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Address all correspondence to *Law & Inequality*, University of Minnesota Law School, 229 19th Avenue South, Minneapolis, Minnesota 55455. Email: lawineqj@umn.edu.

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The Right to Boycott: Anti-BDS Laws Violate the First Amendment to Protect Apartheid

Buchanan Waller†

Introduction

Israel is an apartheid state.[1] Palestinians in the West Bank are restricted from traveling on the same roads as Israeli settlers.[2] They are restricted in where they can travel, whom they can marry, and which political parties they can join.[3] Israel's National Security Minister has ordered the police to forcibly prohibit any display of the Palestinian flag.[4] Palestinians can be forcibly evicted from their

†. Buchanan Waller is a 2023 graduate of the University of Minnesota Law School. I would like to thank the entire team at the *Minnesota Journal of Law & Inequality*. As always, I want to thank my wife Nycole for her unwavering love and support. I would like to thank Brian Chval, Maysa Alqaisi, and Andrea McGauley. Above all, I would like to recognize the many people who have lost their lives in the fight for a free Palestine, or while simply trying to survive, including Rachel Corrie, Aaron Bushnell, Shireen Abu Akleh, and Yazan al-Kafarneh.

1. *See* sources cited *infra* note 8; *see also* B'TSELEM, FORBIDDEN ROADS: ISRAEL'S DISCRIMINATORY ROAD REGIME IN THE WEST BANK (2004) (describing the system of checkpoints and restrictions which govern the ability of Palestinians to travel in the West Bank).

2. *See Over 700 Road Obstacles Control Palestinian Movement Within the West Bank*, UNITED NATIONS OFF. FOR COORDINATION HUMANITARIAN AFFS. (Oct. 8, 2018), https://www.ochaopt.org/content/over-700-road-obstacles-control-palestinian-movement-within-west-bank [https://perma.cc/RL5A-DPDW] (describing the effect of travel restrictions and road checkpoints on Palestinians).

3. *See* B'TSELEM, *supra* note 1; Josef Federman, *New Israeli Rules on Foreigners Tighten Control in West Bank*, AP NEWS (Sept. 5, 2022), https://apnews.com/article/travel-middle-east-israel-west-bank-205608f835d54039a878cacbe153ed5d [https://perma.cc/9PBL-HY2P] (detailing strict new Israeli restrictions on foreign spouses of Palestinians); Henriette Chacar, *Israel's Knesset Passes Law Barring Palestinian Spouses*, REUTERS (Mar. 10, 2022), https://www.reuters.com/world/middle-east/israels-knesset-passes-law-barring-palestinian-spouses-2022-03-10/ [https://perma.cc/2PST-2USU] (describing a new Israeli law "denying naturalization to Palestinians from the occupied West Bank or Gaza married to Israeli citizens, forcing thousands of Palestinian families to either emigrate or live apart."); AMNESTY INT'L, ISRAEL'S APARTHEID AGAINST PALESTINIANS 108–13 (2022) (detailing the various ways Palestinians in the occupied territories and Israel proper are excluded from the formal political process).

4. Elliot Gotkine, *Israel's Ben Gvir Orders Police to Take Down Palestinian Flags, Testing Limits of his Authority*, CNN (Jan. 9, 2023), https://www.cnn.com/2023/01/09/middleeast/israel-ben-gvir-palestinian-flags-intl/index.html [https://perma.cc/5YMY-Q6Y7] (describing how an extremist member of the newly formed government ordered the removal of Palestinian flags, and noting

homes with no recourse.[5] Palestinian journalists and civilians are murdered with impunity.[6] Israeli settlers undertake pogroms—violent mob attacks—with tacit support from their government.[7] It

that while this order may face legal scrutiny, the Israeli government has forcibly prohibited flying the Palestinian flag in the past, such as when police beat mourners to remove Palestinian flags at the funeral of Shireen Abu Akleh).

5. *See* Bethan McKernan & Quique Kierszenbaum, *Israeli Court Paves Way for Eviction of 1,000 Palestinians from West Bank Area*, GUARDIAN (May 5, 2022), https://www.theguardian.com/world/2022/may/05/israeli-court-evict-1000-palestinians-west-bank-area [https://perma.cc/N4H5-YFC5] (describing a ruling by Israel's Supreme Court holding that Israel can evict over 1,000 rural villagers to make room for facilities to train Israel Defense Forces (IDF) soldiers); *see generally Maps Illustrating the Changing Face of Palestine / Israel*, ISRAELI COMM. AGAINST HOUSE DEMOLITIONS, https://icahd.org/maps-maps-illustrating-demolitions-and-displacements-by-month/ [https://perma.cc/6BXZ-2YH9] (documenting home demolitions and Palestinian displacements by month).

6. *See* Murtaza Hussain, *Israel Killed Up to 192 Palestinian Civilians in 2021 Attacks on Gaza*, INTERCEPT (Dec. 9, 2021), https://theintercept.com/2021/12/09/israel-attacks-gaza-palestine-civilians-killed/ [https://perma.cc/PL5V-B2A2] ("More than 70 percent of the reported attacks that killed civilians had no corresponding reports of militants hit alongside them, meaning civilians were the only victims."); Zeena Saifi, Eliza Mackintosh, Celine Alkhaldi, Kareem Khadder, Katie Polgase, Gianluca Mezzofiore & Abeer Salman, *'They Were Shooting Directly at the Journalists': New Evidence Suggests Shireen Abu Akleh was Killed in a Targeted Attack by Israeli Forces*, CNN (May 26, 2022), https://www.cnn.com/2022/05/24/middleeast/shireen-abu-akleh-jenin-killing-investigation-cmd-intl/index.html [https://perma.cc/JK3Q-CSXF] (providing extensive evidence that a prominent Palestinian journalist was assassinated by Israel); *UN: Possible Israel Crimes against Humanity in Gaza*, AL JAZEERA (Feb. 28, 2019), https://www.aljazeera.com/news/2019/2/28/un-possible-israel-crimes-against-humanity-in-gaza [https://perma.cc/7AL8-6UHP] (citing a UN report which found that "snipers targeted people clearly identified as children, health workers and journalists."); *Journalists Casualties in the Israeli-Gaza War*, COMM. TO PROTECT JOURNALISTS, https://cpj.org/2024/03/journalist-casualties-in-the-israel-gaza-conflict/ [https://perma.cc/JJN4-4CCA] (finding that 89 Palestinian journalists had been killed in approximately four months of war in Gaza, with others missing and family members of journalists also killed; the IDF has refused to guarantee the safety of journalists).

7. Bethan McKernan, *'Never Like This Before': Settler Violence in West Bank Escalates*, GUARDIAN (Feb. 27, 2023), https://www.theguardian.com/world/2023/feb/27/israeli-settler-violence-in-west-bank-escalates-huwara [https://perma.cc/6B74-CHQA] (describing how, with the support of IDF soldiers, Israeli settlers killed a Palestinian civilian, injured around 100 civilians, and burned dozens of houses down in a riot dubbed "Kristallnacht in Huwara" by an Israeli commentator); *Settler Extremists are Sowing Terror, Huwara Riot was a 'Pogrom,' Top General Says*, TIMES ISR. (Feb. 28, 2023), https://www.timesofisrael.com/settler-extremists-sowing-terror-huwara-riot-was-a-pogrom-top-general-says/ [https://perma.cc/8LVW-FS7S] ("[H]undreds of people ran riot through Huwara and other nearby towns, leaving one Palestinian dead and several others badly injured, as well as torching homes and cars, and killing sheep. Two days later, no one is still held [in custody] over the unprecedented rampage."); Rina Bassist, *Israel Should 'Wipe Out' Palestinian Village of Huwara, Says Far-Right Minister Smotrich*, AL-MONITOR (Mar. 1, 2023), https://www.al-monitor.com/originals/2023/03/israel-should-wipe-out-palestinian-village-huwara-says-far-right-minister [https://perma.cc/KFG2-LELV] (quoting Israeli Finance

is simple: between the Jordan River and the Mediterranean Sea, Israel is in complete control, and Palestinians are second class citizens. International human rights groups—including Amnesty International, Human Rights Watch, and B'Tselem—have described Israel's treatment of the Palestinians as "apartheid."[8]

The United States is the biggest financial and political supporter of Israel.[9] However, over the past twenty years, American citizens have become increasingly critical of Israel's apartheid policies.[10] In 2005, Palestinian civil society groups issued a call for an international movement to boycott, divest, and sanction (BDS) Israel.[11] Modeled after the South African anti-apartheid strategy, BDS has gained supporters in the United States.[12] Troubled by this development, thirty-eight U.S. states have passed legislation to penalize supporters of BDS.[13] These anti-BDS laws typically take two forms. First, they condition state contracts on the contractor signing a pledge not to boycott Israel.[14] Second, they require state investment funds to divest from any business or organization which boycotts Israel.[15] In Texas, for example, this meant that Hurricane Harvey victims had to sign a pledge vowing they would not boycott Israel in order to get relief from the government.[16]

Minister Bezalel Smotrich voicing his qualified support for the pogrom: "The Palestinian Village of Hawara should be wiped out of the Earth. The Israeli government needs to do it and not private citizens.").

8. AMNESTY INT'L, *supra* note 3; HUM. RTS. WATCH, A THRESHOLD CROSSED: ISRAELI AUTHORITIES AND THE CRIMES OF APARTHEID AND PERSECUTION 1 (2021); B'TSELEM, A REGIME OF JEWISH SUPREMACY FROM THE JORDAN RIVER TO THE MEDITERRANEAN SEA: THIS IS APARTHEID 1 (2021) ("The Israeli regime implements laws, practices, and state violence designed to cement the supremacy of one group—Jews—over another—Palestinians.").

9. Jake Horton, *Israel-Gaza: How Much Money Does Israel Get from the US?,* BBC NEWS (May 24, 2021), https://www.bbc.com/news/57170576 [https://perma.cc/S7ND-XAW5].

10. *See, e.g.*, Lydia Saad, *Americans Still Pro-Israel, Though Palestinians Gain Support*, GALLUP (Mar. 17, 2022), https://news.gallup.com/poll/390737/americans-pro-israel-though-palestinians-gain-support.aspx [https://perma.cc/5HPX-ZZ39] (finding that a near-majority of young people and a majority of liberals support Palestine more than Israel).

11. *What is BDS?*, BDS MOVEMENT, https://bdsmovement.net/what-is-bds [https://perma.cc/YGP6-SX2U].

12. *Id.*

13. *Legislation*, PALESTINE LEGAL, https://legislation.palestinelegal.org/ [https://perma.cc/PQN4-6U59].

14. *Id.*

15. *Id.*

16. *Texas City Requires Israel Pledge for Hurricane Relief*, BBC NEWS (Oct. 20, 2017), https://www.bbc.com/news/world-us-canada-41688999 [https://perma.cc/J9U2-AS45].

Supporters of BDS have challenged the constitutionality of anti-BDS laws. District courts in Kansas, Texas, and Arizona have found that those states' anti-BDS laws violate the First Amendment by prohibiting political expression and compelling speech.[17] However, in June 2022, the Eighth Circuit upheld an Arkansas anti-BDS law as constitutional.[18] The ACLU appealed the decision, but the Supreme Court declined to hear the case.[19]

This Article will examine the history of the anti-apartheid movement and development of anti-BDS laws, analyze the Eighth Circuit's decision in *Arkansas Times LP v. Waldrip*, and suggest a path forward for opponents of anti-BDS laws. Part I of this Article will explore the history of political boycotts in the United States. In particular, this section will focus on boycotts by civil rights leaders in opposition to discriminatory regimes in the United States, South Africa, and Israel. Part I will conclude by providing background on the development of anti-BDS laws in the United States and legal challenges to them, culminating in the Eighth Circuit's decision in *Arkansas Times LP v. Waldrip*. Part II of this Article will analyze the *Waldrip* decision. Part II will argue that the Eighth Circuit should have ruled that Arkansas's anti-BDS statute violates the First Amendment by restricting political expression and compelling speech. Further, the Eighth Circuit's *Waldrip* decision disregards both important legal precedents and the general importance of political boycotts to American civic life. This Article will conclude by outlining future strategies for opponents of anti-BDS laws to use as the courts continue to deliberate on the ability of state governments to restrict boycotts.

I. Background

The boycotts which anti-BDS laws seek to prohibit are nothing new. Economic boycotts have been used in the United States since the American Revolution.[20] In particular, Americans—from

17. *See* Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717 (W.D. Tex. 2019) (holding that a Texas anti-BDS law unconstitutionally compelled speech and restricted a protected right to boycott); Jordahl v. Brnovich, 366 F. Supp. 3d 1016 (D. Ariz. 2018) (granting a preliminary injunction to an attorney who participated in BDS, causing the state to later change its law); Koontz v. Watson, 283 F. Supp. 3d. 1007 (D. Kan. 2018) (holding that a Kansas anti-BDS law unconstitutionally compelled speech).

18. Ark. Times LP v. Waldrip, 37 F.4th 1386 (8th Cir. 2022).

19. Eugene Volokh, *S. Ct. Denies Review of Eighth Circuit En Banc Case Upholding Arkansas "Anti-BDS" Statute*, REASON (Feb. 21, 2023), https://reason.com/volokh/2023/02/21/s-ct-denies-review-of-eighth-circuit-en-banc-case-upholding-arkansas-anti-bds-statute/ [https://perma.cc/76L9-YA6B].

20. JOHN W. TYLER, SMUGGLERS AND PATRIOTS: BOSTON MERCHANTS AND THE

abolitionists seeking to end slavery to civil rights activists protesting Jim Crow segregation—have historically used boycotts and other forms of economic divestment to protest racial discrimination.[21] More recently, American activists engaged in boycotts to help end South Africa's regime of racial apartheid.[22] The BDS movement is simply a continuation of this age-old strategy.

A. Boycotts in the American Civic Tradition

The Supreme Court has acknowledged boycotts are "deeply embedded in the American political tradition."[23] Indeed, the practice of political boycotting predates the founding of the United States. Merchants in colonial America signed agreements not to buy or sell British goods in response to British taxes on imported goods.[24] Several founding fathers helped to organize these boycotts, culminating in the Boston Tea Party.[25]

Boycotts have also been a common tactic for political activists fighting for racial equality. Around 1790, Quakers started the international Free Produce Movement, urging their followers to boycott food harvested by slaves.[26] Quaker abolitionist Elizabeth Heyrick wrote a widely distributed pamphlet advocating a boycott of slave-harvested sugar, calling it "The Shortest, Safest, and Most Effectual Means of Getting Rid of Slavery."[27] At the height of the Free Produce Movement, it is estimated that 400,000 British and American boycotters had completely given up sugar in protest of slavery.[28] The boycott movement spread from Quakers to Black activists. Black abolitionist Frances Ellen Watkins described the Free Produce boycott as "the harbinger of hope, the ensign of

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ADVENT OF THE AMERICAN REVOLUTION 111–16 (1986).

21. Willy Blackmore, *The Boycott's Abolitionist Roots*, NATION (Aug. 14, 2019), https://www.thenation.com/article/archive/boycott-sugar-slavery-bds/ [https://perma.cc/G8CX-7HES]; *Montgomery Bus Boycott*, C.R. DIGIT. LIBR., https://crdl.usg.edu/events/montgomery_bus_boycott/ [https://perma.cc/6Z2E-QZQM].

22. *How U.S. Activists Helped Push South Africa Away From Apartheid*, NPR (Dec. 7, 2013), https://www.npr.org/templates/story/story.php?storyId=249494278 [https://perma.cc/MM22-QC6N].

23. Citizens against Rent Control v. City of Berkeley, 454 U.S. 290, 294 (1981).

24. TYLER, *supra* note 20.

25. *See id.* at 171–210 (describing the roles of John Hancock and Samuel Adams in organizing opposition to the importation of British goods).

26. *See* Carol Faulkner, *The Root of the Evil: Free Produce and Radical Antislavery, 1820-1860*, 27 J. EARLY REPUBLIC 377, 380 (2007) (describing how "calls for abstinence from slave products accompanied the earliest calls for abolition").

27. *Id.*

28. *Id.*

progress, and a means of proving the consistency of our principles and the earnestness of our zeal."[29]

In the twentieth century, U.S. civil rights activists continued to use boycotts as a tactic. Most famously, civil rights activists including Rosa Parks and Martin Luther King Jr. organized the Montgomery Bus Boycott in Alabama.[30] The boycott was a massive success, resulting in reduced revenue for Montgomery's busing company and, eventually, a court decision prohibiting segregation on buses.[31] The Montgomery Bus Boycott galvanized the civil rights movement, but it was just one of many boycotts successfully employed by civil rights activists. After the Montgomery boycott, a similar boycott was carried out by civil rights activists in Tallahassee, Florida.[32] Boycotts were a common and often effective tactic used by civil rights activists.

At the height of the civil rights movement in the 1960s, the Supreme Court had not yet considered the constitutionality of political boycotts.[33] The Supreme Court had only ruled on the right to use boycotts in labor disputes and non-economic forms of advocacy which didn't target businesses.[34] Modern precedent for the constitutional protection of boycotts was established in *NAACP v. Claiborne Hardware Co.*, in which white business owners tried to hold civil rights boycotters liable for financial losses caused by the boycott.[35]

The boycott in Claiborne County, Mississippi, began in 1966.[36] Local Black leaders called for the integration of public schools, desegregation of bus stations, hiring of Black police officers, and better treatment of Black residents by the police.[37] When the white community did not accept the demands, several hundred Black

29. BENJAMIN QUARLES, BLACK ABOLITIONISTS 76 (1969).

30. C.R. DIGIT. LIBR., *supra* note 21.

31. *Id.*

32. *See* Gerald Ensley, *The Ride to Equality Started 60 Years Ago*, TALLAHASSEE DEMOCRAT (May 23, 2016), https://www.tallahassee.com/story/news/2016/05/20/bus-boycott-60-years-later/84546580/ [https://perma.cc/9N8P-JGK3] (describing the seven-month boycott of buses in Tallahassee, initiated a few months after the beginning of the Montgomery boycott).

33. *Boycotting A Boycott: A First Amendment Analysis of Nationwide Anti-Boycott Legislation*, 70 RUTGERS U.L. REV. 1301, 1315 (2018).

34. *Id.*

35. 458 U.S. 886 (1982).

36. *Id.* at 889.

37. *Id.* The list of demands, entitled "Demands for Racial Justice," also included "public improvements in black residential areas, selection of blacks for jury duty . . . [and] that 'Negroes are not to be addressed by terms as 'boy,' 'girl,' 'shine,' 'uncle,' or any other offensive term, but as 'Mr.,' 'Mrs.,' or 'Miss,' as is the case with other citizens." *Id.*

residents unanimously voted at a National Association for the Advancement of Colored People (NAACP) meeting to boycott Claiborne County's white-owned businesses.[38] Black members of the community almost universally observed the boycott.[39] In 1969, a group of white business owners sued the NAACP, Mississippi Action for Progress, and 146 individuals who participated in the boycott, seeking damages for lost profits and an injunction to end the boycott.[40] After years of litigation, the Supreme Court finally heard the case in 1982.[41] In an 8-0 opinion, the Court held "the boycott clearly involved constitutionally protected activity."[42] Crucially, Justice Stevens distinguished the NAACP action from mere economic action and recognized withholding patronage as "peaceful political activity" protected by the First Amendment.[43] *Claiborne's* protection of political boycotts under the First Amendment recognized the long history of boycotts as part of the American civic tradition.

Since *Claiborne*, political boycotts have been consistently employed by activists from across the political spectrum. In 2016, North Carolina passed House Bill 2 (HB2), mandating that residents only use restrooms corresponding to the gender they were assigned at birth.[44] In response, activists from across the country organized a boycott of North Carolina.[45] Bruce Springsteen canceled a concert in Greensboro.[46] PayPal canceled a plan to expand into the state, leading to an estimated loss of 450 jobs and $25 million for the local economy.[47] The NBA moved its 2017 All-Star Game out of

38. *Id.* at 900.

39. *Id.*

40. *Id.* at 889.

41. *Id.* at 889–98.

42. *Id.* at 911.

43. *Id.* at 913.

44. Colleen Jacobs & Daniel Trotta, *Seeking End to Boycott, North Carolina Rescinds Transgender Bathroom Law*, REUTERS (Mar. 30, 2017), https://www.reuters.com/article/us-north-carolina-lgbt/seeking-end-to-boycott-north-carolina-rescinds-transgender-bathroom-law-idUSKBN1711V4 [https://perma.cc/TYZ6-5R9M].

45. *Id.*

46. Amanda Holpuch, *Bruce Springsteen Pulls out of North Carolina Concert over Anti-LGBT Law,* GUARDIAN (Apr. 9, 2016), https://www.theguardian.com/music/2016/apr/08/bruce-springsteen-cancels-north-carolina-concert-lgbt-discrimination-law [https://perma.cc/MEE6-7ZPG] (noting that Springsteen said of the cancellation, "Some things are more important than a rock show . . . .").

47. Jon Kamp & Valerie Bauerlein, *PayPal Cancels Plan for Facility in North Carolina, Citing Transgender Law*, WALL ST. J. (Apr. 5, 2016), https://www.wsj.com/articles/paypal-cancels-plans-for-operations-center-400-jobs-over-north-carolinas-transgender-law-1459872277 [https://perma.cc/U7BD-9WYD].

the state.[48] Additionally, many government entities joined the boycott of North Carolina. Six states and numerous city governments issued orders prohibiting their government employees from traveling to North Carolina.[49] Eventually, the economic strain of the boycott forced North Carolina to repeal HB2.[50] The North Carolina boycott demonstrated both the effectiveness of political boycotts and their widespread acceptance from institutions of American civic life.[51]

B. The South African Anti-Apartheid Movement

Activists in the United States have also used boycotts and advocacy for economic sanctions to help end discriminatory regimes in other countries. In the case of South Africa, a broad coalition of American activists joined an international movement to use boycotts to put pressure on the apartheid regime.[52] This effort was massively successful and the main precedent for the movement to boycott Israel.[53]

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48. Jill Martin, *NBA Moves 2017 All-Star Game to New Orleans*, CNN (Aug. 19, 2016), https://www.cnn.com/2016/08/19/sport/nba-all-star-game-moved-to-new-orleans [https://perma.cc/D3PK-KA3A].

49. *See Bathroom Bill to Cost North Carolina $3.76 Billion,* CNBC (Mar. 27, 2017), https://www.cnbc.com/2017/03/27/bathroom-bill-to-cost-north-carolina-376-billion.html [https://perma.cc/3R47-K735].

50. Jason Hanna, Madison Park & Eliott C. McLaughlin, *North Carolina Repeals 'Bathroom Bill',* CNN (Mar. 30, 2017), https://www.cnn.com/2017/03/30/politics/north-carolina-hb2-agreement/index.html [https://perma.cc/Z4PQ-Q8EC].

51. *See, e.g.*, Samantha Schmidt, *Sean Hannity's Fans Call for Keurig Boycott After Coffeemaker Company Pulls Ads from His Show*, WASH. POST (Nov. 13, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/11/13/sean-hannitys-fans-call-for-keurig-boycott-after-coffee-maker-pulls-ads-from-his-show [https://perma.cc/MCU9-Y7WG] (describing a conservative boycott of Keurig after they pulled advertising from a Fox News show); *Why Donald Trump Wants Fans to Boycott the NFL*, ECONOMIST (Sept. 27, 2017), https://www.economist.com/the-economist-explains/2017/09/26/why-donald-trump-wants-fans-to-boycott-the-nfl [https://perma.cc/2L8U-QG5W] (describing then-President Trump's advocacy for a boycott of the NFL over Colin Kaepernick's national anthem protest); Paige McGlauflin, *Stacey Abrams Warns Businesses in Antiabortion States to 'Do What is Best for Women' as Calls for Boycotts Grow Louder*, FORTUNE (June 28, 2022), https://fortune.com/2022/06/28/stacey-abrams-warns-businesses-antiabortion-states-do-whats-best-women-talent-attraction-boycott [https://perma.cc/DR83-EML7] (discussing the possibility of a boycott movement to protest state anti-abortion legislation).

52. Donald R. Culverson, *The Politics of the Anti-Apartheid Movement in the United States, 1969-1986*, 73 POL. SCI. Q. 127, 133–35 (discussing the civil society actors in the United States that composed the anti-Apartheid movement).

53. *See* OMAR BARGHOUTI, BDS: BOYCOTT, DIVESTMENT, SANCTIONS 64 (2011) (calling for a "South Africa Strategy for Palestine" and comparing apartheid in South Africa and Palestine).

The apartheid regime solidified itself in South Africa in 1948.[54] The white supremacist regime created a legal framework of separation of races (apartheid literally means "separation" in Afrikaans) to enforce its control over the Black majority.[55] These laws included a prohibition on interracial marriage, restrictions on Black political involvement, and forced removals of the Black population to "Bantustan" settlements.[56]

Between 1948 and the eventual end of the apartheid regime in 1994, an international movement opposing apartheid gradually gained traction. The Anti-Apartheid Movement (AAM) was founded in 1959 in London and urged its followers to boycott South African goods.[57] The movement successfully pressured the International Olympic Committee to prohibit South African participation in the Olympics.[58] American trade unions, student groups, and civil rights groups also joined the boycott movement.[59] Despite the growing momentum of the AAM, the United States government and its allies continued to support South Africa's apartheid regime. The U.S. was

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54. *The End of Apartheid*, U.S. DEP'T OF STATE, https://2001-2009.state.gov/r/pa/ho/time/pcw/98678.htm [https://perma.cc/2VJ6-2NME].

55. *Id.*

56. *Id.*; *The Homelands*, S. AFRICAN HIST. ONLINE, https://www.sahistory.org.za/article/homelands [https://perma.cc/263E-NJFK].

57. *The British Anti-Apartheid Movement*, S. AFRICAN HIST. ONLINE, https://www.sahistory.org.za/article/british-anti-apartheid-movement [https://perma.cc/7RHP-2ZKB].

58. Youssef M. Ibrahim, *OLYMPICS; Olympics Committee Ends Its Ban on Participation by South Africa*, N.Y. TIMES (Jul. 10, 1991), https://www.nytimes.com/1991/07/10/sports/olympics-olympics-committee-ends-its-ban-on-participation-by-south-africa.html [https://perma.cc/7XPY-F4UN]; *see also* Douglas Booth, *Hitting Apartheid for Six? The Politics of the South African Sports Boycott*, 38 J. CONTEMP. HIST. 477 (discussing the sports boycott movement against South Africa).

59. Peter Cole, *Bay Area Longshore Workers Fought Against Apartheid*, FOUNDSF, https://www.foundsf.org/index.php?title=Bay_Area_Longshore_Workers_Fought_Against_Apartheid [https://perma.cc/QA5X-R5EN] ("The SALSC had greatly heightened awareness of the struggle against apartheid. The longshore workers also had signaled to others in the Bay Area and across the nation what could be done to combat apartheid."); Paige Cromley, *'The First Student Movement to Call for Divestiture:' Protests Against Apartheid South Africa*, DAILY PRINCETONIAN (Nov. 9, 2023), https://www.dailyprincetonian.com/article/2023/11/princeton-features-retrospective-student-protests-for-divestiture-from-south-africa [https://perma.cc/9JH5-H9U6] (discussing the origins of divestment activism at Princeton University); Zeb Larson, *Atlanta, Georgia, Was a Center of Anti-Apartheid Organizing*, JACOBIN (Oct. 10, 2022), https://jacobin.com/2022/10/anti-apartheid-movement-atlanta-civil-rights [https://perma.cc/N32Q-VBV3] (discussing the early work by civil rights activists in the American South, such as Martin Luther King Jr., in opposing South African apartheid).

South Africa's second-largest investor.[60] U.S. leaders also viewed the fanatical anti-communism of the South African regime as strategically useful in fighting the Cold War.[61] The U.S. consistently blocked attempts at the United Nations to put pressure on the apartheid regime through sanctions.[62]

In a speech in 1978, New Hampshire Governor Meldrim Thomson Jr. called South African Prime Minister John Vorster "one of the great world statesmen of today" and criticized the global press for not covering South Africa's "free elections."[63] He added, "I was greatly impressed by the constructive manner in which he and his administration are resolving the internal problems of their country with calmness, compassion, and courage."[64] He did not, however, mention the recent massacre of more than 176 students protesting the apartheid system.[65] President Ronald Reagan's administration favored constructive engagement with the apartheid regime and supported its proxy war against Soviet and Cuban-backed forces in Angola.[66] Key U.S. allies also supported the apartheid regime, in opposition to the AAM. For example, British Prime Minister Margaret Thatcher called Nelson Mandela's African National Congress (ANC) a "typical terrorist organization" and favored "constructive engagement" with the apartheid regime.[67]

Israel itself was a close ally of the apartheid regime in the 1980s.[68] In 2010, *The Guardian* published a report based on declassified documents showing that Israel attempted to sell nuclear weapons technology to the apartheid regime in 1975.[69] In

60. *Partners in Apartheid: U.S. Policy on South Africa*, 11 AFR. TODAY 2, 2 (1964) (detailing the importance of U.S. trade relations to the stability of the apartheid regime).

61. U.S. DEP'T OF STATE, *supra* note 54.

62. *Id.*

63. RICK PERLSTEIN, REAGANLAND, AMERICA'S RIGHT TURN 1976-80, at 230–31 (2020).

64. *Id.*

65. *Id.* at 231.

66. U.S. DEP'T OF STATE, *supra* note 54.

67. Erin Conway-Smith, *For Margaret Thatcher, Few Tears Shed in South Africa*, WORLD (Apr. 8, 2013), https://theworld.org/stories/2013-04-08/margaret-thatcher-few-tears-shed-south-africa [https://perma.cc/C7JZ-DRD6].

68. Chris McGreal, *Israel and Apartheid: A Marriage of Convenience and Military Might*, GUARDIAN (May 23, 2010), https://www.theguardian.com/world/2010/may/23/israel-apartheid-south-africa-nuclear-warheads [https://perma.cc/3HXS-ZAS6].

69. Chris McGreal, *Revealed: How Israel Offered to Sell South Africa Nuclear Weapons*, GUARDIAN (May 24, 2010), https://www.theguardian.com/world/2010/may/23/israel-south-africa-nuclear-weapons [https://perma.cc/P439-66V6] (detailing minutes from a top-secret meeting between representatives of both countries in which Israeli representative Shimon

1988, after even the United States ended its support for the apartheid regime, Israel sold the regime hundreds of millions of dollars worth of weapons.[70] Israel's support for the apartheid regime was partially strategic, as most other African countries distanced themselves from Israel following the Yom Kippur War of 1973.[71] However, among some of the most committed Zionists, there was also an ideological component to their support. This attitude was summarized succinctly by former Chief of the General Staff of the Israel Defense Forces Rafael Eitan, who said in a speech at Tel Aviv University, "Blacks in South Africa want to gain control over the white minority just like Arabs here want to gain control over us. And we too, like the white minority in South Africa, must act to prevent them from taking us over."[72]

Despite the support of the United States and its allies, the anti-apartheid movement won significant victories in the 1980s. In 1986, the U.S. Congress overrode President Reagan's veto to place sanctions on South Africa.[73] Without its previous ally, and under increasing pressure by the international campaign of boycotts and sanctions, the apartheid regime set out to reach a negotiated settlement with the ANC.[74] In 1990, Nelson Mandela was released from prison, and South Africa officially repealed its apartheid laws in 1991.[75] Multiracial elections were held in 1994, with Mandela's ANC winning massive majorities.[76]

The victory of the ANC and the international anti-apartheid movement over the apartheid regime is a testament to the efficacy of their strategy. While it took several decades to gain traction, the

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Peres offered nuclear warheads "in three sizes.").

70. Duncan Clarke, *Israel's Unauthorized Arms Transfers*, 99 FOREIGN POL'Y 89, 103 (1995) ("Among the U.S.–origin parts or technology re-exported by Israel to South Africa were aircraft engines, anti-tank missiles, armored personnel carriers, and recoilless rifles.").

71. *See* Avi Shilon, *Why Israel Supported South Africa's Apartheid Regime,* HAARETZ (Dec. 11, 2013), https://www.haaretz.com/opinion/2013-12-11/ty-article/.premium/why-israel-supported-apartheid-regime/0000017f-e3ae-df7c-a5ff-e3fe965a0000 [https://perma.cc/5XKG-UV8D] (describing that Israel developed a relationship with South Africa because of the "1973 war, in which Israel refrained from firing the opening shot that led most African countries to break off their ties with Israel . . . .").

72. ILAN PAPPE, ISRAEL AND SOUTH AFRICA: THE MANY FACES OF APARTHEID 1 (Zed Books 2015).

73. Andrew Glass, *House Overrides Reagan Apartheid Veto, Sept. 29, 1986*, POLITICO (Sept. 29, 2017), https://www.politico.com/story/2017/09/29/house-overrides-reagan-apartheid-veto-sept-29-1986-243169 [https://perma.cc/CN7H-AQ5W].

74. U.S. DEP'T OF STATE, *supra* note 54.

75. *Id.*

76. *Id.*

international boycott movement, and eventually the sanctions by South African allies, were integral in ending the apartheid regime.

There are many parallels between supporters of BDS and the South African anti-apartheid movement. Indeed, many South African leaders have gone on to become vocal advocates for the Palestinian cause generally and BDS specifically. In a 1997 speech, Nelson Mandela said, "We know too well that our freedom is incomplete without the freedom of the Palestinians."[77] Desmond Tutu drew explicit comparisons between apartheid in Israel and South Africa.[78] Tutu was also a vocal supporter of BDS, writing, "Those who continue to do business with Israel . . . are contributing to the perpetuation of a profoundly unjust status quo."[79] With the support of former South African leaders, and using their model, BDS is trying to develop a movement just as successful.

C. The Palestinian Anti-Apartheid Movement

Palestinian activists have employed a variety of tactics to fight Israeli apartheid over the years. The First Intifada (Arabic for "uprising"), which began in 1987, was characterized largely by strikes, protests, and civil disobedience.[80] Following the failure of the Camp David Summit, the Second Intifada, which lasted from 2000 to 2005, was characterized by more violent methods, including stone throwing, rocket attacks, and suicide bombing.[81] Scholar Rashid Khalidi has argued the increased violence of the Second Intifada "constituted a major setback for the Palestinian national movement."[82]

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77. Huthifa Fayyad, *Nelson Mandela and Palestine: In His Own Words*, MIDDLE EAST EYE (Feb. 11, 2020), https://www.middleeasteye.net/news/nelson-mandela-30-years-palestine [https://perma.cc/594H-XQMV].

78. Desmond Tutu, *Desmond Tutu to Haaretz: This is My Plea to the People of Israel*, HAARETZ (Dec. 26, 2021), https://www.haaretz.com/israel-news/2021-12-26/ty-article/desmond-tutu-to-haaretz-this-is-my-plea-to-the-people-of-israel/0000017f-dbe4-d856-a37f-ffe4e4080000 [https://perma.cc/Y4WR-XM8F].

79. *Id.*

80. RASHID KHALIDI, THE HUNDRED YEARS' WAR ON PALESTINE 173–74 (1st Picador Paperback ed., Metropolitan Books 2020) (describing the nonviolent tactics of the First Intifada); *see also Fatalities in the First Intifada*, B'TSELEM, https://www.btselem.org/statistics/first_intifada_tables [https://perma.cc/PC6S-DCXR] (showing that Israel killed 1,491 Palestinians during the First Intifada, compared with the 409 Israelis killed by the Palestinians).

81. *See* KHALIDI, *supra* note 80, at 212–16 (comparing the violence of the Second Intifada unfavorably to the first). An estimated 1,100 Israelis and 4,916 Palestinians were killed in the Second Intifada. Most Israelis were killed by suicide bombings, the majority of which were carried out by Hamas and Islamic Jihad. *Id.*

82. *Id.* at 214.

After the Second Intifada ended, a coalition of 170 Palestinian civil society groups issued a call for a nonviolent, international movement of boycotts, divestment, and sanctions against Israel.[83] The BDS movement coalesced around three demands for Israel: (1) ending its illegal occupation of the West Bank, East Jerusalem, Gaza, and the Golan Heights; (2) full equality for the remaining Palestinian citizens of Israel; and (3) allowing a right of return for Palestinian refugees as stipulated by United Nations Resolution 194.[84] These demands are all based in established international law.[85]

BDS has attracted a wide range of international adherents, such as The Israeli Committee against House Demolitions (an Israeli non-governmental organization (NGO)), Jewish Voice for Peace (a U.S. organization of diaspora Jews), Students for Justice in Palestine (a student advocacy group), the African National Congress, the Irish Congress of Trade Unions, American Studies Association, Democratic Socialists of America, and the United Church of Christ.[86] Musicians including Lorde, Lauryn Hill, The Roots, Roger Waters, Future, and Snoop Dogg have joined the boycott by refusing to perform in Israel.[87] Renowned scientist Stephen Hawking supported BDS and canceled his appearance at a

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83. BDS MOVEMENT, *supra* note 11.

84. *Id.*

85. *Id.*

86. *Boycott, Divestment, Sanctions*, ISRAELI COMM. AGAINST HOUSE DEMOLITIONS, https://icahd.org/get-the-facts/boycotts-divestments-sanctions/ [https://perma.cc/PG9V-2AGS]; Noa Landau, *Israel Publishes BDS Blacklist: These Are the 20 Groups Whose Members Will be Denied Entry*, HAARETZ (Jan. 7, 2018), https://www.haaretz.com/israel-news/2018-01-07/ty-article/israel-publishes-bds-blacklist-these-20-groups-will-be-denied-entry/0000017f-e58f-da9b-a1ff-edeffb140000 [https://perma.cc/YN9X-7Y4S]; Jeremy Gordin, *South Africa's Ruling Party Endorses BDS Campaign Against Israel*, HAARETZ (Dec. 21, 2012), https://www.haaretz.com/2012-12-21/ty-article/.premium/top-s-africa-party-backs-anti-israel-move/0000017f-f637-d47e-a37f-ff3f7a7c0000 [https://perma.cc/5DQ9-Z9VV]; *Palestine Solidarity,* IRISH CONG. TRADE UNIONS, https://ictu.ie/motions/2017/palestine-solidarity [https://perma.cc/2BXG-ZRWL]; *What Does the Boycott Mean?*, AM. STUD. ASS'N, https://www.theasa.net/what-does-boycott-mean [https://perma.cc/WH6Z-WHRQ]; Zaid Jilani, *As Congress Tries to Criminalize BDS, The Democratic Socialists of America Endorse It*, INTERCEPT (Aug. 6, 2017), https://theintercept.com/2017/08/06/dsa-democratic-socialists-bds-israel-palestine/ [https://perma.cc/VMR4-RSYH]; Rick Gladstone, *United Church of Christ Approves Divestment to Aid Palestinians*, N.Y. TIMES (June 30, 2015), https://www.nytimes.com/2015/07/01/us/united-church-of-christ-to-divest-israel-to-aid-palestinians.html.

87. *More Than 600 Musicians Sign Letter Pledging to Boycott Israel*, MIDDLE EAST EYE (May 28, 2021), https://www.middleeasteye.net/news/israel-boycott-musicians-pledge-stand-solidarity-palestine [https://perma.cc/3U9X-EFW2].

conference in Israel.[88] In 2014, the Israeli company SodaStream—under pressure from BDS activists—closed a factory it was operating in an illegal settlement in the West Bank.[89] In 2021, Ben & Jerry's Ice Cream announced it would no longer sell its products in the Occupied Palestinian Territories, saying, "We believe it is inconsistent with our values for our product to be present within an internationally recognized illegal occupation."[90] With younger Americans, particularly younger Jewish Americans, increasingly supportive of the Palestinian cause, BDS is likely to continue gaining support in the United States.[91]

Support for BDS is also likely to increase as both the Israeli government and its backers in the United States get more extreme and disconnected from liberal democratic norms. In November 2022, Benjamin Netanyahu's Likud Party won a plurality of votes in Israel's parliamentary elections.[92] To secure a majority, Netanyahu formed a coalition with the Jewish Power party.[93] He selected Jewish Power leader Itamar Ben-Gvir for the cabinet position of National Security Minister.[94] Rabbi Rick Jacobs has compared Netanyahu's embrace of Ben-Gvir to an American

88. Hilary Rose & Steven Rose, *Stephen Hawking's Boycott Hits Israel Where it Hurts: Science*, GUARDIAN (May 13, 2013), https://www.theguardian.com/science/political-science/2013/may/13/stephen-hawking-boycott-israel-science [https://perma.cc/H6G7-3D36].

89. Jodi Rudoren, *Israeli Firm, Target of Boycott, to Shut West Bank Plant*, N.Y. TIMES (Oct. 30, 2014), https://www.nytimes.com/2014/10/31/world/middleeast/sodastream-to-close-factory-in-west-bank.html [https://perma.cc/P9BY-8FVX].

90. *Ben & Jerry's Will End Sales of Our Ice Cream in the Occupied Palestinian Territories*, BEN & JERRY'S (July 19, 2021), https://www.benjerry.com/about-us/media-center/opt-statement [https://perma.cc/238L-5JP7].

91. *See* Saad, *supra* note 10; Justin Nortey, *American Jews Have Widely Differing Views on Israel*, PEW RSCH. CTR. (May 21, 2021), https://www.pewresearch.org/fact-tank/2021/05/21/u-s-jews-have-widely-differing-views-on-israel [https://perma.cc/S8K4-PNSN] (showing that only 24% of American Jews 18 to 29 believe the Israeli government is making sincere efforts towards peace, only 27% strongly oppose BDS, and only 32% approve of Netanyahu's performance as Prime Minister).

92. Patrick Kingsley, *Yapid Concedes in Israel, Paving Way for Netanyahu's Return to Power*, N.Y. TIMES (Nov. 3, 2022), https://www.nytimes.com/2022/11/03/world/middleeast/israel-netanyahu-election.html [https://perma.cc/6A82-DKFP]; *Netanyahu and Far Right Allies Win Israeli Election*, AL JAZEERA (Nov. 3, 2022), https://www.aljazeera.com/news/2022/11/3/netanyahu-and-far-right-declared-winners-in-israeli-elections [https://perma.cc/P7SF-FY69].

93. Mazal Mualem, *Netanyahu Offers National Security Post to Ultranationalist Ben-Gvir*, AL-MONITOR (Nov. 28, 2022), https://www.al-monitor.com/originals/2022/11/netanyahu-offers-national-security-post-ultranationalist-ben-gvir [https://perma.cc/V9V5-8LM9].

94. *Id.*

president "putting [Ku Klux Klan leader] David Duke . . . as attorney general."[95] Ben-Gvir is an avowed anti-Arab racist and terrorist sympathizer.[96] Until 2020, Ben-Gvir displayed a portrait of Baruch Goldstein, who massacred 29 Muslim worshippers and wounded 125 in a mosque shooting, in his home.[97] In 1995, Ben-Gvir stole the hood ornament off then-Prime Minister Yitzkah Rabin's car, saying "We got to his car, we'll get to him, too."[98] A few weeks later, Rabin was assassinated by a far-right extremist.[99] Since entering politics, Ben-Gvir has advocated for the expulsion of Palestinian citizens who don't pass a loyalty test.[100] While campaigning in the 2022 elections, Ben-Gvir brandished a gun in the occupied Sheikh Jarrah neighborhood of East Jerusalem, telling the Palestinian residents, "We're the landlords here, remember that, I am your landlord."[101]

Netanyahu has also appointed Bezalel Smotrich as Finance Minister.[102] Smotrich's views and public statements are completely unaligned with the vast majority of Jewish Americans. Smotrich has described himself as a "fascist homophobe" and said of Arab legislators in Israel, "[I]t's a mistake that [former Israel Prime Minister David] Ben-Gurion didn't finish the job and throw you out in 1948."[103] Following the outbreak of hostilities with Gaza in

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95. *Id.*

96. *See id.*

97. *Ben-Gvir Responds to Bennett: Fine, I'll Take Down Baruch Goldstein's Picture,* TIMES ISR. (Jan. 15, 2020), https://www.timesofisrael.com/liveblog_entry/ben-gvir-responds-to-bennett-fine-ill-take-down-baruch-goldsteins-picture [https://perma.cc/WVS4-RF94] (quoting a Ben-Gvir Facebook post: "[F]or the sake of unity and a right-wing victory in the elections, I'm removing the photograph in my living room.").

98. Judy Maltz, *The Lawyer for Jewish Terrorists Who Started Out by Stealing Rabin's Car Emblem*, HAARETZ (Jan. 4, 2016), https://www.haaretz.com/israel-news/2016-01-04/ty-article/.premium/jewish-terrorisms-star-lawyer/0000017f-eda1-da6f-a77f-fdaff1f00000 [https://perma.cc/5KCF-KK58].

99. *Id.*

100. Orly Halpern, *With Netanyahu Elected, Liberal Israelis Fear for the Future of Democracy*, TIME (Nov. 7, 2022), https://time.com/6230211/netanyahu-israel-palestine-ben-gvir/ [https://perma.cc/W7BV-6QR6].

101. *Extremist MK Ben Gvir Pulls out Gun During Sheikh Jarrah Clash*, TIMES ISR. (Oct. 14, 2022), https://www.timesofisrael.com/extremist-mk-ben-gvir-pulls-out-gun-during-sheikh-jarrah-clashes [https://perma.cc/D9MZ-FPC2].

102. *Netanyahu Announces Agreement to Hand Some West Bank Authority to Smotrich*, TIMES ISR. (Feb. 23, 2023), https://www.timesofisrael.com/liveblog_entry/netanyahu-announces-agreement-to-hand-some-west-bank-authority-to-smotrich/ [https://perma.cc/QSF9-V97C].

103. Amy Spiro, *Smotrich at Knesset: Ben-Gurion Should Have 'Finished the Job,' Thrown out Arabs*, TIMES ISR. (Oct. 13, 2021), https://www.timesofisrael.com/smotrich-at-knesset-ben-gurion-should-have-finished-the-job-thrown-out-arabs [https://perma.cc/EFR9-AUJJ]; *Israel's Far-Right*

October 2023, Israel's Heritage Minister, Amihai Eliyahu, suggested dropping a nuclear bomb on Gaza.[104] He was reprimanded for his comments but remains a cabinet minister in Israel's government.[105] Israel's Agriculture Minister was not disciplined for saying the war would be "Gaza's Nakba," a reference to the 1948 ethnic cleansing of more than 700,000 Palestinians.[106] Now that Israel's majority government has embraced open racism and violent incitement against Palestinians, Americans concerned about racism and violent extremism in their own country will likely struggle to reconcile their beliefs with continued support for Israel.[107]

Should these trends continue, a successful BDS movement could be catastrophic for the apartheid policies of the Israeli government. A 2015 study by the RAND Corporation estimated that if boycotts could shrink Israel's GDP by a modest 2%, it would cost Israel at least $3.2 billion a year.[108] Due to boycotts of Israeli dates, between 2015 and 2018, exports to the U.S. dropped from 23.6 million pounds to seven million pounds.[109] The Israeli government

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Finance Minister Says He's 'A Fascist Homophobe' but 'Won't Stone Gays.'" HAARETZ (Jan. 16, 2023), https://www.haaretz.com/israel-news/2023-01-16/ty-article/.premium/israels-far-right-finance-minister-im-a-fascist-homophobe-but-i-wont-stone-gays/00000185-b921-de59-a98f-ff7f47c70000 [https://perma.cc/7ZYS-38MR].

104. Michael Bachner, *Far-Right Minister Says Nuking Gaza an Option, PM Suspends Him from Cabinet Meetings*, TIMES ISR. (Dec. 5, 2023), https://www.timesofisrael.com/far-right-minister-says-nuking-gaza-an-option-pm-suspends-him-from-cabinet-meetings [https://perma.cc/BB9D-ENSR].

105. *Id.*

106. Chantal Da Silva, '*Nakba 2023': Israel Right-Wing Ministers' Comments Add Fuel to Palestinian Fears*, NBC NEWS (Nov. 13, 2023), https://www.nbcnews.com/news/world/gaza-nakba-israels-far-right-palestinian-fears-hamas-war-rcna123909 [https://perma.cc/QD62-DGGX].

107. *See* Mualem, *supra* note 93 (quoting Jeremy Ben Ami of J Street, an American liberal Zionist group: "I think there is a lot of real concerns about the direction that this new government would take and what it means for Israel-US-Jewish relations.").

108. C. ROSS ANTHONY, DANIEL EGEL, CHARLES RIES, CRAIG BOND, ANDREW LIEPMAN, JEFFREY MARTINI, STEVEN SIMON, SHIRA EFRON, BRADLEY STEIN, LYNSAY AYER & MARY VAIANA, THE COSTS OF THE ISRAELI-PALESTINIAN CONFLICT 28 (RAND Corp. 2015) ("The recent estimate of the potential cost of the BDS movement to the Israeli economy at $3.2 billion . . . is, if anything, an understatement of the magnitude of the potential BDS movement effect."). For other reading on the financial implications of Israel's policies both in Israel proper and the West Bank, see Steven Scheer & Maayan Lubell, *Israeli Judicial Reforms a 'Downside Risk' for Credit Rating, says S&P*, REUTERS (Jan. 12, 2023), https://www.reuters.com/business/finance/sp-sees-israeli-judicial-reforms-downside-risk-credit-rating-2023-01-12 [https://perma.cc/7HDR-CNXJ] (noting an S&P spokesman said the agency "was closely following moves Prime Minister Benjamin Netanyahu's cabinet might make in the occupied West Bank . . . .").

109. Taher Herzallah & Tarek Khaill, *Boycotting Israeli Dates is Working and We*

has taken steps to counter the potential influence of BDS. An ethics code adopted by the Council for Higher Education prohibits faculty members at Israeli universities from voicing support for BDS.[110] International supporters of BDS are formally barred from entering Israel.[111] In 2017, Israel Katz, then serving as Israeli Intelligence Minister, publicly suggested that supporters of BDS should be assassinated.[112] Many supporters of BDS have faced physical intimidation and harassment from the Israeli government.[113] These extraordinary countermeasures show the potential effectiveness of BDS in ending Israel's apartheid policies.

D. The Development of Anti-BDS Laws

One of Israel's main tactics in opposing the BDS movement has been supporting the passage of anti-BDS laws in the United States. Since the first anti-BDS law was passed in 2015, thirty-eight states have passed some form of anti-BDS law.[114] Most of these laws require any individual, entity, or business that contracts with the state to sign a pledge not to boycott Israel.[115] Some laws also require state investment funds to divest from any business which boycotts Israel.[116] As now-disgraced former Governor of New York Andrew Cuomo put it in a *Washington Post* op-ed, "If you boycott Israel, New York state will boycott you."[117]

Need to Keep Going, AL JAZEERA (Apr. 24, 2020), https://www.aljazeera.com/opinions/2020/4/24/boycotting-israeli-dates-is-working-and-we-need-to-keep-going [https://perma.cc/S984-X9CQ].

110. Yarden Zur, *Israeli Universities Urged to Bar Professors from Calling to Boycott Israel*, HAARETZ (Mar. 25, 2018), https://www.haaretz.com/israel-news/2018-03-25/ty-article/universities-urged-to-bar-professors-from-calling-to-boycott-israel/0000017f-db6a-df62-a9ff-dfffb3c40000 [https://perma.cc/X8AR-6E78].

111. Oren Liebermann, *Israel's Travel Ban: Boycott Supporters to be Turned Away*, CNN (Mar. 7, 2017), https://www.cnn.com/2017/03/07/middleeast/israel-bds-boycott-law [https://perma.cc/CLB4-8ELP].

112. *Israeli Government Must Cease Intimidation of Human Rights Defenders, Protect them From Attack*, AMNESTY INT'L (Apr. 12, 2016), https://www.amnestyusa.org/press-releases/israeli-government-must-cease-intimidation-of-human-rights-defenders-protect-them-from-attacks [https://perma.cc/S8T2-S7U9] (explaining that Katz called for "targeted civil eliminations," a reference to the euphuism for Israel's program of targeted assassinations of Palestinian militants).

113. *See, e.g.*, *id.* (denouncing Israel's intimidation and threats against Omar Barghouti, Imad Abu Shamsiyeh, the Palestinian NGO al-Haq, and the Israeli NGO Breaking the Silence).

114. PALESTINE LEGAL, *supra* note 13.

115. *Id.*

116. *Id.*

117. Andrew Cuomo, *Gov. Andrew Cuomo: If You Boycott Israel, New York State will Boycott You*, WASH. POST (June 10, 2016), https://www.washingtonpost.com/opinions/gov-andrew-cuomo-if-you-boycott-israel-

The pro-Israel lobby was instrumental in conceiving, drafting, and lobbying for anti-BDS laws.[118] An investigation by the Center for Public Integrity and USA Today found that several states' anti-BDS laws were copied and pasted from model legislation drafted by pro-Israel lobbyists.[119] Proponents of anti-BDS laws usually cited two main justifications: (1) anti-BDS laws protect a vital American ally, and (2) anti-BDS laws use the state government's power to combat a movement viewed as antisemitic, or at least anti-Israel.[120]

The question of American national interest is ultimately a normative one that would be outweighed by an interest in preserving free expression. However, the antisemitism claim is pervasive enough to merit a rebuttal.[121] First, and most importantly, criticism of Israel simply cannot be conflated with antisemitism. The BDS movement unequivocally condemns antisemitism.[122] Second, the most prominent American supporters of Israel are typically not Jewish Americans, but rather evangelical Christians.[123] This sentiment was perhaps best expressed by former President Donald Trump, who wrote:

> No President has done more for Israel than I have. Somewhat surprisingly, however, our wonderful Evangelicals are far more appreciative of this than the people of the Jewish faith, especially those living in the U.S. . . . U.S. Jews have to get their act together and appreciate what they have in Israel –

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new-york-state-will-boycott-you/2016/06/10/1d6d3acc-2e62-11e6-9b37-42985f6a265c_story.html [https://perma.cc/E76Y-SW9K].

118. Liz Essley Whyte, *One Way to Silence Israel Boycotts? Get Lawmakers to Pass Anti-BDS Bills*, USA TODAY (May 1, 2019), https://www.usatoday.com/story/news/investigations/2019/05/01/statehouse-model-bills-bds-protest-bans/3575083002 [https://perma.cc/8NRB-787E] ("In Louisiana, Democratic Gov. John Bel Edwards did not write his anti-boycott executive order nor the news release accompanying it. Both drafts were sent to him by Mithun Kamath, a pro-Israel advocate for the Jewish Federation of Greater New Orleans . . . [and] reviewed by AIPAC . . . .").

119. *Id.*

120. *See, e.g.*, Cuomo, *supra* note 117.

121. *See* David M. Halbfinger, Michael Wines, & Steven Erlanger, *Is B.D.S. Anti-Semitic? A Closer Look at the Boycott Israel Campaign*, N.Y. TIMES (Oct. 4, 2023), https://www.nytimes.com/2019/07/27/world/middleeast/bds-israel-boycott-antisemitic.html [https://perma.cc/94PJ-QDEZ].

122. *See What is BDS?*, BDS MOVEMENT, https://bdsmovement.net/what-is-bds [https://perma.cc/YGP6-SX2U] ("BDS is an inclusive, anti-racist human rights movement that is opposed on principle to all forms of discrimination, including anti-semitism and Islamophobia.").

123. *See* Tom Gjelten, *As U.S. Jews Cool to Israel, Evangelicals Flock There as Tourists*, NPR (Aug. 25, 2019), https://www.npr.org/2019/08/25/753720351/as-u-s-jews-cool-to-israel-evangelicals-flock-there-as-tourists [https://perma.cc/6WM5-ZU7H] (citing polling which shows much higher rates of support for Israel among American evangelicals than Jews).

Before it is too late![124]

This statement by Trump exemplifies both the support of American evangelicals for Israel, as well as the implicit (and in this case, arguably, explicit) antisemitism of Christian Zionism. Third, the Israeli government itself has had no problem allying with individuals and governments who traffic in blatant antisemitism, such as Viktor Orban, Jair Bolsonaro, and members of Ukraine's neo-Nazi Azov Battalion.[125] Israel's supporters in the U.S. will undoubtedly continue to use claims of antisemitism to deflect legitimate criticism of Israel's apartheid policies, but the hypocrisy of Israel's government and its international supporters make this claim tough to believe. In any case, these dubious claims of antisemitism do not justify the passage of anti-BDS laws.

Some anti-BDS laws have been struck down by courts on First Amendment grounds.[126] In Kansas, a 2017 anti-BDS law required all state contractors "to certify that they are not engaged in a boycott of Israel."[127] At the time, plaintiff Esther Koontz worked for the Wichita Public School District training math teachers.[128] Koontz was a member of the Mennonite Church, which calls on its members to "boycott products associated with Israel's occupation of Palestine."[129] When the anti-BDS law passed and Koontz was presented with a pledge not to engage in a boycott of Israel, she

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124. C. Mandler, *Trump Critical of "U.S. Jews" in Social Media Post*, CBS NEWS (Oct. 17, 2022), https://www.cbsnews.com/news/trump-truth-social-post-us-jews [https://perma.cc/Z2RF-BQYE].

125. *See* William Echikson, *Viktor Orban's Anti-Semitism Problem*, POLITICO (May 13, 2019), https://www.politico.eu/article/viktor-orban-anti-semitism-problem-hungary-jews [https://perma.cc/JKW9-ZKKK] ("[Hungarian President] Orban promoted anti-semitic imagery of powerful Jewish financiers scheming to control the world."); Rafael Kruchin & Sebastiao Nascimento, *'Pro-Israel' Meets Neo-Nazi: Brazil's Bolsonaro Unveils His Best Friends on the German Far Right*, HAARETZ (Aug. 9, 2021), https://www.haaretz.com/world-news/2021-08-09/ty-article-opinion/.premium/pro-israel-meets-neo-nazi-brazils-bolsonaro-unveils-his-german-far-right-allies/0000017f-f48b-d487-abff-f7ff4d260000 [https://perma.cc/43JN-LPFC] (detailing the antisemitic ties of former Brazilian President Jair Bolsonaro, a staunch supporter and ally to Israel); Tzvi Joffre, *Ukraine's Azov Regiment Visits Israel: 'Mariupol is our Masada,'* JERUSALEM POST (Dec. 20, 2022), https://www.jpost.com/international/article-725351 [https://perma.cc/NF7S-VMCL]; *see also* Daniel Estrin, *Netanyahu's Son Yair Stirs Up Controversy with Anti-Semitic Cartoon*, NPR (Sept. 11, 2017), https://www.npr.org/2017/09/11/550058346/netanyahus-son-yair-stirs-up-controversy-with-anti-semitic-cartoon [https://perma.cc/BZ7B-PVWX] (describing how Benjamin Netanyahu's son posted a blatantly antisemitic meme on Facebook).

126. *E.g.*, Koontz v. Watson, 283 F. Supp. 3d 1007 (D. Kan. 2018).

127. *Id.* at 1012–13.

128. *Id.* at 1013.

129. *Id.*

refused to sign.[130] As a result, Koontz was not allowed to contract with the state and lost her job in the Wichita Public School District.[131] The ACLU represented Koontz, and the District Court of Kansas preliminarily enjoined enforcement of the anti-BDS law on the grounds that it violated Koontz's First Amendment right to engage in a boycott.[132]

Opponents of anti-BDS laws won similar victories in Arizona and Texas. In Arizona, Mikkel Jordahl, an attorney and member of Jewish Voice for Peace, was asked to sign a pledge not to boycott Israel in order to continue contracting with the state.[133] When Jordahl refused to sign the pledge, the county he contracted with stopped paying him for his services.[134] The District Court of Arizona ruled in Jordahl's favor and held that Arizona's anti-BDS law unconstitutionally compelled speech and violated a protected right to engage in boycotts.[135] In Texas, the Western District court held that the state violated the First Amendment rights of a speech pathologist, Amawi, who was fired by the school district for refusing to sign an anti-BDS pledge.[136] None of these cases reached a ruling on the laws' constitutionality on federal appeal, as states have responded by amending their anti-BDS laws to raise the threshold for government contracts (usually to $100,000) to nullify the complaints.[137]

The Eighth Circuit is the only federal appellate court to hold that an anti-BDS law complies with the First Amendment. In *Arkansas Times LP v. Waldrip*, it reviewed the constitutionality of an Arkansas anti-BDS law.[138] In 2018, the *Arkansas Times* ran an

130. *Id.* at 1014.

131. *Id.*

132. Koontz, 283 F. Supp. 3d at 1007.

133. Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1029 (D. Ariz. 2018), *vacated as moot*, 789 Fed. Appx. 589, 590 (9th Cir. 2020).

134. *Id.*

135. *Id.* at 1017.

136. Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717 (W.D. Tex. 2019), *vacated as moot*, 956 F.3d 816 (5th Cir. 2020).

137. *See After Court Defeat, Kansas Changes Law Aimed at Boycotts of Israel*, ACLU (June 29, 2018), https://www.aclu.org/press-releases/after-court-defeat-kansas-changes-law-aimed-boycotts-israel [https://perma.cc/3Y9U-EXVX]; Jerod MacDonald-Evoy, *Ducey Signs Bill Loosening Anti-BDS Law in Attempt to Stop Litigation*, ARIZ. MIRROR (Apr. 16, 2019), https://azmirror.com/briefs/ducey-signs-bill-loosening-anti-bds-law-in-attempt-to-stop-litigation/ [https://perma.cc/H7DQ-Y4UT]; Ron Kampeas, *After Legal Challenges, Texas Moves to Amend Anti-BDS Law*, FORWARD (Oct 4, 2023), https://forward.com/fast-forward/422449/texas-anti-bds-israel-law/ [https://perma.cc/58ML-E97L].

138. Ark. Times LP v. Waldrip, 37 F.4th 1386 (8th Cir. 2022).

advertisement for the University of Arkansas.[139] In order to get paid for running the advertisement, the newspaper was asked to sign an anti-BDS pledge.[140] While the *Arkansas Times* had no involvement with BDS, it refused on principle and brought a claim against the University of Arkansas Board of Trustees.[141] Unlike the district courts in Kansas, Arizona, and Texas, the Eighth Circuit ruled in favor of the state and upheld Arkansas's anti-BDS law as constitutional.[142] The ACLU appealed the decision, but the Supreme Court declined to hear the case.[143]

II. Analysis

This section will examine the Eighth Circuit's decision in *Arkansas Times v. Waldrip*. In assessing the constitutionality of Arkansas's anti-BDS law ("Act 710"), the Eighth Circuit asked two questions: (1) does Act 710 regulate "expressive conduct" or merely "unexpressive commercial conduct"?, and (2) does Act 710 compel speech?[144] In upholding Arkansas's statute, the Eighth Circuit answered that the statute regulated only unexpressive commercial conduct and did not compel speech.[145] On both issues, the Eighth Circuit is wrong.

This section will then address how opponents of anti-BDS laws should proceed. Further steps will include both legal appeals and political reforms.

A. Arkansas Times LP v. Waldrip

i. The Eighth Circuit Misreads *Claiborne* to Conclude that Boycotts are Not Expressive Conduct

The deciding question in this case is whether Act 710 regulates "expressive conduct." The First Amendment prohibits government regulations that infringe on a right to free speech.[146] This includes not just verbal speech, but also nonverbal conduct intended to

139. *Id.* at 1390.
140. *Id.*
141. *Id.*
142. *Id.* at 1395.
143. *Supreme Court Declines to Review Challenge to Law Restricting Israel Boycotts*, ACLU (Oct. 4, 2023), https://www.aclu.org/press-releases/supreme-court-declines-to-review-challenge-to-law-restricting-israel-boycotts [https://perma.cc/WN5H-ELX4].
144. *Waldrip*, 37 F.4th at 1391, 1394 (8th Cir. 2022).
145. *Id.*
146. *Id.* at 1391.

convey a message.[147] The state may not prohibit expressive conduct or make government benefits contingent on voicing, or not voicing, a particular opinion.[148] In the past, the courts have ruled on what activities constitute "expressive conduct." For example, in *Texas v. Johnson*, the Supreme Court ruled that flag burning is protected as expressive conduct, as it is an activity aimed at conveying a political message.[149] The Court has ruled on other acts considered expressive conduct, such as wearing a black armband to protest the Vietnam War, displaying a red flag, and wearing clothing expressing anti-war sentiments.[150]

In *Claiborne*, the Supreme Court held that the NAACP's boycott of white-owned businesses in Mississippi constituted expressive conduct.[151] Justice Stevens wrote, "While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case."[152] Justice Stevens asserted that boycotts fall outside of the scope of economic activity which the government may regulate, as opposed to acts of political violence, which may be prohibited.[153] This interpretation is made clear when he concludes, "We hold that the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment."[154] Crucially, Stevens references the boycotters' "activities," not merely their "speech."[155] He further clarified that "[t]he established elements of speech, assembly, . . . and petition, 'though not identical, are inseparable.'"[156] Stevens' language would suggest that *Claiborne* considers boycotts themselves to be expressive conduct protected by the First Amendment.

147. *Id.*

148. *Id.*

149. Texas v. Johnson, 491 U.S. 397 (1989).

150. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (holding that students who wore black armbands to protest the Vietnam War were engaged in nonverbal expressive conduct); Stromberg v. California, 283 U.S. 359 (1931) (ruling on expressive conduct for the first time by overturning the conviction of a woman who displayed a red flag as a nonverbal expression of her anarchist views); Cohen v. California, 403 U.S. 15 (1971) (holding that the wearing of a jacket with the slogan "Fuck the Draft" was protected expressive conduct).

151. NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).

152. *Id.* at 913.

153. *Id.* at 913.

154. *Id.* at 915.

155. *Id.*

156. *Id.* at 911.

The Eighth Circuit reasons, however, that boycotts of Israel are of a different nature.[157] It reverse-engineers this conclusion with a few different arguments. First, the court applies the precedent of *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, along with an extremely narrow interpretation of *Claiborne*.[158] In *Rumsfeld*, the Supreme Court held that the federal government could prohibit law schools from banning military recruiters, which some schools had done as a protest against "Don't Ask, Don't Tell."[159] The Court ruled that banning military recruiters falls outside the scope of expressive conduct, as the refusal itself did not take the form of speech or nonverbal communication.[160]

In *Waldrip*, the state argued that boycotts of Israel should be viewed similarly to *Rumsfeld*, as opposed to *Claiborne*.[161] Again, the question comes down to whether boycotts of Israel are expressive. The Eighth Circuit held that they are not.[162] It did so by misreading *Claiborne*, holding that "*Claiborne* only discussed protecting expressive activities accompanying a boycott, rather than the purchasing decisions at the heart of a boycott."[163] There is no language in *Claiborne* in which the Supreme Court explicitly held the decision only applied to expressive activities, and not the boycott itself.[164] The Eighth Circuit was only able to reach this conclusion by extending an artificial divide between "speech accompanying a boycott" and "unexpressive economic activity" and holding that only the former is expressive and, therefore, eligible for First Amendment protections. However, no such distinction was intended in *Claiborne*, which held that "the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment" and explicitly enumerated one of these nonviolent elements as the decision to "[withhold] patronage from the white establishment of Claiborne County."[165] To the extent that the Eighth Circuit excluded the withholding of patronage from expressive conduct, it did so by misreading and distorting *Claiborne*.

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157. Ark. Times LP v. Waldrip, 37 F.4th 1386 (8th Cir. 2022).
158. *Id.* at 1391–92.
159. Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47 (2006).
160. *Id.*
161. *Waldrip*, 37 F.4th at 1391–92.
162. *Id.*
163. *Id.* at 1392.
164. NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982).
165. Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717, 744 (W.D. Tex. 2019) (quoting *Claiborne*, 458 U.S. 886 at 915)).

ii. The Eighth Circuit Erred in Finding that Act 710 did not Compel Speech

To uphold Act 710, the Eighth Circuit also had to find that it did not compel speech. Under the First Amendment, "The government may not ... compel the endorsement of ideas that it approves."[166] For example, the Supreme Court has held that students in schools cannot be forced to salute the flag.[167] In *Wooley v. Maynard*, the Supreme Court ruled that New Hampshire could not require all state license plates to have the state motto of "Live Free or Die," as this compelled residents to adopt and display a message.[168] In this case, the *Arkansas Times* argued that a state requirement to certify that they will not boycott Israel necessarily compels them to adopt the state's political view.[169] Indeed, other state anti-BDS statutes that have been found unconstitutional by the courts have all run afoul of the First Amendment's protections against compelled speech.[170] Given that Arkansas required a newspaper to sign a document promising to adopt the state's preferred political views, it is hard to see how this would not be a textbook example of compelled speech.

However, the Eighth Circuit found a clever workaround to hold that Act 710 did not compel speech. Because it already decided that boycotts are not "expressive conduct," the statute thus only compels "nonexpressive economic conduct," not speech.[171] This reasoning is flawed for four reasons. First, the restriction on boycotts clearly restricts more than just economic activity. The statute requires vendors, such as the *Arkansas Times*, to sign a declaration that they will not boycott Israel.[172] The effect this forced declaration has on the newspaper's expressive conduct can be shown with a thought experiment. What if Caterpillar, the construction equipment company whose bulldozers are used by the IDF to demolish homes in the West Bank, wanted to run an advertisement for its products in the *Arkansas Times*?[173] What if

166. *See Waldrip*, 37 F.4th at 1391 (citing Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 309 (2012)).

167. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

168. 430 U.S. 705 (1977).

169. Brief for Appellants at 6–8, Ark. Times LP v. Waldrip, 37 F.4th 1386 (8th Cir. 2022) (No. 19-1378).

170. *See* Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717 (W.D. Tex. 2019); Jordahl v. Brnovich, F. Supp. 3d 1016 (D. Ariz. 2018); Koontz v. Watson, F. Supp. 3d. 1007 (D. Kan. 2018).

171. *Waldrip*, 37 F.4th at 1394.

172. Ark. Code Ann. § 25-1-503 (2017).

173. *See, e.g.*, Miguel Ortiz, *The Israel Defense Forces Operate the Most Heavily*

the newspaper's staff, because of their personal political views, wanted to boycott Caterpillar because of its complicity in Israel's apartheid policies? Under Act 710, would they be allowed to make a decision on what to publicize, or not publicize, based on their political convictions? Or would they be required to run the advertisement? Would they be able to publish an editorial explaining their decision not to run the advertisement? Would they be able to publish an editorial urging their readers to join them in boycotting Israeli companies? The answer to all of these questions is no. They would not be able to freely express their beliefs. Simply put, Act 710 would compel the *Arkansas Times* to run this advertisement and would forbid them from writing any such editorial. In this sense, Act 710 restricts expressive conduct. The expressive conduct which is necessarily restricted is not extraneous to the act of boycotting, but an essential part of it. Therefore, the state's requirement does compel speech.

Second, the court's chosen dichotomy between expressive and nonexpressive conduct ignores the fact that boycotts of Israel necessarily are a way of expressing a political viewpoint. The Supreme Court ruled in *Citizens United v. FEC* that independent corporate expenditures for political donations are expressive.[174] Further, the court's *Janus v. AFSCME* decision held that compelling state employees to pay union dues unconstitutionally compelled speech.[175] These are both examples where an economic activity is treated as expressive conduct.[176] Therefore, if the decision to donate money to a political candidate or pay dues to a union is expressive, then the decision of whether to do business with a company must also be expressive and similarly subject to First Amendment protections.

Third, the plain meaning of the text shows that the state intended to regulate expressive conduct. In the Act's definition of

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Armored Bulldozer in the World, WE ARE THE MIGHTY (Oct. 15, 2022), https://www.wearethemighty.com/articles/idf-bulldozers [https://perma.cc/KN2N-HFJB] (describing the Caterpillar D9 bulldozer, which is designed to include a mounted machine gun and nicknamed "The Teddy Bear" by the IDF); *see also* Andrew Buncombe, *Rachel Corrie Was Killed in Gaza by the IDF. 20 Years On, Her Parents Are Still Fighting for Justice*, INDEPENDENT (Mar. 2, 2023), https://www.independent.co.uk/news/world/americas/rachel-corrie-gaza-death-parents-idf-b2288296.html [https://perma.cc/C3FP-JK66] (describing how a Caterpillar bulldozer was used to kill an American activist who was protesting the demolition of a Palestinian home).

174. Hunter Pearl, *Political Nonexpenditures: "Defunding Boycotts" as Pure Speech*, 45 HARV. J.L. & PUB. POL'Y 703, 716 (2022).

175. *Id.*

176. *Id.*

"boycott of Israel," it clarifies that "[a] company's statement that it is participating in boycotts of Israel . . . can be considered by the Arkansas Development Finance Authority as a type of evidence, among others, that a company is participating in a boycott of Israel."[177] This shows that the state may consider the boycotter's speech in determining whether they are in compliance with the law.[178] Indeed, it would be difficult to determine whether an individual is participating in a boycott without considering their public statements.

Fourth, the legislative intent of Act 710 makes it clear that the bill was intended to regulate expressive conduct. Under Arkansas law, "When a statute is ambiguous, [we] must interpret it according to legislative intent and our review becomes an examination of the whole act."[179] At the very least, the plain language of the Act and the court's use of canons of construction suggest that the Act is ambiguous as to whether it prohibits expressive conduct.[180] The Eighth Circuit's majority opinion does not dispute that this ambiguity exists.[181] Therefore, the intent of the Arkansas legislature that enacted the law should be consulted to determine whether the statute regulates expressive conduct. There is an indication in the legislative history that the law was intended to regulate expressive conduct. In the enumerated legislative findings supporting passage of the Act, the sixth finding references "examining a company's promotion or compliance with unsanctioned boycotts . . . ."[182] This shows the legislature intended to monitor not just company's boycotting activity, but also their *promotion* of boycotts. Even if the economic activity of boycotts is not considered expressive, these legislative findings make it clear the legislature also intended to regulate the expressive conduct associated with boycotts.

There are many flaws with the Eighth Circuit's decision in *Waldrip*. The court takes an extremely narrow reading of *Claiborne* to redefine "boycotts" as an act lacking in expressive or political quality. It ignores the obvious ways that, even with such a narrow definition of "boycott," the statute still compels speech. To arrive at

177. Ark. Code Ann. § 25-1-502(1)(B) (2019).

178. *See* Ark. Times LP v. Waldrip, 37 F.4th 1386, 1395 (8th Cir. 2022) (Kelly, C.J., dissenting).

179. *Id.* (quoting Simpson v. Cavalry SPV I, LLC, 440 S.W.3d 335, 338 (Ark. 2014)).

180. *Waldrip*, 37 F.4th 1386.

181. *Id.*

182. Ark. Code Ann. § 25-1-501(6) (2017).

this conclusion, the court ignored the plain meaning of "boycott" offered in the statute and ignores legislative history showing an intent to restrict expressive conduct.

B. The Future of Challenges to Anti-BDS Laws

i. Legal Challenges will be Difficult in Federal Courts

After the Eighth Circuit upheld Act 710, the ACLU appealed the case to the Supreme Court, which in turn declined to hear the case.[183] Currently, the Eighth Circuit is the only appellate court to rule on the constitutionality of anti-BDS laws.[184] District courts in Arizona, Texas, and Kansas all held their states' anti-BDS laws to be unconstitutional on First Amendment grounds.[185] Following the district court opinions in *Koontz*, *Jordahl*, and *Amawi*, legislators in Kansas, Arizona, and Texas amended their anti-BDS laws to exempt the plaintiffs, preventing appellate rulings from the Tenth, Ninth, and Fifth Circuits, respectively, on First Amendment grounds.[186]

In order to combat anti-BDS legislation, BDS advocates should introduce impact litigation targeted at creating a circuit split with the best possible facts to support an appeal to the Supreme Court. With the Eighth Circuit's decision to uphold Arkansas' Act 710, BDS supporters will need the Supreme Court to weigh in for anti-BDS laws to be struck down nationwide.[187]

The first step to creating a circuit split is finding a plaintiff who cannot be retroactively exempted from the law. For example, in Arizona, following the district court's ruling in *Jordahl v. Brnovich*, the state legislature amended the law to only apply to "(1) companies with ten or more full-time employees, and (2) contracts valued at $100,000 or more."[188] A similar maneuver was done in

183. *See* Chris McGreal, *ACLU Asks Supreme Court to Overturn Arkansas' Anti-Boycott Law Against Israel*, GUARDIAN (Oct. 20, 2022), https://www.theguardian.com/world/2010/may/23/israel-south-africa-nuclear-weapons [https://perma.cc/P439-66V6] (noting the ACLU has asked the Supreme Court to overturn an Arkansas anti-BDS law).

184. Daniel Klein, *State Statutes or Executive Orders Restricting Boycotts of Israel*, 46 A.L.R.7th Art. 4 (2019).

185. Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717 (W.D. Tex. 2019); Jordahl v. Brnovich, F. Supp. 3d 1016 (D. Ariz. 2018); Koontz v. Watson, F. Supp. 3d. 1007 (D. Kan. 2018).

186. *See* Klein, *supra* note 184.

187. McGreal, *supra* note 183.

188. Jordahl v. Brnovich, 789 Fed. Appx. 589, 590 (9th Cir. 2020) (holding that "[b]ecause the Act no longer applies to Jordahl or his Firm, his claims for declaratory and injunctive relief are moot.").

Kansas to render moot the claim brought by the plaintiff in *Koontz v. Watson*.[189] A similar amendment could have been made in Georgia, where pro-BDS activist Abby Martin sued after being prevented from speaking at a state university, but the 11th Circuit made doing so unnecessary for Georgia by affirming the district court's dismissal on qualified immunity grounds, avoiding the First Amendment questions.[190] In order to bypass these sorts of amendments which render challenges moot, impact litigation targeting anti-BDS laws would preferably involve a large company or institution.

In addition to finding the right litigant, impact litigation targeting anti-BDS laws should also identify a case with favorable facts, compared with *Waldrip*. The decision in *Waldrip* came down to whether the boycott was expressive in nature.[191] An ideal case would trigger the state's anti-BDS law through an act of advocacy. Although the political and economic aspects of boycotts are "inseparable," as Justice Stevens asserted in *Claiborne*,[192] having an act of advocacy trigger the law would make it harder for a court to find that boycotts are not expressive acts. By focusing on finding a larger institution as a litigant and triggering sanction through indisputably expressive advocacy, BDS advocates will have a better chance at creating a circuit split. This will lead to more favorable circumstances for an appeal to the Supreme Court.[193]

However, there are still challenges to advocates seeking to overturn anti-BDS laws through the courts. The federal courts, including the Supreme Court, have grown increasingly partisan in recent years.[194] One good example of the increasingly political nature of the courts is the author of the Eighth Circuit's *Waldrip* opinion, Judge Jonathan Kobes. Appointed to the Eighth Circuit in

189. *See Legislation – Kansas*, PALESTINE LEGAL (Dec. 16, 2020), https://legislation.palestinelegal.org/location/kansas/ [https://perma.cc/PQN4-6U59].

190. Martin v. Chancellor for the Bd. of Regents of the Univ. Sys. of Ga., No. 22-12827, 2023 U.S. App. LEXIS 15673, at *17 (11th Cir. June 22, 2023) ("Martin has failed to show that it was clearly established that Defendants' inclusion of the anti-boycott clause in Martin's contract . . . was a constitutional violation. As such, we affirm the district court's grant of Defendants' motion to dismiss on the ground of qualified immunity.").

191. Ark. Times LP v. Waldrip, 37 F.4th 1386 (8th Cir. 2022).

192. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911 (1982) (quoting Thomas v. Collins, 323 U.S. 516, 528 (1945)).

193. Eric Hansford, *Measuring the Effects of Specialization with Circuit Split Resolutions*, 63 STAN. L. REV. 1145, 1152 (2011).

194. Adam Liptak, *On Federal Appeals Courts, a Spike in Partisanship*, N.Y. TIMES (Feb. 22, 2021), https://www.nytimes.com/2021/02/22/us/politics/courts-partisanship.html [https://perma.cc/5FVY-PAXQ].

2018 by President Trump, Judge Kobes was rated "Not Qualified" by the ABA.[195] Kobes had previously only tried six cases in his legal career, all of which the ABA deemed "not legally complex."[196] The ABA committee further wrote, "None of the writing we reviewed is reflective of complex legal analysis, knowledge of the law, or ability to write about complex matters in a clear and cogent manner . . . ."[197] He was confirmed by a 50-49 vote, the first confirmation of a federal judge via a tiebreaking vote from the Vice President in U.S. history.[198]

Before joining the Eighth Circuit, Kobes' resume mostly consisted of serving as General Counsel to U.S. Senator Mike Rounds.[199] In 2018, a few months before Kobes was nominated for the Eighth Circuit, Senator Rounds co-sponsored the Israel Anti-Boycott Act in the U.S. Senate.[200] It is entirely possible that there is no legal challenge which would persuade a judge like Judge Kobes—or, for that matter, any of the six conservative members of the Supreme Court—to strike down an anti-BDS law as unconstitutional.

ii. Political Challenges at the State Level will be Needed to Challenge Anti-BDS Laws

While legal challenges filter through the federal courts, opponents of anti-BDS laws will need to consider political challenges to state anti-BDS laws. It is perhaps outside the scope (and ability) of this Article to fully outline a strategy for repeal of anti-BDS laws. However, there are a few general strategies which may be useful.

Repeal of anti-BDS laws will require public engagement. Many anti-BDS laws were passed almost thoughtlessly by legislators who did not read—and, in some cases, did not even write—the

195. Debra Cassens Weiss, *Pence Breaks Tie to Confirm 8th Circuit Nominee with 'Not Qualified' Rating from ABA Committee*, ABA J. (Dec. 12, 2018), https://www.abajournal.com/news/article/pence_breaks_tie_to_confirm_8th_circuit_nominee_with_not_qualified_rating [https://perma.cc/BL35-CF3Z].

196. *Id.*

197. *Id.*

198. *Id.*

199. Catie Edmondson, *Trump's Judicial Nominees Take Heat but Largely Keep Marching through Senate*, N.Y. TIMES (Dec. 11, 2018), https://www.nytimes.com/2018/12/11/us/politics/republicans-judges-confirmation-votes.html [https://perma.cc/GJ62-72PY].

200. Eric Levitz, *43 Senators Want to Make it a Federal Crime to Boycott Israeli Settlements*, N.Y. MAG. (July 19, 2017), https://nymag.com/intelligencer/2017/07/senate-bill-would-make-it-a-federal-crime-to-boycott-israel.html [https://perma.cc/382G-DVX7].

legislation.[201] This is not a coincidence. Israel is a close U.S. ally and has a strong lobbying machine.[202] There can be severe consequences for opposing the Israeli lobby, with little to no countervailing pressure for lawmakers to consider Palestinian interests.[203] Public pressure will be necessary for any political reversals on this issue. In some cases, state lawmakers with little background in foreign policy may be engaged for the first time.[204] In any case, opponents of anti-BDS laws will need to convert the growing disillusionment with Israel's policies (particularly among the young and politically liberal) into political pressure.[205]

Activists will need to create engagement outside of groups that are already focused on this issue. One way to do this would be to emphasize the ways in which anti-BDS laws create a precedent to outlaw other boycotts. This could help engage libertarian-minded political conservatives who are worried about government overreach.[206] Most importantly, this strategy could help to engage environmental activists who are worried about political repression in favor of the fossil fuel industry.[207] As broad of a coalition as

201. *See* Whyte, *supra* note 118.

202. *See id.*; *see also* Tom Perkins, *Pro-Israel Donors Spent over $22m on Lobbying and Contributions in 2018*, GUARDIAN (Feb. 15, 2019), https://www.theguardian.com/us-news/2019/feb/15/pro-israel-donors-spent-over-22m-on-lobbying-and-contributions-in-2018 [https://perma.cc/6626-CJ59] ("The pro-Israel lobby's contributions reach a majority of American politicians. In 2018, it spent money on 269 representatives' and 57 senators' campaigns . . . [and it is] highly likely that there's far more pro-Israel lobby money flowing into American politics than is tracked [through dark money contributions]."); *see generally* JOHN MEARSHEIMER & STEPHEN WALT, THE ISRAEL LOBBY AND U.S. FOREIGN POLICY 3–355 (Farrar, Straus and Giroux, 2007) (describing the function and impact of the Israeli lobby on U.S. foreign policy; the authors argue that, similar to other well-funded political lobbies, the Israel lobby has influenced U.S. legislators to take positions which are not necessarily in the national interest).

203. Whyte, *supra* note 118.

204. *See, e.g.*, *id.*

205. *See* Saad, *supra* note 10; *see also* Nortey, *supra* note 91.

206. *See, e.g.*, Jacob Sullum, *Are Boycotts Protected by the First Amendment?*, REASON (Jan. 9, 2019), https://reason.com/2019/01/09/are-boycotts-protected-by-the-first-amen [https://perma.cc/BM2Z-6M8M] (containing a libertarian-minded conservative columnist's argument that boycotts should be protected by the First Amendment, regardless of whether one agrees with the boycotters).

207. *See* Inara Scott, *The Trouble with Boycotts: Can Fossil Fuel Divest Campaigns Be Prohibited?,* 57 AM. BUS. L.J. 537 (2020) (discussing the potential effect of boycott restrictions on divestment campaigns targeting fossil fuel interests); *see also* Erika Bolstad, *Boycotting the Boycotters: In Oil-Friendly States, New Bills Aim to Block Divestment from Fossil Fuels,* IN THESE TIMES (Mar. 19, 2021), https://inthesetimes.com/article/fossil-fuel-divestment-ban-texas-north-dakota-oil [https://perma.cc/4SZG-8AYK] (discussing state-level efforts to prevent divestment from fossil fuels).

possible is needed to counter the considerable resources and organization of the Israel lobby.

Opponents of anti-BDS laws seeking repeals of these laws would also do well to focus their efforts. While both political parties are overwhelmingly supportive of Israel, Republicans are even more so, and the growing opposition to Israel's policies is disproportionately found amongst the young and liberal.[208] Therefore, activists should look to repeal anti-BDS laws in states with a trifecta of Democratic governors, state houses, and state senates. There are currently ten states with active anti-BDS laws and Democratic trifectas: California, New Mexico, Colorado, Minnesota, Illinois, Michigan, New York, Maryland, New Jersey, and Rhode Island.[209] Opponents of anti-BDS laws should focus their efforts on these states, with a strategy of mobilizing both those concerned about Israeli apartheid and those who simply support a right to boycott.

Conclusion

The right to boycott has been an essential part of the American civic tradition since the country's founding. From the Founding Fathers who boycotted British goods to Quaker activists who boycotted slave goods, boycotts were used as a tactic to express political views in the early history of the United States.[210] In the twentieth century, Americans used boycotts to protest Jim Crow segregation at home and South African apartheid abroad.[211] Likewise, BDS activists seek to use boycotts to protest Israeli apartheid and U.S. support for apartheid.[212]

The Eighth Circuit's decision in *Waldrip* will have wide-ranging consequences for Americans seeking to use boycotts in the coming years. It is quite possible that anti-boycott laws may be extended to crack down on citizens who would boycott fossil fuels.[213] Given the important role of boycotts in political expression for

208. *See* Saad, *supra* note 10; *see also* Nortey, *supra* note 91.

209. *State Government Trifectas*, BALLOTPEDIA, https://ballotpedia.org/State_government_trifectas [https://perma.cc/74EP-BVQV]; PALESTINE LEGAL, *supra* note 13.

210. Brian Hauss, *The Right to Boycott is Under Threat*, ACLU (Oct. 11, 2017), https://www.aclu.org/news/free-speech/right-boycott-under-threat [https://perma.cc/QP7D-366G] ("[P]olitical boycotts empower individuals to collectively express their dissatisfaction with the status quo and advocate for political, social, and economic change.").

211. *See* Ensley, *supra* note 32; *see also* S. AFRICAN HIST. ONLINE, *supra* note 57.

212. BDS MOVEMENT, *supra* note 11.

213. Scott, *supra* note 207.

Americans of all beliefs, the Eighth Circuit's opinion will be disastrous for free expression in the United States.

Opponents of anti-BDS laws should look to use impact litigation to create a favorable case for a circuit split. They should also pursue a political strategy of repealing anti-BDS laws at the state level. This strategy is needed to combat the suppression of free speech on behalf of an apartheid state.

The Subfederal in Immigration Polarization

Huyen Pham & Pham Hoang Van†

Abstract

The framing of subfederal immigration regulation as a red-blue divide is conventional wisdom. As more states, cities, and counties have engaged in the regulation of immigrants within their jurisdictions, it is not particularly surprising to see deep-red states like Texas enacting laws that restrict the rights of immigrants in their jurisdictions (e.g., requiring police within the state to honor detainers issued by United States Immigration and Customs Enforcement (ICE)) or deep-blue states like California enacting laws that protect immigrants' rights (e.g., issuing driver's licenses without requiring proof of lawful immigration status).

Rather than only reflecting national polarization on immigration issues, however, our empirical study shows that subfederal immigration regulation has contributed to increasing national polarization on immigration issues. Using our unique Immigrant Climate Index (ICI) and over fifteen years of subfederal immigration legislation data, we find that subfederal regulation initially crossed red-blue lines more frequently, with blue jurisdictions enacting restrictive laws and red jurisdictions enacting integrationist laws.

Starting with the Obama Administration, subfederal regulation has become more partisan, which has increased *national* partisanship in two important ways. First, as national legislative policy remains gridlocked on immigration issues, regulation has devolved to smaller, more partisan state legislatures or city

†. Huyen Pham, Professor of Law and Associate Dean for Faculty Research & Development, Texas A&M University School of Law (J.D., Harvard Law School; A.B., Harvard College); Pham Hoang Van, Professor of Economics, Hankamer School of Business, Baylor University (Ph.D., Economics, Cornell University; S.M., S.B., Mechanical Engineering, MIT). We thank our colleagues at Texas A&M University and Baylor University for their helpful comments. We are particularly grateful for the comments we received at the Law & Society Association's Race, Reckoning, & Remedy Conference (Lisbon 2022) and the University of Oklahoma's Speaker Series. We would also like to thank Samantha Davis, Lexie Ford, Gillermo Gomez, and Sarah Subramanian for their superb research assistance.

councils. This change then extends regulation to include policies and issues that are primarily, if not exclusively, within local control (e.g., access to private housing or professional licenses). Thus, as local governments regulate immigration through local policies, they create more substantive issues about which to express immigration disagreement in the *national* debate. Second, we identify a copycat counter-effect dynamic *between* subfederal governments, as the enactment of a novel, controversial immigration regulation often inspires duplication and then a counter-reaction as protest effect. For example, Arizona's infamous S.B. 1070 law (requiring law enforcement officers to verify the immigration status of detained persons whom officers suspect are in the United States illegally) inspired copycat laws in Utah, Georgia, Indiana, Alabama, and South Carolina. These restrictive laws, in turn, engendered protest legislation, like California's "anti-Arizona" TRUST Act that greatly restricts police in honoring immigration detainers. Further, as more formerly federal policies (like abortion) devolve to the subfederal level, our analysis of polarization trends in immigration provides insights into polarization in other policy areas.

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Introduction

On June 6, 2002, Attorney General John Ashcroft made a seismic announcement by inviting state and local police to use their "inherent authority" as sovereigns to join federal immigration authorities in enforcing civil immigration laws.[1] This invitation was issued after the 9/11 attacks and the discovery that the hijackers had violated United States immigration laws to enter the country and commit terrorist attacks. Having local enforcement agencies (LEAs) join in this "narrow anti-terrorism mission" was characterized by Ashcroft as a force multiplier, piggybacking on the labor of significantly larger LEA forces, with federal agencies in

1. John Ashcroft, U.S. Att'y Gen., Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002), https://www.justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm [https://perma.cc/2DBT-695Z].

control.[2] The invitation also reversed a longstanding federal position that the enforcement of civil immigration laws (e.g., laws prohibiting visa overstays) belonged exclusively to the federal government, with an established carveout for state and local police to enforce criminal immigration laws (e.g., human trafficking laws).[3]

Twenty years after Ashcroft issued this invitation and opened the floodgates to modern subfederal immigration regulation, the reality has diverged significantly from the narrow, federally controlled framework that Ashcroft pitched. Though policing laws remain the most common type of subfederal regulation, states, cities, and counties have also enacted laws either restricting or enhancing immigrant access to employment, benefits, housing, legal services, and translation services.[4] And as evidenced by the federal lawsuits and other federal actions by different presidential administrations to challenge subfederal laws, the federal government has not always controlled or even agreed with the substance of these laws.[5]

One important consequence of inviting subfederal immigration regulation is the extreme polarization that has developed among subfederal governments on immigration issues, as reflected in the often vastly different laws. Texas, for example, now requires all its law enforcement agencies to honor federal immigration detainers, making it easier for ICE to deport noncitizens who have been stopped by local police.[6] The Texas

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2. *Id*.

3. *Id*.

4. *See, e.g.*, Lisa M. Sanchez & Isabel Williams, *Extending a Hand in Perilous Times: Beneficial Immigration Policy in the Fifty States, 2005-2012*, 101 SOC. SCI. Q. 6 (Oct. 2020); Ann Morse, *Report on State Immigration Laws: 2020*, NAT'L CONF. STATE LEGISLATURES (Mar. 8, 2021), https://www.ncsl.org/research/immigration/report-on-state-immigration-laws-2020.aspx [https://perma.cc/F4YX-YT29].

5. *See, e.g.*, Uriel J. Garcia, *Justice Department Sues Texas over Gov. Greg Abbott's Order for Law Enforcement to Pull Over Vehicles with Migrants*, TEX. TRIB. (July 30, 2021), https://www.texastribune.org/2021/07/30/justice-department-sues-texas-greg-abbott-migrants/ [https://perma.cc/FYY4-CYSF]; Matt Zapotosky, *Justice Dept. Sues California over 'Sanctuary' Laws That Aid Those in U.S. Illegally*, WASH. POST (Mar. 6, 2018), https://www.washingtonpost.com/world/national-security/justice-dept-sues-california-over-sanctuary-laws-that-aid-those-in-us-illegally/2018/03/06/fd489c2e-215c-11e8-94da-ebf9d112159c_story.html [https://perma.cc/Q7QK-LGQ9].

6. Richard Gonzales, *Federal Judge Temporarily Blocks SB4, Texas Law Targeting Sanctuary Cities*, NPR (Aug. 30, 2017), https://www.npr.org/sections/thetwo-way/2017/08/30/547459673/federal-judge-temporarily-blocks-sb4-texas-law-targeting-sanctuary-cities [https://perma.cc/MT55-U274] (describing public discourse around S.B. 4 which,

Governor has even transferred 10,000 state National Guard troops to patrol the Texas-Mexico border and apprehend unauthorized immigrants in what has been dubbed "Operation Lone Star."[7] At the other extreme, California issues driver's licenses to residents who meet state residency requirements without mandating proof of lawful immigration status.[8] The state also prohibits its law enforcement agencies from cooperating with federal immigration enforcement except under narrowly defined circumstances.[9]

On the surface, this polarization at the subfederal level could be seen as a mere extension of national polarization on immigration issues. After all, the immigration debates at the federal level have largely split along party lines, with Republicans advocating for immigration restrictions and greater enforcement while Democrats advocate for integrationist laws and comprehensive immigration reform, often with a legalization component.[10] But with the benefit of the Immigrant Climate Index, a unique index that collects and measures the climate created by subfederal immigration laws, we are able to discern more nuanced patterns. This research suggests that: (1) subfederal immigration regulation started with more non-partisan participation and has become increasingly polarized along party lines over time, and (2) rather than just reflecting national polarization on immigration issues, subfederal regulation itself has provided a mechanism for increasing polarization by enabling smaller, more partisan subfederal governments to enact increasingly restrictive or integrationist laws, which in turn have inspired copycat laws or protest laws.

This polarization between and within subfederal governments and its dynamic interactions with federal policy is underexplored. Studying the scope and determinants of polarization is complicated

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although challenged and temporarily blocked, remains in effect in Texas).

7. Carolina Cuellar, *Members of the Texas National Guard Struggle with Working Conditions at the Border*, NPR (Mar. 1, 2022), https://www.npr.org/2022/03/01/1083664547/members-of-the-texas-national-guard-struggle-with-working-conditions-at-the-bord [https://perma.cc/KL4R-X6DV].

8. Benjamin Oreskes & Ruben Vives, *Giving Driver's Licenses to Those Here Illegally Transformed Many Lives. Then Came Trump*, L.A. TIMES (Apr. 22, 2017), https://www.latimes.com/local/lanow/la-me-ln-ab60-drivers-licenses-20170422-story.html [https://perma.cc/Y2VK-A8LB].

9. *E.g.*, Adrian Florido, *California TRUST Act Moving Toward Passage*, KPBS (Aug. 29, 2013), https://www.kpbs.org/news/border-immigration/2013/08/29/california-trust-act-moving-toward-passage [https://perma.cc/8FYA-MDX7].

10. TOM K. WANG, THE POLITICS OF IMMIGRATION: PARTISANSHIP, DEMOGRAPHIC CHANGE, AND AMERICAN NATIONAL IDENTITY 177 (2017) (differentiating Republican representatives' support of states and localities to enforce immigration laws from the more divided Democratic representatives).

by the ever-shifting subfederal legal landscape. Though federal immigration policies have also changed through the Bush, Obama, and Trump Administrations under study, and at times have done so quite drastically, those federal changes have been largely centralized and thus are easier to track.[11] By contrast, subfederal regulation by its nature is decentralized and much more difficult to record and analyze, as new laws take effect (and expire) and new governmental actors enter (and exit) the subfederal landscape. Regulation at the city and county levels is particularly difficult to track, as there is no centralized clearinghouse for those laws and policies.[12]

With the Immigrant Climate Index (ICI), we provide that centralization. We created the ICI to bring coherence to the study of subfederal immigration regulation by collecting the laws enacted at the state, county, and city levels, categorizing the laws, and assigning a score to each law—positive or negative—based on its effect on immigrants within the subfederal government's jurisdiction. Our ICI scores give us the ability to take both a bird's eye view of these laws over time and to drill down into specific laws enacted at the state, city, and county levels. Collecting data at all levels of subfederal governance also allows us to compare subfederal regulation across jurisdictions (state to state) and within jurisdictions (city and county activity within any particular state). We started our ICI data collection in 2005, when this modern chapter of subfederal immigration regulation began in earnest.[13]

Using the ICI's unique data and the multiple views it provides over time, we find ample evidence that subfederal immigration regulation has indeed been organized around red-blue lines, with "red" jurisdictions[14] largely enacting negative laws (which restrict the protections and benefits extended to immigrants in their jurisdictions) and "blue" jurisdictions[15] largely enacting positive

11. *But see generally* Fatma E. Marouf, *Regional Immigration Enforcement*, 99 WASH. U. L. REV. 1593 (2021) (examining the regional disparities in immigration enforcement context).

12. *See* Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2020 (1988).

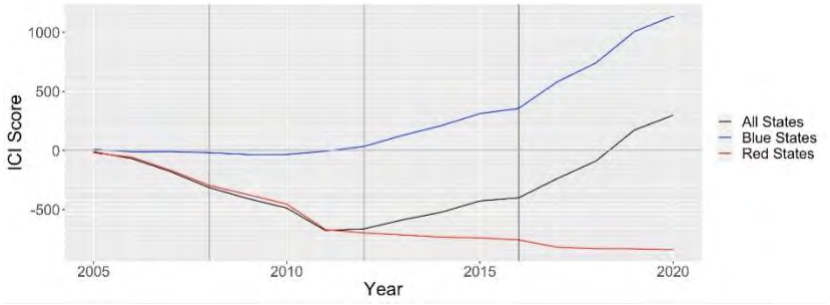
13. *See generally* Huyen Pham & Pham Hoang Van, *Measuring the Climate for Immigrants: A State-by-State Analysis*, *in* STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION POLICY 21–39 (Carissa Byrne Hessick & Gabriel J. Chin eds., 2014).

14. "Red" jurisdictions are defined as jurisdictions that voted for a Republican presidential candidate in the preceding presidential election.

15. "Blue" jurisdictions are defined as jurisdictions that voted for a Democratic presidential candidate in the preceding presidential election.

laws (which integrate immigrants by offering protections and benefits).[16]

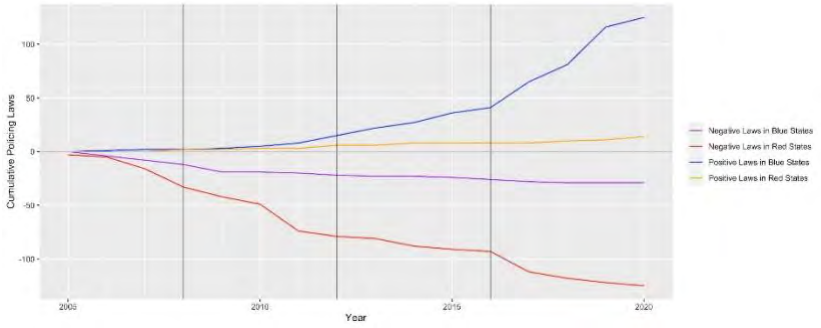
Figure 1: Tracking ICI by Red/Blue Origin



But drilling down, we see that subfederal regulation was more non-partisan in the first phase than in subsequent years.[17] Specifically looking at laws enacted at the state level during the second Bush Administration (2005–2008), we observe that blue states enacted a significant number of negative laws (mostly laws establishing cooperation with federal immigration authorities), more than the number of positive laws enacted. Similarly, although red states enacted more negative laws during this initial phase, they also enacted a number of positive laws.[18]

16. *See infra* Figure 1.
17. *See infra* Figure 2.
18. *Id.*

Figure 2: Counting Positive-Negative State Policing Laws by Red/Blue Origin



In subsequent administrations, however, subfederal immigration regulation became substantially more partisan as the number of red/negative and blue/positive laws increased, both in absolute numbers and as a percentage of laws originating from red or blue states.[19] This growing divide supports the theory of partisan federalism, where firmly polarized state actors channel their partisan fights through both state and federal forums, taking advantage of the institutional federalist framework.[20]

But partisan federalism only tells part of the story. When the ICI data is transposed against common measures of federal immigration enforcement (removals from the interior of the United States and detainer requests),[21] we see counterintuitive patterns: red jurisdictions were most active during a period of historically high federal enforcement (Obama I), and blue jurisdictions were most active during a period of historically average federal enforcement (Trump).[22]

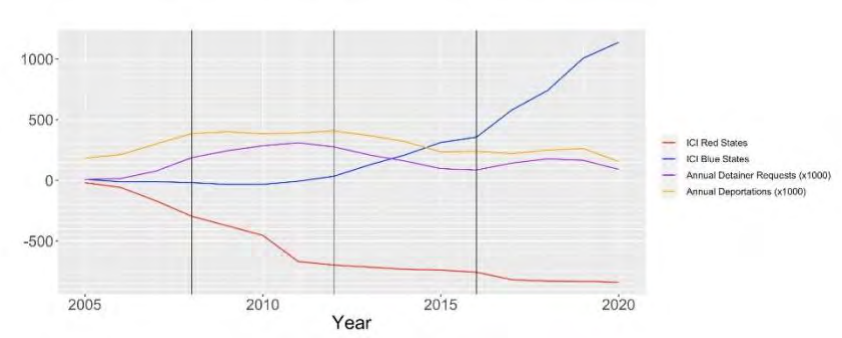
19. *Id.*

20. Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1080–81 (2014).

21. 8 C.F.R. § 287.7(a)–(d). Detainer requests are issued by a federal immigration officer to local law enforcement agencies, requesting the LEA to detain an immigrant who has been arrested for reasons not related to that person's immigration status. In issuing a detainer request, federal immigration authorities ask that the person in custody be detained for up to forty-eight hours beyond the time that the immigrant would ordinarily be released, giving ICE the opportunity to assume custody of the immigrant and place them in removal proceedings.

22. *See infra* Figure 3.

Figure 3: Comparing ICI with Federal Enforcement Measures



These patterns point to deep-rooted partisanship, to be sure. However, the counterintuitive trends in this activity data suggest that the partisanship could be driven by a desire for party and social identification, rather than by concern for actual policy change, which we explore further in this Article.[23]

We also find that subfederal immigration regulation has played a significant and independent role in increasing immigration partisanship. That role is twofold: first, as compared with Congress and federal processes for enacting laws, subfederal governments are smaller, often with simpler processes. Their relative size means it is often easier for a state legislature or a city council to reach agreement and to extend immigration regulation into a new policy area, either in a restrictive or integrationist manner. Using our ICI data, we can chart that exploration into new regulatory areas, such as the push to make access to rental housing and driver's licenses dependent on immigration status.[24] These developing areas of immigration regulation bring local issues into the highly polarized

23. James N. Druckman, Samara Klar, Yanna Krupnikov, Matthew Levendusky & John Barry Ryan, *Affective Polarization, Local Contexts and Public Opinion in America*, 5 NATURE HUM. BEHAV. 28, 28 (2021) ("Partisanship is a type of social identity and, by identifying with one party, individuals divide the world into two groups: their liked in-group (our own party) and a disliked out-group (the other party).").

24. *E.g.*, Daniel Edwardo Guzman, *There Be No Shelter Here: Anti-Immigrant Housing Ordinances & Comprehensive Reform*, 20 CORNELL J.L. & PUB. POL'Y 399, 402 (2012) (highlighting how the immigration policy debate must shift because of changing municipal strategies to exclude immigrants in housing); Margaret Stevens, *Supporters Say Renewed 'Driver's License for All' Push About Safety, Dignity*, MINN. H.R. (Jan. 10, 2023), https://www.house.mn.gov/sessiondaily/Story/17500 [https://perma.cc/6G7Q-4MEL] (stating that opponents of Minnesota's "driver's licenses for all" bill argue that this legislation could encourage illegal immigration).

national conversation, pushing subfederal governments and voters to take sides on these newly federalized issues.

The second important role that subfederal regulations play is the motivation they provide to other subfederal governments to act. Using the ICI data, we observe distinct patterns where a novel immigration regulation inspires both copying by like-minded jurisdictions and counter laws by differing jurisdictions, creating a copycat and counter law cycle. An example of this copycat and counter law cycle is Arizona's infamous S.B. 1070 law, also referred to as the "Support Our Law Enforcement and Safe Neighborhoods Act."[25] Enacted in 2010, the law's primary provisions imposed state criminal penalties on noncitizens who failed to carry their alien registration documents or who worked in Arizona without legal authorization, required law enforcement officers to verify the immigration status of detainees whom officers suspected were in the U.S. illegally and allowed those officers to arrest individuals for unlawful presence without a warrant.[26] S.B. 1070 inspired legislators in Utah,[27] Georgia,[28] Indiana,[29] Alabama,[30] and South Carolina[31] to enact similar legislation in 2011.[32] The successful enactment of S.B. 1070 and its copycat laws also engendered protest legislation. Most notably, California's "anti-Arizona"[33] TRUST Act greatly limits local law enforcement's ability to honor immigration detainers.[34] An important backdrop for this cycle is, of course, federal immigration law and policy, but our ICI data shows that subfederal governments are also reacting to other subfederal

25. Support Our Law Enforcement and Safe Neighborhoods Act, ch. 113, 2010 Ariz. Sess. Laws 450.

26. *Id.*; *see* Arizona v. United States, 567 U.S. 387, 413 (2012) (holding that only the mandatory status checks survived constitutional challenge).

27. Illegal Immigration Enforcement Act, ch. 21, 2011 Utah Laws 261.

28. Georgia Illegal Immigration Reform and Enforcement Act of 2011, 2011 Ga. Laws 794.

29. P.L.171-2011, 2011 Ind. Acts 1926.

30. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Laws 888.

31. South Carolina Act of June 27, 2011, 2011 S.C. Acts 325.

32. *SB 1070 Four Years Later*, NAT'L IMMIGR. L. CTR. (Apr. 23, 2014), https://www.nilc.org/issues/immigration-enforcement/sb-1070-lessons-learned/ [https://perma.cc/28UW-PY8L].

33. Mary Slosson & Tim Gaynor, *California Senate Passes "Anti-Arizona" Immigration Bill*, REUTERS, https://www.reuters.com/article/us-usa-california-immigration/california-senate-passes-anti-arizona-immigration-bill-idUSBRE86502720120706/ [https://perma.cc/9MKW-AXQP].

34. California TRUST Act, ch. 570, 2013 Cal. Stat. 4650 (listing limited circumstances in which law enforcement officials "have discretion to cooperate with federal immigration officials by detaining an individual on the basis of an immigration hold after that individual becomes eligible for release from custody").

governments' immigration regulations. This response means that a single subfederal immigration law can have powerful effects beyond its own jurisdiction. With this copycat counter-law dynamic, subfederal immigration regulation itself becomes a mechanism for increasing immigration polarization on a national scale.

This Article proceeds in three parts. In Part I, we explain the structure and inputs for our Immigrant Climax Index. Using the ICI, we describe in Part II our observed interactions between federal and subfederal immigration laws and between subfederal laws. We organize these observations by presidential administration and explain the copycat and counter law dynamic we observe between subfederal governments on immigration laws and policies. In Part III, we conclude by exploring some practical and theoretical implications for our empirical findings.

I. The Immigrant Climate Index

We developed the Immigrant Climate Index (ICI) to measure and understand more systematically the climate created by subfederal immigration regulations.[35] The ICI collects and analyzes subfederal laws related to immigration, assigning numerical scores based on the laws' effect and scope. Information about these individual laws can be used to calculate scores for states and counties over time. With data collection starting in 2005, the ICI allows us to zoom in to see the immigrant climate at the individual county and state level and to zoom out to assess the climate for the nation as a whole.

In constructing the ICI, we included regulations enacted by cities, counties, and states that specifically affect the immigrants within their jurisdictions. With this parameter, we are less concerned with the legal form of the regulation (e.g., whether it is styled as an ordinance, a law, a resolution, or a policy) and more concerned with its effect: does it concretely affect the lives of immigrants in a positive or negative way? While subfederal governments often pass resolutions expressing support for, or opposition to, some federal immigration policy or principle,[36] those

35. *See* Huyen Pham & Pham Hoang Van, *State-Created Immigration Climates: The Influence of Domestic Migrants*, 38 U. HAW. L. REV. 181 (2016); Pham & Van, *supra* note 13.

36. *See, e.g.*, H. CON. RES. NO. 3048, 67th Legis. Assemb., Reg. Sess. (N.D. 2021) ("Be it further resolved that the Sixty-seventh Legislative Assembly urges the President of the United States and the Department of Homeland Security not to transfer illegal aliens to North Dakota . . . .").

resolutions do not substantively change how the subfederal governments operate.

To separate immigration regulation from subfederal regulation generally, we look for a specific effect on immigrants that differs from any possible effect on non-immigrants. Often, the link to immigrants is clear, as the regulation singles out immigrants in its text, such as by granting or denying a benefit based on immigration status.[37] Occasionally, the regulation does not mention immigrants or immigration at all but has an asymmetrical effect on immigrants. An example of these more indirect laws would be a regulation requiring or prohibiting the translation of government documents into other languages.[38] The asymmetrical effect that this regulation would have on immigrants would thereby cause it to be classified as a subfederal immigration regulation.

The laws used to build the ICI come from several sources, with the earliest data dating back to 2005. To collect state laws, we looked to the immigration-related legislation collected by the National Conference of State Legislatures (NCSL) and used our definition of subfederal immigration regulation to filter out laws that did not have a concrete effect on immigrants' lives.[39] We supplemented the NCSL data with our own news searches to capture state-level laws that were not enacted by legislatures, like executive orders issued by governors.

Collecting city and county laws was more complicated because there is no central clearinghouse for this type of local legislation.[40] For our ICI, those laws were compiled from a variety of sources, including data collected by advocacy groups,[41] government

37. *E.g.*, DENVER, COLO., REV. MUN. CODE ch. 28, art. VIII, § 28-250(a)(3) (2017); Oak Park, Ill., Oak Park Village Code ch. 13, art. 7, § 4 (2017); River Forest, Ill., Re solution No. 17-15 § 5 (Aug. 21, 2017); Rockville, Md., City Code ch. 11, art. 1, § 11-3(e) (2017); Salem, Mass., Salem Code of Ordinances ch. 2, art. XVII, § 2-2062(a) (2017); West Palm Beach, Fla., Resolution No. 112-17 § 5 (Mar. 27, 2017).

38. *See, e.g.*, MINN. STAT. § 120B.115(a)(7) (2017); Santa Fe, N.M., Resolution No. 2017-19 (8) (2017).

39. *About Us*, NAT'L CONF. STATE LEGISLATURES, http://www.ncsl.org/aboutus.aspx [https://perma.cc/GTP3-AFP9].

40. Subrin, *supra* note 12.

41. *See, e.g.*, MEXICAN AMERICAN LEGAL DEF. & EDUC. FUND, http://maldef.org [https://perma.cc/2MNZ-ZPYY]; LATINOJUSTICE PRLDEF, http://latinojustice.org [https://perma.cc/MCP3-D9UV]; NAT'L DAY LABORER ORG. NETWORK, http://www.ndlon.org/en/ [https://perma.cc/JF76-F7DF]; OHIO JOBS & JUST. PAC, http://www.ojjpac.org [https://perma.cc/W256-RDYR].

websites,[42] and searches of electronic news databases.[43] For each law that we found, we contacted the local governmental entity to confirm that the law had been enacted, the date of enactment, and the substance of the law; whenever possible, we obtained a copy of the enacted law. If our research indicated that the law was rescinded (because of litigation or other reasons), we marked the year of rescission in our database and adjusted our ICI calculations to reflect the rescission.

Not all subfederal laws will affect immigrants in the same way. To reflect that varying effect, we considered both a law's type and its geographic range when calculating its ICI score. We divided the laws into four basic types, assigning scores of 1–4, with higher point values assigned to laws with a greater impact (negative or positive) on the lives of immigrants. Tier 4 laws include policing laws that affect the physical security of immigrants by either increasing deportation risk (e.g., a 287(g) agreement that deputizes local law enforcement officers to enforce immigration laws)[44] or decreasing that risk (e.g., a "sanctuary law" that prohibits the use of subfederal resources to enforce immigration laws).[45] Tier 3 includes laws that affect access to the very important benefits that cannot be replaced or must be replaced at high personal cost, such as laws that affect access to general employment or driver's licenses.[46] An example of a negative Tier 3 law would be a regulation requiring public contractors to certify that all of their workers have legal work authorization,[47] while an example of a positive Tier 3 law

42. *See* Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, ICE, https://www.ice.gov/287g [https://perma.cc/33TG-6U4F] (outlining and describing the requirements of 287(g) agreements which govern partnerships between state or local law enforcement agencies and ICE).

43. *See Westlaw News Headlines*, REUTERS (2018), https://www.reuters.com/news/archive/westLaw [https://perma.cc/EV7P-9NBC].

44. ICE, *supra* note 42.

45. *See, e.g.*, DENVER, COLO., REV. MUN. CODE ch. 28, art. VIII, § 28-250(a) (2017); Honolulu, Haw., Res. No. 17-50, CD1 (Feb. 13, 2017); ITHACA, N.Y., MUN. CODE ch. 215, art. VI, § 215-44 (2017); NEWTON, MASS., REV. ORDINANCES ch. 2, art. VI, § 2-405 (2017); Santa Monica, Cal., Res. Embracing Diversity and Clarifying the City's Role in Enforcing Federal Immigration Law (Feb. 28, 2017), *available at* https://www.santamonica.gov/diversity [https://perma.cc/PNE3-DFRV].

46. *See* Kati L. Griffith, *When Federal Immigration Exclusion Meets Subfederal Workplace Inclusion: A Forensic Approach to Legislative History*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 881 (2014) (discussing employment access laws as immigration regulation); María Pabón López, *More than a License to Drive: State Restrictions on the use of Driver's Licenses by Noncitizens*, 29 S. ILL. U. L.J. 91 (2004) (surveying laws regulating driver's licenses).

47. *See, e.g.*, TEX. NAT. RES. CODE ANN. § 81.072(b) (requiring the Texas Railroad Commission to "not award a contract for goods or services in this state to a contractor unless the contractor and any subcontractor register with and participate in the E-

would be a regulation granting driver's licenses regardless of immigration status.[48] In the ICI, Tier 2 laws affect access to benefits that are important but can be more easily replaced. Examples include laws requiring proof of legal immigration status to obtain publicly funded healthcare[49] or granting in-state college tuition rates to undocumented students.[50] Another common Tier 2 law limits access to a specific job by conditioning occupational requirements like licensure on immigration status.[51] All these benefits are important, but because alternatives exist, we assign laws that limit or increase access to these benefits two points. Finally, Tier 1 encompasses laws that affect immigrants' lives in a concrete, albeit less significant, way. For example, laws requiring or prohibiting the translation of government documents into a secondary language would be assigned one point, either positive or negative.[52]

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verify program to verify employee information"); TEX. TRANSP. CODE ANN. § 223.051 (stating the Texas Department of Transportation "may not award a contract for the construction, maintenance, or improvement of a highway . . . to a contractor unless that contractor and any subcontractor register with and participate in the E-verify program to verify employee information.").

48. *See, e.g.*, CAL. GOV'T CODE § 12926(v) (2018) (including "National Origin" as discrimination on the basis of possessing a driver's license granted under Section 12801.9 of the Vehicle Code); CAL. VEH. CODE § 12801.9(a) (2018) (stating that the Department of Motor Vehicles shall issue a driver's license to a person despite their inability to submit satisfactory proof of authorized presence in the United States if he or she meets all other qualifications for receiving a license and provides satisfactory proof to the DMV of his or her identity and California residency); D.C. CODE § 50–1401.05(a) (2018) (amending previous legislation to permit individuals who had a Social Security Number but could not establish legal presence in the United States to obtain a limited purpose driver's license, permit, or identification).

49. *See, e.g.*, ARIZ. REV. STAT. § 36-2903.03(a) (2000) (requiring applicants for health benefits to provide documentation of citizenship or qualified alien status).

50. *See, e.g.*, COLO. REV. STAT. 23-7-103(2)(o) (2018); CONN. GEN. STAT. § 10a-29(9) (2018) (allowing undocumented immigrants to receive in-state tuition for Connecticut universities if they reside in the state, attended any educational institution in the state, completed at least two years of high school in the state, graduated from high school in the state (or the equivalent thereof), and are registered as an entering student or enrolled at a public institution of higher education in the state, so long as they file affidavits with that institution stating they have filed applications to legalize their immigration statuses or will file the applications as soon as they are eligible to do so); *see* Julie Stewart & Thomas Christian Quinn, *To Include or Exclude: A Comparative Study of State Laws on In-State Tuition for Undocumented Students in the United States*, 18 TEX. HISP. J.L. & POL'Y 1 (2012) (analyzing the policy of in-state tuition law for undocumented immigrants in Utah).

51. *See Professional and Occupational Licenses for Immigrants*, CATH. LEGAL IMMIGR. NETWORK, INC. (Aug. 22, 2019), https://www.cliniclegal.org/resources/state-and-local/professional-and-occupational-licenses-immigrants [https://perma.cc/47SG-PT8U].

52. *See, e.g.*, MINN. STAT. § 120B.115(a)(7) (2022); Santa Fe, N.M., Res. No. 2017-19 (8) (2017).

In calculating ICI scores, we also weigh laws differently, depending on their geographic reach. Statewide laws are assigned whole points (from 1–4 points, depending on their tier). City and county laws, however, receive fractional points, weighted to represent their more limited jurisdiction as compared with state laws. So, for example, when Las Vegas signed a 287(g) agreement in 2008, the negative four points that the 287(g) agreement would usually receive under the tier system was weighted to reflect the city's smaller population, as compared with the larger population of Nevada[53]: 1,951,269 (population of Las Vegas metropolitan area) ÷ 2,700,551 (population of Nevada) × -4 (tier points) = -2.89 points.

II. Horizontal and Vertical Subfederal Interactions

In this Article, we focus on subfederal government regulation, the horizontal interactions between subfederal governments, and the resulting polarizing effects on national immigration climate—interactions that are underexplored in the relevant literature. But because of their catalytic role, we start our analysis with an examination of federal immigration policies and their interactions with subfederal regulation.

A. Federal-Subfederal Interactions

The modern chapter of subfederal immigration regulation—the chapter tracked by the ICI—starts with a federal invitation issued by Attorney General John Ashcroft in 2002, asking state and local police to use their "inherent authority" as sovereigns to enforce civil immigration laws.[54] This invitation was issued after the 9/11 attacks, when it was revealed that the hijackers entered on invalid or incomplete visas.[55] By acting as a "force multiplier" to piggyback federal immigration efforts onto significantly larger law enforcement agency forces, advocates argued that incorporating subfederal police into immigration enforcement would enable the nation to better enforce immigration laws.[56] Ashcroft's invitation

53. ICE, MEMORANDUM OF AGREEMENT BETWEEN U.S. IMMIGRATION & CUSTOMS ENFORCEMENT AND LAS VEGAS METROPOLITAN POLICE DEPARTMENT SHERIFF'S OFFICE (2008).

54. Ashcroft, *supra* note 1.

55. Margaret D. Stock & Benjamin Johnson, *The Lessons of 9/11: A Failure of Intelligence, Not Immigration Law*, IMMIGR. POL'Y CTR. (Dec. 2003), https://www.americanimmigrationcouncil.org/sites/default/files/research/PF%20911%20final.pdf [https://perma.cc/9V9P-L4VL].

56. Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 966 (2004).

also reversed a longstanding federal position that the enforcement of civil immigration laws (e.g., laws prohibiting visa overstays) belonged exclusively to the federal government, with a carveout for state and local police to enforce criminal immigration laws (e.g., human trafficking laws).[57]

Initially, the subfederal response to this federal invitation was muted, as few law enforcement agencies were willing to take on the costs of immigration enforcement: the expense of paying officers to take on additional responsibilities,[58] the associated legal liability,[59] and the potential harm to their relationships with immigrant communities and community policing programs.[60] But with continued federal encouragement and national security concerns as a convenient foil, more and more subfederal governments became involved with immigration regulation.[61] Starting in 2005, subfederal governments at the city, county, and state levels enacted immigration regulations in measurably higher numbers; for that reason, we started our ICI tracking in that year.[62]

Because we are interested in studying possible red-blue interactions between the federal and subfederal levels, we tracked our ICI scores by presidential administrations below.[63]

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57. *Id.* at 965, 966, 968–69.

58. James Pinkerton & St. John Barned-Smith, *Sheriff Cuts Ties with ICE Program over Immigrant Detention*, HOUS. CHRON. (Feb. 21, 2017), https://www.houstonchronicle.com/news/houston-texas/houston/article/Sheriff-cuts-ties-with-ICE-program-over-immigrant-10949617.php [https://perma.cc/RBZ4-3UKS] (citing costs as the principal reason for ending Harris County's participation in the 287(g) program).

59. *E.g.*, Complaint, Davila v. N. Reg'l Joint Police Bd., No. 2:13-cv-00070 (W.D. Pa. Jan. 15, 2013), (bringing a civil action suit against Allegheny County's Northern Regional Joint Police Board for wrongfully detaining and imprisoning a U.S. citizen).

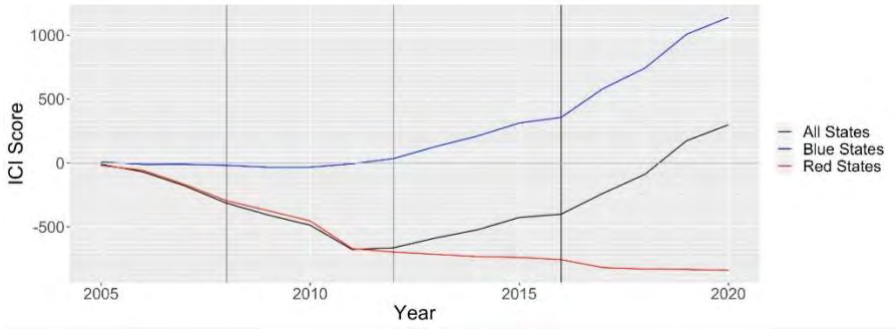
60. Nik Theodore, *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement*, UNIV. ILL. CHI. (May 2013), https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf [https://perma.cc/M67E-26YA] ("Survey results indicate that the increased involvement of police in immigration enforcement has significantly heightened the fears many Latinos have of the police, contributing to their social isolation and exacerbating their mistrust of law enforcement authorities.").

61. In 2005, the National Conference of State Legislatures started compiling reports on immigration-related laws in 2005; before that year, state laws related to immigration were few in number and largely limited to the state distribution of social service benefits. E-mail from Ann Morse, Program Dir., Immigrant Policy Project, Nat'l Conf. State Legislatures, to Huyen Pham, Professor of L., Tex. A&M Univ. Sch. of L. (Aug. 12, 2009, 11:57 EST) (on file with authors).

62. *Id.*

63. *See infra* Figure 4.

Figure 4: Cumulative ICI Through Presidential Administrations



i. Bush II Administration (2005–2008)

During his second term, President George W. Bush was intently focused on comprehensive immigration reform, advocating for a pathway to legal status for the estimated 12 million unauthorized immigrants then living in the United States, paired with tougher border and workplace enforcement.[64] But as noted earlier, the 9/11 attacks dramatically reshaped the nation's immigration policy debates, elevating national security concerns over economic and humanitarian goals.[65] At the federal level, one of the most impactful changes was the creation of the Department of Homeland Security (DHS) and the reassignment of immigration functions that once belonged to the Immigration and Naturalization Service (INS) to three separate federal agencies under DHS authority (ICE for interior enforcement, Customs and Border Protection for border enforcement, and Citizenship and Immigration Services for visas and other service-related work).[66] In the post-9/11 environment, the Bush Administration also created the National Security Entry-Exit Registration System (NSEERS), which required visitors from specific countries, many majority-

64. *The Secure Fence Act: Fact Sheet*, WHITE HOUSE (2006), https://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061026-1.html [https://perma.cc/9FGE-4NTU].

65. Ashcroft, *supra* note 1.

66. Deepa Iyer & Jayesh M. Rathod, *9/11 and the Transformation of U.S. Immigration Law and Policy*, ABA (Jan. 1, 2011), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol38_2011/human_rights_winter2011/9-11_transformation_of_us_immigration_law_policy/ [https://perma.cc/XZ5N-23KA] (discussing how immigration started to be conflated with security after 9/11 by the movement of immigration under DHS).

Muslim, to register when entering and exiting the United States.[67] The Administration also increased security screenings of admitted immigrants, including refugees, resulting in decreased admissions across immigrant categories.[68]

Given the federal focus on national security, it is not surprising that policing laws were the most popular type of subfederal immigration law (making up 30% of all laws).[69] Subfederal regulation in this first phase was markedly less partisan, with blue states enacting substantial numbers of negative laws, a pattern that was particularly pronounced in the realm of policing laws.[70] By the end of the Bush Administration, negative policing laws accounted for fully 20% of all immigration laws enacted in blue states, while positive policing laws accounted for only 12% of their enacted laws.[71] The most common type of immigration laws in blue states were the positive laws conferring government benefits, which accounted for 20.5% of all laws.[72] By this measure, blue states during Bush II looked a lot like red states, where 26% of their immigration laws were negative policing laws.[73] As discussed in more detail below, subfederal regulation became more partisan by the end of the Trump Administration; looking again at statewide policing laws, negative laws fell to only 6.7% of

67. *Id.* (discussing the NSEERS program's emphasis on trying to weed out "terrorists" based on nationality from majority-Muslim nations).

68. Somini Sengupta, *Refugees at America's Door Find it Closed After Attacks*, N.Y. TIMES (Oct. 29, 2001), https://www.nytimes.com/2001/10/29/nyregion/nation-challenged-immigration-refugees-america-s-door-find-it-closed-after.html [https://perma.cc/2M22-9BAF] (discussing temporary moratorium on refugee admissions after 9/11); Edward Walsh, *Effects of 9/11 Reduce Flow of Refugees to U.S.*, WASH. POST (Aug. 21, 2002), https://www.washingtonpost.com/archive/politics/2002/08/21/effects-of-911-reduce-flow-of-refugees-to-us/87c5c2b1-60f2-459a-a96a-50c687dd0a24/ [https://perma.cc/3UW5-3UZQ] (stating that refugee admissions have slowed down).

69. *See, e.g.*, Oklahoma Taxpayer and Citizen Protection Act, 2007 Okla. Sess. Laws 112 (stating that when undocumented immigrants are "harbored and sheltered in this state and encouraged to reside in this state through the issuance of identification cards that are issued without verifying immigration status, these practices impede and obstruct the enforcement of federal immigration law, undermine the security of our borders, and impermissibly restrict the privileges and immunities of the citizens of Oklahoma."); Mark K. Matthews, *Lawmaker Fights Immigrant 'Invasion'*, STATELINE (Sept. 1, 2005), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2005/09/01/lawmaker-fights-immigrant-invasion [https://perma.cc/F6PR-76JD] ("[O]nce they (illegal immigrants) cross the border, it is our schools, our communities, our health care that is being destroyed.").

70. *See supra* Figure 1; *infra* Table 1.

71. *See infra* Table 1.

72. *See id.*

73. *See id.*

all blue state immigration laws but remained a steady percentage (29.3%) of all red state immigration laws.[74] Positive policing laws, by contrast, were now the most common form of regulation in blue states, making up 42.9% of all laws.[75]

Table 1: Polarization in Immigrant Climate as Shown by Types of Laws Enacted

Cumulative Laws by Type
by Vote 2016

Year	Vote2016	Number of Laws	Policing (+)	Policing (-)	Non-Policing (+)	Non-Policing (-)
2008	Red	288	4.2%	26.0%	12.5%	57.3%
2012	Red	582	7.2%	22.9%	15.3%	54.6%
2016	Red	832	12.1%	23.0%	17.5%	47.4%
2020	Red	1,319	19.9%	29.3%	17.7%	33.1%
2008	Blue	200	12.0%	20.0%	39.5%	28.5%
2012	Blue	439	16.6%	12.3%	40.5%	30.5%
2016	Blue	765	23.8%	9.2%	47.1%	20.0%
2020	Blue	1,890	42.8%	6.7%	41.0%	9.6%

ii. Obama I Administration (2009–2012)

Candidate Barack Obama made comprehensive immigration reform a campaign platform. In a May 2008 televised interview with Univision, he made this bold promise: "I can guarantee that we will have, in the first year, an immigration bill that I strongly support."[76] Support from Hispanic and Asian voters was critical to Obama's electoral success, and he won with 62% of the Asian vote and 67% of the Hispanic vote.[77] Many pundits linked this strong support, at least in part, to his promises for comprehensive immigration reform.[78]

74. *See id.*

75. *See id.*

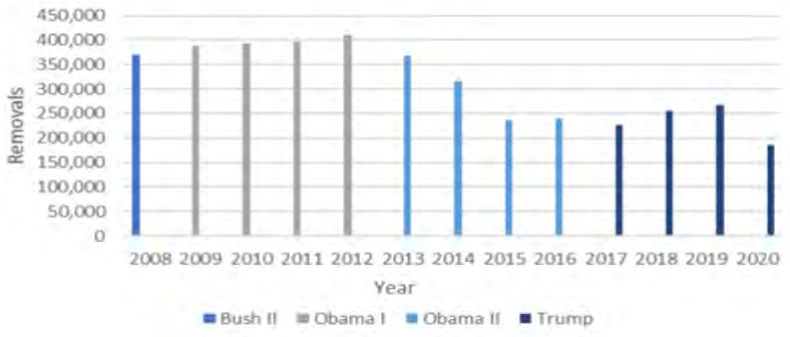
76. Tom McCarthy, *The Evolution of Immigration Reform Under Obama – A Timeline*, GUARDIAN (Nov. 20, 2014), https://www.theguardian.com/us-news/2014/nov/20/immigration-reform-under-obama-timeline [https://perma.cc/WW8Q-THJX].

77. *Id.*

78. *See* Cindy Y. Rodriguez, *Latino Vote Key to Obama's Re-Election*, CNN (Nov. 9, 2012), http://www.cnn.com/2012/11/09/politics/latino-vote-key-election/ [https://perma.cc/T3MZ-N7DW]; *see* John D. Skrentny & Jane Lilly López, *Obama's*

In pursuing his campaign promise, Obama implemented an early strategy of aggressive enforcement, both at the border and in the interior. In these first years, the Obama Administration removed more people than any president before or after him, earning the derogatory moniker "Deporter-in-Chief" from immigration advocates.[79]

Figure 5: Removals by Presidential Administration[80]



This aggressive enforcement was partly strategic, a response to Republican demands that enforcement precede any discussion of legalization,[81] but the high numbers of removals also reflected the increased efficiency of the federal immigration enforcement apparatus that the Obama Administration inherited from previous administrations.[82] The main reason that the federal government

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Immigration Reform: The Triumph of Executive Action, 3 IND. J. L. & SOC. EQUAL. 62, 63–64 (2013).

79. Reid J. Epstein, *NCLR Head: Obama 'Deporter-in-Chief'*, POLITICO (Mar. 4, 2014), https://www.politico.com/story/2014/03/national-council-of-la-raza-janet-murguia-barack-obama-deporter-in-chief-immigration-104217 [https://perma.cc/TV3G-BPUP]; *see infra* Figure 5.

80. 2015 ICE ENF'T & REMOVAL OPERATIONS REP., https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf [https://perma.cc/89P7-SWFU]; 2018 ICE ENF'T& REMOVAL OPERATIONS REP., https://www.ice.gov/doclib/about/offices/ero/pdf/eroFY2018Report.pdf [https://perma.cc/3WRC-92YP]; 2020 ICE ENF'T & REMOVAL OPERATIONS REP., https://www.ice.gov/doclib/news/library/reports/annual-report/eroReportFY2020.pdf [https://perma.cc/VH38-HF3N].

81. *See* Julián Aguilar, *Immigration Reform Groups Urge Obama to Act Without Congress*, TEX. TRIB. (Feb. 27, 2014), https://www.texastribune.org/2014/02/27/immigration-reform-groups-urge-obama-act-alone/ [https://perma.cc/8M8X-254U]; Julián Aguilar, *Obama Immigration Policies Satisfy Neither Right Nor Left*, TEX. TRIB. (Sept. 22, 2011), https://www.texastribune.org/2011/09/22/will-obamas-immigration-policy-help-gop/ [https://perma.cc/ND7V-WU84].

82. Muzaffar Chishti, Sarah Pierce & Jessica Bolter, *The Obama Record on*

became better at finding and removing unauthorized immigrants was the incorporation of law enforcement agencies (LEAs) into federal immigration efforts.[83] Driving this increased enforcement efficiency were federal detainer requests issued by ICE, asking LEAs to continue to hold an immigrant who had been arrested for non-immigration reasons beyond the time of ordinary release so that ICE could take custody and place the individual into removal proceedings.[84] Together with the Secure Communities program (which automatically notifies ICE when an LEA has detained someone with an immigration record), detainer requests are a crucial component to the 'force multiplier' scheme envisioned by John Ashcroft and other advocates of LEA involvement in immigration enforcement.[85] And measured by this important metric of enforcement, the Obama Administration again hit records, issuing more detainer requests than any administration before or after it.[86]

Deportations: Deporter in Chief or Not?, MIGRATION POL'Y INST. (Jan. 26, 2017), https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not [https://perma.cc/2JYL-KT36].

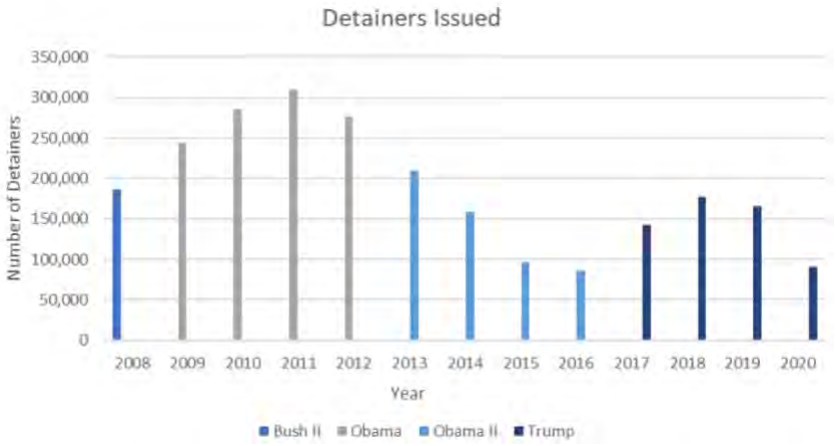
83. *Id.*

84. *Immigration Detainers: An Overview*, AM. IMMIGR. COUNCIL (Mar. 21, 2017), https://www.americanimmigrationcouncil.org/research/immigration-detainers-overview [https://perma.cc/Z2FX-4GL6].

85. *Id.*; Ashcroft, *supra* note 1.

86. Kristie De Peña, *The Slippery Slope of ICE Detainers*, NISKANEN CTR. (June 24, 2020), https://www.niskanencenter.org/the-slippery-slope-of-ice-detainers/ [https://perma.cc/FC3T-F8GM]; *see* Figure 6.

Figure 6: Annual Detainers Issued by Presidential Administration[87]



Despite his enforcement-first immigration agenda, Obama was not able to persuade Congress to pass any comprehensive immigration reform. Even the widely popular DREAM Act,[88] which would have given permanent status to undocumented immigrants who arrived in the United States as children, failed in the Senate by a 55-41 vote after passing the House.[89] With his legislative agenda stymied, Obama turned to executive powers to try to advance his immigration goals, albeit in much more limited ways. One of the Obama Administration's most significant steps was to prioritize ICE's enforcement efforts, issuing memos in 2010 and 2011 that directed ICE attorneys and other employees to exercise prosecutorial discretion and not remove immigrants with familial, educational, military, or other ties in the United States.[90] Rather, the memos directed these federal enforcement employees to

87. *Latest Data: Immigration and Customs Enforcement Detainers*, TRAC IMMIGR., https://trac.syr.edu/phptools/immigration/detain/ [https://perma.cc/7PE9-QH9H].

88. Also known as the Development, Relief, and Education for Alien Minors Act. *The Dream Act: An Overview*, AM. IMMIGR. COUNCIL (Mar. 16, 2021), https://www.americanimmigrationcouncil.org/research/dream-act-overview [https://perma.cc/KHJ4-8RSZ].

89. McCarthy, *supra* note 76.

90. Shoba Sivaprasad Wadhia, *The Morton Memo and Prosecutorial Discretion: An Overview*, IMMIGR. POL'Y. CTR. (July 2011), https://www.americanimmigrationcouncil.org/sites/default/files/research/Shoba_-_Prosecutorial_Discretion_072011_0.pdf [https://perma.cc/U438-BWB2].

prioritize the removal of immigrants who posed public safety or national security risks.[91]

Perhaps Obama's most significant policy move during his first Administration was to create the Deferred Action for Childhood Arrivals (DACA) program in 2012.[92] Characterized as the systematic exercise of prosecutorial discretion, DACA gives temporary legal status to undocumented immigrants who arrived in the United States as children, passed criminal background checks, and either graduated from high school (or had the GED equivalent) or were honorably discharged from the military.[93] With temporary status, these immigrants are also eligible to apply for work authorization.[94] The legality of DACA was immediately challenged in court by red states, and the legal challenges continue; as of this publication date, however, DACA remains in effect, with almost 600,000 beneficiaries.[95]

At the subfederal level during Obama I, immigration regulation continued to grow at a rapid pace, with the total number of laws doubling in both red and blue states compared with the total number of laws at the end of Bush II.[96] With this growth, the divergence between red and blue states became starker. Though the ICI impact of negative red state laws does not hit its lowest point

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91. *Id.*

92. McCarthy, *supra* note 76.

93. Memorandum from Janet Napolitano, Sec'y, Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/5Q7D-QJ2Q].

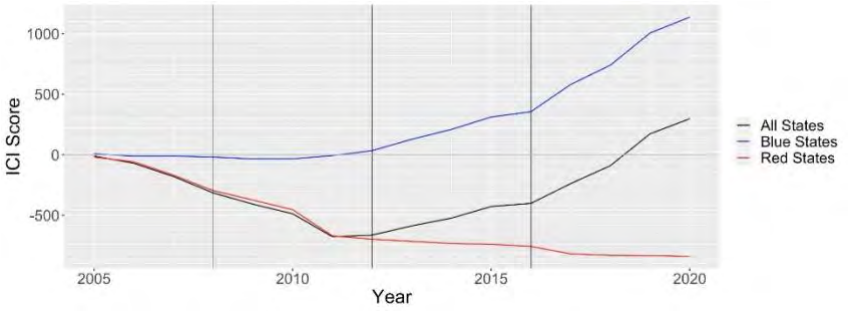
94. DHS, EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN (2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/ZMU5-GBDZ].

95. Nicole Prchal Svajlenka & Trinh Q. Truong, *The Demographic and Economic Impacts of DACA Recipients: Fall 2021 Edition*, CTR. FOR AM. PROGRESS (Nov. 24, 2021), https://www.americanprogress.org/article/the-demographic-and-economic-impacts-of-daca-recipients-fall-2021-edition/ [https://perma.cc/PFD9-YCTM]; *see Consideration of Deferred Action for Childhood Arrivals (DACA)*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 18, 2023), https://www.uscis.gov/DACA [https://perma.cc/EF6C-EJRF] (noting that the U.S. District Court for the Southern District of Texas issued a decision finding the final DACA rule unlawful, enjoining and vacating the final rule so that initial DACA requests will not be processed); *see also* Tom K. Wong, Ignacia Rodriguez Kmec, Diana Pliego, Karen Fierro Ruiz, Debu Gandhi, Trinh Q. Truong & Nicole Prchal Svajlenka, *DACA Boosts Recipients' Well-Being and Economic Contributions: 2022 Survey Results*, CTR. FOR AM. PROGRESS (Apr. 27, 2023), https://www.americanprogress.org/article/daca-boosts-recipients-well-being-and-economic-contributions-2022-survey-results/ [https://perma.cc/L7RB-KAU2] (providing continued data regarding the impact of DACA on recipients' lives in 2022).

96. *See infra* Figure 4.

until later, during Obama II, the rate of negative activity is the steepest during Obama I.[97]

Figure 4: Cumulative ICI Through Presidential Administrations (repeated for convenience)



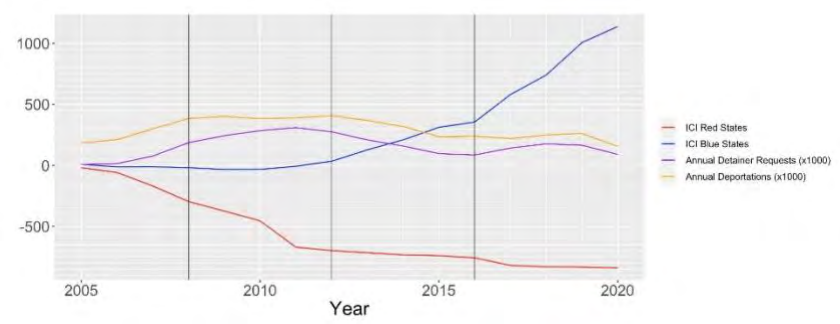
In other words, red states were the most active during this period, enacting the negative policing laws of Bush II while also branching into other areas, making immigration status a condition of access to housing, government benefits, education, and driver's licenses.[98] As shown in Figure 3 (replicated below for convenience), negative ICI activity during Obama I reached its lowest scores, just as federal enforcement was reaching its highest levels, as measured by removals and detainer requests.[99] The theoretical and practical implications of these non-intuitive results are further explored in Section III.

97. *Id.*

98. *See supra* Figure 4; *see, e.g.*, ARIZ. REV. STAT. § 1-502(A) (2010) (Arizona law conditioning access to housing assistance and public benefits on proof of legal status); ALA. CODE § 31-13-8 (2012) (prohibiting invidiuals without legal status from attending public postsecondary education institutions in Alabama); GA. CODE ANN. § 50-36-1 (2006) (Georgia law requiring proof of legal status for driver's licenses).

99. *See infra* Figure 3.

Figure 3: Comparing ICI with Federal Enforcement Measures (repeated for convenience)



By contrast, blue state activity during Obama I was limited but largely positive.[100] Positive policing laws were the most common addition in blue states, accounting for one out of five new laws from 2008 to 2012.[101] By the end of 2012, positive policing laws accounted for 16.6% of all blue state immigration regulation, while negative policing laws accounted for 12.3%.[102] In addition to the divergence emerging between red and blue states, one also emerges across jurisdictions within red states. While the trend for red states as a whole was clearly negative during Obama I, the proportion of local positive policing laws in red states increased to 7.2% of the total in 2012 from 4.2% in 2008.[103] For example, a 2012 Tucson Police Department General Order prohibited officers from inquiring about the immigration status of victims and witnesses of crimes unless it was necessary to further the investigation of the crime.[104]

iii. Obama II Administration (2013–2016)

During his second term, President Obama focused on implementing his removal priorities, resulting in fewer removals as compared with his previous record highs,[105] and perhaps more significantly, changes in the composition of individuals removed.[106] Pursuant to the memos signed during Obama's first term detailing

100. *See supra* Figure 4.
101. *See supra* Figure 3.
102. *Id.*
103. *Id.*
104. Tucson Police Dep't, General Orders Vol. 2 § 2320 (Sept. 2012), https://www.tucsonaz.gov/files/sharedassets/public/v/2/police/documents/general-orders/2300-immigration.pdf [https://perma.cc/3TMC-QCBD].
105. *See supra* Figure 6.
106. Chishti et al., *supra* note 82.

the Administration's removal priorities, the Obama Administration narrowed the focus of removals to two main groups: those who had recently crossed the border illegally and those convicted of serious crimes.[107] In 2016, 85% of all removals had recently crossed the U.S. border unlawfully; of the remaining removals, more than 90% were convicted of what DHS described as serious crimes.[108]

The Obama Administration also focused on expanding executive relief for certain groups of individuals without legal immigration status, such as DACA recipients.[109] The Administration had to defend DACA from a legal challenge brought by attorneys general from red states.[110] President Obama tried to create a similar program for the undocumented parents of U.S. citizens and lawful permanent residents: Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). But, due to the program's legal challenges and lack of support from the incoming Trump Administration, DAPA was never implemented.[111]

At the subfederal level, we see a deepening partisan divide between red and blue states, largely driven by increased positive activity from blue jurisdictions.[112] Recall that blue states were largely inactive during the first Obama Administration; pro-immigration and pro-immigrant groups during this time period may have been focused on trying to push comprehensive immigration reform through at the national level.[113] But when it became clear that no such reform was forthcoming, these groups focused their efforts on subfederal legislation, where the enactment of positive, integrationist laws seemed more likely.[114] Indeed, during the second Obama Administration, 90% of subfederal laws enacted within blue

107. *Id.*

108. *Id.*

109. Svajlenka & Truong, *supra* note 95.

110. *See* Mark Hugo Lopez & Jens Manuel Krogstad, *States Suing Obama Over Immigration Programs Are Home to 46% of Those Who May Qualify*, PEW RSCH. CTR. (Feb. 11, 2015), https://www.pewresearch.org/fact-tank/2015/02/11/states-suing-obama-over-immigration-programs-are-home-to-46-of-those-who-may-qualify/ [https://perma.cc/VFS2-76CQ].

111. Tal Kopan, *Trump Administration Reverses DAPA in 'House Cleaning'*, CNN (June 16, 2017), https://www.cnn.com/2017/06/16/politics/dhs-scraps-dapa-keeps-daca-deferred-action/index.html [https://perma.cc/L3GA-YEVL].

112. *See supra* Figure 4.

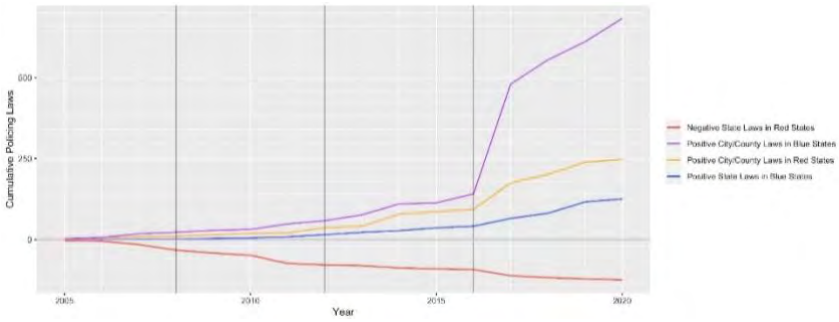
113. *See supra* Figure 3.

114. PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, THE NEW IMMIGRATION FEDERALISM 145 (2015).

states were positive in nature, at both the state and local levels, with more than one-third being positive policing laws.[115]

At the other end of the political spectrum, restrictive activity from red jurisdictions continued during the second Obama Administration; indeed, the national cumulative ICI reached its lowest point during this time period.[116] But two important patterns are worth noting. First, the rate of restrictive legislative activity slowed during the second Obama Administration, significantly outpaced by the positive activity within blue states discussed above.[117] Second, legislative activity within red states diverged as cities and counties increasingly enacted positive local laws.[118] This polarization within states that started during Obama I became more visible under Obama II and exploded during the Trump years.[119] In the aggregate, positive activity outpaced negative activity as the national cumulative ICI began to turn in the positive direction during Obama II.[120]

Figure 7: Contrasting State and City/County Level Laws by +/- Orientation



iv. Trump Administration (2017–2020)

President Trump made immigration restrictions and anti-immigrant sentiment central platforms in his domestic agenda.[121]

115. *See supra* Table 1. In blue states, from 2012 to 2016, the number of subfederal laws increased by 326, of which 292 (90%) were positive laws. *Id.*

116. *See id.*

117. *See id.*

118. *See infra* Figure 7.

119. *See infra* Figure 7.

120. *See supra* Figure 4.

121. *See* Nolan D. McCaskill, *Trump Promises Wall and Massive Deportation Program*, POLITICO (Aug. 31, 2016), https://www.politico.com/story/2016/08/donald-

Through a rapid-fire implementation of more than 400 executive orders, regulations, and policy changes,[122] the Trump Administration fundamentally changed the United States immigration system, contracting opportunities for authorized immigration and pushing for harsh enforcement against unauthorized immigration.[123]

The Trump Administration expanded the public charge rule, making it more difficult for immigrants to prove the financial resources to qualify for a visa,[124] set the refugee admission ceiling at the lowest levels in United States history,[125] denied work visa applications at historically high rates,[126] and fought for a ban on nationals of seven predominantly Muslim countries, a ban that was ultimately upheld by the U.S. Supreme Court.[127]

The Trump Administration also pushed for harsh enforcement policies against unauthorized immigration, eliminating discretionary relief[128] and punishing subfederal law enforcement agencies that did not cooperate in immigration enforcement activities.[129] Some of the Trump Administration's more significant actions in this area include a zero tolerance policy on illegal entry along the southwestern border,[130] prosecutions of unauthorized border crossings as crimes,[131] the separation of families that crossed unlawfully by sending children to separate detention facilities,[132]

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trump-immigration-address-arizona-227612 [https://perma.cc/964A-ZRTL] (noting candidate Trump's vow to build a wall on the southern border and deport all detained undocumented migrants starting from "Day One").

122. SARAH PIERCE & JESSICA BOLTER, DISMANTLING AND RECONSTRUCTING THE U.S. IMMIGRATION SYSTEM: A CATALOG OF CHANGES UNDER THE TRUMP PRESIDENCY 1 (2020), https://www.migrationpolicy.org/sites/default/files/publications/MPI_US-Immigration-Trump-Presidency-Final.pdf [https://perma.cc/964A-ZRTL].

123. Anita Kumar, Behind Trump's Final Push to Limit Immigration, POLITICO (Nov. 30, 2020), https://www.politico.com/news/2020/11/30/trump-final-push-limit-immigration-438815 [https://perma.cc/6THK-4N23].

124. PIERCE & BOLTER, *supra* note 122, at 94.

125. *Id.* at 64 (noting refugee admission ceilings of 50,000 in 2017, 45,000 in 2018, 30,000 in 2019, and 18,000 in 2020); *see also id.* at 67 (noting the refugee admission ceiling of 110,000 immediately before Trump entered office).

126. *NFAP Policy Brief February 2020: H-1B Approved Petitions and Denial Rates for FY 2019*, NAT'L FOUND. FOR AM. POL'Y 1, https://nfap.com/wp-content/uploads/2020/02/H-1B-Denial-Rates-Analysis-of-FY-2019-Numbers.NFAP-Policy-Brief.February-2020-1.pdf [https://perma.cc/9FS9-77B2].

127. PIERCE & BOLTER, *supra* note 122, at 86–87.

128. *Id.* at 38–39.

129. Huyen Pham & Pham Hoang Van, *Subfederal Immigration Regulation and the Trump Effect*, 94 N.Y.U. L. REV. 125, 147 (2019).

130. *See* PIERCE & BOLTER, *supra* note 122, at 50.

131. *Id.* at 52.

132. *Id.* at 30.

the requirement of asylum seekers at the southern border to make their claims in Mexico,[133] and the elimination of Obama's enforcement priorities, so that anyone without lawful immigration status became an enforcement target.[134] For so-called "sanctuary" jurisdictions that did not cooperate with federal immigration enforcement, the Administration threatened to revoke federal funding and targeted them for federal immigration raids.[135]

When COVID-19 infections spread to the United States, the Trump Administration used the pandemic as a reason to restrict immigration even further. His most dramatic policy change was to invoke Title 42, a 1944 public health statute, to expel immigrants seeking asylum without hearing their claims, effectively ending asylum at the southern border.[136] The Trump Administration also suspended the issuance of immigrant visas for most family and employment-based categories and for four non-immigrant work programs.[137]

Despite the harshness of the Trump Administration's policies, federal immigration enforcement (as measured by removals and detainer requests) was at historical averages during this period, certainly well below the historic highs seen during the Obama Administrations.[138] Some analysts suggest that, notwithstanding his tough anti-immigrant rhetoric, Trump failed in decreasing the size of the undocumented population in the United States.[139]

Nonetheless, the Trump presidency inspired a tidal wave of positive laws from blue jurisdictions.[140] We see this "Trump Effect" growing after Trump's election in November 2016, before he even took office in January 2017.[141] Jurisdictions within blue states were incredibly active during the Trump Administration, adding more than 1,100 laws, 85% of which were positive and 66% of which were positive policing laws.[142] Besides the sheer number of laws passed

133. *Id.* at 27.

134. *Id.* at 24.

135. *Id.* at 37.

136. *Id.* at 8.

137. *Id.*

138. *See supra* Figure 5; *supra* Figure 6.

139. *See, e.g.*, Muzaffar Chishti & Sarah Pierce, *Trump's Promise of Millions of Deportations Is Yet to be Fulfilled*, MIGRATION POL'Y INST. (Oct. 29, 2020), https://www.migrationpolicy.org/article/trump-deportations-unfinished-mission [https://perma.cc/9TAL-2NZX].

140. *See supra* Figure 7.

141. *See* Pham & Van, *supra* note 129, at 162 n.164 (2019) (noting the "flurry" of positive "sanctuary" legislation following President Trump's election in November 2016).

142. *See supra* Figure 5.

and the sharp upward trajectory of the national cumulative ICI during this period, other patterns in subfederal immigration regulation should also be noted.[143] First, cities and counties became more active, enacting more positive laws during the first year of the Trump Administration than they had during the previous twelve years combined (2005–2016).[144] Second, there was more diversity among sanctuary cities and counties; previously, large urban cities were the most active in enacting positive regulation, but medium-sized cities and suburbs (with populations under 100,000) surpassed them during the Trump Administration.[145] Finally, we see different types of governmental entities enacting immigration regulations, including school districts, transit authorities, and public universities.[146] Trump's controversial policies and incendiary rhetoric pulled many more subfederal governments into the partisan immigration debate. With this surge of positive activity, the national cumulative ICI reached positive territory for the first time in 2018.[147]

By comparison, red states were much less active during the Trump Administration.[148] Almost one-half of new laws originating from red states were negative,[149] many of them police cooperation agreements signed under a newly invigorated 287(g) program.[150] Red states were not immune to the "Trump Effect," however, as more than half of new laws were enacted by blue cities and counties implementing positive policing laws.[151] The partisan divide *within* red states that emerged during Obama I and expanded during Obama II exploded during the Trump Administration,[152] contributing to the national divide on immigration issues.

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143. *See supra* Figure 4.

144. Pham & Van, *supra* note 129, at 156.

145. *Id.* at 131.

146. *Id.* at 164.

147. *See supra* Figure 4.

148. *See supra* Figure 7.

149. *See supra* Table 1. From 2016 to 2020, jurisdictions in red states added 487 subfederal laws of which 235 were new negative laws. *Id.*

150. *See, e.g.*, BRISTOL CTY. SHERIFF'S OFFICE, MEMORANDUM OF AGREEMENT (2017), https://www.ice.gov/doclib/287gMOA/287gBristolMa2017-02-08.pdf [https://perma.cc/QG2V-A7VA] (entering into a voluntary arrangement whereby local law enforcement is trained and authorized by ICE to perform functions of an immigration officer); OKMULGEE CTY. BD. OF COMM'RS, MEMORANDUM OF AGREEMENT (2018), https://www.ice.gov/doclib/287gMOA/287gJEM_OkmulgeeCoCrimJusOk2018-01-25.pdf [https://perma.cc/Q4XC-E92J] (noting the same).

151. *See supra* Table 1. From 2016 to 2020, jurisdictions in red states added 487 subfederal laws of which 250 were new positive laws. *Id.*

152. *See supra* Figure 7.

In summary, we see several distinct trends in federal-subfederal interactions across presidential administrations. In the first phase (Bush II), subfederal immigration regulation was more non-partisan; blue and red jurisdictions enacted similar numbers of restrictive laws. During Obama I, subfederal immigration regulation became more partisan, as red jurisdictions were most active during this period. This red activity surged despite historically high numbers of removals and detainer requests issued by the Obama Administration, pointing to increased polarization along partisan lines. During Obama II, blue jurisdictions were more active than red jurisdictions, but it was during the Trump Administration that blue subfederal activity really took off. Historically high activity from blue cities and counties accounted for most of this surge, and new actors—school districts, college campuses, and even transit authorities—passed positive laws, mostly on policing, to protect immigrants in their jurisdictions from harsh Trump-era enforcement policies. Federal-subfederal immigration interactions provide an important backdrop for understanding interactions between subfederal governments on immigration policies.

B. The Independent Role of Subfederal Regulations in Polarization

Much of the legal and policy analysis of subfederal immigration regulation has focused on its interactions with federal laws and policies.[153] But subfederal laws merit their own analysis, focused on the ever-broadening subject matter of these laws and their horizontal interactions with each other. Both aspects are important because they illuminate the important and independent role that subfederal laws have played in increasing national polarization on immigration issues.

i. Increasing the Scope of Immigration Regulation

The modern chapter of subfederal immigration regulation began with Ashcroft's invitation for local police to join in federal immigration enforcement efforts.[154] Nevertheless, subfederal immigration regulations have grown beyond these policing roots into new regulatory areas. As explained below, that growth has played a crucial role in increasing national partisanship on

153. *See, e.g.*, Pham & Van, *supra* note 129 (discussing the effect of presidential and federal immigration policy on the immigration policies of subfederal governmental entities).

154. Ashcroft, *supra* note 1.

immigration policies. In Section I, we divided subfederal immigration regulation into tiers, based on their impact on immigrants' lives; here, we build upon that tier classification to look more closely at the substance of the laws.

Though laws in these new regulatory areas vary widely in their substance, they do share two related similarities. First, these laws involve areas where subfederal governments have dominant regulatory power, with debates ordinarily focused on subfederal issues.[155] The debates in these fields become nationalized when federal and subfederal laws insert immigration status as a triggering condition for penalties or benefits. Second, we find both positive and negative laws in these regulatory areas, as subfederal governments use their regulatory positions to express their immigration policy preferences. Thus, in broadening the subject matter of immigration regulation, the subfederal laws have created more points for policy disagreements, resulting in increased national partisanship on these issues.

We start with policing laws and explore the different ways that subfederal governments have either enhanced or restricted the authority of their law enforcement agencies to enforce federal immigration laws. On the pro-enforcement side, subfederal governments have pushed for more cooperation with federal immigration enforcement formally, by signing 287(g) agreements,[156] or more informally, by notifying ICE when immigrants of interest are released from local detention.[157] By cooperating with federally initiated programs or actions, these subfederal governments are, in effect, funneling more immigrants into federal removal processes. Some subfederal governments have also taken unilateral steps to strengthen immigration enforcement

155. For example, policy debates about private housing permits usually focus on localized issues like zoning, parking, or traffic density. *See, e.g.*, Sarah Goh, *A Debate Over Height for the Central District's Acer House and its Afrofuturist Plans*, CAPITOL SEATTLE HILL BLOG (Dec. 16, 2021) https://www.capitolhillseattle.com/2021/12/a-debate-over-height-for-the-central-districts-acer-house-and-its-afrofuturist-plans/ [https://perma.cc/T99Z-HZEC] (discussing the debate over the allowed height of a housing project).

156. *See, e.g.*, BARNSTABLE CTY., MASS., MEMORANDUM OF AGREEMENT 287(G) JAIL ENFORCEMENT MODEL (2020), https://www.ice.gov/doclib/287gMOA/287gJEM_BarnstableCoMA2020-06-09.pdf [https://perma.cc/8Y7D-DXD4] (effecting an arrangement under whereby local law enforcement is trained and authorized by ICE to perform functions of an immigration officer).

157. BROOKLYN PARK POLICE DEP'T, BROOKLYN PARK PD POLICY MANUAL 298 (2022), https://www.brooklynpark.org/wp-content/uploads/2021/06/Updated-Policy-Manual-042922.pdf [https://perma.cc/8C3S-Q3E2] (requiring notification to the federal authority issuing the detainer before release).

by criminalizing certain immigration-related acts[158] or restricting the availability of relief like bail for immigrant defendants.[159] These laws are not responding to any explicit federal action or invitation; rather, they are attempting to impose more local control over immigrants separate from the federal removal process. These unilateral acts have been vulnerable to legal challenges, often on preemption grounds. For example, Arizona tried to create two new state immigration crimes—criminalizing an immigrant's failure to carry immigration papers and an immigrant's working in the state without authorization—but both were struck down by the Supreme Court as preempted by federal law.[160]

On the protective side, some subfederal governments have moved in the opposite direction, restricting police from enforcing federal immigration laws. Most of these laws are written as prohibitions and are very specific in scope: prohibiting the signing of 287(g) agreements,[161] the honoring of immigration detainers except in narrowly defined circumstances,[162] or the use of local jail space by ICE to interview detainees.[163] The specific laws are usually coupled with a general prohibition on the use of subfederal resources to enforce immigration laws or cooperate with immigration law enforcement.[164] As noted earlier, positive subfederal immigration regulation surged during the Trump Administration; in the policing realm, that surge manifested in new types of subfederal entities—school districts,[165] university

158. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, § 10(a), 2011 Ala. Laws 890, 904 (codified as amended at ALA. CODE § 31-13-10 (2023)) (creating a state violation for willful failure to complete or carry an alien registration document).

159. Act of May 26, 2011, ch. 385, sec. 6, § 1105.3(C), 2011 Okla. Sess. Laws 2950, 2958 (codified as amended at OKLA STAT. tit. 22, § 22-1105.3 (2022)) (denying pretrial release for persons accused of or detained for any immigration charges).

160. *Arizona v. United States*, 567 U.S. 387, 417 (2012) (striking down sections 3 and 5(C) of S.B. 1070, which criminalized an immigrant's failure to carry immigration papers and working in the state without authorization).

161. *See, e.g.*, Keep Illinois Families Together Act, § 5(b), 2019 Ill. Laws 1975, 1975 (codified as amended at 5 ILL. COMP. STAT. 835/5 (2023)) (prohibiting any law enforcement agency or official from entering into or remaining in a 287(g) agreement).

162. *See, e.g.*, California Values Act, ch. 495, § 3, 2017 Cal. Stat. 3737, 3738 (codified as amended at CAL. GOV. CODE § 7284.6 (2023)) (prohibiting detaining an individual based on a hold request with few exceptions).

163. *See, e.g.*, *id.* (prohibiting the provision of office space exclusively dedicated for use by immigration authorities).

164. *See, e.g.*, *id.* ("California law enforcement agencies shall not . . . [u]se agency or department moneys or personnel to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes . . . .").

165. *E.g.,* L.A. UNIFIED SCH. DIST., MOTIONS/RESOLUTIONS PRESENTED TO THE

campuses,[166] and even transit authorities[167]—jumping into the immigration fray, enacting laws limiting the enforcement of immigration laws on their premises and by their personnel.

Beyond policing laws, another subfederal area that experienced early immigration expansion was the area of private housing. In 2006, Hazleton, Pennsylvania enacted the first law requiring landlords to verify the legal immigration status of their tenants.[168] Titled the Illegal Immigration Relief Act Ordinance, the law required that tenants prove lawful immigration status to obtain occupancy permits.[169] Other like-minded jurisdictions followed, enacting similarly restrictive laws.[170] The restrictive housing laws motivated protest laws that either specifically prohibited landlords from checking their tenants' immigration status,[171] or more generally prohibited housing discrimination based on a tenant's immigration status.[172]

Subfederal governments have also been quick to interject employment access into the immigration policy debate. Here, though, subfederal governments have been limited by the

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LOS ANGELES CITY BOARD OF EDUCATION FOR CONSIDERATION 2 (2016), https://achieve.lausd.net/cms/lib08/CA01000043/Centricity/Domain/582/LA%20Unified%20Campuses%20as%20Safe%20Zones%20and%20Resource%20Centers%20for%20Students%20and%20Families%20Threatened%20by%20Immigration%20Enforcement.pdf [https://perma.cc/YY5A-QACW] (declaring all school district sites as safe zones and resource centers for students and families threatened by immigration enforcement).

166. *E.g.,* COLO. STATE UNIV., COLORADO STATE UNIVERSITY POLICE DEPARTMENT POLICY MANUAL 1 (2020) https://police.colostate.edu/wp-content/uploads/sites/85/2020/03/412-Immigration-Violations.pdf [https://perma.cc/HK8N-MWXC] ("An officer should not detain any individual, for any length of time, for a civil violation of federal immigration laws or a related civil warrant.").

167. *E.g.,* BAY AREA RAPID TRANSIT, IN THE MATTER OF SETTING A POLICY TO MOST EFFECTIVELY USE RESOURCES TO ENSURE SAFE AND QUALITY TRANSPORTATION FOR ALL RIDERS 3 (2017), https://www.bart.gov/sites/default/files/docs/Safe_Transit_Policy_2017.pdf [https://perma.cc/GA3J-PL9P] (prohibiting employees' assistance or cooperation with any immigration enforcement procedures of federal agencies).

168. Hazleton, Pa., Ordinance 2006-18, § 5 (Sept. 12, 2006). This ordinance also prohibited all business entities from hiring or continuing to employ unauthorized migrants within the city. *Id.* at § 4.

169. This ordinance was adopted on the same day as another declaring English the official language of Hazleton. Hazleton, Pa., Ordinance 2006-19 (Sept. 12, 2006).

170. *See, e.g.,* Farmers Branch, Tex., Ordinance 2952, § 1(B)(5)(i) (Jan. 22, 2008) (requiring a showing of "lawful presence" to obtain a residential occupancy license).

171. *See, e.g.*, ALACHUA CTY., FLA., ALACHUA CTY. CODE § 111.40(a)(18) (2023) (prohibiting landlords from requesting or requiring tenants to disclose their immigration status).

172. *See, e.g.*, S.F., CAL, ADMINISTRATIVE CODE § 37.10B(a)(9) (2023) (prohibiting discrimination by landlords based on their tenants' immigration status).

Immigration Reform and Control Act of 1986 (IRCA), a federal statute that prohibits employers from hiring unauthorized workers and expressly preempts state and local governments from imposing employer sanctions "other than through licensing and similar laws."[173] Within those federal limits, restrictive-minded governments have enacted laws requiring lawful immigration status to obtain certain professional licenses,[174] requiring employers to use the Federal E-Verify system (confirming the work eligibility of potential employees),[175] and revoking the business licenses of employers who hire unauthorized workers.[176]

Because the employment of unauthorized workers is expressly prohibited by federal law, subfederal governments inclined to enact positive laws in this area have also faced constraints. Positive employment laws have thus been largely limited to smaller measures, like requiring employers to inform employees when the employees' work documents will be inspected by federal authorities,[177] prohibiting the requirement of lawful immigration status for professional licenses,[178] and including the reporting of immigration status to federal authorities as an adverse action under whistleblower acts.[179]

The immigration debate has also affected law on driver's licensing, another subfederal regulatory area. Until the 1990s, no state required proof of lawful immigration status to get a driver's license.[180] In 1993, California was the first to enact such a requirement, and Arizona passed a similar law in 1996.[181] By 2011,

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173. 8 U.S.C. § 1324a(h)(2) (2023).

174. *See, e.g.*, Act of May 8, 2007, ch. 905, § 4, 2007 Tex. Gen. Laws 2255, 2256 (requiring lawful immigration status to receive a mortgage broker license).

175. *See, e.g.*, Legal Arizona Workers Act, ch. 279, § 2, 2007 Ariz. Sess. Laws 1312, 1317 (codified as amended at ARIZ. REV. STAT. ANN. § 23-214 (2023)) (upheld as not preempted by the IRCA in Chamber of Commerce v. Whiting, 563 U.S. 582 (2011)).

176. *See, e.g.*, § 2, 2007 Ariz. Sess. Laws at 1316.

177. *See, e.g.*, Act of June 6, 2019, ch. 260, § 1, 2019 Or. Laws 704, 705 (requiring an employer to give employees notice that forms used for verification of an employee will be inspected by a federal agency).

178. *See, e.g.*, Act of Sept. 21, 2018, ch. 659, § 1.5, 2018 Cal. Stat. 4356, 4362 (prohibiting licensing boards from requiring an individual to disclose either citizenship or immigration status).

179. *See, e.g.*, Act of July 13, 2021, ch. 394, § 1, 2021 R.I. Pub. Laws 1648, 1649 (codified as amended at R.I. GEN. LAWS § 28-50-3 (2021)) (amending the Rhode Island Whistleblower Act to include reporting or threatening to report to ICE as an adverse action).

180. *Deciding Who Drives: State Choices Surrounding Unauthorized Immigrants and Driver's Licenses*, PEW CHARITABLE TR. 4 (Aug. 2015), https://www.pewtrusts.org/-/media/assets/2015/08/deciding-who-drives.pdf [https://perma.cc/63X7-4WXB].

181. *Id.*

unauthorized immigrants could only obtain driver's licenses in three states: Utah, New Mexico, and Washington.[182] The desire to crack down on unauthorized immigration motivated some of these restrictions,[183] as the ability to drive legally is a vital link to working and thriving in most communities in the United States.[184] These restrictive state-level laws may have also been spurred by the enactment of the Federal REAL ID Act in 2005.[185] REAL ID sets minimum standards that state-issued identification cards must meet to be accepted for federal purposes (e.g., to board an airplane); these standards require proof of lawful immigration status.[186] Though the deadline to fully comply with REAL ID has been extended several times,[187] the impending federal requirements and the desire to provide federally-compliant identification for their residents nonetheless motivated some states to enact restrictive laws.[188]

On the integrationist side, a minority of states issue driver's licenses to their residents without requiring proof of legal immigration status.[189] The rationales for these positive laws range from public safety to economic necessity and economic costs.[190] Interestingly enough, after being the first state to require proof of

182. *Id.*

183. *See* Sarah E. Hendricks, *Living in Car Culture Without a License: The Ripple Effects of Withholding Driver's Licenses from Unauthorized Immigrants*, IMMIGR. POL'Y CTR. 8 (Apr. 2014), https://www.americanimmigrationcouncil.org/sites/default/files/research/living_in_car_culture_without_a_license_3.pdf [https://perma.cc/W5VM-C4G5] (noting the use of driver's license citizenship restrictions to further "self-deportation" policies).

184. *Id.* at 9 (illustrating how the lack of driver's licenses limits the livelihoods of immigrants).

185. REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302.

186. *Id.* at 313.

187. Elaine S. Povich, *Real ID, Real Problems: States Cope with Changing Rules, Late Rollouts*, STATELINE (Aug. 6, 2019), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/08/06/real-id-real-problems-states-cope-with-changing-rules-late-rollouts [https://perma.cc/N7P8-BQ4R] ("DHS has postponed the original deadline of 2008 many times since the Real ID law was enacted in 2005, but the department says it has no plans to extend the Oct. 1, 2020, deadline."); Juliana Kim, *REAL ID Enforcement is Delayed Again to 2025*, NPR (Dec. 5, 2022), https://www.npr.org/2022/12/05/1140778386/real-id-enforcement-delayed-2025-immigration-privacy [https://perma.cc/37U8-7YBA] ("The Transportation Security Administration and other federal agencies were expected to only accept the nationally approved IDs starting May 3, 2023. But on Monday, the Department of Homeland Security announced that the deadline would be extended until May 7, 2025.").

188. Povich, *supra* note 187 (noting Kentucky's rollout of REAL ID to spare residents from having to use passports for air travel when the REAL ID Act takes effect).

189. PEW CHARITABLE TR., *supra* note 180.

190. *Id.*

lawful immigration status, California in 2013 enacted A.B. 60, allowing California residents to obtain driver's licenses without having to prove lawful immigration status.[191] California's reasons for its policy change were to allow for more licensed drivers to ensure that they are tested, trained, and insured.[192] Vermont enacted a similar law in 2013,[193] citing the need for unauthorized immigrants working on the state's dairy farms to get to work.[194] And in one of the most recent actions on this front, Massachusetts in 2022 enacted the Work and Family Mobility Act, allowing immigrants without legal status to obtain a driver's license.[195] This law, which survived an attempted voter repeal, was pushed by its supporters as a way to create safer roads because it reduces unlicensed drivers, a public safety benefit for the larger community.[196] As of March 2023, nineteen states issue driver's licenses without requiring proof of lawful immigration status.[197] To prepare for the eventual enforcement of REAL ID, most of these jurisdictions have created two different types of licenses: licenses that comply with REAL ID requirements, including the requirement of lawful immigration status, and licenses that are issued without that proof.[198]

Besides driver's licenses, state and local governments distribute other benefits, and the distribution of those benefits has increasingly been dependent on lawful immigration status or even of citizenship. In 1996, Congress enacted two laws—the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) and the Illegal Immigration Reform and Immigrant

191. Act of Oct. 3, 2013, ch.524, sec. 1, § 12801.9–11, 2013 Cal. Stat. 91 (amending the Vehicle Code relating to driver's licenses).

192. *Id.*

193. Act of Jan. 5, 2013, sec. 1, § 603, 2013 Vt. Legis. Serv. 1 (amending the section to expand eligibility for driving and identification privileges).

194. DEBORAH A. GONZALEZ & PETER MARGULIES, A LEGAL AND POLICY ANALYSIS OF DRIVER'S LICENSES FOR UNDOCUMENTED RHODE ISLANDERS 3 (Roger Williams Univ. L. Sch. 2016).

195. Act of June 9, 2022, sec. 1, ch. 81, § 8, 2022 Mass. Legis. Serv.

196. Sam Pollak, *Question 4 Arguments Cite Safety Concerns and Voter Fraud*, PROVINCETOWN INDEP., (Oct. 26, 2022), https://provincetownindependent.org/local-journalism-project/2022/10/26/question-4-arguments-cite-safety-concerns-and-voter-fraud/ [https://perma.cc/4NMX-37G8].

197. *States Offering Driver's Licenses to Immigrants*, NAT'L CONF. STATE LEGISLATURES (Mar. 13, 2023), https://www.ncsl.org/immigration/states-offering-drivers-licenses-to-immigrants [https://perma.cc/G9SH-X4P2].

198. Kendra Sena, *Driver's Licenses and Undocumented Immigrants*, ALBANY L. SCH. (July 15, 2019), https://www.albanylaw.edu/government-law-center/drivers-licenses-and-undocumented-immigrants [https://perma.cc/NED3-AYT8] (explaining the tiered systems in California and New York).

Responsibility Act (IIRIRA)—that imposed broad restrictions on the ability of legal permanent residents to receive federal benefits and placed additional restrictions on the already limited ability of unauthorized immigrants to receive those benefits.[199] Importantly, PRWORA also made unauthorized immigrants ineligible to receive even state or local benefits unless the state passed specific legislation establishing eligibility.[200] Few states have done so, resulting in mostly negative regulation at the subfederal level. Some restrictive laws require citizenship or permanent status to participate in the state's health insurance pool[201] or to obtain benefits under laws assisting minority- or women-owned businesses.[202]

A notable exception to the restrictive benefits trend is a class of laws enacted by twenty-seven states that allow unauthorized immigrant students to attend public colleges and universities at in-state tuition rates.[203] Most of these laws do not mention immigration status explicitly but rather condition tuition rates on graduation from an in-state high school.[204] Perhaps not surprisingly, other states have enacted laws restricting in-state tuition or even admission to public colleges and universities to students with lawful immigration status.[205] But interestingly, positive college tuition laws have cut across the political spectrum, enacted by red states (e.g., Texas)[206] and blue states (e.g., California)[207] alike.

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199. Act of Aug. 22, 1996, Pub. L. No. 104–193, § 411, 110 Stat. 2268 (codified as amended at 8 U.S.C. § 1621(2012)) (restricting state and federal benefits for certain immigrants); Act of Sept. 30, 1996, Pub. L. No. 104–208, § 505, 110 Stat. 3009–672 (codified as amended at 8 U.S.C. § 1623(2012)) (under Title V, people who are deportable, excludable, and on nonimmigrant visas are deemed ineligible for benefits).

200. Act of Aug. 22, 1996, Pub. L. No. 104-193, 110 Stat. 2268, § 411, 110 Stat. 2268 (codified as amended at 8 U.S.C. § 1621(2012)).

201. Act of May 26, 2009, ch. 533, sec. 4, § 1506.152., 2009 Tex. Gen. Laws 1232.

202. Act of May 6, 2009, ch. 869, sec. 1, § 2.2-1400, 2009 Va. Acts (relating to the Department of Minority Business Enterprise).

203. *Portal to the States*, HIGHER EDUC. IMMIGR. PORTAL, https://www.higheredimmigrationportal.org/states/ [https://perma.cc/5FML-UKHU].

204. *E.g.*, Act of June 17, 2005, ch.21, sec. 1, § 21-1-4-6, 2005 N.M. Laws (requiring only graduation from a New Mexico high school and at least one year in a New Mexico middle school or high school).

205. *E.g.*, Act of May 10, 2011, ch. 11, sec. 1, § 12-14-11-1, 2011 Ind. Acts 2790; Act of May 14, 2008, no. 697, § 20-3-519.2, 2011 Ga. Laws 759.7.

206. Act of June 16, 2001, ch. 1392, sec. 1, § 54.051(m), 2001 Tex. Gen. Laws 3582.

207. Act of Oct. 13, 2001, ch. 814, sec. 1–2, § 68130.5, 2001 Cal. Stat. 6652–6654.

Our ICI also tracks laws that don't fit neatly into any of the previously described categories but nonetheless affect immigrants' lives. Some examples include laws that either require government transactions to be conducted only in English,[208] establish legal defense funds to pay for legal fees for immigrants in deportation proceedings,[209] create advisory councils to improve delivery of government services to immigrant groups,[210] or establish hotlines to report immigration violations.[211] The commonality among these miscellaneous laws is that they insert immigration status into otherwise local concerns, creating more points for the expression of immigration preferences and for immigration disagreements.

ii. The Copycat and Opposing Law Cycle

Beyond expanding the subject matter of immigration regulation, subfederal laws have also increased national polarization on immigration by interacting on the subfederal level. Using the multiple views afforded by the ICI over time, we see two main categories of subfederal-subfederal interaction: mimicking a law in approval (copycat laws) or enacting an opposing law in disapproval (opposing laws). These categories are not mutually exclusive or linear, as a subfederal immigration regulation could be both copied and opposed by different jurisdictions at different points in time. We focus our analysis here on two case studies—the Illegal Immigration Act Ordinance enacted by Hazleton, Pennsylvania in 2006 and the Support Our Law Enforcement and Safe Neighborhoods Act (S.B. 1070) enacted by Arizona in 2010——as illustrative of this intra-subfederal dynamic.

The Copycat and Opposing Law Cycle: Hazleton's Housing Law

With the case studies, we observed this pattern: a regulation that was novel in some way, pushing the boundaries of subfederal immigration regulation and garnering considerable press coverage

208. Compare Act of June 27, 2013, ch. 321C, sec. 3, § 321C-6, 2013 Haw. Sess. Laws 679, 681–682 (establishing a statewide language access resource center to help people with limited English language proficiency), with Act of May 11, 2007, ch. 186, sec. 1, § 73-2801, 2007 Kan. Sess. Laws 1666 (establishing English as the official state language).

209. *E.g.*, Act of June 25, 2021, ch. 352, sec. 2, § 8-3.8-101, 2021 Colo. Sess. Laws 2287.

210. *E.g.*, Act of July 15, 2009, no. 141, sec. 1, § 1222, 2009 La. Acts 1868, 1869–1870 (creating advisory councils to improve delivery of government services to Latin Americans).

211. *E.g.*, Act. of 2011, no. 73, sec. 65.12, 2011 S.C. Acts 1212.

along the way, would be enacted and quickly copied by like-minded jurisdictions. Then, jurisdictions with opposing viewpoints would enact laws that either prohibited the enactment of the original law or more proactively protected the right at issue.

Hazleton's 2006 Illegal Immigration Act Ordinance was certainly novel. The ordinance required landlords to check for tenants' "occupancy permits," which the tenants obtained from a city office after showing proof of legal immigration status.[212] At that time, no other jurisdiction in the United States made the renting of private housing dependent on legal immigration status; with its Illegal Immigration Act Ordinance, Hazleton took the unprecedented step of placing private landlords in an enforcement role, making them gatekeepers to an important necessity—housing.[213]

Hazleton's mayor, Lou Barletta, stated that the basic purpose of the law was to make Hazleton hostile for unauthorized immigrants and denied that there was any racial motive. "I had to declare war on the illegals," Barletta asserted.[214] "This isn't racial, because 'illegal' and 'legal' don't have a race."[215] Detractors argued that the ordinance encouraged discrimination against Hispanic residents, violated federal and state housing laws, and overstepped the powers of a local government.[216] Hazleton's housing law was quickly copied, first by surrounding Pennsylvania townships like West Hazleton and Hazle Township, but soon, by cities as far away as Valley Park, Missouri and Escondido, California; thirteen of these laws were enacted in 2006, the same year as Hazleton's law, and some of these laws copied the entirety of the Hazleton ordinance almost word for word.[217]

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212. Hazleton, Pa., Ordinance 2006-18 (Sept. 8, 2006).

213. *See* Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEORGETOWN L.J. 777 (2008).

214. Michael Powell & Michelle García, *Pa. City Puts Illegal Immigrants on Notice*, NBC NEWS (Aug. 22, 2006), https://www.nbcnews.com/id/wbna14463098 [https://perma.cc/RG7W-RJFU].

215. *Id.*

216. *Id.*

217. Chico Harlan, *In These Six American Towns, Laws Targeting 'The Illegals' Didn't Go as Planned*, Wash. Post (Jan. 26, 2017), https://www.washingtonpost.com/business/economy/in-these-six-american-towns-laws-targeting-the-illegals-didnt-go-as-planned/2017/01/26/b3410c4a-d9d4-11e6-9f9f-5cdb4b7f8dd7_story.html [https://perma.cc/9FTS-L8HJ]; *compare supra* note 212 (Hazleton's ordinance stating that "United States Code Title 8, subsection 1324(a)(1)(A) prohibits the harboring of illegal aliens. The provision of housing to illegal aliens is a fundamental component of harboring."), *with* Escondido, Cal., Ordinance No. 2006-38 R (Oct. 18, 2006) (Escondido's ordinance stating that "United States Code Title 8, subsection 1324(a)(1)(A) prohibits the

These housing laws faced legal challenges in court, with both the Third and Fifth Circuit Courts of Appeals striking down these laws on preemption grounds.[218] The Third Circuit held that Hazleton's ordinance impermissibly regulated immigration because it attempted to mandate that only those with lawful status may live in the community.[219] The court noted the danger of this type of local law, which would eviscerate the federal government's sole authority to regulate immigration, if enacted in many municipalities.[220] In striking down the ordinance enacted in Farmers Branch, Texas, the Fifth Circuit held that the ordinance (which tracked Hazleton's law) conflicted with federal anti-harboring laws and federal laws giving the federal government the sole authority to determine legal immigration status and to prosecute immigration violations.[221]

Interestingly, the Eighth Circuit upheld Fremont, Nebraska's housing law, holding that the ordinance—which largely tracked the Hazleton and Farmers Branch laws—was not preempted by federal law.[222] The Fremont law, the court held, did not intrude on the federal government's prerogative to determine the lawful presence of immigrants in the community or make removal determinations.[223] The court also held that Fremont's ordinance did not violate federal anti-harboring law because, while it defined "harboring" more expansively than federal law, it expressly exempted types of harboring permissible under federal law from local prosecution.[224] Since that decision was issued, another Nebraska city, Scribner, enacted a similar restrictive housing ordinance.[225]

Facing these legal headwinds, the restrictive laws became less popular after the initial wave in 2006. But the restrictive laws existed long enough to inspire other subfederal governments to enact positive housing laws, either prohibiting any Hazleton-type

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harboring of illegal aliens. The provision of housing to illegal aliens is a fundamental component of harboring.").

218. *See infra* notes 219–21.

219. *See* Lozano v. City of Hazleton, 620 F.3d 170, 220–21 (3d Cir. 2010), *vacated sub nom.* City of Hazleton, Pa. v. Lozano, 563 U.S. 1030 (2011).

220. *Id.* at 221.

221. *See* Villas at Parkside Partners v. City of Farmers Branch, Tex., 726 F.3d 524, 530–31 (5th Cir. 2013) (en banc).

222. *See* infra note 223.

223. *Keller v. City of Fremont*, 719 F.3d 931, 942 (8th Cir. 2013).

224. *Id.* at 943.

225. *Scribner Voters Approve Ordinance Barring Illegal Immigrants from Housing, Jobs*, AP NEWS (Nov. 9, 2018), https://apnews.com/article/immigration-nebraska-fremont-46b86680fcf64a68aa69306160ef7d80 [https://perma.cc/78SV-RHW5].

requirement for landlords or more directly protecting the right of immigrant tenants to access private housing. For example, in 2007, the State of California passed the Immigrant Tenant Protection Act, which prohibits landlords from inquiring about the immigration or citizenship status of tenants or prospective tenants; landlords are also barred from disclosing a tenant or prospective tenant's immigration status, with the intent to harass, intimidate, retaliate, or influence a tenant to vacate.[226] The Act also prohibits any local government in the state from enacting contrary ordinances.[227] And in 2018, Boulder, Colorado enacted Ordinance 8249, which amended the city's Human Rights Code to prohibit landlords from inquiring into a prospective tenant's immigration status or refusing to rent to a prospective tenant based on immigration status.[228] Table 2 below has a list of Hazleton and Counter-Hazleton Housing Laws.

Table 2: Hazleton, Copies, and Counter Housing Laws

Jurisdiction	Year Enacted
Hazleton, PA	2006
Valley Park, MO	2006
West Hazleton, PA	2006
Hazle Township, PA	2006
Gilberton, PA	2006
Berwick, PA	2006
Riverside, NJ	2006
Escondido, CA	2006
Altoona, PA	2006
Bridgeport, PA	2006
Farmers Branch, TX	2006

226. Cal. Civ. Code § 1940.05 (West 2018).
227. Cal. Civ. Code § 1940.3 (West 2018).
228. Boulder, Co. Rev. Code tit. 12, § 12-1-2 (2018).

Gaston County, NC	2006
Inola, OK	2006
Cherokee County, GA	2006
State of California	2007
San Francisco, CA	2008
Fremont, NE	2014
State of California	2017
Boulder, CO	2018
Scribner, NE	2018
Alachua County, FL	2019
Annapolis, MD	2019
Pittsburgh, PA	2020
Denver, CO	2020

So, though the original restrictive laws may have had limited direct impact because of legal challenges, they had important ripple effects by connecting the availability of housing to lawful immigration status and entangling landlords with immigration law enforcement. For the first time, access to private housing became a frontline issue in immigration enforcement, with its denial seen by restrictionists as a way to deter unauthorized immigration and its protection seen by immigrant advocates as an important civil right.[229] With a significant number of subfederal governments

229. These housing laws have inspired thoughtful scholarship. *See, e.g.*, Rigel C. Oliveri, *Between a Rock and a Hard Place: Landlords, Latinos, Anti-Illegal Immigrant Ordinances, and Housing Discrimination*, 62 VAND. L. REV. 55 (2009) (calling on Congress to prohibit anti-immigrant housing ordinances because the ordinances will likely lead to discrimination against "foreign-seeming" people); Chad G. Marzen, *Hispanics in the Heartland: The Fremont, Nebraska Ordinance and the Future of Latino Civil Rights*, 29 HARV. J. RACIAL & ETHNIC JUST. 69 (2013) (analyzing the housing ordinances in the context of the movement for Latino civil rights); Kristina M. Campbell, *Local Illegal Immigration Relief Act Ordinances: A Legal, Policy, and Litigation Analysis*, 84 DENV. U. L. REV. 1041 (2007) (analyzing

taking a position on this issue, these restrictive housing laws, and the opposing laws they inspired, deepened the nation's partisan divide on immigration issues.

The Copycat and Opposing Law Cycle: Arizona's S.B. 1070 Enforcement Law

Another example of this copycat-opposing law cycle started with Arizona's S.B. 1070, the Support Our Law Enforcement and Safe Neighborhoods Act, enacted in 2010 and described by its supporters as a way to stand up against "decades of federal inaction"[230] and remove political handcuffs to enable police to enforce immigration laws.[231] The law was novel in its attempts to create new state crimes for offenses that had previously only been penalized, if penalized at all, under federal immigration laws and to give state and local law enforcement more authority to enforce existing federal immigration laws. For example, Section 3 made it a state offense for an immigrant not to carry their federally issued alien registration card,[232] an offense previously only punishable under federal law.[233] And in perhaps its most controversial provision, Section 2(B) required all state law enforcement authorities to determine the immigration status of all persons who are detained, stopped, or arrested and are suspected of unauthorized status.[234]

Thus, the goal of S.B. 1070 was clear: to give more immigration enforcement control to state and local authorities in Arizona, who would presumably engage in more rigorous enforcement than federal authorities were perceived to be engaging in. "[W]illing to do the job that the federal government won't do" was a frequent rallying cry for those who supported the state's increasingly harsh immigration regulations.[235] Arizona had already enacted other negative immigration laws, including the Legal Arizona Workers

anti-immigrant housing ordinances and possible challenges to them based on Fair Housing Act and federal preemption arguments).

230. Scott Wong, *States Defy Arizona-law Backlash*, POLITICO (Apr. 27, 2011), https://www.politico.com/story/2011/04/states-defy-arizona-law-backlash-053826 [https://perma.cc/KNX2-CCW3] (quoting then-Arizona governor Jan Brewer).

231. *Divisive Ariz. Immigration Bill Signed Into Law*, CBS NEWS (Apr. 23, 2010), https://www.cbsnews.com/news/divisive-ariz-immigration-bill-signed-into-law/ [https://perma.cc/MRC7-GRLC].

232. ARIZ. REV. STAT. ANN. § 13-1509 (2010) (invalidated 2012).

233. Ann Morse, *Arizona's Immigration Enforcement Laws*, NAT'L CONF. STATE LEGISLATURES (July 28, 2011), https://www.ncsl.org/research/immigration/analysis-of-arizonas-immigration-law.aspx#Similar_Bills [https://perma.cc/ZS3W-4TPK].

234. ARIZ. REV. STAT. ANN. § 11-1051 (2010).

235. Wong, *supra* note 230.

Act that required Arizona employers to use the federal E-Verify system to verify the work eligibility of their employees and revoked the business licenses of those employers who hire unauthorized workers.[236] But it was S.B. 1070 that cemented Arizona's strident anti-immigration reputation. Described as "the nation's toughest legislation against illegal immigration," S.B. 1070 was widely condemned, including by then-President Obama, who said the measure would "threaten to undermine basic notions of fairness . . . as well as the trust between police and their communities."[237] Other opponents called the law a discriminatory policy that would result in "breaches of due process and equal protection."[238]

Advocates for and against S.B. 1070 found receptive ears in different state legislatures. First, arguments by proponents inspired copycat proposals in no less than ten states. Of those ten states, five—Utah,[239] Georgia,[240] Indiana,[241] Alabama,[242] and South Carolina[243]—moved forward to enact S.B. 1070-like legislation in 2011.[244] Typical of the copycat laws was Georgia's Illegal Immigration Reform and Enforcement Act of 2011. This law mirrored S.B. 1070's provisions by making it a crime to knowingly harbor or transport unauthorized immigrants, empowered law enforcement to check the immigration status of people reasonably suspected of being present in the country illegally, and also expanded the requirement for employers to use the federal E-Verify system.[245] Similarly restrictive laws were proposed but not enacted in the blue-ish states of Pennsylvania, Minnesota, Rhode Island, Michigan, and Illinois.[246]

Like the Hazleton housing law, S.B. 1070 also faced legal challenges, challenges that reached the Supreme Court. In a 5-3

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236. ARIZ. REV. STAT. ANN. § 23-212 (2010).

237. CBS NEWS, *supra* note 231.

238. Kasie Hunt, *Arizona Gov. Signs Immigration Law*, POLITICO (Apr. 23, 2010), https://www.politico.com/story/2010/04/arizona-gov-signs-immigration-law-036283 [https://perma.cc/5B9Q-TCKQ].

239. Utah Illegal Immigration Enforcement Act, H.B. 497, Gen. Sess. (2011).

240. Georgia Illegal Immigration Reform and Enforcement Act of 2011, H.B 87, 151st Gen. Assemb., Reg. Sess. (2011).

241. S.B. 590, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011).

242. Beason-Hammon Alabama Taxpayer and Citizen Protection Act, H.B. 56, 2011 Leg., Reg. Sess. (2011).

243. South Carolina Act of June 27, 2011, no. 69, 2011 S.C. Acts 325.

244. NAT'L IMMIGR. L. CTR., *supra* note 32.

245. Georgia Illegal Immigration Reform and Enforcement Act of 2011, H.B. 87, 151st Gen. Assemb., Reg. Sess. (2011).

246. Morse, *supra* note 233.

decision issued in 2012, the Court struck down three provisions of S.B. 1070 as preempted by federal law.[247] Those provisions purported to create new state crimes for immigration-related behavior (working without authorization and not carrying an alien registration card) and to give state law enforcement officers the power to make warrantless arrests for immigration offenses.[248] However, the Court upheld the most controversial provision of S.B. 1070—the "show me your papers" provision that requires law enforcement officers to check the immigration status of any person they stop, detain, or arrest if they suspect that the person does not have lawful immigration status.[249]

While these legal challenges were unfolding, other states were enacting laws to challenge S.B. 1070. In 2010, when S.B. 1070 was enacted, several states passed resolutions protesting the law, urging boycotts of Arizona and Arizona businesses.[250] But it wasn't until 2012 that the first state enacted an opposition law directly linked to S.B. 1070. In July 2012, California enacted the California Transparency and Responsibility Using State Tools Act (TRUST Act), which prohibits state law enforcement officers from honoring ICE detainer requests, except under certain circumstances (like detainer requests for individuals who have committed serious or violent felonies).[251] Although its legislative history suggests that state legislators were also protesting the federal Secure Communities and the high removal rates of the first Obama Administration, the history is also clear that the TRUST Act was designed to be an "anti-Arizona" law.[252] After the California Senate had approved the TRUST Act, its sponsor, Assemblyman Tom Ammiano, commented, "Today's vote signals to the nation that California cannot afford to be another Arizona."[253]

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247. Arizona v. United States, 567 U.S. 387, 416 (2012).

248. *Id.* at 400, 403, 407.

249. *Id.* at 416.; Alisa Reznick, *'Show me your papers': A decade after SB 1070*, AZPM NEWS (July 30, 2020), https://news.azpm.org/p/news-splash/2020/7/30/177558-show-me-your-papers-a-decade-after-sb-1070/ [https://perma.cc/V8FN-NBT8].

250. Anna Gorman & Nicholas Riccardi, *Calls to Boycott Arizona Grow over New Immigration Law*, L.A. TIMES (Apr. 28, 2010), https://www.latimes.com/archives/la-xpm-2010-apr-28-la-me-0428-arizona-boycott-20100428-story.html [https://perma.cc/E683-ZFRQ].

251. CAL. GOV'T CODE § 7282 (West 2018).

252. *California Senate Passes "anti-Arizona" Immigration Bill*, REUTERS (July 5, 2012), https://www.reuters.com/article/us-usa-california-immigration/california-senate-passes-anti-arizona-immigration-bill-idUSBRE86502720120706 [https://perma.cc/X924-YPNX].

253. *Id.*

To be sure, cities and counties had previously enacted sanctuary-type laws, limiting cooperation between local police and ICE, but California's TRUST Act was the first to bring sanctuary laws to the state level.[254] In 2013, Connecticut enacted its own TRUST Act, and Illinois did the same in 2017.[255] Both acts placed broad restrictions on the authority of state law enforcement officers to honor federal immigration detainers.[256] Though not labeled as TRUST acts, other states enacted similar laws that limited the authority of their law enforcement agencies to enforce or cooperate with federal enforcement of immigration laws. Colorado, for example, moved to TRUST-type status by enacting several different laws. First, the state revoked previous legislation that had prohibited sanctuary cities and required law enforcement agencies to report unauthorized persons to ICE in 2013.[257] Then Colorado prohibited the honoring of ICE detainers at all jails in 2014,[258] eventually extending the detainer prohibition to all law enforcement agencies and officers in 2019.[259]

Thus, Arizona's enactment of S.B. 1070 had wide-ranging effects, well beyond the state's borders. It inspired both copycat and counter laws, and in doing so, elevated subfederal disagreement about federal ICE cooperation to the state level. This elevation is compelling for several reasons. Most obviously, state laws have broader geographic reach, so a decision at the state level to cooperate or not cooperate with federal immigration enforcement will have more significant, and presumably more uniform, effects than a similar law enacted only at the city or county level. But perhaps more importantly, the elevated disagreement becomes more visible on the national stage, cementing a state's reputation on these issues and further increasing the national partisan divide on immigration issues.

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254. Danielle Riendeau, *TRUST Act: California Could Set National Model for Correcting the Damage Done by S-Comm*, ACLU (July 23, 2012), https://www.aclu.org/news/national-security/trust-act-california-could-set-national-model-correcting-damage-done-s-comm [https://perma.cc/P7R7-CU6D].

255. CONN. GEN. STAT. § 54-192h; 5 ILL. COMP. STAT. 805/1 (2017).

256. *Id.*

257. 29 COLO. REV. STAT. 29-29, *repealed by* H.B. 13-1258 (2013).

258. Keith Coffman, *All County Sheriffs in Colorado Halt Federal Immigration Holds: ACLU*, REUTERS (Sept. 18, 2014), https://www.reuters.com/article/us-usa-colorado-immigration/all-county-sheriffs-in-colorado-halt-federal-immigration-holds-aclu-idUKKBN0HD2PI20140918 [https://perma.cc/W8GT-EY2E].

259. 2019 Colo. Sess. Laws 2759. See Table 3 for a list of S.B. 1070 and counter-S.B. 1070 enforcement laws.

Table 3: S.B. 1070, Copies, and Representative Counter-Enforcement Laws

State	Year	Name	Description
Arizona	2010	S.B. 1070	Expanded state and local authority to enforce federal immigration law
Alabama	2011	H.B. 56	Required employers to verify employees' legal status
Georgia	2011	H.B. 87	Empowered police to check immigration status of suspected undocumented people
Indiana	2011	S.B. 590	Permitted police to arrest possessors of certain immigration-related documents
South Carolina	2011	S.B. 20	Required police to demand proof of legal status during traffic stops based on reasonable suspicion
Utah	2011	H.B. 497	Authorized police to verify immigration status of individuals they stopped
California	2013	TRUST Act	Prohibited honoring federal immigration detainers except in limited circumstances
Colorado	2013	H.B. 13-1258	Repealed state law that prohibited sanctuary cities and required law enforcement to report unauthorized persons to ICE

Connecticut	2013	Trust Act	Prohibited honoring federal immigration detainers except in limited circumstances
Colorado	2014	N/A	Stopped jails from honoring federal immigration detainers
Illinois	2017	TRUST Act	Prohibited honoring federal immigration detainers except in limited circumstances
Vermont	2017	Fair and Impartial Policing Policy	Required police to adopt policies prohibiting honoring immigration detainers
New Jersey	2018	Immigrant Trust Directive	Issued new rules to state, county, and local police and corrections officers prohibiting them from detaining immigrants at the request of ICE
Colorado	2019	H.B. 19-1124	Prohibited honoring of federal immigration detainers except in limited circumstances
Washington	2019	S.B. 5497	Prohibited honoring federal immigration detainers except in limited circumstances
D.C.	2020	D.C. Law 23-282	Prohibited honoring federal immigration detainers except in limited circumstances
Maryland	2021	H.B. 0016	Prohibited honoring of federal immigration detainers except in limited circumstances

Opposing Law Cycle: Subfederal Interactions Within Jurisdictions

We have focused thus far on interactions between subfederal governments that are either equal (e.g., state-state) or otherwise have no overlapping jurisdiction (e.g., state and city in another state). With the multiple views afforded by the ICI data, we have also observed interactions *within* jurisdictions which, because of their hierarchical relationships, create a complicated dynamic. The most common intra-jurisdiction interaction we have observed are red states enacting anti-sanctuary laws to respond to, and override, positive blue city or county policies.[260] Like the Hazleton and S.B. 1070 examples discussed above, the states are reacting to another subfederal government's immigration policies, but unlike the earlier examples, states have considerable legal and financial authority over cities and counties within their borders. Thus the end result, at least in terms of laws and policies, is not only the suppression by states of disfavored immigration laws and policies enacted at the city and county levels, but a widening partisan divide on immigration issues.

In our discussion of ICI trends across different presidential administrations, we noted that during Obama II, we started to see a partisan divide within red states, with positive policing laws enacted at the city and county levels.[261] That divide became a chasm during the Trump Administration, with red states enacting anti-sanctuary laws to prohibit positive policing laws at the city and county levels.[262] An instructive example comes from Texas. The sheriffs' offices in Dallas County and Travis County (including Austin) had developed policies limiting their cooperation with federal immigration enforcement.[263] In response, Governor Greg Abbott made passing anti-sanctuary laws a legislative priority. In an October 2015 letter to Dallas County Sheriff Lupe Valdez, Abbott wrote:

> Your refusal to fully participate in a federal law enforcement program intended to keep dangerous criminals off the streets [(the immigration detainer program)] leaves the State no choice

260. *See infra* note 279.

261. *See supra* notes 25, 168.

262. *See infra* note 279.

263. Morgan Smith, *Abbott: No State Grants for Sheriffs Who Don't Work with ICE*, TEX. TRIB. (Nov. 4, 2015), https://www.texastribune.org/2015/11/04/abbot-no-state-grants-sheriffs-who-dont-work-ice/ [https://perma.cc/B8DW-KQL4]; Patrick Svitek, *Gov. Abbott Demands Travis County Reverse New "Sanctuary" Policy*, TEX. TRIB. (Jan. 23, 2017), https://www.texastribune.org/2017/01/23/abbott-demands-hernandez-reverse-new-sanctuary-pol/ [https://perma.cc/CK8H-MWWM].

> but to take whatever actions are necessary to protect our fellow Texans. . . . At a minimum, Texas must pass laws that prohibit any policy or action like yours that promotes sanctuary to people in this state illegally. The State must also enact laws that make it illegal for a Sheriff's Department to not honor a federal immigration detainer request.[264]

He wrote a similarly threatening letter to Travis County Sheriff Sally Hernandez in January 2017.[265]

Several months later, in May 2017, Texas enacted S.B. 4, which requires all law enforcement agencies to honor all ICE detainer requests, allows law enforcement officers to question the immigration status of all those arrested or detained, and threatens agency leaders with fines, criminal penalties, and removal from office for violations.[266] The law also imposed penalties for statements or policies that hindered cooperation with federal immigration enforcement.[267] The biggest cities in Texas, including Austin, Dallas, and Houston (all under Democratic leadership), sued and won temporary relief when a district court judge held that S.B. 4 violated the First Amendment rights of agency officials.[268] But the law was eventually upheld by a panel of the Fifth Circuit, requiring the plaintiff cities to rescind their sanctuary policies and cooperate with federal immigration enforcement.[269] Without the benefit of preemption arguments or even the Tenth Amendment arguments that states invoke to fight federal commandeering, the plaintiff cities were forced to comply with S.B. 4.[270]

Another example of partisanship within states is the interaction between Kansas City/Wyandotte County and the state of Kansas. In February 2022, the Unified Government of Kansas City and Wyandotte County enacted a Safe and Welcoming City Act

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264. Letter from Greg Abbott, Governor of Texas, to Lupe Valdez, Sheriff of Dallas County (Oct. 26, 2015), https://gov.texas.gov/uploads/files/press/DallasCounty_FederalImmigrationDetainer_10262015.pdf [https://perma.cc/UZU5-JRC9].

265. Letter from Greg Abbott, Governor of Texas, to Sally Hernandez, Sheriff of Travis County (Jan. 23, 2017), https://gov.texas.gov/uploads/files/press/TravisCountySheriffSanctuaryCity_01232017.pdf [https://perma.cc/4C9F-B2BV].

266. S.B. 4, 85th Tex. Leg. (2017).

267. *Id.*

268. Manny Fernandez, *Federal Judge Blocks Texas' Ban on Sanctuary Cities*, N.Y. TIMES (Aug. 30, 2017), https://www.nytimes.com/2017/08/30/us/judge-texas-sanctuary-cities.html [https://perma.cc/DH75-JATB].

269. El Cenizo, Texas v. Texas, 890 F.3d 164 (5th Cir. 2018).

270. Julián Aguilar, Federal Appeals Court's Ruling Upholds Most of Texas' "Sanctuary Cities" Law, TEX. TRIB. (Mar. 13, 2018), https://www.texastribune.org/2018/03/13/texas-immigration-sanctuary-cities-law-court/ [https://perma.cc/PU7F-MAKA].

that codified long-standing prohibitions that prevented local police from: assisting ICE in enforcing immigration laws, collecting immigration information during policing activities, transferring information to ICE unless required by law, and entering into 287(g) agreements.[271] The Act also provided for the creation of identification cards, which could be used by undocumented immigrants.[272] As the most diverse county in Kansas, the Act's sponsors said that the law was intended to improve public services and quality of life for its residents.[273]

The reaction from the state was swift and severe. In April 2022, the state enacted HB 2717, which used broad, sweeping language to prohibit municipalities from limiting or restricting the enforcement of federal immigration laws.[274] The law also prohibited municipalities from issuing identification cards to be used for state purposes and authorizes the state attorney general or county district attorneys to file lawsuits to force compliance with its provisions.[275] In explaining his support for H.B. 2717, Republican Attorney General Derek Schmidt said that he objected to the Wyandotte law because it created a "sanctuary jurisdiction for illegal immigrants."[276]

Alhough H.B. 2717's language was ambiguous, creating confusion for municipalities within Kansas,[277] Wyandotte County quickly rescinded the policing provisions of its Welcoming City Act. The County also modified its municipal ID program, renaming it a "community identification" program, specifying that the identification could not be used for state purposes, and switching

271. UNIFIED GOV'T OF WYANDOTTE CNTY./KANSAS CITY, KAN. CODE OF ORDINANCES ch. 18, §§ 18-162–18-168 (amended).

272. *See id.* The identification cards were also designed to be used by veterans, the elderly, and people with disabilities. *Id.*

273. Tim Carpenter, *Kelly Signs Bill Spiking Wyandotte County's Adoption of 'Sanctuary' City Policy*, KAN. REFLECTOR (Apr. 11, 2022), https://kansasreflector.com/2022/04/11/kelly-signs-bill-spiking-wyandotte-countys-adoption-of-sanctuary-city-policy/ [https://perma.cc/5CEP-X7YT].

274. KAN. STAT. ANN. §§ 8-1327, 25-2908 (2022).

275. *Id.* The state law also contained language that prohibits municipalities from enacting any ordinance that would restrict communication with federal immigration authorities, language that largely tracks pre-existing prohibitions under federal law. 8 U.S.C. §§ 1373, 1644.

276. Carpenter, *supra* note 273.

277. Noah Taborda, *Kansas Immigrants Say They Face 'Unsafe and Unwelcome' State Under Law Banning Sanctuary Cities*, KANSAS REFLECTOR (May 28, 2022), https://www.kcur.org/news/2022-05-28/kansas-immigrants-say-they-face-unsafe-and-unwelcome-state-under-law-banning-sanctuary-cities [https://perma.cc/V3X2-883A].

the program's administration from city officials to a contracted nonprofit organization.[278]

With these *intrastate* examples, we see a different dynamic. Like the *interstate* conflicts, we see disagreement with immigration policy preferences expressed through reactive laws. But here, these conflicts do not manifest in the formal laws or policies that would measurably affect our ICI measures. Rather, because of the power imbalance, state preferences on immigration issues will override any contrary city and county laws if the state legislature decides to act.[279] But the policy disagreements remain, increasing the national polarization on immigration issues.

Conclusion

To summarize our main empirical findings: in its most modern chapter, subfederal immigration regulation has expanded significantly, in both its geographic range and in its substance. By the end of 2020, there were more than 3,200 laws, reaching every state and important facets of daily life: policing and access to private housing, driver's licenses, employment, education, and public benefits. During Bush II, these laws were more non-partisan in nature, with a significant number of blue jurisdictions enacting negative laws and red jurisdictions enacting positive laws. But during the Obama Administrations, subfederal regulation took a decidedly partisan turn. Restrictive laws enacted by red jurisdictions skyrocketed, even though President Obama engaged in historically high levels of immigration enforcement, both at the border and in the interior of the country (measured by numbers of deportations and detainer requests). Following a similar pattern, blue jurisdictions enacted record numbers of positive laws during the Trump Administration, enough to pull the national ICI into

278. Safe and Welcoming City Act, Wyandotte County/Kansas City, KS, §§ 18-162–18-168 (2022) https://civicclerk.blob.core.windows.net/stream/WYCOKCK/294585e9-138a-4b8c-98c7-eb6da8ecefa9.pdf?sv=2015-12-11&sr=b&sig=K1wAlwKmmb%2FIsqcnkMCJ4ziwILIuswMDfJaA6F2LNVY%3D&st=2022-08-25T03%3A40%3A15Z&se=2023-08-25T03%3A45%3A15Z&sp=r&rscc=no-cache&rsct=application%2Fpdf [https://perma.cc/LH5P-84QK].

279. Pratheepan Gulasekaram, Rick Su & Rose Cuison Villazor, *Anti-Sanctuary and Immigration Localism*, 19 COLUM. L. REV. 837 (2019) (analyzing the tension between states and localities regarding anti-sanctuary laws); Karla Mari McKanders, *Immigration to Blue Cities in Red States: The Battleground Between Sanctuary and Exclusion*, 21 U. PA. J. CONST. L. 1051 (2019) (examining the political and ideological contours of state and local exclusionary and sanctuary laws in the context of the Trump Administration).

positive territory for the first time ever. Interestingly, these laws—mostly sanctuary laws designed to protect immigrants from deportations—were enacted even as the Trump Administration engaged in historically average levels of immigration enforcement (again measured by numbers of deportations and detainer requests).

What do these findings portend for immigration law and policy? Taking the long view afforded by the ICI data, we observe that the number of subfederal laws has tapered from its highs, but that partisanship continues to fuel their enactment. Others have identified partisanship as the main determinant of subfederal immigration regulation;[280] we use our ICI data to demonstrate the ways that subfederal regulation itself increases national partisanship on immigration issues. Specifically, in Section II we explained how subfederal regulation expanded the substantive reach of immigration regulation, creating new flashpoints for partisan identification and disagreement, and we also identified patterns of copycat and opposition enactments.[281] While partisanship as a determinant of subfederal activity has remained largely constant,[282] we note here that the political identification of subfederal jurisdictions can change, often resulting in changed immigration regulation. Colorado, for example, in 2006 enacted one of the first and most negative laws, S.B. 90, that prohibited local sanctuary legislation.[283] During the previous presidential election, Colorado had voted for George W. Bush.[284] But as Colorado turned bluer in its political identification,[285] its immigration regulations also became more positive. Some examples of those positive laws include prohibiting the honoring of federal immigration detainers except in limited circumstances,[286] establishing legal defense funds

280. *See, e.g.*, PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, THE NEW IMMIGRATION FEDERALISM (2015), (focusing on the importance of advocates and policy entrepreneurs in the proliferation of state-level immigration legislation); *see also* Doris Marie Provine, Monica W. Varsanyi, Paul G. Lewis & Scott H. Decker, POLICING IMMIGRANTS: LOCAL LAW ENFORCEMENT ON THE FRONT LINES (2016) (examining the role of local police in immigration law enforcement).

281. *See supra* Part II.

282. As we note in Part II, subfederal immigration regulation started as a more non-partisan phenomenon.

283. 2006 Colo. Legis. Serv. ch. 177 (S.B. 06–090) (West).

284. *Colorado*, 270 TO WIN, https://www.270towin.com/states/Colorado [https://perma.cc/KZ5D-MKYF].

285. In 2016, for example, Colorado voted for Hillary Clinton for president, and in 2020, it voted for Joseph Biden. *Id.*

286. 2019 Colo. Legis. Serv. ch. 299 (H.B. 19-2759) (West).

to pay for legal fees for immigrants in deportation proceedings,[287] and allowing undocumented immigrants to access in-state tuition.[288] Now, Colorado has one of the most positive state scores in the ICI.

As we look to the future of subfederal immigration regulation, we see several likely developments. First, as the number of politically purple jurisdictions dwindles[289] and the congressional gridlock on immigration reform continues, we are likely to see more subfederal jurisdictions joining the fray of immigration regulation. An example of that increased immigration involvement is Virginia: in 2018, after Democrats took full control of state government for the first time in decades,[290] the state enacted one of its first substantial immigration regulations, H.B. 1211, which allows unauthorized immigrants to obtain driver's licenses.[291] And if Texas is representative, we may also expect to see more extreme subfederal regulations emerge. We noted earlier that Texas Governor Greg Abbott has mobilized state National Guard troops to arrest presumed unauthorized immigrants under Operation Lone Star.[292] Some of those immigrants have been transported back to the border to await federal deportation, but others have been charged with criminal trespass, a misdemeanor under state law, and are being detained and tried through criminal processes.[293] By punishing immigrants through its own criminal legal system, Texas' most recent laws are an escalation from previous negative policing laws that merely sought to increase the number of immigrants funneled into federal removal processes.

Finally, as we look further toward the future of subfederal regulation, we believe that perhaps the most accurate predictor of any particular jurisdiction's activity—both in terms of volume and

287. 2021 Colo. Legis. Serv. ch. 352 (H.B. 21-1194) (West).

288. 2013 Colo. Legis. Serv. ch. 156 (S.B. 13-033) (West).

289. Wendy Underhill & Ben Williams, *2022 Midterm Elections: 11 Takeaways*, NAT'L CONF. STATE LEGISLATURES (Nov. 17, 2022), https://www.ncsl.org/research/elections-and-campaigns/2022-midterm-elections-11-takeaways-magazine2022.aspx [https://perma.cc/LZ8Q-EV5P] (noting that the number of state governments under one-party control continues to increase).

290. *Virginia Democrats Take Control of State Legislature for First Time in over Two Decades,* NBC NEWS (Nov. 5, 2019), https://www.nbcnews.com/politics/politics-news/democrats-capture-virginia-state-senate-first-time-years-house-grabs-n1077036 [https://perma.cc/L8W4-EQ78].

291. 2020 Va. Laws ch. 1227 (H.B. 1211).

292. Cuellar, *supra* note 7.

293. Julie McCullough, *More Than 100 Civil Rights Groups Ask Feds to Slash Texas Funding over Migrant Trespassing Arrests,* TEX. TRIB. (Dec. 15, 2021), https://www.texastribune.org/2021/12/15/migrant-arrests-border-security-complaint/ [https://perma.cc/K5CM-FRSM].

the restrictive/integrationist orientation of its laws—is the combination of both the political identification of the jurisdiction (red/blue) and the political identification of the President. Specifically, a jurisdiction is most likely to be active when its political identification differs from the political identification of the President. We noted in Part II that (1) red jurisdictions were most active and most negative during President Obama's first term, a period of historically high immigration enforcement, and (2) blue jurisdictions were most active and most positive during the Trump Administration, a period of historically average immigration enforcement. We see a similar pattern in current times: since the beginning of the Biden Administration, Texas has enacted some of its most restrictive policies (including Operation Lone Star), and its governor has harshly criticized the Administration's "open-border policies,"[294] although Biden has largely continued many of Trump's border policies.[295]

Looking at the bigger theoretical implications, these dynamics certainly present a strong case study of partisan federalism, where firmly polarized state actors channel their partisan fights through both state and federal forums, taking advantage of the institutional federalist framework.[296] But the ICI data, compared with federal enforcement data, suggests that the partisanship driving the enactment of subfederal laws is more tethered to party identification (and disassociation from the other party) and less connected to policy positions.[297] The target audience for these subfederal laws may not be the federal government at all, but rather voters within the subfederal jurisdictions, with the laws serving as political signaling. Our case study and these observations provide rich material for further exploration by federalism scholars.

Finally, our data collection and analysis of polarization trends in subfederal immigration law may add insights into other areas of

294. Armando Garcia, *Abbott Exhorts Biden to Help Curb Immigration at the Border, Claiming It's an 'Invasion'*, ABC NEWS (Nov. 20, 2022), https://abcnews.go.com/Politics/abbott-exhorts-biden-curb-immigration-border-claiming-invasion/story?id=93445128 [https://perma.cc/Y7FU-S5E7].

295. Hamed Aleaziz & Courtney Subramanian, *Biden Announces Major Border Strategy Shift, Expands Trump Policy*, LA TIMES (Jan. 5, 2023). https://www.latimes.com/politics/story/2023-01-05/biden-new-border-strategy [https://perma.cc/ML8S-T6GP].

296. Bulman-Pozen, *supra* note 20.

297. *See* James N. Druckman, Samara Klar, Yanna Krupnikov, Matthew Levendusky & John Barry Ryan, *Affective Polarization, Local Contexts and Public Opinion in America*, 5 NATURE HUM. BEHAV. 28, 28 (2021) (suggesting that partisanship is a form of social identification, to divide our world into two groups: our liked in-group and the disliked out-group (the other party)).

law where polarization is emerging. With the reversal of *Roe v. Wade*[298] and the ending of federal abortion rights rooted in the United States Constitution, states are rushing to enact laws to either prohibit or protect abortion access within their jurisdictions. Interestingly, states are also reacting to other states' laws. For example, New Mexico Governor Michelle Lujan Grisham issued an executive order, allocating $10 million to build an abortion clinic close to the state's border with Texas, where abortion access has been heavily restricted.[299] Our analysis of polarization in subfederal immigration regulation may provide insights into the polarization dynamics in the abortion debate and other contexts where lawmaking has devolved to the subfederal level.

298. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

299. Andrew Jeong, *N.M. Plans $10M Abortion Clinic Near Tex. Border, Expecting Post-Roe Demand*, WASH. POST (Sept. 1, 2022) https://www.washingtonpost.com/nation/2022/09/01/new-mexico-abortion-clinic-texas-border/ [https://perma.cc/BP67-6R8C].

Sword or Shield? The Weaponization of Title IX Against Transgender Athletes

Jacqueline Brant†

Introduction

Transgender people in the United States are under attack. There are currently over 1.6 million people above the age of thirteen who identify as transgender in the United States.[1] Trans issues have gained national attention in the political arena, leading to increased rates of violence and anti-trans legislation.[2] 2021 was a record-breaking year for the highest number of violent fatal incidents against transgender people, the majority of whom were people of color.[3] As of 2023, forty-five states had laws or pending legislation targeting the transgender community.[4] There were more than 300 anti-trans legislative proposals in 2022, 140 of which sought to deny trans-related medical care to trans youth.[5] Other examples of anti-trans legislation include banning gender changes

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†. Jacqueline Brant is a law student at University of Minnesota Law School with a concentration in civil litigation and is an incoming associate at Bowman and Brooke LLP. She is also a former member of the Oberlin College Women's Soccer team, where she first began contemplating the topic of this Article. The Author is grateful to Joe Mrkonich, Michelle Lester, and her teammates from the Oberlin College Women's Soccer team for their insightful feedback and vibrant conversation, which was instrumental in the development of this Article.

1. JODY L. HERMAN, ANDREW R. FLORES & KATHRYN K. O'NEILL, HOW MANY ADULTS AND YOUTH IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 1 (UCLA Sch. of L. Williams Inst. 2022).

2. *See* HUM. RTS. CAMPAIGN FOUND., DISMANTLING A CULTURE OF VIOLENCE: UNDERSTANDING VIOLENCE AGAINST TRANSGENDER AND NON-BINARY PEOPLE AND ENDING THE CRISIS (2021), https://reports.hrc.org/dismantling-a-culture-of-violence?_ga=2.261641229.1013274671.1668485151-2053197631.1668485151 [https://perma.cc/B5WE-VE5G] (discussing how anti-trans stigma, cultural norms, and denial of opportunities prevent transgender people from participating fully in society and subjects them to violence).

3. HUM. RTS. CAMPAIGN FOUND., FATAL VIOLENCE AGAINST THE TRANSGENDER AND GENDER NON-CONFORMING COMMUNITY IN 2022 (2022), https://www.hrc.org/resources/fatal-violence-against-the-transgender-and-gender-non-conforming-community-in-2022 [https://perma.cc/7KHY-2MRP].

4. *2023 Anti-Trans Legislation*, TRACK TRANS LEGIS., https://www.tracktranslegislation.com/ [https://perma.cc/TR3J-V7PQ].

5. Arthur Jones II & Aaron Navarro, *This Year on Pace to See Record Anti-Transgender Bills Passed by States, Says Human Rights Campaign*, CBS NEWS (Apr. 22, 2022), https://www.cbsnews.com/news/2022-anti-transgender-legislation-record-human-rights-campaign/ [https://perma.cc/R6QL-4BMG].

on birth certificates, banning discussions about gender in sex education curriculum, categorizing gender-affirming care as "child abuse," not requiring school employees to respect students' pronouns, banning transgender people from using public restrooms that align with their gender identity, banning medical transition services, banning irreversible gender reassignment surgery in minors, and forbidding youth from participating in gendered activities and athletics in accordance with their gender identity.[6]

Some scholars attribute the recent surge of anti-trans legislation to backlash from the legalization of gay marriage in 2015 with the *Obergefell v. Hodges* Supreme Court decision.[7] Much of this anti-trans legislation and debate focuses on the inclusion of transgender athletes in sex-segregated athletics.[8] At least thirty states have banned or are attempting to ban transgender youth from participating on sports teams that align with their gender identity.[9] In a world where transgender youth are significantly more likely to suffer from severe mental health concerns including depression, anxiety, self-harm, and even suicide, why has the issue of sports stolen the spotlight?[10]

Athletics are likely targeted by conservative groups for two reasons. First, young female athletes are convenient 'victims'; legislators can frame young female athletes losing athletic competitions as a solid and tangible harm.[11] Second, athletics are

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6. *See 2023 Anti-Trans Legislation*, *supra* note 4; Jones & Navarro, *supra* note 5.

7. *See* LOREN CANNON, THE POLITICIZATION OF TRANS IDENTITY: AN ANALYSIS OF BACKLASH, SCAPEGOATING, AND DOG-WHISTLING FROM OBERGEFELL TO BOSTOCK (Rowman & Littlefield Publ'g Grp., 2022) (explaining the political backlash phenomenon after *Obergefell*).

8. *See* Danielle Kurtzleben, *Political Dispute over Transgender Rights Focuses on Youth Sports*, NPR (Mar. 11, 2021), https://www.npr.org/2021/03/11/974782774/political-dispute-over-transgender-rights-focuses-on-youth-sports [https://perma.cc/QUT7-M7SL].

9. Jones & Navarro, *supra* note 5.

10. HUM. RTS. CAMPAIGN FOUND., MENTAL HEALTH AND THE LGBTQ COMMUNITY 1–2 (2016), https://assets2.hrc.org/files/assets/resources/Human_Rights_Campaign_Foundation_-_LGBTQ_Mental_Health_One-Pager.pdf [https://perma.cc/VUE4-UZJB] (discussing that transgender youth are four times more likely to experience depression than non-trans peers, that one-third of transgender youth have seriously considered suicide, that one-fifth of transgender youth have made a suicide attempt, and that 40% of transgender adults report serious psychological distress).

11. *See* Shayna Medley, *[Mis]interpreting Title IX: How Opponents of Transgender Equality Are Twisting the Meaning of Sex Discrimination in School Sports*, 45 N.Y.U. REV. L. & SOC. CHANGE, 673, 674–75 (2022) (explaining how anti-trans advocates frame preventing trans people from participating in sports as protecting cisgender women and girls).

hugely important to many youths, bestowing on them a sense of belonging and community.[12] Thus, keeping trans kids out of sports in such a public manner serves to further humiliate and isolate transgender youth.[13]

Amongst the onslaught on transgender legislation, there have been several constitutional challenges to transgender rights as well. Anti-trans activists mounted a new legal attack strategy in *Soule v. Connecticut Association of Schools* that not only represents a potentially devastating constitutional attack on transgender youth in the United States, but also calls into question the validity, legitimacy, and very existence of the transgender identity.[14] In this case, cisgender girls within the Connecticut high school system alleged that the Connecticut Interscholastic Athletic Conference (CIAC) policy allowing transgender students to compete on teams in accordance with their gender identity violated the rights of cisgender girls.[15] The plaintiffs asserted that transgender girls competing on girls high school athletic teams violates Title IX because it infringes upon the equal opportunity for cisgender girls to compete in school sports.[16] *Using equal protection clauses in this manner is a perversion of these anti-discrimination policies. Title IX policies were enacted to shield groups that have been historically discriminated against from discrimination in the educational context, not to be utilized as a sword to facilitate discrimination against one minority group at the hands of another.*[17]

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12. *See* Michelle Román, *Fair Play: Transgender Athletes and Their Opponents on (and off) the Field*, 94 CLEARING HOUSE 237, 242 (2021) (explaining the sense of community that youth gain from school athletics).

13. *See* Madeleine Carlisle, *Inside the Right-Wing Movement to Ban Trans Youth from Sports*, TIME (May 15, 2022), https://time.com/6176799/trans-sports-bans-conservative-movement/ [https://perma.cc/WCJ5-GTBZ] (discussing a January 2022 poll which found that 85% of trans youth said debates about anti-trans bills negatively impacted their mental health).

14. Soule v. Conn. Ass'n of Schs., 57 F.4th 43 (2d Cir. 2022) (upholding the district court's holding that the plaintiffs failed to establish standing "for reasons of speculation" and that CIAC and its member schools did not have adequate notice that their policy violated Title IX).

15. *See generally* Amended Verified Complaint for Declaratory and Injunctive Relief and Damages, Soule v. Conn. Ass'n of Schs., No. 3:20-cv-00201, 2021 WL 1617206 (D. Conn. Apr. 25, 2021), *aff'd*, 57 F.4th 43 (2d Cir. 2022) [hereinafter Amended Complaint] (laying out the complaints and injuries the plaintiffs are claiming).

16. *Id.*

17. *See* Margaret E. Juliano, *Forty Years of Title IX: History and New Applications*, 14 DEL. L. REV. 83, 83–85 (2013) (explaining that the goal of Title IX was to "increase parity between men and women" because of historic sex discrimination against women).

In this Article, I will be discussing how athletics policies addressing transgender athletes became a subject of national debate, who exactly Title IX policy protects from discrimination and why, what Fourteenth Amendment law is relevant to the debate, and how Fourteenth Amendment law should guide courts to interpret discrimination on the basis of sex to protect transgender students from school-related athletics bans. The interpretation of sex discrimination in the context of Title IX has crucial implications not only for transgender students, but also women of color, intersex people, and cisgender women.

I. Background

A. The State of Transgender Youth in National and International Sports

There is a long history of transgender athletes participating in sporting events that align with their gender identity both in the United States and in international competitions. Prior to the 1968 International Olympic Committee (IOC) guidelines requiring gender verification checks, individual international sports administrations "began requiring female competitors to bring medical 'femininity certificates'" and other types of gender verification procedures when athletes outside the gender binary—including intersex athletes—entered the public eye.[18] However, in the 1970s, U.S. tennis player Renée Richards—a transgender woman who underwent a full medical transition—won a lawsuit against the United States Tennis Association after the Association banned her from competing in the Women's U.S. Open.[19] In this 1977 decision, the New York Court cited the professional conclusions of a doctor that Richards "should be classified as female . . . [m]easured by all the factors, including chromosomal

18. Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes*, N.Y. TIMES (June 28, 2016), https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html [https://perma.cc/GL3Y-EBMS]; *see also* Pat Griffin, Helen Carroll & Cyd Ziegler, *LGBTQ Sports History Timeline*, CAMPUS PRIDE (Oct. 24, 2012), https://www.campuspride.org/resources/lgbt-sports-history-timeline/ [https://perma.cc/2FWD-LYQS]; elisewiegele, *History of Transgender Inclusion in Sports*, TIMETOAST, https://www.timetoast.com/timelines/timeline-of-transgender-inclusion-in-sports [https://perma.cc/G6GP-EZJU].

19. Griffin et al., *supra* note 18; *see also* Rachel Stark-Mason, *A Time of Transition*, NCAA CHAMPION MAG. (Nov. 17, 2019), http://www.ncaa.org/static/champion/a-time-of-transition/ [https://perma.cc/Z8WE-T323] (explaining that Richards went on to compete in the Women's U.S. Open, although she notably did not win).

structure," and held that "[w]hen an individual such as [Renée Richards] . . . finds it necessary for [her] own mental sanity to undergo [sex reassignment surgery], the unfounded fears and misconceptions of defendants must give way to the overwhelming medical evidence that this person is now female."[20] Thus, the U.S. Tennis Association's ban on Renée Richards was declared unlawful under the New York Human Rights Law, which made it "unlawful discriminatory practice for an employee, because of age, race, creed, color, national origin, sex or disability, or marital status of any individual to refuse to hire or employ or to bar or to discharge from employment such individual."[21] Since then, there have been numerous transgender athletes in the United States who participated in competitions that align with their gender identity.[22]

In 2004, the IOC passed the Stockholm Consensus, which formally authorized transgender athletes to compete on teams and in events consistent with their gender identity.[23] The IOC found that "individuals undergoing sex reassignment of male to female before puberty should be regarded as girls and women" and recommended "that individuals undergoing sex reassignment from male to female after puberty (and the converse) be eligible for participation in female or male competitions."[24] It is important to note that the IOC "pulls a lot of weight in the world of international sport competition" and yields substantial bargaining power over other countries who wish to participate in the Olympic games.[25] Over the years, the IOC has pushed many high-profile laws and agendas in countries beyond the scope of the Olympic games.[26] Thus, the IOC has significant influence over the way many sports

20. Richards v. U.S. Tennis Ass'n, 400 N.Y.S.2d 267, 272 (N.Y. Sup. Ct. 1977).

21. *Id.* at 273.

22. *Six Trans Athletes You Should Know*, SPORTANDDEV.ORG (Nov. 19, 2021), https://www.sportanddev.org/en/article/news/six-trans-athletes-you-should-know [https://perma.cc/D2XT-GCYR]; *see also* Stark-Mason, *supra* note 19; *Cross-Training – The History and Future of Transgender and Intersex Athletes (Page 1)*, TRANSAS CITY, https://web.archive.org/web/20230315105944/http://transascity.org/cross-training-the-history-and-future-of-transgender-and-intersex-athletes-1/ [https://perma.cc/3KET-9B9P] (giving a history of "sex testing" and a brief history of transgender athletes starting in the 1950s).

23. INT'L OLYMPIC COMM., STATEMENT OF THE STOCKHOLM CONSENSUS ON SEX REASSIGNMENT IN SPORTS 1 (Oct. 28, 2003).

24. *Id.*

25. Marc Zemel, *How Powerful is the IOC? – Let's Talk About the Environment*, 1 CHI.-KENT J. ENV'T & ENERGY L. 173, 220 (2011).

26. S.T. Arasu, *Is the IOC Getting Too Powerful?*, GOSPORTS (Sept. 28, 2020), https://www.gosports.com.my/view/is-the-ioc-getting-too-powerful/ [https://perma.cc/84UB-PKZC] (explaining the IOC's influence in Italy, India, Malaysia, and Indonesia).

federations implement policies regarding transgender athletes.[27] In 2021, the IOC updated its policy on transgender athletes further: the new "framework" allows transgender athletes to compete in the event that aligns with their gender identity so long as they meet the eligibility requirements for the sport's respective international organization.[28] Such requirements must rely on "robust and peer reviewed research," while also respecting principles of non-discrimination, fairness, privacy, bodily autonomy, and prevention of harm.[29]

After the IOC issued this guidance in 2021, many international teams and associations in the United States and Europe began allowing transgender athletes to participate in events in accordance with their gender identity in line with the IOC guidance.[30] In particular, many United States organizations such as the National Collegiate Athletic Association (NCAA), the Premier Hockey Federation (previously known as the National Women's Hockey League), the National Women's Soccer League, and Athletes Unlimited have all released trans inclusion guidelines that allow trans women in particular to compete in women's leagues.[31] Notably, the NCAA approved a policy mirroring the IOC guidance in 2011.[32] The NCAA stated that it:

> believes in and is committed to diversity, inclusion and gender equity . . . [s]ince participation in athletics provides student-

27. Joanna Harper, *Transgender Athletes and International Sports Policy*, 85 DUKE L. & CONTEMP. PROBS., 151, 162 (2022) ("[T]he voice of the IOC is itself influential . . . .").

28. INT'L OLYMPIC COMM., IOC FRAMEWORK ON FAIRNESS, INCLUSION, AND NON-DISCRIMINATION ON THE BASIS OF GENDER IDENTITY AND SEX VARIATIONS 3 (2021).

29. INT'L OLYMPIC COMM., *supra* note 28, at 3–6; *see Transgender Guidelines*, WORLD RUGBY (2022), https://www.world.rugby/the-game/player-welfare/guidelines/transgender#SummaryforTransgenderWomen [https://perma.cc/5KTB-SWQX] (explaining that transgender women may not compete in international rugby competitions in the women's division); WORLD AQUATICS, POLICY ON ELIGIBILITY FOR THE MEN'S AND WOMEN'S COMPETITION CATEGORIES (2022) (demonstrating eligibility requirements regarding acceptable testosterone level and acceptable transition period); Chris Mosier, *International Federations*, TRANSATHLETE.COM (2022), https://www.transathlete.com/international-federations [https://perma.cc/F2L5-ULJF] (outlining various transgender policies for different international sports organizations).

30. Griffin et al., *supra* note 18.

31. Julie Kliegman, *Understanding the Different Rules and Policies for Transgender Athletes*, SPORTS ILLUSTRATED (July 6, 2022), https://www.si.com/more-sports/2022/07/06/transgender-athletes-bans-policies-ioc-ncaa [https://perma.cc/63GT-TAMG].

32. Marta Lawrence, *Transgender Policy Approved*, NCAA (Sept. 13, 2011), https://ncaanewsarchive.s3.amazonaws.com/2011/september/transgender-policy-approved.html [https://perma.cc/Y579-8RHX].

> athletes a unique and positively powerful experience, the goals of these policies are to create opportunity for transgender student-athletes to participate in accordance with their gender identity while maintaining the relative balance of competitive equity within sports teams.[33]

Since 2011, policies allowing transgender athletes to compete on teams that aligned with their gender identity were relatively uncontroversial in the United States until the 2015 *Obergefell v. Hodges* decision.[34] In *Obergefell*, the Supreme Court held that state prohibitions on gay marriage are unconstitutional.[35] Following the decision, anti-gay marriage activists turned their energy towards anti-trans legislation with much of the same anti-gay rhetoric, including an overarching mantra of protecting children.[36] Since then, the rights of trans athletes have come under fire. In particular, the NCAA updated its trans athlete policy in 2021 to defer to the "national governing bod[y]"—the bodies in charge of making decisions for international leagues and games—for each sport regarding eligibility decisions.[37] While this change affected many transgender athletes, it constituted a direct attack on swimmer and transgender woman Lia Thomas, whose participation in NCAA women's swimming was hotly contested at the time this decision dropped.[38] At that time, Lia Thomas—dubbed "the most controversial athlete in America"—set two NCAA women's swimming records and three Ivy League records after medically transitioning, leading to attacks on her character, skill, and identity by many national and international news sources.[39] Two months prior to the 2022 national championships, the NCAA and USA

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33. Lawrence, *supra* note 32.

34. Carlisle, *supra* note 13; *see generally* CANNON, *supra* note 7 (explaining the recent anti-trans legislation and violence as a backlash of the *Obergefell* decision).

35. Obergefell v. Hodges, 576 U.S. 644 (2015) (ruling that state bans on gay marriage are unconstitutional).

36. *See* Carlisle, *supra* note 13.

37. Kliegman, *supra* note 31.

38. *Id.*

39. Robert Sanchez, *'I Am Lia': The Trans Swimmer Dividing America Tells Her Story*, SPORTS ILLUSTRATED (Mar. 3, 2022), https://www.si.com/college/2022/03/03/lia-thomas-penn-swimmer-transgender-woman-daily-cover [https://perma.cc/3TJ7-B8HB]; Eric Levenson & Steve Almasy, *Swimmer Lia Thomas Becomes First Transgender Athlete to Win an NCAA D-I Title*, CNN (Mar. 17, 2022), https://www.cnn.com/2022/03/17/sport/lia-thomas-ncaa-swimming/index.html [https://perma.cc/ED4R-XS9L]; Yaron Steinbuch, *Transgender Swimmer Lia Thomas is 'Destroying' Sport, Official Says*, N.Y. POST (Dec. 28, 2021), https://nypost.com/2021/12/28/official-transgender-swimmer-lia-thomas-is-destroying-the-sport/ [https://perma.cc/2KVE-5HYX] (quoting transphobic rhetoric of former USA Swimming official Cynthia Millen on "Tucker Carlson Tonight").

Swimming initiated new guidelines that put Thomas's eligibility in question.[40] Despite national attention and rage, the NCAA ultimately allowed Thomas to continue competing despite falling two months short of fulfilling USA Swimming's strict eligibility requirements for hormone therapy.[41] It is important to note that Thomas's NCAA championship in the 500-yard freestyle event was her only national title, and she failed to repeat past victories in the last swim competition of her collegiate career.[42]

Following *Obergefell*, there was "passion, dedication, and concern held by anti-marriage equality activists that had to go *somewhere*."[43] These activists turned this energy towards an anti-trans offensive, including "hundreds of explicitly anti-trans pieces of legislation proposed," rescinding Title IV protections of trans students, an uptick in transgender violence, restriction of transgender-related healthcare, and a general fight against the legal and social acceptance and "recognition of transgender persons."[44] This backlash is, at its core, a "collective response" on a national scale, resulting in a collective harm against the transgender community.[45] It is not unusual for backlashes to be targeted against "vulnerable [and] already marginalized" groups; in this way, backlash can be viewed as opportunistic because the targeting has "less to do with the original concern of the backlashers" and more to do with the ease of further oppressing an already marginalized group.[46]

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40. *See* Kliegman, *supra* note 31.

41. *See id.*; Katie Barnes, *NCAA Ruling Clears Path for Transgender Swimmer Lia Thomas to Compete at Nationals*, ESPN (Feb. 10, 2022), https://www.espn.com/college-sports/story/_/id/33261181/ncaa-ruling-clears-path-transgender-swimmer-lia-thomas-compete-nationals [https://perma.cc/EV23-7MZW]; *see also USA Swimming Releases Athlete Inclusion, Competitive Equity and Eligibility Policy*, USA SWIMMING (Feb. 1, 2022), https://www.usaswimming.org/news/2022/02/01/usa-swimming-releases-athlete-inclusion-competitive-equity-and-eligibility-policy [https://perma.cc/E7GQ-QU7Y] (laying out the strict eligibility requirements in place for trans female athletes).

42. Levenson & Almasy, *supra* note 39; Delaney Parks, *Lia Thomas Takes Eighth Place in Her Final Swim of the NCAA Championships*, DAILY PENNSYLVANIAN (Mar. 19, 2022), https://www.thedp.com/article/2022/03/lia-thomas-ncaa-championships-100-freestyle [https://perma.cc/NX7M-TPC4]; Les Carpenter, *Lia Thomas Broke No Records at the NCAA Championships but Left Plenty of Questions*, WASH. POST (Mar. 20, 2022), https://www.washingtonpost.com/sports/2022/03/20/lia-thomas-ncaa-swimming-championships-questions/ [https://perma.cc/TC26-EV6Y].

43. CANNON, *supra* note 7, at 30–31.

44. *Id.* at 31.

45. *Id.* at 93.

46. *Id.* at 87–89; *see also* Elizabeth Barnes, *Justice at What Cost?*, HIST. TODAY (Dec. 12, 2018), https://www.historytoday.com/archive/history-matters/justice-what-

Thus, the "anti-trans offensive" following the *Obergefell* decision can be seen as a backlash against a "vulnerable [and] already marginalized" group: the transgender community.[47] Anti-trans activists frame their attack against transgender people as a method of protecting cisgender women.[48] Anti-trans activists assert that without laws protecting cisgender women from transgender women and girls, cisgender women would be "eliminated from participation and denied any meaningful opportunity for athletic involvement," would be attacked by child predators who are transgender in public restrooms, or would be "abused" through gender-affirming care by parents who are forcing a transgender identity on children who are actually cisgender.[49] None of these claims are grounded in real-life statistics. This backlash reaction has set up the current debate regarding how Title IX applies to the rights of both cisgender women and transgender students, especially when these rights seemingly clash.

B. Title IX Background and Relationship to Athletics

Title IX is "an example of how the [Fourteenth] Amendment has been interpreted over time."[50] While the Fourteenth Amendment provides that "no state can deny to any person within its jurisdiction the equal protection of the laws," Title IX uses this language to "specifically [prohibit] sex discrimination."[51] When

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cost [https://perma.cc/H9UB-L62L] (outlining the backlash against Black women following emancipation); King-Kok Cheung, *(Mis)interpretations of (In)justice: The 1992 Los Angeles "Riots" and "Black-Korean Conflict"*, 30 MELUS 3 (2005) (explaining that violence against Koreans can be understood as a backlash against Koreans during the LA "riots" after the beating of Rodney King).

47. CANNON, *supra* note 7, at 87–89.

48. Medley, *supra* note 11, at 684–85.

49. Defendant's Reply in Support of Motion to Dismiss at 11–12, Soule v. Conn. Ass'n of Schs., No. 3:20-cv-00201, 2021 WL 1617206 (D. Conn. Apr. 25, 2021), *aff'd*, 57 F.4th 43 (2d Cir. 2022); Josh Gelernter, *A Conservative Defense of Transgender Rights*, NAT'L REV. (Dec. 17, 2016), https://www.nationalreview.com/2016/12/transgender-bathrooms-conservative-defense-transgender-rights/ [https://perma.cc/3RLE-NGT3]; Katy Steinmetz, *Why LGBT Advocates Say Bathroom 'Predators' Argument Is a Red Herring*, TIME (May 2, 2016), https://time.com/4314896/transgender-bathroom-bill-male-predators-argument/ [https://perma.cc/T3FT-C26Z];
Eleanor Klibanoff, *Judge Temporarily Blocks Some Texas Investigations into Gender-Affirming Care for Trans Kids*, TEX. TRIB. (June 10, 2022), https://www.texastribune.org/2022/06/10/texas-gender-affirming-care-child-abuse/ [https://perma.cc/YT3W-RAUB].

50. *The 14th Amendment and the Evolution of Title IX*, U.S. COURTS, https://www.uscourts.gov/educational-resources/educational-activities/14th-amendment-and-evolution-title-ix [https://perma.cc/48AT-YY7W].

51. *Id.*

Title IX was enacted as part of the Education Amendments of 1972, its purpose was to "provide equal access to educational opportunities to men and women" as well as to prohibit and prevent sex discrimination.[52] A key piece of "increas[ing] equality and promot[ing] parity in entrance to graduate school, math and science programs, and after school activities" was to provide an equal opportunity to participate in sports at all levels of education.[53] The text of Title IX reads: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[54] Title IX notably does not explicitly address transgender students or transgender athletes.[55] Title IX applies to all schools, educational agencies, and other educational institutions that receive funds from the Department of Education; this accounts for "17,600 local school districts, over 5,000 postsecondary institutions, and charter schools, for-profit schools, libraries, and museums."[56] For the purposes of Title IX, discrimination based on sex includes discrimination based on sexual orientation or gender identity.[57] Historically, Title IX has applied to sexual harassment, employment discrimination, athletics, and more.[58]

The Office for Civil Rights (OCR) under the U.S. Department of Education has flipped back and forth on several occasions regarding the status of transgender student athletes. Under the Obama Administration, the Department of Education and the OCR sent a letter stating that "when a student or student's parent or guardian . . . notifies the school administration that the student will assert a gender identity that differs from previous

52. TERESA R. MANNING, DEAR COLLEAGUE: THE WEAPONIZATION OF TITLE IX; HOW A FEDERAL LAW AIMED AT EQUAL ACCESS TO EDUCATION ORGANIZED THE CAMPUS SEX POLICE AND AUTHORIZED CAMPUS BUREAUCRATS TO CREATE A NEW GENDER HIERARCHY (Nat'l Ass'n of Scholars 2020); Steve K. Fedder, *Title IX on Campus: A Riddle Wrapped in an Enigma*, 51 MARYLAND. BUS. J. 16, 18 (2018); Emily Suski, *Subverting Title IX*, 105 MINN. L. REV. 2259, 2260–61 (2021).

53. Juliano, *supra* note 17.

54. 20 U.S.C. § 1681.

55. TITLE IX'S APPLICATION TO TRANSGENDER ATHLETES: RECENT DEVELOPMENTS, CONG. RSCH. SERV. (2020).

56. TITLE IX AND SEX DISCRIMINATION, U.S. DEP'T OF EDUC. – OFF. FOR CIVIL RTS. (2021).

57. *U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity*, U.S. DEP'T OF EDUC. (June 16, 2021), https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity [https://perma.cc/JPP2-27MT].

58. Juliano, *supra* note 17, at 84 n.9.

representations or records, the school will begin treating the student consistent with the student's gender identity"; additionally, schools may not "adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about differences between transgender students and other students of the same sex or others' discomfort with transgender students."[59] However, a few years later, the Trump Administration rescinded this 2016 guidance, stating that the guidance "did not 'contain extensive legal analysis' or undergo a public comment process."[60]

In addition to the Trump Administration's rescindment, the OCR did issue a letter specifically addressing the *Soule* lawsuit in 2020.[61] This letter stated:

> [B]y permitting the participation of certain male student-athletes in girls' interscholastic track in the state of Connecticut, pursuant to the Revised Transgender Participation Policy, [the CIAC] denied female student-athletes athletic benefits and opportunities, including advancing to the finals in events, higher level competitions, awards, medals, recognition, and the possibility of greater visibility to colleges and other benefits.[62]

Once President Biden took office, the U.S. Department of Education reversed transgender policies in education again.[63] The reversal letter from June 16, 2021, stated that "Title IX's prohibition on discrimination on the basis of sex [includes]: (1) discrimination based on sexual orientation; and (2) discrimination based on gender identity."[64] Although this press release announces protection for transgender students across the educational board, it does not specifically mention athletics on any education level.[65] President Biden also released an executive order stating:

> Children should be able to learn without worrying about

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59. RESCINDED OCR LETTER, DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS, DEP'T OF EDUC. – OFF. OF CIVIL RTS. (2016); *see also* TITLE IX'S APPLICATION, *supra* note 55, at 2 (discussing the changing approach to transgender athletes within the Department of Education during the change from the Obama to Trump Administration).

60. TITLE IX'S APPLICATION, *supra* note 55, at 2 (quoting MANNING, *supra* note 52, at 2).

61. TIMOTHY C.J. BLANCHARD, REVISED LETTER OF IMPENDING ENFORCEMENT ACTION (U.S. Dep't of Educ. Off. For Civ. Rights 2020).

62. *Id.*

63. Press Release, U.S. Dep't of Educ., U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity (June 16, 2021), https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity.

64. *Id.*

65. *Id.*

> whether they will be denied access to the restroom, the locker room, or school sports . . . . The Supreme Court held [in *Bostock v. Clayton County*] that Title VII's prohibition on discrimination 'because of . . . sex' covers discrimination on the basis of gender identity and sexual orientation. Under *Bostock*'s reasoning, laws that prohibit sex discrimination – including Title IX of the Education Amendments of 1972 . . . prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.[66]

Despite the U.S. Department of Education's reversal announcement and Biden's executive order discussed above, the state of transgender protections in education are murky at best. First, it is essential to note that executive orders and guidance from the Department of Education are highly unstable—these tools are easily reversible depending on which president is sitting in office, which is why the guidance has already flipped.[67] Therefore, even if the executive order and Department of Education guidance did definitively protect transgender athletes, those protections could last only as long as Biden remains in office.[68] Regardless, the inconsistent policies do reveal that at least some political authorities would interpret Title IX to cover protections for transgender athletes, teeing up a legislative and judicial battle over the interpretation of sex within Title IX.

II. Analysis

This section will first address the intricacies, foundations, and arguments laid out in the *Soule* lawsuit, including the CIAC transgender policy at the heart of the lawsuit and the allegations and factual assertions set forth in the pleadings. Next, this section

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66. Exec. Order No. 13988, 86 C.F.R. 7023 (2021). *See generally* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020) (holding that firing an employee based exclusively on their identity as transgender or for their sexual orientation violates Title VII). The *Bostock* decision addresses discrimination under Title VII and in the employment context. *Id.* The Court held that discriminating "because of" sex also meant discrimination due to transgender status. *Id.* at 1741–43. While this interpretation of sex discrimination could certainly inform the interpretation decision under Title IX and the *Soule* lawsuit, the decision is not binding. Applying this decision to Title IX and *Soule* is outside the scope of this Article due to the stark differences between the employment sphere and the school athletics sphere.

67. *What is an Executive Order?*, AM. BAR ASS'N (Jan. 25, 2021), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-executive-order-/ [https://perma.cc/CWB5-WTDL]; Amy Kosanovich Dickerson, *New OCR Title IX Dear Colleague Letter Withdraws Obama Era Guidance*, FRANCZEK (Sept. 27, 2017), https://www.franczek.com/blog/new-ocr-title-ix-dear-colleague-letter-withdraws-obama-era-guidance/ [https://perma.cc/DJD5-JZ8S] (discussing the recent flip in OCR policies under the Secretary of Education's direction).

68. *What is an Executive Order?*, *supra* note 67.

will address two landmark Supreme Court cases for LGBTQ+ rights under the Fourteenth Amendment—*Romer v. Evans* and *U.S. v. Windsor*—and apply these holdings to the *Soule* lawsuit. Together, *Romer* and *Windsor* can be read to forbid laws from having the explicit purpose of stigmatizing or identifying a group as inferior. Ultimately, the holdings from *Romer* and *Windsor* can and should guide the inquiry in the *Soule* case; the explicit effect and purpose of banning transgender youth from participating in school-sponsored athletics is to stigmatize transgender youth and identify transgender youth as different, dangerous, and overall inferior.

A. The Soule Lawsuit: Discrimination on the Basis of 'Biological' Sex

The *Soule* lawsuit was filed against the backdrop of these recent developments in Title IX regulations and nationwide debate regarding the legitimacy and existence of transgender people. The plaintiffs in the lawsuit are four female athletes from Connecticut represented by their mothers, and the defendants are the CIAC and various school boards around the state.[69] The policy in controversy states the following:

> [F]or purposes of sports participation, the CIAC shall defer to the determination of the student and his or her local school regarding gender identification . . . . [T]he school district shall determine a student's eligibility to participate in a CIAC gender specific sports team based on the gender identification of that student in current school records and daily life activities in the school and community at the time that sports eligibility is determined for a particular season.[70]

The CIAC stated that it adopted this policy in order to provide "transgender student-athletes with equal opportunities to participate in CIAC athletic programs consistent with their gender identity."[71] In response, the plaintiffs allege that this policy violates the requirements of Title IX because "treating girls differently regarding a matter so fundamental to the experience of sports – the chance to be champions – is inconsistent with Title IX's mandate of equal opportunity for both sexes."[72] They assert the CIAC policy "result[s] in boys displacing girls in competitive . . . events," that

69. Amended Complaint, *supra* note 15, at 3–4 (laying out the complaints and injuries the plaintiffs are claiming).

70. *See* CONN. INTERSCHOLASTIC ATHLETIC CONF., REFERENCE GUIDE FOR TRANSGENDER POLICY (2020).

71. *Id.* at 1.

72. Amended Complaint, *supra* note 15, at 2–3 (quoting McCormick *ex rel.* McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 295 (2d Cir. 2004)) (laying out the complaints and injuries the plaintiffs are claiming).

"more boys than girls are experiencing victory and gaining the advantages that follow" (such as recruitment opportunities and athletic scholarships), and that the "interests and abilities of male and female students" are not "equally effectively accommodated" to the "extent necessary to provide equal [opportunities]."[73]

The general thrust of the argument is that transgender women are biologically and physiologically male, and, therefore, allowing physiological and biological males to compete against women is a violation of equal opportunity under Title IX.[74] Biological differences that allegedly give transgender girls an edge in high school athletics include things like larger lung capacity, larger hearts and per-stroke pumping volume, increased number of muscle fibers, larger bones, increased mineral density, height advantage, and differences in body fat levels.[75] Further, the complaint states "plaintiffs do not know whether or if so at what time the students with male bodies who are competing in girls' CIAC track events began taking cross-sex hormones," and even if these athletes were taking hormone drugs, this would not "completely reverse their advantages in muscle mass and strength, bone mineral density, lung size, or heart size."[76]

The plaintiffs conclude that "as increasing numbers of males are in fact competing in girls' and women's events each year, girls are in fact losing, and males are seizing one [championship] and record after another."[77] This, they argue, has resulted in unequal athletic opportunity in violation of Title IX because "boys" are displacing and excluding "specific and identifiable girls" from competition.[78] They claim the CIAC's policy thus has resulted in harm to girls beyond simply a lack of equal opportunity; they also assert why girls have suffered loss of hope of victory, success, recognition, loss of the chance to be champions, demoralization, anxiety, intimation, emotional and psychological distress, depression, and loss of college athletic exposure.[79]

Although there are many issues contained in the *Soule* complaint, the main point at issue is how courts should interpret "sex" within the greater context of Title IX. Title IX provisions forbid schools from discriminating on the basis of sex for any school-

73. *Id.* at 1–8 (quoting *Policy Interpretation*, 44 Fed. Reg. at 71,417–18).
74. *Id.* at 11–13.
75. *Id.*
76. *Id.* at 17.
77. *Id.* at 18.
78. Amended Complaint, *supra* note 15, at 2.
79. *Id.* at 1–3, 106–15.

related or school-sanctioned activities.[80] Additionally, Title IX requires schools to protect the equal opportunity of "both sexes" in school-related and school-sanctioned activities.[81] The plaintiffs in *Soule* asked the court to find that transgender students essentially fall outside the reach of Title IX protection because Title IX requires "both" sexes be protected—that is, men and women.[82] Under the *Soule* plaintiffs' proposed rule, gender is black and white; students cannot "switch" between the fixed boundary of binary sex, and individuals who do attempt to transition are "fraudulently being individuals they 'biologically' are not."[83] On the other hand, schools with trans-inclusive athletic policies propose a different interpretation of these Title IX provisions. The defendants propose that "sex" and "gender" are not based solely on biological or physiological traits.[84] Rather, the defendants argue that there is no precedential Title IX decision, nor any text from Title IX itself that "purports to restrict schools from allowing girls who are transgender to play on the same teams as other girls," acknowledging and affirming transgender students' girlhood under Title IX.[85] Thus, the defendant's interpretation of "sex" within the context of Title IX regulations would recognize transgender students who identify as trans girls and trans boys as true girls and boys, respectively.[86]

While the Second Circuit ultimately dismissed *Soule*, it was dismissed on procedural grounds alone.[87] The transgender students that were the subject of the lawsuit had graduated, as well as two of the four plaintiffs; additionally, there were no other transgender students that the remaining two plaintiffs were likely to compete against during their final year of eligibility.[88] The Second Circuit found that the plaintiffs in *Soule* lacked standing and injury, but it

80. *See generally* Amended Complaint, *supra* note 15 (asserting that gender is a biological fact that is inescapable). Plaintiffs also fail to acknowledge the transness of two students, referring to them only as boys and men. *Id.*

81. 34 C.F.R. § 106.41.

82. Amended Complaint, *supra* note 15, at 8.

83. *Id.* at 12–17; M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 946 (2015).

84. Defendant's Reply, *supra* note 49, at 6.

85. *Id.* at 6–7.

86. *Id.* Notably, neither the plaintiffs nor the defendants in *Soule* mention or propose how to handle transgender students who do not fall within the gender binary.

87. *See* Ruling and Order, Soule v. Conn. Ass'n of Schs., No. 3:20-cv-00201, 2021 WL 1617206 (D. Conn. Apr. 25, 2021), *aff'd*, 57 F.4th 43 (2d Cir. 2022) [hereinafter "Ruling and Order"] (dismissing case based on lack of standing and moot issue).

88. *Id.* at 8–9.

did not altogether reject the plaintiffs' claim that transgender athletes should be categorically barred from participation in high school athletics.[89] Thus, the general argument of the *Soule* lawsuit may be used in future cases and presents a serious threat to transgender rights and public health. If a different court upholds this argument as legitimate in a future lawsuit, it could not only limit transgender youth's ability to participate in school athletics, but also threaten the validity of transgender existence altogether. The plaintiffs' argument also threatens cisgender women, ultimately reinforcing and perpetuating the idea that cisgender women are inherently inferior physically and athletically to cisgender males. Future courts should therefore find that cisgender female athletes are not being harmed by transgender female athletes and thus may not use Title IX as a sword to perpetuate discrimination against transgender athletes—and ultimately themselves.

B. Essence and Interpretations: Protecting Cisgender Women or Discriminating Against Transgender Students?

Romer v. Evans and *U.S. v. Windsor* are two landmark Supreme Court cases that struck down laws discriminating against the LGBTQ+ community because they were found to violate the Fourteenth Amendment and equal protection principles.[90] Although neither of these decisions dealt directly with education or athletic inclusion, they shed light on the types of laws and exclusions that are explicitly in conflict with equal protection and the Fourteenth Amendment. These decisions, taken together, support the notion that laws cannot have the explicit purpose of excluding LGBTQ+ and other minority groups from legally protected activities—such as marriage or employment—nor can they peel back protections and rights that LGBTQ+ and other minority groups have previously been granted in furtherance of equality and equal protection.

89. *Id.* at 15–18 (explaining that if a transgender athlete began competing in Connecticut during the plaintiffs' final year of eligibility, the plaintiffs would be permitted to "file a new action under Title IX along with a motion for a preliminary injunction").

90. *See* Romer v. Evans, 517 U.S. 620 (1996); *see also* United States v. Windsor, 570 U.S. 744 (2013).

i. *Romer v. Evans*

A key case for LGBTQ+ rights in the United States is *Romer v. Evans*.[91] Before this case commenced, several Colorado municipalities passed laws prohibiting discrimination against LGBTQ+ individuals.[92] For example, some municipalities banned discrimination on the basis of sexual orientation in "many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services."[93] Cities in Colorado, notably Denver, were some of the first cities to provide anti-discrimination policies for LGBTQ+ people.[94] However, Amendment 2 was passed to the Colorado Constitution stating the following:

> Neither the State of Colorado, through any of its branches or departments . . . municipalities or school districts shall enact, adopt, or enforce any statute, regulation, ordinance, or policy whereby homosexual, lesbian, or bisexual orientation . . . shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status, or claim of discrimination.[95]

Thus, this amendment essentially repealed any protective ordinances "to the extent they [prohibited] discrimination on the basis of 'homosexual, lesbian, or bisexual orientation' . . . ."[96]

The Supreme Court eventually held that this Amendment 2 was unconstitutional because it violated the Fourteenth Amendment's Equal Protection Clause in several ways.[97] Importantly, the Court noted that the fact that there was no precedent for the amendment at issue indicated its unconstitutionality because "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."[98] The

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91. *See Romer*, 517 U.S. 620.

92. *A Brief History of LGBT Rights in Colorado*, LAW WEEK COLO. (June 18, 2018), https://www.lawweekcolorado.com/article/a-brief-history-of-lgbt-rights-in-colorado/ [https://perma.cc/CZ5K-2G47]; *see also Romer*, 517 U.S. at 625 (providing background as to the local and municipal laws protecting LGBTQ+ individuals leading up to the lawsuit).

93. *Romer*, 517 U.S. at 625.

94. *See A Brief History of LGBT Rights*, *supra* note 92.

95. *Romer*, 517 U.S. at 625.

96. *Id.* at 624.

97. *Id.* at 630–36. Arguments of unconstitutionality include that the amendment is an abnormal deviation from common law, constitutes a denial of protection across the board, demonstrates a refusal to prohibit arbitrary discrimination in governmental and private settings, and subjects a group to immediate and substantial discrimination. *Id.*

98. *Id.* at 633 (citing Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37–38

fact that laws that singled out "a certain class of citizens for disfavored legal status or general hardships" were "not within [the] constitutional tradition" of the United States was particularly concerning to the Court in this case.[99]

Although not directly related to Title IX, athletics, or transgender people, there are numerous principles within the *Romer* opinion that are relevant to the question of whether Title IX and equal protection principles may allow transgender people to be excluded from the athletic teams of their choosing. Importantly, the Court in *Romer* was particularly concerned with the fact that the Colorado amendment removed affirmative protections; those protections, if revoked, would have subjected LGBTQ+ individuals "to immediate and substantial risk of discrimination . . . ."[100] In the same way, the plaintiffs in the *Soule* lawsuit are seeking to remove an affirmative protection that would subject trans athletes to "immediate and substantial risk of discrimination . . . ."[101] Equal protection principles generally "[forbid] the organized society to stigmatize an individual as a member of an inferior or dependent caste, or as a non-participant."[102] The Court notes that laws and amendments such as at issue in *Romer* violate equal protection principles. By announcing that "gays and lesbians shall not have any particular protections from the law, [the amendment] [inflicted] on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it."[103]

Ultimately, the principles enumerated in the *Romer* decision indicate that equal protection principles within the Constitution side "with tolerance over exclusion."[104] Furthermore, it signals the broader idea that laws that discriminate against LGBTQ+ people are not constitutional "simply because the state wants to

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(1928)).

99. *Id.* at 633–34. The Court notes here that the fact that it was highly atypical for laws to remove protections that explicitly protected groups from discrimination was itself an indicator of its unconstitutionality.

100. *Id.* at 625.

101. *Id.*

102. Joseph S. Jackson, *Persons of Equal Worth:* Romer v. Evans *and the Politics of Equal Protection*, 45 UCLA L. REV. 453, 485 (1997) (explaining that a "central concern of the 14th Amendment was to guarantee for African Americans the substantive right to participation in civil society on an equal footing," therefore signaling a "principle of equal citizenship.") As the rights of protected classes under the Fourteenth Amendment expanded, these groups began to be entitled to the same principle of equal citizenship under the Amendment. Thus, a denial of equal protection is a denial of equal citizenship.

103. *Id.* at 486.

104. *Id.* at 489.

discourage" LGBTQ+ acceptance and behavior.[105] Thus, state and government actors must have a legitimate reason beyond simply wanting to discourage LGBTQ+ acceptance and legitimacy in order to pass laws that effectively discriminate against LGBTQ+ people.[106] This idea could prove highly relevant in the *Soule* case. The Department of Education must have a legitimate reason to ban transgender people from sports beyond wanting to discourage the acceptance and validation of transgender people and athletes.

ii. *U.S. v. Windsor*

The Supreme Court affirmed and re-applied the same reasoning from *Romer v. Evans* in 2013 in *U.S. v. Windsor*, resulting in the overturning of the Defense of Marriage Act (DOMA).[107] DOMA defined marriage as marriage between one man and one woman and allowed states to refuse to recognize gay marriages performed in other states.[108] The plaintiffs argued that the deprivation of marriage and the benefits conferred on couples through marriage resulted in injury and indignity to a degree that constituted "a deprivation of an essential part of the liberty protected by the Fifth Amendment," due process, and equal protection principles.[109]

At the time of the lawsuit, New York state law allowed same-sex couples to register as domestic partners and recognize same-sex marriages performed in other states or countries as valid under New York law.[110] The Court found that DOMA sought to explicitly injure a class that New York was seeking to protect, and that the Constitution's "guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group."[111] Ultimately, DOMA was ruled unconstitutional because it was an "unusual deviation from the tradition of recognizing" marriage, and that there was "strong evidence of [the] law having the purpose and

105. Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 62 (1996).

106. *Id.* at 61–63 (explaining why states must have a justification for statutes aside from pure animus or to discourage behavior that the state views as undesirable or immoral).

107. *See generally* United States v. Windsor, 570 U.S. 744 (2013) (ruling that DOMA was unconstitutional because it violated the Fourteenth Amendment).

108. *Windsor*, 570 U.S. at 746.

109. *Id.*

110. *Id.* at 753.

111. *Id.* at 746 (quoting Dep't of Agriculture v. Moreno, 413 U.S. 528, 534–35 (1973)).

effect of disapproval of a class" operating to "deprive same-sex couples of the benefits and responsibilities that come with" recognition of marriage.[112] Finally, the Court found that DOMA's "operation in practice" was to "identify and make unequal" a subset class as well as to "impose a disadvantage, a separate status, and so a stigma" upon gay people in the U.S.[113] This effect was not the "incidental effect" of the statute, but rather "its essence."[114]

This language is strikingly similar to the language found in *Romer v. Evans*. The focus of both cases was the stigmatization and moral condemnation that was at the heart of the laws in question. Further, both cases highlighted the unusual nature of the laws. In *Romer*, the Court discussed how it was unusual to target one historically underrepresented group and deny them protection across the board.[115] Similarly, the Court in *Windsor* focused on the unusual nature of trumping a state's definition for marriage and its effect of depriving couples the benefits and responsibilities of federal recognition of marriage.[116] Thus, in both cases, the Supreme Court highlights the fact that unusual or non-traditional laws, the main thrust of which is to deny the benefits or rights from one group for the sake of other groups, require "careful consideration" and are often unconstitutional.[117]

While the *Romer* Court focuses on the immediate discrimination that the LGBTQ+ population would be subjected to upon the passage of Amendment 2 as the non-traditional character of the amendment itself, the *Windsor* Court is particularly concerned with the way in which DOMA stripped LGBTQ+ people of dignity.[118] DOMA aimed to treat LGBTQ+ unions as "second-class," not worthy of the same rights and respect as heterosexual marriages.[119] By withholding access to one simple institution—marriage—from only LGBTQ+ people, DOMA actually withheld social security benefits, copyright benefits, veteran's benefits, estate law benefits, tax benefits, and healthcare benefits from people in LGBTQ+ relationships.[120] By withholding these rights and

112. *Id.*
113. *Id.* at 746–47.
114. *Windsor*, 570 U.S. at 770.
115. Romer v. Evans, 517 U.S. 620, 627–30 (1996).
116. *Windsor*, 570 U.S. at 746.
117. *Id.* at 770 (quoting *Romer*, 517 U.S. at 633).
118. *Romer,* 517 U.S. at 633–34; *Windsor*, 570 U.S. at 769–72.
119. *Windsor*, 570 U.S. at 771.
120. *Id. See also* Brad A. Greenberg, *DOMA's Ghost and Copyright Revisionary Interests*, 108 NW. U. L. REV. 391, 392–93 (2014) (explaining that through the Copyright Act, widows can inherit their spouse's copyrights free of federal taxes, and

responsibilities, the Court found that DOMA restricted the dignity and visibility of LGBTQ+ people, essentially "writing inequality into the entire United States Code."[121]

C. Essence of Soule*: Weaponizing Title IX Against Transgender Youth*

Although Title IX initially covered gender inclusion in traditional schooling and academic areas, additional regulations were added later to expand and solidify what Title IX did not originally cover, including athletics.[122] The regulations at the heart of the *Soule* case are the following:

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise be discriminated against in any interscholastic, intercollegiate, club, or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.
>
> A recipient which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes.[123]

The plaintiffs in *Soule* focus on the equal opportunity clause.[124] Their argument interprets "both sexes" strictly—that is, "biological" males and "biological" females.[125] Under the plaintiffs' framework in *Soule*, there are no options outside "biological" frameworks. Under this framework, allowing "biological" males to compete in women's competitions would constitute a violation of the equal athletic opportunity promised by Title IX by preventing women from competing in athletics authentically. Any transgender students are "fraudulently being individuals that they 'biologically' are not"; thus, the plaintiffs find transgender people to be "immoral, fraudulent, mentally ill, delusional, medically wrong, or imaginary/nonexistent."[126]

However, the opinions from *Romer* and *Windsor* conflict heavily with this interpretation. Both of these cases support the

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that DOMA preempted this free exchange in states that did not recognize gay marriage).

121. *Windsor*, 570 U.S. at 747.

122. Paul Anderson & Barbara Osborne, *A Historical Review of Title IX Litigation*, 18 J. LEGAL ASPECTS SPORT 127, 127 (2008).

123. 34 C.F.R. § 106.41.

124. *See generally* Amended Complaint, *supra* note 15 (laying out the plaintiffs' arguments).

125. *Id.*

126. Levasseur, *supra* note 83, at 946–66 n.101, n.114, n.122 (discussing the history of describing transgender issues, care, and people as "fraudulent").

notion that laws are unconstitutional if the essence of those laws is to create a stigmatization to, express disapproval of, or identify a group as unequal, even if the law has a stated purpose that is not explicitly discriminatory.[127] For example, in *Romer*, Colorado claimed the amendment's purpose was to prevent LGBTQ+ people from receiving preferential treatment over non-LGBTQ+ people and to further the moral agenda and personal preferences of the citizens of Colorado.[128] In *Windsor,* proponents of DOMA argued that DOMA merely "[defended] the institution" of traditional marriage from alleged corruption.[129] The plaintiffs in *Soule* maintain that their interpretation of equal opportunity and sex in Title IX provisions has the purpose of promoting the equal opportunity of girls in high school.[130] Regardless, a law cannot deny protection of the law or remove protections for certain groups under the guise of removing "preferential treatment" that groups like the LGBTQ+ community supposedly possess.[131]

It is important to first highlight that it is not within constitutional nor Title IX tradition to remove students from participating in school activities—rather, Title IX's explicit purpose is to encourage equal participation and inclusivity.[132] As mentioned previously in this Article, transgender athletes—including trans women—have been able to compete in women's competitions for decades.[133] Out of 190 Title IX cases between 1993 and 2007, there were only nineteen cases that dealt with the exclusion of boys from girls' teams or girls from boys' teams.[134] Furthermore, although "sex testing" female athletes has existed for decades, professional sports governing bodies only began testing women for chromosomes and regulation of "professional women athletes' endogenous testosterone levels" in 2011.[135] Additionally, high schools and colleges have not engaged in sex testing or sex verification for students; however, since the *Soule* lawsuit, many states have looked into the new possibility of testing young female athletes who are suspected of being transgender, including required "genital

127. United States v. Windsor, 570 U.S. 744, 746–47 (2013); Romer v. Evans, 517 U.S. 620, 635–36 (1996).

128. *Romer*, 517 U.S. at 644–47 (Scalia, J., dissenting).

129. *Windsor*, 570 U.S. at 770–71.

130. Amended Complaint, *supra* note 15, at 8–10.

131. *Romer*, 517 U.S. at 639 (Scalia, J., dissenting).

132. Fedder, *supra* note 52, at 18; *see* Suski, *supra* note 52, at 2260–62.

133. *See* Griffin, *supra* note 18.

134. Anderson & Osborne, *supra* note 122, at 136–37.

135. Medley, *supra* note 11, at 683–84.

exams."[136] There is no court in the United States that has ever interpreted Title IX's equal opportunity provisions to not extend to transgender students, nor has any United States court ever determined that "sex" within Title IX explicitly excluded or failed to encapsulate the transgender identity.[137]

Preventing transgender children from participating in sports in accordance with their gender identity is unusual in the same way the laws in *Romer* and *Windsor* were. The plaintiffs in *Soule* are asking the court to find that transgender students in the United States be banned from participating in sports in accordance with gender identity across all levels of competition.[138] They make no allowances for individual consideration of transgender athletes, nor for transgender athletes who have medically transitioned.[139] Under this framework, transgender athletes may participate on teams that do not align with their identity—resulting in stigmatization and ostracization—or they cannot participate in athletics at all.[140] Such a rule under Title IX policy would thus serve as both a total ban on transgender athletes and spur social stigmatization. Forcing athletes to participate on teams that do not align with their gender identity would only apply to transgender students, singling them out for their transness and placing barriers to participation in school-sanctioned activities that do not exist for cisgender students.[141] Although some transgender athletes may choose to compete in athletics despite anti-trans athlete laws, many may choose not to pursue athletics to avoid the social stigmatization, medical procedures, and distressful media coverage.[142] Thus,

136. Elizabeth A. Sharrow, *How High School Sports Became the Latest Battleground over Transgender Rights*, CONVERSATION (Dec. 22, 2020), https://theconversation.com/how-high-school-sports-became-the-latest-battleground-over-transgender-rights-151361 [https://perma.cc/8VV9-B4YN] (explaining the introduction of laws that would authorize sex testing of high school and college athletes through genital exams and genetic and hormone testing across twenty states in 2020); Maia Belay & Russel Falcon, *Ohio Bill Would Require Genital Exams for Student Athletes if Sex is Questioned*, FOX 59 (June 10, 2022), https://fox59.com/news/national-world/ohio-bill-would-require-genital-exams-for-student-athletes-if-sex-is-questioned/ [https://perma.cc/8QJD-4K8G].

137. Defendant's Reply, *supra* note 49, at 9–11.

138. Amended Complaint, *supra* note 15, at 46.

139. *Id.* at 17.

140. *New Study Examines Why Transgender Girls Participate in High School Sports, as Wave of Sports Bans are Implemented Across the U.S.*, TREVOR PROJECT (Oct. 18, 2022), https://www.thetrevorproject.org/blog/new-study-examines-why-transgender-girls-participate-in-high-school-sports-as-wave-of-sports-bans-are-implemented-across-the-u-s [https://perma.cc/9DXD-F3V3].

141. *Id.*

142. *Id.*; Eddie Pells, *Title IX's Next Battle: The Rights of Transgender Athletes*, AP NEWS (June 19, 2022), https://apnews.com/article/title-ix-transgender-athletes-

banning transgender students from participating in high school athletics identifies children by a single trait—being transgender—as a class and denies them access to a program that all other children would normally have access to. This is an unusual law outside the tradition of Title IX's mission of challenging traditional gender roles and battling sex discrimination and prejudice.[143]

Furthermore, like marriage in *Windsor*, the ability to fully participate in school and its activities is a cornerstone of the social and political landscape in the United States.[144] The effect of this type of stigmatization—especially in high school—cannot be understated. Athletic programs at all levels have benefits that reach far beyond just physical fitness.[145] Participation in athletics allows "students to develop care and empathy . . . learn to see things outside their own personal perspective," "create a support system that transcends the field of play," expand an understanding and acceptance of self, and "cultivate a second family."[146] Furthermore, "participation in sports has been shown to counteract the harms suffered from bullying, rejection, and discrimination."[147] Notably, schools and communities that implement transgender-inclusive policies—including inclusive athletic policies—"report lower suicide, greater school safety, and higher grades" for all

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rights-9adfe49a8e07f66f07b5e2302bb94730 [https://perma.cc/HH2F-YHWV]; Scott Gleeson, *'It's a Life or Death Issue': Trans Athletes Fight for Their Humanity While Battling Anti-Trans Laws*, USA TODAY (June 9, 2021), https://www.usatoday.com/story/sports/2021/06/09/its-life-death-issue-trans-athletes-fight-draconian-laws/5290074001/ [https://perma.cc/P3RW-W74B] [hereinafter "*It's Life or Death"*].

143. Amended Complaint, *supra* note 15, at 42; Romer v. Evans, 517 U.S. 620, 621, 633 (1996); United States v. Windsor, 570 U.S. 744, 768 (2013); MANNING, *supra* note 52.

144. *See* Kenneth Macri, *Not Just a Game: Sport and Society in the United States*, 4 INQUIRIES J. (2012) (explaining that high school sports participation has extensive benefits lasting long past graduation); Steve Amaro, *Participation in High School Athletics Has Long-Lasting Benefits*, NAT'L FED'N STATE HIGH SCH. ASS'NS, (Jan. 22, 2020), https://www.nfhs.org/articles/participation-in-high-school-athletics-has-long-lasting-benefits/ [https://perma.cc/R7Z4-2AX9]; *Windsor*, 570 U.S. at 746–47 ("The state's decision to give this class of persons [gay people] the right to marry conferred upon them a dignity and status of immense import.").

145. *See* Medley, *supra* note 11, at 676–77 ("Participation in athletics can promote physical and mental health, support the development of leadership skills, foster self-esteem, and confer prestige as well as academic and career opportunities. There is also evidence that athletic participation in school has a positive effect on students' academic achievement and graduation rate.").

146. Amaro, *supra* note 144.

147. *Transgender Athletes: A Research-Informed Fact Sheet*, UNIV. KAN. SCH. SOC. WELFARE, https://socwel.ku.edu/sites/socwel/files/documents/Transgender-Sports-Youth-Fact-Sheet.pdf [https://perma.cc/W4GR-263C].

students, not just transgender students.[148] Thus, denying transgender students the ability to participate in sports denies them the social and mental health benefits associated with school athletic programs. The denial opens transgender students up to immediate stigmatization, as they are singled out as students who cannot participate fully in school programs. Singling out transgender students based on their transgender status in sports and in the greater school community gives the "stigmatizing message that a transgender boy is not a normal or real boy, or a transgender girl is not a normal or real girl,"[149] coinciding with the "cultural messages that drive bullying of transgender youth."[150]

Proponents of banning transgender girls and women from participating in women's sports would argue that the purpose of the ban is not to stigmatize or express disapproval of transgender people, but rather to promote equal opportunity for cisgender women. In this view, any adverse effects on the transgender community are merely side effects of the ban, not the essence of it.[151] However, this argument is reminiscent of the arguments found in *Windsor* and *Romer*, which the Court ultimately rejected. The essence of such a ban would be to uphold traditional gender roles. The plaintiffs make this apparent by repeatedly referring to transgender girls as boys, using the dead names when referring to transgender students, asserting that biological men are inherently more competitive and athletically gifted than biological women, and claiming that traditional gender roles are "inescapable biological facts of the human species, not stereotypes, 'social constructs', or relics of past discrimination."[152] The plaintiffs also seemingly mock transgender athletes, saying they should not be "praised by schools and media as 'courageous'" or "hailed as 'female [athletes] of the year.'"[153] These anti-trans athletic rules and regulations along "binary sex categories provide a mechanism for enforcing, regulating, and surveilling socially constructed gender roles."[154]

148. *Id.*

149. Levasseur, *supra* note 83, at 992 (quoting Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 WISC. J. L. GENDER & SOC'Y 301, 314 (2013)).

150. *Id.*

151. *Cf.* Amended Complaint, *supra* note 15, at 8–9 (alleging that the central issue is equivalent opportunities in sports without reference to exclusion); *see also* Medley, *supra* note 11, at 684–85 (noting that anti-trans activists emphasize unfair advantage for cisgender women as opposed to exclusion of transgender people).

152. Amended Complaint, *supra* note 15, at 12.

153. *Id.* at 19.

154. Medley, *supra* note 11, at 685.

Such rules are simply an effort to force people into compliance with social norms and are ultimately exclusionary policies claiming to serve as a "proxy for athletic ability."[155]

Overall, the essence of banning transgender girls from competing in high school athletics is to discriminate or stigmatize one group of individuals based on their gender. Although the word "transgender" does not appear in the text of Title IX, nor does Title IX specifically purport to protect transgender students, there is nothing in the text that specifically states that transgender students are not included in the definition of "sex" or are not afforded Title IX protection.[156] While the *Soule* plaintiffs ask the court to find that "sex" is limited to "biological" sex in a way that excludes transgender students, such an interpretation directly conflicts with the values in landmark LGBTQ+ cases like *Romer* and *Windsor*.[157] Essentially, the *Soule* plaintiffs ask the court to conclude that transgender girls are not "real" girls by denying them, singling them out, and banning them from sports teams that align with their identity in a way that is explicitly unconstitutional under both the *Romer* and *Windsor* frameworks, which held that this type of singling out of LGBTQ+ people violated equal protection principles in other contexts.[158] The exclusion of transgender students from Title IX would result in a revocation of equal protection for transgender students, systemically denying them from the same fulfilling high school experience cisgender students have access to, as well as excluding a class of individuals based on one attribute.

D. Title IX As a Shield: Inclusive Interpretation Options

If courts ultimately reject the interpretation of sex that the plaintiffs argue for in *Soule*, the question regarding how the court should interpret "sex" remains. There are several ways that courts could "interpret the prohibition on sex discrimination" in a way that

155. *Id.* at 687.

156. *See* Defendant's Reply, *supra* note 49, at 6–7 ("Plaintiffs fail to identify any text from Title IX, the implementing regulations, the 1979 Policy Statement, or any other OCR Policy Statements pre-2020 that purports to restrict schools from allowing girls who are transgender to play on the same teams as other girls.").

157. Amended Complaint, *supra* note 15, at 12 (referencing transgender students as biological males nine times).

158. *See* Levasseur, *supra* note 83, at 992 ("The cost to the transgender student when the student's gender identity is not respected can be severe. 'This is precisely the kind of "badge of inferiority" that antidiscrimination laws, such as Title IX, forbid.'").

"would make the law available to transgender plaintiffs."[159] Generally, courts should interpret "sex" under Title IX to include not only cisgender men and women, but transgender men and women, too. As noted above, there is nothing within the text of Title IX or in case law that explicitly bars this interpretation.[160] There are three lines of precedent in sex discrimination cases that could be applicable here, outlined below.

The available categories to which courts could choose to define sex discrimination include "discrimination on the basis of gender nonconformity," discrimination "based on the change of one's sex," or discrimination "based on gender identity."[161] Discrimination on the basis of gender nonconformity recognizes that discrimination can frequently occur based on how one presents their gender outwardly.[162] This would include people who fall outside the gender binary or intersex people but could run the risk of excluding transgender people who fall squarely within the gender binary, particularly those individuals who are able to "pass" as the gender they identify with. On the other hand, discrimination on the basis of "change" in sex explicitly protects transgender people who have taken steps to medically transition; however, it may not cover people who are generally gender nonconforming or individuals who choose to not medically transition for a variety of reasons.[163]

In the context of sex segregation—including sex-segregated sports—discrimination based on gender identity would be the most effective interpretation to extend Title IX anti-discrimination norms to transgender students.[164] Gender identity encapsulates change of sex, transgender status, and gender presentation in general, regardless of medical transitioning.[165] Banning transgender students from competing on teams that align with their gender identity necessarily requires the classification of

159. Erin Buzuvis, *On the Basis of Sex: Using Title IX to Protect Transgender Students from Discrimination in Education*, 28 WIS. J. L. GENDER & SOC'Y 219, 220–21 (2013).

160. *See* Defendant's Reply, *supra* note 49, at 6–7.

161. Buzuvis, *supra* note 159, at 221.

162. *See id*. at 230. For an example of a court decision finding that sex discrimination encapsulates discrimination on the basis of gender nonconformity, see Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874 (9th Cir. 2001).

163. Buzuvis, *supra* note 159, at 231–32 (citing Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008)) (arguing that the *Schroer* court held that "refusing to hire someone who changes their sex targets that person because of sex," which is sex discrimination "in the same sense that refusing to hire someone because they have converted from one religion to another is discrimination on the basis of religion.").

164. *Id*. At 240.

165. *Id*. At 233.

individuals as cisgender and transgender *as well as* male or female. Many jurisdictions have already interpreted other statutes to explicitly prohibit discrimination against people based on gender identity, which necessarily includes the transgender identity.[166] Rules and classifications such as the ones in *Soule* essentially exclude transgender students "from a team that does not match the gender listed on the student's birth records," which would constitute unlawful discrimination on the basis of gender identity.[167]

Finding that discrimination on the basis of gender identity is included within the greater context of sex discrimination is not only consistent with the mission of Title IX, but actually furthers the mission of Title IX overall. Considering that the mission of Title IX is to eradicate any and all gender discrimination in school-related athletics, discrimination based on "gender identity" would be the most effective in protecting not only transgender people from sex-based discrimination, but also people of color (who are most frequently targeted for gender policing), intersex people, and cisgender women.

Despite the unique space athletics holds in the culture of the United States, it has been used as a tool to further the agenda of female inferiority, traditional gender roles, and racism. Historically, women were not able to participate in excessive physical activity due to supposed danger it presented to women both physically and psychologically, ultimately affecting their ability to have and raise children.[168] Similarly, racial segregation of sports was essentially an extension of Jim Crow laws excluding Black people not only from popular United States culture during the time period, but from the political and economic benefits of participating in professional sports.[169] Even the rules for men and women within

166. *Id.* At 241–42.

167. *Id.* at 242 (quoting Memorandum from Mitchell Chester, Comm'r, Mass. Dep't of Elementary & Secondary Educ., to Members of the Bd. of Elementary & Secondary Educ. (June 19, 2012)).

168. *See* Nancy Leong, *Against Women's Sports*, 95 WASH. U. L. REV. 1251, 1251–55 (2018) (explaining how sports that are strictly segregated along gender lines imply that women are "physically, intellectually, or emotionally unable to compete with men."). In fact, that data show that for many sports, women are just as athletically talented as men. *See, e.g.*, Franck Le Mat, Mathias Géry, Thibault Besson, Cyril Ferdynus, Nicolas Bouscaren & Guillaume Millet, *Running Endurance in Women Compared to Men: Retrospective Analysis of Matched Real-World Big Data*, 53 SPORTS MED. 917, 917–18 (2023) (noting that women perform better in endurance sports). Ultimately, sex segregation of sports both is a product of and reinforces the notion that women are inferior to men on numerous fronts.

169. *See* Ronen Ainbinder, *Changing the Game: Sports in the Jim Crow Era*, LEARNING FOR JUST. (June 5, 2020), https://www.learningforjustice.org/podcasts/teaching-hard-history/jim-crow-

the same sport—tennis, for example—uphold the notion that female athletes are weaker and athletically inferior; rules such as these not only reinforce this gender stereotype, but help make it so by preventing female athletes from competing under the same rules as men.[170] Another example is gymnastics: while men's gymnastics highlight skills such as power, strength, and speed, women's gymnastics highlights elegance, grace, and "artistry"; further, female gymnasts must wear leotards, specific hairstyles, and makeup, while men wear "long pants and tank tops."[171] The implications of such rules are that female athletes should be valued and scored for "the way they look" rather than on their skill and talent.[172]

Strict "biological" rules that claim to be based in scientific fact which ultimately exclude individuals who fall outside of traditional gender roles are ultimately methods of policing gender on a broader scale. It is about deciding who gets to be a woman and what it means to be a woman.[173] Thus, it is no surprise that the women who have recently been determined to "run afoul of the gender verification rules" are all from the "global south" and women of color.[174] This phenomenon can be attributed to patriarchal power structures, but also a continued extension of colonial power in determining who may own and profit from their femininity.[175] Generally, sports testing and general policing disproportionately prejudice women of color and intersex people.[176] These tests are often predicated on gender stereotyping that is not always accurate and based in racist stereotypes.[177] For example, 16.5% of men exhibit "'female' levels"

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era/changing-the-game-sports-in-the-jim-crow-era [https://perma.cc/TQ6H-3QFM].

170. *See* Leong, *supra* note 168, at 1276 ("Artistic gymnastics . . . evaluates both men and women on acrobatic ability, but also evaluates women on elegance and grace, while emphasizing strength and power for men.").

171. *Id.*

172. *Id.*

173. *See* Monica Hesse, *We Celebrated Michael Phelps's Genetic Differences. Why Punish Caster Semenya for Hers?* WASH. POST (May 2, 2019), https://www.washingtonpost.com/lifestyle/style/we-celebrated-michael-phelpss-genetic-differences-why-punish-caster-semenya-for-hers/2019/05/02/93d08c8c-6c2b-11e9-be3a-33217240a539_story.html [https://perma.cc/PPJ9-Z8FJ].

174. Melissa Block, *Olympic Runner Caster Semenya Wants to Compete, Not Defend Her Womanhood*, NPR (July 28, 2021), https://www.npr.org/sections/tokyo-olympics-live-updates/2021/07/28/1021503989/women-runners-testosterone-olympics [https://perma.cc/E73T-7ALK].

175. *See id.* (noting that Dr. Tlaleng Mofokeng believes that the double standard comes at least partially as a remnant of patriarchal and colonial power).

176. *Id.*

177. Morgan Campbell, *Rules Governing Olympic Runners Send a Disturbing Message to Female Athletes, Especially Those Who Are Black*, CBC (July 7, 2021), https://www.cbc.ca/sports/opinion-case-of-namibian-runners-further-exposes-half-

of testosterone, while 13.7% of women exhibit "'male' levels" of testosterone naturally.[178] These are natural fluctuations in athletes' bodies, yet they are treated as unfair advantages in a way that other biological advantages in athletics are not.[179] If having naturally high testosterone levels can be considered an advantage, why are attributes such as abnormal height, abnormal limb length, or low lactic acid production considered acceptable athletic anomalies?[180]

The Title IX framework under *Soule* would also punish women and girls who do not comply with traditional gender norms and stereotypes.[181] For example, the *Soule* complaint ignores intersex people altogether. Under the *Soule* framework, an intersex person assigned female at birth could be banned from competing in women's sports despite presenting as and living as a woman for the entirety of their life. This has already happened on an international scale. Caster Semenya, an intersex woman from South Africa, was banned from the 2020 Summer Olympics in Tokyo after refusing to artificially lower her testosterone levels, which her body naturally produces.[182] She was assigned female at birth, lived her entire life identifying as a woman, and competed in women's events; she was only banned from women's sports following a required sex verification test after winning the 800-meter world championship at the age of 18.[183] Since Caster Semenya was banned, rates of sex testing have increased, and additional athletes have been banned from the international stage, most of them being women from African countries.[184]

Finally, the lawsuit has implications for cisgender women. The plaintiffs' argument depends on inherent male superiority and notions that females are inherently worse athletes. The plaintiffs state that "as a result of these many inherent physiological

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baked-testosterone-regulation-1.6092033 [https://perma.cc/B4PL-MJNW].

178. Quispe Lopez, *'Sex Tests' on Athletes Rely on Faulty Beliefs About Testosterone as a Magical Strength Hormone*, BUS. INSIDER (Aug. 1, 2021), https://www.businessinsider.com/the-olympics-uses-testosterone-to-treat-trans-athletes-like-cheaters-2021-7 [https://perma.cc/7V86-ZQYY] (citing M. L. Healy, J. Gibney, C. Pentecost, M. J. Wheeler & P. H. Sonksen, *Endocrine Profiles in 693 Elite Athletes in the Postcompetition Setting*, 81 CLINICAL ENDOCRINOLOGY 294, 294 (2014)).

179. *Id.*

180. *Id.*; *see also* Hesse, *supra* note 173.

181. *Cf.* Medley, *supra* note 11, at 687 ("[S]ex testing tells us more about . . . 'what we want to do with the results, why we're testing, and our cultural attitudes towards sex and gender.'").

182. Block, *supra* note 175.

183. *Id.*

184. *Id.*

differences between men and women after puberty, male athletes consistently achieve records 10-20% superior to comparably fit and trained women across almost all athletic events," that males have "physiological advantages," and that women have "little hope of winning" or competing with "biological [males]."[185] These types of arguments—and strict segregation of sports by gender in general—harm cisgender women by communicating that "women are weaker and less physically capable" than men, a notion that "underlies some of the more virulent arguments that women simply are not equal to men."[186] This is the crux of the *Soule* argument: by seeing transgender girls and women as boys or men, the plaintiffs both assert and rely upon the fact that women are physically inferior to men, a presumption that is not necessarily true.[187] Notably, the complaint in *Soule* fails to address the fact that two of the four plaintiffs "outperformed both [transgender athletes] in championship races," and only two transgender girls have ever competed within the CIAC division within the past seven years.[188]

Thus, while there are three precedential alternatives to interpreting sex discrimination, discrimination based on gender identity would extend the broadest level of protection to groups that are potentially affected by gender discrimination. Discrimination on the basis of gender identity would extend discrimination protection to cisgender women, intersex people, transgender people, and women of color irrespective of how these individuals choose to outwardly express their gender and medical-transition status. Protecting gender minorities is at the very root of Title IX, and a broad interpretation of gender discrimination would best accomplish gender equity in school settings. A broad interpretation would help all gender minorities have access to crucial academic and social programs such as athletics.

185. Amended Complaint, *supra* note 15, at 10–20, 34.

186. Leong, *supra* note 168, at 1253.

187. *See generally* REBECCA M. JORDAN-YOUNG & KATRINA KARKAZIS, TESTOSTERONE: AN UNAUTHORIZED BIOGRAPHY 9 (Harv. Univ. Press 2019) (explaining the myth that testosterone levels are linked to higher levels of athleticism); *See generally* Leong, *supra* note 168 (noting that many sports are not sex-segregated, and females compete with males in those sports and win). Leong points to several sports and studies, including rock climbing, long-distance running, cycling, shooting, fencing, and wrestling. *Id.* at 1259. Many of these sports include other measures rather than gender, such as weight class. *Id.* at 1269.

188. Defendant's Reply, *supra* note 49, at 11.

Conclusion: High Stakes

There are several concerning points within the *Soule* lawsuit that elevate the stakes for transgender people nationwide. It is clear from the rhetoric of the complaint that this lawsuit is not just about the right to equal opportunity in sports, but rather the legitimacy of the transgender rights movement as a whole.[189] Although the lawsuit was filed against various school boards and not individual students, the plaintiffs do call out two specific students.[190] Throughout the entirety of the complaint, the plaintiffs refuse not only to call the transgender students by their correct pronouns, but also refer to them exclusively as "physiological males" or "biological males."[191] They refer to trans female athletes as males, boys, and "students with male bodies who are competing in girls' [competitions]."[192] From the outset of the complaint, the plaintiffs assert that transgender women are not "specific" or "identifiable" girls or women, as opposed to real cisgender girls and women.[193]

Additionally, the plaintiffs deny the existence and legitimacy of the transgender identity altogether. The plaintiffs present unsubstantiated and out-of-context "data" as "inescapable biological facts of the human species, not stereotypes, social constructs, or relics of past discrimination."[194] Perhaps most concerningly, the complaint suggests that waves of "males" are "claiming transgender identity as girls," further cementing the fact that this lawsuit is not simply about women succeeding in sport, but also advancing a fundamentally anti-trans ideology.[195]

Although seemingly politically insignificant to some in the United States, athletics are and have always been political. Bans

189. *See* Jack Mackey, Engendering Trans Inclusion in Interscholastic and Intercollegiate Athletics: A Critical Analysis of Sex and Gender in Sports, Title IX Protections Post-Bostock, and Intersectional Methods of Antidiscrimination Law 57 (May 13, 2021) (B.A. thesis, William & Mary University) (explaining that the *Soule* lawsuit is an attempt to "codify a means by which it could be argued that the legal recognition of transgender people could constitute a form of sex discrimination [against cisgender women] in and of itself.").

190. Amended Complaint, *supra* note 15, at 21 (identifying two transgender athletes in the CIAC sports system).

191. *See generally id.* (demonstrating the plaintiff's refusal to refer to transgender women as women, including two high school students they specifically named); *see also* Mackey, *supra* note 189, at 68 (giving further background into the case, including the fact that the case stalled in the lower courts because the plaintiffs and their lawyers requested that the judge recuse himself after the judge refused to call the transgender women "males.").

192. Amended Complaint, *supra* note 15, at 17.

193. *Id.* at 2.

194. *Id.* at 12.

195. Mackey, *supra* note 189, at 68 (quoting Amended Complaint, *supra* note 15).

based on rigid gender binary lines threaten not only the transgender community, but also cisgender women and intersex people. It has the potential to affect many underrepresented and historically discriminated-against groups at an international level, including women, non-binary people, and people of color. While banning transgender athletes from playing sports under Title IX in high school may seem like a narrow issue, allowing the rigid interpretation of gender and sex proposed by the plaintiffs in *Soule* under the guise of protecting women could open the door to allowing agencies and organizations to police identity and decide who counts as a "real" man or woman and who does not. Thus, excluding people from participating in high school athletics based on their transgender status facilitates generalized exclusion, discrimination, and stigmatization of not only transgender people, but also women and intersex people.

As transgender issues continue to dominate news cycles in the United States, the status of transgender athletes under Title IX will continue to evolve. Because an increasing number of lawsuits are being filed within this context, it is inevitable that new policies and rules will come out of various court decisions—including a Supreme Court ruling in the future. For these reasons, it is imperative that LGBTQ+ activists and politicians consider the most effective way to interpret discrimination on the basis of sex under Title IX so that the rights of transgender students and other minority gender groups are adequately protected. Because discrimination on the basis of gender identity would extend the broadest blanket of protection for students of all genders, courts should interpret "sex" in this manner, using Title IX as a shield to protect groups like the transgender community from discrimination rather than a sword with which to exclude otherwise vulnerable groups.

Martin Sostre – Enemy of the State

Laura Molik†

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Introduction – Remembering Martin Sostre

> *In American prisons, which are extraordinary violent places, the most vicious form of punishment is simply to lock a person in an empty room for years with absolutely nothing to do. This emptying of any possibility of communication or meaning is the real essence of what violence really is and does.*
>
> David Graeber[1]

Martin Ramirez Sostre was born in East Harlem on March 20, 1923, to a Black father and Puerto Rican mother.[2] A World War II

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†. J.D., Albany Law School, 2022; B.A. in Philosophy, Purchase College – State University of New York, 2013. I am deeply grateful to Anthony Paul Farley, James Campbell Matthews Distinguished Professor of Jurisprudence at Albany Law School, for his dedication and generosity in supporting this project and his invaluable insights and guidance in pursuing this subject matter. I would also like to thank my husband, Samuel D. Molik, for his meaningful contributions to this Article and his unwavering support.

1. DAVID GRAEBER, THE UTOPIA OF RULES: ON TECHNOLOGY, STUPIDITY, AND THE SECRET JOYS OF BUREAUCRACY 59 (Melville House 2015).

2. Alexandria Symonds, *Overlooked No More: Martin Sostre, Who Reformed America's Prisons from His Cell*, N.Y. TIMES (Apr. 24, 2019), https://www.nytimes.com/2019/04/24/obituaries/martin-sostre-overlooked.html [https://perma.cc/4G9Z-PDV9]; John L. Hess, *Clemency Given to Sostre and 7*, N.Y. TIMES (Dec. 25, 1975), https://www.nytimes.com/1975/12/25/archives/clemency-given-to-sostre-and-7-sakharov-and-others-urged-governor.html

Tuskegee veteran, jailhouse lawyer, "brilliant" teacher,[3] radical activist, and fearless prison organizer, Sostre was one of the leading figures in the Black liberation movement of the 1960s. He inspired some of the most prolific Black Anarchists of the late twentieth

[https://perma.cc/T9NK-54WK]; David Vidal, *The Prison Attorney*, N.Y. TIMES (Dec. 25, 1975), https://www.nytimes.com/1975/12/25/archives/the-prison-attorney-martin-sostre.html [https://perma.cc/9DEY-J634]; William C. Anderson, *The Unforgettable Life of Prison Rebel Martin Sostre*, ROAR MAG. (Aug. 12, 2000), https://roarmag.org/essays/martin-sostre-prison-activist/ [https://perma.cc/UBH5-7HLR]; FRAME UP! THE IMPRISONMENT OF MARTIN SOSTRE (Pacific Street Film Collective 1974) (Sostre's father was a merchant seaman and his mother dropped out of Textile High School in New York City after tenth grade); Joseph Shapiro, *How One Inmate Changed the Prison System from the Inside*, NPR (Apr. 17, 2017), https://wamu.org/story/17/04/17/how-one-inmate-changed-the-prison-system-from-the-inside/ [https://perma.cc/Y4BA-WXQX] ("[Sostre's] parents were black and Puerto Rican — his father a house painter and mechanic; his mother, a seamstress. He dropped out of high school during the Great Depression to help support his family."); Malcolm McLaughlin, *Storefront Revolutionary: Martin Sostre's Afro-Asian Bookshop, Black Liberation Culture, and the New Left, 1964–1975*, 7 SIXTIES 1, 4 (Jul. 3, 2019) ("Martin Sostre was . . . raised in poverty by his Puerto Rican mother during the turbulent years of the Depression – a time of 'picketing, agitation, uprisings and gang fights,' as he later recalled.").

3. FRAME UP!, *supra* note 2.

century,[4] including Kuwasi Balagoon,[5] Ashanti Alston,[6] and Lorenzo Kom'boa Ervin.[7]

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4. Dana M. Williams, *Black Panther Radical Factionalization and the Development of Black Anarchism*, 46 J. BLACK STUD. 678, 679–80 (Jul. 2015) ("The key figures of Black anarchism . . . are Ashanti Alston, Kuwasi Balagoon, Lorenzo Kom'boa Ervin, Ojore Lutalo, and Martin Sostre. These individuals began to discover anarchism during the period of the late 1960s through the 1970s, to develop their ideas into the 1980s, and then began to have an influence upon American anarchism beginning in the 1990s. All except Sostre were members of the BPP . . . . All spent time in prison for a variety of crimes (including allegedly fabricated charges), which they and supporters considered politically motivated crimes and prosecutions. None began adulthood as anarchists, but all moved toward anarchist positions after their participation in the Black freedom movements in the 1960s. Each articulated a distinct version of Black anarchism, as they emphasized different concerns, defined anarchism differently, advocated different strategies for social change, and spoke to different audiences—consequently 'Black anarchism' appears to be a somewhat heterogeneous ideological subvariant in anarchist thought and practice.").

5. Kuwasi Balagoon is the author of KUWASI BALAGOON, A SOLDIER'S STORY: REVOLUTIONARY WRITINGS BY A NEW AFRIKAN ANARCHIST (Matt Meyer & Karl Kersplebedeb eds., PM Press 3d ed. 2019); Akinyele K. Umoja, *Maroon: Kuwasi Balagoon and the Evolution of Revolutionary New Afrikan Anarchism*, 79 SCI. & SOC'Y 196, 196 (2015) ("Black Panther Party (BPP) and Black Liberation Army (BLA) member Kuwasi Balagoon has emerged as a heroic symbol for radical anarchists and some circles of Black radicals in the United States. He is one of the most complex figures of the Black Liberation movement. His legacy is obscured within broader Black liberation and radical circles. The evolution of his politics and his life as an open bisexual add layers of complexity to his legacy. Balagoon's political biography is a long road that includes his activism as a G.I. in the U. S. army in Germany, a tenant organizer in Harlem, and member of the Harlem branch of the BPP. Documenting the political life of Kuwasi Balagoon reveals his significance as a symbol of Black and radical anarchism. Recognition of Balagoon's contribution to Black Liberation will only emerge with the advance of both anti-authoritarian politics and challenges to homophobia in African-American activist circles.").

6. Interview by Hilary Darcy with Ashanti Alston, Black Panther Party (BPP) member, in Dublin, Ir. (Mar. 4, 2009), https://www.interfacejournal.net/wordpress/wp-content/uploads/2010/11/Interface-2-1-pp22-35-Alston.pdf [https://perma.cc/U4YB-4UL9] ("Growing up in Plainfield, New Jersey, during a turbulent and politically charged time, Ashanti's life reads like a timeline of recent revolutionary history. Inspired by the 1967 rebellions across the United States, Ashanti joins the Black Panther Party at age 17 and takes part in setting up a chapter in his hometown. Two years later, with comrades facing the death penalty, he decides to join the Black Liberation Army and organises [sic] to break them out of jail. In 1975 he begins an 11-year sentence for a 'bank expropriation' and spends his time self-educating. He has visited the Zapatista movement, organises with Anarchist People Of Colour (APOC) and the Malcolm X Grassroots Movement, and is co-chair of the Jericho Amnesty Movement while also travelling widely to share his experiences with radical movements.").

7. Lorenzo Kom'boa Ervin is a former member of the BPP and the Black Liberation Army (BLA), as well as the author of ANARCHISM AND THE BLACK REVOLUTION (2d ed., Mid-Atlantic Publishing Collective 1993); Nik Heynen & Jason Rhodes, *Organizing for Survival: From the Civil Rights Movement to Black Anarchism Through the Life of Lorenzo Kom'boa Ervin*, 11 ACME: INT'L J. FOR CRITICAL GEOGRAPHIES 393, 393-94 (2015); Jonathan W. Hutto, Sr., *The Black Freedom Struggle: An Anarchist Perspective (A Review of Anarchism and the Black Revolution: The Idea of Black Autonomy, Lorenzo Komboa Ervin)*, *in* 27

It remains true to this day that the vast majority of self-described American anarchists are white, a fact that was not lost on Black Anarchists like Sostre and Ervin, who in many ways center their later work in part around a critique of this reality.[8] The development of the concept of Black Autonomy grew out of a recognition of the forces of systemic racism within majority white movements and the necessity for Anarchists of Color to retain "independence of thought, culture, and action"[9] in order to make possible "the building of a true freedom movement in this land."[10] Since the earliest expressions of Black Anarchism in the United States, there have been numerous prolific Black Anarchists who have been lost to history. However, the origin of Black Anarchism as a distinct collection of history, theory, and organization is more accurately ascribed to the legacy of Martin Sostre.[11]

PERSPECTIVES ON ANARCHIST THEORY 107, 108 (The Institute for Anarchist Studies 2014) ("It is Ervin's desire to spread anarchist ideas, not to lead people, but to teach them how to better organize themselves."); Lorenzo Kom'boa Ervin, *Martin Sostre: Prison Revolutionary*, BLACK ROSE ANARCHIST FED'N (Feb. 25, 2020) [hereinafter "Ervin, *Prison Revolutionary*"], https://blackrosefed.org/martin-sostre-prison-revolutionary-komboa/ [https://perma.cc/ZJ63-K3NJ] ("I became an Anarchist, a jailhouse lawyer, and a prison activist during the 1970's [sic] because of Martin Sostre."); Anderson, *supra* note 2 ("Sostre's immeasurable contributions . . . had a big impact on the life and thought of Black anarchist Lorenzo Kom'boa Ervin. It was Sostre who introduced the former Black Panther Party member to anarchism after they met in federal detention. . . . Lorenzo based much of his efforts around Black Autonomy, his own jailhouse litigation and his 'Free Lorenzo' campaign that resulted in his freedom on Sostre's instructions. Through Lorenzo, Sostre indirectly inspired a new generation of Black anarchists (myself [author] included)." (citing Ervin, *Prison Revolutionary*, *supra* note 7)).

8. Ervin, *Prison Revolutionary*, *supra* note 7 ("[S]ince much of the analysis about Black oppression and Socialism was by white radicals, [Sostre] had originally gravitated into Black nationalism. It was only later during his time in prison that he gravitated into Anarchist Socialism. . . . [T]he Anarchist movement generally, had no ties or solidarity to the Black population in the USA, the UK, or the colonized people of color in the Third World. It was essentially a white European movement.").

9. *Id*. ("Like Sostre had said, we must manufacture our own Anarchist of Color school of thought and revolutionary practice. Nobody can truly speak for us and fight in our name. Black Autonomy means independence of thought, culture and action. We are not racial separatists, but we must be sure that we are strong enough to insist on our politics, leadership, and respect within any broader universal movement. We have been sold out, left out, betrayed, and tricked too many times by internal racism inside majority white coalitions and movements. Black voices matter!").

10. Williams, *supra* note 4, at 691–92 ("[T]here is a new understanding among at least some Anarchists about how White supremacy is both structurally and ideologically a weapon which prohibits the building of a true freedom movement in this land . . . ." (citing Ervin, ANARCHISM AND THE BLACK REVOLUTION, *supra* note 7)).

11. *Id.* at 688.

Sostre's legal victories in federal court as a *pro se* litigant challenging New York State prison practices continue to have profound ramifications for the prisoners' rights movement, particularly around issues of solitary confinement, censorship of written materials and correspondence, religious freedom and expression, and access to courts and legal representation while incarcerated.[12] Yet Sostre is rarely named or even acknowledged in popular accounts of some of the most legally, politically, and socially transformative moments of the civil rights movement of the 1960s and 70s which he directly influenced, including the Attica Prison Rebellion in 1971.[13] In fact, it was Attica officials' refusal to

12. McLaughlin, *supra* note 2, at 16; H.W., *Introductory Note*, *in* Martin Sostre, *The New Prisoner*, 4 N.C. CENT. L. REV. 242, 242 (1973) ("Among the many liberties advocated by Brother Sostre have been: rights to the free exercise of religion (*Sostre v. McGinnis,* 334 F.2d 906 (1964) [sic]; indigent prisoner's right to appeal in forma pauperis *(Applic. Of Sostre,* 189 F. Supp. 111 (1960) [sic]; rights of prisoners to due process, right to political expression, right to unfettered access to public officials and a rather limited freedom from cruel and unusual punishment (*Sostre v. Rockefeller,* 312 F. Supp. 863 ([1970]) [sic], affirmed in part and reversed in part (*Sostre v. McGinnis,* 442 F.2d 178 ([1971)) [sic]; right to due process in relation to censorship of literature (*Sostre v. Otis,* 330 F. Supp. 941 (1971) [sic]. He has also been the moving force behind the formation of a prisoners' union in New York State and an advocate of minimum wages for inmate workers."); Herman Schwartz, *A Comment on Sostre v. McGinnis*, 21 BUFF. L. REV. 775, 775 (1972) ("*Sostre v. McGinnis* . . . raised almost every important current prisoners' rights issue—the propriety of lengthy and indefinite solitary confinement, interference with mail, procedural due process, exhaustion of remedies, free expression of radical ideas, inmate legal assistance, the legality of punitive and compensatory damages against state prison officials, to list but some."); Ervin, *Prison Revolutionary*, *supra* note 7 ("[I]n the late 1960's and early 1970's, Martin Sostre (1923-2015) was . . . well known as a prison activist, revolutionary, and jailhouse lawyer, who almost single-handedly won democratic rights for prisoners to receive and read revolutionary literature, write books, worship alternative religious faiths, to not be held indefinitely in solitary confinement, and to obtain legal rights to have access to legal rights at disciplinary proceedings. He was the one responsible for prisoners being able to organize during the prison struggle [of] 1967-1974. These lawsuits changed prison conditions nationwide."); Anderson, *supra* note 2 ("Had it not been for Martin Sostre, much of the important work of political prisoners, politicized prisoners and prison movements that we know of today would not have been possible.").

13. Anderson, *supra* note 2 ("Not enough people know Sostre today, though his impact on the prison struggle is as large as Black radicals like George Jackson, Angela Davis and Mumia Abu Jamal."); Ervin, *Prison Revolutionary*, *supra* note 7 ("Sostre's political consciousness and legal activism opened the door for prisoners to have legal and human rights and the ability to organize at a time of civil rights, Black Power, the New Left, and the Vietnam anti-war movements. At one stage, 1970-1976, the prison movement became the central protest movement in America, especially after the August political assassination of George Jackson, and the September, 1971 Attica rebellion. . . . [But] Martin Sostre has been lost to history . . . . He literally opened the doors for radical prisoners, Anarchist tendencies of color and radical praxis, yet not one institution or movement today is named after him. . . . Groups of jailhouse lawyers should name themselves after the man who more than anyone, successfully fought for prisoners' democratic rights, was an

implement the "sweeping prison reforms ordered by Federal Courts in the *Sostre v. Rockefeller* and *Sostre v. Otis* decisions" that played no small part in bringing the Attica prison population to its breaking point.[14] But Sostre's part in the Attica Rebellion and the impact of his pro se cases on prisoner climate at Attica leading up to the rebellion is generally left out of the story, much like the reality of the massacre itself.[15] Sostre traces these ominous omissions to "the white racist conspiracy of silence inherent in oppressive-racist America when the victims of white atrocities are Black."[16]

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activist who provided an example of a revolutionary political prisoner, and who prefigured the Black-led revolutionary prison movement, including the Attica rebellion and prison labor and activist movements of the 1970's-1980's [sic].").

14. Sostre, *The New Prisoner*, *supra* note 12, at 247 ("When the 28 Attica Reform Demands presented to and accepted by Commissioner Russell Oswald on September 12, 1971, are viewed against the background of *Sostre v. Rockefeller, Sostre v. Otis* and other directives, it becomes clear that your refusal to comply with the directives of the Courts and implement the reforms resulted in the Attica Rebellion fifteen months later. . . . had the provisions of the Federal Court mandates been complied with, and had other legitimate grievances brought to your attention by us prior to September 1971 been redressed, not one person would have died or been injured on September 9-13, 1971." (citing Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970) and Sostre v. Otis, 330 F. Supp. 941 (S.D.N.Y. 1971))); Ervin, *Prison Revolutionary*, *supra* note 7 ("The protest at Attica was put down with a bloody massacre by prison and political officials, but it opened the eyes of millions all over the world to American state violence and racism. . . . There is no doubt that the prior demands of Martin Sostre, in his writings and prisoner's rights lawsuits, who had been imprisoned at Attica some years previous, played a role ideologically. Sostre's struggle inside as a political prisoner was clearly bound up with what became the Attica Rebellion. Contrary to prison officials' accounts which now claim that the so-called Attica prison 'riot' had taken place because of a 'gang of criminals' who took guards hostage for no good reason, the truth is New York State officials refused to listen to Sostre or even the federal courts which over the years had ordered an end to brutality, racism, and mistreatment of the men inside. The prisoners took matters into their own hands, demanding human rights and an end to racist abuse with the 1971 rebellion, which shook America and the entire world.").

15. Sostre, *The New Prisoner*, *supra* note 12, at 253 ("Attica defrocked the vicious outlaw murderers who were passing themselves off as lawful authorities. It is now a historical fact that the upholders of 'law and order' are the mass murderers of 43 persons in the Attica Massacre. These are the murderers and torturers who are in charge of New York State and its prison camps."); *but see* HEATHER ANN THOMPSON, BLOOD IN THE WATER (Vintage Books 2017) (presenting an exception to the typical omission of Sostre from accounts of the Attica Rebellion).

16. Sostre, *The New Prisoner*, *supra* note 12, at 247 ("The Attica Rebellion not only was the direct consequence of your systematic denial of our basic human rights, but of your adamant refusal to accord us the civilized treatment ordered by Federal Courts in *Sostre v. McGinnis, Sostre v. Rockefeller, Sostre v. Otis,* and in many other decisions. Despite this fact being common knowledge to thousands of lawyers, judges, legislators, administrators and ordinary 'people' familiar with the sweeping prison reforms ordered by Federal Courts in the *Sostre v. Rockefeller* and *Sostre v. Otis* decisions, and the millions of words written on the causes of Attica, why hasn't this fact – the obdurate refusal of outlaw State officials to obey Federal Court orders – been exposed? It is due to the white racist conspiracy of silence inherent in

Today, Sostre's history is largely forgotten, ignored, or obscured,[17] and historians often mistake the basic facts of his life.[18] This collective repression of Sostre's story is not an accident; it is the state functioning as designed. The primary purpose of incarceration is to preserve state power by exerting control over one's body and psychosocial autonomy with the explicit intent to maintain social order and racial hierarchy above all else.[19] As Ervin observed, the criminal justice system in the United States functions as a tool for upholding the power and authority of the state rather than as a means of promoting justice for the citizenry or protecting a free society.[20] Sostre challenged that power and the racial hierarchy it upholds and depends upon, which is why the system ultimately erased him.[21]

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oppressive-racist America when the victims of white atrocities are Black." (citing Sostre v. McGinnis, 334 F.2d 906, 909 (2d Cir. 1964); Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970); and Sostre v. Otis, 330 F. Supp. 941 (S.D.N.Y. 1971))).

17. McLaughlin, *supra* note 2, at 2.

18. For example, history professor Garrett Felber mistakenly labeled Sostre as a Korean War veteran instead of a World War II Tuskegee veteran and ignored his first conviction and incarceration inside of the Armed Forces in a 2016 article. Garrett Felber, *Martin Sostre and the Fight Against Solitary Confinement*, AFR. AM. INTELL. HIST. SOC'Y (May 16, 2016), https://www.aaihs.org/martin-sostre-and-the-fight-against-solitary-confinement/ [https://perma.cc/R2ES-UWDT]. In another example, William C. Anderson describes Sostre as having "joined" the United States Army instead of being drafted, a key psychological difference considering the inherent de-individualization and complete institutional control over one's life that the Army entails, to which Sostre was not subjected by his own will. Anderson, *supra* note 2.

19. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 13 (The New Press 2012) ("Like Jim Crow (and slavery), mass incarceration operates as a tightly networked system of laws, policies, customs, and institutions that operate collectively to ensure the subordinate status of a group defined largely by race."); Anthony Paul Farley, *The Black Body as Fetish Object*, 76 OR. L. REV. 457, 487 (Jan. 1997) ("[P]ower is 'the name that one attributes to a complex strategical situation in a particular society.' There is nothing about 'race' which is separate from this 'complex strategical situation.'" (quoting 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 93 (Vintage Books 1990))).

20. Hutto, *supra* note 7, at 108 ("Ervin views the State itself, both in theory and in practice, as the root of all oppression within society when he says: 'But what is the State? It is a political abstraction, a hierarchical institution by which a privileged elite strives to dominate the vast majority of people. The State's mechanisms include a group of institutions containing legislative assemblies, the civil service bureaucracy, the military and police forces, the judiciary and prisons and the sub-central State apparatus. The purpose of this specific set of institutions which are the expressions of authority in capitalist societies . . . is the maintenance and extension of domination over the common people by a privileged class, the rich in Capitalist societies . . . .'" (quoting LORENZO KOM'BOA ERVIN, ANARCHISM AND THE BLACK REVOLUTION: THE IDEA OF BLACK AUTONOMY 46 (P&L Press 2013))).

21. Anderson, *supra* note 2 ("What does it mean to live the life Martin Sostre did and have your work remain largely unnoticed? It exposes the naked truth of a society that disappears both people and the problems we face.").

Every piece, character, and dark detail of Sostre's story, when examined in its totality, illuminates the complex web of coordinated oppression that defines the American system of incarceration and its dehumanizing enforcement of racial hierarchy by means of institutional violence.[22] From the moment Sostre was drafted into the U.S. Army at age 19, he was subjected to institutional systems of control and deliberate dehumanization, and yet, ironically, it was these very systems that created the Black radical that the state so feared in the first place.[23]

This Article is an attempt not only to tell Sostre's story accurately, but to highlight his story as a source of powerful insight into the nature and purpose of the U.S. prison system. To do so, I will utilize and adapt a methodology developed by Kendall Thomas in his 1992 essay on Angelo Herndon, a Black communist who was charged with inciting insurrection in Georgia in 1932,[24] and whose legal challenge to those charges is regarded as "one of the great civil liberties decisions of the 1930s" and "one of the notable 'success stories' of the Supreme Court's First Amendment jurisprudence."[25]

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22. *Id.* ("The state as prison has been the lived experience for countless Black people throughout generations, but sometimes a myriad of lives can be crystallized into a single account exposing the oppressive realities in intimate detail. The life of the great intellectual, imprisoned litigator and revolutionary organizer Martin Sostre was just that.").

23. Sostre, *The New Prisoner*, *supra* note 12, at 243–44 ("Your widely-publicized prison reform programs—a smoke screen not only to cover up the greatest domestic massacre in a century [at Attica], but to conceal your current repressive pacification program consisting of the post-Attica multi-million dollar appropriation for guns, gas, chemical sprays, for training killers on their effective use, construction of additional gun towers and assault tunnels within your prison camps from which to shoot us down, building and reinforcing special treatment housing or maxi-maxi units [euphemisms for solitary confinement torture chambers], etc.— . . . your repressive prison pacification program . . . has already proven counter-productive in that it has set in motion dynamic revolutionary forces that will effect the overthrow of your racist-capitalist system.").

24. Kendall Thomas, *Rouge et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case*, 65 S. CAL. L. REV. 2599–2600 (1992) ("In 1932, Eugene Angelo Braxton Herndon, a young Afro-American member of the Communist Party, U.S.A., was arrested in Atlanta and charged with an attempt to incite insurrection against that state's lawful authority.") (footnote omitted).

25. *Id.* at 2600–01 ("[I]n *Herndon v. Lowry* [301 U.S. 242 (1937)], Herndon filed a writ of habeas corpus asking the U.S. Supreme Court to consider the constitutionality of the Georgia statute under which he had been convicted. . . . [T]he Court, voting 5-4, declared the use of the Georgia political-crimes statute against him unconstitutional on the grounds that it deprived Herndon of his rights to freedom of speech and assembly and because the statute failed to furnish a reasonably ascertainable standard of guilt. *Herndon v. Lowry* is generally acknowledged as one of the great civil liberties decisions of the 1930s, one of the notable 'success stories' of the Supreme Court's First Amendment jurisprudence. It marked the first time the Supreme Court had mentioned the Holmes-Brandeis 'clear and present danger' formula in the ten years since its decision in *Whitney v.*

Thomas's project revolves around the cultivation of a "cultural history of the political events" driving the evolution of constitutional law in the U.S. through the subversive evocation of "popular memory."[26] Thomas attributes the origins of the phrase "popular memory" to Foucault, who describes it as the power to control the dynamics of social struggle.[27] Thomas characterizes the concept of "popular memory" or "countermemory" as the radical remembering of classes and communities that have been intentionally unwritten and overwritten by mainstream institutional history in a way that directly challenges mainstream history's monopoly over memory.[28]

Channeling W. E. B. Du Bois, Thomas critiques mainstream institutional history as being told "from above" by those in power, to the exclusion of the oppressed, poor, and powerless who

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California [274 U.S. 357, 374 (1957)]. It was also the first case in which the Supreme Court used the test to uphold the civil liberties claims of an individual against censorial state action, the first time the Supreme Court reviewed a sedition conviction from the South, and the first political-crimes conviction reviewed by the Court that involved an African-American defendant.") (footnotes omitted).

26. *Id.* at 2603 ("This Article . . . offers a 'remembrance' of the [Angelo Herndon] case in the form of a cultural history of the political events that led to the Court's first response to the case. I believe that the concept of a 'popular memory' can offer us great insight into constitutional history, both as object and as method . . . not simply at the level of accent and emphasis but in terms of epistemology and interpretation.") (footnotes omitted).

27. *Id.* at 2604 n.27 ("The phrase 'popular memory' appears to have originated with the French philosopher-historian Michel Foucault[:] . . . 'There's a real fight going on[] . . . [o]ver what we can roughly describe as popular memory. It's an actual fact that people–I'm talking about those who are barred from writing, from producing their books themselves, from drawing up their own historical accounts–that these people nevertheless do have a way of recording history, or remembering it, of keeping it fresh and using it. . . . Since memory is actually a very important factor in struggle (really, in fact, struggles develop in a kind of conscious moving forward of history), if one controls people's memory, one controls their dynamism. And one also controls their experience, their knowledge of previous struggles.'" (quoting Michel Foucault, *Film and Popular Memory*, in FOUCAULT LIVE 89, 91–92 (Sylvere Loitringer ed., John Johnston trans., 1989))).

28. *Id.* at 2604–06 ("[The value of] a historical literature devoted to the retrieval of 'popular memory[]' . . . lies not only in its concrete study of the history of 'subaltern' classes and communities but also in the powerful analytical terms and procedures it deploys to articulate a 'popular' historical record, or 'countermemory.' What has emerged is a way of thinking and writing about the historical process that challenges not only the premises but also the overall project of much mainstream historiography.") (footnotes omitted), 2664 ("A popular constitutional history is unwilling to impose a teleological framework on the raw material that constitutes its object of study. The source of this agnosticism is a realization that the progressivist vision of constitutional history is both an interpretive '[structure] of memory and remembering' and, at the same time, an ideological strategy of 'organized forgetting': What is forgotten is the lived experience of those whose stories disrupt the ordered image that the historical narrative of constitutional progress imposes on an unruly past.") (footnote omitted).

experience history "from below."[29] Eliminating popular cultural history from the institutional history of constitutional law gives the institutional state exclusive analytical authority over legal interpretation, application, and enforcement.[30] It is the "doorkeeper" that stands forever "before the law."[31] In contrast, developing a popular historical record requires a new examination of the cultural perspectives of those who have experienced the American constitutional order "from below."[32] The creation of a popular historical record necessitates the inclusion of the perspectives of oppressed individuals whose speech has traditionally been barred from the mainstream historical record.[33] Accordingly, Thomas highlights the value of Herndon's autobiographical account of legal events as "an instance of popular historical record"[34] and an important historical "index of American constitutionalism."[35] Similarly, I will be using Sostre's firsthand

29. *Id.* at 2604 ("Historians, wrote Du Bois, had for too long studied and written about the past solely through the eyes of those with power and position. . . . Blinded by the view from the lofty heights of professional history, practitioners had left untold the story of the nation's powerless and poor. . . . Du Bois called for the close, careful study of American history 'from below'; indeed, his own work may be taken as an exemplary intervention against the majestic myopia of historiography 'from above.'") (footnotes omitted).

30. *Id.* at 2606–07 ("American constitutional history remains one of the few disciplines in which the call for the rigorous reconstruction of our national past from the bottom up has for the most part been ignored. The historical treatment of constitutional law and politics in America is, in short, still largely an institutional history. We have yet to move beyond magisterial accounts of 'great' advocates arguing 'great' cases involving 'great' issues decided by 'great' judges sitting on 'great' courts. . . . American legal scholarship has paid insufficient attention to the cultural history of constitutionalism in America.") (footnotes omitted).

31. FRANZ KAFKA, *Before the Law*, *in* THE COMPLETE STORIES 22–23 (Willa & Edwin Muir trans., Schocken Books, Inc. 1971).

32. Thomas, *supra* note 24, at 2607 ("The chief task of a cultural history of American constitutionalism is to identify and interpret the records left by those who have experienced the American constitutional order from its underside.").

33. *Id.* at 2607 ("[A] cultural history of constitutionalism from the bottom up recognizes the right of 'un- or misrepresented human groups to speak for and represent themselves in domains defined, politically and intellectually, as normally excluding them, usurping their signifying and representing functions, overriding their historical reality.'") (footnote omitted).

34. *Id.* at 2604–05 n.27 ("One of the sources on which I shall rely is *Let Me Live*, the autobiography of Angelo Herndon. . . . Working from a more expansive understanding of the concept [of popular memory], I shall take Herndon's account of his own experience itself as an instance of a popular historical record." (citing ANGELO HERNDON, LET ME LIVE (Random House 1937))).

35. *Id.* at 2620 ("Nothing could be more elitist than to blithely dismiss Herndon's narrative of his trial and conviction, whether the dismissal takes the form of a weak claim that *Let Me Live* is a layman's legal history with which we need not be concerned, or whether it rests instead on a stronger assertion that the book is merely a piece of audacious Communist Party propaganda.") (footnote omitted), 2666 ("Herndon's account is valuable because it provides a perspective on the case from

accounts of significant legal events in his life as an instance of popular historical record in my analysis of those events and their significance to the constitutional history of American incarceration.[36]

The reexamination of history "from below" in Thomas's methodology does not simply add alternative versions of history to the existing institutional narrative; rather, it recasts the scope of historical possibility in a way that radically questions the logical and ideological basis of mainstream historical accounts.[37] Accordingly, Thomas's "rereading" of the Angelo Herndon case seeks to expose the various hidden cultural, social, and political complexities of the events of the case for the purpose of rewriting those events into a popular historical record that paints a more complete picture of the 1930s as a significant episode in the broader history of American constitutionalism.[38] In fact, Thomas maintains that a full account or understanding of American constitutionalism

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below–from the point of view of those for whom '[h]istory is what hurts.' . . . Herndon's subaltern experience . . . is as fundamental and significant an index of American constitutionalism as that found in official legal texts.") (footnote omitted).

36. *See generally* Sostre, *The New Prisoner*, *supra* note 12.

37. Thomas, *supra* note 24, at 2607 ("More is at stake[] . . . than 'adding one part of a population, that which has been neglected, to another, that which has provided the traditional information base.' Constitutional history from the bottom up also seeks to challenge the conceptual order or hierarchy that subtends the exclusion of the common run of human beings and their concerns from the historical study of constitutional law. This project, then, is not directed simply at reversing the longstanding bias against the record of the subaltern in American constitutional history. It also represents an effort 'to broaden the basis of history, to enlarge its subject matter, make use of new raw materials and offer new maps of knowledge.' One might anticipate that a popular memory of American constitutionalism will force us to rethink the very terms of constitutional history.") (footnotes omitted), 2666 ("My insistence on reckoning the constitutional meanings into the cultural record left by the historically dispossessed is not merely an effort to replace the current hegemony of institutional history with that of a hegemonic popular memory. It is an attempt rather to retrieve the 'buried' and 'subjugated knowledges' bequeathed to us by Americans who lived out their lives at the bottom of our constitutional order.") (footnote omitted).

38. *Id.* at 2607–08 ("The rereading offered here of the Angelo Herndon case should be taken as an illustration of the type of contribution that the quest for the recovery of a popular memory can make. It offers a case study of a period in our constitutional history of which we have important, but finally inadequate, institutional accounts: the turbulent decade of the 1930s, which has come to be known, significantly, as the 'years of protest.' As we shall see, even a cursory review of historical work on the Angelo Herndon case reveals the limitations of the notion–explicit or implicit in much of the literature–that the institutional 'great case' model permits us to fully grasp the complex, contradictory logic of the story of American constitutionalism.") (footnotes omitted).

is not otherwise possible without such infusion of "popular memory" or "countermemory" into traditional accounts of legal history.[39]

Through the intentional retrieval of a popular historical record via a conscious remembering and recording of the cultural, political, and social realities of the oppressed, Thomas goes beyond the elitist editing of mainstream institutional history and exposes a hidden underlying narrative of conflict between state institutions and subjugated individuals.[40] In applying this method to the history of constitutional law, Thomas's project instigates a fundamental reconsideration of the traditional legal frameworks enforced as fundamental truths by the dominant political order against the underclass through institutional legal history, which he calls "great-case historiography."[41] The inclusion of popular cultural history implicitly vests power in the oppressed masses to author their own experience of American constitutionalism as dispensed by and through the institutional apparatus of the state.[42]

Attorney, author, and scholar Michelle Alexander has asserted that:

> [W]hile it is generally believed that the backlash against the Civil Rights Movement is defined primarily by the rollback of affirmative action and the undermining of federal civil rights legislation by a hostile judiciary, the seeds of the new system of

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39. *Id.* at 2603 ("[A]n orthodox doctrinal treatment of the Angelo Herndon case[] . . . does not, indeed cannot, allow for more than a partial account of its larger historical meaning. Without a cultural anatomy of the Angelo Herndon case, one cannot hope to attain more than a skeletal picture of its significance as an episode in the history of American constitutionalism . . . ."), 2609 ("[I]t is only through the lens of popular memory that we can begin to reach a critical understanding of . . . the history of American constitutionalism.").

40. *Id.* at 2609 ("The perspective of popular historical method permits us to see the extent to which the history of constitutionalism in America, viewed from its underside, can be plotted as a story of a body of law born of sustained struggle, the outcome of painful, passionate political and ideological contests between subordinate groups and dominant institutions. This is a story that the optic of institutional historiography is by definition unable to see, much less view empathetically.") (footnote omitted).

41. *Id.* at 2608 ("Constitutional history in the institutional mode is hostile at all points to the type of thinking about historical research and interpretation suggested by work in popular memory. Perhaps the most significant threat that popular historical method represents for the dominant tradition of great-case historiography is its critical posture toward the notion that American constitutionalism is a story of the protracted but almost preordained emergence and progressive elaboration of the rules and principles that make up our fundamental law.").

42. *Id.* at 2609–10 ("The method of popular constitutional history does not just re-create a legal case; it recalls a larger, largely forgotten political culture. It permits us to see Angelo Herndon not simply as an issue or problem for constitutional discourse but as a conscious agent in shaping this discourse. In short, popular constitutional historiography refuses to view constitutionalism in American culture as the exclusive preserve of elites and institutions.") (footnote omitted).

> control—mass incarceration—were planted during the Civil Rights Movement itself, when it became clear that the old caste system was crumbling and a new one would have to take its place.[43]

The life, activism, and incarceration of Martin Sostre profoundly demonstrates this intentionally hidden reality.

I. From the Army to Attica

> *[O]nce mental chains are broken there is no return to the status quo ante.*
>
> Martin Sostre[44]

Sostre entered the U.S. Army on February 2, 1942.[45] He was trained as an aircraft mechanic and was stationed at the air base in Tuskegee, Alabama.[46] Two years later, Sostre was charged with "cruelty and maltreatment" under Article 93 of the Uniform Code of Military Justice[47] after a fight broke out between two companies, including Sostre's.[48] He was convicted on April 28, 1944, and sentenced to three years in prison, leading to his first period of incarceration.[49] Although many of the facts surrounding the events leading to Sostre's military conviction are unknown, staged fights between Black and white companies for which only the Black companies were blamed or punished was a common tactic used to discriminate against Tuskegee Airmen during this period, and a documented pattern of similar incidents helps to corroborate Sostre's account of these events.[50] Sostre would not be released from

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43. ALEXANDER, *supra* note 19, at 27–28.

44. Sostre, *The New Prisoner*, *supra* note 12, at 254 (emphasis omitted).

45. McLaughlin, *supra* note 2, at 4; Shapiro, *supra* note 2; FRAME UP!, *supra* note 2.

46. FRAME UP!, *supra* note 2.

47. *Id.*; Uniform Code of Military Justice art. 93, 10 U.S.C. § 893 (1951).

48. Symonds, *supra* note 2 ("[Sostre] was drafted into the Army in 1942 but was dishonorably discharged in 1946 after being involved, by his account, in a fight between rival companies."); Shapiro, *supra* note 2.

49. FRAME UP!, *supra* note 2.

50. *See generally* Tanja B. Spitzer, *St. Louis, July 12, 1973: A Disaster with Long-Lasting Repercussions*, NAT'L WWII MUSEUM (July 12, 2020), https://www.nationalww2museum.org/war/articles/st-louis-national-records-fire-july-12-1973 [https://perma.cc/9MJP-JG33] (describing a "devastating" fire at the National Personnel Records Center, which resulted in the destruction of millions of personnel files covering the period when Sostre would have served in the military); Michael Hankins, *A Pattern of Resistance: The Tuskegee Airmen on Trial, Part 1*, SMITHSONIAN NAT'L AIR & SPACE MUSEUM (June 9, 2020), https://airandspace.si.edu/stories/editorial/pattern-resistance-tuskegee-airmen-trial-part-1 [https://perma.cc/7U9J-DHM8]; Michael Hankins, *Mutiny at Freeman*

the custody of the Army until 1948, well after he was dishonorably discharged from the Army on August 28, 1946.[51]

After leaving the Army, Sostre returned to Harlem.[52] His dishonorable discharge status left him without the benefits entitled to other veterans and severely restricted his employment opportunities.[53] Backed into a corner, Sostre became, in his own words, a "street dude, a hustler."[54] His first civilian arrest was in 1952 for possession and sale of narcotics.[55] After briefly fleeing the state, Sostre was captured on October 31, convicted, and sentenced to twelve years in prison.[56] Sostre spent eleven days at Sing Sing Correctional Facility before he was transferred to Attica on December 23, 1952.[57]

While in Attica, Sostre began reading the Quran and came to embrace the Nation of Islam,[58] following a similar political trajectory to many other Black revolutionaries and anarchists of his time.[59] He also studied Indian scriptures, yoga, and other Eastern

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Field: The Tuskegee Airmen on Trial, Part 2, SMITHSONIAN NAT'L AIR & SPACE MUSEUM (June 9, 2020), https://airandspace.si.edu/stories/editorial/mutiny-freeman-field-tuskegee-airmen-trial-part-2 [https://perma.cc/2FYB-3HWC].

51. FRAME UP!, *supra* note 2; Anderson, *supra* note 2; *Subversive Influences in Riots, Looting, and Burning (Buffalo, N.Y.): Hearing Before a Subcomm. of the H. Comm. on Un-American Activities (HUAC)*, 98th Cong. (1968) (statement of Frank N. Felicetta, Comm'r, Buffalo Police Department).

52. McLaughlin, *supra* note 2, at 4.

53. Shapiro, *supra* note 2 ("He came back to Harlem in 1946 with no job skills."); 38 C.F.R. § 2.1064(a) (1946) ("To be entitled to compensation or pension . . . the period of active service upon which claim is based must have been terminated by discharge or release under conditions other than dishonorable. In other words benefits . . . are barred where the person was discharged under dishonorable conditions.").

54. *Id.*

55. FRAME UP!, *supra* note 2 (explaining that Sostre was arrested in New York City on Mar. 3, 1952, for sale and possession of narcotics, and in San Diego on Aug. 29, 1952, for possession of narcotics (stemming from the New York charge) and unlawful flight from federal authorities).

56. FRAME UP!, *supra* note 2; Anderson, *supra* note 2; McLaughlin, *supra* note 2, at 4 ("In 1952, aged 29, [Sostre] was caught, tried, convicted, and sentenced to a six-to-twelve-year term in Attica Prison.") (footnote omitted).

57. FRAME UP!, *supra* note 2; Anderson, *supra* note 2; Symonds, *supra* note 2 ("After a short stint at Sing Sing, [Sostre] was transferred to the Attica Correctional Facility and later to Clinton State Prison.").

58. Symonds, *supra* note 2 ("[Sostre] became involved in the Nation of Islam after borrowing a copy of the Quran from a fellow inmate.").

59. Anderson, *supra* note 2; Ervin, *Prison Revolutionary*, *supra* note 7 ("[Sostre] had served a sentence in Attica, New York, during the early 1960's and went through a political metamorphosis from a Black Muslim ([Nation of Islam]), Black nationalist, and later an Anarchist."); Williams, *supra* note 4, at 688 ("[M]any Black anarchists had comparable experiences of incarceration, which in some cases created favorable opportunities for political transformation. Due to government suppression (particularly the FBI's CointelPro), former Panthers faced uniquely high incarceration rates among 1960s' movement activists. This was particularly true for

philosophy, developing a deep and complex spirituality.[60] It was this spirituality that Sostre credited with giving him the strength to endure various forms of extreme physical, psychological, and spiritual violence, including solitary confinement, throughout his incarceration.[61] During this initial period of spiritual self-transformation, Sostre developed a deeper understanding of the U.S. government's organization of power and racial hierarchy through the violently oppressive, even genocidal design of the state prison system. Consequently, he began to emerge as a leading activist and central figure of the prison organizing movement of the 1950s, '60s, and '70s.[62]

The ideology Sostre came to embrace through the Nation of Islam informed and even demanded resistance to the expression of white supremacy through state violence.[63] For Sostre, revolutionary

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those in the most militant wings of the Black freedom struggle. The geographic and spatial distance from outside movements and extra time to reassess previous strategies may have played a key role for the creation of Black anarchism . . . . Prison-based transformation is not unique to the Black anarchists. Malcolm X famously converted to the Nation of Islam while in prison, which was one of Malcolm's many 'reinventions[.]' Prison activist and BPP member George Jackson originally was politicized once in prison. . . . Word-of-mouth was a key pathway to the adoption of anarchism for these Black activists.") (citations omitted); McLaughlin, *supra* note 2, at 3 ("[P]rison activism flourished in the 1960s and 1970s largely in tandem with the burgeoning of movements for minority rights across the United States. Activists fought for shared goals inside prison as well as outside: for recognition of their claim upon the rights of citizenship, to assert their humanity, to construct a sense of community, and to define new political identities. Sostre was an important example of such activism.") (footnotes omitted), 4 ("In the 1950s, Attica was one of many prisons where the Nation of Islam flourished and Sostre soon joined.").

60. McLaughlin, *supra* note 2, at 10; Warren L. Schaich & Diane S. Hope, *The Prison Letters of Martin Sostre: Documents of Resistance*, 7 J. BLACK STUD. 281, 290–91 (1977) ("Spiritual enlightenment began for Sostre while 'reading and studying of Indian scriptures' in Attica in the 1950s. It was during his first of four consecutive years in solitary (1960-1964) that Sostre developed his spiritual powers more fully.") (citation omitted).

61. McLaughlin, *supra* note 2, at 10; Schaich & Hope, *supra* note 60, at 290 ("[Sostre] attributed his efforts to 'endure' and 'defeat' the 'physical torture inflicted by the state' to his 'spiritual powers.' He perceived 'the inability of the oppressive state to prevail over the spirituality of one man' as a political victory for him and for all liberating forces.") (citations omitted).

62. Reggie Gardner, *Martin Sostre: A Victim of American Justice*, 1 BLACK VIEW 8, 8 (1973) ("Like many other Black revolutionaries Martin Sostre's road to Black activism began while he was in prison. . . . While there, Sostre became a Muslim . . . . Soon afterward he became involved in prison reform. When he became eligible for parole Sostre challenged the all-white composition of the parole board. In subsequent years he instituted federal suits against jailers which U. S. District Judge Constance Motley stated resulted in the 'elimination of some of the more inhumane aspects of solitary confinement in state prison.'").

63. Schaich & Hope, *supra* note 60, at 290 ("For Sostre . . . [n]ot to act against agencies of oppression was an unpardonable sin of omission. 'We must turn a good

resistance to inhumane treatment by prison officials was itself a religious act that connected oneself to the world.[64] Collective education was a central dogmatic pillar of Sostre's newly adopted theology, a theology explicitly based in the emancipation of Black Americans.[65] Moreover, in studying the law for the purposes of *pro se* litigation and helping other incarcerated persons access and strategically utilize the legal system to challenge their own incarceration, Sostre was fulfilling a religious duty. Thus, access to not only the Quran, but all literature and correspondence by prison employees, was an exercise of religious expression for Sostre and the fulfillment of what he saw as a religious obligation.

During this time, Sostre requested access to the Quran and the ability to gather with fellow Muslims to worship.[66] Seeking to make an example of him and show what happens when prisoners undertake any form of self-organization, prison officials responded harshly and swiftly[67]—not only were Sostre's requests denied outright, but he was branded a dangerous insurrectionist and accused of preaching racial hatred.[68] Considering Sostre's view that helping his fellow prisoners was a religious obligation, it can be argued that the prison's censorship of not just the Quran, but all literature and written correspondence directly prevented Sostre

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portion of ourselves over to spirituality,' said Sostre, 'but it is equally crucial that we retain enough to act outward with willed action against powers of domination in the physical world.'").

64. *Id.* at 290 ("For Sostre, 'the struggle [against the state] is a spiritual one' . . . . Crucial to Sostre's personal ideology was the spiritual dimension supporting his larger theme of resistance.") (citation omitted), 291–92 ("Sostre struggled to 'direct spiritual physical energies toward' further revolutionary resistance. Sostre's spiritual growth was a result of his struggle. His spiritual quest did not cast him out of the polis or impede his will for political activity; instead it provided a rationale and ground swell of further self-immersion in personal resistance as the ultimate political act. As a spiritualist, Sostre maintained that action imprints one's inner self on to the external world, translating the duality of being and action into one political posture.") (citation omitted).

65. Garrett Felber, *"Shades of Mississippi": The Nation of Islam's Prison Organizing, the Carceral State, and the Black Freedom Struggle*, 105 J. AM. HIST. 71, 72 (2018) ("[T]he Nation of Islam's prison organizing—and black nationalism more broadly . . . should be seen as a central current of the postwar struggle for black freedom. Its political strategies and conceptual legacies expand our understandings of the midcentury black freedom struggle, the prisoners' rights movement, and the development of the punitive state.").

66. Shapiro, *supra* note 2; Sostre v. McGinnis, 334 F.2d 906, 907 (2d Cir. 1964).

67. McLaughlin, *supra* note 2, at 4 ("[Joining the Nation of Islam] was a fateful decision that placed [Sostre] at odds with the prison authorities, who viewed the Nation as a threat to discipline rather than as a legitimate religion. He soon earned a reputation as a troublemaker. State Commissioner of Corrections Paul McGinnis described him as 'a very difficult problem case' who 'continuously failed to abide by the rules' of the prison.").

68. Shapiro, *supra* note 2.

from engaging in religious expression. In the legal action Sostre brought to address this treatment, the judge agreed with the sentiment of prison officials that the Nation of Islam was a hate group.[69]

Sostre was also beaten by prison guards and thrown in solitary confinement.[70] Alone in the timeless darkness of solitary confinement under conditions of torture, Sostre began to teach himself constitutional law.[71] During his imprisonment, he would use those skills to bring groundbreaking religious persecution claims[72] in *Pierce v. LaVallee* (1961)[73] and *Sostre v. McGinnis* (1964).[74]

II. The *Pro Se* Prisoner

> *Do you not see that we've converted your prison camps into revolutionary training camps for cadres of the Black liberation struggle? More important, your prisons have become ideological crucibles and battle grounds. Soon you shall reap the harvest.*
>
> Martin Sostre[75]

The first religious persecution claim Sostre brought as a *pro se* plaintiff following mistreatment while incarcerated at a state prison established federal district courts as proper venues for

69. Sostre v. McGinnis, 334 F.2d. at 909 ("'I don't know any other religion that teaches racial hatred as an essential part of the faith of the religion. There are many religions which have practiced racial hatred at various times, but this movement [Nation of Islam] is the only movement that I know of which makes it a tenet of the faith that all white people should be hated.'" (quoting Fulwood v. Clemmer, 206 F. Supp. 370, 373 (D.D.C. 1962))).

70. Pierce v. LaVallee, 293 F.2d 233, 234 (2d Cir. 1961).

71. Schaich & Hope, *supra* note 60, at 282–84 ("There is perhaps no image as torturously inactive as that of solitary confinement. 'The box,' 'the hole,' embodies society's most telling vision of punishment: caged isolation. Against this scene of forced passivity where all human interaction must be imaginary, Sostre engaged himself in powerful actions of resistance as have only a few others . . . .While serving time in Attica, Sostre became a student of constitutional, international, and New York State law."); Anderson, *supra* note 2 ("When prison authorities tried to stifle his right to express his beliefs, placing Sostre in solitary confinement after accusing him of trying to arouse dissent, he became a self-taught student of law and took part in a successful lawsuit challenging the authorities' suppression of his beliefs.").

72. McLaughlin, *supra* note 2, at 4 ("[Sostre] challenged the regime openly after studying law."); Schwartz, *supra* note 12, at 775–76 ("During his first prison stay . . . [Sostre] was a plaintiff in two of the first important prisoners' rights cases in New York, *Sostre v. McGinnis* and *Pierce v. LaVallee,* which gave prisoners certain limited rights.") (citations omitted).

73. 293 F.2d. at 233.

74. 334 F.2d at 906.

75. Sostre, *The New Prisoner*, *supra* note 12, at 244.

constitutional challenges.[76] In 1958, Sostre and two other Black Muslim plaintiffs incarcerated in Attica State Prison sought relief under the Civil Rights Act, claiming religious persecution and interference by prison officials with their practice of religion.[77] The District Court judge entered judgment for the defendants regarding the religious persecution claim and dismissed the rest of the complaint.[78] The plaintiffs appealed to the U.S. Courts of Appeals

76. *Pierce*, 293 F.2d at 234 ("In these three actions, plaintiffs seek relief under the Civil Rights Act, 28 U.S.C. § 1343, 42 U.S.C. § 1983, for religious persecution alleged to have been practiced upon them while they were inmates of Clinton State Prison at Dannemora, New York."), 235–36 ("[P]resent cases involve no unresolved question of state law, solution of which might render a decision on the constitutional issue unnecessary. Either the plaintiffs were punished solely because of their religious beliefs or they were not. If they were, the defendant's conduct violates both the state statute and the United States Constitution. If the plaintiffs were punished for legitimate reasons, neither law is violated. We find, therefore, that *this is not a case where federal courts should abstain from decision* because the issue is within state cognizance.") (emphasis added). The court went on to admonish the defense for having "failed to give any reason why a trial in the state court is more desirable than a consideration by the federal court on the merits" and reversed and remanded the case "for consideration of the claims that plaintiffs were disciplined solely because of their religious beliefs." *Id*. at 236.

77. Sostre v. McGinnis, 334 F.2d at 907 ("This is an action brought under 28 U.S.C. § 1343 and 42 U.S.C. § 1983 by the appellants 'in [sic] behalf of themselves and all others similarly situated.' . . . Plaintiffs allege that they are 'members' of the Islamic religion, known as Muslims, and followers of the sect led by the Honorable Elijah Muhammad. They complain that they have been denied certain rights with respect to the practice of their religion, including the right 'to attend together congregational worship,' the right to communicate with ministers of their faith and to have such ministers visit the prison and the right to have various religious publications and to carry these publications outside their cells. The relief [sought] includes an order to the defendants to provide congregational religious services and an injunction against 'making, promulgating, maintaining and enforcing any and all rules, regulations or practices which prohibit, prevent or impede Plaintiffs and other Muslim inmates of Attica Prison' from holding or attending congregational services, communicating and conferring with ministers of their religion, receiving religious literature and 'carrying, displaying, discussing or otherwise using' such literature. The plaintiffs also ask that defendants be enjoined 'from making, promulgating, maintaining or enforcing any and all rules, regulations or practices which inflict any punishment or loss of good time or other penalty on Plaintiffs or other Muslim inmates of Attica Prison solely because of the exercise of their freedom of worship in accordance with their faith.'"); Sostre, *The New Prisoner*, *supra* note 12, at 251 ("*Sostre v. McGinnis* was the result of a six-year spiritual, physical and legal struggle led by three determined prisoners. The struggle commenced in Clinton Prison during 1958 when we first sued in Plattsburgh Supreme Court via writ of *mandamus* seeking the exercise of religious freedom . . . . It took six years of suffering and litigation to get the *Sostre v. McGinnis* ruling in 1964. I personally spent five years in solitary confinement struggling."); McLaughlin, *supra* note 2, at 4 ("[A]s plaintiff in the landmark case Sostre v. McGinnis (1964), [Sostre] argued that the recent Civil Rights Act should guarantee freedom of worship in prison – a major contribution to the Nation of Islam's struggle for recognition and to the emerging prisoners' rights movement."); Schaich & Hope, *supra* note 60, at 284–85.

78. Sostre v. McGinnis, 334 F.2d at 907 ("The district court entered judgment for the defendants 'on the claim of religious persecution' and otherwise dismissed the

for the Second Circuit, where Judge Paul R. Hays reversed and remanded the case, expressing general agreement with the district court's ruling and stressing that state authorities "must be given an opportunity to propose workable rules for the administration of the rights claimed by these plaintiffs."[79] The Court of Appeals also directed that the District Court should retain jurisdiction over the matter for one year in case there was "any unreasonable delay on the part of the state" in promulgating such rules.[80]

Judge Hays's religious prejudice became clear through his reluctance to grant that the plaintiffs were practicing something that can even be characterized as a religion.[81] Even after conceding this seemingly basic point, his discomfort was evident.[82] He repeatedly went out of his way to clarify, distinguish, and undermine.[83] Judge Hays seemed distressed over calling Islam a religion at all and wanted to make clear that his hands were tied by judicial deference.[84] He wrote that even if the Nation of Islam was a religious sect, it surely did not merit equal treatment to Catholicism, Protestantism, Judaism, or even Islam as it is practiced outside of the United States.[85] Hays even went so far as to denounce the Nation of Islam as an anti-white hate group that "makes it a tenet of faith that all white people should be hated."[86] He characterized Elijah Muhammad as a vengeful cult leader who demonized all white people as "evil," insisted on segregation of

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complaint on the ground that decision should be withheld while the New York courts were 'given an opportunity to act to safeguard and define the plaintiffs' rights under New York law within the framework of New York's legitimate policies governing penal institutions.'").

79. *Id*.

80. *Id*. at 913.

81. *Id*. at 907–08 ("We accept, as we must, since it is not clearly erroneous, the finding of the district court that the beliefs of the organization with which plaintiffs associate themselves constitute a 'religion.'").

82. *Id*. at 908 ("[I]t is obvious from the evidence in the record that the activities of the group are not exclusively religious.").

83. *Id*.

84. *See supra* notes 81–83.

85. Sostre v. McGinnis, 334 F.2d at 908–09 ("To concede that we are dealing here with a group which has some characteristics of a religious sect is separated by an enormous gap from the conclusion which the plaintiffs press upon us, the conclusion that since it is a religion this sect is subject to the same rules and regulations and must be treated in the same way as are Catholics, Protestants and Jews. . . . The differences between the beliefs of the Muslims, who, like the plaintiffs, are followers of Elijah Muhammad, and the beliefs of other religions, including . . . the orthodox Islam of several hundred millions of Asians and Africans, are far more striking than the similarities.").

86. *Id*. at 909.

white and Black people, and instigated outrage, agitation, and resentment toward white Christians.[87]

To demonstrate that the perceived threat of this type of anti-Christian violence breaking out was real and imminent, Hays cited several examples from other prisons, including observance of Ramadan and some direct actions that were inspired by Sostre.[88] He then used threats of violent insurrection as a seemingly self-evident justification for harsh and swift suppression at the slightest hint of self-organization amongst Muslim prisoners.[89] This was how

87. *Id*. ("Basic to the problem of prison discipline is the fact that the teachings of Elijah Muhammad include condemnation of the entire white race as wholly 'evil,' composed of devils, murderers, thieves, robbers, scientists at tricks, world snoopers, meddlers and liars. Presenting almost, equal difficulty is the Muslims' demand for total segregation between whites and blacks. These Muslims also adopt the position that the Christian religion is loathsome and despicable. When these doctrines are preached openly in the presence of white fellow-prisoners, most of whom are Christians, the result is outrage, resentment and attempts at reprisal. It is for this reason that plaintiffs were not permitted to carry certain Muslim literature from their cells and display or distribute it to others.").

88. *Id*. at 910 ("'Riots, prompted by disputes over religiously unacceptable prison food, proselytizing in the exercise yard, and refusals by individual Muslims to obey white guards have occurred in a number of prisons.' At Attica Prison the authorities were fortunately able to nip in the bud a sit-down strike of Muslim inmates in protest against punishment of Sostre. . . . At Lorton Reformatory, a District of Columbia penal institution, riots occurred in which Muslims armed with sticks, stones and pickaxes, ran from building to building breaking plate glass windows and causing damage estimated at between seven and twelve thousand dollars. They were demanding 'a proper respect for their religion' and a separate dormitory. On another occasion the Muslims at Lorton insisted on being served meals before sunup and after sundown during Ramadan.").

89. *Id*. at 911 ("'Once the imminence of danger is apprehended and proved, it would seem preferable to give the warden the discretion his competence warrants, and uphold all disciplinary measures reasonably necessary to meet the threatening situation. It is conceivable that finding that a religious group presents a 'clear and present danger' would not ipso facto lead to a proscription of all their activities. Normally, the most private and contemplative of religious activities is the reading of one's bible. The Black Muslim Koran, however, is the source of the anti-white doctrine that prompts many of the disciplinary problems, and Black Muslim services almost invariably involve stirring expositions of the implications of the black supremacy doctrine – words that may well pervade the behavior of those who attended for the rest of the day. . . . Thus, upon clear demonstration of the imminent and grave disciplinary threat of the Black Muslims as a group in a particular prison, proscription by prison officials of their activities seems constitutionally permissible.'"); Felber, *supra* note 65, ("[T]he 'dialectics of discipline'—paradoxically helped develop the protest strategies and legal framework for the prisoners' rights movement while fortifying and accelerating the expansion of the carceral state through new modes of punishment and surveillance. These dialectics took two major forms during this period in New York prisons. The first was the relationship between state methods of control such as prison transfers, confiscation of religious literature, solitary confinement, and loss of 'good time' (sentence time reduction for good conduct) and the responses by Muslim prisoners through hunger strikes, writ writing, and take-overs of solitary confinement. The second was the interaction between Muslim religious practices and prison surveillance. An emerging web of

censorship of Muslim religious literature was upheld by Hays as a necessary measure to protect white Christians against a domestic terrorist group determined to go to war against white people—or, at the very least, a necessary tool to maintain prison discipline.[90]

The right to freely exercise one's religion is constitutionally protected, even in prison.[91] However, this protected right is "subject to extensive limitations which would not be applicable were the plaintiffs not prisoners."[92] The orderly maintenance of prison discipline supersedes the right to religious freedom in prison, such that religious practice is only protected if it does not interfere with "the necessary disciplinary regime established by the prison officials."[93] This is a crucial point, one that hearkens to the crux of incarceration—the suppression and destruction of individual psychosocial autonomy. Black Muslims, in their self-organizing and religious activities, evinced an ideology of autonomous self-determination that threatened the symbolic order of power, violence, subjugation, and submission by which 'discipline' is maintained in the institution of the prison.[94]

Personal autonomy is not something that prisoners have an unlimited fundamental right to; rather, they are only allowed to exist within the pre-prescribed boundaries and limits of a given prison's disciplinary regime, which is continually rewritten and reinforced onto the bodies of prisoners through sanctions,

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state surveillance monitored Muslim rituals and attempted to construct a religioracial formation to justify the suppression of Islam in prisons.").

90. Sostre v. McGinnis, 334 F.2d 906, 911 (2d Cir. 1964) ("The particular characteristics of the Muslims obviously require that whatever rights may be granted because of the religious content of their practices must be carefully circumscribed by rules and regulations which will permit the authorities to maintain discipline in the prison.").

91. *Id*. at 908.

92. *Id*.

93. *Id*. ("[T]he practice of any religion, however orthodox its beliefs and however accepted its practices, is subject to strict supervision and extensive limitations in a prison. . . . No romantic or sentimental view of constitutional rights or of religion should induce a court to interfere with the necessary disciplinary regime established by the prison officials. . . . A prisoner has only such rights as can be exercised without impairing the requirements of prison discipline.").

94. *Id*. at 910 ("The so-called Muslim Brotherhood, an 'adjunct of the Islamic faith,' is a semi-secret organization which was formed by these plaintiffs and others as a kind of government within the prison. Of this organization Judge Brennan said in *Pierce v. Lavallee*, 212 F. Supp. 865, 869 (1963): 'Admittedly there existed at Clinton Prison an organization of inmates with inmate leadership dedicated to the formation of secret plans, strategy and policies and further dedicated to the extension of objectives of said organization throughout the state prison system.' . . . The Brotherhood had a constitution which, among other things, provided for kangaroo courts to punish erring members. We have held that the Brotherhood had 'overtones of secrecy and intrigue[.]'") (citations omitted).

punishment, and acts of violence designed to degrade and dehumanize.[95] Supplanting another's natural autonomy with forced compliance with an institutional disciplinary regime is only possible through the force of violence, both as an event occurring against Black bodies in prison and as a perpetual threat superimposed onto the body, mind, and soul of the prisoner through a never-ending barrage of humiliation, deprivation, and cruelty.[96]

Ultimately, Judge Hays gave New York State keys to every possible back door by which to escape from a court mandate forcing prison officials to respect Sostre's religious practice or grant his fundamental right to engage in it.[97] In the end, Judge Hays tossed the ball back to the state, claiming improper federal jurisdiction over state administrative issues.[98]

III. The Buffalo Bookstores

> *Today's lynching is a felony charge. Today's lynching is incarceration. Today's lynch mobs are professionals. They have a badge; they have a law degree. A felony is a modern way of saying, 'I'm going to hang you up and burn you.' Once you get that F, you're on fire.*
>
> Michelle Alexander[99]

On October 18, 1964, Sostre, who was then age 41, completed his twelve-year sentence, four years of which he spent in solitary

95. Sostre, *The New Prisoner*, *supra* note 12, at 251 ("The spiritual and physical aspect of the struggle involved years of torture in solitary confinement, beatings, tear gassings while locked in cages, bread and water diets, and many other barbarities inflicted by the State to break our spirit, health and resoluteness, and coerce other prisoners from joining our ranks.").

96. Farley, *supra* note 19, at 507 ("Th[e] inculcation of immorality in black bodies served to justify, to those who inhabited bodies marked as white, the social facts of white mastery and black slavery. Slave immorality served to display the slaves as children of a lesser god, as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations.").

97. Sostre v. McGinnis, 334 F.2d 906, 912–13 (2d Cir. 1964) ("The problem presented by the Muslim group is not whether they should be permitted to have congregational services, a minister, religious literature, but rather, under what limitations protective of prison discipline they should be permitted these rights. . . . In other words the nub of this whole situation is not to be found in the existence of theoretical rights, but in the very practical limitations on those rights which are made necessary by the requirements of prison discipline.").

98. *Id*. at 911–12 ("It is not the business of the Federal Courts to work out a set of rules and regulations to govern the practices of religion in the state prisons. Surely this is a task for the state authorities to undertake.").

99. Alexander, *supra* note 19, at 205.

confinement.[100] In the months that followed, Sostre broke with the Nation of Islam, moved to Buffalo, New York, and took a job at the Bethlehem Steel plant.[101] During this period, Sostre began to openly embrace explicit anti-capitalist, anti-imperial, and later anarchist beliefs.[102]

In 1966, Martin opened a radical Afro-centric book and record store on Buffalo's East side.[103] Sostre was inspired by the radical Harlem bookstores of his youth, which had a profound effect on him and gave him an early education in Black culture and radical Black theory.[104] Sostre's Afro-Asian Bookstore sold jazz records, African

100. Sostre v. Rockefeller, 312 F. Supp. 863, 866 (S.D.N.Y. 1970); Shapiro, *supra* note 2; FRAME UP!, *supra* note 2; Schaich & Hope, *supra* note 60, at 285; McLaughlin, *supra* note 2, at 2, 4.

101. Shapiro, *supra* note 2; Gardner, *supra* note 62, at 8; McLaughlin, *supra* note 2, at 2 ("By the time [Sostre] settled in Buffalo, he had broken with the Nation [of Islam] but it served as a departure point for his intellectual journey."), 4 ("Sostre . . . left the Nation of Islam behind but not its austere ethos of self-discipline nor, crucially, its black nationalism.").

102. FRAME UP!, *supra* note 2; Anderson, *supra* note 2 ("Sostre was a fierce critic of leadership, authority and imperialism. He was opposed to empire and identified with the anti-imperialist efforts. . . . He consistently connects the global struggle against US imperialism to the struggle for Black liberation."); McLaughlin, *supra* note 2, at 2 ("Guided by feelings of solidarity with peoples of color around the world, Sostre became absorbed by the revolutionary struggles of Cuba, China, and Vietnam."), 10–11 ("Above all, Sostre's view of the world came into focus through the politics of anti-imperialism. . . . He read the writings of Nkrumah, Che Guevara, Mao, and Ho Chi Mihn [sic] and it was through the lens of anti-imperialism that he looked at the world, at America, and at Buffalo. . . . [T]he Vietnam War crystallized those ideas. . . . Crucially, anti-imperialism and opposition to the war served to connect the politics of black liberation with socialist and radical liberal movements, YAWF [Youth Against War and Fascism] included. Sostre came to see the importance of an alliance between black militants and white radicals, which the peace movement could cement. . . . Sostre came to see the Viet Cong as heroic resistance fighters and he became convinced that he was engaged in the same struggle – on one front, as he saw it, of a global campaign.") (footnotes omitted).

103. FRAME UP!, *supra* note 2; Schwartz, *supra* note 12, at 775; Anderson, *supra* note 2; Ervin, *Prison Revolutionary*, *supra* note 7 ; McLaughlin, *supra* note 2, at 2 ("When [Sostre] rented a storefront in the Black community and opened for business with a handful of radical books arranged on homemade shelves, the name he chose reflected both his black nationalist roots and his emerging internationalism: the Afro-Asian Bookshop."); Gardner, *supra* note 62, at 8 ("Every penny he could save was set aside towards Sostre 's compelling dream: an Afro-American bookstore in the Buffalo ghetto. Finally after months of back-breaking labor Sostre was able to open the store, with the purpose of educating and politicizing the youth. Sostre worked lengthy hours in the store, fifteen hours a day, seven days a week.").

104. Schaich & Hope, *supra* note 60, at 285; McLaughlin, *supra* note 2, at 4 ("[Sostre] dropped out of high school at an early age, learning his lessons on the Avenue instead of in the classroom, and consequently spending his youth in and out of trouble. It was during that time, however, that he first became aware of the National Memorial African Bookstore at 7th Avenue and 126th Street – Lewis Michaux's celebrated 'House of Common Sense and Home of Proper Propaganda.'"); Anderson, *supra* note 2 ("[Sostre] was inspired early on by Black speakers, thinkers

carvings, Black Nationalist and anti-war literature.[105] The bookstore quickly became a center for radical socialist, communist, anarchist, and Black Nationalist thought and a popular social spot in Buffalo's "Black ghetto" that over time became a "beacon of black liberation culture"[106] and a "mecca"[107] for local radical youth and other political dissidents.[108] For Sostre, the true mission and purpose of the bookstore was not profit, but educating, politicizing, and radicalizing young people.[109] Sostre's successful bookstore

and activists around the African National Memorial Bookstore on 125th street [sic].").

105. Anderson, *supra* note 2 ("[Sostre's] bookstore would become a place where he cultivated resistance for an entire community. He sold radical books covering topics like Black nationalism and communism."); FRAME UP!, *supra* note 2 (local Buffalo resident remarking that Sostre's store was the only Black bookstore with anti-war literature); McLaughlin, *supra* note 2, at 1 ("[Sostre's] store was the place to find the writings of Douglass, DuBois, J. A. Rogers, and the autobiography of Malcolm X, but also the sort of publications that other local booksellers considered too subversive to sell. He boasted his was the only store in the region to hold the works of Castro, Che Guevara, Mao, Ho Chi Mihn [sic], and Robert F. Williams. His bookshop was, he claimed, a 'power base of revolutionary political philosophy.' . . . Tapping interests that flourished during the Black Power years, he also sold African-inspired jewelry, lithographs, and carved wooden artworks. And, with a feel for youth fashion, he laid out boxes of hip soul records, and played music to tempt people inside. When customers came looking for Sam and Dave's 'Hold on I'm Coming' or asking about the African statuettes in the window, Sostre talked with them about Malcolm X's message of black pride, and handed out antiwar pamphlets."), 10 ("[Sostre's] store became a local resource for antiwar activism and he stocked protest literature, including YAWF's magazine, *The Partisan*.") (footnote omitted).

106. McLaughlin, *supra* note 2, at 1.

107. Gardner, *supra* note 62, at 8 ("Slowly but surely [Sostre's] store became a mecca for the politically minded local youths who not only patronized it but actively attended the educational activities it sponsored.").

108. FRAME UP!, *supra* note 2; Ervin, *Prison Revolutionary*, *supra* note 7 ("Sostre's bookstore became a center of radical thought and political education in [Buffalo]."); Schaich & Hope, *supra* note 61, at 285 ("[Sostre] encouraged Black youth to gather and read, listen, or congregate for spiritual renewal and sustenance. The bookstore served as a symbol for the political and cultural aspirations of the Black community. From there, 'revolutionary seeds could be planted in the consciousness of the youth.' The bookstore functioned as a political and educational center.") (citation omitted); McLaughlin, *supra* note 2, at 11 ("[Sostre's] rhetoric enabled him to build a sense of cohesion around his store. He could appeal to students and to local youths alike and that enabled him to achieve something valuable and, in itself, remarkable: he brought those disparate groups together under one roof and around a common set of causes.").

109. Gardner, *supra* note 62, at 8 ("Though the store only grossed about sixty dollars a week, to Brother Sostre this was secondary. What was really important was that its patrons were gaining concrete knowledge of themselves and their precarious position[] in American society."); Schaich & Hope, *supra* note 60, at 285 ("It was Malcolm X whom Sostre found most appealing to the audience of Black youths. As the bookstore was a unifying symbol in Sostre's search for an active community, books were tools for the politically naïve–providing a way to act for the inert, and identity for the oppressed. His purpose was to create 'freedom fighters.'") (citations omitted); McLaughlin, *supra* note 2, at 8–9 ("[T]he real breakthrough came when he

business expanded rapidly, and he opened two more Buffalo locations by the summer of 1967.[110]

Martin's bookstore business was part of an emerging insurgent entrepreneurial trend of radical Black bookstores during the 1960s Black Power movement.[111] This trend among Black radicals and their ability to utilize a capitalist business model to facilitate education, radicalization, and Black community-building was particularly threatening to the socio-economic status quo, which relied heavily on poverty and non-ownership as delivery

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saw youths gathered at a neighboring record store which played music through speakers. Sostre realized the potential . . . . He bought a record player and a clutch of records, and '[t]he reaction was instantaneous.' When the music played, 'heads turned toward the shop,' and more customers came by. Sostre quit his job at Bethlehem Steel and began working full-time at the store, 16 hours a day, seven days a week. When youths came looking for records, Sostre engaged them in political conversation. Sometimes he sold a book but, often, he let customers borrow copies or sit on the floor and read. . . . Sostre had a talent for talking with young people in a street-smart manner. He usually began by talking about Malcolm X. . . . Copies of his autobiography, and pamphlets and recordings of his speeches were Sostre's best sellers. Having hooked them with Malcolm X, Sostre would move on to Robert F. Williams, Kwame Nkrumah, or Mao. It all hinged on context, on creating what Sostre called 'soul atmosphere' by relating politics to black culture and 'careful blending of revolutionary literature, protest novels, traditional Negro histories, paintings by local artists, African carvings, tikis and lithographs, jazz and rhythm and blues records' . . . . Sostre's success rested on the free play of ideas that his store embodied. His was a populist approach that reflected an undogmatic intellectual eclecticism. His student visitors, for example, were impressed by his broad knowledge and command of current affairs, black and Asian literature, history, politics, and philosophy. It was the atmosphere of leftist intellectual permissiveness that provided Sostre with the opportunity to create a space for political dissent which local black youths and student radicals could both share.") (footnotes omitted), 12 ("Sostre wanted the Afro-Asian Bookshop to serve as a center for political action.").

110. Anderson, *supra* note 2; McLaughlin, *supra* note 2, at 1 ("At the height of his success, [Sostre] could be found at the store late into the night, playing records, deep in discussion.") (footnote omitted).

111. McLaughlin, *supra* note 2, at 3 ("Partly, what makes Sostre's story particularly compelling is its broader resonance. His political thinking and activism emerged from an intriguing confluence of older traditions of ghetto struggle and the emerging political concerns of the 1960s. His bookshop was inspired by earlier forms of nationalism, militant self-help, and business enterprise. It embodied Sostre's attempt to absorb, combine, and re-combine those established influences and to assimilate new ideas and ways of conceptualizing the relationship between black America and the world, racism and imperialism, and culture and politics. Part of Sostre's importance lies in the way he successfully fused Malcolm X and soul music, for example, or Mao Zedong and African lithographs, into a meaningful political message for a new generation. He was not alone in doing so, but his work in Buffalo offers us an insight into the roots of Black Power culture and the African-American search for self-definition during the 1960s."), 7–8 ("Sostre's business was part of a peculiar insurgent strand of black enterprise: the black bookshop movement. Bookshops were a key part of the Black Power movement. During the 1960s–70s, they helped disseminate new ideas and served as important local centers of debate and activism.") (footnotes omitted).

systems for racial oppression.[112] Buffalo, like cities around the country, was determined to clamp down on both the Black Power movement and communism, seeing these movements as the greatest political threat to the inherited ruling power of the rich white elite that was now being questioned on a mass scale in the 1960s.[113] After Sostre moved to Buffalo, the city had become increasingly aggressive with targeting, surveillance, and suppression of Black radicals, suspected communists, and anti-war activists.[114]

During the last weekend of June 1967, a series of race riots occurred in Buffalo[115] "in response to the many manifestations of institutional racism like unemployment, housing discrimination

112. *Id*. at 7 ("Enterprise need not necessarily prioritize profit and self-interest at the expense of (or above) other social and cultural objectives. . . . Sostre's business strategy put him in line with an emerging trend. Floyd McKissick of the Congress of Racial Equality (CORE), for example, believed entrepreneurialism would be the driving force behind a political transformation, too: he envisaged the construction of a black-owned model community, Soul City, and hoped black corporations could ultimately 'reclaim' ghetto businesses and form the basis of political power.") (footnote omitted), 9 ("Sostre believed he had struck upon a vital form of political activism: 'militant Black leaders must organize, in their totality, all of the indigenous cultural forces that have meaning for and give substance to the[ir] outlook.' For other aspiring political entrepreneurs, he estimated a similar operation could be established using his method for as little as $600.") (footnote omitted).

113. *Id*. at 8 ("Sostre's was not the only store to suffer repression: police officers firebombed, smashed, and flooded Vaughn's bookstore during the Detroit uprising of 1967; FBI surveillance forced Drum and Spear to fold in a climate of intimidation.") (footnote omitted).

114. *Id*. at 3 ("During the 1960s, newly reinvigorated police 'red squads' and the FBI mobilized against black militancy and antiwar activism."), 13 ("The growth of antiwar protest and black militancy in the 1960s vexed the conservative political establishment of Buffalo, a city that . . . 'has never been kind to radicals.' . . . In 1964, the year Sostre arrived, Buffalo was undergoing one of its periodic anticommunist drives as HUAC scheduled a visit to root out the Maoist Progressive Labor Movement. It was also the year of the first 'long, hot summer' of urban unrest in the North when riots struck Harlem, Bedford-Stuyvesant, and elsewhere – including Rochester. FBI Director J. Edgar Hoover reacted by demanding expanded FBI surveillance and closer liaison with police departments. It signaled renewed surveillance across America and, locally, Buffalo's sentinels stirred.") (footnotes omitted).

115. Schwartz, *supra* note 12, at 775; Schaich & Hope, *supra* note 60, at 283; McLaughlin, *supra* note 2, at 12 ("The situation flew out of control on 27 June after police officers confronted a group of youths. The officers lost their tempers and discipline crumbled. They set about clearing the streets and, as residents put it, became 'stick happy.' Angry youths responded by bombarding the police with rocks, bottles, and Molotov cocktails. The police replied with batons, buckshot, and a choking fog of tear gas. . . . Street-fighting continued and looters moved in on smashed-open stores. Disorder broke out the next day, and the next, and the next, and the pattern of window-breaking, looting, fire-setting, and clashes was repeated. Remarkably, no one was killed, but dozens of people were left injured.") (footnotes omitted).

and police brutality."[116] During the riots, "[Sostre's] bookstore became safe haven for people to escape tear gas and police batons."[117] Sostre was not only blamed for the riots but actively framed for them.[118] Police saw the riots as an opportunity to scapegoat Sostre and punish him for distributing radical books and spreading revolutionary ideas at his bookshop.[119]

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116. Anderson, *supra* note 2.

117. *Id*. ("When revolt hit Buffalo, Sostre was there doing the work he knew best: teaching, distributing radical literature to the Black community — especially young people — and providing context to the situation at hand. Sostre organized through education and supported the uprising using the methods he had learned from the orators, teachers and street-level militants during his youth in Harlem. . . . He would give out lessons and liberation literature to the people hanging out in his store, which the authorities perceived as a threat. It remained open and packed well into the night as people rebelled against police forces."); McLaughlin, *supra* note 2, at 6 ("Sostre's ambition was to establish his store as a center for ghetto youths, and that holds the key to understanding his activist strategy. . . . Sostre addressed himself to that younger generation and presented himself as their spokesman. He derided efforts by community leaders to calm the riot with offers of employment: young people wanted more than 'those hot and dirty, low-paying jobs,' he argued; they wanted 'justice' and a fair share. He saw youths as tinder for a revolutionary fire. The key question of the moment, he wrote, was therefore how 'to command the allegiance of the militant Black youth.' His answer was the Afro-Asian Bookshop.") (footnote omitted), 12 ("It was during the tense period leading to the riot that Sostre noticed a growing interest in his store . . . .[I]n the week of the riot, Sostre remained open through the early hours, providing 'refuge [...] for many passers-by' and 'freedom fighters' – meaning rioters. As street battles raged, he held forth, 'made political hay in denouncing [...] police brutality,' and pointed out the relevance of his books . . . .It was the perfect circumstance to sell radical publications. . . . Simultaneously, he added, he 'create[d] several new freedom fighters.'") (footnotes omitted).

118. Ervin, *Prison Revolutionary*, *supra* note 7 ("A Black 'riot' against police brutality of a Black youth broke out . . . and Sostre was blamed for this rebellion since many youth visited his bookstore."); McLaughlin, *supra* note 2, at 12 ("While his prison correspondence was (perhaps cautiously) ambiguous, his claim that he had created 'freedom fighters' during the uprising could well be taken to imply that he had exhorted youths to join in. The police claimed he went even further. According to a police witness, a 15-year-old boy, Sostre prepared Molotov cocktails in his basement and urged youths to 'get out there and start these fires.' He allegedly said, 'don't mess with none of the soul brothers and sisters;' they should target white-owned businesses. At Sostre's behest, allegedly, they firebombed the Woodlawn Tavern, opposite the bookstore, the Florida Food Market, and (unsuccessfully) the Pine Grill. Such evidence must be treated with extreme skepticism for the young witness would likely have confessed to anything while in the intimidating surroundings of a police station.").

119. FRAME UP!, *supra* note 2; McLaughlin, *supra* note 2, at 14 ("After the June riot, officers took the opportunity for retribution when a fire broke out at a tavern next to the Afro-Asian Bookshop. As the blaze came under control, they smashed the windows of Sostre's store and had the firemen turn the hoses on his shelves inside, destroying the books. Gerald Gross gathered donated books and restocked while Sostre put plywood over the windows and pasted up radical articles, cartoons, photographs of the Buffalo uprising, and antiwar publicity. Naturally, it did nothing to mollify the police. People came by the store at night to tear his posters down."); Anderson, *supra* note 2 ("[Sostre] grew to be recognized as an educator among community members who used his shop as a space for learning and fellowship. This

On July 14, Sostre and his coworker Geraldine Robinson were arrested on riot and drug charges when the FBI and Buffalo Police Department raided Sostre's bookstore.[120] At his arraignment hearing, Sostre was charged with possession and sale of narcotics, assaulting two policemen, inciting a riot, and arson.[121] His charges were amended the following day to heroin possession and sale based on police informant testimony that the witness later recanted and trumped-up police testimony that turned out to be physically impossible.[122] In 1974, Pacific Street Film Collective would debut a

was at odds with the Buffalo Police Department who threatened Sostre for his actions. He was politicizing Black youth at a time when the state was increasingly concerned and surveilling proponents of anti-capitalist, Black empowerment across the United States."); Gardner, *supra* note 62, at 18 ("The influence and importance of [Sostre's] shop was not taken lightly by the reactionary white citizenry of Buffalo. It soon became the target of investigations. FBI agents visited the store and questioned Sostre on his motive for selling revolutionary literature. A short time later two city detectives . . . interrogated Sostre about his store. During the summer of 1967[,] the Buffalo Black community erupted in rebellion. During these days Sostre allowed the store to be used as a haven for those fleeing tear gas and bullets. *This was apparently the culminating incident which stamped Sostre as an enemy to be destroyed, in the eyes of the police.*") (emphasis added).

120. Ervin, *Prison Revolutionary*, *supra* note 7 ("The city cops and white political establishment chafed at Sostre's organizing and political education, and decided to shut him down. They arrested him on July 14, 1967, along with a bookstore co-worker, and charged them with 'sale of narcotics, riot, arson, and assault.' These were totally frame-up charges."); Anderson, *supra* note 2 ("Eventually, authorities resolved to deal with the defiant Sostre by attacking and ransacking his store. He and Geraldine Robinson (his co-defendant) were imprisoned on narcotics and riot charges."); Gardner, *supra* note 62, at 8; McLaughlin, *supra* note 2, at 2 ("When rioting erupted in Buffalo's Black community in the summer of 1967, Sostre could not resist the temptation to get involved. The authorities, who had long viewed his store with suspicion, moved against him. In one of the era's many now-notorious counterintelligence operations, a combined force of FBI and police officers raided the bookstore, planted heroin on the premises, arrested Sostre, and charged him with dealing narcotics – and, almost as if it were an afterthought, with arson and incitement to riot."), 13 ("It was the last [Sostre] would see of the Afro-Asian Bookshop."), 14 ("Sostre had been at liberty for less than three years by the time of his arrest.").

121. Schaich & Hope, *supra* note 60, at 281; Hess, *supra* note 2; Gardner, *supra* note 62, at 8.

122. Sostre, *The New Prisoner*, *supra* note 12, at 242–43 ("[Sostre's] conviction was based on the most spurious of evidence: the testimony of a convicted drug dealer, who subsequently submitted an affidavit indicating that he had perjured himself at the request of the District Attorney and a conveniently 'missing' motion picture film that was allegedly taken through a window that turned out to be boarded up at the time."); Gardner, *supra* note 62, at 18 ("Several facts were uncovered during and after the trial which indicate that Martin Sostre was framed. At the time of the supposed filming of a heroin transaction, plywood panels completely covered the front of the store. A professional filmmaker testified that even with a high quality zoom lens he could only see about a foot in the store if shooting from the cite where the police took the picture. The alleged drug transaction however took place twenty-five feet within the store."). Affidavits filed by police regarding the details of the transaction were wildly inconsistent, including conflicting accounts of whether an

documentary on Sostre called *Frame Up! The Imprisonment of Martin Sostre*, which was released when Sostre was still in prison and included an interview with Arto Williams, the police informant and star prosecution witness whose testimony was used to convict Sostre in 1968.[123] During the interview, Williams would describe in detail how Sostre was framed by Buffalo police for possession and sale of narcotics and the part Williams played in the set-up.[124] After this information came to light, "Sostre' s lawyers immediately filed a motion for a new trial, [but] this motion was denied."[125] While the charges of arson and inciting a riot were ultimately dropped,[126] Sostre was indicted on drug and assault charges on August 9, 1967.[127]

Shortly after Sostre was arrested, Buffalo police commissioner Frank N. Felicetta went to Washington, D.C. to testify at a Senate Internal Security Subcommittee, where he referred to Sostre as "Martin X," labeled Sostre "a prominent figure in the recent disorders of our city,"[128] and lied about Sostre having been "arrested for possession of and dealing in illegal narcotics" while serving in

officer had witnessed a "glassine envelope" being passed between hands in a drug deal. The officer who claimed to have been conducting surveillance on Sostre's bookstore when the alleged transaction took place had no film in his camera at the time, so he had no photographic evidence of the transaction occurring. Additionally, although the officer was stationed about eighty feet away from the store while conducting this surveillance, he claimed that he could see the bookstore clearly through his camera lens. FRAME UP!, *supra* note 2.

123. FRAME UP!, *supra* note 2 (describing that Arto Williams filed a 1971 affidavit recanting his original testimony given at Sostre's trial that assisted the Buffalo police in deliberately framing Sostre); McLaughlin, *supra* note 2, at 17.

124. Anderson, *supra* note 2 ("In 1971 the primary 'witness' against Sostre recanted his testimony and admitted he had helped frame Sostre so he himself could be released from jail.").

125. Gardner, *supra* note 62, at 18; Hess, *supra* note 2; Schwartz, *supra* note 12, at 775; McLaughlin, *supra* note 2, at 17 ("In May 1973, Arto Williams exposed the police conspiracy and, although Sostre's sentence was not reversed, it was revealed as a miscarriage of justice."); Schaich & Hope, *supra* note 60, at 281–82 ("The only witness for the state, Arto Williams, a known drug addict, testified that he bought the heroin from Sostre. But in May of 1973, Williams admitted perjuring his original testimony, claiming a deal was made with police for his own release. His second testimony was ruled 'unworthy of belief' and dismissed. Judge J. Curtin stated 'there was no reason not to believe the police officers[.]'") (citation omitted); FRAME UP!, *supra* note 2 at 23:46–24:00 ("The state produced a series of legal precedents indicating even if [the informant] lied [at trial and] the police and prosecution were not aware of that fact at the time of the trial, then the conviction should not necessarily be overturned.").

126. Hess, *supra* note 2; Anderson, *supra* note 2; Gardner, *supra* note 62, at 8; McLaughlin, *supra* note 2, at 2; Schaich & Hope, *supra* note 60, at 281; FRAME UP!, *supra* note 2.

127. FRAME UP!, *supra* note 2.

128. *Id*.

the Army.[129] Local newspapers, including the Buffalo Evening News and the Courier Express, characterized Sostre as a "dangerous black militant and white-hater," "a leader of the ghetto rebellion," and numerous other defamatory portrayals.[130]

Because Sostre could not afford the bail that was set,[131] he was forced to remain imprisoned for eight months before his trial began.[132] While representing himself at trial, Sostre was found in contempt of court[133] and gagged because his zealous defense of himself was too "confrontational."[134] In March 1968, Sostre was

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129. *HUAC Hearing*, *supra* note 51; McLaughlin, *supra* note 2, at 13 ("So far as the city's Police Commissioner Frank Felicetta was concerned, the impetus for protest was obvious: 'joining the issues of civil rights and the war in Vietnam,' he told the House Un-American Activities Committee (HUAC) in 1968, 'is standard Communist practice.' Such demagoguery was a staple of police officers eager . . . to 'strike in dramatic ways at the radical or ghetto enemy and to play the role of savior.' In Buffalo's local press (and HUAC), Felicetta found an eager audience.") (footnote omitted).

130. FRAME UP!, *supra* note 2; Gardner, *supra* note 62, at 18 ("During this time of his imprisonment the police department and Buffalo News repeatedly proclaimed Sostre's guilt and whipped up a racist hysteria among Buffalo's white citizenry."); Schaich & Hope, *supra* note 60, at 283–84 ("After Sostre's arrest, Buffalo newspapers quoted police officials who portrayed Sostre as a major instigator of the riots. The media created image of a black man connected to both riots and drugs clearly emerged early in the case with the July 16 headline: 'Police Tie Sostre to Dope Sales/Suspect Linked to Disorders' (Courier Express, July 16, 1967[]). Among many unsubstantiated accusations was Police Chief Michael Amico's charge that 'Sostre conducted a $15,000 weekly business in illegal narcotics traffic' (Courier Express, July 16, 1967[]). Sostre's past was described as 'deeply rooted in violence,' with loaded images of Muslim Black Power, Black Nationalism, subversion, arson, and looting (Buffalo Evening News, July 15, 1967[]; July 18[]; August 4[]; August 5[]; August 8[]; Courier Express, July 15, 1967[]; July 16[]; July 18[]). Police Commissioner Felicetta's Senate testimony was quoted: 'Martin X [Sostre] planned to use the fires to force white owners to sell out to him cheap' (Buffalo Evening News, August 5, 1967[]). Furthermore, Felicetta claimed that 'Mr. X' taught 13 to 16 year old boys in a 'school' to 'make Molotov cocktails' (Buffalo Evening News, August 5, 1967[]; August 4[]). The Commissioner reported unconfirmed stories about Sostre's 'plans . . . to loot and burn and assault any white persons . . . Mr. X said he hated all whites and colored police' (Buffalo Evening News, August 5, 1967[]; August 4[]). Sostre was publicly stigmatized by a negative and sinister image. The image passed from police to the public through the media.").

131. FRAME UP!, *supra* note 2.

132. McLaughlin, *supra* note 2, at 14; Schaich & Hope, *supra* note 60, at 281 ("Unable to raise $50,000 in bail (later reduced to $25,000), Sostre remained locked in the County Jail until his trial."); Gardner, *supra* note 62, at 8.

133. Schwartz, *supra* note 12, at 775 ("Sostre served as his own defense counsel and drew a 30-day contempt sentence because of his exchanges with the court.").

134. McLaughlin, *supra* note 2, at 14 ("[Sostre] refused to cooperate with the trial and instead used the court to proselytize. 'You might as well get the rope and hang this nigger,' he told the judge; 'this is what this is, a regular lynching.' He called the judge a fascist, a Hitler; he called the police 'Gestapo.' During one hearing, the judge gagged Sostre as he railed against the establishment: 'You are going to get another Vietnam right here!' and 'racist Buffalo is going to burn!' It was to be his swansong.") (footnotes omitted); Anderson, *supra* note 2 ("Sostre was gagged in court but was

convicted by an all-white jury in less than an hour and sentenced to serve "thirty to forty years for selling narcotics, followed by thirty days further imprisonment for contempt of court."[135] In 1971, Sostre's arrest and prosecution was shown to be orchestrated under COINTELPRO, of which Sostre was a target.[136]

IV. The Motley Cases

> *I cannot submit to injustices, even minor ones. Once one starts submitting to minor injustices and rationalizes them away, their accumulation creates a major oppression. That's how entire people fell into slavery.*
>
> Martin Sostre[137]

Sostre spent the first night of his sentence alone on an empty cell block in Attica Prison.[138] Sostre immediately tried to file an application for a certificate of reasonable doubt, which he had already prepared in anticipation of his fraudulent conviction, but an Attica guard refused to mail it.[139] The very next day, Sostre was transferred to Green Haven Prison and placed in solitary confinement.[140] After several days in solitary, Sostre was briefly admitted into the general population and allowed to mail his

unfazed by what he described as a 'foolish' attempt to silence him. He later wrote that he was demonstrating 'the weakness of this fascist beast' in the courtroom and encouraged Black people to look at what he was doing to the oppressor. Sostre promised to be consistently confrontational, and from prison, he encouraged Black people to 'Defy white authority!,' setting an example through his actions.").

135. Sostre v. McGinnis, 442 F.2d 178, 181 (2d Cir. 1971); Ward Churchill & Jim Vander Wall, *AGENTS OF REPRESSION: THE FBI'S SECRET WARS AGAINST THE BLACK PANTHER PARTY AND THE AMERICAN INDIAN MOVEMENT* 61 (South End Press 1990); Hess, *supra* note 2; McLaughlin, *supra* note 2, at 2, 14; Ervin, *Prison Revolutionary*, *supra* note 7; FRAME UP!, *supra* note 2; Schwartz, *supra* note 12, at 775; Gardner, *supra* note 62, at 18 ("Sostre had a speedy trial lasting only three days. [H]e was . . . convicted of sale and possession of narcotics and given a sentence of 30 to 41 years. Despite the fact that Buffalo has a substantial Black citizenry, the jury was all white."); Schaich & Hope, *supra* note 60, at 281 ("[Sostre] was convicted by an all-white jury for selling $15 worth of heroin and sentenced to prison for 31 to 41 years.").

136. Churchill & Wall, *supra* note 135, at 61 ("Some of the worst examples of FBI-engineered convictions are: black anarchist Martin Sostre, imprisoned for thirty to forty-one years for selling narcotics from his radical bookstore/meeting place in Buffalo, New York (Sostre was head of a community anti-drug campaign)[.]"); McLaughlin, *supra* note 2, at 17 ("In 1975, the Church Senate investigation shone light on the Bureau's counterintelligence operations and, after that, it became harder to justify keeping prisoners like Sostre locked away.") (footnote omitted).

137. Schaich & Hope, *supra* note 60, at 288.

138. Sostre v. Rockefeller, 312 F. Supp. 863, 866 (S.D.N.Y. 1970).; McLaughlin, *supra* note 2, at 14.

139. Sostre v. Rockefeller, 312 F. Supp. at 867.

140. *Id.*

application before he was sent back to solitary confinement for "having dust on his cell bars."[141] He remained there for more than a year.[142] Sostre "lost 124 1/3 days of 'good time' credit," which can potentially benefit parole and release decisions as a result of a prison policy that precluded prisoners from earning such credit while in "punitive segregation," another term for solitary confinement.[143]

In 1969, Sostre sued Governor Nelson A. Rockefeller, state corrections commissioner Paul D. McGinnis, and two prison officials in *Sostre v. Rockefeller* (1969).[144] In his handwritten complaint, Sostre alleged First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment violations.[145] These violations stemmed from censorship of his mail and legal correspondence, suppression of his political speech and expression, denial of an opportunity to earn "good time" credits without notice or a hearing, and the reasons, conditions, and length of his solitary confinement.[146] This case and its follow-up, *Sostre v. Rockefeller* (1970),[147] came before the Honorable Constance Baker Motley,[148] who was the first Black

141. *Id.* at 869 ("The day after plaintiff's court-ordered release from segregation, July 3, 1969, he was again disciplined. This time he was charged with having dust on his cell bars. The punishment was to confine him to his cell for several days . . . . This court finds that this charge and punishment were imposed upon Sostre in retaliation for his legal success."); Schwartz, *supra* note 12, at 778 ("On the day he was released from segregation, he was punished by being confined in his cell for several days, 'ostensibly because "dust" was found on his cell bars.'") (footnote omitted).

142. Sostre v. Rockefeller, 309 F. Supp. 611, 612 (S.D.N.Y. 1969); Sostre v. Rockefeller, 312 F. Supp. at 867 ("On June 25, 1968, Sostre was back in solitary confinement . . . . He remained in such confinement until July 2, 1969, when he was returned to the general population pursuant to a temporary restraining order issued by this court in the present action, followed by a preliminary injunction.") (citations omitted).

143. Sostre v. Rockefeller, 312 F. Supp. at 868, 872 ("As a result of his confinement, plaintiff lost 124 1/3 days of good time which might otherwise have been applied both to hasten consideration of his eligibility for parole and in mandating his release on parole.") (citations omitted); Schwartz, *supra* note 12, at 778.

144. Sostre v. Rockefeller, 309 F. Supp. at 611.

145. Sostre v. McGinnis, 442 F.2d 178, 181 (2d Cir. 1971).

146. Sostre v. Rockefeller, 309 F. Supp. at 611; Sostre v. Rockefeller, 312 F. Supp. at 863; McLaughlin, *supra* note 2, at 16 ("[Sostre] filed his handwritten complaint—under the 1871 Civil Rights Act[]—and challenged the warden's decision to send him into solitary confinement and the confiscation of his legal books and political texts.").

147. Sostre v. Rockefeller, 312 F. Supp. at 863.

148. Sostre v. Rockefeller, 309 F. Supp. at 612; Sostre v. Rockefeller, 312 F. Supp. at 866.

woman to serve as a federal judge.[149] These cases were part of a larger trend of federal cases examining state prison practices.[150]

The facts of the *Rockefeller* cases were focused around an interview of Sostre by Green Haven Prison Warden Harold Follette in his office.[151] In the interview, Follette accused Sostre of providing legal assistance to other incarcerated individuals without a license, confronted him about a letter Sostre had written to his sister in which he referenced the Republic of New Africa (RNA) organization—which Follette deemed suspicious—and refused to mail Sostre's legal correspondence to his attorney.[152] Sostre refused to answer Follette's questions regarding the RNA.[153] Follette cited

149. Anderson, *supra* note 2; *Constance Baker Motley: Judiciary's Unsung Rights Hero*, U.S. COURTS (Feb. 20, 2020) https://www.uscourts.gov/news/2020/02/20/constance-baker-motley-judiciarys-unsung-rights-hero [https://perma.cc/5463-TMSB] ("[F]rom the late 1940s through the early 1960s, Motley played a pivotal role in the fight to end racial segregation, putting her own safety at risk in one racial powder keg after another. She was the first African American woman to argue a case before the Supreme Court, and the first to serve as a federal judge. For all her achievements, Motley's legacy has receded with time—at least outside the federal Judiciary, where she is revered by the many judges and clerks she mentored. During Black History Month, she is celebrated far less often than Thurgood Marshall, whom she served as a key lieutenant, and Martin Luther King, Jr., whom Motley represented at critical moments . . . . As a front-line lawyer for the NAACP Legal Defense and Educational Fund, Motley personally led the litigation that integrated the Universities of Georgia, Alabama, and Mississippi among others—overcoming Southern governors who literally barred the door to African American students. She opened up schools and parks to African Americans, and successfully championed the rights of minorities to protest peacefully . . . . Along the way, she experienced countless courtroom delays and indignities. Motley kept her cool, even as some judges turned their backs when she spoke . . . . Those who remember Motley best have varied explanations of how she found the courage and tenacity to dismantle Southern race laws. But they agree that Motley exhibited supreme calm and confidence throughout her career . . . . Even as Motley prepared her autobiography, she stayed characteristically humble about her legacy . . . .").

150. Schwartz, *supra* note 12, at 776 ("Led to some extent by Federal District Judge Constance Baker Motley's opinion in *Sostre v. Rockefeller* [312 F. Supp. 863 (2d Cir. 1970)] in May, 1970 . . . federal judges in New York and elsewhere had begun to look critically at numerous prison practices. At the same time, federal and state judges began to protest the 'tidal wave' of Civil Rights Act cases brought by prisoners and others.") (citations omitted).

151. Sostre v. Rockefeller, 312 F. Supp. at 867 ("[Sostre] was called to the office of defendant Follette, Warden of Green Haven Prison, who had the papers on his desk. The Warden asked Sostre whether he had a license to practice law, to which he replied in the negative. The Warden admittedly denied Sostre the right to prepare legal papers for his codefendant, since he was not a licensed attorney, and flatly refused to mail out the motion papers.") (citation omitted).

152. *Id.*

153. *Id.* ("Warden Follette questioned Sostre about a reference in his letter to his attorney about an organization known as R.N.A. (Republic of New Africa) 'because defendant Follette was concerned about a statement in plaintiff's May 19, 1968 letter to his sister.' This statement reads: 'As for me, there is no doubt in my mind whatsoever that I will be out soon, either by having my appeal reversed in the courts

Sostre's refusal to cooperate and answer questions, the content of the letter to his sister, his jailhouse lawyering activities, his sharing of law books with other prisoners, and supposed evidence of a plan by Sostre to break out of prison as justification for his decision to place Sostre in solitary confinement.[154]

Sostre was punished for trying to mail out a motion for his codefendant, who was also incarcerated and did not have her own lawyer.[155] Follette cited precedent from a New York Court of Appeals decision[156]—which held that prisoners can only write to their attorneys about legal matters relating specifically to their own case or their own treatment while incarcerated—as justification for his refusal to mail the legal document and his subsequent punishment of Sostre.[157] Sostre contended that the warden's refusal

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or by being liberated by the Universal Forces of Liberation. The fact that the militarists of this country are being defeated in Viet Nam and are already engaged with an escalating rebellion in this country by the oppressed Afro-American people and their white allies are sure signs that the power structure is on its way out. They are now in their last days and soon they won't be able to oppress anybody because they themselves will be before the People's courts to be punished for their crimes against humanity as were the German war criminals at Nuremberg.'") (citation omitted).

154. Sostre v. Rockefeller, 309 F. Supp. at 612 ("Plaintiff was placed in the segregation unit of the prison on June 25, 1968, because of disciplinary infractions. These infractions consisted of 'threats and boasts that he would escape from the custody of correctional authorities; the presence of contraband material in his cell, consisting of two large pieces of emery board, adaptable for the fashioning of a key or lock picking tool; and disposing of his personal law books to other prisoners in violation of (prison) regulations;' as well as refusing to answer 'questions put to him by prison authorities regarding his alleged recruitment of other prisoners for an organization suspected to be fomenting insurrection within (the) institution;' 'engaging in unlawful correspondence by mail with unknown persons;' and 'preparing legal papers on behalf of one Geraldine Robinson.'") (citation omitted); Sostre v. Rockefeller, 312 F. Supp. at 867–68; Gardner, *supra* note 62, at 8 ("[Sostre] was put in solitary confinement for: 1) practicing law without a license (Sostre prepared a motion for changing venue of his co-defendant and shared law books with fellow inmates); 2) refusal to answer questions about the separatist Republic of New Africa; 3) telling his sister that he would be out soon, either by having his appeal reversed in the courts or being liberated by the 'Universal Forces of Liberation.'").

155. McLaughlin, *supra* note 2, at 15 ("Soon after arriving at Green Haven prison, Sostre attempted to take a hand in his own legal defense and to offer help to Geraldine Robinson, who had no lawyer of her own. The prison authorities stood in his way. When he drafted an application for a stay of trial for Geraldine and sent it, with two other documents, to his lawyer Joan Franklin, the Warden intercepted his mail and held it back. He summoned Sostre to his office, warned him that he was 'practicing law without a law degree,' refused to let him have a letter Franklin had sent to him, confiscated his legal books, and sent him into solitary confinement.") (footnote omitted).

156. Brabson v. Wilkins, 227 N.E.2d 383 (2d Cir. 1967).

157. Sostre v. Rockefeller, 312 F. Supp. at 870 ("The Warden claims he relied upon the decision of the New York Court of Appeals in Brabson v. Wilkins in denying plaintiff the right to prepare and mail out a motion for his codefendant and in

to mail his legal correspondence was arbitrary and capricious and violated his rights under the Fourteenth Amendment as well as his Sixth Amendment right to effective assistance of counsel.[158] Motley agreed with the dissent that the level of discretion afforded to the warden in limiting prisoners' legal communications "unnecessarily interfere[s] with and endanger[s] this prisoner's right to communicate with his attorney and governmental officials having either jurisdiction over the penal system or the power and authority to correct conditions existing therein."[159] Additionally, Motley held that the right of prisoners to seek relief from courts or government officials for grievances or abuses while incarcerated is so significant that it outweighs the risk of prison rules being broken as a result of prisoners' legal communications.[160] Moreover, there are certain rights that are inalienable even while incarcerated, and the right to petition the courts is one of them.[161]

Follette claimed to be authorized under state law to sentence Sostre to solitary confinement.[162] Motley saw through this hubristic defense, pointing out that "[t]here is nothing in this statute which authorized Follette to punish [the] plaintiff for exercising his constitutional rights."[163] Despite the compromised status of prisoners' constitutional protections, she wrote, there is no administrative or disciplinary need great enough to justify a total

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punishing him for this act."), 873 ("In support of his position, the Warden relies upon Brabson v. Wilkins, which upheld the right of the prior Warden at Attica Prison to intercept and withhold from a prisoner communications to and from an attorney dealing with matters other than 'legality of detention and treatment received.'") (citation omitted).

158. *Id.* at 873.

159. *Id.*

160. *Id.* at 874 ("[T]he right of a prisoner to unexpurgated communications with his attorney is so significant that it outweighs the danger of frustration of prison rules regarding outside activities in the rare case where an attorney—an officer of the court—would assist a prisoner in avoiding legitimate prison regulations.").

161. *Id.* at 873 ("There is no question that defendants cannot unreasonably restrict the right of plaintiff to apply to the state court for relief . . . .' (A) right of access to the courts is one of the rights a prisoner clearly retains. It is a precious right, and its administratively unfettered exercise may be of incalculable importance in the protection of rights even more precious.'") (citations omitted), 874 ("[P]risoners do retain certain constitutional rights in prison: The right of an individual to seek relief from illegal treatment or to complain about unlawful conduct does not end when the doors of a prison close behind him. True it is that a person sentenced to a period of confinement in a penal institution is necessarily deprived of many personal liberties . . . . Among the rights of which he may not be deprived is the right to communicate, without interference, with officers of the court and governmental officials; with those persons capable of responding to calls for assistance.").

162. *Id.* at 888.

163. Sostre v. Rockefeller, 312 F. Supp. at 888–89.

denial of prisoners' due process rights.[164] Motley went on to outline what it would take to make the state statute cited by Follette constitutional, including a fifteen-day maximum for solitary confinement that could "be imposed only for serious infractions" after providing the minimum procedural due process safeguards which all prisoners are constitutionally entitled to receive.[165]

Sostre claimed that his punishment of solitary confinement and subsequent loss of "good time" credits violated his procedural due process rights under the Fourth and Fifth Amendments in that he received no notice of the charges against him, was not given an opportunity to be heard, and was denied the option of legal representation, among other reasons.[166] The minimum due process procedural safeguards that Sostre was entitled to before being sentenced to punitive segregation included: (1) written notice; (2) a hearing; (3) a written record; and (4) retaining counsel.[167] Because

164. *Id.* at 872–73 ("A prisoner carries with him to prison his right to procedural due process which applies to charges for which he may receive punitive segregation or any other punishment for which earned good time credit may be revoked or the opportunity to earn good time credit is denied . . . . [B]asic constitutional rights cannot be sacrificed, even in the case of prisoners, 'in the interest of administrative efficiency.'") (citations omitted).

165. *Id.* at 868 ("This court finds that punitive segregation under the conditions to which plaintiff was subjected at Green Haven is physically harsh, destructive of morale, dehumanizing in the sense that it is needlessly degrading, and dangerous to the maintenance of sanity when continued for more than a short period of time which should certainly not exceed 15 days."), 871 ("In order to be constitutional, punitive segregation as practiced in Green Haven must be limited to no more than fifteen days and may be imposed only for serious infractions of the rules."), 889 (citing AM. CORR. ASS'N, MANUAL OF CORRECTIONAL STANDARDS 414–15 (3d ed. 1966)).

166. *Id.* at 871–72 ("Plaintiff claims that his confinement to segregation for more than a year was effected in violation of his right not to be deprived of his liberty without due process of law as guaranteed by the Fifth and Fourteenth Amendments to the Federal Constitution, in that: 1) he was sentenced to such confinement for offenses which under the rules of the prison did not constitute offenses; 2) with respect to the charge involving the emery paper there was no proof that he had such paper in his possession; 3) he did not receive advance written notice of the charges; 4) he was denied the right to assistance of counsel or a counsel substitute; 5) he was denied the right to call witnesses in rebuttal of the charges; 6) he was denied the right to confront or cross-examine witnesses; 7) there were no written records of the disciplinary proceedings against him other than a notation of the charges, plaintiff's plea, and defendants' summary determination of guilt; [and] 8) the right to appeal and the ability to make a meaningful appeal were denied as a result of the omission of his right to counsel, to call and cross-examine witnesses, and to have a written record.").

167. *Id.* at 872 ("Before plaintiff could have been constitutionally 'sentenced' to punitive segregation, he was entitled to: 1) written notice of the charges against him (in advance of a hearing) which designated the prison rule violated; 2) a hearing before an impartial official at which he had the right to cross-examine his accusers and call witnesses in rebuttal; 3) a written record of the hearing, decision, reasons therefor and evidence relied upon; and 4) retain counsel or a counsel substitute.").

he received none of those things, the court held that Sostre was wrongly denied the minimum level of required due process protection regarding his extreme punishment.[168]

On the issue of cruel and unusual punishment, the court held that Sostre's punishment was grossly disproportionate to his offense.[169] Moreover, there was no sign whatsoever indicating a coming release from solitary confinement—indicating that were it not for Sostre's legal claim, he would probably still be there.[170] Motley simply did not buy Follette's story concerning Sostre's attitude of obstinate insubordination and went further to say that, even if it were true, the punishment that was imposed was still wildly disproportionate.[171] In addition, the court found no valid justification for Follette's refusal to mail Sostre's letter.[172] Rather, the court found, under the totality of the circumstances, that:

> Sostre was sent to punitive segregation and kept there until released by court order not because of any serious infraction of the rules of prison discipline, or even for any minor infraction, but because Sostre was being punished specially by the Warden because of his legal and Black Muslim activities during his 1952-1964 incarceration, because of his threat to file a law suit against the Warden to secure his right to unrestricted correspondence with his attorney and to aid his codefendant

168. *Id.* ("This court holds that plaintiff was, in effect, 'sentenced' to more than a year in punitive segregation without the minimal procedural safeguards required for the imposition of such drastic punishment upon a prisoner. This punishment not only caused plaintiff physical deprivation, needless degradation, loss of work, training and self improvement opportunities, and mental suffering, but materially affected the length of time he must serve under his courtimposed [sic] sentence.").

169. *Id*. at 871 ("The conditions which undeniably existed in punitive segregation at Green Haven, this court finds, 'could only serve to destroy completely the spirit and undermine the sanity of the prisoner,' when imposed for more than fifteen days. Subjecting a prisoner to the demonstrated risk of the loss of his sanity as punishment for any offense in prison is plainly cruel and unusual punishment as judged by present standards of decency.") (citations omitted); Sostre v. Rockefeller, 309 F. Supp 611, 613 (S.D.N.Y. 1969).

170. Sostre v. Rockefeller, 312 F. Supp. at 889.

171. *Id*. at 871 ("The Warden claimed that he assigned Sostre to punitive segregation because Sostre refused to answer 'fully and truthfully' questions put to him by the Warden about the meaning of the letters R.N.A. The court disbelieves that ambiguous claim. But even if this were true, assignment to punitive segregation for an indefinite period of time for this infraction of the rules is likewise so disproportionate to the charge, as to be clearly barred by the Eighth Amendment's prohibition against disproportionate punishment.") (citations omitted); Schwartz, *supra* note 12, at 790 ("[Motley's] opinion . . . offers hope that the inmate's side of the story will not automatically be disbelieved.").

172. Sostre v. Rockefeller, 312 F. Supp. at 874 ("No valid reason, other than the shibboleth of prison discipline, has been advanced for the denial of this right in the case before us. I believe that *courts should look behind inappropriate slogans so often offered up as excuses for ignoring or abridging the constitutional rights of our citizens.*") (emphasis added).

> and because he is, unquestionably, a black militant who persists in writing and expressing his militant and radical ideas in prison.[173]

The court ultimately held that Sostre's First Amendment right to freedom of political expression was violated on all counts.[174] Judge Motley found the defense's arguments to be unpersuasive and the defendant's actions to be in bad faith:

> Even if the defense of 'good faith' were available to defendants . . . the court finds that they had none. Sostre was, in fact, subjected to cruel and unusual punishment because he insisted upon exercising his constitutional rights. The multiplicity of charges against him was a pretext for his long punishment.[175]

Motley accordingly affirmed Sostre's claim that both the length and conditions of his confinement amounted to cruel and unusual punishment under the Eighth and Fourteenth Amendments.[176] In dicta, Judge Motley reminded us that, like all constitutional protections, the scope, interpretation, and application of the Eighth Amendment changes and evolves over time, and it is only by this continual reimagining of traditional legal norms that we are able to become a more just society: "[T]he words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[177] Thus, finding Sostre's punishment to be cruel and unusual was not a besmirchment of constitutional precedent, but rather a revelatory recognition of an emerging constitutional threat—mass incarceration.[178]

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173. *Id.* at 869–70 (citations omitted); Schwartz, *supra* note 12, at 777–78 ("Follette sentenced Sostre to punitive segregation. Although Follette claimed to have based his decision on . . . alleged infractions, Judge Motley found that the punishment was really in retaliation for Sostre's political and legal activism, his threat to sue Follette for interfering with Sostre's mail, and for certain activities found by Judge Motley to be constitutionally protected.").

174. Sostre v. Rockefeller, 312 F. Supp. at 876.

175. *Id.* at 888 (citations omitted).

176. *Id.* at 863, 871 ("The court . . . holds that the totality of the circumstances to which Sostre was subjected for more than a year was cruel and unusual punishment when tested against 'the evolving standards of decency that mark the progress of a maturing society.'" (quoting Trop v. Dulles, 356 U.S. at 101)).

177. Sostre v. Rockefeller, 309 F. Supp. 611, 613 (S.D.N.Y. 1969) (citing Trop v. Dulles, 356 U.S. 86, 100–01 (1958)).

178. Alexander, *supra* note 19, at 234 ("The nature of the criminal justice system has changed. It is no longer concerned primarily with the prevention and punishment of crime, but rather with the management and control of the dispossessed.").

Motley granted a long list of injunctive relief, including enjoining prison officials from placing Sostre in solitary confinement again for the same reasons, granting Sostre the "good time" credits he did not have an opportunity to earn while in punitive segregation, enjoining prison officials from refusing to mail Sostre's legal correspondence, and enjoining prison officials from censoring Sostre's religious or political literature.[179] Further, Motley enjoined prison officials from punishing Sostre for sharing legal materials for as long as the prison failed to provide prisoners with alternative means of access to legal materials and assistance and required the prison administration to submit proposed prison rules and regulations governing the control and censorship of literature to the court for approval.[180] Motley also awarded compensatory and punitive damages.[181] The court retained jurisdiction pending judicial review and approval of the proposed prison rules and mandated that Sostre be given an opportunity to provide feedback.[182]

Though the Motley decision was seen as a groundbreaking advance in prisoner's rights, there were significant limitations to the decision in the real world, including the fact that prison administrators often have no intention of implementing court directives through regulatory reform and typically face no real consequences if they do not.[183] Another limiting force on Motley's

179. Sostre v. Rockefeller, 309 F. Supp. at 614; Sostre v. Rockefeller, 312 F. Supp. at 885; Schwartz, *supra* note 12, at 778–79 (footnote omitted).

180. Sostre v. Rockefeller, 309 F. Supp. at 614; Sostre v. Rockefeller, 312 F. Supp. at 885; Anderson, *supra* note 2; Gardner, *supra* note 62, at 18; Schwartz, *supra* note 12, at 778–79.

181. Sostre v. Rockefeller, 312 F. Supp. at 885–86 ("The court finds that such cruel and unusual punishment over the long period of time involved here resulted in injury to plaintiff as follows: 1) severe physical deprivations, i.e., loss of energy-giving food and loss of exercise, 2) needless degradation, 3) loss of work opportunities of a rehabilitative nature, 4) loss of money which might have been earned by working, 5) loss of schooling and training opportunities, 6) loss of self-improvement through reading books of one's own choice, and 7) great mental anguish. Therefore, the court awards plaintiff $25.00 per day for every day spent in punitive segregation (372 days), or a total of $9,300 compensatory damages against defendants Follette and McGinnis . . . . The bad faith and malice toward Sostre (based in large part upon political disagreement with him) that motivated Follette to put plaintiff in punitive segregation and, in effect, to 'throw the key away,' and McGinnis' failure to act after being notified of Sostre's confinement as early as July 1968, are quite reprehensible; an award of exemplary damages is in order . . . . Otherwise, these malicious acts . . . might recur in the future. The court, therefore, awards the additional sum of $10.00 per day, or a total of $3,720 in punitive damages against defendants Follette and McGinnis.") (citations omitted); Gardner, *supra* note 62, at 18.

182. *Id.* at 889.

183. Schwartz, *supra* note 12, at 777 ("The decision was hailed as a new bill of rights for prisoners and the New York Times headlined its page 1 story with 'Court

sweeping decision was the decisions of other courts[184] and, in particular, its equally sweeping appeal in *Sostre v. McGinnis* (1971).[185]

On appeal, Circuit Judge Irving R. Kaufman generally disagreed with Judge Motley's conclusions and systematically whittled away most of Motley's holdings.[186] While tactfully conceding the limitations of his own counterargument, Kaufman undermined the validity of Motley's reasoning and gaslit her conclusions just enough to nullify the practical impact of Motley's decision.[187]

In general, censorship of prisoners' mail is dehumanizing and counterproductive to the touted goal of prisoner rehabilitation.[188] In particular, censorship of prisoners' mail that is intended for their attorney, courts, or public officials concerning a legal issue that relates to their conviction or treatment while incarcerated is

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Extends Convicts' Rights.' Analysis of what the court did, rather than what it occasionally said, discloses a rather different result. Indeed, the decision definitively settled very few issues and much of what it did decide would not, by the court's own admission, do much to improve prison conditions.") (footnotes omitted).

184. *Id.* at 776 ("In December 1970, Judge Clarence Herlihy, Presiding Justice of the Appellate Division, Third Department, castigated the federal courts for interfering in state prison administration, focusing particularly on Judge Motley's opinion in Sostre and on Judge Morris Lasker's release of Angela Davis from solitary confinement . . . .") (citation omitted).

185. 442 F.2d 178 (2d Cir. 1971).

186. *Id.* at 185; Schwartz, *supra* note 12, at 779 ("The court of appeals reversed almost every part of Judge Motley's order except for the return of the 124 1/3 days good time, the propriety of the award of compensatory damages against Follette (who had since died), and the right to possess political literature, subjecting that right, however, to 'reasonable regulation.'").

187. *See, e.g.*, Sostre v. McGinnis, 442 F.2d at 190 ("We respect the outrage, given form and content by scholarly research and reflection, that underlay the expert testimony at trial of Sol Rubin . . . [who] testified that Sostre's segregated environment was degrading, dehumanizing, conducive to mental derangement, and for these reasons 'a gross departure' from enlightened and progressive contemporary standards for the proper treatment of prison inmates."), 191 ("For a federal court, however, to place a punishment beyond the power of a state to impose on an inmate is a drastic interference with the state's free political and administrative processes . . . . Accordingly, we have in the past declined to find an Eighth Amendment violation unless the punishment can properly be termed 'barbarous' or 'shocking to the conscience.'").

188. *Id.* at 199 ("The harm censorship does to rehabilitation cannot be gainsaid. Inmates lose contact with the outside world and become wary of placing intimate thoughts or criticisms of the prison in letters. The artificial increase of alienation from society is ill advised. The values commonly associated with free expression—an open, democratic marketplace of ideas, the self-development of individuals through self-expression, the alleviation of tensions by their release in harsh words rather than hurled objects—these values that we esteem in a free society do not turn to dross in an unfree one.").

downright unconstitutional.[189] Warden Follette routinely censored and redacted Sostre's legal correspondence based exclusively on his own discretion.[190] Judge Kaufman agreed with Motley that Follette's redaction of and refusal to mail Sostre's written correspondence with his attorney violated Sostre's constitutional rights and that allowing unlimited censorship of prisoner correspondence based exclusively on the unfettered discretion of prison officials would have a "chilling" effect on prisoner's willingness and ability to seek redress for abuses suffered at the hands of those same prison officials.[191] Still, Kaufman reserved room for prison administrators to regulate exceptions to this

189. *Id.* at 189, 200–01 ("Sui generis in both logic and the case law[] are letters addressed to courts, public officials, or an attorney when a prisoner challenges the legality of either his criminal conviction or the conditions of his incarceration . . . . It would be inappropriate on constitutional grounds, ironic, and irrational to permit drastic curtailment of constitutional rights in the name of punishment and rehabilitation, while denying prisoners a full opportunity to pursue their appeals and postconviction remedies . . . . [I]f a communication is properly intended to advance a prisoner's effort to secure redress for alleged abuses, no interest would justify deleting material thought by prison authorities to be irrelevant to the prisoner's complaint. The danger that an official will improperly substitute his judgment for that of the correspondent's then preponderates. For similar reasons, prison officials may not withhold, refuse to mail, or delete material from otherwise protected communications merely because they believe the allegations to be repetitious, false, or malicious.") (citations omitted); Schwartz, *supra* note 12, at 786 ("Without . . . sealed letters [between an inmate and their lawyer], confidential communication is virtually impossible. Partly because of the practice of building prisons in forsaken areas of the countryside, miles from any large cities, it is very difficult to visit inmate clients more than infrequently; telephone calls are not permitted; and censorship itself often consumes many days, as letters lie waiting for the censor to get around to them. The rich defendant can, of course, pay his lawyer to visit often, but the poor man cannot, and most prisoners are very poor.").

190. Sostre v. Rockefeller, 312 F. Supp. 863, 869 (S.D.N.Y. 1970) ("All of plaintiff's letters to and from his attorney, Joan Franklin, were censored by the Warden. He excised therefrom everything which he believed was not directly related to Sostre's immediate case."); Sostre v. McGinnis, 442 F.2d at 187 ("Defendant Follette censored Sostre's correspondence with Joan Franklin of the NAACP, the attorney of record representing Sostre on appeal from his conviction. Follette regularly excised from letters passing between Sostre and Miss Franklin 'objectionable' material—anything which 'in his judgment was not relevant to Sostre's appeal.' In accordance with Rule 47 of the Inmate Rule Book which restricts inmates' correspondence to persons on an approved mailing list, Warden Follette in late September, 1968, refused to forward a letter from Sostre to the United States Post Office Inspector, in which Sostre complained of Green Haven's practice of not returning to prisoners receipts for certified mail."); Schwartz, *supra* note 12, at 778.

191. Sostre v. McGinnis, 442 F.2d at 200–01 ("The generous scope of discretion accorded prison authorities also heightens the importance of permitting free and uninhibited access by prisoners to both administrative and judicial forums for the purpose of seeking redress of grievances against state officers. The importance of these rights of access suggests the need for guidelines both generous and specific enough to afford protection against the reality or the chilling threat of administrative infringement.").

general rule against discretionary censorship that allow for "nonarbitrary restraint of communication"[192] in "special circumstances."[193]

Notwithstanding the constitutional limitations imposed on prisoners' rights,[194] they still retain certain fundamental rights that are inalienable to all persons, including the right to freedom from punishment for one's internal thoughts and beliefs.[195] Even after Sostre was released from solitary confinement, his political literature, personal writings and legal resources continued to be heavily censored; further, he continued to be punished for the materials he managed to keep, which included magazines and newspapers, personal writings, Black Panther Party and New Republic of Africa literature, poetry,[196] and Harvard Law Review

192. *Id.* at 203 ("The refusal to mail Sostre's letter to the Post Office Inspector, complaining of prison practices, clearly infringed Sostre's Fourteenth Amendment rights. We also affirm Judge Motley's order insofar as it enjoins defendants Follette and McGinnis, their employees, agents, successors, and all persons in active concert and participation with them, from deleting material from, refusing to mail or refusing to give to Sostre: (1) Any communication between Sostre and the following—(a) any court; (b) any public official or agency; or (c) any lawyer—with respect to either his criminal conviction or any complaint he may have concerning the administration of the prison where he is incarcerated. We reverse, however, insofar as Judge Motley enjoined nonarbitrary restraint of communication between Sostre and his co-defendant in the criminal matter pending against him.").

193. *Id.* at 201 ("[W]e agree with Judge Motley that it was improper for Warden Follette to delete material from correspondence between Sostre and his attorney merely because Follette thought the material irrelevant to Sostre's appeal of his conviction. We believe it was also improper for Follette to refuse to mail a letter of complaint to the Postal Inspector. We leave a more precise delineation of the boundaries of this protection for future cases. We need only add that when we say there may be cases which will present special circumstances that would justify deleting material from, withholding, or refusing to mail communications with courts, attorneys, and public officials, we necessarily rule that prison officials may open and read all outgoing and incoming correspondence to and from prisoners.").

194. Id. at 188–89 ("It is clear that in many respects the constitutionally protected freedoms enjoyed by citizens-at-large may be withdrawn or constricted as to state prisoners . . . .").

195. *Id.* at 189 ("Among those rights not taken from Sostre when he entered Attica, either 'expressly or by necessary implication,' is freedom from discriminatory punishment inflicted solely because of his beliefs, whether religious or secular.") (citations omitted).

196. *Id.* at 187 ("[A] month after his release from segregation, Sostre was deprived of the use of the prison exercise yard and the privilege of attending movies because he possessed 'inflammatory racist literature' in his cell. The literature consisted of articles written by Sostre himself on paper properly in his possession. Most of the articles consisted of extracts from magazines and newspapers which Sostre was also permitted to have and read in his cell. The extracts included quotations from Mao Tse Tung, poetry written by a prison inmate, the names of the officers, the party program, and rules of conduct of the Black Panther Party; the officers and oath of allegiance of the Republic of New Africa; a 'program' for Black Student Unions; and the poem 'If We Must Die,' by Claude McKay. In addition, guards found in Sostre's

articles, which he was lending out to other prisoners.[197] Again, Kaufman agreed with Motley that punishing Sostre for possession of such materials, which he was otherwise allowed to have, would have a chilling effect on a "wide range of prisoner expression."[198] And again, he noted the mitigating effect of regulatory guidelines on the chilling threat of arbitrary and discriminatory punishment.[199]

Kaufman therefore affirmed Motley's holding that prison officials are constitutionally precluded from punishing Sostre for his political expression, possession of political literature, and efforts to seek redress of grievances in court (unless, of course, such discipline is for the purpose of preventing Sostre from "inciting disturbances" or "to protect the security and order of New York prisons").[200] Thus,

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cell an article which he had written himself, entitled 'Revoluntionary [sic] Thoughts.' The district court found that Sostre's punishment for possessing this material constituted another infringement of his freedom of expression.") (footnote omitted); Sostre v. Rockefeller, 312 F. Supp. 863, 869 (S.D.N.Y. 1970); Schwartz, *supra* note 12, at 778 ("After Judge Motley ordered his release from segregation on a preliminary injunction in July 1968, he was again punished, this time for having 'inflammatory racist literature' in his cell, including some of his own writings, and extracts from newspapers and magazines which he had been permitted to have.") (footnote omitted).

197. Sostre v. Rockefeller, 312 F. Supp. at 869 ("On June 25, 1968, search of Sostre's cell also revealed that he was lending his law books to other inmates, after removing therefrom a stamp identifying these books (which turned out to be copies of the Harvard Law Review) as belonging to Sostre.").

198. Sostre v. McGinnis, 442 F.2d at 202 ("Whatever doubts we might have as to the wisdom of seizing an inmate's political writings, we would not lightly overturn a warden's judgment that possession of the writings might subvert prison discipline if there existed the risk of their circulation among other prisoners. However, Sostre was punished simply for putting his thoughts on paper, with no prior warning and no hint that he intended to spirit the writings outside his cell. To sanction such punishment, even though in the judgment of prison officials the writings were 'inflammatory' and 'racist,' as in the instant case, would permit prison authorities to manipulate and crush thoughts under the guise of regulation. The intimidating threat of future similar punishment would chill a wide range of prisoner expression, not limited to that expression which Follette might in fact deem dangerous enough to discipline.").

199. *Id.* at 202–03 ("The danger of undetected discriminatory punishment of ideas is particularly acute in the absence of statutory standards to guide the exercise of Follette's discretion.").

200. *Id.* at 204 ("We have held that Sostre was improperly punished for possession of constitutionally protected literature. We perceive no reason, however, to set political speech apart from other kinds of constitutionally protected speech. We therefore modify the district court order so as to enjoin defendants Follette and McGinnis, their employees, agents, successors, and all persons in active concert and participation with them, from punishing Sostre for having literature in his possession and for setting forth his views orally or in writing, except for violation of reasonable regulations. We do not hereby enjoin officials from taking reasonable measures to prevent prisoners from inciting disturbances and otherwise to protect the security and order of New York prisons, consistent with prisoners' rights to

placing Sostre in solitary confinement was a violation of due process of law if Follette did so in retaliation for Sostre's political speech or legal activities.[201] Because Kaufman could not show anything from the record that clearly absolved Follette from having retaliated against Sostre, the court was forced to show deference to Judge Motley's finding of unlawful retaliation.[202] In contrast, Kaufman rejected Motley's findings regarding other defendants, including McGinnis, stating that he could not find a reason in the record to support the claim that McGinnis was acting under similarly misguided or improper motivations, thereby letting McGinnis off the constitutional hook for his part in Sostre's punishment.[203] Kaufman went on to say that even if Motley's finding that Follette acted unconstitutionally was granted as true, he was also off the hook because he passed away before the trial began; and with no currently employed prison officials left on the hook, there was no reason not to reverse the order enjoining them from throwing Sostre right back into solitary confinement for previous charges.[204] Similarly, Kaufman reversed Motley's award of damages because there was no one left on the hook who could be asked to pay up.[205]

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freedom of expression.").

201. *Id.* at 189 ("Accordingly, Sostre's lengthy confinement to segregation violated due process of law if, as the district court found, Warden Follette inflicted the punishment either because of Sostre's militant political ideas or his litigation, past or threatened, against Follette or other state officials.").

202. *Id.*

203. *Id.* at 189–90 ("The record is barren of any justification for attributing to . . . [McGinnis], in sanctioning Sostre's continued confinement, any more sinister motive than appropriate deference to the judgment of Warden Follette. McGinnis on the record before us, had no reason to suspect Follette of other than proper motivation.").

204. Sostre v. McGinnis, 442 F.2d at 204 ("We have refused to set aside Judge Motley's findings that Warden Follette unlawfully committed Sostre to segregated confinement because of his legal activities and beliefs. Warden Follette, however, is deceased and we perceive no threat that others will duplicate his improper conduct. Accordingly, we vacate that portion of the district court order which enjoined defendants and others from returning Sostre to punitive segregation for charges previously preferred against him.").

205. *Id.* at 204–05 ("Section 1983, authorizes recovery of compensatory, and, in an appropriate case, punitive damages against an individual for the unjustifiable violation of constitutional rights 'under color' of state law. This liability, however, is entirely personal in nature intended to be satisfied out of the individual's own pocket. Moreover, the doctrine of sovereign immunity, as codified by the Eleventh Amendment, bars the exaction of a fine from a state treasury without the state's consent, at least on account of tortious actions committed by its agents under the circumstances of this case. It follows from these principles that although Sostre was entitled to compensatory damages against Warden Follette, Follette's successor as warden, who had no part whatsoever in Follette's wrongful conduct against Sostre, incurred no personal money responsibility upon Follette's death . . . . Accordingly, there is no party before us against whom appropriately to award damages. In any

Kaufman acknowledged that incarcerated persons are entitled to some measure of due process before they are punished for violating prison policy.[206] Here, Kaufman repeated the tried-and-true hymn of prison order and discipline as the highest of priorities to justify regulatory exceptions to the constitutional prohibition of discretionary punishment of prisoners.[207] He further unraveled the constitutional net by falling back on the familiar federalist catch-all of improper federal jurisdiction:

> Most important, we think it inadvisable for a federal court to pass judgment one way or another as to the truly decisive consideration, whether formal due process requirements would be likely to help or to hinder in the state's endeavor to preserve order and discipline in its prisons and to return a rehabilitated individual to society . . . . We would not presume to fashion a constitutional harness of nothing more than our guesses. It would be mere speculation for us to decree that the effect of equipping prisoners with more elaborate constitutional weapons against the administration of discipline by prison authorities would be more soothing to the prison atmosphere and rehabilitative of the prisoner or, on the other hand, more disquieting and destructive of remedial ends. This is a judgment entrusted to state officials, not federal judges.[208]

It is telling that Kaufman here described the basic constitutional rights of prisoners as "elaborate constitutional weapons" that Motley's decision would effectively "equip[] prisoners with" against the "administration of discipline by prison authorities."[209] Even when he presumed to defer judgment of the situation to prison administrators, he portrayed prisoners as dangerous, criminal militants, and the state as the noble facilitator of rehabilitation.[210] Ultimately, Kaufman concluded that regulatory

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event, we are persuaded to reverse the award of punitive damages. Warden Follette's improper conduct in segregating Sostre so far as appears reflected no pattern of such behavior by himself or by other officials. The deterrent impact of a punitive award would be of minimal use.") (citations omitted).

206. *Id.* at 196.

207. *Id.* at 199–200 ("Whatever wisdom there might be in such reflection, we cannot say with requisite certitude that the traditional and common practice of prisons in imposing many kinds of controls on the correspondence of inmates, lacks support in any rational and constitutionally acceptable concept of a prison system . . . . Discipline and prison order are sufficient interests to justify such regulation incidental to the content of prisoners' speech.").

208. *Id.* at 197 (citations omitted).

209. *Id.*

210. *Id.*; Farley, *supra* note 19, at 516 ("The sociologist, no less than the lawmaker and the law enforcer, sings the system's endless hymn of self-praise. For the desiring white bodies, this is a joyful noise made possible only by the promise of race-pleasure. This race-pleasure is produced by the sociological thematization of black bodies as minstrels and as criminals all.") (footnote omitted).

safeguards would sufficiently protect prisoners against arbitrary and unconstitutional punishment such that all of the minimal procedural due process requirements laid out by Motley are only required sometimes.[211] Kaufman's inexplicable trust that prison regulators would act reasonably and with respect for the constitutional rights of prisoners led him to forego any measure of oversight of the very people who were in charge of and failed to protect the rights of Martin Sostre and reverse Judge Motley's order that prison administrators submit new disciplinary regulations to the district court for approval.[212]

Judge Kaufman cited Supreme Court precedent to uphold a prison policy requiring incarcerated persons to seek the warden's approval before assisting other incarcerated persons in preparing legal materials or committing other acts of "jailhouse lawyer[ing]."[213] The policy stipulated that prisoners could prepare legal papers for themselves and non-inmate codefendants but not fellow inmates absent explicit permission from the warden.[214] Accordingly, a prisoner's constitutional rights were only violated if such permission was denied.[215] The policy thereby created a condition that the prisoner must opt into at their own peril before they could be given the privilege of exercising their constitutional

211. Sostre v. McGinnis, 442 F.2d at 203 ("All of the elements of due process recited by the district court are not necessary to the constitutionality of every disciplinary action taken against a prisoner. In light of this, we reverse the district court insofar as it enjoined defendants and others from so disciplining Sostre that he loses accrued good time credit or is unable to earn good time credit without full compliance with all the procedural steps set forth in Judge Motley's injunction.").

212. *Id.* at 203–04 ("[A]s consideration of Sostre's case does not properly raise any question whether New York prisons regularly or systematically ignore minimal due process requirements, we must reverse the order of the district court that defendants submit for its approval, proposed rules and regulations governing future disciplinary actions . . . .[W]e do not believe that there is any need for the extraordinary procedure requiring defendants to submit rules and regulations governing the receipt, distribution, discussion and writing of political literature for the approval of the district court. We have no reason to conclude that New York prison officials will not abide by the constitutional rights of prisoners as we define them today.").

213. *Id.* at 201 (citing Johnson v. Avery, 393 U.S. 483 (1969)); *see also* Sostre v. Rockefeller, 312 F. Supp. 863, 870 (S.D.N.Y. 1970) ("Prisoners at Green Haven may prepare legal papers for themselves. There is no rule of the prison which prohibits inmates from preparing legal papers for their non-inmate codefendants. However, the rules do bar inmates, except upon approval of the Warden, from assisting 'other inmates in the preparation of legal papers.'") (citation omitted) *and* Schwartz, *supra* note 12, at 790 ("Sostre was punished for trying to help other inmates with their legal affairs. The court denied him relief because it found that he had not obeyed the prison regulation requiring him to seek permission to provide such help.").

214. Sostre v. Rockefeller, 312 F. Supp. at 870.

215. Sostre v. McGinnis, 442 F.2d at 201 ("There would be a violation of Johnson only if the Warden denied permission, or if the conditions on which he granted it were unreasonable.").

rights. Thus, because Sostre did not ask Follette's permission to assist other incarcerated persons in legal matters, there was no constitutional violation and no need for a legal remedy like an injunction.[216]

Judge Kaufman was naively optimistic about the reasonableness and feasibility of following the *Johnson* rule or other Green Haven Prison policies, which required initiating an interaction with prison officials that would almost certainly be unsuccessful and end in violence.[217] At the same time, he suspected that prisoners had sinister, ulterior motives behind helping each other pursue legal remedies, as if mutual aid between them was not possible or getting free was not motivation enough.[218]

The undisputed conditions of Sostre's solitary confinement were as follows: Sostre was not allowed second portions of food or any desserts;[219] only allowed one hot shower and shave per week;[220] confined to his cell twenty-four hours a day because he refused to submit to a daily "strip frisk" and "rectal examination," which was the mandatory condition for him to be able to leave his cell for one hour of recreation each day;[221] prevented from participating in a prison work program, which deprived him entirely of the little

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216. *Id.* at 204 ("Johnson v. Avery permitted reasonable rules regulating the conduct of inmates in assisting other inmates in legal proceedings. Sostre has not proved that the rules regulating his right to assist other prisoners in their legal affairs were unreasonable and that his punishment was for violating such rules. Therefore, we must reverse the district court insofar as it enjoined interference with Sostre's translation of letters of fellow-inmates since he had failed to comply with the rule requiring that he seek permission of the warden. For the same reason, we reverse the injunction against punishing Sostre for sharing with other inmates his law books, law reviews, and other legal materials, and from refusing to permit Sostre to assist any other inmate in any legal matter."); Schwartz, *supra* note 12, at 790.

217. Sostre v. McGinnis, 442 F.2d at 201–02 ("We assume that permission would be granted as a matter of course, subject only to reasonable conditions. Nor can we consider unreasonable the Green Haven rule forbidding prisoners from sharing their personal law books with one another. This regulation would not prohibit Sostre, for example, from recommending legal source material to other inmates. We do not see how they would be unduly burdened by being required to acquire the books through prison officials rather than directly from Sostre.").

218. *Id.* at 202 ("We cannot ignore the concern of prison officials that strong-willed inmates might exact hidden and perhaps non-monetary fees in return for nominally free privileges at the inmates' private lending library."); Schwartz, *supra* note 12, at 790.

219. Sostre v. Rockefeller, 312 F. Supp. at 868; Sostre v. McGinnis, 442 F.2d at 186.

220. Sostre v. Rockefeller, 309 F. Supp. 611, 612 (S.D.N.Y. 1969); Sostre v. Rockefeller, 312 F. Supp. at 868; Sostre v. McGinnis, 442 F.2d 186 ("Sostre remained in his cell at all times except for a brief period once each week to shave and shower.").

221. Sostre v. Rockefeller, 309 F. Supp. at 613; Sostre v. Rockefeller, 312 F. Supp. at 868; Sostre v. McGinnis, 442 F.2d at 186.

earning power he had while incarcerated;[222] prevented from attending school or training programs;[223] not allowed access to the prison library, newspapers, magazines, television, or movies;[224] woken up at half-hour intervals throughout the night by a patrolling guard;[225] and confined to a cell with no windows or natural daylight and only one lightbulb that could not be turned on or off from inside the cell.[226] The only furnishings Sostre had in his cell were law books, a toothbrush, and some toothpaste.[227] Another prisoner placed under similar conditions in a separate cell nearby died by suicide while Sostre was in solitary confinement.[228]

Kaufman's disagreement with Motley's conclusions concerning the constitutional limits of solitary confinement (called "segregated confinement" in the case) was in part based on its widespread and regular use in other states and on the federal level.[229] Kaufman also minimized Motley's contention that the conditions of Sostre's punitive segregation were cruel or unreasonable.[230] In Kaufman's

222. Sostre v. Rockefeller, 309 F. Supp. at 612; Sostre v. Rockefeller, 312 F. Supp. at 868.

223. Sostre v. Rockefeller, 312 F. Supp. at 868.

224. Sostre v. Rockefeller, 309 F. Supp. at 612; Sostre v. Rockefeller, 312 F. Supp. at 868.

225. Sostre v. Rockefeller, 309 F. Supp. at 613.

226. *Id.*

227. FRAME UP!, *supra* note 2 (Sostre interview).

228. Sostre v. Rockefeller, 312 F. Supp. at 868 (citation omitted); Sostre v. McGinnis, 442 F.2d 178, 185 (2d Cir. 1971).

229. Sostre v. McGinnis, 442 F.2d at 192–93 ("It is undisputed on this appeal that segregated confinement does not itself violate the Constitution . . . . Indeed, we learn that a similar form of confinement is probably used in almost every jurisdiction in this country and has been described as one of 'the main traditional disciplinary tools' of our prison systems. . . . In several states . . . incarceration in segregated cells seems to be for an indefinite period, as it is in New York. The federal practice appears to be that prisoners shall be retained in solitary 'for as long as necessary to achieve the purposes intended,' sometimes 'indefinitely.' Furthermore, 'willful refusal to obey an order or demonstrated defiance of personnel acting in line of duty may constitute sufficient basis for placing an inmate in segregation.' Such analogous practices do not impel us to the conclusion that the Eighth Amendment forbids indefinite confinement under the conditions endured by Sostre for all the reasons asserted by Warden Follette until such time as the prisoner agrees to abide by prison rules—however counter-productive as a correctional measure or however personally abhorrent the practice may seem to some of us."); Schwartz, *supra* note 12, at 778.

230. Sostre v. McGinnis, 442 F.2d at 186 ("It can hardly be questioned that his life in segregation was harsher than it would have been in the general population, but neither was it clearly unendurable or subhuman or cruel and inhuman in a constitutional sense."), 193–94 ("In arriving at this conclusion, we have considered Sostre's diet, the availability in his cell of at least rudimentary implements of personal hygiene, the opportunity for exercise and for participation in group therapy, the provision of at least some general reading matter from the prison library and of unlimited numbers of law books, and the constant possibility of communication with other segregated prisoners. These factors in combination raised the quality of

view, the isolation was not so isolated—he could talk to at least one other person, as evidenced by the fact that he was able to dictate a legal letter for another prisoner while in punitive segregation.[231] The lack of anything to do was not so lacking either—he had at least one thing to do, considering he could request any law book he wanted to read by the light of a single dim bulb that he could not turn on or off.[232] Sostre's cell was not so small, as it was not any smaller than other "normal-sized"[233] cells, and there was even a toilet so he did not have to literally lie in his own filth, besides what accumulated between weekly showers without access to deodorant.[234] Sostre could even go outside if he wanted to—all it would take was getting a rectal examination, which Sostre said was "symbolic of being sodomized."[235]

Sostre was confined indefinitely until "submissiveness," to be determined at the sole discretion of the warden.[236] Judge Kaufman effectively blamed Sostre for the length of his solitary confinement because Sostre refused to jump through hoops of humiliation which could have led to his release, which included group therapy and strip searches.[237] Kaufman further justified Sostre's punishment as

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Sostre's segregated environment several notches above those truly barbarous and inhumane conditions heretofore condemned by ourselves and by other courts as 'cruel and unusual.'") (citations omitted).

231. *Id.* at 185.

232. Sostre v. Rockefeller, 309 F. Supp. 611, 613 (S.D.N.Y. 1969); Sostre v. McGinnis, 442 F.2d at 186.

233. Sostre v. McGinnis, 442 F.2d at 186. There is nothing normal about a human being existing exclusively within 48 square feet of space.

234. *Id.* at 186.

235. FRAME UP!, *supra* note 2. Sostre described his experience in solitary confinement in an interview featured in the documentary FRAME UP!: "[T]hey require that every time you leave your cell, the solitary confinement building, to go let's say to the hospital, inside the prison, or to go to the visitor's room to see your attorney, or to see your private visit, that you strip down, naked, you bend over, and spread your cheeks. Now they know you don't have anything in your rectum. They just do this to dehumanize you. Because once a man bends over and spreads his cheeks, two or three hacks leering at you, that's a sign not only of submission, but is symbolic of being sodomized. And a lot of prisoners submit to that, but I'm not gonna submit." Farley, *supra* note 19, at 473 ("Race, like rape, is, among other things, a crime of humiliation. To be thematized as black is a form of humiliation in and of itself."), 500 ("Acts of racial categorization separate black people from their humanity. They are both expressions of disgust and invitations to self-loathing.").

236. Sostre v. McGinnis, 442 F.2d at 187 ("Pursuant to the usual practice at Green Haven, Sostre was sentenced to 'solitary' confinement for an indefinite period . . . . '[S]ubmissiveness' was to be the touchstone for his release."); Sostre v. Rockefeller, 312 F. Supp. 863, 868 (S.D.N.Y. 1970) ("Release from segregation is wholly within the discretion of the Warden."); Farley, *supra* note 19, at 514 ("Learning to live in a subaltern body often involves learning to submit and stop asking questions.").

237. Schwartz, *supra* note 12, at 778 ("Sostre was sentenced to segregation for an indefinite period until he agreed to abide by the rules of the institution or until he

"an entirely constitutional means" to respond to a "credible threat to the security of the prison[,]" citing Sostre's refusal to answer the questions or obey the orders of prison officials, including the order to regularly submit to rectal exams.[238] Kaufman ultimately concluded that Sostre's indefinite solitary confinement was not cruel and unusual and overturned Motley's fifteen-day maximum limit.[239] However, Kaufman agreed with Motley that Sostre be given the "good time" credits that he was precluded from earning while in solitary confinement.[240]

Judge Kaufman referred to the "new penology" that was emerging at the time, which posited that the purpose of our penal system is correctional rather than penal.[241] He contrasted this theory with the realities of the criminal justice system, which he described as promoting the opposite goals in a harmful and counterproductive way.[242] Though Judge Kaufman apologetically claimed that he "respect[s] the outrage" of those who criticize inhumane prison practices and disclaimed "any intent by this decision to condone, ignore, or discount the deplorable and counter-productive conditions of many of this country's jails and prisons," he neatly backpedaled on all of the progress Motley would have made toward addressing or changing those conditions, making his words ring hollow.[243] The crux of Kaufman's overturning of Motley's

participated successfully in group therapy."); Sostre v. Rockefeller, 309 F. Supp. at 612 ("Prisoners placed in segregation are required to participate in group counseling, but plaintiff has continually refused."); Sostre v. McGinnis, 442 F.2d at 185–87 ("[S]ostre aggravated his isolation by refusing to participate in a 'group therapy' program offered each inmate in segregation . . . . Follette testified that Sostre could have returned to the general population either by successful participation in group therapy or by agreeing to live by the rules of the prison. Sostre's contention is that he refused to agree to obey rules that he considered an infringement of his constitutional rights.").

238. Sostre v. McGinnis, 442 F.2d at 194; Farley, *supra* note 19, at 472.

239. Sostre v. McGinnis, 442 F.2d at 192–93; Schwartz, *supra* note 12, at 783.

240. Sostre v. McGinnis, 442 F.2d at 204.

241. *Id.* at 190 (citation omitted).

242. *Id.* at 191 ("Anathema to this perspective are perhaps more traditional practices which subject prisoners to deprivation, degradation, subservience, and isolation, in an attempt to 'break' them and make them see the error of their ways. It is suggested by many observers that such techniques are counter-productive, tending only to instill in most prisoners attitudes hostile to rehabilitation, summarized by one author as 'doubt, guilt, inadequacy, diffusion, self-absorption, apathy (and) despair.'").

243. *Id.* at 190, 205; Schwartz, *supra* note 12, at 791 ("[Judge Kaufman's opinion is] a cautious opinion, full of good intentions and dubious rulings, leaving many of the most important issues 'for another day'; above all, an opinion fearful of judicial intrusion at this time into a strange and volatile area. Indeed, the opinion closes with something of an apologia for how little it does to advance the cause of humane prison conditions: 'It is appropriate, lest our action today be misunderstood, that we

decision was that it is not the place of federal courts to tell states how to administrate their prisons.[244]

Conclusion – Sostre's Living Legacy

> *Little did you imagine that the very dungeons used to torture us, where you forced us to sleep naked on the cold concrete floor with windows opened to give us pneumonia, on bread and water diet, and with a five gallon paint bucket for a toilet, would become the crucibles from which evolved the new hardened prisoner and the Vanguard revolutionary ideology which has now spread throughout New York State prison and into the ghettos . . . . We, the new politically aware prisoner, will soon galvanize the revolutionary struggle in America to its new phase that will hasten the overthrow of your exploitative racist society, recover the product of our stolen slave labor which you now enjoy, and obtain revolutionary justice for all oppressed people.*
>
> Martin Sostre[245]

In December 1972, Sostre was transferred to Clinton Prison, where he was again placed in solitary confinement for refusing to shave his beard and for refusing to submit to a rectal exam.[246] On

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disclaim any intent by this decision to condone, ignore, or discount the deplorable and counter-productive conditions of many of this country's jails and prisons. We strongly suspect that many traditional and still widespread penal practices, including some which we have touched on in this case, take an enormous toll, not just of the prisoner who must tolerate them at whatever price to his humanity and prospects for a normal future life, but also of this society where prisoners return angry and resentful.' But it ends on a ringing affirmation of judicial impotence: 'We do not doubt the magnitude of the job ahead before our correctional systems become acceptable and effective from a correctional, social and humane viewpoint, but the proper tools for the job do not lie with a remote federal court. The sensitivity to local nuance, opportunity for daily perseverance, and the human and monetary resources required lie rather with legislators, executives, and citizens in their communities.'" (quoting Sostre v. McGinnis, 442 F.2d at 205)).

244. Sostre v. McGinnis, 442 F.2d at 190-91 ("We respect the outrage, given form and content by scholarly research and reflection, that underlay the expert testimony at trial . . . that Sostre's segregated environment was degrading, dehumanizing, conducive to mental derangement, and for these reasons 'a gross departure' from enlightened and progressive contemporary standards for the proper treatment of prison inmates. . . . For a federal court, however, to place a punishment beyond the power of a state to impose on an inmate is a drastic interference with the state's free political and administrative processes. It is not only that we, trained as judges, lack expertise in prison administration. Even a lifetime of study in prison administration and several advanced degrees in the field would not qualify us as a federal court to command state officials to shun a policy that they have decided is suitable because to us the choice may seem unsound or personally repugnant.").

245. Sostre, *The New Prisoner*, *supra* note 12, at 253–54 (written by Sostre while in solitary confinement at Auburn Prison for refusing to shave his beard).

246. FRAME UP!, *supra* note 2.

March 15, 1974, his appeal was denied.[247] Sostre was paroled on the narcotics-related count in December 1975 but remained in prison to serve the rest of a sentence from a charge of assaulting Clinton Prison guards.[248] This alleged incident was the result of a brutal attack of Sostre by seven guards after his repeated refusal to submit to sexual assault via a nonconsensual rectal examination.[249] This scene highlights the ways in which Black resistance against institutional violence operates on the level of the symbolic.[250] This scene also reveals the way that sexual violence is utilized intentionally in prisons as a tool of dehumanization and

247. *Id.*

248. Hess, *supra* note 2.

249. Farley, *supra* note 19, at 472 ("Race and rape are similar performances in that the pleasure of power that race brings its perpetrators is comparable to the pleasure of power that rape brings its perpetrators. Indeed, both pleasures work a similar pain into the identities of their victims."); Schaich & Hope, *supra* note 60, at 288 ("Sostre believed every person's body was sacred, and its violation a 'profanation.' 'I refuse to submit to rectal examination,' said Sostre, 'on the grounds that it's unlawful, dehumanizing and degrading.' Retaliation for his defiance came in 1974 when he claimed he was assaulted by seven guards after refusing a rectal search for the sixth consecutive time. '[I] was subdued . . . lifted off the floor and spread eagle while my face was toward the floor.' In a choking armlock, one 'sadist continued to squeeze totally preventing me from breathing.' As the rectal search was performed, Sostre claimed he was 'suffocated' into 'unconsciousness.' As a result of this incident, Sostre was charged and convicted of second degree assault. Sostre's reluctance to compromise and refusal to cooperate were expressed in his unwillingness to exchange a plea of guilty, at the trial judge's request, for a suspended sentence. 'I can't plead guilty, Your Honor, I never hit those guards.'"); McLaughlin, *supra* note 2, at 15 ("By the time he appeared in court in New York in October 1969, he had spent 373 consecutive days in solitary and had rarely even stepped outside into the yard because it meant submitting to humiliating internal examinations before leaving and returning to his cell. The mistreatment went on for years. At one court hearing in 1973, he reportedly appeared 'weak and visibly bruised' from the latest beating. On that occasion, he had been taken out of his cell in the solitary confinement building and instructed to submit to a rectal examination. When he refused, he wrote, 'a seven-guard goon squad' surrounded him. He told them that 'the rectal search was a violation of my constitutional right to privacy and human dignity'—and so they knocked him to the ground and forced him to submit.") (footnotes omitted) (citations omitted); Hess, *supra* note 2 ("[Sostre's] resistance to rectal searches, required by prison procedures, led to his spending most of his term in solitary confinement and finally resulted in his conviction for assaulting a group of guards at Clinton Prison. On a petition supported by other inmates, charging that his safety was threatened by personnel there, he was transferred to the Federal New York City Correctional Center . . . .").

250. Thomas, *supra* note 24, at 2614 ("The strategic manipulation and reversal of the dominant culture's political symbols is, and has long been, a central feature of African-American resistance movements, in both their reformist and their radical incarnations . . . . African-Americans have lived by and fought through symbols: We cannot hope to comprehend the history of their collective encounter with the ideology and institutions of American constitutionalism unless we carefully attend to its symbolic aspects, conceived as both an arena and an arsenal of struggle.") (footnotes omitted).

degradation, a pleasurable nobodying of the Other that reaffirms a phantasy of white supremacy over the Black criminal body.[251]

Sostre's case garnered national and international interest and an outpouring of support.[252] Numerous defense committees

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251. Farley, *supra* note 19, at 479 ("In each form of nobodying the Other, the manipulation of the Other's reality is itself an erotic experience of pleasure-in-humiliating . . . ."), 507.

252. *See* Hess, *supra* note 2; *see also* Ervin, *Prison Revolutionary*, *supra* note 7; Robert D. McFadden, *Sostre, Inmate Activist, Is Seized as a Fugitive*, N.Y. TIMES (May 24, 1986), https://www.nytimes.com/1986/05/24/nyregion/sostre-inmate-activist-is-seized-as-a-fugitive.html [https://perma.cc/4PQD-NLW8] ("A campaign to free Mr. Sostre gained national attention and drew support from Andrei Sakharov, the Soviet physicist and dissident[,] Jean-Paul Sartre, and a number of figures in the civil rights movement."); McLaughlin, *supra* note 2, at 3 ("Sostre's case was taken up by radicals of various stripes because of the larger cause it represented . . . . [T]he 'core reality' of the antiwar movement during those years was that it provided a place where 'the scattered remnants, hunkered-down ideological currents, underground traditions, and new outgrowths of American radicalism regrouped.' Much the same could be said about the prisoner release campaigns, in which civil libertarians and intellectuals joined with black and white radicals. At the decade's end, campaigns for the release of incarcerated activists seized national and international attention." (quoting Van Gosse, *A Movement of Movements: The Definition and Periodization of the New Left*, *in* COMPANION TO POST-1945 AMERICA (eds. Jean-Christophe Agnew & Ray Rosenzweig, Blackwell 2002))), 16–17 ("After Sostre's arrest, the students of YAWF organized a movement and started to build his reputation . . . . The Black Panther Party, itself facing an FBI onslaught, embraced Sostre's cause. Don Cox, then a field organizer for the party, went as far as to equate the cause with that of the Panthers' leaders: 'when we demand the freedom of Huey Newton, [and] Bobby Seale,' he told The Activist, 'we must also talk about the freedom of Martin Sostre.' . . . When YAWF organized "Free Martin Sostre Week" in October 1969 to coincide with a court appearance, they received the endorsement of a dazzling array of groups, from SDS to Asian-Americans for Action, the Movement for Puerto Rican Independence and the Young Lords, and from groups based in Cleveland, Ohio, which were fighting for the freedom of another black militant, Ahmed Evans. On the morning of 29 October, protesters descended on Foley Square, rallied outside the Federal Court Building, and then took up seats for the hearing. Inspired by their presence, Sostre lectured the judge, pointing to his supporters: they were 'the universal forces of liberation,' he told the court; if the law would not free him then, one day, they surely would . . . . Dick Gregory, entertainer, activist, and candidate for President for the Peace and Freedom Party in 1968, appeared at Sostre's trial to denounce the case as typical of a worrying trend: 'police look for a scapegoat in every city in the country where there has been rioting,' he said. Many others agreed. William Worthy took up Sostre's cause and gave it national exposure in some of the best-known black publications in America, including the Afro-American, and Ebony. As Sostre's name entered the mainstream, Jet also came to his defense with an article placing him alongside many of his heroes, including Malcolm X, Robert F. Williams, and Kwame Nkrumah. East coast newspapers picked the story up, too. In the Boston Globe, Sostre's case was compared with the persecution of 'several other black liberation fighters and anti-war activists,' including 'Huey Newton, Robert F. Williams (in exile), Herman Ferguson, Arthur Harris, Edward Oquenado and many other unnamed heroes.' By 1970, Sostre was embedded in the political discourse surrounding civil liberties in America. Writing in the New York Times in the wake of Kent State, Paul Cowan argued that the release of 'political prisoners like Huey Newton, Bobby Seale, and Martin Sostre,' was a necessary precondition for achieving social peace. The same year, also in the New York Times, Arthur Miller (who knew

dedicated to Sostre's cause sprang up across New York and around the world, including the Martin Sostre Defense Committee, the Committee to Free Martin Sostre, and others, each of which worked to publicize Sostre's case and petition Governor Hugh Carey for his release.[253] In December 1973, Amnesty International put Sostre on its "prisoner of conscience" list, stating, "We became convinced that Martin Sostre has been the victim of an international miscarriage of justice because of his political beliefs . . . not for his crimes."[254] Russian Nobel Peace Laureate Andrei Sakharov added his name to Sostre's clemency appeal on December 7, 1975.[255] On December 19, the Buffalo Evening News continued its nearly decade-old smear campaign of Sostre when it published an editorial urging the Governor not to grant Sostre clemency and warning that Sostre had been "ragingly defiant of the entire law enforcement, judicial, and penal system."[256]

On Christmas Eve, 1975, Governor Carey granted clemency to Sostre, and he was released from prison for the last time in February 1976 at the age of fifty-two.[257] He had served twenty years

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something about political witch-hunts) shoehorned Sostre onto his list of writers who were prisoners of conscience: he 'has difficulty in writing his own appeals because the prison rations paper and pencils,' Miller explained. From a protest movement organized by a small band of local activists, the outcry against Sostre's incarceration spread . . . .") (footnotes omitted).

253. *See* Hess, *supra* note 2 ("The Governor had received appeals for his release from . . . a committee of Americans including Ramsey Clark, Philip and Daniel Berrigan, the Rev. Ralph D. Abernathy, Julian Bond and Angela Davis."); *see also* FRAME UP!, *supra* note 2; McFadden, *supra* note 252; Anderson, *supra* note 2; Schwartz, *supra* note 12, at 775 ("A book has been written about [Sostre's] trial and a defense committee has been formed; in Buffalo, 'free Martin Sostre' has become a widespread rallying cry for protesting students and others.").

254. *Amnesty International Newsletter*, AMNESTY INT'L (Feb. 1, 1976), https://www.amnesty.org/en/documents/nws21/002/1976/en/ [https://perma.cc/UQW3-8WMV]; Hess, *supra* note 2; McLaughlin, *supra* note 2, at 17 ("Amnesty International listed him as a prisoner of conscience, and the case gained added publicity from a 1974 radical Pacific Street film documentary, *Frame Up!*" (citing FRAME UP!, *supra* note 2)); Ervin, *Prison Revolutionary*, *supra* note 8 ("At one point, [Sostre] became the best known political prisoner in the world, and his case became adopted by Amnesty International, the prisoner of conscience organization, in 1973. This was a first for U.S. political prisoners and put tremendous pressure on the state of New York and the U.S. government."); Schaich & Hope, *supra* note 60, at 286.

255. *See* McFadden, *supra* note 252; *see also* Hess, *supra* note 2.

256. Schaich & Hope, *supra* note 60, at 284.

257. *Amnesty International*, *supra* note 254; Anderson, *supra* note 2; McFadden, *supra* note 252; Schaich & Hope, *supra* note 60, at 282; Hess, *supra* note 2 ("Governor Carey granted Christmas Clemency yesterday to Martin Sostre, a black Puerto Rican militant . . . . [T]he Governor's statement yesterday observed [that] Mr. Sostre filed 'numerous lawsuits which have clarified the legal rights of prisoners.'"); McLaughlin, *supra* note 2, at 2 ("Eventually, Sostre won his freedom . . . . His case became an embarrassment. He was finally pardoned in December 1975."), 17-18 ("The prospects

of his life in prison and nearly seven years in solitary confinement.[258] Sostre returned to Manhattan, where he worked as a tenants' rights organizer[259] and political aide to a local Assemblymember.[260] He finally settled in New Jersey with his wife Lizabeth and his sons Mark and Vincent, where he would live out the rest of his life.[261] Sostre passed away on August 12, 2015, at the age of ninety-two.[262]

In November 2017, the Frank E. Merriweather Jr. Library hosted *To and From 1967: A Rebellion with Martin Sostre*, an event commemorating the fiftieth anniversary of the Black rebellion on Buffalo's east side.[263] The event included an installation created by a local east side artist called *Reviving Sostre*, consisting of three painted bookshelves placed in the lobby of the library, which was built on the site where one of Sostre's bookstores used to stand.[264]

In March 2022, there were 31,262 people incarcerated in New York State prisons.[265] According to New York State Department of

for Sostre's freedom had never been so good. Activists stepped up their campaign with a sit-in protest at New York Governor Carey's Albany offices and he was deluged with letters appealing for clemency from Angela Davis, Julian Bond, soviet dissident Andrei Sakharov, and former Attorney General Ramsey Clark, among others. He seemed to have little choice but to grant Sostre a Christmas pardon in 1975."); Ervin, *Prison Revolutionary*, *supra* note 7 ("Finally, [Sostre's] worldwide defense organization pressured the New York state governor to grant Sostre an executive clemency, and he was released in 1976.").

258. Schaich & Hope, *supra* note 60, at 282 ("Sostre was imprisoned from 1952 to 1964, and from 1967 to . . . 1975, a total of 20 [years] . . . . By the age of 52, Sostre lived almost seven years in solitary confinement.").

259. McLaughlin, *supra* note 2, at 18 ("[I]n the years after his release, [Sostre] devoted himself to tenants' rights campaigns and community activism in New York and New Jersey. As he told a New York Times reporter, a week after his release, his fight for justice was not over. All that has happened is that the 'battlefield has changed from the dungeons, the prisons, to the street,' he said. 'This is just one continuous struggle.'") (footnote omitted).

260. Hess, *supra* note 2; McFadden, *supra* note 252; McLaughlin, *supra* note 2, at 18 ("The conditions of [Sostre's] release dictated that he must be employed and so Marie Runyon, a Harlem tenant activist who had been elected to the state legislature (and who had joined the sit-in at Carey's offices [to release Sostre]), hired him as an aide, promising to pay his wages out of her own salary. There, in that moment, was a victory that went further than Sostre's personal deliverance from prison and reflected a dramatic change in American political culture: Sostre, denounced in Senate hearings as a subversive threat to the United States in 1968 and persecuted by the FBI, was officially employed by a representative in the state legislature—herself a Harlem activist—seven years later[.]") (footnote omitted).

261. *See* Symonds, *supra* note 2.

262. *Id.*

263. *To and From 1967: A Rebellion with Martin Sostre*, JUST BUFFALO LITERARY CTR. (Nov. 18, 2017), https://www.justbuffalo.org/event/1967-rebellion-martin-sostre-20171118/ [https://perma.cc/NHD6-FBCY].

264. *Id.*

265. *New York's Prison Population Continues Decline, But Share of Older Adults*

Corrections and Community Supervision data, solitary confinement is still in widespread use in New York State, despite the passage of the HALT Solitary Confinement Act in 2021 banning its use beyond fifteen consecutive days.[266] Private prisons remain one of the most reliable and profitable industries to invest in.[267] Inside and outside prison walls, police continue to brutalize, criminalize, terrorize, frame, and murder Black people.[268]

Ruth Wilson Gilmore reminds us that "prison abolition is not just about closing prisons. It's a theory of change."[269] This is the defining moral imperative of our time—one that requires the ideological disentangling of our conceptions of 'crime' and 'punishment' and the unraveling of the social, economic, and political assumptions that support our reliance on the modern prison to maintain social order—and Martin Sostre has set the example for future generations about how to fight back against,

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Keeps Rising, OFF. N.Y. STATE COMPTROLLER (Jan. 13, 2022), https://www.osc.state.ny.us/press/releases/2022/01/new-yorks-prison-population-continues-decline-share-older-adults-keeps-rising [https://perma.cc/8QEK-4XVG].

266. Matt Katz, *Data Shows New York is Violating a New Law Banning Solitary Confinement*, GOTHAMIST (Sept. 8, 2022), https://gothamist.com/news/data-shows-new-york-is-violating-a-new-law-banning-solitary-confinement [https://perma.cc/8KNP-7KBU] ("The HALT Solitary Act, signed by former Gov. Andrew Cuomo in 2021, went into effect in March [of 2022]. It prohibited the placement of any incarcerated person in solitary confinement, known as 'segregated confinement,' for more than 15 days in a row, and more than 20 nonconsecutive days in a 60-day period. Yet the practice remains widespread in New York prisons, according to newly released data from the state Department of Corrections and Community Supervision, which operates [New York's] vast state prison system. The latest statistics show that as of Aug. 1, 228 people were held for longer than 15 days, including 50 locked in for between 31 and 90 days. Of all 490 people held in the solitary units known as segregated housing, the average length of stay was 16.1 days. Once inside, incarcerated people are required to have four hours out of their cell daily — two for recreation, and two for therapeutic programming.").

267. *See* Kara Gotsch & Vinay Basti, *Capitalizing on Mass Incarceration: U.S. Growth in Private Prisons*, SENT'G PROJ., (Aug. 2, 2018) https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons/ [https://perma.cc/JPF9-37DN].

268. Williams C. Iheme, *Systemic Racism, Police Brutality of Black People, and the Use of Violence in Quelling Peaceful Protests in America*, 15 AGE HUM. RTS. J. 224, 228 (2020) (citations omitted) ("[T]he culture of hate against Black people in America was not recently developed, instead the heightened use of smart phones in the 21st century has helped to create more awareness, consciousness, and exposure of the cruelty and brutality by the American police for centuries. This claim is embellished by the video records showing the level of mastery with which the brutality is usually carried out, the perfect use of deadly tactics in tackling down, handcuffing, and skillfully choking Black people to death even in broad daylight, amidst a global spectacle.").

269. (Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES (Apr. 17, 2019), https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html [https://perma.cc/CZ92-9WP3].

while refusing to accept the dehumanization of the U.S. system of racial oppression and institutionalized dehumanization known as mass incarceration.[270] Sostre's story reveals the true purpose of the U.S. prison system—to subjugate, silence, and erase any person who challenges the supreme authority of the state and threatens to expose its true core: white supremacy and racial violence.

Throughout his life, Sostre never stopped fighting for the autonomy and human dignity that the carceral state was designed to deny him.[271] Yet that very state, in its determination to eradicate any perceived threat or challenge to its status quo of racial subjugation, created an anarchist revolutionary whose experience made him uniquely equipped to challenge said system and whose legacy lives on to inspire and instruct new generations of anarchists, radical theorists, revolutionaries, movement lawyers, jailhouse lawyers, and prison abolitionists to come.[272] As Sostre

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270. ANGELA DAVIS, ARE PRISONS OBSOLETE? 20–21 (Seven Stories Press 2003) ("Effective alternatives [to punitive justice] involve both transformation of the techniques for addressing 'crime' and of the social and economic conditions that track so many children from poor communities, and especially communities of color, into the juvenile system and then on to prison. The most difficult and urgent challenge today is that of creatively exploring new terrains of justice, where the prison no longer serves as our major anchor."); Schaich & Hope, *supra* note 60, at 286 ("From [Sostre's] perspective, to cooperate with the courts, the guards, or the warden was to assist in his own destruction . . . ."), 288 ("Sostre chose to resist even the smallest acts of humiliation. Any cooperation with the state's attempts to dictate the terms of one's human rights was rejected as an argument for apostasy."); Anderson, *supra* note 2 ("We celebrate the hard-won battles of Sostre while still in the trenches of an unwon war. He did not waver in his dedication at times when many would have chosen to do otherwise. He lived a life where he worked to take parts of the prison system down, even while in a cage himself. We will all die some way or the other, but we should hope to take a piece of the state with us as we go until it is completely undone. *Martin Sostre showed us the way.*") (emphasis added).

271. Anderson, *supra* note 2 ("While being imprisoned, [Sostre] was *still* doing the political education work that he previously did in the community. He claimed several victories in court for the rights of those in prison, from political and religious freedoms to restricting the use of solitary confinement. He himself had been subjected to the torture of solitary confinement, had his mail tampered with and was subjected to intimidation—all because of his work. But Sostre remained true to his cause.").

272. Sostre, *The New Prisoner*, *supra* note 12, at 244 ("Every one of your prison camps has now become a revolutionary training camp feeding trained revolutionary cadres to each revolutionary foco in the ghetto. The recruits are the thousands of Black militants and revolutionaries framed and kidnapped from the ghettos in your desperate effort to put down the spreading Black Rebellion. While on the surface it appears you've cooled the ghettos, all you've done was remove the dynamic elements, dumped us in your prison camps where our diverse ideologies and experiences cross-fertilized, hardened and embittered us in your dehumanizing cages by abuse, breaking up our families, etc., to then return us to the ghettos as fully-hardened revolutionary cadres. Your oppressive mentality blinds you to these clear facts."); Symonds, *supra* note 2 ("[Sostre's son] Vinny said his father would have wanted 'to be remembered the same way he lived, which is to inspire people to fight against

wrote from solitary confinement, "Revolutionary spirit conquers all obstacles[,]"[273] but praxis is only truly possible as an enemy of the state.

injustice.'"); Anderson, *supra* note 2 ("[In Martin Sostre's own words,] '[t]he burden of a long sentence would be lightened by the satisfaction of knowing that the mission set out for me, that of helping my people free themselves from the oppressor, is being accomplished . . . ."); Ervin, *Prison Revolutionary*, *supra* note 7 ("We don't have [Sostre] here today in the flesh, but we can at least honor his memory and never let it die!").

273. Sostre, *The New Prisoner*, *supra* note 12, at 244.

Teaching "Mistrust"

Sarah J. Schendel and Sam E. Bourgeois†

Abstract

Do lawyers have an ethical duty to cultivate client trust? Sociologist Matthew Clair's ethnographic study of the Boston-area court system, *Being a Disadvantaged Defendant: Mistrust and Resistance in Attorney-Client Interactions*, focuses on the ways criminal defendants engage with, withdraw from, and resist attorney-client interactions. Composed of Clair's observations and analysis, along with the actual words of clients and attorneys, it is a powerful—if somewhat unusual—addition to the professional responsibility (PR) curriculum for the professor looking to incorporate social science research on race and class into the law curriculum, and to inspire in-class discussions beyond the Model Rules of Professional Conduct. Clair's article offers opportunities to discuss both traditional legal ethics subject matter like the allocation of authority and communication in the attorney-client relationship, as well as complex topics too often neglected in the PR curriculum, like the role of race and class in said relationships.

This Article, coauthored by a professor and student, discusses the whys, hows, and lasting impact of using *Mistrust and Resistance* as an assigned reading in a course on professional responsibility. After discussing the pedagogical justifications for including Clair's article in the course and practical considerations about how and when to assign it, the Article then describes student, professor, and guest speaker reactions to *Mistrust and Resistance*. This Article—like any good professional responsibility class—attempts to connect

†. Sarah J. Schendel is an Associate Professor of Academic Support at Suffolk University School of Law. Prof. Schendel (hereinafter identified in the first person) thanks Matthew Clair for his work and for being a generous guest speaker in my class. Any errors or misstatements of his work are entirely my own. This Article owes a debt of gratitude to Prof. G.S. Hans's article *How and Why Did It Go So Wrong: Theranos as a Legal Case Study*, which provides practical insights as to using a non-legal text in an ethics class and helped expand my thinking about the course. 37 GA. ST. U. L. REV. 427 (2021). Thank you most of all to my students, who inspire me daily and drive me to be a better teacher and lawyer. Sam E. Bourgeois is a 2023 graduate of Suffolk University Law School. Sam first and foremost would like to thank Prof. Schendel for his inclusion as a co-author in this piece. Additionally, he thanks his friends, family, and mentors for their untiring support. It has been a long, and at times potholed, ride.

professional identity formation, the value of students' practical experience, quality of client experience, bias, and public perceptions of the legal profession to better understand the ethical duties facing attorneys.

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Introduction

There is no ethical rule explicitly requiring an attorney to gain a client's trust, but it would be nearly impossible to fulfill many of the ethical obligations of legal practice without such a foundation.[1] Paradoxically, it is challenging to earn a client's trust without first demonstrating a commitment to those same ethical obligations: communication, allocation of decision-making, and confidentiality, for example. Prominent sociologist Matthew Clair's article, *Being a Disadvantaged Criminal Defendant: Mistrust and Resistance in*

1. *See generally* MODEL RULES OF PRO. CONDUCT (AM. BAR. ASS'N 2023) (containing no explicit rule requiring an attorney to gain a client's trust).

Attorney-Client Interactions ("*Mistrust and Resistance*"), is the result of a multi-year ethnographic study of the Boston-area criminal court system that focuses on the ways "socioeconomically and racially disadvantaged defendants" engage with, withdraw from, and resist attorney-client interactions and the demands and expectations of the criminal justice system more broadly.[2]

Composed of Clair's observations and analysis, along with the actual words of clients and attorneys, *Mistrust and Resistance* is a powerful—if somewhat unusual—addition to the professional responsibility (PR) curriculum for any law professor looking to inspire class discussions beyond the Model Rules of Professional Conduct ("Model Rules"). Clair's piece offers opportunities to discuss traditional legal ethics topics such as the allocation of authority (Rule 1.2) and communication in the attorney-client relationship (Rule 1.4). It also allows students to consider complex topics too often neglected in the PR curriculum, including the limitations of the representational system, client "lay legal expertise" and resistance to the expectations of legal proceedings, and the role of race and class in attorney-client relationships.[3]

This Article was written jointly by Professor Sarah Schendel and law student Sam Bourgeois, and proceeds in three parts.[4] Part I summarizes Clair's article, and why I, Prof. Schendel, chose to use it. Part II explains how I used it and the pedagogical choices behind when, where, and how it was situated in the semester and syllabus. Part III concludes with Sam's first-person response to the article, as both a student in the class and a legal aid intern the following summer. This Article provides a model for professors who teach PR and are interested in how a piece like *Mistrust and Resistance* might offer a dynamic avenue by which to teach the Model Rules, examine public perceptions of attorneys, and foster fruitful discussion of career choice, self-awareness, and professional identity formation.

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2. Matthew Clair, *Being a Disadvantaged Criminal Defendant: Mistrust and Resistance in Attorney-Client Interactions*, 100 SOC. FORCES 194, 194 (2021) [hereinafter Clair, *Mistrust and Resistance*]. *See generally* MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT (2020) (discussing the issues from this Article in depth, but outside the scope of this Article since the book is not used in class) [hereinafter CLAIR, PRIVILEGE AND PUNISHMENT].

3. Clair, *Mistrust and Resistance, supra* note 2.

4. For clarity of voice, "I" will refer to Prof. Sarah Schendel, and "Sam" will refer to Sam Bourgeois.

I. Choosing Mistrust and Resistance

A. The Article

Prof. Clair's article draws on interviews and ethnographic observations of more than 100 criminal defendants and legal officials in the Boston-area court system to consider "how socioeconomically and racially disadvantaged defendants interact with their defense attorneys, and with what consequences."[5] Specifically, Clair asserts that "[g]iven racialized and classed constraints, many disadvantaged defendants mistrust their court-appointed lawyers."[6] This lack of trust in the attorney-client relationship has a powerful impact on what clients tell attorneys, how clients feel about their representation, and the ways attorneys understand and (mis)interpret client actions.[7] Clair concludes that client "mistrust often results in withdrawal from their lawyers and active efforts to cultivate their own legal knowledge and skills" through defendants' use of "lay legal expertise to work around and resist the authority of their lawyers."[8] This lay legal expertise may arise from their own experiences with the legal system, or those of their communities.

In response to what Clair deems "resistance"—clients speaking in court against the advice of their attorneys or filing motions on their own, for example—defense attorneys and judges often "respond with silencing and coercion" rejecting "disadvantaged defendants' attempts to advocate for themselves."[9] Clair's work touches on the incredibly complex dynamics at work within the criminal legal system and in individual attorney-client relationships.[10] Clair's findings "complicate existing accounts of disadvantaged defendants as passive and contribute to broader sociological theories of how disadvantaged people engage with institutional authorities."[11] His observations and conclusions push attorneys to examine their own expectations of clients and biases they might have that impact their representational choices.[12]

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5. Clair, *Mistrust and Resistance, supra* note 2, at 194.
6. *Id*.
7. *See* Clair, *Mistrust and Resistance, supra* note 2.
8. *Id*. at 194.
9. *Id*.
10. *See* Clair, *Mistrust and Resistance, supra* note 2.
11. *Id*. at 195 (citing JOHNATHAN D. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE (1972); DEBRA S. EMMELMAN, JUSTICE FOR THE POOR: A STUDY OF CRIMINAL DEFENSE WORK (2003); MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1992)).
12. *Id*. at 211–13.

Beyond individual choices, however, even when attorneys are open to allocating greater involvement and decision-making to their client, Clair reveals how attorneys are still limited by the customary norms of the court and the limitations of the criminal legal system.[13] While many of the Model Rules focus on the individual decisions facing attorneys, Clair's article interrogates both these decisions and the landscape and systems within which both attorneys and clients are constrained, providing a real-world addition to discussions of the Model Rules in PR classes.

B. Contextualizing and Navigating the Model Rules to Enhance the Attorney-Client Relationship

Throughout his article, Clair challenges lawyers to critically engage with, and go beyond, the demands of rules of professional responsibility. This is consistent with the approach many professors take to teaching the Model Rules as a "floor," a basis, or starting point for professional conduct.[14] Specifically, Clair's article endeavors to help attorneys contextualize the Model Rules within lived experience, helping lawyers to draw effective boundaries when allocating agency in a case, better understand clients' goals, confront structural challenges to building trust, and develop their own professional identity.

i. Effectively Allocating Agency to Build Trust

The relationships, decisions, and challenges in Clair's article implicate numerous rules of professional responsibility. Rule 1.2, for example, governs the allocation of authority between the attorney and client.[15] As the Model Rules dictate, the client is in control of determining the objective of their case, while attorneys should use their expertise and discretion to decide on the exact means taken to achieve that objective.[16] In practice, however, these boundaries can blur or break down.[17] In his study, Clair examines the ways clients sought to exert agency over both decisions around the outcome of a case and the means of achieving those aims.[18]

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13. *Id.* at 208.

14. *See, e.g.*, *Taking Ethics to a Higher Level*, FORDHAM L. NEWS (Dec. 21, 2017), https://news.law.fordham.edu/blog/2017/12/21/taking-ethics-higher-level/ [https://perma.cc/FY2W-2WVM].

15. MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2023).

16. *Id.*

17. *See* Clair, *Mistrust and Resistance, supra* note 2, at 198–99.

18. *Id.* at 195.

With regard to the means used in a case, which is generally left to the professional expertise of the lawyer, Clair observed multiple situations where clients wanted to file motions independent of, or against the recommendation of, their attorneys.[19] These instances involved not only decision-making and authority (Rule 1.2), but often also, by necessity, communication (Rule 1.4), and sometimes withdrawal from representation (Rule 1.16).[20] In one instance where a lawyer declined to file motions the client had requested and the two had a disagreement in court, the client told the judge that the lawyer was "not doing what I ask him to do."[21] In response, the lawyer asked to withdraw (under Rule 1.16), citing a breakdown in communication; the judge granted the motion.[22] This withdrawal had serious consequences for the client, who then lost their union-appointed attorney, made too much money to qualify for a court-appointed counsel, and could not afford a private lawyer.[23] Clair understood this as an instance of the judge failing to try to repair the relationship and communication between attorney and client and instead "penaliz[ing] defendants for resisting their lawyers' expertise and authority."[24]

This scenario—an angry response to a client's attempt to be more involved in the process of their case—was common in Clair's experience and clearly created stress for both attorneys and clients.[25] One private defense counsel described how a client attempted to file a motion without the attorney's knowledge while detained.[26] The motion contained various procedural errors, but the attorney seemed most bothered by the client's decision to file at all. The attorney said it "really pisses me off" when defendants seek to file motions on their own because it calls into question the attorney's "legal expertise and practice of the law."[27] This comment

19. *Id.* at 208–10.

20. *See* MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR. ASS'N 2023); *see also id.* at r. 1.16; *id.* at r. 1.4.

21. Clair, *Mistrust and Resistance, supra* note 2, at 209.

22. *Id.* at 210.

23. *Id.*

24. *Id.* at 209.

25. *See id.* at 210.

26. *See id.* at 208.

27. *Cf. id.* at 208 (detailing one defendant's account of how he once tried to file a motion to suppress evidence by mailing it to the judge from jail without his lawyer's assistance: "You mail it [from jail]. You put it, and they look at it. And then . . . nine times out of ten, they're going to deny, because the judge, you know, he's an asshole."); *cf. id.* (quoting another defendant's description of the futility of trying to get his lawyer to file motions in his case: "I'm telling him to file these motions because I'm looking up stuff on my own and asking questions of other people. So I'm like, 'File this, this, and this.' And he's like, 'Nah, the judge is a [expletive]. She won't do it. It's

highlights the reality of the attorney's ego in decision-making and how a client's attempts to become more involved in their own case can be interpreted by counsel as an attack on their abilities.

Clair observes that the way a lawyer reacts to client efforts to assert agency can have major consequences for their case. He finds that disadvantaged defendants often develop lay legal expertise as an *intentional investment* in their case and legal experience, a way to "work around and resist the authority of their lawyers" and take ownership over their experience within legal systems.[28] As such, lawyers may be able to begin (re)building trust and respect with clients if they are able to view this assertion of knowledge by the client as an investment in and commitment to the legal process based in valuable lived and community experience, rather than being annoyed or threatened by it and responding "with silencing and coercion."[29]

Some of the most specific examples of client agency in decision-making discussed within Rule 1.2 concern criminal cases where "the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."[30] Students' ability to understand and memorize the important decisions that are always in the hands of the client is a necessary part of passing the Multistate Professional Responsibility Examination (MPRE).[31] Clair's article explicitly touches on decisions like plea deals that must be made by clients, highlighting the pressure defendants feel from attorneys who may "try to get [their clients] to take deals."[32] Clair recounts one scenario where an attorney tried "to persuade [a client] to take a plea," telling Clair that they "'don't see a way out of this case' and that the deal would result in far less time in prison than if [the client] were to lose at trial."[33] While advising a client as to the implications of going to trial is an appropriate and necessary role for an attorney, the decision of whether to accept a plea is

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not gonna work.'").

28. *Id.* at 194.

29. *Id.*; *see also id.* at 195, 203, 211 (discussing the common response of lawyers to silence and coerce clients when they questioned their attorney's authority or exercised some level of expertise to establish control of their case).

30. MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR. ASS'N 2023).

31. The MPRE is a multiple-choice exam that is required for admission to the bar in all but two jurisdictions in the United States (Wisconsin and Puerto Rico). *About the MPRE*, NAT'L CONF. BAR EXAM'RS, https://www.ncbex.org/exams/mpre/about-mpre [https://perma.cc/H6PW-XRZS].

32. Clair, *Mistrust and Resistance, supra* note 2, at 204.

33. *Id.* at 209.

ultimately in the hands of the client. Clair himself observes an attorney trying "to persuade" a client to take a plea and witnesses the attorney complaining when the client "started to really push back."[34] Some clients perceived this pressure to take a plea deal as being a result of the close relationships between court-appointed lawyers and prosecutors, assuming these professional (and sometimes personal) connections compromised criminal defense attorneys.[35] This discussion often resonates with the many students in class who have interned with criminal defense attorneys, public defenders, or district attorneys. They have experienced the ways these attorneys might interact with opposing counsel and understand how clients might interpret these collegial relationships as a sort of collusion or divided loyalty.

Similarly to different experiences of the relationships between opposing counsel, a failure to address differences in lived experiences between the attorney and client can foment distrust in the relationship. For example, Clair observes that attorneys' lack of personal or community exposure to policing or other mechanisms of surveillance often led them to value terms of probation differently than their clients:[36]

> [D]isadvantaged defendants, many of them who lived in highly surveilled, policed neighborhoods, [and] had a preference for incarceration over probation. Of course, most lawyers and most middle-class people think of probation as a less serious offense . . . . It's supposed to be less costly, it's supposed to be an alternative sanction, right? But for many disadvantaged defendants recognizing sort of all the tolls of being on probation, job requirements, going to drug treatment, moving in and out of the cities, or getting on the T to go to different places for drug rehab, paying for services. But then also just the threat of being surveilled by the system and ultimately being able to be pulled back in, they just wanted to do their time and be done. So that

34. *Id.*

35. *Id.* at 204.

36. Clair, *Mistrust and Resistance, supra* note 2, at 205 (describing Richard, a defendant who was encouraged to take a plea and then became justifiably upset upon realizing that the charge was on his record as a result); *cf.* Brianna Remster & Rory Kramer, *Race, Space, and Surveillance: Understanding the Relationship between Criminal Justice Contact and Institutional Involvement*, 4 SOCIUS 1, 14 (2018) (suggesting that avoidance of formal institutions is associated with criminal justice contact) and Michelle S. Phelps, *Mass Probation: Toward a More Robust Theory of State Variation in Punishment*, 19 PUNISHMENT & SOC'Y 53, 67 (2017) ("Probation is neither a simple alternative nor complement to imprisonment, but a unique form of state control."); *see also* CLAIR, PRIVILEGE AND PUNISHMENT, *supra* note 2, at 152) ("Just under 25 percent of staff public defenders serving in Boston-area courthouses in 2016 were racial minorities, whereas nearly 67 percent of defendants in 2012 were racial minorities.").

> legal goal differed right between the lawyer and the client.[37]

Such differences in perspectives, if unaddressed, can lead to fundamental misunderstandings about the desired goal of the client and the ideal outcome in the case. The example of some clients preferring incarceration to probation is often a very powerful one for students, many of whom may lack personal experience with policing and the oversurveillance of communities of color. An assumption by attorneys that probation is preferrable to incarceration may arise both from a lack of lived experience and also from excessive focus on the legal outcome of the client's case:

> [W]ith respect to the ultimate goal or purpose, oftentimes disadvantaged people surprisingly had different things they wanted to achieve that maybe actually would harm them more in the legal way, but ultimately achieved different forms of what they were seeking with respect to justice or with respect to how they understood how criminal legal sanctions operated in their daily lives.[38]

Though seemingly counterintuitive for lawyers and law students who may view any plea or period of incarceration as a failure, a client's individual lived experience or community knowledge may inform their desire to settle a case and spend a short period of time in jail in order to avoid a term of probation.[39] Without adequate communication and trust, an attorney may be baffled—frustrated even—by a client's rejection of a plea. While Rule 1.2 instructs lawyers to "abide by a client's decisions concerning the objectives of representation," it does not tell lawyers how best to elicit and understand a client's goals.[40] Similarly, Rule 1.4 does little to explain what it means to "*reasonably consult* with the client about the means by which the client's objectives are to be accomplished."[41]

Also, many of the Model Rules, and thus many PR classes, focus primarily on the individual attorney-client relationship, perhaps at a cost to the other relationships informing a client's decision-making.[42] For example, a client's desire to reject a plea and

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37. Matthew Clair, Address to Prof. Schendel's Professional Responsibility Class (Fall/Winter 2021) (transcript on file with author).

38. *Id.*

39. *See* Clair, *Mistrust and Resistance, supra* note 2, at 12, 16; *see also* GIDEON'S ARMY (HBO Documentary Films 2013); DAVID C. MAY & PETER B. WOOD, RANKING CORRECTIONAL PUNISHMENTS: VIEWS FROM OFFENDERS, PRACTITIONERS, AND THE PUBLIC 43–46 (2010).

40. MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR. ASS'N 2023).

41. *Id.* at r. 1.4 (emphasis added).

42. *See generally* MODEL RULES OF PRO. CONDUCT (AM. BAR. ASS'N 2023) (lacking reference to, for example, community).

go to trial might be rooted less in concern for their individual sentence and instead focused on the opportunity to cross-examine a police officer about the practices of surveillance and harassment the client's community faces.[43] In this way, a system of individual representation can obscure the larger issues and communities impacted, as the "procedural safeguard of representation" may in fact "quiet[] community discomfort with criminal systems" by seemingly providing advocacy for defendants while not addressing inequities in the underlying systems.[44] This critique rejects a view of individual representation as a lawyer "stand[ing] between the client and the overwhelming power of the criminal process" and instead reads such a dynamic as the lawyer standing "between the public and that process to obscure the realities of a system that fall disproportionally on marginalized populations."[45] When viewed in a legal vacuum, this issue is relatively straightforward under Rule 1.2: the decision of whether to accept a plea for probation or go to trial is in the hands of the client.[46] However, Clair's article illustrates how such a decision often involves so much more than the preferences or expertise of two individuals.[47]

Discussing with students how they might react to scenarios where a client seeks to assert more agency and ownership over their case is a perfect opportunity to review decisions through the lens of Rules 1.2 and 1.4. Additionally, it opens the door to discussions about the complexities of attorney-client relationships and the role of ego in decision-making: specifically, how attorneys can (and must) work to separate their response as a professional from their

43. *See* CLAIR, PRIVILEGE AND PUNISHMENT, *supra* note 2, at 167; *see also* Brittany Friedman, *Book Review: Matthew Clair, Privilege and Punishment: How Race and Class Matter in Criminal Court*, 25 THEORETICAL CRIMINOLOGY 687, 688 (2021) ("Clair convincingly reveals how the legal culture of criminal courts, which requires people navigating the system as criminal defendants to perform unquestioned deference to legal actors—including their attorney, prosecutors, and judges—constrains disadvantaged people who instead tend to draw on previous negative interactions with the criminal legal system to question legal actors and make civil rights demands of the system, including of their defense attorneys.").

44. *See* Jenny E. Carroll, *If Only I Had Known: The Challenges of Representation*, 89 FORDHAM L. REV. 2447, 2452–54 (2021) ("[T]he appointment of effective defense counsel is as much about making the public believe that it could be just as it is about actually providing some protection for the accused and some resistance to the state[.] Representation emerges not as a balancing force for systems that might suffer bias and injustice but as a fraught and broken proposition.").

45. *Id.* at 2454.

46. MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR. ASS'N 2023).

47. Clair, *Mistrust and Resistance, supra* note 2, at 206–07.

annoyance at a client's decision and any sense of being insulted or undervalued.[48]

ii. Recognizing Structural Barriers to Competency and Trust

While probing and thoughtful about individual attorney decisions and client interactions, Clair is also intentional about clarifying that a lack of trust between attorney and client is often not solely the result of interpersonal and individual challenges, but also structural ones.[49] While criminal defense attorneys might not always see themselves as part of the same system as prosecutors and judges, that distinction is not always clear to defendants.[50] The perception by clients that all judges and lawyers are ultimately part of the same system can lead clients to impute experiences with past judges to their current attorneys;[51] to view the friendly or cordial relationships between defense attorneys and prosecutors as suspicious;[52] or to believe that, regardless of a lawyer's individual intent, their high caseloads make it impossible to provide competent representation.[53]

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48. *See, e.g.,* Cassandra Burke Robertson, *Online Reputation Management in Attorney Regulation*, 29 GEO. J. LEGAL ETHICS 97 (2016) (discussing how social psychological dynamics arising from online reviews unleash processes of ego threat and cognitive distortion that encourage overreaction); s*ee also id.* at 98 (discussing the complexities of attorney-client relationships and the role of ego in decision-making).

49. *See* Clair, *Mistrust and Resistance*, *supra* note 2, at 204.

50. As a companion to Clair's piece, I also assign students Prof. Jenny Carroll's article about her experience of being a public defender, *If Only I Had Known: The Challenges of Representation*. *See* Carroll, *supra* note 44, at 2452 ("[T]he appointment of effective defense counsel is as much about making the public believe that it could be just as it is about actually providing some protection for the accused and some resistance to the state[.] Representation emerges not as a balancing force for systems that might suffer bias and injustice but as a fraught and broken proposition."). Both Clair and Carroll discuss the importance of the individual attorney-client relationship, while also centering the relationship in the broader context of the the legal system. *See id.* at 2453–57; *see also* Clair, *Mistrust and Resistance, supra* note 2, at 204.

51. Clair, *Mistrust and Resistance*, *supra* note 2, at 205 ("And then [the judge] said, 'Shut up. I'm not talking to you.' These early experiences of mistreatment have stuck with Donna for over three decades; she cannot shake the feeling that her lawyers are always 'working for the other side.'").

52. *Id.* at 204 ("Robert . . . told me: 'Sometimes you get the feeling like a lot of these public defenders are friends with the DAs, you know. They don't want to fight them because they have to eat lunch together later in the day.'"). This is a Rule 1.4 communication issue; helping clients understand why you might be speaking with the district attorneys may alleviate such concerns.

53. *Id.* ("Others felt that the indigent defense system was structurally overwhelmed by a high caseload, resulting in their lawyers making tradeoffs between clients."); *see also id.* ("Christopher . . . said: ' . . . I know public defenders

Scholars like Professor Paul Butler have proffered that "many of the problems identified by critics [of the criminal justice system] are not actually problems, but are instead integral features of policing and punishment in the United States. They are how the system is supposed to work."[54] Both Clair and Prof. Jenny Carroll's articles push students and professors to reexamine the ways our clients might view us and our role in the legal system while also asking us to consider the ways that we might contribute to our clients'—and their communities'—silencing.[55] Ultimately, both authors recognize that these questions culminate in a disquieting question: whether it is possible for criminal defense attorneys to provide ethical representation within existing legal structures.[56]

One key component of ethical representation is attorney competence. Clair highlights perhaps the most daunting barrier to competence facing many criminal defense attorneys: time.[57] It takes time to be competent under Rule 1.1, time to develop the legal knowledge and skills necessary, and time to be thorough in preparation.[58] Heavy caseloads and their impact on the ability of even well-meaning attorneys to thoroughly prepare is not lost on defendants.[59] Beyond leaving attorneys underprepared, defendants often perceive the crunch on time as incentivizing some attorneys to advocate for pleas and other means of moving cases along quickly.[60] For the defendants Clair observed, "the caseload pressures perceived to be a routine part of a court-appointed lawyer's job result in perverse incentives to reduce their caseload by coercing defendants to plea or by refusing to employ time-consuming legal procedures."[61]

Closely related to competence, and often entwined, is a lawyer's duty of diligence under Rule 1.3, wherein the Model Rules instruct a lawyer to act with reasonable diligence and promptness in representing a client.[62] For the defendants in Clair's study, attorneys struggled to exhibit diligence often because of time constraints, failing to reply in time or in sufficient ways to clients'

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have like huge caseloads and no time.'").

54. Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 2019 FREEDOM CTR. J. 75, 81 (2019).

55. *See* Carroll, *supra* note 44; *see* Clair, *Mistrust and Resistance*, *supra* note 2.

56. *See* Carroll, *supra* note 44; *see* Clair, *Mistrust and Resistance*, *supra* note 2.

57. *Id.* at 204.

58. *Id.*; *see* MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2023).

59. Clair, *Mistrust and Resistance*, *supra* note 2, at 195, 204, 213.

60. *Id.* at 204.

61. *Id.*

62. *See* MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2023).

request for information or action on a case.[63] Even for those who have not worked in public defenders or district attorneys offices, fears of being overwhelmed by cases are likely relatable for most law students, many of whom are sympathetic to the strain on the criminal legal system.[64]

Lastly, structural constraints may impact how clients view their attorney's loyalty. The ethical duty of loyalty is closely related to trust—essentially, if a client doesn't feel like a lawyer is loyal to them and their interests, they won't (and shouldn't) trust the lawyer.[65] While loyalty is most explicitly discussed in the Model Rules addressing conflicts, like Rules 1.7, 1.8, and 1.9, the individuals Clair interviewed expressed concerns about their attorney's loyalty in a few ways.[66] As previously mentioned, disadvantaged defendants were skeptical of their attorney's role within the broader legal system and how it might preempt their loyalty to their client; for example:

> Court-appointed lawyers, who routinely interact with prosecutors to make deals and to socialize, were assumed to be professionally compromised. [One defendant told Clair]: 'Sometimes you get the feeling like a lot of these public defenders are friends with the DAs, you know. They don't want to fight them because they have to eat lunch together later in the day.'[67]

Another defendant said that "half the time, the public defenders are working with the DA."[68] This perceived closeness with prosecutors and the criminal legal system as a whole led defendants to be "skeptical of court-appointed lawyers' abilities, precisely because they were part of the indigent defense system."[69] Clair outlines how mistrust and questions of loyalty might arise when clients feel excluded from communication, using an example of a time when discussion between the lawyers at the judge's bench didn't include the client.[70] In response to being excluded, the client, understandably, wanted to know why a conversation between attorney and judge happened outside their presence, saying, "This

63. *See* Clair, *Mistrust and Resistance*, *supra* note 2.

64. *See* Jak Petzold, *Law Student Stress and Anxiety*, LSSSE (May 11, 2022), https://lssse.indiana.edu/blog/law-student-stress-and-anxiety/ [https://perma.cc/KCY2-7LAP].

65. *Id.*

66. *See* MODEL RULES OF PRO. CONDUCT r. 1.7, r. 1.8, r. 19 (AM. BAR ASS'N 2023).

67. Clair, *Mistrust and Resistance*, *supra* note 2, at 204.

68. *Id.*

69. *Id.*

70. *Id.* at 209.

is my life we're talking about here."[71] Again, such confusion and mistrust implicates perceived failures of loyalty and actual failures of communication.

iii. Professional Identity Formation

Teaching law students about cultivating client trust and responding to client mistrust is also a gateway to discussing their individual professional identities. While hardly the first development in or push for greater attention to professional identity formation in law schools, the American Bar Association's recent revisions to Accreditation Standard 303 have placed the issue in the spotlight.[72] As defined within 303-5, professional identity formation focuses on "what it means to be a lawyer and the special obligations lawyers have to their clients and society."[73] A curricular focus on helping students develop their professional identity "should involve an intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice."[74] Additionally, the revised requirements of 303(c) provide that "[a] law school shall provide education to law students on bias, cross-cultural competency, and racism: (1) at the start of their program of legal education, and (2) at least once again before graduation."[75] By observing the consequences disadvantaged defendants face for expressing resistance alongside those that attorneys experience as a result of client mistrust, Clair's article provides numerous opportunities to work towards these facets of professional identity development and cross-cultural competency.[76] Additionally, class discussion about the article prompts students to reflect on the way their own race, class, and community origins may be different to or align them with the clients they represent.

71. *Id.*

72. *See* Harmony Decosimo, *Taxonomizing Professional Identity Formation*, 67 ST. LOUIS U. L.J. 1 (2022) (reviewing a comprehensive survey of the history of PIF and how it has been used in legal education).

73. *See* NAT'L ASS'N FOR LAW PLACEMENT, REVISED ABA STANDARDS 303(B) AND (C) AND THE FORMATION OF A LAWYER'S PROFESSIONAL IDENTITY, PART 1: UNDERSTANDING THE NEW REQUIREMENTS, § 1(1) (2022), https://www.nalp.org/revised-aba-standards-part-1 [https://perma.cc/59AP-P9Y7] ("Because developing a professional identity requires reflection and growth over time, students should have frequent opportunities during each year of law school and in a variety of courses and co-curricular and professional development activities.").

74. *Id.*

75. *Id.* at § 1.

76. *See* Clair, *Mistrust and Resistance*, *supra* note 2 (documenting sources of distrust between disadvantaged criminal defendants—"those who are working-class or poor and often racially subordinated"—and the legal professionals they rely on to navigate the system).

Students can build their own professional identities through reflecting on how other attorneys respond to client mistrust and resistance, and by learning about clients' experiences in the courtroom. Further, reflecting on Clair's piece often prompts students to share their experiences with the legal system and listen to the way their fellow students' identities inform their trust of the system's efficacy and outcomes.

The roles of race and class are at the heart of Clair's article and his attempts to understand the relationships between clients and attorneys.[77] In one instance, a defendant whom Clair calls Slicer discusses being assigned two court-appointed lawyers, one a Black man and the other a white woman.[78] Despite similar outcomes in both cases, Slicer felt that his Black lawyer was "looking out for a black brother" while his white lawyer was a "white liar" who was "working for them [the government]."[79] Disadvantaged Black defendants reported to Clair that they often felt stereotyped by their lawyers, even those who were also Black.[80] One defendant, Tim, was initially excited to be assigned a Black lawyer in one of his cases, but ultimately failed to establish a trusting relationship with his counsel given their cultural distance and his sense that she stigmatized him as a drug dealer.[81] These are important client experiences for students to be exposed to in order to gain a better understanding of how they might be perceived, what steps they can take to acknowledge and address these dynamics, and what it might mean for them as attorneys and people. Any exposure to first person narrative is also powerful in another way: law school can often make students—especially students of color—feel as though their lived experiences, their own lay legal expertise and that of their communities, are less significant than case law.[82] Conveying the importance of lived client

77. *Id*.

78. *Id*. at 204.

79. *Id*.

80. *Id*.

81. *Id*. ("After a few meetings, Tim felt she was 'stereotyping me [. . .] like I was some drug dealer,' because 'so many black kids come through there with criminal records [and] she was surprised that I had only, like, petty cases like trespassing.' Tim was annoyed his lawyer kept expressing surprise that his record had no major drug-related arrests on it. He concluded his lawyer was a 'sellout'—'one of them type of [black people] who is like "Yes, sir." "No, sir."'").

82. *See* O.J. Salinas, *Secondary Courses Taught by Secondary Faculty: A (Personal) Call to Fully Integrate Skills Faculty and Skills Courses into the Law School Curriculum Ahead of the NextGen Bar Exam,* 107 MINN. L. REV. 2663, 2676 n.25 (2023) ("[N]on-traditional students remain marginalized on campus, left out of the community, devalued, and underappreciated.") (alteration in original) (quoting L. Sch. Surv. Of Student Engagement, *Diversity & Exclusion: 2020 Annual Survey*

experience counteracts such tendencies, opening the door for discussions critiquing the forced objectivity that a falsely value-neutral legal education uses to silence and exclude so many students.

In addition to the revised Rule, the accompanying interpretations provide additional guidance.[83] New Interpretation 303-6 emphasizes "the importance of cross-cultural competence to professionally responsible representation" and finds that "the obligation of lawyers to promote a justice system that provides equal access and eliminates bias, discrimination, and racism in the law should be among the values and responsibilities of the legal profession to which students are introduced."[84] Beyond the elements of professional identity formation elaborated on in 303, it should also be the goal of professional responsibility professors to push students to think not only about what the Model Rules permit or allow, but what choices reflecting their personal values they want to make beyond the Model Rules' requirements. This might include what they want their relationships with clients to look like, and what constitutes sufficient communication for the needs of their individual clients. Finally, Rule 8.4(g), which classifies several types of harassment and discrimination as professional misconduct, is the site of contentious nationwide debate, including challenges from conservative groups as to the constitutionality of such a rule and its enforcement by disciplinary boards.[85] While we only talk about Rule 8.4(g) briefly in class, it is a powerful reminder to

Results, IND. UNIV. CTR. FOR POSTSECONDARY RSCH. 5 (2020)); *see also id*. at 2676–77 (describing the author's experience as a non-traditional law student who felt "like the traditional law school classroom—with its focus on students reading judicial opinions and professors asking Socratic-style questions—often amplified the size of the hole [separating traditional and non-traditional law students]" and forced non-traditional students to "[play] 'catch-up' in a game that seemed to only value certain skills and life experiences.").

83. *See* NAT'L ASS'N FOR L. PLACEMENT, *supra* note 73.

84. *See id*. at § 2(2).

85. *See* MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2023) ("It is professional misconduct for a lawyer to . . . (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."); *see, e.g.,* Dennis Rendleman, *The Crusade against Model Rule 8.4(g)*, AM. BAR ASS'N (Oct. 2018), https://www.americanbar.org/news/abanews/publications/youraba/2018/october-2018/the-crusade-against-model-rule-8-4-g-/ [https://perma.cc/D66X-LBPH]; Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31 (2018); *A Misguided Proposed Ethics Rule Change*: *BA Model Rule 8.4(g) and the States,* CENTER FOR LAW & RELIGIOUS FREEDOM, https://www.christianlegalsociety.org/center/aba-model-rule-8-4g-and-the-states/ [https://perma.cc/2TPN-9LNL].

students that the Rules and ethical duties of lawyers are topics being debated and decided every day, and they should be a part of these discussions.[86]

In conclusion, Clair emphasizes that it "remains important to investigate the way people are rewarded or penalized in their interactions with professionals."[87] In order to support our own professional identity formation, lawyers need to frankly reflect on the ways we punish clients (intentionally or unintentionally) for not responding to us or other professionals in the way we anticipate or expect.[88]

II. Using *Mistrust and Resistance*: When, How, Why

Students are first introduced to Clair's piece during week two of our Professional Responsibility class.[89] For our first class, I always begin by posing the intentionally provocative question, "Who should be a lawyer?" as we jump into questions about who is granted and denied admission to the bar and why.[90] Beginning with admission means we jump right into the Model Rules while also touching issues like gatekeeping, class, and race in the legal profession. Reginald Dwayne Betts's *The New York Times* article, *Could an Ex-Convict Become an Attorney? I Intended to Find Out*, provides a powerful personal story to fuel this discussion.[91] For week two, students are assigned Rules 1.1, 1.2, 1.3, and 1.4, as well as two articles: Clair's *Mistrust and Resistance* and Prof. Jenny Carroll's *If Only I Had Known: The Challenges of Representation*.[92]

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86. *See* MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2023); *see* Rendleman, *supra* note 85; *see* Aviel, *supra* note 85.

87. Clair, *Mistrust and Resistance*, *supra* note 2, at 213.

88. *E.g.,* Clair, *Mistrust and Resistance*, *supra* note 2, at 212. There is also much for professors to examine here about the way that we respond to students' interactions or requests that are unexpected or unwelcome. *See id.* ("[R]esearch on the navigation of schools—a commonly studied institutional space—has shown how working-class and poor people defer to teachers and other professionals, whereas middle-class parents and students gain rewards through proactive and demanding interaction styles.") (first citing Jessica McCrory Calarco, *Coached for the Classroom Parents' Cultural Transmission and Children's Reproduction of Educational Inequalities*, 79 AM. SOCIO. REV., 1015–37 (2014); and then ANNETTE LAREAU, UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE (2011)).

89. Sarah Schendel, *Professional Responsibility Syllabus* (2023).

90. *Id*.

91. *Id*.; Reginald Dwayne Betts, *Could an Ex-Convict Become an Attorney? I Intended to Find Out*, N.Y. TIMES (Oct. 16, 2018), https://www.nytimes.com/2018/10/16/magazine/felon-attorney-crime-yale-law.html [https://perma.cc/Y2BD-G2TC].

92. Schendel, *supra* note 89; Carroll, *supra* note 44, at 2447. Other benefits of using Carroll's article include the author's identity as a first-generation lawyer, which is important representation for students, especially the 25% of Suffolk Law

Including *Mistrust and Resistance* early in the semester has the added benefit of allowing for callbacks to the piece throughout the semester. For example, in week three the class focuses on choosing clients, withdrawing from representation, and communication, topics which overtly tie into the article.[93] We discuss the reality that public defenders and court-appointed attorneys don't have the same choice over clients as private attorneys might and that clients of appointed counsel may also have limited choice.[94] Clair's article brings these issues to light and examines how a lack of choice—especially on the side of the client—impacts the attorney-client relationship.[95] Along with selecting clients and being retained, we also discuss the realities of withdrawing from or terminating representation, and how this impacts the client. Clair's article explicitly discusses situations where a client fires an attorney, how that choice is perceived by the judge, and what it means for the client's case moving forward.[96]

The following week, we discuss the ethical issues implicated by career choice, discussing prominent attorneys whose tactics, choice of clients, and conduct as advocates have been critiqued, including David Boies, Neal Katyal, and Paul Clement.[97] We debate what 'representation for all' means, which lawyers truly have a choice over their clients, and public perception of whether a client's crimes or positions can be assigned to their counsel.[98] This is often a lively discussion, and I lead us towards the related topic of

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students who are the first in their families to attend college. *See ABA Required Disclosures & Consumer Facts*, SUFFOLK UNIV. (2023), https://www.suffolk.edu/law/about/aba-required-disclosures-consumer-facts [https://perma.cc/J484-TCPH]. *See* MODEL RULES OF PRO. CONDUCT r. 1.1—1.4. (AM. BAR ASS'N 2023).

93. Schendel, *supra* note 89.

94. I have also assigned, and often refer to, Andrew Perlman, *A Career Choice Critique of Legal Ethics Theory*, 31 SETON HALL L. REV. 830 (2001).

95. Clair, *Mistrust and Resistance*, *supra* note 2, at 199.

96. *Id.* at 206.

97. Schendel, *supra* note 89. Assigned reading includes Alex Pereene, *Neal Katyal and the Depravity of Big Law*, NEW REPUBLIC (Dec. 8, 2020), https://newrepublic.com/article/160481/neal-katyal-depravity-big-law [https://perma.cc/5TD6-BDTB]; James B. Stewart, *David Boies Pleads Not Guilty*, N.Y. TIMES (Sept. 21, 2018), https://www.nytimes.com/2018/09/21/business/david-boies-pleads-not-guilty.html [https://perma.cc/BX2E-ZAUS]; *Foundations for Practice,* UNIV. DENV. IAALS, https://iaals.du.edu/projects/foundations-practice [https://perma.cc/T78J-TBLR]; Paul Clement & Erin Murphy, *The Law Firm That Got Tired of Winning*, WALL ST. J. (June 23, 2022), https://www.wsj.com/articles/2nd-amendment-bruen-new-york-gun-case-supreme-court-decision-kirkland-and-ellis-rule-of-law-constitution-11656017031 [https://perma.cc/5VGW-5LFW].

98. *See* MODEL RULES OF PRO. CONDUCT r. 1.2(b) (AM. BAR ASS'N 2023) (stating that client positions are not attributable to attorneys).

whether legal education and the practice of law are "value neutral" and whether they should be.[99] Again, Clair's article ties in seamlessly to these related readings and topics. In the following week, when we address stigma, substance abuse, and mental health challenges in the profession, both Clair and Carroll's articles are incredibly useful for illustrating how the criminal system can be traumatic for both attorneys and their clients.[100]

Towards the middle of the semester, we turn our focus to access to justice. I've tried to tie this into the Model Rules about unauthorized practice as a way of both covering those important rules and also questioning how the profession limits access to attorneys, pushing us to think about access to justice as something more than simply access to counsel.[101] We look at the devastating experience of Kalief Browder's incarceration and fight for justice, where having an attorney was not enough to protect him against torture at the hands of the criminal justice and carceral systems.[102] Turning away from criminal law, we also read *Turner v. Rogers*,[103] originally a family court case, to discuss the limitations of *Gideon v. Wainwright*,[104] and the high stakes facing those in many civil proceedings.[105] Again, this allows us to revisit Clair's article, this time thinking beyond lawyers as the sole solution or challenge to a client's access to justice and the courts.

While perhaps not initially expected, *Mistrust and Resistance* also retains relevance during our week on fees, billing, and finances. In that class, we watch the trailer for *A Civil Action*,[106] a film in which class representatives for families impacted by environmental pollution and corporate greed seek justice for their community. The clip highlights the connection between fees and trust in a few ways:

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99. For an important discussion of the role of values in Professional Identity Formation and legal education, see Decosimo, *supra* note 72.

100. Clair, *Mistrust and Resistance*, *supra* note 2, at 205; Carroll, *supra* note 44, at 2457.

101. MODEL RULES OF PRO. CONDUCT r. 5.5 (AM. BAR ASS'N 2023) (forbidding unauthorized practice of law and setting standards for interstate practice).

102. *See* Jennifer Gonnerman, *Before the Law: A Boy Was Accused of Taking a Backpack. The Courts Took the Next Three Years of His Life*, NEW YORKER (Sept. 28, 2014), https://www.newyorker.com/magazine/2014/10/06/before-the-law [https://perma.cc/AAZ2-XET6].

103. 564 U.S. 431 (2011).

104. 372 U.S. 335 (1963) (holding that the Sixth Amendment guarantees a right to counsel for criminal defendants, and that states are required to provide attorneys to defendants who cannot afford their own).

105. Specifically, the assigned reading for the week on access to justice and unauthorized practice includes MODEL RULES OF PRO. CONDUCT r. 5.3, 5.5, 5.7 (AM. BAR ASS'N 2023) and *Turner*, 564 U.S. 431.

106. *See* A CIVIL ACTION (Touchstone Pictures 1998).

one class representative, a parent whose child is chronically ill because of the chemical pollution in question, tells the attorney that their goal in the litigation was not to get money from the company, but to find out what happened and get an apology.[107] This same class representative also asks where the money from the settlement is going, noting the attorney's expensive suits and first-class airfare.[108] In talking about *A Civil Action*, we discuss the impact of the contingency fee structure on Rule 1.2 authority allocation issues, when the attorney has an interest in the financial outcome of a case, and the limits of representation discussed in Carroll's article, where the parents want something (answers, an apology, etc.) that is not necessarily among the outcomes the court system is structured to provide.[109] While the clients in *A Civil Action* fear their attorney is being driven by financial interest, rather than having their best interests in mind, Clair notes in his article client concerns about public defenders having no financial incentive to work hard for a better outcome, with one client saying, "If you pay them money, they give a [expletive]."[110]

Interestingly, Clair observed that middle-class defendants had *more* trust in their lawyers in part because they have paid them a considerable amount.[111] One defendant, for example, said that having a privately retained lawyer made them feel "confident" because "[in] hiring him and paying him a huge lump of money, there is a certain level of trust there."[112] When discussing fees and money in class, I make a point to expand discussion beyond the Model Rules to Interest on Lawyers' Trust Accounts (IOLTA) and retainers and have a broader discussion about what money means to clients and to attorneys. I often take this chance to remind students that many people (both attorneys and clients) are uncomfortable discussing money and that it's worth taking the time to think about our relationship with these conversations so we can have fruitful and clear communication with clients about fees.

In the final weeks of the semester, we arrive at the week focused on confidentiality and attorney-client privilege. In addition to more traditional materials about the rules of confidentiality, I assign a podcast called "The Buried Bodies Case," which tells the

107. *Id*.
108. *Id*.
109. *See* MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2023); Carroll, *supra* note 44, at 2452.
110. Clair, *Mistrust and Resistance*, *supra* note 2, at 205.
111. *Id*. at 211.
112. *Id*.

story of a case where a criminal defendant told his two attorneys the location of a missing girl (unsure whether she was alive or deceased), their resulting decisions, and the impact for both the case and the people involved.[113] This, again, explicitly relates back to both Clair and Carroll's articles not only because it again discusses criminal defense attorneys, but also because it is another reminder of why trust is crucial to the attorney-client relationship.[114] There are always some students who advocate for changes to Rule 1.6 that would allow attorneys to break confidentiality in cases like the one in *Buried Bodies*, and—while offering sympathy for all involved—I push them to think more critically about what such a change would mean for attorney-client relationships, and how it might further increase client mistrust of attorneys.[115]

Beyond simply assigning the students to read it and mentioning it in class, there are numerous other ways to actively use Clair's article, for an interested professor. One fairly simple way would be as an "issue spotter," asking students what Model Rules they believe are implicated by the clients' stories, either as an exam question or in class by using quotes from actual defendants and lawyers. Another approach would be to have guest speakers, especially public defenders, judges, or past defendants, comment on the article's observations. The first time I taught the article, Clair generously appeared via Zoom as a guest speaker. I asked students to submit questions for him ahead of time, and I conducted the visit interview-style, using some of the students' questions. I recorded the conversation and have used it in a variety of ways over subsequent semesters. When teaching a three-hour-long class (in person or via Zoom), I've used clips from the interview to break up and prompt our discussion.

I've recently developed a PR class for our school's new Hybrid JD program and have assigned the students these clips to view before our live classes together. For example, in week two, when the Hybrid JD students read the Clair article, they also watch a clip of Clair discussing attorney-client relationships generally, as well as another clip of a conversation with a public defender guest speaker discussing the realities of indigent criminal defense practice and how he establishes trust with his clients. Recently, I have also

113. *Radiolab: Buried Bodies*, WNYC STUDIOS (June 3, 2016), https://radiolab.org/podcast/the_buried_bodies_case [https://perma.cc/H8SE-LPBH].

114. Clair, *Mistrust and Resistance*, *supra* note 2, at 196; Carroll, *supra* note 44, at 2461.

115. MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2023) (addressing attorney-client confidentiality).

added in a clip of a partner in a large international law firm discussing what attorney-client relationships look like in the field of mergers and acquisitions, with the goal of making these issues appeal to and connect with as many students as possible and showing the transferability of these conversations. In week seven, which focuses on access to justice issues, I have them return to Clair's work by including a clip where he discusses the difficulties of secondary trauma and how it can impact work in the legal field, as well as the need for greater access to justice, and what some approaches and solutions might look like.

One thing that Clair and Carroll's articles share is an acknowledgement of both the individual role of the public defender, and the systemic challenges and barriers in which they work.[116] Carroll is frank about the myth of the defense attorney as a "shield," someone who can protect their client from the injustices of the criminal law system, a task made impossible when the system is closing in around your client from all sides.[117] Carroll's pain and frustration at working with a system where her client's stories cannot be fully told or heard is palpable.[118] Though Carroll and Clair are coming from different perspectives—both from within and outside of the attorney-client relationship—they both place blame on a system that does not make room for a holistic narrative or complete agency for the client.[119]

III. Reactions

A. Mine and Students'

From the first day of class, I inform the students of my biases and background. I practiced as an immigration attorney, representing immigrants and their families for over seven years.[120] A significant portion of this work was on behalf of immigrants who

116. Clair, *Mistrust and Resistance, supra* note 2, at 205; Carroll, *supra* note 44, at 2453.

117. Carroll, *supra* note 44, at 2454.

118. *Id*. at 2447, 2460; *see also* Butler, *supra* note 54, at 75; *see also* Paul Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176 (2013).

119. *See* Clair, *Mistrust and Resistance, supra* note 2; *see also* Carroll, *supra* note 44.

120. *Sarah J. Schendel*, SUFFOLK UNIV. STAFF DIRECTORY, https://www.suffolk.edu/academics/faculty/s/s/sschendel [https://perma.cc/SQ4F-JPYC].

had been charged with or convicted of crimes.[121] I sometimes worked on both their criminal and immigration cases.[122]

At times, I feel defensive when reading Clair's article—defensive of my own work and the work of many hard-working, over-burdened criminal defense attorneys I know. I share these feelings and have found that such disclosures help students who have internalized the message that attorneys must act without emotion, that attorneys must be purely analytical beings. I encourage them instead to become more aware of their emotional reactions and biases, so that they can better separate those from their professional decision-making processes.

For the most part, students respond positively to the variety of somewhat unusual, non-casebook readings assigned in the class, including Clair's article. Every semester there are some students who have worked or interned in the Boston criminal courts, either for the Office of the District Attorney, the Committee for Public Counsel Services, or for individual judges, and some who have longer-term experience (for example, as Victim Witness Advocates) before coming to school. Of course, there are also some students who have had their own personal interactions (individually or through family) with criminal courts, or with attorneys more broadly. It is true that some students who held more idealized views of the attorney-client relationship and the work of lawyers have found both Clair and Carol's pieces "bleak" for the realities and challenges they present. And, as most professors know, student reactions are rarely (if ever) uniform. Some students take issue with the way Clair, and other authors I select, address issues of race, class, and professional identity formation. I tell students from the start that I have three goals for the class: to teach them about the Model Rules and help them pass the MPRE; to talk about current events in legal ethics and media coverage of lawyers; and to help them think through what sort of lawyers they want to be and how their personal values and ethics might inform their professional life. Not all students are interested in the latter two, nor do all PR classes at the law school include such material. While at least one student wrote in their class evaluation that they felt PR "wasn't the place" to discuss issues like bias and race, others have specifically stated that the "real world" readings and inclusion of "communities often excluded by many . . . other classes" were among their favorite parts of the course.

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121. *Id.*
122. *Id.*

B. Sam's Story

Sam was an engaged and thoughtful participant throughout my Fall 2021 PR class, so much so that I asked him to be my Research Assistant in Spring 2022. When I checked in with him Summer 2022 to ask how his internship working in legal services was going, he mentioned that he had been thinking about Clair's article as he navigated relationships with clients. I was thrilled to hear that the piece—and our classroom conversations—had stayed with him, and I asked him to share his reflections, and eventually to join me in co-authoring this Article. Sam, in his own words:

I spent my 2L summer as a student attorney at a legal service organization in Cambridge, Massachusetts, providing legal aid to low-income clients. My caseload consisted of a combination of documented and undocumented people from Honduras, El Salvador, and Guatemala. None of my clients spoke English as their primary language and one or two only spoke Ixil.

From the onset of my summer, I knew there was an explicit difference in class and ancestry between myself and my clients. I am white and speak Spanish as a second language; I have only heard vague family stories of my great grandfather, Julio, who came from Spain to Honduras to reportedly conduct some sort of business with the United Fruit Company. As a white man working with a predominantly Latino/a community, I know that history has carved out room for mistrust in my attorney-client relationships. While I don't use this knowledge as a template for every interaction, I do keep it in the back of my head as a reference point for how others may perceive me.

It was only a week into my time at the legal aid organization that I found myself on the receiving end of mistrust in the attorney-client relationship. Clair's article immediately came to mind, but before I explain, let me set the scene: during my first few days at the organization, I introduced myself to a group of clients who were part of a multi-plaintiff wage theft case. I explained I was their new student attorney for the summer and that I was trying to file affidavits of indigency on their behalf to avoid court fees in filing their claim.

During this introduction, I told the clients that their prior student attorney had left the organization and would be returning in the fall. I continued by letting the clients know that Spanish is my second language. I requested that if at any point they did not understand me, to please let me know.

Immediately following my introduction, I felt mistrust—or at least wariness—seeping into the attorney-client relationship. I knew

many of the clients in this case had formed close relationships with the previous student attorneys during the process of investigating and drafting their initial complaint. My clients were justifiably reluctant to begin that relationship-forming process all over—perhaps especially with a young white man whom they had just met.

From this point, I began picking up on what I considered to be a telltale sign of mistrust: my clients switched from speaking with me in Spanish and began attempting to speak to me in English. Later, some of my coworkers posited this could have been a form of endearment; however, I felt that it was because my clients did not trust me in discussing, let alone handling, their legal issues in Spanish. Shortly thereafter, some of the clients began reaching out asking about their previous student attorney, questioning if I was even capable of "helping" them. I was a few days into my internship, and there was already a solid foundation of mistrust. This was not entirely unexpected on my end, in part because of my own mistrust of the legal system. If someone told me I had a new student attorney for the summer, I would honestly resist trusting my attorney as well.

I thought about Clair's article – the examples of other white men who held much of the apparent power in the client-attorney relationship. I remembered various examples of them, intentionally or negligently, silencing or coercing clients who expressed withdrawal or resistance. Clair's article gave me examples of how not to conduct myself when engaging with disadvantaged clients in the frameworks of mistrust. I thought about how the court and legal systems do not give room to clients experiencing mistrust. But why not? How could I translate this to my own situation?

Truthfully, I began spiraling a bit, and the bleakness of the overarching situation set in. There was no clear-cut answer laid out for me as to how to build trust with clients. I knew I was not violating any of my ethical obligations set out under the Model Rules; however, I was still anxious and felt guilty.

I know there were important differences between Clair's study and my situation: I was a student attorney, whereas attorneys in Clair's article passed the bar. Clair's article focuses on criminal defendants, and I was working with plaintiff litigants. Nonetheless, I tried to focus on the similarities: the need for trust and communication between (student) attorneys and clients. I began reframing my thoughts to come up with a creative solution—there had to be some way to realign this attorney-client relationship. I was okay with my clients resisting me, but I did not want them to withdraw. For me, once my clients withdrew, I would no longer be able to "zealously" advocate for them. The attorney-client

relationship is a two-way relationship after all, I am merely the client's legal (student) representative.

Following some independent brainstorming and a handful of meetings with my supervisor, I developed a plan to potentially (re)gain some of my clients' trust while combating withdrawal. I planned to write and send a letter on official letterhead to each of the clients, inviting them to a group meeting at a community organization in their neighborhood. The meeting at the community organization would be in their neighborhood and be facilitated by a community translator. I wanted a place where we could all sit down, meet, and talk in person about what was going on in the client-attorney relationship.

I chose to send a letter on official letterhead because it was a tangible object that the clients could hold, unlike a phone call or a text. I thought this formality would bolster my legitimacy and start the process of developing a formal client-attorney relationship. Moreover, I felt that meeting the clients in their hometown, with a local and well-known organization, would provide some level of comfort that may not exist in either my office or the courts. For example, many of my clients lacked access to personal transportation and had to travel over an hour on public transportation to reach my office for a meeting. Shifting the burden of transportation to myself was also an attempt to show that I was as committed to this case as my clients.

After not receiving any responses for the next few days, I finally heard back. All of the plaintiffs in the group wage theft case were willing to meet with me. So, I took the commuter line across the Charles River and made my way to the local community organization. Eventually, one by one, the clients began to show up. Anxiously, I made my way into a meeting room filled with the clients and staff members from the community organization. I had planned my opening remarks: I made my reintroduction in Spanish. I admitted to the clients that I was "just a student attorney" and reiterated I did not grow up speaking Spanish; however, I was confident I could be of service to keep their case moving forward if they gave me the opportunity. Additionally, I offered an apology for my original introduction that served as the catalyst for this meeting.

Something clicked. I was in the middle of explaining why I needed to know the address and income of the clients when one of them, an older man, interrupted me: "Okay, okay—what do we have to sign?" From an interpersonal perspective, I regained some of the clients' trust and willingness to work with me by making a sincere personalized display that I was committed to as their advocate. My

race, class, and fluency in region-specific Spanish dialects were less of an issue or barrier upon showing that I was willing to connect with my clients on a community oriented basis. While I know I cannot change my race, class, or the constraints of the American legal system, I can change the modes and methods by which I interact with my clients.

In retrospect, I feel that what worked for me in this situation was meeting with clients in an environment where they felt comfortable: their community, and not a court or office. I put myself in a physical space where the clients were free to speak openly in whatever language they please, question me, and importantly, inquire more about my professional identity. Additionally, by focusing on giving myself space and time to reflect on and respect my clients' mistrust, I was not threatened by this process. I did not withdraw or let my ego get in the way. I was able to eventually find a solution that worked for both my clients and me. I knew a damaged ego could go a long way in terms of silencing and coercing clients who offer their own lay expertise.

Understandably, this is not a one-size-fits-all solution. Each instance of mistrust in the attorney-client relationship will have different needs, challenges, and opportunities. A criminal defense attorney, for example, will often not have the opportunity to meet with the client in their community. There is not a universal solution for rebuilding trust; however, with some creativity and self-awareness, I have realized these situations do not have to be so bleak.

Conclusion

Teaching professional responsibility is an incredible opportunity to discuss the challenges and rewards of practicing law with students, and to push students to turn their gaze inward while also honing their critiques of the systems of power within which all lawyers operate. I truly enjoy teaching Clair's piece every year and am so grateful for the voices it allows students to hear and the issues it pushes them to consider. While it is not enough on its own to tackle every issue involved in representing clients, I am hopeful that intentional use of Clair's article will help students like Sam identify a lack of trust and its impact once they are in practice. Beyond merely identifying the issue, students who have carefully engaged with Clair's article and related classroom discussions will hopefully find themselves more likely to move past an immediate ego-centered reaction to client mistrust and investigate the systemic challenges and causes of a strained attorney-client relationship, as well as the role their own race and class plays in

the relationship, finding ways to interrupt and prevent the silencing of their clients by attorneys and the system alike. While having the gaze of the sociologist turned on our profession can feel uncomfortable, it's an important reminder that the legal system impacts everyone (not just the attorneys and clients intimately involved), and that one of the responsibilities of being a part of the profession is being mindful of the public perception of attorneys and how these perceptions impact access to justice. The personal stories and actual quotes in Clair's piece can stand in stark opposition to the sometimes sterile tone and aspirational, vague nature of the Model Rules. My desire for students in my professional responsibility classroom is, yes, to learn the Model Rules and pass the MPRE, but also to think about what their own values require of them as an attorney, to question their actions even when they are not in violation of the Model Rules, and to get them thinking proactively about some of the decisions they may face in practice. Clair's article has become a valuable part of these discussions, and of helping me walk with students down the path of observing and critiquing our legal systems, with the hope they will feel empowered—and obligated—to improve them.

Commandments Before Amendments: The Ministerial Exception & How the Court Prioritizes Religious Rights Over Other Constitutional Protections

Evelyn Doran†

Introduction

In 2015, Katherine Savin began a position as a social worker at San Francisco General Hospital in San Francisco, California.[1] While employed there, she was assigned to the palliative care unit and worked closely with Father Bruce Lery, a member of the clergy.[2] During her employment, "Father Lery repeatedly and consistently engaged in sexual harassment towards [Savin] in the workplace."[3] When Savin reported Father Lery's conduct to her supervisors, the hospital took no steps to investigate or address the misconduct.[4] When Savin told her supervisors about the sexual harassment a second time, she was urged to not report the incident and told to cover up the email she sent about the conduct.[5] Eventually, the conditions of her work became unbearable, leading her to quit the job.[6] She then filed a Title VII claim for sexual harassment and retaliation.[7]

In 2018, Hans Hazen began working as a part-time pastor at United Methodist Church in Neodesha, Kansas.[8] From April to

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†. Evelyn Doran is a member of the University of Minnesota Law School's Class of 2024 and received a bachelor's degree from Gustavus Adolphus College in English, Creative Writing, Political Science, and Management in 2021. During law school, she primarily studied employment law and civil litigation, and represented employees in individual and class action suits against discrimination, retaliation, and ERISA violations. She would like to thank Professor Matthew Bodie for his support and feedback, as well as her friends, family, and mentors for their continued support throughout her law school education.

1. Savin v. City & Cnty. of S.F., No. 16-cv-05627-JST, 2017 WL 2686546, at *1 (N.D. Cal. June 22, 2017).

2. *Id.*

3. *Id.* (quoting First Amended Complaint ¶ 18, *Savin*, 2017 WL 2686546 (No. 16-cv-05627-JST)).

4. *Id.*

5. *Id.*

6. *Id.* at *2.

7. *Id.*

8. Hazen v. Great Plains Ann. Conf. of United Methodist Church, No. 21-4046-

November of 2019, Hazen was subjected to sexually inappropriate comments and nonconsensual sexual contact from William Sexton, the youth director at United Methodist Church.[9] When Hazen reported the sexual harassment to officials from United Methodist and its affiliate, the Great Plains Conference, neither entity investigated the conduct nor took any disciplinary action against Sexton.[10] On October 8, 2020, Hazen submitted a formal complaint to the district superintendent and the Great Plains Conference bishop.[11] On October 10, 2020, United Methodist and the Great Plains Conference terminated Hazen's employment.[12] Hazen then filed a Title VII claim for hostile work environment and retaliation for reporting sexual harassment.[13]

Though both suits described above originate from nearly identical facts, their outcomes are polar opposites. While Savin can state a claim based on Father Lery's sexual harassment, Hazen cannot do the same because of a split between the Ninth and Tenth Circuits.[14] The doctrine at the center of this divide is called the ministerial exception. In 2012, the Supreme Court recognized a "ministerial exception" to federal employment discrimination statutes based on the First Amendment's protection of religious freedom.[15] In 2020, the Court again addressed the exception and clarified that the determination of whether a given employee was covered by the ministerial exception could not be made based on "checklist items" but rather should be based on fact-specific inquiries into whether the employee "performed vital religious duties."[16] This decision reaffirmed an expansive and nebulous view of the exception's limits.[17] This rejection of concrete standards has created widespread confusion regarding the outer limits of the

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JWB, slip op. at *1 (D. Kan. Dec. 10, 2021).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. The circuit split over the ministerial exception's application to hostile work environment and sexual harassment claims is expressed most clearly in the differences between *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940 (9th Cir. 1999) and *Skrzypczak v. Roman Cath. Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010).

15. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 195–96 (2012).

16. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2066–67 (2020).

17. *Id.* at 2075 (Sotomayor, J., dissenting) (calling the majority's rule that the applicability of the ministerial exception is dependent on the employee's "religious function" vague and not a "legal framework").

ministerial exception. As a result, lower courts continue to struggle to define key dimensions of the exception, including what causes of action are precluded by the exception and what exactly constitutes a "minister."[18]

The questions raised by the ministerial exception show that this doctrine is flawed in two fundamental ways. First, the Court's refusal to create easily cognizable standards for when to apply the exception has led to disparate outcomes across the justice system, burdening litigants and courts as they attempt to define the exception's undefined aspects.[19] Second, the exception's vague language, in combination with the Court's evolving Religion Clause jurisprudence, has the potential to undermine other coequal constitutional rights that are asserted against religious institutions, creating tension between religious freedom and values of equity and justice.[20] To provide a full account of these shortcomings, this Note will first detail the legal backdrop of the First Amendment's Religion Clauses and the Court's interpretation thereof. It will then follow the doctrinal evolution of the ministerial exception, its history, and the legal questions it has yet to answer. Finally, this Note will highlight the inequality the exception engenders and the way such inequality is deepened by the originalism favored by the Court's conservative majority. Moreover, it will explore possible theoretical alternatives that might protect

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18. *See, e.g.*, Demkovich v. St. Andrew the Apostle Par., Calumet City, 3 F.4th 968 (7th Cir. 2021) (deciding whether or not the ministerial exception applies to sexual harassment and hostile work environment claims brought under Title VII); Penn v. N.Y. Methodist Hosp., 884 F.3d 416 (2d Cir. 2018) (finding that the ministerial exception barred a Title VII claim of racial discrimination); DeWeese-Boyd v. Gordon Coll., 163 N.E.3d 1000 (Mass. 2021) (deciding whether a social work professor at a Christian liberal arts college was a "minister" for purposes of the ministerial exception).

19. *Hosanna-Tabor*, 565 U.S. at 196 (stating that the Court's decision only clarifies the ministerial exception as it applies to Title VII disputes where an employee alleges that they were terminated in violation of the statute and that the Court "express[es] no view on whether the exception bars other types of suits"). *Compare Bollard*, 196 F.3d 940 (holding that pursuit of sexual harassment claims under Title VII did not create the sort of entanglement between church and state that might violate the Establishment Clause), *with Skrzypczak*, 611 F.3d 1238 (holding that the ministerial exception barred plaintiff's hostile work environment claim).

20. Ira C. Lupu & Robert W. Tuttle, Kennedy v. Bremerton School District—*A Sledgehammer to the Bedrock of Nonestablishment*, AM. CONST. SOC'Y: EXPERT F. (June 28, 2022), https://www.acslaw.org/expertforum/kennedy-v-bremerton-school-district-a-sledgehammer-to-the-bedrock-of-nonestablishment/ [https://perma.cc/LDT4-3DSS]; Samuel J. Levine, *Recent Applications of the Supreme Court's Hands-Off Approach to Religious Doctrine*, *in* LAW, RELIGION, AND HEALTH IN THE UNITED STATES 75 (Holly Fernandez Lynch, I. Glenn Cohen & Elizabeth Sepper eds., 2017).

the genuine interests of religious institutions without creating unnecessary ambiguity or significant incursion onto other rights. This review of the ministerial exception makes one thing clear: the ministerial exception is an example of a dangerous trend in Religion Clause jurisprudence in which the Supreme Court fails to engage in a meaningful analysis of the conflicting rights at issue, creating a hierarchy within what should be coequal constitutional rights.

I. Background

A. The Evolution of Religion Clause Jurisprudence

To understand the ministerial exception, one must first be familiar with the constitutional provisions it draws upon: the First Amendment's Religion Clauses. These clauses, the Establishment Clause and the Free Exercise Clause, guarantee that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[21] The Free Exercise Clause therefore protects the individual's right to their religious beliefs, while the Establishment Clause prohibits the establishment of an official religion.[22] Until recently, modern interpretations of the First Amendment's Religion Clauses have been guided by two twentieth-century cases: *Lemon v. Kurtzman*[23] and *Employment Division v. Smith*.[24] In *Lemon*, the Court addressed whether two state programs providing funding to nonpublic schools violated the Establishment Clause by requiring schools to provide proof that the funds were used exclusively for secular purposes.[25] In finding that both programs violated the Religion Clauses, the Court held that laws challenged on Religion Clause grounds must have a secular legislative purpose and a principal or primary effect that neither advances nor inhibits religion and cannot foster excessive government entanglement with religion.[26] The Court did little in *Lemon* to clarify how to decide whether a given statute satisfies these requirements, instead noting that "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[27]

21. U.S. CONST. amend. I.

22. *Amdt1.5 Relationship Between the Establishment and Free Exercise Clauses*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-5/ALDE_00000039/ [https://perma.cc/9NSQ-GT4Q].

23. 403 U.S. 602 (1971).

24. 494 U.S. 872 (1990).

25. *Lemon*, 403 U.S. at 603.

26. *Id.* at 612–13.

27. *Id.* at 614.

In this way, *Lemon* left unsettled the issue of the Religion Clauses' scope.

The Court took up the issue again in *Smith*, deciding whether the State of Oregon's determination that the religious use of peyote disqualified claimants from unemployment compensation violated the Free Exercise Clause.[28] In upholding the state's determination, the Court ruled that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[29] The Court grounded its decision in the idea that "[t]he mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."[30] This decision lowered the standard of review for statutes burdening the free exercise of religion, replacing the "compelling state interest" requirement in *Sherbert v. Verner*[31] with a much more permissive standard.[32]

Congress quickly reacted to the Court's new standard in *Smith*, passing the Religious Freedom Restoration Act (RFRA) in 1993.[33] RFRA rebuked the Court's ruling, finding that "laws 'neutral' towards religion may burden religious exercise as surely as laws intended to interfere with religious exercise," and that "governments should not substantially burden religious exercise without compelling justification."[34] Grounded in those principles, RFRA forbade any statute from "substantially burden[ing] a

28. *Smith*, 494 U.S. at 872.

29. *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring)).

30. *Id.*

31. *Sherbert* defines this requirement by holding that "no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, 'only the gravest abuses, endangering paramount interest, give occasion for permissible limitation.'" 374 U.S. 398, 406 (1963) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

32. Amy Adamczyk, John Wybraniec & Roger Finke, *Religious Regulation and the Courts: Documenting the Effects of* Smith *and RFRA*, 46 J. CHURCH & STATE 237, 239–40 (2004) ("Thus, critics contend that the *Smith* decision withdrew the compelling interest test as the standard for adjudicating free exercise claims."); *Smith*, 494 U.S. at 891 (O'Connor, J., concurring) ("In my view, today's holding dramatically departs from well-settled First Amendment jurisprudence . . . .").

33. Religious Freedom Restoration Act, Pub. L. No. 103-141 (codified at 42 U.S.C. §§ 2000bb, 2000bb–1 to 2000bb–4).

34. 42 U.S.C. § 2000bb(a); *see also* Kent Greenawalt, Hobby Lobby*: Its Flawed Interpretive Techniques and Standards of Application*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 125, 126 (Micah Schwartzman, Chad Flanders & Zöe Robinson eds., 2016) (detailing the passage of RFRA, which was "[a]dopted to reject the Supreme Court's curtailment in *Employment Division v. Smith*").

person's exercise of religion even if the burden results from a rule of general applicability," except when that burden "[was] the least restrictive means of furthering [a] compelling governmental interest."[35]

RFRA's expansive protection of religious exercise was short-lived. In 1997, the Court held in *City of Boerne v. Flores* that the statute unconstitutionally limited the power of state and local governments and overstepped Congress's enforcement powers from Section Five of the Fourteenth Amendment.[36] In so holding, the Court struck down the portions of RFRA that applied to state and local governments.[37] Congress quickly responded to this curtailment, emphasizing the severability of the portions of RFRA pertaining to state and local governments by passing the Religious Land Use and Institutionalized Persons Act (RLUIPA).[38] RLUIPA amended RFRA by removing the language concerning state and local governments, instead focusing on limiting the scope of federal statutes and regulations that may burden religious exercise.[39] The Court appeared to implicitly accept this narrower version of RFRA, upholding a lower court's use of the statute in *Gonzales v. O Centro Espirita Uniao Do Vegetal*.[40] Thus, under *Smith*, RFRA, and *Flores*, the United States judicial system applies two standards. At the state and local level, regulations burdening the free exercise of religion need only satisfy *Smith*'s rational basis review. At the federal level, regulations imposing that same burden must meet RFRA's compelling interest requirement.

This scheme of protections for religious exercise has been stretched and challenged several times in the past decade.[41] The

35. 42 U.S.C. § 2000bb-1.

36. 521 U.S. 507, 532 (1997).

37. *Id.* at 536.

38. Religious Land Use and Institutionalized Persons Act, Pub. L. No. 106-274, 114 Stat. 803.

39. Whitney Travis, *The Religious Freedom Restoration Act and* Smith*: Dueling Levels of Constitutional Scrutiny*, 64 WASH. & LEE L. REV. 1701, 1710 (2007).

40. *See* 546 U.S. 418, 439 (2006) (relying on the lower court's opinion and affirming its finding that the federal government had failed to satisfy RFRA's "compelling interest" requirement).

41. *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (finding that the Colorado Civil Rights Commission's determination that the bakery discriminated against a gay couple was not neutral towards religion); Roman Cath. Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63 (2020) (granting in part a church's motion for a temporary restraining order and preliminary injunction to bar enforcement of New York Governor Andrew Cuomo's COVID-19 restrictions on in-person gatherings, finding that the church had a strong likelihood of success on the merits); Fulton v. City of Phila., 141 S. Ct. 1868 (2021) (holding that the City of Philadelphia's refusal to contract with Catholic Social Services unless they agreed to

most paradigmatic example of this phenomenon may be the Court's recent decision in *Kennedy v. Bremerton*.[42] In *Kennedy*, the Court held that a high school football coach's decision to pray on the football field with students after games was protected by the Free Exercise Clause and that the school's discipline in response to his conduct violated his free exercise rights.[43] In its ruling, the Court held that "the Establishment Clause must be interpreted by "'reference to historical practices and understandings'"" that "'accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.'"[44] As it reached this conclusion, the Court effectively overruled *Lemon*, stating that "this Court long ago abandoned *Lemon* and its endorsement test offshoot."[45] Thus, *Kennedy* signals a major shift in modern Religion Clause jurisprudence; the Court now seems to root its interpretation of the Free Exercise and Establishment Clauses in what it describes as their original meaning.[46]

Beyond the Court's invocation of original meaning, *Kennedy* is also noteworthy because of the way it applied *Smith*. Though the Court rejected *Lemon* outright, it did not do the same to *Smith*, instead arguing that the school district's actions were not subject to rational basis review because they were not neutral or generally applicable.[47] This approach, through which the Court avoids the issue of rational basis review and applies strict scrutiny, is mirrored in several other recent cases.[48] An instructive example of such

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certify same-sex couples as foster parents violated the Free Exercise Clause of the First Amendment); 303 Creative LLC v. Elenis, 142 S. Ct. 1106 (2022) (holding that the Religion Clauses prohibit enforcement of anti-discrimination public accommodations laws which would force the regulated individual to engage in expressive speech that violates their religious convictions). For an instructive overview of this trend, see Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1456 (2015).

42. 142 S. Ct. 2407 (2022).

43. *Id.* at 2416.

44. *Id.* at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576–77 (2014)).

45. *Id.* at 2411.

46. Michael L. Smith, *Abandoning Original Meaning*, 36 ALBANY L. REV. 43, 72 (2023). For an instructive overview of how the Court has previously treated prayer by public school employees, see Maya Syngal McGrath, *Teacher Prayer in Public Schools*, 90 FORDHAM L. REV. 2427 (2022).

47. *Kennedy*, 142 S. Ct. at 2422.

48. *See* W. COLE DURHAM & ROBERT SMITH, *Inapplicability of the General Rule of* Smith – *Laws Targeting Religion:* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, Trinity Lutheran Church of Columbia, Inc. v. Comer, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, *and* Fulton v. City of Philadelphia, *in* RELIGIOUS ORGANIZATIONS AND THE LAW § 3:11 (2d ed. 2022) (discussing the joint impact of *Smith* and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, which

reasoning is *Fulton v. City of Philadelphia*.[49] In *Fulton*, the City of Philadelphia said that it would not contract with Catholic Social Services (CSS) to provide foster care services because CSS's overt policy of refusing to work with same-sex couples violated a nondiscrimination provision in the city's contract with CSS as well as a public accommodations nondiscrimination ordinance.[50] The Court held that the case was not controlled by *Smith*'s rational basis review because the city's contract reserved the right to grant individual exceptions to its nondiscrimination provision and, therefore, was not a neutral rule of general applicability.[51] The majority then evaluated the claim under the compelling interest test and found that the city's proffered interests in maximizing the number of foster parents and protecting the city from liability were not served by the policy and too speculative, respectively.[52] It therefore held that the city had not shown a compelling "particular interest" in excluding CSS from the program in light of the availability of exemptions from the nondiscrimination provision.[53] In so deciding, the Court maintained *Smith* but further distanced itself from the decision.[54] As the Court continues to decide its Religion Clause cases around *Smith*, it seems to all but overrule the case, essentially subjecting future cases to the same treatment as *Lemon* by simply making *Smith*'s holding obsolete.

While *Kennedy* presents potentially the clearest departure from the Court's Religion Clause precedent, cases like *Fulton* show that this area of jurisprudence has seen several meaningful doctrinal evolutions in the past decade.[55] These instances, analyzed in isolation, each present their own analytical issues that run up against longstanding rules and norms.[56] However, the importance

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serves to distinguish when a government policy is not neutral and of general applicability).

49. 141 S. Ct. 1868 (2021).

50. *Id.* at 1874–76.

51. *Id.* at 1879.

52. *Id.* at 1882.

53. *Id.*

54. *See id.* at 1876–77.

55. *See* Garrett Epps, *The Strange Career of Free Exercise*, ATLANTIC (Apr. 4, 2016), https://www.theatlantic.com/politics/archive/2016/04/the-strange-career-of-free-exercise/476712/ [https://perma.cc/P8KN-TNT9] (describing the changes in the Court's Free Exercise jurisprudence from *Smith* to *Hobby Lobby*); Zalman Rothschild, *"Religious Equality" is Transforming American Law*, ATLANTIC (Oct. 29, 2020), https://www.theatlantic.com/ideas/archive/2020/10/coming-threat-gay-rights/616882/ [https://perma.cc/433H-HK68] (recounting the "potential power" of the Court's reasoning in *Masterpiece Cakeshop* and noting the potential "far-reaching implications" of applying that same reasoning in *Fulton*).

56. *E.g.*, Nelson Tebbe, Micah Schwartzman & Richard Schragger, *When Do*

of their individual shortcomings is clearer when examined in the aggregate: what in isolation present as concerns of judicial solicitude and preservation of precedent in the aggregate become an overarching lack of guiding principles and a dizzying array of tests, rules, and standards.[57]

B. The Ministerial Exception: Beginnings and Supreme Court Recognition

The ministerial exception is rooted in early interpretations of the First Amendment and its Free Exercise Clause, which are themselves grounded in early understandings of religious autonomy.[58] Scholars are divided as to the history of the foundational principles of church autonomy. Much of legal academia agrees that these principles date back to the founding of the colonies and the early development of United States common law as a reaction to the entanglement of religion and government in seventeenth-century England.[59] However, it was not until 1972 that the ministerial exception as a discrete articulation of these

Religious Accommodations Burden Others?, *in* THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY 328, 332 (Susanna Mancini & Michel Rosenfeld eds., 2018) (describing how recent Religion Clause cases raise a difficult question regarding the longstanding rule that religious exemptions should not burden third parties and arguing that "accommodating Hobby Lobby at the cost of interfering with its employees' contraception coverage did indeed violate the principle against shifting burdens from religious claimants to other private citizens"); Brief for Scholars of Religious Liberty et al. as Amici Curiae Supporting Respondents at 35, Zubik v. Burwell, 578 U.S. 403 (2016), 2016 WL 675865 ("As we have explained, however, the Court has never applied the Free Exercise/RFRA version of heightened scrutiny to require the government to resort to options that would impose such burdens on third parties—especially not where, as here, such burdens would be borne only by persons of one sex.").

57. Eva Brems, *Objections to Antidiscrimination in the Name of Conscience or Religion: A Conflicting Rights Approach*, *in* THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY 277, 280 (Susanna Mancini & Michel Rosenfeld eds., 2018) ("Human rights-adjudicating bodies seem to address [the conflict between anti-discrimination and religious exemption] on an ad hoc basis; they have not yet come up with a coherent and consistent approach to conflicts between human rights.").

58. *See* Thomas C. Berg, Kimberlee Wood Colby, Carl H. Esbeck & Richard W. Garnett, *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 NW. L. REV. COLLOQUY 175 (2011) (describing the longstanding tradition of separating the authorities of the church and the state); Ian Bartrum, *Religion and Race: The Ministerial Exception Reexamined*, 106 NW. L. REV. COLLOQUY 191, 192–94 (2011).

59. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1422 (1990); Joseph Capobianco, *Splitting the Difference: A Bright-Line Proposal for the Ministerial Exception*, 20 GEO. J.L. & PUB. POL'Y 451, 456–59 (2022). *But see* Leslie C. Griffin, *The Sins of* Hosanna-Tabor, 88 IND. L.J. 981, 988–90 (2013) (highlighting alternative histories and legal traditions that were excluded from the Court's opinion in *Hosanna-Tabor*).

principles was first expressed in *McClure v. Salvation Army*.[60] In *McClure*, the Fifth Circuit held that applying the provisions of Title VII to govern the employment relationship between the Salvation Army and its officer was unconstitutional under the principles of the ministerial exception.[61] It reasoned that such regulation "would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the [F]ree [E]xercise [C]lause of the First Amendment."[62] Notably, the Fifth Circuit did not reach the issue of why McClure was a minister and therefore subject to the exception and did not consider whether other positions within the Salvation Army might not be considered ministers, instead simply holding that "there exists 'a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'"[63] In the forty years after *McClure* and before the Supreme Court weighed in on the ministerial exception, many state and federal courts followed the Fifth Circuit's lead, adopting the ministerial exception as an exemption from government regulation of the relationship between religious institutions and their ministers and created varying degrees of deference and non-interference.[64]

The Supreme Court first recognized the ministerial exception in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, holding that Cheryl Perich's Americans with Disabilities Act (ADA) retaliation claim was barred by a ministerial exception rooted in the First Amendment.[65] Perich was employed by Hosanna-Tabor Evangelical Lutheran Church and School as a "called teacher," teaching math, language arts, social studies, science, gym, art, and music, as well as religion classes.[66] In 2004, Perich was diagnosed with narcolepsy, began the 2004–2005 school year on disability leave, and upon returning learned that her position had been given to another

60. 460 F.2d 553, 560 (5th Cir. 1972).

61. *Id.*

62. *Id.*

63. *Id.* (quoting Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952)).

64. Griffin, *supra* note 59, at 982, n.6.

65. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 181 (2012) ("Both Religion Clauses bar the government from interfering with the decision of a religious group to fire one of its ministers.").

66. *Id.* at 177–78.

teacher.[67] Perich then filed a charge with the Equal Employment Opportunity Commission, alleging violations of the ADA.[68]

The Court concluded that Perich was a minister for purposes of the ministerial exception (and therefore did not have a cause of action) based on four relevant circumstances: first, that Perich had the title of minister; second, that she had a high degree of formal religious training; third, that she "held herself out as a minister of the Church"; and fourth, that her "job duties reflected a role in conveying the Church's message and carrying out its mission."[69] The Court limited its decision to the facts of the case at bar and did not address larger questions of what factors must be considered when determining whether an employee was a minister or whether a given cause of action was barred by the exception.[70]

Eight years later, the Court again took up the ministerial exception in *Our Lady of Guadalupe School v. Morrissey-Berru*.[71] In *Our Lady of Guadalupe*, the Court considered whether two elementary school teachers at Catholic schools with job responsibilities similar to Perich's were subject to the ministerial exception even though they did not have the title of "minister" or extensive religious training.[72] The Court's opinion disposed of two suits, one by Agnes Morrissey-Berru and one by Kristen Biel.[73] Morrissey-Berru and Biel were trained as secular teachers, held degrees and licenses in education, and primarily taught secular subjects, though they also taught religion.[74] Morrissey-Berru alleged that the school's decision to not renew her contract was age discrimination in violation of the Age Discrimination in Employment Act of 1967,[75] while Biel alleged that the school failed

67. *Id.* at 178.

68. *Id.* at 179.

69. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2062 (2020) (quoting *Hosanna-Tabor*, 565 U.S. at 191–92).

70. *Hosanna-Tabor*, 565 U.S. at 196 ("We express no view on whether the [ministerial] exception bars other types of suits . . . ."); *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2067 (declining to impose a "rigid formula" and asking courts to "take all relevant circumstances into account."); *see* Griffin, *supra* note 59, at 1006–16 (demonstrating the numerous questions *Hosanna-Tabor* failed to answer about the scope of the ministerial exception); Levine, *supra* note 20, at 79 ("Notwithstanding the Court's unanimous decision in *Hosanna-Tabor*, a number of questions remained unanswered. Indeed, the Court arguably achieved unanimity precisely because it restricted the scope of its analysis, avoiding some of the more complex issues that may arise in further application of the ministerial exception.").

71. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2055.

72. *Id.*

73. *Id.* at 2056–58.

74. *Id.*

75. *Id.* at 2058.

to renew her contract because she had requested medical leave to seek treatment for breast cancer.[76]

The Court held that both teachers were subject to the ministerial exception and, therefore, could not state a cause of action for the employment decisions they disputed.[77] In its holding, the Court further affirmed that it did not want to establish criteria that could be used as "checklist items to be assessed and weighed against each other in every case" and instead "called on courts to take all relevant circumstances into account and to determine whether each particular position implicated the fundamental purpose of the exception."[78] Moreover, the Court again did not specify what suits are subject to the ministerial exception.[79]

C. The Exception's Interpretation Since Our Lady of Guadalupe

Lower courts and legal scholars have been unable to uniformly interpret the ministerial exception based on *Hosanna-Tabor* and *Our Lady of Guadalupe*, often reaching conflicting conclusions about the exception's scope.[80] Many of the discrepancies revolve around whether a type of claim is barred by the exception. Determining whether a given cause of action is subject to the ministerial exception requires answering a crucial question: what exactly qualifies as interference with the "internal governance of the church"[81] or the sort of government entanglement in religious matters envisioned in the Religion Clauses, *Hosanna-Tabor*, and *Our Lady of Guadalupe*?[82] This issue is best embodied in the divide

76. *Id.* at 2059.

77. *Id.* at 2069.

78. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2067.

79. *But see id.* at 2072–73 (Sotomayor, J., dissenting) (stating that the exception applies to employment discrimination suits).

80. *See, e.g.*, cases cited *supra* note 18.

81. *Hosanna-Tabor*, 565 U.S. at 188; *see* Ira C. Lupu & Robert W. Tuttle, *#MeToo Meets the Ministerial Exception: Sexual Harassment Claims by Clergy and the First Amendment's Religion Clauses*, 25 WM. & MARY J. RACE GENDER & SOC. JUST. 249, 250–51 (2019) (discussing whether the ministerial exception extends to claims of sexual harassment based on hostile work environments).

82. Brandenburg v. Greek Orthodox Archdiocese of N. Am., No. 20-CV-3809, 2021 WL 2206486, at *4 (S.D.N.Y. June 1, 2021) ("But neither the Supreme Court nor the Second Circuit has decided whether the exception bars hostile work environment claims that do not involve challenges to tangible employment actions, and the other Circuits are divided on the question."); *cf.* Fratello v. Archdiocese of N.Y., 863 F.3d 190, 202–03 (2d Cir. 2017) (stating that "those properly characterized as 'ministers' are flatly barred from bringing employment-discrimination claims against the religious groups that employ or formerly employed them" and specifically referencing internal decisions regarding hiring & firing of religious leaders); *see*

between the Ninth and Tenth Circuits regarding the application of the ministerial exception to Title VII cases alleging sexual harassment or hostile work environment claims. Though the cases that most clearly articulate this split both predate *Hosanna-Tabor* and *Our Lady of Guadalupe*,[83] the split remains in the wake of those decisions.[84]

In the Ninth Circuit case that continues to guide this question, *Bollard v. California Province of the Society of Jesus*, the court found that the ministerial exception did not apply to claims alleging sexual harassment or hostile work environment because such claims did not target an employment decision made in the relationship between a church and its minister.[85] The court held, rather, that such claims are too attenuated from the principles animating the Free Exercise Clause, because they focus on disciplinary inaction, and the employer seeks exemption merely because the target of the inaction is a minister.[86]

The Tenth Circuit's decision in *Skrzypczak v. Roman Catholic Diocese of Tulsa* represents the other side of this circuit split.[87] In *Skrzypczak*, the court found that the plaintiff's Title VII hostile work environment claim was barred by the ministerial exception.[88] The court rooted its decision in the idea that opening churches up to Title VII liability may lead them to make decisions about what kinds of ministers to hire based on whether a given minister might lower the likelihood that the church is sued, rather than religious objectives.[89] Though both *Bollard* and *Skrzypczak* were decided before *Hosanna-Tabor* and *Our Lady of Guadalupe*, both decisions still bind their respective circuits.[90] It seems that the Court's

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Damonta D. Morgan & Austin Piatt, *Making Sense of the Ministerial Exception in the Era of* Bostock, U. ILL. L. REV. ONLINE 26 (Apr. 5, 2022), https://illinoislawreview.org/online/making-sense-of-the-ministerial-exception-in-the-era-of-bostock/ [https://perma.cc/G67X-BKSX] (proposing a clearer, synthesized definition of when an employee performs a "religious function" and is therefore subject to the ministerial exception).

83. *See* Bollard v. Cal. Province of the Soc'y of Jesus, 196 F.3d 940, 947 (9th Cir. 1999); Skrzypczak v. Roman Cath. Diocese of Tulsa, 611 F.3d 1238, 1245 (10th Cir. 2010).

84. *See, e.g.*, Savin v. City & Cnty. of S.F., No. 16-cv-05627-JST, 2017 WL 2686546, *1 (N.D. Cal. June 22, 2017); Hazen v. Great Plains Ann. Conf. of United Methodist Church, No. 21-4046-JWB, slip op. at *1 (D. Kan. Dec. 10, 2021).

85. *Bollard*, 196 F.3d at 947.

86. *Id.*

87. *Skrzypczak*, 611 F.3d at 1245.

88. *Id.*

89. *Id.*

90. Morgan Nelson, *Discussing* Demkovich*: An Analysis of Why and How the Supreme Court Should Reconsider the Expansion of the Ministerial Exception*, 54

definition of the ministerial exception has done little to provide lower courts with greater guidance on the exception's limits or correct arguably erroneous interpretations.[91]

This open question is made all the more important because of the shifting nature of the Court's Religion Clause jurisprudence. While the exception, as articulated in 2020, insulates religious employers from suits brought by ministers when such actions would "threaten[] the [institution's] independence in a way that the First Amendment does not allow,"[92] the Court's interpretation of the Free Exercise Clause has shifted since then, expanding its definition of what is protected by that provision.[93] The most worrying overarching theme that the Court has recently drawn upon is its interpretation of historical understandings of religious liberty. In its accounts of the legal tradition surrounding the Religion Clauses, the Court presents a single perspective and routinely rejects other interpretations of such history, often leaving out vital context for the practices it calls upon.[94] By grounding its decisions in this type of reasoning, the Court opens itself up to questions of legitimacy and judicial solicitude, the degree of certainty litigants can have in the application of precedent, and the potential policy goals or strategic moves that may be guiding its decisions.[95]

Many members of the legal community have noted the potential issues with these unanswered questions. First, several scholars have argued that the undefined dimensions of the exception create an undue burden on religious institutions and their employees as they attempt to discern how a court might choose

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TEX. TECH L. REV. 825, 836–40 (2022) (describing the circuit split on the issue of the ministerial exception's application to Title VII sexual harassment and hostile work environment claims and noting that the split continues to exist after the Supreme Court's ministerial exception cases).

91. Lupu & Tuttle, *supra* note 81, at 302.

92. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069 (2020).

93. *See* Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on* Fulton v. City of Philadelphia, 2020–2021 ACS SUP. CT. REV., https://www.acslaw.org/analysis/acs-journal/2020-2021-acs-supreme-court-review/the-radical-uncertainty-of-free-exercise-principles-a-comment-on-fulton-v-city-of-philadelphia/ [https://perma.cc/9N5F-ZNR7].

94. *See id.* (describing the flaws in Justice Alito's description of the history of free exercise principles in *Fulton v. City of Philadelphia*).

95. *See* Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271 (2020) (arguing that much of the Court's unanimity in cases deciding Establishment Clause principles is attributable to the practice of enabling conservative justices to reach their goals and further arguing that this practice is a flawed strategic decision because it will likely lead to an expectation of further concessions, not increased cooperation).

whether or not to apply the exception in their case.[96] Second, others have noted the deference the ministerial exception tends to give to religious employers, how such deference stands to undermine the rights and interests of employees, and the issue this creates in an already imbalanced relationship.[97] Finally, others still have analyzed the ministerial exception within the larger context of the Court's shifting Free Exercise jurisprudence, noting its place within the broader judicial trend of greater corporate religious liberty[98] and evolving notions of originalism[99] and critiquing the Court's proffered reasoning in *Hosanna-Tabor* and *Our Lady of Guadalupe*.[100]

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96. Capobianco, *supra* note 59, at 468 ("Current tests are too imprecise and therefore harm one or both interests to an intolerable extent."); Charlotte Garden, *Ministerial Employees and Discrimination Without Remedy*, 97 IND. L.J. 1007, 1015 (2022) ("[T]he ministerial exception allows employers to mislead their employees about their rights at the recruitment and hiring stages, and then to invoke the ministerial exemption if the employee sues."); Richard C. Osborne III, *A Country Divided: Refining the Ministerial Exception to Balance America's Diversity*, 34 REGENT U. L. REV. 607, 610 (2022) ("In *Our Lady of Guadalupe*, the Supreme Court doubled down on an untenable approach. The result is a current approach that is overbroad, unworkable, and confusing.").

97. Griffin, *supra* note 59, at 981 ("The Court mistakenly protected religious institutions' religious freedom at the expense of their religious employees."); Garden, *supra* note 96, at 1018–21 (describing the ministerial exception's long-term consequences for employees who may now find themselves without legal remedy).

98. *E.g.*, Zöe Robinson, Hosanna-Tabor *after* Hobby Lobby, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 173 (Micah Schwartzman, Chad Flanders & Zöe Robinson eds., 2016) (contextualizing the ministerial exception within the Court's larger Free Exercise Clause project, specifically its treatment of the free exercise rights of corporate entities like Hobby Lobby, which challenged the Affordable Care Act's requirement that employer-sponsored healthcare plans cover contraceptive healthcare).

99. *E.g.*, Griffin, *supra* note 59, at 988; *see, e.g.*, Berg et al., *supra* note 58, at 177. *See also*, Lupu & Tuttle, *supra* note 93 (describing the flaws in Justice Alito's description of the history of free exercise in *Fulton v. City of Philadelphia*).

100. Caroline Mala Corbin, *The Irony of* Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 106 NW. L. REV. COLLOQUY 951, 951 (2012) ("Indeed, the irony of the *Hosanna-Tabor* case is that trying to discern whether the schoolteacher was a minister entangled the Court in religious doctrine more than simply adjudicating her retaliation claim would have."); Thomas F. Farr, *The Ministerial Exception: An Inquiry into the Status of Religious Freedom in the United States and Abroad*, *in* RELIGIOUS FREEDOM AND THE LAW: EMERGING CONTEXTS FOR FREEDOM FOR AND FROM RELIGION 25, 31 (Brett G. Scharffs, Asher Maoz & Ashley Isaacson Woolley eds., 2018) (arguing that the Court's decision in *Hosanna-Tabor* actually undermines the First Amendment rights it purports to protect); Griffin, *supra* note 59, at 984 ("When *Hosanna-Tabor* and the earlier ministerial exception cases are reviewed in detail, it becomes apparent that the numerous justifications for the exception are all a restatement of one foundational and fundamentally mistaken argument: that religious groups are entitled to disobey the law."); Schwartzman & Tebbe, *supra* note 95.

II. Analysis: The Dangers of the Ministerial Exception

Synthesizing recent academic commentary and judicial decisions on the ministerial exception and related free exercise and anti-establishment principles makes several things clear. First, the Supreme Court's failure to meaningfully define the scope and applicability of the ministerial exception makes it more difficult to litigate suits against religious employers, burdening litigants and courts alike. Second, the exception is one example of a dangerous overarching trend in which courts continue to promote religious liberty to the detriment of other coequal constitutional rights. Third, that trend is likely to gain greater support from the Supreme Court in coming years as its decision in *Kennedy* shifts the Overton window for policies regarding religious liberty. Fourth, this trend is not the only path forward for protecting the interests of religious institutions—other frameworks for understanding conflicts of rights as well as theories of freedom of conscience may provide viable alternatives.

A. The Impact of the Ministerial Exception's Ambiguity on Potential Suits Against Religious Employers

As religious liberty jurisprudence has evolved over the past fifty years, courts have routinely supported carve-outs and exemptions for religious institutions from otherwise generally applicable statutory schemes.[101] In supporting their decisions, courts have drawn upon many different rationale, theories, and methods of interpretation, creating a vast array of rules, tests, and guiding principles.[102] The wide diversity of judicial reasoning (and judicial outcomes) that result when questions of religious liberty are raised points to one major issue: the lack of clarity from the Supreme Court.

In its recent holdings on the ministerial exception, religious liberty, and the scope of the Religion Clauses, the Court has prioritized fact-specific determinations, often noting that its decision in a given matter is limited to the case at bar and leaving open closely-related questions and issues.[103] When the Court so limits its reasoning and refuses to provide generally applicable principles that might be of use to lower courts, it complicates the

101. Sepper, *supra* note 41, at 1456.

102. Osborne, *supra* note 96, at 625; Smith, *supra* note 46 (manuscript at 38).

103. *E.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 196 (2012).

adjudication of claims of religious liberty.[104] This phenomenon is observable in the adjudication and outcome of cases where religious employers invoke the ministerial exception. Courts remain divided on multiple fronts and continue to spend time and resources answering questions as to the exception's application to jurisdictional issues, different causes of action, and specific job descriptions.[105] The fact that such issues must be continuously litigated burdens the judicial system and makes it more difficult for courts to quickly and fairly resolve cases on their merits.[106] As a result, courts are wading through unclear or ill-defined changes in jurisprudence, leading to inconsistent results across jurisdictions.[107] What is more, these disparate outcomes among substantially similar legal questions across different circuit courts highlight one of the pressing issues with the Court's treatment of the ministerial exception. As long as the Court fails to provide concrete, cognizable standards by which lower courts may uniformly apply the ministerial exception, the exception's application will continue to result in unequal outcomes, needlessly harming litigants when they pursue justice in some jurisdictions rather than others.

Moreover, as many scholars point out, the reasoning by which the Court purports to reach its holding often leaves ample room for critique.[108] Chief among these concerns is that the exception's reasoning is, at its core, contradictory.[109] While the exception is rooted in the notion that the government cannot interfere in matters of religious concern, it itself commits this very sin by requiring courts to judge whether a given employee performs vital religious duties.[110] Though this inquiry could be made less intrusive by specifically limiting it to members of the clergy or ordained ministers, courts have not taken that approach, instead turning

104. *See* Robinson, *supra* note 98, at 174.

105. *See* Osborne, *supra* note 96, at 609; Lupu & Tuttle, *supra* note 81, at 250–51.

106. Osborne, *supra* note 96, at 610.

107. Morgan & Piatt, *supra* note 82.

108. Corbin, *supra* note 100; Farr, *supra* note 100, at 31 (arguing that the Court's decision in *Hosanna-Tabor* actually undermines the First Amendment rights it purports to protect); Griffin, *supra* note 59, at 984 ("When *Hosanna-Tabor* and the earlier ministerial exception cases are reviewed in detail, it becomes apparent that the numerous justifications for the exception are all a restatement of one foundational and fundamentally mistaken argument: that religious groups are entitled to disobey the law.").

109. Justin E. Lewis, *What's in a Church? Refocusing Analysis under the Ministerial Exception on the Role and Nature of Religious Institutions*, 18 DARTMOUTH L.J. 104, 127 (2020).

110. *Id.*

"theological cartwheels to transform elementary and secondary school teachers, university and seminary professors, school principals . . . and musicians into ministers."[111] This approach stands to continue, as it has been endorsed by *Hosanna-Tabor* and *Our Lady of Guadalupe*.[112] As courts are asked to evaluate whether an employee performed vital religious duties, they are forced to make value judgments about what duties are most meaningful for that determination (an evaluation that inherently requires entanglement in religious doctrine) and in so doing reach various conclusions, resulting in the disparate outcomes described above.

Others view the shortcomings of the ministerial exception from an entirely different angle, arguing that it betrays its own bias by failing to limit the exception to church decisions grounded in religious doctrine.[113] The circuit split over whether to apply the ministerial exception to sexual harassment and hostile work environment claims is at the forefront of this issue. The Court's decisions in *Hosanna-Tabor* and *Our Lady of Guadalupe* do not clarify whether the exception extends beyond tangible employment actions, leaving the area to be decided by the individual circuits.

In *Bollard v. California Province of the Society of Jesus*, the Ninth Circuit reached this question, defining the ministerial exception as a restriction that "provide[s] important protections to churches that seek to choose their representatives free from government interference and according to the dictates of faith and conscience."[114] In construing the ministerial exception in this way, the Ninth Circuit limited its scope to only those choices for which a church could provide "a religious justification."[115] More importantly, the court found that the church's argument for applying the ministerial exception in this case (which alleged sexual harassment, hostile work environment, and constructive discharge claims) failed because the conduct alleged by the plaintiff on the part of the church was not a decision at all.[116] Rather, the plaintiff merely alleged that the church had failed to intervene when he reported the harassment, and in the courts view "it stray[ed] too far from the rationale of the Free Exercise Clause to extend constitutional protection to this sort of disciplinary inaction simply because a

111. Griffin, *supra* note 59, at 1007.

112. *Hosanna-Tabor*, 565 U.S. at 192–93; Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2066–67 (2020).

113. Griffin, *supra* note 59, at 998.

114. 196 F.3d 940, 945 (9th Cir. 1999).

115. *Id.* at 947.

116. *Id.*

minister is the target as well as the agent of the harassing activity."[117] In this way, the Ninth Circuit's conception of the ministerial exception is more true to its underlying principles than the Supreme Court's precedent. By acknowledging that the exception is meant to protect *decisions* that are grounded in religious justification, the Ninth Circuit recognizes the valid Free Exercise interests that may be curtailed by the regulation of some employment actions, while also combatting the weaponization of those interests in circumstances in which they should not be applied.

The other side of this circuit split is represented by *Skrzypczak v. Roman Catholic Diocese of Tulsa*.[118] The plaintiff in *Skrzypczak* filed suit against her former employer after her termination, alleging violations of Title VII, the Age Discrimination in Employment Act, and the Equal Pay Act, including gender discrimination, age discrimination, and hostile work environment claims.[119] In responding to the hostile work environment claim, the court held:

> [W]e are not inclined to agree with the Ninth Circuit's reasoning that a hostile work environment claim brought by a minister does not implicate a church's spiritual functions. Rather, we believe that allowing such a claim may, as Judge Trott stated in his dissent from *Elvig*, "involve gross substantive and procedural entanglement with the Church's core functions, its polity, and its autonomy."[120]

To support its finding, the court pointed to cases which found that requiring churches to respond to hostile work environment claims would lead them to employ ministers who would lower their exposure to liability rather than those who would "best 'further [their] religious objectives'" and would thereby impermissibly regulate their employment decisions.[121] The circuit split is therefore rooted in one central question: what type of employment decision (or lack thereof) is protected by the ministerial exception? Is it, as the Ninth Circuit holds, limited to "active" decisions, rather than

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117. *Id.*

118. 611 F.3d 1238 (10th Cir. 2010).

119. *Id.* at 1241. The individual adverse employment actions alleged in support of Skrzypczak's age and gender discrimination claims more clearly fall within the scope of the ministerial exception's prohibition on regulation of employment decisions by religious institutions, so my analysis of this case will focus on the court's treatment of her hostile work environment claim.

120. *Id.* at 1245 (quoting Elvig v. Calvin Presbyterian Church, 375 F.3d 951, 976 (9th Cir. 2004) (Trott, J., dissenting)).

121. *Id.* at 1245 (quoting Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 803–04 (9th Cir. 2005) (order denying petition for rehearing) (Kleinfield, J., dissenting)).

disciplinary inaction, or as the Tenth Circuit holds, inclusive of decisions regarding whether to discipline ministers that harass their coworkers? These questions make clear the exception's shortcomings by laying bare the discrepancies it leaves unanswered.

B. The Court's Creation of Superior Rights

Concerns regarding the principles underlying the Court's treatment of the ministerial exception are further vindicated by the Court's approach to claims of religious freedom when they conflict with other constitutionally protected rights. While it is inevitable that coequal rights will run up against one another,[122] the way the Court chooses to resolve conflicts of rights, both in terms of which rights are vindicated in the end and the reasoning necessary to reach that conclusion, may help us understand the Court's fundamental principles and values.[123] While scholars have observed and critiqued the Court's seemingly dichotomous treatment of civil rights claims in the realms of race and religion on an aggregate level,[124] the ministerial exception presents an even clearer example of the Court's failure to adequately scrutinize conflicts of rights, as it puts two competing constitutional rights in direct opposition of one another.[125] Thus, understanding the principles animating the exception, their role in undermining coequal rights in relation to religious liberty, and the way those principles are applied in cases invoking the ministerial exception are all crucial steps in conducting a complete inventory of how the Court uses the ministerial exception to favor claims of religious liberty.

The theoretical shortcomings inherent in the Court's conception of the ministerial exception are best understood when removed from their context. At the center of the ministerial

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122. Brems, *supra* note 57, at 279 ("When cultural resistance to the adoption of nondiscriminatory attitudes and practices is rooted in a religious or nonreligious belief system, this may result in the mobilization of legal arguments . . . [s]uch legal arguments typically include human rights arguments . . . and on the prohibition of discrimination on grounds of religion.").

123. David Simson, *Most Favored Racial Hierarchy: The Ever-Evolving Ways of the Supreme Court's Superordination of Whiteness*, 120 MICH. L. REV. 1629, 1632 (2022) ("[A] critical comparative analysis of race and religion jurisprudence uncovers new aspects of the ways in which the Court engages in what Reggie Oh has recently called the 'racial superordination' of whiteness in the American racial hierarchy.").

124. *Id.* at 1632; Leah M. Litman, *Disparate Discrimination*, 121 MICH. L. REV. 1, 19 (2022).

125. *See* Bartrum, *supra* note 58, at 191 ("[T]he exception guards a highly contested border between two fundamental constitutional values—equal protection and religious liberty . . . .").

exception is a singular notion: that the Constitution's guarantee of religious liberty must be protected at all costs, even when it means undermining the Constitution's guarantee of equal protection under the law.[126] Thus, the exception necessarily prioritizes protecting religion over protecting other aspects of social life, such as race, gender, or sexuality.[127] This special treatment of religious liberty compared to other constitutionally guaranteed rights is not unique to the ministerial exception. Rather, we can observe it on an aggregate level through a process of critical comparative analysis, also known as "doctrinal intersectionality."[128] By observing that the Court has routinely emphasized the importance of protecting religious freedom while undermining protections from racial discrimination, we may conclude the following:

> [T]he Court has come to conclude in the religion context that the devaluing of religion, a constitutionally special aspect of social experience, is an affront to constitutionally required dimensions of equality and that an assertive approach, the "most favored nation" approach, is necessary to protect this equality. If the Court was interested in the consistent application of constitutional principles of equality, one would expect the Court to apply a similar approach to racial equality. The fact that the Court is not only *not* doing so but seems poised to push its jurisprudence in these two contexts conceptually further and further apart from each other is telling.[129]

The principles described above are only exacerbated when applied to the ministerial exception. As scholars have observed, "[In *Hosanna-Tabor*], the Court held that the protection afforded [to religious employers] is *absolute*. That is, the Court did not undertake any balancing of the competing interests, instead holding that the institutional interest in decisions involving internal affairs was so strong that balancing was unnecessary."[130] This is an even clearer and more troubling articulation of the value judgments identified through doctrinal intersectionality. When comparing the Court's treatment of race in one case with its treatment of religion in another, the implications are merely that the Court is more likely to protect religion and less likely to protect race. When that comparison is brought into stark opposition, as it

126. Simson, *supra* note 123, at 1632.

127. *Id.*

128. *Id.*

129. Simson, *supra* note 123, at 1662. *See also*, Litman, *supra* note 124, at 41 ("In religious discrimination cases, by contrast, the Court does not even require evidence that religious groups face greater burdens under the law than nonreligious groups.").

130. Robinson, *supra* note 98, at 190–91.

is in the case of the ministerial exception to Title VII suits, the logical end of this reasoning comes into sharp focus.

The Second Circuit's decision in *Rweyemamu v. Cote* serves as an instructive example of this problem.[131] In *Rweyemamu*, the court held that a Black minister's Title VII suit for race discrimination based on the church's failure to promote him, its preference for his white peers, and his ultimate dismissal was barred by the ministerial exception.[132] In its holding, the court found that deciding whether the church's proffered reason for his termination was actually pretext for racial discrimination would create an "impermissible entanglement with religious doctrine."[133] The court's decision does not reflect a balancing of the interests at stake, as it does not consider the constitutional rights protected by the Title VII claim and instead creates a total exemption for the church in order to protect its interest in religious liberty.[134] As courts continue to insulate religious institutions from suits brought by ministers under Title VII, they create a hierarchy within what should be coequal constitutional rights, with religion prevailing and guaranteed protections against discrimination left unfulfilled. Not only is this detrimental to the rights of individuals employed by religious institutions, but it also fails to properly address what should be a meaningful consideration: the proper means by which to adjudicate conflicts of rights.

C. Protecting Religious Liberty Through a Conflict of Rights Analysis

The most critical failure of the ministerial exception is its absolute nature: once an employer establishes that it is a religious institution, that the plaintiff is its minister, and that the employment action at issue concerns the relationship between the religious institution and its minister, the exception cannot be rebuffed.[135] Such a framework fails to consider the rights of individuals employed by religious institutions, instead ending its analysis once the court is satisfied that the defendant has stated a valid claim of religious liberty.[136] This approach may be a viable response to a statute that interferes with religious liberty and is not itself grounded in a constitutional right, as "[f]undamental rights

131. 520 F.3d 198 (2d Cir. 2008).
132. *Id.* at 209.
133. *Id.*
134. *Id.* at 207.
135. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2069 (2020).
136. Capobianco, *supra* note 59, at 454.

normally function as 'trumps': even though most fundamental rights are not absolute, they have priority over other claims."[137] It is unavailing, however, when the state action at issue is itself protecting a fundamental right.[138] In that situation, courts cannot simply find that one type of right always defeats the other. Rather, they must engage in a "conflicts of rights" analysis.[139] This framework prioritizes procedural fairness by focusing on taking each rights-based claim seriously, finding that "it is important for decision makers to show genuine respect and care for all stakeholders" by "carefully assess[ing] the merits of each position . . . [allowing] all voices to be expressed, and . . . [making] people feel that their concerns are taken seriously, and that sincere efforts are being undertaken to address them."[140]

While the current approach to adjudicating conflicts of rights "seem[s] to address such cases on an ad hoc basis" and without "a coherent and consistent approach," fair adjudication of conscience claims (like those of religious liberty) against antidiscrimination provisions requires "devoting adequate attention to both the conscience-based claim and the antidiscrimination claim . . . carefully assessing the merits of each, and . . . clearly motivating the outcome on the basis of that assessment."[141] Doing so not only serves litigants by guaranteeing a more thoroughly considered disposition, but it also serves the judiciary by fostering decisions that are more likely to be accepted as legitimate by stakeholders.[142] This added benefit is crucial in the context of the Supreme Court's Religion Clause jurisprudence, as it faces growing skepticism regarding the substantive reasoning animating its decisions, as well as accusations of value-based adjudication.[143]

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137. Eva Brems, *Introduction*, *in* CONFLICTS BETWEEN FUNDAMENTAL RIGHTS 1, 2 (Eva Brems ed., 2008).

138. *Id.* ("[I]n cases of a conflict between fundamental rights, the 'trump' aspect is no longer relevant, and any solution of the conflict risks being perceived as arbitrary.").

139. Brems, *supra* note 57, at 280.

140. *Id.* at 282.

141. *Id.* at 280.

142. *Id.* at 281 ("[A]s a factor determining the perception of the legitimacy of the institution concerned, the perception of procedural fairness (was the case dealt with in a fair manner?) is more significant than the perception of distributive fairness (was the outcome of the case fair?).").

143. Patricia Tevington, *Growing Share of Americans See the Supreme Court as 'Friendly' Toward Religion*, PEW RSCH. CTR. (Nov. 30, 2022), https://www.pewresearch.org/short-reads/2022/11/30/growing-share-of-americans-see-the-supreme-court-as-friendly-toward-religion/ [https://perma.cc/UZ5H-EHF2] ("A vast majority of Americans (83%) say Supreme Court justices should not bring their own religious views into how they decide cases, and 44% say the justices have

The central feature of the conflicts of rights approach is the way it names and evaluates the merits supporting each rights-based claim and conceptualizes how those merits must be weighed against one another.[144] Though it is not explicitly labeled as a conflicts of rights approach, the framework suggested by Kent Greenawalt may also prove useful in developing a means by which to evaluate rights in conflict. In his work, which specifically addresses claims of conscience as a reason for exemption from a legal requirement, Greenawalt proposes that each claim warrants several questions, including:

> (1) what counts as a relevant claim of conscience?; (2) should an exemption be limited to religious conscience or extended to all claims of conscience?; (3) must such claims be sincere, and how may sincerity be determined?; (4) must the claimant's relation to the action to which she objects be close or is peripheral involvement sufficient?; (5) what, if any, considerations should outweigh claims of conscience that ordinarily would warrant acceptance?; (6) should standards of exemption be cast in general or specific terms?[145]

By casting the issue this way, Greenawalt gets to the heart of one of the key issues in evaluating conflicting rights. While a defendant invoking the ministerial exception argues that the plaintiff's suit threatens to intrude on a fundamental, constitutionally guaranteed right, there may be (and indeed often are) times when such an argument is ultimately unfounded.[146] While the validity of a claim of religious liberty under the ministerial exception is currently only vetted when the court determines whether the plaintiff is a minister,[147] the burden to successfully establish a defense which leaves the plaintiff without any recourse for what may be itself a violation of a coequal right must be greater.[148] A religious employer has a clear incentive to argue that its right to religious liberty is implicated in a given suit even when such argument may be disingenuous. If it is successful, it is effectively protected from nearly any possible regulation of the employment relationship and in so doing saves itself the trouble of

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been doing this too much in recent decisions.").

144. Brems, *supra* note 57, at 282.

145. Kent Greenawalt, *Religious Toleration and Claims of Conscience*, *in* THE RISE OF CORPORATE RELIGIOUS LIBERTY 3, 6 (Micah Schwartzman, Chad Flanders & Zöe Robinson eds., 2016).

146. *See, e.g.*, Puri v. Khalsa, 844 F.3d 1152 (9th Cir. 2017) (finding that based on the pleadings, the plaintiffs' claims were not barred by the ministerial exception).

147. *See id.*

148. Lorenzo Zucca, *Conflicts of Fundamental Rights as Constitutional Dilemmas*, *in* CONFLICTS BETWEEN FUNDAMENTAL RIGHTS 19, 31 (Eva Brems ed., 2008).

ensuring compliance with said regulations, as well as the cost of litigation if the employee were to allege that the institution violated the regulations. Thus, there is a likelihood that religious employers will manufacture an apparent conflict of rights in order to benefit from the ministerial exception's protection.[149]

Part of the conflicts of rights analysis must therefore acknowledge that the ministerial exception may encourage defendants to fabricate a perceived intrusion on their religious liberty.[150] However, the matter of how to determine whether a religious employer's employment decisions are actually related to religious tenets and not pretextual presents a clear problem. While this question may be somewhat easy to answer at its farthest edges,[151] it quickly becomes incredibly thorny and threatens to force courts to weigh in on the interpretation of religious doctrines, posing a clear free exercise issue. Courts may, however, rely on established religious doctrine as "a connection to religious conviction, say that God or church teaching absolutely forbids particular behavior, can constitute one criterion to assess whether a person's sense that an act is morally wrong rises to the necessary degree of intensity and magnitude."[152] Evaluating the applicability of the ministerial exception to a given suit may be served well by this test. For example, a religious employer could be required to show that the employment decision at issue in the suit is closely connected to an established tenet of their religion, as evidenced by written teachings or previously professed convictions. Greenawalt also proposes another means of measuring sincerity that does even more to prevent judicial evaluation of religious convictions. He suggests that, rather than evaluating the claim, courts could "allow anyone to receive an exemption if that person undertakes to do what most people would regard as at least as onerous as the required act."[153] In the ministerial exception context, this might mean conditioning availability of the exception on an employer's adherence to an employment contract that provides additional protections to employees, like by requiring "for cause" termination in all instances that are not covered by the exception.

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149. Zucca, *supra* note 148, at 31; Greenawalt *supra* note 145, at 14.

150. *See* Griffin, *supra* note 59, at 14.

151. For example, in a sex discrimination case based on a Roman Catholic church's failure to allow a woman to enter the priesthood or, on the opposite end, a Black minister's hostile work environment claim based on being the target of repeated racial harassment.

152. Greenawalt, *supra* note 145, at 14.

153. *Id.*

Beyond the apparent or pretextual invocations of the ministerial exception, several serious conflicts of rights issues still remain. Even if the religious employer is pursuing application of the exception to protect their credible claims of religious liberty, the fundamental rights of the employee are still at stake. Thus, the exception as it stands is untenable. This reality is reflected in Greenawalt's assumption that "[n]o one thinks claims of conscience to perform otherwise required acts should always be absolute."[154] Rather, the ministerial exception should be subject to a "process of comparative evaluation," in which three dimensions must be considered: (1) the gravity of the denial of rights implicated by the exemption; (2) the degree of inconvenience to those impacted by the exemption; and (3) whether "the very message sent by acknowledging the claims is unacceptable, that people broadly need to understand that certain actions (or refusals to act) simply should not be tolerated."[155] The first and third categories identified here are clearly implicated by the ministerial exception. As is discussed above, the ministerial exception can have devastating consequences for the rights of employees and, moreover, may run afoul of foundational moral principles, such as intolerance for racism and bigotry. Because of how well these questions address some of the exception's most glaring shortcomings, this framework may be useful for identifying when the exception has gone too far.

Professors Nelson Tebbe, Micah Schwartzman, and Richard Schragger present yet another alternative method for protecting both religious liberty and the rights that such liberty threatens. Tebbe, Schwartzman, and Schragger point to the Court's precedent on the burdens created by religious accommodation, noting that "[t]he rule against third-party harm, as it has come to be known, holds that the government cannot accommodate religious citizens if that means harming other private citizens."[156] Rooting their framework in this principle, Tebbe, Schwartzman, and Schragger argue that Title VII's undue hardship framework, under which employers are not required "to accommodate religious employees

154. Greenawalt, *supra* note 145, at 16. It should be noted that this point may be contestable, given the Court's current articulation of the ministerial exception, which creates an absolute right within the relationship between a religious institution and its ministers.

155. *Id.*

156. Nelson Tebbe, Micah Schwartzman & Richard Schragger, *How Much May Religious Accommodations Burden Others?*, *in* LAW, RELIGION, AND HEALTH IN THE UNITED STATES 215 (Holly Fernandez Lynch, I. Glenn Cohen & Elizabeth Sepper eds., 2017) (citing Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710 (1985); *Lee*, 455 U.S. at 261.

where doing so would impose 'undue hardship' on the employer," may present an attractive means by which to mitigate harm to third-parties without prohibiting all religious accommodations.[157]

In this solution, a religious exemption is impermissible if it would require third parties "to bear more than a *de minimis* cost" to accommodate the exemption.[158] The key determination, therefore, is what burden to a third-party created by a religious employer's use of the ministerial exception reaches the level of *de minimis* cost. In discerning where that line might be drawn, Tebbe, Schwartzman, and Schragger provide examples of when courts have (and have not) found that a religious accommodation to an employee (per Title VII) poses an undue hardship.[159] One such example is *Trans World Airlines v. Hardison*.[160] In *Hardison*, the Court held that an employer was not obligated to accommodate its employee's religiously-based inability to work on Saturdays because "[i]t would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others."[161] This interpretation easily maps onto the ministerial exception. Here, rather than being concerned with the burdens borne by the employer, we ask whether the proposed accommodation "relieve[s] serious burdens on religion but impose[s] slight costs on others."[162] This would account for the ministerial exception's greatest shortcoming and provide a more measured approach to claims of religious liberty.

III. Conclusion

Given the numerous shortcomings identified above, one thing is clear: the ministerial exception is an infeasible standard by which to protect religious institutions. That is not to say, however, that

157. *Id.* at 217.

158. *Id.* at 221 (quoting Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)).

159. *Id.* at 220–28.

160. 432 U.S. 63 (1977). Note, however, that *Hardison* was substantially abrogated by the Court's decision in *Groff v. DeJoy*, 143 S. Ct. 646 (2023), which held that employers must provide reasonable religious accommodations unless such accommodations would result in substantially increased costs. While this means that the "*de minimis* cost" standard no longer controls Title VII religious accommodations, it is still a useful standard for considering the posited theoretical framework.

161. Tebbe, Schwartzman & Schragger, *supra* note 156, at 221 (alteration in original).

162. *Id.* at 228.

those institutions should not be protected at all. Rather, their constitutionally guaranteed interests in religious liberty should be vindicated, but the question of how best to achieve that goal is complicated by the impact it may have on the coequal constitutional rights of others. The Court's current approach to addressing this issue does nothing to account for the rights of those impacted by the ministerial exception, instead creating a blanket exemption without qualification for any religious employer's relationship with its "minister." In so doing, the Court has failed litigants on two fronts. First, it has created a rule that is susceptible to many different interpretations, leaving lower courts puzzled and resulting in inconsistent judicial outcomes. Second, it has effectively created a hierarchy within what should be equal rights, prioritizing the Religion Clauses' protection of religious institutions and undermining the equal protection rights of their employees. While some may argue that this is simply the unfortunate reality of religious liberty, many scholars have proposed viable alternatives to the ministerial exception.[163] In the future, activists and litigants should give greater consideration to these alternatives, reframing the conversation around religious liberty and reminding the Court that there are many paths forward.

163. *E.g.*, Corbin, *supra* note 100, at 970.

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