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Environmental Justice as Housing Justice: HUD, Land Use, and the Case for the Fair Housing Act's Application to Discriminatory Siting Claims

John Leiner†

Introduction

"This community cannot and should not take more chemical pollution," said Deborah Hawley, director at St. Francis Prayer Center in Genesee Township, Michigan.[1] St. Francis is one of the complainants seeking to block the siting, or placement, of the Ajax hot-mix asphalt plant in the same community the Flint Water Crisis ravaged less than a decade ago.[2] St. Francis and two other neighborhood groups allege that by siting polluting industry near majority-marginalized neighborhoods, the Township continues a practice of racial discrimination, violating Title VI of the 1964 Civil Rights Act, the Fair Housing Act (FHA), and the Housing and Community Development Act of 1974.[3] The complainants' Housing and Urban Development (HUD) administrative complaint argues that, in granting Ajax a building permit, the Township ignored concerns about the plant's toxic pollution disproportionately harming Black residents in nearby low-income and federally-

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1. Erin Fitzgerald, *Flint Residents Sue State Agency for Approving Air-Polluting Asphalt Plant*, EARTHJUSTICE (Feb. 11, 2022), https://earthjustice.org/news/press/2022/flint-residents-sue-state-agency-for-approving-air-polluting-asphalt-plant [https://perma.cc/AYN6-GVYY].

2. Flint Rising v. Genesee Twp. (U.S. Dep't of Hous. & Urb. Dev. Dec. 12, 2021) (housing discrimination administrative complaint).

3. *Id.* at 4.

subsidized housing.[4] Toxic pollution exacerbates these residents' comorbidities and forces them to stay in unsafe housing conditions.[5]

Historically, HUD has demurred upon receiving similar environmental justice (EJ)[6] complaints, hardly ever investigating such claims.[7] Environmental discrimination claims are ostensibly less directly related to housing than, say, claims of mortgage discrimination[8] or racial steering, both of which are discrimination claims within HUD's investigative jurisdiction.[9] For example, if a mortgage lender refuses to offer a loan to a Black couple on the basis of race with the effect of that family being unable to purchase a home, the discriminatory cause responsible for that effect is the lender's racial bias.[10] Moreover, if a real estate agent does not show the same Black couple a new home in a certain neighborhood because of the couple's race, the discriminatory cause responsible for the effect of that family not living in that neighborhood is the agent's racial bias.[11]

On the other hand, assume there is a Black family living in Section 8 housing. If that family suffers lead exposure with the effect of that family living in unsafe housing, the cause of the lead exposure, which then caused the family's housing to be unsafe, is less clear. It could be soil contaminated by a long-demolished industrial plant or a number of other causes.[12] Whether the cause

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4. *Id.* at 5.

5. *Id.*

6. *See* U.S. DEP'T HOUS. & URB. DEV., *Pursuing Environmental Justice*, https://www.hud.gov/climate/environmental_justice [https://perma.cc/92C2-B64U]; *see also* U.S. ENV'T PROT. AGENCY, *Learn About Environmental Justice*, https://www.epa.gov/environmentaljustice/learn-about-environmental-justice [https://perma.cc/L34E-X5KB].

7. *Cf.* Megan Haberle, *Fair Housing and Environmental Justice: New Strategies and Challenges*, 26 J. AFFORDABLE HOUS. & CMTY. DEV. L. 272, 273 (2017) (stating that HUD indicated in its 2016–2020 EJ Strategy a plan "to issue guidance on civil rights enforcement relating to EJ," guidance which HUD has yet to provide).

8. *Housing Discrimination Under the Fair Housing Act*, U.S. DEP'T HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/fair_housing_act_overview [https://perma.cc/PXZ4-BGR5]. This webpage from HUD provides examples of mortgage discrimination under the Fair Housing Act, including "[r]efus[ing] to make a mortgage loan or provide other financial assistance for a dwelling." *Id.*

9. *Id.*; *Examples of Housing Discrimination*, U.S. DEP'T HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/examples_housing_discrimination [https://perma.cc/3WEY-3CJT].

10. *Id.*

11. *Id.*

12. *Lead in Soil*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 16, 2022), https://www.cdc.gov/nceh/lead/prevention/sources/soil.htm [https://perma.cc/D3CH-AWBT].

of the lead exposure is linked to some discriminatory conduct ultimately affecting the family's housing, insofar as it is unsafe, is yet another question. Put simply, there is an issue of cause and effect—a longer causal chain—that makes environmental discrimination hard to prove. It is less likely to be investigated by HUD as a *housing* issue because the environment's nexus with housing is less direct than the nexus between mortgage lending and housing or the nexus between real estate agents and housing.

Given this problem of proving cause and effect, plaintiffs have long struggled to obtain relief for environmental racism's harmful effects, both administratively and through the courts.[13] Recently, however, the Department has indicated a willingness to act on such claims. In July 2022, HUD issued a Letter of Findings in *Southeast Environmental Task Force v. City of Chicago*, in which it threatened to withhold all funding to the City of Chicago for its role in facilitating the proposed relocation of the General Iron metal recycling facility ("the General Iron case").[14] With its Letter, HUD has positioned itself to act on behalf of victims of discriminatory siting practices after criticism for failing to investigate EJ in accordance with HUD's own stated policies.[15]

Whereas before, HUD provided no guidance for proving discriminatory intent or disparate impact in EJ cases, the General Iron Letter of Findings suggests what legal framework future EJ plaintiffs may utilize to prove discrimination under both theories in discriminatory siting cases.[16] Notwithstanding the Letter's novelty,

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13. *See generally* JILL LINDSEY HARRISON, FROM THE INSIDE OUT: THE FIGHT FOR ENVIRONMENTAL JUSTICE WITHIN GOVERNMENT AGENCIES (2019) (providing helpful background on limitations causing state and federal regulatory agencies not to adopt environmental justice policies); Terenia Urban Guill, *Environmental Justice Suits Under the Fair Housing Act*, 12 TUL. ENV'T L.J. 189, 226 (1998) ("The words of the statute, and the regulations seeking to clarify them, suggest that Title VIII . . . is not the easy solution envisioned . . . .").

14. *See* Env't Task Force v. City of Chicago, Case No. 05-20-0419-6/8/9, 18 (U.S. Dep't of Hous. & Urb. Dev. July 19, 2022) (Letter of Finding of Noncompliance with Title VI and Section 109).

15. *See* U.S. DEP'T HOUS. & URB. DEV., HUD ENVIRONMENTAL JUSTICE STRATEGY 2016–2020: DRAFT VERSION FOR PUBLIC COMMENT 12 (2016) ("While current investigation guidance does not specifically address environmental justice, the Office of Fair Housing and Equal Opportunity (FHEO) is in the process of revising guidance for investigators to encompass EJ complaints . . . ."); *cf.* Haberle, *supra* note 7, at 273 ("[H]owever, the initiatives developed by the last administration left much work to be done.").

16. *See* U.S. DEP'T JUST. C.R. DIV., *infra* note 74, for an explanation of the *Arlington Heights* burden-shifting framework. The HUD administrative Letter of Findings regarding the General Iron metal recycling facility in Chicago cites to *Arlington Heights*. It suggests the type of evidence EJ plaintiffs could show to meet their evidentiary burden, either in court or administratively, when challenging the

however, it postponed discussion of Chicago's liability under the FHA, only finding that the City violated Title VI and the Housing and Community Development Act of 1974.[17] A finding of an FHA violation in the General Iron case could add another arrow in EJ plaintiffs' quiver for alleging discriminatory siting and housing discrimination, like in Flint.[18] It could create a path for EJ plaintiffs to find administrative recourse where it did not exist before and could frame discriminatory siting as not only an environmental phenomenon but also a housing problem—for plausibly the first time in HUD's history.[19]

This Article argues that HUD has jurisdictional authority to make findings of discrimination in discriminatory siting cases under the FHA in light of its Letter of Findings in the General Iron case. Part I will include an overview of discriminatory siting and of environmental racism's relationship with housing and zoning. Part II will provide a background of the FHA and its broad implementation, focusing on the Act's statutory language and scope. Part III will explain challenges EJ plaintiffs face proving discriminatory intent and effect in discriminatory siting cases. Part IV will assess the Chicago case's implications. Part V will describe the FHA's statutory text. Part VI will be split into three subsections of analysis. The first will explain how the FHA's statutory text and discriminatory intent and disparate impact case precedent support the FHA's application to siting claims. The second subsection will set forth how HUD's own policy supports the Department's investigation of siting claims under the FHA. Lastly, the final subsection will suggest that courts would likely defer to HUD's interpretation of its own jurisdiction.

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siting of an industrial facility.

17. *See* Env't Task Force v. City of Chicago, Case No. 05-20-0419-6/8/9, 2 (U.S. Dep't of Hous. & Urb. Dev. July 19, 2022) (Letter of Finding of Noncompliance with Title VI and Section 109).

18. Fitzgerald, *supra* note 1; Flint Rising v. Genesee Twp. (U.S. Dep't of Hous. & Urb. Dev. Dec. 12, 2021).

19. There are myriad phenomena which may fall under the umbrella of 'environmental justice.' While this Article may indirectly suggest HUD's willingness to investigate environmental justice more broadly, it focuses on HUD's willingness and capacity to investigate discriminatory siting claims *as a subset of* environmental justice claims. This Article does not seek to provide commentary on the Fair Housing Act's applicability to, or HUD's investigative authority over, environmental justice claims beyond those discussed in the forthcoming text.

I. Background

A. Discriminatory Siting and Its Relationship to Zoning, Housing, and Environmental Racism

i. Discriminatory Siting Defined

Industrial siting is a common example of how zoning decisions affecting the location of polluting industry sites, such as an industrial facility or a toxic waste dump, disproportionately impact marginalized communities. As a public health principle, municipalities commonly separate land uses through what is known as Euclidean zoning.[20] Keeping industrial, commercial, and residential areas separate minimizes humans' exposure to industrial pollutants and communicable diseases.[21] At the same time, zoning is also a cause of racial segregation and socioeconomic disparities.[22] In the early twentieth century, municipalities frequently zoned for industrial and commercial uses near marginalized neighborhoods and exposed those communities to environmental hazards as a result.[23] Today, polluting facilities are still predominantly zoned in marginalized neighborhoods at the time of siting.[24]

Discriminatory siting occurs when marginalized communities, particularly Black communities, are disproportionately exposed to industrial sites' harmful pollutants.[25] The siting process refers to the procedures a municipality takes to plan and zone for polluting industry, including abidance to environmental regulations, environmental review procedures, and hearings for public

20. *See generally* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (establishing the power of municipalities to zone for a variety of land uses); *see also* Michelle Shortsleeve, *Challenging Growth-Restrictive Zoning in Massachusetts on a Disparate Impact Theory*, 27 B.U. PUB. INT. L.J. 361, 381 (2018) ("In [*Euclid*], the Supreme Court held zoning laws to be a permissible exercise of municipalities' police power . . . .").

21. Lauren M. Rossen & Keshia M. Pollack, *Making the Connection Between Zoning and Health Disparities*, 5 ENV'T JUST. 119, 120 (2012); Ashira Pelman Ostrow, *Preempting Zoning*, 36 J. LAND USE & ENV'T L. 91, 99 (2020).

22. Rossen & Pollack, *supra* note 21, at 122.

23. *Id.* ("Research has suggested that noxious facilities are deliberately sited in disadvantaged neighborhoods, rather than low-income or minority groups moving in to communities fraught with environmental hazards."); Sheila R. Foster, *Vulnerability, Equality and Environmental Justice: The Potential and Limits of Law*, *in* THE ROUTLEDGE HANDBOOK OF ENVIRONMENTAL JUSTICE 136 (Ryan Holifield, Jayajit Chakraborty & Gordon Walker eds., 2018).

24. *Id.* at 137.

25. Kyla N. George, *Black Spaces Matter: An Analysis of Environmental Racism, Siting, and Litigation in America*, 16 S. J. POL'Y & JUST. 69, 76 (2022).

comment.[26] Sometimes municipalities take shortcuts during the siting process by bypassing review procedures.[27] In other cases, municipalities deliberately site industry near low-income communities of color.[28] If a community adjacent to polluting industry disproportionately suffers from underlying health conditions, which air pollutants tend to exacerbate, this could give rise to discriminatory siting claims although this health impact is not a prerequisite for claims to arise.[29]

ii. Discriminatory Siting's Effects and the EJ Movement's Origins

Negative Effects of Discriminatory Siting on Low-Income Communities of Color

Housing and discriminatory siting are interrelated because of the disproportionate proximity of low-income and federally subsidized housing to polluting industry.[30] More than half of people living within two miles of toxic waste facilities are people of color.[31] A 2007 report by the United Church of Christ (UCC) observed that 46% of the 1.9 million housing units for poor families were located within a mile of factories that reported toxic emissions to the EPA.[32] Over 68% of Black people lived in areas prone to the maximum effects of coal-fired power plants' smokestack plumes, as opposed to 56% of white people.[33] The U.S. Government Accountability Office

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26. *See* William G. Murray Jr. & Carl J. Seneker II, *Industrial Siting Allocating the Burden of Pollution*, 30 HASTINGS L.J. 301 (1978) (describing federal and state regulations as well as general siting requirements for industrial facilities, including the concept of "interested persons," which broadly refers to public participation in the siting process and testimony by those whom the siting may affect).

27. *See* Naikang Tsao, *Ameliorating Environmental Racism: A Citizens' Guide to Combatting the Discriminatory Siting of Toxic Waste Dumps*, 67 N.Y.U. L. REV. 366, 415–16 (1992) (suggesting that "departures from the ordinary decisionmaking process" for hazardous waste siting could be pertinent to a showing of discriminatory intent).

28. *Id.* at 418.

29. *See id.*

30. *Id.*; *but see* R. Shea Diaz, *Getting to the Root of Environmental Injustice: Evaluating Claims, Causes, and Solutions*, 29 GEO. ENV'T L. REV. 767, 769–75 (2017) (assessing mixed empirical results for negative environmental impacts on low-income communities of color, with some research suggesting higher-income white people are more vulnerable to certain environmental harm).

31. Jorge Andres Soto & Morgan Williams, *The Nation's Challenge and HUD's Charge: Creating Communities of Opportunity for All*, 26 J. AFFORDABLE HOUS. & CMTY. DEV. L. 305, 309 (2017).

32. ROBERT D. BULLARD, PAUL MOHAI, ROBIN SAHA & BEVERLY WRIGHT, TOXIC WASTES AND RACE AT TWENTY: 1987–2007, at 4 (United Church of Christ, 2007).

33. *Id.*

determined that the majority of the between 130,000 and 450,000 suspected toxic waste sites, known as brownfields, are located near low-income communities of color.[34] Pollution exacerbates underlying health disparities in these communities, including higher rates of cardiovascular disease and obesity.[35] Additionally, over 1,000 federally-assisted housing developments are located near sites on the National Priorities List of potentially hazardous waste sites.[36] Residents in these developments are predominantly people most vulnerable to harmful pollution, including people of color.[37]

Residents in federally-subsidized housing are particularly vulnerable to harmful pollution because of federal housing programs' requirements limiting both residents' notice of environmental harms and ability to move away from these harms.[38] For example, "[f]ederal law does not require any federal agency or housing provider to give current or prospective tenants actual notice that a housing unit is located on or near a Superfund site."[39] Nor do "[c]urrent federally mandated housing inspections [take] into consideration environmental contamination."[40] Moreover, many of these tenants are either in public housing or receive Section 8 project-based vouchers.[41] Therefore, since tenants in federally-subsidized housing often do not have warning of nearby pollution and are frequently unable to transfer their affordable housing contract to another development, they have a 'Sophie's choice' upon notice of the environmental harms they face: lose their housing or risk exposure to harmful pollution.[42]

Origins and Progress of the EJ Movement

Community action against discriminatory siting was the impetus for the greater EJ movement.[43] Chicago resident Hazel

34. *Id.*

35. Soto & Williams, *supra* note 31, at 310.

36. SHRIVER CTR. ON POVERTY L. & EARTHJUSTICE, POISONOUS HOMES: THE FIGHT FOR ENVIRONMENTAL JUSTICE IN FEDERALLY ASSISTED HOUSING 14 (2020). The National Priorities list is a list of industrial sites known to potentially release hazardous pollutants. It guides the EPA in determining which industrial sites it should investigate for clean-up.

37. *Id.* at 15.

38. *Id.* at 29.

39. *Id.*

40. *Id.* at 33.

41. *See id.*

42. *Id.*

43. For further background on the EJ movement's political action and discussion of siting process reforms, see Sheila Foster, *Justice from the Ground Up: Distributive*

Johnson, known as the Mother of the Environmental Justice Movement, lived in a public housing development called Altgeld Gardens Homes.[44] After Johnson's husband died of lung cancer and her children suffered from skin and respiratory problems, she learned that city officials had deliberately placed Altgeld Gardens where toxic industry was sited.[45] Johnson famously referred to a "toxic doughnut": toxic industry completely surrounded her neighborhood.[46] Later, Johnson founded People for Community Recovery (PCR) in 1979,[47] a group that led numerous widespread protests against new landfill and incinerator development.[48]

Johnson's activism occurred simultaneously with that of predominantly Black residents in Warren County, North Carolina, opposing the siting of toxic waste disposal.[49] The Warren protests fostered a 1987 report by the aforementioned UCC's Commission for Racial Justice.[50] That report "examined the race and socio-economic status of communities with commercial hazardous waste facilities and uncontrolled toxic waste sites and concluded that a community's racial composition was the strongest predictor of a hazardous waste facility's location."[51] Johnson's efforts, along with the UCC report, led to President Bill Clinton's Executive Order Number 12898.[52] Entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," the Order mandated that federal agencies "identif[y] and address[], as appropriate, disproportionately high and adverse human health or environmental effects of [their] programs . . . ."[53]

Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement, 86 CAL. L. REV. 775 (1998).

44. SHRIVER CTR. ON POVERTY L. & EARTHJUSTICE, *supra* note 36, at 22.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 23.

49. *Id.* at 24.

50. *Id.*

51. *Id.* (citing BENJAMIN F. CHAVIS JR. & CHARLES LEE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (United Church of Christ, 1987)).

52. SHRIVER CTR. ON POVERTY L. & EARTHJUSTICE, *supra* note 36, at 23; Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

53. Exec. Order No. 12898, 59 Fed. Reg. 7629, 7629 (Feb. 16, 1994) ("Agency Responsibilities[:] [t]o the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United

The federal approaches to discriminatory siting have been meager at best. Despite President Clinton's Executive Order, there has been no coordinated federal agency response to environmental justice.[54] Congress has not passed substantive legislation to mitigate discriminatory siting's effects on communities of color.[55] EJ plaintiffs often struggle to illuminate discriminatory intent undergirding siting decisions, and the government can easily point to a non-discriminatory motive for its siting decision to conceal intent.[56] Additionally, proving discrimination under disparate impact theory—that is, showing the siting's discriminatory effect as opposed to intent—is not an option for plaintiffs under Title VI of the Civil Rights Act and the Equal Protection Clause.[57] Recent proposed federal EJ legislation sought to amend Title VI to codify disparate impact theory, but it later stalled. The federal government has, for the most part, implicitly decided that environmental justice is a local issue to be left to the "laboratory of the states."[58] Whereas environmental justice has received comparatively little federal legislative support, the FHA has its roots in a federal mandate to address housing inequality.

B. The Fair Housing Act: A Broad Remedial Tool with an Uncertain Scope

Congress enacted the FHA, also known as Title VIII of the Civil Rights Act of 1968, to strengthen federal protections against

States . . . .").

54. Harrison, *supra* note 13.

55. *See* Jacob Elkin, *Environmental Justice and Pennsylvania's Environmental Rights Amendment: Applying the Duty of Impartiality to Discriminatory Siting*, 11 COLUM. J. RACE & L. 195, 230 (2021) (describing how the Environmental Equal Rights Act of 1993 was an example of an "unsuccessful attempt . . . to incorporate racial criteria into evaluations of siting approvals.").

56. Maria Ramirez Fisher, *On the Road from Environmental Racism to Environmental Justice*, 5 VILL. ENV'T L.J. 449, 469 n.116 (1994).

57. *See* Elkin, *supra* note 55, at 197–98 ("Under modern Equal Protection Clause jurisprudence, governmental actions with racially disproportionate impacts are unconstitutional only when the government acted with an intent to discriminate. Similarly, Title VI of the Civil Rights Act does not provide a private right of action to combat discrimination unless the plaintiff can prove the governmental agent in question acted with discriminatory intent.").

58. Robert J. Klee, *What's Good for School Finance Should Be Good for Environmental Justice: Addressing Disparate Environmental Impacts Using State Courts and Constitutions*, 30 COLUM. J. ENV'T L. 135, 158–60 (2005) (describing how the "implicit decision to leave environmental justice issues to the 'laboratory' of the states" could in theory initiate states' expansion of plaintiffs' rights to oppose discriminatory siting and influence federal court decisions through a "new national consensus" but that this argument fails because environmental justice "primarily results from failed local political processes").

housing discrimination.[59] President Lyndon Johnson established the Kerner Commission in 1967 to evaluate the "origins of the recent major civil disorder in our cities," and in 1968, the Commission recommended legislation targeting housing discrimination.[60] Amidst civil unrest arising from Dr. Martin Luther King, Jr.'s assassination, Congress passed the FHA into law.[61]

The FHA authorized HUD to investigate claims of housing discrimination, sue discriminating entities, and to "affirmatively" encourage housing integration by promoting "truly balanced and integrated living patterns."[62] Isolated in substandard housing, people of color were the Act's primary intended beneficiary.[63] Marginalized residents were subject to both private and public housing discrimination.[64] For example, these residents were not only confined to economically depressed neighborhoods because of private racial covenants, but they also could not obtain federally-backed mortgage loans due to redlining and lending discrimination.[65]

Courts have applied the FHA to a broad range of discriminatory housing practices. Following the Supreme Court's mandate in *Trafficante v. Metropolitan Life Insurance Company*[66] to afford private litigants "very broad standing . . . to challenge discrimination,"[67] courts have applied the FHA to "racial steering, race-based appraisal practices, redlining, exclusionary zoning and planning, public housing site selection and demolition, and

59. Chloe K. Bell, The Lasting Impact of Housing Discrimination on Industrial Development, Environmental Injustice, and Land Use 1–23 (Oct. 1, 2021) (unpublished manuscript) (on file with IIT Chicago-Kent College of Law); *see* Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOCIO. F. 571 (2018).

60. Exec. Order No. 11365, 3 C.F.R. § 674 (1966–1970); Spencer Bailey, *Winning the Battle and the War Against Housing Discrimination: Post-Acquisition Discrimination Claims Under the Fair Housing Act*, 28 J. AFFORDABLE HOUS. & CMTY. DEV. L. 223, 227 (2019).

61. Bailey, *supra* note 60, at 227–28.

62. Myron Orfield & William Stancil, *Challenging Fair Housing Revisionism,* 2 N.C. C.R. L. REV. 32, 58 (2022); Massey, *supra* note 10 at 575; Raphael W. Bostic & Arthur Acolin, *Affirmatively Furthering Fair Housing: The Mandate to End Segregation*, *in* THE FIGHT FOR FAIR HOUSING 189 (Gregory D. Squires ed., 2017).

63. *See* Orfield & Stancil, *supra* note 62, at 33.

64. *Id.*

65. *Id.* at 65.

66. 409 U.S. 205, 212 (1972) ("We can give vitality to §810(a) [of the Fair Housing Act] only by a generous construction . . . .").

67. Restoring Affirmatively Furthering Housing Definitions and Certifications, 86 Fed. Reg. 30781 (proposed June 10, 2021) (to be codified at 24 C.R.R. pts. 5, 91, 92, 570, 574, 576, 903) (explaining the FHA's "broad remedial purpos[e]" within the context of the Affirmatively Furthering Fair Housing rule).

discriminatory community development activities."[68] The FHA's broad implementation notwithstanding, uncertainty accompanying the Act's scope is twofold. Scholars question what forms of discrimination the FHA reaches and debate whether the Act's purpose was to affirmatively integrate development or prevent segregation.[69] The former issue stems from the FHA's textual ambiguity and implicates EJ plaintiffs' capacity to prove discrimination in discriminatory siting cases.[70]

C. Proving Discriminatory Siting and Plaintiffs' Challenges

Although there are benefits to bringing EJ claims under the Fair Housing Act as opposed to Title VI of the Civil Rights Act of 1964, namely that an FHA claim does not require the municipality sued to be a recipient of federal funding,[71] EJ plaintiffs face myriad challenges in bringing discriminatory siting cases under the FHA.[72] The first barrier to recourse is the *McDonnell Douglas* burden-shifting framework courts have established for FHA discrimination claims.[73] Not only is it challenging for EJ plaintiffs to prove discriminatory intent when a siting practice appears facially neutral or non-discriminatory, but it is also difficult for plaintiffs to show that siting will have a discriminatory *effect* on a particular community—that is, whether siting will disparately impact that community absent of intent. As such, *very* few discriminatory siting

68. Alice L. Brown & Kevin Lyskowski, *Environmental Justice and Title VIII of the Civil Rights Act of 1968 (The Fair Housing Act)*, 14 VA. ENV'T L.J. 741, 743 (1995).

69. *Compare* Orfield & Stancil, *supra* note 62 (arguing that the FHA's requirement of the federal government to ensure racial integration is well established), *with* EDWARD G. GOETZ, THE ONE-WAY STREET OF INTEGRATION (2018) (arguing that the FHA does not require the federal government to actively pursue integration but instead emphasizes its role in community development).

70. *See* Brown & Lyskowski, *supra* note 68, at 743–44.

71. *The Fair Housing Act (FHA): A Legal Overview*, CONG. RSCH. SERV. (Feb. 2, 2016), https://crsreports.congress.gov/product/pdf/RL/95-710 [https://perma.cc/7QF7-8HYV].

72. *Id.*

73. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (establishing the burden-shifting framework for discrimination cases under Title VII of the Civil Rights Act of 1964). This same burden-shifting framework is applied to FHA discrimination claims. *See* U.S. DEP'T HOUS. & URB. DEV. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, CHAPTER 2: THEORIES OF DISCRIMINATION, TITLE VIII COMPLAINT INTAKE, INVESTIGATION, AND CONCILIATION WORKBOOK (8024.1). If the plaintiffs meet their prima facie burden to show an act was discriminatory by a preponderance of the evidence, the burden shifts to defendants to "articulate some legitimate, nondiscriminatory reason" for its action. *Id.* "[I]f the defendant satisfies this burden, the plaintiff has the opportunity to prove by a preponderance of evidence that the legitimate reasons asserted by the defendant are in fact mere pretext." *Id.*

cases have been tried in court under the FHA and even fewer have prompted a HUD investigation. Additionally, HUD has lacked certainty about its jurisdictional capacity and an overall strategy to investigate claims and make referrals to the Department of Justice (DOJ).

i. *Arlington Heights* and Discriminatory Intent

The Supreme Court established the legal framework for proving discriminatory intent in FHA and Title VI cases in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.[74] In this seminal case, the Court established six factors a court may consider to find circumstantial evidence probative of intent.[75] A court or agency utilizes these factors to assess whether plaintiffs have met their *McDonnell Douglas* burden of showing that a "discriminatory purpose motivated a [defendant's] actions . . . ."[76] These factors include: (1) "[s]tatistics demonstrating a 'clear pattern unexplainable on grounds other than' discriminatory ones"; (2) "[t]he historical background of the decision"; (3) "the specific sequence of events leading up to the challenged decision"; and (4) "[d]epartures from . . . normal procedures."[77]

In discriminatory siting cases there is often a lack of both direct and circumstantial evidence of decisionmakers' racial bias for siting polluting industry in a particular area.[78] For example, under the "historical background" factor, plaintiffs may fail to show that previous siting of undesirable land uses was made by the same public entity and thus probative of discriminatory intent.[79] Such evidence may be stored away in historical records where it is difficult to find. Under the "sequence of events" and "departures" factors, plaintiffs struggle to prove the entity "violated any procedural or substantive requirements."[80] Adding to plaintiffs' struggles to meet their own burden of proof, courts frequently

74. 429 U.S. 252 (1977).

75. *Id.* at 266–68; *see* U.S. DEP'T OF JUST., *Title VI Legal Manual: Section VI: Proving Discrimination – Intentional Discrimination* (providing helpful overview of the *Arlington Heights* factors for the burden-shifting framework within Title VI discrimination analysis).

76. *Title VI Legal Manual: Section VI*, *supra* note 74.

77. *Id.*

78. Foster, *supra* note 23, at 139; *see* R.I.S.E. v. Kay, 768 F. Supp. 1141 (E.D. Va. 1991), *aff'd* 977 F.2d 573 (4th Cir. 1992).

79. Melissa Kiniyalocts, *Environmental Justice: Avoiding the Difficulty of Proving Discriminatory Intent in Hazardous Waste Siting Decisions* 12 (Univ. of Wis. Land Tenure Ctr. Working Paper no. 36, 2000).

80. *Id.* at 11–12.

accept facially neutral, nondiscriminatory reasons defendants cite for placing polluting industry in a certain area.[81] Examples include a site being previously zoned for industry or the site's close proximity to transportation routes for industrial vehicles.[82]

ii. *Inclusive Communities* and Disparate Impact

Compared to discriminatory intent, the burden of proof for FHA disparate impact claims is considerably lower for EJ plaintiffs. Therefore, these claims are more common. In *Texas Department of Housing & Community Affairs Project v. Inclusive Communities Project*, the Supreme Court ruled that disparate impact claims are cognizable under the FHA.[83] The ruling affirmed previous appellate decisions that had recognized the legitimacy of such claims.[84] Under a disparate impact claim, an EJ plaintiff may show discrimination by first providing evidence that the siting of polluting industry has a disparate adverse impact on communities of color in low-income and federally subsidized housing. The burden then shifts to the municipality to show that it had a legitimate, non-discriminatory reason for its siting decision.

Unlike with a discriminatory intent claim, plaintiffs do not bear the burden of showing direct, circumstantial, or other evidence of intent. Instead, they must prove an act's negative effects. This is useful with facially neutral laws and policies.[85] Plaintiffs may meet their burden of proof with statistical evidence that the siting would disproportionately limit the availability of housing and harm the wellbeing of Black families, for example.[86]

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81. Foster, *supra* note 23, at 139.

82. *Id.*

83. 576 U.S. 519, 521 (2015) ("Suits targeting unlawful zoning laws and other housing restrictions that unfairly exclude minorities from certain neighborhoods without sufficient justification are at the heartland of disparate-impact liability.").

84. *See* Bradley Pough, *Neighborhood Upzoning and Racial Displacement: A Potential Target for Disparate Impact Litigation*, 21 U. PA. J.L. & SOC. CHANGE 267, 273–74, 280–81 (2018).

85. Brian Connolly, *Promise Unfulfilled? Zoning, Disparate Impact, and Affirmatively Furthering Fair Housing*, 48 URB. L. 785, 803 (2016).

86. *See* Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Anti-Discrimination Principle*, 47 EMORY L.J. 409 (1998).

II. Analysis

A. Implications of the General Iron Case

HUD's Letter of Findings in *Southeast Environmental Task Force v. City of Chicago* may signal HUD's willingness to investigate discriminatory siting claims under several civil rights statutes.[87] The Department began its investigation of the General Iron metal recycling facility's proposed relocation in October 2020.[88] In its complaint, the environmental non-profit Southeast Environmental Task Force claimed that the city discriminated on the basis of race and national origin by facilitating the relocation of the facility from Lincoln Park, a predominantly white neighborhood on Chicago's Northside, to its predominantly Black and Latine Southside.[89] After General Iron announced its plan to relocate in 2018, the City provided a slew of regulatory permits enabling the relocation.[90] In May 2021, however, the EPA recommended the City reconsider the facility's environmental impact, and the City denied General Iron's final permit in February 2022.[91]

HUD's investigation, which concluded in July 2022, found that the City violated Title VI and the Community Development Act of 1974 by supporting the proposed relocation even though it knew the facility would worsen Southside residents' environmental burdens.[92] The Letter states that the City "pushed hard for the relocation" by "pressur[ing] General Iron to close its lawfully operated North Side facility," and took responsibility for the relocation through a press release.[93] The Letter asserts that the facility's relocation would disparately impact marginalized residents under *Arlington Heights* by "bring[ing] environmental benefits to a neighborhood that is 80% White and environmental harms to a neighborhood that is 83% Black and Hispanic."[94] In addition to claiming that the City worked closely with General Iron and departed from normal permitting procedures, the Letter also alleges that the City "continued a historical pattern and broader

87. 42 U.S.C. § 2000d; 42 U.S.C. § 5309; 42 U.S.C. §§ 3601–19.

88. Env't Task Force v. City of Chicago, Case No. 05-20-0419-6/8/9, 2 (U.S. Dep't of Hous. & Urb. Dev. July 19, 2022) (Letter of Finding of Noncompliance with Title VI and Section 109).

89. *Id.*

90. *Id.* at 3.

91. *Id.* at 2.

92. *Id.* at 18.

93. *Id.* at 7.

94. *Id.* at 17.

policy of directing heavy industry to Black and Hispanic neighborhoods" by facilitating the relocation.[95]

Although HUD's Letter did not find the City of Chicago violated the FHA, it provides a helpful framework for HUD to investigate similar discriminatory siting claims under the Act. The evidentiary standards for proving both Title VI and FHA discrimination are nearly identical. Disparate impact liability, however, is a unique option for FHA plaintiffs unavailable to Title VI plaintiffs.[96] The six non-exhaustive *Arlington Heights* factors the Letter cites are the same criteria used for FHA analysis.[97] The fact pattern in Chicago, moreover, is similar to those elsewhere: when a municipality zones for industry in a marginalized neighborhood, there is a corollary of *not* zoning for industry in white neighborhoods.[98] Based on the Letter alone, HUD could apply similar reasoning in its analysis of the plaintiffs' FHA claim. Why HUD has delayed processing of the plaintiffs' FHA claim is unknown, but it likely has concerns about its jurisdiction for investigating and making a finding of housing discrimination when the underlying facts are environmental in nature.

B. The FHA's Statutory Text

i. Affirmatively Furthering Fair Housing (AFFH) and Implementing Regulations & HUD Objectives

Another highly consequential FHA tenet is the Affirmatively Furthering Fair Housing provision.[99] Section 3608(d) requires HUD to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies" of the FHA.[100] This mandate "aims to overcome the effect of historical patterns of segregation and prevent the continuation of segregated communities."[101] It is commonly held that 3608(d) encourages "proactive integration of housing" through government policies and not simply abolishing discrimination, although

95. *Id.*

96. *See Title VI Legal Manual: Section VI*, *supra* note 74.

97. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

98. Flint Rising v. Genesee Twp., HUD Administrative Complaint (Dec. 15, 2021).

99. *See generally* Bostic & Acolin, *supra* note 63 (outlining the AFFH mandate's history and its renewed regulatory implementation).

100. 42 U.S.C. § 3608(e)(5).

101. Bostic & Acolin, *supra* note 62, at 190.

arguments favoring the latter proposition have become more common.[102]

While HUD actively pursued its first FHA mandate to investigate discrimination claims through its Office of Fair Housing and Equal Opportunity (FHEO), fewer resources have been devoted to carrying out its AFFH mandate.[103] 'Analyses of Impediments' are reports jurisdictions receiving HUD funding develop to assess the status of housing choice and housing segregation within their communities.[104] They also detail localities' plans to affirmatively further fair housing.[105] Prior to 2015, HUD scarcely monitored Analyses of Impediments.[106] Grantees of HUD grant programs, such as the Community Development Block Grant (CDBG), are required to perform these analyses.[107] Thus, in 2015, HUD promulgated a rule mandating its funding recipients to complete various fair housing assessments and commit to standards governing neighborhood segregation, lack of housing choice, and housing access.[108] After the Trump Administration suspended the rule's implementation, the Biden Administration reinstated the rule in 2021[109] and simplified it in 2023.[110] HUD committed to leveraging the 2015 rule to carry out EJ policy in its 2016 to 2020 Environmental Justice Strategy.[111]

ii. 42 U.S.C. §§ 3604 (a)–(b) and Post-Acquisition Discrimination

The first two provisions of the FHA, Sections 3604(a) and (b), are relevant for determining whether the Act reaches "post-acquisition conduct," or discrimination *after* a person has taken possession of the property.[112] Section 3604(a) bars "any

102. Orfield & Stancil, *supra* note 62, at 41–45, 61.

103. Bostic & Acolin, *supra* note 62, at 190, 195.

104. U.S. DEP'T HOUS. & URB. DEV. OFF. FAIR HOUS. & EQUAL OPPORTUNITY, FAIR HOUSING PLANNING GUIDE, 4-2 (VOL. 1).

105. *Id.*

106. Bostic & Acolin, *supra* note 62, at 195.

107. *Id.* at 196.

108. *Id.* at 197–99; Press Release, Department of Housing and Urban Development, HUD Restores Affirmatively Furthering Fair Housing Requirement (June 10, 2021).

109. Reinstatement of HUD's Discriminatory Effects Standard (to be codified at 24 C.F.R. pt. 100).

110. 24 C.F.R. pt. 100 (2023).

111. U.S. DEP'T HOUS. & URB. DEV., HUD ENVIRONMENTAL JUSTICE STRATEGY 2016–2020, DRAFT VERSION FOR PUBLIC COMMENT (2016).

112. *See, e.g.*, Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1 (2008); Aric

discriminatory conduct that has the effect of depriving people of housing," such as "harassment or discriminatory terms and services," so long as the behavior has the effect of "making housing unavailable."[113] Plaintiffs frequently employ 3604(a) in cases involving discriminatory real estate transactions and advertising.[114] Section 3604(b) states that it is unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services of facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."[115]

While many courts have found 3604(a) and (b)'s language applicable to post-acquisition conduct, others have held the provisions do not apply.[116] The Seventh Circuit's decision in *Halprin v. Prairie Single Family Homes of Dearborn Park Association* was the first to discuss 3604's temporal limitations.[117] The court established a narrow reading of 3604(a) and (b) by holding that the provisions only implicated conduct related to access to housing.[118] In a subsequent case reversing *Halprin*, the Seventh Circuit in *Bloch v. Frischholz* held on rehearing that discriminatory conduct under 3604(a) need not relate to the "physical condition of the premises" and that discrimination may make housing unavailable after possession.[119] There, residents sued their condominium

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Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203 (2006).

113. Oliveri, *supra* note 111, at 20; 42 U.S.C. § 3604(a) (stating that it is unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.").

114. *See, e.g.*, Shivangi Bhatia, *To "Otherwise Make Unavailable": Tenant Screening Companies' Liability Under the Fair Housing Act's Disparate Impact Theory*, 88 FORDHAM L. REV. 2551, 2566–80 (2020) (analyzing Section 3604's application to tenant screening companies' FHA liability).

115. 42 U.S.C. § 3604(b).

116. *See, e.g.*, Treece v. Perrier Condo. Owners Ass'n, 2022 WL 860418 (E.D. La. Mar. 23, 2022) (citing Cox v. City of Dall., 256 F.3d 281 (5th Cir. 2005)) (holding that 3604(a) reaches post-acquisition conduct, stating, "[a]s other circuit courts have noted, 'nothing in section 3604 limits its scope to discriminatory conduct occurring before or at the time of signing a lease.'"). The Department of Justice also supports the view that 3604(a) reaches post-acquisition discrimination. *See* UNITED STATES STATEMENT OF INTEREST *in* Drayton v. McIntosh Cnty., Ga., 2016 WL 3963063 (S.D. Ga. Apr. 21, 2016).

117. Bailey, *supra* note 60, at n.100; *see* Jessica D. Zietz, *On Second Thought: Post-Acquisition Housing Discrimination in Light of* Bloch v. Frischolz, 66 U. MIAMI L. REV. 495, 505–06 (2012).

118. Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 329 (7th Cir. 2004) ("The Fair Housing Act contains no hint either in its language or its legislative history of a concern with anything but *access* to housing.").

119. Bloch v. Frischholz, 587 F.3d 771, 777 (7th Cir. 2009) (en banc) (clarifying

association for religious and racial discrimination when association rules prohibited them from placing a Jewish mezuzah in the hallway.[120] While the *Halprin* decision aligned with precedent affirming 3604(a)'s exclusive coverage of conduct preventing *acquisition* of property,[121] the court's suggestion in *Halprin* that 3604 applied to constructive eviction[122] led the *Bloch* court to reach the opposite conclusion about 3604(a)'s reach.[123] The *Bloch* court did not provide a definitive answer on 3604(b)'s reach.[124]

As for 3604(b), while some have held that a "privilege" extends to a person's inhabiting of the property, others have limited this language to the initial "sale or rental of a dwelling."[125] Likewise, some courts have held that "services" include only those associated with the initial possession, whereas others extend "services" to those pertaining to one's use and enjoyment of their property.[126] The variance centers on the meaning of the phrase "in connection therewith."[127] If it is "unlawful . . . to discriminate . . . in the provision of services or facilities in connection [with the sale or rental of a dwelling]," then post-acquisition discrimination (after sale or rental) is *outside* of 3604(b)'s scope.[128] If it is unlawful to discriminate "in the provision of services or facilities in connection [with a dwelling]," then it is *within* 3604(b)'s scope.[129]

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that "[a] defendant can engage in post-sale practices tantamount to 'redlining' that make a plaintiff's dwelling 'unavailable,'" thereby reversing an earlier panel decision that did not apply 3604 to post-acquisition discrimination).

120. *Id*.

121. *Id.* at 328–29 (citing NAACP v. Am. Family Mutual Ins. Co., 978 F.2d 287 (7th Cir. 1992)); San Pedro Hotel Co. v. City of L.A., 159 F.3d 470 (9th Cir. 1998); Hamad v. Woodcrest Condo. Ass'n, 328 F.3d 224, 229–31 (6th Cir. 2003); Hogar Agua y Vida en el Desierto Inc., 36 F.3d 177 (1st Cir. 1994); *contra* Trafficante v. Metro. Life. Ins. Co., 409 U.S. 205 (1972) (reasoning that "[t]he language of the Act is broad and inclusive," the Supreme Court applied the FHA to post-acquisition discrimination, albeit without analysis of the FHA's statutory language).

122. *Bloch*, 587 F.3d at 329.

123. *Bloch*, 587 F.3d 771 (overruling *Halprin*, 388 F.3d 327).

124. *See* Bailey, *supra* note 60, at 240.

125. Benjamin A. Schepis, *Making the Fair Housing Act More Fair: Permitting Section 3604(b) to Provide Relief for Post-Occupancy Discrimination in the Provision of Municipal Services–A Historical View*, 41 TOL. L. REV. 411–12 (2010).

126. *Compare Cox*, 256 F.3d 281, *with* Comm'n Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 713 (9th Cir. 2009) ("There are few 'services or facilities' provided at the moment of sale, but there are many 'services or facilities' provided to the dwelling associated with the occupancy of the dwelling. Under this natural reading, the reach of the statute encompasses claims regarding services or facilities perceived to be wanting after the owner or tenant has acquired possession of the dwelling.").

127. *City of Modesto*, 583 F.3d at 711.

128. *Id.*

129. *Id.*

Yet more courts have also examined the issue of 3604's scope. The D.C. Circuit in *Webb v. U.S. Veterans Initiative* held that 3604(a) prohibited post-acquisition discrimination when the District discriminated against Latine tenants by selectively enforcing housing code violations.[130] The Fifth Circuit in *Cox*, by contrast, rejected the plaintiffs' argument that 3604(a) and (b) applied to post-acquisition discrimination involving illegal dumping in their predominantly Black neighborhood. It reasoned that the City's enforcement of its zoning laws, if a "service" under 3604(b), was not "connected" to the "sale or rental of a dwelling," remarking that holding otherwise would "[create] rights for any discriminatory act which impacts property values."[131] Solidifying its aforementioned *Webb* decision, the D.C. Circuit made nearly identical arguments to deny relief in *Clifton Terrace Associations v. United Technologies Corporation*.[132] In 2019, the Eleventh Circuit differed from *Cox*, as did the Ninth Circuit in 2009, in holding that 3604 did reach post-acquisition discrimination.[133] The Ninth Circuit notably held that 3604(b) did not require a constructive eviction.[134] In *Doe v. County of Kankakee*, the District Court for the Northern District of Illinois held that renters proved racial discrimination under 3604(a) when "aggressive anti-drug policing . . . made housing unavailable" to marginalized residents.[135] Section 3604(b) has also been held actionable in post-acquisition claims involving denial of pool access and janitorial services.[136]

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130. *See* Rachel Smith, *Policing Black Residents as Nuisances: Why Selective Nuisance Law Enforcement Violates the Fair Housing Act*, 34 HARV. J. RACIAL & ETHNIC JUST. 87, 108–09 (2018); 2922 Sherman Ave. Tenants Ass'n v. Dist. of Columbia, 444 F.3d 673, 685 (D.C. Cir. 2006) (holding that prohibiting tenants' occupancy after possession makes housing "unavailable"); Webb v. U.S. Veterans Initiative, 993 F.3d 970 (D.C. Cir. 2021) ("As our sister circuits have held, nothing in section 3604 limits its scope to discriminatory conduct occurring before or at the time of signing a lease.").

131. Cox v. City of Dall., 430 F.3d 734, 745–46 (5th Cir. 2005).

132. 929 F.2d 714 (D.C. Cir. 1991).

133. Georgia State Conference of the NAACP v. City of Lagrange, 940 F.3d 627, 632 (11th Cir. 2019) ("The statute does not contain any language limiting its application to discriminatory conduct that occurs prior to or at the moment of the sale or rental."); *City of Modesto*, 583 F.3d at 713 ("[W]e conclude that the [FHA] reaches post-acquisition conduct discrimination.").

134. *City of Modesto*, 583 F.3d at 713.

135. Smith, *supra* note 129 at 109; *see* Doe v. County of Kankakee, 2004 WL 1557970 (N.D. Ill. July 8, 2004).

136. *See* Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act,* 58 ALA. L. REV. 203 (2006) (providing examples of 3604(b)'s application to post-acquisition harassment as well as its disability provisions, (f)(1) and (f)(2)).

C. Support for HUD's Investigative Jurisdiction for Discriminatory Siting Claims Under the FHA

i. The Statutory Text of §§ 3604(a)–(b) Supports HUD's Investigation of Discriminatory Siting Claims as Claims of Housing Discrimination

Insofar as discriminatory siting "make[s] housing unavailable,"[137] and interferes with "privileges" and "services"[138] for marginalized residents in low-income and federally subsidized housing, the statutory text of 3604(a) and (b) warrants investigation of these claims under the FHA.[139] Discriminatory siting occurs where these communities already exist, suggesting that discrimination claims are typically actionable only if post-acquisition claims are within 3604's scope.[140] Notwithstanding the aforementioned circuit split, HUD has long viewed post-acquisition discrimination as actionable under 3604.[141] Therefore, the circuit split should not limit HUD's willingness to investigate under FHA Section 1983.[142]

As a practical matter, discriminatory siting can "make housing unavailable" by impacting marginalized residents' ability to live in low-income and federally subsidized communities.[143] For example, if the siting of an asphalt plant near a Section 8 or public housing development spews harmful emissions that make it harder for residents to breathe or go outside, then the siting "make[s] housing unavailable" by affecting the habitability of residents' homes.[144] Since Section 8 residents' vouchers are project-based, and thus tied to a particular development, there can be no actual eviction since

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137. 42 U.S.C. § 3604(a); Oliveri, *supra* note 111, at 20.

138. 42 U.S.C. § 3604(b).

139. *Id.*

140. *Id.*

141. *See, e.g.*, Brief for the United States as Amicus Curiae in Support of Plaintiffs-Appellants at 8, Paulk v. Ga. Dep't of Transp. (11th Cir. 2016) (No. 16-13406-D) ("Courts have applied the FHA to post-acquisition discrimination for more than two decades."); United States of America's Statement of Interest at 4, Drayton v. McIntosh Cnty., Ga. (S.D. Ga. 2016) (No. 2:16-CV-53) ("The language of the FHA and HUD's implementing regulations clearly support the application of the FHA to post-acquisition conduct.").

142. *Cf.* 42 U.S.C. § 1983 (permitting individuals deprived of their civil rights under the Fair Housing Act and other civil rights statutes to seek relief, including via the administrative process).

143. *See* Rossen & Pollack, *supra* note 21; Oliveri, *supra* note 111, at 20.

144. *See* United States of America's Statement of Interest, *supra* note 140, at 26 n.7 (citing *Bloch*, 587 F.3d at 777, to assert that 3604(a) prevents discrimination that "make[s] unavailable or denies" housing).

residents do not have the choice of moving.[145] The same applies to public housing residents, whose only option is to relocate to another public housing development, and to low-income tenants, who might only be able to afford rent in that particular neighborhood. However, since constructive eviction suffices to make housing unavailable under 3604(a), no actual eviction is required in HUD's view.[146]

Discriminatory siting can also interfere under 3604(b) with "privileges" of housing associated with housing's availability. *City of Modesto* clarified that "[t]he inclusion of the word 'privileges' implicates continuing rights, such as the privilege of quiet enjoyment of the dwelling."[147] Judicial interpretations of similar "privilege" language in Title VII of the Civil Rights Act of 1964 support this reading.[148] Since HUD also supports this interpretation, it is reasonable that discrimination affecting the privilege of quiet enjoyment should be actionable and thus investigated. Using the same asphalt plant example, if the plant's noxious fumes make it difficult for marginalized residents to breathe or to go outside, this interferes with the "privilege" of quiet enjoyment of their dwelling.[149] If the same plant contaminates marginalized residents' water source or interferes with sewer access, then this could constitute interference with those residents' municipal "services."[150] Again, since HUD's position is that 3604(b) applies to post-acquisition discrimination, some courts' interpretations that 3604(b) discrimination is only actionable as it relates to the "sale or rental" of a dwelling is not a limiting factor.[151]

Critics of applying the FHA to discriminatory siting and environmental justice more generally may argue that it is impossible to gauge when a siting makes housing unavailable, interferes with privileges of a dwelling, or restricts access to municipal services. In theory, whether a constructive eviction occurs may depend on emissions and other data determining

145. POISONOUS HOMES, *supra* note 36, at 15.

146. United States of America's Statement of Interest, *supra* note 140, at 26 n.7.

147. *City of Modesto*, 583 F.3d at 713.

148. United States of America's Statement of Interest, *supra* note 140, at 12.

149. Roger Pilon, *Property Rights and the Constitution*, CATO INST. (2017), https://www.cato.org/cato-handbook-policymakers/cato-handbook-policy-makers-8th-edition-2017/property-rights-constitution [https://perma.cc/G4ZV-JSZ4] ("Thus, a principled approach respects equal rights of quiet enjoyment—and hence environmental protection.").

150. *Id.*

151. *City of Modesto*, 583 F.3d 690.

residents' health and safety within their home.[152] Moreover, evaluating whether a constructive eviction occurs and whether a siting harms residents' use and enjoyment of their dwelling is a subjective exercise. Both arguments are sound and highlight the evidentiary barriers to proving discrimination. However, even if plaintiffs in some cases have tepid claims and cannot prove how siting is discriminatory, this does not affect HUD's jurisdictional and investigative authority. HUD has authority to investigate weaker claims and find that siting was *not* violative of the FHA. Lastly, plaintiffs' showing of a constructive eviction may not be sufficient to prove discrimination by itself. They must also show that a municipality intentionally discriminated in siting polluting industry in their neighborhood or that the siting has a discriminatory effect.

ii. HUD's Discriminatory Intent and Effect Standards Demonstrate HUD's Capacity to Investigate Discriminatory Siting as a Zoning Issue That Impacts Housing

Discriminatory Siting as a Land Use and Zoning Matter That HUD Has Authority to Investigate

Discriminatory siting is inherently a zoning issue insofar as local governments use and modify land use plans to site polluting industry near low-income communities of color in affordable and federally subsidized housing.[153] As a function of Euclidean zoning, in which municipalities separate land uses using zoning powers, low-income and multi-family communities are located apart from single-family districts, as are industrial ones from residential.[154] Consequentially, disparate environmental impacts are created when a developer or municipality zones for polluting industry, an 'unwanted land use.'[155] This is because, while industry may not be sited near single-family housing, it is instead sited near marginalized communities in multi-family and affordable housing.[156] Look no further than Chicago, where HUD found the City used its land use and permitting powers to site the General

152. Oliveri, *supra* note 111, at 24.

153. Patricia E. Salkin, *Environmental Justice and Land Use Planning and Zoning*, 32 REAL EST. L.J. 429, 430–31 (2003).

154. *See id*. at 238.

155. *Id.*

156. *See id.*

Iron plant near low-income communities of color.[157] Although HUD has yet to determine any FHA violation in that case, its findings of discrimination indicate the Department's view that siting decisions, as land use decisions, can be discriminatory.

HUD has jurisdictional authority to investigate land use decisions. Section 8024.1 of HUD's *Title VIII Complaint Intake, Investigation, and Conciliation Handbook* outlines rules HUD investigators should follow to determine HUD's jurisdiction for a complaint.[158] In the section entitled "Timeliness and Continuing Violations," addressing those violations that are "continuing in nature," the handbook notes "[d]iscriminatory zoning ordinances are one example" and provides a timeframe for complainants to make a timely complaint.[159] Later, in the section entitled "Activities Prohibited Under Section [3604]," the handbook states HUD "has jurisdiction to accept and investigate complaints of discriminatory application of zoning codes . . . ."[160] It also states that complainants alleging "manipulation of zoning codes" should file complaints under 3604(a) and 3604(b).[161] Insofar as siting involves discriminatory application of zoning codes to place polluting industry near low-income housing, HUD has authority to investigate claims of discrimination.

HUD's Discriminatory Intent and Disparate Impact Evidentiary Standards

HUD's discriminatory intent and disparate impact standards for FHA enforcement also provide support for its jurisdictional authority to investigate discriminatory siting claims. HUD may effectively use each standard to determine whether a siting is discriminatory. A 2016 Joint Statement by HUD and the DOJ "provide[d] an overview of the [FHA]'s requirements relating to state and local land use practices and zoning laws."[162] The joint statement explicitly lists the *Arlington Heights* factors as criteria for analyzing whether a land use or zoning practice is "enacted with

157. LETTER OF FINDING OF NONCOMPLIANCE, *supra* note 87, at 2.

158. U.S. DEP'T HOUS. & URB. DEV., TITLE VIII COMPLAINT INTAKE, INVESTIGATION, AND CONCILIATION HANDBOOK (8024.1) (2005), https://www.hud.gov/program_offices/administration/hudclips/handbooks/fheo/80241 [https://perma.cc/C6N4-55C2].

159. *Id*. at 3-5.

160. *Id*. at 3-28.

161. *Id*.

162. JOINT STATEMENT OF DEP'T HOUS. & URB. DEV. & DEP'T JUST.: STATE AND LOCAL LAND USE LAWS AND PRACTICES AND THE APPLICATION OF THE FAIR HOUSING ACT (2016) at 1.

discriminatory intent."[163] It also cites the Supreme Court's decision in *Inclusive Communities* to set forth "[t]he standard for evaluating housing-related practices with a discriminatory effect," which is codified in HUD's Discriminatory Effects Rule.[164]

A variety of housing cases illustrate how HUD may utilize its evidentiary standards to investigate discriminatory siting claims. Cases applying *Arlington Heights* or *Inclusive Communities* to zoning and land use decisions demonstrate how siting, as a land use decision, discriminates with either intent (i.e., treatment) or effect. They also demonstrate how siting decisions, like the land use decisions at issue in these cases, affect housing in a discriminatory manner, make housing "unavailable" within the meaning of 3604(a), and interfere with "privileges" and "services" of housing within the meaning of 3604(b).

Avenue 6E Investments, LLC v. City of Yuma

The Ninth Circuit's analysis in *Avenue 6E Investments, LLC v. City of Yuma* is useful for assessment of discriminatory siting claims under a theory of discriminatory intent. There, the first *Arlington Heights* factor, historical background, was particularly relevant. The court considered the defendant's decision to deny a developer's request for a zoning change accommodating a "moderately-priced" housing development in a predominantly white neighborhood.[165] Next, the court assessed the city's "historical patterns of segregation by race and class" and resulting housing stratification to suggest that these patterns were relevant for a showing of discriminatory intent.[166] On summary judgment, the court agreed with the plaintiff that denial of the zoning change request could plausibly have prevented Latine residents from moving to a predominantly white neighborhood, making housing "unavailable" to Latine residents under 3604(a).[167]

Avenue 6E Investments suggests that "historical patterns of segregation" in discriminatory siting cases can show evidence of municipalities' discriminatory intent.[168] Tying industrial siting to

163. *Id.* at 4.

164. *Id.* at 5.

165. Avenue 6E Invs. v. City of Yuma, 818 F.3d 493, 498 (9th Cir. 2016).

166. *Id.* at 508.

167. *See id.* at 508–09. The Ninth Circuit also noted as part of the historical background and "departure" criteria under *Arlington Heights* that the City had ignored its own planning experts' zoning recommendations encouraging it to adopt the developer's zoning request and that it did so to appease constituents' racial animus. *Id.* at 507.

168. *Id.*

housing's location to show that siting "makes housing unavailable" is arduous.[169] Nonetheless, if plaintiffs can show how redlining, flood plain maps, or land use plans formed the siting decision's historical background and caused low-income housing to be situated by polluting industry, or vice versa, this could create presumptive intent.[170] One theory of intent would be that, historically, the municipality made a concerted effort to segregate marginalized residents from white neighborhoods by zoning for low-income housing near industry, or zoning for industry near low-income housing, while *not* zoning for industry in white neighborhoods. Therefore, historical patterns of segregation contribute to making housing "unavailable" to residents in low-income housing because the only housing available to them is near polluting industry, the risks of which jeopardize their health and use and enjoyment of their housing. Even if some, but not all, low-income housing is located near polluting industry, there need not be "a complete absence of desired housing" for residents to make a showing of discrimination.[171] Zoning practices may still be discriminatory if "they *contribute* to . . . mak[ing] housing unavailable" under 3604(a).[172]

Redlining, flood plain maps, and land use plans are forms of circumstantial evidence that may illustrate zoning patterns that confined marginalized residents to certain industrial neighborhoods.[173] On the other hand, even if redlining or land use plans did not *cause* low-income housing's proximity to industry *per*

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169. *Id.*

170. See Kriston Capps & Christopher Cannon, *Redlined, Now Flooding*, BLOOMBERG (Mar. 15, 2021), https://www.bloomberg.com/graphics/2021-flood-risk-redlining/ [https://perma.cc/WWS8-L69G] for a helpful report explaining higher flood risks in historically redlined neighborhoods and the much lower risks in predominantly white neighborhoods. The article's summaries of quantitative data collected by research teams at various nonprofits and academic institutions paints a picture of redlining's harmful effects. While redlining is not the only factor determining industrial siting, it can suggest a pattern of historical discrimination. *See also* Darryl Fears, *Redlining Means 45 Million Americans Are Breathing Dirtier Air, 50 Years After It Ended*, WASH. POST (Mar. 9, 2022), https://www.washingtonpost.com/climate-environment/2022/03/09/redlining-pollution-environmental-justice/ [https://perma.cc/89YZ-SXBE] (giving an in-depth overview of a recent study published in the journal *Environmental Science and Technology Letters*, which found that Black and Latine Americans are more likely to live in formerly redlined areas that are highly polluted when compared with white Americans).

171. *Ave. 6E Invs.*, 818 F.3d at 509.

172. Pac. Shores Props. v. City of Newport Beach, 730 F.3d 1142, 1157 (9th Cir. 2013) (quoting City of Edmonds v. Wash. State Bldg. Code Council, 18 F.3d 802, 805 (9th Cir. 1994)).

173. *Id.*

se, it can still be circumstantial evidence of a "pattern and practice" of racial discrimination, which discriminatory siting continues.[174] While a municipality might argue that the ubiquity of redlining alone could allow HUD to make a finding of discrimination more easily, this is unlikely. The "historical background" element under *Arlington Heights*, for which redlining may suffice in a siting claim, is only one criterion.[175] If redlining is part of a "pattern or practice" of housing discrimination, which the siting of industry perpetuates, a finding of discrimination may be more likely.[176] That said, plaintiffs' evidentiary burden is still difficult to satisfy.

The Ninth Circuit's reasoning in *Avenue 6E Investments* is also useful for siting claims under a disparate impact theory. The City of Yuma's refusal to rezone for multi-family housing created a disparate impact on Latine residents by creating two distinct zoning policies.[177] Given the city's propensity to accept rezoning requests, having not denied any of the seventy-six requests in the three years preceding its decision, one could reasonably infer that the City would grant single-family and other zoning requests in white neighborhoods.[178] Additionally, given the statistical prevalence of Latine residents in "substantially all of the available low- to moderate-income housing," the City's denial would have a "disproportionate effect" on Latine residents' housing access.[179] Even if housing is not 'blocked' in the same way it was in Yuma, evidence of two distinct zoning practices is evidence of a disparate impact in siting cases. If a municipality zones for industry near low-income, marginalized housing but does not in white neighborhoods, this may show disparate impact.

Mhany Management, Incorporated v. County of Nassau

The Second Circuit's decision in *Mhany Management v. County of Nassau* is also useful for assessing how EJ plaintiffs may show a siting decision's discriminatory intent and disparate impact. In *Mhany*, the court held that the County's rezoning of a non-residential area only accommodated single-family zoning, while restricting multi-family housing.[180] Fewer multi-family units would decrease housing options for the majority of families of color in the

174. *Id.*
175. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).
176. *See id.*
177. *Ave. 6E Invs.*, 818 F.3d at 503.
178. *See id.* at 497.
179. *Id.* at 508.
180. Mhany Mgmt., Inc. v. County of Nassau, 819 F.3d 581, 619–20 (2d. Cir. 2016).

county who did not live in single-family homes.[181] This disparate impact on housing availability showed the county's zoning decision's discriminatory effect.[182] As for discriminatory intent, the court considered the "sequence of events" leading up to the zoning decision.[183] It described extensive public opposition against multi-family housing to conclude that the county intended to appease constituents' racially-motivated concerns about "undesirable" housing in their neighborhood.[184]

The Second Circuit did not explain a clear disparity in the County's zoning practices. That is, neither court outlined a policy guiding how the County zoned for housing in neighborhoods of color as opposed to white neighborhoods. However, the Second Circuit's analysis creates an inference that the county would not have rezoned for multi-family housing in single-family districts.[185] In the siting context, EJ plaintiffs may articulate a similar disparate impact. Even if there is no clear, intentional policy for zoning for industry in marginalized neighborhoods versus white neighborhoods, the municipality's decision to site industry near marginalized neighborhoods has the *effect* of concentrating industry there.

Moreover, the court's description of the county's response to public outcry creates an inference that public opinion would not have swayed the County's decision to rezone if it had been marginalized residents complaining about the presence of single-family zoning near multi-family housing.[186] Using this type of inference, EJ plaintiffs may argue that a municipality would not have zoned for industry near housing if it were located in a predominantly white neighborhood. Plaintiffs may also show opposition to affordable housing to prove discriminatory intent in the siting context. Even if this opposition did not occur in the "sequence of events" leading up to the siting decision, it may still serve as "historical background" for the decision.[187] Finding this evidence may require a look at historical records.

181. *Id.*
182. *Id.*
183. *Id.* at 608.
184. *Id.* at 607–08.
185. *Id.*
186. *Id.* at 588, 593, 597, 606.
187. *Id.*

United States v. City of Parma

The Sixth Circuit's decision in *United States v. City of Parma* emphasized the illegality of zoning decisions that have either discriminatory purpose or effect.[188] In that case, Parma, Ohio, residents alleged that the City discriminated against residents by denying building permits for a low-income housing development and by "refus[ing] to submit an adequate housing assistance plan in connection with its application for [Federal] Community Development Block Grant Funds."[189] Municipal officials claimed that the developer of federally subsidized housing "[failed] to comply with Parma's land use ordinances" causing the building permits' denial, but such compliance was not previously required.[190] The court affirmed the lower court's holding that the City had engaged in a "consistent policy of making housing unavailable to [B]lack persons" through both discriminatory intent and effect.[191] One particular ordinance required voter approval for low-income housing construction.[192] Municipal officials' public statements opposing affordable housing and departures from zoning practices contributed to a finding of "a pattern or practice of discrimination" that "ma[de] housing unavailable."[193]

Most notable was the Sixth Circuit's conclusion that although local communities like Parma have the right under *Village of Euclid* "to control land use by zoning ordinances and regulations," those which "have a racially discriminatory effect" violate the FHA.[194] While a siting decision is not a 'housing decision' identical to a denial of a building permit for affordable housing, it is a land use decision that can have the same effect of denying housing in a racially discriminatory manner. Just as a zoning ordinance "makes housing unavailable" to marginalized families by limiting the availability of affordable housing, a zoning ordinance allowing for the siting of industry near marginalized neighborhoods "makes housing unavailable" by constructively evicting residents who must tolerate harmful emissions at home.[195]

188. 661 F.2d 562 (6th Cir. 1981).
189. *Id.* at 566.
190. *Id.* at 567.
191. *Id.* at 568.
192. *Id.* at 567.
193. *Id.* at 575, 568.
194. *Id.* at 575.
195. *Id.*

iii. Investigating Discriminatory Siting Claims is Consistent with HUD's Stated Policy

Aside from HUD's jurisdictional authority, HUD's investigation of discriminatory siting claims would align with its stated goal of creating policy to address EJ concerns. HUD's most recent Environmental Justice Strategy states in its overview that "the mission of [HUD] is to create strong, sustainable, inclusive communities" and that these goals are "intrinsic to the concept of environmental justice."[196] Among goals to help "[i]dentify and address disproportionate environmental and human health impacts faced by low-income communities of color" is goal A.5: "[d]evelop guidance for complaint investigation, compliance reviews, and enforcement of the [FHA]."[197] Seven years later, FHEO has yet to issue such guidance, which it was allegedly "in the process of revising."[198] These stated yet unachieved policy goals suggest that leveraging HUD's investigative authority is in concert with this policy. Addressing discriminatory siting in communities receiving federal funding is also in concert with HUD's policy to "[l]everage the [AFFH] rule" to address environmental justice by enabling federal housing programs to "integrat[e]" segregated communities.[199]

iv. HUD is Given Deference for Its Interpretation of the FHA

Since HUD is entitled to deference for its FHA interpretations, if its investigations find a party discriminatorily sited and violated the FHA, such finding would not run afoul of HUD's regulatory authority. HUD's Letters of Finding are not regulations but are still provided *Chevron* deference.[200] In *City of Arlington v. FCC*, the Supreme Court held that agency jurisdictional determinations are afforded the same deference as other statutory interpretations.[201] In that case, the FCC issued a declaratory ruling specifying the

196. ENV'T JUS. STRATEGY 2016–2020, *supra* note 15, at 9.

197. *Id.* at 12.

198. *Id.*

199. *Id.* at 10.

200. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024). This Article was written and edited prior to the *Loper Bright* decision.

201. City of Arlington v. FCC, 569 U.S. 290 (2013); Daniel T. Shedd & Todd Garvey, *Chevron Deference: Court Treatment of Agency Interpretations of Ambiguous Statutes*, CONG. RSCH. SERV. (Aug. 28, 2013), https://sgp.fas.org/crs/misc/R43203.pdf [https://perma.cc/B2UR-WF37] (describing how *City of Arlington* expanded the scope of the *Chevron* two-step test on page 2 of the report).

number of days for a state or local government to complete review of wireless service facility siting applications.[202] The issue was whether the FCC had authority under the Telecommunications Act of 1996 and "stayed within the bounds of its statutory authority."[203] The Court ruled that the *Chevron* two-step test was the proper method for answering this question.[204]

Here, the question of whether HUD may find a municipality violated the FHA by discriminatorily siting would be a question of HUD's jurisdictional authority in EJ cases. A court would inquire whether the FHA, as HUD's organic statute, defined the FHEO's administrative enforcement powers unambiguously in Section 3610 of the Act.[205] Since that Section does not define a "discriminatory housing practice" warranting investigation, a court would inquire whether HUD's interpretation of discriminatory siting as a "discriminatory housing practice" is permissible. HUD has long investigated municipal land use and zoning decisions, and the Secretary has broad authority to interpret HUD's regulations, which guide HUD's investigative procedure. Therefore, HUD's interpretation of discriminatory siting as within its jurisdiction is within the zone of reasonable interpretation.

Conclusion

For many years, a legal avenue did not exist for EJ plaintiffs to prove discriminatory siting of industry under the FHA either through the courts or administratively.[206] Federal agencies, including HUD, were uncertain of their jurisdiction to investigate discrimination claims and carry out EJ policy. HUD's General Iron Letter of Findings was the first of its kind, and while it left the FHA liability question unanswered, a possible framework exists for HUD to find FHA liability in the future. Using discriminatory intent and disparate impact as tools at its disposal, HUD may investigate discriminatory siting claims in a manner consistent with statutory text and its jurisdictional authority.

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202. *City of Arlington,* 569 U.S. at 293, 297.

203. *Id*. at 291.

204. *Id*. at 297.

205. 42 U.S.C. § 3610 (providing broad authority for the HUD Secretary to investigate housing discrimination and outlining the steps for the Department via the Secretary to receive and investigate complaints).

206. Haberle, *supra* note 7.

The *Batson* Challenge: Evidence, Court Opacity, and Discrimination Before the Supreme Court

Kaitlyn Filip†

Abstract

Research shows that *Batson v. Kentucky* has been largely toothless in terms of creating diverse juries and that the presence of jurors of color, in the event that they are included, can be the difference between acquittal and conviction or, in capital trials, life and death. *Batson* fails to uproot the legacy of white supremacist logics embedded in the criminal legal system, as evidenced through patterns and practices of race-based discrimination in the selection of jurors. The use of *Batson* challenges for creating more equitable trials for defendants of color is greatly contested by scholars. This Article reexamines *Batson* as an evidentiary question and argues that the logic of *Batson*—and the cases that follow—structurally limits courts in a way that reaffirms discriminatory patterns rather than alleviating them.

This Article examines *Batson* and the 2019 case *Flowers v. Mississippi,* focusing how the Supreme Court constructs the evidentiary standard for establishing discriminatory intent in striking potential jurors. I develop the concept of "court opacity," arguing that although the courts are meant to be theoretically public spaces, they are in fact deeply closed off, thus underscoring the impossibility of establishing intent. *Flowers* is illustrative of both our understanding of how systemic discrimination works as well as an example of how the Supreme Court forecloses even that remote option. Using racial bias in jury selection as a case study, I call for increased court transparency in the collection and publication of court data in order to alleviate some of the structural burdens on establishing discrimination.

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Table of Contents

Introduction

A. The Tardy Furniture Murders

On July 16, 1996, four people, three of whom were white, were murdered in a furniture store (Tardy Furniture) in Winona, Mississippi, where a Black man, Curtis Flowers, had worked for four days over the preceding month.[1] The state claimed that Flowers killed the people in Tardy Furniture as revenge for being fired—that he broke into a car, stole a gun, and walked to Tardy where he killed four people and then walked back home.[2] There were no witnesses, the physical evidence did not directly connect to Flowers in particular, and Flowers claimed that he had an alibi and had not, in fact, been fired at all.[3] He was arrested and tried, where the jury deliberated for only sixty-six minutes before sentencing him to death.[4]

Although the case drew substantial attention in Winona, Mississippi, at the time because of the number of victims, the respectability of the establishment (it was on the "good side" of town), and the delay between murder and arrest, this is not a particularly noteworthy case.[5] Black men are regularly arrested for gun violence or in connection to harms against white people without substantial evidence.[6] If anything, it was the existence of a trial that was strange, as approximately 94% of state felony convictions are the result of plea bargains.[7] In addition, there are several state-controlled off-ramps following an arrest that offer alternatives to a full trial.[8]

What made Curtis Flowers's case remarkable is that he went to trial for the same crime five additional times following this initial

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1. Flowers v. Mississippi, 139 S. Ct. 2228, 2232 (2019); In the Dark, *S2 E1: July 16, 1996,* APM REPS. (May 1, 2018), https://www.apmreports.org/episode/2018/05/01/in-the-dark-s2e1 [https://perma.cc/2S2U-QBSN] [hereinafter *Episode 1: July 16, 1996*].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Samuel R. Gross, Maurice Possley, Ken Otterbourg, Klara Stephens, Jessica Weinstock Paredes & Barbara O'Brien, *Race and Wrongful Convictions in the United States: 2022*, NAT'L REGISTRY EXONERATIONS (Sept. 2022), https://www.law.umich.edu/special/exoneration/Documents/Race%20Report%20Preview.pdf [https://perma.cc/G7Y5-N88M].

7. *The Truth About Trials*, MARSHALL PROJECT https://www.themarshallproject.org/2020/11/04/the-truth-about-trials [https://perma.cc/9ZQG-ALNK].

8. *Id.*

sentencing.[9] After the first trial—and the two subsequent ones—the Mississippi Supreme Court overturned his conviction based on prosecutorial misconduct.[10] Trials four and five never reached a verdict: the jury was deadlocked.[11] The sixth trial resulted in a conviction, this time upheld by the Mississippi Supreme Court but ultimately reversed by the Supreme Court of the United States.[12] At each re-trial, the prosecutor (the same each time, Doug Evans) was able to decide whether or not to re-try the case.[13] Although there is no national accounting for this phenomenon, it is generally agreed to be incredibly rare, and even unheard of, at this stage.[14] When it does happen, it is often for instances such as trials four and five, where the jury has not reached a verdict.[15]

Even stranger than the sheer volume of trials, Flowers's conviction was repeatedly overturned for the same issue: racial bias on the part of the prosecutor in *voir dire,* i.e., jury selection.[16] This process, in theory, is supposed to be selected on race-neutral grounds: the 1986 Supreme Court case *Batson v. Kentucky* grants a right of action for one party (often the defense) to challenge another party's decision-making in jury selection.[17] The presumptive logic here rests in part on the idea that the right to serve on a jury is a fundamental right that cannot be denied on the basis of race.[18] *Batson v. Kentucky* introduced a protective mechanism for parties to enforce that right. This right is, to the best of our collective legal knowledge, generally believed to have overwhelmingly failed to address the problem of bias in the criminal courtroom, and it certainly does not function to uproot biased jurors.[19] Few criminal

9. *Episode 1: July 16, 1996, supra* note 1.

10. Flowers v. Mississippi, 139 S. Ct. 2228, 2232 (2019).

11. *Id*.

12. *Id*.

13. In the Dark, *S2 E7: The Trials of Curtis Flowers,* APM REPS. (June 5, 2018), https://www.apmreports.org/episode/2018/06/05/in-the-dark-s2e7 [https://perma.cc/A4D2-JUZD] [hereinafter *Episode 7: The Trials of Curtis Flowers*].

14. *See id.*; In the Dark, *S2 E8: The D.A.,* APM REPS. (June 12, 2018), https://www.apmreports.org/episode/2018/06/12/in-the-dark-s2e8 [https://perma.cc/C4VN-75D6] [hereinafter *Episode 8: The D.A.*].

15. Parker Yesko, *How Can Someone Be Tried Six Times for the Same Crime?,* APM REPS. (May 1, 2018), https://www.apmreports.org/story/2018/05/01/how-can-someone-be-tried-six-times-for-the-same-crime [https://perma.cc/TG3G-R5GL].

16. Flowers v. Mississippi, 139 S. Ct. 2228, 2232 (2019).

17. Batson v. Kentucky, 476 U.S. 79 (1986).

18. *Id*.

19. Susan N. Herman, *Why the Court Loves* Batson: *Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1818–19 (1993); Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 462–64 (1996); Tania Tetlow,

cases go to trial and, of overall challenges to peremptory strikes, few are *Batson* challenges. Many of those are unsuccessful, in part because of the extreme difficulty in establishing the intentional racial animus of the prosecutor in their decision-making.[20] Few appellate cases even cite *Batson v. Kentucky*, other than those that ultimately made it to the Supreme Court for the purpose of clarifying that initial decision, suggesting that it is an infrequent recourse for defendants in appealing convictions.

Flowers's case becomes more remarkable because it was extensively covered during the appellate process following the sixth trial (and fourth conviction) by reporters for the second season of a true crime podcast for American Public Media, *In the Dark*.[21] The podcast, hosted by Madeleine Baran, covered the facts of the Flowers case over the course of twenty hour-long episodes.[22] During their investigation the *In the Dark* team delved deep into the *Batson* challenge issue that instigated most of the re-trials, spending a considerable amount of time on the particulars of the prosecutor's behavior in the case[23] Baran and her team went in person to examine transcripts of criminal jury trials in central Mississippi over twenty-six years.[24] Baran found that the prosecutor on the Flowers case, Doug Evans, when he was the lead prosecutor over those years, had a history of striking Black jurors at a much higher rate than white jurors.[25]

Solving Batson, 56 WM. & MARY L. REV. 1859, 1859 (2014); Tania Tetlow, *Why* Batson *Misses the Point*, 97 IOWA L. REV. 1713, 1714 (2012); Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 503 (1999).

20. Melilli, *supra* note 19; Cavise, *supra* note 19, at 530–32.

21. *Episode 1: July 16, 1996*, *supra* note 1.

22. *Id.*

23. *Id.*; *Episode 7: The Trials of Curtis Flowers*; *Episode 8: The D.A.*; In the Dark, *S2 E11: The End*, APM REPS. (July 3, 2018), https://www.apmreports.org/episode/2018/07/03/in-the-dark-s2e11 [https://perma.cc/6SEU-3JEL] [hereinafter *Episode 11: The End*]; In the Dark, *S2 E12: Before the Court*, APM REPS. (Mar. 19, 2019), https://www.apmreports.org/episode/2019/03/19/in-the-dark-s2e12 [https://perma.cc/9MRJ-KA26] [hereinafter *Episode 12: Before the Court*]; In the Dark, *S2 E13: Oral Arguments*, APM REPS. (Mar. 26, 2019), https://www.apmreports.org/episode/2019/03/26/in-the-dark-s2e13 [https://perma.cc/B4A8-RHCL] [hereinafter *Episode 13: Oral Arguments*]; In the Dark, *S2 E14: The Decision*, APM REPS. (June 21, 2019), https://www.apmreports.org/episode/2019/06/21/curtis-flowers-wins-scotus-appeal [https://perma.cc/D7AM-LQDL] [hereinafter *Episode 14: The Decision*].

24. *Episode 8: The D.A.*; Will Craft, *Mississippi D.A. Doug Evans Has Long History of Striking Black People from Juries*, APM REPS. (June 12, 2018), https://features.apmreports.org/in-the-dark/mississippi-da-doug-evans-striking-black-people-from-juries/ [https://perma.cc/88UF-VRCB].

25. *Id*. His office struck Black people from juries at about 4.5 times the rate it

This extensive data work, collecting information on 6,700 jurors in 225 trials, was not used by the Supreme Court in *Flowers v. Mississippi* to establish the grounds for the vacating of the conviction in the sixth and (so far) final trial of Curtis Flowers.[26] The Supreme Court in *Flowers* instead heard the *Batson* issue only as it appeared in that case. Although this case was an opportunity to clarify thirty-three years of cases on racial bias in jury selection and to determine if patterns and practice of discrimination over a prosecutor's entire career can be used to establish plausible discrimination in a particular instance against a particular juror or criminal defendant, the Supreme Court did not take that opportunity. However, *Flowers* is still fundamentally a case about how respondents are able to prove discrimination and the types of evidence available for that purpose.

Because of the extraordinary nature of the case, and the work of investigative journalists in bringing it before the Supreme Court in the first place, it is also a test case on how court transparency could plausibly work. *Flowers v. Mississippi* serves as an example of unique, unprecedented, and irreplicable data access making a difference in a court case on what is, ultimately, a civil rights issue. The story told through the Supreme Court cases on racial discrimination in jury selection between *Batson v. Kentucky*, in 1986, and *Flowers v. Mississippi*, in 2019, is ultimately a story of the role court data management plays in racial equity and access to justice.

In this Article, I do two things. First, I argue that the way the Supreme Court handles discrimination in jury selection between *Batson v. Kentucky* and *Flowers v. Mississippi* is ultimately a depiction of failed opportunity. I do a close reading of the cases in what I call the *Batson* case trajectory, focusing on the 'Third Step' to argue that the logic of the Supreme Court's standards for proving discrimination ultimately rests on a failure to uproot the discrimination embedded within the system. That is, I contribute to the scholarship on the failure of *Batson* to produce equitable criminal jury trials, while also arguing that the failure of the Supreme Court to actually overturn prior cases leads to a reform-logic shift in discrimination law that ultimately preserves discrimination rather than rooting it out.

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struck white people, striking 50% of eligible Black jurors compared to 11% of eligible white jurors.

26. Flowers v. Mississippi, 139 S. Ct. 2228, 2244 (2019) (describing the four categories of evidence that the Supreme Court balanced in its decision, all of which are sourced from Flowers's various trials).

Second, I argue that the reform-logic shift to evidentiary standards for proving discriminatory intent, rather than to solving systemic discrimination, underscores a fundamental problem of what I call 'court opacity.' I argue that the court system, despite being theoretically public and open, is closed in practice. This closure, rather than being protective of privacy rights, is instead a source of tremendous inequity within the court system. In this instance, even when the courts are supposedly meant to alleviate discrimination within the system, the nature of court opacity meaningfully constrains that process to limit court equity. That is, representational interventions such as *Batson v. Kentucky* purportedly meant to relieve racial animus within the system are constrained by the system's own closure. Here, I will look specifically at how the Supreme Court handles historical systemic data about bias in jury selection, and how the shifting standards discussed above work with a presupposition that open courts are not possible. What the Court in *Batson* calls insurmountable as a data production burden and reifies in *Flowers* is only insurmountable through its own construction. Yet, this logic undergirds the very failures embedded in the *Batson* case trajectory.

In this Article, I use the *Batson* case trajectory as a case study to analyze how discrimination law is constrained from two directions: by embedded bad prior decisions from the Court and the Court's reliance on constrained data production as a functional normality of the system.

B. Rights, Juries, and the Public

In this Article, I argue that *Batson v. Kentucky* is a case in which the Supreme Court affirmatively, though narrowly, grants a particular right to criminal defendants: a jury that is not *explicitly* and deliberately chosen on the basis of race. *Batson* does not guarantee a right to a jury that does not use racial bias in their decision-making; the Supreme Court does not, in fact, ever touch on that issue.[27] *Batson* does not guarantee the idea of a jury of one's

27. Scholarship on the issue of racial bias in jury decision-making is thin, as most jury decision-making scholarship focuses exclusively on the jury's ability to understand instructions. *See, e.g.*, Susan N. Herman, *Why the Court Loves* Batson: *Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1818–19 (1993); Kenneth J. Melilli, *Batson in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 462–64 (1996); Tania Tetlow, *Solving Batson*, 56 WM. & MARY L. REV. 1859, 1859 (2014); Tania Tetlow, *Why Batson Misses the Point*, 97 IOWA L. REV. 1713, 1714 (2012); Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the*

peers. *Batson* does not guarantee racially proportionate representation on juries; that is, the Supreme Court does not require that the racial demographics of juries represent the racial demographics of the county where the case is being heard.[28] All *Batson* does guarantee is that jurors should not be deliberately excluded from service on the basis of race and, more importantly, confirm that race-based exclusion from service on a jury is a constitutional violation sufficient to overturn a conviction should the defense be capable of establishing that this has happened.[29] This logic rests largely on the idea that jurors have a constitutionally protected right to serve and cannot, per the Fourteenth Amendment, be excluded from service on the basis of race.[30]

Furthermore, *Batson* is largely irrelevant to most criminal cases. The life cycle of a criminal case, beginning at arrest, offers numerous off-ramps on the path to a jury trial, with prosecutorial discretion in charging and plea bargaining having the largest impact on circumventing jury trials. Although we lack robust statistics on the exact proportion of arrests that result in criminal jury trials, it is estimated that as little as 2% of criminal cases are jury trials.[31] Within those cases that do involve a jury, procedural issues with the composition of the jury are infrequently cited. Even then, racial bias is not always the driving factor as *Batson* has been broadly interpreted to include gender.[32]

As an affirmative granting of rights, *Batson* is, on its face, already extremely limited. It covers only a small proportion of ways in which jury trials can result in discrimination for defendants, jury trials themselves comprising only a small proportion of ways in which criminal procedure more broadly can result in discrimination for defendants. For example, people of color are more likely to be

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Challenge of Discrimination in Jury Selection, 1999 WIS. L. REV. 501, 503 (1999).

28. Holland v. Illinois, 493 U.S. 474, 480 (1990) ("The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does).").

29. Batson v. Kentucky, 476 U.S. 79, 100 (1986) ("If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed.").

30. *Id*. at 88 (citing Strauder v. West Virginia, 100 U.S. 303 (1880)).

31. Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 JUDICATURE 26, 31–32 (2017) (providing statistics on criminal jury trials for the four largest U.S. states (Texas, California, Florida, and Pennsylvania) over four years).

32. Flowers v. Mississippi, 139 S. Ct. 2228, 2243 (2019) (citing J.E.B. v. Ala. *ex rel*. T.B., 511 U.S. 127 (1994)).

arrested and charged than white people.[33] Both prosecutorial discretion and selective application of statutory provisions seem to result in discriminatory treatment for defendants of color.[34] Studies show that sentencing is often more favorable to white criminal defendants.[35] Furthermore, as I mentioned above, *Batson* does not protect against discriminatory treatment from the jury, just discriminatory treatment of the jury; jurors themselves are still allowed to make decisions based on racial animus.

I emphasize that *Batson* is a very small piece of the criminal defense puzzle not only to contextualize the case itself as non-revolutionary for defendants' rights, but also to show the scope of the mechanism that I discuss in this Article. The *Batson* story, as I tell it, culminates in one man being released from prison after substantial additional intervention from a team of investigative journalists and an unprecedented volume of evidence from prior trials of the same case. This story colors the scope and implications of the opacity/transparency argument. Transparency itself does not resolve inequities in the court but can offer opportunities to do better, more precise advocacy without substantial outside intervention. Here, justice within the criminal legal system relied on hours of manual work from journalists for a negligible result.

Viewing *Batson* as a case study emphasizes how, although knowledge limitations—opacity—necessarily constrain representative interventions, transparency is insufficient for radical criminal legal systems change or even minimal reform. I argue that transparency offers more opportunities for intervention, particularly if that transparency can be normalized and made widespread. In the *Flowers* story, a modicum of transparency—a very small amount of data—is contingent on the affirmative advocacy of investigative journalists. Public access to court information ought to be a normal feature of the criminal legal system that facilitates justice, rather than something contingent a third-party advocate.

My use of this case study rests on an important fundamental assumption: the criminal defendant is a part of the public that, I argue, is unfairly denied access to court information. In this Article,

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33. Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/blog/2020/07/27/disparities/ [https://perma.cc/TWX7-MDE8].

34. *Id.*

35. ASHLEY NELLIS, SENT'G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 14 (2021), https://www.sentencingproject.org/app/uploads/2022/08/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf [https://perma.cc/556F-8SXA].

I resist the Supreme Court's move in *Batson* to shift the rights framing from the defendant to the juror. Instead, I emphasize a way of thinking about the right of the defendant not solely as a defendant but also an ordinary citizen. This Article puts two different types of Constitutional rights in conversation: the rights afforded to the public, in general, as pertaining to the courts; and the rights afforded to the criminal defendant, in particular, as pertaining to a specific case. I argue that, in cases like *Batson* and *Flowers*, these Constitutional protections are best understood as entwined. As I argue throughout this Article for mass availability of criminal jury trial transcripts, I acknowledge that the average citizen who is unconnected to the legal system is unlikely to pursue them. Still, my aim here is, in part, to collapse the distinction between 'citizen' (or 'public') and 'defendant.'

Finally, the *Batson* story is an epistemological and evidentiary story of criminal defense that takes many of the ordinary markers or tropes of crime stories and reworks them. Kat Albrecht and I argue elsewhere that the true crime podcast landscape is dominated by narratives of guilt and innocence.[36] Furthermore, we argue that these stories are tied to depictions of cases as ordinary or extraordinary in a way that reifies the idea of a normally functioning criminal legal system.[37] In other words, true crime stories often tie narratives of innocence with narratives of a break from the ordinary functioning of the legal system, ultimately suggesting that the mechanisms by which the criminal legal system convicts and incarcerates are ordinarily fair, just, or accurate. In this Article, I look at how those stories are enacted through criminal procedure and then retold in the public sphere.

This Article begins in Part I with a discussion of how current scholarship understands and talks about *Batson v. Kentucky* and other cases on discrimination and jury selection. Part II outlines *Batson v. Kentucky* itself, closely analyzing the case to better understand how discrimination law functions before the Court in this particular instance. Part II(B) examines the Step Three cases that follow *Batson*, whereby the defense must respond to the prosecution's non-discriminatory reason for a strike by establishing discriminatory intent. I dissect the logic of the rebuttal and argue that emphasizing the evidentiary burden re-entrenches

36. Kat Albrecht & Kaitlyn Filip, *The Serial Effect*, 53 N.M. L. REV. 29, 49–67 (2023) (arguing that narratives of guilt or innocence as perpetuated by true crime media can have a salient impact on criminal legal proceedings, including systemically disadvantaging the defense).

37. *Id.*

discrimination within the system. Part III then turns to *Flowers v. Mississippi* as the most recent case on racial discrimination in jury selection. Here, I argue that the specter of court opacity haunts discrimination law. I examine how the Court continuously moves the goal post on the idea of having a history of discriminatory behavior in the record and ask what that means for the availability of particular arguments before the Court. Finally, I conclude by unpacking court opacity more broadly and return to the media coverage of *Flowers v. Mississippi* to look at the relationship between knowledge and publicity.

I. Literature Review: Rhetorical and Legal Academic Interventions on the Supreme Court

In this Article, I conduct a content analysis of a series of cases from *Batson v. Kentucky* to *Flowers v. Mississippi* concerning the Supreme Court's internal conversations about racial discrimination in jury selection. In doing so, I consider the Supreme Court's internal conversations across time and examine the impact of those conversations on arguments before the Court. Furthermore, I consider the role of cultural discourse—particularly popular media and journalism—on the Supreme Court's reasoning and argumentative potential. This analysis follows two existent strands of law and rhetoric scholarship. First, there exists a wealth of work on the internal conversations of the Supreme Court in particular. Although most of this work does not involve conversations wherein the same material case is being reexamined (not an entirely uncommon activity for the Court) a lot of this work still draws on patterns over time. Second, I engage with law and rhetoric scholarship focusing on the role of the media in the court system.

Rhetoric scholars have looked at some of the body of what I would call "the discrimination cases." These are Supreme Court cases involving a matter that directly affects a group on the basis of "race, color, religion, sex, or national origin" or ability status.[38] Much of this work operates under the analytical assumption that the work of a Supreme Court opinion in these cases is to grant or confer rights, and that this work is often done rhetorically.[39]

38. *See generally* Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) (1964) (outlining the categories—inclusive of sexual orientation and gender identity as "on the basis of sex"—under which the Supreme Court has heard discrimination cases outside those pertaining to ability per the Americans with Disabilities Act); Americans with Disabilities Act, 42 U.S.C. § 12102 (1990) (defining disability, inclusive of pregnancy).

39. *See* Gibson, *infra* note 47; *but see* Cmiel, *infra* note 59 (finding that the discrimination cases are fundamentally not rights-granting).

Instead, I take a substantially zoomed out, sociological view of the text of Supreme Court opinions, looking at how those cases come to appear before the Court, who the other actors are, and what the social and political impact of those opinions is or could be (when possible).

Gerald N. Rosenberg argues that it is difficult to impossible to generate substantial reform through litigation.[40] In his book, he responds to a common assumption that even unsuccessful litigation can be used to advance a cause through publicity and specifically points to *Brown* and *Roe* as case studies.[41] He argues that the scholarly emphasis on *Brown* underemphasizes the work of the civil rights movement and that abortion activists have overemphasized *Roe* at the expense of mobilization.[42] That is, he argues that a good deal of prior thinking overemphasizes the Supreme Court's role in social change while underemphasizing the role of on-the-ground practitioners and movements. Although scholars have responded with empirical evidence that supports the idea that a favorable Supreme Court decision can change hearts and minds with respect to particular groups, this response does not undermine the presupposition that judicial opinions are responsive to changing perceptions rather than the driving force behind them.[43] These studies also suggest that these changing social beliefs are more indicative of an individual's thoughts and feelings about the Supreme Court rather than their own mobilization over the rights at stake in the opinion.[44]

I take as my analytical starting point the idea that the Supreme Court is not a rights-granting institution and is responsive to existing mobilization. This is not to say that the Supreme Court is on "the right side of history" or is in agreement with any particular political mobilization but, rather, to reinforce the idea that the Supreme Court can only take what is put before it through the lower courts and appellate process. It does not announce rights but, instead, engages with existing discourse about those rights. As

40. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 6–8 (2d ed. 2008).

41. *Id.*

42. *Id.* at 39–41, 201.

43. *See, e.g.,* Margaret E. Tankard & Elizabeth Levy Paluck, *The Effect of a Supreme Court Decision Regarding Gay Marriage on Social Norms and Personal Attitudes*, 28 PSYCH. SCI. 1334, 1339–41 (2017) (finding that a Supreme Court ruling had an impact on individual's perception of social norms in support of marriage equality but not necessarily on their personal feelings about gay marriage or gay people).

44. *Id.*

such, my orientation to the discourse of the Supreme Court specifically deemphasizes its words as necessarily politically impactful. This diverges from much of the existent scholarship in rhetoric which does emphasize the language of opinions as *doing*.

Katie Gibson, for example, studies—primarily through Justice Ruth Bader Ginsburg's dissents on abortion cases—how Justice Ginsburg "has boldly challenged the traditional boundaries of legal language to make way for a feminist jurisprudence and more democratic rule of law."[45] Ginsburg's dissents, Gibson argues, carve out a new space within the Supreme Court for thinking about women.[46] Gibson argues elsewhere that "Justice Ginsburg's judicial rhetoric is transformative: it articulates an alternative framework for reproductive rights, and it shifts the language of the law to legitimate voices, experiences, and rights of groups traditionally excluded by the rhetoric of the law."[47] Although I disagree with Gibson's emphasis on the dissent as a transformative mechanism because of the inherent lack of meaningful stickiness in the language of the dissent as well as the sociological failure to account for how those ideas get to the Supreme Court in the first place, her work is illustrative with respect to how internal conversations within opinions work.

For example, she writes, "Justice Ginsburg's dissent exposes the law as an instrument of patriarchy and disrupts the myth of neutrality central to the judicial opinion genre."[48] That is, Justice Ginsburg's dissents show partiality (and emotion) within judicial conversations. I argue that the dissent is not politically transformative from a rights-preserving perspective as Gibson otherwise argues. However, this idea that the dissent sheds light on aspects of the majority opinion that are not otherwise available within that primary text is methodologically instructive for me. That is, although she writes that the dissent is an opportunity for Justice Ginsburg to "paint the majority opinion as outmoded and out of step with a more progressive and more just version of women" as a way of "open[ing] up a space for taking the material experiences of women seriously" in a way that strikes me as an overblown reading of the potential of dissent, Gibson still illustrates how the

45. KATIE L. GIBSON, RUTH BADER GINSBURG'S LEGACY OF DISSENT: FEMINIST RHETORIC AND THE LAW 2 (2018).

46. *Id.* at 16–17.

47. Katie L. Gibson, *In Defense of Women's Rights: A Rhetorical Analysis of Judicial Dissent*, 35 WOMEN'S STUD. COMMC'N 123, 124 (2012).

48. *Id.* at 126.

dissent demonstrates alternative arguments before the court.[49] Dissents in particular are meaningful spaces for understanding what the Court could have held. I disagree that these alternative arguments are *transformative*, but both concurrences and dissents offer insight into alternative outcomes. I take this understanding about potential alternatives as guiding.

Similarly, Peter Odell Campbell, in reading *Lawrence v. Texas*, situates the majority opinion within the options inherent in the Fourteenth Amendment. Campbell argues that, "Kennedy's choice to foreground the Due Process Clause rather than the Equal Protection Clause of the Fourteenth Amendment as the basis for the majority's opinion has the potential to realize a constitutional legal doctrine . . . that is more consistent with radical queer politics than the foregrounding of the Equal Protection Clause in other recent favorable decisions in gay and lesbian civil rights cases."[50] That is, Campbell argues that the Court's use of Due Process rather than Equal Protection in their argument allows for a more solid foundation for future marriage cases.[51] The emphasis on the logic of queer futurity again, to me, overemphasizes the world-building power of the Supreme Court. However, Campbell's methodological perspective vis-à-vis understanding options and opportunities for the Court embedded in their own opinions is illustrative.[52] Campbell brilliantly emphasizes building new paths within the law when the Court has closed off standard ones. That is, Campbell emphasizes the creative potential of alternative arguments in the face of entrenched problems.

The tendency of law and rhetoric scholars to examine the work of one particular justice as a speaker is not limited to Justice Ginsburg. Catherine Langford writes that Justice Antonin Scalia "was an opportunistic textualist and that textualism is as rhetorical as any other form of judicial interpretation, contrary to Scalia's advocacy of textual interpretation as the form of constitutional interpretation closest to the Constitution's original meaning and least vulnerable to political influence."[53] Functionally, in tracing Justice Scalia's own work, Langford finds internal inconsistency with his stated articulation of his personal jurisprudential

49. *Id.* at 127, 132.

50. Peter Odell Campbell, *The Procedural Queer: Substantive Due Process,* Lawrence v. Texas*, and Queer Rhetorical Futures*, 98 Q.J. SPEECH 203, 204 (2012).

51. *Id.* at 217.

52. *Id.* at 208.

53. CATHERINE LANGFORD, SCALIA V. SCALIA: OPPORTUNISTIC TEXTUALISM IN CONSTITUTIONAL INTERPRETATION 8 (2017).

methodology.[54] Reading how his work varies across time and circumstance for Langford gives insight into how *textualism* functions.[55] Here, I take this as guiding for both the methodological principle of reading the Court across texts (although with less value placed on authorship) as well as a beacon on the Court's own unreliability as narrators of their own decision-making. This latter point is important as, here, I am often suspect of the Court's own articulation of the relationship between their stated aims and ideology: this comes to a head as I unpack their internal inconsistency with the relationship to precedent in the *Batson* trajectory.

Timothy Barouch gives specific insight into this jurisprudential narration through what he calls "novelization" while articulating the publicness of the Court.[56] In conversation with Robert Asen, Robert Hariman, and John Lucaites on the performative nature of citizenship, Barouch synthesizes the relationship between narrative and democracy.[57] He writes, "The narrative's stock characters, common themes, tropic structures, and reversals comprise a forum through which deep social conflicts are staged and resolved because of the novel's ability to maintain a relationship with contemporary times . . . . As a sociopolitical practice, novelization maintains a connection to democratization."[58] The articulation of narrative structures across cases revolving around the same material issues helps articulate how those material issues matter, while granting overall insight into the Court.

Importantly, I consider the work of the Supreme Court as not a rights-granting authority but, rather, as the leading word on how the law is meant to organize the lives of ordinary people as well as how the law organizes itself. Speaking on popular political speech, Kenneth Cmiel argues that "[t]he kind of rhetoric we get in our presidential elections says much more about ourselves than we care to admit. It is one indication of the way we have organized our lives."[59] Political speech is meaningful, in part, because it grants insight into other aspects of daily life. More importantly, Marianne

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54. *Id.*

55. *Id.* at 7.

56. TIMOTHY BAROUCH, THE CHILD BEFORE THE COURT: JUDGMENT, CITIZENSHIP, AND THE CONSTITUTION 12-13 (2021).

57. *Id.* at 6.

58. *Id.* at 13.

59. KENNETH CMIEL, DEMOCRATIC ELOQUENCE: THE FIGHT OVER POPULAR SPEECH IN NINETEENTH-CENTURY AMERICA 16 (1990).

Constable argues that "[l]aw structures what can be said in court and elsewhere, safeguarding some statements from particular interpretations and prohibiting others from being repeated or even presented."[60] Constable underscores the importance of the definitional work of the Supreme Court for First Amendment law, but this idea is broadly transferable.[61] The idea that law about speech structures speech works analogously to law that is not first and foremost about speech: in this Article, I will argue that law governing procedure also governs the arguments that can be made before the courts, even when not directly regulating those speech acts. I use Constable to think about procedure as a system of regulating court speech.

Although the nature of media and the law has rapidly shifted in the twenty-first century, rhetorical scholarship helps us understand the idea of the trial in public. Robert A. Ferguson, for example, identifies a tension with the public trial and a fair trial due to the nature of sometime akin to spectacle.[62] Robert Hariman captures the tension between publicity and legitimacy, writing, "Although recognizing the persuasive dynamics of popular trials is an important step toward fully understanding their nature and significance, it also seems to work against us, for the more a trial appears to be a scene or product of public controversy and rhetorical artistry, the less legitimate it appears."[63] The concept of the popular trial as a site of enacted social knowledge, public discourse, and constituted by social agreements demonstrates the contextual nature of the trial.

Beyond rhetoric scholarship, newsworthiness social science research tends to focus on what makes a trial, crime, or harm newsworthy. Often less interested in the narrative construction of particular cases and their place in society, newsworthiness scholarship takes the social construction of the news itself as the object of analysis.[64] Scholars of crime and newsworthiness emphasize the way that the construction of the news matters

60. MARIANNE CONSTABLE, OUR WORD IS OUR BOND: HOW LEGAL SPEECH ACTS 10 (2014).

61. *Id.*

62. ROBERT A. FERGUSON. THE TRIAL IN AMERICAN LIFE xii (2007).

63. POPULAR TRIALS: RHETORIC, MASS MEDIA, AND THE LAW 3 (Robert Hariman ed., 1990).

64. *See generally* MICHAEL SCHUDSON, THE SOCIOLOGY OF NEWS (2011) (arguing that news is a social institution shaped by economics, technology, politics, culture, and organizational structures); MARK FISHMAN, MANUFACTURING THE NEWS (1980) (arguing, using a 1976 crime wave against elderly New Yorkers as a case study, that the news is, in fact, socially constructed—reporters, he argued, did not fabricate the news, but gave it form).

because of its relationship to stereotyping.[65] Here, I am less interested in what makes the news and more in the narrative after-effects of a case becoming news, but this scholarship points to the overall limitations of relying on newsworthiness for procedural justice, as I discuss in the conclusion of this Article.

Critical race scholars identify some of the major structural problems within discrimination law. Kimberle Crenshaw identifies a "definitional tension in antidiscrimination law, which attempts to distinguish equality as process from equality as result" which is "more productively characterized as a conflict between the stated goals of antidiscrimination law."[66] This definitional tension functionally over-emphasizes the process as ameliorative to racism and, when paired with the fact that racism is a central underpinning of American society, "antidiscrimination discourse is fundamentally ambiguous and can accommodate conservative as well as liberal views of race and equality."[67] Crenshaw helpfully delineates the ways in which purportedly anti-discrimination law functions to uphold the status quo and focuses directly on building a productive response to the built-in failures of discrimination law.[68] This emphasis on the tension between procedural and uprooting systemic discrimination informs my own interpretation of the reform-mindedness of the Supreme Court that I discuss in the next section.

In this Article, I first look more closely at how a particular piece of discrimination law was built through a set of Supreme Court opinions: The development of *Batson v. Kentucky* is situated

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65. *See generally* Melissa Hickman Barlow, David E. Barlow & Theodore G. Chiricos, *Economic Conditions and Ideologies of Crime in the Media: A Content Analysis of Crime News*, 41 CRIME & DELINQUENCY 3 (1995) (exploring the relationship between media portrayals of crime and real conditions); John G. Boulahanis & Martha J. Heltsley, *Perceived Fears: The Reporting Patterns of Juvenile Homicide in Chicago Newspapers*, 15 CRIM. JUST. POL'Y REV. 132 (2004) (arguing that individuals who receive crime information from newspapers report higher levels of fear of crime); Franklin D. Gilliam Jr., Shanto Iyengar, Adam Simon & Oliver Wright, *Crime in Black and White: The Violent, Scary World of Local News*, 1 HARV. INT'L J. PRESS/POL. 6 (1996) (arguing that local news depicts crime as violent and non-white); Susan B. Sorenson, Julie G, Manz & Richard A. Berk, *News Media Coverage and the Epidemiology of Homicide*, 88 AM. J. PUB. HEALTH 1510 (1998) (arguing that some homicides are more newsworthy than others); Esther Thorson, *The Reporting of Crime and Violence in the Los Angeles Times: Is There a Public Health Perspective?*, 6 J. HEALTH COMMC'N 169 (2001) (showing that stereotyping of crime and violence are strongly present in the L.A. Times).

66. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 12 GERMAN L.J. 247, 249–50 (2011).

67. *Id*. at 249.

68. *Id*. at 284.

within a broader internal conversation about discrimination law that the Court is having concurrently, but emphasizes the ways in which this particular conversation about jury selection becomes, via the rhetorical moves of the Court across a series of cases, an entrenchment of the idea that some degree of discrimination within court proceedings is to be expected. The punchline of *Batson v. Kentucky*, I argue following Crenshaw but emphasizing the rhetorical work of the opinions, is ultimately that procedural safeguards are not meant to eradicate discrimination or racial animus but to preserve the integrity of the process in the face of legitimate claims concerning racial animus. I argue that the Court refuses to uproot its own history of allowing discriminatory procedure and engages in protectionist discourse that ultimately makes *Batson* a story about sufficiently proving that there is *enough* discrimination to warrant intervention.

In the final portion of this Article, I argue that *Flowers v. Mississippi*, as the most recent case in the *Batson* case trajectory, grants substantial insight into how this move toward sufficient proof works with the opacity problem of the courts to substantially limit the ability of an individual defendant to establish discrimination. In other words, *Flowers* is exemplary of how the Court entrenches discrimination from two sides: first, by moving the goal posts on the conversation vis-à-vis uprooting discrimination and, second, by carefully safe-guarding the information they claim that a defendant could use in order to do so in their own case.

A. Legal and Empirical Scholarship on Jury Selection and Discrimination

Although *Flowers v. Mississippi* is a recent case that the Supreme Court purports to be relatively minor, it has received some scholarly attention. To date, most work on the case itself has been from law student notes and comments which may be more immediately responsive to recent cases.[69] In a Harvard Law Review

69. *See generally* Darby Gibbins, *Six Trials & Twenty-Three Years Later: Curtis Flowers and the Need for a More Expansive* Batson *Remedy*, 59 HOUS. L. REV. 713 (2022) (arguing that Flowers's situation is illustrative of the toothlessness of *Batson* in preventing and remedying discriminatory selection processes, particularly when those are repeated); Anuva Ganapathi, *Re-Thinking* Batson *in Light of* Flowers: *An Effort to Cure a 35-Year Problem of Prosecutorial Misconduct*, 33 GEO. J. LEGAL ETHICS 503 (2020) (arguing that Evan's repeated misconduct is an ethical problem and that ought to be remedied through the Model Rules of Professional Conduct); Eric Hatfield, *Six Wrongs Take Away a Right: The Odyssey of Curtis Flowers and the Prosecutorial Misconduct That Caused It*, 47 S.U. L. REV. 347 (2020) (arguing that

issue unpacking recent Supreme Court opinions, Dorothy Roberts wrote on the case immediately following the Court's decision. Roberts reads the opinion in terms of the relationship between the Fourteenth Amendment and carceral punishment, reading the Court's logic as an explicit rejection of an abolitionist approach.[70]

Roberts argues that the Court in *Flowers* shifts the focus from white supremacy broadly to something much smaller and simpler, writing:

> Missing from the Court's opinion is any discussion of the white supremacist logic behind keeping black people off juries, including the reason why West Virginia enacted the 1873 law at issue in *Strauder* allowing only white people to be jurors, and why prosecutors so routinely and relentlessly exclude black jurors from capital trials of black defendants.[71]

The Court, she argues, does not adequately engage with either the logics of its own case law or with *why* this particular mode of discrimination is a recurrent problem.[72] The Court does not go back and look at how *Swain* and *Strauder* happened. She elaborates:

> Justice [Brett] Kavanaugh recognize[d] that all-white juries are problematic, but characterized the problem as the harm that individual rogue prosecutors inflict on individual black citizens whom they wrongfully exclude from juries. This formulation ignores the way all-white juries have historically functioned as a legal institution to perpetuate racial subordination.[73]

Simply, Roberts argues that *Flowers* centers the discriminatory harm to the juror over the discriminatory harm to the defendant, both on the basis of race.[74]

As Roberts clarifies, the prosecution has an easier time convicting Black defendants, particularly in capital trials, when the jury is entirely or predominantly white.[75] She writes:

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prosecutorial misconduct must be remedied, here through state action).

70. Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 10–11 (2019).

71. *Id*. at 96.

72. *Id.*

73. *Id*. at 96–97.

74. *Id.*

75. *Id*. at 97 (citing William J. Bowers, Benjamin D. Steiner & Maria Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PENN. J. CONST. L. 171, 259 (2001); citing Douglas L. Colbert, *Challenging the Challenges*, 76 CORNELL L. REV. 1, 110–13 (1990); citing James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 909–10 (2004); citing Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1616–49 (1985)). In Flowers' own four trials, a Black juror was the "lone holdout" responsible for the mistrial. Garrett Epps, *A Racial Pattern So Obvious, Even the Supreme Court Might See It*, ATLANTIC (Mar. 18, 2019), https://www.theatlantic.com/ideas/archive/2019/03/flowers-v-mississippi-

> By misidentifying the relationship between jury selection and white supremacy, the Court in *Flowers* went off track. Justice Kavanaugh's opinion did nothing to invalidate all-white juries as violations of the Fourteenth Amendment's antislavery ideals. To the contrary, Justice Kavanaugh made it clear that the Court's aim was the opposite – to maintain the current jury selection system.[76]

Again, Roberts argues that the emphasis of the Court is nowhere near uprooting white supremacy but, instead, on something akin to making the structures that uphold it more palatable: this is the function of moving the focus from discrimination against defendant to discrimination against juror.[77] In the next section, I argue that an analogous problem is baked into *Batson* itself (to reappear in *Flowers*) in its focus on proving discriminatory intent rather than impact. Roberts names this phenomenon an anti-abolitionist method, and understanding her logic here is central to my own reading of the case trajectory as fundamentally reifying discriminatory structures, logics, and substance.[78] Furthermore, the language of abolition that Roberts uses helpfully elucidates the problem of doctrinal preservation that I discuss in the next section.

There has been a wealth of scholarship on *Batson* itself since the opinion was issued in 1986.[79] Empirical work has had two

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jurors-removed-because-race/585094/ [https://perma.cc/HD2H-SX3F].

76. *Id*. at 98.

77. *Id.*

78. *Id*. at 99.

79. *See generally* Payton Pope, *Black Lives Matter in the Jury Box: Abolishing the Peremptory Strike*, 74 FLA. L. REV. 671 (2022) (arguing that as a racial justice issue, the peremptory strike ought to be abolished alongside an expansion of the strike for cause); Ela A. Leshem, *Jury Selection as Election: A New Framework for Peremptory Strikes*, 128 YALE L. J. 2356 (2019) (arguing that peremptory strikes ought to be abolished in favor of for cause strikes); Jordan Benson, *Stricken: The Need for Positive Statutory Law to Prevent Discriminatory Peremptory Strikes of Disabled Jurors*, 103 CORNELL L. REV. 437 (2018) (arguing that *Batson* should be expanded to account for discriminatory strikes on the basis of ability); Jeanette E. Watson, *Do Non-Discriminatory Peremptory Strikes Really Exist, or is a Juror's Right to Sit on a Jury Denied When the Court Allows the Use of Peremptory Strikes*, 17 TEX. WESLEYAN L. REV. 371 (2011) (emphasizing that peremptories are problematic with respect to the rights of jurors and ought to be abolished to protect their rights); Mattie Johnstone & Joshua M. Zachariah, *Peremptory Challenges and Racial Discrimination: The Effects of* Miller-El v. Cockrell, 17 GEO J. LEGAL ETHICS 863 (2004) (analyzing the impact of *Miller-El* and arguing that discriminatory strikes are also a professional ethics issue); Susan Hightower, *Sex and the Peremptory Strike: An Empirical Analysis of* J.E.B. v. Alabama's *First Five Years*, 52 STAN. L. REV. 895 (2000) (arguing that the expansion of *Batson* to include gender has itself also been fundamentally toothless); Tracy M.Y. Choy, *Branding Neutral Explanations Pretextual Under* Batson v. Kentucky: *An Examination of the Role of the Trial Judge in Jury Selection*, 48 HASTINGS L.J. 577 (1997) (arguing that all courts should use all relevant factors in determining whether the legitimate non-

separate threads: first, the impact of racial bias on the juries themselves (or, in other words, the impact of mixed-race juries on jury decision-making) and, second, the remaining prevalence of bias in the selection process following *Batson*. I now discuss each of those strands in turn while emphasizing the methodologies of these strands of scholarship in order to clarify the basis for our current understanding of court functioning post-*Batson*.

To the first point, scholars are in agreement that racially homogenous (meaning entirely white) juries lead to worse outcomes for defendants, particularly defendants of color. William J. Bowers, Benjamin D. Steiner, and Marla Sandys conducted interviews with 1,155 jurors across 340 capital trials and analyzed the racial identity of the jurors in relation to the outcomes of the cases they participated in.[80] They find that white jurors are more likely to recommend capital punishment and are more likely to see a Black defendant as dangerous.[81] This work situates both the life or death stakes of homogenous juries as well as the logic behind individual jurors' decision-making.

Using a data set of felony trials in Florida between 2000 and 2010, Shamena Anwar, Patrick Bayer, and Randi Hjalmarsson found that juries of all-white jurors are much more likely to convict Black defendants than juries with even one Black juror.[82] As they note, their data set was difficult to produce because few courts maintain records identifying jury members' races or jury pools, and most states exclude this type of data from public records requests.[83]

Finally, Jacinta M. Gau identifies steps within the jury-selection process whereby most non-white jurors are lost: noting that most happen from the procedures through which jurors are pulled from the general population, rather than the voir dire process.[84] Further, she found that prosecutors disproportionately used peremptory strikes against Black jurors and that defense attorneys did so against white jurors.[85] Neither Gau's study nor the

discriminatory reason offered by the prosecution is pretextual).

80. Bowers, *supra* note 75, at 189–90.

81. *Id*. at 241–44.

82. Shamena Anwar, Patrick Bayer, & Randi Hjalmarsson, *The Impact of Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1017 (2012).

83. *Id*. at 1026.

84. Jacinta M. Gau, *A Jury of Whose Peers? The Impact of Selection Procedures on Racial Composition and the Prevalence of Majority-White Jurors*, 39 J. CRIME & JUST. 75, 84 (2016).

85. *Id*. She notes that this mirror's the results of Shari Seidman Diamond, Destiny Peery, Francis J. Dolan & Emily Dolan, *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425 (2009).

Diamond et al. study she cites consider the availability of Black jurors for defense attorneys to strike. Although Gau acknowledges that most of the prospective Black jurors are lost before venire, both studies only note correlation between race of struck jurors and side of the V. For example, when Justice Clarence Thomas in oral arguments in *Flowers* questioned the defense's striking of only white jurors, Justice Sonia Sotomayor responded that the defense did not have any Black jurors upon which to exercise peremptories because the prosecution had already struck every Black juror.[86] This necessarily colors the reading of the homogeneity of the use of strikes against white jurors even without considering, to return to Roberts's point above, the role of white supremacy in disparate use of strikes. Notably, Gau's data was collected by public defenders because, again, the courts do not otherwise collect this information.[87]

Given the difficulty in getting pertinent court data, the general empirical analysis of the post-*Batson* state of discrimination in jury selection is less prevalent, less general, and less widespread than might be anticipated. Bruce E. Barrett presents a statistical model for establishing the neutrality of strikes, accounting for the back-and-forth nature of the strikes.[88] Daniel R. Pollitt and Brittany P. Warren looked at cases decided by the Supreme Court of North Carolina on the issue, noting that none, at the time of publication, have ever been successful.[89] Notably, they focused their analysis on the success of published appellate decisions where the data is readily available and, often, on the record with respect to the racial breakdown of the venire members.

Following Justices Thurgood Marshall and Stephen Breyer, multiple legal scholars make the argument that peremptory strikes in general are bad, usually because they definitionally perpetuate discrimination within the process. Some scholars suggest that peremptories can be saved or modified to be less discriminatory, though it is not always clear how these solutions would maintain a distinction between peremptories and for cause strikes.[90] Others

86. Oral Argument at 53:28, Flowers v. Mississippi, 139 3. Ct. 2228 (2019) (No. 17-9572), https://www.oyez.org/cases/2018/17-9572 [https://perma.cc/LGL9-5BWB].

87. Gau, *supra* note 84, at 79.

88. Bruce E. Barrett, *Detecting Bias in Jury Selection*, 61 AM. STATISTICIAN 296, 296 (2007).

89. Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate* Batson *Record*, 94 N.C. L. REV. 1957, 1957 (2016).

90. *See generally*, Daniel Hatoum, *Injustice in Black and White: Eliminating Prosecutors' Peremptory Strikes in Interracial Death Penalty Cases*, 84 BROOK. L.

are more definitive, arguing that peremptory strikes are bad as a matter of course. For example, Douglas L. Colbert argues that peremptory strikes are unconstitutional from a Thirteenth Amendment perspective because one of the Amendment's "primary objectives was to assure equal justice and universal freedom for African-American people" and that this is applicable to both the Black defendant and the Black juror.[91] From the opposite perspective, Elaine A. Carlson argues that peremptory strikes are functionally dead and that for-cause strikes ought to be expanded to remediate their limitations.[92] Carlson promotes parties' control over the jury composition process and argues against balancing that with Constitutionally protected rights.[93] Still, it is telling that peremptory strikes in their current form are dissatisfying from a racial justice perspective and a perspective of wishing to discriminate against jurors.

Finally, scholars have used *Batson* as a case study in systemic procedural discrimination in the criminal legal system. Melynda J. Price describes *Batson* proceedings as a "ritual," "a process that serves as an active affirmation of the non-discriminatory selection of juries. The law requires judges and legal counsel to act out this process in dramatic fashion as a way of communicating that race is not a factor in peremptory challenges. In this very same action, courts can ignore the unconstitutional use of race in peremptory challenges."[94] Price bases this depiction of *Batson* proceedings on the relative infrequency of their success, which then render the non-discriminatory reason proffered by the prosecution more culturally legitimate through this ritualization.[95] Price specifically urges for the end of peremptories in capital cases because of their ultimate life or death stakes for Black defendants.[96]

REV. 165 (2018) (arguing that peremptories should not be allowed in the limited case of death penalty cases); Aliza Plener Cover, *Hybrid Jury Strikes*, 52 HARV. C.R.-C.L. L. REV. 357 (2017) (arguing for a hybrid model between peremptories and for-cause challenges, requiring ex ante justification without a conclusive showing of bias).

91. Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 7–8 (1990–1991).

92. Elaine A. Carlson, Batson, J.E.B., *and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947, 1003–04 (1994).

93. *Id*.

94. Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 77 (2009).

95. *Id*.

96. *Id*. at 107.

Scholars rarely argue for the abolition of peremptory strikes entirely, though some Supreme Court justices themselves do so, and instead offer remediation options to make peremptory strikes function better, despite scholarship indicating that the system is inherently broken.[97] Some argue that the contemporary jury selection process—far from being fixed by *Batson*—is fundamentally broken in favor of overt racial discrimination.[98] Finally, Michael J. Klarman and Thomas Ward Frampton both use *Batson* as a case study for understanding contemporary criminal procedure as Jim Crow jurisprudence with the policy punchline unstated.[99]

In the following section, I specifically synthesize Price and Roberts to look at the discursive trajectory of post-*Batson* Supreme Court cases dealing with race-based jury discrimination. In unpacking these cases' rhetorical logic, I am guided by Price and Roberts's theoretical perspectives on peremptory strikes.

II. The Story of the *Batson* Case Trajectory: A Dialogue on Knowledge and Equal Protection

In his concurrence in *Batson v. Kentucky*, Justice Byron White writes, "Much litigation will be required to spell out the contours of the Court's equal protection holding today, and the significant effect it will have on the conduct of criminal trials cannot be gainsaid."[100]

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97. *See generally* Nancy Leong, *Civilizing* Batson, 97 IOWA L. REV. 1561 (2012) (arguing that *Batson* doctrine might function differently—more equitably—were the claims to be litigated by the struck jurors themselves); Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075 (2011) (arguing that the *Batson* framework ought to be modified to better capture less overt forms of discrimination from the prosecution); Robin Charlow, *Tolerating Deception and Discrimination after* Batson, 50 STAN. L. REV. 9 (1997) (arguing that ethical sanctions for attorneys might be a viable option for ameliorating the toothlessness of *Batson*).

98. *See generally*, Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785 (2020) (arguing that *for cause* strikes are also racially discriminatory but that the Supreme Court has functionally given them a pass by focusing on peremptories); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985) (arguing, prior to the *Batson* decision, that there is a widespread tendency for white jurors to convict Black defendants).

99. *See generally,* Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593 (2018) (arguing that the Jim Crow jury never fell and that this is indicative of the use of race as a salient factor in the selection of jurors); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000) (arguing, too, that the Jim Crow jury never fell—that *Batson* did not have a meaningful impact on the use of race in jury selection).

100. Batson v. Kentucky, 476 U.S. 79, 102 (1986).

Although I disagree with the latter half of Justice White's remarks, the remainder of this Article spells out the prescience of his predictions. Yet, depending on which of the seven *Batson* opinions (five opinions, two dissents) you cite, *Batson* was either the beginning of a jurisprudential conversation on the role of peremptory strikes in criminal jury trials, the continuation of a conversation previously established, or the full upheaval of an entire prior system of belief.

Although the conversation resulting from *Batson* emphasizes the opinion's lack of total clarity, I take it as a clear and concise starting point of a new era in peremptory strike law and discourse. This is not controversial.[101] My novel argument here is in reconfiguring the *Batson* case trajectory— a series of cases from 1986 with *Batson v. Kentucky* to 2019 with *Flowers v. Mississippi*— as an explicit conversation about the role of knowledge and evidence in Equal Protection discrimination claims, a conversation that can be seen through the theoretical lens of court opacity.

The *Batson* case trajectory offers a clear insight into the mechanics of court opacity in relation to Equal Protection Clause discrimination claims and, I argue, shows the Court affirmatively thinking through the ability and capacity of various actors to make arguments based on evidentiary burdens. These cases are: *Batson v. Kentucky*, *Miller-El v. Dretke*, *Snyder v. Louisiana*, *Foster v. Chatman*, and *Flowers v. Mississippi*.[102] Although the Supreme Court has subsequently heard additional cases pertaining to the contours of *Batson*—specifically on the questions of expanding it to civil trials and on expanding it sex-based dismissal[103]—my analysis focuses on clarifying the contours of the race decision in criminal trials by highlighting the evidentiary conversation in that specific terrain. This analysis proceeds in three parts: first, it discusses the terrain as established in *Batson*; second, it analyzes the Court's

101. *See, e.g.*, Susan N. Herman, *Why the Court Loves* Batson: *Representation-Reinforcement, Colorblindness, and the Jury*, 67 TUL. L. REV. 1807, 1818–19 (1993); Kenneth J. Melilli, *Batson in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 462–64 (1996); Tania Tetlow, *Solving Batson*, 56 WM. & MARY L. REV. 1859, 1859 (2014); Tania Tetlow, *Why Batson Misses the Point*, 97 IOWA L. REV. 1713, 1714 (2012); Leonard L. Cavise, *The Batson Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 503 (1999).

102. Batson v. Kentucky, 476 U.S. 79 (1986); Miller-El v. Dretke, 545 U.S. 231 (2005); Snyder v. Louisiana, 552 U.S. 472 (2008); Foster v. Chatman, 578 U.S. 488 (2016); Flowers v. Mississippi, 139 S. Ct. 2228 (2019).

103. *See, e.g.*, Edmonson v. Leesville Concrete Company, 500 U.S. 614 (1991) (expanding *Batson*'s logic to civil trials); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (expanding *Batson*'s logic to sex-based challenges).

back and forth in the middle cases; and, finally, it examines the current terrain as reestablished in *Flowers*.

A. Batson v. Kentucky: Setting the Stage

As mentioned above, there are seven different opinions within *Batson* itself: the opinion, four separate concurrences, and two separate dissents.[104] Even within the opinion, there is a rich, discursive terrain and no clear single answer. Of course, the majority opinion is legally guiding. And as a practical matter, I do not often attribute particular importance to concurrences or dissents because they are not controlling law. Here, however, I will discuss Chief Justice Burger's dissent because of his overall contributions to the conversation about evidentiary burdens, and the concurrences' insight into possible alternatives.

The Court, in the majority opinion written by Justice Lewis Powell, claims to be reexamining *Swain v. Alabama* via *Strauder v. West Virginia*.[105] They are, they argue, reexamining *Swain* with respect to "[t]he evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury."[106] The majority frequently insists that their opinion that day was not a complete overhaul of established precedent[107]—a point Chief Justice Burger spends a great deal of time on in his dissent, extolling the importance of *stare decisis*.[108] However, this presumptive move to emphasize the evidentiary burden required to establish racial animus is, in fact, a fairly radical departure from precedent.

The Court's insistence that they are merely reexamining the evidentiary burden of *Swain*[109] is partially nonsense rhetoric and partially deeply salient. The Supreme Court—composed of an almost entirely distinct set of Justices between the cases—previously held in *Swain* that the State had not systemically discriminated against Black jurors and that even if it had, that such discrimination would not be a Constitutional violation.[110] So *Batson*, by holding that the State's intentional systemic

104. *Batson*, 476 U.S 79.
105. *Id*. at 90.
106. *Id*. at 82.
107. *See id*. at 93–96.
108. *See id*. at 112 (Burger, J., dissenting).
109. *Id*. at 98.
110. Swain v. Alabama, 380 U.S. 202, 226–27 (1965).

discrimination was an Equal Protection violation[111] does meaningfully differ from and overturn *Swain*'s holding. Still, Justice Powell's majority explicitly states that it is reaffirming *Swain*.[112]

This rhetorical distancing from the fact of an overturn is not atypical Supreme Court language. As Chief Justice Warren Burger addresses in his dissent, the Court has a vested interest in *stare decisis* both because of its own prior writing on the issue of precedent but also, as scholars argue, because consistency legitimates the Court, particularly over time.[113] However, what happens in *Batson* is, as Burger again points out in his dissent, a discussion that is not about what unconstitutional discrimination looks like within the criminal legal system but, instead, a conversation about the evidentiary burden of proving that discrimination.[114] In the interest of consistency, of an opinion that is not facially a radical departure from a relatively recent case, of distinguishing rather than demolishing, the Court in *Batson* begins to build out evidentiary standards.

This is why the Court turns to *Strauder*. *Strauder* is actually not a case about explicitly peremptory strikes and, instead, examines the Constitutionality of a law in West Virginia that explicitly states that only white people are allowed to serve on juries.[115] The Court held in *Strauder* in 1879 that this law is an Equal Protection violation.[116] The Court in *Batson* uses this case to insist upon the facially true idea that discrimination against jurors on the basis of race is unconstitutional per the Equal Protection Clause of the 14th Amendment.[117] However, this is a meaningfully distinct type of discrimination: the Court in *Strauder* does not, in contrast to *Batson*, parse methods for excluding Black jurors, merely that it cannot be done unilaterally. The use of peremptory strikes is a fairly surgically precise mode of excluding jurors, compared to the blunt instrument of explicitly discriminatory

111. *Batson*, 476 U.S. at 99.

112. *Id*. at 82.

113. *See e.g.*, *Stare Indecisis?: A Panel of Experts at Harvard Law School Examine the Supreme Court's Fidelity to Past Precedents in the Wake of the Precedent-Busting Term*, HARV. L. TODAY (Oct. 5, 2022), https://hls.harvard.edu/today/does-overturning-precedent-undermine-the-supreme-courts-legitimacy/ [https://perma.cc/W4U9-P4JD] (discussing the relationship between reliance on precedent – real or rhetorical – and perceived legitimacy of the Supreme Court).

114. *See Batson*, 476 U.S. at 126 (discussing burdens of proof under the majority view).

115. Strauder v. West Virginia, 100 U.S. 303 (1879).

116. *Id*. at 311–12.

117. *Batson*, 476 U.S. at 85–86.

legislation. This difference is made even more apparent by the existence of *Swain*, a much more closely analogous case. Turning instead to *Strauder* to legitimize the logic of *Batson* is something of a leap.

This is, again, not an uncommon type of logical leap for the Supreme Court because of their reliance on *stare decisis* to guide normative decision-making. A good deal of Supreme Court cases that reevaluate (overturn) a prior decision end up creating these types of logical holes. Here, the majority opinion's sleight of hand—looking at how discrimination is proven rather than if peremptory strikes are (potentially or always) discriminatory—becomes a profoundly important discursive minefield. What has been used in the cover-up to protect *stare decisis* becomes the new problem of the law generally: here, the failure to radically address peremptory strikes directly shifts the conversation to how we parse good strikes from bad strikes.

Justice Marshall's concurrence and Justice William Rehnquist's dissent both point to this problem. Justice Rehnquist, dissenting, writes, "The use of group affiliations, such as age, race, or occupation, as a 'proxy' for potential juror partiality, based on the assumption or belief that members of one group are more likely to favor defendants who belong to the same group, has long been accepted as a legitimate basis for the State's exercise of peremptory challenges."[118] Rehnquist emphasizes that what is special about peremptories is that they are not questioned for legitimacy, unlike for-cause challenges. His logic is a bit strange in the contemporary discrimination jurisprudence that follows from the work in the majority opinion and other contemporaneous and future civil rights cases because he is functionally arguing that because peremptories are by nature discretionary, they do not need to be constitutionally legitimate (non-discriminatory).

But that is, in fact, as Justice Marshall argues in his concurrence, the actual logic of peremptories: a peremptory strike definitionally, prior to the writing of the majority opinion, does not require the striking party to give a reason for their challenge of a juror.[119] A for-cause challenge (unlimited in number per trial) requires the affirmative statement of a legitimate, non-discriminatory reason up front; peremptories (limited in number per trial) capture everything else.[120] Justice Marshall rhetorically

118. *Id.* at 138.

119. *See id.* at 105–06 (discussing the ease of striking a juror and the potential bias at play).

120. *Id.*

takes for granted that peremptories are necessarily discriminatory: "The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely."[121] Justice Marshall centers his logic on eradicating discrimination and argues that, in order to do so, peremptories must not be a feature of the criminal legal system.[122]

But the majority opinion, in contrast, does not take a stance on the role of discrimination within the criminal legal system. It does not actually weigh in on the wholesale functioning of peremptories or the stakes of discriminating against jurors (instead relying on the logic of *Strauder* as obfuscation). Other scholars emphasize that this leaves discrimination baked into the system at a moment of opportunity for excising it, had they followed Justice Marshall's recommendations or overturned *Swain* entirely. I argue instead that in shifting the jurisprudential language from the mechanics of strikes to the mechanics of differentiating between good strikes and bad (the evidentiary standards of establishing discrimination), the majority opinion actually invents a new avenue for discrimination.[123] That is, the Supreme Court creates a new unequal playing field: this time, the unequal burden rests on the ability to establish the State's motives here, through evidence.

In failing to excise the discrimination baked into the peremptory challenge process (and reaffirmed through *Swain*), the Supreme Court shifted the focus away from the moral blameworthiness of systemic discrimination and onto the problem of how to measure if that discrimination is, in fact, sufficiently unconstitutional. This introduces a knowledge problem that the Supreme Court, per Justice White's prescient concurrence, has spent decades attempting to clarify. I argue that there exists a substantial body of parallel discrimination cases being clarified concurrently—the way that *Batson* shifts the problem from discrimination to evidence is not unique in the Supreme Court—and that the Supreme Court is grappling with this thematic

121. *Id.* at 102–03.

122. *Id.* at 107.

123. *See generally* Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785 (2020) (arguing that for-cause strikes are also racially discriminatory but that the Supreme Court has functionally given them a pass by focusing on peremptories); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985) (arguing, prior to the *Batson* decision, that there is a widespread tendency for white jurors to convict Black defendants).

problem throughout various civil rights cases.[124] I focus here on *Batson* and peremptory challenges in order to take a deep look at that pattern in this specific context.

B. The Intermediary Cases: The Batson Third Step

The Supreme Court outlines a three-step burden-shifting framework for determining the legitimacy of a *Batson* challenge: first, the defense has the burden of showing an inference of discrimination; second, the burden shifts to the prosecution to put forth a race-neutral (legitimate, non-discriminatory) reason for the strike; and, third, the burden shifts back to the defense to establish that the proffered reason is pretextual and that the discrimination is, in fact, purposeful.[125] Since 1986, the Court has returned to this process several times in order to clarify those steps. In this section, I focus on the cases that focus on Step Three, the process of establishing purposeful discrimination or rebutting the State's purportedly race-neutral reasoning.

In a Step One case, *Johnson v. California*, Justice Stevens for the majority gives insight into why I am focusing on Step Three:

> Thus, in describing the burden-shifting framework, we assumed in *Batson* that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated. We did not intend the first step to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination.[126]

Step One is conceptualized as a relatively low structural barrier to arguing discrimination and is consistently reaffirmed as such by the Supreme Court. Whether or not it consistently works as such in practice is not knowable because of the general structures around *Batson* that I will discuss later in this Article. However, the Supreme Court does not have a real conversation about it: as it granted certiorari on the first step, primarily in the early 2000s, it was exclusively to reaffirm the simplicity of the step, clarifying attendant issues rather than the step itself.[127]

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124. The Court in *Batson* begins to define how a party can establish a prima facie case of discrimination (with some theoretical keys to refuting rebuttals), which is a dominant theme in cases interpreting the Civil Rights Act of 1964.

125. *Batson*, 476 U.S. at 93–94.

126. Johnson v. California, 545 U.S. 162, 170 (2005).

127. For example, *Johnson v. California* focuses more on the rights of states to clarify the standard, and *Rice v. Collins* focuses on res judicata. The Court clarifies

Furthermore, as Justice John Paul Stevens emphasizes, the three-step framework involves differential relationships to evidence. The first step does not involve a conversation around proof the way that the third step does: generally, it is sufficient to pass Step One to allege only that Black jurors were struck at an abnormal rate or in contrast to similarly situated white jurors.[128] The thirty years of clarification of *Batson* that center on the third step often involve the majority in those cases getting extremely surgically precise about what evidence the defense may or may not use in order to establish discrimination.

I argue that this is where the opacity issue comes to the fore. In the above section, I argued that the Supreme Court's work in shifting the conversation from one of eradicating discrimination to one of proving discrimination set the tone for the problem that eventually becomes catastrophic by *Flowers*. In this section, I argue that the intermediary cases I discuss here are marked by a conversation – often explicitly – about what the defense must do in order to establish intentional discrimination from the prosecution. I argue that these cases appear to be broadly permissive; in fact, Justice Thomas's dissents throughout the cases tell a consistent story that the Court has been overly permissive in considering too much evidence from the defense and, even as I disagree with his overall aims, this is not an extraordinary claim about the various majority opinions. The amount of evidence to be considered becomes the battleground in the intermediary cases, which underscores how the Court continues having a conversation that is fully adjacent to, rather than directly about, discrimination in practice.

However, in viewing the cases as a collection—and then, in the next section, through *Flowers*—the permissibility of evidence comes with an asterisk: the Supreme Court allows for the trial judge to consider evidence in the extraordinary event that it exists. I argue that each of the overly permissible pieces of evidence that the Supreme Court allows is unlikely to actually be available to the defense in practice. This is not because the State is not engaging in intentional discrimination, but instead because the defense lacks actual practicable avenues for meeting the invisible burden of the third step as the Court narrows the scope of what that could look like, even though they appear permissive.

The third step is inherently problematic. In his concurrence to *Miller-El*, echoing Justice Marshall's concerns in *Batson*, Justice

different contours, but the overall stakes remain roughly the same.

128. *Johnson*, 545 U.S. at 170.

Breyer blames this on the problems intrinsic to "the inherently subjective reasons that underlie use of a peremptory challenge."[129] *Miller-El v. Dretke*, *Foster v. Chatman*,[130] and *Snyder v. Louisiana*[131] each consider the Third Step and, as such, begin to clarify the parameters of persuasion. I argue that these cases begin to build expectations around the types of evidence that can be considered to establish this intent because they structure the ability to prove intentional discrimination.

The *Miller-El* Court draws on an age discrimination in employment case, *Reeves v. Sanderson Plumbing Co.*, to establish that the defense can draw on comparative juror analysis in order to rebut the State's facially race neutral reason.[132] This means that Courts may allow the defense to use comparators—in this case, jurors who are similarly situated but for the identity category in question (here: race)—in order to establish racial animus. Importantly, the evidence that the Court is considering in this case is entirely intrinsic to the single trial in question. In his dissent, Justice Thomas clarifies the totality of the evidence has not been properly introduced by the defense.[133] Although the procedural admissibility of that evidence is apparently up for debate, the intentionality of the State was determinable through the context of the single trial.

This is an important through line in the *Batson* Step Three cases: the defense may prove that the prosecution acted with intentional racial animus to discriminate via their behavior at and papers pertaining to the trial in question. The Court considers functionally similar evidence in *Snyder v. Louisiana*: using transcript evidence of the voir dire in order to establish if the prosecution questioned Black and white jurors differently.[134] *Foster v. Chatman* similarly considers particularly obvious and egregious behavior by the prosecution: a set of documents from the district attorney's office that explicitly sorted jurors by race, including memos delineating a strategy for picking a single Black juror to avoid striking (presumably in order to avoid striking *all* of the available Black jurors and, consequently, defeating the problem of comparators).[135]

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129. Miller-El v. Dretke, 545 U.S. 231, 267 (2005).
130. Foster v. Chatman, 578 U.S. 488 (2016).
131. Snyder v. Louisiana, 552 U.S. 472 (2008).
132. *Miller-El,* 545 U.S. at 241.
133. *Id.* at 291.
134. *Snyder,* 552 U.S. at 479.
135. *Foster*, 578 U.S. at 513.

This is consistent with how the Supreme Court generally establishes burdens of proof for discrimination cases in the latter half of the twentieth century and early twenty-first century. The burden shifting framework—from articulating harm, to offering a legitimate non-discriminatory reason, to establishing that the reason is pretextual—follows, often directly, many of the Title VII cases being decided roughly contemporaneously. In the matter of proving discrimination, the Supreme Court is surprisingly internally consistent.

However, the Supreme Court's engagement with discrimination law is not as a rights-granting institution but, instead, can be considered pedagogical. These rulings articulate the types of behaviors the State is forbidden from engaging in if the State wishes to cleanly escape an unfavorable ruling on a *Batson* challenge. These cases teach prosecutors how to avoid claims of discrimination by narrowly defining the behaviors that the Court will consider problematic in evaluating their selection.

Furthermore, the Court takes as a given that the defense will be able to access the information necessary to establish Step Three after Step Two. Returning to Justice Stevens's opinion in *Johnson v. California* on Step One, "Thus, in describing the burden-shifting framework, we assumed in *Batson* that the trial judge would have the benefit of all relevant circumstances, including the prosecutor's explanation, before deciding whether it was more likely than not that the challenge was improperly motivated."[136] That is, the Court does not consider that Step Three may not be capable of being established given the information available to the defense. More cynically, the Court does not seem to care about capturing all discrimination so much as capturing discrimination that is provable within a certain set of constraints.

In the rest of this Article, I will unpack this argument, establishing that as the Court defines the contours of proving a *Batson* violation, they narrow the scope of arguments available to the defense to establish that prosecutorial discrimination was intentional by pushing prosecutorial action into the dark, outside of the behaviors described in the intermediary cases. As discrimination becomes less overt, the ability to prove that, particularly through the materials directly pertaining to trial, becomes increasingly difficult. I argue, through *Flowers v. Mississippi*, that the Supreme Court has pushed the possibility of

136. Johnson v. California, 545 U.S. 162, 170 (2005).

proving a relatively simple procedural misstep behind a hefty informational paywall.

III. What We Can Know About Prosecutors: The Stakes of *Flowers v. Mississippi*

In *Flowers*, the Supreme Court walks a fragile line; the case is haunted by both prosecutor Doug Evan's history of discriminatory practices and by the case's high-profile nature in and surrounding the Winona, Mississippi area.[137] Although the majority opinion is incredibly careful in asserting that the Court does not break new ground in the *Batson* trajectory and, instead, applies its own prior rulings to "the extraordinary facts of this case," the extraordinary facts of this case necessarily make it a benchmark case in understanding what history and publicity mean from an evidentiary perspective.[138]

As I have argued in the previous section, the intervening *Batson* Step Three cases substantially narrow the universe of available mechanisms for establishing discrimination.[139] Price argues that the cultural impact of this shift is to render the lack of outcome itself satisfactory.[140] Here, I argue that in *Flowers*, the Supreme Court concludes its journey of normalizing the *Batson* question as one about evidence rather than discrimination and narrows the defense's ability to prove that discrimination occurred. By analyzing the oral arguments and the opinions of the case, I argue that the Supreme Court narrows the funnel even further, compressing the ability to establish discrimination to almost nothing.

A. The Oral Arguments: On History

Supreme Court oral arguments take an hour, and each side has approximately thirty minutes to present their case and receive questions and comments from the Justices. Justices interrupt the flow of an attorney's argument to ask questions.[141] Some scholars suggest that how Justices generally interact with attorneys during

137. Kat Albrecht & Kaitlyn Filip, *supra* note 36.

138. Flowers v. Mississippi, 139 S. Ct. 2228, 2235 (2019).

139. *See supra* Section II.B.

140. Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 77 (2009).

141. Timothy R. Johnson, Ryan C. Block, & Justin Wedeking, *Pardon the Interruption: An Empirical Analysis of Supreme Court Justices' Behavior During Oral Arguments*, 55 LOY. L. REV. 331 (2009); Tonja Jacobi & Matthew Sag, *Taking Laughter Seriously at the Supreme Court*, 72 VAND. L. REV. 1423 (2019).

arguments can be predictive of case outcomes.[142] Some suggest that the quality of oral arguments is relevant to predicting the outcome of cases while others argue that Justices tend to vote along party lines regardless of the quality of an individual attorney's argumentation.[143] Here, I focus not on the predictive capacity of argumentation but rather on the themes prevalent in the arguments as indicative of some aspect of the Supreme Court's line of reasoning.

In the presentation of her oral argument in *Flowers*, Professor Sheri Lynn Johnson, Flowers's attorney, emphasizes the singular strike by the prosecution of prospective juror Carolyn Wright.[144] She emphasizes that Doug Evans, in response to the defense, made a number of false statements about his reasoning for moving to exclude Wright.[145] Johnson emphasizes the particular facts of this case in a way the Justices largely ignore, except for a question from Justice Elena Kagan to Mississippi Special Assistant Attorney General Jason Davis in his arguments.[146]

Instead of emphasizing the particular facts of the case, the Justices ask extensively about the role of history. The discussion of history is, within the oral arguments and, as I will argue, within the opinion itself, incredibly slippery and ill-defined. Although the Justices sought to adopt a clear definition of 'history' for precedential purposes, no clear definition or scope of 'history' was presented during the oral arguments.

Justices Samuel Alito and John Roberts each offer boundaries around 'history,' but not ones that are consistent or particularly clear. Justice Alito asks Johnson, given the troubling history of this case, what outcome she would recommend if the Court were to

142. Maron W. Sorenson, *Asking Versus Telling: The Supreme Court's Strategic Use of Questions and Statements During Oral Arguments*, 76 POL. RSCH. Q. 1559 (2023); Bryce J. Dietrich, Ryan D. Enos & Maya Sen, *Emotional Arousal Predicts Voting on the U.S. Supreme Court*, 27 POL. ANALYSIS 237 (2019); Daniel M. Katz, Michael J. Bommarito II & Josh Blackman, *Crowdsourcing Accurately and Robustly Predicts Supreme Court Decisions* (Dec. 11, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3085710 [https://perma.cc/5PSY-U6KT]; Linda Greenhouse, *Press Room Predictions*, 2 PERSP. ON POL. 781 (2004).

143. Timothy R. Johnson, Paul J. Wahlbeck & James F. Spriggs, II, *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99 (2006) (arguing that the quality of arguments does have a predictive capacity for determining outcomes of Supreme Court cases).

144. Oral Argument at 3:54, Flowers v. Mississippi, 139 3. Ct. 2228 (2019) (No. 17-9572), https://www.oyez.org/cases/2018/17-9572 [https://perma.cc/LGL9-5BWB] [hereinafter Oral Argument].

145. *Id.* at 2:21.

146. *Id.* at 35:54.

disregard everything about the case prior to the trial.[147] Johnson responds that the evidence, even without *Flowers IV*, is still clear and convincing as in the *Batson* cases, as "this Court has demanded a sensitive inquiry into all of the circumstances that prove racial discrimination."[148] Here, Justice Alito asks if history includes the case beyond the present trial, and Johnson says yes, per the *Batson* precedent.[149] Together, they stay relatively close to the facts of the Tardy Furniture murders.

Justice Roberts, on the other hand, gives unique insight into a potentially much larger scope for 'history' by asking how far back the Court must look: "If the prosecutor had one *Batson* violation in his 30-year career, 20 years ago, is that something that should be brought out and pertinent in the assessment of the current *Batson* challenges?"[150] Justice Roberts dramatically shrinks and distances Doug Evans's history of established *Batson* violations: even within the *Flowers* history itself, he had two additional violations verified by the Mississippi Supreme Court between 1996 and 2019.[151] Justice Roberts asks Johnson to stop fighting the hypothetical when she reiterates the extraordinary nature of the case, in order to develop a general rule for all cases moving forward, not just on a particular case as extreme as this one.[152] Although smaller in scope, this line of inquiry uniquely considers the prosecutor's career outside of the facts of the case before it.

Johnson responds that the established rule for Step Three in a *Batson* analysis is that every factor that bears upon the analysis is relevant, although the strength or weakness of that relevance may vary based on the factors that Justice Roberts mentions.[153] This is interesting because of its ultimate lack of specificity. Within this discussion between Justice Roberts and Johnson, the definition of 'history' becomes increasingly murky as the interlocutors disagree on how closely to engage with facts of the case.

For the prosecution, Davis opens by saying, "The history in this case is troubling, but the history is confined to this case."[154] This is especially unclear: Justice Kavanaugh and Justice Breyer both seem to interpret this opening statement as a call to limiting

147. *Id.* at 3:09.
148. *Id.* at 3:27.
149. *Id.*
150. *Id.* at 14:42.
151. *Id.* at 42:29.
152. *Id.* at 15:50.
153. *Id.* at 16:51.
154. *Id.* at 25:54.

the legal definition of 'history' to the single trial. Justice Kavanaugh replies that you cannot take the history out of the case, noting that Doug Evans struck forty-one Black jurors and only one white juror.[155] This is the only instance during the oral arguments where we know with some certainty that the line of questioning is about 'history' vis-à-vis the *Flowers* cases and only the *Flowers* cases. Elsewhere, as described, the Court floats hypotheticals and tries, without specificity, to define 'history' as something more expansive than the history of *Flowers I-V*.

This is noteworthy because the history the Supreme Court has before it is not, in fact, only Doug Evans's behavior in the *Flowers VI* trial. Amicus briefs from the Magnolia Bar Association and the NAACP Legal Defense Fund both describe Evans's history beyond the case—specifically the American Public Media statistical evidence from Evans's office from 1992 to 2017—as well as Winona's general history of denying equal rights.[156] Although Flowers' own brief and oral arguments stayed with the facts of the particular case, arguing only for the inclusion of the facts of *Flowers I-V*, the broader history of Evans' office was available to them and, as Justice Thomas writes in his dissent, haunts the case.[157] Evans's office was found to have struck Black jurors at 4.4 times the rate it struck white jurors between 1992 and 2017, striking 50% of eligible Black jurors compared to 11% of eligible white jurors.[158] The APM data showed that, even when controlling for other purportedly race-neutral factors, Evans's office still struck Black jurors more frequently.[159]

The Court, in oral arguments, definitively does not touch this data. Both Johnson and Davis continuously redirect the Court back to the facts of the case, staying as closely to *Flowers VI* as the Court will allow.[160] Still, the available data casts a troubling shadow over the line of argumentation before the Court and this becomes even more salient within the opinions themselves.

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155. *Id.* at 27:33.

156. Brief for NAACP Legal Defense Fund & Educational Fund, Inc. as Amici Curiae Supporting Petitioner, Flowers v. Mississippi, 139 S. Ct. 2228 (2019) (No. 17-9572); Brief for Magnolia Bar Association, Mississippi Center for Justice & Innocence Project New Orleans as Amici Curiae Supporting Petitioner, Flowers v. Mississippi, 139 S. Ct. 2228 (2019) (No. 17-9572).

157. *Flowers*, 139 S. Ct. at 2252–74 (Thomas, J., dissenting).

158. *Id.*

159. *Id.*

160. *See generally* Oral Argument.

B. The Text of Flowers and the Problems of History and Transparency

Despite the Court's insistence that it broke no new ground with the *Flowers* opinion, it is actually doing something particularly strange when contextualized within the broader scope of the *Batson* trajectory: it is revisiting the requirements of *Swain* and asking if those requirements can now be considered a possibility.[161] Justice Kavanaugh wrote in *Flowers* that the Court in *Batson* rejected their own articulation in *Swain* that the defendant must demonstrate a history of racially discriminatory strikes.[162] I have argued above that this is a strange reading of *Swain* because it is *Batson* itself which considers the *necessity* of a historical argument, whereas *Swain* considers the *sufficiency* of a historical argument.[163] Here, Justice Kavanaugh wrote that the Court held in *Batson* that the need to establish a history of discrimination in order to establish intent in a particular case is "an 'insurmountable' burden."[164]

The insurmountable burden cited by Justice Kavanaugh is a mere footnote in *Batson* that specifically references the difficulty of establishing a history of bad peremptory challenges because of the problem of record-keeping. The Court wrote in full, "In jurisdictions where court records do not reflect the jurors' race and where *voir dire* proceedings are not transcribed, the burden would be insurmountable."[165] That is, the burden of producing patterns of discrimination would vary between jurisdictions, contingent on the record-keeping work of individual jurisdictions. For some, this would be insurmountable. This is the only instance in the *Batson* trajectory where the Court articulated the logistics of the practical difficulty of establishing a pattern of discriminatory strikes. In the rest of the Supreme Court's reasoning, this insurmountable burden was taken for granted and left unexplained. Here, too, the Court relegated it to a footnote: the most unexamined of assumptions undergirding the case as a whole.

Even in this footnote in *Batson*, the logistics are insufficiently unpacked and, more importantly, the implications for the appellate

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161. *Flowers*, 139 S. Ct. at 2235.

162. *Id.* at 2241.

163. Swain, the petitioner, established that there had been no Black jurors in the county in nearly fifteen years. The Court held that this was not sufficient to establish a Fourteenth Amendment violation because of a relatively narrow reading of the purpose of the peremptory strike. Swain v. Alabama, 380 U.S. 202, 221–23 (1965).

164. *Flowers*, 139 S. Ct. at 2241 (citing Batson v. Kentucky, 476 U.S. 79, 92 n.17 (1986)).

165. *Batson*, 476 U.S. at 92 n.17 (citing People v. Wheeler, 583 P.2d 748, 767–68 (Cal. 1978)).

structure upon which the logic of *Batson* implicitly relies are left unsaid. In *Batson*, the Supreme Court acknowledged that the lower courts do not always have court records that reflect jurors' race and that they do not always transcribe *voir dire* proceedings.[166] A transcript is an official court record, certified to be a verbatim account of proceedings that transpired in court, that must be taken by a court reporter. Transcripts can be a vital part of the appellate process but there is no universal legal requirement that all cases have a court reporter—or even a recording of the proceedings—or that the transcript be complete. There is no cohesion on the maintenance and availability of these records across the country.[167]

In the literature review, I discussed studies that relied upon appellate records in order to establish the effectiveness of *Batson* in lower courts.[168] What has been unduly prohibitive for scholarship has been understanding the universe of potential challenges.[169] Fully understanding the insurmountable burden of the often non-existent and usually inaccessible court record is not presently possible: we actually do not currently know, broadly, the patterns of prosecutorial behavior with respect to jury selection in cases that have not been appealed *for that reason*.

In *In the Dark*, APM Reports did a full analysis of court records in a single county in Mississippi to better understand prosecutor Doug Evans's behavior between 1992 and 2017.[170] Under the current system of court records management, Will Craft with APM Reports described that the process of manually collecting and analyzing race data from 225 trials over 25 years took them a full year to analyze and collect.[171] He wrote:

> There is no complete record of trials at the district court level so the first step we took was to create a complete list of all trials for the Fifth Circuit Court District. Through a combination of records requests and by going page-by-page through hand-written docket books at each of the eight courthouses in the

166. *Id.*

167. *See generally* Kat Albrecht & Kaitlyn Filip, *Public Records Aren't Public: Systemic Barriers to Measuring Court Functioning & Equity*, 113 J. CRIM. L. & CRIMINOLOGY 1 (2023) (conducting a national survey of county clerk offices on the availability and cost of criminal court transcripts and finding tremendous variation in both cost and availability to laypeople).

168. *See* Gau, *supra* note 84, at 79–80; Pollitt & Warren, *supra* note 89, at 1957–58; Barrett, *supra* note 88, at 296.

169. *See* Albrecht & Filip, *supra* note 167; Frampton, *supra* note 98.

170. Craft, *supra* note 24.

171. WILL CRAFT, APM REPS., PEREMPTORY STRIKES IN MISSISSIPPI'S FIFTH CIRCUIT COURT DISTRICT 2, https://features.apmreports.org/files/peremptory_strike_methodology.pdf [https://perma.cc/TNY4-VR4R].

district, we created a list of 418 trials from 1992 to 2017.[172]

It is unclear if APM Reports had any costs imposed by the courts for records requests, but often laypeople or scholars would at this juncture.[173]

Three APM Reports journalists went to courthouses, the Mississippi Department of History and Archives, and the Mississippi Supreme Court Archives to digitize court files and transcripts where available because those files are often still maintained as paper records if they are maintained at all.[174] They then manually coded the digital records for the venire, a record of the peremptory strikes written down either by the judge or court reporter, the race of each venire member as written down by either the judge or the court reporter (in the margins), the list of all selected jurors, and a transcript of the *voir dire* where available.[175]

The resultant analysis of Doug Evans's history of racial discrimination in jury selection followed a year of intense, team-based archival work. This Article walked through the process undertaken by APM Reports to fully underscore how difficult, time intensive, and potentially expensive that process can be. Footnote 17 truly undersells the insurmountable burden of the data problem here. In *Swain*, the disparity had been obvious: there had been no Black jurors serving in Talladega County in fifteen years. In that case, a history needed only be established by looking at who had (or had not) served on a jury—a much easier records question, though still one that would require extensive investigation.

In most cases, as discussed above, the discrimination becomes more subtle: prosecutors strategically pick a single Black juror or run out of strikes before they can clear all available Black venire members. This means that the process must be more closely examined to even begin to understand a potential pattern. The Supreme Court maintains that showing this pattern is not necessary: it is distinctively plausible that these types of patterns could routinely show up in the prosecutorial record were each case to have a team of diligent investigative journalists uncovering that prosecutor's pattern. However, not only is that beyond the reasonable scope of an ordinary appeals process, the *Batson* trajectory does not ever make clear that this would be considered.

172. *Id.* at 3.
173. *See* Albrecht & Filip, *supra* note 167, at 10–11.
174. CRAFT, *supra* note 171, at 3.
175. *Id.* at 3–4.

That is, the Court in *Flowers* simply reiterated that a petitioner need not establish a history of discrimination outside of the case.[176] Justice Kavanaugh wrote:

> *Batson* did not preclude defendants from still using the same kinds of historical evidence that *Swain* had allowed defendants to use to support a claim of racial discrimination. Most importantly for present purposes, after *Batson*, the trial judge may still consider historical evidence of the State's discriminatory peremptory strikes from past trials in the jurisdiction, just as *Swain* had allowed.[177]

And yet *Flowers* does, in fact, seem to preclude defendants from using exactly the kind of historical evidence that *Swain* seemed to require at a minimum, since *Swain* required a broader historical record.[178] Justice Kavanaugh's definition of "historical evidence" is slippery here: he simultaneously means evidence pertaining to the case and beyond the case. In discussing Flowers as a defendant, he is using "historical evidence" in a way that is not otherwise possible: the expanded universe of Flowers's own case is distinctively non-normative.

What the Court did in *Flowers* was rule on the option of using the historical record of multiple trials of the same defendant as functionally analogous to using the historical record of all trials tried by the same prosecutor in the same county, even though both sets of data are uniquely *available* to Flowers. The question of that data being an insurmountable burden is irrelevant here because Flowers surmounted it.[179] Just as the common understanding of *Batson* moved the harm suffered from the defendant to the juror, here, the Court similarly foreclosed the definition of who had done the harm and when. The insurmountable burden of compiling a historical record is actually irrelevant in *Flowers* because Curtis Flowers had a unique, utterly unprecedented record that would likely not occur again. The Court, therefore, did not directly rule on how the historical record should be considered in determining discriminatory intent in jury selection, even as they stated over and over that the functional idea of a historical record was something that they could possibly consider.[180]

There are three problems here: first, the Court's ever-shifting relationship to its own opinion in both *Swain* and *Batson* that makes statistical data a massive evidentiary question mark in the

176. Flowers v. Mississippi, 139 S. Ct. 2228, 2245 (2019).
177. *Id.*
178. Swain v. Alabama, 380 U.S. 202, 205–09 (1965).
179. *Flowers*, 139 S. Ct. at 2245.
180. *Id.*

establishment of discrimination; second, the Court's primary assumption about the individual nature of a single case is divorced from evidence; and, third, the Court's unfettered acceptance of its own culture of failing to collect, store, and produce data pertinent to its own proceedings. This Article has largely discussed problem one and will elaborate upon problem two and expand upon problem three in the following sections.

i. On Evidence: The Court's N=1 Problem

I argue that an inherently contradictory feature of the United States legal system is that the law simultaneously overemphasizes precedent while deemphasizing context. This means that a legal understanding of a case is driven by its relationship to other cases, but only sometimes. By this I mean that one of the fundamental tenets of legal argumentation is that the court considers the facts before it and only the facts before it. One of the ways in which knowledge and transparency works in the courts is through, mostly evidentiary, decisions about what can be heard or what must be excluded.

The law, specifically discrimination law, does not yet broadly account for systemic comparisons.[181] Although some lower courts are beginning to hear statistical evidence in relation to particular causes of action—such as the Racial Justice Act in California[182]—generally, the law does not allow for an understanding of this type of contextualization. For the most part, the statistical story of how the law treats differently situated groups does not matter.

This maps onto a fundamental analytical problem of discrimination law: the law is set up to understand disparate treatment rather than disparate impact. Policies and practices that do not explicitly discriminate are often legal regardless of whether they *actually* do not discriminate. For example, the law considers standardized test scores to be a race-neutral factor in college admissions decisions even though considering those alone tends to result in an over-admission of white applicants due to systemic factors that allow for white students to have better resources to perform better on such tests.[183]

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181. *See, e.g.*, *Flowers*, 139 S. Ct. at 2241 ("[T]he *Batson* Court held that a criminal defendant could show 'purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges *at the defendant's trial*.'" (citing Batson v. Kentucky, 476 U.S. 79, 96 (1986))).

182. CAL. PENAL CODE § 745 (West 2024).

183. Uma Mazyck Jayakumar & Ibram X. Kendi, *'Race Neutral' is the New 'Separate but Equal'*, ATLANTIC (June 29, 2023), https://www.theatlantic.com/ideas/archive/2023/06/supreme-court-affirmative-

Here, this is an important consideration because of the way that the law is structurally set up to ignore histories. The way the Supreme Court structurally pushes that discussion outside of the realm of the possible within *Flowers* is non-normative but the overall reluctance of the courts to consider history beyond the case before it is, in fact, an ordinary functioning of the courts. Although the totality of this issue is beyond the scope of this Article, it is worth mentioning here because it underscores the overall reluctance to use statistical data beyond the present record. That is, the Court's reluctance to consider data being so deeply enshrined in its ordinary functioning makes the laissez-faire attitude of *Batson* Footnote 17 unremarkable: that the data problems of the courts are a fundamental assumption of the functioning of the courts is unsurprising when one considers that this is a standard point of view of the United States legal system.

ii. Accepting Footnote 17: Considerations on Transparency and Privacy

The Court's implicit acceptance of the logic of Footnote 17 in *Batson* reveals a new layer to the problem of how discrimination law works. The procedural logic discussed above suggests a court system that is fundamentally predicated on not uprooting its own prior history of discrimination and, instead, retrenching that. Data access underscores that lack of interest and, furthermore, acts as a protective mechanism against self-critique that is never, in fact, actually weighed against any other intervening interests.

The theoretical consideration in the openness of courts is typically expressed in an overriding public interest versus an individual's interest in privacy. Publicity is a guiding legal principle Constitutionally derived from the First and Sixth Amendments, a democratic value, and a fundamental principle of the public sphere.[184] Legal actors routinely respond to that fundamental

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action-race-neutral-admissions/674565/ [https://perma.cc/5XVE-ZRDW]; Lauren Camera, *Test-Only Admissions Would Make Colleges More White, More Wealthy*, U.S. NEWS (June 24, 2019), https://www.usnews.com/news/education-news/articles/2019-06-24/test-only-admissions-would-make-colleges-more-white-more-wealthy [https://perma.cc/ZYR8-PA99] ("[A] test-only admissions policy would increase the share of white students at top colleges from 66% to 75%, and the combined share of black and Latino students would decrease from 19% to 11%. The share of Asian students would fall slightly, from 11% to 10%.").

184. *See* Richmond Newspapers v. Virginia, 448 U.S. 555 (1980) (holding that criminal trials must be open to the public); *see also* Associated Press v. U.S., 326 U.S. 1 (1945) (holding that anticompetitive behavior by news organizations affected the First Amendment by affecting the ability of the public to receive information from multiple sources); *see also* U.S. CONST. amend. VI. & amend. I.

presupposition with arguments in favor of opacity or, at least, limiting a general right to publicity. Prosecutors argue against *Brady* requirements to share information, often exercising discretion under *Brady* by citing an overriding interest in public safety or even unilaterally determining that the information in question is not sufficiently important.[185] Judges, following the Federal Rules of Evidence, routinely exclude evidence from proceedings in the interest of preserving fairness.[186] Furthermore, the Supreme Court, in delineating the very principle of court publicity has explicitly named situations in which the public is not entitled to full information about a trial: namely, in the case of child abuse, whereby the victim cannot meaningfully consent to the implied waived privacy of a public trial.[187] The discourses around both publicity and opacity often center on notions of equity and fairness as a potential overriding interest.

Footnote 17 is not subject to a balancing test. The Court does not grapple with the issue of whether automatically constraining the collection of data at the trial court level is met with an overriding public interest in the name of privacy. Theoretically, the rejoinder could be, particularly in 1986, that the production and maintenance of comprehensive public records for every jury selection process would be unduly expensive for the courts for ultimately little material value for the public. However, policy experts broadly disagree, even when accounting for courthouses that contemporaneously maintain their records via paper (such as in Cook County). Injustice Watch reported in 2018, for example, that court recording in Cook County eviction courts is a major access to justice issue: that the lack of court reporters or digital recording equipment "has serious repercussions, largely preventing effective appeals of eviction rulings and making it nearly impossible to hold judges accountable."[188] And, while the issue is more salient in civil

185. *See* Brady v. Maryland, 373 U.S. 83 (1963) (holding that the prosecution has an affirmative pre-trial duty under the Constitution to disclose exculpatory evidence); Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138 (2012); *see generally* JULILLY KOHLER-HAUSMANN, GETTING TOUGH: WELFARE AND IMPRISONMENT IN 1970S AMERICA (2017) (discussing the impact of "tough on crime" rhetoric on punishment generally).

186. *See* FED. R. EVID. 403.

187. Stephen E. Smith. *What's In a Name? Strict Scrutiny and the Right to a Public Trial*, 57 IDAHO L. REV. 447, 463–64 (2021).

188. Olivia Stovicek and Mari Cohen, *Failure to Record Cook County Eviction Court Hearings Leaves Tenants Vulnerable,* INJUSTICE WATCH (Apr. 25, 2018), https://www.injusticewatch.org/civil-courts/housing/2018/failure-to-record-cook-county-eviction-court-hearings-leaves-tenants-vulnerable/ [https://perma.cc/5FTT-

courts where there is substantially less reporting and record-keeping overall than in criminal courts, the issues of leveling the playing field and creating a record for appeal are equally salient in criminal courts.

Notably, this analysis fails to account for how, in the case of a criminal defendant, the interests being balanced should necessarily be the defendant's own: considering an overriding public interest versus an overriding interest in privacy. A good analysis would consider a criminal defendant's interest in not having their name publicly associated with ongoing proceedings, although I have argued elsewhere that the maintenance and production of court data is not sufficient to influence the cottage industry of exploitation of individuals involved in the criminal legal system, alongside the rights of the criminal defendant not just as a criminal defendant but as a member of the public.[189] In other words, there are constitutionally-imposed rights to criminal defendants, but here, the production and maintenance of court records and data is not just about the ability of a defendant to have a record for appeal but for the public—which includes criminal defendants writ large—to understand the systemic functioning of the criminal courts. Critics may argue that the general public does not have reason to care about their rights as an individual to study, know, or understand the patterns of individual prosecutors in individual jurisdictions and that advocating for such collection and preservation of data is unduly burdensome given the overriding lack of personal interest. While it may be true that an individual without any attachment to the criminal legal system might not have any personal interest in better understanding the systemic functioning of the courts, the ability to contextualize an individual case can be helpful for defendants who are also members of the public, particularly as lower courts become increasingly amenable to considering statistical data.

The Court also does not deal with this in *Batson* Footnote 17 or elsewhere. Not only does it fail to do a good analysis of the

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QYDA]; *see also The Case for Recording Devices in Cook County Eviction Courts*, CHI. APPLESEED CTR. FOR FAIR CTS. (July 2016), https://www.chicagoappleseed.org/wp-content/uploads/2018/04/July-2016-Case-for-Recording-Devices-Formatted-1.pdf [https://perma.cc/3PQ8-4FW4].

189. Kaitlyn Filip & Kat Albrecht, *Regulating Harms: Tensions Between Data Privacy and Data Transparency*, 8 J. REGUL. COMPLIANCE 115 (2022) (arguing that oftentimes public records and data is available on a for-pay model to interested third parties and is always available to the state or courts, creating an overall power discrepancy between criminal defendants and the state that keeping court data secret does not ameliorate and, in fact, exacerbates).

balanced interests in the case of record-keeping, it fails to do any analysis at all. Keeping the focus on the *Batson* problem, the Court's entire analysis across the case trajectory from 1986 to 2019 rests on an assumption that access to broad court data on jury selection is insurmountable. The passive voice at play in this articulation of the problem of accessing broad court data shifts focus from the actors responsible for making that data fundamentally and insurmountably inaccessible: resting on the idea that systemic data about the jury selection patterns of particular prosecutors is "insurmountable" suggests that this is simply how the system must be and that change is impossible.

What is worse is that the Court in *Flowers* holds on to that idea of it being insurmountable. Justice Kavanaugh not only reifies the idea in Footnote 17 that court data cannot be accessed because it is routinely not collected, he makes that idea central to the text in *Flowers*, articulating it as a holding in the main text of *Batson*.[190] *Flowers* as a case holds the keys to undoing the fundamental problems of *Batson*: that it is toothless, that it shifts attention from the defendant to the juror, that it reifies the logic of discrimination rather than undoing it. Because the case is so extraordinary, the Court had the opportunity to leverage its extraordinary set of facts to comment on patterns of racial discrimination in jury selection. Instead, they functionally narrowed the definition of history from *Swain*: they say that *Swain*'s burden is insurmountable because of the impossibility of obtaining broad statistical data about particular jurisdictions and, yet, they refuse to consider the broad statistical data about Winona, Mississippi available to them.

Flowers's team likely kept the definition narrow because of its own interest in winning in this particular case. However, the Court need not have, once again, failed to alter their own milquetoast anti-discrimination logic: "[W]e break no new legal ground. We simply enforce and reinforce *Batson* by applying it to the extraordinary facts of this case."[191] Instead of taking the extraordinary facts—and the unique contemporary digital and media circumstances that brought those extraordinary facts to public light—as an opportunity to rethink the use of public data in these cases, the court avoided the question all together.

190. Flowers v. Mississippi, 139 S. Ct. 2228, 2241 (2019) (citing Batson v. Kentucky, 476 U.S. 79, 92 n.17 (1986)).

191. *Id*. at 2235.

Conclusion: Opacity, Discrimination, and The Popular Trial

Given the Supreme Court's own history in the *Batson* trajectory that I have identified here, I would not have expected the Court to do something radical in *Flowers*. As previously described, the Court's relationship to its own history is ironically too entrenched to adequately consider the role of history and context in the cases before it. The Court doing something fundamentally conservative vis-à-vis race and rights is a predictable outcome, particularly in light of all of the scholarship discussed above. Still, what makes *Flowers* particularly unique, I argue, is its context and the way in which the Court had the opportunity to make a different choice but, instead, re-entrenched their own discriminatory logic once again.

I want to return here to *In the Dark* season 2. In May 2018, American Public Media began reporting on the Curtis Flowers cases as a follow-up to their 2016 reporting on the Jacob Wetterling case (a story about the abduction of a young child in 1989). The podcast unexpectedly spanned nearly two and a half years of active airing, concluding in October 2020 with an episode in conversation with Flowers himself.[192] Much has been made of the role of the podcast *Serial* and its involvement in the Adnan Syed case, with reporters generally asserting the importance of the podcast for the administration of justice in Syed's appeals.[193] While one function of contemporary true crime, particularly when driven by journalists, can be in a reexamination of a case, it is worth noting here one more reason why Flowers is extraordinary.

First, I want to take a moment to discuss *Serial* as a comparator. *Serial*'s first season covers the investigation into the murder of high school student Hae Min Lee and the subsequent arrest and conviction of her ex-boyfriend Adnan Syed for that murder.[194] Throughout the course of the season, host Sarah Koenig routinely questions whether she believes that Syed is guilty or innocent, a standard question in the true crime space that became a site of tremendous discourse for fans of the podcast.[195] I have

192. In the Dark, *Season 2, Episode 20: Curtis Flowers* (Oct. 14, 2020), https://www.apmreports.org/episode/2020/10/14/in-the-dark-s2e20 [https://perma.cc/7BHQ-WYQ6].

193. *See* Lindsey A. Sherrill, *The "Serial Effect" and the True Crime Podcast Ecosystem*, 16 JOURNALISM PRAC. 1473, 1486 (2022).

194. *'Serial': Season 1*, N.Y. TIMES (Sept. 20, 2022), https://www.nytimes.com/2022/09/20/podcasts/serial-adnan-syed.html [https://perma.cc/K4QC-PTYV].

195. Hanna Rosin, *The Real Secret of* Serial, SLATE (Oct. 23, 2014),

argued elsewhere that *Serial* is predominantly a show about the idea of guilt or innocence, which means that it rests on the fundamental assumption that the system is only interesting as a means of analysis when it gets that guilt or innocence question wrong.[196] Basically, *Serial* is a variant of an innocence project: Koenig looks into the procedural missteps of the case because of doubts around the outcome of the case.

Along the way, Koenig reports on substantial procedural missteps.[197] She discusses how the police failed to investigate several open avenues, Syed's defense counsel was unusually ineffective, and that the conviction relied upon evidence that should not hold up.[198] As others have discussed, barring the level of negligence exhibited by Syed's attorney, this is a fairly normal set of facts about criminal trials in the United States: the police often set their sights on a particular suspect and do not deviate despite available alternative stories and evidence at trial need not be scientifically reliable. What is unusual about the Adnan Syed case is that the cultural impact of the podcast contributed to a general public understanding of Syed having experienced injustice at the hands of the system. As of this writing, Syed has been released from prison in light of a reexamination of the procedural unfairness.[199] Still, *Serial* did not create any evidence or data or participate in the emancipation of Adnan Syed, even as its cultural impact on the public perception of the case did likely contribute to his release.

What is unique about Curtis Flowers's case, however, is the investigative work of APM. *In the Dark* does not ever weigh in on whether or not Curtis Flowers may have killed four people in Tardy Furniture on July 16, 1996. *In the Dark* also does not take the position that the system was uniquely unjust to Curtis Flowers. In fact, the podcast balances a perspective on the strange circumstances of his trials with the idea that a great deal of the procedural injustice enacted is a routine part of doing business in the criminal legal system. *In the Dark* seeks to contextualize Flowers's case as one of many, operating on the assumption that an

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https://www.slate.com/articles/arts/culturebox/2014/10/serial_podcast_and_storytelling_does_sarah_koenig_think_adnan_syed_is_innocent.html [https://perma.cc/AAM4-ZPCD].

196. *See generally* Albrecht & Filip, *supra* note 36.

197. *See id.* at 56.

198. *Id.* at 44.

199. Brian Witte, *Adnan Syed's Murder Conviction on Hold for Now, as Maryland Supreme Court Considers Appeal*, AP NEWS (May 25, 2023), https://apnews.com/article/adnan-syed-appeal-serial-maryland-549a9607b24abcd1d1ea4fc6c69f2db3 [https://perma.cc/XE9F-RKK5].

ordinary part of the criminal legal system involves mistreatment of Black defendants.

In the Dark likely had less of an impact on the release of Curtis Flowers than *Serial* had on the release of Adnan Syed because of the extraordinary facts of the Flowers procedural history evidenced by the Supreme Court's discussions. However, *In the Dark* is an extraordinary example of the relationship between journalism and the law. Here, the impact of the podcast as media is actually not likely changing hearts and minds or uncovering overlooked innocence. Instead, *In the Dark* functions as a set of resources otherwise completely unavailable to a single criminal defendant. I have described above the year-long process through which APM produced an unprecedented amount of contextual data about prosecutor Doug Evans. In many ways, this data is otherwise impossible because of the structural functioning of the courts. Still, here, it exists.

In his dissent in *Flowers*, Justice Thomas takes issue with the narrativization of the case: from the procedural posture before the Supreme Court to the media attention, to the majority's understanding of how statistical data tells a story, to Flowers's story as an "entertaining melodrama."[200] Justice Thomas writes, "[P]erhaps the Court granted certiorari because the case has received a fair amount of media attention," critiquing the relationship between law and the media.[201] He states that the Court giving attention to cases with massive amounts of media attention will only exacerbate the problems of publicity and "undermine the fairness of criminal trials."[202] Conversely, I argue that this case is, in fact, one in which as part of the media coverage the drama of Flowers's situation is de-emphasized.

To conclude, what I argue that Justice Thomas gets right in his dissent, although we fundamentally disagree, is that we ought to revisit the relationship between widespread media attention and justice and that the majority fundamentally drops the ball on its understanding of statistical evidence. An individual's freedom should not rest on the dogged pursuit of pertinent statistical data by third parties, but, I argue, the answer to that potential inequity is not to foreclose the use of statistical data as an argument in jury (and other) discrimination cases. Instead, the Supreme Court ought to revisit *Batson* Footnote 17 in light of the deeply embedded legacy

200. *Flowers*, 139 S. Ct. at 2266 (Thomas, J., dissenting).

201. *Id*. at 2254.

202. *Id*. (naming the problems of publicity as: influencing public opinion (including that of potential jurors) and discouraging witness testimony).

of *Swain* and make the courts more transparent so that this—and other—data can be more easily utilized. The standard is only insurmountable insofar as we allow courts to fail to maintain and produce public records.

State-by-State Morality Superseding Federal Immigration Law: An Analysis of the "Crimes Involving Moral Turpitude" Distinction Through the Lens of Post-*Dobbs* Anti-Abortion Law

Coryn Johnson†

Introduction

The term "crimes involving moral turpitude" has been used for more than a century, permeating U.S. immigration law at nearly every stage of the admission, maintenance of legal status, and naturalization processes.[1] Lacking a statutory definition, courts generally agree that crimes involving moral turpitude, or CIMTs, include crimes of violence, crimes of fraud, and crimes "thought of as involving baseness, vileness or depravity."[2] And, while they are supposed to be defined by reference to current moral standards, the judicial doctrine of *stare decisis* binds judges to centuries-old concepts of morality. Based on this fuzzy characterization, noncitizens convicted of CIMTs may be deported without a hearing following a separate aggravated felony, disqualified from asylum relief or other forms of relief from removal, or become permanently inadmissible to the United States.[3] In many ways, what does and does not constitute a CIMT has the potential to impact every noncitizen. Rooted in outdated concepts of morality, the application of CIMTs in immigration law results in inconsistencies across—and within—jurisdictions.

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1. *See, e.g.*, Immigration Act of 1917, 8 U.S.C. § 155(a) (repealed 1952).

2. Jordan v. De George, 341 U.S. 223, 226–29 (1951).

3. Rob Doersam, *Punishing Harmless Conduct: Toward a New Definition of "Moral Turpitude" in Immigration Law*, 79 OHIO ST. L. J. 547, 554 (2018).

Such inconsistencies are especially notable in the context of U.S. abortion law. Following the Supreme Court's decision in *Dobbs v. Jackson Women's Health Org.*,[4] abortion law is left entirely in the hands of the states, resulting in near-outright bans on abortion in some and express constitutional protection in others.[5] Thus, giving or receiving an abortion may be perfectly legal (and considered perfectly moral) in one state while simultaneously illegal (and considered immoral) in another state. Even so, because morality is hard to determine, courts rely heavily on *intent* when deciding whether a crime involves moral turpitude.[6] As such, in states that criminalize the act of seeking or performing an abortion, abortion likely falls within the CIMT determination. Thus, giving or receiving an abortion would provide grounds for inadmissibility or removal in states that criminalize the act. In sharp contrast, these very same acts enjoy state constitutional protection as enumerated *rights* in other states, resulting in no repercussions on a noncitizen's immigration status.[7] In the context of federal immigration law, this inconsistency can have life or death consequences.

This Article seeks to examine CIMTs within immigration law through the lens of post-*Dobbs* anti-abortion law. Ultimately, this Article argues that, within immigration law, the CIMT determination must consider morality through a national lens. Even so, in practice, this is near impossible, particularly regarding acts such as abortion, where morality is harshly disputed. How can something meet the definition of "baseness, vileness or depravity" when the very same act is not merely permitted but, in fact, constitutionally protected in other states? The short answer is it cannot. Still, to reach this answer, it is imperative that one considers *which* societal view on morality matters—a state's or a nation's. In the context of federal immigration law, it must be the latter.

4. 597 U.S. 215 (2022).

5. *See infra* Part I.D.

6. *See* Sotnikau v. Lynch, 846 F.3d 731, 736 (4th Cir. 2017) ("For offenses that do not involve fraud or sex, the Board and courts typically turn to scienter to determine whether a crime involves moral turpitude.").

7. *See infra* Part I.D.

I. Background

A. History of Crimes Involving Moral Turpitude

American jurisprudence has used the concept of moral turpitude for over two centuries,[8] and CIMTs have played a pervasive role within immigration law for a majority of that time.[9] The CIMT classification has consistently been used to effectuate racist and classist policies, barring large groups of noncitizens from entry on the purported basis of public safety.[10] During the seventeenth century, the British government had a policy of exporting convicts to the colonies, incentivizing colonial America to exclude immigrants bearing foreign felony convictions.[11] This British practice continued far into the nineteenth century and, at least in part to curtail "the flow of convicts sent to America involuntarily,"[12] Congress passed the Page Act.[13] The Act denied admission[14] to those who had been convicted of or received an emigration-conditioned pardon for a felony.[15] Still, the far greater motivation behind the Act was to stop the entrance of Chinese sex workers into the United States, beginning a practice of excluding

8. *See* Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001, 1010 (2012) (mapping the centuries-long application of 'moral turpitude' through the law of defamation, evidence, voting rights, and immigration).

9. S. REP. NO. 81-1515, at 350 (1950) (tracing the evolution of "crimes involving moral turpitude" in federal immigration law back to 1891).

10. *See, e.g.*, David B. Oppenheimer, Swati Prakash & Rachel Bums, *Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law*, 26 BERKELEY LA RAZA L.J. 1, 39 (2016) (noting that the Immigration Act of 1990 focused primarily on patrolling the U.S.-Mexico border by, among other tactics, streamlining criminal and deportation procedures and increasing penalties for immigration violations).

11. Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 261 (2001) (citing Act of Mar. 3, 1875, ch. 141, 18 Stat. 477).

12. *Id.*

13. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477.

14. Today, "admission" means lawful entry "into the United States after inspection and authorization by an immigration officer." Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(13)(A). Thus, the concept of "seeking admission" encompasses more than a mere attempt to obtain a visa or cross a border. Noncitizens may be denied admission into the United States if any grounds of "inadmissibility" apply to them. *See* 8 U.S.C. § 1182 (listing the grounds of inadmissibility). Those deemed inadmissible when attempting to enter the United States are subject to "expedited removal," meaning they can be removed from the country without a hearing unless they are a lawful permanent resident (LPR) or have a credible claim to asylum. DAVID WEISSBRODT, LAURA DANIELSON & HOWARD S. MEYERS III, IMMIGRATION LAW AND PROCEDURE IN A NUTSHELL 257 (7th ed. 2017).

15. Doersam, *supra* note 3.

noncitizens from specific countries based on purported criminal grounds.[16] This practice continues to date.[17]

Despite this legislation, widespread reports of criminal noncitizens remaining in the United States continued into the late 1880s.[18] As a result, Congress passed the Immigration Act of 1891 and, in doing so, introduced the concept of moral turpitude into immigration law.[19] Specifically, this statute excluded "persons who [were] convicted of a felony or other infamous crime or misdemeanor *involving moral turpitude*."[20] Perhaps because "moral turpitude" had a generally understood meaning at the time, Congress did not define the term within the Act.[21]

With the turn of the twentieth century, concerns regarding the presence of immigrant criminals in the United States continued, and in 1917, Congress extended the "moral turpitude" designation from its role as grounds for inadmissibility to also serve as a basis for removal[22] (still commonly referred to as deportation[23]). However, when Congress codified "moral turpitude" into the subsequent Immigration and Nationality Act (INA) in the mid-twentieth century, the term had fallen into disuse and lost its widely

16. George Anthony Peffer, *Forbidden Families: Emigration Experiences of Chinese Women under the Page Law, 1875-1882*, 6 J. AM. ETHNIC HIST. 28, 28 (1986) ("Horace E. Page, the California congressman who introduced it, sought to end the danger of cheap Chinese labor and immoral Chinese women."). The first restrictive federal immigration law in the United States, the Page Act effectively prohibited the entry of Chinese women, marking the end of open borders. *Id.* at 29; *see also* JOHN SOENNICHSEN, THE CHINESE EXCLUSION ACT OF 1882, at xiii (2011) (noting that the Page Act denied citizenship to those of Chinese origin and prevented Chinese women and their spouses from immigrating to the United States). Seven years later, the 1882 Chinese Exclusion Act banned immigration by Chinese men as well. SOENNICHSEN at xiv (noting that the Chinese Exclusion Act barred Chinese immigration into the United States for a decade).

17. *See, e.g.*, Protecting the Nation From Foreign Terrorist Entry into the United States, 82 Fed. Reg. 13209 (Mar. 6, 2017) (using the terrorist acts of some individuals to deny entry to entire country populations).

18. Doersam, *supra* note 3, at 554.

19. *Id.*

20. Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084 (emphasis added).

21. At the time, the term 'moral turpitude' was used in everyday vernacular, and Americans had a common understanding of its definition. *See* Harms, *supra* note 11, at 261 (citing Act of Mar. 3, 1875, ch. 141, 18 Stat. 477); *see* Simon-Kerr, *supra* note 8, at 1017–19.

22. Abel Rodriguez & Jennifer A. Bulcock, *Legislating Morality: Moral Theory and Turpitudinous Crimes in Immigration Jurisprudence*, 53 LOY. L.A. L. REV. 39, 44–45 (2019); Immigration Act of 1917, ch. 29, § 19, 39 Stat. 889.

23. Also referred to as deportation, "removal is the expulsion of a non-citizen who has already been admitted to the United States." WEISSBRODT, *supra* note 14, at 287. Noncitizens who are present in the United States in violation of the INA or any other law of the United States are removable. 8 U.S.C. § 1227(a)(1)(B).

understood meaning.[24] Despite the term's falloff, Congress failed to provide "moral turpitude" with a statutory definition.[25] In fact, it has yet to do so,[26] and "Congress has never provided any guidance regarding the term's meaning or scope."[27]

As a result of Congress's inaction on the topic, modern courts are left questioning how to apply a term that lost its meaning centuries ago. The Board of Immigration Appeals (BIA)[28] has described "moral turpitude" as a "nebulous concept."[29] Even so, this description grossly understates the universal confusion courts have when applying this term to the criminal convictions of noncitizens—an issue that stems from the term's basis in morality. As noted by one commentator, "[t]he term 'moral turpitude' is probably incapable of precise definition in a legal sense, since it basically involves moral or ethical judgments."[30] Despite this major—and well-documented—confusion, the "moral turpitude" distinction continues to occupy a prominent place within U.S. immigration law.[31]

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24. Doersam, *supra* note 3, at 554.

25. *See* Harms, *supra* note 11, at 259 (noting that, instead, "Congress left the power to define 'crimes involving moral turpitude' to the judicial system").

26. *See* Rodriguez et al., *supra* note 22, at 46 ("Since the inception of its appearance within United States immigration law, it has lacked a statutory definition." (citing H.R. REP. NO. 64-10384, at 8 (1916) ("You know that a crime involving moral turpitude has not been defined. No one can really say what is meant by saying a crime involving moral turpitude.")).

27. *Id.*

28. The BIA is an administrative appellate body within the United States Department of Justice. The BIA is responsible for reviewing U.S. immigration court decisions. To appeal a decision by the BIA, a party must petition for review to the associated federal circuit court. *Board of Immigration Appeals*, U.S. DEPT. OF JUST., https://www.justice.gov/eoir/board-of-immigration-appeals [https://perma.cc/VCF8-F67B].

29. *In re* Tran, 21 I. & N. Dec. 291, 292 (B.I.A. 1996).

30. Annotation, *What Constitutes "Crime Involving Moral Turpitude" Within Meaning of [§§] 212(a)(9) and 241(a)(4) of Immigration and Nationality Act (8 U.S.C.A. [§§] 1182(a)(9), 1251(a)(4)), and Similar Predecessor Statutes Providing for Exclusion or Deportation of Aliens Convicted of Such Crime[s]*, 23 A.L.R. Fed. 480 § 2[a] (1975 & 2021 Supp.).

31. *Id.*; *see also, e.g.,* Jordan v. De George, 341 U.S. 223, 233 (1951) (Jackson, J., dissenting) ("Congress knowingly conceived [the term CIMT] in confusion. During the hearings of the House Committee on Immigration, out of which eventually came the Act of 1917 in controversy, clear warning of its deficiencies was sounded and never denied."); Barbosa v. Barr, 926 F.3d 1053, 1061 (9th Cir. 2019) (Berzon, J., concurring) (arguing that after "tortured attempts to find logical consistency" in the moral turpitude designation, "the time is ripe for reconsideration" of the issue, particularly in light of recent void-for-vagueness determinations in *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018)); Marmolejo-Campos v. Holder, 558 F.3d 903, 921 (9th Cir. 2009) (Berzon, J., dissenting) (deeming the Board's precedential case law regarding the meaning of moral turpitude "a mess of conflicting authority"); Arias v. Lynch, 834 F.3d 823, 835

B. Modern Application of Crimes Involving Moral Turpitude in Immigration Law

i. Statutory Basis

The CIMT classification permeates nearly every aspect of U.S. immigration law. In the United States, conviction of a crime involving moral turpitude can make one deportable,[32] and merely admitting to the commission of a crime involving moral turpitude can bar a noncitizen from entering the country[33] or from eligibility for adjusting to permanent resident status.[34] In addition, committing a crime involving moral turpitude may subject a noncitizen to mandatory detention[35] or disqualify one from naturalization for failure to meet the "good moral character" requirement.[36] The concept of "turpitudinous conduct" exists at each stage of the deportation process, and it is nearly impossible for a noncitizen to obtain and maintain legal status in the United States without avoiding "turpitudinous conduct."[37]

Despite its pervasive presence in immigration law, the INA does not define "moral turpitude." And, outside of a few *per se*

(7th Cir. 2016) (Posner, J., concurring) ("The concept of moral turpitude, in all its vagueness, rife with contradiction, a fossil, an embarrassment to a modern legal system, continues to do its dirty work.").

32. 8 U.S.C. § 1227 (a)(2)(A)(i) ("Crimes of moral turpitude. Any alien who—(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255, of this title) after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable.").

33. 8 U.S.C. § 1182 (a)(2)(A)(i) ("[A]ny alien convicted of, or who admits having committed or who admits committing acts which constitute the essential elements of (I) a crime involving moral turpitude . . . or an attempt or conspiracy to commit such a crime . . . is inadmissible."). If the crime was committed by an individual under the age of eighteen and more than five years before the individual's application for a visa or other documentation, or if the maximum penalty for the crime does not exceed one year of imprisonment and the noncitizen was sentenced to a term of six months or less, the noncitizen is exempted from the admissibility bar. 8 U.S.C. § 1182 (a)(2)(A)(ii).

34. *See In re* Ortega-Lopez, 27 I. & N. Dec. 382 (B.I.A. 2018) (holding that any conviction of a CIMT is a bar to this relief, unless (1) it is the only CIMT the person has committed, (2) a sentence of six months or less was imposed, and (3) the offense carries a maximum possible sentence of 364 days or less).

35. 8 U.S.C. § 1226 (c)(1) ("The Attorney General shall take into custody any alien who—(A) is inadmissible by reason of having committed any offense covered in [8 U.S.C. § 1182 (a)(2)], [or] (B) is deportable by reason of having committed any offense covered in [8 U.S.C. § 1227 (a)(2)(A)(i)].").

36. 8 U.S.C. § 1101(f) (explaining that, for purposes of the INA, "[n]o person shall be regarded as, or found to be, a person of good moral character who . . . is, or was—(3) a member of one or more of the class of persons, whether inadmissible or not, described in [8 U.S.C. § 1182(a)]").

37. *See* Rodriguez, *supra* note 22, at 42.

classifications,[38] there exists no definitive list dictating which crimes do and do not involve "moral turpitude." As a result, courts have worked for centuries to create a meaningful definition of the term.[39]

ii. *Matter of Silva-Trevino* and Other Relevant Case Law

Case law does not clarify the definition of moral turpitude.[40] Courts generally employ the traditional characterization of moral turpitude, defining such as conduct that is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general."[41] Additional characterizations include conduct which "shocks the public conscience"[42] or is "contrary to the accepted and customary rule of right and duty between man and man."[43]

That said, even provided these characterizations, the definition remains confusingly vague[44]—though not unconstitutionally so.[45] Courts have largely skirted the challenges associated with determining what is base, vile, or depraved by prohibiting *per se* most activity involving fraudulent[46] or sexually

38. *See* Jordan v. De George, 341 U.S. 223, 226–29 (1951) (noting that violent crimes and crimes involving fraudulent behavior are commonly considered CIMTs).

39. Doersam, *supra* note 3, at 551 (citing Arias v. Lynch, 834 F.3d 823, 825 (7th Cir. 2016)).

40. *See* Rodriguez, *supra* note 22, at 49.

41. *In re* Silva-Trevino, 26 I. & N. Dec. 826, 833 (B.I.A. Oct. 12, 2016); *see also Moral Turpitude*, BLACK'S LAW DICTIONARY (4th ed. 1968) ("An act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man."); *see also, e.g.*, *Arias*, 834 F.3d at 829 (citing the same definition); Rohit v. Holder, 670 F.3d 1085, 1089 (9th Cir. 2012) (same definition); Matter of Franklin, 20 I. & N. Dec. 867, 868 (B.I.A. 1994) (same definition); *In re* Flores, 17 I. & N. Dec. 225, 227 (B.I.A. 1980) (same definition); *Jordan*, 341 U.S. at 226 (same definition).

42. Sotnikau v. Lynch, 846 F.3d 731, 735–36 (4th Cir. 2017) (quoting Medina v. United States, 259 F.3d 220, 227 (4th Cir. 2001)).

43. Smith v. U.S. Att'y Gen., 983 F.3d 1206, 1210 (11th Cir. 2020) (quoting Keungne v. U.S. Att'y Gen., 561 F.3d 1281, 1284 (11th Cir. 2009)).

44. *See Jordan*, 341 U.S. at 233 (Jackson, J., dissenting).

45. *Id.* at 232 (holding that the phrase "crime involving moral turpitude" was not unconstitutionally vague); *see also* Islas-Veloz v. Whitaker, 914 F.3d 1249, 1250 (9th Cir. 2019) (holding that the Supreme Court's more recent decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015) and *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018) did not reopen inquiry into the constitutionality of the phrase).

46. *Jordan*, 341 U.S. at 229 (Jackson, J., dissenting) ("[F]raud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude.").

illicit conduct[47] and, at the periphery of those categories, relying primarily on the *mens rea,* or intent, associated with a given offense.[48]

Outside of these *per se* categories,[49] courts generally use a two-pronged framework to determine whether conduct falls within the bounds of moral turpitude. "A crime involving moral turpitude must involve conduct that not only violates a statute but also independently violates a moral norm. That is to say, to involve moral turpitude, a crime requires two essential elements: a culpable mental state and reprehensible conduct."[50] Thus, in short terms, turpitudinous conduct is that which is "base, vile or depraved," (i.e., reprehensible) *and* knowingly committed (i.e., committed with a "culpable mental state").

Even so, in many cases, the *mens rea* requirement seems to play the deciding role, dubbing conduct that arguably does not rise to the level of "depravity" as morally turpitudous simply because it was committed knowingly in violation of some existing criminal code.[51] Criminally reckless conduct may also meet the *mens rea* requirement for crimes involving moral turpitude.[52] In contrast, crimes involving criminal negligence are generally excluded from the morally turpitudinous classification.[53] Inheriting this

47. *See, e.g.*, Reyes v. Lynch, 835 F.3d 556, 560 (6th Cir. 2016) ("Specifically, the BIA has found that the act of prostitution is a CIMT." (citing *In re* W, 4 I. & N. Dec. 401, 402 (B.I.A. 1951))).

48. Sotnikau v. Lynch, 846 F.3d 731, 736 (4th Cir. 2017) ("For offenses that do not involve fraud or sex, the Board and courts typically turn to scienter to determine whether a crime involves moral turpitude.").

49. *See* Rodriguez, *supra* note 22, at 49–50 ("Antiquated honor norms, rather than contemporary moral principles, form the basis for these per se categories.").

50. *Sotnikau*, 846 F.3d at 735–36 (internal citations omitted).

51. *See In re* Perez-Contreras, 20 I. & N. Dec. 615, 618 (B.I.A. 1992) ("Where knowing or intentional conduct is an element of an offense," the BIA has "found moral turpitude to be present."); *see also, e.g.*, Arias v. Lynch, 834 F.3d 823, 835 (7th Cir. 2016) (remanding the case for reexamination under the *Silva-Trevino* categorical framework following the immigration judge's determination that the felony charge of knowingly using a false social security number constitutes a crime involving moral turpitude); Tillinghast v. Edmead, 31 F.2d 81 (1st Cir. 1929) (finding that a misdemeanor conviction of intentional 'petit larceny' to be a crime involving moral turpitude); *Jordan*, 341 U.S. at 223 (finding that the crime of conspiracy to defraud the United States of taxes on distilled spirits constituted a crime involving moral turpitude); Velez-Lozano v. I.N.S., 463 F.2d 1305 (D.C. Cir. 1972) (finding criminalized consensual sodomy to be morally turpitudinous).

52. *In re* Medina, 15 I. & N. Dec. 611, 613–14 (B.I.A. 1976) (explaining "that moral turpitude can lie in criminally reckless conduct" because "a corrupt or vicious mind is not controlling" in determining whether assault with a deadly weapon is morally turpitudinous).

53. *See, e.g.*, Rodriguez-Castro v. Gonzales, 427 F.3d 316, 323 (5th Cir. 2005) (recognizing that "negligence-based crimes usually do not amount to [crimes

definition, *Matter of Silva-Trevino* (*"Silva-Trevino III"*) lays the present framework for determining whether a specific crime involves moral turpitude.[54]

In *Matter of Silva-Trevino* ("*Silva-Trevino II*"),[55] the Attorney General ordered the BIA to develop a uniform standard to determine whether a particular criminal offense constitutes a crime involving moral turpitude.[56] In response, the BIA "conclude[d] that the categorical and modified categorical approaches apply" when determining whether a noncitizen's criminal conviction constitutes a crime involving moral turpitude.[57] For the purposes of this Article, only the categorical approach is of interest.

Under the categorical approach, using what has been dubbed the "realistic probability test," the court asks whether the minimum conduct that has a realistic probability of being prosecuted under the statute involves moral turpitude.[58] Again, this itself requires two determinations: (1) a culpable mental state, or *mens rea*, on behalf of the respondent; and (2) "inherently base, vile, or deprave[d]" conduct that is "contrary to the accepted rules of morality."[59] In making this determination, the court may only look to the language of the state criminal statute *itself*, without considering any of the underlying facts of the specific case at hand.[60] In other words, the court first determines the minimum conduct likely to be prosecuted under the statute. Next, the court decides if the minimum conduct (1) requires *mens rea* and (2) is inherently base, vile, or depraved. If the answer to both is affirmative, the minimum conduct potentially prosecuted under the statute *does* involve moral turpitude—then that crime is automatically one involving moral turpitude.

For example, in *Zarate v. United States Attorney General*, the Eleventh Circuit held that the BIA failed to properly apply the categorical approach in finding that a noncitizen's use of another person's social security card was a crime involving moral

involving moral turpitude]").

54. 26 I. & N. Dec. 826 (B.I.A. Oct. 12, 2016) [hereinafter *Silva-Trevino III*].

55. 26 I. & N. Dec. 550 (A.G. 2015) [hereinafter *Silva-Trevino II*].

56. *Silva-Trevino III*, 26 I. & N. Dec. at 826.

57. *Id.* at 830.

58. *Id.* at 831.

59. Zarate v. U.S. Att'y Gen., 26 F.4th 1196, 1208 (11th Cir. 2022).

60. *Silva-Trevino III*, 26 I. & N. Dec. at 831; *see also* Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007) (explaining that to show a realistic probability that the statute includes conduct not involving moral turpitude, the respondent "must at least point to his own case or other cases in which the state courts in fact did apply the statute in a special (nongeneric) manner for which he argues"); Moncrieffe v. Holder, 133 S. Ct. 1678, 1694–95 (2013).

turpitude.[61] Under the categorical approach, the Eleventh Circuit explained that the BIA should have looked *only* to the elements of Mr. Zarate's conviction, which included "(1) false representation of a Social Security number, (2) with intent to deceive, (3) for any purpose."[62] Without sufficient analysis, the BIA had incorrectly equated "intent to deceive" with "fraud"—a *per se* crime involving moral turpitude.[63] However, the Eleventh Circuit explained that while these elements *could* encompass fraudulent activity, the categorical approach analyzes the "*least* culpable conduct necessary to sustain a conviction."[64] Such an analysis would include "the false representation of the Social Security number for 'any other purpose,' i.e., for a *non-fraudulent purpose*."[65] Thus, reasoned the Eleventh Circuit, Mr. Zarate's conviction was not a *per se* crime involving moral turpitude.[66] Because the BIA failed to *separately* analyze (1) whether Mr. Zarate exhibited a culpable mental state and (2) whether his "offense was inherently base, vile, or depraved, and contrary to the accepted rules of morality," but instead incorrectly equated his false representation to fraud, the Eleventh Circuit remanded the case for proper review.[67]

Despite *Silva-Trevino*'s attempt "to develop a uniform standard for determining whether a particular criminal offense is a crime involving moral turpitude," inconsistencies prevail.[68] The *Silva-Trevino* board expressly acknowledged the limitations of establishing uniformity in the application of such an ambiguous term, and the "[f]ederal courts of appeals differ on whether to extend the realistic probability test to the context of crimes involving moral turpitude."[69] Though most circuit courts follow the realistic probability test,[70] the Third and Fifth Circuits have

61. *Zarate*, 26 F.4th 1196 (11th Cir. 2022).

62. *Id.* at 1202 (citing United States v. Harris, 376 F.3d 1282, 1291 (11th Cir. 2004)).

63. *Id.*

64. *Id.* at 1203 (quoting Gelin v. U.S. Att'y Gen., 837 F.3d 1236, 1241 (11th Cir. 2016) (emphasis added)).

65. *Zarate*, 26 F.4th at 1203. This meets the realistic probability standard, as it showcases conduct outside the scope of 'moral turpitude.'

66. *Id.*

67. *Id.* at 1208 (internal citations omitted).

68. *Silva-Trevino III*, 26 I. & N. Dec. at 826.

69. *Id.* at 831 ("[T]o provide a uniform national framework for deciding whether a crime involves moral turpitude—*to the extent that is possible in light of divergent rulings in the Federal appellate courts*—we will apply the categorical and modified categorical approaches as defined by the recent Supreme Court precedent.") (emphasis added).

70. Four circuits have explicitly adopted the realistic probability standard. *See* Cano-Oyarzabal v. Holder, 774 F.3d 914, 917 (7th Cir. 2014); Leal v. Holder, 771

expressly rejected this test as applied to crimes involving moral turpitude.[71]

C. The Relationship Between Crimes Involving Moral Turpitude and Abortion

Following the decision in *Dobbs v. Jackson Women's Health Org*.[72] and the resulting rapid criminalization of abortion by many states,[73] immigration judges may hold that illegal abortions constitute crimes involving moral turpitude, making noncitizens convicted under these statutes inadmissible or subject to removal.[74] That said, case law interpreting whether providing or receiving an abortion constitutes a crime involving moral turpitude is slim. Nearly fifty years ago, *Roe v. Wade* held that, during the first trimester, a state government could place no restrictions on women's ability to choose to abort pregnancies other than imposing minimal medical safeguards.[75] This holding was affirmed in 1992 by *Casey v. Planned Parenthood*, in which the majority further noted that constitutional protections applied to those seeking an abortion up until fetal viability.[76] Thus, during the nearly fifty years between *Roe* and *Dobbs*, states could not criminalize abortion prior to fetal viability. During this period, abortion law jurisprudence remained largely undeveloped.

F.3d 1140, 1145 (9th Cir. 2014); Villatoro v. Holder, 760 F.3d 872, 877–79 (8th Cir. 2014); Rodriguez-Heredia v. Holder, 639 F.3d 1264, 1267 (10th Cir. 2011). Another four circuits follow the "categorical approach based on Supreme Court precedent, without expressly addressing the realistic probability test." *Silva-Trevino III*, 26 I. & N. Dec. at 831; *see, e.g.*, Walker v. U.S. Att'y Gen., 783 F.3d 1226, 1229 (11th Cir. 2015); Efstathiadis v. Holder, 752 F.3d 591, 595 (2d Cir. 2014); Yeremin v. Holder, 738 F.3d 708, 715 (6th Cir. 2013); Prudencio v. Holder, 669 F.3d 472, 484 (4th Cir. 2012). The First Circuit looks "to the inherent nature of the crime conviction" when applying the categorical approach. *Silva-Trevino III*, 26 I. & N. Dec. at 831 ("In evaluating the criminal statute under the categorical approach, *unless circuit court law dictates otherwise*, we apply the realistic probability test." (citing Da Silva Neto v. Holder, 680 F.3d 25, 29 n.7 (1st Cir. 2012))) (emphasis added).

71. *Silva-Trevino III*, 26 I. & N. Dec. at 832. *See also* Jean-Louis v. U.S. Att'y Gen., 582 F.3d 462, 481–82 (3d Cir. 2009) (declining to use the realistic probability test in the context of crimes involving moral turpitude); Gomez-Perez v. Lynch, 829 F.3d 323, 327 (5th Cir. 2016) (labeling an offense as a crime involving moral turpitude if "the minimum reading of the statute [of conviction] necessarily reaches *only* offenses involving moral turpitude").

72. 142 S. Ct. 2228 (2022).

73. *See infra* notes 108–09.

74. *See* Asees Bhasin, Dobbs v. Jackson Women's Health *and Its Devastating Implications for Immigrants' Rights*, HARVARD L. PETRIE-FLOM CTR.: BILL OF HEALTH (Sept. 27, 2022), https://blog.petrieflom.law.harvard.edu/2022/09/27/dobbs-immigrants-rights/ [https://perma.cc/V5EV-3G7T].

75. 410 U.S. 113 (1973).

76. 505 U.S. 833 (1992).

There is little—if any—historical evidence indicating that *receiving* an abortion was considered a crime involving moral turpitude.[77] One of the earliest mentions of abortion in the context of crimes involving moral turpitude occurred in *Matter of M,* a 1946 decision by the Board of Immigration Appeals finding that to "procure a miscarriage," (i.e., the performance of an abortion—as opposed to seeking or receiving an abortion) constituted a crime involving moral turpitude.[78] In *Matter of M*, the respondent, a noncitizen and native of Jamaica, "was arrested in 1942 on a charge of abortion."[79] He was later convicted and sentenced to "a term of not less than 4 nor more than 8 years."[80] The respondent had also been arrested in 1927 for performing an abortion.[81] However, "the District Attorney permitted him to plead guilty to assault," where he was then sentenced to "not less than 2 nor more than 5 years."[82] The assault conviction covered two other indictments: "manslaughter, first degree, and, feloniously possessing a narcotic and anaesthetic [sic]."[83] Because the respondent could only be deported if each of his two charges involved moral turpitude, the BIA analyzed whether both abortion and assault met this standard.[84] The BIA first found that "[a]bortion has been held to be a crime involving moral turpitude,"[85] seemingly marking the crime as one that would be considered to *categorically* involve moral turpitude under the modern legal framework.[86] In contrast, the BIA next noted "that the crime of assault in the second degree . . . does not *necessarily* involve moral turpitude."[87] However, because the respondent committed "assault with intent to commit the felony of

77. Bhasin, *supra* note 74.

78. *In re* M, 2 I. & N. Dec. 525, 528 (B.I.A. 1946) ("'Procuring or attempting to procure a miscarriage of a woman', is the felony defined in section 80. We therefore conclude that the alien was convicted of assault with intent to commit the felony of abortion. Since abortion is a crime involving moral turpitude, the conviction for assault with intent to commit abortion under section 242, subdivision (5) of the New York Penal Law also involves moral turpitude.").

79. *Id.* at 525.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 526.

84. *Id.*; *see* Fong Haw Tan v. Phelan, 333 U.S. 6, 9–10 (1948) (authorizing "deportation only where a[] [noncitizen] having committed a crime involving moral turpitude and having been convicted and sentenced, *once again* commits a crime of that nature and is convicted and sentenced for it") (emphasis added).

85. *In re* B, 56113/313 (renumbered AR-5695775) (June 24, 1943).

86. *See Silva-Trevino III*, 26 I. & N. Dec. at 846.

87. *In re M*, 2 I. & N. Dec. at 526 (emphasis added) (citing U.S. *ex rel.* Zaffarano v. Carsi, 63 F.2d 757 (2d Cir. 1933)).

abortion"—already determined to be a crime involving moral turpitude—the respondent's assault conviction also involved moral turpitude.[88] As such, the respondent was ordered "deported to Jamaica."[89]

Foreign convictions of crimes involving moral turpitude also provide grounds for inadmissibility and removability. For example, in the 1961 case *Matter of K*, the respondent, a native of the Soviet Union, was convicted of "the crime of abortion in violation of paragraphs 218 and 47 of the German Criminal Code."[90] As in *Matter of M*, the court noted, without further explanation, that "[t]he crime [of abortion] does involve moral turpitude."[91] However, the respondent in *Matter of K* was not deported, as her crime had been pardoned by the United States High Commissioner for Germany.[92] Unlike the crime of procuring an abortion, courts have held that the crime of *encouraging* abortion does not *per se* involve moral turpitude. For example, in *Matter of Cassisi*, decided in 1963, the BIA found that "the section of law of which the respondent was convicted [was] a broad, divisible statute which enumerates several acts, the commission of which may or may not involve moral turpitude."[93] Because the record of conviction did not provide enough information to show whether the respondent's particular acts involved moral turpitude, the proceedings were dismissed.[94]

However, all these cases precede modern CIMT analysis, which places greater emphasis on *mens rea* and the resulting societal harm attributed to a crime. Specifically, these cases lack express analysis under the categorical approach, as defined in *Silva-Trevino III*.[95] Likely due to abortion's constitutionally-protected status recognized in *Roe v. Wade*[96] and *Casey v. Planned*

88. *Id.* at 528.

89. *Id.* at 529.

90. 9 I. & N. Dec. 336, 336 (B.I.A. 1961).

91. *Id.*

92. *Id.* at 339.

93. 10 I. & N. Dec. 136, 137 (B.I.A. 1963). *See* CONN. GEN. STAT. § 53-31 (1989) (repealed 1990) ("Any person who, by publication, lecture or otherwise or by advertisement or by sale or circulation of any publication, encourages or prompts to the commission of the offenses described in section 53-29 [Attempt to Procure Miscarriage] or 53-30 [Abortion or Miscarriage], or who sells or advertises medicines or instruments or other devices for the commission of any of said offenses except to a licensed physician or to a hospital approved by the department of health services, or who advertises any so-called monthly regulator for women, shall be fined not more than five hundred dollars or imprisoned for not more than one year or both.").

94. 10 I. & N. Dec. at 138.

95. *See supra* Part II.B.ii.

96. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022), *modified*, Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833

Parenthood,[97] no cases since have analyzed abortion as a CIMT. As such, the few decisions analyzing abortion as a CIMT hold little precedential weight.

D. Post-Dobbs *Abortion Law*

On June 24, 2022, the Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Org.*,[98] which overturned *Roe v. Wade*[99] and *Casey v. Planned Parenthood*[100] and held that no right to an abortion exists under the Constitution.[101] The sweeping decision returned the question of abortion's legality to the states, resulting in vastly differing protections (or prohibitions), time constraints, conditions under which abortions can be obtained, and criminal standards and means of enforcement.[102] Those advocating for the criminalization of abortion often do so on alleged moral grounds.[103] In fact, the *Dobbs* majority opinion flaunts language of morality throughout.[104] States criminalize abortion because an alleged majority of their populations consider the act immoral,[105]

(1992).

97. 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

98. 597 U.S. 215 (2022).

99. 410 U.S. 113 (1973).

100. 505 U.S. 833 (1992).

101. *Dobbs*, 597 U.S. at 230.

102. *See, e.g.*, state statutes cited *infra* note 109 (criminalizing abortion in their respective states) and state common law cited *infra* note 115 (finding a constitutionally protected right to abortion in their respective state constitutions).

103. *America's Abortion Quandary*, PEW RSCH. CTR. (May 6, 2022), https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary/ [https://perma.cc/WQA6-3YZH].

104. *See, e.g., Dobbs*, 597 U.S. at 223 ("Abortion presents a profound moral issue on which Americans hold sharply conflicting views."); *id.* at 255 ("Men and women of good conscience can disagree . . . about the profound moral and spiritual implications of terminating a pregnancy even in its earliest stage." (citing Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992))), 257 ("None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion."), 258 ("Abortion is nothing new. It has been addressed by lawmakers for centuries, and the fundamental moral question that it poses is ageless."), 269 ("[T]he [*Roe*] Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people.").

105. *See, e.g.*, *Governor Ivey Issues Statement After Signing the Alabama Human Life Protection Act*, OFF. ALA. GOVERNOR (May 15, 2019) https://governor.alabama.gov/newsroom/2019/05/governor-ivey-issues-statement-after-signing-the-alabama-human-life-protection-act/ [https://perma.cc/6D2U-TSRJ] ("[T]his legislation stands as a powerful testament to Alabamians' deeply held belief that every life is precious and that every life is a sacred gift from God."); *see also Views About Abortion By State*, PEW RSCH. CTR.: RELIGIOUS LANDSCAPE STUDY, https://www.pewresearch.org/religion/religious-landscape-study/compare/views-about-abortion/by/state/ [https://perma.cc/X2FH-TNPC]

and receiving or procuring an abortion clearly involves intent.[106] Thus, in states that criminalize abortion, such conduct likely falls within the purview of what would be deemed a crime involving moral turpitude.

Following the decision in *Dobbs* and the 2022 November elections, twelve states have passed a total ban on abortion,[107] with limited exceptions for rape, incest, or the life of the mother.[108] This ban is effectuated either through criminalization of administering an abortion,[109] or both administering and receiving an abortion.[110] That said, some of these statutes are in partial limbo under preliminary injunctions by state district courts. For example, an Idaho district court judge issued a preliminary injunction on August 24, 2022, partially blocking the enforcement of Idaho Code § 18-622, which outright banned the procurement and receival of an

(showing that, in most states that have criminalized abortion, the majority of residents agreed that abortions should be illegal in all or most cases).

106. *See infra* Part III.A.i. (discussing the *mens rea* requirement of different state anti-abortion statutes).

107. There is significant overlap between anti-abortion and anti-immigration ideology. *See* Bhasin, *supra* note 74 (noting the long-held, dangerous stereotypes of immigrant parents as "being hyper-fertile and giving birth to 'anchor babies'"). Former President Donald Trump campaigned with the promise to restrict abortion and immigration. Many of his supporters "underst[ood] opposition to abortion and immigration as intertwined—as a means of preserving white, Christian America." Reva Siegel & Duncan Hosie, *Trump's Anti-Abortion and Anti-Immigration Policies May Share a Goal*, TIME (Dec. 13, 2019), https://time.com/5748503/trump-abortion-immigration-replacement-theory/ [https://perma.cc/W35X-LD5R]. He largely kept this promise, appointing federal judges hostile to reproductive rights and issuing sweeping change to United States immigration law based on the demonization of immigrants. This ideology is reflected in the dangerous emergence of the 'Replacement Theory.' "An extension of colonialist theory, [the 'Replacement Theory'] is predicated on the notion that white women are not having enough children and that falling birthrates will lead to white people around the world being replaced by nonwhite people." Nellie Bowles, *'Replacement Theory,' a Racist, Sexist Doctrine, Spreads in Far-Right Circles*, N.Y. TIMES (Mar. 18, 2019), https://www.nytimes.com/2019/03/18/technology/replacement-theory.html [https://perma.cc/LPK2-YA2N].

108. As of November 2, 2023, Alabama, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia have all passed legislation that presently criminalizes abortion—regardless of the age of the fetus—within the respective state penal code. *Abortion Policy Tracker*, *State Health Facts*, KFF, https://www.kff.org/other/state-indicator/abortion-policy-tracker/ [https://perma.cc/9EHL-TDER].

109. *See* ALA. CODE § 26-23H-4 (2019) (Alabama); ARK. CODE ANN. § 5-61-304 (2023) (Arkansas); KY. REV. STAT. ANN. § 311.787 (West 2022) (Kentucky); LA. STAT. ANN. § 40:1061 (2022) (Louisiana); MISS. CODE ANN. § 41-41-45 (2023) (Mississippi); MO. REV. STAT. § 188.017 (2019) (Missouri); OKLA. STAT. tit. 63, § 1-746.7 (2023) (Oklahoma); S.D. CODIFIED LAWS § 34-23A-69 (2023) (South Dakota); TENN. CODE ANN. § 39-15-211 (2023) (Tennessee); TEX. HEALTH & SAFETY CODE ANN. § 171.204 (West 2021) (Texas); W. VA. CODE § 16-2R-3 (2022) (West Virginia).

110. *See* IDAHO CODE ANN. §§ 18-605, 606 (2023).

abortion.[111] The injunction prevents the enforcement of the ban when an abortion is necessary to avoid: (1) seriously jeopardizing the health of the pregnant person, (2) a serious impairment to bodily functions of the pregnant person, or (3) a serious dysfunction of body part of the pregnant person[112] (pursuant to the Emergency Medical Treatment and Labor Act (EMTALA)[113]). Though the ruling barred the state from enforcing the abortion ban in medical emergencies, nearly all abortions remain illegal in Idaho.[114]

In sharp contrast to those banning abortion, nearly one-third of states have recognized protections for the right to receive an abortion within their own state constitutions.[115] For example, in 1995, the Minnesota Supreme Court interpreted the state constitutional right to privacy to include the right to receive an abortion up to twenty weeks after conception.[116] This right not only permits abortions up to twenty weeks following conception, but also "protects the woman's *decision* to abort" and requires *practical access* to abortions.[117] Practical access to the right to an abortion means more than the mere freedom from criminal liability in

111. United States v. Idaho, 623 F. Supp. 3d 1096, 1117 (D. Idaho 2022), *reconsideration denied*, No. 1:22-CV-00329-BLW, 2023 WL 3284977 (D. Idaho May 4, 2023), *cert. granted before judgment sub nom.* Moyle v. United States, No. 23A469, 2024 WL 61828 (U.S. Jan. 5, 2024), *cert. granted before judgment*, No. 23A470, 2024 WL 61829 (U.S. Jan. 5, 2024).

112. *Id.* (granting a preliminary injunction enjoining the state and its officers from enforcing Idaho Code § 18-622 when the health of the pregnant person is at risk, on grounds that it may violate EMTALA).

113. 42 U.S.C. § 1395ddI(1)(A)(i)–(iii).

114. United States v. Idaho, 623 F. Supp. 3d at 1117; *see also* Rebecca Boone, *Idaho Asks Judge to Rethink Temporary Block on Abortion Ban*, AP NEWS (Sept. 22, 2022), https://apnews.com/article/abortion-health-religion-idaho-c3c2df4884f16dbf6cea3f3c854663b4 [https://perma.cc/8PVV-A32H] (explaining that the preliminary injunction does not impact the remaining majority of abortions that fall outside of emergency medical situations).

115. The State Supreme Courts of Alaska, Florida, Iowa, Kansas, Minnesota, and Montana recognize the right to abortion under the state constitution. California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Maine, Maryland, Massachusetts, Nevada, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington all have laws protecting abortion. Specifically, Colorado, the District of Columbia, New Jersey, Oregon, and Vermont protect the right to abortion throughout the pregnancy, not just to the point of viability. *Abortion Policy Tracker*, *State Health Facts*, KFF, https://www.kff.org/other/state-indicator/abortion-policy-tracker/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D [https://perma.cc/9EHL-TDER].

116. *See* Women of the State v. Gomez, 542 N.W.2d 17, 32 (Minn. 1995) ("[U]nder our interpretation of the Minnesota Constitution's guaranteed right to privacy, the difficult decision whether to obtain a therapeutic abortion will not be made by the government, but will be left to the woman and her doctor.").

117. *Id.* at 31 (emphasis in original).

Minnesota; it also requires state-run healthcare to pay for abortions for indigent women.[118] And, on January 19, 2023, the Minnesota Legislature passed the Protect Reproductive Options (PRO) Act, codifying the state constitutional right to an abortion.[119] The PRO Act expressly establishes that "[e]very individual has a fundamental right to make autonomous decisions about the individual's own reproductive health," including abortion and contraception.[120] Similarly, the Supreme Court of California also recognized a right to abortion under the California Constitution in 1969, four years before *Roe*.[121] In November 2022, Californians approved Proposition 1, which explicitly added abortion and contraception rights to the state constitution.[122]

In short, the current state of abortion law presents drastic inconsistencies from state to state. Other crimes present state-to-state inconsistencies in the CIMT context. For example, the Stand Your Ground law in Florida[123] provides an affirmative defense to what could be considered murder in Connecticut.[124] However, the drastic difference in the legal treatment of abortion is unmatched.[125]

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118. *Id.* at 30–31 ("We believe that this tradition compels us to deviate from the federal course on the question of denying funding to indigent women seeking therapeutic abortions . . . . Indigent women . . . are precisely the ones who would be most affected by an offer of monetary assistance, and it is these women who are targeted by the statutory funding ban . . . . We conclude, therefore, that these statutes constitute an infringement on the fundamental right of privacy.").

119. MINN. STAT. § 145.409 (2023).

120. *Id.*

121. People v. Belous, 458 P.2d 194, 199 (Cal. 1969) ("The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgement of a 'right of privacy' or 'liberty' in matters related to marriage, family, and sex." (citing Griswold v. Connecticut, 381 U.S. 479, 485, 486, 500 (1965); Loving v. Virginia, 388 U.S. 1, 12 (1967))).

122. S. CONST. AMEND. NO. 10, 2021–22 Sess. (Cal. 2022); *California Proposition 1 Election Results: Constitutional Right to Reproductive Freedom*, N.Y. TIMES (Dec. 20, 2022), www.nytimes.com/interactive/2022/11/08/us/elections/results-california-proposition-1-constitutional-right-to-reproductive-freedom.html [https://perma.cc/U3JG-7DET].

123. FLA. STAT. § 776.013 (2017) ("A person who is in a dwelling or residence in which the person has a right to be has no duty to retreat and has the right to stand his or her ground and use or threaten to use . . . [d]eadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony.").

124. CONN. GEN. STAT. § 53a-19(b) (2022) ("[A] person is not justified in using deadly physical force upon another person if he or she knows that he or she can avoid the necessity of using such force with complete safety . . . by retreating . . . .").

125. *Compare* VT. CONST. ch. I, art. 22 ("That an individual's right to personal reproductive autonomy is central to the liberty and dignity to determine one's own life course and shall not be denied or infringed unless justified by a compelling State interest achieved by the least restrictive means."), *with* IDAHO CODE ANN. § 18-605(1)

Considering the inchoate standards currently applied for determining CIMTs, future immigration removal or admissibility decisions will hinge on whether courts choose to apply moral turpitude to abortion statutes.

II. Analysis

With the release of *Dobbs*, more than twenty states have passed near-outright bans on abortion.[126] A survey of the statutory language criminalizing abortion shows that each statute includes a "culpable mental state," meeting the first essential requirement for crimes involving moral turpitude.[127] However, the issue lies in the morality consideration. How can an action that is both criminalized and immoral in one state enjoy state constitutional protection in another? Can morality differ so widely from state to state? Or, in the context of federal immigration law, should morality be considered from a national standpoint? This analysis explores these questions.

A. The Impact of Dobbs *on Abortion as a Crime Involving Moral Turpitude*

i. State Abortion Bans and the *Mens Rea* Requirement

Following *Dobbs*, many states passed a total ban on abortion, with limited exceptions for rape, incest, or the life of the mother.[128] Each of the respective statutes includes a *mens rea* requirement. For example, South Dakota penalizes the provider under an "intentional[] or reckless[]" *mens rea* requirement:

> It is a Class 6 felony to *intentionally or recklessly* perform, or attempt to perform, an abortion of an unborn child capable of feeling pain unless it is a medical emergency. No penalty may be assessed against the woman upon whom the abortion is performed, or attempted to be performed.[129]

Similarly, many other states criminalize abortion that is provided "knowingly," as exemplified by the relevant Louisiana statute:

> No person may *knowingly* administer to, prescribe for, or procure for, or sell to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being. No person may *knowingly* use or employ any instrument or procedure

(2023) (criminalizing abortion as a felony with up to five years imprisonment).

126. *See supra* notes 108–09.

127. *See infra* Part III.A.i.

128. *See supra* notes 108–09.

129. S.D. CODIFIED LAWS § 34-23A-69 (2023) (emphasis added).

> upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being.[130]

or "purposely," as provided in the Arkansas statute:

> A person shall not *purposely* perform or attempt to perform an abortion except to save the life of a pregnant woman in a medical emergency.[131]

Currently, only Idaho criminalizes the abortion provider, the person receiving an abortion, and any "accomplice or accessory."[132] Specifically, any person—a licensed provider or not:

> who knowingly . . . provides, supplies or administers any medicine, drug or substance to any woman or uses or employs any instrument or other means whatever upon any then-pregnant woman with intent thereby to cause or perform an abortion shall be guilty of a felony and shall be fined not to exceed five thousand dollars ($5,000) and/or imprisoned in the state prison for not less than two (2) and not more than five (5) years.[133]

Likewise:

> [e]very person who, as an accomplice or accessory to any violation of section 18-605 . . . induces or knowingly aids in the production or performance of an abortion; and . . . [e]very woman who knowingly submits to an abortion or solicits of another, for herself, the production of an abortion, or who purposely terminates her own pregnancy otherwise than by a live birth . . . shall be deemed guilty of a felony and shall be fined not to exceed five thousand dollars ($5,000) and/or imprisoned in the state prison for not less than one (1) and not more than five (5) years . . . .[134]

However, unlike many of the other state statutes criminalizing abortion, Idaho expressly notes that:

> no hospital, nurse, or other health care personnel shall be deemed in violation of this section if in good faith providing services in reliance upon the directions of a physician or upon the hospital admission of a patient for such purpose on the authority of a physician.[135]

As expressed in the above language, Idaho imposes a "knowing" *mens rea* requirement on abortion providers, those receiving an abortion, and any accomplice or accessory. Thus, this survey of the statutory language criminalizing abortion shows that each statute includes a "culpable mental state," meeting the first

130. LA. STAT. ANN. § 40:1061(c) (2022) (emphasis added).
131. ARK. CODE ANN. § 5-61-304(a) (2023) (emphasis added).
132. IDAHO CODE ANN. §§ 18-605(1), 606(1)–(2) (2023).
133. *Id.* at § 18-605(1).
134. *Id.* at §§ 18-606(1)–(2).
135. *Id.* at § 18-606(2).

essential requirement for crimes involving moral turpitude.[136] However, *mens rea* is a common requirement underlying most criminal law—and such was never the issue with the CIMT classification. Instead, as many others have expressed and this Article echoes, the issue lies in the morality consideration.[137] In the context of abortion, this consideration is especially ripe for contradicting views.

ii. The Morality Consideration

Justice Samuel Alito opens and closes the *Dobbs* opinion expressly noting his view that deep moral implications underly abortion law: "Abortion presents a profound moral issue on which Americans hold sharply conflicting views . . . . We end this opinion where we began. Abortion presents a profound moral question."[138] Unlike crimes such as murder, rape, or even fraud—which are near-universally considered immoral—abortion is penalized as a criminal felony in some states and enjoys state constitutional protection in others. This sentiment is exactly why the morality consideration embedded into crimes involving moral turpitude leads to sharp inconsistencies,[139] inconsistencies Justice Alito himself uses as a basis for his argument that abortion laws should be left to the states. However, a state-by-state determination on abortion's legality, of course, does little to help federal courts answer the morality question consistently—in many ways, it actually contravenes this effort. As such, many courts have seemingly opted to avoid the question of what is "base, vile, depraved," or within the "accepted rules of morality" by relying instead on the *mens rea* associated with a given offense.[140] Under

136. Sotnikau v. Lynch, 846 F.3d 731, 736 (4th Cir. 2017) ("[T]o involve moral turpitude, a crime requires two essential elements: a culpable mental state and reprehensible conduct." (quoting *In re* Ortega-Lopez, 26 I. & N. Dec. 99, 100 (B.I.A. 2013))).

137. *See, e.g.*, Rodriguez, *supra* note 22, at 49–50 ("Antiquated honor norms, rather than contemporary moral principles, form the basis for these per se categories.").

138. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2240, 2284 (2022).

139. These inconsistencies are exacerbated by the doctrine of *stare decisis*, which bakes the individual moral judgment of judges into binding precedent. *See* Rodriguez, *supra* note 22, at 85 ("[T]he crime involving moral turpitude is susceptible to critique because it perpetuates questionable, decontextualized moral judgments as well as moral determinations locked within a relatively rigid system of precedents.").

140. *See* Simon-Kerr, *supra* note 8, at 1060 ("Rather than make the kind of case-specific, fact-specific, era-specific inquiry advocated by Judge Hand, federal courts handled the moral turpitude question by citing precedent that reproduced its core applications and then by looking for the element of scienter to resolve cases at the

this approach, criminal abortion would certainly meet the standard for turpitudinous conduct, given the various *mens rea* requirements outlined above. However, using *mens rea* as a proxy for morality is exactly the method rejected by the Eleventh Circuit in *Zarate*.[141] So, yet again, one is left with inconsistent results based on conflicting approaches, ideologies, and understandings of morality itself.

iii. Abortion Under the Categorical Approach

The minimum conduct that could realistically be prosecuted under state anti-abortion statutes is likely either the procurement of an abortion or, in states that criminalize "accomplices" to abortion, assisting one in procuring or receiving an abortion.[142] Whether the crime of abortion is classified as one involving moral turpitude hinges on whether abortion *itself* is "inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general,"[143] as the categorical approach gives no weight to the thoughts or circumstances behind the decision to provide or receive an abortion.[144]

This approach fails in the context of abortion, where many consider its morality based on circumstances behind the choice to receive an abortion rather than looking only at the act itself.[145] One could argue that courts may avoid the morality consideration altogether, based on precedent dubbing abortion a *per se* crime involving moral turpitude.[146] However, not only is this precedent far

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margins.").

141. Zarate v. U.S. Att'y Gen., 26 F.4th 1196, 1207–08 (11th Cir. 2022).

142. *Silva-Trevino III*, 26 I. & N. Dec. 826, 831 (B.I.A. 2016).

143. *Id.* at 833.

144. As a whole, the categorical approach contradicts the understanding of many that morality is entirely context dependent. Modern moral theorists focus "on the creation of moral systems that provide methods, most commonly guiding principles, based on conceptions of the rights, such as actions that are rights actions, and the good, meaning that which has intrinsic value, rather than trying to identify particular categories of action deemed moral or immoral." Rodriguez, *supra* note 22, at 67. Under this theory, one focuses on the methods and reasons for taking certain actions, rather than the actions themselves—in direct tension with the categorical approach adopted by the BIA, which explicitly prohibits any analysis outside the action described by the statute. *See* Rodriguez, *supra* note 22, at 67 (citing DAVID ROSS, THE RIGHT AND THE GOOD 65 (Philip Stratton-Lake ed., 2d ed. 2002) (discussing in-depth what makes an act "right" and a thing "good" in the context of moral philosophy)).

145. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2240 (2022).(explaining that some believe "abortion should be allowed under *some but not all circumstances*") (emphasis added).

146. *In re* M, 2 I. & N. Dec. 525, 528 (B.I.A. 1946) (holding that the "procurement" of abortion constitutes a crime involving moral turpitude); *In re* K, 9 I. & N. Dec. 336,

too slim to justify a sweeping *per se* distinction,[147] but some cases actually contravene such a holding. *Matter of Cassisi* leaves the morality determination open to the deciding judge's discretion in the context of *encouraging* an abortion.[148] Regardless, even when taking a more black-and-white approach to abortion's morality, the categorical analysis inevitably leads to the roadblock[149] created by the drastically different views of abortion—on one end, a passionate minority liken it to murder,[150] and on the other end, supporters consider it an enumerated right inherent in one's exercise of bodily autonomy.[151] In the immigration context, with no current analysis encompassing what it means when states disagree on the morality of an action, judges are left to either adopt the alleged views of the state or turn to their own beliefs of morality—both of which pose major issues for an area of law that falls exclusively under federal jurisdiction.

B. The Problem with a 'Morality Standard—Can 'Morality' Differ from State to State?

Because crimes involving moral turpitude are necessarily based on notions of morality (and therefore inherently rooted in

336 (1961) ("The crime [of abortion] does involve moral turpitude.").

147. As compared to, for example, fraud, which is based on a much richer precedential history. *See* Jordan v. De George, 341 U.S. 223, 229 (1951).

148. *In re* Cassisi, 10 I. & N. Dec. 136, 137 (B.I.A. 1963).

149. Additionally, an approach modifying the categorical approach "for the sake of salvaging the deeply flawed crime involving moral turpitude" would only lead to further confusion and inconsistencies. Rodriguez, *supra* note 22, at 89. The Supreme Court has expressly noted the importance of the categorical approach in criminal law. Taylor v. United States, 495 U.S. 575, 600 (1990) (applying "a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions"). Abandoning this method would ignore congressional intent and require factual inquiry by the appellate courts, posing major Sixth Amendment concerns. Rodriguez, *supra* note 22, at 86 n.181 (citing Shepard v. United States, 544 U.S. 13, 16 (2005) (holding that a later sentencing court "is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented" and may not look at other documents to contextualize the conviction, such as police reports)).

150. *Dobbs*, 142 S. Ct. at 2240 ("Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life."); *see also Nearly a Year After* Roe's *Demise, Americans' Views of Abortion Access Increasingly Vary by Where They Live*, PEW RSCH. CTR. (Apr. 26, 2023), https://www.pewresearch.org/politics/2023/04/26/nearly-a-year-after-roes-demise-americans-views-of-abortion-access-increasingly-vary-by-where-they-live/ [https://perma.cc/M54B-ZEQN] (presenting evidence that a minority of Americans (36%) believe that abortion should be illegal in all or most circumstances).

151. *Id.* ("Others feel just as strongly that any regulation of abortion invades a woman's right to control her own body and prevents women from achieving full equality.").

individualist determinations of "right" and "wrong"), no altered approach or clarifying definition will overcome the classification's inconsistencies and ultimately fatal flaws. Some have proposed focusing more heavily on the *mens rea* requirement, which, as previously noted, ignores the embedded concept of morality to the point that it becomes a null distinction from other criminal classifications used as a basis for inadmissibility or deportation.[152] Others have proposed shifting the understanding of morality to better reflect modern moral standards, a sort of "morality . . . by social consensus" approach.[153] While morality by consensus may best align with the BIA's definition of moral turpitude under "the accepted rules of morality and the duties owed between man and man,"[154] such an approach will never account for the individualistic and unobjective nature of morality. Universal morality does not exist—as is made abundantly clear in the context of abortion law.[155] In fact, the absence of universal morality serves as a necessary basis for Justice Alito's argument for leaving the decision of abortion's protection or criminalization to the states.[156] Still, by setting state-wide legal treatment, states have intrinsically adopted the idea of morality-by-consensus on a state level, criminalizing abortion when the majority of state voters deem it to be morally reprehensible.[157] Our government is built around attempting to democratize morality. As such, in the context of CIMTs within *federal* immigration law, courts should analyze morality-by-consensus on a *national* level. By looking purely at the statutory language of *state* laws, they fail to do so.

Throughout the *Dobbs* majority opinion, Justice Alito references the contrasting views regarding the morality of

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152. *See supra* Part III.A.i.

153. Rodriguez, *supra* note 22, at 53; *see also* Doersam, *supra* note 3, at 581 (proposing a substitute of "modern moral sensibilities that actually correspond to reputational harm by penalizing crimes of violence, crimes that hurt vulnerable victims, or alternatively, crimes that occasion harsh sentences"); Jordan v. De George, 341 U.S. 223, 237 (1951) (Jackson, J., dissenting) (suggesting that the understanding of moral turpitude should be "measured against the moral standards that prevail in contemporary society to determine whether the violations are generally considered essentially immoral").

154. Islas-Veloz v. Whitaker, 914 F.3d 1249, 1256 (9th Cir. 2019).

155. *See id.* at 1256–57 (discussing numerous examples of conflict interpretations in different legal contexts).

156. *See Dobbs*, 142 S. Ct. at 2243 ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. 'The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.'" (citing Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833 (1992))).

157 *See, e.g.*, Hartig, *supra* note 168.

abortion.[158] Perhaps no other issue receives such widely variable treatment in United States law, with some states criminalizing abortion as a felony, punishable by up to five years in prison,[159] and others expressly protecting it as an enumerated right under their state constitutions.[160] If a noncitizen physician performs an abortion in Texas, for example, they may face deportation for committing a crime involving moral turpitude.[161] However, if that same noncitizen were to do so in California, their actions would be perfectly legal.[162] How can an action that is both criminalized and immoral in one state enjoy state constitutional protection in another? Can morality differ from state to state? It seems ridiculous to claim so.

Interestingly, Justice Alito raises a parallel argument to defend his decision to leave abortion to the states. He attacks the previous reasoning adopted in *Roe* and *Casey* that analyzes the constitutional right to an abortion through the trimester framework with a focus on fetus viability.[163] "[A]ccording to *Roe*'s logic," he explains, "States now have a compelling interest in protecting a fetus with a gestational age of, say, 26 weeks, but in 1973 States did not have an interest in protecting an identical fetus. How can that be?"[164] He continues:

> Viability also depends on the quality of the available medical facilities. Thus, a 24-week-old fetus may be viable if a woman gives birth in a city with hospitals that provide advanced care for very premature babies, but if the woman travels to a remote area far from any such hospital, the fetus may no longer be viable. *On what ground could the constitutional status of a fetus*

158. *See, e.g.*, *Dobbs*, 142 S. Ct. at 2240 ("Abortion presents a profound moral issue on which Americans hold sharply conflicting views."); *id.* at 2256 ("Men and women of good conscience can disagree . . . about the profound moral and spiritual implications of terminating a pregnancy even in its earliest stage." (citing *Casey*, 505 U.S. at 850 (1992)); *id.* at 2258 ("None of the other decisions cited by *Roe* and *Casey* involved the critical moral question posed by abortion."); *id.* at 2258 ("Abortion is nothing new. It has been addressed by lawmakers for centuries, and the fundamental moral question that it poses is ageless."); *id.* at 2265 ("[A] question of profound moral and social importance that the Constitution unequivocally leaves for the people.").

159. *E.g.*, IDAHO CODE §§ 18-605, 606 (2024).

160. *See supra* notes 116–22 (noting that Minnesota and California protect abortion access statutorily and under their state constitutions).

161. *See* TEX. HEALTH & SAFETY CODE § 171.204 (2021). Note, however, that this statute's validity has been questioned in *United States v. Texas*, 566 F. Supp. 3d 605 (W.D. Tex. 2021).

162. People v. Belous, 458 P.2d 194, 199 (Cal. 1969).

163. *Dobbs*, 142 S. Ct. at 2269 ("[V]iability is heavily dependent on factors that have nothing to do with the characteristics of a fetus.").

164. *Id.* at 2269–70.

> *depend on the pregnant woman's location?* And if viability is meant to mark a line having universal moral significance, can it be that a fetus that is viable in a big city in the United States has a privileged moral status not enjoyed by an identical fetus in a remote area of a poor country?[165]

Likewise, "On what ground could the [morality of a noncitizen's conduct] depend on the [noncitizen's] location?"[166] Justice Alito's own concern with what he considers to be an arbitrary determination for constitutional protection—the location of a pregnant person—showcases the problem with embedding something as nuanced and individualized as morality into laws that hold life-or-death consequences for some noncitizens. That said, morality and the law have always been intertwined,[167] making the application of moral standards in legal contexts unavoidable. But, if courts must use a 'morality by social consensus' approach, and 'count heads,' so to speak, they must first consider which population should serve as the denominator.

In the context of immigration law—which is exclusively federal—morality is necessarily a *national* question. It would seem that "universal morality" should thus be based on the majority view of the entire United States population (a view which supports access to legal abortions).[168] Defining the national population raises the additional question of whether the moral views of noncitizens should be considered, as they are the only ones directly impacted by the underlying moral interpretations. Notably, their views are not expressly considered in a democratic sense, given their noncitizen status and inability to vote. The ideals animating federalism present another potential issue. If morality were considered on a national level for purposes of CIMT analysis, would that violate principles of federalism, both in the context of criminal law generally (which is traditionally under the jurisdiction of the state) and abortion law specifically (which *Dobbs* expressly left to state-by-state determination)? Would the concept of universal morality be subject to gerrymandering practices, or would "morality by consensus" be determined by pure popular vote?

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165. *Id.* at 2270 (emphasis added) (internal citations and quotations omitted).

166. *Id.*

167. Simon-Kerr, *supra* note 8, at 1010.

168. *See* Hannah Hartig, *About Six-in-Ten Americans Say Abortion Should Be Legal in All or Most Cases*, PEW RSCH. CTR. (June 13, 2022) https://www.pewresearch.org/fact-tank/2022/06/13/about-six-in-ten-americans-say-abortion-should-be-legal-in-all-or-most-cases-2/ [https://perma.cc/4YTU-DUV2] (noting that in June 2022, approximately "61% majority of U.S. adults say abortion should be legal in all or most cases, while 37% think abortion should be illegal in all or most cases").

In short, *true* morality by consensus is impossible to determine in practice. Still, in the context of federal immigration law, courts must look to a *national* sense of morality in determining CIMT classifications. If an act considered a crime in some states[169] is explicitly lawful in more than half of the states and the District of Columbia,[170] can it actually be "base, vile, or depraved"?[171] How does a rejection of the underlying state moral judgment by a large proportion of the nation's population figure into the CIMT analysis under immigration law? This question is undoubtedly hard to answer, which may lead to the conclusion that the CIMT classification itself must be eliminated, as express reliance on a morality standard inherently leads to inconsistencies and embeds the personal biases of judges into the law far more than other types of criminal classifications. However, before reaching this solution, the question must first be posed. As things currently stand, such an inquiry has been largely ignored in the scholarship and judicial decisions analyzing CIMTs.

Conclusion

Since the beginning of U.S. immigration law, the concept of moral turpitude has led to deeply flawed inconsistencies. Rooted in dated, Judeo-Christian notions of morality, the application of CIMTs hardly reflects the modern understanding. Even so, morality itself defies universal consensus, showcased most clearly through the lens of post-*Dobbs* abortion law. Under the post-*Dobbs* framework, noncitizens who illegally receive or perform an abortion could potentially be deported without a hearing, disqualified from asylum relief, or become permanently inadmissible to the United States—all under the guise of so-called morality. This framework builds on the dangerous converging ideologies of the anti-immigration and anti-abortion movements. Embedding individual state concepts of morality into federal law allows the ideologies of a passionate minority to bleed into national judicial precedent. Such interference violates notions of federalism, and a just immigration system cannot operate under this flawed framing.

Ultimately, in the context of federal immigration law, courts must look to a *national* sense of morality in determining CIMT classifications. Only then can courts, academics, and Congress alike

169. *See* KFF, *supra* note 108.
170. *Id.*
171. *Silva-Trevino III*, 26 I. & N. Dec. 826, 833 (B.I.A. 2016).

properly consider whether the classification itself must be eliminated altogether.

Challenging the Criminalization of Homelessness Under Fair Housing Law

Tom Stanley-Becker†

Abstract

This Article advances a novel argument that private plaintiffs and federal agencies should use federal fair housing laws to challenge state and local legislation that criminalizes homelessness. Blue and red jurisdictions alike have adopted such punitive legislation primarily in the last two decades. This Article focuses on camping bans and their enforcement by sweeps of homelessness encampments. It contends that such measures are susceptible to fair housing challenges, as evidence of their disparate impact on people of color and people with disabilities is overwhelming, reflecting the ongoing legacy of systemic racism. This Article diverges from existing scholarship and litigation that center on constitutional challenges to such laws, including a challenge based on the Eighth Amendment's prohibition of cruel and unusual punishment that the Supreme Court rejected in June 2024. Specifically, this Article proposes that private plaintiffs and federal agencies should bring suits and take other actions to challenge the anti-camping legislation by relying on two federal antidiscrimination laws: the Fair Housing Act (FHA), with the duty it imposes on federal agencies to affirmatively further fair housing, and Title VI of the 1964 Civil Rights Act. Unlike the constitutional challenges, claims based on fair housing guarantees strike at the heart of what is wrong with the criminalization of camping—it denies people experiencing homelessness, who are disproportionately people of color and people with disabilities, a place to live.

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Introduction

A tide of new legislation criminalizing homelessness is sweeping the United States.[1] Roscoe Billy Ray Bradley, Jr., a Black man experiencing homelessness in Culver City, California, lives in a tent under the 405 Freeway bridge.[2] "They can't take my tent. That's my personal property," says Bradley, who has camped in the spot for more than a decade. "I'm not going anywhere."[3] But Bradley's use of his tent as a home is now illegal under an anti-camping ordinance adopted by the Culver City Council in 2023.[4] The ordinance is aimed at razing homeless encampments.[5]

Bradley's experience parallels that of many people who are adversely affected by the criminalization of homelessness in cities across the country. The criminalization of homelessness is particularly pernicious because it disproportionately harms people of color like Bradley due to the well-documented fact that people of color are over-represented among people experiencing homelessness.[6] Cities and states across the country have recently adopted legislation similar to that in Culver City, addressing the homelessness crisis by cracking down on camping.[7] Reportedly, even elected leaders in blue cities have been "pushed to their wits' end by massive encampments and irate voters" and are "taking steps to ban camps," accelerating the spread of the punitive initiatives nationwide.[8] A 2024 Stateline study of policy trends finds

1. *See* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS (2019), https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf [https://perma.cc/4433-ASVU].

2. Alicia Victoria Lozano, *California City Bans People from Living in Tents Amid Homeless Crisis*, NBC NEWS (Feb. 18, 2023), https://www.nbcnews.com/news/us-news/california-city-bans-people-living-tents-homeless-crisis-rcna70852 [https://perma.cc/HL3D-C4K6].

3. *Id.*

4. *Id.*

5. *Id.*

6. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 1, at 32.

7. *Id.* at 75–79.

8. Marisa Kendall, *California Cities Are Cracking Down on Homeless Camps. Will the State Get Tougher Too?,* CALMATTERS (May 22, 2023), https://calmatters.org/housing/2023/04/california-homeless-city-laws/ [https://perma.cc/VXW8-SMG7]. Several other cities and counties throughout California, including Sacramento, Elk Grove, Oakland, Santa Cruz, and Milpitas, have adopted anti-camping ordinances in the past three years. *See* KCAL-News Staff, *LA City Council Votes to Expand Anti-Camping Law in Woodland Hills*, CBS L.A. (May 10, 2023), https://www.cbsnews.com/losangeles/news/la-city-council-votes-to-expand-anti-camping-law-in-woodland-hills/ [https://perma.cc/2UA6-57CQ]; *see also* Staff and News Service Reports, *LA City Council Expands Anti-Camping Law Aimed at Homeless in Woodland Hills*, L.A. DAILY NEWS (May 11, 2023),

that "[m]any jurisdictions have shifted toward supporting the rights of local residents and businesses that must contend with encampments and other problems, rather the rights of homeless people."[9]

This Article argues that anti-camping criminal legislation and its enforcement violate fair housing laws. It proposes a novel approach under fair housing law to challenge the anti-camping legislation, potentially providing redress for people experiencing homelessness. It focuses on the protections provided by two critical federal antidiscrimination laws: the Fair Housing Act (FHA), with the duty it imposes on federal agencies to affirmatively further fair housing, and Title VI of the 1964 Civil Rights Act.[10] It contends that private plaintiffs and federal agencies should invoke fair housing law guarantees to mount challenges to state and local legislation that criminalizes homelessness encampments and disproportionately harms people of color and people with disabilities.

Camping bans are among a set of laws criminalizing homelessness.[11] The legislation restricts or prohibits diverse categories of life-sustaining conduct performed by people experiencing homelessness, including sleeping, sitting or lying down, and living in vehicles on public property.[12] Taken together, the policies and their enforcement constitute what is termed the "criminalization of homelessness," even though some of the measures are initially enforced only with civil sanctions.[13]

The anti-camping legislation has a disparate racial impact because the population of people experiencing homelessness is disproportionately made up of people of color, reflecting broader structures of inequality in the United States.[14] As the tax scholar Dorothy Brown writes of "the disproportionate percentage of black Americans in poverty"—the persistence of "separate and unequal worlds" due to racial disparities in access to housing, education, jobs, income and health care—"in so many areas of life, being black

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https://www.dailynews.com/2023/05/10/la-city-council-expands-anti-camping-law-aimed-at-homeless-in-woodland-hills/ [https://perma.cc/2T3A-GF8L].

9. Robbie Sequeira, *More Cities and States Crack Down on Homeless Individuals*, GOVERNING (Jan. 4, 2024), https://www.governing.com/urban/more-cities-and-states-crack-down-on-homeless-individuals [https://perma.cc/A2DT-M26L].

10. Fair Housing Act, 42 U.S.C. §§ 3601–3631 (2011); 42 U.S.C § 2000d (1964).

11. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 1, at 12.

12. *Id.* at 12–14.

13. *Id.* at 15.

14. *Id.* at 12.

is more likely to hurt."[15] Nationwide, Black people represent 13% of the total population but 37% of people experiencing homelessness, according to data collected by the U.S. Department of Housing and Urban Development (HUD) in the 2023 point-in-time homelessness count.[16] The same racial disparity is true of the nation's unsheltered population: people who experience homelessness outside the formal shelter system—who by necessity often live by camping on public property—26% of whom are Black.[17] Therefore, the enforcement of camping bans has a profoundly disparate impact.

Consider, for example, the case of Los Angeles, one of the country's bluest of cities, where the unsheltered population of people experiencing homelessness is among the largest nationwide.[18] According to criminal justice data, Black Angelenos have been disproportionately represented among those arrested for violating the city's anti-camping ordinance.[19] From January 2012 to

15. DOROTHY A. BROWN, THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT 11, 20 (2021); U.S. CENSUS BUREAU, BLACK INDIVIDUALS HAD RECORD LOW OFFICIAL POVERTY RATE IN 2022 (Sept. 12, 2023), https://www.census.gov/library/stories/2023/09/black-poverty-rate.html [https://perma.cc/3V38-SN8X] (highlighting the distribution of total population and poverty by race in 2022 in Figure 3); U.S. BUREAU OF LAB. STAT., LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (Jan. 5, 2024), https://www.bls.gov/web/empsit/cpsee_e16.htm [https://perma.cc/B4ZG-7ZTU] (highlighting unemployment rates at the end of 2023; the Black unemployment rate was at 5.4%, and the white unemployment rate was at 3.2%); CTRS. FOR DISEASE CONTROL & PREVENTION, IMPACT OF RACISM ON OUR NATION'S HEALTH, https://www.cdc.gov/minority-health/racism-health/index-1.html [https://perma.cc/X2MH-MEK3] (discussing the effect of racism on health inequities and disparities among communities of color); *see* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012); *see also* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2018).

16. U.S. DEP'T OF HOUS. & URB. DEV., THE 2023 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS 4 (Dec. 2023), https://www.huduser.gov/portal/sites/default/files/pdf/2023-AHAR-Part-1.pdf [https://perma.cc/8Z68-UMXE].

17. U.S. DEP'T OF HOUS. & URB. DEV., HUD 2023 CONTINUUM OF CARE HOMELESSNESS ASSISTANCE PROGRAMS POPULATIONS AND SUBPOPULATIONS, FULL SUMMARY REPORT (ALL STATES, TERRITORIES, PUERTO RICO AND DISTRICT OF COLUMBIA) 2 (Nov. 19, 2023), https://files.hudexchange.info/reports/published/CoC_PopSub_NatlTerrDC_2023.pdf [https://perma.cc/T8GG-TF6Q].

18. Hanna Love & Tracy Hadden Loh, *Homelessness in US Cities and Downtowns: The Perception, the Reality, and How to Address Both*, BROOKINGS (Dec. 7, 2003), https://www.brookings.edu/articles/homelessness-in-us-cities-and-downtowns/ [https://perma.cc/RC7D-QV6B] (listing major U.S. cities with the highest prevalence of homelessness in Table 1). Los Angeles has the fifth-largest population of people experiencing homelessness proportional to the overall population nationwide, after San Francisco, New York City, Long Beach, and Boston, but a higher percentage of unsheltered people than the other four. *Id.*

19. Travis Schlepp, *Black People Disproportionately Arrested for Violating L.A.*

May 2023, city authorities arrested 36,807 people for violating the ordinance; almost 50% of the arrests were of Black people, who make up less than 10% of the city's population.[20]

Such stark disparities are hardly exceptional. To the contrary, the anti-camping legislation adopted in hundreds of cities across the country reinforces a pervasive regime of "unequal worlds."[21] As a remedy, this Article suggests that private plaintiffs and federal agencies should make use of the guarantees of federal fair housing law to challenge the legislation and its enforcement. In focusing on fair housing law, the approach differs from scholarship addressing constitutional challenges to the criminalization of homelessness.[22] One vein of that scholarship finds that measures prohibiting life-sustaining behavior such as sleeping and camping in public criminalize a status and thus are unconstitutional under the Eighth Amendment's Cruel and Unusual Punishment Clause.[23] Another finds that the legislation simply criminalizes the actions of people experiencing homelessness, not the status of being homeless, and therefore is constitutional.[24] And another considers the limited remedies available to people experiencing homelessness who pursue constitutional challenges to the criminal legislation.[25] Studies have also been directed to the pernicious effect of civil laws targeting

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Homeless Ordinance, Controller Report Shows, KTLA5 (June 22, 2023), https://ktla.com/news/local-news/black-people-disproportionately-arrested-for-violating-l-a-homeless-ordinance-controller-report-shows/ [https://perma.cc/WM6T-HF5W].

20. *Id.* (citing L.A. CONTROLLER KENNETH MEJIA, INTERACTIVE MAP CITY OF LA, 41.18 ARRESTS MAP JANUARY 2012 – MAY 2023, https://controller.lacity.gov/landings/4118 [https://perma.cc/7FDV-TH5X]; and U.S. CENSUS BUREAU, QUICK FACTS: LOS ANGELES, CALIFORNIA (July 1, 2022), https://www.census.gov/quickfacts/fact/table/losangelescitycalifornia/PST045222 [https://perma.cc/6SGF-BXBZ]).

21. BROWN, *supra* note 15, at 11.

22. Hannah Kieschnick, *A Cruel and Unusual Way to Regulate the Homeless: Extending the Status Crimes Doctrine to Anti-Homeless Ordinances*, 70 STAN. L. REV. 1569 (2018) (arguing that the status crimes doctrine and the protections of the Eighth Amendment ought to extend to the criminalization of people experiencing homelessness); Ryan P. Isola, *Homelessness: The Status of the Status Doctrine*, 54 U.C. DAVIS L. REV. 1725 (2021) (discussing conflict among lower courts about the constitutionality of anti-homeless ordinances); Andrew I. Lief, *A Prosecutorial Solution to the Criminalization of Homelessness*, 169 U. PA. L. REV. 1971 (2021) (arguing that prosecutors are better suited than courts to mitigate harms arising from anti-homeless laws); Sara K. Rankin, *Civilly Criminalizing Homelessness*, 56 HARV. C.R.-C.L. L. REV. 367 (2021) (highlighting the detrimental impacts of cities enforcing anti-homeless statutes with civil penalties).

23. *See* Kieschnick, *supra* note 22; *see also* Isola, *supra* note 22.

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

25. Eric S. Tars, Heather M. Johnson, Tristia Bauman & Maria Foscarinis, *Can I Get Some Remedy?: Criminalization of Homelessness and the Obligation to Provide an Effective Remedy*, 45 COLUM. HUM. RTS. L. REV. 738 (2014).

people experiencing homelessness, tracing how cities have shifted from criminal to civil measures in order to deprive plaintiffs of "constitutional and procedural tools to fight criminalization."[26]

This Article argues that fair housing law offers a potent means of challenging the criminalization of homelessness. It breaks new ground by proposing reliance on the anti-discrimination guarantees of federal housing law as a basis for challenges to camping bans.[27] In suggesting this approach, the Article proceeds in three parts. Part I examines the historical backdrop of the criminalization legislation and the diversity of its current forms. Part II analyzes the limits of existing constitutional challenges to the camping bans, focusing on the cruel and unusual punishment challenge under the Eighth Amendment currently pending in the Supreme Court. Part III lays out the novel challenge to the anti-camping legislation possible under federal fair housing law and argues for both private and public enforcement of fair housing laws to combat the bans.

I. Criminalization of Homelessness: Precursors and Present-Day Legislation

A. Historical Antecedents

The origins of the legislation criminalizing homelessness can be traced back to statutes from the early modern era that punished vagrancy.[28] The measures took root in the American colonies and became entrenched in the state law of the early republic.[29] The use of anti-vagrancy law became more draconian in the Black Codes and other Jim Crow legislation imposed to enforce racial subordination after the Civil War.[30] A century later, the laws criminalizing

26. Rankin, *supra* note 22, at 370.

27. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, WELCOME HOME: THE RISE OF TENT CITIES IN THE U.S. 64 (Mar. 2014), https://homelesslaw.org/wp-content/uploads/2018/10/WelcomeHome_TentCities.pdf [https://perma.cc/8DVL-EPBX]. A single report, in less than a page, suggests a fair housing theory, but concludes, "Since no one has litigated on behalf of encampments under this theory, further discussion of the merits of these claims would be premature." *Id.*

28. RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S 341 (2016).

29. *See* Papachristou v. Jacksonville, 405 U.S. 156, 161 (1972) ("Jacksonville's ordinance and Florida's statute were 'derived from early English law' . . . and employ 'archaic language' in their definitions of vagrants . . . . The history is an often-told tale. The break-up of feudal estates in England led to labor shortages which in turn resulted in the Statutes of Laborers . . . ." (quoting Johnson v. State, 202 So.2d 852, 854 (Fla. 1967))).

30. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 198 (1988); GOLUBOFF, *supra* note 28, at 116; Anna Trevorrow & Victoria Pelletier, *Sweeping Homeless Encampments is Antiquated and Inhumane*,

vagrancy took on new force, resurrected and expanded as state and local governments pursued "broken windows" policing during the 1980s and 1990s.[31] Introduced by the criminologist James Q. Wilson, the infamous broken windows policing theory holds, in the words of one legal critic, "[t]hat seemingly minor instances of social and physical disorder in urban spaces can contribute to an atmosphere of lawlessness that encourages more serious crimes."[32]

Today, the acute crisis of homelessness has led to the rapid expansion of legislation criminalizing or otherwise punishing homelessness. In jurisdictions nationwide, residents and business owners have pressured lawmakers to remove people experiencing homelessness from public property near their homes and establishments. The National Law Center on Homelessness & Poverty (NLCHP) has found that across 187 cities,[33] there has been a dramatic increase in diverse forms of anti-homelessness legislation: from 2006 to 2019, "city-wide bans on camping have increased by 92%; on sitting or lying [on public property] by 78%; on loitering by 103%; on panhandling by 103%; and on living in vehicles by 213%."[34] States have also enacted laws that criminalize homelessness.[35] During the years of the Trump Administration, the

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PORTLAND PRESS HERALD (Dec. 27, 2023), https://www.pressherald.com/2023/12/27/opinion-sweeping-encampments-is-antiquated-inhumane/ [https://perma.cc/U5YF-9UG9].

31. Press Release, Columbia Law School, Shattering Broken Windows: Professor Bernard E. Harcourt Dismantles the Data and Assumptions Behind an Influential But Controversial Theory of Criminal Justice (Apr. 8, 2015) (on file with the Columbia Law School Online Archive).

32. *Id.*; *see also* BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN-WINDOWS POLICING (2001).

33. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HOUS. NOT HANDCUFFS 2019, *supra* note 1, at 10, 27 n. 13 (stating that "187 cities are only a sampling; criminalization ordinances exist in many more municipalities than just the ones covered [in the report]" and that "[t]he 187 cities . . . were chosen in 2006 based on their geographic diversity (e.g., they include urban and rural communities in all regions of the country), and the availability of the cities' municipal codes online."). The National Law Center on Homelessness & Poverty released a State Law Supplement in November 2021. *See* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 2021: STATE LAW SUPPLEMENT (2021), https://homelesslaw.org/wp-content/uploads/2021/11/2021-HNH-State-Crim-Supplement.pdf [https://perma.cc/8RBZ-KH7S].

34. ERIC S. TARS, NAT'L HOMELESSNESS LAW CTR., CRIMINALIZATION OF HOMELESSNESS 6 (2021).

35. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, STATE LAW SUPPLEMENT, *supra* note 33, at 9. For an example, *see* MO. REV. STAT. § 67.2300.5 (2023), a Missouri law making it unlawful to camp or sleep on state land took effect at the beginning of 2023. *See also* Rebecca Rivas, *New Missouri Law Makes Sleeping on State Land a Crime for People Experiencing Homelessness*, MO. INDEP. (June 29, 2022), https://missouriindependent.com/2022/06/29/new-missouri-law-makes-sleeping-on-state-land-a-crime-for-people-experiencing-homelessness/ [https://perma.cc/S4BK-

punitive approach was exemplified by the threat to use federal law enforcement agents to relocate people experiencing homelessness in cities like Los Angeles to large camps on federal land.[36]

The criminalization of homelessness forms part of a broader set of punitive laws and practices directed against people living in poverty.[37] Those measures include money bail; work requirements for receipt of public benefits; biased school discipline leading to the school-to-prison pipeline, and crime-free housing ordinances—all of which shape the experience of people caught in the cycle of homelessness and incarceration, disproportionately affecting people of color.[38]

B. Laws Criminalizing Homelessness and Their Enforcement

People experiencing homelessness use diverse strategies in order to survive: camping in public parks, sleeping in their cars, kindling fires to stay warm, and urinating and defecating on public property.[39] The laws criminalizing homelessness define such actions as crimes.[40] Notably, as the Ninth Circuit Court of Appeals states, anti-camping laws "punish as a criminal offense the life-sustaining act of sleeping in public with bedding when a person has nowhere else to go."[41] Camping bans are among the most widespread measures criminalizing homelessness, and their

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H9MJ]. The Missouri Supreme Court on December 19, 2023, struck down the statute, holding that it violated the single subject requirement of the state Constitution, which bars state law from having too many unrelated subjects. Byrd v. State of Missouri, 679 S.W.3d 492, 496 (Mo. 2023) (en banc). It is unclear if the ordinance will be redrafted by the state legislature. *See* Tara Suter, *Law Against Homelessness Struck Down in Missouri*, THE HILL (Dec. 20, 2023), https://thehill.com/regulation/court-battles/4370230-law-against-homelessness-struck-down-in-missouri/ [https://perma.cc/8JLY-6WC4].

36. Jeff Stein, *As Trump Prepares Big Push on Homelessness, White House Floats New Role for Police*, WASH. POST (Sept. 16, 2019), https://www.washingtonpost.com/business/2019/09/16/trump-prepares-big-push-homelessness-white-house-floats-new-role-police/ [https://perma.cc/WR24-LDWX].

37. *See generally* PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA (2017) (describing how the "criminalization of poverty" emerged during the Reagan era and has continued through a series of laws and policies that disproportionately affect marginalized groups).

38. *Id*.

39. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 1, at 37–50 (describing the various ways that people experiencing homelessness engage in "life-sustaining conduct in public space" as well as statutes criminalizing these actions).

40. *Id.*

41. Johnson v. City of Grants Pass, 72 F.4th 868, 924 (9th Cir. 2023), *cert. granted sub nom.* City of Grants Pass v. Johnson, 144 S. Ct. 679 (2024).

enforcement through police sweeps of homeless encampments makes brutally apparent the punishment of life-sustaining activity.[42]

i. Types of Anti-Homelessness Criminal Legislation

People experiencing homelessness confront a range of local and state laws that penalize their strategies for survival. The most comprehensive catalogue of laws criminalizing homelessness is a 2019 study by the NLCHP examining codes from 187 cities.[43] The codes prohibit using camping paraphernalia; sleeping in public; sitting or lying down in public; loitering, loafing, and vagrancy; begging; storing property in public; scavenging and dumpster diving; sharing food; living in vehicles; and public urination and defecation.[44] In focusing on laws that ban camping on public property,[45] this Article also addresses enforcement through evictions from homeless encampments,[46] known as sweeps, because such measures are most susceptible to fair housing challenges.

The NLCHP found that 72% of the cities in its sample had at least one law restricting camping on public property.[47] The Los Angeles ordinance exemplifies prohibitions adopted across the country. It begins by declaring "the homelessness crisis has reached epic proportions," and then bans the obstruction of streets, sidewalks, and public rights-of-way, including areas proximate to tunnels, bridges, overpasses, and underpasses, "by sitting, lying, or sleeping, or by storing, using, maintaining, or placing personal property . . . ."[48] Other city ordinances specify in still greater detail the actions outlawed by the camping bans. For example, the Columbia, South Carolina, criminal code defines camping as using or residing in "a public street, sidewalk, or park for private living accommodations, such as erecting tents or other temporary structures or objects providing shelter; sleeping in a single place for any substantial prolonged period of time; regularly cooking or preparing meals; or other similar activities."[49] And many anti-camping ordinances expressly criminalize the use of tents or other structures as dwelling places. For example, the Minneapolis code

42. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 1, at 38.
43. *Id.* at 9–10.
44. *Id.* at 12–14.
45. *Id.* at 38.
46. *Id.* at 40.
47. *Id.* at 38.
48. L.A., CAL., MUN. CODE § 41.18(a)(1) (2021).
49. COLUMBIA, S.C., CODE OF ORDINANCES § 14-105(a)(1) (2023).

bans placing a "tent or other temporary structure . . . upon any public street or on any public or private premises or street in the city . . . as a shelter or enclosure of persons and their effects for the purpose of living therein."[50]

The spread of the anti-camping measures nationwide reflects not only grassroots pressures, but the aims of a well-funded lobbying campaign that has shaped the legislation. A Texas-based conservative advocacy group called the Cicero Institute has spearheaded the initiatives, promoting the camping bans as "entrepreneurial solutions to public problems."[51] The Institute has drafted a model bill titled the Reducing Street Homelessness Act, versions of which have been introduced in six states: Arizona, Georgia, Missouri, Oklahoma, Texas, and Wisconsin.[52] The model bill makes sleeping on public property a misdemeanor punishable by a fine of up to $5,000 and a month in jail and bars cities that fail to enforce such camping bans from receiving state funds.[53] Texas enacted a version of the bill in 2021, prohibiting camping, defined to mean "resid[ing] temporarily in a place with shelter," including "a tent, tarpaulin, lean-to, sleeping bag, bedroll, blankets, or any form of temporary, semipermanent, or permanent shelter, other than clothing or any handheld device . . . ."[54] In 2022, Tennessee became the first state to make unauthorized camping on public property a felony.[55]

ii. Enforcement of the Anti-Camping Legislation

According to the National Coalition for the Homeless, local governments have increasingly enforced anti-camping laws by authorizing sweeps of homelessness encampments: "a rapid growth in the number of encampments in cities, suburbs, and rural areas across the country," the coalition finds, "has led to massive encampments sweeps (closing 'tent cities'), encouraged by the complaints of housed neighbors as well as by local ordinances that

50. MINNEAPOLIS, MINN., CODE OF ORDINANCES § 244.60(a).

51. Kristian Hernández, *Homeless Camping Bans Are Spreading. This Group Shaped the Bills*, STATELINE (Apr. 8, 2022), https://stateline.org/2022/04/08/homeless-camping-bans-are-spreading-this-group-shaped-the-bills/ [https://perma.cc/QK6L-K7BB].

52. *Id*.

53. *Id*.

54. TEX. PENAL CODE § 48.05.

55. Ashley Hoak, *Public Camping in Tennessee Becomes a Felony, Homeless Seek Refuge*, WCYB NEWS 5 (July 1, 2022), https://wcyb.com/news/local/public-camping-in-tennessee-becomes-a-felony-homeless-seek-refuge [https://perma.cc/7RQC-TBW4].

prohibit camping on public land."[56] Reasons for the sweeps also include "alleged environmental damage to local ecosystems" as well as "encroachment on private property and construction sites" and "reports of violence within individual camps."[57] Homeless encampments have generated more adverse public scrutiny and pressure on public officials than has the presence of individuals surviving homelessness alone, outside of camps. As the NLCHP notes, public officials "frequently cite concerns for public health as reason to . . . evict homeless encampments . . . ."[58] A 2023 Associated Press investigation of the crackdown on homeless encampments found that "attempts to clear encampments increased in cities from Los Angeles to New York as public pressure grew to address what some residents say are dangerous and unsanitary living conditions."[59] For example, in Phoenix, the number of sweeps increased from 1,200 in 2019 to 3,000 in 2022, while Las Vegas swept about 2,500 encampments from January to September of 2022, up from 1,600 in 2021.[60] A recent statement from the California State Association of Counties and the League of California Cities finds that enforcing anti-camping measures "is a critical component to the overall well-being of the community."[61]

In addition to sweeps of homeless encampments, enforcement of the criminalization legislation can lead to arrest as well as criminal and civil fines and incarceration. Criminal penalties include court-imposed costs and fees, jail time, and probation.[62] Civil penalties include tickets and fines.[63] Civil penalties have received less attention in academic scholarship[64] but have serious

56. NAT'L COAL. FOR HOMELESS, SWEPT AWAY: REPORTING ON THE ENCAMPMENT CLOSURE CRISES 5 (2016).

57. *Id*.

58. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 1, at 15. Along with displacing people from public space, the sweeps often cause people to lose their belongings. *Id.* at 40. For example, as part of "Operation Clean Sweep," the Boston Police Department in 2019 destroyed the wheelchairs of people experiencing homelessness. *Id.* People saw the officers seize "three wheelchairs and [crush] them in the back of a garbage truck before ordering the homeless owners away from the Boston Medical Center." *Id*.

59. Claire Rush, Janie Har & Michael Casey, *Cities Crack Down on Homeless Encampments. Advocates Say That's Not the Answer*, AP NEWS (Nov. 28, 2023), https://apnews.com/article/homelessness-encampment-sweeps-cities-08ff74489ba00cfa927fe1cf54c0d401 [https://perma.cc/K348-K32K].

60. *Id.*

61. Sequeira, *supra* note 9.

62. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 1, at 50.

63. For example, a person experiencing homelessness is up to eleven times more likely to be arrested than a housed person; in Los Angeles in 2016, one in six arrest bookings were for people experiencing homelessness. *Id.*

64. Rankin, *supra* note 22, at 368.

collateral consequences for people experiencing homelessness, including credit damage; driver's license suspension; and, as a consequence of failure to pay fines, arrest and criminal liability.[65] For non-compliance with civil sanctions "due to sickness, lack of transportation, behavioral health crises, or the panoply of challenges associated with poverty and homelessness," writes the homeless rights advocate Sara K. Rankin, "civil infraction can then mutate into a misdemeanor through contempt provisions."[66] Moreover, the accumulation of a criminal record increases the difficulty of exiting the ranks of the homeless, particularly for people of color.[67]

Notably, too, the punitive force of the criminalization of homelessness is fully captured neither by the express provisions of the legislation nor by arrest and conviction statistics. Rather, there exists the threat of "invisible persecution," explain homeless rights advocates.[68] During the enforcement process, the broad and vague provisions of the legislation invite disparate and possibly discriminatory enforcement.[69] And criminalization may take place at the sub-statutory and sub-arrest level as the police use their discretion to compel people experiencing homelessness to leave encampments and other areas, as well as otherwise threatening them for engaging in conduct needed to survive. The danger of the abuse of police discretion is acute not only during formal police sweeps.[70]

II. Existing Constitutional Challenges to the Criminalization Statutes

Both the legislation criminalizing homelessness and its enforcement have been challenged on constitutional grounds, with a measure of success. The challenges rely on the Eighth, First, Fourth, and Fourteenth Amendments, and have been litigated largely in the federal courts mainly since the 1990s.[71] The litigation

65. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 1, at 50.

66. Rankin, *supra* note 22, at 379.

67. *See* Tom Stanley-Becker, *Breaking the Cycle of Homelessness and Incarceration: Prisoner Reentry, Racial Justice, and Fair Chance Housing Policy*, 7 U. PA. J. L. & PUB. AFF. 257 (2022).

68. Rankin, *supra* note 22, at 369.

69. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 1, at 38–39.

70. *Id.* at 39.

71. Tars et al., *supra* note 25, at 742–43 (examining constitutional challenges to criminalization of homelessness statutes and arguing that the provision of "narrow injunctive relief or small monetary damage awards" is insufficient to "protect homeless people against the egregious and widespread nature of criminalization.").

has achieved only a patchwork of protections, which limit the criminalization measures only in certain jurisdictions. The most fundamental challenges rested on the Eighth Amendment prohibition of cruel and unusual punishment, but they were rejected by the Supreme Court in its June 2024 decision in *City of Grants Pass v. Johnson*.[72] Thus, it is critical to pursue alternative legal protections for the rights of people experiencing homelessness under the guarantees of fair housing law.

A. Eighth Amendment

The Ninth Circuit was the source of the most far-reaching constitutional holdings striking down anti-camping legislation as cruel and unusual punishment. In 2018, in *Martin v. Boise*, in response to a challenge to a Boise, Idaho, ordinance criminalizing camping, the Ninth Circuit held that people experiencing homelessness cannot be punished for sleeping outdoors, on public property, when other shelter is unavailable.[73] The challenge was brought by plaintiffs who had been convicted of violating the ban, some of whom served jail time.[74] In *Martin*, the Court held:

> [T]he Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter . . . . [A]s long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter. [75]

In 2023, the Ninth Circuit reaffirmed that holding in *Johnson v. City of Grants Pass*.[76] Here, the Court struck down camping bans adopted by the city of Grants Pass, Oregon, that subjected people who were experiencing homelessness to civil fines and ultimately criminal prosecution for "using a blanket, a pillow, or a cardboard box for protection from the elements while sleeping within the City's limits."[77] Because the city provided insufficient shelter, the Court

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72. 144 S. Ct. 2202 (2024). Much of this litigation is summarized in the NLCHP's *Housing Not Handcuffs: A Litigation Manual*. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: A LITIGATION MANUAL 6–8, 10–14, 21–75 (2018), https://homelesslaw.org/wp-content/uploads/2018/10/Housing-Not-Handcuffs-Litigation-Manual.pdf [https://perma.cc/3CLK-3F35].

73. 920 F.3d 1031, 1048 (9th Cir. 2018), *cert. denied*, 140 S.Ct. 674 (2019) (citing U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*.") (emphasis added)).

74. *Id.* at 1037.

75. *Id*. at 1048.

76. 72 F.4th 868 (9th Cir. 2023), *cert. granted*, 2024 WL 133820 (2024).

77. *Id.* at 874–75.

held that the bans "prohibit Plaintiffs from engaging in activity they cannot avoid"—specifically, "conduct that was 'involuntary and inseparable from status'"—and thus violate the Eighth Amendment.[78]

Both decisions provoked vituperative and extended dissents. In *Martin,* it was objected that the nullification of the camping ban "shackles the hands of public officials trying to redress the serious societal concern of homelessness."[79] In *Grants Pass*, the many dissents included a bitter indictment of the Eighth Amendment's application as unfounded in the text of the Constitution:

> [O]n top of everything that our localities must now contend with, our court has injected itself into the mix by deploying the Eighth Amendment to impose sharp limits on what local governments can do about the pressing problem of homelessness . . . . With no mooring in the text of the Constitution, our history and traditions, or the precedent of the Supreme Court, we have taken our national founding document and used it to enact judge-made rules governing who can sit and sleep where, rules whose ill effects are felt not merely by the States, and not merely by our cities, but block by block, building by building, doorway by doorway.[80]

The Ninth Circuit denied rehearing by a vote of 14 to 13.[81]

The City of Grants Pass filed a petition for certiorari in the Supreme Court.[82] The City's petition was supported by amicus briefs from jurisdictions nationwide as well as law enforcement organizations.[83] The Court granted cert in *Grants Pass* and for the first time assessed the criminalization of homelessness.

The Court reversed the Ninth Circuit, holding that the legislation does not violate the Eighth Amendment as it criminalizes the action of camping rather than the status of being

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78. *Id.* at 890, 899. *See also* Sara K. Rankin, *Hiding Homelessness: The Transcarceration of Homelessness*, 109 CALIF. L. REV. 559, 565 (2021) (arguing that cities in response to *Martin v. Boise* have become "more creative and bolder in their efforts to hide homelessness rather than solve it. In particular, *Martin* may have sparked at least three unintended and decidedly negative developments for unsheltered homeless people: (1) more frequent and less regulated encampment sweeps as a pipeline to confinement; (2) renewed interest in involuntary commitment, conservatorships, and forced treatment; and (3) efforts to round up unsheltered people into congregate FEMA-style tents or camps.").

79. *Martin*, 920 F.3d at 590 (Smith, J., dissenting from the denial of rehearing *en banc*).

80. *Grants Pass*, 74 F.4th at 945 (Bress, J., dissenting from denial of rehearing *en banc*).

81. Johnson v. City of Grants Pass, 50 F.4th 787 (9th Cir. 2022).

82. City of Grants Pass v. Johnson, 144 S. Ct. 679 (2024).

83. Docket, City of Grants Pass v. Johnson, No. 23-175, 2024 WL 133820 (U.S. Jan. 12, 2024).

homeless.[84] The Court distinguishes its 1962 decision in *Robinson v. California*, the foundation of the lower court's decision. In *Robinson*, the Court reviewed a challenge to a criminal conviction under a California statute prohibiting addiction to narcotics. The Court held that the law violated the Cruel and Unusual Punishments Clause of the Eighth Amendment by criminalizing the status of narcotic addiction.[85] The Court in *Grants Pass* reasons that public camping ordinances "like those before [them] are nothing like the law at issue in *Robinson*" because instead of criminalizing "mere status" they criminalize actions like "'occupy[ing] a campsite' on public property 'for the purpose of maintaining a temporary place to live.'"[86]

Further, the Court reasons that the punishments Grants Pass imposes for violating its anti-camping legislation are not cruel and unusual in light of the 18th century meaning of the terms.[87] Justice Gorsuch, writing for the majority, explains that in the 18th century English law "still 'formally tolerated' certain barbaric punishments like 'disemboweling, quartering, public dissection, and burning alive,' even though those practices had by then 'fallen into disuse.'"[88] "The Cruel and Unusual Punishments Clause," Gorsuch finds, "was adopted to ensure that the new Nation would never resort to any of those punishments or others like them."[89]

The Court suggests that state and local legislatures are more appropriate bodies to address homelessness questions. Local legislators, the Court posits, must have latitude to assess the causes of homelessness and develop responses to it.[90] The Court holds that the Eighth Amendment does not provide federal judges with the authority to dictate homelessness policy.[91] Responses to the problem of homelessness are best left to the American people and their elected representatives.[92]

The Supreme Court has thus now foreclosed the most sweeping constitutional challenge to anti-camping legislation to date.

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84. *Grants Pass*, 144 S. Ct. at 2216–18.
85. *Id.* at 2218.
86. *Id.*
87. *Id.* at 2215–16.
88. *Id.* at 2215 (2024) (quoting Bucklew v. Precythe, 587 U.S. 119, 130 (2019)).
89. *Id.* at 2216.
90. *Id.* at 2220–24.
91. *Id.* at 2224.
92. *Id.*

B. First Amendment

Two forms of challenges under the First Amendment have been mounted to legislation punishing people experiencing homelessness and prohibiting activity supporting their life-sustaining efforts. First, prohibitions on begging have been successfully challenged under the free speech clause of the Amendment.[93] In *Norton v. Springfield*, the Seventh Circuit struck down an ordinance barring panhandling in a historic district of downtown Springfield, Illinois, comprising less than 2% of the city's area but containing its principal shopping, entertainment, and government zones, including the State Capitol and many state government buildings.[94] The ordinance defined panhandling as an oral request for an immediate donation of money.[95] Signs requesting money were allowed.[96] The Court reasoned that the ordinance discriminated among types of speech based on its content and was thus inconsistent with the recent First Amendment jurisprudence of the Supreme Court.[97]

Similarly, in *Rodgers v. Bryant*, the Eighth Circuit upheld an injunction against the enforcement of an Arkansas anti-loitering statute, reminiscent of anti-vagrancy codes, which makes it a crime to loiter if a person "[l]ingers or remains on a sidewalk, roadway, or public right-of-way, in a public parking lot or public transportation vehicle or facility, or on private property, for the purpose of asking for anything as charity or a gift: (A) In a harassing or threatening manner; (B) In a way likely to cause alarm to the other person; or (C) Under circumstances that create a traffic hazard or impediment."[98] As in *Norton*, the *Rodgers* Court found that the law discriminated against speech based on its content and was thus subject to strict scrutiny.[99]

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93. "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I.

94. Norton v. Springfield, 806 F.3d 411 (7th Cir. 2015).

95. *Id.* at 412.

96. *Id.*

97. The Supreme Court has held that "regulation of speech is content based [and thus subject to strict scrutiny] if a law applies to a particular speech because of the topic discussed *or* the idea or message expressed." Reed v. Gilbert, Ariz., 135 U.S. 2218, 2227 (2015) (emphasis added).

98. 942 F.3d 451, 454 (8th Cir. 2019).

99. *Id. See also* McCraw v. Oklahoma City, 973 F.3d 1057 (10th Cir. 2020); Cutting v. Portland, 802 F.3d 79 (1st Cir. 2015); Brown v. District of Columbia, 390 F. Supp. 3d 114 (D.D.C. 2019); Blitch v. Slidell, 260 F. Supp. 3d 656 (E.D. La. 2017); Petrello v. Manchester, 2017 WL 3972477 (D.N.H. Sept. 7, 2017); Champion v. Commonwealth, 520 S.W.3d 331 (Ky. 2017).

In addition to the free speech clause, the free exercise clause[100] has been successfully invoked to challenge city efforts to bar churches and other religious organizations from giving sanctuary to people experiencing homelessness on the property of the organization.[101] Likewise, claims that restrictions on sharing food in public violate the free exercise clause or restrict expressive conduct have also had some success in federal courts.[102]

C. Fourth Amendment

Sweeps of homeless encampments often involve both searches and seizures implicating Fourth Amendment protections.[103] Fourth Amendment protection depends on whether a search infringes on a reasonable expectation of privacy, and people experiencing homelessness have been found to have a reasonable expectation of privacy in their dwelling places, even though the dwelling is a tent or shack or makeshift structure on public property.[104] While noting that the question of trespass under anti-camping legislation is relevant to considerations of reasonable expectation of privacy protected by the Fourth Amendment, courts have nevertheless sustained challenges to seizures during sweeps, reasoning that "the property of homeless individuals is often located in the parks or under the overpasses that they consider their homes."[105]

Challenges have also been upheld against seizure of the property of people experiencing homelessness. The Ninth Circuit let stand an injunction against the seizure of belongings left temporarily on city sidewalks by people experiencing homelessness.

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100. "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise* thereof . . . ." U.S. CONST. amend. I (emphasis added).

101. *See, e.g.*, Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570 (2d Cir. 2002) (affirming preliminary injunction) ("Church's provision of sleeping space to homeless people was the manifestation of a sincerely held religious belief deserving of protection under the free exercise clause"); *see also* Fifth Ave. Presbyterian Church v. City of New York, 177 Fed. Appx. 198 (2d Cir. 2006), *cert. denied*, 127 U.S. 387 (2006) (affirming summary judgment in favor of the Plaintiff).

102. *See, e.g.*, Big Hart Ministries v. City of Dallas, 2013 WL 12304552 (N.D. Tex. 2013) (finding violation of Texas Religious Freedom Restoration Act); Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 11 F.4th 1266 (11th Cir. 2021) (finding violation of right to engage in expressive conduct).

103. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable *searches and seizures*, shall not be violated . . . ." U.S. CONST. amend. IV (emphasis added).

104. *See, e.g.*, State v. Pippin, 200 Wash. App. 826, 841, 403 P.3d 907, 915 (2017) (warrantless search of a tent of a person experiencing homelessness found to be unconstitutional); State v. Wyatt, 187 Wash. App. 1004 (2015) (same).

105. *See, e.g.*, Pottinger v. Miami, 810 F. Supp. 1551, 1571 (S.D. Fla. 1992) (stating that "whether the person occupying the property is a trespasser" is highly relevant to whether the person enjoys a reasonable expectation of privacy).

In *Lavan v. Los Angeles,* the Court found, "by seizing and destroying Appellees' unabandoned legal papers, shelters, and personal effects, the City meaningfully interfered with Appellees' possessory interests in that property. No more is necessary to trigger the Fourth Amendment's reasonableness requirement."[106] Upholding the injunction, the Court concluded, "The district court was correct in concluding that even if the seizure of the property would have been deemed reasonable had the City held it for return to its owner instead of immediately destroying it, the City's destruction of the property rendered the seizure unreasonable."[107]

D. Fourteenth Amendment Due Process

Challenges to the criminalization of homelessness under the Fourteenth Amendment advance two types of due process claims: that the legislation is unconstitutionally vague, and that it permits the taking of property without due process. Landmark precedents exist for void for vagueness claims, from a line of cases challenging anti-vagrancy and anti-loitering ordinances on due process grounds. In both *Papachristou v. City of Jacksonville*[108] and *City of Chicago v. Morales*,[109] the Supreme Court sustained such challenges. In *Papachristou*, the Court struck down a Jacksonville, Florida, ordinance that subjected vagrants to arrest and imprisonment for up to ninety days. In terms enduring from the colonial era, the ordinance defined vagrants as "[r]ogues and vagabonds . . . common drunkards . . . common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons . . . ."[110] In *Morales*, the Court relied on *Papachristou* to strike down a Chicago loitering ordinance that prohibited alleged gang members from disobeying police commands to disperse from public places and defined loitering as "remain[ing] in any one place with no apparent purpose."[111] The Court held that the ordinance was unconstitutionally vague because it "fail[ed] to give the ordinary citizen adequate notice of what is forbidden and what is permitted."[112]

106. 693 F.3d 1022 (9th Cir. 2012).
107. *Id*. at 1030.
108. 405 U.S. 156 (1972).
109. 527 U.S. 41 (1999).
110. *Papachristou*, 405 U.S. at 156 n.1.
111. *Morales*, 527 U.S. at 47.
112. *Id.* at 60.

These void for vagueness precedents undergird recent decisions sustaining challenges to city ordinances criminalizing homelessness. In *Desertrain v. City of Los Angeles*,[113] the Ninth Circuit held unconstitutional a Los Angeles ordinance that prohibited using a vehicle on public property "as living quarters either overnight, day-by-day, or otherwise."[114] Finding the scope of the prohibited conduct unconstitutionally vague, the Court reasoned, "Plaintiffs are left guessing as to what behavior would subject them to citation and arrest by an officer."[115] In particular, it asked about activity otherwise lawful:

> Is it impermissible to eat food in a vehicle? Is it illegal to keep a sleeping bag? Canned food? Books? What about speaking on a cell phone? Or staying in the car to get out of the rain? These are all actions Plaintiffs were taking when arrested for violation of the ordinance, all of which are otherwise perfectly legal.[116]

The next important decision in the circuit following *Desertrain* was *Bloom v. City of San Diego*, which enjoined a similar San Diego ordinance on vagueness grounds.[117]

Seizure of the possessions of persons experiencing homelessness has also been successfully challenged under the Fourteenth Amendment as a taking of property that requires due process, even if the property is unattended. In *Lavan v. City of Los Angeles*,[118] plaintiffs experiencing homelessness prevailed not only under the Fourth Amendment,[119] but also in alleging that the City of Los Angeles took their belongings without due process in violation of the Fourteenth Amendment by "seizing and immediately destroying their unabandoned personal possessions, temporarily left on public sidewalks while [they] attended to necessary tasks such as eating, showering, and using restrooms."[120] Finding that the unabandoned belongings of people experiencing homelessness was "property" within the meaning of the Fourteenth Amendment, the Ninth Circuit held that the city must follow due process requirements, namely that "individuals must receive notice

113. 754 F.3d 1147 (9th Cir. 2014).

114. *Id*. at 1149.

115. *Id*. at 1155.

116. *Id*. at 1155–56.

117. Bloom v. City of San Diego, No. 3:17-cv-02324, 2018 WL 9539239 (S.D. Cal. Aug. 21, 2018). The enjoined ordinance criminalized use of a vehicle "while it is parked or standing on any street as either temporary or permanent living quarters, abode or place of habitation either overnight or day by day." SAN DIEGO, CAL., MUN. CODE § 86.0137(f) (2018).

118. 693 F.3d 1022 (9th Cir. 2012).

119. *Id*. at 1027–31.

120. *Id*. at 1024.

and an opportunity to be heard before the Government deprives them of property."[121]

This body of constitutional jurisprudence has produced a patchwork of restrictions on measures that criminalize aspects of homelessness. However, anti-camping prohibitions remain in place. The Supreme Court overturned the Ninth Circuit's decision in *Grants Pass,* holding that the prohibition on camping on public property is not cruel and unusual punishment, expanding the exercise of police power and restricting Eighth Amendment protections.[122] In light of the Court's *Grants Pass* decision, this Article proceeds to offer an alternative legal theory under fair housing laws. Fair housing litigation is critical because, unlike constitutional cases, it highlights and directly addresses the disparate impact that the criminalization of homelessness has on people of color and people with disabilities.

III. Challenges Should Be Mounted Under Fair Housing Laws

Private plaintiffs and federal agencies should challenge legislation criminalizing homelessness and its enforcement under fair housing statutes. In particular, challenges to camping bans should be mounted under the FHA and Title VI of the 1964 Civil Rights Act, and the federal government should also use regulations promulgated pursuant to its duty to affirmatively further fair housing (AFFH) to obtain information and secure commitments from state and local governments to reduce the criminalization of homelessness.[123]

In tandem, fair housing statutes afford a cause of action to people experiencing homelessness who confront punitive camping bans, and serve as a basis for the exercise of antidiscrimination oversight and enforcement by government agencies. Each route—private and public—has certain advantages and disadvantages in advancing challenges to the anti-camping legislation. Private plaintiffs can effectively pursue litigation seeking to establish new

121. *Id.* at 1032 (quoting United States v. James Daniel Good Real Prop., 510 U.S. 43, 48 (1993)).

122. City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024).

123. The Fair Housing Act imposes a duty on "[a]ll executive departments and agencies" to administer programs in a manner that affirmatively furthers the FHA's purpose of fair housing. 42 U.S.C. § 3608(d); *see also* U.S. DEP'T OF HOUS. & URB. DEV., HUD FACT SHEET AND FREQUENTLY ASKED QUESTIONS: AFFIRMATIVELY FURTHERING FAIR HOUSING, NOTICE OF PROPOSED RULEMAKING, https://www.hud.gov/sites/dfiles/FHEO/documents/AFFH%20Fact%20Sheet.pdf [https://perma.cc/K6MS-6EB7].

legal protections, whereas government agencies may be constrained by political or bureaucratic considerations. On the other hand, government agencies can enlist significantly more resources than private firms, and private advocacy organizations may be constrained by the interests of donors or other special interests.[124] Finally, the breadth of federal authority allows government agencies to bring challenges under all the fair housing laws, whereas people experiencing homelessness have no private right of action under key statutes, notably Title VI, whose antidiscrimination protections are enforceable only by government agencies.[125]

A. Private Enforcement

i. FHA

Plaintiffs experiencing homelessness should challenge the anti-camping statutes and their enforcement under the FHA. The discriminatory denial of a dwelling place is prohibited by the FHA, which makes it unlawful:

> To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.[126]

Of course, anti-homelessness legislation does not regulate the sale or rental of a dwelling. Arguably, however, camping bans "make unavailable or deny" a dwelling to people experiencing homelessness by making it a crime for them to occupy their dwellings and by sweeping them out of those dwellings.

The first task, then, is to address the preliminary question of whether the structures inhabited by people experiencing homelessness are "dwelling[s]" within the meaning of the FHA. The next task is to examine both the disparate impact and disparate treatment claims that could be brought under the FHA.

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124. *See generally* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976) (discussing the tensions that civil rights litigators faced in the context of school desegregation litigation).

125. Alexander v. Sandoval, 532 U.S. 275 (2001) (holding that no private right of action exists to enforce agency regulations issued pursuant to Title VI § 602).

126. 42 U.S.C. § 3604(a). The 1988 amendments to the FHA extended protection to people with disabilities. *See* 42 U.S.C. § 3604(f)(1).

Applicability of the FHA: Definition of Dwelling

A threshold question that must be addressed before applying FHA theories of liability is whether the structures within which people experiencing homelessness find shelter in parks and on other public property are "dwellings" under the FHA. Section 3602(b) of the FHA provides a definition: "'Dwelling' means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families . . . ."[127] If the laws criminalizing camping are understood to force people experiencing homelessness out of any form of a "structure"—e.g., a tent or shack—which they are occupying as a "residence," it is possible to argue that those laws violate the FHA.

A fair housing case involving a homeless encampment will thus raise two definitional questions: whether a building or structure is at issue and whether it is "occupied as, or designed or intended for occupancy as, a residence" within the meaning of the FHA.[128]

The use of both words "building" and "structure" in the definition suggests that Congress intended to cover a broader category of dwelling than just traditional houses and apartments. Adopting a narrow definition would render the word "structure" superfluous, contrary to accepted canons of statutory construction.[129] Moreover, the plain meaning of the term "structure" encompasses the makeshift shelters and tents that people experiencing homeless build or place on public property. The common use of the word structure to encompass the shelters used in homeless encampments is evidenced in a study commissioned by HUD's Office of Policy Development and Research of homeless encampments that states: "A common element of all definitions of encampments is that they must have some type of built structures."[130] Emphasizing the broad meaning of the word "structures," the study continues: "These structures can take many forms, including tents, small structures on pallets, and shanties or lean-to shacks."[131]

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127. 42 U.S.C. § 3602(b).

128. *Id*.

129. The "canon against superfluity" applies "where a competing interpretation gives effect 'to every clause and word of a statute.'" Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91, 106 (2011) (quoting *Duncan v. Walker,* 533 U.S. 167, 174 (2001)).

130. U.S. DEP'T OF HOUS. & URB. DEV., EXPLORING HOMELESSNESS AMONG PEOPLE LIVING IN ENCAMPMENTS AND ASSOCIATED COST 10 (2020), https://www.huduser.gov/portal/sites/default/files/pdf/Exploring-Homelessness-Among-People.pdf [https://perma.cc/F2RQ-CPZ7].

131. *Id.*

To date, no case law directly addresses the question of whether a tent, shack or similar structure would be considered a dwelling under Section 3604(a). A single brief comment makes that claim, citing only an intermediate California Court of Appeals decision holding that a tent is a building for purposes of applying the state burglary statute.[132] However, it is important to note that some of the anti-camping criminalization provisions use the same terms as the FHA. For example, Charlotte, North Carolina, defines temporary shelter as "tents, tarps, or *any type of structure* or cover that provides partial shelter from the elements"[133] in prohibiting camping by "placing any tents or a temporary shelter on city property for living accommodation purposes."[134] Likewise, Minneapolis makes it unlawful to place a "tent *or other temporary structure* . . . upon any public street or on any public or private premises or street in the city and used as a shelter or enclosure of persons and their effects for the purpose of living therein"[135]—while the meaning of "structure," used alongside the term "building," as part of the definition of a covered dwelling in the FHA, encompasses tents and other shelters within a homeless encampment.

That leaves the question of whether such a structure is "occupied as, or designed or intended for occupancy as, a residence . . . ."[136] There is a debate among legal scholars about whether formal homeless shelters are covered dwellings under the FHA.[137] But the majority of courts that have considered the question have concluded that homeless shelters are covered

132. Ariella Aboulafia, *Washington, D.C.: The Capital of Fair Hous. Act Violations*, 25 HUM. RTS. BRIEF 93, 96 (2022); People v. Wilson, No. A055665 (Cal. App. Dec. 29, 1992).

133. CHARLOTTE, N.C., CODE § 15-26(a) (emphasis added).

134. *Id.*

135. MINNEAPOLIS, MINN., CODE OF ORDINANCES § 244.60(a) (emphasis added).

136. 42 U.S.C. § 3602(b).

137. *See* Karen Wong, *Narrowing the Definition of "Dwelling" Under the Fair Housing Act*, 56 UCLA L. REV. 1867 (2009) (arguing that the FHA's definition of dwelling should not apply to shelters and proposing a more holistic definition); *see also* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 27; WELCOME HOME: THE RISE OF TENT CITIES IN THE UNITED STATES 64 (Mar. 2014), https://homelesslaw.org/wp-content/uploads/2018/10/WelcomeHome_TentCities.pdf [https://perma.cc/3MDQ-HUYP] (asserting that encampments "may be" dwellings under the FHA); Renee Williams, *Shelters and the Definition of "Dwelling" Under the Fair Housing Act*, 43 HOUS. L. BULL. 230 (2013), https://www.nhlp.org/wp-content/uploads/Shelters-and-the-Definition-of-Dwelling-43-Hous.-L.-Bull.-225-230-31-Nov-Dec-2013.pdf [https://perma.cc/QPD3-DC6E] (analyzing the lack of consensus among courts about whether shelters are dwellings under the FHA").

dwellings.[138] HUD has also promulgated a regulation that explicitly identifies "sleeping accommodations in shelters intended for occupancy as a residence for homeless persons"[139] as an example of a "dwelling unit"[140] and "has consistently taken the position that homeless shelters are covered by the FHA . . . ."[141] HUD has identified the question of "whether the resident has anywhere else to which to return"[142] as key to determining whether a formal shelter is a covered dwelling for purposes of the FHA.[143] This framing weighs in favor of finding tents and other makeshift structures to be covered.

The primary question in the formal homeless shelter cases is whether the shelter is occupied "as a residence."[144] Most of the relevant decisions rely on the definition from *United States v. Hughes Memorial Home* that centers on the intent to return—"a temporary or permanent dwelling place, abode or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit."[145] Informal shelters in

138. *See* Hunter v. District of Columbia, 64 F. Supp. 3d 158, 173–76 (D.D.C. 2014) (concluding that a homeless parent experienced discrimination as defined by the FHA because the shelter was a "dwelling"); Defiore v. City Rescue Mission of New Castle, 995 F. Supp. 2d 413, 418–20 (W.D. Pa. 2013) (deciding that the defendant religious organization did not provide sufficient evidence that the term "dwelling" under the FHA did not cover emergency overnight shelters); Boykin v. Gray, 895 F. Supp. 2d 199, 207 (D.D.C. 2012) ("[T]he Court does not find the FHA categorically inapplicable based on its definition of the word 'dwelling.'"); Jenkins v. New York City Dep't of Homeless Servs., 643 F. Supp. 2d 507, 517–18 (S.D.N.Y. 2009) ("[P]rior to the development of any factual record, the homeless shelter to which Jenkins [Plaintiff in the case] was denied entry could well fall within the definition of dwelling under the FHA."); Woods v. Foster, 884 F. Supp. 1169, 1173–74 (N.D. Ill. 1995) (finding that a homeless shelter is a dwelling under the FHA and thus former residents could bring suit for sexual harassment in violation of the Act); *but see* Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries, 717 F. Supp. 2d 1101 (D. Idaho 2010) (holding that a shelter was not a "dwelling" when the shelter's guests were generally allowed to stay for a maximum of seventeen consecutive nights, were not guaranteed the same bed each night, and were not allowed to stay in the shelter during the day), *aff'd on other grounds*, 657 F.3d 988 (9th Cir. 2011).

139. 24 C.F.R. § 100.201.

140. *Id.*

141. Statement of Interest of the United States of America at 7, Defiore v. City Rescue Mission of New Castle, No. 2:12-cv-01590-CB, 995 F. Supp. 2d 413 (W.D. Pa. 2013).

142. HUD, *Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs*, 81 Fed. Reg. 64763, 64771 (Sept. 21, 2016) (citing HUD, *Final Report of HUD Review of Model Building Codes*, 65 Fed. Reg. 15740, 15746 (Mar. 23, 2000)).

143. *Id.*

144. 42 U.S.C. § 3602(b).

145. U.S. v. Hughes Memorial Home, 396 F. Supp. 544, 549 (W.D. Va. 1975) (citing WEBSTER'S THIRD NEW INT'L DICTIONARY).

homeless encampments—such as tents, no less than formal homeless shelters—meet this definition.

As with the question of whether a shelter in a homeless encampment is a "structure," there do not appear to be any decisions under the FHA addressing the issue of whether such encampment shelters are occupied as "a residence." Again, however, the plain meaning of the statutory terms strongly supports coverage. People experiencing homelessness intend to occupy such structures as residences; critically, they have nowhere "else to which to return."[146] While there is no data on the length of time people experiencing homelessness occupy such structures, the data on the lengthy duration of their experience of "unsheltered homelessness" (meaning homelessness without formal shelter), strongly suggests their residence in informal structures for extended periods of time.[147] Much like the definition of dwelling, some state and local provisions use the same phrasing as the FHA when defining "residence." For example, Corvallis, Oregon, prohibits camping on any public property and defines camping as "To set up or to remain in or at a campsite, for the purpose of establishing or maintaining a temporary or permanent place as a *residence* to the exclusion of others."[148]

Finally, the conclusion that tents and makeshift structures occupied by people experiencing homelessness count as residences, or dwelling places, within the meaning of the FHA finds support in Fourth Amendment cases in which courts have held that individuals experiencing homelessness have a reasonable expectation of privacy in such structures. In so holding, the Washington Court of Appeals noted that a "tent allowed . . . sleeping under the comfort of a roof and enclosure."[149] The Court reasoned that "the realities of homelessness dictate that

146. Civ. Rts. Div., U.S. Dep't of Just. & U.S. Dep't of Hous. & Urb. Dev., Joint Statement of the U.S. Dep't of Hous. & Urb. Dev. and the Dep't of Just., Accessibility (Design and Construction) Requirements for Covered Multifamily Dwellings under the Fair Housing Act 4 (2013), https://www.hud.gov/sites/documents/JOINTSTATEMENT.PDF [https://perma.cc/J5M8-FQ68].

147. *See* SAMANTHA BATKO, ALYSE D. ONETO & AARON SHROYER, UNSHELTERED HOMELESSNESS: TRENDS, CHARACTERISTICS, AND HOMELESS HISTORIES, URB INST. (Dec. 2020), https://www.urban.org/sites/default/files/publication/103301/unsheltered-homelessness.pdf [https://perma.cc/T6A2-PA4E] (finding that the average length of time for people experiencing unsheltered homelessness in 2019 was seven years).

148. CORVALLIS, OR. CODE § 5.01.020(1) (emphasis added).

149. State v. Pippin, 403 P.3d 907, 915 (Wash. Ct. App. 2017)

dwelling places are often transient and precarious."[150] "The temporary nature of [the individual's] tent," the Court held, "does not undermine any privacy interest."[151] Nor should the fact that tents of people experiencing homeless are not as permanent as brick and mortar residences undermine the conclusion that such structures are dwellings under the FHA. Courts should hold that tents and other structures in homeless encampments fall within the definition of "dwelling" under the FHA.

FHA Theories of Liability

There are two possible theories of liability under the FHA: discriminatory effects and disparate treatment. Application of the discriminatory effects theory under the FHA was approved by the Supreme Court in 2015 in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*[152] and its framework was codified by HUD in May 2023.[153] Under the HUD rule, plaintiffs can challenge "policies that unnecessarily cause systemic inequality in housing, regardless of whether they were adopted with discriminatory intent."[154] Liability under the disparate treatment theory requires plaintiffs to prove intentional housing discrimination against members of a protected class.[155] Because people of color and people with disabilities are disproportionately represented among the populations living in homeless encampments, the theory of discriminatory effects offers plaintiffs strong support for challenging the anti-camping statutes under the guarantees of the FHA. Furthermore, the discretionary and complaint-driven process of disbanding homeless encampments may yield evidence supporting disparate treatment claims as well.

150. *Id*. at 915.

151. *Id*.

152. 576 U.S. 519 (2015).

153. *Id*.

154. Press Release, U.S. Dep't of Hous. & Urb. Dev., HUD Restores "Discriminatory Effects" Rule (Mar. 17, 2023), https://www.hud.gov/press/press_releases_media_advisories/hud_no_23_054 [https://perma.cc/JDQ3-BCMP].

155. Disparate treatment by state and local governments and officials may also give rise to a claim under the Equal Protection Clause, but disparate impact claims are not possible under the Clause because the Supreme Court held that disparities in the treatment of people based on race are subject to heightened scrutiny under the Equal Protection Clause only if they are "intentional." *See* Washington v. Davis, 426 U.S. 229 (1976). Possible claims under the Equal Protection Clause are outside the scope of this Article.

Discriminatory Effects

Challenges involving discriminatory effects proceed in three phases, the burden of proof shifting between the plaintiff and the defendant. First a plaintiff must show that the "practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin."[156] Second, the defendant may provide a "legally sufficient justification" for the practice; as HUD's rule provides:

> (1) A legally sufficient justification exists where the challenged practice:
>
> > (i) Is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent, with respect to claims brought under 42 U.S.C. 3612, or defendant, with respect to claims brought under 42 U.S.C. 3613 or 3614; and
> >
> > (ii) Those interests could not be served by another practice that has a less discriminatory effect.[157]

The HUD rule further provides that a legally sufficient justification "must be supported by evidence and may not be hypothetical or speculative."[158] Third, the plaintiff may demonstrate that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could "be served by another practice that has a less discriminatory effect."[159] Each prong is addressed below.

PRONG ONE: DISCRIMINATORY EFFECTS

It is possible for plaintiffs to make out a prima facie case that camping bans have a disparate impact by alleging facts at the pleading stage and producing statistical evidence thereafter demonstrating that the bans disproportionately affect people of color and people with disabilities — both of whom are protected classes under the FHA. The racial composition of people experiencing homelessness is reflected in HUD's 2023 point-in-time count:

> People who identify as Black, African American, or African, as well as Indigenous people (including Native Americans and Pacific Islanders), continue to be overrepresented among the population experiencing homelessness. People who identify as

156. 24 C.F.R. § 100.500(a).
157. 24 C.F.R. § 100.500(b).
158. *Id.*
159. 24 C.F.R. § 100.500(b)(1)(ii).

> Black made up just 13 percent of the total U.S. population and 21 percent of the U.S. population living in poverty but comprised 37 percent of all people experiencing homelessness and 50 percent of people experiencing homelessness as members of families with children.[160]

In particular, Black people are overrepresented among people experiencing unsheltered homelessness, and the number of Latinx people sleeping in public places increased from 2020 to 2022.[161]

People with disabilities are also overrepresented among the population of people experiencing homelessness. According to the Interagency Council on Homelessness, people experiencing homelessness are significantly more likely to have disabilities compared to both the U.S. population and all people living in poverty in the U.S. [162] Nearly half the people experiencing homelessness report having a disability.[163] In 2016, the percentage of people experiencing homelessness who have disabilities was significantly higher among individuals (47.3%) than among adults in families with children (21.9%), but those percentages are far higher than those for the general population (19.6% for individuals and 8.4% for adults in families with children) and for those living in poverty (30.5% for individuals and 15% for adults in families with children).[164] Disability rates are also 8% higher among children and youth experiencing homelessness compared to their peers.[165] A study commissioned by HUD in 2020 found that 96% of the residents of one Houston encampment and 98% of the residents in another had at least one disability, and that in Chicago, San Jose, and Tacoma, Washington, outreach workers reported that

160. U.S. DEP'T OF HOUS. & URB. DEV., OFF. OF CMTY. PLANNING & DEV., 2023 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONG., PART 1: POINT-IN TIME ESTIMATES OF HOMELESSNESS 2 (2023), https://www.huduser.gov/portal/sites/default/files/pdf/2023-AHAR-Part-1.pdf [https://perma.cc/L8M5-NA7X]; *see also Racial Inequalities in Homelessness, by the Numbers*, NAT'L ALL. TO END HOMELESSNESS (June 1, 2020), https://endhomelessness.org/resource/racial-inequalities-homelessness-numbers/ [https://perma.cc/YR5Q-445X].

161. Melissa Chinchilla, Joy Moses & Alex Visotzky, *Increasing Latino Homelessness: What's Happening, Why and What to Do About It*, NAT'L ALL. TO END HOMELESSNESS (Jan. 24 2023), https://endhomelessness.org/resource/increasing-latino-homelessness-whats-happening-why-and-what-to-do-about-it/ [https://perma.cc/J7Q2-UTFZ]; BATKO, *supra* note 147, at vi.

162. U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, HOMELESSNESS IN AMERICA: FOCUS ON INDIVIDUAL ADULTS 6 (2018).

163. *Id*.

164. *Id*.

165. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 1, at 33.

encampment residents exhibited high rates of both mental health challenges and substance use disorders.[166]

The disparate impact on people of color and people with disabilities are linked. The myriad of factors that constitute structural racism have caused people of color to have substandard health outcomes, and a disproportionate share of people with disabilities are people of color.[167] As these linked characteristics pervade the population experiencing homelessness nationwide, the anti-camping legislation thus has a disparate impact on these two protected classes. Proof of a prima facie case in the first phase shifts the burden to the defendants.

Prong Two: Legally Sufficient Justification

If a court finds plaintiffs challenging camping bans satisfy prong one of the discriminatory effects doctrine, it then becomes possible for defendant jurisdictions to argue that the anti-camping legislation is "necessary to achieve one or more substantial, legitimate, nondiscriminatory interests."[168] In construing FHA protections, the Supreme Court in *Inclusive Communities Project* clarified that an "important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies."[169] This phase of the analysis "provides a defense against disparate-impact liability."[170] Here the likely justification for banning camping on public property is that the ban is necessary not only to protect the aesthetic beauty of the city's streets and parks but also to protect public health, on the grounds that people who camp in parks allegedly are unsanitary and may also urinate or defecate in public. Additionally, in claiming a valid interest in the policy, defendants may argue the bans are necessary to prevent crime.

166. U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 130, at 12.

167. *Adults with Disabilities: Ethnicity and Race*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 16, 2020), https://www.cdc.gov/ncbddd/disabilityandhealth/materials/infographic-disabilities-ethnicity-race.html [https://perma.cc/CM36-6BW3].

168. 24 C.F.R. § 100.500(b)(1) (2023). *See* Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, 576 U.S. 519, 527 (2015) ("HUD has clarified that this step of the analysis 'is analogous to the Title VII requirement that an employer's interest in an employment practice with a disparate impact be job related.'").

169. *Texas Dep't of Hous. & Cmty. Affairs*, 576 U.S. at 541. The Court explains that this "step of the analysis is analogous to the business necessity standard until Title VII . . . ." *Id.*

170. *Id.*

Such justifications for criminalizing camping will almost certainly be found "substantial" and "legitimate."[171] But a question of whether the anti-camping law is "necessary" to achieve the asserted purposes will remain.[172] Here, the HUD rule imposes the burden of proof on defendant jurisdictions.[173] The weight of that burden has not yet been clearly established by the Supreme Court.[174] A recent district court decision suggests that a defendant must "evaluate" and "analyze" whether the contested policy is "necessary to further" the asserted legitimate interest.[175] Conceivably, plaintiffs punished for camping on public property will have a stronger counter to empirical claims concerning crime and public health than to aesthetic justifications less susceptible to rigorous evaluation or analysis. In either case, it is likely defendant cities would succeed at this stage, where their evidentiary burden is simply to show that anti-homelessness camping laws are necessary to advance a legitimate interest. Therefore, the burden of proof returns to plaintiffs in the last stage of disparate impact analysis.

Prong Three: Less Discriminatory Means

Finally, even if a government defendant proffers a legally sufficient justification for a camping ban, people experiencing homeless swept out of an encampment would have a strong challenge based on available evidence of a less discriminatory and less expensive alternative to criminalization – provision of temporary shelter. Under HUD's codification of disparate impact standards, plaintiffs are entitled to offer proof that the

171. 24 C.F.R. § 100.500(b)(1)(i).

172. *Id.*

173. 24 C.F.R. § 100.500(c)(2).

174. Scholars are debating this point both under the FHA and under Title VII, which is the source of the three-prong test. *See* David Lurie, *Rental Home Sweet Home: The Disparate Impact Solution for Renters Evicted from Residential Foreclosures*, 111 NW. U. L. REV. 239, 266–67 (2016); Susan S. Glover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 388, 399 (1996) (advocating for an "absolute necessity" requirement and providing a four-prong test); George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination,* 73 VA. L. REV. 1297, 1312–16 (1987) (calling for an intermediate standard, higher than a "legitimate nondiscriminatory reason" but short of "scientific standards of validity" (quoting McDonnell Douglas Corp. v. Green, 441 U.S. 792, 802 (1973)).

175. Fair Hous. Just. Ctr. v. Pelican Mgmt., 2023 WL 6390159 at *13–*14 (S.D.N.Y. 2023) (holding that the defendant "did not evaluate, let alone determine, that subsidy tenants contributed to those high arrears, and did not analyze the frequency with which subsidy holders did or did not pay their portion of the rent, despite having the data within the company's business records to conduct such an analysis.")

government's legitimate interests "could not be served by another practice that has a less discriminatory effect."[176] That rule also provides that the proposed alternative "must be 'equally effective' as the defendant's chosen policy at serving the defendant's interest(s), taking into account '[f]actors such as the cost or other burdens' that alternative policies would impose."[177] In *Watson v. Fort Worth Bank and Trust*, the Supreme Court held that the plaintiff's burden at the third phase of the disparate impact analysis is "not only to present potential alternatives, but to provide evidence that equally effective and less discriminatory alternatives exist."[178]

Here, in bearing that burden of proof, plaintiffs have empirical evidence that there exists a less discriminatory, alternative practice to camping bans and their enforcement—placing people experiencing homelessness into shelters or other subsidized housing instead of simply sweeping them out of encampments. Sweeps are expensive, whether resulting in incarceration of the camp's residents or not. Where sweeps do not lead to jail time, people experiencing homelessness without other forms of shelter are likely to move their encampments elsewhere, requiring another sweep, and another, and others thereafter, in a cycle without resolution of the problem of homelessness. [179] And if encampment residents are arrested, convicted, and jailed, the cost of incarceration exceeds that of providing formal shelter; moreover, the burden of a criminal record increases the likelihood of homelessness after release from incarceration.[180] It is well established that providing temporary housing—and, when necessary, mental health and substance abuse treatment—is less expensive than enforcing the criminalization measures.[181] As the

176. 24 C.F.R. § 100.500(b)(1)(ii). *See* Huntington Branch, N.A.A.C.P. v. Huntington, 844 F.2d 926, 936 (2d Cir. 1988).

177. Southwest Fair Hous. Council v. Maricopa Domestic Water Improvement Dist., 17 F.4th 950, 970 (9th Cir. 2021) (internal citations omitted).

178. *Id*. at 970–71 (citing Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 997–98 (1988)).

179. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 1, at 71.

180. Stanley-Becker, *supra* note 67.

181. For surveys of the literature, s*ee* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 1, at 71–74; Lavena Staten, *Penny Wise But Pound Foolish: How Permanent Supportive Housing Can Prevent a World of Hurt* i–ii, 25–27 (Sara K. Rankin, ed., 2019); Andrew Fraieli, *The Cost to Criminalize Homelessness,* HOMELESS VOICE (May 10, 2021), https://homelessvoice.org/the-cost-to-criminalize-homelessness/ [https://perma.cc/8H59-K623]; Sara Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99 (2019). For studies of particular jurisdictions, *see, e.g.*, JOSHUA HOWARD & DAVID TRAN, SEATTLE UNIV. HOMELESS RIGHTS ADVOCACY PROJECT, AT WHAT COST: THE MINIMUM COST OF CRIMINALIZING HOMELESSNESS IN SEATTLE AND SPOKANE iii (Sara K. Rankin, ed., May 2015) (examining costs in

legal director of the National Homelessness Law Center explains, "It is more expensive to keep a person experiencing homelessness who has been arrested for a nonviolent offense in pretrial detention for months (as they often can't pay bail) than to provide them with housing."[182] Investigating the costs of criminalizing homelessness, journalists have found that taxpayers pay more than three times as much to criminalize a single person experiencing homelessness than to provide supportive housing.[183] A comprehensive study conducted at the University of Seattle Law School indicates that reduced incarcerations result in savings of between $1,400 and $1,800 per person annually, and those figures do not even take into account all the costs of arrest, adjudication, and post-release probation or parole procedures.[184]

The case of Los Angeles illustrates the type of evidence available to plaintiffs in proving the availability of less discriminatory, less expensive means than enforcing anti-camping legislation. The city has spent as much as $30 million annually on sweeps of homeless encampments, incurring further expenses through incarceration aimed at preventing a return to parks and other public property as dwelling places.[185] By 2023, in Los Angeles, according to the city's Homeless Services Authority, there were roughly 23,000 informal shelters—"tents, vehicles and makeshift shelters"—occupying public property.[186] Based on nationwide data, the cost of basic shelter bed provisions is approximately $16,000 per

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Seattle and Spokane); GREGORY A. SHINN, RETHINK HOMELESSNESS & IMPACT HOMELESSNESS, THE COST OF LONG-TERM HOMELESSNESS IN CENTRAL FLORIDA: THE CURRENT CRISIS & THE ECONOMIC IMPACT OF PROVIDING SUSTAINABLE HOUSING SOLUTIONS 8 (2014), https://shnny.org/uploads/Florida-Homelessness-Report-2014.pdf [https://perma.cc/JP7Y-H4UB] (examining costs in Central Florida); SARAH B. HUNTER ET AL., EVALUATION OF HOUSING FOR HEALTH PERMANENT SUPPORTIVE HOUSING PROGRAM, RAND CORP. viii (2017) (examining costs in Los Angeles County).

182. Eric Tars, *Alternatives to Criminalization: The Role of Law Enforcement*, EOPS OFF. E-NEWSLETTER (Dec. 2015), https://cops.usdoj.gov/html/dispatch/12-2015/alternatives_to_criminalization.asp [https://perma.cc/2WST-24NW].

183. Fraieli, *supra* note 181 ("It costs taxpayers $31,065 per year to criminalize a single person suffering from homelessness — through enforcement of unconstitutional anti-panhandling laws, hostile architecture, police raids of homeless encampments, and just general harassment. The cost of providing them supportive housing — $10,051 per year."). *See* Press Release, USICH Exec. Dir. Jeff Olivet, Collaborate, Don't Criminalize: How Communities Can Effectively and Humanely Address Homelessness (Oct. 26, 2022), https://www.usich.gov/news-events/news/collaborate-dont-criminalize-how-communities-can-effectively-and-humanely-address [https://perma.cc/U3ZB-K2ZM].

184. Staten, *supra* note 181, at 27.

185. *Id*. at 28 ("In 2019, Los Angeles will spend $30 million on sweeps.").

186. *Homelessness in Los Angeles County 2023*, L.A. ALMANAC, https://www.laalmanac.com/social/so14.php [https://perma.cc/36NM-VALZ].

year;[187] whereas the average cost of incarcerating a single individual is $47,057 per year.[188] Consider the differential, using homelessness in Los Angeles as a suggestive example: $16,000 x 23,000 informal shelters = $368 million versus $47,057 x 23,000 informal shelters = $1.082 billion. Adding $30 million (the cost of the sweeps of homeless encampments) equals $1.112 billion.[189] Simple math suggests that shelter provisions are less expensive than criminalization.

Providing shelter is not only less discriminatory but less expensive than enforcing anti-camping legislation. Such evidence affords plaintiffs experiencing homelessness a basis for advancing a strong case of disparate impact in violation of the FHA.

Disparate Treatment

It is notoriously difficult to acquire direct evidence of discriminatory intent. Nevertheless, along with alleging violations of the FHA using a discriminatory effects framework, it may also be possible for plaintiffs experiencing homelessness to allege intentional discrimination against members of classes protected by the FHA, challenging disparate treatment in both the adoption and enforcement of anti-camping legislation. We might speculate that such challenges could — and should — rely on circumstantial evidence drawn from complaint-driven criminalization of homeless encampments as well as discretionary policing.

First, it may be possible for plaintiffs to advance arguments that camping bans have been adopted for discriminatory purposes. As evidence for that claim, it would be important to examine statements by local residents demanding anti-camping legislation as well as statements by government officials supporting the bans. Of course, direct evidence of discriminatory intent is rare, as the Fourth Circuit has observed:

> [O]fficials acting in their official capacities seldom, if ever,

187. Dennis P. Culhane & Seongho An, *Estimated Revenue of the Nonprofit Homeless Shelter Industry in the United States: Implications for a More Comprehensive Approach to Unmet Shelter Demand*, HOUS. POL'Y DEBATE 11 (2021), https://nlihc.org/sites/default/files/Estimated-Revenue-of-the-Nonprofit-Homeless-Shelter-Industry-in-the-United-States-Implications-for-a-More-Comprehensive-Approach-to-Unmet-Shelter.pdf [https://perma.cc/Y6HC-M52C].

188. CHRISTIAN HENRICHSON, JOSHUA RINALDI & RUTH DELANEY, THE PRICE OF JAILS: MEASURING THE TAXPAYER COST OF LOCAL INCARCERATION, VERA INSTITUTE OF JUST., https://www.vera.org/publications/the-price-of-jails-measuring-the-taxpayer-cost-of-local-incarceration [https://perma.cc/FB5E-QSYD].

189. While these are certainly "back-of-the-envelope" calculations, they strongly suggest that advocates, with access to better data produced in discovery, could make a compelling empirical case on this prong in most jurisdictions.

> announce on the record that they are pursuing a particular course of action because of their desire to discriminate . . . . Even individuals acting from invidious motivations realize the unattractiveness of their prejudices when faced with their perpetuation in the public record. It is only in private conversation, with individuals assumed to share their bigotry, that open statements of discrimination are made, so it is rare that these statements can be captured for the purposes of proving . . . discrimination in a case such as this.[190]

Therefore, gathering circumstantial evidence of a discriminatory purpose is critical as well.

The type of evidence that may be available to support disparate treatment claims is illustrated by two recent FHA cases against a South Carolina county and an Arizona city concerning the denial of zoning applications.[191] In the South Carolina case, the plaintiffs alleged public expression of racial animus, "that there was intense public opposition to the zoning application and that it was characterized by racist euphemism and derogatory undertones, not only online generally but through emails and letters sent directly to the Council."[192] Plaintiffs further alleged that racism characterized the speech of elected officials; "'[m]any of the public statements made by the Council members opposing the Zoning Application echoed the euphemistic and racially coded language used by many of the public speakers.'"[193] The Court found the evidence persuasive of discriminatory intent, holding, "after reviewing the alleged comments . . . by [County residents] and by Council members in a light most favorable to Plaintiffs, the Court finds that Plaintiffs have plausibly alleged that a discriminatory purpose was a motivating factor in Defendants' decision to deny the zoning application."[194]

In the Arizona case also, evidence of racist public expression proved persuasive to the Court in finding a violation of the FHA. The Court cited claims that "the language alleged to have been used by the neighbors opposing Plaintiffs' rezoning request was sufficiently racially charged to raise the inference of racial animus and to put the decision-making body on notice."[195] The Court found the plaintiffs "put forth evidence to support . . . allegations that

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190. *Smith v. Clarkton*, 682 F.2d 1055, 1064 (4th Cir. 1982).

191. S.C. State Conf. v. Georgetown Cnty., No. 2:22-CV-04077-BHH, 2023 WL 6317837 (D.S.C. Sept. 28, 2023); Ave. 6E Invs., LLC v. Yuma, 217 F.Supp.3d 1040 (D. Ariz. 2017).

192. *S.C. State Conf.*, 20232023 WL 6317837, at *11.

193. *Id.*

194. *Id.* at *12.

195. *Ave.* 6E *Invs.*, 217 F. Supp. 3d at 1055.

such comments were in fact made in letters and during council meetings,"[196] concluding that "evidence shows that the City Council, at least in part, based its denial on the opposing neighbors' concerns"—concerns that expressed "discriminatory animus."[197]

Evidence of discriminatory animus, as expressed by the public and/or government officials in relation to the enactment of the anti-camping laws—gleaned from the public record and freedom of information requests—likewise could offer the basis for claims about intent, supporting disparate treatment challenges to the legislation. As the Fourth Circuit found, proof of a discriminatory purpose requires "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[198]

Second, it may be possible for plaintiffs to argue that the camping bans are enforced more harshly or with greater frequency against members of protected classes. Mere observation of the persistence of homeless encampments—punctuated by police sweeps—suggests the prohibitions are not uniformly or consistently enforced, nor are the penalties evenly distributed. It is hardly inconceivable, as with enactment of the bans, that enforcement may be influenced by discriminatory animus, including the racial biases and racial stereotypes of neighbors and merchants in the vicinity of the encampments, for in many cities sweeps have been motivated by resident complaints.[199] Additionally, government officials, such as police officers, enforcing the ordinances are likely subject to implicit bias. As city council members in Portland, Maine, bluntly observed recently, "Unconscious bias remains firmly rooted in society's views of homelessness."[200] Evidence of that bias — both the complaints that motivate enforcement and the arrest statistics needed to support a claim of disparate treatment in enforcement— may be difficult to obtain prior to the filing of a complaint. Nevertheless, plaintiffs should consider pleading such a claim (if they have a good faith basis to do so) and pursuing that evidence in discovery. This also requires "sensitive inquiry" into available circumstantial and direct evidence.

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196. *Id.*

197. *Id.*

198. *S.C. State Conf.*, 2023 WL 6317837, at *12.

199. *See, e.g.*, Brian Howey, *Complaints From Neighbors Now Driving City's Response to Homeless Camps*, S.F. PUB. PRESS (Feb. 20, 2020), https://www.sfpublicpress.org/complaints-from-neighbors-now-driving-citys-response-to-homeless-camps/ [https://perma.cc/LB7U-E8FK].

200. Trevorrow & Pelletier, *supra* note 30.

Using both disparate impact and disparate treatment theories, private plaintiffs should invoke the protections of the FHA to challenge the discrimination inherent in the criminalization of homelessness.

B. Public Enforcement

Federal government agencies[201] have several advantages over private plaintiffs in seeking to limit the criminalization of homelessness under fair housing law, from the power to enforce Title VI of the 1964 Civil Rights Act and the authority to request information from cities agencies receiving federal funds to greater financial resources to pursue challenges to the anti-camping legislation. Agencies including HUD, the Department of Justice, and the Interagency Council on Homelessness have expressed opposition to criminalization, but, to date, have taken little legal action against the adoption and enforcement of the measures.[202] That should change.

i. Government Agency Opposition to the Criminalization of Homelessness

The federal government is already rhetorically opposed to the criminalization of homeless. HUD, for example, has publicly announced:

> [C]riminalization policies further marginalize men and women who are experiencing homelessness, fuel inflammatory attitudes, and may even unduly restrict constitutionally protected liberties and violate our international human rights obligations. Moreover, there is ample evidence that alternatives to criminalization policies can adequately balance the needs of all parties.[203]

In 2015, HUD inserted a new question into the application for grants under its $2 billion Continuum of Care (CoC) program, "designed to promote a community-wide commitment to the goal of ending homelessness,"[204] in order to award local governments and non-profit providers higher scores and potentially increased

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201. State agencies may also have important authority in this area, but the authority of state agencies is beyond the scope of this Article.

202. *See* sources cited *infra* notes 208, 212, and 219.

203. HUD EXCHANGE, DECRIMINALIZING HOMELESSNESS, https://www.hudexchange.info/homelessness-assistance/alternatives-to-criminalizing-homelessness/ [https://perma.cc/3UPF-7XMN] (last visited Apr. 4, 2024).

204. The CoC Program is authorized by subtitle C of title IV of the McKinney-Vento Homeless Assistance Act, 42 U.S.C. § 11381–11389, and the CoC Program Rules are in 24 C.F.R § 578.

funding for demonstrating their prevention of the criminalization of homelessness.[205] In 2016, the grant application again was updated with specific guidance for CoC programs on anti-criminalization; a Notice of Funding Availability (NOFA) provided for awarding additional points to CoCs that implemented specific strategies to prevent criminalization of homelessness within the CoC's geographic area. Maximum points will be awarded to CoCs that indicate specific strategies to ensure homelessness is not criminalized, such as engaging or educating local policymakers, engaging or educating law enforcement, implementing community plans, or engaging or educating businesses.[206]

Although the Trump Administration sought to remove these incentives, HUD's 2019 funding authorization statutorily required the Department to retain the prior criteria for CoC programs,[207] so the NOFA continued to state that HUD would reward CoCs that "implement specific strategies to prevent the criminalization of homelessness . . . ."[208] The anti-criminalization incentive remains in place, and indeed HUD has grown more specific in objecting to anti-camping measures such as "bans on public sleeping . . . ."[209] The 2023 NOFA reiterates, under the heading, "*Criminalization",* that additional points will be awarded if applicants "[i]mplement specific strategies to prevent the criminalization of homelessness within the CoC's geographic area,"[210] and expressly encourages dismantling anti-camping laws and establishing protections for the civil rights of people experiencing homelessness, along with promoting access to housing and services:

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205. *See* TARS, *supra* note 34, at 3.

206. CMTY. PLAN. & DEV., U.S. DEP'T OF HOUS. & URB. DEV., NOTICE OF FUNDING AVAILABILITY (NOFA) FOR THE FISCAL YEAR (FY) 2016 CONTINUUM OF CARE PROGRAM COMPETITION 1, 35 (2016), https://www.hud.gov/sites/documents/2016COCCOMPNOFA.PDF [https://perma.cc/8RRK-NPS7].

207. The Fiscal Year (FY) 2019 funds were authorized by the Consolidated Appropriations Act of 2019 (Public Law 116-6, approved February 15, 2019). *See* CMTY. PLAN. & DEV., U.S. DEP'T OF HOUS. & URB. DEV., NOTICE OF FUNDING AVAILABILITY (NOFA) FOR THE FISCAL YEAR (FY) 2019 CONTINUUM OF CARE PROGRAM COMPETITION 1, https://files.hudexchange.info/resources/documents/FY-2019-CoC-Program-Competition-NOFA.pdf [https://perma.cc/KJ3Z-Q5G8]. *See* also TARS, *supra* note 34, at 3.

208. CMTY. PLAN. & DEV., *supra* note 207, at 64.

209. CMTY. PLAN. & DEV., U.S. DEP'T OF HOUS. & URB. DEV., NOTICE OF FUNDING AVAILABILITY (NOFA) FOR THE FISCAL YEAR (FY) 2023 CONTINUUM OF CARE PROGRAM COMPETITION AND RENEWAL OR REPLACEMENT OF YOUTH HOMELESS DEMONSTRATION GRANTS 1, 83 (2023), https://www.hud.gov/sites/dfiles/CPD/documents/FY-2023-CoC-NOFO-Publication.pdf.

210. *Id*. at 83.

> Indicate specific strategies to (1) ensure homelessness is not criminalized and (2) to reverse existing criminalization policies such as bans on public sleeping or other behaviors associated with homelessness. This includes engaging and educating local policymakers and law enforcement to reduce criminalization of homelessness and adopt protocols that uphold civil rights and prioritize connections to housing and services, implementing community plans, or engaging and educating businesses.[211]

The DOJ has taken positions similar to those of HUD, promoting "alternatives to the criminalization of homelessness."[212] In a Community Policing Dispatch, the DOJ has stated that not only does the criminalization of homelessness "do little to prevent and end homelessness but it also takes law enforcement officers away from their important work of solving crime and protecting the public."[213] According to the DOJ, enforcing criminalization is neither cost effective nor successful: "law enforcement can play an important role in creating solutions to homelessness that we know are more effective than criminalization and can even save taxpayer dollars."[214] The DOJ has also lent support to cruel and unusual punishment challenges to criminalizing homelessness by filing amicus briefs;[215] as the head of the Civil Rights Division stated, prosecuting people experiencing homelessness "for something as innocent as sleeping, when they have no safe, legal place to go, violates their constitutional rights."[216] The DOJ's Office of Community Oriented Policing Services has expressly advocated against criminalization, stating, "arresting people for performing basic life-sustaining activities like sleeping in public takes law enforcement professionals away from what they are trained to do: fight crime."[217] In seeking alternatives to incarceration, the DOJ has worked with HUD to sponsor outreach programs for people experiencing homelessness to resolve warrants for offenses such as sleeping on a sidewalk.[218]

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211. *Id*.

212. OFF. OF PUB. AFFS., CONSTRUCTIVE ALTERNATIVES TO CRIMINALIZATION (May 29, 2012), https://www.justice.gov/archives/opa/blog/constructive-alternatives-criminalization [https://perma.cc/4JJK-H7P5].

213. ERIC TARS, ALTERNATIVES TO CRIMINALIZATION: THE ROLE OF LAW ENFORCEMENT, 8 COPS OFF. E-NEWSLETTER 12 (2015), https://cops.usdoj.gov/html/dispatch/12-2015/alternatives_to_criminalization.asp [https://perma.cc/ZV6M-KVQ6].

214. *Id*.

215. Press Release, Off. of Pub. Affs., Justice Department Files Brief to Address the Criminalization of Homelessness (Aug. 6, 2015).

216. *Id*.

217. Tars, *supra* note 182.

218. OFF. OF PUB. AFFS., *supra* note 212.

The ICH has also publicly opposed the criminalization of homelessness, collaborating with HUD and the DOJ. Under the Helping Families Save Their Homes Act adopted by Congress in 2009, the ICH is expressly charged with "develop[ing] alternatives to laws and policies that prohibit sleeping, eating, sitting, resting, or lying in public spaces when there are no suitable alternatives, result in the destruction of property belonging to people experiencing homelessness without due process, or are selectively enforced against people experiencing homelessness."[219] A 2012 ICH report, *Searching Out Solutions: Constructive Alternatives to the Criminalization of Homelessness*,[220] remains a leading guide for homeless rights advocates.[221] A 2023 ICH report, *From Evidence to Action: A Federal Homelessness Research Agenda*, flags "an increase in harmful and dangerous local and state laws that criminalize homelessness," noting the need to examine the "impact of anti-camping laws" and "effects of encampment sweeps."[222]

Federal agencies have the means to turn this agenda into action and, importantly, some of those means can *only* be employed by the government. Those means should be used in legal challenges to the anti-camping laws and encampment sweeps in order to reverse the criminalization of homelessness.

ii. Federal Government Enforcement Actions

HUD and DOJ Enforcement of the FHA

In challenging the enactment and enforcement of the anti-camping legislation, HUD has authority to initiate a complaint and, after investigating, make a finding of discrimination under the FHA that can result in the filing of a lawsuit by the DOJ. The DOJ can also initiate litigation to address a pattern of practice of housing discrimination.[223] That authority should be used to pursue theories of both discriminatory effects and disparate treatment under the

219. Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22, § 1004(a)(12), 123 Stat. 1668 (May 20, 2009).

220. U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, SEARCHING OUT SOLUTIONS: CONSTRUCTIVE ALTERNATIVES TO THE CRIMINALIZATION OF HOMELESSNESS (2012), https://www.usich.gov/guidance-reports-data/federal-guidance-resources/searching-out-solutions-constructive-alternatives [https://perma.cc/B5DX-D5X9].

221. TARS, *supra* note 34.

222. U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, FROM EVIDENCE TO ACTION: A FEDERAL HOMELESSNESS RESEARCH AGENDA, 2024-2028 13 (Nov. 2023), https://www.usich.gov/sites/default/files/document/From%20Evidence%20to%20Action_A%20Federal%20Homelessness%20Research%20Agenda%20November%202023.pdf [https://perma.cc/BK22-LST5].

223. 29 U.S.C. §§ 3610, 3613, 3614.

FHA, as addressed above. In tandem, HUD should file complaints, and the DOJ should initiate litigation against local jurisdictions similar to the cases brought by both departments in challenging exclusionary zoning ordinances and discriminatory nuisance and crime-free housing ordinances.[224]

In addition, under the FHA, all federal departments and agencies have a duty to administer their programs "in a manner affirmatively to further the purposes of [the Act]" and to "cooperate with the Secretary [of HUD] to further such purposes."[225] The FHA imposes a special duty on HUD to affirmatively further the purposes of the FHA—referred to as a duty to affirmatively further fair housing (AFFH).[226] HUD should fulfill this duty in a manner that minimizes the discriminatory impact of state and local criminalization laws.

HUD can rely on a rule it proposed in early 2023 to implement the AFFH, once it becomes final, to induce cities and states to eliminate laws and ordinances criminalizing homelessness. The rule is modeled on HUD's 2015 AFFH rule,[227] which required grantees receiving specified forms of HUD funding to assess the existence of fair housing within their borders and set goals to affirmatively further fair housing. While the 2015 rule was repealed in 2020, under the Trump administration, the proposed AFFH rule restores its provisions,[228] under which, when finalized, jurisdictions should be required to assess any policies that tend to criminalize homelessness—determining, in particular, whether they have a disparate impact on protected classes and to set goals to eliminate that impact under their mandatory "Equity Plans."[229] Because the rule will require recipients of HUD funds to indicate "which

224. *See* Joint Statement of the Dep't of Hous. & Urb. Dev. and the Dep't of Just., State and Local Land Use Laws and Practices and the Application of the Fair Hous. Act (Nov. 10, 2016); HUD Off. of the Gen. Couns., Guidance on Application of the Fair Hous. Act Standards to the Enforcement of Local Nuisance and Crime-Free Hous. Ordinances Against Victims of Domestic Violence, Other Crime Victims, & Others Who Require Police or Emergency Services (Sept. 13, 2016).

225. 42 U.S.C. § 3608(d).

226. 42 U.S.C. § 3608(e); U.S. DEP'T OF HOUS. AND URB. DEV., FACT SHEET: THE DUTY TO AFFIRMATIVELY FURTHER FAIR HOUSING, https://www.hud.gov/sites/dfiles/FHEO/documents/AFFH-Fact-Sheet.pdf [https://perma.cc/5P5U-DP6K].

227. 80 Fed. Reg. 42352 (July 16, 2015).

228. 88 Fed. Reg. 8516 (Feb. 9, 2023). *See*, in particular, proposed § 5.154.

229. The rule requires an Equity Plan that assesses, among other things, "investments in infrastructure; and (vii) Discrimination or violations of civil rights law or regulations related to housing or access to community assets based on race, color, national origin, religion, sex, familial status, and disability." 88 Fed. Reg. 8562 (proposed § 5.154(c)(3)(vii)) (Feb. 9, 2023).

protected class groups experience significant disparities in access to . . . community assets"[230]—and defines community assets to include facilities providing "a desirable environment" and meeting "the needs of residents throughout the community"[231]—community assets should be broadly construed to include parks and other public spaces in order to permit HUD to gather data on the disparate impact of criminalization measures as a possible predicate to further enforcement action.

HUD and DOJ Enforcement of Title VI

HUD and DOJ should also explore using Title VI of the 1964 Civil Rights Act to combat the criminalization of homelessness. Enforceable only by federal funding agencies, Title VI provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[232]

Because jurisdictions with laws that criminalize homelessness almost certainly receive federal funds, a challenge to their legislation, such as camping bans, is possible under Title VI.[233] The same disparate impact and disparate treatment theories that can be pursued under the FHA, as addressed above, also can be pursued under Title VI in relation to a "program or activity receiving Federal financial assistance."[234] In the wake of *Alexander v. Sandoval*,[235] there is no implied private right of action under Title VI, [236] and thus only federal agencies, like HUD and the DOJ, may bring challenges to the criminalization statutes under Title VI.

To implicate Title VI, it is not sufficient that a jurisdiction with a camping ban receive federal funds to support any of its programs. Rather, to trigger a Title VI challenge, the discrimination must

230. 88 Fed. Reg. 8563 (proposed § 5.154(d)(4)(i)) (Feb. 9, 2023).

231. 88 Fed. Reg. 8558 (proposed § 5.152) (Feb. 9, 2023).

232. 42 U.S.C. § 2000d.

233. U.S. DEP'T OF JUST., TITLE VI LEGAL MANUAL, § V(A), https://www.justice.gov/media/1121301/dl?inline [https://perma.cc/8SUZ-5NWG].

234. *See id*. Similar action is possible on behalf of people with disabilities under Section 504 of the Rehabilitation Act as it uses identical language concerning "any program or activity," but protects only "handicapped individual[s]." 29 U.S.C. § 794. Disparate impact is actionable under the Rehabilitation Act. *See, e.g.,* Jennings v. Alexander, 715 F.2d 1036 (6th Cir. 1983). Moreover, the Act expressly creates a private right of action unlike Title VI. 29 U.S.C. § 794a.

235. 532 U.S. 275 (2001).

236. *See* South Camden Citizens in Action v. N.J. Dep't of Env't Prot., 145 F. Supp. 2d 446 at 508–09 (D.N.J. 2001) (citing Alexander v. Sandoval, 532 U.S. 275 (2001)).

occur in the "program or activity" that receives the federal support.[237] A public program or activity covered by Title VI includes "a department, agency, special purpose district, or other instrumentality of a State or of a local government."[238] Yet within such public programs and activities, a particular targeted unit allegedly engaging in discrimination need not be the direct recipient of federal funds to implicate Title VI. The DOJ Title VI Legal Manual explains the meaning of "program or activity" with regard to the prohibition of discrimination in public institutions:

> [T]he 'program or activity' that Title VI covers encompasses the entire institution and not just the part of the institution that receives federal financial assistance. 42 U.S.C. § 2000d-4a. Moreover, the part of the program or activity that receives assistance can be, and often is, distinct from the part that engages in the allegedly discriminatory conduct. [239]

Therefore, Title VI would not be implicated where certain agencies or departments receive federal funds while others adopt or enforce criminalization measures. Rather, under Title VI, a single department or agency — a "program or activity"—must be identified that both receives federal funds and has adopted or enforces a criminalization measure, even if separate subunits of the department or agency satisfy those two requirements.

Two types of public institutions are ripe for investigation for the purpose of Title VI challenges to the camping bans central to the criminalization of homelessness: police departments and housing agencies.

Police Departments

In all likelihood, a police department that enforces homelessness criminalization measures receives federal funding for various purposes. Such a department would constitute a "program or activity" covered by Title VI prohibitions against discrimination, even in cases where the federal assistance supports a subunit not directly involved in the alleged discriminatory conduct.[240] The DOJ would be empowered therefore to withdraw funding from that police department under 42 U.S.C. § 2000d-1(1). The DOJ would also have authority to bring civil actions seeking injunctions against enforcement of specific homelessness criminalization measures under 42 U.S.C. § 2000d-7(a), with support for such Title VI

237. *See* 42 U.S.C. § 2000d.

238. U.S. DEP'T OF JUST., TITLE VI LEGAL MANUAL*, supra* note 233, § V at 24.

239. *Id.* at 23.

240. 42 U.S.C. § 2000d, 2000d-4(a)(1). *See also* U.S. DEP'T OF JUST., TITLE VI LEGAL MANUAL, *supra* note 233, at 23–27.

challenges resting on disparate impact and/or disparate treatment theories of liability.

Furthermore, a federal funding agency, such as the DOJ, has authority under Title VI to initiate affirmative compliance review ensuring non-discrimination by recipients of federal funds.[241] Exercise of that federal authority should be directed against police departments that enforce camping bans through sweeps of homeless encampments whose punitive force falls disproportionately on people of color and people of disabilities.

Housing Agencies

It is also likely that state and local governments that have adopted laws that criminalize homelessness have housing agencies that receive federal funding from HUD.[242] Under Title VI, claims that housing agencies discriminate in promulgating or enforcing criminalization measures may be harder to prove than similar challenges against police departments. However, persuasive arguments could be made that in failing to provide sufficient shelter services, HUD-funded housing agencies drive people experiencing homelessness into encampments, without other alternatives, and thereby expose their life-sustaining activities, such as sleeping, to criminal prosecution and punishment.

Additionally, because HUD funds Public Housing Authorities' (PHAs) police,[243] if PHA police belong to police departments that enforce the criminalization of homelessness, there may be a basis for HUD to investigate and enforce Title VI against police departments that target people experiencing homelessness for violating camping bans.

Finally, as arms of the federal government, both the DOJ and HUD have authority under Title VI to make pre-litigation requests for information from public bodies receiving federal funds, where there is reason to suspect a Title VI violation because of disparate treatment in the adoption or enforcement of a camping ban and/or because of the disparate impact of the ban. Such evidence may prove probative in undergirding Title VI challenges.

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241. U.S. DEP'T OF JUST., TITLE VI LEGAL MANUAL, *supra* note 233, at 5.

242. *See* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 1.

243. U.S. DEP'T OF HOUS. AND URB. DEV., PUB. AND INDIAN HOUS. NOTICE PIH 95-58 (PHA), GUIDELINES FOR CREATING, IMPLEMENTING AND MANAGING PUB. HOUS. AUTHORITY POLICE DEPARTMENTS IN PUB. HOUS. AUTHORITIES (1995), https://www.hud.gov/program_offices/administration/hudclips/notices/pih/95pihnotices [https://perma.cc/62XG-ATB3].

The breadth of federal authority—the full deployment of the resources of the DOJ and HUD to enforce fair housing law—has the potential to afford people experiencing homelessness essential support in challenging the punishment of their life-sustaining activities. In keeping with the guidance of the 2023 ICH report, *From Evidence to Action*, both public and private action is needed to reverse the criminalization of homelessness.[244]

Conclusion

The point of this exploration of fair housing law is to show how its antidiscrimination protections provide a basis for defending the rights of people experiencing homelessness through challenges to the enactment and enforcement of laws that criminalize camping on public property. This Article steps beyond simply criticizing the spate of anti-homelessness criminal measures as harmful and dangerous[245] to address how the harms disproportionately affect people of color and people with disabilities. And it steps beyond calls for alternatives to the criminalization of homelessness[246] to specify how fair housing law — the Fair Housing Act, with the duty it imposes on federal agencies to affirmatively further fair housing, and Title VI of the Civil Rights Act — presents private plaintiffs and agencies of the federal government means to challenge camping bans and police sweeps of homeless encampments and thereby promote humane and nondiscriminatory alternatives.

The public record does not reveal what happened to Roscoe Billy Ray Bradley, Jr., a man experiencing homelessness who lived under a California freeway, claiming in response to a Culver City ordinance that his tent was his property and he was "not going anywhere."[247] But the 2023 Culver City measure criminalizes camping in public places, exemplifying the tide of anti-homelessness legislation sweeping the country.[248] It bars people experiencing homelessness from living in public parks, passageways, alleyways, rights-of-way, streets, sidewalks, greenbelts, medians, and parking lots.[249] Like other bans nationwide, it broadly defines camping to include: "use of, settling, fixing in place, setting up, storing, locating, or leaving behind in a prohibited public place any or a combination of the following: tents,

244. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 222, at 13.
245. *Id*.
246. U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 220.
247. Lozano, *supra* note 2.
248. CULVER CITY, CAL., MUN. CODE § 9.10.700.
249. *Id*.

huts, other temporary physical shelters, cots, beds, or hammocks."[250] Police presence is anticipated during sweeps, which the city terms "cleanups."[251]

Because people experiencing homelessness are disproportionately people of color and people with disabilities—both protected classes under fair housing law—two possible avenues of challenge to the anti-camping measures exist under the guarantees of fair housing laws: claims of disparate impact and claims of disparate treatment. As a person of color, Roscoe Billy Ray Bradley, Jr. could potentially find protection through both. As a private plaintiff, he could find protection under the FHA, but under Title VI, which affords no private right of action, only federal agencies, such as HUD or the DOJ, could proceed on his behalf.

Challenges under fair housing law offer a novel approach to reversing the criminalization of homelessness. Punitive camping bans raise profound concerns about the treatment of vulnerable populations, making a crime of life-sustaining efforts by people experiencing homeless who are disproportionately people of color and people with disabilities. How courts will view claims under fair housing law is uncertain, but pursuit of those claims is necessary to confront lawmakers with evidence of the normative harms and fiscal costs of criminalizing homelessness.

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250. *Id.*

251. *Culver City Approves Anti-Camping Ban*, FOX11 (Feb. 14, 2023), https://www.foxla.com/news/culver-city-bans-camping-in-public-places [https://perma.cc/7HJT-A6YC]. The Culver City ordinance was adopted in the wake of the declaration of a Homeless State of Emergency in Los Angeles, on the grounds that the crisis would migrate to nearby suburbs like adjacent Culver City. Gillian Moran Perez & Jessica P. Oglivie, *Culver City Votes to Ban Public Camping, Targeting Street Encampments*, LAIST (Feb. 14, 2023), https://laist.com/news/culver-city-will-vote-on-anti-camping-ban-targeting-homeless-encampments [https://perma.cc/9EYE-MHTM].

20 Years Later: Qualified Immunity as a Model for Improving Manifestation Determination Reviews Under the Individuals with Disabilities Education Act

Matthew Schmitz†

Introduction

In 2015, a high school student in the Bristol Township School District faced suspension for twisting a teacher's arm.[1] According to witness accounts, the student, Z.B., was play-fighting with his friend and girlfriend between classes when a teacher, Mr. Donnelly, who did not know the students, told them to stop.[2] After Mr. Donnelly asked twice, Z.B. stopped and walked to class with his arm around his girlfriend.[3] Mr. Donnelly, perceiving Z.B. as having put his girlfriend in a headlock, told Z.B. to remove his arm multiple times and eventually grabbed Z.B.[4] Feeling Mr. Donnelly grab his arm, Z.B. grabbed Mr. Donnelly's arm and twisted it, giving Mr. Donnelly a sprained shoulder.[5] As the school considered whether to suspend Z.B., they faced a challenge that is familiar to any school: the challenge of balancing school safety and the educational needs of students who misbehave.[6]

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1. Bristol Twp. Sch. Dist. v. Z.B., No. CV-15-4604, 2016 WL 161600, at *1, *2 (E.D. Pa. Jan. 14, 2016).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Antonis Katsiyannis & John W. Maag, *Manifestation Determination as a Golden Fleece*, 68 EXCEPTIONAL CHILD. 85, 92 (2001); *see also* Jennifer D. Walker & Brittany L. Hott, *Navigating the Manifestation Determination Review Process*, 24 BEYOND BEHAV. 38, 38 (2015) (describing this balance and the accompanying challenges in the context of manifestation determination reviews).

The ability to discipline students is important for properly functioning schools, but in recent years school officials across the country are questioning the wisdom of discipline that excludes students from the learning environment.[7] Part of the motivation for critiquing exclusionary discipline—a term for disciplinary action like suspension or expulsion that removes students from their standard education setting—is the general increase in 'behavior problems' among students and the emerging evidence that mental health challenges play a key role in student behavioral issues.[8] Some school officials recognize that restorative practices which prioritize the student's growth may create more positive outcomes than excluding them from the classroom environment.[9] The movement towards restorative practices, however, is far from universal across the country and faces several key challenges.[10]

In Z.B.'s case, an additional factor complicated the school's decision on exclusionary discipline: his severe Attention Deficit/Hyperactivity Disorder (ADHD).[11] This diagnosis, in turn, brings Z.B. within a group of students who have faced the brunt of traditional suspension practices: students with disabilities.[12] Recent trends suggest that students with disabilities face exclusionary discipline at a rate disproportionate to their non-disabled peers.[13] Disability status is not the only source of disparity either, as students who are both disabled and Black face an even greater risk of school exclusion, following the larger trend that schools exclude Black and Native students from the classroom more often than any other racial groups.[14] These trends are troubling

7. Andrea Peterson, *Schools Are Looking at All Alternatives to Avoid Suspending Students*, WALL ST. J. (Jan. 4, 2023), https://www.wsj.com/articles/schools-are-looking-at-all-alternatives-to-avoid-suspending-students-11672838456 [https://perma.cc/2U5P-BYN7].

8. *Id.*

9. *Id.*

10. *Id.*

11. Bristol Twp. Sch. Dist. v. Z.B., No. CV-15-4604, 2016 WL 161600, at *2 (E.D. Pa. Jan. 14, 2016).

12. Amy E. Fisher, Benjamin W. Fisher & Kirsten S. Railey, *Disciplinary Disparities by Race and Disability: Using DisCrit Theory to Examine the Manifestation Determination Review Process in Special Education in the United States*, 24 RACE ETHNICITY & EDUC. 755, 755 (2021).

13. Donna St. George, *Biden Warns Schools Not to Overpunish Students with Disabilities*, WASH. POST (July 19, 2022), https://www.washingtonpost.com/education/2022/07/19/school-discipline-special-ed-biden/ [https://perma.cc/B7RD-WAQR] ("According to federal data, students served by the Individuals with Disabilities Education Act represented 13 percent of school enrollment across the nation but were handed nearly 25 percent of out-of-school suspensions in 2017-2018, the most recent school year available.").

14. Fisher et al., *supra* note 12, at 757 ("On average, for every 100 students with

enough that both the Obama and Biden Administrations have issued federal guidance aimed at addressing the disparate disciplinary treatment of students with disabilities in recent years.[15]

Removing students with disabilities from school settings, by definition, deprives them of access to key shared educational experiences.[16] Although the U.S. Supreme Court has found that American students do not enjoy an affirmative right to an education at the federal level,[17] there is still a good amount of statutory and state constitutional law that aims to create universal access to American public education.[18] Exclusionary discipline not only hinders such efforts to promote access to education, but it can also have a powerful negative impact on student success and wellbeing.[19] Some evidence even suggests that exclusionary discipline can make unwanted behaviors more likely to occur, actively working against its own purpose.[20]

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an IDEA identified disability label, White students lost 43 days to suspension whereas Black students lost 121 days . . . ."); St. George, *supra* note 13; Risa Johnson, *Native American Students Suspended at Higher Rates than Peers. New Report Looks at Solutions*, PALM SPRINGS DESERT SUN (Feb. 6, 2020), https://www.desertsun.com/story/news/2019/09/30/report-native-american-students-suspended-higher-rates-than-others/2391474001 [https://perma.cc/E6J6-4NLN].

15. St. George, *supra* note 13.

16. Allan G. Osborne, *Discipline of Special-Education Students Under the Individuals with Disabilities Education Act*, 29 FORDHAM URB. L.J. 513, 514 (discussing occurrences of some students with disabilities being totally excluded from public schools, thus preventing them from succeeding in their educational programs).

17. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 38 (1972) (rejecting the District Court's finding that "education is a fundamental right or liberty").

18. *E.g.*, Trish Brennan-Gac, *Educational Rights in the States*, AM. BAR ASS'N (Apr. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_2_civil_rights/educational_rights_states/ [https://perma.cc/86AE-Z737] (citing California, Connecticut, Washington, West Virginia, Mississippi, Oklahoma, Wisconsin, and Kentucky among those states that have found a fundamental right to education under their constitution); 20 U.S.C. § 1400(d)(1)(A) (describing the general purpose of IDEA as ensuring statutory entitlement to free appropriate public education to all children with disabilities).

19. *See, e.g.*, Elizabeth M. Chu & Douglas D. Ready, *Exclusion and Urban Public High Schools: Short- and Long-Term Consequences of School Suspensions*, 124 AM. J. EDUC. 479, 500 (2018) (finding connections between suspensions and weaker attendance, increased tardiness, decreased completion of credits, and higher dropout rates, as well as graduation rates).

20. Peterson, *supra* note 7, at 2 ("Instead of changing the problematic behavior, suspensions and being sent to the principal's office can make acting out more likely, says Jill Sharkey, a professor in the department of counseling, clinical and school psychology at the University of California, Santa Barbara.").

In amending the Individuals with Disabilities Education Act (IDEA) in 1997, Congress worked to provide a clearer fail-safe to protect students with disabilities from suspensions and expulsions that result from manifestations of their disability.[21] This protection was what the Bristol Township School District turned to in response to Z.B.'s alleged misconduct.[22] Labelled "manifestation determination reviews" (MDRs), the process grew out of Congress's preference for keeping students in the least restrictive environment (LRE) possible for their education.[23] The key component of the MDR process is requiring schools to call a meeting with the student's individualized education program (IEP) team whenever out-of-school suspensions cross a ten-day threshold indicating long-term suspensions.[24] The outcome of the meeting—with three limited exemptions for weapon possession, causing serious bodily injury, and drug possession or use—depends on whether the student's behavior was a manifestation of their disability.[25] Schools cannot exclude students beyond ten days for manifestations, but they can exclude beyond ten days for non-manifestations.[26] In Z.B.'s case, the school found his failure to follow directions and his physical response to being touched were not manifestations of his ADHD, which enabled them to exclude him for over ten days.[27] A hearing officer later overturned that determination and the district court sustained the hearing officer's decision, meaning the school had to conduct another MDR before they could exclude Z.B. long-term.[28]

Through the MDR process, Congress responded to legal concerns in the 1980s and 1990s about the conflict between school suspension practices and the IDEA's stay-put rights, which prohibit changes in student placement without parental consent and input.[29] Recent evidence on disciplinary disparities, however, suggests that

21. Fisher et al., *supra* note 12, at 756.

22. Bristol Twp. Sch. Dist. v. Z.B., No. CV-15-4604, 2016 WL 161600, at *5 (E.D. Pa. Jan. 14, 2016).

23. Osborne, *supra* note 16, at 513–15. Per the definition used to determine state funding eligibility, LRE aims to educate children with disabilities in the same spaces as children without disabilities "[t]o the maximum extent appropriate." 20 U.S.C. § 1412(a)(5)(A). It also seeks to limit the removal of students to situations "when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id.*

24. Osborne, *supra* note 16, at 530–32.

25. 20 U.S.C. § 1415(k)(1)(G).

26. Osborne, *supra* note 16, at 530.

27. *Bristol Twp. Sch. Dist.*, No. CV-15-4604, 2016 WL 161600, at *5.

28. *Id.* at *6–7, *15.

29. *See, e.g.*, Stuart v. Nappi, 443 F. Supp. 1235, 1242 (D. Conn. 1978) (raising concerns about this gap in legislative guidance).

the MDR process fails to protect at least some students with disabilities from undue discipline.[30] The fact that the federal government and state counterparts largely do not track schools' reasons for suspensions complicates the task of understanding these disciplinary disparities.[31] The failure to protect students with disabilities from long-term exclusions is impactful, in part, because schools play a large role in exposing students to society, and the lessons students learn from school policies can shape their views of societal values.[32] With the eyes of students on their schools, the educational and legal communities need to pay close attention to what the MDR process prioritizes and whether the process fulfills its promises to students and parents.

In addition to concerns about effectiveness, Congress needs to fit the MDR framework to our dynamic societal understandings of disability as a social identity.[33] For example, the social model of disability, which Michael Oliver brought to the forefront in 1990, shifted scholarly and popular focus away from the inherent qualities of the individual, which seem to play a central role in MDRs.[34] Oliver argues society should instead focus on the ways human organizations actively disable a person.[35] In other words, ways in which society *disables* people rather than ways in which people *have a disability*.[36] In the context of Oliver's thinking, the MDR's focus on the medical disability category and its symptoms is more in line with the traditional medical model of disability—rigid attachment to scientific classifications.[37] By shifting its focus and

30. Fisher et al., *supra* note 12, at 755.

31. Maria Polletta, Tara García Mathewson & Fazil Khan, *Inside Our Analysis of Attendance-Related Suspensions in Arizona*, HECHINGER REP. (Dec. 6, 2022), https://hechingerreport.org/inside-our-analysis-of-attendance-related-suspensions-in-arizona/ [https://perma.cc/FTT8-76JC].

32. John Dewey, *The School and Social Progress*, *in* THE SCHOOL AND SOCIETY 31–32 (Univ. of Chi. Press ed., 1907) ("[The school] has a chance to affiliate itself with life, to become the child's habitat, where he learns through directed living; instead of being only a place to learn lessons having an abstract and remote reference to some possible living to be done in the future. It gets a chance to be a miniature community, an embryonic society.").

33. *See* Fisher et al., *supra* note 12, at 763 ("The compounding identities of being a racial minority and having a disability label symbolically represent an even further deviation from normativity than either identity alone, likely influencing school personnel to exclude Black students with disabilities at particularly high rates.").

34. Deborah J. Gallagher, David J. Connor & Beth A. Ferri, *Beyond the Far Too Incessant Schism: Special Education and the Social Model of Disability*, 18 INT'L J. INCLUSIVE EDUC. 1120, 1123 (2014).

35. *Id.*

36. *Id.*

37. Walter A. Zilz, *Manifestation Determination: Rulings of the Courts*, 18 EDUC. & L. 193 (2006) (citing the three questions raised by 34 C.F.R. § 300.523).

embracing recent methods of thinking about disability, the MDR process could create greater respect for disabled people and more fully acknowledge their status as human agents.[38]

In line with the notion that society views children differently than it views adults, school officials enjoy a form of legal protection for their wrongful actions distinct from that provided by MDR procedure.[39] As public officials acting under the color of state law, teachers are vulnerable to civil rights claims under Section 1983 when they interfere with the rights of others.[40] Like any other public official challenged under Section 1983, they also have access to the judicially created qualified immunity defense.[41] Qualified immunity arose from policy concerns about protecting public officials from harassment and allowing for sufficient notice when their conduct might violate Section 1983.[42] The general qualified immunity framework, in contrast to the MDR standard, focuses on whether the official violated someone's constitutional or legal rights and whether those rights were clearly established.[43] That standard—in particular the "reasonable official" language that accompanies it—places the focus squarely on the individual, their notice, and their choices.[44] If substituted for the current MDR framework, this qualified immunity model and its focus on the individual could both provide more robust protections for students and put their personhood rather than their disability at the center.

This Article will present the case for modifying the MDR standard to resemble qualified immunity, bolstering the protections given to students with disabilities. Part I will summarize the legal development of both the IDEA's MDR process and Section 1983 qualified immunity. It will pay specific attention to the public policy concerns that helped shape each framework, the contours of the frameworks, and how those contours have changed over time. Part II will analyze three key flaws in the MDR process—its exemptions, its notice implications, and its failures to respect student agency—and discuss how qualified immunity addresses these concerns. It

38. *See* Dewey, *supra* note 32, at 43–44 ("Those modifications of our school system which often appear (even to those most actively concerned with them, to say nothing of their spectators) to be mere changes of detail, mere improvement within the school mechanism, are in reality signs and evidences of evolution.").

39. *See* Sarah Smith, *The Problem of Qualified Immunity in K-12 Schools*, 74 ARK. L. REV. 805 (2022).

40. 42 U.S.C. § 1983; *see also* Smith, *supra* note 39.

41. Smith, *supra* note 39, at 813.

42. *Id.*

43. *Id.* at 806–07.

44. *Id.* at 807.

will also note the potential positive impact this modified framework could have in combatting disproportionate discipline and promoting a social model of disability. Finally, the conclusion will couch these issues in the general environment of student discipline and the rights of students with disabilities, discussing some of the practical concerns surrounding a modified framework and the issues scholars, researchers, and legislators should focus on next.

I. Background

A. The Development of the MDR

The Education for All Handicapped Children Act (EHA), which Congress passed in 1975, represented a significant expansion of procedural and substantive protections for students with disabilities and laid the foundation for the modern IDEA.[45] Though it did not speak to student discipline, the EHA mandated that all students receive their education in the LRE and put in place procedural avenues for parents to challenge changes in student placement.[46] Among the earliest cases of individuals seeking redress for the EHA's failures to respond to disciplinary actions, particularly when those disciplinary actions involved changing student placement, was *Stuart v. Nappi*.[47] In *Stuart*, a student with learning disabilities and behavioral challenges requested an injunction from a ten-day suspension.[48] The United States District Court for the District of Connecticut noted the incompatibility between a disabled student's statutory "right to remain in her present placement," on the one hand, and the school's prerogative to maintain order and safety, on the other.[49]

Although Congress did not include a formal "stay-put right" in the statute for almost twenty years,[50] the *Stuart* court granted the injunction, acknowledging the necessity of keeping the school from unilaterally interfering with the student's placement stability

45. Osborne, *supra* note 16, at 513–14.

46. *Id.* at 513–14.

47. 443 F. Supp. 1235, 1235 (D. Conn. 1978).

48. *Id.* at 1239.

49. *Id.* at 1241 ("[T]he right to remain in her present placement directly conflicts with Danbury High Schools's [sic] disciplinary process.").

50. *See* Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, § 615(k)(7)(A), 111 Stat. 37, 60 (1997) ("[T]he child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(A)(ii) or paragraph (2), whichever occurs first, unless the parent and the State or local educational agency agree otherwise.").

through the disciplinary process.[51] Building on this idea, the District Court for the Northern District of Indiana, in *Doe v. Koger*, recognized the EHA's clear statement that schools must determine if students are disruptive because of their disability before enacting a suspension.[52]

Subsequent cases further defined this simple determination into a structure Congress would later adopt as the MDR.[53] From the Fifth Circuit, *S-1 v. Turlington* defined expulsion as a change in educational placement that, under EHA regulations at the time, required review by a specialized team to determine whether the child's disability caused the behavior.[54] In *Honig v. Doe*, the Supreme Court further refined the threshold for disciplinary changes of placement.[55] Relying on a Department of Education Office of Civil Rights interpretation, the Court held that suspensions shorter than ten days were not a change of placement, but anything beyond ten days would require the specialized review mentioned in *S-1*.[56] In *Light v. Parkway C-2 School District*, the Eighth Circuit created an exception to these specialized reviews in instances where students posed a danger to oneself or others.[57] The court reasoned that "[e]ven a child whose behaviors flow directly and demonstrably from her disability is subject to removal where that child poses a substantial risk of injury to herself or others."[58]

Taken together, the various federal courts created a system to address the EHA's failure to guide exclusionary discipline wherein exclusionary discipline totaling more than ten days would trigger specialized determinations unless the student's behavior posed a danger to themselves or others.[59] Congress refined and codified this procedure in the 1997 amendments to the IDEA under the MDR name.[60] The amended language required IEP teams to perform the newly-termed MDRs with the help of other qualified individuals.[61] Accompanying regulations from the Department of Education in

51. *Cf. Stuart*, 443 F. Supp. at 1243.

52. Doe v. Koger, 480 F. Supp. 226, 229 (N.D. Ind. 1979).

53. Osborne, *supra* note 16, at 518, 520, 525.

54. 635 F.2d 342, 347–48 (5th Cir. 1981).

55. 484 U.S. 305, 325 n.8 (1988) (citing the position of the Office of Civil Rights within the Department of Education considering a suspension of up to ten schooldays to not be a change in placement).

56. *Id.*

57. 41 F.3d 1223, 1228 (8th Cir. 1994).

58. *Id.* at 1228.

59. Osborne, *supra* note 16, at 530.

60. *Id.* at 529.

61. *Id.* at 530.

1999 set up three statements that the specialized team must affirm or deny to reach a decision.[62] In 2004, however, an additional amendment to the IDEA replaced these inquiries with a two-part, disjunctive determination.[63]

The amended regulatory standard directs the MDR team to determine "[1] if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or [2] if the conduct in question was the direct result of the local educational agency's failure to implement the IEP."[64] This change established two possible avenues for overturning the exclusionary discipline.[65] The first route maintained an emphasis on what scholars have called the "relationship test" but defined it more explicitly than the previous standard.[66] In the context of Z.B.'s case from before, the MDR team would answer the question of whether Z.B.'s ADHD caused him to disobey Mr. Donnelly and twist his arm.[67] If this was the cause, the school's list of disciplinary options for that incident would no longer include long-term exclusions.[68] If his ADHD did not cause the behavior, the school would be free to exclude Z.B. for more than ten days, unless the second avenue applied.[69]

The second avenue is more focused on the school's actions, where the first focuses on the student's actions.[70] This avenue asks whether the school has provided the services it promised in the student's IEP—that is, whether it has implemented the IEP.[71] If the school has failed to implement the IEP, the next question is whether those missing services directly led to the student's behavior.[72] Turning again to Z.B.'s case, the facts in *Bristol Township* do not mention what his IEP included, but if part of the IEP involved an intervention or service that was not implemented and that failure

62. Zilz, *supra* note 37, at 194–95 (citing 34 C.F.R. § 300.523).

63. Maria M. Lewis, *Were the Student's Actions a Manifestation of the Student's Disability? The Need for Policy Change and Guidance*, 25 EDUC. POL'Y ANALYSIS ARCHIVES 1, 6 (2017) (quoting 20 U.S.C. § 1415(k)(1)(E)).

64. 20 U.S.C. § 1415(k)(1)(E).

65. Walker & Hott, *supra* note 6, at 45 (demonstrating the two-prong approach).

66. Justin P. Allen, *The School Psychologist's Role in Manifestation Determination Reviews: Recommendations for Practice*, 38 J. APPLIED SCH. PSYCH. 1, 2 (2022).

67. Bristol Twp. Sch. Dist. v. Z.B., No. CV-15-4604, 2016 WL 161600, at *3 (E.D. Pa. Jan. 14, 2016).

68. *Id.*; Osborne, *supra* note 16, at 530.

69. *See* Osborne, *supra* note 16, at 530; *see also* Lewis, *supra* note 63, at 6; *see also* 20 U.S.C. § 1415(k)(1)(E).

70. 20 U.S.C. § 1415(k)(1)(E).

71. *Id.*

72. *Id.*

caused this incident, the school would not be able to exclude Z.B. for more than ten days.[73] If his IEP was properly implemented or if the failure to implement did not cause this incident, the school would be allowed to exclude Z.B. for the same length of time as it would have excluded a non-disabled student.[74] This all assumes that the student's behavior is outside of the three exemptions for (1) seriously injuring themselves or other people, (2) weapon possession, and (3) drug possession or use.[75]

One of Congress's expressed goals behind this new standard was crafting "a uniform standard for student behavior and set[ting] clear expectations of students" as well as working to "return the focus of teachers and students to the learning that is happening in the classroom . . . ."[76] In its report, the House of Representatives included praise from the National Association of Elementary School Principals (NAESP) and American Federation of Teachers (AFT) extolling the flexibility and simplification that the new standard and accompanying procedural changes offered.[77] The report describing the 2004 amendments highlights the flexibility they added to the process and suggests that school safety was a strong priority.[78]

Since Congress developed and amended the MDR, scholars have taken a critical view of its scope of protection and overall effectiveness.[79] The scholarship is divided between those critics who focus on the procedure's disciplinary outcomes and those who focus on the theoretical assumptions behind it.[80] Scholars who emphasize the alarming trends in disciplinary disparities between disabled and non-disabled students often point to areas within the federal regulations that the Department of Education should clarify.[81]

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73. *Bristol Twp. Sch. Dist.*, No. CV-15-4604, 2016 WL 161600, at *4; Osborne, *supra* note 23, at 530.

74. *Id.*; Osborne, *supra* note 16, at 530.

75. 20 U.S.C. § 1415(k)(1)(G). Each exemption is confined to behavior on school premises or at a school function. *Id.*

76. H.R. REP. NO. 108-77, at 119 (2003).

77. *Id.* at 119–20.

78. *Id.*

79. Zilz, *supra* note 37, at 202–04 (recounting results of an empirical study of MDR cases).

80. *Compare* Justin P. Allen & Matthew T. Roberts, *Practices and Perceptions in Manifestation Determination Reviews*, 53 SCH. PSYCH. REV. 31 (2021) (taking a very practical line of critique) *with* Katsiyannis & Maag, *supra* note 6 (focusing more on the theoretical implications of the process).

81. *See, e.g.*, Allen & Roberts, *supra* note 80, at 31 (suggesting reincorporation of school psychologists into MDR meetings); Jennifer D. Walker & Frederick J. Brigham, *Manifestation Determination Decisions and Students with Emotional/Behavioral Disorders*, 25 J. EMOTIONAL & BEHAV. DISORDERS 107, 116

These areas include reincorporating school psychologists into the determination meetings and finding more measurable ways to determine the connection between disability and behavior.[82] Perhaps most damning is the critical observation that MDRs present a robust combination of subjective determinations and deferential court treatment that makes accountability for the determination team elusive.[83] Students not only face an amorphous 'relationship test' standard but also a reviewing court that applies an unfavorable presumption on appeal.[84] Because of its vague nature, the relationship test reinforced in the 2004 reauthorization of the IDEA is one area that deserves further review.[85] Among the suggested changes, some scholars have proposed altering and developing the standard beyond its 2004 amended form to include other previously used or discussed factors.[86] Others propose adjusting the current framework by lowering the standard of causation and placing the burden of proof on the school rather than the student.[87]

Theoretical critiques of the MDR process, in contrast, tend to look at its relationship with the medical model of disability.[88] In particular, they note a troubling assumption.[89] The MDR process, critics argue, assumes that a student's ability status controls their intentionality.[90] In other words, it assumes students with disabilities are not active participants in navigating the situation that resulted in a punishable behavior. Instead, they are passengers

(2017) (suggesting potential for the development of team decision-making training models across special education meetings); Maria M. Lewis, *Navigating the Gray Area: A School District's Documentation of the Relationship Between Disability and Misconduct*, 120 TCHRS. COLL. REC. 1, 6, 24 (2018) (noting the tendency for subjectivity in the MDR analytical process and its potential to compound with deferential treatment of MDR decisions by the courts).

82. Allen & Roberts, *supra* note 80, at 31; Walker & Brigham, *supra* note 81, at 116.

83. Lewis, *supra* note 81, at 6; Clare Raj, *Disability, Discipline, and Illusory Student Rights*, 65 UCLA L. REV. 860, 890 (2018) ("[C]ourts simply ask whether the MDR team fully considered all of the relevant information before it.").

84. Raj, *supra* note 83, at 889–90.

85. Allen, *supra* note 66, at 5.

86. Lewis, *supra* note 81, at 16–17 (advocating for a combination of the 1997 and 2004 standards); Fisher et al., *supra* note 12, at 764.

87. Raj, *supra* note 83, at 920 ("Congress should amend IDEA's discipline provision to require schools to demonstrate by a preponderance of the evidence that the conduct in question was: (1) not rooted in disability, and (2) not the result of the school district's failure to implement an appropriate IEP whenever schools seek to enact long-term exclusion of children with disabilities.").

88. Katsiyannis & Maag, *supra* note 6, at 89–90.

89. Fisher et al., *supra* note 12, at 759.

90. *Id.*

in a vehicle that their disability is driving. Despite the good intentions behind this assumption, some scholars argue that it deemphasizes student agency and does not fully recognize their personhood.[91] Theoretical critics, like practical critics, respond to these scholars' concerns by proposing new questions that should determine the MDR process.[92] The common thread between the two lines of critique, then, is the belief that the MDR process and standard still requires refining and reworking, which is where the qualified immunity framework might provide helpful insight.[93]

B. The Development of Qualified Immunity

Qualified immunity provides school officials, among others, with protection from both liability and the expense of trial in Section 1983 claims involving constitutional rights violations.[94] It arises in the context of motions to dismiss or summary judgment and works to avoid the expense of discovery for claims that plaintiffs do not substantiate or instances where the right violated was not clearly established.[95] This violation-of-rights and clearly-established standard, while subject to its own criticism, also arose from policy concerns about fair warning, protecting the discretion of public officials, and the unwise diversion of official energy and resources.[96]

The foundational case for modern understandings of qualified immunity is *Wood v. Strickland*.[97] In *Strickland*, students expelled for spiking punch at an extracurricular meeting brought a claim under Section 1983 against decision makers at the school.[98] When

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91. *Id.*

92. Katsiyannis & Maag, *supra* note 6, at 93–94 (suggesting four questions concerning a student's ability to interpret and respond to the situation, including whether the student "possess[es] the requisite skills to engage in an appropriate alternative behavior" and "interpret[s] the situation factually or distort[s] it to fit some existing bias"); Fisher et al., *supra* note 12, at 764.

93. *See* Katsiyannis & Maag, *supra* note 6; *see also* Fisher et al., *supra* note 12; *see also* Lewis, *supra* note 81; *see also* Raj, *supra* note 83.

94. John C. Jeffries, Jr., *What's Wrong with Qualified Immunity*, 62 FLA. L. REV. 851, 851–52 (2010). *See also* Justin Driver, *Schooling Qualified Immunity*, EDUC. NEXT 8 (Mar. 23, 2021), https://www.educationnext.org/schooling-qualified-immunity-should-educators-be-shielded-from-civil-liability/ [https://perma.cc/5MWN-RSWG].

95. Karen M. Blum, *The Qualified Immunity Defense: What's "Clearly Established" and What's Not*, 24 TOURO L. REV. 501, 501–02 (2008).

96. Smith, *supra* note 39, at 805 (recounting Supreme Court cases that have described these policies).

97. 420 U.S. 308 (1975). Ironically for our purposes, *Strickland* centers around the exclusionary discipline of students. *Id.*

98. *Id.* at 308, 311.

determining whether school officials could be held liable in their official capacity, the Supreme Court advanced a standard based on whether the official "knew or reasonably should have known that the action [they] took . . . would violate the constitutional rights of the student affected" and whether they had "a belief that [they were] doing right."[99] This standard, the Court said, would protect the good faith efforts of public officers and keep lawsuits from chilling their discretion.[100] The Court's standard had an objective component—reasonable basis for the belief one was acting lawfully—and a subjective component—good faith belief.[101]

A few years later, in *Harlow v. Fitzgerald*, a case concerning conspiracy by former White House aides, the Court honed the standard's objective knowledge component.[102] As part of its holding, the Court articulated that "a reasonably competent public official" would be aware of the "clearly established" law covering their behavior.[103] Therefore, officials would not enjoy immunity from violations of clearly established laws and rights.[104] In *Anderson v. Creighton*, however, the Court raised the bar on constructive knowledge, holding that "the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[105] This ensured laws were established "on the ground"—in the practical realities facing an official—rather than in some abstract sense.[106]

In *Anderson*, the Court also advanced an explicit rationale for not focusing more on the "precise nature" of the unique duties and rights involved in each of its qualified immunity cases.[107] Creating various immunities to meet the particulars of a situation "would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide."[108] The most beneficial rule would be a general standard that public officials can apply to many situations rather than several more specific exceptions and

99. *Id.* at 321–22.
100. *Id.* at 317–18.
101. Jeffries, *supra* note 94, at 852 (citing Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974)).
102. 457 U.S. 800, 817–18 (1982).
103. *Id.* at 818–19.
104. *Id.*
105. 483 U.S. 635, 640 (1987).
106. Jeffries, *supra* note 94, at 854.
107. *Anderson*, 483 U.S. at 643.
108. *Id.*

modifications.[109] This explanation follows from the Court's priority to create a clear and reliable sense of protection.[110]

In the wake of these cases, the current two-prong standard depends on (1) establishing a violation of a constitutional or statutory right occurred and (2) showing that right was clearly established when the violation occurred.[111] This standard, like its previous versions, works to ensure both that the teacher or public official is on notice of a particularized right and that the plaintiff proved the violation enough to avoid frivolous suits.[112] Qualified immunity, however, has been a frequent subject of scholarly criticism.[113] Among the most pressing concerns are whether, in practice, immunity is necessary to protect public officials' discretion and whether the clearly established prong provides a predictable standard.[114] The doctrine has also taken on significant criticism in the context of litigating police misconduct that violates constitutional rights.[115] Courts, policy makers, and the public should take these critiques seriously, but they do not necessarily prevent the beneficial use of the qualified immunity framework in other contexts.[116] One example, as this Article argues, could be student discipline, where qualified immunity presents an insightful and robust framework for protecting discretion against unwarranted punishment, a model that the MDR process may be able to emulate.

II. Analysis

The MDR process suffers from at least three flaws that a qualified immunity framework could help correct. The first is its treatment of students on the extremes who under the current

109. *Id.*

110. Wood v. Strickland, 420 U.S. 308, 318–19 (1975).

111. *See, e.g.*, Doe v. Aberdeen Sch. Dist., 2022 U.S. App. LEXIS 21118, at *8–9 (8th Cir. Aug. 1, 2022).

112. Smith, *supra* note 39, at 813.

113. *See, e.g.*, Smith, *supra* note 39 (discussing qualified immunity in the context of schools); Hayden Carlos, *Disqualifying Immunity: How Qualified Immunity Exacerbates Police Misconduct and Why Congress Must Destroy It*, 46 S.U. L. REV. 283 (2018) (describing how qualified immunity interacts with police misconduct).

114. *Id.* at 817–18.

115. *See, e.g.*, Carlos, *supra* note 113.

116. Scholarship specifically targeting qualified immunity reform will naturally be more comprehensive and persuasive on this subject than this Article, with its focus on MDRs. For the purposes of this Article, it is enough to recognize that the qualified immunity doctrine is mired in controversy in the context of public officials and police officers but may have redeeming value if its mechanisms can serve to protect students from undeserved exclusions.

system fall into a set of exemptions that abandon the mission of determining when a student's disability causes their behavior.[117] The second is the failure of the MDR process to ensure notice for student-actors before they are disciplined for their behavior.[118] The third—more psychosocial—flaw is the MDRs' failure to respect the agency of students with disabilities and communicate to those students that the school and the law view them as full human persons. Together, these flaws make it difficult for students to understand and capitalize on the presumption in their favor baked into MDRs.[119] Congress can remedy that ineffectiveness by replacing the current MDR inquiries with a qualified-immunity-inspired framework: to exclude a student long-term, the school must prove (1) that the student violated a school policy, and (2) that the policy was clearly established at the time of the violation to the extent that a reasonable student with this disability would have known their actions were in violation of the policy.[120] This section explores each of the current structure's weaknesses in turn and how a qualified immunity framework would address them.

A. The Congressional Choice to Exempt Certain Behaviors

Congress's choice to craft exemptions from the MDR standard raises concerns about whether the current 'relationship test' is the best possible framework. The essence of the statutory protection is that schools should discipline students only if their behavior was independent of their disability.[121] By carving out exemptions for weapon possession, drug possession, and serious bodily harm,[122] the statutory structure abandons its concern with manifestations and entirely favors the school's prerogative to govern safety. Recall that

117. Raj, *supra* note 83, at 899 ("The MDR provision . . . prioritiz[es] the category of disability above the specific circumstances of the child.").

118. *See, e.g.*, Off. for C.R., U.S. Dep't of Educ., Fact Sheet: Supporting Students with Disabilities and Avoiding the Discriminatory Use of Student Discipline Under Section 504 of the Rehabilitation Act of 1973, at 3 (2022), https://www2.ed.gov/about/offices/list/ocr/docs/504-discipline-factsheet.pdf [https://perma.cc/NDA7-C22Z] (requiring notice to parents but not students).

119. Raj, *supra* note 83, at 901 ("The plain language of the IDEA's manifestation determination provision demands an extremely close nexus between conduct and disability in order to invoke the IDEA's protections of FAPE [free appropriate public education]. This high standard of causation makes it more likely that students with disabilities will be excluded for behaviors rooted in their disabilities.").

120. *See, e.g.*, Doe v. Aberdeen Sch. Dist., 42 F.4th 883, 890 (8th Cir. 2022) (exemplifying the current language used in the Eighth Circuit for qualified immunity on which the MDR process could build).

121. 20 U.S.C. § 1415(k)(1)(E)(i)(I).

122. 20 U.S.C. § 1415(k)(1)(G) (carving out the special circumstances receiving distinct treatment under the statute).

the House Report on the 2004 amendments specifically cited its concern with prioritizing school safety.[123] As such, under the exemptions, the student who brings drugs into the school surrenders their statutory protections for the sake of the school's safety precautions.

Our public disinterest in allowing students to attend public schools after their violent acts may make it easier to justify these exemptions,[124] and it is hard to blame schools and parents for wanting to protect student safety. In that vein, it is important to remember that schools have access to non-exclusionary discipline and short-term exclusionary discipline regardless of the MDR findings.[125] Long-term exclusions are only one possible disciplinary measure. Because schools still have other disciplinary tools and because the MDR exemptions deny a subset of students access to procedural protections in contrast to the purpose of the MDR, there may be room for a more comprehensive approach.[126] Comprehensive approaches are even more worth exploring in light of Congress's 2004 aim to find an MDR standard that could "provide[] for a uniform and fair way of disciplining children with disabilities in line with discipline expectations for children without disabilities."[127] While a determination process with carveouts can still meet this goal, a standard without any exemptions lends itself better to uniform and fair treatment.

The current exemptions create, somewhat arbitrarily, situations where schools determine their discipline for certain categories of behavior differently than they do for others. The exemptions also leave out non-violent bullying behavior and sexual assault, actions that can be at least as damaging as drugs and violence. Even for those areas it covers, the current structure requires school officials to make the difficult decision of whether behavior falls into these exempt categories. Rather than trying to categorize student behavior within an exemption, educators and students alike might benefit from applying the same questions to all students whether their behavior was dangerous or not. For these extreme cases, the result could still be the same in many cases—the

123. H.R. REP. NO. 108-77, at 119 (2004).

124. Katsiyannis & Maag, *supra* note 6, at 92 (citing John W. Maag & Kenneth W. Howell, *Special Education and the Exclusion of Youth with Social Maladjustments: A Cultural-Organizational Perspective*, 13 REMEDIAL & SPECIAL EDUC. 47 (1992)).

125. *See, e.g.*, *Discipline*, Minn. Dep't Educ., https://education.mn.gov/mde/fam/disc [https://perma.cc/Y7XH-Y4BJ].

126. *Id.*

127. H.R. REP. NO. 108-77, at 118 (2004).

school excluding the student long-term—but the MDR team would apply the standard consistently and communicate it clearly.

In other words, the qualified immunity framework can provide a standard that applies in all cases, while addressing the policy concerns that motivate the current exemptions. This framework lends itself to broad application by using "reasonable student" language. Under Section 1983, this language blocks claims against public officials if they prove that "a reasonable officer could have believed" they acted in line with the law that was clearly established at the time.[128] A similar standard could protect students from discipline if a reasonable student with their disability could have believed they acted in line with the clearly established school rules.

A "reasonable student with a given disability" standard—rather than the bare reasonable student—is the practical equivalent to the reasonable official because courts "occasionally consider defining characteristics of the person whose conduct is being evaluated" when defining reasonableness.[129] By linking the inquiry with the student's specific disability, for example a reasonable student with autism,[130] this standard is flexible enough to account for the different levels of challenge that people from various disability backgrounds face. If combined with reforms aimed at bringing more expertise into the MDR process,[131] the reasonable student with a given disability standard would provide at least as much predictability as the current 'relationship test,' and arguably more.

By using a reasonableness standard, the qualified immunity framework addresses the current exemptions by categorizing each of the exempt behaviors as reasonably out of line with school policy. More precisely, the MDR team would determine that a reasonable student with their disability should know those behaviors are against school policy. In the process, reasonableness allows decision

128. Jeffries, *supra* note 94, at 852 (quoting Anderson v. Creighton, 483 U.S. 635, 641 (1987)).

129. Carrie L. Hoon, *The Reasonable Girl: A New Reasonableness Standard to Determine Sexual Harassment in Schools*, 76 WASH. L. REV. 213, 226 (2001).

130. RESTATEMENT (SECOND) OF TORTS § 283A cmt. b (AM. L. INST. 1965) also supports a 'reasonable student with a given disability' standard considering its preference towards holding children to a distinct expectation. "A child of tender years is not required to conform to the standard of behavior which it is reasonable to expect of an adult. His conduct is to be judged by the standard of behavior to be expected of a child of like age, intelligence, and experience." *Id.* That distinct expectation refers to "a child of like age, intelligence, and experience" with disability status fitting neatly within a child's experience. *Id.*

131. Allen & Roberts, *supra* note 80, at 1.

makers to consider that not every drug, weapon, or violence policy is equally clear and that not every student understands the intersection between their behaviors and policies in the same way. Decision makers might find that it was reasonable for a student experiencing psychosis, for example, to think their dangerous act in response to a trigger was within the school policy.[132] The same determination team, however, might find that a student with ADHD should know that dangerous behavior violated the policy. This applies not only to behavior that would fall within the exemptions, but it would also allow MDR teams to recognize that reasonable beliefs about compliance with attendance standards, class rules, and other less severe behaviors might vary with both disability category and the clarity of the policy.

Under the qualified-immunity-inspired standard, there may be some students who face disabilities that are so severe it is hard to recognize much agency in their actions. Admittedly, a qualified immunity framework asks educational officials to adopt a disputed and somewhat uncommon belief that they can treat all students as responsible parties that can understand at least some aspects of school policies. That said, the operative element of what a reasonable student *should know* violates school policy still asks MDR teams to consider how a student's disability impacts their awareness of the interaction between policy and behavior. For some students, after the appropriate diagnosis, this constructive knowledge may be minimal or non-existent. The determination team is not required to hold students with severe disabilities to the same expectations as their peers. MDR teams should, however, reserve such prioritization of disability impact over student agency for students whose disabilities demonstrably impact their agency. While this rare case may sound ripe for an exemption—for example, "unless that student's disability substantially restricts their ability to know school policy"—such cases are part and parcel of the knowledge element. The knowledge element asks teams to see the student as a human actor who makes choices for which the school can hold them responsible unless, like a public official unable to understand how their actions collide with individual rights, the student's constructive knowledge is sufficiently impaired.

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132. For a discussion of supporting students experiencing psychosis, see Jason Schiffman, Sharon A. Hoover, Caroline Roemmer, Samantha Redman & Jeff Q. Bostic, *Supporting Students Experiencing Early Psychosis in Middle School and High School*, NAT'L ASSOC. STATE MENTAL HEALTH PROGRAM DIRECTORS (2018), https://www.nasmhpd.org/sites/default/files/Guidance_Document_Supporting_Students.pdf [https://perma.cc/5L37-C49U].

Incorporating the disability category also opens concerns that decision makers, often lacking empirical data and disability-specific expertise, will be ill-equipped to define how a reasonable student with a complex disability would understand school policy. This concern about bias is important and exists both in the current 'relationship test' and a qualified immunity framework.[133] It opens valid questions beyond the scope of this Article about whether Congress should include independent parties and judicial processes within the larger MDR procedure.

This concern also points, however, to one of the most important and impactful elements of a qualified immunity framework: the burdens on the parties. Under the qualified immunity framework, the parties attempting to hold government officials accountable must allege facts sufficient to constitute a violation and convince the court that a reasonable official at the time of the incident should have known their behavior violated the relevant rights.[134] Applied to students, this would mean the school would have to prove both that the violation occurred, and the rule was clearly established. That shift would strengthen the presumption in students' favor and make for more consistent and manageable court review of MDR decisions. Change of this sort is consistent with at least one suggested modification offered by current MDR scholars.[135] In contrast to the weak and temporary stay-put protections of the current MDR, this model can provide the teeth necessary to discourage schools from allowing their biases to impact the discipline process. Legal scholars, educators, and Congress will still need to address issues of measurability, bias, and sufficient resources, but placing the burden of proof on the school does more to deter bias than the existing standard.[136] At the same time, the modified framework also respects students as agents and creates stronger protections against improper exclusion by placing the students' decision-making processes at the center of its investigation.

133. Lewis, *supra* note 81, at 24.

134. Saucier v. Katz, 533 U.S. 194, 201 (2001), *limited by* Pearson v. Callahan, 555 U.S. 223, 232 (2009) (rejecting the rigid order *Saucier* set for determining the two questions).

135. Raj, *supra* note 83, at 920.

136. *See, e.g.*, Fisher et al., *supra* note 12, at 760.

B. Notice to Students and the School's Culpability

While MDR inquiries consider the school's responsibility for potentially insufficient provision of IEP services,[137] this is where the current required consideration of the school's potential fault stops. In particular, the current structure does not consider the school's responsibility for poorly defined and lightly communicated policies.[138] This concern is key because of its notice implications and because schools in many parts of the country can suspend students for something as innocuous as missing classes.[139] Likely in part because of the deference they give to MDR teams, federal courts have yet to address this issue and do not currently require schools to properly inform students of their policies before disciplining them.[140] The closest any federal government body has come to requiring notice of the code of conduct is a United States Department of Education requirement that schools notify all students after the fact of their violation when considering suspension.[141] Some state statutes require that conduct regulations be "clear and definite to provide notice to [students]" but not every state has set that requirement.[142] Further, even those that do aim to proactively notify students still provide for instances where decision makers do not need to consider student notice.[143]

Under current MDR procedure, the possibility remains that schools can discipline a student for violating policies of which the student was not aware.[144] For example, suppose that when Z.B. physically responded to Mr. Donnelly touching him, the school district did not have a clear and well-distributed policy on how students should respond to teachers physically intervening in

137. 20 U.S.C. § 1415(k)(1)(E)(i)(II).

138. Osborne, *supra* note 16, at 518, 520, 525.

139. Tara García Mathewson & Maria Polletta, *When the Punishment Is the Same as the Crime: Suspended for Missing Class*, HECHINGER REP. (Dec. 6, 2022), https://hechingerreport.org/when-the-punishment-is-the-same-as-the-crime-suspended-for-missing-class/ [https://perma.cc/FQ4P-5LZ9].

140. Raj, *supra* note 83, at 890. The closest the Supreme Court has come is *Goss v. Lopez*, 419 U.S. 565, 581 (1975), which established that schools must give students notice of the charges against them for suspensions of ten days or fewer, but this notice comes after the behavior in question.

141. Walker & Hott, *supra* note 6, at 38.

142. *See, e.g.*, Pupil Fair Dismissal Act, MINN. STAT. § 121A.45, subd. 2(a)–(c) (2022) (providing three permissible grounds for dismissal with only the first explicitly mentioning notice to students); *see also* NEB. REV. STAT. § 79-262.

143. *Id*.

144. *Cf.* 20 U.S.C. § 1415(k)(1)(B) ("School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days . . . .").

situations.[145] A seventeen-year-old student exposed to our cultural discussions of self-defense might have every reason to think the school has a policy that mirrors what he knows about his surrounding world.[146] A teacher grabbing his arm, depending on Z.B.'s personal experiences and the teacher's strength or aggression, might lead Z.B. to think more about these self-defense ideas as a natural caveat to the school's general and unnuanced policy on physical contact.[147] This perceived caveat could make Z.B.'s views of his behavior reasonable, in the absence of a clear school policy prohibiting students from physically responding when teachers touch them.[148]

Nothing in the statutory language of the IDEA or accompanying regulations requires setting clear expectations that can help students avoid getting caught in the grey area.[149] This is, in part, because courts and legislatures have hesitated to interfere with school policy-making decisions, finding educators better suited to make those calls.[150] This judicial and legislative restraint makes sense, since educators have more specific training on behavioral expectations and have many demands on their time.[151] Congress, however, should not hesitate to intervene where there is evidence that schools fail to respect the rights of students, as the stark disparities in disciplining students with disabilities suggests.[152] Legislators and judges, more than educators, are experts on how society should handle clashes between procedures and individual rights.[153]

Like its Section 1983 predecessor, a qualified immunity MDR framework that requires clearly established policies can protect students from their failure to anticipate both changes in policy and

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145. The record does not say whether this policy existed but does allude to a general policy against assault of students and teachers. Bristol Twp. Sch. Dist. v. Z.B., No. CV-15-4604, 2016 WL 161600, at *4 (E.D. Pa. Jan. 14, 2016).

146. *See also* Erica Terrazas, *When My Child is Disciplined at School*, TEX. APPLESEED 4 (Jan. 2009), https://senate.texas.gov/cmtes/81/c530/SB33-EricaTerrazas-1.pdf [https://perma.cc/7JYY-2HVS] (discussing Texas schools' use of Disciplinary Alternative Education Programs (DAEPs) allowing schools to consider student intent, self-defense, and disciplinary history).

147. *Bristol Twp. Sch. Dist.*, No. CV-15-4604, 2016 WL 161600, at *7.

148. *Id*.

149. As previously mentioned, at least two state legislatures require 'clear and definite' policies, but the practice seems to be far from universal.

150. *But see* Michael Benjamin Superfine & Roger D. Goddard, *The Expanding Role of the Courts in Educational Policy: The Preschool Remedy and an Adequate Education*, 111 TCHRS. COLL. REC. 1796 (2009).

151. *Id*.

152. *Id*.

153. *Id*.

answers to questions that fall in grey areas.[154] Students whose behavior online, for example, does not neatly fit within current school policies can enjoy protection from the harmful effects of exclusionary discipline. This is especially important because school officials, unlike Congress or executive agencies, may not always have time to define comprehensive policies in new areas of behavior that emerge over time, with technological development and changing cultural context.[155] This lack of clarity may even be the case for behaviors, like unexcused absences, where 'unexcused' may be a vague standard despite the fact that absences have long been cause for school discipline.[156] This protection is important not just for students with disabilities, but for all students. It is unrealistic to expect all students to understand the nuances and scope of policies that school officials, as experts on school policy, could not comprehensively develop.

The requirement that schools clearly establish policies can protect student discretion without sacrificing the most operative component of the 'implementation of the IEP' prong in the existing MDR standard.[157] As a tool that helps students participate in the curriculum and receive their education with nondisabled students, IEPs by necessity work to help students understand and navigate the school environment.[158] On the basic level of establishing standards of conduct and assisting students in meeting them, clearly establishing a policy is an essential part of schools implementing the IEP.[159] In other words, the shift to a qualified immunity framework still holds schools accountable for implementing the IEP.

The reasonableness consideration also allows for nuance by permitting findings of degree. The mother in *Bristol Township* hesitated to agree with the MDR finding in part because she believed that "some portions of this [incident] were due to [Z.B.'s]

154. Jeffries, *supra* note 94, at 859 ("In such areas, the chief effect of qualified immunity is to avoid damages liability for failure to anticipate developments in the law.").

155. Osborne, *supra* note 16, at 513–14.

156. *See generally* Christopher A. Kearney, Carolina Gonzálvez, Patricia A. Graczyk & Mirae J. Fornander, *Reconciling Contemporary Approaches to School Attendance and School Absenteeism: Toward Promotion and Nimble Response, Global Policy Review and Implementation, and Future Adaptability (Part 1)*, FRONTIERS IN PSYCH. 1 (2019) (describing methodological advances in our understanding of student absences that challenge the dichotomy of "excused" and "unexcused" absences).

157. 20 U.S.C. § 1415(k)(1)(E).

158. 20 U.S.C. § 1414(d)(1)(A)(i)(II)(aa).

159. *Id.*

Disability."[160] The current 'relationship test,' as her response suggests, asks an either-or question about the relationship between a disability and the behavior deserving discipline: *either* the disability caused the behavior, and long-term exclusion is not allowed, *or* the disability did not cause the behavior, and long-term exclusion is allowed.[161] In contrast, a qualified immunity framework would allow determination teams to find and acknowledge the role of a student's disability, while still finding that the student should have reasonably known their behavior violated school policy.[162] For example, the determination team could have found that Z.B.'s failure to follow directions and his physical response to Mr. Donnelly were a manifestation of his ADHD, but still found that he should have reasonably known his behavior violated school policy.[163] By moving the inquiry from an all-or-nothing determination of causation to one that prioritizes the student's decision-making and notice, a qualified immunity framework creates room for much-needed nuance in understanding and describing potentially punishable student behavior. This nuance further underscores the need to provide more resources and expertise for determination teams as they weigh these various factors.

C. Failure to Respect Students as Full Persons

The lack of a notice requirement in the current framework also speaks to how the MDR framework views the agency of students with disabilities.[164] Instead of looking to understand the choices a disabled student made and their awareness of policies guiding that behavior—among other relevant circumstances—the determination only asks if the student made a choice at all.[165] Whether the student made the best decision based on the information they had in that moment is irrelevant to the determination.[166] This leaves the possibility that, in accordance with an ill-defined policy, schools could exclude a student who acted thoughtfully simply because the

160. Bristol Twp. Sch. Dist. v. Z.B., No. CV-15-4604, 2016 WL 161600, at *5 (E.D. Pa. Jan. 14, 2016).

161. *Id.* at *4.

162. *See* Smith, *supra* note 39.

163. The doctor assigned to the determination, Dr. Catherine Newsham, conceded that the failure to follow directions was likely connected to Z.B.'s ADHD. *Bristol Twp. Sch. Dist.*, No. CV-15-4604, 2016 WL 161600, at *5.

164. Fisher et al., *supra* note 12, at 758.

165. *See* 20 U.S.C. § 1415(k)(1)(E).

166. *Bristol Twp. Sch. Dist.*, No. CV-15-4604, 2016 WL 161600, at *4.

student's disability was not connected enough to their actions.[167] Conversely, students who had notice of a well-defined policy and acted less carefully can avoid discipline if the determination team finds enough connection between their action and the disability.[168] Not only does this ignore the discretionary role of the student in their own behavior, but it fails to encourage thoughtful use of that discretion.[169] This flaw in the standard has the potential to ask either more or less of students than they are capable of, rather than looking to their true understanding of how their behavior coincides with school rules.

The choice to ignore the discretion of students with disabilities also separates them from the adults with whom they share the school environment. Had the facts of *Bristol Township* been different, Mr. Donnelly could have injured Z.B., and Z.B. could have attempted a Fourth Amendment excessive force claim under Section 1983.[170] Putting the merits of that case aside, Mr. Donnelly would enjoy the protection of qualified immunity and full recognition of his discretion. The reviewing court would consider whether he reasonably should have known that his choice to grab Z.B. violated Z.B.'s rights.[171] The same level of deference to his discretion might also control the school's decision on whether to suspend Mr. Donnelly from work.[172] The current MDR standard, however, does not require a determination team to afford Z.B. the same consideration.[173] This is most important in situations like Z.B.'s where there is some ambiguity and potential blame for the physical altercation on both the part of the teacher and the student.[174] There seems to be no clear explanation in the MDR policy development record for why our system gives less deference to students with disabilities—or students in general—than we do to school officials, despite the severe consequences of long-term exclusions. This change to the MDR could help rectify that discrepancy.

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167. Fisher et al., *supra* note 12, at 758.

168. *Id*. at 764.

169. *Id*.

170. Doe *ex rel.* Doe v. Hawaii Dept. of Educ., 334 F.3d 906, 909 (9th Cir. 2003) ("[T]he right of a student to be free from excessive force at the hands of teachers employed by the state was clearly established as early as 1990 . . . .").

171. *Bristol Twp. Sch. Dist.*, No. CV-15-4604, 2016 WL 161600, at *3.

172. *Id*. at *7.

173. Lewis, *supra* note 81, at 2.

174. *See* Bristol Twp. Sch. Dist. v. Z.B., No. CV-15-4604, 2016 WL 161600 (E.D. Pa. Jan. 14, 2016).

D. The Possible Risks of Implementing a Reasonableness Standard

It is worth noting the potential drawbacks to reasonableness and its expansive scope. Determination team members would still have room to insert their biases, both through the factors they choose to consider and their evaluation of whether those factors weigh for or against the student. The MDR for Z.B.'s interaction with his teacher demonstrates this risk.[175] The hearing officer found that the determination was "based on the broad, general determination that [Z.B.'s] conduct in this case did not fit within the general characteristics/usual symptoms of ADHD."[176] That general conclusion, combined with the finding that the investigation was essentially a "rubber stamp," suggests that the school officials were relying more on their stereotyped thinking than critical analysis of the particular facts.[177] By putting the student's disability at the center of its focus, the 'relationship test' invites determination team members to engage these stereotypes in their decision-making.[178]

A qualified immunity framework also creates the risk of focusing on "characteristics" and "usual symptoms" since it would compare students with reasonable members of their same general disability group.[179] Reasonableness mitigates these concerns, however, by allowing for consideration of various other non-disability-related factors. In Z.B.'s case, those might include his possible self-defense perception, his understanding of the rules, and his lack of teacher-student relationship with Mr. Donnelly.[180] Determination team members might still let their biases about children and types of disabilities color their decision on these and other factors, but those biases would not be as disability specific, and other concerns could more easily overshadow them.

A final issue is the specific difficulty courts have had interpreting the "clearly established" element of the qualified immunity framework.[181] Whether or not the law is "clearly established" is far from a simple yes-or-no question.[182] For example, the Eleventh Circuit has described three distinct categories of law with varying degrees of its "relation to precedent" in trying to figure

175. *Id.* at *6.
176. *Id.* at *5.
177. *Id.* at *7.
178. Lewis, *supra* note 81, at 24.
179. *Bristol Twp. Sch. Dist.*, No. CV-15-4604, 2016 WL 161600, at *6.
180. *Id.* at *2–4.
181. Jeffries, *supra* note 94, at 853.
182. *Id.*

out what establishment means.[183] There are also key questions about how much generality decision makers should consider in determining whether a rule or policy is clearly established: should decision makers recognize the rule as established merely in abstract terms, or are the particular facts necessary for establishment?[184] Returning to Z.B.'s hypothetical self-defense belief, would clear establishment require the school to have disciplined previous students who physically responded when teachers touched them, or would generalized comments from the school about student responses be enough?

Schools also will not be able to side-step the concerns about where clearly established policies come from.[185] School officials may write policies in various locations or release them orally. MDR teams must decide whether they expect students to only know the written policies or whether they should expect awareness of oral policies, implied expectations, and common-sense principles. The question of proper sources may be easier in schools than in other contexts, since the realm of school policies is less dense than the statutory, regulatory, and constitutional laws that apply to government officials, but which policies to apply remains a difficult question.

There is no reason to believe that educators, with primary tasks and skills lying elsewhere, will be better able to sort through what it means for a school policy to be clearly established than courts are.[186] Determination team members may also have biases towards finding that a policy was clearly established, especially if they were the ones who drafted the policy.[187] As mentioned before, however, the requirement that schools prove the policy was clearly established provides more fodder for judicial oversight and accountability.[188] On a more basic level, it requires schools to put in writing their reasons for believing the policy was clearly established, which may do more to encourage reflection.[189] The burden of proof for the school may not erase bias concerns, but like several other features of the qualified immunity framework it does more to prevent bias than the existing standard.[190] The end result

183. *Id.* (citing Vinyard v. Wilson, 311 F.3d 1340, 1350–51 (11th Cir. 2002)).

184. *Id.* at 855–56 (looking to *Pearson v. Callahan* and *Fields v. Prater* as polar opposites on the generality of scope courts should take in their reviews).

185. *Id.* at 858–59.

186. *See* Superfine & Goddard, *supra* note 150.

187. *See* Fisher et al., *supra* note 12, at 759.

188. Smith, *supra* note 39, at 117–18.

189. Jeffries, *supra* note 94, at 858–59.

190. Fisher et al., *supra* note 12, at 756.

of the qualified-immunity-inspired modification would be an MDR process that erases a few clear flaws in the current approach while sending a message to students with disabilities that schools respect them as responsible and capable agents.

Conclusion

As schools work to refine their disciplinary policies over the coming months and years, they face countless challenges, such as a lack of mental health resources and general staffing concerns, that will make it harder to override exclusionary discipline as the default setting.[191] Still, some schools seem resolved to fight for an improved disciplinary system, and the ongoing concern over disproportionate discipline of students with disabilities, particularly disabled Black students, is a vital part of that reform discourse.[192] Together with the persistent presence of disability activism both within and beyond schools,[193] disciplinary trends emphasize the need to revise a MDR standard that has not been overhauled in two decades.[194] The qualified-immunity-inspired framework proposed here offers to make headway both on issues of disability rights and finding equitable disciplinary rates between disabled and non-disabled students.

Most of the improvements that Congress should make to the MDR are more resource-based and procedural.[195] Scholars have highlighted the potential for biases to have undue weight in the determination process,[196] the lack of empirical tools measuring the role of different disabilities in students' behaviors,[197] and the lack of both requirements and funding for the proper level of expertise during MDR meetings.[198] These same resource concerns explain why outright bans on suspensions are not feasible, though ending the practice of suspensions is an admirable goal given the growing evidence that they are a harmful practice.[199] If teachers cannot

191. *See* Peterson, *supra* note 7.

192. Fisher et al., *supra* note 12, at 757.

193. *Cf.* Gallagher, *supra* note 34, at 1121 (responding to the social model's impact on special education policy debates).

194. Fisher et al., *supra* note 12, at 756.

195. *E.g.*, *id.* at 759.

196. *Id.*

197. Katsiyannis & Maag, *supra* note 6, at 91 ("There are no empirically validated methods to make a determination as to whether or not misbehavior was related to a disability . . . .").

198. Fisher et al., *supra* note 12, at 761.

199. *See* Satoria Ray, *The Case for Banning School Suspensions*, PROGRESSIVE MAG. (Apr. 22, 2021), https://progressive.org/public-schools-advocate/the-case-for-

exercise some exclusionary discipline in proper situations and if school districts continue to face resource shortages, schools will be spreading their teachers even thinner and could exacerbate an already troubling teacher scarcity.[200] Suspensions remain a practical necessity until schools are funded to provide for the needs of students who behave in extreme ways and to support the teachers who serve them.

In practice, then, the change in framework proposed here may not have its most positive consequences without also addressing these additional flaws in the procedural steps and supporting determination teams. Nonetheless, identifying the driving inquiries that best serve the purposes of the MDR process and respecting disabled students' full personhood is an important first step in reforming disciplinary practices for students with disabilities. The changes may seem semantic to some, but they could be a key move towards bringing the disability rights movement fully into the realm of K-12 education and removing an artificial obstacle for many students with disabilities, sending the clear message that they are as capable and responsible as their peers.

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banning-school-suspensions-ray-210422/ [https://perma.cc/97XF-GQNB].

200. Alia Wong, *Overworked, Underpaid? The Toll of Burnout is Contributing to Teacher Shortages Nationwide*, USA TODAY (Dec. 27, 2022), https://www.usatoday.com/story/news/education/2022/12/21/why-there-teacher-shortage-schools-struggled-nationwide-2022/10882103002/ [https://perma.cc/KVK4-C8QQ].

The Metamorphoses of Racial Discrimination in American Real Estate

Stevie J. Swanson†

Introduction

Many students come to law school hoping to obtain the skills to make the world a better place. Figuring out the best way to effectuate positive change begins with understanding the past. It is impossible to fully comprehend the present racial disparities in American real estate without clarity about past injustices. This Article focuses on aspects of real estate discrimination not fully explored in traditional law school property courses. It examines these forms of discrimination in greater depth than the classroom allows and brings them out of the darkness of our turbulent past and into the light of the present day. It illuminates the continued presence of real estate discrimination in the United States and exposes some of its current forms.

Traditional property courses in law school teach students about topics like zoning, land sale transfers, real estate brokers, and mortgages. Attempting to stay on schedule, explore everything on the syllabus, and cover the copious amounts of material necessary for practice and the bar exam, first-year property courses fail to delve deeply into the history surrounding the cases and statutes. Highly controversial topics are often covered in a matter-of-fact manner that focuses on memorization and application of the black letter law. Students frequently complete these courses unaware of the nefarious role government and the law plays in perpetuating racial discrimination, inequality, and lack of access to opportunity. Students are also often ignorant of the "badges and incidents of

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slavery" that still permeate land ownership in the United States.[1] This Article focuses on four major types of discrimination in real estate and exposes their continued existence, and in some cases, their covert metamorphoses.

The Article begins in Part I with an introduction to present-day inequalities before discussing them in Part II through health, education, public services, and labor mobility. Then, it examines the current wealth gap between Black and white Americans.[2] It also looks at the disparity between Black and white homeownership rates in the United States.[3] Finally, it compares statistical data on business ownership gaps between Black and white Americans.[4]

The Article then explores various types of real estate discrimination, beginning with zoning in Part III. It discusses the illegality of race-based zoning with the Supreme Court's decision in *Buchanan v. Warley*.[5] It explains numerous ways that local governments circumvented the *Buchanan* prohibition on race-based zoning while achieving the same objectives. Then, it explores the concepts of expulsive zoning, environmental racism, and exclusionary zoning that evolved post-*Buchanan*. Exclusionary zoning often manifests as a type of economic zoning that regulates based upon requirements for single-family residential use, minimum lot size, and minimum square footage requirements.[6] Environmental racism involves zoning in a manner that industrial uses are placed in minority neighborhoods and people of color are exposed to pollution.[7] Expulsive zoning encompasses environmental racism. Expulsive zoning involves the displacement of Black

1. *See* The Civil Rights Cases, 109 U.S. 3, 20 (1883) (coining the term "badges and incidents of slavery").

2. Benjamin Harris & Sydney Schreiner Wertz, *Racial Differences in Economic Security: The Racial Wealth Gap*, U.S. DEP'T OF TREASURY (Sept. 15, 2022), https://home.treasury.gov/news/featured-stories/racial-differences-economic-security-racial-wealth-gap [https://perma.cc/ZD7R-MBE8].

3. *More Americans Own Their Homes, but Black-White Homeownership Rate Gap is Biggest in a Decade, NAR Report Finds*, NAT'L ASS'N OF REALTORS (Mar. 2, 2023), https://www.nar.realtor/newsroom/more-americans-own-their-homes-but-black-white-homeownership-rate-gap-is-biggest-in-a-decade-nar [https://perma.cc/6MP5-5XPJ].

4. Lynda Lee, *Who Owns America's Businesses?*, U.S. CENSUS BUREAU (Jan. 4, 2023), https://www.census.gov/library/stories/2023/01/who-owns-americas-businesses.html [https://perma.cc/C3NR-LJHT].

5. 245 U.S. 60 (1917).

6. Richard D. Kahlenburg, *An Economic Fair Housing Act*, CENTURY FOUND. (Aug. 3, 2017), https://tcf.org/content/report/economic-fair-housing-act/ [https://perma.cc/ARW9-77WL].

7. Allison Shertzer, Tate Twinam & Randall P. Walsh, *Race, Ethnicity, and Discriminatory Zoning*, 8 AM. ECON. J.: APPLIED ECON., 217, 218, 242–43 (2014).

communities for highway expansion, industry, business, and urban renewal, primarily through the mechanism of eminent domain.[8] This Article will examine the continued detrimental effect of historic zoning discrimination, addressing the reality that "[n]eighborhoods zoned only for single-family homes are whiter, wealthier, and better educated. There's less pollution. Kids there have safer places to play and will later go on to make more money than kids who grew up in other neighborhoods."[9]

From zoning, the Article moves to a brief discussion of racially restrictive covenants and their unenforceability after the 1948 decision of the Supreme Court in *Shelley v. Kraemer* in Part IV.[10] It exposes the governmental insistence on the use of racially restrictive covenants for those who sought to secure desirable Fair Housing Act (FHA)-backed mortgages.[11] The Article discusses the fact that hundreds of thousands of racially restrictive covenants were recorded post-*Shelley*.[12] It ties the impact of those covenants to present-day inequities. It also explores attempts by state legislatures to contend with racially restrictive covenants on land records in the modern era.[13]

From racially restrictive covenants, the Article will move to a discussion of race nuisance in Part V. The race nuisance cases involve Black enterprises being declared a nuisance by the courts.[14] Often, when the nuisance was abated, the business was either altered to terminate the nuisance or shut down.[15] Examples of common law nuisances include noise, dust, smoke, fumes, odors, vibrations, and vermin.[16] Race nuisance cases are a noteworthy

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8. ANTERO PIETILA, NOT IN MY NEIGHBORHOOD: HOW BIGOTRY SHAPED A GREAT AMERICAN CITY 232 (2010).

9. Andrew Lee, *The Hidden Link Between Zoning and Racial Inequality*, ANTI-RACISM DAILY (Mar. 23, 2022), https://the-ard.com/2022/03/23/the-hidden-link-between-exclusionary-zoning-and-racial-inequality/ [https://perma.cc/52QT-TVF8].

10. 334 U.S. 1 (1948).

11. RICHARD R.W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS 9 (2013).

12. GENE SLATER, FREEDOM TO DISCRIMINATE: HOW REALTORS CONSPIRED TO SEGREGATE HOUSING AND DIVIDE AMERICA 161 (2021).

13. Stevie J. Swanson, *Indignity Perpetuated: Race-Based Housing Post-Reconstruction to the Fair Housing Act's Impact on the Digital Age: Where Do We Go From Here?*, 23 CONN. PUB. INT. L.J. 127, 153–58 (2023).

14. *See* Rachel Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505, 520–29 (2006) (exploring cases where nuisance claims were made against Black establishments with mixed results).

15. *Id*. at 527–28 (discussing injunctive relief granted in two cases against Black-owned saloons that limited their hours of operation).

16. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 413–14 (3rd ed. 2000).

aspect of history, despite not being the most pervasive of the real estate discrimination tactics discussed in this Article.[17] This Article will explore how race nuisance cases impacted real estate discrimination involving Black businesses, hospitals, funeral homes, and churches.[18] It will then bring race nuisance into the modern era, by examining programs like the Los Angeles Citywide Nuisance Abatement Program (CNAP), which allows the City Attorney to file civil injunctions against owners of "nuisance" properties.[19]

The final form of real estate discrimination discussed will be a lesser-known type called racial reverters in Part VI. When land is transferred, sometimes the grantor conveys less than all of their rights. If the grantor conditions land ownership "so long as" the grantee fulfills a condition, or reserves the right to take back the land if the grantee violates the terms, the grantor has retained a possibility of reverter in the case of a fee simple determinable, or a right of entry, in the case of a fee simple subject to condition subsequent.[20] This Article will illustrate examples of racial reverter clauses in deeds, wills, and trusts, like the one requiring a park which had been conveyed through defeasible fee to the Charlotte Park Commission to be maintained "for use by the white race only . . . ."[21]

I. Why Are We Still Talking About Real Estate Discrimination Now?

The "concentrations and traditions" that real estate discrimination in the United States created "linger on."[22] Real estate discrimination appeared (and often still appears) in a plethora of ways, including race-based expulsive and exclusionary zoning, racially restrictive covenants, race nuisance cases, and

17. Godsil, *supra* note 14, at 544 (suggesting possible explanations for why race nuisance cases had limited success during Jim Crow, including segregationists' acknowledgment that Black businesses had to exist somewhere in order for segregation to continue).

18. *See, e.g.*, Fox v. Corbit, 137 Tenn. 466 (1916) (saloon); Giles v. Rawlings, 148 Ga. 575 (1918) (hospital); Qualls v. Memphis, 15 Tenn. App. 575 (1932) (funeral home); Morrison v. Rawlinson, 193 S.C. 25 (1940) (church).

19. Terra Graziani, Joel Montano, Ananya Roy & Pamela Stephens, *Property, Personhood, and Police: The Making of Race and Space Through Nuisance Law*, 54 ANTIPODE 439 440, 440 (2021).

20. Swanson, *supra* note 13, at 159 n.246.

21. JACK GREENBERG, RACE RELATIONS AND AMERICAN LAW 284 (1959) (quoting Charlotte Park & Recreation Comm'n v. Barringer, 88 S.E2d 114 (N.C. 1955), *cert. denied*, 350 U.S. 983 (1956)).

22. *Id*. at 276.

racial reverters, to name just a few. The impact of real estate discrimination on Black Americans is pervasive, rooted in a history of parasitic, toxic, and government-endorsed discriminatory actions.

Real estate discrimination was parasitic because while it severely limited the options Black people had for where they could live, it also prevented them from having the opportunity to receive FHA-insured loans.[23] Black families were forced into substandard housing for which they paid exorbitant prices.[24]

Real estate discrimination was toxic because industry and manufacturing were purposefully located in Black neighborhoods and residents were subject to pollution.[25] The copious rat bites and deaths from lead poisoning created toxic environments for Black Americans too.[26] Importantly, real estate discrimination was government-endorsed, from the local government-sanctioned race-based zoning ordinances of the early 1900s to the expulsive and exclusionary zoning of the more recent era.[27] The government (through the FHA) made sure that white people could obtain mortgages with low interest rates, long fixed-rate terms, and minimal down payments while they systematically denied the same benefits to Black people.[28] The government even used eminent domain to split Black neighborhoods in two to create highway systems to transport white families away from the inner cities and out to the suburbs,[29] where they could use their affordable mortgages to build large homes.

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23. *Id*. at 300–02.

24. *Id*.

25. U.S. COMM'N ON C.R., NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE 13–16 (Oct. 2003), https://www.usccr.gov/files/pubs/envjust/ej0104.pdf [https://perma.cc/CMN3-FVSG] (providing a brief overview of environmental racism in the United States).

26. KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP 28 (2019) ("A report produced about the causes of riots in Philadelphia in the summer of 1964 found that . . . children living in 'Negro slums' experienced 80 percent of lead poisoning deaths and 100 percent of rat bites.").

27. Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, *in* ZONING AND THE AMERICAN DREAM 101, 101–02 (Charles M. Haar & Jerold S. Kayden eds., 1989).

28. RICHARD ROTHSTEIN, THE COLOR OF LAW 64–65 (2017).

29. *Id*. at 129 (referencing a report from the New Jersey State Attorney General's office that described the construction of an interstate highway as having the dual purpose of "eliminating" Black and Puerto Rican "ghetto areas" and "building highways that benefit white suburbanites, facilitating their movement from the suburbs to work and back").

As the Supreme Court stated in the eminent domain case *Berman v. Parker* in 1954:

> The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[30]

Berman displaced Black Americans in the name of blight removal. There were no comparable efforts in 1954 to apply this concept of public welfare to predominantly white neighborhoods.

II. Ramifications of Real Estate Discrimination

In 1877, federal troops withdrew from the South.[31] One hundred years later, in 1977, racially restrictive covenants were still being used by the real estate industry (until users were sued by the Justice Department).[32] Over 150 years of discrimination in real estate stains the American landscape. It impacts where one's children attend school, their exposure to crime and policing, and even the types of stores they can access.[33]

A. Education

One of the ramifications of real estate discrimination is lack of access to quality educational opportunities.[34] Real estate discrimination "thwarts the opportunity of low wage and working-class families to attend high-performing schools" because public school students are often assigned to the schools in the neighborhoods where they live.[35] Making reference to Ferguson, Missouri (where no elementary school is less than 75% Black), Richard Rothstein noted that "educational performance in such racially isolated settings is inadequate."[36] Segregated housing leads

30. 348 U.S. 26, 33 (1954) (internal citation omitted).

31. ROTHSTEIN, *supra* note 28, at 39.

32. Kimberly Quick, *Exclusionary Zoning Continues Racial Segregation's Ugly Work*, CENTURY FOUND. (Aug. 4, 2017), https://tcf.org/content/commentary/exclusionary-zoning-continues-racial-segregations-ugly-work [https://perma.cc/4KF5-N9QA].

33. Lance Freeman, *Build Race Equity into Rezoning Decisions*, BROOKINGS (Jul. 13, 2021), https://www.brookings.edu/blog/how-we-rise/2021/07/13/build-race-equity-into-rezoning-decisions/ [https://perma.cc/MJ4Q-8ZTS].

34. Quick, *supra* note 32.

35. Richard D. Kahlenburg, *Housing and Educational Inequality: The Case of Long Island*, CENTURY FOUND. (June 1, 2023), https://tcf.org/content/report/housing-and-educational-inequality-the-case-of-long-island/ [https://perma.cc/L39Z-FSCY].

36. *Id.*; Richard Rothstein, *The Making of Ferguson: Public Policies at the Root*

to segregated education.[37] Lack of funding in economically distressed racially homogenous neighborhoods leads to a lack of educational opportunity for the children in that neighborhood.

B. Public Services

Lack of access to adequate housing also frequently leads to lack of access to public services. For example, Black residents of Apopka, Florida, sued the City alleging that they were deprived of the right to equal municipal services including paving and street maintenance, storm water drainage, water distribution systems, sewage facilities, and adequate parks and recreation.[38] This deprivation is directly tied to real estate discrimination as Apopka enacted a racial zoning ordinance in 1937 (twenty years after this was outlawed by the Supreme Court), relegating Black people to living only on the south side of the railroad tracks.[39] The racialized zoning ordinance was not repealed until 1968.[40] The impact of this race-based zoning is significant as 312 of the 368 Black families living in Apopka at the time of the case were still residing in the area previously zoned for Black residents.[41] Ultimately, the plaintiffs were successful in alleging inadequate services in the provision of street paving, storm water drainage, and water distribution systems.[42]

Black neighborhoods are sometimes plagued by unpaved streets and inadequate public improvements.[43] Local governments have under-invested in poor, marginalized neighborhoods.[44] Neighborhoods of color have had less access to "water provision, sewage and garbage removal, street cleaning, street lighting, street paving, [and] police protection . . . ."[45] Inadequate public services

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of Its Troubles, ECON. POL'Y INST. (Oct. 15, 2014) at 31, https://files.epi.org/2014/making-of-ferguson-final.pdf [https://perma.cc/G8UF-S4EV] ("[S]chool desegregation requires housing desegregation.").

37. *Id*. at 31; Kahlenburg, *supra* note 35.

38. Dowdell v. City of Apopka, 511 F. Supp. 1375, 1377 (M.D. Fla. 1981).

39. *Id*. at 1378; *see also* Buchanan v. Warley, 245 U.S. 60, 82 (1917) (outlawing racial zoning ordinances).

40. *Dowdell*, 511 F. Supp. at 1378.

41. *Id*. at 1377.

42. *Id*. at 1382–84.

43. PIETILA, *supra* note 8, at 232–33.

44. Yonah Freemark, *The Role of Race in Zoning: A History & Policy Review*, URB. INST. 16 (Sept. 16, 2021), https://www.urban.org/sites/default/files/publication/104794/the-role-of-race-in-zoning-a-history-policy-review_1.pdf [https://perma.cc/M4WQ-9ACU].

45. ROSE HELPER, RACIAL POLICIES AND PRACTICES OF REAL ESTATE BROKERS 10 (1969).

added further insult to the injury of real estate discrimination because not only were Black families crowded into inadequate housing and isolated from resources and opportunities, but they were also ignored (in the provision of public services) by the governments that forced them there.

C. Health

As Kwame Ture and Charles V. Hamilton wrote in 1967, "In America we judge by American standards, and by this yardstick we find that the [B]lack man lives in incredibly inadequate housing, shabby shelters that are dangerous to mental and physical health and to life itself."[46] Because of real estate discrimination, Black children are more likely to have asthma and to die from it.[47] Black children's increased risk results from living near polluting factories and in rental housing with mold and other risk factors.[48]

High blood pressure and increased risk of heart disease are also tied to discriminatory housing policies.[49] A dearth of fruits and vegetables, an overabundance of easily accessible fast food options, lesser access to public transportation, and a lack of health insurance all contribute to a higher incidence of serious health problems in Black Americans.[50]

Black Americans are often subject to more types of health risks than white Americans due to being forced into inadequate and substandard housing. A disproportionate amount of rat bites and lead poisoning deaths have affected Black families living in slum conditions.[51] A study done to ascertain the cause of the 1964 Philadelphia riots showed that 100% of all rat bites and 80% of lead poisoning deaths were suffered by Black children.[52] As Justice

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46. KWAME TURE & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA 155 (1967) (published as Stokely Carmichael & Charles V. Hamilton).

47. Kat Stafford, *Chapter 2: Black Children Are More Likely to Have Asthma. A Lot Comes Down to Where They Live*, AP NEWS (May 23, 2023), https://projects.apnews.com/features/2023/from-birth-to-death/black-children-asthma-investigation.html [https://perma.cc/6WFX-P4NM].

48. *Id.*

49. Kat Stafford, *Chapter 4: High Blood Pressure Plagues Many Black Americans. Combined with COVID It Is Catastrophic*, AP NEWS (May 23, 2023), https://projects.apnews.com/features/2023/from-birth-to-death/high-blood-pressure-covid-racism.html [https://perma.cc/U68C-9LMP].

50. *Id.*

51. TAYLOR, *supra* note 26, at 28.

52. *Id.* at 28; *see also* HELPER, *supra* note 45, at 4 (describing how news of Black children dying from rat bites in overcrowded neighborhoods could motivate civic action).

Ketanji Brown Jackson noted in her dissent in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, when Black children are tested for lead, their blood lead levels test at twice the rate of their white counterparts.[53]

Toxic effects of pollution disproportionately impact the Black community because of racialized zoning policies that forced Black people into cohabitation with factories.[54] According to Barry Hill, a former director at the Office of Environmental Justice at the United States Environmental Protection Agency, "minorities and low-income communities are disproportionately exposed to environmental harms and risks."[55] In the United States, race is the strongest predictor of exposure to environmental hazards.[56] Black neighborhoods were often zoned to permit industry.[57] Yale Rabin uses the term "expulsive zoning" to describe "the intrusion into [B]lack neighborhoods of disruptive incompatible uses that have diminished the quality and undermined the stability of those neighborhoods."[58] For example, the more predominantly Black a community in the southeastern United States is, the more likely it is that the community is situated near a hazardous waste site.[59]

One final health impact of real estate discrimination is the presence of heat islands. Heat islands are often low-income, predominantly marginalized, urban neighborhoods that experience significantly higher temperatures because of "fewer trees and more concrete buildings and parking lots."[60] Heat islands are a modern challenge to Black neighborhoods because increased temperatures are linked to negative impacts on short-term cognitive performance, stamina, and working memory.[61]

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53. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 395 (2023) (Jackson, J., dissenting) (citing ROTHSTEIN, *supra* note 28, at 230).

54. U.S. COMM'N ON C.R., *supra* note 25, at 15.

55. *Id.* at 14 n.8 (quoting Barry Hill, Dir., Off. of Env't Just., U.S. Env't Prot. Agency, February Hearing Testimony).

56. *Id.*

57. ROTHSTEIN, *supra* note 28, at 50.

58. Rabin, *supra* note 27, at 101.

59. Robert W. Collin & Robin Morris Collin, *Urban Environmentalism and Race*, *in* URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY 220, 221 (June Manning Thomas & Marsha Ritzdorf eds., 1997).

60. Cecilia Rouse, Jared Bernstein, Helen Knudsen & Jeffery Zhang, *Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market*, WHITE HOUSE: COUNCIL OF ECON. ADVISERS BLOG (June 17, 2021), https://www.whitehouse.gov/cea/written-materials/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market [https://perma.cc/R9JD-JXCM].

61. *Id.*

D. Wealth

Real estate discrimination has severely impeded access to home ownership for Black Americans. Home ownership is often the best way to increase wealth and build financial equity.[62] Housing is important for economic well-being and wealth accumulation because homeownership has traditionally "been the best way to build household wealth and also to qualify for better housing, establishing credit worthiness and building financial equity."[63] The homeownership gap between white and Black Americans is 30%.[64] The homeownership gap between Black and white Americans is not improving—it was the same in 2020 as it was in 1970.[65] This gap is a testament to the persistence of real estate discrimination in the United States.

The endurance of real estate discrimination is to blame for these sobering statistics. The National Association of Realtors (NAR) reported in 2023 that Black Americans continue to see higher denial rates for home loans, refinancing, and loans for home improvement.[66] Twenty-four percent of Black homebuyers surveyed by the NAR experienced discrimination in the home buying process.[67] Black Americans not only have a more difficult time buying homes, but the homes that they are able to buy do not appreciate in value as quickly.[68] Families of color receive less quality for their housing dollars than do white families.[69] Thirty-nine percent of Black Americans surveyed reported discrimination

62. Richard McGahey, *Zoning, Housing Regulation, and America's Racial Inequality*, FORBES (June 30, 2021), https://www.forbes.com/sites/richardmcgahey/2021/06/30/zoning-housing-regulation-and-americas-racial-inequality/?sh=2d773fb47d86 [https://perma.cc/MGD8-UM6N].

63. *Id.*

64. Alexander Hermann, *In Nearly Every State, People of Color Are Less Likely to Own Homes Compared to White Households*, JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV.: HOUSING PERSPECTIVES (Feb. 8, 2023), https://www.jchs.harvard.edu/blog/nearly-every-state-people-color-are-less-likely-own-homes-compared-white-households [https://perma.cc/6X5K-PH2U] (showing that, while 71.7% of white households owned their homes in the period from 2015 to 2019, only 41.7% of Black households were homeowners during the same period); *see also Racial Differences in Economic Security: Housing*, U.S. DEPT. OF TREASURY (Nov. 4, 2022), https://home.treasury.gov/news/featured-stories/racial-differences-in-economic-security-housing [https://perma.cc/5WCA-Y89D] (reaching the same conclusion).

65. *Id.*

66. NAT'L ASS'N OF REALTORS, *supra* note 3.

67. *Id.*

68. Harris & Wertz, *supra* note 2.

69. HELPER, *supra* note 45, at 6.

in the home appraisal process.[70] Black Americans also have consistently higher rates of foreclosure than white Americans.[71]

There is a strong correlation between homeownership and wealth accumulation. "[White people] are much more likely to inherit wealth than [Black people], and much of that inherited wealth comes from housing equity."[72] In 2016, the median wealth for Black households in the United States was $17,100, and the median wealth for white households was $171,000.[73] In addition to having lower wealth accumulation, Black households are more likely than white households to have zero net worth or to be in debt.[74] In 2016, almost 20% of Black households had negative net wealth, compared to 9% of white households.[75] Negative net wealth impacts both physical and mental health.[76]

Lack of wealth is exacerbated by high housing costs. Low-cost rental units decreased by four million units from 2011 to 2017.[77] Cost burdens are defined as the share of U.S. households paying more than 30% of their incomes for housing.[78] The cost burden share for Black renters in 2017 was nearly 55%.[79] The impact of this cost burden is catastrophic. In 2017, severely cost burdened Black families with children spent 35% less on food, 46% less on clothes, and 75% less on healthcare than those without housing cost burdens.[80] Housing inadequacies are impacting the health, nutrition, and comfort of Black families at a dramatic level.

Things are not looking up. Nationally, only thirty-seven rental homes are available for every one hundred extremely low-income

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70. NAT'L ASS'N OF REALTORS, *supra* note 3.

71. Harris & Wertz, *supra* note 2.

72. McGahey, *supra* note 62 (citing Darrick Hamilton & William Darity, Jr., *Can 'Baby Bonds' Eliminate the Racial Wealth Gap in Putative Post-Racial America?*, 37 REV. BLACK POL. ECON. 207, 213 (2010)).

73. Rakesh Kochhar & Anthony Cilluffo, *How Wealth Inequality Has Changed Since the Great Recession, by Race, Ethnicity and Income*, PEW RESCH. CTR (Nov. 1, 2017), https://www.pewresearch.org/short-reads/2017/11/01/how-wealth-inequality-has-changed-in-the-u-s-since-the-great-recession-by-race-ethnicity-and-income/ [https://perma.cc/KR7K-LZWZ].

74. *Id.*

75. Harris & Wertz, *supra* note 2.

76. *Id.*

77. JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., THE STATE OF THE NATION'S HOUSING 4 (2019), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_State_of_the_Nations_Housing_2019.pdf [https://perma.cc/89E6-AE6C].

78. *Id.*

79. *Id.* at 32.

80. *Id.* at 33.

renters.[81] Affordable options are dwindling. The number of landlords participating in the United States Department of Housing and Urban Development's Housing Choice Voucher Program is decreasing.[82] Real estate discrimination manifests in more people of color renting and struggling to afford their rent.[83] Struggling to afford rent, in turn, is linked to "instability, eviction, . . . homelessness, . . . food insecurity, poor health, lower academic achievement, and lower economic mobility."[84] If something does not change, achieving racial wealth convergence in the United States will be impossible.[85]

E. Labor Mobility

Real estate discrimination, combined with racialized migration patterns like "white flight" after the Great Migration in the Twentieth Century, have led to Black households being concentrated in certain areas—particularly the inner city and predominantly Black suburbs.[86] Housing limits access to opportunities like jobs.[87] Housing supply issues "also limit labor mobility, because workers cannot afford to move to higher productivity cities that have high housing prices."[88] Housing discrimination is all-encompassing because it contains a population

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81. *Racial Disparities Among Extremely Low-Income Renters*, NAT'L LOW INCOME HOUS. COAL. (Apr. 15, 2019), https://nlihc.org/resource/racial-disparities-among-extremely-low-income-renters [https://perma.cc/U3PX-HABB] (quoting NAT'L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES (2019), https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2019.pdf [https://perma.cc/9YU7-F8HR]).

82. Demetria Lester, *Housing Choice Vouchers Examined by Race*, MREPORT (Nov. 23, 2022), https://themreport.com/news/data/11-23-2022/housing-choice-vouchers [https://perma.cc/N3AC-HLMQ].

83. *Racial Inequities in Housing Fact Sheet*, OPPORTUNITY STARTS AT HOME, https://www.opportunityhome.org/resources/racial-equity-housing/ [https://perma.cc/J225-BAUH] (citing *Sectors: Housing Influences Outcomes Across Many Sectors and the Research Shows It,* OPPORTUNITY STARTS AT HOME, https://www.opportunityhome.org/related-sectors/ [https://perma.cc/4XSV-YSRN]).

84. *Id.*

85. Harris & Wertz, *supra* note 2; *see also* Ellora Derenoncourt, Chi Hyun Kim, Moritz Kuhn & Moritz Schularick, *Wealth of Two Nations: The U.S. Racial Wealth Gap, 1860-2020*, at 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30101, 2022), https://www.nber.org/system/files/working_papers/w30101/w30101.pdf [https://perma.cc/P7GN-7U3P] ("Should existing differences in wealth-accumulating conditions persist, racial wealth convergence will not only stop altogether, but will even reverse course.").

86. Christine Leibbrand, Catherine Massey, J. Trent Alexander, Katie R. Genadek & Stewart Tolnay, *The Great Migration and Residential Segregation in American Cities during the Twentieth Century*, 44 SOC. SCI. HIST. 19, 22–25 (2020).

87. Freemark, *supra* note 44, at 29.

88. Rouse et al., *supra* note 60, at 3.

in a certain geographic area and denies that population access to jobs, parks, grocery stores, clean air, and clean water.[89] Without the ability to relocate to a higher-paying job, upward mobility is a nearly insurmountable challenge.

F. Business Ownership

Real estate discrimination most often focuses on housing, but it also extends to Black-owned businesses. Later, this Article will expand the discussion by looking at race nuisance cases and their potential impact on Black-owned businesses. According to the United States Census Bureau, Black-owned businesses make up fewer than 150,000 of 5.8 million total businesses, or 2.44% of all businesses across all sectors of the economy.[90] Racial discrimination and white insecurities have stunted the growth of Black-owned businesses in America. In the 1921 Tulsa Race Massacre, a white mob, jealous of Black success, decimated Black Wall Street (a thirty-five-block stretch in the Greenwood neighborhood of Tulsa, Oklahoma) in less than twenty-four hours.[91] Real estate discrimination continues to impact nearly all aspects of the lives of Black Americans.

III. Race-Based Zoning

Racial separation and exclusion have been central to land use regulation since the 1880s.[92] The first race-based zoning ordinance was enacted in Baltimore in 1910 and was quickly followed by similar ordinances in cities such as Richmond, Birmingham, Atlanta, Louisville, St. Louis, New Orleans, Indianapolis, and Dallas.[93] In 1917, the United States Supreme Court struck down race-based zoning ordinances in *Buchanan v. Warley*.[94] While the motivation of the Court seemed more about protecting the white property owner's right to "acquire, use and dispose" of his property, the zoning ordinance from Louisville violated the Due Process

89. *Racial Inequities in Housing Fact Sheet*, *supra* note 83.

90. Lee, *supra* note 4.

91. Yuliya Parshina-Kottas, Anjali Singhvi, Audra D.S. Burch, Troy Griggs, Mika Gröndahl, Lingdong Huang, Tim Wallace, Jeremy White & Josh Williams, *What the Tulsa Race Massacre Destroyed*, N.Y. TIMES (May 24, 2021), https://www.nytimes.com/interactive/2021/05/24/us/tulsa-race-massacre.html [https://perma.cc/2J4L-4A2N].

92. Joe R. Feagin, *Arenas of Conflict: Zoning and Land Use Reform in Critical Political-Economic Perspective*, *in* ZONING AND THE AMERICAN DREAM 73, 84 (Charles M. Haar & Jerold S. Kayden eds., 1989).

93. RABIN, *supra* note 27, at 106.

94. 245 U.S. 60 (1917).

Clause of the Fourteenth Amendment and thus could not stand.[95] Race-based zoning did not stop after *Buchanan*.[96] The city of Apopka, Florida, for example, passed a race-based zoning ordinance in 1937—a full two decades after this was prohibited by the Supreme Court ruling in *Buchanan*.[97] Apopka's race-based zoning ordinance was not repealed until 1968.[98] Birmingham, Alabama's race-based zoning was enforced until 1950.[99] West Palm Beach, Florida, adopted its race-based zoning ordinance more than a decade after *Buchanan* (in 1929), and it was maintained until 1960.[100] Kansas City, Missouri, and Norfolk, Virginia, designated African American areas in official planning documents to guide spot zoning until 1987.[101]

Race-based zoning actively enforced segregation and land use patterns in many United States cities for more than a half-century after its judicial demise. Its impact can still be felt today. "Zoning reflects the insidious and pervasive racism that permeates the fabric of political and social policies and is a constant factor in American history."[102] Eventually the use of racially explicit terms faded from favor, but the sentiments behind race-based zoning still permeated local governments.

A. Stated Purposes for Zoning

In 1926, the Supreme Court finally had occasion to consider the constitutionality of zoning in *Village of Euclid v. Ambler Realty Co.*[103] The Village of Euclid created a zoning ordinance which separated property uses into six different use districts.[104] Euclid's zoning ordinance stated that nothing but single family residential dwellings were allowed in the U-1 District.[105] This meant that not only businesses and factories were excluded from being by the single family homes, but also two-family dwellings (duplexes or

95. *Id*. at 74, 82.

96. Michael H. Wilson, *The Racist History of Zoning Laws*, FOUND. FOR ECON. EDUC. (May 21, 2019), https://fee.org/articles/the-racist-history-of-zoning-laws/ [https://perma.cc/HW5U-VDHW].

97. Dowdell v. City of Apopka, 511 F. Supp. 1375 (M.D. Fla. 1981).

98. *Id*.

99. GREENBERG, *supra* note 21, at 278.

100. ROTHSTEIN, *supra* note 28, at 47.

101. *Id*. at 48.

102. William M. Randle, *Professors, Reformers, Bureaucrats, and Cronies: The Players in* Euclid v. Ambler, *in* ZONING AND THE AMERICAN DREAM 31, 41 (Charles M. Haar & Jerold S. Kayden eds., 1989).

103. 272 U.S. 365 (1926).

104. *Id*. at 380.

105. *Id*. at 380–81.

townhomes), as they were zoned U-2.[106] Similarly, no multi-family dwellings (apartments) were allowed in the U-1 or U-2 Districts.[107]

The Court rationalized that it was appropriate to keep the single-family detached homes separated from the other types of housing because the apartment house was "a mere parasite."[108] The Court also stated that apartment houses were very nearly nuisances.[109] The Court found that "a nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."[110] It is not that apartment houses do not have a place, but that place is not in close proximity to single-family (i.e., white) homes. The Court upheld this part of the ordinance because separating single-family homes from everything else "increase[d] the safety and security of home life, greatly tend[ed] to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections, decrease[d] noise and other conditions which produce or intensify nervous disorders, preserve[d] a more favorable environment in which to rear children, etc."[111] The separation of single-family residential homes from all other types of housing was a thinly veiled mechanism for maintaining housing segregation after *Buchanan*. So, while the Court held in *Euclid* that zoning was constitutional unless it was found to be "arbitrary and unreasonable," what it really meant was that those trying to keep white homes separate from Black dwelling places had the full power and authority of the Supreme Court behind them.[112]

States grant local governments the ability to zone.[113] This ability stems from the police powers (health, safety, and welfare).[114] Looking at previous exercises of the police power, zoning does not always appear nefarious and biased on its face. James and Nancy Duncan, in their book *Landscapes of Privilege*, highlight some of the seemingly benign aspects of zoning like preventing nuisances,

106. *Id*.
107. *Id*.
108. *Id*. at 394.
109. *Id*. at 395.
110. *Id*. at 388.
111. *Id*. at 394.
112. *Id*. at 395, 397.
113. *See* JAMES S. DUNCAN & NANCY G. DUNCAN, LANDSCAPES OF PRIVILEGE: THE POLITICS OF AESTHETIC IN AN AMERICAN SUBURB 100 (2004), http://ndl.ethernet.edu.et/bitstream/123456789/17232/1/James%20S.Duncan_2004.pdf [https://perma.cc/C5ZE-22FQ] ("Planning and land-use controls . . . are the responsibility of local government.").
114. *Id*.

promoting health and welfare, fire safety, clearing the way for water and sewer facilities, and provision of schools and parks.[115] They also discuss zoning used to protect the character of neighborhoods and preserve property values.[116] Maintaining the character of the neighborhood and protection of property values have historically been code for safeguarding racial segregation in housing.[117] Zoning has become a device for "excluding the undesirable."[118]

Post-*Buchanan*, new types of zoning ordinances evolved that were exclusionary and expulsive. These forms of zoning maintained segregation without using taboo racialized language. Richard Rothstein describes the two new faces of zoning in his book *The Color of Law*. Rothstein writes, "[o]ne face, developed in part to evade a prohibition on racially explicit zoning, attempted to keep African Americans out of white neighborhoods by making it difficult for lower-income families, large numbers of whom were African Americans, to live in expensive white neighborhoods."[119] This type, of course, is exclusionary zoning and it will be explored later in this Article after expulsive zoning.

B. Expulsive Zoning

The second face of zoning, Rothstein writes, "attempted to protect white neighborhoods from deterioration by ensuring that few industrial or environmentally unsafe businesses could locate in them."[120] The second face Rothstein references is expulsive zoning. Expulsive zoning encompasses both placement of industrial uses in Black communities (to protect and preserve white ones) as well as the use of industry to expel Black residents altogether.[121] Referencing the decision in *Euclid*, Yale Rabin writes that "the intrusion of nonresidential uses into residential areas was sufficiently detrimental to the welfare of those areas and their residents to warrant their legal exclusion."[122] Zoning has not protected everyone. Black neighborhoods have been zoned disproportionately for manufacturing.[123] Local governments have

115. *Id*. at 100–01.
116. *Id*. at 101.
117. *Id*. at 100–01.
118. Rabin, *supra* note 27, at 105.
119. ROTHSTEIN, *supra* note 28, at 56–57.
120. *Id*. at 57.
121. *See* Rabin, *supra* note 27, at 102.
122. Rabin, *supra* note 27, at 101–02.
123. Shertzer et al., *supra* note 7, at 26; *see also* Tate Twinam, *The Long-Run Impact of Zoning: Institutional hysteresis and Durable Capital in Seattle, 1920-2015*, 73 REG'L SCI. & URB. ECON. 155, 162 (2018).

used the power of zoning to place commercial and industrial uses in areas where Black families reside.[124] As Justice Jackson recently noted in a dissent, the government also facilitated "the disproportionate location of toxic-waste facilities in Black communities . . . ."[125] Industrial zoning and toxic waste zoning were used to turn Black communities into slums.[126]

White residents were diabolically savvy to avoid placing industry in their residential midst. As Yale Rabin notes, "the intrusion into Black neighborhoods of disruptive incompatible uses" has "diminished the quality and undermined the stability of those neighborhoods."[127] Zoning that puts industrial uses in Black communities degrades residential property values and exposes residents to health hazards.[128] The United States Commission on Civil Rights has found that "exposure to waste facilities, landfills, lead-based paint, and other pollutants has an adverse impact on human health."[129] Communities of color who house "these facilities report increased rates of asthma, cancer, delayed cognitive development, and other illnesses."[130] Zoning for industry and toxic waste in marginalized and low-income communities causes these communities to decline.[131] The more industry in the neighborhood, the lower the property values become.[132] This leads to the eventual displacement of community members and the neighborhood becoming less desirable.[133] Because property values decline, industry finds those neighborhood even more desirable because it is cheaper for factories to locate in Black neighborhoods.[134] The people left in these neighborhoods face nearly worthless property and a litany of health problems.[135]

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124. Jade A. Craig, *"Pigs in the Parlor": The Legacy of Racial Zoning and the Challenge of Affirmatively Furthering Fair Housing in the South*, RACE, RACISM & L. (Nov. 18, 2022), https://racism.org/articles/basic-needs/propertyland/301-housing/10908-pigs-in [https://perma.cc/9TFL-X7EZ].

125. Students for Fair Admissions, Inc., v. President & Fellows of Harvard Coll., 600 U.S. 181, 294 (2023) (Jackson, J., dissenting).

126. ROTHSTEIN, *supra* note 28, at 54.

127. Rabin, *supra* note 27, at 101.

128. *See* Andrew H. Whittemore, *Racial and Class Bias in Zoning: Rezoning Involving Heavy Commercial and Industrial Land Use in Durham (NC), 1945-2014*, 83 J. AM. PLAN. ASS'N 235 (2017).

129. U.S. COMM'N ON C.R., *supra* note 25, at 20.

130. *Id*.

131. *Id*. at 15.

132. *Id*.

133. *Id*.

134. *Id*.

135. *Id*.

Cities who placed industry in residential Black neighborhoods purposefully created blight and pollution to simultaneously protect their own health and property values while poisoning and expelling Black residents.[136] Expulsive zoning also increased segregation and overcrowding.[137] Black families expelled by the intrusion of industry had few options for relocation.[138] Race-based zoning, racially restrictive covenants, and prevalent animosity towards Black people severely limited their relocation destinations.[139] Thousands of Black people were displaced through expulsive zoning.[140] In Jackson, Tennessee, alone, urban renewal projects aimed at bringing more business and industry to South Jackson displaced more than 2,600 Black residents, about one-fifth of the city's Black population.[141] As Rabin notes, the blight and "disruptive effects of expulsive zoning grow, rather than diminish, with the passage of time."[142] It is a current practice, not just a vestige of past discrimination.[143]

C. Eminent Domain

Though obviously not a type of zoning, eminent domain is related to the concept of expulsive zoning because it involves government-induced forced relocation of Black Americans.[144] Sometimes land was condemned for municipal use (taken by eminent domain) once Black people moved into the area.[145] The use of eminent domain in the 1950s and 1960s was promoted to clear 'slums' and remove blight.[146] Blight was "a disease that threatened to turn healthy areas into slums."[147] Leaving blight unchecked was

136. *Id.*
137. Rabin, *supra* note 27, at 102.
138. *Id.* at 107–08.
139. *Id.*
140. *See id.* at 108–18.
141. *Id.* at 113.
142. *Id.* at 118.
143. *Id.*
144. *See* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 6–13 (2003) (explaining the use of eminent domain as a means to "relocate minority populations" by "selecting racially changing neighborhoods as blighted areas").
145. GREENBERG, *supra* note 21, at 278–79.
146. *See* Pritchett, *supra* note 144, at 29 ("Renewal advocates argued that . . . [e]minent domain powers and government subsidy were needed because 'most blighted properties are valued at far more than their real worth—and at more than private enterprise could afford to pay a development agency for them.'" (quoting MEL SCOTT, METROPOLITAN LOS ANGELES 95 (1950))).
147. *Id.* at 3.

dangerous to cities, the argument went.[148] Blight had to be removed because blighted property was "on its way to becoming a slum."[149] Government officials advanced that urban renewal, through blight removal and slum clearance, was necessary to stop neighborhood deterioration.[150] Though blight was a seemingly race-neutral term, it was "infused with racial and ethnic prejudice."[151] Ernest Burgess argued in 1925 that the "inva[sion]" by immigrant communities and communities of color into an area sped up the "'junking' process in the area of deterioration."[152] City governments were able to capitalize on fear of slums (and fear of marginalized residents) to utilize eminent domain to forcibly eject unwanted residents in the name of blight removal and beautification of cities.[153]

Berman v. Parker quantified blight removal and slum clearance as "public welfare" that justified use of the Fifth Amendment power of eminent domain.[154] According to the Court, the evils of blight were so prolific that a more Hobbesian application of eminent domain was necessary.[155] As the Court found in *Berman*:

> Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.[156]

The Court makes it sound like eradication of substandard housing will save the nation from relegation to subhuman status (i.e., cattle). In truth, racist zoning laws, racially restrictive covenants, and landlords charging exorbitant rent are to blame for the blight.[157] Those who received the Fifth Amendment guarantee

148. *Id.*

149. *Id.* at 18 (quoting MABEL WALKER, URBAN BLIGHT AND SLUMS 4 (1938)).

150. Pritchett, *supra* note 144, at 19.

151. *Id.* at 6.

152. *Id.* at 17 (quoting Ernest Burgess, *The Growth of the City: An Introduction to a Research Project*, *in* THE CITY 47, 58 (Robert E. Park et al. eds., 1925)).

153. *See generally* GREENBERG, *supra* note 21, at 293 (reporting that 90% of families displaced into public housing and 60% of families to be displaced by urban renewal were non-white as of June 30, 1956).

154. 348 U.S. 26, 33 (1954).

155. Ngoc Nguyen, *Thomas Hobbes: Politics, Philosophy and Ideas*, COLLECTOR (Jan. 13, 2022), https://www.thecollector.com/thomas-hobbes-lifes-work/ [https://perma.cc/4CFV-BWYM] (noting that Hobbesian ideas about the state of nature justified "wide-ranging government powers" to protect people from others' harm).

156. *Berman*, 348 U.S. at 32–33.

157. For a discussion of race-based zoning, see *supra* Part III. See *infra* Part IV

of "just compensation"[158] were not the Black inhabitants of "[m]iserable and disreputable housing."[159] As Justice Clarence Thomas noted in his dissent to *Kelo v. City of New London*, "Over 97 percent of the individuals forcibly removed from their homes by the 'slum-clearance' project upheld by this Court in *Berman* were [B]lack."[160] Throughout the nation, landlords forced Black residents to pay higher rent for inferior housing stock.[161] As early as 1914, in Baltimore, Maryland, Black-occupied properties were condemned and Black residents, as renters, "had no say."[162] In other places, Black renters lived in crumbling dwellings owned by white landlords.[163]

Urban renewal, facilitated through eminent domain, "prioritized destruction over construction."[164] From 1949 to 1965, urban renewal displaced approximately one million people.[165] The displacement of Black people was so disproportionate that urban renewal had the nickname "Negro Removal."[166] The goal of urban renewal was often the "creation or preservation of a White, middle-class neighborhood."[167] As attorney and author Jack Greenberg aptly put it in 1959, "that which is forbidden by zoning ordinance and covenant cases may be achieved by even more direct governmental action."[168]

Urban renewal intensified segregation and decreased housing options for Black families in the United States.[169] Due to the

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for a discussion about racially restrictive covenants.

158. U.S. CONST. amend. V.

159. *Berman*, 348 U.S. at 32. *See* Pritchett, *supra* note 144, at 4 ("Property *owners* in blighted areas were due government-determined fair value for their holdings . . . .") (emphasis added); *see also* PIETILA, *supra* note 8, at 232 (noting that evicted Black people in Baltimore County "received no relocation compensation" when displaced by expulsive zoning).

160. 545 U.S. 469, 522 (2005) (Thomas, J., dissenting).

161. ELIZABETH A. HERBIN-TRIANT, THREATENING PROPERTY: RACE, CLASS, AND CAMPAIGNS TO LEGISLATE JIM CROW NEIGHBORHOODS 15 (2019).

162. PIETILA, *supra* note 8, at 52.

163. *See supra* Part III.

164. TAYLOR, *supra* note 26, at 255.

165. EDWARD D. GOETZ, NEW DEAL RUINS: RACE, ECONOMIC JUSTICE, & PUBLIC HOUSING POLICY 112 (2013).

166. *Id.; see also* Sigmund C. Shipp, *Winning Some Battles But Losing the War? Blacks and Urban Renewal in Greensboro, NC, 1953-1965*, *in* URBAN PLANNING AND THE AFRICAN AMERICAN COMMUNITY 188 (June Manning Thomas & Marsha Ritzdorf eds., 1997) ("Researchers . . . suggested that the entire [urban renewal] program could be referred to as 'Negro removal' or 'Negro clearance.'").

167. Shipp, *supra* note 166, at 188.

168. GREENBERG, *supra* note 21, at 294.

169. *See id.* (noting that redevelopers "almost always" relocated Black residents to "overcrowded and slum-like" sections of the city or public housing, which also

vestiges of racialized zoning and racially restrictive covenants, redlining, and the unavailability of traditional mortgage financing options,[170] Black families were often concentrated as renters in substandard housing owned by white landlords.[171] As slum clearance, blight removal, and urban renewal transformed neighborhoods into safe, shiny, and new uses (for white residents), Black communities were not invited to share in the sparkle.

One remarkably effective slum clearance tool, referenced briefly above, was the Interstate Highway System's construction.[172] Rothstein noted that highway routes were designed with local, state, and federal participation to destroy Black communities.[173] Justice Jackson, in her dissent to *Students for Fair Admissions,* referenced the "deliberate action of governments at all levels in designing interstate highways to bisect and segregate Black urban communities."[174]

Black people were uprooted, scattered away from their churches, businesses, and community support systems, left with little to no relocation assistance, and higher housing costs in their new residences.[175] After the conclusion of *Nashville I-40 Steering Committee v. Ellington,* a case allowing highway I-40 to slice through Nashville, Tennessee's Black community,[176] it was revealed that government officials redirected the original plan for the highway's path to assure that it cut through the center of the Black community.[177] Raymond Mohl noted that, in Nashville, highway I-40 "dead-ended fifty local streets, disrupted traffic flow . . . separated children from their playgrounds and schools, parishioners from their churches, and businesses from their customers."[178]

The need to vacate in the name of eminent domain and highway expansion necessitated forced relocation of Black

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intensified segregation *de facto*); Pritchett, *supra* note 144, at 4.

170. For a discussion of race-based zoning, see *supra* Part III. See *infra* Part IV for a discussion about racially restrictive covenants.

171. *See supra* Part III.

172. David Karas, *Highway to Inequity: The Disparate Impact of the Interstate Highway System on Poor and Minority Communities in American Cities*, 7 NEW VISIONS FOR PUB. AFFAIRS 9, 14 (2015).

173. ROTHSTEIN, *supra* note 28, at 127.

174. Students for Fair Admissions, Inc., v. President & Fellows of Harv. Coll., 600 U.S. 181, 393 (2023) (Jackson, J., dissenting).

175. *See supra* Part III.

176. Nashville I-40 Steering Comm. v. Ellington, 387 F.2d 179 (6th Cir. 1967).

177. Karas, *supra* note 172, at 12.

178. Raymond A. Mohl, *Citizen Activism and Freeway Revolts in Memphis and Nashville: The Road to Litigation*, 40 J. URB. HIST. 870, 880 (2014).

households.[179] It was difficult to procure housing since areas where Blacks were encouraged to live were scarce.[180] They were often forced to go from bad to worse areas as their "new" housing options were even more expensive than their previous "blighted" ones.[181] One example of increased housing costs for relocated Black people from Chicago (for non-whites earning less than $3000/year) shows that rent before slum clearance was 35% of median income before relocation and 46% of income after forced relocation.[182] When the Interstate Highway System was enacted in 1956, there was no relocation assistance available for those whose homes were destroyed to build the highways.[183] In fact, the Eisenhower Administration warned that relocation assistance would "run up costs" since an estimated 100,000 people would likely be evicted per year to build the highways.[184] The Federal requirement of new housing for Americans displaced by highway construction was not set until 1965, when the highway system's construction was essentially finished.[185] It was incredibly difficult to secure "safe and sanitary housing to replace what had been taken through eminent domain."[186] Moving was and is expensive and inconvenient.[187] It involves time-off from work to secure new housing, pack, and un-pack belongings. It requires establishing new transportation routes, securing new childcare, and registering children in school. Rarely, if ever, were Black communities compensated for these expenses and lost wages.[188] Relocation costs, coupled with lost time and

179. *See* Roger Biles, *Expressways Before the Interstates: The Case of Detroit, 1945–1956*, 40 J. URB. HIST. 843, 850 (2014) (noting that site selection for expressways invariably uprooted less affluent neighborhoods while leaving middle-class enclaves unharmed); Karas, *supra* note 172, at 13–14 (describing the general consensus among scholars of United States transportation history that the Interstate Highway System had an adverse impact on minority communities, and Black neighborhoods in particular).

180. *See supra* Part III.D. and accompanying notes.

181. *Id.*

182. Taylor, *supra* note 26, at 41.

183. ROTHSTEIN, *supra* note 28, at 131.

184. *Id.*

185. *Id.*

186. Karas, *supra* note 172, at 14.

187. Move, Inc., *Moving Cost Calculator*, MOVING.COM, https://www.moving.com/movers/moving-cost-calculator.asp [https://perma.cc/EXA7-PGRR] ("The average cost of a local move is $1,250. The average cost of a long-distance move is $4,890 (distance of 1,000 miles."). When the author moved from Minnesota to Tennessee in 2021, the cost was over $14,000 to relocate her two-person household.

188. Federal relocation assistance was not available until passage of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. 91–646, 84 Stat. 1894 (1970). The Act provides no compensation for lost wages. *Id.*; *See*

wages from moving, disruption to their sense of community, and increased costs of obtaining alternative housing surely exacerbated the financial and emotional challenges facing Black people in America.

In a 1962 article from The Saturday Evening Post, a block-buster[189] describes the challenges faced by Black people who were finally able to become homeowners (after paying more than double for a home than the whites who fled from the integrated block had paid).[190] Due to the exorbitant housing costs and interest rates in the installment land contracts offered blockbusters offered, Black people were forced to "overcrowd and overuse their buildings by renting out part of them, or to skimp on maintenance, starting the neighborhood on the way to blight."[191] This was a self-perpetuating cycle of degradation, despair, and poverty not caused by Black people, but often attributed to them.

In the first part of the twentieth century, Black people were only allowed to live in certain areas.[192] They often were forced to rent from slumlords who did not maintain rentals.[193] They could not access traditional mortgages due to FHA policies and redlining.[194] When homes finally became available to purchase (often through blockbusting), predatory blockbusters financed the properties in such a way that it was impossible to remain current on payments if only one family occupied the home.[195] Overcrowding and lack of extra resources for maintenance and improvements led whites to argue that Black owned and occupied properties were blighted.[196] Once blighted, the neighborhood became ripe for condemnation and

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also Peter M. de Petra, *Compensation for Moving Expenses of Personal Property in Eminent Domain Proceedings*, 20 HASTINGS L.J. 749, 749 (1968) (noting the rule that expenses incurred for moving from condemned properties are not compensable as a governmental taking).

189. Block-busters were real estate agents and developers who exploited white communities' racial fears to buy out white-owned real property at depressed prices, and sell the same properties to Black buyers at inflated prices. Block-busters sometimes locked Black buyers into installment land contracts that withheld title to the property until the loan was fully paid. *See* Norris Vitchek, *Confessions of a Block-Buster*, SATURDAY EVENING POST, Jul. 1962, at 15, 15 https://www.saturdayeveningpost.com/wp-content/uploads/satevepost/Confessions-of-a-Block-Buster.pdf [https://perma.cc/5VYD-H767].

190. *Id.* at 17–18.

191. *Id.* at 18.

192. *See supra* Part III.

193. *Id.*

194. *See supra* notes 28–29 and accompanying text.

195. *See* Vitchek, *supra* note 189, at 18.

196. *Id.*

urban renewal.[197] Forced relocation followed, and the cycle started all over again.

Eminent domain for slum clearance and urban renewal purposes has slowed.[198] After the Kelo decision in 2005 traumatized white Americans by making them feel as though they were subject to having their property stripped from them for "economic development" reasons, the public use started to contract after years of expansion.[199] President George W. Bush issued an Executive Order: Protecting the Property Rights of the American People, on June 23, 2006.[200] The Executive Order limited instances where the Federal Government could take property through eminent domain to takings which benefitted the general public and were not "merely for the purpose of advancing the economic interest of private parties."[201] The Institute for Justice notes that since the *Kelo* decision forty-seven states "have strengthened their protections against eminent domain abuse."[202] Post-*Kelo*, states have also established "additional criteria for designating blighted areas subject to eminent domain."[203] Recently, the Supreme Court of Iowa embraced Justice O'Connor's dissent in *Kelo*, rather than the majority opinion.[204] Some cities are contemplating razing urban stretches of the highway system that have historically torn through communities.[205] The impact that this might have on communities has yet to be fully explored.

In at least one instance, property taken through eminent domain was returned to the heirs of the family it was taken from.[206] In 1924, local government took Bruce's Beach, a popular beachfront resort in Los Angeles County, California, from African Americans

197. *See supra* notes 146–53 and accompanying text.

198. *See* sources cited *infra* notes 203, 204.

199. Ilya Solmin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2109– 10 (2009) ("In two national surveys conducted in the fall of 2005, 81% and 95% of respondents were opposed to *Kelo* . . . .*Kelo* was opposed by . . . 82% of whites . . . .A 2006 Saint Index survey found that 71% of respondents supported reform laws intended to ban "the taking of private property for private development" projects, and 43% supported such laws 'strongly.'").

200. Exec. Order No. 13,406, 3 C.F.R. § 13406 (2006).

201. *Id.*

202. *Eminent Domain: IJ Defends Homes and Businesses from Government Land Grabs*, INST. FOR JUST. https://ij.org/issues/private-property/eminent-domain/ [https://perma.cc/7H4R-ZCFT].

203. ALFRED BROPHY & ALBERTO LOPEZ & KALI MURRAY, INTEGRATING SPACES: PROPERTY LAW & RACE 184 (2011).

204. Puntenney v. Iowa Utils. Bd., 928 N.W.2d 829, 848–49 (2019).

205. Karas, *supra* note 172, at 17.

206. *See infra* note 208.

Willa and Charles Bruce through eminent domain.[207] In 2021, the Governor of California signed a bill that would allow the beach to be transferred to Willa and Charles Bruce's descendants.[208] The family has decided to sell it back to LA County for twenty million dollars.[209] While this is encouraging and provides hope for similar initiatives across the country, there is much left undone.

D. Exclusionary Zoning

The final type of zoning that this article will examine is exclusionary zoning. Exclusionary zoning "exploded" after the Fair Housing Act outlawed explicit racial exclusion.[210] The trial judge from *Euclid v. Ambler Realty* noted that zoning's true purpose was "to classify the population and segregate them according to their income or situations in life."[211] Exclusionary zoning in a suburban setting often includes prohibitions on multi-family units and mobile homes.[212] Neighborhoods with more Black residents are more likely to be zoned for higher density buildings, "suggesting that volume restrictions may have been used as an early form of exclusionary zoning."[213] Most exclusionary zoning is focused on the type of housing that can be built in a certain area.[214] Examples of exclusionary zoning include limits on the height of buildings, minimum lot size requirements, prohibitions on multi-family

207. Rosanna Xia, *Manhattan Beach was once home to Black beachgoers, but the city ran them out. Now it faces a reckoning*, L.A. TIMES (Aug. 2, 2020), https://www.latimes.com/california/story/2020-08-02/bruces-beach-manhattan-beach [https://perma.cc/E8HX-7TDL].

208. Bill Chappell, *The Black Family who won the return of Bruce's Beach will sell it back to LA County*, HEALTH NEWS FLA. (Jan. 4, 2023), https://health.wusf.usf.edu/2023-01-04/the-black-family-who-won-the-return-of-bruces-beach-will-sell-it-back-to-la-county [https://perma.cc/GQ28-66LN].

209. *Id.*

210. Lee, *supra* note 9.

211. James W. Ely, Jr., *Reflections on "*Buchanan v. Warley*," Property Rights, and Race*, 51 VAND. L. REV. 953, 958 (1998) (quoting Ambler Realty Co. v. Village of Euclid, 272 U.S. 365 (1926)).

212. Joe R. Feagin, *Arenas of Conflict: Zoning and Land Use Reform in Critical Political-Economic Perspective*, *in* ZONING AND THE AMERICAN DREAM 84, 84 (Charles M. Haar & Jerold S. Kayden eds., 1989).

213. Shertzer et al., *supra* note 7, at 244.

214. *See* Rouse et. al., *supra* note 60; Elliot Anne Rigsby, *Understanding Exclusionary Zoning and Its Impact on Concentrated Poverty*, CENTURY FOUND. (June 23, 2016), https://tcf.org/content/facts/understanding-exclusionary-zoning-impact-concentrated-poverty/ [https://perma.cc/9FNQ-T9BT] ("Traditionally, exclusionary zoning policies have . . . single residence per lot requirements, minimum square footage requirements, and costly building codes. Together, these requirements make it difficult to build multi-family rental units that would allow lower-income residents to live in wealthy suburban developments with access to quality schools and employment.").

homes, preference for single-family-owner-occupied-detached homes, minimum set-back requirements, and minimum square footage requirements.[215]

Exclusionary zoning appears to be race-neutral, as there is no explicit reference to race; however, "zoning masquerading as an economic measure" has been used for a century to achieve segregation.[216] A New York Court of Appeals case has held that "[t]he primary goal of a zoning ordinance must be to provide for the development of a balanced, cohesive community which will make efficient use of the town's available land."[217] A New York Supreme Court, Appellate Division, case has held that a "municipality may not legitimately exercise its zoning power to effectuate socioeconomic or racial discrimination."[218] At a state level, a zoning ordinance will be invalidated if "it was enacted with an exclusionary purpose, or it ignores regional needs and has an unjustifiably exclusionary effect."[219] In New York at least, "a municipality may not zone to exclude persons having a need for housing within its boundaries or region."[220]

At a federal level, the prevailing test comes from *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, which held that zoning is not "unconstitutional solely because it results in a racially disproportionate impact."[221] The Supreme Court found in *Village of Arlington Heights* that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[222] Proof of racially discriminatory intent is hard to come by; as the U.S. Court of Appeals for the Tenth Circuit noted in *Dailey v. Lawton*, "[i]f proof of a civil rights violation depends upon an open statement by an official of an intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection."[223]

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215. Rouse et al., *supra* note 60.

216. ROTHSTEIN, *supra* note 28, at 52.

217. Berenson v. New Castle, 341 N.E.2d 236, 241 (N.Y. 1975).

218. Continental Bldg. Co. v. Town of N. Salem, 625 N.Y.S2d 700, 702–03 (1995) (quoting Suffolk Hous. Servs. v. Town of Brookhaven, 511 N.E.2d 67, 69 (N.Y. 1987)).

219. *Id.* at 703 (quoting Robert E. Kurzius, Inc. v. Inc. Vill. of Upper Brookville, 414 N.E.2d 680 (N.Y. 1980)).

220. *Id.* (citing *Berenson v.* Town *of New Castle, 341 N.E.2d 236 (N.Y. 1975); Matter of Golden v. Planning Bd. of* Town *of Ramapo,* 285 N.E.2d 291 (N.Y. 1972)).

221. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

222. *Id.*

223. Dailey v. Lawton, 425 F.2d 1037, 1039 (10th Cir. 1970) (citing Shelley v. Kraemer, 334 U.S. 1 (1948); Reitman v. Mulkey, 387 U.S. 369 (1967)).

E. Zoning: Where are we now?

Unfortunately, the past zoning discrimination's ramifications still linger. As President Obama stated in 2015, racial segregation has been replaced by class segregation.[224] Class-based, or economically exclusionary, zoning has essentially the same result as racialized zoning.[225] To be clear, economically based segregation is not by choice, it is socially engineered.[226] While there is much work still to be done, many jurisdictions are enacting laws to rectify past zoning discrimination.[227]

One state that has enacted zoning reform is Massachusetts. In 2021, Massachusetts passed a zoning act to permit multi-family zoning "as of right" and to require "reasonable levels of multi-family housing development near MBTA stations."[228] MBTA stations are Massachusetts Bay Transportation Authority stations such as commuter rail stations, subway stations, ferry terminals, and bus stations.[229] The law also requires each MBTA community to have at

224. Juliet Eilperin & Michelle Boorstein, *In frank language, Obama addresses poverty's roots*, WASH. POST (May 12, 2015), https://www.washingtonpost.com/local/in-frank-language-obama-addresses-povertys-roots/2015/05/12/5acfa3fc-f8dd-11e4-a13c-193b1241d51a_story.html [https://perma.cc/NY5A-WE4S].

225. Kahlenburg, *supra* note 6.

226. *Id.*

227. Angela Ruggiero, *Berkeley to end single-family residential zoning, citing racist ties*, MERCURY NEWS (Feb. 24, 2021), https://www.mercurynews.com/2021/02/24/berkeley-to-end-single-family-residential-zoning-citing-racist-ties/ [https://perma.cc/JW9S-7GZD] ("Vice Mayor Lori Droste, who introduced the legislation, said although the current Berkeley City Council is not responsible for the history of racial segregation in the city's zoning codes, 'we do have the ability to remedy it.'"); Everton Bailey Jr., *Portland changes zoning rules to allow duplexes, triplexes, fourplexes in areas previously reserved for single-family homes*, OREGONIAN (Aug. 13, 2020), https://www.oregonlive.com/portland/2020/08/portland-changes-zoning-code-to-allow-duplexes-triplexes-fourplexes-in-areas-previously-reserved-for-single-family-homes.html [https://perma.cc/VZF6-Y87F] ("The three council members who voted to enact the new policy said it will help begin repairing the damage caused by zoning rules that contributed to racial discrimination and segregation in Portland and wide disparities in homeownership rates and wealth attainment."); Sarah Mervosh, *Minneapolis, Tackling Housing Crisis and Inequity, Votes to End Single-Family Zoning*, N.Y. TIMES (Dec. 13, 2018), https://www.nytimes.com/2018/12/13/us/minneapolis-single-family-zoning.html [https://perma.cc/STD2-6JYS].

228. *AG Campbell Issues Advisory on Requirements of MBTA Communities Zoning Law*, COMMONW. OF MASS. (Mar. 15, 2023), https://www.mass.gov/news/ag-campbell-issues-advisory-on-requirements-of-mbta-communities-zoning-law [https://perma.cc/92Z5-W7DY].

229. *Multi-Family Zoning Requirement for MBTA Communities*, COMMONW. OF MASS., https://www.mass.gov/info-details/multi-family-zoning-requirement-for-mbta-communities [https://perma.cc/EJN8-Z5L2].

least one zoning district of reasonable size that has no age restrictions and is suitable for families with children located within a half mile of an MBTA station.[230] MBTA communities are essentially those communities serviced by the MBTA, though Boston, which MBTA services, is exempt from complying with this section of the zoning act.[231] There are 177 MBTA communities subject to this provision of the zoning act.[232]

Unfortunately, though this act is thoughtfully drafted to increase multi-family housing opportunities in close proximity to transportation stations, there seem to be jurisdictions disinterested in compliance with the act.[233] As evidence of lack of compliance, the Massachusetts Attorney General, Andrea Joy Campbell, issued an advisory on March 15, 2023 to clarify that "covered communities cannot opt out of or avoid their obligations by choosing to forego state funding" and that "[f]ailure to comply may result in civil enforcement action or liability under federal and state fair housing laws."[234] The fact that the Attorney General of the state had to nudge MBTA communities to comply, by reminding them of the penalties for non-compliance, illustrates that little progress was made in the two years since zoning reform. Another challenge is that it does not reach the entire state, the city of Boston, or even all parts of the MBTA communities (the act requires at least "one district of reasonable size within the community" to comply with the act).[235] The ramifications of discriminatory zoning have not escaped Boston. Why has Boston escaped the reach of zoning reform?

California also instituted zoning reform. The California HOME Act took effect January 1, 2022.[236] The HOME Act made it

230. *Id.*

231. *Id.* ("While served by the MBTA, Boston is exempted from the Zoning Act, including section 3A.").

232. *Id.*

233. *See* Press Release, Milton Neighbors for Responsible Zoning, Statement on Successful Signature Drive (Dec. 21, 2023) (announcing that a petition challenging the city's designation as a rapid transit community gathered 3,000 signatures); Andrew Brinker, *Most Towns Are Going Along with the State's New Multifamily Housing Law. Not Middleborough.*, BOSTON.COM (Feb. 14, 2023), https://www.boston.com/real-estate/the-boston-globe/2023/02/14/multifamily-housing-law-middleborough/ [https://perma.cc/K6S2-B757].

234. Press Release, Andrea Joy Campbell, Att'y Gen., State of Mass., AG Campbell Issues Advisory on Requirements of MBTA Communities Zoning Law (Mar. 15, 2023).

235. *Multi-Family Zoning Requirement for MBTA Communities*, *supra* note 229.

236. David Garcia & Muhammad Alameldin, *California's HOME Act Turns One: Data and Insights from the First Year of Senate Bill 9*, UC BERKELEY (Jan. 18, 2023), https://ternercenter.berkeley.edu/research-and-policy/sb-9-turns-one-applications/ [https://perma.cc/H9JA-Z7XP].

possible for a homeowner to split their lot and build up to four homes on a single-family parcel.[237] The great news about this zoning reform is that it is a state-wide act; the bad news is that its impact has been limited in its first year as few have taken advantage of it.[238]

As of 2019, Oregon has initiated zoning reforms as well.[239] Under the new zoning law, every city in the Portland area, or cities having a population higher than 10,000, must allow duplexes on any lot where single-family homes are permitted.[240] Additionally, all cities with populations of 25,000 or more will also have to allow triplexes and fourplexes on any lots that would have been approved for a single-family home.[241]

In December of 2018, the Minneapolis City Council upzoned the city such that duplexes and triplexes were now allowed on what had been single-family lots (70% of the city had been single-family residential use only).[242] The other reforms included were the elimination of off-street minimum parking requirements; the possibility of more housing density near transit stops; the provision for inclusionary zoning that required 10% of new apartments to be set aside for moderate income households; and an increase in the affordable housing fund from $15 million to $40 million to combat homelessness and provide relief for low income renters.[243]

These measures appear to have helped thwart rent increases. The cost of rent has grown a mere 1% since 2017 in Minneapolis, compared with a 31% increase in the United States overall during that period.[244] Unfortunately, not as much progress has been made with homeownership. Comparing homeownership rates between Black and white households, the Twin Cities (Minneapolis and St. Paul) had the highest disparity in homeownership rates of any similarly sized metro area in the United States in 2021.[245]

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237. *Id.*

238. *Id.*

239. Julia Shumway, *White House: Oregon single-family zoning law could be model for nation*, OR. CAP. CHRON. (Oct. 29, 2021), https://oregoncapitalchronicle.com/2021/10/29/white-house-oregon-single-family-zoning-law-could-be-model-for-nation/ [https://perma.cc/77T7-G7SK].

240. *Id.*

241. *Id.*

242. Kahlenburg, supra note 6.

243. *Id.*

244. Mark Niquette & Augusta Saraiva, *First American city to tame inflation owes success to affordable housing*, SEATTLE TIMES (Aug. 10, 2023), https://www.seattletimes.com/business/first-american-city-to-tame-inflation-owes-success-to-affordable-housing [https://perma.cc/9NG2-CWNT].

245. *Id.*

Some municipalities are seeking zoning reform through the use of an "equity analysis" rather than an outright change to zoning codes. In New York City (NYC), for example, Local Law 78 of 2021 requires certain public and private applications to the NYC Department of City Planning to require a racial equity report to "assess how a proposed project relates to the City's goals of promoting fair and equitable housing and access to economic opportunities."[246] Among other things, the racial equity reports must detail the affordability of rents or prices of residential units and whether residents will have access to jobs.[247]

Seattle conducted a 2035 Equity Analysis evaluating four potential growth alternatives.[248] It found that communities of color face the greatest risk of displacement and that marginalized communities have less access to opportunity.[249] In order for new growth to build strong people and communities, the Equity Analysis suggests advancing economic opportunity and mobility; promoting transportation and connectivity; preventing residential, commercial and cultural displacement; building on local cultural assets; developing healthy and safe neighborhoods for all; and creating equitable access to all neighborhoods.[250]

Other suggestions for rectifying zoning discrimination include political changes at the local level. For example, having greater African American representation on the Atlanta City Council led to more equitable treatment for African Americans in the zoning arena.[251] Others suggest disposition of public land, increased density bonuses for developers, and elimination of parking requirements.[252]

President Biden has repeatedly tried to facilitate substantive and meaningful housing reforms. In 2021, the White House announced ambitious plans for zoning reform and proposed billions of dollars in competitive grants to incentivize exclusionary zoning

246. Cozen O'Connor, *NYC Agencies Provide Preliminary Guidance for Compliance with City Council Mandated Racial Equity Report Requirements*, JDSUPRA (May 18, 2022), https://www.jdsupra.com/legalnews/nyc-agencies-provide-preliminary-4243772/ [https://perma.cc/4NUJ-CXF2].

247. *Id.*

248. *Seattle 2035 Equity Analysis*, CITY OF SEATTLE, https://www.seattle.gov/Documents/Departments/OPCD/ONgoingInitiatives/SeattlesComprehensivePlan/2035EquityAnalysisSummary.pdf [https://perma.cc/HV6P-MTL7].

249. *Id.*

250. *Id.*

251. Whittemore, *supra* note 128, at 238.

252. Freemark, *supra* note 44, at 36.

reforms.[253] In 2022, the Biden Administration proposed a $10 billion grant program that would reward states and localities for removing barriers to housing development.[254] The good news is that the spending package Congress passed in December 2022 included the first competitive grant program for zoning reform.[255] It was called a Yes In My Backyard (YIMBY) Grant.[256] Unfortunately, it was for $85 million which is a very small fraction of the $10 billion Biden was hoping for.[257] The President's Budget for fiscal year 2024 requests the same $85 million for "grants to identify and remove barriers to affordable housing."[258]

While more money could always be allocated, and more states and localities could always affirmatively act to facilitate zoning reforms, these are significant steps in the right direction. Obviously, there is much to be done to achieve equity and remediate past injustices, but acknowledgement of past injustice and movement toward solutions are some measure of progress.

IV. Racially Restrictive Covenants

Racially restrictive covenants have been around in the United States for over 100 years.[259] Richard Rothstein noted that as early as the 1800s, deeds in Massachusetts forbade resale to Black people or natives of Ireland.[260] During the period from 1910 to 1917, such covenants were not the preferred form of racial segregation in housing because race-based zoning was legal.[261] As previously noted, the Supreme Court outlawed race-based zoning with *Buchanan v. Warley* in 1917.[262]

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253. Rouse et al., *supra* note 60.

254. Rachel M. Cohen, *The Big, Neglected Problem That Should be Biden's Top Priority*, VOX (Mar. 1, 2023), https://www.vox.com/policy/23595421/biden-affordable-housing-shortage-supply [https://perma.cc/N37M-FRLY].

255. *Id.*

256. *Id.*

257. *Id.*

258. *FY24 Budget Chart for Selected Federal Housing Programs*, NAT'L LOW INCOME HOUS. COAL. (July 11, 2023), https://nlihc.org/sites/default/files/House_HUD-USDA_Budget-Chart_FY24.pdf [https://perma.cc/E6LM-YY4N].

259. ROTHSTEIN, *supra* note 28, at 78.

260. *Id.*

261. *See, e.g.*, Rigsby, *supra* note 214 ("Prior to the Supreme Court's *Buchanan v. Warley* decision in 1917, city zoning ordinances across the country legally forbade minorities from occupying blocks where the majority of residents were white."); Garrett Power, *Apartheid Baltimore Style: The Residential Segregation Ordinances of 1910-1913*, 42 MD. L. REV. 289 (1983) (discussing facially racial zoning ordinances in Baltimore in 1910).

262. Buchanan v. Warley, 245 U.S. 60 (1917).

In 1926, the Supreme Court held in *Corrigan v. Buckley* that "[i]ndividual invasion of individual rights is not the subject-matter of the [Fourteenth] Amendment."[263] This meant that racially restrictive covenants were not within the purview of the Fourteenth Amendment and that they would be upheld by the courts. After *Corrigan*, private individuals, real estate professionals, banks, developers, and even the Federal Housing Administration strongly encouraged the use of racially restrictive covenants to increase or preserve property values.[264]

The legal enforceability of race-based covenants ended with the Supreme Court's decision in *Shelley v. Kraemer* in 1948.[265] The Court in *Shelley* did not hold that racially restrictive covenants were illegal, they simply forbade their enforcement through state action.[266] Unfortunately, from 1948 to 1968 (when the Fair Housing Act was passed), "hundreds of thousands" of new racially restrictive covenants were recorded to signal racially hostile attitudes.[267]

In private agreements, penalties for violating racially restrictive covenants were often steep fines.[268] Racially restrictive covenants often automatically renewed until a majority vote of lot owners chose to abandon the covenants.[269] Sometimes the fines for violating racially restrictive covenants even exceeded the value of the home at issue.[270] In 1953, Olive Barrows, a white woman from California, sued Leola Jackson, another white woman, for $11,600 in damages for breaching a racially restrictive covenant in their neighborhood.[271] The Court held that it would "not permit or require California to coerce respondent to respond in damages for failure to observe a restrictive covenant that this Court would deny California the right to enforce in equity . . . ."[272] The fact that five years after the Supreme Court's decision in *Shelley*, it still had to clarify that

263. Corrigan v. Buckley, 271 U.S. 323, 330 (1926).

264. Swanson, *supra* note 13, at 132–33.

265. Shelley v. Kraemer, 334 U.S. 1, 22 (1948).

266. *Id.* at 38–39.

267. SLATER, *supra* note 12, at 161.

268. *See* Catherine Silva, *Racial Restrictive Covenants History*, UNIV. OF WASH. (2008), https://depts.washington.edu/civilr/covenants_report.htm [https://perma.cc/UD4V-W2KE] ("If an owner violated the restriction, they could be sued and held financially liable. Because of this legal obligation, racial restrictions were rarely contested, which is the key reason why they were so effective.").

269. ROTHSTEIN, *supra* note 28, at 90 (noting that in a subdivision called Westlake, fines for violating racially restrictive covenants could total $16,000 where homes were valued at $15,000).

270. *Id.*

271. Barrows v. Jackson, 346 U.S. 249 (1953).

272. *Id.* at 258.

money damages for breach of a racially restrictive covenant were unavailable, speaks to the pervasive nature of race-based covenants in the United States during that era.

In 1968, in the wake of Dr. Martin Luther King, Jr.'s assassination, Congress passed the Fair Housing Act and finally made racially restrictive covenants illegal to create.[273] Section 3604(a) of the Fair Housing Act makes it illegal to deny housing to anyone on the basis of race.[274] To deny refers to "any conduct which makes housing unavailable, as well as all practices that have the effect of denying dwellings on prohibited grounds, and that in any way impede, delay, or discourage a prospective buyer or renter."[275] While racially restrictive covenants clearly denied housing to protected classes, in violation of the Fair Housing Act, they remained a strong signal to outsiders about local racial attitudes.[276] Many white people, deprived of the legality of drafting racially restrictive covenants, enforced housing segregation through violence.[277]

It took time for the nation to figure out how to respond to the Fair Housing Act as it related to race-based covenants. In November 1969, the Department of Justice sent letters to the presidents of the eighteen major title companies in the United States advising them that re-printing race-based covenants in their title policies was a violation of Section 3604(c) of the Fair Housing Act.[278] In 1972, the Court of Appeals for the District of Columbia Circuit enjoined the recorder of deeds from accepting race-based covenants for recordation and prevented the recorder from providing copies of

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273. DeNeen L. Brown, *The Fair Housing Act Was Languishing in Congress. Then Martin Luther King Jr. Was Killed*, WASH. POST (Apr. 11, 2018), https://www.washingtonpost.com/news/retropolis/wp/2018/04/11/the-fair-housing-act-was-languishing-in-congress-then-martin-luther-king-jr-was-killed/ [https://perma.cc/TUQ4-5KWF].

274. 42 U.S.C. § 3604(a).

275. US Dept. of Hous. v. Wagner, HUDALJ No. 05-90-0775-1 (June 22, 1991), https://www.hud.gov/sites/documents/HUD_05-90-0775-1.PDF [https://perma.cc/9TGV-FHXP] (citing U.S. v. Youritan Constr. Co., 370 F. Supp. 643, 648 (N.D. Cal. 1973)).

276. *See* BROOKS & ROSE, *supra* note 11, at 6 ("The fact that racial covenants continued to be written after *Shelley* suggests that . . . a major function of racial covenants was to allow white neighbors to identify themselves as allies in a preference for segregation . . . .")

277. *See* Jeannie Bell, *The Fair Housing Act and Extralegal Terror*, 41 IND. L. REV. 537, 542 (2008) (noting, for example, white resistance in Illinois in the 1950s that included "confrontations, protesting, picketing, in addition to violent attacks.").

278. Letter from Jerris Leonard, Former U.S. Assistant Att'y Gen., Dep't Just., to Herman Berniker, President, Title Guarantee Co. (Nov. 26, 1969) (on file with Lincoln Memorial Duncan Sch. of L. Libr.).

instruments containing racially restrictive covenants unless they were stamped with a notice stating that the "restrictive covenants found therein are null and void."[279] Unfortunately, the legal advancements to end segregation did not end violence against Black people who moved into white neighborhoods. As Stephen Meyer noted, violence occurred through "thousands of small acts of terrorism."[280] It "persisted throughout the century, [with] the most vicious and extensive violence occurring in the North during the two decades following World War II."[281] Rubinowitz and Perry further argue that the "housing-related crimes that Meyer describes as continuing into the 1960s [actually] persisted through the rest of the century and beyond . . . ."[282] Black people were discouraged from residing in white neighborhoods through a variety of means. Disruption of water and sewer services, threats, acts of vandalism, cross burnings, arson, and physical violence were all used to perpetuate residential segregation in the United States.[283] Racially restrictive covenants continued to be used by the real estate industry until 1977, when it was sued by the Justice Department.[284]

Race-based Covenants Now

People are divided on how to handle race-based covenants that remain on the public record. Some feel that the offensive language should be removed.[285] Others feel that removal would only stymie efforts at restitution.[286] In a 2018 Sixth Circuit Court of Appeals case, *Mason v. Adams County Recorder*, an African American man

279. Mayers v. Ridley, 465 F.2d 630, 631 (D.C. Cir., 1972).

280. STEPHEN GRANT MEYER, AS LONG AS THEY DON'T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS 6 (2000).

281. *Id.*

282. Leonard Rubinowitz & Imani Perry, *Crimes Without Punishment: White Neighbors' Resistance to Black Entry*, 92 J. OF CRIM. L. & CRIMINOLOGY 335, 340 (2001).

283. Farrell Evans, *How Neighborhoods Used Restrictive Covenants to Block Nonwhite Families*, HIST. CHANNEL (Dec. 15, 2022), https://www.history.com/news/racially-restrictive-housing-covenants [https://perma.cc/GQ9Q-VLS5].

284. Quick, *supra* note 32.

285. *See* Cheryl W. Thompson, Cristina Kim, Natalie Moore, Roxana Popescu & Corinne Ruff, *Racial Covenants, a Relic of the Past, Are Still on the Books Across the Country*, NPR (Nov. 17, 2021), https://www.npr.org/2021/11/17/1049052531/racial-covenants-housing-discrimination [https://perma.cc/9Q4L-3JAY] (discussing the efforts of various homeowners who found racially restrictive covenants to remove the language).

286. Nick Watt & Jack Hannah, *Racist Language Is Still Woven into Home Deeds Across America. Erasing It Isn't Easy, and Some Don't Want To*, CNN (Feb. 15, 2020), https://www.cnn.com/2020/02/15/us/racist-deeds-covenants/index.html [https://perma.cc/5WNG-J53F].

sued all eighty-eight Ohio county recorder's offices seeking an injunction to force them to stop printing and publishing documents with race-based covenants in them.[287] Mr. Mason also sought injunctions to remove all documents with racially restrictive covenants from view and to permit the inspection and redaction of such documents.[288] Mr. Mason lost due to lack of standing.[289]

Individual suits are costly and time consuming. Recognizing this, some state legislatures have begun to address racially restrictive covenants through statutory reform. These reforms generally take four main approaches: notification, repudiation, modification, and redaction.[290]

Notification statutes take the least obtrusive approach and simply post a notice, whether in a statute, on the wall of the public records office, or as a disclaimer on a website, that states that the land records may contain racially restrictive covenants that are null and void and legally unenforceable.[291] Florida has a statute with a notification provision.[292]

Repudiation takes it a step further than notification because it attaches the notification about the illegality and unenforceability of the discriminatory statement directly to the offending document.[293] The Indiana Code includes a repudiation provision.[294]

Modification removes the offensive language from the property owner's deed.[295] This approach is the second most comprehensive of the four reforms. Texas has adopted modification.[296]

Finally, the most far-reaching reform is redaction. Redaction removes all discriminatory language related to the race-based covenant from the land records.[297] The original deeds containing the repugnant language are typically stored in an archival facility and

287. Mason v. Adams Co. Recorder, 901 F.3d 753, 755 (6th Cir. 2018).

288. *Id.*

289. *Id.* at 757.

290. *Housing Discrimination, Addressing Illegal Covenants in Historic Land Records*, AM. LAND TITLE ASS'N, https://www.alta.org/media/pdf/advocacy/housing-discrimination-addressing-illegal-covenants-in-historic-land-records.pdf [https://perma.cc/76SN-Q6A2].

291. Swanson, *supra* note 13, at 154.

292. FLA. STAT. § 712.065(1) (2022).

293. *Housing Discrimination, Addressing Illegal Covenants in Historic Land Records*, *supra* note 290.

294. IND. CODE § 32-21-15 (2021).

295. Swanson, *supra* note 13, at 156.

296. S. 30, 87th R.S. ch. 532 § .0261(b) (codified as Tex. Prop. Code Ann. § 5.0261 (2021)).

297. *Housing Discrimination, Addressing Illegal Covenants in Historic Land Records*, *supra* note 290.

are no longer part of the chain of title to the property.[298] The State of Washington has codified redaction.[299] Washington's move toward redaction has not been without controversy. In the Washington Supreme Court case, *In re Lots 1 & 2*, the Court was tasked with determining whether the public records office had a duty to remove void provisions from the record.[300] Before the Washington Supreme Court made its determination, the Washington Legislature amended the prior statute to clarify that there was such a duty on the part of the public records offices.[301] Not all states have taken action to adopt one of the four types of reform.[302] As more states move towards reform, the visual and psychological impact of racially restrictive covenants may decrease, but the economic effects will linger on.

V. Race Nuisance

A hybrid type of real estate discrimination was the race nuisance case, sometimes referred to as "judicial zoning."[303] In race nuisance cases, Black property owners were sued by white (in nearly all instances) property owners alleging that the Black-owned and/or Black-operated property was a nuisance.[304] The race nuisance cases discussed here began at the end of legal racialized zoning and extended into the 1950s.[305] These cases involved a dance hall, a hospital, and a church that were each either owned or operated by Black individuals.[306] During this era, many establishments "obsessed over preserving the 'racial purity'" and excluded Black patrons.[307] Since Black people were unable to relax

298. Swanson, *supra* note 13, at 157.

299. WASH. REV. CODE. ANN. § 49.60.227 (West 2022).

300. *In re* That Portion of Lots 1 & 2, 199 Wash. 2d 389, 391, 394 (2022).

301. *Id.* at 399–400.

302. *See* Amanda Holpuch, *Illinois Homeowners Can Now Remove Racist Clauses from Their Property Deeds*, N.Y. TIMES (Jan. 20, 2022), https://www.nytimes.com/2022/01/20/us/illinois-housing-deed-racism.html [https://perma.cc/MCM3-BGV2] (noting that by 2022, only fourteen states have passed laws removing or modifying racially restrictive language in property covenants).

303. BROPHY ET AL., *supra* note 203, at 63.

304. Not all white plaintiffs were successful in race nuisance cases. *See* Thoenebe v. Mosby, 101 A. 98 (Pa. 1917) (finding a black dance hall was not a nuisance in Pennsylvania). Godsil posits that the race nuisance cases where white plaintiffs lost might have been instances where a small number of white landowners "were sacrificed for the preservation of racial segregation." Godsil, *supra* note 14, at 509.

305. *See infra* notes 309–21 and accompanying text.

306. *Id.*

307. Amy Leigh Wilson, *A Unifying Anthem or Path to Degradation: The Jazz Influence in American Property Law*, 55 ALA. L. REV. 425, 431 (2004) (arguing that

at a dancehall, seek medical attention, or worship with white people in most places, it was necessary for Black-owned or operated establishments to exist. Race-based zoning and racially restrictive covenants made it very challenging for Black-owned businesses, or establishments catering to Black patrons, to find operating locations.[308] When a location was finally secured, race nuisance cases were an impediment to their continued existence.

In *Fox v. Corbitt*, the owner of a grocery store in Nashville sued the Black owner of a saloon alleging that large crowds of Black individuals "of low order" were assembled in and around the saloon who were "drunk, boisterous, and quarrelsome."[309] The Tennessee Supreme Court upheld the lower court's determination that the saloon was an abatable nuisance and supported damages based upon the depreciation in value of the grocer's property because of the nuisance.[310] Having been unable to prevent the land next-door to his grocery store from being owned and operated by Black people, Fox was successful at decreasing the value and productivity of the Black-owned land through his nuisance claim.[311] While preventing nuisance is generally a race-neutral endeavor, the Court here made sure to reference that the saloon was frequented by Black patrons of a "low order."[312] This area of the law is sometimes called "judicial zoning" because the courts accomplish what municipalities (after *Buchanan*) often cannot—zoning by race.[313]

In *Giles v. Rawlings*, a homeowner sued a Black hospital praying for relief from the "kind and character of diseases," "obnoxious" odor, careless dress, and noise "whether from the effects of being treated" or the "nature" of the Black patients.[314] The Supreme Court of Georgia reversed the lower court's denial of an injunction to abate the nuisance and remanded it to the lower court

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after the 1920s the Jazz Age furthered integration because of the popularity of Black musicians and dancers).

308. *See generally* Wilson, *supra* note 307.

309. Fox v. Corbitt, 194 S.W. 88, 88 (Tenn. 1916); *see also* Green v. State ex rel. Chatham, 56 So.2d 12 (Miss. 1952) (holding that a Black dance hall with a juke box was a nuisance); Trueheart v. Parker, 257 S.W. 640, 641 (Tex. Civ. App. 1923) ("To those that business or pleasure had lured to the dance, it was a terpsichorean dream of pleasure, while to the unfortunate denizens of the homes near by it was a terrible nightmare, and while the dancers chased the fleeting hours with flying feet to the sensuous strains of dance hall music, the residents tossed upon sleepless beds.").

310. *Fox*, 194 S.W. at 89.

311. *Id.*

312. *Id.* at 88.

313. BROPHY ET AL., *supra* note 203, at 63.

314. Giles v. Rawlings, 97 S.E. 521, 521–22 (1918).

for reconsideration.[315] The action of the Court here created the opportunity for the lower court to shut down the hospital if it determined that it was a nuisance. It is noteworthy that on the same property as the Black hospital there was a larger white hospital.[316] Interestingly, the larger white hospital was not alleged a nuisance by the neighbor, but the smaller Black one was. It is likely that the white hospital had far better facilities and treatment for its patients (which made it less of a problem), but it is just as likely that the homeowner was unwilling to live in close proximity to Black people. This racial animus is supported by the fact that the homeowner complained of the noise from automobiles used to haul away the dead from the Black hospital.[317] Instead of having compassion for the large number of dead people coming from the Black hospital, the homebuyer was annoyed enough by the sound of the vehicles used to dispose of their dead bodies that he filed a lawsuit to shut down the entire hospital.

In *Morison v. Rawlinson*, white residents petitioned the city council to have a Black church declared a nuisance.[318] The city council adopted a resolution that declared the church a public nuisance.[319] The Supreme Court of South Carolina held that the church services constituted a public nuisance.[320] It found that the noise of the church service, "with its unending repetition, accompanied by breaches of the peace, tends to shatter the nervous system and impair the health of those subjected to it . . . ."[321] It shocks the conscience that a southern city would impede its Black residents' ability to worship, given that but for the Trans-Atlantic Slave Trade most descendants of Africans in the United States would likely not have converted to Christianity. The use of race nuisance cases was one of many mechanisms working in tandem to discriminate in access to housing. As discussed previously, sometimes the discrimination came directly from the government, and other times it was achieved through the private sector.

315. *Id.*
316. *Id.* at 521.
317. *Id.* at 576.
318. Morison v. Rawlinson, 7 S.E.2d 635 (S.C. 1940).
319. *Id.* at 637.
320. *Id.* at 638.
321. *Id.*

Modern Day Race Nuisance

Henderson and Jefferson-Jones examine the modern phenomena of "#LivingWhileBlack."[322] Much like the race nuisance cases, "#LivingWhileBlack" incidents focus on the performance of particular activities by Black individuals that result in the involvement of law enforcement and security.[323] It is not the activities Black individuals engage in that are the problem; it is the fact that Black individuals are engaged in the activities. "#LivingWhileBlack" incidents stem from benign activities like shopping, driving, birdwatching, and jogging.[324] Much like worshipping at church, dancing at a nightclub, and visiting a hospital while ill are all generally acceptable activities, "#LivingWhileBlack" focuses on how the very presence of Black people may constitute a nuisance.[325] The link between the modern phenomenon of white 911 callers seeking to displace Black people from shared spaces and historic race nuisance cases is strong. As Henderson and Jefferson-Jones note, "callers in #LivingWhileBlack incidents have consistently leveraged property concepts of entitlement and belonging to advocate for the physical ouster of Black people from shared spaces."[326]

Sometimes, the modern-day equivalents of the race nuisance cases are seen through anti-loitering protocols.[327] In the twenty-first century, nuisance has also been used to target sex work, drug transactions, the gathering of individuals, and 911 calls by victims of domestic violence.[328] As previously mentioned, the Citywide Nuisance Abatement Program (CNAP) from Los Angeles allows the city attorney to file civil injunctions against owners of "nuisance" properties.[329] The theory behind CNAP is that "controlling and revitalising the physical environment reduces crime."[330] Of the 121 CNAP injunctions filed between 2010 and 2018, 80% of the lawsuits were in census tracts that are 75% Black and Latino.[331] This

322. Taja-Nia Y. Henderson & Jamila Jefferson-Jones, *#LivingWhileBlack: Blackness as Nuisance*, 69 AM. UNIV. L. REV. 863 (2020).

323. Lolita Buckner Inniss, *Race, Space, and Surveillance: A Response to #LivingWhileBlack: Blackness as Nuisance*, 69 AM. L. REV. F. 213 (2020).

324. *Id.* at 214–17.

325. *Id.* at 218.

326. Henderson & Jefferson-Jones, *supra* note 322, at 872.

327. Godsil, *supra* note 14, at 554.

328. GRAZIANI ET AL., *supra* note 19, at 442.

329. *Id.*

330. *Id.* at 444.

331. *Id.*

indicates that nuisance law is still being used to complicate land access for minorities in the present.

In another dramatic nuisance reduction strategy, a California city created a special police unit to target Black households suspected of using Section 8 vouchers.[332] In response to an increase in the number of Section 8 families in Antioch, California, Antioch residents formed a citizens' organization to try to reduce the number of families using Section 8 vouchers in the city.[333] Private citizens submitted complaints to this special police unit and the officers took drastic measures, including searching the homes of Black women and using any evidence found to submit complaints to the county housing authority to try to get their Section 8 vouchers revoked.[334] Similar techniques were used in Lancaster and Palmdale, two other California cities.[335]

Minorities targeted by this harassment filed suits against Lancaster, Palmdale, and Antioch.[336] All three settled, with the parties in the Antioch case agreeing to more transparency on the part of the city, not to focus CNAP initiatives on Black recipients of Section 8 vouchers, and damages (in the amount of $180,000 to be split between the five plaintiffs) and attorneys' fees (another $180,000).[337] In the Lancaster and Palmdale case settlement, the Housing Authority of Los Angeles County agreed to pay nearly $2 million to the parties that were discriminated against.[338] The Lancaster and Palmdale cases were particularly egregious because once a (white) resident filed a complaint, a Black or Latino household was "aggressively investigated" for "largely noncriminal activity" with the goal of having their Section 8 vouchers revoked by asserting "evidence of lease violations."[339] White residents and groups persuaded legislative bodies to pass nuisance ordinances to

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332. Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1544 (2012).

333. *Id.*

334. *Id.* at 1545.

335. *Id.*

336. Cmty. Action League v. City of Palmdale, No. 11-4817, 2012 U.S. Dist. Lexis 189977 (C.D. Cal. Feb. 1, 2012); Williams v. City of Antioch, No. 08-2301, 2012 U.S. Dist. Lexis 49096 (N.D. Cal. Mar. 8, 2012).

337. *Williams*, 2012 U.S. Dist. Lexis 49096, at *6.

338. *LA County Housing Agency, Palmdale, Lancaster Settle Section 8 Discrimination Case*, AP (July 20, 2015), https://www.cbsnews.com/losangeles/news/la-county-housing-authority-agrees-to-2m-settlement-in-section-8-discrimination-lawsuit/ [https://perma.cc/9EJW-VHPS].

339. Ocen, *supra* note 332, at 1568.

effectively excluded Black Section 8 voucher recipients.[340] This is reminiscent of nuisance cases from nearly a century ago that impacted Black-owned businesses and churches. Now, just as then, white people are weaponizing the law to remove unwanted Black people from spaces that white people prefer to remain homogenous. The weapon of choice, in these cases, was nuisance law. While there appears to be a shift from using nuisance against Black-owned businesses historically, to targeting Black households in residential settings in the present, Black people are still disproportionately impacted by nuisance actions based upon race.[341] Hopefully, increased federal resources aimed at fair housing will continue to stand up to discrimination as it occurs. This is definitely some progress, but real movement toward eradicating real estate discrimination requires reenforced infrastructure and legislation to preempt using nuisance law as a tool for race-based exclusion.

V. Racial Reverters

The final type of historic real estate discrimination to be explored is the racial reverter. Racial reverters are unique because they effectuate racial discrimination without judicial enforcement.[342] Racial reverters most often take the form of fee simple determinables.[343] A fee simple determinable is a conveyance created with the key words "so long as," "while," "during," or "until."[344] The future interest accompanying the fee simple determinable is the possibility of reverter.[345] Its purpose is to "revest title in the grantor upon the occurrence of a named event."[346] The named event, in the case of racial reverters, was typically the use of the property by anyone other than "members of the White Race."[347] The future interest accompanying the fee simple determinable is the possibility of reverter. The possibility of reverter operates automatically, is not a restraint on alienation, and is not within the scope of the Rule Against Perpetuities.[348] The fee

340. *Id.* at 1576–79.

341. *See generally* Henderson & Jefferson-Jones, *supra* note 322; Ocen, *supra* note 332.

342. BROOKS & ROSE, *supra* note 11, at 179.

343. Peter H. Gerns, *Constitutional Law—Equal Protection—Use of Fee Simple Determinable to Enforce Racial Restrictive Provisions*, 34 N.C. L. REV. 113 (1955).

344. Swanson, *supra* note 15, at 158–59 n.246.

345. *Id.* at 158.

346. Gerns, *supra* note 343, at 116.

347. Hermitage Methodist Homes of Va., Inc. v. Dominion Trust Co., 387 S.E.2d 740, 741 (Va. 1990).

348. BROOKS & ROSE, *supra* note 11, at 73–78, 179.

simple determinable thus creates a fairly effective mechanism for infecting land transactions with the poison of racial discrimination.

One of the more famous post-*Shelley* cases involving a racial reverter stemmed from a series of 1929 deeds conveying land to the city of Charlotte, North Carolina, for use as parks, playgrounds, and golf courses "to be used and enjoyed by persons of the white race only."[349] The North Carolina Supreme Court held in 1955 that the use of the golf course by non-white persons would trigger the possibility of reverter, and the property would revert back to the grantors or their heirs.[350] They further elaborated that the "operation of this reversion provision is not by any judicial enforcement by the State Courts of North Carolina," that *Shelley* "has no application," and appellants' rights were not violated under the Fourteenth Amendment to the U.S. Constitution.[351] The Supreme Court's refusal to review the case suggested that racial reverters might be viable mechanisms for preserving segregation.[352]

The Supreme Court finally had the occasion to take this issue up in 1970 with *Evans v. Abney*.[353] In 1911, Senator A.O. Bacon conveyed property, through his will, in trust to the City of Macon to be used as a public park "for the exclusive use of the white people of that city."[354] In a prior case, *Evans v. Newton*, the Court had held that "continued operation of Baconsfield as a segregated park was unconstitutional."[355] This necessitated the Supreme Court of Georgia's determination on the applicability of *cy pres* to reform the conveyance to keep it from failing.[356]

Cy pres means "as near as possible."[357] When a charitable trust becomes impossible to fulfill, *cy pres* can be used to reform the trust while attempting to conform as nearly as possible to the grantor's intent.[358] The Court noted that "since racial separation was found to be an inseparable part of the testator's intent, the Georgia courts held that the State's *cy pres* doctrine could not be used to alter the

349. Charlotte Park and Recreation Comm'n v. Barringer, 88 S.E.2d 114, 122 (N.C. 1955) *cert. denied*, 350 U.S. 983 (1956).

350. *Id.* at 124–25.

351. *Id.* at 123.

352. BROOKS & ROSE, *supra* note 11, at 180.

353. Evans v. Abney, 396 U.S. 435, 436 (1970).

354. *Id.*

355. *Id.* at 440 (citing Evans v. Newton, 382 U.S. 296 (1966)).

356. *Id.*

357. *Cy Press: Charitable Trusts*, CORNELL L. SCH. (Aug. 2022), https://www.law.cornell.edu/wex/cy_pres_charitable_trusts [https://perma.cc/HET2-V2C5].

358. *Id.*

will to permit racial integration."[359] *Cy pres* could not be used because the separation of the races was "an inseparable part" of the grantor's intent.[360] When trusts cannot be reformed through *cy pres*, under Georgia law, a resulting trust is created in favor of the grantor, testator, or their heirs.[361] This resulting trust caused the park to revert to Senator Bacon's heirs (rather than a possibility of reverter—as seen in the *Charlotte Park* case).[362]

When the State of Georgia declined to use *cy pres* to reform the trust, it failed, and the U.S. Supreme Court held that the termination of the trust, and resulting closure of the park to everyone, presented "no violation of constitutionally protected rights."[363] In fact, the Court asserted that closure of the park eliminated all discrimination against Black people because "termination of the park was a loss shared equally" by white and Black citizens of Macon.[364] The Supreme Court failed to take into account the fifty-five odd years that white people had exclusive use of the park before *Newton* in their calculation of equal loss.[365]

Racial Reverters Now

What is the current status of the law regarding racial reverters? In response to *Abney*, in 1971, scholar Lawrence Casazza wrote that it seemed unlikely that the Court would extend *Shelley* to possibilities of reverter.[366] Casazza further stated that "[i]t would seem that the few private racial restrictions which are given effect 'automatically,' by the operation of law, will not be struck down as involving state action violative of the Equal Protection Clause."[367] So far, Casazza has been right. The Supreme Court has not revisited this issue since 1970.[368]

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359. *Abney*, 396 U.S. at 442.

360. *Id.*

361. *Id.* at 442–43.

362. *Id.*

363. *Id.* at 444.

364. *Id.* at 445.

365. *Newton*, 382 U.S. 296.

366. Lawrence J. Casazza, *Constitutional Law – Estates – Reversion of the Res of a Charitable Trust Which Failed Because It Necessitated Racially Discriminatory State Action Is Not Violative of the XIVth Amendment Where the Reversion Is by Operation of State Law, and Due to the State Court's Refusal to Apply the Doctrine of Cy. Pres.*, 2 LOY. U. CHI. L. J. 390, 399 (1971).

367. *Id.*

368. Michael Klarman, *An Interpretive History of Equal Protection*, 90 MICH. L. REV. 213, 293 (1991) (describing how *Abney* and a later case *Moose Lodge No. 107 v. Irvis* represent the entirety of the Burger Court's decisions on state action and equal protection, with *Moose Lodge* relating instead to granting of liquor licenses instead

Are there other tools for combatting racial reverters? Yes, but maybe not where one would expect. When contemplating statutes that fight discrimination in real property, the Fair Housing Act is usually at the forefront. It prohibits, among other things, discrimination in the sale or rental of real property on the basis of race, et cetera.[369] It does not prohibit discrimination in use.[370] Imagine a scenario where "Racist Grandpa" decides to leave property to "Friend" in his will, so long as it is only occupied by members of the white race. Implicit in this conveyance is a possibility of reverter that will automatically be triggered if Friend allows use of the property by a non-white individual. The Fair Housing Act will not prevent the application of the possibility of reverter to dispossess the non-white user of the property of the land.

What about 42 U.S.C. Section 1982? Will it prevent the possibility of reverter from conveying the land back to Racist Grandpa's heirs? This code section originated in the Civil Rights Act of 1866, and the Supreme Court relied on it in *Jones v. Alfred H. Mayer Company*.[371] Section 1982 states that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[372] This code section appears to have the same limitations as the Fair Housing Act, though an argument could potentially be made that "hold" is analogous to use. Worth noting is that the Supreme Court did not mention either section 1982 or the Fair Housing Act in its consideration of *Abney*.[373]

In *Charlotte Park and Recreation Commission v. Barringer*, the Supreme Court of North Carolina held that upholding the racial reverter did not violate the appellants' rights under Sections 1981 and 1983.[374] Section 1981 states that all persons shall have "the same right in every State and Territory to . . . the full and equal benefit of all laws and proceedings for the security of persons and

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of *Abney*'s focus on racial reverters).

369. 42 U.S.C. § 3604.

370. *Id.*

371. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

372. 42 U.S.C. § 1982.

373. *Abney*, 396 U.S. at 447 (summarizing the Court's analysis of the various arguments by petitioners and applicable law, where the Court analyses the Fourteenth Amendment and the *cy pres* doctrine without mention of Section 1982 or the Fair Housing Act).

374. Charlotte Park and Recreation Comm'n v. Barringer, 88 S.E.2d 114, 123 (N.C. 1955).

property as is enjoyed by white citizens . . . ."[375] Section 1983 states that every person who subjects a citizen of the United States to the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable . . . for redress . . . ."[376] The combination of the lack of discussion of Section 1982 by the Supreme Court in *Abney* and the explicit statement that Sections 1981 and 1983 were not violated in *Charlotte Park and Recreation* makes it seem unlikely that a Section 1982 argument is likely to prevail against a racial reverter.

What recourse is there? Surely jurisprudence is not stagnated by Senator Bacon's 1911 will. Fear not, some state statutes are efficiently solving the problem of racial reverters. Take, for example, a Tennessee statute which states that "[e]very condition, restriction, or prohibition, including a right of entry or possibility of reverter, that directly or indirectly limits the use or occupancy of real property on the basis of race . . . is void . . . ."[377] Arkansas, Hawaii, Idaho, Illinois, Massachusetts, Michigan, New Hampshire, New Jersey, and Washington join Tennessee as states with similar codifications against racial reverters.[378] Many of the statutes not only explicitly state that insertion of these provisions into land conveyancing documents is impermissible but also state that honoring, or attempting to honor, racial reverters is disallowed.[379]

In states without statutes prohibiting racial reverters, their use depends upon the grantees' willingness to relinquish possession.[380] While the possibility of reverter transfers the title to the property back to the grantor (or their heirs) by operation of law and without state action,[381] this assumes the grantee's peaceful relinquishment.[382] A scholar, Peter Gerns, aptly noted in 1955, if the grantee refuses to vacate the premises, the grantor would have

375. 42 U.S.C. § 1981.

376. 42 U.S.C. § 1983.

377. TENN. CODE ANN. § 4-21-604 (1984).

378. *See* ARK. CODE ANN. § 16-123-206 (2023); HAW. REV. STAT. ANN. § 515-6 (LexisNexis 2023); IDAHO CODE § 55-616 (2023); 775 ILL. COMP. STAT. 5/3-105 (LexisNexis 2023); MASS. ANN. LAWS CH. 184, § 23B (LexisNexis 2023); MICH. COMP. LAWS SERV. § 37.2505 (LexisNexis 2023); N.H. REV. STAT. ANN. § 354-A:13 (LexisNexis 2023); N.J. STAT. ANN. § 46:3-23 (West 2023); WASH. REV. CODE ANN. § 49.60.224 (LexisNexis 2023).

379. TENN. CODE ANN. § 4-21-604 (2023); N.H. REV. STAT. ANN. § 354-A:13 (LexisNexis 2023); ARK. CODE ANN. § 16-123-206 (2023); MICH. COMP. LAWS SERV. § 37.2505 (LexisNexis 2023); IDAHO CODE § 55-616 (2023); WASH. REV. CODE ANN. § 49.60.224 (LexisNexis 2023). This list is not exhaustive.

380. Gerns, *supra* note 343, at 117.

381. Casazza, *supra* note 366, at 399.

382. Gerns, *supra* note 343, at 117.

to bring an action in ejectment to regain possession of the premises and that might very well constitute state action (under a *Shelley* lens).[383] Gerns also noted that this action in ejectment might be akin to removing an adverse possessor and might not violate the grantee's constitutional rights.[384] A lot has changed since Gerns made this assertion in 1955. Today, it is likely that court involvement in regaining possession would likely constitute the requisite state action under *Shelley*.

Current title insurance industry practices provide some clarity on how to deal with racial reverters in real estate transactions. A sample ALTA Loan Policy of Title Insurance from 2021 states that discriminatory covenants are illegal and unenforceable at law.[385] Title companies perform searches of the real property records to determine whether or not to issue owner's policies and lender's policies of title insurance.[386] In those searches, they find both racially restrictive covenants and racial reverters.[387] Standard practice is to treat discriminatory covenants as encompassing racial reverters and any other race-based exclusion.[388]

While a majority of states have not yet codified a ban on the creation of racial reverters, or a ban on honoring, or attempting to honor them, there is progress. These mechanisms are being used less in the twenty-first century, as racial animus wanes and the desire for complex land transfer mechanisms declines. Additionally, real estate developers have used them infrequently in the years following the 1950s.[389] Banks were disinclined to extend loans where racial reverters were present out of fear of the possibility of reverter and the potential for automatic reversion back to the grantor.[390] Cautious optimism is the best path regarding racial reverters. The precedent, *Abney*, is still viable for virulent hatred to prevail, assuming the state declines to reform through *cy pres* and has no statute to prevent creation or honoring of racial reverters.

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383. *Id.* at 117.

384. *Id.*

385. *ALTA Loan Policy 2021 v. 1.00*, AM. LAND TITLE ASS'N (2021), https://www.alta.org/policy-forms/ [https://perma.cc/QU8Y-WCP4] (ALTA Loan Policy of Title Insurance, Schedule B, Exceptions from Coverage).

386. James Chen, *Title Search: What It Is, How It's Done, and Title Insurance*, INVESTOPEDIA (Apr. 7, 2023), https://www.investopedia.com/terms/t/titlesearch.asp [https://perma.cc/JZ7B-PS24].

387. Interview with Erica McClure, Esq., V.P. of Commercial, Melrose Title Company (July 14, 2023).

388. *Id.*

389. BROOKS & ROSE, *supra* note 11, at 180.

390. *Id.*

Conclusion

The ramifications and inequities of centuries of real estate discrimination in this country continue to tarnish the progress being made. How can this be rectified and redressed? Dr. Martin Luther King, Jr. once wrote,

> We need a powerful sense of determination to banish the ugly blemish of racism scarring the image of America. We can, of course, try to temporize, negotiate small, inadequate changes and prolong the timetable of freedom in the hope that the narcotics of delay will dull the pain of progress. We can try, but we shall certainly fail. The shape of the world will not permit us the luxury of gradualism and procrastination. Not only is it immoral. It will not work . . . . It will not work because it retards the progress . . . of the nation as a whole.[391]

As Dr. King predicted sixty years ago, gradualism and procrastination have not worked to eradicate racism, or, as this article argues, real estate discrimination in the United States. As previously highlighted, substantial progress has been made to eradicate racial zoning, race-based covenants, race nuisance, and racial reverters. Some areas have seen more progress than others, and more must be done. Malcom X once said that "[l]and is the basis of all independence; [l]and is the basis of freedom, justice, and equality."[392]

If land creates independence, then more pathways to homeownership need to be created. The Joint Center for Housing Studies of Harvard University acknowledges that "affordable housing is in short supply."[393] Local, state, and federal governments need to actively support the eradication of real estate discrimination and support land (and wealth) redistribution. At the federal level, Congress needs to pass bills like House Resolution 3507, introduced May 18, 2023, which would discourage discriminatory land use policies and remove barriers to affordable housing.[394] Some of the ways House Resolution 3507 could more equitably distribute access to "freedom, justice, and equality" would be through expanding high-density and multifamily housing, reducing minimum lot sizes, creating transit-oriented development zones, eliminating or reducing minimum square footage

391. MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 140–41 (1963).

392. Malcom X, *Message to the Grass Roots Delivered at the Northern Negro Grass Roots Leadership Conference in Detroit (Nov. 10, 1963)*, *reprinted in* MALCOLM X SPEAKS 9 (George Breitman, ed., 1990).

393. JOINT CTR. FOR HOUS. STUD., *supra* note 77, at 33.

394. Yes in My Backyard Act, H.R. 3507, 118th Cong. (2023) (introduced May 18, 2023).

requirements, and donating vacant land for affordable housing projects.[395] If passed, House Resolution 3507 has the power to right many wrongs. Sadly, LexisNexis gives the bill a "low chance to pass next stage."[396]

At a local level, reparations are starting to gain some traction. Scholars from the National Bureau of Economic Research conclude that reparations "lead to immediate reductions in racial wealth inequality."[397] Reparations can take many forms such as direct payments and land-based wealth distribution.[398] The city of St. Paul, Minnesota, is experimenting with reparations.[399] Through its "Inheritance Fund," qualifying descendants of the historic African American "Rondo" neighborhood (decimated when the city plowed through it to construct Interstate 94) can receive up to $110,000 in downpayment assistance or up $80,000 in the Homeowner Rehab Program.[400] While this has the potential to effectuate massive and immediate positive change for St. Paul's Black residents, the City of St. Paul has closed applications "following a high volume of applications."[401] The city notes that all previously submitted applications will be processed during this pause.[402] Hopefully, this valuable resource will open up again soon.

Whatever the efforts to remedy real estate discrimination and achieve equity, the processes will take acknowledgment of past—and present—injustices, time, perseverance, and patience. These are not problems that can be solved quickly. This nation took centuries to create the problems that it faces, and it will take substantial effort and cooperation to rectify the harms. As Dr. King once noted about the complex plight of Black people in the United States, "[w]e will make progress if we accept the fact that four hundred years of sinning cannot be canceled out in four minutes of

395. *Id.*

396. *118 Legislative Outlook H.R. 3507*, LEXISNEXIS, https://plus.lexis.com/api/permalink/5ae48aa2-8689-4fd4-8d38-edac6683c5fb/?context=1530671 [https://perma.cc/JXS5-HK8K].

397. Derenoncourt et al., *supra* note 85, at 4.

398. Danielle Russell, *The Power of Land: Race, Equity, and Justice*, OPENLANDS (June 18, 2020), https://openlands.org/2020/06/18/the-power-of-land-race-equity-and-justice/ [https://perma.cc/X65C-8Q22].

399. *Downpayment Assistance Program*, STPAUL.GOV, https://www.stpaul.gov/departments/planning-and-economic-development/housing/downpayment-assistance-program [https://perma.cc/Y7LV-3ZUQ].

400. *Id.*

401. *Id.*

402. *Id.*

atonement."[403] We must continue to make steadfast progress through muti-faceted approaches at all levels of government if we are to reverse the centuries of health, wealth, and equity lost through real estate discrimination.

403. KING, *supra* note 391, at 130.

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