appealed, and the Michigan Supreme Court reversed.[190]

ii. Arguments

This subsection highlights the three key arguments put forth by Plaintiffs' counsel in *Johnson v. VanderKooi*. First, they argued that while the trespass approach to the Fourth Amendment is typically applied to property, it should also apply to government intrusions on a person's body, such as fingerprinting.[191] Second, they argued that Plaintiffs' reasonable expectation of privacy was infringed.[192] Third, Plaintiffs' counsel argued that fingerprinting during a *Terry* stop is unconstitutional because of the fingerprinting's purpose, scope, and duration.[193] An analysis of these arguments reveals—and the Michigan Supreme Court's

185. *See* Johnson v. Vanderkooi, 983 N.W.2d 779 (Mich. 2022).

186. *See supra* notes 1–15 and accompanying text.

187. 42 U.S.C. § 1983 (providing civil actions for the "deprivation of any rights, privileges, or immunities secured by the Constitution," including deprivation which stems from "any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia").

188. Pls.-Appellants' Brief to Supreme Court, *supra* note 7, at *13–15 (noting that the trial courts granted summary judgment in favor of Grand Rapids because the violations did not derive from a "policy or custom" of the city); *see* Johnson v. VanderKooi, 903 N.W.2d 843, 848–49 (Mich. Ct. App. 2017), *rev'd in part*, 918 N.W.2d 785 (2018), *rev'd*, 983 N.W.2d 779 (Mich. 2022); Harrison v. VanderKooi, 2017 WL 2262889, at *1 (Mich. Ct. App. May 23, 2017) (affirming the trial courts' decisions), *rev'd in part sub nom.* Johnson v. Vanderkooi, 918 N.W.2d 785 (2018) (reversing and remanding to the Court of Appeals to directly address the Fourth Amendment claims in the consolidated appeals), *rev'd*, 983 N.W.2d 779 (Mich. 2022).

189. Pls.-Appellants' Brief to Supreme Court, *supra* note 7, at *14–15.

190. *Johnson*, 983 N.W.2d 779.

191. Pls.-Appellants' Brief to Supreme Court, *supra* note 7, at *16–18.

192. *Id.* at *21.

193. *Id.* at *31–32.

consideration of these arguments corroborates—how muddled Fourth Amendment jurisprudence is when it comes to on-site fingerprinting. The ultimate holding of *Johnson v. VanderKooi*—that the fingerprinting constituted a search under the Fourth Amendment, though the court did not determine whether or not the Fourth Amendment was violated—still makes it unclear how successful similarly situated Plaintiffs' claims would fare under the Supreme Court's jurisprudence.

Even though it convinced the Michigan Supreme Court, at least two possible issues befall Plaintiffs' trespass argument that could lead to different rulings in future cases.[194] In *Johnson v. VanderKooi*, the Plaintiffs relied on *Grady v. North Carolina* to say that physical trespass doctrine is not limited to homes and personal property but also includes contact to the human body.[195] First, while the Michigan Supreme Court accepted that fingerprinting is a search under the trespass doctrine,[196] it did not necessarily have to strike the practice down as unreasonable.[197] In *Grady* itself, the Court remanded the case for a determination of the reasonableness of the intrusion.[198] As is detailed later in this discussion, the court in *Johnson v. VanderKooi* found that on-site fingerprinting was not reasonable as part of a *Terry* stop;[199] however, the court remanded the case to the court of appeals to determine whether or not Keyon Harrison freely and voluntarily consented to the fingerprinting, thereby

194. Pls.-Appellants' Brief to Supreme Court, *supra* note 7, at *16–18 (citing *United States v. Jones*, 565 U.S. 400 (2012)) (arguing that a physical trespass to a constitutionally protected area for the purpose of obtaining information is a search under the Fourth Amendment); *id.* (citing *Grady v. North Carolina,* 575 U.S. 306 (2015)) (arguing that the physical trespass doctrine is not limited to homes and personal property but also includes contact to the human body and that placing ink onto someone's fingers and physically manipulating their hands and digits onto the fingerprint card is a physical intrusion in order to obtain information, beyond what a private citizen may do, and is therefore a search worthy of Fourth Amendment protection).

195. *Grady*, 575 U.S. at 309 ("In light of these decisions, it follows that a State also conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements."); *see also Jones*, 565 U.S. at 406 n.3 ("Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred."); Florida v. Jardines, 569 U.S. 1 (2013) (citing *Jones*, 565 U.S. at 406 n.3) (affirming that a search occurs when the government gains evidence by physically intruding on constitutionally protected areas).

196. *Johnson*, 983 N.W.2d at 787 ("The fingerprinting of each of the plaintiffs in these cases constituted a physical trespass onto a person's body, a constitutionally protected area.").

197. *Id.* at 787 (citation omitted) ("The determination that fingerprinting pursuant to the P&P policy constitutes a search does not end our inquiry. The Fourth Amendment is not, of course, a guarantee against *all* searches and seizures, but only against *unreasonable* searches and seizures.").

198. *Grady*, 575 U.S. at 310.

199. *Johnson*, 983 N.W.2d at 787–89.

making the search reasonable and lawful.[200] Though on-site fingerprinting was properly found to be a search under the Fourth Amendment, the fact-specific inquiry into the reasonableness of this search may distinguish future claims that try to rely on similar theories. Second, there is a clear distinction between the search in *Grady*, on-going and indefinite satellite-based monitoring,[201] and the relatively short taking of fingerprints in the present case. While the Michigan Supreme Court held this intrusion was too long and convincingly defended this holding under *Terry*,[202] the malleability of the *Terry* doctrine and the specifics of the on-site fingerprinting program in particular could allow another court to form a different conclusion.

Further, Denishio Johnson and Keyon Harrison argued that they "had a reasonable expectation that government agents would not take their fingerprints without consent."[203] The Michigan Supreme Court did not address this argument in its majority opinion. However, the concurrence agreed with the Plaintiffs' argument.[204] Yet, it is unclear that other courts would follow the concurrence's *Katz* analysis, especially since this analysis was dependent on fingerprinting procedure as it currently operates at the GRPD. At the core of Plaintiffs' claim was that "[v]irtually any intrusion," even if only a light touch, invades personal security.[205] To bolster the claim, the Plaintiffs also cited to *Cupp v. Murphy*,[206] which held that scraping fingernails to obtain trace evidence is a search.[207] However, to reach that holding, the Court in *Cupp* distinguished scraping under fingernails from voice exemplars, handwriting exemplars, and *fingerprints*, thereby implying there is no reasonable expectation of privacy in fingerprinting.[208] Nonetheless, the

200. *Id.* at 789–90.

201. *See Grady*, 575 U.S. at 310 (describing the continuous satellite-based monitoring program).

202. *Johnson*, 983 N.W.2d at 787–89.

203. Pls.-Appellants' Brief to Supreme Court, supra note 7, at *21.

204. *See Johnson*, 983 N.W.2d at 791–98 (Welch, J., concurring).

205. Pls.-Appellants' Brief to Supreme Court, supra note 7, at *22 (citing Maryland v. King, 569 U.S. 435, 446 (2013)).

206. *Id.* (citing Cupp v. Murphy, 412 U.S. 291 (1973)).

207. *Cupp*, 412 U.S. at 295.

208. *See id.* at 295. Looking more broadly than the present case, new fingerprinting technologies will make it so law enforcement can take individuals' fingerprints both more quickly and more accurately. *See, e.g.*, Danny Thakkar, *Portable Fingerprint Scanners for Law Enforcement: Identify Verification on the Street*, BAYOMETRIC, https://www.bayometric.com/portable-fingerprint-scanners-law-enforcement/ [https://perma.cc/K6JG-MVUW] (describing evolution of portable fingerprint ID scanners). Thus, this line of reasoning, even if it prevailed in the present case, may become largely irrelevant in the near future. *Accord Johnson*, 983 N.W.2d at 791–92 (Welch, J., concurring) (internal citation omitted) ("The collection and use of biometric information, such as

concurrence in *Johnson v. VanderKooi* indicated that fingerprinting could be covered by *Cupp*, as "[l]ike a hair sample or fingernail scrapings, some form of advanced examination, likely involving a trained expert using sense-enhancing technology or computers, is necessary to make a fingerprint useful to law enforcement or fact-finders."[209] With ever-advancing technologies, however, this logic will not always hold true for fingerprinting, as the concurrence acknowledged.[210]

Lastly, Plaintiffs argued that fingerprinting during a *Terry* stop is unconstitutional because of the purpose, scope, and duration of the fingerprinting. Unlike the appellate court, the Michigan Supreme Court agreed.[211] However, this argument may fail in other courts given the U.S. Supreme Court's dicta on fingerprinting and the fact-specific analysis of the GRPD's fingerprinting policy as it was applied to the plaintiffs. Plaintiffs argued that fingerprinting is not permissible during a *Terry* stop because it does not serve the very narrow purpose of discovering weapons that could be used to harm officers or other civilians.[212] Alternatively, they argued that the scope of a *Terry* stop had been exceeded since the detention was not "carefully tailored to its underlying justification," and it lasted "longer than is necessary to effectuate the purpose of the stop,"[213] which is to ensure that there is no criminal activity afoot.

The Michigan Supreme Court agreed that on-site fingerprinting exceeded the scope and duration of a *Terry* stop.[214] In this case, there was no indication that the fingerprinting would "tie either plaintiff to the circumstances that justified each *Terry* stop."[215] However, the court seemed to leave open the opportunity that on-site fingerprinting could be allowed if it is related in scope to the circumstances that justified the

fingerprints, may not always require a physical trespass sufficient to trigger *United States v. Jones*, and thus courts should carefully examine the technologies at issue and how biometric data will be collected and used.").

209. *Johnson*, 983 N.W.2d at 798 (Welch, J., concurring).

210. *Id.* ("There might soon be a time when we are called upon to determine the constitutionality of a nontouching/nontrespassory harvesting of biometric information for investigative purposes prior to arrest. Changing technologies require an evolving lens through which our search and seizure jurisprudence should be viewed.").

211. *Id.* at 788 (majority opinion) ("Fingerprinting pursuant to the P&P policy exceeded the permissible scope of a Terry stop because it was not reasonably related in scope to the circumstances that justified the stop. Having held that fingerprinting constitutes a search, it is clear that fingerprinting does not fall within the limited weapons search that is justified under certain circumstances during a Terry stop; fingerprinting is simply not related to an officer's immediate safety concerns.").

212. Pls.-Appellants' Brief to Supreme Court, supra note 7, at *31–32.

213. Florida v. Royer, 460 U.S. 491, 500 (1983).

214. *Johnson*, 983 N.W.2d at 787–89.

215. *Id.* at 789.

Terry stop.[216] Further, the court found that the on-site fingerprinting exceeded the permissible duration of a *Terry* stop because the officers fingerprinted Keyon Harrison after he had already answered questions about his identity and after officers had already determined that no criminal activity had taken place.[217] This fact-specific analysis leaves open the possibility that an on-site fingerprinting program applied to a different plaintiff might be completely acceptable.

Further, in dicta in *Hayes v. Florida*, the Supreme Court seems to set out a framework for implementing *Terry*'s objective standard for on-site fingerprinting that would allow it.[218] The *Hayes* standard has three requirements: 1) a reasonable suspicion for the stop; 2) a reasonable basis for believing that fingerprinting would confirm or dispel the officer's suspicion; and 3) that the fingerprinting be carried out with dispatch.[219] Given the Court's formulation in *Hayes*, as long as a police officer claims they have "reasonable suspicion" that an individual may be tied to a crime, and there were fingerprints taken at the crime scene, officers can take an individual's fingerprints during a *Terry* stop and add them to their database, as long as it is done quickly. This large loophole in Supreme Court jurisprudence, in the form of a broad *Terry* stop exception to the warrant requirement, makes the trespass theory and reasonable expectation of privacy arguments possibly irrelevant and could allow for on-site fingerprinting in other cases.

iii. How State Constitutionalism Can Fail — The Michigan Case Study

While this Article argues that state constitutionalism can provide protection against on-site fingerprinting, it is not a panacea. In fact, not just any state constitutionalist approach will suffice to stop on-site fingerprinting programs. Before outlining how the functional approach will work in Part III, this section shows why both the primacy and secondary approaches fail.

Again, the primacy approach begins with state's constitutional text and only reviews federal and state high court opinions on the matter for persuasive value.[220] As is typical of constitutional interpretation, the primacy approach analysis begins by looking to the constitutional text before turning to precedent.[221] Like the vast majority of states, Michigan's

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216. *See id.* at 788–89.

217. *Id.* at 789.

218. *See* Hayes v. Florida, 470 U.S. 811, 817 (1985).

219. *Id.*

220. JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES 1–43 (4th ed. 2006); *see also supra* Section I.B.ii.2.

221. *See supra* Section I.B.ii.2.

constitutional language on searches and seizures clearly mirrors the U.S. Constitution.[222]

The three differences between the Michigan Constitution and the U.S. Constitution, taken together, suggest that the Michigan Constitution does not offer any additional protection relevant for on-site fingerprinting. The first difference between the relevant provisions is a slight grammatical modification.[223] However, while divergent in form, the Michigan and federal constitutions' search and seizure provisions are identical in substance. Therefore, there is no requisite difference, as necessitated by the primacy approach, to warrant diverging from a federal holding. Second, Michigan's Fourth Amendment equivalent was amended to provide that certain objects, like weapons, should be admissible as evidence even if unlawfully obtained or seized outside a dwelling.[224] However, this is dubiously relevant to the on-site fingerprinting context and again does not provide sufficient fodder under the primacy approach to diverge from Supreme Court holdings.[225] Finally,

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222. *Compare* MICH. CONST., art. I, § 11 ("The person, houses, papers, possessions, electronic data, and electronic communications of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things or to access electronic data or electronic communications shall issue without describing them, nor without probable cause, supported by oath or affirmation. The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state."), *with* U.S. CONST. amend IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."). *See also* Sydney Goldstein, *Search and Seizure Laws by State*, LAWINFO (Mar. 4, 2021), https://www.lawinfo.com/resources/criminal-defense/search-seizure-laws-by-state.html [https://perma.cc/S3GG-7C65] (listing 48 states that have a provision that someone's person, house, papers, possessions shall be secure from unreasonable searches and seizures, including Michigan).

223. The Michigan Constitution provides that "[n]o warrant . . . shall issue without describing them, *nor without* probable cause" while the the U.S. Constitution provides that "no Warrants shall issue, *but upon* probable cause." MICH. CONST., art. I, § 11; U.S. CONST. amend IV. *Compare* MICH. CONST. art. 2, § 10 (1908), *and* MICH. CONST. art. 1, § 11 (1963), *with* MICH. CONST. art. 6, § 26 (1850) (reverting back to "nor" instead of "or" in the search and seizure provision by 1908, thereby ostensibly rejoining the requirements of a warrant and probable cause cementing the current grammatical structure).

224. *Compare* MICH. CONST. art. 6, § 26 (1850) (no provision providing that certain objects, such as weapons, should be admissible evidence even if unlawfully seized), *with* MICH. CONST. art. 2, § 10 (1908) (containing a provision providing that certain objects should be admissible evidence even if unlawfully seized), *and* MICH. CONST. art. 1, § 11 (1963) (containing provision providing that certain objects should be admissible evidence even if unlawfully seized, but with minor alterations from the 1908 version).

225. If relevant at all, this provision demonstrates a specific local history and suggests the Michigan legislature is more willing to infringe on search and seizure protections, which does not portend well for stopping on-site fingerprinting dragnets. The ultimate holding in

a 2020 amendment that prohibits unreasonable searches and seizures of a person's electronic data and communications similarly has limited applicability because there is (currently) no electronic data involved in on-site fingerprinting.[226] Taken together, these differences do not suggest a necessary divergence from the Supreme Court's indications that on-site fingerprinting may be justifiable without probable cause.

Analyzing Michigan's precedent does not lead to additional constitutional protections. While the Michigan Supreme Court explicitly stated that it would go beyond federal law based on its own constitution in *People v. Bender*,[227] it disclaimed any reliance on the state constitution and its discretion to provide protection beyond the federal constitutional floor in *People v. Hill*.[228] Similarly, in *People v. Long*, the Michigan Supreme Court—analyzing a search and seizure in the *Terry* stop context—rested its analysis entirely on federal constitutional law.[229] Altogether, these holdings suggest an unwillingness of the Michigan Supreme Court to advance independent interpretations of Michigan's constitution.

The secondary approach also does not suggest that the Michigan Supreme Court will diverge from federal jurisprudence. The secondary approach first asks if the Supreme Court has failed to protect a civil liberty,[230] which this Article suggests it has.[231] If a court is to diverge from the federal precedent under the secondary approach, it would be for one of three reasons: flawed federal analysis, structural differences between the state and federal government, or distinctive state characteristics (whether in constitutional text, laws, constitutional convention documents, or other local differences).[232]

To begin with, it is not possible for a state court to proscriptively rebuke the Court's analysis.[233] While the Supreme Court's ambiguous stance on on-site fingerprinting is debatable on a conceptual level, given the Constitution's Supremacy Clause, the Court has the final say on the

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Johnson v. Vanderkooi, 983 N.W.2d 779 (Mich. 2022), focused on interpreting the U.S. Constitution, leaving this question open.

226. *See* MICH CONST. art. 1 § 11 (2020).

227. People v. Bender, 551 N.W.2d 71, 80 (Mich. 1996) ("In so holding, we reiterate that our state constitution affords defendants a greater degree of protection in this regard than does the federal constitution.").

228. People v. Hill, 415 N.W.2d 193 (Mich. 1987).

229. People v. Long, 359 N.W.2d 194 (Mich. 1984).

230. *See* GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 44; discussion *supra* Section I.B.ii.3.

231. *See supra* Sections I.A.ii–iii, II.C.

232. *See supra* notes 112–113 and accompanying text.

233. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

interpretation of rights enshrined in the Constitution.[234] Therefore, this element of the secondary approach suggests state courts should follow the Supreme Court's analysis.

Another reason to diverge from the Supreme Court's reasoning is a structural difference in the state constitution. However, as identified earlier, the federal and Michigan search and seizure provisions do not contain structural differences or meaningful divergence in text.[235] Michigan's Constitutional convention documents do not suggest that the framers of the Michigan Constitution hoped to imbue the state's search and seizure provision with any divergent meaning.[236] Scholars have found that liberal, wealthier, and coastal states are more likely to grant rights beyond the federal constitutional floor.[237] However, it is unclear how these factors play out in Michigan,[238] a moderate Midwestern state of slightly below-average wealth.[239]

In sum, state constitutionalism is not a cure-all. By focusing on interpretative methodologies, the primacy and secondary approaches can miss out on a fundamental aspect of state courts: the value state courts add to our federalist system.[240] Namely, these approaches constrain state courts' ability to explicitly consider their role in vertical separation of powers—a role that requires states to consider and advance individuals' rights where federal institutions fail to do so.[241] If we are to stop on-site fingerprinting dragnets, advocates and judges alike

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234. *But see* Williams, *supra* note 93 (explaining that the Supreme Court's rulings on rights provisions serve as a floor that state courts can exceed to be more protective).

235. *See supra* notes 222–225 and accompanying text.

236. *E.g.*, THE MICHIGAN CONSTITUTIONAL CONVENTIONS OF 1835-1836: DEBATES AND PROCEEDINGS 279 (Harold M. Dorr ed. 1940) (noting the search and seizure provision was adopted without amendment in identical form to the federal provision).

237. Brody, *supra* note 91, at 77, 82, 85.

238. It is important to note that this analysis is constrained by the fact that the Michigan Supreme Court has not articulated which local differences they would consider or find compelling.

239. *See Most Liberal States 2023*, WORLD POP. REV., https://worldpopulationreview.com/state-rankings/most-liberal-states [https://perma.cc/2EBJ-YRBQ]; *Richest States 2023*, WORLD POP. REV., https://worldpopulationreview.com/state-rankings/richest-states-in-usa [https://perma.cc/9UNN-8QJB].

240. *See supra* notes 125–137 and accompanying text.

241. GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 281; *see also id.* at 122 ("State power exists for the benefit of the people of the state, to be sure, and state constitutions exist in part to translate the state polity's wishes into a satisfying plan of state-level self-government. But state power also exists for the benefit of the people of the nation, and it plays a potentially significant role in securing their liberty. This relationship implies an interdependence between state and national constitutionalism that most theories fail to recognize. My welfare, in other words, depends not only on our shared national Constitution and on my state constitution, but also to some extent on your state constitution as well. State constitutions are thus linked in a web of constitutional relations created by the national system of federalism.").

must look to the functional theory of state constitutionalism to fill the gap left by the primacy and secondary approaches to state constitutionalism.

III. Functional State Constitutionalism's Role in Protecting Against Fingerprinting Dragnets

Part II recounted how Fourth Amendment jurisprudence is generally unfavorable to litigants hoping to stop on-site fingerprint dragnets. Further, Supreme Court dicta suggests the Court is likely to uphold warrantless on-site fingerprinting. Worse yet, state constitutionalism may also fail to protect individuals' rights. What, then, can be done to protect against these unreasonable searches and seizures? Section III.A considers the benefits of state constitutionalism regarding on-site fingerprinting dragnets and details how *functional* state constitutionalism accentuates these benefits. Section III.B argues that the functional theory of state constitutionalism can be utilized to stop on-site fingerprinting throughout the United States, as evidenced by its potential effectiveness in combatting the GRPD's on-site fingerprinting in Michigan.

A. Benefits of Using State Constitutionalism

State courts have a wider breadth of interpretative power than their federal counterparts for multiple reasons. One such reason is that state constitutions often provide more positive rights than the U.S. Constitution. The U.S. Constitution is full of negative rights.[242] Negative rights impose a duty on others to not interfere with a person's freedom.[243] For example, the First Amendment states, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[244] While state constitutions also include negative rights, many have created positive and third-generation rights as well.[245] Positive rights impose an affirmative duty on the state to help individuals obtain or do something, such as the right to receive free public schooling.[246] Third-generation rights go a step further and impose communal positive rights, such as the right to a healthy environment or

242. *See* Williams, *supra* note 93, at 967 (implying the presence of negative rights due to the lack of positive rights in the Federal Constitution).

243. *See* Rachel Alyce Washburn, *Freedom of Marriage: An Analysis of Positive and Negative Rights*, 8 WASH. U. JUR. REV. 87, 108 (2015) ("Under a negative rights theory, the government must acknowledge personhood rights and protect a person's innate right to be free from government constraints on that right.").

244. U.S. CONST. amend. I.

245. *See, e.g.*, Williams, *supra* note 93, at 967; EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 1–3 (2013).

246. *See* Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1343–48 (1992) (surveying positive right to education provisions in state constitutions).

to affirmative governmental economic assistance; such third-generation rights "are unheard of in our Federal Constitution."[247]

Furthermore, state constitutions, which are far more amenable to amendment,[248] contain "a wide variety of policy-oriented provisions."[249] In fact, "nationally, state constitutions contain about forty percent policy-oriented clauses."[250] Policy-oriented clauses take on a legislative form and provide detailed solutions to partisan issues instead of espousing fundamental principles like the U.S. Constitution.[251] For example, the Wyoming constitutional convention included a provision that limited the work day to eight hours—a form of regulation typically left to legislatures.[252] Taken together, these differences in the rights provided and goals of state constitutions versus their federal counterpart signal that state constitutions are more expansive. Consequently, state courts interpreting language in their constitutions can, and likely should, assume they can construe these rights more expansively than the Supreme Court can interpret the language in the U.S. Constitution.[253]

Other than their distinctive features, which give additional interpretative breadth, state courts also have several advantages relative to the Supreme Court "when it comes to defining constitutional rights and crafting constitutional remedies."[254] For example, when "announc[ing] rights and remedies," the Supreme Court must be mindful of whether and how they will function across the entire nation.[255] The national impact of the Court's decisions has a limiting effect on the Court, particularly when constitutional claims are innovative.[256] The Court does not want to promulgate a ruling that may be underenforced or have too broad an impact, so the Court instead opts for a "federalism discount."[257] On the other hand, state supreme courts can better account for cultural, geographical, and historical differences, as well as local conditions in

247. Williams, *supra* note 93, at 967.

248. *See, e.g.*, James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 820–22 (1992).

249. Williams, *supra* note 93, at 969.

250. *Id.* at 970.

251. Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 RUTGERS L.J. 945, 958–59 (1994).

252. *Id.* at 969–70.

253. *See* GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 230 ("[S]tate courts have typically inferred from the federal structure of American government and from the historical circumstances of the founding period that, unlike the U.S. Constitution, state constitutions grant state courts plenary rather than limited judicial power.").

254. SUTTON, *supra* note 109, at 16.

255. *Id.*

256. *Id.* at 17.

257. *Id.* (citations omitted).

their state-specific interpretations.[258] Additionally, a "mistaken or an ill-conceived constitutional decision" can be more easily remedied at the state level through constitutional amendment or, in many states, judicial elections.[259] Therefore, "state courts . . . have far more freedom to 'try novel social and economic experiments without risk to the rest of the country.'"[260] This freedom is particularly important for difficult and practically complex constitutional questions.[261] In fact, this state experimentation may be precisely what is happening with on-site fingerprinting. Perhaps—worried about the ramifications of a more expansive, rights-protective ruling, such as minimizing the states' ability to utilize their police power—the Supreme Court is leaving on-site fingerprinting with a federalism discount. Under that view, dealing with on-site fingerprinting dragnets is a perfect example of when it may be better to allow state-by-state interpretation of constitutionality.

State-by-state interpretation underscores a key aspect of state constitutionalism: the constitutional discussion between state and federal judges helps jurists at all levels across the country develop a stronger understanding of constitutional law.[262] State courts "decide whether to embrace or reject innovative legal claims. Over time, the market of judicial reasoning identifies winners and losers."[263] In turn, "the federal courts (and national legislature) profit from the contest of ideas, as they can choose whether to federalize the issue *after* learning the strengths and weaknesses of the competing ways of addressing the problem."[264] Moreover, state interpretations may illuminate language in the U.S. Constitution that first appeared in state constitutions or "provide pragmatic reasons for following or steering clear of an approach."[265] Further, having both state and federal jurists engage in a single discourse

258. SUTTON, *supra* note 109, at 174; *see also* GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 88 ("For example, state law overwhelmingly provides the controlling substantive rules in the laws of tort, contract, commercial transactions, *crimes, property,* wills, and family formation.") (emphasis added).

259. SUTTON, *supra* note 109, at 18 (citation omitted).

260. *Id.* (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

261. *Id.* at 19 ("The more difficult the constitutional question . . . the more indeterminate the answer may be. In these settings, it may be more appropriate to tolerate fifty-one imperfect solutions rather than to impose one imperfect solution on the country as a whole . . . ."); Liu, *supra* note 123, at 1322 ("Problems with a high level of practical complexity may not be amenable to national solutions or, if resolved by a national court, may result in a federalism discount that dilutes the underlying right.").

262. *See* James A. Gardner, *Justice Brennan and the Foundations of Human Rights Federalism*, 77 OHIO ST. L.J. 355, 374 (2016); Liu, *supra* note 123, at 1311; SUTTON, *supra* note 109, at 187.

263. SUTTON, *supra* note 109, at 20.

264. *Id.*

265. *Id.* at 183.

about these constitutional ideas and principles broadens the discourse and forces all jurists to craft a more sound jurisprudence.[266]

The Supreme Court's ruling in *Mapp v. Ohio* provides a tangible example of this principle.[267] The *Mapp* decision was "deeply influenced by an emerging consensus among state courts, which [the Court] carefully and extensively documented."[268] By the time of the Court's holding in *Mapp*, state court decisions in more than half the states made clear that "suppression of illegally seized evidence was the most effective way to deter constitutionally unreasonable searches."[269] At its core, this process of consultation suggests state and federal judges alike accept the proverbial wisdom that two (or more) heads are better than one. That may help explain why "[s]ince *Mapp*, and particularly in the last fifteen years or so, the Court has increasingly exhibited this more robust form of reliance on state court decision-making."[270] Altogether, this redundancy, variation, and jurisprudential discourse plays a crucial role in our federal system.[271]

The functional approach accentuates the benefits of state constitutionalism by explicitly centering the federalist implications of the courts' decisions.[272] Given our nation's vertical separation of powers, state officials are given "the power to resist national authority in appropriate circumstances because they *must* have it—because a properly functioning national system of federalism demands that they have it."[273] As arbiters of the state constitution, state courts play a crucial role in this equation.[274] "Federalism requires that state power be available for deployment outwardly, against threats originating at the national level."[275] Therefore, "state courts should understand themselves presumptively to have been granted such authority. This rebuttable presumption rests on inferences derived from the purposes and operation of the federal system" itself.[276] Consequently, the functional approach takes state constitutionalism's core function—separation of powers—and places it at the center of constitutional interpretation,

266. *See* Liu, *supra* note 123, at 1304, 1311.

267. Mapp v. Ohio, 367 U.S. 643 (1961).

268. GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 105.

269. *Id.*

270. *Id.* (emphasis added); *see also id.* ("Rather than merely opening itself to persuasion by the reasoning and experiences of state courts, the Court has used the *content* of state law to provide a baseline against which to measure whether any particular individual right can be considered part of the fundamental liberty protected by the Fourteenth Amendment.").

271. *See* Liu, *supra* note 123, at 1332–40.

272. GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 195.

273. *Id.* at 188–89.

274. *See id.*

275. *Id.* at 187.

276. *Id.* at 228.

thereby allowing state courts to best serve their function of rebuffing encroachments on civil liberties and rights, notwithstanding federal jurisprudence on the matter.[277]

B. Functional State Constitutionalism's Role in Stopping On-Site Fingerprinting Throughout the United States

Advocates and courts embracing the functional theory of state constitutionalism can effectively reject the GRPD on-site fingerprinting program and any similar programs that might exist or pop up across the country. Instead of being bogged down by the federal interpretations of the Fourth Amendment and trying to differentiate the state constitution's text, history, or local conditions (as the primacy and secondary approaches require), a state supreme court should center its role in our federal system in its analysis. This role requires state courts to "share responsibility for advancing the people's collective welfare" with the federal government.[278] Therefore, it is crucial that state courts (as well as other state branches) check abuses allowed by the U.S. Supreme Court.[279] Under this approach, state supreme court justices would read identical search and seizure language[280] in their constitution to signal an intent not for conformity[281] but instead as an invitation to innovate as is necessary to ensure protections of citizen's rights as they believe can best "effectuate the guarantee."[282] This approach is crucial to successfully stopping on-site fingerprinting dragnets because it allows for state court justices to account for the on-the-ground reality that investigatory stops and dragnets disproportionately undermine the civil rights and liberties of communities of color.

The case study of the dragnet created by GRPD's on-site fingerprinting program had the potential to demonstrate the importance of the functional approach of state constitutional interpretation. The

277. SUTTON, *supra* note 109, at 189 ("If state courts turn to their constitutions only when the Federal Constitution does not decide the question—or worse, only when they disagree with the U.S. Supreme Court's interpretation of the National Constitution—the documents will collect more dust and become more diminished."). This in turn minimizes the state courts' role in federalism.

278. GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 281.

279. *Id.*

280. *See id.* at 254 ("[D]uplicative rights provisions pose no interpretational difficulties whatsoever, and indeed are among the easiest cases, for the functional approach permits them to be recognized for what they are: direct invitations to state courts to monitor federal judicial rulings under the corresponding provisions of the U.S. Constitution, and to exercise their independent judgment concerning the way in which the rights in questions should be best understood and applied.").

281. *Id.* ("[If] the state provisions mean the same thing as their national counterparts, they serve no obvious useful function.").

282. *Id.* at 281–82.

Michigan Supreme Court, in a sense, missed the opportunity to vindicate Keyon and Denishio's rights without having to address Fourth Amendment jurisprudence or the Supreme Court's dicta indicating on-site fingerprinting may be allowed during a *Terry* stop.[283] They could have held that there is a right to privacy to one's fingerprints or even that the scope of a *Terry* stop never allows for on-site fingerprinting without running afoul of the Michigan search and seizure provision. In doing so, they could have been more experimental and brought in more coherent ways of reading the search and seizure language that consciously rebut the Supreme Court's intrusion on individuals' privacy.[284] While it is encouraging that the court found the U.S. Constitution's search and seizure protections apply to on-site fingerprinting, as demonstrated earlier, the Michigan court's holding may not apply in other challenges.[285] Michigan's sister courts around the country still have the chance to explicitly consider their functional role in our federalist system: protecting their citizens from undue incursions on their rights regardless of Supreme Court holdings on the matter.

Johnson v. VanderKooi raises another key aspect of functional state constitutionalism ensuring protections against on-site fingerprinting: transparency. A crucial task for advocates (and judges alike) is to brighten the lines of accountability because the "redundancies built into our structure of government largely serve to channel and manage conflict rather than to facilitate permanent resolution."[286] If state court judges can avoid conflict and hide behind Supreme Court decisions, they can shift the accountability upwards; while politically savvy for judges facing reelection, this conduct limits transparency.[287] Nevertheless, conflict and contestation of ideas is crucial to our federalist system.[288] The jurisprudential conflict among state and federal courts forces both state and federal judges to more thoughtfully engage with different issues that may impact different populations under a certain doctrine.[289] This

283. The court did not consider the Michigan Constitution at all, relying entirely on the Fourth Amendment.

284. *See* SUTTON, *supra* note 109, at 174 ("There is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed in the same way. Still less is there reason to think that a highly generalized guarantee, such as a prohibition on 'unreasonable' searches, would have just one meaning over a range of differently situated sovereigns.").

285. *See supra* Section II.C.ii.

286. Liu, *supra* note 123, at 1339–40.

287. *See* SUTTON, *supra* note 109, at 188–189.

288. *Id.* at 175–76.

289. *Id.* ("If the court decisions another sovereign ought to bear on the inquiry, those of a sister state should have the most to say about the point. Two state constitutions are more likely to share historical and linguistic roots. They necessarily will cover smaller

engagement not only has value in shaping coherent constitutional law, but it also helps raise the profile of issues, thereby garnering a better pulse of the public's view of an issue.[290] A state supreme court extending a right farther than the Supreme Court is willing to "register[s] a forceful and often very public dissent."[291]

One example of the importance of public rejection of a Supreme Court holding are the events following the Court's ruling in *Bowers v. Hardwick*.[292] In *Bowers*, the Court upheld a Georgia statute criminalizing sodomy that was challenged under the Due Process Clause.[293] A dozen years later, the Georgia Supreme Court struck down that same law under Georgia's Due Process Clause, which was worded identically to its federal counterpart.[294] The *Powell* ruling "prompted an explosion of news reports, editorials, and opinion pieces" supporting the *Powell* judgment and chastising the Supreme Court's contradictory *Bowers* ruling.[295] Five years after *Powell*, citing both to public disapproval of their *Bowers* holding and to the Georgia Supreme Court's *Powell* decision, the Supreme Court invalidated a Texas sodomy law.[296] Admittedly, "the *Powell* decision and the subsequent media reaction was only one event in a barrage of criticism of *Bowers* that came from many sources over a period of seventeen years, and did not by itself trigger the Supreme Court's reversal of position."[297] However, this shift underscores how state supreme court divergence can help shape and clarify public opinion and eventually state and federal courts' jurisprudence.[298]

Beyond transparency, functional state constitutionalism will push both federal and state supreme courts to create a clearer and more coherent search and seizure jurisprudence that more genuinely faces fingerprinting dragnets' implications for communities of color.[299] Since they would not be bogged down by the Fourth Amendment's

jurisdictions than the National High Court. In almost all instances they will be construing individual-liberty guarantees that originated in state constitutions, not the Federal Constitution.").

290. GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 100 ("[W]henever a state court dissents from the reasoning of a U.S. Supreme Court decision it offers a forceful and very public critique of the national ruling, which can in the long run influence the formation of public and, eventually, official opinion on the propriety of the federal ruling.").

291. *Id.*

292. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

293. *Id.*

294. *See* Powell v. State, 510 S.E.2d 18 (Ga. 1998).

295. GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 102.

296. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

297. GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 103.

298. *Id.*

299. Liu, *supra* note 123, at 1339 ("[I]nnovation by state courts can inform federal constitutional adjudication, allowing the U.S. Supreme Court to assess what has worked and what has not.").

jurisprudential complexity, states could more clearly delineate rights or posit novel articulations of how different lines of search and seizure doctrine can interact more coherently.[300] These different articulations could be "persuasive precedent in other states considering the same matter," and at times persuasive to the Supreme Court itself.[301] "Marriage equality and the decision that sodomy laws are unconstitutional come to mind" when considering major U.S. Supreme Court cases preceded by persuasive state constitutional law decisions.[302] Perhaps if advocates commit to making functional state constitutionalist arguments, on-site fingerprinting can be added to this list of doctrines where state courts influenced the Supreme Court to be more rights-inclusive and protective.

Conclusion

The Supreme Court has never clarified under what circumstances on-site fingerprinting would be allowed, but it has made clear that it is possible. The Michigan Court of Appeals decision in the *Johnson v. VanderKooi* case, arising out of the Grand Rapids Police Department's photograph and fingerprinting program, shows how the Supreme Court's current interpretation of the Fourth Amendment has created a template for establishing and maintaining a fingerprinting dragnet.[303] The Michigan Supreme Court's decision in *Johnson v. VanderKooi* shows the case of a state high court ignoring (or perhaps merely sidestepping) the United States Supreme Court's dicta on fingerprinting and rejecting the practice under a trespass theory of the Fourth Amendment.[304] However, the concurrence in that case made clear that many federal courts have "either held that fingerprinting is a search or strongly suggested that it is" and that "the national landscape of Fourth Amendment law in this area is murky at best.[305] If this murkiness is allowed to continue, spurred by technological advancement in fingerprinting technology, this dragnet may proliferate to other jurisdictions, at the expense of communities of color—even if the Michigan Supreme Court found a path under the federal constitution in this case to stop it. If the United States Supreme

300. *See* GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25.

301. Williams, supra note 93, at 974 ("Further, in some situations a progression of state constitutional rulings can lead, ultimately, to a change of position by the United States Supreme Court itself, as in its marriage equality decision."); GARDNER, INTERPRETING STATE CONSTITUTIONS, *supra* note 25, at 100 ("[S]tate rulings that depart from or criticize U.S. Supreme Court precedents can contribute to the establishment of a nationwide legal consensus at the state level, a factor that the Supreme Court sometimes considers in the course of constitutional decision-making.").

302. Williams, *supra* note 93, at 964.

303. Johnson v. VanderKooi, 903 N.W.2d 843, 848–49 (2017), *rev'd in part*, 918 N.W.2d 785 (2018), *rev'd*, 983 N.W.2d 779 (Mich. 2022).

304. *Johnson*, 983 N.W.2d at 784–87.

305. *Id.* at 795.

Court's dicta is to be taken seriously, as many lower courts have done, this path may be foreclosed.

Instead of relying on Fourth Amendment jurisprudence, plaintiffs, their lawyers, and state court judges should turn to state constitutionalism. However, all instantiations of state constitutionalism are not necessarily up to the task. Instead, functional state constitutionalism lays the path forward by explicitly considering state courts' roles in our federalist system. In following the functional approach, state courts can be more experimental and bring in more coherent ways of reading the search and seizure language that consciously rebut the Supreme Court's intrusion on individuals' privacy. Since "American constitutional law creates two potential opportunities, not one, to invalidate a state or local law," it seems peculiar to only take one.[306] Ultimately, even if state constitutionalism only offers "second best" opportunities, "second best opportunities to expand civil liberties are better than no chances at all."[307] State constitutional interpretation based on state courts' functional role in federalism is a vital feature of our federal system that will push both the federal Supreme Court and state supreme courts to create a clearer and more coherent search and seizure jurisprudence that more genuinely faces the implications of fingerprinting dragnets for communities of color. In the meantime, moreover, this approach will force state courts, legislatures, and the country writ large to figure out whether or not we truly believe on-site fingerprinting dragnets *should* have a role in our society. While the federal courts may currently allow on-site fingerprinting under specific circumstances, the American people may just say, "keep your hands off my fingerprints!"

306. SUTTON, *supra* note 109, at 8.

307. Williams, *supra* note 93, at 974 (internal quotation omitted).

Trans Bodies, Trans Speech

Parker Rose Wingate†

Abstract: Over the last decade, the acceptability of the very existence of transgender people became a hot-button issue in American politics. A bevy of litigation regarding access to gender-affirming care has ensued. Using medical science to alter one's appearance is not a new concept, but today legislatures and courts scrutinize such care with renewed vigor, arguing a need to regulate the ways with which citizens may use established medical intervention to change their appearance. This scrutiny manifests itself in bans on various forms of gender-affirming care for transgender people, predominantly transgender youth. In response, this Article examines a nascent theory of the right to gender-affirming care: gender-affirming healthcare as symbolic speech protected by the First Amendment.

Table of Contents

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I. Introduction

This Article argues that the act of gender expression through receiving gender-affirming health care as part of a gender transition is symbolic speech recognized by the First Amendment under a novel theory of symbolic speech doctrine. An examination of the relevant case law interpreting similar questions of symbolic speech protection demonstrates a clear connection between First Amendment speech rights of gender expression, queer identity expression, and self-expression through body modification. Courts across the nation now recognize free speech interests in things like body piercing, gender-expressive clothing, and LGBT-expressive speech. The extension of this logic leads to the conclusion that the Constitution must recognize a First Amendment symbolic speech right in pursuing gender-affirming care[1] to express one's gender identity.

This Article is divided into five parts. Part I summarizes the most recent wave of anti-transgender legislation and what it means for the transgender community. It then discusses the singular case in which a judge has briefly noted the merits of arguing for symbolic speech

1. Gender-affirming care is healthcare that brings one's bodily presentation closer to that of their gender identity, including hormone treatment, surgery, vocal training, hair removal, and more. 'Transgender" (or simply "trans") means having a gender identity that differs from that assigned at birth. "Cisgender" (or simply "cis") means having a gender identity that matches that assigned at birth.

protection for gender-affirming care.[2] Part II illustrates the relevant First Amendment doctrine regarding symbolic speech, discusses the implications of an ongoing circuit split regarding the test for protected symbolic speech, and explains the constitutionality of governmental restrictions on symbolic speech. Part III introduces the relevant case law on gender-expressive speech of transgender (trans) people, LGBT-expressive speech, body modification as speech, and third-party standing for First Amendment speech claims. Part IV sets forth and evaluates the doctrinal argument for protecting gender-affirming healthcare—specifically for trans people—as symbolic speech under the First Amendment, examining the constitutionality of a ban on gender-affirming care. It further discusses the double standard regarding access to gender-affirming and gender-expressive healthcare for cis and trans people. Part V concludes that there is a strong First Amendment interest in gender-affirming healthcare.

A. The Current Wave of Anti-Trans Legislation

In the 2015 *Obergefell v. Hodges* decision, the Supreme Court affirmed marriage as a right for same-sex couples, marking a monumental legal and cultural victory for the LGBT community.[3] Since *Obergefell*, opponents of LGBT civil rights have shifted focus from sexual orientation to gender identity.[4] They have recently proposed dozens of bills seeking to restrict transgender freedoms, mostly in Republican-dominated states.[5] Multiple states have passed laws restricting youth access to

2. *See* Vuz v. DCSS III, Inc., No. 3:20-CV-00246-GPC-AGS, 2020 WL 7240369 (S.D. Cal. Dec. 9, 2020).

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

4. *See* Nancy J. Knauer, *The Politics of Eradication and the Future of LGBT Rights*, 21 GEO. J. GENDER & L. 615, 655 (2020) ("By far, the majority of new anti-LGBT legislation and policy is directed at transgender people . . . .").

5. *See id.* at 651 (describing the recent wave of legislation restricting transgender freedoms and explaining that these policies are primarily seen in "red states" and under Republican administrations); *Map: Attacks on Gender Affirming Care by State*, HUM. RTS. CAMPAIGN https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map [https://perma.cc/F3ZK-HR3V] (May 8, 2023) (showing that thirty states have passed or considered a law or policy banning gender-affirming care for minors, and, as of April 3, 2023, tracking more than 110 bills across the country that would "limit or prevent transgender people from accessing gender-affirming care"). Since the first draft of this Article was written, many additional such bans have been proposed or enacted, and some also curtail gender-affirming care regardless of age. *See, e.g.*, MO. CODE REGS. ANN. tit. 15, § 60-17.010 (2023) (drastically curtailing eligibility for gender-affirming care for transgender people in the state of Missouri, by Emergency Rule); Steve Gorman, *Montana Governor Signs Bill Banning Transgender Medical Care for Youths*, REUTERS (Apr. 29, 2023) https://www.reuters.com/world/us/montana-governor-signs-bill-banning-transgender-medical-care-youths-2023-04-29/ [https://perma.cc/664T-7Y92] (discussing Montana's recent ban on gender-affirming care for trans youth, as well as the concurrent censure of transgender Represenative Zoey Zephyr for speaking against the ban).

gender-affirming healthcare, falsely claiming transgender healthcare is too new to be sure of its safety or efficacy,[6] when in reality gender-affirming care (both for trans adults and youth) has been in practice for decades.[7] While the specific rights targeted have varied over the years,[8] the overall trend paints a picture of coordinated anti-trans actors using the legal system to make life for transgender people more difficult.[9]

These anti-trans bills have begun to significantly encroach into trans people's ability to access gender-affirming healthcare. Already, there have been laws criminalizing aspects of gender-affirming healthcare use, with Texas Governor Greg Abbott going so far as to issue an executive order to child protection officials in Texas to investigate and possibly prosecute parents for helping their children seek gender-affirming care, even from licensed clinicians.[10] Several states are considering bills that would ban gender-affirming care for transgender people up to twenty-six years old.[11]

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6. *See Map: Attacks on Gender Affirming Care by State*, *supra* note 5 (showing seventeen states have passed a law or policy banning gender-affirming care for minors, though court injunctions in three of these states have ensured continued access to gender affirming care).

7. Though perhaps new to the public eye, gender-affirming care dates at least as far back as the founding of the Institute for Sexual Science by Dr. Magnus Hirschfeld in Berlin, circa 1920, when early forms of hormone replacement therapy (HRT) and gender-affirming surgeries were successfully administered to treat gender dysphoria. *See* Molly Nunn, *Transgender Healthcare Is Medically Necessary*, 47 MITCHELL HAMLINE L. REV. 605, 612–14 (2021) (discussing the history of the Institute for Sexual Science). In the United States, trans patients have been prescribed gender-affirming care such as HRT since at least 1949. *See* Joanne Meyerowitz, *Sex Change and the Popular Press: Historical Notes on Transsexuality in the United States*, *1930-1955*, 4 J. LESBIAN & GAY STUD. 159, 171 (1998) (discussing the case of Miss Lynn Barry, a transgender medical patient). The American Medical Association (AMA) considers gender-affirming care "medically-necessary, evidenced-based care" and opposes restrictions on access to it. *AMA Reinforces Opposition to Restrictions on Transgender Medical Care*, AM. MED. ASS'N (June 15, 2021), https://www.ama-assn.org/press-center/press-releases/ama-reinforces-opposition-restrictions-transgender-medical-care [https://perma.cc/GT3P-8M49] (quoting AMA board member Michael Suk, MD).

8. For an in-depth discussion of the recent trend toward restricting the rights of transgender youth, see *Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors: Chapter One*, 134 HARV. L. REV. 2163 (2021).

9. *See* Knauer, *supra* note 4, at 619; *see also* Erin Reed, *2600 Leaked Anti-Trans Lobbyist Emails Show Fundamentalism, Not Evidence, Is How First Anti-Trans Bills Were Drafted*, ERIN IN THE MORNING (Mar. 10, 2023), https://www.erininthemorning.com/p/2600-leaked-anti-trans-lobbyist-emails [https://perma.cc/7BRC-PE4A] ("While anti-trans experts have tried to argue that the bills that target the transgender community are being written using 'science' and 'evidence,' the disturbing message behind the scenes is clear: the attacks on transgender rights are crafted with religious motivation and political calculations that have no ties to evidence whatsoever.").

10. *ACLU, Lambda Legal Sue to Block Texas from Investigating Parents Who Support Their Transgender Kids*, ACLU (Mar. 1, 2022), https://www.aclu.org/press-releases/aclu-lambda-legal-sue-block-texas-investigating-parents-who-support-their-transgender [https://perma.cc/D7AJ-KSSQ].

11. *See, e.g.*, *Map: Attacks on Gender Affirming Care by State*, *supra* note 5 (stating that

To date, civil rights litigators have had success defending gender-affirming healthcare with theories grounded in Substantive Due Process, the Equal Protection Clause, and the Eighth Amendment.[12] With gender-affirming healthcare vital to transgender health and happiness, including its vital role in preventing suicidality,[13] however, a discussion of why a good-faith reading of the First Amendment and its case law protects gender-affirming care is warranted, as it only makes sense to bring all potential ammunition to the battlefield. Such a discussion must begin with a brief history of the first case to ever mention the idea of such an argument.

B. The Vuz *Case*

The prospect of First Amendment symbolic speech protection for gender-affirming care has yet to be studied at length, and no academic or legal sources have yet discussed the implications of symbolic speech doctrine for bans on such care. Notably, however, one court in California approved of the framing of gender transition as an aggregate of behaviors, clothing choices, and gender-affirming surgery, and that this gender expression conduct could constitute symbolic speech protected under the First Amendment.[14]

In *Vuz v. DCS III*, *Inc.*, a trans woman sued the local jail for allegedly burdening her protected gender expression and retaliating against her First Amendment right to express her gender identity through gender transition.[15] The plaintiff claimed that she "conveys the message of her

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as of May 8, 2023, these states include Oklahoma, Texas, and South Carolina).

12. *See* Brandt v. Rutledge, 551 F. Supp. 3d 882 (E.D. Ark. 2021), *aff'd*, 47 F.4th 661 (8th Cir. 2022) (enjoining a ban on gender-affirming care for youth due to violations of Equal Protection and Substantive Due Process rights); *see also* Edmo v. Corizon, Inc., 935 F.3d 757 (9th Cir. 2019) (holding that a prison official's denial of gender-affirming surgery to a transgender prisoner was a violation of the Eighth Amendment).

13. *See, e.g.*, Diana M. Tordoff, Jonathon W. Wanta, Arin Collin, Cesalie Stepney, David Inwards-Breland & Kym Ahrens, *Mental Health Outcomes in Transgender and Nonbinary Youths Receiving Gender-Affirming Care*, 5 JAMA NETWORK OPEN e220978 (2022) (finding that after receiving gender-affirming care, trans and nonbinary youth had 60% lower odds of depression and 73% lower odds of suicidality); Amy E. Green, Jonah P. DeChants, Myeshia N. Price & Carrie K. Davis, *Association of Gender-Affirming Hormone Therapy With Depression, Thoughts of Suicide, and Attempted Suicide Among Transgender and Nonbinary Youth*, 70 J. ADOLESCENT HEALTH 643 (2022) (reporting significant improvement in the mental health of trans youth with the provision of requested gender-affirming healthcare); Hillary B. Nyugen, Alexis M. Chavez, Emily Lipner, Liisa Hantsoo, Sara L. Kornfield, Robert D. Davies & C. Neill Epperson, *Gender-Affirming Hormone Use in Transgender Individuals: Impact on Behavioral Health and Cognition*, 20 CURRENT PSYCHIATRY REPS. 1 (2018) (finding significantly improved mental health in trans youth and trans adults following treatment with gender-affirming care in the form of hormones).

14. *See* Vuz v. DCSS III, Inc., No. 320-CV-00246-GPC-AGS, 2020 WL 7240369, at *5–6 (S.D. Cal. Dec. 9, 2020).

15. *Id.*

feminine gender identity, contrary to any masculine gender identity that may be forced upon her, by wearing women's apparel, styling herself in a feminine manner, *undergoing cosmetic surgeries to feminize her appearance*, and maintaining feminine mannerisms."[16]

Noting a parallel with precedent based on appearance-based expression,[17] the court found that the "Plaintiff has pled sufficient facts to support her claim that this conduct is intended to convey a particular message—her feminine gender identity—and that that conduct is likely understood as conveying that message."[18] Unfortunately, the strength of this claim, particularly the gender-affirming surgery portion of her gender expression, was not further evaluated because the court dismissed the claim on other grounds.[19]

The *Vuz* case demonstrates the viability of a symbolic speech claim for gender-affirming care, but its early dismissal means a more robust discussion of the merits of such a claim is still warranted. The *Vuz* opinion never discussed the strength of plaintiff's gender-affirming cosmetic surgery claim, and the case did not involve a ban on such gender-affirming care. This Article sets out to prove that the judge in *Vuz* was correct to accept feminizing cosmetic surgery as part of a claim for protected symbolic speech. This Article will further argue that such a claim would withstand scrutiny even outside a framing of gender transition as an aggregate of gender expression conduct.

II. Symbolic Speech Doctrine

A. The Spence-Hurley *Test*

The first step for a plaintiff seeking constitutional protection from governmental action is to establish that a fundamental right is involved.[20] If a fundamental right is not at issue, the reviewing court will apply the highly deferential rational basis test,[21] and the plaintiff is far more likely

16. *Id.* (emphasis added).

17. *See id.* at *5 (citing McMillen v. Itawamba Cnty. Sch. Dist., 702 F. Supp. 2d 699, 704 (N.D. Miss. 2010)) ("The reasoning of the district court in *McMillen v. Itawamba County School District* supports, rather than undermines, Plaintiff's argument. There, the district court found that the plaintiff intended to communicate her view 'that women should not be constrained to wear clothing that has traditionally been deemed "female" attire[.]'").

18. *Id.*

19. *Id.* at *6 (finding plaintiff failed to plausibly allege that defendants' actions burdened her expression of gender identity, as she would have been transferred to the men's jail regardless of her gender expression).

20. *See, e.g.*, *Romer*, 517 U.S. 620 (1996); Griswold v. Connecticut, 381 U.S. 479 (1965) (finding that privacy is a fundamental right, and discussing other fundamental rights that are not explicitly enumerated in the Constitution).

21. *See, e.g.*, *Romer*, 517 U.S. at 631 ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a

to be denied constitutional protection.[22] This Article proposes that a fundamental right at issue in a ban or limitation on gender-affirming care is the freedom of speech guaranteed by the First Amendment.[23]

Symbolic speech—non-verbal conduct conveying an intended message—is generally protected by the First Amendment's free speech clause.[24] This protection, however, is subject to the possibility of the government's valid interest in restricting the underlying conduct.[25] Essentially, the government may not restrict symbolic speech itself, but it may restrict underlying conduct if done for purposes unrelated to suppressing speech.[26]

When determining if a given pattern of conduct is entitled to protection as symbolic speech, a court will apply the *Spence* test (sometimes called the *Spence-Hurley* test). This test was created by the Supreme Court in *Spence v. Washington*.[27] In *Spence*, a college student was convicted of violating a criminal statute that forbade the alteration of the American flag.[28] The student appealed his conviction to the Supreme Court, arguing his alteration of the flag was protected symbolic speech.[29]

Reversing the conviction, the Court ruled that symbolic speech is protected by the First Amendment's free speech clause when "[an] intent to convey a particularized message [is] present, and in the surrounding circumstances the likelihood [is] great that the message would be understood by those who [view] it."[30] Thus, symbolic speech is protected pursuant to a two-part test: a plaintiff must show (1) an intent to convey a particularized message and (2) a great likelihood those receiving the message will understand it given the circumstances.

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rational relation to some legitimate end."); Thompson v. Ashe, 250 F.3d 399, 407 (6th Cir. 2001) ("[Where a] policy does not implicate any fundamental right, we review it under the rational basis standard.").

22. *See, e.g.*, Aaron Belzer, *Putting the "Review" Back in Rational Basis Review*, 41 W. ST. U. L. REV. 339, 340 (2014) (describing the current rational basis standard as "an extraordinarily deferential standard by any measure").

23. *See* U.S. CONST. amend. I; Schneider v. State of New Jersey, 308 U.S. 147, 150 (1939) ("This court has characterized the freedom of speech . . . as [a] fundamental personal right[][.]").

24. *See* BARBARA J. VAN ARSDALE ET AL., 16A AM. JUR. 2D CONSTITUTIONAL LAW § 528 (2023). *But see* United States v. O'Brien, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

25. RALPH C. CHANDLER, RICHARD A. ENSLEN & PETER G. RENSTROM, CONSTITUIONAL LAW DESKBOOK § 8:112 SYMBOLIC SPEECH (2022).

26. *See infra* Section II.B.

27. *See* Spence v. Washington, 418 U.S. 405 (1974).

28. *Id.* at 405.

29. *Id.* The student had affixed a large peace symbol made out of tape on the flag. *Id.*

30. *Id.* at 410–11.

The *Spence* test was modified by the Supreme Court's subsequent decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*.[31] In *Hurley*, a private parade organizer challenged a ruling which required the organizer to allow a group of LGBT Irish marchers to join the organizer's St. Patrick's Day Parade.[32] The organizer argued the forced inclusion of the LGBT marchers was unconstitutionally compelled speech, and the Court agreed.[33] The Court's ruling modified the application of the *Spence* test—relaxing the particularized-message aspect—allowing for protection where symbolic speech expresses more vague, hard-to-articulate messages. The Court asserted that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock."[34] Therefore, the Supreme Court held that a private speaker's action does not lose First Amendment protection just because it contains "multifarious voices" or fails to have an isolated, "exact message as the exclusive subject matter of the speech."[35]

While the Court's relaxation of the message requirement may make for a more speech-protective symbolic speech doctrine in general, the *Hurley* holding has created a circuit split due to the difficulty lower courts have had in applying *Hurley* to the *Spence* factors.[36] While the circuit split regarding the exact interpretation of the *Hurley* decision's effect on *Spence* is significantly more complex,[37] this Article is primarily focused on the Second and Eleventh Circuits' interpretations (the latter of which is also joined by the Sixth and Ninth Circuits).[38]

The Second Circuit has essentially left the *Spence* test unchanged.[39] This interpretation of the *Spence-Hurley* test is the most difficult version for plaintiffs to satisfy, and it has been criticized for being neither faithful to the text of the *Hurley* decision nor helpful for free speech policy

31. *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557 (1995).

32. *Id.* at 557.

33. *Id.* at 581.

34. *Id.* at 569 (internal citations omitted). Jackson Pollock is a painter known for abstract expressionism. *See, e.g.*, Francis Valentine O'Connor, *Jackson Pollock*, ENCYC. BRITANNICA (Apr. 30, 2023), https://www.britannica.com/biography/Jackson-Pollock [https://perma.cc/7MPC-WLBJ].

35. *Hurley*, 515 U.S. at 569–70.

36. *See* Sandy Tomasik, *Can You Understand This Message? An Examination of* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston's *Impact on* Spence v. Washington, 89 ST. JOHN'S L. REV. 265, 271–76 (2015).

37. *See id.* (detailing how the Sixth and Ninth Circuits, the Eleventh Circuit, the Third Circuit, and the Second Circuit have all interpreted *Hurley*'s application to *Spence*).

38. *See id.* at 276–81 (arguing that the Sixth, Ninth, and Eleventh Circuits have similarly interpreted *Hurley*'s liberalization of the first *Spence* factor).

39. *See id.* at 275–76, 286-88 (discussing the Second Circuit's interpretation of *Hurley*).

outcomes.[40] This stricter standard for achieving protection as symbolic speech is useful for analyzing the strength of this Article's argument, as it poses the highest burden on the plaintiff for establishing such a claim.

In contrast, the Eleventh Circuit has relaxed the first factor of the *Spence* test.[41] "In the Eleventh Circuit, the new test would be whether a reasonable person would understand *some sort of message*, not whether an observer would necessarily infer a specific message."[42] Broadly, this interpretation avoids the sort of problem alluded to in *Hurley*'s mention of abstract Jackson Pollock paintings: the original *Spence* test arguably failed to protect "speech where the audience does not understand the exact same message the actor intends to convey."[43]

This Article will analyze these two key approaches for identifying protected symbolic speech: one stricter, and one more liberalized. In the Second Circuit version, the speaker must have an intent to convey a particularized message which the audience is likely to understand. In the Eleventh Circuit version, the speaker must intend to convey a particularized message and the audience must understand that some message was expressed. This Article argues that gender-affirming care satisfies the stricter Second Circuit version of *Spence*—eliminating the need to argue for a more lenient standard like the Eleventh Circuit interpretation. Nonetheless, the Eleventh Circuit's emphasis on protection, even where a speaker's exact message is not necessarily understood, would be especially helpful for cases involving gender-affirming care that clash with the traditional male-female binary, which may be particularly relevant for cases involving non-binary plaintiffs.

B. Regulation of Protected Symbolic Speech — The O'Brien *Test*

Once a court determines some regulated conduct is protected as symbolic speech, it must then determine whether the regulation burdening this symbolic conduct is nonetheless constitutional.[44] A court first must determine whether the regulation is an incidental regulation of symbolic conduct or content-based discrimination, as this determines the level of scrutiny to which the governmental action will be subjected: intermediate or strict scrutiny.[45] Essentially, "[a]s a threshold matter, a

40. *See id.*

41. *Id.* at 273–74, 276–81.

42. *Id.* at 277 (emphasis added).

43. *Id.* at 278.

44. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376 (1968) (noting that the "[t]he First Amendment does not protect the "apparently limitless variety of conduct [that] can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

45. *See* Hannah H. Porter, *Tattooist v. Tattoo: Separating the Service from the Constitutionally Protected Message*, 2012 B.Y.U. L. REV. 1071, 1078–79 (2012). Note that the

regulation of symbolic conduct must not aim directly at the regulated conduct's expressive elements but rather may impose only an incidental limitation on the First Amendment. Otherwise, the regulation is content-based discrimination subject to strict scrutiny."[46] A regulation is more likely to be found as an incidental limitation where it is "not seeking to limit the message but rather the way that the message is conveyed," and the "governmental interest is unrelated to the suppression of free expression."[47] In such cases, the regulation would be scrutinized under a form of intermediate scrutiny, the *O'Brien* test.

In *United States v. O'Brien*, O'Brien claimed that the act of burning his draft registration certificate was protected symbolic speech, as his conduct communicated that he was against the Vietnam War and the draft.[48] The Supreme Court accepted for the sake of argument that O'Brien's conduct was expressive, but it determined that restrictions on symbolic conduct that are not content-based may still be constitutional if they survive a form of intermediate scrutiny.[49] In this case, the Court determined the government's regulation was not content-based, so intermediate scrutiny applied.[50] Under the *O'Brien* test, an incidental governmental burden on symbolic speech is valid only "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[51] In *O'Brien* itself, the

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determination of which level of scrutiny to apply to a constitutional challenge based on "pure speech" is distinct; symbolic conduct is not "pure speech," as "it necessarily combines both speech and nonspeech elements." *Id.* at 1078.

46. *Id.* at 1078–79 (footnote omitted); see also Holder v. Humanitarian L. Project, 561 U.S. 1, 25–28 (2010) (applying strict scrutiny to a statute that purportedly regulated only plaintiffs' conduct; "as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message").

47. Porter, *supra* note 45, at 1079; *see, e.g.*, Barnes v. Glen Theatre, Inc., 501 U.S. 560, 570–71 (1991) (finding that a prohibition on nudity as applied to erotic dance performances was not related to the suppression of free expression; the state's regulation prevented public nudity in all places, and dancers could still perform and convey an "erotic message" while wearing some amount of clothing).

48. United States v. O'Brien, 391 U.S. 367, 377 (1968).

49. *See id.* at 376–77.

50. *Id.* at 381–82 (finding that the government did not regulate O'Brien's conduct "because the communication allegedly integral to the conduct is itself thought to be harmful[;]" rather, it was the conduct of destroying the draft registration certificate that *itself* was harmful and targeted by the regulation, not any message that conduct might convey).

51. *Id.* at 377; *see also* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189 (2010) (citing *O'Brien*, 391 U.S. at 377) ("[A] content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.").

Court found that the statute criminalizing O'Brien's expressive conduct satisfied this standard.[52]

It seems likely, but far from certain, that a court would determine a ban on gender-affirming care to be an incidental limitation on symbolic conduct as opposed to content-based discrimination and apply the *O'Brien* test. It would be easy enough for legislators to write a statute, even one passed with discriminatory purpose, as an incidental regulation, and courts are often unwilling to look into the intent of facially neutral legislation where a valid interest arguably exists.[53] This problem is particularly acute in the case of gender-affirming care bans because health care is a practice with obvious basis for state regulation,[54] and gender-affirming care is, of course, a form of health care.[55] State legislators could craft statutes that make the provision of gender-affirming care effectively banned by way of onerous regulation, rather than by a simple blanket prohibition,[56] making legal analysis of the intent and burden of these statutes particularly complex. Thus, the mere existence of a valid, important interest in state regulation of medicine could likely be enough to argue incidental limitation in the case of statutes pertaining to gender-affirming care, leading to the application of

52. *See O'Brien*, 391 U.S. at 382 (finding that the government had a substantial interest in "assuring the continuing availability" of draft certificates, the statute was the narrowest means of protecting this interest, and the statute "condemns only the independent noncommunicative impact of conduct within its reach").

53. *See, e.g.*, *Barnes*, 501 U.S. at 582–83 (1991) (Souter, J., concurring) ("Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional.").

54. *See generally* Edward P. Richards, *The Police Power and the Regulation of Medical Practice: A Historical Review and Guide for Medical Licensing Board Regulation of Physicians in ERISA-Qualified Managed Care Organizations*, 8 ANNALS HEALTH L. 201, 202–22 (1999) (describing the United States' historical regulation of the practice of medicine through the states' policed power to enact laws pertaining to public safety and health).

55. *Cf.* Transgender Legal Def. & Ed. Fund, *Medical Organization Statements*, TLDEF'S TRANS HEALTH PROJECT: WORKING FOR TRANSGENDER EQUAL RTS, https://transhealthproject.org/resources/medical-organization-statements/ [https://perma.cc/D2M8-86S4] (providing links to statements from numerous medical organizations that recognize the medical necessity of gender-affirming care and endorsing such treatments).

56. *Cf.* Nicole Huberfeld, *Returning Regulation to the States, and Predictable Harms to Health*, SCOTUSBLOG: SYMP. (June 30, 2022), https://www.scotusblog.com/2022/06/returning-regulation-to-the-states-and-predictable-harms-to-health/ [https://perma.cc/L3QM-HJJ9] (discussing state laws relating to abortion care and how some states are drastically limiting access to such care through "onerous and unnecessary regulations"); *Human Rights Crisis: Abortion in the United States After* Dobbs, HUM. RTS. WATCH (Apr. 18, 2023), https://www.hrw.org/news/2023/04/18/human-rights-crisis-abortion-united-states-after-dobbs#_ftnref6 [https://perma.cc/ZWL9-Y5XU] (noting that states which have imposed heavy restrictions on abortion care have made this care "often totally inaccessible").

intermediate scrutiny. As this Article will illuminate, however, a ban on gender-affirming care should not pass the *O'Brien* test.

III. Previously Protected Speech

While no court has fully evaluated the right to pursue and receive gender-affirming care under a symbolic speech theory,[57] courts across the country have ruled on related issues of gender and LGBT identity expression, physicians' free speech rights to provide or refer patients for gender-affirming care, and body modification.[58] These cases together can serve as a guide for assessing the present question.

A. Gender and LGBT Identity Expression

Courts have on several occasions indicated that the gender expression of transgender people—largely in terms of choice of dress—can be protected under the First Amendment's free speech clause. One of the most notable cases, *Doe ex rel. Doe v. Yunits*, involved a transgender student in a Massachusetts public school.[59] When the student (referred to as Doe) transitioned from male to female during her seventh grade school year, she began to dress in feminine clothes and wear makeup during school hours.[60] The school forbade her behavior, often sending her home to change, citing the dress code's prohibition on disruptive clothing.[61] The student's treating therapist determined that it was

57. Again, the *Vuz* court dismissed the plaintiff's case on other grounds before properly evaluating the merits of such an argument. *See* Vuz v. DCSS III, Inc., No. 320-CV-00246-GPC-AGS, 2020 WL 7240369, at *6 (S.D. Cal. Dec. 9, 2020). Additionally, one journal article has mentioned the possibility of symbolic speech protection for gender-affirming surgery, but this possibility appeared only in a brief footnote. *See* Charles Thomas Little, *Transsexuals and the Family Medical Leave Act*, 24 J. MARSHALL J. COMPUT. & INFO. L. 315, 333 n.118 (2006) ("Arguably, [gender-affirming surgery] is a form of symbolic expression, as it manifests one's emotions and thoughts pertaining to gender.").

58. This Article does not delve into the litigation revolving around the Trump-era military ban on trans enlistees. While this controversy garnered much attention, it is of little use to this analysis. The Biden Administration unilaterally withdrew the policy before the courts came to a conclusion on the merits of the issue, so legal analysis on this issue was never resolved. *See* Exec. Order No. 14,004, 86 Fed. Reg. 7471 (Jan. 25, 2021). For a detailed analysis of the litigation, see Rose Gilroy et al., *Transgender Rights and Issues*, 22 GEO. J. GENDER & L. 417, 426–32 (2021).

59. *See* Doe *ex rel.* Doe v. Yunits, No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000), *aff'd sub nom.* Doe v. Brockton Sch. Comm., No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000). Cases where the speech in question concerns a minor in a public school setting should be viewed as particularly strong precedent where the plaintiff succeeds, as the government is given great deference in regulating speech in the public classroom, especially with younger students. *See*, *e.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) ("[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.").

60. *Yunits*, 2000 WL 33162199, at *1.

61. *Id.*

"medically and clinically necessary for plaintiff to wear clothing consistent with the female gender and that failure to do so could cause harm to plaintiff's mental health," yet during her eighth grade school year, the principal required the student to come to his office every day to approve her appearance, sometimes sending her home to change.[62] Due to this treatment, the student missed so much school that she needed to repeat the eighth grade; the school told the student that she would not be allowed to enroll if "she wore any girls' clothing or accessories."[63]

The student subsequently filed a complaint with multiple claims, including that the school had violated her "right to free expression" as guaranteed by the First Amendment.[64] The court held that Doe's conduct was indeed likely symbolic speech and granted a preliminary injunction.[65] Her conduct sent a particularized message of gender expression; her gender expression through clothing and accessories was "not merely a personal preference but a necessary symbol of her very identity."[66] Further, as evidenced by the school's hostility in response to Doe's gender expression, her message was recognized and understood by its audience.[67]

While *Yunits* was an unpublished state court decision, the Second Circuit soon discussed *Yunits* in a published decision regarding a cis woman's claim of First Amendment protection for gender-expressive conduct.[68] In *Zalewska v. County of Sullivan*, though the Second Circuit ultimately ruled that a cis woman who wanted to wear skirts to work did not engage in symbolic speech, the court simultaneously all but decreed that the student's conduct in *Yunits* would pass the Second Circuit's narrowly construed version of the *Spence-Hurley* test:

> Of course, there may exist contexts in which a particular style of dress may be a sufficient proxy for speech to enjoy full constitutional protection. A state court in Massachusetts, for example, found in [Yunits], that [Doe's] decision to wear traditionally female clothes to school as an expression of female gender identity was protected speech . . . . [Doe's] dress was an expression of [her] clinically verified gender identity. This message was readily understood by others in [her] high school context, because it was such a break from the norm. It sent a clear and particular message about the plaintiff's gender

62. *Id.*

63. *Id.* at 2.

64. *Id.*

65. *Id.* at *8 (enjoining the school "from preventing plaintiff from wearing any clothing or accessories that any other male or female student could wear to school without being disciplined"); *see also* Christine L. Olson, *Transgender Foster Youth: A Forced Identity*, 19 TEX. J. WOMEN & L. 25, 34–35 (2009) (summarizing the court's analysis in *Yunits*).

66. *Yunits*, 2000 WL 33162199, at *3.

67. *Id.*

68. *See* Zalewska v. Cnty. of Sullivan, 316 F.3d 314 (2d Cir. 2003).

> identity. By contrast, a [cis] woman today wearing a dress or a skirt on the job does not automatically signal any particularized message about her culture or beliefs.[69]

In other words, while a transgender woman choosing to wear traditionally feminine clothing sends a particularized message about her gender identity that can be readily understood, a cisgender woman choosing to wear skirts to convey her "cultural values" is not particularized and cannot be readily understood.

Additionally, a Federal District Court in Virginia has held that a transgender employee's conduct in presenting as female[70] plausibly constituted protected speech.[71] In *Monegain v. Department of Motor Vehicles*, the court affirmatively discussed *Yunits* and *Zalewska*—considering them "persuasive case law"—when determining whether a transgender employee's decision to present as female was intended to communicate a message about her gender identity and gender expression.[72] The *Monegain* court determined that the plaintiff's gender expression through her appearance indeed was "intended to communicate a message of public concern about her gender identity and gender expression."[73] Her decision to present herself as female at work "sent a clear and particular message about [Monegain's] gender identity," and her coworkers responded—often negatively—to this message.[74]

The *Monegain* court also relied on *Kastl v. Maricopa County Community College District* in reaching its decision.[75] In this unpublished but influential opinion, the District Court for the District of Arizona held that a transgender female employee who was fired for refusing to use the men's restroom at a public community college stated a free speech claim under the First Amendment.[76] The defendant college in this case did not dispute that the employee's gender expression constituted speech, but rather argued that her speech did not address a matter of public concern

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69. *Id.* at 320.

70. The plaintiff stated that presenting as female for her constituted "wearing clothing, makeup, body styling and hair styling typically associated with a feminine gender expression." Monegain v. Dep't of Motor Vehicles, 491 F. Supp. 3d 117, 129 (E.D. Va. 2020).

71. *See id.* at 134–36. There is a distinct test for the free speech of public employees; "for a First Amendment retaliation claim, 'whether the speech addressed a matter of public concern, is "the threshold question."'" *See id.* at 132–36. However, the court still considered the two-step *Spence-Hurley* analysis, considering whether the employee sent a particularized message and if the message was readily understandable. *See id.* at 135.

72. *Id.* at 134–35.

73. *Id.* at 136 (quoting Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550, 561–62 (4th Cir. 2011)).

74. *Id.* at 135 (alteration in original) (quoting *Zalewska*, 316 F.3d at 320).

75. *See id.* at 135–36.

76. Kastl v. Maricopa Cnty. Cmty. Coll. Dist., No. CIV.02-1531PHX-SRB, 2004 WL 2008954, *9 (D. Ariz. June 3, 2004).

(as is required in a free speech claim made by a public employee).[77] The court agreed that "attire may be understood as an expression of her change in gender identity, as it is clearly understood as such by her employer and the restroom patrons who complained of her use of the women's restroom."[78]

Beyond gender expression through choice of dress, federal courts in Idaho and Ohio have also ruled in favor of transgender plaintiffs in cases relating to gender markers on birth certificates. First, in *F.V. v. Barron*, the Federal District Court for the District of Idaho addressed a categorical ban on transgender individuals changing the sex marker on their birth certificate under the Equal Protection and Due Process Clauses, and it considered whether a proposed rule requiring birth certificates of transgender individuals to be marked as "amended" violated the First Amendment.[79] The court ultimately held that the plaintiffs' success on their Equal Protection claim obviated the need to address the First Amendment claim's merits, but that "any constitutionally sound rule [regarding birth certificate regulations] must not include the revision history as to sex or name to avoid impermissibly compelling speech."[80] Second, in *Ray v. McCloud*, the Federal District Court for the Southern District of Ohio held that a ban on changing the sex marker on birth certificates failed even rational basis scrutiny under the Equal Protection Clause.[81] This holding again mooted plaintiffs' First Amendment claim, unfortunately.[82] While both decisions ostensibly avoided the issue of the First Amendment in their reasoning, combining the reference to avoiding compelled speech in *Barron*, and the fact that the court in *Ray* characterized the challenged Ohio statute as "almost identical" to the statute in *Barron*,[83] the two cases imply a judicial suspicion to compelled speech in regards to gender identity.

Further, case law on the right to speak or express one's LGBT identity (i.e., one's sexual orientation or one's gender identity) is often referred to as "coming out speech" and has been protected by the courts.[84] The willingness to protect such coming out speech seems to be increasing apace with society's acceptance of the LGBT community in

77. *Id.* at *9 n.13.

78. *Id.*

79. *See* F.V. v. Barron, 286 F. Supp. 3d 1131 (D. Ct. Idaho 2018), *decision clarified sub nom.* FV. v. Jeppesen, 466 F. Supp. 3d 1110 (D. Ct. Idaho 2020), *decision clarified* 477 F. Supp. 3d 1144 (D. Ct. Idaho 2020).

80. *Id.* at 1135.

81. *Ray v. McCloud*, 507 F. Supp. 3d 925, 939–40 (S.D. Ohio 2020).

82. *Id.* at 940 n.11.

83. *Id.* at 940.

84. Kara Inglehart, Jamie Gliksberg & Lee Farnsworth, *LGBT Rights and the Free Speech Clause*, 37 GPSOLO MAG. 17, 18 (2020).

general.[85] One of the earliest successful coming out speech arguments was in the 1974 case *Gay Students Organization of the University of New Hampshire v. Bonner*.[86] When the University of New Hampshire disallowed the formation of a gay student group, the Federal District Court for the District of New Hampshire held that "gay students coming together for social events constituted expressive conduct and association protected under the First Amendment."[87] In a later case, the Federal District Court for the District of Utah ruled a public school district's policy forbidding a teacher from discussing her same-sex partner was viewpoint discrimination in violation of the First Amendment, as no policy required similarly situated heterosexual teachers refrain from discussing their opposite-sex partners.[88]

B. Physicians' Free Speech

Several courts have also considered the free speech rights of physicians to provide or refer patients for gender-affirming care. In *City and County of San Francisco v. Azar*, the Federal District Court for the Northern District of California held that doctors concerned about a federal agency rule's effect on the healthcare of their LGBT patients had third-party standing to bring a free speech challenge under the First Amendment on their patients' behalf.[89] The challenged rule would allow those with "religious, moral, or other conscientious objections to refuse to provide abortions and certain other medical services," including gender-affirming surgery.[90] In finding the physicians had standing, the court reasoned "most of the medical procedures at issue here such as abortions, *gender-affirming surgery*, and HIV treatments cannot be safely secured without the aid of a physician," and "[t]he rights of the individual physician plaintiffs and their patients here are thus closely intertwined."[91] The court ultimately vacated the rule in its entirety because it was invalid, so the free speech claim was not explicitly analyzed.[92]

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85. *See id.* at 17 (discussing the increased judicial willingness to protect coming out speech over the past decade).

86. *See* Gay Students Org. of the Univ. of N.H. v. Bonner, 367 F. Supp. 1088 (D. N.H.), *modified*, 509 F.2d 652 (1st Cir. 1974).

87. Inglehart et al., *supra* note 84, at 18 (describing the holding of *Bonner*, 367 F. Supp 1088).

88. *See* Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279 (D. Utah 1998).

89. *See* City & County. of San Francisco v. Azar, 411 F. Supp. 3d 1001, 1011 (N.D. Cal. 2019); *cf.* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2118 (2020) (characterizing the rule against third-party standing as "hardly absolute," and allowing abortion providers and clinics to have standing on behalf of their actual or potential patients).

90. *Azar*, 411 F. Supp. 3d at 1005, 1011.

91. *Id.* at 1011 (emphasis added).

92. *Id.* at 1025.

Further, in *Brandt v. Rutledge*, a Federal District Court for the Eastern District of Arkansas concluded (and the Eighth Circuit affirmed), inter alia, that doctors likely have a First Amendment right of free speech to refer transgender youth patients to gender-affirming care specialists.[93] Issuing a preliminary injunction on the ban on such referrals, the court noted the challenged law was "a content and viewpoint-based regulation because it restrict[ed] healthcare professionals only from making referrals for 'gender transition procedures,' not for other purposes."[94] The court found that the ban "cannot survive strict scrutiny or even rational scrutiny."[95] The court also found that the ban on physicians providing or discussing gender-affirming care very likely violates the Equal Protection Clause.[96] The statute banned care for transgender patients, but left the cisgender versions of such care unrestricted, and it could not survive rational basis scrutiny, let alone heightened scrutiny.[97]

C. Body Modification

A few cases have addressed the issue of body modification as protected speech. The majority of such cases stem from litigation regarding tattooing regulations. Historically, tattoos have been so taboo in the eyes of the general public that litigation regarding protection for people with tattoos was generally unsuccessful.[98] The recent trend in such litigation, however, is a growing recognition of First Amendment protection for tattoos.[99] This growing protection comes notwithstanding an ongoing circuit split on the matter. While the Ninth and Eleventh Circuits have protected tattoos and tattooing businesses as pure speech under the First Amendment,[100] the Eighth Circuit has indicated that a

93. Brandt v. Rutledge, 551 F. Supp. 3d 882 (E.D. Ark. 2021), *aff'd*, 47 F.4th 661 (8th Cir. 2022); *cf.* Eknes-Tucker v. Marshall, No. 2:22-CV-184-LCB, 2022 WL 1521889, at *1141 n.13, *1149 (M.D. Ala. May 13, 2022) (noting support for trans youth care from over twenty major medical organizations and granting partial preliminary injunctive relief against a similar trans youth healthcare ban in the state of Alabama, though without accepting the physician speech claim). In *Brandt*, the physicians had third-party standing to challenge the ban on behalf of their patients, and they had standing in their own right. *Brandt*, 551 F. Supp. 3d at 888.

94. *Id.* at 893.

95. *Id.* at 894.

96. *Id.* at 891–92.

97. *Id.*

98. *See* Alicen Pittman, *Tattoos and Tattooing: Now Fully Protected As "Speech" Under the First Amendment*, 38 W. ST. U. L. REV. 193, 195–98 (2011).

99. *See* Wendy Rima, *The Human Body: The Canvas for Tattoos; the Public Workplace: An Exhibit for A New Form of Art?*, 66 DRAKE L. REV. 705, 714–19 (2018).

100. *See* Buehrle v. City of Key W., 813 F.3d 973 (11th Cir. 2015) ("[T]attooing [is] virtually indistinguishable from other protected forms of artistic expression."); Anderson v. City of Hermosa Beach, 621 F.3d 1051 (9th Cir. 2010) ("[W]e hold that tattooing is purely expressive activity rather than conduct expressive of an idea[.]").

tattoo is symbolic speech that must survive a *Spence-Hurley* analysis to obtain First Amendment protection.[101] Notably, when the Eighth Circuit denied a tattoo as being protected by the First Amendment, its reasoning did *not* rest on the fact that tattoos are body modification.

In *Stephenson v. Davenport Community School District*, a student initially asserted that her tattoo constituted "political speech" that should be protected under the First Amendment.[102] The Eighth Circuit did not take issue with the fact that a tattoo is body modification; it simply conducted a *Spence-Hurley* analysis to determined whether Stephenson's tattoo was protected conduct.[103] Ultimately, it determined that the tattoo in question was "nothing more than 'self-expression'" and was therefore not protected under the First Amendment.[104] However, the *Stephenson* court left open the possibility that a different tattoo with a particularized meaning could pass the *Spence-Hurley* test.[105] Thus, while tattoos are subject to a First Amendment circuit split over whether they are pure or symbolic speech, that tattoos are body modification is not relevant to this analysis.

Similarly, while body piercing has rarely been litigated regarding the First Amendment, at least one court has protected body piercing as a form of symbolic speech. In an unpublished opinion, the court in *Difeo v. Town of Plaistow* ruled that body piercing is symbolic speech.[106] In its decision, the court noted that, as body piercing's inherent health risks can be substantially reduced through proper medical licensure, a total ban was unconstitutionally overbroad.[107]

In addition to case law framing simple forms of body modification (e.g., piercings) as protected symbolic speech,[108] several scholars have previously addressed the possibility of First Amendment speech protection for much more complex forms of body modification. One such argument asserts the use of brain-enhancing or mind-altering drugs or medical interventions would fall under the umbrella of free speech protection.[109] Just as writing in a journal or electronically recording one's

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101. *See* Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1307 n.4 (8th Cir. 1997).

102. *Id.*

103. *Id.*

104. *Id.*

105. *See* Blue Horseshoe Tattoo, V, Ltd v. City of Norfolk, No. CL06-3214, 2007 WL 6002098, at *2 (Cir. Ct. Va. Jan. 17, 2007) ("[The] *Stephenson* case seems to leave open the possibility that a particular tattoo might constitute protected political speech.").

106. Difeo v. Town of Plaistow, No. 00-E-0218, 2002 WL 31059361, at *3 (N.H. Super. Ct. Mar. 7, 2002).

107. *Id.* at *6.

108. This case law refers to non-medical body modification, as opposed to the more medicalized forms of body modification inherent to gender-affirming care.

109. *See* Marc Jonathan Blitz, *Freedom of Thought for the Extended Mind: Cognitive*

thoughts is protected as speech, medical interventions can constitute similar tools of enhancing the mind's ability to communicate.[110] Likewise, one author argues the inverse is true: just as the First Amendment's free speech clause prohibits the government from banning mind-enhancing medicine, it should be prohibited from forcing mind-affecting drugs onto unwilling citizens, as this would alter the organ responsible for conceptualizing speech—akin to dictating speech.[111] This body of writing illustrates that, contrary to what some may argue, legal writers have long recognized a place for free speech law in the world of drugs and medicine. The whirlwind of litigation surrounding gender-affirming care simply differs in that it is perhaps the first form of body modification to garner so much attention from the public and the legal sphere.

IV. Applying the Law to Gender-Affirming Care Bans

With this background in mind, applying a First Amendment theory of symbolic speech to the constitutionality of a ban on gender-affirming health care for transgender patients requires several steps. First, a court must determine whether or not the regulated conduct—gender-affirming care—is protected symbolic speech. As Section A illustrates, gender-affirming care should be protected as symbolic speech. Next, the proper level of scrutiny must be determined, and the deciding court must apply the correct level of scrutiny once ascertained. As Section B illustrates, the *O'Brien* test and its intermediate scrutiny likely apply to bans on gender-affirming care, and such a ban would fail this test and should be found unconstitutional.

A. Gender-Affirming Care and Spence-Hurley

This Article argues that the practice of gender-affirming care—its receipt and provision—is protected symbolic conduct.[112] To establish

Enhancement and the Constitution, 2010 WIS. L. REV. 1049 (2010).

110. *Id.* at 1070 ("If freedom of thought covers journal writing because it is an extension of one's thought and makes further use or refinement of that thought possible, it should perhaps also insulate from state regulation alterations of one's thinking with neural prosthetics or cognitive-enhancement drugs."); *cf.* Adnan K. Husain, *Spillage from the Fountain of Youth: The Regulation of Prospective Anti-Aging Molecular and Genetic Therapies*, 2006 U. ILL. J.L. TECH. & POL'Y 159, 184 (2006) (discussing the First Amendment implications of a government ban on life-extending drugs).

111. Kevin Newman, *Sounding the Mind: On the Discriminatory Administration of Psychotropics Against the Will of the Institutionalized*, 22 S. CAL. REV. L. & SOC. JUST. 265, 274 (2013) (citations omitted) ("The ability to produce one's own ideas, which psychotropic medication jeopardizes, is necessary to have a meaningful First Amendment right to communicate those ideas . . . . Forcible medication frequently and drastically curtails this fundamental right of cognitive liberty.").

112. Gender-affirming care is not "pure speech," as pure speech as a category is generally reserved for more direct forms of speech, such as written or spoken word. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969) (differentiating between

that gender-affirming care is protected symbolic speech, a court must first apply some version of the *Spence-Hurley* test.[113] As the Second Circuit's interpretation of the test is the most demanding version,[114] this version of the *Spence-Hurley* test is the best one to use to test this Article's present theory. The Second Circuit has left the original *Spence* test effectively unchanged since *Hurley*,[115] so the question at issue is whether a trans person, through altering their body with gender-affirming care, (1) intends to convey a particularized message that (2) the audience has a great likelihood of understanding given the surrounding circumstances.

i. Gender-Affirming Care Conveys a Particularized Message

First, gender-affirming care conveys a particularized message. Through its practice, gender-affirming care expresses to the world that gender is a malleable social construct not solely dictated by one's sex chromosomes and sex assigned at birth. Through the effects of gender-affirming care, a patient makes a statement to the world of their internal sense of femininity, masculinity, androgyny, or lack of connection to the gender binary. It is both the act and the end product of gender-affirming care that communicates particularized ideas of gender to the world. More simply, gender-affirming care acts as a key facilitator and communicator of gender identity and gender expression.

As discussed previously, several courts have indicated gender expression conveys a particularized message,[116] and gender-affirming care should plainly be considered part of gender expression. At least one district court has already agreed that cosmetic gender-affirming procedures are part of the aggregated conduct that constitutes an individual's gender expression.[117] Further, at least two courts have indicated that transgender women dressing in traditionally "feminine" clothing conveys a particularized message.[118] Albeit limited, this case law supports a finding that gender identity expression—at least for trans people—conveys a particularized message. From there, one needs to simply extend protection of these forms of gender expression to the ways in which gender-affirming care, by altering how the patient's body presents to the world (such as through creation or removal of breasts, changes to skin complexion, etc.), sends a distinct and particularized

symbolic speech and pure speech).

113. *See supra* Section II.A.

114. *See supra* Section II.A.

115. *See* Tomasik, *supra* note 36, at 286–88.

116. *See supra* Section II.A.

117. *See* Vuz v. DCSS III, Inc., No. 320-CV-00246-GPC-AGS, 2020 WL 7240369, at *5–6 (S.D. Cal. Dec. 9, 2020); *see also supra* Section I.B.

118. See *supra* Section II.A for an in-depth discussion of these cases.

message of gender identity, be it feminine, masculine, androgyne, or other.

Finally, *Doe ex rel. Doe v. Yunits* could here prove to be a sort of bridge between gender expression in the form of clothing and gender expression through gender-affirming healthcare as a particularized message.[119] Doe's therapist had specifically noted that the student wearing gender-affirming feminine clothes was necessary for her health and well-being, and the court seemed to find this factor important for showing a particularized message, noting that "therefore, plaintiff's expression is not merely a personal preference but a necessary symbol of her very identity."[120] As has been noted, gender-affirming care is evidence-based, supported by leading medical organizations, and can be medically necessary for the treatment of gender dysphoria in transgender patients.[121] The practice of such care can similarly be a "necessary symbol" of transgender individuals' gender identity and convey a particularized message.

1. Body Modification is Not a Distinguishing Factor

Though it is evidence-based and often medically necessary healthcare, gender-affirming care is also in a sense body modification.[122] Therefore, the next question is whether this body modification aspect would somehow distinguish it from cases like *Zalewska*, *Yunits*, and *Monegain*, which indicated conduct like choice of dress could be protected gender expression. Making this distinction is especially important precisely because opponents of gender-affirming care are likely to argue that such care is neither speech nor medicine, but simply and exclusively body modification.[123] While such assertions are not true, the issue would also be moot if it can be shown that body modification does not distinguish gender-affirming care from other forms of gender expression that have been protected as symbolic speech.

Little case law on surgical body modification exists. However, case law on tattoos and body piercing (arguably the most popular forms of body modification today) suggests that just because conduct involves body modification does not necessarily mean it cannot be protected

119. *See* Doe *ex rel.* Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *2 (Mass. Super. Ct. Oct. 11, 2000)

120. *Id.*

121. *See* sources cited *supra* note 7.

122. *See* sources cited *supra* note 7.

123. *Cf.* Kelsey Bolar, *Stop the Mutilation of Our Girls with So-Called 'Gender-Affirming Care,'* FOX NEWS (Mar. 11, 2023), https://www.foxnews.com/opinion/stop-mutilation-girls-gender-affirming-care [https://perma.cc/G6HP-MU25] (arguing that gender-affirming care is "bodily mutiliation").

speech.[124] In the case of tattooing, while courts disagree on the level of First Amendment protection to give tattoos, even the courts more hostile toward protecting tattooing as speech have not focused on the body modification aspect of tattooing.[125] Similarly, in the case of body piercing, that piercings are body modification was not a problem for plaintiffs arguing that their conduct was protected by the First Amendment, and the practice of body piercing has been protected as symbolic speech.[126]

Given that other forms of body modification are not distinguished simply on the grounds of being body modification when identifying protected symbolic speech, the fact that gender-affirming care involves body modification should not be a distinguishing factor in assessing whether or not such care is protected speech. That gender-affirming care is evidence-based, often medically necessary healthcare further distinguishes it from cosmetic body modification like tattoos and body piercings. Like body piercing and tattooing, speech claims grounded in gender-affirming care should be adjudicated based on their relationship with expression under the *Spence-Hurley* test, just like any other symbolic speech claims. The novelty of the body modification is not proper grounds for denying such First Amendment claims.[127]

2. The Provider-Patient Distinction

Another potential distinguishing factor between previously recognized symbolic conduct and gender-affirming care is the dichotomy between the recipient of the gender-affirming care and the physician providing the care. While cases like *Brandt v. Rutledge* show that courts may be willing to extend First Amendment speech protection to physicians providing gender-affirming care,[128] a physician discussing gender-affirming care with their patient is a distinct communication from the message a patient communicates in receiving such gender-affirming

124. *See supra* Section III.C.

125. *See supra* Section III.C.

126. *See* Difeo v. Town of Plaistow, No. 00-E-0218, 2002 WL 31059361, at *6–7 (N.H. Super. Ct. Mar. 7, 2002).

127. Additionally, articles placing mind-altering medication, brain chips, and life-extension treatments within the ambit of the free speech clause prove body modification and medical treatments are not nearly as unheard of in First Amendment law as one would initially assume. *See* Blitz, *supra* note 109; Husain, *supra* note 110; Newman, *supra* note 111. Additionally, gender-affirming healthcare is not the first form of healthcare at a controversial nexus of speech and medical science. *See* Marc Jonathan Blitz, *Free Speech, Occupational Speech, and Psychotherapy*, 44 HOFSTRA L. REV. 681, 780 (2016) ("[Psychotherapy] straddles the key constitutional boundary line between individuals' inner lives, where each person should exercise autonomy free of state control, and the realm of appropriate health and safety regulations, where clients count on government to monitor medical practice.").

128. *See* Brandt v. Rutledge, 551 F. Supp. 3d 882 (E.D. Ark. 2021), *aff'd*, 47 F.4th 661 (8th Cir. 2022).

care. For this reason, the provider-patient distinction must be directly addressed.

It is worth revisiting case law involving tattoos to address this issue. In litigation regarding tattooing and the First Amendment, the artist-customer dichotomy sometimes impacted a finding of symbolic speech, with some courts ruling that the tattoo artist, acting simply as a mechanism for applying the tattoo, does not engage in protected speech.[129] At first glance, this distinction could pose a logistical problem for protecting the right to access gender-affirming care. Essentially, one could argue that restrictions on doctors providing gender-affirming care are aimed only at the doctors' conduct, and not the patients' expression of gender—like how one might argue that the proprietor of the tattoo shop does not have the speech interest that the tattoo recipient has. In this way, a clever defendant could argue that a restriction on gender-affirming care practitioners presents a thorny standing issue.

However, the trans patient and their provider are distinguished from the tattoo customer and artist because of the special relationship between patients and providers, a relationship that has already been recognized in the context of gender-affirming care.[130] As *City and County of San Francisco v. Azar*, highlighted, a third-party doctor has standing to bring a First Amendment suit on behalf of their patient where "[t]he rights of the individual physician plaintiffs and their patients [are] . . . closely intertwined."[131] Further, as the *Azar* court noted, gender-affirming care is at the nexus of such a physician-patient relationship.[132]

Just like how the physicians in *Azar* had standing to sue the government for issuing a rule which threatened the First Amendment rights of, inter alia, their transgender patients seeking gender-affirming care,[133] the physician-plaintiff distinction does not prevent a free speech challenge to bans on gender-affirming healthcare.

ii. The Audience Understands the Message

As neither the body modification issue nor the physician-plaintiff distinction can distinguish gender-affirming care from the gender expression at issue in *Zalewska*, *Yunits*, or *Monegain*, a plaintiff asserting symbolic speech protection for gender-affirming care would very likely survive the strict Second Circuit version of the *Spence-Hurley* test's first prong: intent to convey a particularized message. Next, the plaintiff would

129. *See* Porter, *supra* note 45, at 1081.

130. *See supra* Section II.B.

131. City & County of San Francisco v. Azar, 411 F. Supp. 3d 1001, 1011 (N.D. Cal. 2019).

132. *Id.*; *see also* Doe v. Bolton, 410 U.S. 179 (1973) (addressing a similar patient-physician relationship in the domain of abortion care).

133. *Azar*, 411 F. Supp. 3d at 1011.

have to survive the second prong: the audience must have a great likelihood of understanding the message given the surrounding circumstances.

This prong is clearly satisfied in the case of gender-affirming care, largely for the same reason it was satisfied in *Doe ex rel. Doe v. Yunits*—namely, evidence of audience hostility. As the *Yunits* court noted, the defendant's hostility and attempts to prevent a transgender person from expressing their gender identity through symbolic speech is itself proof that the audience understands the message conveyed by the conduct.[134] Gender-affirming care has long been politically controversial, precisely because its message of affirming transgender gender identity and expression has been well understood by audiences. For instance, when Adolf Hitler and the Nazis burned down the Institute of Sexual Science in 1933, they did so precisely because of the hatred they had for the message its gender-affirming care broadcast.[135] Today, with dozens of bills being introduced to limit access to and/or criminalize gender-affirming healthcare,[136] the fact that gender-affirming care conveys a message of the affirmation of gender expression and identity is undeniable. Like in *Yunits*, hostility to the message proves that the audience understands what is being conveyed.

A plaintiff need not prove retaliation exists in their particular case to establish that their particularized message was readily understandable. The key is simply that such hostility proves the general public, and especially the American government, understand that gender-affirming care represents affirmation of trans people's gender identity. Moreover, the impetus for government restriction on gender-affirming care proves that such care sends a message to the general public, because conservative backlash against messages of affirmed gender identity is precisely why politicians in states with primarily Republican legislatures are so keen to ban gender-affirming care in the first place.[137]

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134. *See* Doe *ex rel.* Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *1, *4 (Mass. Super. Ct. Oct. 11, 2000) ("The school's vehement response and some students' hostile reactions are proof of the fact that the plaintiff's message clearly has been received."), *aff'd sub nom.* Doe v. Brockton Sch. Comm., No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

135. *See* Nunn, *supra* note 7, at 614. Note, also, many of the most famous photos of Nazi book burnings are in fact decontextualized photos of this attack on the Institute for Sexual Science. *See* Brandy Schillace, *The Forgotten History of the World's First Trans Clinic*, SCI. AM. (May 10, 2021), https://www.scientificamerican.com/article/the-forgotten-history-of-the-worlds-first-trans-clinic/ [https://perma.cc/L9ZJ-PJWA].

136. *See* ACLU, *supra* note 10; *see also* ELANA REDFIELD, KERITH J. CONRON, WILL TENTINDO & ERICA BROWNING, UCLA SCH. OF L., WILLIAMS INST., PROHIBITING GENDER-AFFIRMING MEDICAL CARE FOR YOUTH (2023) (discussing restrictions on gender-affirming healthcare across the United States).

137. While no evidence shows a hatred of trans people on the part of the American public writ large, evidence is strong that the majority of the anti-trans laws recently passed were

If gender-affirming care did not send a particularized message, or if the message was not understood by the various audiences, the controversy would never exist in the first place. Stated simply, the existence of the message is understood by those seeking to restrict access to gender-affirming care and is exactly what those seeking restrictions are hoping to snuff out. Even in a case where a government policy is somehow only incidentally restricting this type of symbolic speech, the fact remains that the speech's message is particularized and likely to be understood by its audience. For another example of a situation where controversy signals understanding of a non-verbal message, consider a hypothetical ban on the use of the middle finger gesture in public—if it were not understood that such a gesture conveys a message many find offensive,[138] the interest in passing such a ban would be inexplicable.

B. Scrutinizing Restrictions on Gender-Affirming Care — Applying O'Brien

The establishment of protected symbolic speech does not end the inquiry. Recall, if a restriction on conduct does not aim at the underlying expression—if it is not content-based discrimination—it is an incidental restriction subject to intermediate scrutiny (i.e., the *O'Brien* test).[139] Under the *O'Brien* test: a restriction on conduct is valid "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[140] Here, the government must show that the ban on the conduct of gender-affirming care only incidentally burdens the expression inherent in such care, that it has a valid interest in banning such care, and that the incidental restriction on the First Amendment freedom of speech of transgender

championed by a network of organized transphobes working with conservative groups mainly in Republican states. *See, e.g.*, Madison Pauly, *Inside the Secret Working Group That Helped Push Anti-Trans Laws Across the Country*, MOTHER JONES (Mar. 8, 2023), https://www.motherjones.com/politics/2023/03/anti-trans-transgender-health-care-ban-legislation-bill-minors-children-lgbtq/ [https://perma.cc/3Q6Q-88GL] (discussing a communications leak amongst anti-trans litigators); Dell Cameron & Dhruv Mehrotra, *An Anti-Trans Doctor Group Leaked 10,000 Confidential Files*, WIRED (May 2, 2023), https://www.wired.com/story/american-college-pediatricians-google-drive-leak/ [https://perma.cc/BGX5-HM99] (discussing a concurrent leak of emails from an anti-trans doctor group, designated by the Southern Poverty Law Center to be a hate group, in which communications reveal a religious animus against transgender people).

138. *Cf.* Cruise-Gulyas v. Minard, 918 F.3d 494, 497 (6th Cir. 2019) ("Any reasonable officer would know that a citizen who raises her middle finger engages in speech protected by the First Amendment." (citations omitted)).

139. *See supra* Section II.B; Porter, *supra* note 45, at 1078–79.

140. *Id.* at 367.

individuals is no greater than necessary to achieve whatever interest the government identifies.[141]

i. There Is No Valid Substantial or Important Governmental Interest in Banning Gender-Affirming Care

While the government will likely succeed in arguing that a ban on gender-affirming care is an incidental restriction,[142] the government is unlikely to survive the *O'Brien* test, as there is no valid, non-pretextual interest in banning gender-affirming healthcare. The government would not have to produce novel evidence or undertake expensive new studies to prove there is a problem that the government is attempting to ameliorate by banning gender-affirming care for trans people, but it would have to show evidence that the government reasonably relied upon for the proposition that a ban is necessary to advance the government's interests.[143] Most government interests in banning gender-affirming care for trans people cannot be articulated without drawing on anti-trans animus, gender stereotyping, or religious belief,[144] all of which would amount to a need to suppress the free expression of certain people's gender identity. Obviously, these interests should be invalid for purposes of surviving the *O'Brien* test.

1. "Safety" Interests are Pretextual

The most common governmental interest in limiting access to gender-affirming care seems to be one of safety.[145] However, the existence of cisgender analogs to gender-affirming trans care underscore the lack of reasonable interest held by the government in the underlying safety of gender-affirming care, because the government deems the same type of care safe for cisgender patients.[146] The fact that nearly every respected medical association in the United States has put out statements

141. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968).

142. *See supra* Section II.B. This Author would still urge, however, making the argument that gender-affirming healthcare is inseparable from the message of gender affirmation it sends.

143. *See* City of Erie v. Pap's A.M., 529 U.S. 277, 296 (2000) (discussing the establishment of valid interests in enacting regulation under *O'Brien*).

144. *See* Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 WM. & MARY J. WOMEN & L. 187 (2013).

145. *See, e.g.*, Brandt v. Rutledge, 551 F. Supp. 3d 882, 889–90 (E.D. Ark. 2021) (discussing purported state interest in patient safety as a pretense for banning trans youth care); Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, 1185–86 (M.D. Ala. 2022) (same).

146. *See Eknes-Tucker*, 603 F. Supp. 3d at 1145 (noting that hormone treatments used in gender-affirming care have been used to treat conditions like central precocious puberty for decades); *Brandt*, 551 F. Supp. 3d at 893 ("The goal in this context is pretextual because Act 626 allows the same treatments for cisgender minors that are banned for transgender minors as long as the desired results conform with the stereotype of the minor's biological sex.").

defending the practice of gender-affirming healthcare for trans people cuts further against arguments that justify bans on gender-affirming care by arguing that bans are necessary for protecting the safety of trans patients.[147] In fact, gender-affirming care for trans people increases positive life outcomes and decreases suicide attempts for trans patients.[148] There is no compelling evidence to reasonably rely upon for justifying an interest in banning this care, and there is ample evidence that such bans on gender-affirming care would worsen health outcomes for trans patients, up to and including causing an increase in the death rate of trans patients.

This notion also holds true for bans on trans youth gender-affirming care. While opponents of trans youth care argue that surgery and hormone therapy are too big of decisions for minors to make,[149] they fail to understand that gender-affirming healthcare for trans minors requires that such decisions be made only after informed discussion with parents and providers.[150] Further, this gender-affirming care consists mostly of highly reversible, orally-administered puberty blockers, which trans youth take to pause puberty until they are old enough and mature enough to make decisions on more permanent interventions.[151] Considering the literature already shows that transgender youth experience a decrease in suicidal thoughts following gender-affirming healthcare, any purported governmental interest in banning such care for trans youth would have to outweigh the impact of a likely increase in suicide attempts of the affected citizens,[152] some portion of which may well be successful.

Most people are born with bodies that communicate the gender expression they desire, but some people desire to alter their bodies to better or more firmly express their gender; not all these people are trans. In fact, most people who choose to alter their bodies to better express their gender are cis. In the United States, well over 132,000 women

147. *See Eknes-Tucker*, 603 F. Supp. 3d at 1145 (noting support for transgender youth care from over twenty major medical organizations).

148. *See* Nunn, *supra* note 7, at 622; *see also* Luke R. Allen, Laurel B. Watson, Anna M. Egan & Christine N. Moster, *Well-Being and Suicidality Among Transgender Youth After Gender-Affirming Hormones*, 7 CLINICAL PRAC. PEDIATRIC PSYCH. 302, 307 (2019) (discussing a drop in transgender youth patients' suicidal ideation following prescription of gender-affirming hormones).

149. *See, e.g.*, *Eknes-Tucker*, 603 F. Supp. 3d at 1145 (M.D. Ala. 2022) ("Defendants proffer that the purpose of the Act is 'to protect children from experimental medical procedures,' the consequences of which neither they nor their parents often fully appreciate or understand.").

150. *See* Caroline Salas-Humara, Gina M. Sequeira, Wilma Rossi & Cherie Priya Dhar, *Gender Affirming Medical Care of Transgender Youth*, 49 CURRENT PROBS. PEDIATRIC & ADOLESCENT HEALTH CARE 100683 (2019).

151. *Id.*

152. *See* Allen et al., *supra* note 148, at 307.

received breast augmentation surgery in 1998.[153] By 2019, this number had doubled, with over 280,692 breast augmentations performed.[154] In the early 2000s, Pfizer's hit male-virility drug Viagra was being dispensed by over half a million American physicians a year and to as many as 30 million men worldwide, owing much of its gargantuan success to a desire to feel and seem more masculine in the middle-aged cis male population.[155] These wildly popular treatments are for a predominantly cis population.[156] All medical treatments come with risks; however, the risks associated with breast augmentation can be incredibly serious and even life-threatening, including loss of or changes to nipple sensation, hematoma, and death.[157] For Viagra users, there are serious risks, including hypertension and changes in or loss of vision.[158] Nevertheless, cis patients do not contend with the level of gatekeeping and scrutiny experienced by trans patients, and critics have long noted the double standard. Attorney and former American Civil Liberties Union fellow Dr. Elizabeth Loeb lamented the two-tiered regime in 2008:

> As TV shows such as *Extreme Makeover* have repeatedly shown, plenty of folks are telling stories about uncovering a "true self" by undergoing as many invasive surgeries as they so choose without a trace of juridical approbation or punishment. The catch is that such legal and cultural permission holds steady only so long as my choices map onto the landscape of normative and normativizing physical norms of race, sex, and gender. Taking out a rib so that I can model for a Gucci show? Yes! Cutting off my penis to more fully express my felt gender? No![159]

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153. *See* David B. Sarwer, Jodi E. Nordmann & James D. Herbert, *Cosmetic Breast Augmentation Surgery: A Critical Overview*, 9 J. WOMEN'S HEALTH & GENDER-BASED MED. 843 (2004).

154. THE AESTHETIC SOC'Y, AESTHETIC PLASTIC SURGERY NATIONAL DATABANK STATISTICS: 2019, at 5 (2020).

155. *See* Janice M. Irvine, *Selling Viagra*, 5 CONTEXTS 39, 39 (2006) (discussing the importance of the desire for a sense of renewed masculinity to the success of Viagra); Konstantinos Hatzimouratidis, *Sildenafil in the Treatment of Erectile Dysfunction: An Overview of the Clinical Evidence*, 1 CLINICAL INTERV. AGING 403 (2006) (discussing global usage statistics of sildenafil, the generic name for Viagra).

156. Given that transgender adults constitute less than 1% of the U.S. population, there is no reasonable way to dispute that the majority of people receiving prescriptions for Viagra or undergoing breast augmentation are cisgender. Esther L. Meerwijk & Jae M. Sevelius, *Transgender Population Size in the United States: A Meta-Regression of Population-Based Probability Samples*, 107 AM. J. PUB. HEALTH 1 (2017); *see* Watts v. State of Indiana, 338 U.S. 49, 52 (1949) ("[There] comes a point where this Court should not be ignorant as judges of what we know as men.").

157. *See*, *e.g.*, David A. Hidalgo & Jason A. Spector, *Breast Augmentation*, 133 PLASTIC & RECON. SURGERY 567e, 575e (2014).

158. *See* Luís Antônio B. Leoni, Gerson S. Leite, Rogério B. Wichi & Bruno Rodrigues, *Sildenafil: Two Decades of Benefits or Risks?*, 16 AGING MALE 85 (2013); *see also* Sidney M. Wolfe, *There Have Been Inadequate Warnings that Erectile Dysfunction Drugs Can Cause Blindness*, 7 MEDSCAPE GEN. MED. 61 (2005).

159. Elizabeth Loeb, *Cutting It Off: Bodily Integrity, Identity Disorders, and the Sovereign*

Now that transgender people enjoy more widespread access to gender-affirming and gender-expressive care, and the public is aware of increasing access to gender-affirming care for trans people, bad-faith actors in the legal field and in various state legislatures wish to ban such categories of healthcare for trans people often under the fig leaf of protecting patient safety, despite the excellent patient satisfaction under the presently accepted informed-consent model of gender-affirming healthcare for trans patients.[160]

2. Protecting "Detransitioners" and Fertility Concerns are Not Valid Interests

Beyond plainly pretextual "safety" interests, there remain two potentially colorable government interests in banning gender-affirming care for trans people: (1) avoiding regrets of the few cisgender people who undergo gender-affirming trans care and come to see it as a mistake later in life,[161] and (2) avoiding negative impacts on reproductive ability in gender-affirmed patients. However, even if these interests were to be considered valid, neither are likely to withstand any level of scrutiny.

For the first possible interest, simply put: the fact that gender-affirming healthcare significantly alleviates suicidal ideation in transgender patients, coupled with the rarity of detransitioners,[162] means that an interest in protecting detransitioners would have to be at the expense of risking the lives of a greater number of transgender patients. The government would have to argue it has a valid interest in sacrificing some number of transgender lives—not for the protection of cisgender lives, but for the avoidance of cisgender regret. Many surgeries, if not all, have non-zero rates of regret, but it would be ridiculous to ban knee surgeries or heart surgeries because some small percentage of such patients eventually express regret. Banning gender-affirming care to

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Stakes of Corporeal Desire in U.S. Law, 36 WOMEN'S STUD. Q. 44, 47 (2008) (internal citations omitted).

160. *See* Cassandra Spanos et al., *The Informed Consent Model of Care for Accessing Gender-Affirming Hormone Therapy Is Associated With High Patient Satisfaction*, 18 J. SEXUAL MED. 201 (2021); Timothy Cavanaugh, Ruben Hopwood & Cei Lambert, *Informed Consent in the Medical Care of Transgender and Gender-Nonconforming Patients*, 18 AMA J. ETHICS 1147 (2016).

161. These patients who regret receiving gender-affirming care, often referred to as "detransitioners," are exceedingly rare, even compared to those undergoing other more socially accepted forms of medical care. *See, e.g.*, Valeria P. Bustos et al., *Regret after Gender-Affirmation Surgery: A Systematic Review and Meta-Analysis of Prevalence*, 9 INT'L OPEN ACCESS J. AM. SOC'Y PLASTIC SURGEONS 3477 (2021) (reporting that, of a pool of 7,298 transgender patients undergoing some form of gender-affirming surgery, only 77 expressed any form of regret; only some of these patients opted to "reverse their gender role"—detransition—indeed, many of the "regrets" identified involved regrets over poor surgical outcomes).

162. *See id.*

prevent harm against a miniscule number of detransitioners is not a valid government interest.

For the second possible interest, it could be a valid interest for the government to require patients be informed of risks to reproductive ability. However, a sacrifice of trans lives for the avoidance of assisted reproductive technology is simply irrational. Doctors have the technology today to store eggs and sperm and to use them in the future to create healthy children.[163] Doctors do not have the technology to revive the dead. Further, cisgender adults often obtain reproductive sterilization procedures.[164] For the government to rest its *O'Brien* argument on an interest in protecting reproductive ability, it would have to argue that there is a valid interest in sacrificing some number of transgender lives to predictable suicide in order to avoid the necessity of egg and sperm storage for future reproduction, and that this interest does not apply to cisgender adults who pursue sterilization procedures. This interest is irrational.

Although *O'Brien* is a relatively deferential test, it does not allow the government to pretextually substitute a desire to discriminate based on the content of expression for a valid governmental interest.[165] There must be some *valid* government interest.[166] The government cannot toss half-baked, irrational fears at the court and call them satisfactory.

ii. Banning Gender-Affirming Care Restricts the Symbolic Conduct of Transgender Individuals Greater than Necessary to Serve Any Sort of Governmental Interest

Under *O'Brien*, an "incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of [an important governmental] interest."[167] Even if the government survives the important or substantial interest requirement, the government will still likely fail for overbreadth in a ban on gender-affirming healthcare.

In *Difeo*, the court ruled a zoning ordinance wholly banning all body piercing was unconstitutional for being overbroad.[168] In so holding, the

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163. *See, e.g.*, Joshua Sterling & Maurice M. Garcia, *Fertility Preservation Options for Transgender Individuals*, 9 TRANSLATIONAL ANDROLOGY & UROLOGY 215 (2020).

164. *See, e.g.*, Deborah Bartz & James A. Greenberg, *Sterilization in the United States*, REV. OBSTET. GYNECOL. Winter 2008, at 23.

165. *See* Police Dep't of City of Chicago v. Mosley, 408 U.S. 92, 101–2 (1972) (holding the Equal Protection Clause invalidates First Amendment restrictions predicated on a government interest in content discrimination).

166. *Id.*

167. United States v. O'Brien, 391 U.S. 367, 367 (1968).

168. *Difeo v. Town of Plaistow*, No. 00-E-0218, 2002 WL 31059361, at *6 (N.H. Super. Ct. Mar. 7, 2002); *accord* NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288, 307 (1964) ("[A]

court noted that a town's health interest in regulating the safety of body piercing, though indeed a substantial government interest, did not justify a total ban on the practice.[169] Instead, the government's interest would have justified a ban on body piercing by those without medical licensure, provided there exists a process for licensing qualified persons.[170]

In the case of gender-affirming care, the parallel is clear: a total ban on all such care fails the *O'Brien* test because it bans far more conduct than is necessary to protect the government's identified interest. The medical care involved in various gender-affirming procedures is subject to governmental regulation, including licensure and training requirements.[171] A sweeping ban on all such care, or on an entire subcategory (e.g., a ban on all testosterone blocker prescriptions) plainly oversteps the boundaries provided by the Constitution.

V. Conclusion

Gender-affirming healthcare communicates gender identity. Both transgender and cisgender patients recognize the gendered message certain body parts and traits express. The bans and restrictions on such care are enacted by people who have never made serious attempts to protect or assist the transgender community yet are ostensibly attempting to protect trans people from having too much access to healthcare. The timing and the target of these efforts to restrict access to gender-affirming care for trans people reveal the actual intent behind these restrictions: suppressing the symbolic speech of transgender people. Any fair adjudicator will see the case law so far and the circumstances today, and demand respect for the First Amendment symbolic speech interest inherent in gender-affirming healthcare.

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governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.").

169. *Difeo*, 2002 WL 31059361, at *6.

170. *Id.* at *7.

171. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 18, § 505.2(l) (2016) (setting out requirements for the provision of gender-affirming care in New York).

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