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# MINNESOTA JOURNAL OF LAW & INEQUALITY

VOLUME XLIII

# POISON! An Africana Legal Studies Investigation into Enslaved Africans and Their Deadly Roots

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## Introduction: Opening the File

Auntie Sue had seven masters
she outlived all
'cept the last
she served them mint julep
with sugar and ground up glass
– Listervelt Middleton, *Southern Winds African Breezes*[1]

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†. Assistant Professor of Law, American University Washington College of Law. "When we wanted to meet at night we had an old conk, we blew that. We all would meet on the bank of the Potomac River and sing across the river to the slaves in Virginia, and they would sing back to us." James V. Deane, enslaved in Maryland, said those words. Interview with James V. Deane in Baltimore, Maryland (Sept. 1937) *published in* 16 George P. Rawick, The American Slave: A Composite Autobiography, Maryland Narratives at 6, 8 (George P. Rawick ed., 1972). This article is meant to be a voice in a collective song, an invitation to sing back. This voice is imperfect; on its own, it is limited in language, experience, and insight, but I hope, as part of the collective voice, it is powerful, and can help connect with those across the river. *Medaase* (thank you) to the ancestors, to all African people who found themselves on this side of the ocean, to the Akan-speaking peoples of then and now. Deepest gratitude to my direct ancestors to the origins of the family, including those who lived on land in what is now called Maryland, to my wise grandparents, to my loving parents, to my amazing family. *Asante Sana* to Greg Carr, Valethia Watkins, Mario Beatty, and the ASCAC family. A big thank you to Jordan Griffin, for your tremendous research assistance finding rare sources and for the thoughtfulness and enthusiasm you put toward this project. I am grateful for the contributions of Khelani Clay at AUWCL's Pence Law Library, Raychelle Burks from American University's Department of Chemistry, and Darby Nisbett from the Maryland State Archives. Endless gratitude to those whose sharing and feedback touched this project, including Fatou Camara, Deborah Cantrell, Aderson François, Sandy Wells, participants in my talks at New York Law School and Villanova University Charles Widger School of Law, and my AUWCL colleagues. Thank you to the members of the ASALH Bethel Dukes chapter for introducing me to the Listervelt Middleton poem which opens this piece. And my deepest appreciation to all others who helped along the way, including the wonderful students who inform, propel, and steer this Africana Legal Studies conversation in awe-inspiring and mysterious ways. Finally, special appreciation to my friends Cookie, Raegan, and Hatsi, my personal "conjurers" who helped me heal.

1. LISTERVELT MIDDLETON, SOUTHERN WINDS AFRICAN BREEZES 50 (1987). Middleton goes on to write, "We still need glass grinders[;] in almost every profession[;] people willing to work[;] to sabotage white oppression." *Id.*

This article is a murder investigation.[2]

And a strange one, as the victims might be the suspects, and the suspects might be the victims. Or, even stranger, who we are calling the victims might be the enforcers of an entirely different justice system we did not initially see.

This is a cold case: we are investigating African people enslaved in the Province of Maryland during the eighteenth century. It is really a collection of cases—all cases of poisoning. These enslaved Africans were poisoning their enslavers. The incidents are described in legal records and newspapers. But what do these poisonings really mean? It is our job in this moment to take a closer look.

According to the colonial legal system, the subjects of our investigation, the African poisoners, were criminals. But that legal characterization of the poisoners is not the only characterization. We are tasked with reexamining these cases, this time with some key methodological insights in our investigative toolbox, insights from disciplinary Africana Studies.

In one paradigm, we could think of the poisoners as murderers. And we could argue that they were using self-defense. Or, in another paradigm, we could conclude that, by poisoning, these Africans were addressing wrongdoing according to their own indigenous governance systems. By applying Africana Legal Theory, this investigation demonstrates the shift in orientation that reveals those African governance systems at work. In centering the perspectives of the Africans who used their deadly roots to poison the enslavers, our characterization of the "murderers" necessarily changes. They are criminals in one system and agents of justice in another.

Our investigation will be informed by the knowledge of indigenous African governance, what Africana Legal Theory calls

2. Throughout this article, I use a narrative framing device inspired by Greg Carr's longstanding use of the acronym "CSI" (Crime Scene Investigation) to refer to his critical examination of popular historic tourist sites around the world, cleverly recasting those sites as scenes of crimes against African people. After exposure to this usage, in my years as a practicing attorney, including as a university attorney conducting sexual misconduct and discrimination investigations, I came to appreciate the complexities of the investigation process and its approaches. The nature of an investigation can dramatically shift depending on what conduct is being investigated and the assumptions of the investigator. It is for these reasons that this article uses the rhetoric of investigation to explore the orientation shift at the center of Africana Legal Theory. This article includes excerpts from narratives and interviews with formerly enslaved people. Some quotes include racial slurs. I have chosen to retain the originally published language for historical accuracy and so as not to disrupt the words of the ancestors.

"Protocol"—specifically, the Protocol of Akan speakers of West Africa. We will be tracking this Protocol to eighteenth century Maryland. By tracing the steps of Akan Protocol along this one passageway, we may begin to contemplate the larger implications of Protocol's continuity in the Western Hemisphere.

## I. Investigative Tool-Kit: Definitions and Grounding Principles

As Africana Legal Studies investigators, we are guided by the theoretical underpinnings of disciplinary Africana Studies and the work of African-Centered thinkers. Disciplinary Africana Studies, and Africana Legal Studies by extension, is not simply about the subject matter Africana—"Africa and Africans wherever and whenever you find it/them."[3] It is about the *methodology* used to approach that subject matter.[4]

Africana Legal Studies takes particular interest in the idea of Governance, defined by Greg Carr as the "sets of common rules and/or understandings [that] Africans create to internally regulate their lives . . . ."[5] The European world—that is, the West—has its own Governance and uses its own systems and principles to create, implement, and sustain that Governance. We call that Law. Law arises out of the Western experience and tradition.[6] It is inappropriate to assume that all peoples of the world have always subscribed to this European version of Governance or the underlying concepts and assumptions that inform it. Accordingly, it is inappropriate to use the same language created from European Governance to describe, say, African Governance. For more detail on this problem, which I call the "QLO" (Qualified Law

3. Greg Carr, *Teaching and Studying the African(a) Experience: Definitions and Categories*, *in* AFRICAN-AMERICAN HISTORY COURSE: LESSONS IN AFRICANA STUDIES 13 (Sch. Dist. of Phila. ed., 2006).

4. *See* JACOB H. CARRUTHERS, AFRICAN WORLD HISTORY PROJECT: THE PRELIMINARY CHALLENGE 1 (Jacob H. Carruthers & Leon C. Harris eds., 1997) ("Most African historians trained in foreign universities have been shackled with non-African theoretical frameworks, historiographies, and methodologies."); *see also* Angi Porter, *Africana Legal Studies: A New Theoretical Approach to Law & Protocol*, 27 MICH. J. RACE & L. 249, 256 (2022) (describing and demonstrating the Africana Legal Studies approach).

5. *See* Carr, *supra* note 3, at 15 (defining "Governance"). "Governance" can also mean the ways in which African people "make decisions, resolve disputes, recognize authority, interact with others, establish common tastes and styles, etc." *Id.* at 13.

6. *See* Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 LAW & INEQ. 323, 324–25 (1997).

Orientation), extensive discussion is found in my article, *Africana Legal Studies: A New Theoretical Approach to Law & Protocol*.[7]

Thus, a primary methodological task of Africana Legal Studies is distinguishing African Governance from European Governance by using distinct language and avoiding use of Legal terms of art to describe African Governance. "Law" and "Legal" are thus capitalized to emphasize that these are references to European Governance. The word "Protocol" is used as a placeholder to signal the "epistemic rupture,"[8] a primary step needed to respect African Governance on its own terms—terms that should, ultimately, as a result of a necessarily collective effort, be described using African languages.[9] "Protocol" serves as an open challenge to the presumed ubiquity of Law and, more significantly, a gateway toward indigenous African thought on Governance, and it will therefore be used throughout this investigation.

Overall, our approach attempts to move from an orientation that centers Law to an orientation that centers Protocol.[10] Let's begin.

## II. Crime Scene: Africans Were Poisoning Their Enslavers

In the 1700s, the African world—continental and diasporic—was experiencing one of the most intense periods of the *Maafa*, the "disaster" or "the great suffering of our people at the hands of Europeans."[11] One roaring furnace in the boiling-house of the

7. Porter, *supra* note 4.

8. *Cf.* Decolonialidade e Perspectiva Negra, *Desaprendendo Lições da Colonialidade: Escavando Saberes Subjugados e Epistemologias Marginalizadas* [Unlearning Coloniality Lessons: Excavating Subjugated Knowledges and Marginalized Epistemologies], YOUTUBE (Dec. 26, 2019), https://www.youtube.com/watch?v=zeFI9vTl8ZU [https://perma.cc/S6PS-7ED9] (broadcasting Oyèrónkẹ́ Oyěwùmí's remarks referencing an "epistemic rupture" with feminism, made on October 7, 2016).

9. *Id.* (referencing a "linguistic rupture"); *see also* Porter, *supra* note 4, at 283 n.161 ("African minds will not be truly liberated from Western hegemony until we are able to think and dream in the languages of our ancestors.").

10. Porter, *supra* note 4, at 321–22.

11. MARIMBA ANI, LET THE CIRCLE BE UNBROKEN: THE IMPLICATIONS OF AFRICAN SPIRITUALITY IN THE DIASPORA 12 (1980) (defining Kiswahili *Maafa* as "disaster"); *see also* MARIMBA ANI, YURUGU: AN AFRICAN-CENTERED CRITIQUE OF EUROPEAN CULTURAL THOUGHT AND BEHAVIOR xxi (1994) (defining *Maafa* as "the great suffering of our people at the hands of Europeans in the Western hemisphere"); Greg E. Kimathi Carr, *The African-Centered Philosophy of History: An Exploratory Essay on the Genealogy of Foundationalist Historical Thought and African Nationalist Identity Construction*, *in* CARRUTHERS, *supra* note 4, at 288 n.10 (defining *Maafa* as "the processes of human aggression visited by Europeans upon African people globally over the past half millennium" and attributing its popularization to Ani).

*Maafa* was the Province of Maryland, a primary center of enslavement which, along with Virginia, held over half of the enslaved African population in the United States in bondage at one point.[12]

The occupants of this place—Europeans with the nerve to claim the land already inhabited by Indigenous peoples, many of them Algonquin speakers, like the Piscataway, Sekohese, Nanticoke, and Accomack peoples[13]—were so devoted to atrocity that, in 1790, four out of every ten white families in Maryland were enslaving Africans.[14]

12. Richard C. Wade, *Foreword* to LETITIA WOODS BROWN, FREE NEGROES IN THE DISTRICT OF COLUMBIA, 1790-1846, at vi (1972) ("Indeed, Maryland and Virginia contained over half of the [enslaved African] population of the entire nation in the first census [in 1790]."); *see also* HOWARD FRENCH, BORN IN BLACKNESS: AFRICA, AFRICANS, AND THE MAKING OF THE MODERN WORLD, 1471 TO THE SECOND WORLD WAR 387 (2021) (describing Maryland and Virginia as "the heartland of American slavery during the eighteenth century"); CEDRIC J. ROBINSON, BLACK MOVEMENTS IN AMERICA 4 (1997) (explaining that Maryland was a principal slaveholding colony). While created borders define U.S. life and history and the contours that frame Law, it is important to step back and recognize that there is an absurdity to thinking within the bounds of the colony of Maryland when considering the African perspective. Africans were not Marylanders. They were people of their respective nations, peoples, and kin. Nevertheless, I have chosen to focus on Maryland for several reasons, not least of them owing to the fact that I have ancestry in the state extending back through the time of enslavement. I also feel compelled to explore the history of the place where I reside and honor those who were here by holding up their stories.

13. *See* NED BLACKHAWK, THE REDISCOVERY OF AMERICA: NATIVE PEOPLES AND THE UNMAKING OF U.S. HISTORY, at x (2023); ELIZABETH RULE, INDIGENOUS DC: NATIVE PEOPLES AND THE NATION'S CAPITAL 11 (2023); *see also The First Marylanders*, MD. OFFICE OF TOURISM, https://www.visitmaryland.org/article/first-marylanders [https://perma.cc/LQ4M-XWAY].

14. BRUCE LEVINE, HALF SLAVE AND HALF FREE: THE ROOTS OF THE CIVIL WAR 39 (Eric Foner ed., 2005).

However, African people,[15] enslaved and "free,"[16] on the coasts of the African continent,[17] aboard ships on the high seas,[18] and on

15. Throughout this piece, in line with the African-centered and pan-African work, I use the term "African" in the broadest sense to include both continental and diasporic African people. *See, e.g.*, NGŨGĨ WA THIONG'O, SOMETHING TORN AND NEW: AN AFRICAN RENAISSANCE 48, 52, 89 (2009). We must note that the notion of "African" identity is, at times, used in the modern, pan-African sense and, at other times, used as a term of scholarly convenience, as African people during the period up to the 1830s would not have identified themselves as "African." I use the term, as many scholars of Africana must, to reference a macro group in hindsight, and not to suggest members of this group would have seen themselves according to the term. *See* MICHAEL A. GOMEZ, EXCHANGING OUR COUNTRY MARKS: THE TRANSFORMATION OF AFRICAN IDENTITIES IN THE COLONIAL AND ANTEBELLUM SOUTH 5 (1998) (marking 1830 as the point when African American identity emerged rather than identity based on ethnicity); TOBY GREEN, A FISTFUL OF SHELLS: WEST AFRICA FROM THE RISE OF THE SLAVE TRADE TO THE AGE OF REVOLUTION 268 (2019) ("[I]n the seventeenth and eighteenth centuries . . . people did not see themselves as 'African' but rather as belonging to a specific lineage, kingdom and ritual community — just as people did not see themselves as 'Europeans' at the outset of this time . . . ."); FRENCH, *supra* note 12, at 256 ("[I]t is important to consider that in an era when few Africans had yet made return voyages to Europe, and almost none had any picture of the purposes to which Africans were being put in the New World, little synthetic or unified sense of African identity existed.").

16. I use "free" in scare quotes here because African people designated as "free" under colonial and later U.S. Law were not "free" in any real sense of the word; they could be kidnapped on a whim, they could be punished with enslavement, and they were prohibited from voting, using banks, and owning real estate. There were numerous Laws restricting their lives. JEFFREY R. BRACKETT, THE NEGRO IN MARYLAND: A STUDY OF THE INSTITUTION OF SLAVERY 175–91 (Herbert B. Adams ed., 1889). Ultimately, no African person in the Western Hemisphere was truly free from the *Maafa*, though many, regardless of the designation as "slave" or "free," used their agency to reject oppression and create a maximum sense of freedom. My emphasis on nominal freedom is meant to challenge the Legal status of "free" created by colonial and U.S. statutes.

17. *See, e.g.*, MD. GAZETTE, July 27, 1769, at 2, https://www.msa.maryland.gov/megafile/msa/speccol/sc4800/sc4872/001281/html/m1281-0843.html [https://perma.cc/Q2FY-TN5B] ("It is reported that the King of Brack, a powerful Chief on the Gold Coast, has commenced Hostilities against the Dutch, and taken one of their Factories . . . .").

18. Resistance to enslavement occurred on the continent and "captives on board ships crossing the Atlantic rebelled with regularity." Patrick Manning, *Slavery & Slave Trade in West Africa: 1450–1930*, *in* THEMES IN WEST AFRICA'S HISTORY 99, 109 (Emmanuel Kwaku Akyeampong ed., 2006). *See also* QUOBNA OTTOBAH CUGOANO, *Thoughts and Sentiments on the Evil and Wicked Traffic of the Slavery and Commerce of the Human Species, Humbly Submitted to the Inhabitants of Great-Britain* (1787), *reprinted in* THOUGHTS AND SENTIMENTS ON THE END OF SLAVERY 1 (Vincent Carretta ed., 1999). Cugoano explains that, while on the slave ship with his country-people, "death was more preferable than life, and a plan was concerted amongst us, that we might burn and blow up the ship, and to perish all together in the flames." *Id.* at 15. This plan was for the women and boys to blow up the ship, not the men, who "were chained and pent up in holes." *Id.* at 15. *See also* WALTER C. RUCKER, THE RIVER FLOWS ON: BLACK RESISTANCE, CULTURE, AND IDENTITY FORMATION IN EARLY AMERICA 35 (2006) ("[T]he Akan were viewed as prone to shipboard revolts . . . .").

land across the Western Hemisphere, were refusing to be terrorized, tortured, or imprisoned.[19] They were, instead, escaping.[20]

They were plotting revolts.[21] They were sabotaging equipment and destroying property.[22] They were fighting overseers and other Whites.[23] They were taking their own lives and the lives of loved

19. *See, e.g.*, Manning, *supra* note 18, at 110 ("The anti-slavery movement began the moment enslavement began, in the minds of those enslaved, and was revealed in acts of rebellion in the barracoons, on board ship [sic] and on slave plantations.").

20. *See, e.g.,* 2 LATHAN WINDLEY, RUNAWAY SLAVE ADVERTISEMENTS: A DOCUMENTARY HISTORY FROM THE 1730S TO 1790 (1983) (highlighting through Maryland runaway advertisements just how frequently Africans escaped enslavement); Interview by Claude Anderson with Elizabeth Sparks in Mathews, Virginia (Jan. 13, 1937), *published in* 16 GEORGE P. RAWICK, THE AMERICAN SLAVE: A COMPOSITE AUTOBIOGRAPHY, Virginia Narratives at 50, 53 (George P. Rawick ed., 1972) ("Plenty of slaves ran away.") (providing account from a woman formerly enslaved in Virginia); BRACKETT, *supra* note 16, at 89. I have chosen to use the language "escape" rather than "runaway" here. "Runaway" is from the standpoint of the plantation or enslaving estate—from the standpoint of the slaveholder. "Escape" centers the perspective of the enslaved person.

21. *See* 4 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO 35 (Helen Tunnicliff Catterall ed., 1936) ("Depositions of several Negroes in Prince Georges County relating to a most wicked and dangerous Conspiracy having been formed by them to destroy his Majestys [sic] Subjects within this Province, and to possess themselves of the whole Country . . . ."); *see also* BRACKETT, *supra* note 16, at 96 ("Insurrection wholly local and the work of a few negroes only, was not unknown in Maryland.").

22. *See, e.g.*, JOHN R. MCKIVIGAN & STANLEY HARROLD, ANTISLAVERY VIOLENCE: SECTIONAL, RACIAL, AND CULTURAL CONFLICT IN ANTEBELLUM AMERICA 4 (John R. McKivigan & Stanley Harrold eds., 1999); JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO, *supra* note 21, at 44 (concerning "*Negro Cesar* . . . setting fire to the Barn"). Arson was a very common as a form of resistance. Enslaved Africans were destroying "white property." *See, e.g.*, WILLIAM F. CHEEK, BLACK RESISTANCE BEFORE THE CIVIL WAR 91–94 (1970).

23. *See, e.g.*, Frederick Douglass, *Narrative of the Life of Frederick Douglass, an American Slave*, *in* FREDERICK DOUGLASS: AUTOBIOGRAPHIES 64–65 (1994) (detailing Douglass's epic fight with Covey, the overseer); ZORA NEALE HURSTON, BARRACOON: THE STORY OF THE LAST "BLACK CARGO" 59 (Deborah G. Plant ed., 2018) (detailing an episode when the overseer tried to whip an enslaved African woman, and the enslaved African men took the whip away from the overseer and whipped *him* with it); Frederick Douglass, *My Bondage and My Freedom*, *in* FREDERICK DOUGLASS: AUTOBIOGRAPHIES, *supra*, at 182 (detailing a physical fight between an enslaved woman named Nelly and the overseer) ("She was whipped—severely whipped; but she was not subdued, for she continued to denounce the overseer, and to call him every vile name. He had bruised her flesh, but had left her invincible spirit undaunted."); John B. Cade, *Out of the Mouths of Ex-Slaves*, 20 J. NEGRO HIST. 294, 315 (1935) (providing the account of Emma Gray, formerly enslaved in Morehouse Parish, Louisiana, who said: "I then snatched the whip and struck him [the overseer] on the head. This drew blood . . . After fifteen minutes of hard tussling, he let me go and never attempted to whip me again."); BRACKETT, *supra* note 16, at 139 n.1 (explaining that, in 1836, a white man "had . . . undertaken to chastise a black woman who was not his slave, and . . . she resisted and whipped him . . . ."); Interview with James V. Deane in Baltimore, Maryland (Sept. 1937), *published in*

ones as a way to break free from the nightmare they found themselves in.[24]

They were attacking and killing their enslavers.[25] And they were doing all of this *constantly*.[26]

Oh—and they were poisoning.[27]

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RAWICK, *supra* note 20, Maryland Narratives at 6, 7 (detailing an incident where a slave-owning White woman slapped an enslaved African woman and the enslaved African woman struck her back).

24. MCKIVIGAN & HARROLD, *supra* note 22, at 4 (referencing suicide and highlighting instances when "slave mothers . . . killed their babies to save them from a life of bondage.").

25. *See, e.g.*, JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO, *supra* note 21, at 19–20 (49 Md. Arch. 489, Oct. 1665) (detailing the trial of "Jacob, the Negro," who stabbed the woman who was his "owner," Mary Utye, in her arm twice, killing her); *id.* at 35 (28 Md. Arch. 257, Apr. 1742) ("Negroes Seamore, Cesar, Charles, Ben, Cooper, Mol and Marlborough on clear Evidence for the Murder of Jeremiah Pattison their Master . . . ."); *id.* at 39 (31 Md. Arch. 34, June 1754) ("Negro Cesar the Slave of Walter Dulany and Tom the Slave of Margaret Gaither for assaulting Duncan Robertson and Mary Suttor . . . in the Night . . . and . . . Carrying away . . . Sundry Effects . . . ."); *id.* at 42 (32 Md. Arch. 3, Apr. 1761) (detailing an instance when a "Negro Peter" murdered the wife and child of his enslaver); PHILIP D. MORGAN, SLAVE COUNTERPOINT: BLACK CULTURE IN THE EIGHTEENTH-CENTURY CHESAPEAKE & LOWCOUNTRY 329–30 (1998) ("An overseer, provoked by a slave woman's impertinent language, struck her; she retaliated by hitting the overseer so many times 'with fists and switches' that he died."); EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 34–36 (1974) (discussing multiple instances of overseers who were killed by enslaved Africans for treating enslaved Africans cruelly); *id.* at 34 (detailing a 1791 case in Virginia, in which an enslaved man named Moses was acquitted after killing his overseer, who was trying to kill Moses); T. STEPHEN WHITMAN, CHALLENGING SLAVERY IN THE CHESAPEAKE: BLACK AND WHITE RESISTANCE TO HUMAN BONDAGE, 1775–1865 15 (2007) (noting that six slave revolt plots were uncovered by enslavers in Virginia between 1709 and 1731); Interview with Rev. Silas Jackson, *published in* RAWICK, *supra* note 20, Maryland Narratives at 29, 32 ("In 1858 two white men were murdered near Warrenton on the road by colored people, it was never known whether by free people or slaves."); Interview with Richard Macks, *published in* RAWICK, *supra* note 20, Maryland Narratives at 51, 55 ("One time a slave ran away and was seen by a colored man, who was hunting, sitting on a log eating some food late in the night. He had a corn knife with him. When his master attempted to hit him with a whip, he retaliated with the knife, splitting the man's breast open, from which he died. The slave escaped and was never captured."); BRACKETT, *supra* note 16, at 131 (detailing how seven Africans enslaved in Maryland killed their enslaver).

26. *See, e.g.*, Interview with Richard Slaughter, *published in* RAWICK, *supra* note 20, Virginia Narratives at 49, ("Did slaves ever run away! Lord, yes. All the time."); FRENCH, *supra* note 12, at 338 ("Here and there in the Black Atlantic, smaller fires were almost constantly being lit.").

27. *See, e.g.*, PHILIP J. SCHWARZ, TWICE CONDEMNED: SLAVES AND THE CRIMINAL LAWS OF VIRGINIA, 1705-1865, at 94–95, 103, 113 (1988); *id.* at 95 ("Between 1740 and 1785, more enslaved Virginians stood trial for poisoning than for any other crime except stealing."); Diana Paton, *Witchcraft, Poison, Law, and Atlantic Slavery*, WM. & MARY Q. 235, 261 (2012); GENOVESE, *supra* note 25, at 616 ("Poison held a special place in the arsenal of slave weapons throughout the Americas."); Adriano Pedrosa,

Including in Maryland.

In 1737, Negro Preston attempted to poison Ezekiel Gillis and his wife in Anne Arundel County, Maryland.[28]

On March 20, 1738, "a certain Negro Pompey and Negro Indey[,] two slaves belonging to the hon[ora]ble George Plater[,] Esqr," conspired to poison "the Overseer[,] Clerk[,] and Gardiner of the said Mr[.] Plater."[29]

In May 1738, in Prince Georges County, "a certain Negro named Bess the Slave of a Certain John Beale . . . feloniously attempt[ed] to murder with poyson [sic] the af[orementione]d John Beale her Master . . . ."[30]

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Hélio Menezes, Lilia Moritz Schwarcz, & Tomás Toledo, *Emancipations*, *in* AFRO-ATLANTIC HISTORIES 82, 82 (Adriano Pedrosa & Tomás Toledo eds., 2021) ("Riots occurred during the long sea voyages, with captives rising up on board slave ships. This continued into the daily life of the slave quarters. From the 16th century onward, the Afro-Atlantic landscape witnessed uprisings, escapes, insurrections, the establishment of runaway communities, and the poisoning of plantation owners."); YVONNE CHIREAU, BLACK MAGIC: RELIGION AND THE AFRICAN AMERICAN CONJURING TRADITION 70 (2006) ("From the mid-1700s to the turn of the century, proceedings against poisoners constituted some of the most frequent actions taken against African Americans by local courts in South Carolina, Maryland, North Carolina, and Virginia."). *See generally* Chelsea L. Berry, Poisoned Relations: Medicine, Sorcery, and Poison Trials in the Contested Atlantic, 1680–1850 (2019) (Ph.D. dissertation, Georgetown University) (on file with Georgetown University Institutional Repository) (exploring over five hundred investigations and trials of alleged poisonings, centered on African medical practitioners, in slave societies); Paton, *supra*, at 251–52 (detailing John Newton's account of enslaved African men attempting to poison or tamper with the ship's water in order to spiritually harm their captors).

28. *The Upper House U.H.J.*, ARCHIVES OF MD. 219 (14 May 1739, at 12), https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000040/html/am40--219.html [https://perma.cc/9GWE-34FM]. Most of the cases listed in this article were collected in the foundational work of Helen Tunnicliff Catterall. *See, e.g.*, JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO, *supra* note 21. I was first introduced to these poisoning cases there, and I then consulted records in the Maryland State Archives, finding additional details. For ease of reading, and to emphasize the orientation-shift narrated in this piece, these incidents are described from the orientation of the colony, stated in a voice assuming that each person committed the crime. In the records, these enslaved Africans were convicted for the crimes listed. However, this does not necessarily mean that they in fact committed these acts. They were certainly capable of doing these acts, as is explored below, but considering the nature of the Legal system during colonial times (and today), wrongful convictions were likely.

29. *Proceedings of the Council of Maryland, 1738/9*, ARCHIVES OF MD. 161 (March 20, 1738, at 27), https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000028/html/am28--161.html [https://perma.cc/E4SL-4ZMV]; BRACKETT, *supra* note 16, at 131.

30. *Proceedings of the Council of Maryland, 1738*, ARCHIVES OF MD. 137, https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000028/html/am28--137.html [https://perma.cc/G3W9-B36C]; *see also* JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO, *supra* note 21, at 34.

In June 1755, convictions were entered for "Negro[] Anthony and Negro Jenny for Consulting, Conspiring & advising to Poison their late Master Jeremiah Chase . . . ."[31]

Also in June 1755, "Negro Jack . . . attempt[ed] to Poison his Master Francis Clements."[32]

Later that year, in St. Mary's County, "Negro Harry the Slave of Philip Key the younger & Negro Cork, the Slave of Philip Key Esqr [were sentenced to death] for feloniously consulting, advising, conspiring and Attempting to Poison a Certain John Key, and also at Prince Georges County . . . Negro Thomas the Slave of John Prather [was sentenced to death] for Feloniously consulting, advising, and conspiring & Attempting to Poison a Certain Richard Duckett . . . ."[33]

Yet another 1755 poisoning is recorded, wherein "another Negro wench was likewise found Guilty for intending to poison her Master, which fell in the Way of two Negro Children, who [consumed] it, and both died."[34]

In 1757, in Anne Arundel County, "Negro . . . [F]ida . . . attempt[ed] to poison" her enslaver, Ephraim Gover.[35]

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31. *Proceedings of the Council of Maryland, 1753–1761*, ARCHIVES OF MD. 56–57 (June 24, 1755, at 69), https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000031/html/am31--69.html [https://perma.cc/548Z-4T3H].

32. *Id.* Records note that Jack was executed "[a]t the same time, and on the same Gallows" as Anthony and Jenny, and a William Stratton (who was likely a European indentured servant). MD. GAZETTE, Jul. 10, 1755, at 3, https://www.msa.maryland.gov/megafile/msa/speccol/sc4800/sc4872/001279/html/m1279-0744.html [https://perma.cc/SFP2-A3F6].

33. *Proceedings of the Council of Maryland, 1753–1761*, ARCHIVES OF MD. 79 (Oct. 23, 1755), https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000031/html/am31--79.html [https://perma.cc/T32E-TGB8]; *see also* MD. GAZETTE, Oct. 9, 1755, at 3, https://www.msa.maryland.gov/megafile/msa/speccol/sc4800/sc4872/001279/html/m1279-0744.html [https://perma.cc/ET54-RP7H] ("Negro Harry, and Negro Cork, were indicted, found guilty, and condemn'd, for attempting to poison the late Dr. John Key, of that County, deceased.").

34. MD. GAZETTE, Jun. 26, 1755, at 3, https://www.msa.maryland.gov/megafile/msa/speccol/sc4800/sc4872/001279/html/m1279-0736.html [https://perma.cc/JC2R-G2AS].

35. *Proceedings of the Council of Maryland, 1753–1761*, ARCHIVES OF MD. 182, https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000031/html/am31--182.html [https://perma.cc/BJ7A-SAXP]; MD. GAZETTE, Mar. 10, 1757, at 3, https://www.msa.maryland.gov/megafile/msa/speccol/sc4800/sc4872/001279/html/m1279-1102.html [https://perma.cc/2PJ3-FPFB] ("This Day a Negro Wench named Fida, belonging to Ephraim Gover of Herring-Bay, was Tried at the County Court,

In May 1760, Bett Pone of Talbot County, Maryland, attempted to poison her overseer.[36] This record provides some additional detail: "Negro woman named Bett Pone . . . of her malice, propense, and forethought voluntarily and feloniously did consult[,] advise[,] conspire[,] and attempt with poison and poisonous, venomous, and virulent powder mixtures and other poisonous, venomous, and virulent ingredients and matter put and mixt in and with certain food and victuals to wit cream, milk, small homminy, boild bacon, and boild salades."[37] Bett Pone "attempted to kill, murder, and poison" a "planter" (enslaver) named David Robinson.[38] Robinson was Bett Pone's overseer.[39] Robinson "became sick and lanquished [sic]."[40] Interestingly, during the previous month another enslaved African named Buckinfield, also of Talbot County, attempted to poison this same David Robinson.[41]

In 1761, enslaved Africans Samuel, Abigail, and Rachel of Calvert County attempted to poison a Mrs. Smith.[42] They were executed, though one of the women's executions was postponed due

for attempting to Poison her Master and a Negro Man, found Guilty, and received Sentence of Death.").

36. *Talbot County Court, Criminal Record, 1755–1761*, ARCHIVES OF MD. (May 10, 1760, at fol. 374), https://msa.maryland.gov/megafile/msa/speccol/sc5400/sc5496/051600/051600/html/51600bio.html [https://perma.cc/N6FB-ZULF]. Bett Pone was "owned" by Henrietta Maria Goldsborough, an example demonstrating that white women owned property and were also enslavers. *Id.*

37. *Id.*

38. *Id.*

39. *Proceedings of the Council of Maryland, 1753–1761*, ARCHIVES OF MD. 423, 438, https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000031/html/am31--438.html [https://perma.cc/7R5B-TGRC].

40. *Talbot County Court, Criminal Record, 1755–1761*, ARCHIVES OF MD., *supra* note 36.

41. *Id.* Buckinfield was "owned" by Margarett Robins, yet another case indicating that white women could and did "own" enslaved Africans. *See id.*

42. *Proceedings of the Council of Maryland, 1761–1769*, ARCHIVES OF MD. 16 (at 312), https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000032/html/am32--15.html [https://perma.cc/DAR6-4WGZ].

to her pregnancy.[43] This delay was likely motivated by greed rather than humanitarianism.[44]

In 1764, "Negroes from Calvert County . . . Toe, Sambo, and Betty . . . attempt[ed] to poison Mr. [William Hamilton] Smith and his Wife."[45] Mr. Smith ultimately died after months of sickness.[46]

In 1766, Negro David from Talbot County attempted to poison his enslaver, Samuel Mulliken.[47] During his trial, an enslaved African woman testified about "his preparing a Dose Composed of Ground puppies and other ingredients which he supposed poisonous with intent to give it to his Master."[48] "Ground puppies" is a

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43. MD. GAZETTE, Oct. 15, 1761, at 3, https://www.msa.maryland.gov/megafile/msa/speccol/sc4800/sc4872/001280/html/m1280-0628.html [https://perma.cc/VS5K-TG2W] ("On Wednesday, last week, a Negro Man and Woman, were Executed in *Calvert* County, pursuant to their Sentence, for attempting to Poison the late *Mrs. Smith*. One other Wench is under sentence of Death for the same crime, but her Execution is respited on Account of her Pregnancy.").

44. Pregnancy would have offered enslavers a chance to benefit from the value of another enslaved human being. *See* BRACKETT, *supra* note 16, at 119 (explaining that enslavers were "loath to lose" the value of those they enslaved as a result of criminal execution).

45. *Proceedings of the Council of Maryland, 1761–1769*, ARCHIVES OF MD. 91, https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000032/html/am32--91.html [https://perma.cc/K4VB-QY8Y]; BRACKETT, *supra* note 16, at 132.

46.

> Calvert County, May 15, 1764. On Monday the 14th of this Instant, Died, Mr. William Hamilton Smith, in the 22nd Year of his Age; he had been Ten Months declining in his Health, and could get no Relief; it was suspected by all about him, that his Ailments were the Effect of Poison given to him by his own Negroes.

MD. GAZETTE, May 17, 1764, at 2, https://www.msa.maryland.gov/megafile/msa/speccol/sc4800/sc4872/001280/html/m1280-1197.html [https://perma.cc/8WN2-458Q].

47. *Proceedings of the Council of Maryland, 1761–1769*, ARCHIVES OF MD. 445 (Nov. 15, 1766, at 178), https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000032/html/am32--178.html [https://perma.cc/D2UU-AG4V]; Handwritten Record, ARCHIVES OF MD. (Dec. 24, 1766), https://msa.maryland.gov/megafile/msa/speccol/sc5400/sc5496/051500/051570/negro_david_commission_record_page_214.pdf [https://perma.cc/3WTF-2JXT]; *Biographical Series: David (b. ? – d. 1767)*, ARCHIVES OF MD., MSA SC 5496-51570, https://msa.maryland.gov/megafile/msa/speccol/sc5400/sc5496/051500/051570/html/51570bio.html [https://perma.cc/5D4Y-5PGK]; CHIREAU, *supra* note 27, at 73 (referring to a man named Nero who was convicted alongside David for poisoning his enslaver with "groundpuppies").

48. *Talbot County Court, Criminal Record, Negro David*, ARCHIVES OF MD. (Nov. Court 1766, at fol. 499–500), https://msa.maryland.gov/megafile/msa/speccol/sc5400/sc5496/051500/051570/negro_david_page_499_criminal_record.jpg [https://perma.cc/F4Z9-E9KM]; *Proceedings of the Council of Maryland, 1761-1769*, ARCHIVES OF MD. 32 (Nov. 15, 1766, at 178),

reference to dried salamanders.[49] The skin of salamanders, by the way, is poisonous.[50]

In 1769, enslaved African Pompey of Charles County ("owned" by an enslaver named Benjamin Davis) attempted to poison Leonard Burch.[51]

In 1797, decedent Robert Dunn's will stated that an enslaved African woman would be emancipated once all of his family members died; that enslaved African woman poisoned and killed Dunn's three children.[52]

These are the poisoning cases from the eighteenth century—the cases that we *know* about.[53] Even more arise later during the nineteenth century, beyond the scope of our investigation.[54]

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https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000032/html/am32--178.html [https://perma.cc/D2UU-AG4V]; *Biographical Series: David (b. ? – d. 1767)*, ARCHIVES OF MD., *supra* note 47.

49. 4 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO, *supra* note 21, at 46; CHIREAU, *supra* note 27, at 73 (explaining that "groundpuppies" were dried salamanders and "would be a staple in the ritual formulae of African American Conjurers in the post Emancipation era.").

50. Interview with Raychelle Burks, Assoc. Professor, Dep't of Chemistry, Am. Univ., in Washington, D.C. (Nov. 3, 2023); Tim Lüddecke, Stefan Schulz, Sebastian Steinfartz & Miguel Vences, *A Salamander's Toxic Arsenal: Review of Skin Poison Diversity and Function in True Salamanders, Genus* Salamandra, SCI. NATURE, Sept. 4, 2018, at 2–3.

51. *Proceedings of the Council of Maryland, 1769-1770*, ARCHIVES OF MD. 313 (Sept. 12, 1769, at 73),
https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000032/html/am32--313.html [https://perma.cc/FRJ6-GCMZ].

52. MD. GAZETTE, Apr. 27, 1797, at 2,
https://msa.maryland.gov/megafile/msa/speccol/sc4800/sc4872/001285/html/m1285-0492.html [https://perma.cc/52LF-HBP7].

53. Interview with Raychelle Burks, *supra* note 50. Dr. Burks highlighted the context of poison in the eighteenth century.

54. For example, there is the July 7, 1855, incident when 14-year-old Josephine Webb, enslaved in Caroline County, Maryland, attempted to poison her enslaver, Elizabeth Baynard, and poisoned Baynard's cousin, Mary Reid. *Biographical Series: Josephine Webb (b. 1841 – d. 1867)*, ARCHIVES OF MD., MSA SC 5496-002965 https://msa.maryland.gov/megafile/msa/speccol/sc5400/sc5496/002900/002965/html/02965bio.html [https://perma.cc/2K79-PAST]. Josephine served the coffee to the women; they both got sick, and Reid died. *Id.* The newspaper of the time stated, "Miss Reed had had occasion a few days previous to the occurrence to correct the girl for some misconduct, and report says that the girl at the time made a declaration that she would 'make a change there before long,' or words to that amount." *Distressing Homicide*, BALT. SUN, 18 Jul. 1855,
https://msa.maryland.gov/megafile/msa/speccol/sc5400/sc5496/002900/002965/images/webb_2.pdf [https://perma.cc/WQY5-FZPP]. While this was reported as involving "arsenic or some other poisonous substance," the newspaper also included a report that Josephine stated to the man who took her to jail that she mistakenly put "polk-root" (likely poke root) in the coffee. *Id.* Pokeweed—Phytolacco Americana—was

### *A. Motive, Means, and Opportunity*

American University Chemist Raychelle Burks explains that the eighteenth century was an era when a person "could absolutely poison someone and get away with it."[55] Poisonous substances were abundant in North America, and detection methods were not refined.[56] It is important to note that what Europeans in the Western Hemisphere called "poison" was not limited "to substances that provoke[d] purely pharmacological reactions"—rather, the term "poison" was applied more broadly to substances intended to harm.[57] I, too, am using this broad view because it just so happens to align with the expansive world-senses[58] Africans brought with them from home.

It is also important to note that "every poisoning is not meant to be homicidal"—poisoning could have been a means of achieving the broader notion of what Burks calls "chemical control," or poisoning with the goal of slowing people down, altering their consciousness as a means of distraction, or causing them to be less

used to treat illnesses like arthritis, mumps, and ulcers; however, "[a]ll parts of the pokeweed plant (leaves, *roots*, berries) are considered to be toxic." EDDIE L. BOYD & LESLIE A. SHIMP, AFRICAN AMERICAN HOME REMEDIES: A PRACTICAL GUIDE—WITH USAGE AND APPLICATION DATA 87 (2014) (emphasis added); *see also* HERBERT C. COVEY, AFRICAN AMERICAN SLAVE MEDICINE: HERBAL AND NON-HERBAL TREATMENTS 65, 106, 125 (2007). Despite this, it was used as food too: "The leaves and more tender shoots are frequently used for greens, by the negroes." WILLIAM ED GRIMÉ, ETHNO-BOTANY OF THE BLACK AMERICANS 160 (1979) (quoting PATRICK BROWNE, THE CIVIL AND NATURAL HISTORY OF JAMAICA (London, B. White & Son 1756)); *see also* COVEY, *supra*, at 106 (explaining that the toxicity of pokeweed is determined by the quantity ingested). Later, Josephine allegedly stated that she poisoned the coffee on purpose and used arsenic. *Distressing Homicide*, *supra*. Another nineteenth-century incident involved a 14-year-old enslaved woman named Judith, who, on November 6, 1834, admitted to poisoning and killing the two sons of Maryland enslaver and renowned physician and horticulturalist John Bayne. *Biographical Series: John H. Bayne (b. 1804 – d. 1870)*, ARCHIVES OF MD., MSA SC 5496-10538, https://msa.maryland.gov/megafile/msa/speccol/sc5400/sc5496/010500/010538/html/010538bio.html [https://perma.cc/UK6G-G7RC]. Judith reportedly also stated that she had earlier killed Bayne's infant daughter and had also tried to burn the estate house down. *Id.*

55. Interview with Raychelle Burks, *supra* note 50.

56. *Id.*

57. *See* Paton, *supra* note 27, at 243. European colonists were coming out of their own history and continental experience, which included witchcraft and high-profile poison plots in Europe. *Id.* at 239–40, 242.

58. Oyèrónkẹ́ Oyěwùmí uses the term "world-sense" in her discussion of African societies and cultures, critiquing "worldview" as a linguistic reflection of "the West's privileging of the visual." OYÈRÓNKẸ́ OYĚWÙMÍ, THE INVENTION OF WOMEN: MAKING AN AFRICAN SENSE OF WESTERN GENDER DISCOURSES 2–3 (1997).

violent.[59] If homicidal, the killing might not have been intended to be immediate; a poisoner might have had the purpose of slowly and subtly making someone sick over a long period of time.[60]

The prevalence of poisoning, often surprising to modern learners, was well-known during enslavement—by both Africans and Europeans.[61] And it is important here to remember that, while our investigation centers on Maryland, the African practice of taking lives through use of lethal substances was a hemispheric phenomenon, extending beyond the region, colony, country, and continent.[62]

## III. Allegations: "Violence," "Revenge," and the Legal Orientation

We know about these poisonings because they were prosecuted and memorialized in the colonial criminal record. Within a Legal framework, one would see these acts of poisoning as illegal acts—crimes, most saliently.[63]

In 1715, Maryland, a slave state, codified its system of enslavement.[64] Fourteen years later, in 1729, the colony proscribed certain conduct of enslaved Africans in its Act for the More Effectual Punishing of Negroes and Other Slaves; and for Taking Away the Benefit of Clergy from Certain Offenders.[65] This statute explained,

> Whereas several Petit-Treasons, and cruel and horrid Murders, have been lately committed by Negroes, which Cruelties they were instigated to commit with the like Inhumanity, because

59. Interview with Raychelle Burks, *supra* note 50; *see also* Berry, *supra* note 27, at 165 (referencing "taming" practices used by enslaved Africans to control enslavers' emotions and make them less violent).

60. Interview with Raychelle Burks, *supra* note 50; *see, e.g.*, MD. GAZETTE, May 17, 1764, *supra* note 46 ("Calvert County, May 15, 1764. On Monday the 14th of this Instant, Died, Mr. William Hamilton Smith, in the 22nd Year of his Age; he had been Ten Months declining in his Health, and could get no Relief; it was suspected by all about him, that his Ailments were the Effect of Poison given to him by his own Negroes.").

61. KELLEY FANTO DEETZ, BOUND TO THE FIRE: HOW VIRGINIA'S ENSLAVED COOKS HELPED INVENT AMERICAN CUISINE 95 (2017) ("[P]oisoning was a well-known tactic used by enslaved domestics to kill or harm their enslavers.").

62. *See, e.g.*, Paton, *supra* note 27, at 255 ("[A] lieutenant judge in the colony described Saint Domingue as 'swarming with slaves, so-called soothsayers and sorcerers who poison.'").

63. In the civil realm, poisoning may be considered tortious battery as well. *See* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 36 (2d ed. 2024). My focus in this article is poison as a crime.

64. William M. Wiecek, *That Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America*, WM. & MARY Q., April 1977, at 262, n.13.

65. Act for the More Effectual Punishing of Negroes and Other Slaves; and for Taking Away the Benefit of Clergy from Certain Offenders, Md. Laws (1729).

> they have no Sense of Shame, or Apprehension of future Rewards or Punishments: And that the Manner of executing Offenders, prescrib[e]d by the Laws of England, is not sufficient to deter a People from committing the greatest Cruelties, who only consider the Rigour and Severity of Punishment: be it therefore enacted . . . That when any Negro[], or other Slave, shall be convict [sic], by Confession, or Verdict of a Jury, of . . . Murder . . . it shall be made lawful for the Justices before whom such Conviction shall be, to give Judgment against such Negro[], or other Slave, to have the right Hand cut off, to be hang'd in the usual Manner, the Head severed from the Body, the Body divided into Four Quarters, and Head and Quarters set up in the most public[] Places of the County where such Fact was committed.[66]

Eight years after this, in 1737, the colony amended the statute to expressly specify poisoning (and conspiring to poison) as a crime and streamlined its method of punishment to simply "death":

> Whereas, the Laws in Force, for the Punishment of Slaves, are found insufficient, to prevent their committing very great Crimes and Disorders; and that a further Provision is necessary to keep them in proper Bounds and due order; And for a more speedy Method to bring them to Justice, than is prescribed by the Laws heretofore made . . . Be it therefore enacted . . . That if any Slave or Slaves shall at any Time as of the Publication of this Act, *consult, advise, or conspire* . . . to murder *or poison* any Person or Persons whatsoever . . . and be thereof convict, by Confession or Verdict, shall suffer *Death*, as in Cases of Felony, without Benefit of Clergy.[67]

Correspondingly, this is the same year our first poisoning incident (by "Negro Preston") is recorded.[68]

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66. *Id.*

67. A Supplementary Act to the Act Entitled an Act for the More Effectual Punishment of Negroes and Other Slaves and for Taking Away the Benefit of Clergy from Certain Offenders, Md. Laws (1737) (emphasis added). In 1751, the legislature added attempted poisoning to the list and enabled courts to convict an enslaved African based on their silence at trial. *See* Act for the More Effectual Punishment of Negroes and Other Slaves, and for Taking Away the Benefit of Clergy from Certain Offenders, Md. Laws (1751) ("Be it therefore Enacted, . . . that if any Slave or Slaves, shall at any Time consult, advise, conspire, *or attempt* . . . to Murder or Poison any Person or Persons whatsoever . . . and be thereof convict by Confession or Verdict, *or who shall of Malice stand Mute* . . . shall suffer Death . . . without Benefit of Clergy.") (emphasis added). These Maryland laws existed in a broader universe of similar statutes imposed by other enslaving colonies and polities, all of whom learned from one another the ways to try and control the threat of poison. A 1682 slave code of Saint Domingue (now Haiti), for instance, targeted poisoning by forbidding "superstitious ceremonies and assemblies," use of "makandals" or "magical packets," and "pretended magic." *See* Paton, *supra* note 27, at 255.

68. *The Upper House U.H.J.*, ARCHIVES OF MD. 219 (May 14, 1739, at 12), https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000040/html/am40--220.html [https://perma.cc/6BBE-YDAA].

In the consciousness of European inhabitants of the Maryland Colony, the poisonings at the center of our investigation violated these statutes. They were crimes. But how should we talk about these acts? Should we replicate the historic record and merely examine these acts as criminal? Should we applaud these as acts of resistance?

It, of course, depends on our orientation. The Legal orientation necessarily maintains that these acts are crimes, because it is a European-centered orientation that shuns violence against those at its center—Europeans—even when they are enslavers.

After all, violence is not tolerated in Law and in societies that value the rule of Law. Well . . . unless that violence is violence imposed by the state in the form of executions. Or is violence conducted through operation of war.[69] Or is violence deemed a reasonable use of force by state agents.[70] Or is violence, including deadly force, used against a person one "reasonably" believes to be breaking into one's home.[71] Or is violence used where the perpetrator has the non-violent opportunity to retreat and avoid an aggressor but also has a right to be in the place where they are.[72]

When we contemplate the place of violence in Law, we quickly see that there is no equality in the Legal narrative around violence. The medal of righteousness is not equally granted. For (continental and diasporic) African people,[73] *non*-violence is preferred (but see COINTELPRO).[74] Non-violence is good interior decoration, so long

69. Ponder, as an example, the American Revolutionary War.

70. *See, e.g.*, Verdict of Not Guilty, Minnesota v. Yanez, No. 62-CR-16-8110 (Minn. Dist. Jun. 16, 2017) MCRO [Minnesota Court Records Online] No. 127 (finding police officer Jeronimo Yanez not guilty of manslaughter in the fatal shooting of Philando Castile).

71. *See, e.g.*, Information, Missouri v. Lester, No. 23CY-CR00894-01 (Mo. Cir. Ct. Sept. 1, 2023) (charging Andrew Lester for the shooting of 16-year-old Ralph Yarl, who rang the doorbell and allegedly touched the door of a house where he thought his siblings were); *but see* MO. REV. STAT. § 563.031(2)(2) (2024) (codifying the Castle Doctrine, which allows deadly force if someone unlawfully enters a dwelling occupied by the defendant).

72. FLA. STAT. § 776.012 (2023) (Florida's "Stand Your Ground" statute).

73. Please note that I use the term "African" broadly, to reference both continental and diasporic African people, which includes "African descendants," "African Americans," and the like.

74. *See* ROBINSON, *supra* note 12, at 151–53. COINTELPRO was an FBI operation that targeted non-violent organizations like the Student Nonviolent Coordinating Committee, the Congress of Racial Equality, the Southern Christian Leadership Conference, the Mississippi Freedom Democratic Party, and the NAACP. *Id.*

as it does not disrupt the underlying architectural design of the Western Social Structure.[75]

But poisoning is violent. And it disrupted the social order of enslavement. Therefore, its characterization as a crime makes sense from the Legal orientation. Yet, the simple Legal narrative about poisoning and other African resistance acts as criminal acts that were criminally punished is an act of violence in and of itself. This is narrative violence that snuffs out African memory and harms the African psyche by rendering the catalyst for African resistance—the *original violence*—invisible.

What about the precedent violence that necessitated the poisoning? The violence inflicted by Europeans against the Africans they enslaved? Put simply, the "White violence" preceding the "Black violence"?

We claim to be against simply "violence." But we tend to ignore the White violence. By failing to mention this category of violence and casting a spotlight only on violence employed by African people, we imply that violence itself is exclusively the province of African people and that Europeans (including European Americans) do not do violence. As a result, European or White violence is allowed to hide, to evade scrutiny, to lie in wait. This is what Greg Carr would refer to as the "invisibility of Whiteness":

> If you say, "White," you have made it visible . . . and the power of Whiteness . . . lies in its invisibility. As long as you don't say it, the assumption is race is not operating, when the reality is the exact and utter opposite.[76]

Thus, if we reference the original European violence provoking other violent acts, we make Whiteness visible and thereby weaken its clandestine power in the narrative, and we help address the ongoing narrative violence against African people.

Relatedly, poisoning, as a type of African violence, is sometimes cast as "revenge,"[77] which is perhaps a more descriptive and comprehensive characterization than "crime," as it at least

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75. Carr defines "Social Structure" as "the social, economic, political and/or cultural environment that Africans found themselves living under during the period under study." Carr, *supra* note 3, at 14; *see also* NGŨGĨ WA THIONG'O, MOVING THE CENTER: THE STRUGGLE FOR CULTURAL FREEDOMS 43 (1993).

76. Karen Hunter Show, *In Class with Carr, Ep. 135: The Kanye Complex*, YOUTUBE (Oct. 8, 2022), https://youtu.be/10RGVT6kGI8?t=7540 [https://perma.cc/5BKV-RQGV] (2:05:00); *see also* Porter, *supra* note 4, at 275 (detailing Carr's teachings, inspired by Clyde Taylor, on the "invisibility of language" and Whiteness).

77. MORGAN, *supra* note 25, at 618 ("Thomas Anburey heard from Virginians about the 'remarkable' abilities of slaves to cause swift or slow deaths 'agreeable to their ideas of *revenge*.'") (emphasis added).

hints at the presence of the precedent violence and the initial aggressor. But the trouble with "revenge" is that it carries connotations of moral wrong, and vengeance is not seen as legitimate in Law. This may partially explain why imminence, necessity, and (the culturally-defined) "reasonableness" are often required for the privilege of self-defense to apply: "the modern doctrine of self-defense allows that otherwise criminal force can be justified so long as the actor *reasonably* believes its use *necessary* to protect against *imminent* and unlawful attack."[78]

How curious, though, are the delicate distinctions between impermissible vengeance and justified violence.[79] When we go to the movies, for example, and we watch characters escape kidnapping, torture, or abuse, even if they have to violently strike down their abuser to do so, we applaud and cheer. The hesitancy by some to express this same reaction with respect to African violence under the same or similar circumstances speaks to the dehumanization of African people in the Western-centered[80] narrative.

As I have stated before, "Characterization is a matter of orientation."[81] Considering this, there must be another way to characterize the violent acts of poisoning by enslaved Africans in Maryland and elsewhere. Let us move to the other side of the room, change our orientation, and view this crime scene from a different angle. Could it be that we have the victim and suspect confused? Perhaps the characterization of self-defense is promising . . . .

## IV. Dead-End Interrogation: The Legal Frame of Self-Defense Does Not Go Far Enough

The notion of revenge is a potential clue about the poisonings, hinting to a precedent violent act. It seems our suspects' acts might

78. Fritz Allhoff, *Self-Defense Without Imminence*, 56 AM. CRIM. L. REV. 1527, 1529 (2019) (emphasis added); *see* James Q. Whitman, *Between Self-Defense and Vengeance/Between Social Contract and Monopoly of Violence*, 29 TULSA L. REV. 901, 901–02 (2013). Significantly, but beyond the scope of this discussion, the privilege of self-defense is allowed only where the attack defended against is "unlawful"; in other words, there is no privilege to defend against lawful attacks—say, for example, various types of attacks by enslavers on those they enslaved.

79. Whitman, *supra* note 78.

80. Oyèrónkẹ́ Oyěwùmí explains that the term "Westocentric . . . reaches beyond 'Eurocentric' to include North America." OYĚWÙMÍ, *supra* note 58, at 18.

81. Porter, *supra* note 4, at 262. In a conversation about the present article, Fatou Kiné Camara offered a poignant example of the power of characterization when noting that, "[I]n the USA, when a person is sentenced to death and then killed, they say that the prisoner has been executed by lethal injection, not that the judge has poisoned him." Communication from Fatou Kiné Camara, Professor, Université Cheikh Anta Diop, Dakar, Senegal (Apr. 26, 2024).

be justified under Law as a type of tolerable violence: violence in defense of self. Once we make the initial aggressor and their violence visible, we may be able to exonerate our suspects while still operating in a Legal framework. Ultimately, however, I do not think we have nailed the case. While the self-defense frame is a key orientation shift, it does not shift far enough.

The self-defense argument, which attempts to recharacterize poisoning murders as justified acts, may take the following form:

*Captured, displaced, and enslaved Africans have a "defense" for their "crimes." The force (e.g., poisoning) used by African people resisting enslavers and other European oppressors was a reasonable use of force to deflect violence, minimize violence, avoid violence, and prevent further violence by proponents and agents of Whiteness in their repeated, ongoing, and unabating kidnapping, false imprisonment, assault, battery, coercion, duress, rape (of women, men, and children), intentional infliction of emotional distress, murder, terrorism, and genocide.*

This argument has been made in various ways.[82] And it seems compelling. One may defend oneself and others against violence.[83] Assuming we get over the Legal hurdles of the privilege (e.g., reasonableness, imminence, and necessity, to name a few),[84] self-defense provides an exonerating theory for those who used the deadly force of poisoning.[85]

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82. "[T]here is near universal agreement that slavery was oppressive and often led black people to acts of violent self-defense." MCKIVIGAN & HARROLD, *supra* note 22, at 4. Frederick Douglass made the self-defense argument in 1893 when referencing the Haitian Revolution:

> Much has been said of the savage and sanguinary character of the warfare waged by the Haitians against their masters and against the invaders sent from France by Bonaparte with the purpose to enslave them; but impartial history records the fact, that every act of blood and torture committed by the Haitians during the war was more than duplicated by the French.

Frederick Douglass, *Haiti Among the Foremost Civilized Nations of the Earth: An Address*, *in* FREDERICK DOUGLASS: SPEECHES & WRITINGS 690 (David W. Blight ed., 2022).

83. *See* Allhoff, *supra* note 78, at 1529.

84. There may be academic arguments about lack of imminence in the poisoning scenarios, and those arguments might be addressed with rebuttals similar to arguments involving "battered woman syndrome" or "battered spouse syndrome," given Africans in the 1800s were trying to survive in a hostile environment where they were under constant attack. *See id.* at 1538–41 (exploring "battered woman syndrome" and its relationship to the imminence requirement). These arguments do not get rid of the imminence requirement, but they seek to establish that it was "reasonable to believe that an attack is imminent." *Id.* at 1541. Allhoff urges emphasis on necessity, rather than imminence, and argues that the imminence requirement be abandoned altogether in self-defense frameworks. *See id.* at 1542.

85. *See id.* at 1529.

Indeed, even at the time of the "murders," self-defense—couched within a "natural rights" argument—could be a viable defense where an enslaved African killed their enslaver.[86] The evidentiary restrictions of slave codes were a formidable barrier here, though.[87] For example, in Maryland, as in most states, enslaved Africans could not testify against Whites, so they effectively could not defend themselves in cases like the ones we are investigating.[88]

In our current interpretation, applying a self-defense framework to the poisoning incidents provides a perhaps satisfying result, but that result is not worth subscribing to the rationale that gets us there. This is because the self-defense framework is still a Legal framework. At its core, it prioritizes a Western Way of thinking about Governance and silences and invalidates the African Way.[89]

Additionally, we cannot forget the ill-gotten ubiquity of Law.[90] African people—continental and diasporic—have been forcibly pushed to subscribe to Law as our sole frame of reference for Governance. Many have resisted that push,[91] but Law has held a tight chokehold on approaches to Governance worldwide. This does not make a Legal framework inherently wrong for everyone, but we

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86. GENOVESE, *supra* note 25, at 34. Genovese describes a 1791 case where an enslaved man named Moses killed his overseer. *Id.* Moses was acquitted based on an argument by counsel that referenced the natural right of self-preservation. *See* BROWN, *supra* note 12, at 51–54. An observer of the trial stated that "slaves were the subject of no law but that of nature." *Id.* at 53. The acquittal of Moses was not without controversy: another observer lamented,

> [I]f [slaves] are taught to believe that they have a right to defend themselves from the restraints which their situations have hitherto subjected them to, and even to kill the man who shall offer to controul [sic] them, I greatly fear, that the trial of Moses will be an era from whence to date the rise of many serious and awful consequences to the defenceless individuals to this country.

*Id.* at 54.

87. THOMAS D. MORRIS, SOUTHERN SLAVERY AND THE LAW, 1619 – 1860, at 229, 232, 234 (1996).

88. *Id.* African people could not testify in capital cases, except to confess to the crime. *Id.* at 234. They *could*, however, testify against other Africans. *See id.* at 238.

89. *See* CARRUTHERS, *supra* note 4, at v (using the phrase "the African Way" in its title for Part I: "The Challenge: Restoring the African Way"). I am analyzing at a macro scale, so I have maintained use of the singularized "Way" despite the awareness that, in the histories of both continents, there are countless ways of governing.

90. *Cf.* John Henrik Clarke, *Foreword* to JACOB H. CARRUTHERS, MDW NTR: DIVINE SPEECH; A HISTORIOGRAPHICAL REFLECTION OF AFRICAN DEEP THOUGHT FROM THE TIME OF PHARAOHS TO THE PRESENT, at xv (1995) ("The colonizing of history is equal to the crime of slavery, because one crime relates to the other.").

91. *See, e.g.*, SYLVIANE A. DIOUF, SLAVERY'S EXILES: THE STORY OF THE AMERICAN MAROONS 2 (2014) (discussing marronage and its project of autonomy).

must acknowledge that its vast adoption by continental and diasporic African subjects and thinkers was coerced.

Accordingly, part of bringing justice[92] is to pick up, dust off, embrace, and elevate that which we were forced to let go.[93] To restore "an African-centered perspective free from the shackles of Western paradigms."[94] This is critical, especially when the topic we are contemplating is African people themselves—and enslaved Africans at that. Using a Western frame to validate their actions paints over their own systems of thought with a broad, Western brush, as thinking in (Western) Legal terms would not be the default way of thinking for those who remembered their own systems of Governance in Africa. Against the twin coercive acts of enslavement and chaining the enslaved to the Western theoretical model, we restore balance by centering how African people themselves may have thought about their own actions and experience. So, let us take a close look at the self-defense framing of these poisonings and why it is a poor fit for our investigation, particularly after we have repositioned ourselves to view the crime scene from an African-centered perspective.

The self-defense frame is one of victimhood: imminent victimhood requires one to victimize another. Oddly, this mutual victimhood model creates two absurdities for our investigation. First, viewing Africans as victims obscures their agency and long memory. Second, in this Legal system, European victimhood is promoted over African victimhood. This spells a losing game for the Africans involved. I will discuss each problem in turn.

First, casting our poisonings as self-defense fails to fully contemplate African agency and promotes the view that the prominent identity of the poisoners was that of imminent victims. This connotation might apply in many instances, but it disregards the power of enslaved Africans who perceived their actions as being carried out with a sense of control and long memory about how the world should work and how wrongdoing should be addressed. In

92. A classical African way of saying "bringing justice" or "bringing truth" might be to say "doing Maat" or *jrt mAat*. *See* CARRUTHERS, *supra* note 90, at 163 (explaining the concept of "Maat" as "justice" and translating the ancient text "Nine Petitions of the Farmer Whose Speech Is Good") ("Speak Maat, Do Maat; Since it is important, it is great and it endures."); *see also* JAMES P. ALLEN, MIDDLE EGYPTIAN: AN INTRODUCTION TO THE LANGUAGE AND CULTURE OF HIEROGLYPHS 180, 147 (3d ed. 2014).

93. Clarke, *supra* note 90, at xi ("The task before the Africans both at home and abroad is to restore to their memory what slavery and colonialism made them forget.").

94. CARRUTHERS, *supra* note 4.

ignoring this form of power, the theory of self-defense also ignores the collective power of African cultural continuity; it does not readily contemplate the "deep well"[95] of precedent culture and Governance from which Africans would have drawn to frame their actions. What if these poisoners were not merely victims backed against a wall with no other option? What if they were also, or instead, agents acting according to their Protocol?

Chelsea Berry, who examined poison trials across the Western Hemisphere that occurred between 1680 and 1850, explains that "[w]hen we focus exclusively on poison as a 'weapon of the weak,' we are in danger of uncritically adopting the perspective of Europeans and missing the fuller and much more complex picture of how different people in the Atlantic world understood poison and poisoning cases."[96] This reflects Asa Hilliard's related point that "[p]eople of African descent in the United States can only be understood when *both* the African cultural and Western hemispheric political realities are taken into account together."[97]

The second problem with applying the self-defense frame and its dual victimhood model to enslaved Africans is that doing so automatically places the African "victim" in jeopardy of invalidation. Make no mistake: in the framework of self-defense, the defender is still the defendant—just perhaps a justified one. Self-defense is a *defense*. This means, even in a self-defense framework, it is the self-defender who bears the burden of justification; the defender is on trial and required to prove the privilege. This posture, while illuminating precedent violence, continues to center and primarily scrutinize the violence of the defender, implicitly centering the victimhood of the plaintiffs or the people the State views as the victims—here, the European enslavers. This is fitting: to this day U.S. Law does not place European and African victimhood on equal footing.[98]

Thus, using the self-defense frame is still Western-centered, European-centered, Law-centered. It does not contemplate the

95. JACOB H. CARRUTHERS, INTELLECTUAL WARFARE, at xv (1999) ("We must draw our ideas from the deep well of our heritage.").

96. Berry, *supra* note 27, at 23.

97. ASA G. HILLIARD, THE MAROON WITHIN US: SELECTED ESSAYS ON AFRICAN AMERICAN COMMUNITY SOCIALIZATION 7 (1995) (emphasis in original).

98. *See, e.g.*, *Race and Wrongful Convictions in the United States*, NAT'L REGISTRY OF EXONERATIONS 5 (Samuel R. Gross ed., 2022) ("Many studies in at least 15 states have shown that defendants who are charged with killing white victims, regardless of their own race, are more likely to be sentenced to death than those charged with killing Black victims."); *see also id.* at 3 ("Black murder defendants are not only more numerous than whites, they are also more likely to be innocent, especially if the victims were white.").

world-senses and Governance systems—the Protocol—of African peoples. African people in the Western Hemisphere are not merely "a color group"; they are a collection of cultural groups linked to nations and polities with distinctly African histories and cultures.[99] These people with memory would have thought about poison using minds informed by that memory.

The self-defense orientation might be useful when employed by a defense attorney, or someone cast in the role of savior, as it is a useful narrative for exoneration in the Legal system, a persuasive narrative to pull on the heartstrings of benevolent arbiters like judge and jury, who may empathize and may be eager to save Black "victims." But that narrative, with its strategic benefit of Legal exoneration and Legal justification, represents one characterization, not the rich diversity of experience of enslaved Africans. It is, thus, a flattening narrative. While perhaps a well-intentioned attempt to defend African actors, it is still imprisoned by (Western) Legal constructs.

Even assuming, for the sake of argument, that the concept of self-defense—a human being is justified in fighting a human attacker—is universal among human beings,[100] the ideas behind the concept are not necessarily *part of the Governance* of every human culture. As a Legal concept, the idea of self-defense and the conclusions we attach to that idea (e.g., that it is justified if proportional and necessary in response to imminent attack) come from the story of Law's development, which is a Western story.[101] The concept and the principles related to the concept arise out of the Western experience.[102]

Law uses a center that is not that of the people being examined. In other words, this orientation is not African-Centered: it does not prioritize the views and systems of thought of the people it characterizes; it does not characterize what people were doing in the way *they* would characterize it. It undermines the goal described

99. *See* HILLIARD, *supra* note 97, at 8. "Distinctly African" is used here as a macro description, particularly to highlight distinction from European histories and cultures.

100. When we begin to interrogate universality, we might further investigate whether there are examples in the human experience where culture nullifies the preservation of self.

101. *See* Nunn, *supra* note 6 at 324–25 ("Law, as understood in European-derived societies, is not universal. It is the creation of a particular set of historical and political realities and of a particular mind-set or world-view.")

102. *Cf.* OYĚWÙMÍ, *supra* note 58, at 18 ("The questions that inform research are developed in the West, and the operative theories and concepts are derived from Western experiences.").

by Ngũgĩ, which is to "understand[] all the voices coming from what is essentially a plurality of centres all over the world."[103]

And while we can never describe things the way enslaved Africans would have without being able to speak to the people themselves, in their native language, one thing we can do, as best we can, is "break the chain that links African ideas to European ideas and listen to the voice of the ancestors without European interpreters."[104] We know Africans had their own Governance systems that preceded, and therefore did not need or use, (European) Legal constructs. We therefore do not need to use Legal constructs in describing those Governance systems.

How do we chain-break in this investigation? We start by recognizing the Western-centered Governance (Legal) bias that permeates our theoretical landscape, and we proceed by marking every Legal theory, every Legal term of art, as inherently suspect, attempting to describe African Governance without using such terms, zooming out the lens, and studying the relevant Governance *on its own terms*, as best we can, in the time that we are in, using what language we have.[105]

So, then, with respect to our poisonings: are we even standing in a "crime scene"? Or is this the site of something else? If the poisoning "murders" were not justified in self-defense, do we return to the theory of vengeance—in other words, Africans taking the Law into their own hands?[106] But what if Africans weren't taking the Law into their own hands? What if their hands were already holding something: another system entirely? And they were acting within the framework of *that* system?

. . . Thereby revealing that our poisoner-suspects weren't actually victims . . .

They were executioners . . . .

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103. NGŨGĨ, *supra* note 75, at 11.

104. CARRUTHERS, *supra* note 90, at xviii.

105. *See* Carruthers, *supra* note 4, at 1 ("While we should avail ourselves of any methods that benefit our project, we should first seek African ways of thinking and searching before embracing foreign epistemes, which we may not need and which may in fact defeat the objectives of the project.").

106. Whitman, *supra* note 78, at 903 (referencing the notion of taking the law into one's own hands as connected to ideas about self-defense and revenge).

## V. A New Lead: Africana Legal Theory Reveals Poison as Protocol[107]

> Sir I freely and Chearfully acknowledge, that I am of the African race, and in that colour which is natural to them of the deepest dye (My father was brought here a S[lav]e from Africa) . . . .
>
> . . . . Sir, Suffer me to recall to your mind that time in which the Arms and tyranny of the British Crown were exerted with every powerful effort in order to reduce you to a State of Servitude . . . .
>
> . . . . Here Sir, was a time in which your tender feelings for your selves had engaged you thus to declare, you were then impressed with proper ideas of the great valuation of liberty, and the free possession of those blessings to which you were entitled by nature; but Sir how pitiable is it to reflect, that altho you were so fully convinced of the benevolence of the Father of mankind, and of his equal and impartial distribution of those rights and privileges which he had conferred upon them, that you should at the Same time counteract his mercies, in detaining by fraud and violence so numerous a part of my brethren under groaning captivity and cruel oppression, that you should at the Same time be found guilty of that most criminal act, which you professedly detested in others, with respect to yourselves . . . .
>
> – Benjamin Banneker, to Thomas Jefferson, Secretary of State, 1791[108]

African people—continental and diasporic—have historically been considered one of the "groups thought to lack a capacity for law."[109] We know that this is not true, but if we think in Legal terms, we may find ourselves searching for Legal concepts across Africana, which is nonsensical when we step back to realize that African people come from countless polities with their own systems of Governance existing for and arising out of the millennia

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107. The reader will notice from this point on that, as a thematic frame for this article, I am juxtaposing criminal investigation lingo with phrases evoking Protocol. This is intentionally ironic. Juxtaposing Legal concepts with Protocol concepts illustrates how one may feel in the beginning stages of shifting orientation. We are holding two worlds, two systems of thought. These systems can coexist and interact, so long as there is awareness and appreciation regarding what each of them truly means. This is the promise of Africana Legal Studies: the ability to deflate the inflated sense of Law and, *at the same time*, understand the vast expanse occupied by Protocol.

108. Letter from Benjamin Banneker to Thomas Jefferson (Aug. 19, 1791), *in* 22 THE PAPERS OF THOMAS JEFFERSON 49, 50–54 (Charles T. Cullen, Eugene R. Sheridan & Ruth W. Lester eds., 1986), *Founders Online*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Jefferson/01-22-02-0049 [https://perma.cc/7P3E-CRU3].

109. *See* MARK S. WEINER, BLACK TRIALS: CITIZENSHIP FROM THE BEGINNINGS OF SLAVERY TO THE END OF CASTE 10–11 (2004).

preceding European intrusion.[110] This is because Law, while presenting as an absolute and universal truth for all human cultural constituencies, is in fact one way of thinking about Governance, and it arises from the European historical experience and worldview.[111]

We must therefore deflate the false universalism of Law and restore and amplify knowledge about Protocol. This Protocol approach is what we will explore for the remainder of this investigation. It is our new lead.

When we enter the minds of enslaved African poisoners and make the pivotal shift from a Legal orientation to their Protocol orientation, we may consider the following statements:

- Poisoning was not revenge. It was justice.
- Poisoning was not self-defense. It was a remedy.
- The poisoners were not victims. They were executioners.
- Poisoning was not a crime. It was a punishment.
- Poisoning was not wrongdoing. It was a method of *addressing* wrongdoing.[112]

Again, "[c]haracterization is a matter of orientation."[113] These are not the *only* characterizations, and they are not necessarily exclusive.[114] But these orientation-shifting statements are made to emphasize, and to compel us to start from, a particular orientation: the Protocol orientation. From this orientation, our poisoners were rejecting the Law that told them they could not harm their enslavers.[115] And they were championing their vision of how things are done and how wrongdoing is addressed.

### *A. Unapologetically Pursuing the New Lead in the Face of the Powers That Be*

To understand fully any aspect of Afro-American life, one must

110. This is the dynamic of what I call the Qualified Law Orientation ("QLO"), which is the improper imposition of Western Legal constructs onto African Governance. For an extended discussion on the QLO, see Porter, *supra* note 4, at 273.

111. Law is not separate from culture; Law arises from culture. And "[c]ulture is a product of a people's history." NGŨGĨ, *supra* note 75, at 42; *see also* Nunn, *supra* note 6, at 323–27.

112. I present these as binary to amplify the point that there is an underappreciated orientation that requires our focus.

113. Porter, *supra* note 4, at 262.

114. *See, e.g.*, CHIREAU, *supra* note 27, at 71 ("Poisoners were viewed by many African Americans as arbiters of justice and, certainly, revenge.").

115. *See, e.g.*, An Act for the More Effectual Punishing of Negroes, and Other Slaves; and for Taking Away the Benefit of Clergy from Certain Offenders, Md. Laws (1737).

> realize that the black American is not without a cultural past . . . .
>
> – John Henrik Clarke[116]

To pursue this new lead, we will have to go to bat with the usual doubters, detractors, and objectors. Let us pause to consider our grounding theoretical principles as well as the classic arguments.

First, there is no one way to narrate history. As we ready ourselves to examine Protocol, you should know going in that positive characterizations of the African past, of Protocol, and of African resistance are sometimes, in turn, characterized as "romanticization."[117] Because this characterization comes up repeatedly, it must be addressed, repeatedly.

The fallacy of the "romanticization" characterization is that it assumes there is some objective manner of history-telling. There is not.[118] Instead, various narratives are created out of many cultures with their unique collective experiences and world-senses. In other words, we are all operating from different centers.[119] There is not, and there cannot be, a single narrative.

Thus, the old adage that "history is told by the victors" is misleading. *Mainstream* history is told by the victors. The

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116. John Henrik Clarke, *The Origin and Growth of Afro-American Literature*, *in* AFRICAN INTELLECTUAL HERITAGE: A BOOK OF SOURCES 218, 218 (Molefi Kete Asante & Abu S. Abarry eds., 1996).

117. *See, e.g.*, Sabelo J. Ndlovu-Gatsheni, *Inkosi Yinkosi Ngabantu: An Interrogation of Governance in Precolonial Africa—The Case of the Ndebele of Zimbabwe*, 20 S. AFR. HUMANS. 375, 375 (2008) ("[T]his article engages with the central issue of precolonial forms of governance in Africa with a view to countering those ahistorical perspectives that unduly blamed precolonial African traditions and cultures for bequeathing a politics of disorder on the post-colonial state, together with those that romanticise precolonial forms of governance as a golden age of pristine democracy and consensual politics."); Steve Kibble & Alex Vines, *Angola: New Hopes for Civil Society?*, 90 REV. AFR. POL. ECON. 537, 537 (2001) ("[I]t is important not to romanticise the attempts of Angolans to organise themselves for self-help, peace promotion and the like. Many organisations do not last, there are divisions amongst and between groups and a lack of government structures able or interested in dialogue."); PHIL CLARK, THE GACACA COURTS, POST-GENOCIDE JUSTICE AND RECONCILIATION IN RWANDA: JUSTICE WITHOUT LAWYERS 47 (2010) ("[T]he Rwandan government (and some commentators) wrongly romanticise gacaca as a form of time-honoured justice automatically acceptable to all Rwandans.").

118. *See* Carr, *supra* note 3, at 13 ("Historical narratives make necessary decisions on what events to include based on the social, economic, political and/or cultural priorities of the author."); NGŨGĨ, *supra* note 75, at 9.

119. *See* NGŨGĨ, *supra* note 75, at 9. Because the narratives we create are not fully compatible with one another, there cannot be a just or accurate singular narrative. Despite attempts to create one, such a narrative is doomed to flatten and gloss over the stories and interests of many constituents. Lawyers and investigators in particular should know this well, working as they do with witnesses and their various perspectives on truth.

dominant, overrepresented history is told by the victors. But there is more than one history.[120] The victors have their history. Everyone else has theirs.[121] Just because you have not heard the other histories does not mean no one is telling them.

We must remember that there are, in fact, multiple narratives. And the various narrators have various perspectives, world-senses, and experiences.[122] As invisible as the Western center is made in Western narratives, *all* narratives have their centers, and all narratives must make choices about what goes in, what stays out, what deserves emphasis, and what is relegated to a footnote.[123]

African people have always been telling our own stories.[124] The problem is that, currently, as well as for the last 500 years, we African people have been living in a Social Structure defined by Western power.[125] There is a power imbalance, and that power dynamic comes as a result of historical atrocity. This is a situation in which the party with ill-gotten power defines history-telling by romanticizing its own role in history while pathologizing Africa and its people—continental and diasporic.[126]

For generations in Western thought, discourse, and education, the assertion that Africa has no history has prevailed and influenced various actions and enabled various atrocities.[127] Many European narrators promoted the myth that Africans did not have indigenous Governance and that they did not have the capacity to create Governance systems.[128] As Howard French stated, "Western

120. *See* Greg E. Carr, *Towards an Intellectual History of Africana Studies: Genealogy and Normative Theory* (2006), *in* THE AFRICAN AMERICAN STUDIES READER 438, 440 (Nathaniel Norment, Jr. ed., 2007) (noting "distinct African and European systems of communal meaning-making").

121. *See* Carr, *supra* note 3, at 13. Carr poses the question, "How do [the people being studied] view themselves, their origins and their world in any given time and place?" *Id.* Simply asking this question reveals that there are always two macro-orientations for studying African people: the orientation of the non-African narrator, and the orientation of African people.

122. *Id.*

123. *Id.*

124. *See* Carr, *supra* note 120, at 443.

125. *See* Carr, *supra* note 3, at 14–15.

126. *See* NGŨGI, *supra* note 75, at 42–43; CHEIKH ANTA DIOP, THE AFRICAN ORIGIN OF CIVILIZATION: MYTH OR REALITY xiv (Mercer Cook ed. & trans., Lawrence Hill & Co. 1974) (1967) ("Our investigations have convinced us that the West has not been calm enough and objective enough to teach us [Africans] our history correctly, without crude falsifications.").

127. BASIL DAVIDSON, THE BLACK MAN'S BURDEN: AFRICA AND THE CURSE OF THE NATION-STATE 52 (1992) (noting the use of the "Africa-has-no-history assertion" to justify colonization and territorial dispossession).

128. *See id.* at 12 ("Because, according to the British, there were no African models, these states would have to be built on European models.").

culture has labored long and hard to perpetuate ideas of precolonial Africa as a space of unadulterated primitivism and lack of human capacity for advancement."[129] This has led to the dismissal of indigenous African systems of Governance (Protocol) as mere "prepolitical" "folk beliefs."[130]

It is in this foggy atmosphere that we must fly. Shining the light on Africa, and a bright light at that, is how we must propel ourselves through the muck of distorted discourse. In this circumstance, I take the tact of Chancellor Williams, who explained that we African people who are "under perpetual siege and fighting an almost invisible war for survival" cannot afford to tell history in an "objective" manner, in a manner lacking characterization.[131]

What is "objectivity" here? Limiting Africana-positive statements and opinions in scholarship? Such a posture would deliberately disregard the reality on the ground, where Africana-negative, pathological discourse runs amok. Such intellectual recklessness would only usher along the abysmal status quo.

It is grossly negligent to ignore the difference in situation between scholarship on European and European-derived subjects and scholarship on Africana.[132] If we have any chance of climbing out of the hole that has been dug for us and reaching net-positive, we must tell history from an African center, with no apology, highlighting our past strengths, analyzing our past weaknesses,

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129. FRENCH, *supra* note 12, at 70.

130. *See* MCKIVIGAN & HARROLD, *supra* note 22, at 5. Such a designation is both dismissive and fallacious, as it assumes Africans to be on a track of development built by the West, when, in fact, all human constituencies developed their *own* pathways and ways of contemplating and sensing the universe. As scholars like Oyěwùmí have noted, Africa was not and is not "the West waiting to happen." OYĚWÙMÍ, *supra* note 58, at 21; *see* NGŨGI, *supra* note 75, at 26 ("The problem arises from the tendency to see the local and the universal in mechanical opposition; and the relativity of cultures in a temporal ground of equality almost as if cultures within a nation and between nations have developed on parallel bars towards parallel ends that never meet, or if they meet, they do so in infinity."). Enslaved Africans did not come from nations that were a preformed or deformed version of the West. They came from fully formed, uniquely African societies. Their beliefs were not in some lesser category of "folk" knowledge.

131. CHANCELLOR WILLIAMS, THE DESTRUCTION OF BLACK CIVILIZATION: GREAT ISSUES OF A RACE FROM 4500 B.C. TO 2000 A.D. 22 (1987).

132. *Cf.* U.N. Comm. on the Elimination of Racial Discrimination, General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention of the Elimination of All Forms of Racial Discrimination, ¶ 8, U.N. Doc. CERD/C/GC/32 (Sept. 24, 2009) ("To treat in an equal manner persons or groups whose situations are objectively different will constitute discrimination in effect, as will the unequal treatment of persons whose situations are objectively the same.").

and using lessons learned "for the express purpose of determining *what to do now*."[133]

As I have noted, merely bringing Africa into focus, and daring to have a positive tone whilst doing so, is *not* misleading or intellectually dishonest, as the "romanticization" characterization insidiously suggests.[134] Rather, it is a manner in which a narrator with an African center describes the world, a manner that presupposes the beauty, value, and worth of Africana. To remedy centuries of demonization and marauding of Africana, to fill the void of ignorance, to restore balance to the global African community, it is necessary to create, amplify, and encourage audacious African-centered narratives that staunchly refuse to engage in pathology and dare not apologize for emphasizing the good. It is okay—necessary—to do *sankofa*, to "tak[e] the *best* of the past to build a better future."[135]

As part of this larger project, we must investigate, study, and elevate Protocol—the uniquely African concepts of Governance. We must learn how Protocol evolved, adapted, borrowed, innovated, and persisted across space and time. And we must ask what Protocol might have been had it developed, unencumbered by the *Maafa*, according to African Ways of Knowing[136] and world-senses. This imagining tells us what might be, today and in the future.[137]

### *B. Modus Operandi: Akan Protocol and Poison*

> Slaves were humans, but they were also Africans from specific cultural and sociopolitical contexts. The types of resistive behavior Africans and African Americans engaged in were largely shaped by their African past.
>
> – Walter C. Rucker, *The River Flows On*[138]

To observe Protocol in the Western Hemisphere, we first need some understanding of Protocol on the African Continent.[139]

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133. WILLIAMS, *supra* note 131, at 22 (emphasis in original).

134. Porter, *supra* note 4, at 261–64.

135. Kwadwo Appiagyei-Atua, *Contribution of Akan Philosophy to the Conceptualisation of African Notions of Human Rights*, 33 COMPAR. & INT'L L.J. S. AFR. 165, 171 (2000) (emphasis added). "*Se wo were fi na wo san kofa a yenkyi*," or "It is not a taboo to learn from the past," is an Akan proverb suggesting that the past is a useful source of knowledge and guidance for the future. *Id.* at 168.

136. Carr, *supra* note 3, at 15. Carr defines "Ways of Knowing" as "systems of thought" that "African peoples develop[ed] to explain their existence." *Id.*

137. Porter, *supra* note 4, at 318–20 (emphasizing the importance of imagining).

138. RUCKER, *supra* note 18, at 4.

139. *See, e.g.*, NORA WITTMANN, SLAVERY REPARATIONS TIME IS NOW: EXPOSING LIES, CLAIMING JUSTICE FOR GLOBAL SURVIVAL 448 (2012) ("It is therefore vital to

Without this requisite knowledge, we cannot identify or recognize the Protocol as it existed during the *Maafa*. Marimba Ani instructed, "Not knowing ourselves, we have not known how to recognize manifestations of our heritage."[140] As one might say in a Legal context, we cannot pick out the relevant facts—we cannot "issue spot"—if we do not know the relevant rules.

What were African people doing *before we were so rudely interrupted*? It is essential that we explore this question in order to understand the actions and thoughts of Africans during the continuing disaster.

i. The Akan Speakers

There is complexity as to African ethnicities in the Western Hemisphere. Some ethnolinguistic distinctions were not existent in pre-*Maafa* Africa and were essentially created by European traders and enslavers yet taken on as identity by enslaved Africans. As investigators, we will acknowledge and work through the complexity rather than throw up our hands and dismiss African groupings in the story of enslavement.[141]

The site of our investigation is Maryland, and scholars have traced certain African ethnic identities to Maryland and the Chesapeake region.[142] These identities include a group of African people collectively referred to as "the Akan" or "Akan speakers."[143]

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un-earth and re-assess pre-Maafa African political systems and ways of organizing society through pertinent research to add to what we already know from great ancestor researchers such as Cheick [sic] Anta Diop.").

140. ANI, *supra* note 11, at 2.

141. RUCKER, *supra* note 18, at 8 ("Completely dismissing these identities, no matter how problematic they may be, would be another step toward the denial of African or African American agency.").

142. *See* GWENDOLYN MIDLO HALL, SLAVERY AND AFRICAN ETHNICITIES IN THE AMERICAS 110–11 (2005).

143. The terms "Akan" and "Akan speakers" are, however, inexact, for reasons thoroughly explained by Walter C. Rucker. WALTER C. RUCKER, GOLD COAST DIASPORAS: IDENTITY, CULTURE, AND POWER 1–17 (2015). Rucker uses the term "Coromantee" to reference Africans in the Western Hemisphere whose identities were associated with peoples of the Gold Coast, including peoples who spoke languages other than Akan—such as Ga, Adanme, and Ewe. *Id.* at 6–7. He warns against hyperfocus on Akan speakers or the Asante empire and advocates for this more expansive reference. *Id.* at 26; *see also* THE AKAN PEOPLE: A DOCUMENTARY HISTORY 14 (Kwasi Konadu ed., 2016) (critiquing "Asante-centric preoccupation"). Rucker also advises that the contours of Akan culture are complex, and it is error to think of the culture as "genetic, homogeneous, [or] timeless." RUCKER, *supra*, at 238 n.2. Additionally, isolating Akan speakers is somewhat fictive, as many Africans were multilingual when on the Continent and experienced cultural exchange. *See* Berry, *supra* note 27, at 52. Considering this important discussion, for the sake of

The Akan speaking peoples are from the "Gold Coast" of West Africa.[144] Akan speakers are in two subgroups: Twi (in the area that is now Ghana) and Baule (in the area that is now eastern Côte d'Ivoire).[145] Barima Kodwo Eduadwa IV explains, "The Akans are, all the Twi-speaking people of Ashanti [Asante], Akuapim, Brong-Ahafo, Akim, Wassaw, Sefwi, Denkyira, Kwahu and the Fantes along the coastal belt."[146]

As the *Maafa* began, it was Akan speakers who were at the center of gold production that launched the Western world into "modernity."[147] Around 1690—after the *Maafa* had begun—Akan Protocol included unification of polities into the Asante nation and the authority under the *Sika Dwa* (golden stool), a symbol of divine ancestral unity, authority, and power.[148] In the 1700s, Akan was widely spoken in the Gold Coast region, and "between 1700 and 1765 most of the Gold Coast Africans sucked into transatlantic

this investigation, we are zooming in our lens with attention to the concept of Akan speakers, as elusive as it might be, as the unit of analysis here. This choice is made in large part due to preference for an African-oriented term (the Akan) and a need in this particular interrogation to focus on the Governance structures of a narrower group in the pre-*Maafa* context. It must be acknowledged, however, that the question of identity is an important one that we are continuing to collectively understand.

144. *See* GOMEZ, *supra* note 15, at 65; Frederick Knight, *Sankofa: Slaves from the Gold Coast and the Evolution of Black Culture in North America*, 10 TRANSACTIONS HIST. SOC'Y GHANA, NEW SERIES 183, 184 (2006–2007) ("The Gold Coast, a term coined during the years of European commercial expansion onto the West African littoral because of the region's mineral, runs from the Tano to the Volta Rivers."); HALL, *supra* note 142, at 101 ("In Lower Guinea, the European maritime traders named African coasts for the major products they purchased there.").

145. GOMEZ, *supra* note 15, at 105; HALL, *supra* note 142, at 107 ("Akan languages, mainly Twi, predominated in the Gold Coast and spilled over into the Ivory Coast to the west and into the Slave Coast to the east.").

146. Barima Kodwo Eduakwa IV, *Preface* to NANA AKUA KYEREWAA OPOKUWAA, AKAN PROTOCOL: REMEMBERING THE TRADITIONS OF OUR ANCESTORS 8 (1997). They include various linguistic groups such as the Asante, Fante, Akyem, Bron, Kwahu, Akwamu, and many others. GOMEZ, *supra* note 15, at 105; RUCKER, *supra* note 143, at 75. "What distinguishes one group from the other is their dialect, otherwise they speak the same language and their customary practices are not different from each other." Eduakwa, *supra*; *see also* J.E. CASELY HAYFORD, GOLD COAST NATIVE INSTITUTIONS: WITH THOUGHTS UPON A HEALTHY IMPERIAL POLICY FOR THE GOLD COAST AND ASHANTI, at x (1903) ("[B]oth the Fantis and the Ashantis come from the same stock, and may be regarded as cousins, if not brothers, the difference in character arising merely from their respective local environments.").

147. *See* GREEN, *supra* note 15, at 37.

148. DAVIDSON, *supra* note 127, at 53–56. Note that the "Asante Empire was founded in 1695 at Kumasi by Akan peoples uniting under a banner of militarized expansion—the name 'Asante' deriving from the Twi for 'war,' *esah*, and *esantefor*, meaning 'because of war.'" GREEN, *supra* note 15, at 297.

slave trading vortices knew Akan as a primary, secondary, or tertiary language."[149]

ii. Akan Protocol and Ways of Knowing

> Before even the British came into relations with our people, we were a developed people, having our own institutions, having our own ideas of government.
>
> – J.E. Casely Hayford, 1922, *quoted by* Walter Rodney[150]

The Akan had Protocol—what Western-centered scholars might call "Law."[151] Searching for Protocol is not easy. At any given time, Protocol is evolving and adapting. It is difficult to understand its state at a certain point, as with Law or any other subject we are seeking to understand across time and space. And, as with other subject matter, there are general overarching characteristics and features that change more slowly and that hold continuing relevance in the story. As African-centered investigators, we cannot be deterred by the resulting difficulty created by the attack on and concealment of our history. We must do our best to piece the stories together and push one another along, collectively, to restore meaningful and usable knowledge.

Akan had their Protocol, as J.E. Casely Hayford explained in 1903: "I have endeavoured to show that, on the Gold Coast, you are not dealing with a savage people without a past, who are merely striving to copy or imitate foreign Institutions."[152] Rather, the continental Akan had their own institutions, "which we

149. RUCKER, *supra* note 143, at 22; *see also id.* at 27 (noting Akan's prevalence in geographic scope and speakership even before 1700). Akan was "the major language on the Gold Coast." HALL, *supra* note 142, at 101.

150. WALTER RODNEY, HOW EUROPE UNDERDEVELOPED AFRICA 33 (1982).

151. *See* DAVIDSON, *supra* note 127, at 76 (referencing the nation-state-like attributes of the Asante, who became a unified polity during the *Maafa*). That Africans had their own Governance systems before the *Maafa* is a fact that should not need to be stated or proven. However, in Western discourse, as it was with colonial U.S. law, the burden is on the black. *See* Wiecek, *supra* note 64, at 263. The idea that "the burden is on the black" is an old one that used to be expressly enshrined in law. *Id.* In South Carolina (1740) and Georgia (1755) this notion was established in freedom suits. *Id.* It was presumed that a black person was a slave unless they could prove their "free" status. *Id.* This became part of common law of southern states after "Independence." *Id.* The notion that the burden is on the black is still in effect today in various respects. I will leave it to the reader to ponder just how. As for the burden of proving that Africans had their own Governance systems, that burden should not exist. The burden should be on those who take the nonsensical position—those who doubt that human beings with society possessed Governance. *See* CARRUTHERS, *supra* note 90, at 13 (discussing the absurdity of placing "the burden of proof on those who argue the obvious").

152. CASELY HAYFORD, *supra* note 146, at 128.

understand, and which from experience [we]re adapted to us."[153] Akan speakers likely used systems of Protocol that were consistent among Akan-speaking nations.[154] This Protocol was organized and governed polities with a variety of interacting institutions.[155]

An important threshold issue in our examination of Akan Protocol is understanding its place in the cultural logic.[156] In considering what comprises the body of any Protocol, the question may arise: how can we know that the subject matter being studied (e.g., poison) is *part of* or connected to Protocol? What does Protocol touch? What touches Protocol?

The answer depends on the cultural logic in which we are operating. In the cultural logic, does Governance touch only some things rather than touching everything? Does Governance occupy a discrete area of life, with a degree of separateness from other areas? Today, in the West, because of the West's history and culture, some conceptualize Law as occupying a discrete space in Western cultural logic, for example, a space separate from religion.[157] But in another cultural logic, perhaps Governance includes religion.

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153. *Id.* at 127–28.

154. *Id.* at 21 ("In the Gold Coast proper we have . . . the native states of Fanti, Ahanta, Insima, Ga, Wassa, and others*, having more or less the same laws and customs*, and speaking generally the same language, or dialects of the same language.") (emphasis added).

155. John Mensah Sarbah commented in 1903 that "when, in 1481, Portuguese navigators and other European trading adventurers first appeared on the Gold Coast, they found an organized society having kings, rulers, institutions, and a system of customary laws, most of which remain to this day." *Advertisement to the Second Edition* of JOHN MENSAH SARBAH, FANTI CUSTOMARY LAWS: A BRIEF INTRODUCTION TO THE PRINCIPLES OF THE NATIVE LAWS AND CUSTOMS OF THE FANTI AND AKAN DISTRICTS OF THE GOLD COAST (Alpha Editions 2020) (1904); *see also* DAVIDSON, *supra* note 127, at 52–63 (describing the "Asante polity"). While Sarbah is theorizing in his time, and therefore using the framework of customary law (what Africana Legal Studies theory would reference as the Qualified Law Orientation or "QLO"), his point can be taken to suggest a complex Akan Protocol, that is, an Akan system of governance.

156. Oyèrónkẹ́ Oyěwùmí uses the term "cultural logic" in her discussion of African cultures and world-senses. OYĚWÙMÍ, *supra* note 58.

157. For a great discussion on Law as a discrete category of culture, *see* FERNANDA G. NICOLA & GÜNTER FRANKENBERG, COMPARATIVE LAW: INTRODUCTION TO A CRITICAL PRACTICE § 9.2.3 (forthcoming 2024); *see also* Seth Tweneboah, *Religion, Law, and Politics in Ghana:* Duabɔ *(Imprecation) as Spiritual Justice in the Public Sphere*, 14 AFR. J. LEGAL STUD. 209, 215 (2021) (contrasting Akan imaginings of governance with, for example, Austinian notions of law); *cf.* ANI, *supra* note 11, at 6 (relating the same point with respect to science and religion). The U.S. Constitution's First Amendment prohibits Congress from making laws "respecting an establishment of religion," reflecting the European historical experience in which multiple religions, or religious approaches, were in conflict with one another. U.S. CONST., Am. I.

The key to understanding Protocol's space in African cultural logics lies in the notion of "Ways of Knowing," a category from Carr's Africana Studies Framework that pushes beyond sharply-defined concepts of religion, spirituality, philosophy, and worldview to encompass, more broadly, Africans' "ideas about themselves, the world and the universe."[158] Using this term helps us navigate various African cultural logics to consider the place of Protocol.

Perhaps the cultural logic under investigation does not *include* Ways of Knowing. Perhaps, instead, Ways of Knowing permeates all aspects of the cultural logic.[159] It is commonly understood that the cultural logics of many African peoples follow this Permeative Principle.[160] Therefore, Ways of Knowing becomes the medium in which the cultural logic lives and operates. Ways of Knowing is the water in which the cultural structure is submerged. Accordingly, when Permeative Principle applies, Ways of Knowing informs everything, it is the conduit to everything—we must travel through it to reach any aspect of culture, including Protocol, including poisoning.

Permeative Principle exists in the Akan cultural logic.[161] Nana Akua Kyerewaa Opokuwaa attested to this: "Akan culture and spirituality are one. There is no way to separate an Akan from the

158. Carr, *supra* note 3, at 15. Carruthers might call this same idea "African Deep Thought." CARRUTHERS, *supra* note 90, at 15 ("I substitute the term African Deep Thought for African and Black philosophy.").

159. Note that I sometimes use "Ways of Knowing" as a singular noun, especially when I use it to refer to the singular category in Carr's Africana Studies Framework.

160. *See, e.g.*, STERLING STUCKEY, SLAVE CULTURE: NATIONALIST THEORY AND THE FOUNDATIONS OF BLACK AMERICA 96 (25th ann. ed., 2013) ("Religion encompassed more for [enslaved Africans] than for whites, rendering irrelevant the distinction between the sacred and the secular—a false dichotomy to a people for whom emotional fervor and dance were integral to religious expression."); *see also* Tweneboah, *supra* note 157, at 210 (suggesting that religion-as-law—or what I would call Ways-of-Knowing-as-Protocol—is alive and well in contemporary Africa). For more on Permeative Principle, *see* Porter, *supra* note 4, at 299. If we are to take heed of Ida B. Wells's observation that "[t]he white man's dollar is his god," we might surmise that Western culture has its own permeative principle, with money serving the role of religion. *See Southern Horrors: Lynch Law in All Its Phases*, *in* IDA B. WELLS, THE LIGHT OF TRUTH: WRITINGS OF AN ANTI-LYNCHING CRUSADER 57, 78 (Mia Bay & Henry Louis Gates, Jr. eds., 2014). This is why, often, with respect to Western societies, we can "follow the money" to make connections between seemingly unrelated components of the Western cultural logic.

161. CASELY HAYFORD, *supra* note 146, at 101 ("Overshading and permeating the political, judicial, and social economy of the Aborigines [Indigenous people of Ghana] is that system of faith and worship known as Fetishism."). Observing the Akan women's practices in war, Casely Hayford continued, "So fervent is [the Akan] belief in spiritual forces influencing mundane affairs." *Id.* at 92; *see also* Tweneboah, *supra* note 157, at 215 (showing the spiritual and legal intersections of *duabɔ*).

spiritual aspects of his or her humanness."[162] Irene Odotei further clarified that "in the world view and belief system of Ghanaians, *every activity* has its source and is sustained by the spiritual world through the gods and ancestors."[163] For the Akan, "everyday living is considered a spiritual experience that cannot be compartmentalized."[164]

This is why, when searching for Akan Protocol, and to understand the Protocol behind the poisonings potentially influenced by or carried out by Akan speakers, we should look to Akan Ways of Knowing.[165] We must travel through Akan Ways of Knowing to reach the destinations of Protocol, poisoning, and any related notions (such as Protocol *of* poisoning and poisoning *as* Protocol).[166]

### iii. Akan Ways of Knowing Regarding Death

The Akan world-sense contemplates a universe "filled with spiritual forces" that cause uncommon occurrences in our lives.[167] The world is full of *obosum* (divine entities and ancestral spirits).[168] They can impact our lives and cause our deaths.[169]

*Owu* is the idea of death in Akan language.[170] And its opposite is *awo* (birth).[171] *Owu* (death) is considered to be *awo* (birth) into the ancestral realm.[172] *Owu* is "a departure and not a complete annihilation of a person."[173] It is "cross[ing] the water."[174]

Generally, *owu* is considered "a time for celebration . . . . It is believed that the departed is leaving this world to continue his work

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162. OPOKUWAA, *supra* note 146, at 26.

163. Irene Odotei, *Festivals in Ghana: Continuity, Transformation and Politicisation of Tradition*, 6 TRANSACTIONS HIST. SOC'Y GHANA, NEW SERIES 17, 18 (2002) (emphasis added).

164. OPOKUWAA, *supra* note 146, at 127.

165. Tweneboah, *supra* note 157, at 215 ("[T]he Akan do not separate the religious from the legal.").

166. *Id.* ("[T]he Akan do not separate the religious from the legal."); *id.* at 212 ("[R]eligion provides 'the validating foundations for human rights' in this [contemporary Ghanaian] society.") (quoting ABAMFO OFORI ATIEMO, RELIGION AND THE INCULTURATION OF HUMAN RIGHTS IN GHANA 30 (2013)).

167. *See* RUCKER, *supra* note 143, at 88.

168. *See id.* at 89; Berry, *supra* note 27, at 60 (describing seventeenth century Akan usage of the word *bosom*).

169. *See* RUCKER, *supra* note 143, at 88.

170. Joseph Brookman-Amissah, *Akan Proverbs About Death*, 81 ANTHROPOS 75, 77 (1986).

171. *Id.*

172. *Id.*

173. JOHN S. MBITI, AFRICAN RELIGIONS AND PHILOSOPHY 152 (2d ed. 1969).

174. OPOKUWAA, *supra* note 146, at 76.

in the spirit world."[175] A person continues to live after death, as death is merely "a transition."[176] And there is no belief in a hell or eternal damnation: "as for a material hell, the scarecrow of the missionaries, he [the Native of the Gold Coast] merely smiles at such a suggestion. Is there not trouble enough in this world? God knows there is. Why should God add trouble to trouble?"[177]

Seventeenth and eighteenth century writers noted that Akan speakers in Jamaica and the Danish West Indies saw death as a "blessing" and believed it would return them to their homeland.[178] This belief buoyed resistance to enslavement, as it limited the operation of fear being killed during an uprising.[179] What Western thinkers reference as "suicide" to the Akan "represented the ultimate contingency plan" during resistance efforts.[180] It "allowed them to be reborn in Africa as free people."[181]

But not all death is a good death in Akan Ways of Knowing. The Akan believe in two categories of death, as explained by Joseph Brookman-Amissah: there is *owu pa*, good death from natural circumstances, and *owu bon*, bad death, brought on by violence, accident, or "malignant magic."[182] If a person has *owu bon*, their spirit will become *tofo*, or a "wandering and aggressive spirit."[183] It was thought that *owu bon* (bad death), sickness, or misfortune was due to "the activation of spiritual forces or the ancestors by an aggrieved party."[184]

One Akan proverb, referencing *Odomankoma*, "the creative aspect of *Nyame*, the Supreme Being," states: *Odomankoma na oma owuo di akane* ("It was none but *Odomankoma* who made Death eat poison.").[185] This proverb personifies Death as an entity vulnerable to defeat—and by poison, no less. Thus, in Akan cultural logic, Death can be met with poison, perhaps bringing about *owu bon*, bad death, to Death itself.

175. *Id.*
176. *Id.* at 87.
177. CASELY HAYFORD, *supra* note 146, at 103.
178. RUCKER, *supra* note 18, at 53.
179. *Id.*
180. *Id.*
181. *Id.*
182. Brookman-Amissah, *supra* note 170, at 78.
183. *Id.*
184. *See* RUCKER, *supra* note 143, at 88.
185. Brookman-Amissah, *supra* note 170, at 83–84.

iv. Akan Protocol of Addressing Wrongdoing

One way to address wrongdoing in Akan Protocol was (and is) to use a ritual in which one verbally invokes a divine punishment.[186] This "grievance imprecation" is called *duabɔ*, and it is a request for "a deity to unleash divine wrath or a curse on the target or wrongdoer."[187] As Seth Tweneboah explains, *duabɔ* is "an essential mode of justice" and is used "as a means to seek justice and to settle disputes in society."[188]

The word *duabɔ* is thought to come from the noun *dua* (tree, wood, club) and the verb *bɔ* (hit, strike, knock).[189] Being hit and killed by a fallen tree was considered a terrible occurrence in the culture of the Akan.[190] And if someone experienced something terrible in their life, it might be said that *dua abu bɔ no*—"a tree has fallen on [them]."[191] Through *duabɔ*, then, a person—through ritual invocation—can topple the figurative tree and bring calamity to another person's life.[192]

*Duabɔ* is based on the belief that ancestors and divine entities, the *obosum*, participate in Protocol—as *abrafo*, or enforcers, punishers, and executioners.[193] Thus, the ritual is used to voice grievances, signaling to ancestors and divine entities the existence of hate and conflict.[194] Considered to be serious, swift, and effective, *duabɔ* is used as a ritual of last resort, reserved to address egregious wrongdoing.[195]

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186. *See* Tweneboah, *supra* note 157, at 214.

187. Kofi Agyekum, Ntam *'Reminiscential Oath' Taboo in Akan*, 33 LANGUAGE SOC'Y 317, 318 (2004).

188. Tweneboah, *supra* note 157, at 220, 229.

189. *Id.* at 213. *Dua* is alternatively linked to the word *dué* (woe). *Id.* at 214.

190. *Id.* at 213 ("[I]n the old Akan society, to be killed by a fallen tree was deemed as the worst form of calamity.") (citing personal communication with Sefa Nyarko).

191. *Id.* Kwame Gyekye explains that the "ultimate cause" for the tree falling is a spiritual one, and he elaborates:

> It is not that the Akans do not know that a falling tree can kill a person . . . . In such situations the question the Akan poses is not "Why did the falling tree kill him?" but "Why did *that* tree fall at *that* particular time and kill *that* particular person?"

KWAME GYEKYE, AN ESSAY ON AFRICAN PHILOSOPHICAL THOUGHT: THE AKAN CONCEPTUAL SCHEME 78 (1987) (emphasis in original).

192. *See* Tweneboah, *supra* note 157, at 213–14.

193. *Id.* at 214–15 ("The potency of *duabɔ*, then, rests on society's belief in the pertinence of the deities who are held as occupying crucial agentic role in law and order of the traditional society. The deities are understood to enforce their laws, striking imprecatees dead or visit some form of misery on one's adversary."); THE AKAN PEOPLE, *supra* note 143, at 17.

194. *See* Tweneboah, *supra* note 157, at 214–15.

195. *See id.* at 215–16, 219.

Akan speakers of the Gold Coast region over time had various ideas about what constituted wrongdoing. In 1903, Casely Hayford pointed out that, historically, wrongdoing included "stealing from a farm, rape, swearing an oath upon the King's life, selling a real-born Ashanti, kidnapping, [and] immorality of a certain kind . . . ."[196] Akan Ways of Knowing also informed *who* was perceived as responsible for wrongdoing. According to J.M. Sarbah, Akan Protocol includes collective responsibility, meaning an entire family is responsible for the wrongs of one family member.[197] It is reasonable to infer that these contours would have been subsumed into the practices of Protocol, like *duabɔ*.

Finally, *duabɔ*—at least today—sometimes involves food, drink, and animal slaughter.[198] Tweneboah references highly-publicized *duabɔ* rituals in 2016, in which ritual participants used "eggs and schnapps" and slaughtered sheep to address the wrongdoing of certain leaders.[199] If we ponder this Protocol practice of *duabɔ*, specifically contemplating its connection to food, drink, and meat, we can see the potential link to our poisoning cases. The form of administration and the parties involved may not be an exact match, but there are enough shared components to keep *duabɔ* in mind as we continue our investigation.

Another Akan Protocol practice involving food and drink is *ntam*—a ritual for promise-making and promise-keeping.[200] This practice is seen in other systems of Protocol as well.[201] *Ntam* was used in Akan Protocol to initiate conflict, resolve conflict, and declare innocence.[202] Rucker explains, "[i]n most cases, taking an

196. CASELY HAYFORD, *supra* note 146, at 29–30. The way we think of stealing in this context, though, must be informed by other aspects of Akan Protocol, *e.g.*, collective "ownership" as opposed to the Western idea of individual ownership. *See id.* at 46–47 ("[I]n the Customary Law, we find no trace of individual ownership. What the head of a family acquires to-day in his own individual right will, in the next generation, be quite indistinguishable from the general ancestral property of which he was a trustee.").

197. SARBAH, *supra* note 155, at 39.

198. *See* Tweneboah, *supra* note 157, at 219.

199. *Id.*

200. *See* RUCKER, *supra* note 143, at 90–91; Barfuo Abayie Boaten I, *The Asafo and the Use of 'Ntam' in Conflicts and Conflict Resolution in Asante*, 2 TRANSACTIONS HIST. SOC'Y GHANA, NEW SERIES 29, 30 ("*Ntam* is a forbidden word or a statement made to remind one of an event of a catastrophic nature. From this standpoint there are personal oaths, family oaths, society oaths and state oaths.").

201. Promise-making rituals like *ntam* were not unique to Akan Protocol but were seen in other African cultures as well. RUCKER, *supra* note 143, at 92; *see, e.g.*, Berry, *supra* note 27, at 22 (describing "ordeal draughts" of Kikongo speakers of West Central Africa).

202. *See* Boaten, *supra* note 200, at 30–31.

oath was a sacred act that involved eating or drinking substances believed by adherents to contain sufficient spiritual potency to kill anyone taking the oath on false pretense or breaking the terms of a sworn agreement."[203] And, in line with Permeative Principle, the ancestors "were regarded as the custodians of the oath(s)."[204] The drink served as a linking instrument between the living Akan and the ancestors who protected them, as well as between the living Akan and each other.[205]

Typically, in the Gold Coast region, *ntam* was "administered by divine priests at the beginning of a military campaign and was a virtually unbreakable pact."[206] If a leader made a promise to fight, "the elders and the warriors, the young men, would have to go through the process of *Abosonom* which was the 'drinking of fetish; a kind of oath swearing through the drinking of a herbal preparation to signify that they were with the chief in his desire to fight . . . . [I]f a member failed to fight till death then he had defiled the oath . . . .'"[207]

In 1705, Willem Bosman, a Dutch explorer who was on the Gold Coast for thirteen years, wrote the following of this promise:[208]

> Where they drink the *Oath-Draught*, 'tis usually accompanied with an Imprecation, *that the Fetiche* may kill them if they do not perform the Contents of their Obligation. Every Person entring [sic] into any Obligation is obliged to drink this Swearing Liquor.[209]

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203. RUCKER, *supra* note 143, at 91.

204. Boaten, *supra* note 200, at 30.

205. RUCKER, *supra* note 18, at 45.

206. *Id.*

207. Boaten, *supra* note 200, at 31.

208. Paton, *supra* note 27, at 244 (referencing Bosman's time on the Gold Coast as fourteen years); RUCKER, *supra* note 143, at 77 (referencing thirteen years).

209. WILLIAM BOSMAN, A NEW AND ACCURATE DESCRIPTION OF THE COAST OF GUINEA, DIVIDED INTO THE GOLD, THE SLAVE, AND THE IVORY COASTS 149 (English trans., London 1705). Generally, we must be cautious and discerning when relying upon sources written about African people from a European center. *See* THE AKAN PEOPLE, *supra* note 143, at 15. It is important to note the bias of Bosman's text and that it is full of mischaracterizations and insults toward African people. *See, e.g.*, BOSMAN, *supra*, at 116 (calling Gold Coast peoples "crafty, idle and careless"); *id.* at 117 ("They are besides so incredibly careless and stupid"); *id.* at 138 (calling Gold Coast peoples "perverse," "lumpish Wretches"). A student of mine, Asma Mohammadi, once raised a point about how citing Western voices is "almost of a form of validation." Asma Mohammadi, Draft Africana Legal Studies Paper: Deconstructing Islamic Slavery—An Analysis of Shariah and African Governance 9 (April 10, 2023) (unpublished paper on file with author). This is a key concern. Being African-centered I think means prioritizing African knowledge and voices, stating them first and foremost. Centering them. That does not mean other statements

Bosman continued: "If you ask what Opinion the *Negroes* have of those who falsify their Obligations confirmed by the Oath-Drink; they believe the perjured Person shall be swelled by that Liquor till he bursts; or if that doth not happen, that he shall shortly dye [sic] of a Languishing Sickness . . . ."[210]

*Ntam* could also be used as *Nsidie*, a declaration of innocence or "a situation when one puts a curse on oneself to claim innocence in a conflict situation."[211] Casely Hayford described this use in Legal terms:

> Where there is a strong conflict of evidence, and the Court is unable to arrive at a decision, the ordeal is resorted to, which consists of drinking a large quantity of a herbal preparation known as *edum*. If the party drinking returns the stuff, he is declared free, or not guilty. If he retains the *edum*, he is found guilty.[212]

The substances used to concoct the drink used for *ntam* (e.g., rum, gunpowder, blood, water, millet) were essential.[213] Rucker explains that "most accounts of seventeenth- and eighteenth-century Gold Coast oathing ceremonies involve the creation of special drinks made from a variety of substances," with ingredients symbolizing the manner of death that would befall violators of the promise (e.g., blood for a violent death, water for drowning, millet for prevention of enjoying the fertile gifts of the earth).[214] If we step back to contemplate the operation of *ntam* and the Ways of Knowing that drive it, we see that our notion of "poison" can be related to this form of Akan promise-keeping—because if the promise was unkept,

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should not be referenced as a secondary or marginal matter. It is important to use these statements as evidence (particularly with Africana in the Western Hemisphere, where we have an evidence problem due to the *Maafa*) and marshal the admissions and concessions of enslavers and others who themselves recognized the existence of a fact. This evidence is compelling because it smokes out ignorance. Even enslavers recognized the agency of African people. It is the future generations who attempted (and failed) to conceal that power. *See also* KATRINA HAZZARD-DONALD, MOJO WORKIN': THE OLD AFRICAN AMERICAN HOODOO SYSTEM 19 (2013) (explaining that while many sources are "racist and pejorative, it is still possible, however, to glean comparative factual information concerning traditional African religious practices that would carry over into the New World.").

210. BOSMAN, *supra* note 209, at 149–50.

211. Boaten, *supra* note 200, at 30.

212. CASELY HAYFORD, *supra* note 146, at 94; *see also* BOSMAN, *supra* note 209, at 150 ("If any Person is suspected of Thievery and the Indictment is not clearly made out, he is obliged to clear himself by drinking the *Oath-Draught*, and to use the Imprecation, that the *Fetiche* may kill him if he be guilty of Thievery.").

213. *See* RUCKER, *supra* note 143, at 91.

214. *Id.*

it was assumed that the violator would experience a painful death involving sickness and bloating.[215]

Up to now, we have considered the internal Protocol of the Akan, that is, the Protocol used to manage their own lives.[216] At some point during the *Maafa*, African people had to decide how to respond to the atrocious and brazen conduct of Europeans around them. This externally-directed Protocol used to interact with the new problems presented by the Social Structure and sanctioned by its Governance (Law) was likely drawn from extant African cultural logic and Ways of Knowing.[217]

In examining the practices of *Duabɔ* and *ntam*, we observe that Akan Protocol includes longstanding practices of using food and drink in the process of inviting divine entities and ancestors to punish wrongdoers.[218] Common sense tells us that the knowledge flowing from these practices was undoubtedly applied by the Akan to address the wrongs of European enslavement, creating an adapted form of externally-directed Protocol to meet the *Maafa*. Accordingly, the enslaved Akan and their collaborators could bring about *owu bon* (bad death) and send the spirits of European

215. RUCKER, *supra* note 18, at 46.

216. *See* Carr, *supra* note 3, at 15 (noting the distinction between studying how Africans governed themselves versus how Africans interacted with Whites).

217. *Cf.* Nunn, *supra* note 6, at 323–24 (explaining that "law" is a creation of culture). Beyond the scope of this article, another form of externally-directed Protocol arguably occurred when African people used poisoning within various polities on the Continent or against other "African" people in the Western Hemisphere. *See* CHIREAU, *supra* note 27, at 70–71 (detailing "intrablack poisonings"); MORGAN, *supra* note 25, at 614–15 (same); JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO, *supra* note 21, at 44 (32 Md. Arch. 101, Dec. 1764) (detailing "Negro Jack Slave['s]" act in poisoning "Negro Clair Slave"); *id*. at 46 (32 Md. Arch. 188, April 1767) (providing the example of "Negro Glasgow" attempting to poison "a certain Negro Man"). These poisonings are potentially *externally-directed* Protocol, as Africans like the Akan speakers would not have thought of themselves as "African" during the eighteenth century, but rather would have held identities in terms of their nation, culture, and kinship. Pan-African identity came later, and our referent "African" as applied to these earlier times is for discursive facility and scholarly convenience, not an attempt to identify as people would have identified themselves. *See* GOMEZ, *supra* note 15, at 5, 12–13 (noting that in British North America, there was no pan-African consciousness until the 1830s and that enslaved Africans to that point largely saw themselves as members of different African polities or ethnicities); GREEN, *supra* note 15, at 268 ("[P]eople did not see themselves as 'African' but rather as belonging to a specific lineage, kingdom and ritual community—just as people did not see themselves as 'Europeans' at the outset of this time, but rather defined themselves according to the style of Christian belief and nation."). It is important that we keep this in mind and not lump actions by Africans as to other Africans before 1830 as "Black-on-Black crime," that is, internal Protocol.

218. *See* Tweneboah, *supra* note 157, at 219.

enslavers into endless wandering, depriving them of any celebrated rebirth or peaceful existence after life.[219]

## VI. Tracking Movements: Continuity of Protocol from the African Continent to the Western Hemisphere

> I . . . thought of my grandfather, and of the long nights I had passed with him, listening to his narratives of the scenes through which he had passed in Africa.
>
> – Charles Ball, enslaved in Maryland just before the Civil War[220]

Did captive, enslaved, and "free" Africans in the Western Hemisphere remember their Protocol, such as the Akan Protocol of addressing wrongdoing through use of divinely-imbued food and drink? It is our job to try to answer this question by using what clues we have to track African "Movement and Memory."[221] Many scholars, "guilty of underestimating the perseverance of African culture even among second, third, and fourth generation creoles," might doubt such a project.[222]

As John Henrik Clarke explained, "the Black Race did not come to the United States culturally empty-handed."[223] The "African" in "African American" is not a mere phonetic cadence. It is a reference to a place and its peoples, deep history, and longstanding cultures. Africans—enslaved, colonized, or otherwise oppressed—were not and are not hollow shells waiting to be filled by Western culture. Many may have trouble understanding this, especially as we tend to look at the historical record as a complete representation of reality. It is not. When we study the lives of African people during enslavement, we must take note of the simple and obvious fact that Africans existing in the hostile environment of the Western Hemisphere during this era actively hid things from Europeans.[224]

This contributes to what I call the "Evidence Problem," the written information gap presented by a Social Structure in which

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219. *See* Brookman-Amissah, *supra* note 170, at 78.

220. Knight, *supra* note 144, at 195–96 (quoting Charles Ball's autobiography).

221. Carr, *supra* note 3, at 16 (outlining "Movement and Memory" as a conceptual category of the Africana Studies framework) ("This category asks the question, 'how did Africans during the period being studied preserve memories of where they had been and what they had experienced, and how did they pass these memories to future generations?'").

222. RUCKER, *supra* note 18, at 5.

223. Clarke, *supra* note 116, at 218.

224. *See, e.g.*, STUCKEY, *supra* note 160, at 87 ("In America . . . much of African culture was hidden from whites . . . .").

Europeans controlled written knowledge and history production to a stifling degree. This phenomenon existed not only because of Europeans' control of information; African people were also controlling the flow of information.[225] To survive—as a matter of life, death, and peace—our ancestors feigned ignorance, lied, and concealed.[226] The Evidence Problem also arises from the Western preoccupation with written modes of production, which enshrines written sources as a requirement for legitimacy and truth, and conflicts with the primarily oral cultures of many African peoples.[227] The phrase "Evidence Problem" is meant to both problematize that Western fixation and describe its result.

The Evidence Problem was a solution for enslaved Africans, yet it exists as a problem for us (investigators, scholars, learners) today, a problem not of a permanent or dismaying sort, but a challenge to be met and solved. Crafting our solution will involve awareness of the underlying cause and dynamics of the Evidence Problem. Scholars of Africana should avoid the trap of thinking that simply because there is scant or no written evidence of a thing, the thing did not exist. In such a situation, we must use common sense and an African-centered approach to understand the context and make necessary inferences.

Our initial recognition is the most obvious one: African people who found themselves in the Western Hemisphere during the eighteenth century were human beings. Humans remember things. Humans communicate with one another in the languages they know.[228] Humans tell stories. Humans talk to their children.

Based on these threshold recognitions, we can confidently infer that Africans in the Western Hemisphere, including in eighteenth century Maryland, knew and remembered their

225. *See, e.g.*, LEVINE, *supra* note 14, at 145 (quoting Charles Colcock Jones in 1842) ("[Of African people:] They are one thing before the whites, and another before their own color."); STUCKEY, *supra* note 160, at 84 ("The clearest indictments of slavery and the deepest expressions of sorrow must have been spoken in the native tongues and sung as well, but they are unrecorded.").

226. *See, e.g.*, LEVINE, *supra* note 14, at 145 (quoting an anonymous formerly enslaved person) ("The white folks made us lie . . . . We had to lie to live.").

227. *See* GREEN, *supra* note 15, at xvii ("To the Western historical mindset, drawing on oral histories . . . is an anti-historical endeavor. But in West Africa, history is an oral genre, held and recounted by professional historians known as praisesingers, or griots, whose patrons ask them to sing important histories at key public events and commemorations.").

228. Enslaved African people had their own languages. This is illustrated in a Maryland runaway slave advertisement from 1759, which notes that an African woman who escaped "talks in her own Language very fast . . . ." WINDLEY, *supra* note 20, at 35 (MD. GAZETTE, Dec. 6, 1759). Of course, enslaved Africans would have used their first languages to communicate.

Protocol.[229] And they were able to talk to each other about it.[230] Their communal and intergenerational communication carried cultural memory, enabling continued cultural practice.[231]

And in Maryland, the site of our investigation, waves of African-born people arrived well into the nineteenth century, with each new wave carrying African memory.[232] While enslavers in Maryland imposed endless constraints on enslaved Africans, there was still time and space for Protocol and other aspects of African culture to continue on their properties. Enslaved Africans in Maryland had time outside of laboring, and during this time, they talked to one another.[233]

On Sundays, holidays, and bad-weather days, enslaved Africans used the time they had for their own activities.[234] These occasions provided time for storytelling, conversation, and, in turn, cultural transmission and continuity.[235] In fact, Maryland passed a law in 1723 prohibiting anyone from working, or requiring enslaved people to work, on "the Lord's day."[236] James V. Deane, a man formerly enslaved in Maryland, explained: "On Sunday we fed the stock, after which we did what we wanted."[237] Evenings were also an opportunity to use time. Formerly enslaved Charles Coles explained his personal experience in Maryland in the 1850s and 60s: "They required the farm hands to work from 7 a.m. to 6:00 p.m.; after that their time was their own."[238] Also enslaved in Maryland,

229. *See* Berry, *supra* note 27, at 22 ("People from [Europe, West Africa, and West Central Africa] brought their ideas with them into the western Atlantic and adapted them to new circumstances . . . .").

230. *See* GOMEZ, *supra* note 15, at 13, 26–27 (referencing "interplantational relations" and ethnic clusters).

231. *See, e.g.*, LEVINE, *supra* note 14, at 104 (detailing intergenerational transmission of culture, including the example of "Big Lucy," who one Louisiana enslaver complained "corrupt[ed] every young negro in her power").

232. *See* Douglass, *My Bondage and My Freedom*, *supra* note 23, at 168 ("There is not, probably, in the whole south, a plantation where the English language is more imperfectly spoken than on Col. Lloyd's [Maryland plantation]. It is a mixture of Guinea and everything else you please. *At the time of which I am now writing, there were slaves there who had been brought from the coast of Africa*.") (emphasis added); *see also* Porter, *supra* note 4, at 268.

233. *See, e.g.*, Douglass, *My Bondage and My Freedom*, *supra* note 23, at 188.

234. *See* LEVINE, *supra* note 14, at 107; BRACKETT, *supra* note 16, at 104; Charles Coles, *in* RAWICK, *supra* note 20, Maryland Narratives at 5 ("I do not remember whether the slaves worked or not on Saturdays, but I know the holidays were their own."); Dennis Simms, *in* RAWICK, *supra* note 20, Maryland Narratives at 60.

235. *See* LEVINE, *supra* note 14, at 107.

236. BRACKETT, *supra* note 16, at 108.

237. James V. Deane, *in* RAWICK, *supra* note 20, Maryland Narratives at 7.

238. Charles Coles, *in* RAWICK, *supra* note 20, Maryland Narratives at 4; *see also*

Richard Macks remembered specifically that "[a]t nights the slaves would go from one cabin to the other, talk, dance or play the fiddle or sing."[239] The time and space of the enslavement landscape also enabled family members (especially fathers) to use nights and Sundays to visit kin who lived on other properties.[240]

For some, restrictions made it more difficult to create and maintain space to gather and communicate. Dennis Simms explained that on the Contee plantation in Maryland, "we were never allowed to congregate after work . . . we were very unhappy."[241] Nevertheless, Simms continued, "[s]ometimes we would, unbeknown to our master, assemble in a cabin and sing songs and spirituals."[242] Mr. Simms and his community were not alone in gathering this way; over a century before them, other enslaved African people gathered and met in large groups to the extent that, in 1723, the Maryland General Assembly got involved in trying to prevent such meetings.[243] By statute, constables were appointed to stop these gatherings, and any person who encouraged large meetings of enslaved Africans on their own property could be liable for a fine of 1,000 pounds of tobacco (later $20).[244] Colonial legislators made note of what they perceived to be the problem on the ground: "tumultuous Meetings & Cabaling of Negroes," or, from an African-centered perspective, gatherings in which Africans participated in their Ways of Knowing.[245]

Several years later, in 1729, legislators again attempted to counter the persistence of African Ways of Knowing by amending the punishment imposed for African crimes from conventional

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Rev. Silas Jackson, *in* RAWICK, *supra* note 20, Maryland Narratives at 32 ("When work was done the slaves retired to their cabins, some played games, others cooked or rested or did what they wanted.").

239. Richard Macks, *in* RAWICK, *supra* note 20, Maryland Narratives at 56.

240. Allan Kulikoff, *The Beginnings of the Afro-American Family in Maryland*, *in* LAW, SOCIETY, AND POLITICS IN EARLY MARYLAND 189 (Aubrey C. Land et al. eds., 1974) ("Fathers had regular visiting nights.").

241. Dennis Simms, *in* RAWICK, *supra* note 20, Maryland Narratives at 61.

242. *Id.* In nearby Virginia, Georgina Giwbs explained, "[s]ometimes de men slaves would put logs in de beds, and dey'd cover 'em up, den dey go out. Mastah would see de logs and think dey wuz de slaves." Georgina Giwbs, *in* RAWICK, *supra* note 20, Virginia Narratives at 16; *see also* Elizabeth Sparks, *in* RAWICK, *supra* note 20, Virginia Narratives at 53 ("Nigguhs used to go way off in quarters an' slip an' have meetins. They called it stealin' the meetin'.").

243. BRACKETT, *supra* note 16, at 100, 104.

244. *Id.* at 100–01.

245. *Proceedings of the Council of Maryland, 1753-1761*, ARCHIVES OF MD. 81 (Oct. 21, 1755), https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000031/html/am31--423.html [https://perma.cc/W26C-F3QS].

execution to maiming and torturing.[246] Why? From the European perspective, and the Legal perspective, more earthly brutality was required, as Africans had "no sense of shame or apprehension of future rewards or punishments."[247] This is a statement about African Ways of Knowing regarding what happens after death; Europeans recognized that African people in the colony possessed beliefs distinct from their own religion and Christian-infused morality. Ironically, such racist and condescending statements serve as express acknowledgment of the cultural continuity of African Ways of Knowing in Maryland.

Despite these Legal measures, as Mr. Simms' story illustrates, African people, enslaved and "free," continued to gather.[248] Their "interplantational relations" throughout the colonies and states show that they were not isolated, as many imagine them to have been.[249] Despite *Maafa* conditions, they built and retained their community and continued practicing their Ways of Knowing.[250] Such a situation would have facilitated the continuation of Protocol.

### *A. Following the Trail: Akan Protocol Continuity in Maryland*

> Our practices are an indication that our ancestors brought Akan culture and traditions with them and indeed preserved those traditions as best they could in such a hostile environment. It could not be taken away from them nor us.
>
> – Nana Akua Kyerewaa Opokuwaa, *Akan Protocol: Remembering the Traditions of Our Ancestors*[251]

Generally, the cultural continuity of African people in the Western Hemisphere has been well-documented, and scholars have done the additional work to link the Africans taken from the Gold

246. *See* BRACKETT, *supra* note 16, at 120; An Act for the More Effectual Punishing of Negroes and Other Slaves; and for Taking Away the Benefit of Clergy from Certain Offenders, LAWS OF MD., Aug. 8, 1729 ("[T]he manner of executing offenders, prescribed by the laws of England, is not sufficient to deter from such offences a people who consider only the severity of a punishment . . . .").

247. BRACKETT, *supra* note 16, at 120; An Act for the More Effectual Punishing of Negroes and Other Slaves; and for Taking Away the Benefit of Clergy from Certain Offenders, LAWS OF MD., Aug. 8, 1729.

248. BRACKETT, *supra* note 16, at 199, 203. Indeed, one particularly large meeting was documented in 1860. *Id.* at 203.

249. GOMEZ, *supra* note 15, at 26.

250. Kulikoff, *supra* note 240, at 189–90 ("Slave society was characterized by hundreds of interconnected and interlocking kinship and friendship networks that stretched from plantation to plantation and from county to county.").

251. OPOKUWAA, *supra* note 146, at 18.

Coast to the Hemisphere.[252] Gwendolyn Midlo Hall explained that "[c]lustering of Africans shipped to the Americas from the Gold Coast is very clear."[253] Africans from the Gold Coast were a "consistent" and "constant presence" in British North America over the duration of the British trade in African people.[254] And most captives from the Gold Coast arrived in the colonies during the 1700s.[255] Many were bound for Jamaica, which had a "marked concentration of Gold Coast Africans," and from there were "reexported" to the mainland colonies in a common phenomenon known as "transshipment."[256]

Gold Coast captives, who were mostly Akan speakers, were known as "Coromantee," "Kromantine," or other variations, and

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252. *See* Knight, *supra* note 144, at 192; *see also* GOMEZ, *supra* note 15, at 105 ("The sources are in agreement that captives coming out of the Gold Coast were, for the most part, Akan-speaking."). For example, Knight explains cultural continuity in a "free" Black settlement in Plymouth, Massachusetts:

> [T]he archaeologist James Deetz points to the clustering of the twelve-foot by twelve-foot houses without chimneys owned by Quaminy and the other free blacks in the community. This architectural and settlement pattern differs from the Anglo-American pattern, which was a more dispersed settlement of houses with chimneys and measured sixteen-foot by sixteen-foot.

Knight, *supra* note 144, at 192. Knight also explains that the members of the settlement decorated their ancestors' graves with broken glass and pottery, "quite possibly from a Gold Coast practice," or a practice from elsewhere in Africa. *Id.* at 193.

253. HALL, *supra* note 142, at 110; *see also* Knight, *supra* note 144, at 184–85 (explaining that there were ethnic clusters of Gold Coast Africans, with "higher *concentrations* in some regions than others") (emphasis in original).

254. GOMEZ, *supra* note 15, at 31, 33–34. The Akan presence in North America was "influential." *Id.* at 105.

255. Knight, *supra* note 144, at 184 ("The majority of the people from the Gold Coast who were enslaved in North America entered during the eighteenth century."); *see* RUCKER, *supra* note 18, at 31 ("[T]he English managed to export approximately 320 slaves per month from the Gold Coast between 1690 and 1730."); HALL, *supra* note 142, at 122. ("After 1650, Africans from the Gold Coast were most likely to be found primarily in British America, where they were widely recorded as Coromanti."). At least 665,000 Africans from the Gold Coast were exported during the Atlantic trade, most being war captives. GOMEZ, *supra* note 15, at 106. The wars happening on the continent were driven by a desire to meet European demand for captives. *Id.*

256. RUCKER, *supra* note 18, at 32 ("During the eighteenth century, mainland colonies like South Carolina, Rhode Island, Virginia, Maryland, and New York received cargoes from Jamaica . . . ."); Knight, *supra* note 144, at 186. *See also* GOMEZ, *supra* note 15, at 106 ("Jamaica in particular developed a strong preference for the Gold Coast . . . ."). In fact, Gold Coast Africans, or Akan speakers, were the strongest numerical representation of Africans in Jamaica, where enslavers believed Akan speakers were physically stronger than others. *Id.* at 107. Relatedly, the term "Obeah" was used to reference "African ritual practices" or Ways of Knowing in the British Caribbean, an acknowledgement of the cultural continuity of Africans in that part of the hemisphere. Berry, *supra* note 27, at 95.

they were favored by enslavers in the Western Hemisphere, who associated them with "physical strength and a capacity to work."[257] However, European enslavers also considered the Akan to be particularly resistant: "The perception of Akan rebelliousness was ubiquitous in eighteenth-century commentary."[258] This had some foundation in reality, as "many people who became Coromantees in the Americas had been soldiers with training in the arts of war."[259]

Meanwhile, Maryland was one of the five core colonies with the most significant populations of enslaved Africans in British North America.[260] The general African presence in the colony was strong during the eighteenth century; Whitman notes that "by the 1720s, a substantial majority of blacks in the Chesapeake were African-born," and "[b]y the eve of the American Revolution perhaps no more than one-fifth of American slaves had begun life in Africa."[261]

257. GOMEZ, *supra* note 15, at 105–07; *see also* HALL, *supra* note 142, at 122, 134; RUCKER, *supra* note 18, at 29–30, 32; Knight, *supra* note 144, at 184. The term "Coromantee" is a reference to "two Fante-speaking towns, Upper and Lower Kormantse, and a nearby trading factory in Atlantic Africa's Gold Coast—a region coterminous with modern-day Ghana." RUCKER, *supra* note 143, at 2.

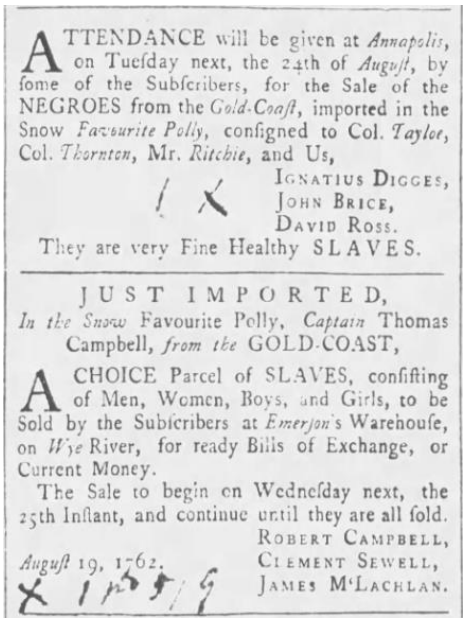
258. Rucker, *supra* note 18, at 34–35 ("In particular, Akan-speakers from the Gold Coast were perceived to be the most recalcitrant group in the British Caribbean and were likely a sizable portion of the 'Refuse' and "Malefactors' sold to New York on the eve of the 1712 revolt . . . . [T]he Akan were viewed as prone to shipboard revolts.").

259. RUCKER, *supra* note 143, at 5.

260. GOMEZ, *supra* note 15, at 24.

261. WHITMAN, *supra* note 25, at 12–13.

There was a specifically Akan presence and influence in Maryland.[262] Michael Gomez explains that "[t]here were . . . relatively substantial numbers of Akan speakers in . . . Maryland, as those from the Gold Coast were universally acclaimed and sought."[263] This is reflected in newspaper advertisements like the following from the *Maryland Gazette* in 1762:



ATTENDANCE will be given at *Annapolis*, on Tueſday next, the 24th of *Auguſt*, by ſome of the Subſcribers, for the Sale of the NEGROES from the *Gold-Coaſt*, imported in the Snow *Favourite Polly*, conſigned to Col. *Taylor*, Col. *Thornton*, Mr. *Ritchie*, and Us,

IGNATIUS DIGGES,
JOHN BRICE,
DAVID ROSS.

They are very Fine Healthy SLAVES.

JUST IMPORTED,
*In the Snow* Favourite Polly, *Captain* Thomas Campbell, *from the* GOLD-COAST,

A CHOICE Parcel of SLAVES, conſiſting of Men, Women, Boys, and Girls, to be Sold by the Subſcribers at *Emerſon's* Warehouſe, on *Wye* River, for ready Bills of Exchange, or Current Money.

The Sale to begin on Wedneſday next, the 25th Inſtant, and continue until they are all ſold.

ROBERT CAMPBELL,
CLEMENT SEWELL,
JAMES M'LACHLAN.

*Auguſt* 19, 1762.

Source: MD. GAZETTE, Aug. 19, 1762, at 2

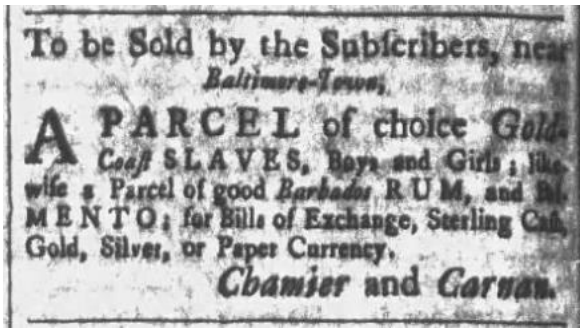
> Attendance will be given at Annapolis on Tuesday next, the 24th of August, by some of the Subscribers, for the Sale of the Negroes from *the Gold-Coast* . . . They are very Fine Healthy Slaves . . . . from the Gold-Coast, a Choice Parcel of slaves, consisting of Men, Women, Boys, and Girls, to be Sold by the Subscribers at Emerson's Warehouse on Wye River, for ready Bills of Exchange, or Current Money.[264]

262. *See* GOMEZ, *supra* note 15, at 107, 113; *see also* MORGAN, *supra* note 25, at 587 ("[A]n Asante drum made from African woods and decorated with carvings apparently accompanied an African to Virginia.").

263. GOMEZ, *supra* note 15, at 150. *But see* HALL, *supra* note 142, at 111 ("[A] surprisingly small percentage of Atlantic slave trade voyages arrived in South Carolina and Virginia from the Gold Coast.") (noting twenty-five voyages to Virginia).

264. MD. GAZETTE, Aug. 19, 1762, at 2, https://www.msa.maryland.gov/megafile/msa/speccol/sc4800/sc4872/001280/html/m1280-0802.html [https://perma.cc/H6YZ-HBPW] (emphasis added).

About 1,500 Gold Coast Africans landed in the colony, meaning 23% of the African community in eighteenth century Maryland was from the Gold Coast and likely Akan speaking.[265] And these are conservative numbers, as they do not account for transshipment from the Caribbean.[266] The following 1755 *Maryland Gazette* advertisement hints at transshipment, placing enslaved Africans with Caribbean liquor: "To be Sold by the Subscribers, near Baltimore-Town, A Parcel of choice Gold-Coast Slaves, Boys and Girls; likewise a parcel of good Barbados Rum . . . ."[267]


To be Sold by the Subſcribers, near
*Baltimore-Town,*
A PARCEL of choice *Gold-*
*Coaſt* SLAVES, Boys and Girls; like-
wiſe a Parcel of good *Barbados* RUM, and Bil.
MENTO; for Bills of Exchange, Sterling Caſh,
Gold, Silver, or Paper Currency.
*Chamier* and *Garman.*

SOURCE: MD. GAZETTE, Jan. 23, 1755, at 4.

The trail of Akan cultural continuity in Maryland is also illuminated by the presence of personal names from the Akan naming system. Akan Ways of Knowing include the belief that living human beings have three components: (1) *mogya* (blood) or the physical aspect of a person, inherited from the mother; (2) *ntoro* (spirit) or the personality, inherited from the father; and (3) *kra* (soul), of which there are seven types, depending on one's day of birth.[268] From this flows a naming system: "Akan children receive a first name determined by the actual day of their birth. On reaching adulthood, the original day-name is typically used in conjunction with familial names, and its continued use creates a sense of camaraderie, which often transcends gender lines, among those born on the same day."[269]

265. Knight, *supra* note 144, at 184–85.

266. *Id.* at 186.

267. MD. GAZETTE, Jan. 23, 1755, at 4, https://www.msa.maryland.gov/megafile/msa/speccol/sc4800/sc4872/001279/html/m1279-0632.html [https://perma.cc/8B2F-AQUG].

268. GOMEZ, *supra* note 15, at 111.

269. RUCKER, *supra* note 18, at 38.

In many instances, Africans retained their African names in the Western Hemisphere.[270] In Maryland, eighteenth century advertisements in search of escaped Africans reference names like "Cuffy" and "Cuffee."[271] In fact, one such "Negro Coffee the Slave" was convicted of murder in Maryland in April 1762.[272] The names of these Africans suggest they were Akan speakers or from the Gold Coast region.[273] These names were probably what we would write today as "Kofi" or "Kwefi," the Akan day-name to reference males born on *Efi-da* or *Fiada* (Friday).[274]

If Akan speakers were present in eighteenth century Maryland, they probably would have remembered their culture, including their Ways of Knowing, their Protocol, and its practices, such as *ntam* and *duabɔ*. For example, we know that enslaved Africans across the hemisphere were imbibing a mixture of graveyard dirt and blood to bind themselves to resistance efforts against the Europeans.[275] Walter C. Rucker has explored this extensively.[276] According to Rucker, the promise-drink was "ubiquitous" in revolts in the Western Hemisphere involving Akan speakers, and the ingredients of graveyard dirt and blood held symbolic significance: "Graveyard dirt linked the conspirators to

270. *See* Knight, *supra* note 144, at 195 ("While African naming practices generally died out by the end of the eighteenth century, some were still known by African names well into the nineteenth century."). However, aliases and name changes were often used by enslaved Africans, for various purposes, including as a means to escape detection. *See, e.g.*, WINDLEY, *supra* note 20, at 11–12 (MD. GAZETTE, Oct. 4, 1749) (showing advertisement by Thomas Stockett); *see id.* at 15 (MD. GAZETTE, Aug. 14, 1751) ("She at times dresses in Men's Cloaths, and changes her own and Master's Name, when it suits her; and at other Times pretends to be Free."); *see id.* at 24 (MD. GAZETTE, June. 26, 1755) ("[A] Negroe Slave named Exeter, (but has given himself the Name of Edward Smith, and says he is a Freeman) ").

271. WINDLEY, *supra* note 20, at 4–5 (MD. GAZETTE, June 9, 1747) (referencing a man named "Cuffy" who was "much scarified on his Forehead, and has Holes in all his teeth"); *id.* at 15 (MD. GAZETTE, Oct. 23, 1751) (mentioning "A Man, named Cuffee"); *id.* at 66 (MD. GAZETTE, Sept. 18, 1766) (referencing "a Negro Man named Cuffee").

272. JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO, *supra* note 21, at 43. In 1750, one colony over, in Caroline County, Virginia, "Cuffy Coleman" was hanged after being convicted of poisoning. DEETZ, *supra* note 61, at 94.

273. RUCKER, *supra* note 143, at 134–35. It should be noted that "Cuffee" became a "more general referent" in eighteenth and nineteenth century North America. *Id.*

274. *See id.* at 84; *see also* ASANTE TWI: DICTIONARY AND PHRASEBOOK 258 (2015).

275. *See* RUCKER, *supra* note 18, at 41.

276. *See, e.g.*, RUCKER, *supra* note 143, at 179–86 (outlining specific evidence of continuation of Gold Coast oathing traditions into the Western Hemisphere).

ancestral spirits, creating an inviolable oath," and "blood represented the forged bond between the living."[277]

Interestingly, the presence of the Akan promise—*ntam*—in the Hemisphere goes hand-in-hand with the reputation the Akan had among Europeans for being uniquely resistant to enslavement.[278] Relatedly, among Europeans, the Akan speakers had a reputation for deliberately taking their own lives.[279] This also makes sense, as *ntam* suggests a promise-maker's willingness to die for their cause.[280] Important context for analyzing this act is the Akan speakers' belief in death as a transition or continuation, not an end.[281]

Based on the evidence, we know that the Akan cultural tradition of asking ancestral spirits to impose consequences on the living (for broken promises, and perhaps, for other reasons) did not disappear.[282] If *ntam* and other Akan cultural practices appeared in New York and in Jamaica, they probably made it to Maryland.[283] While *ntam* and *duabɔ* were originally promises and curses for use within the African setting, in the continued and adapted Protocol of the Western Hemisphere, the acts of cursing and the skill of preparing divinely-imbued food and drink were likely applied to harm enslavers.

Enslaved Africans had to develop mechanisms by which they could address problems arising in the quarters, or were otherwise unique to their lives and separate from their relations with the slaveholder. In order to adjudicate cases and resolve disputes, they

277. RUCKER, *supra* note 18, at 43–46. Ritual use of graveyard dirt by Africans in the Western Hemisphere endured up to the time of emancipation. For example, Page Harris, a formerly enslaved woman in Maryland, recounted another practice involving graveyard dirt: "It was always said that slaves, when they ran away, would try to go through a graveyard and if he or she could get dirt from the grave of some one that had been recently buried, sprinkle it behind them, the dogs could not follow the fleeing slave, and would howl and return home." Page Harris, *in* RAWICK, *supra* note 20, Maryland Narratives at 24.

278. RUCKER, *supra* note 18, at 34, 45.

279. MORGAN, *supra* note 25, at 641 ("Some Africans, particularly 'Keromantees' [Gold Coast Africans], he [a Delaware missionary] continued, committed suicide calmly and deliberately as a result of their faith.").

280. It is evocative of another time in Africana, when Fisk University students signed their last wills and testaments before traveling to Alabama for the Freedom Rides in 1961. *See* PBS, *"Who the Hell Is Diane Nash?" From Freedom Riders*, YOUTUBE (Sept. 23, 2016), https://www.youtube.com/watch?v=GIffL6KplzQ [https://perma.cc/EQ9Y-JKUF].

281. *See* MBITI, *supra* note 173, at 152.

282. RUCKER, *supra* note 143, at 196.

283. *See* RUCKER, *supra* note 18, at 41 (detailing the presence of the oath in Jamaica); *id.* at 27–29, 35–38 (explaining the Akan cultural connections to a 1712 revolt in New York City).

would have necessarily drawn from the wealth of their experiences in Africa.[284]

### *B. Conspiracy: The Skilled Community Behind the Poisonings*

We may have a conspiracy on our hands.

As is evident from the litany of incidents giving rise to our investigation, poisoning was often a collective endeavor.[285] The Maryland records show the often communal nature of this act, as when enslaved Africans Pompey and Indey worked together to poison their enslaver's overseer, clerk, and gardener;[286] and Anthony and Jenny "conspir[ed]" to poison their enslaver;[287] and Harry and Cork worked together to attempt to poison a man;[288] and Bett Pone and Buckinfield, held by two different enslavers, attempted on separate occasions to poison the same overseer;[289] and Samuel, Abigail, and Rachel worked together to try to poison "Mrs. Smith";[290] and Toe, Sambo, and Betty (in the same county as Samuel, Abigail, and Rachel) later collectively attempted to poison a "Mr. Smith and his wife."[291] Across Maryland, African people were *working together* to poison. It is a hint at the notion of—and persistence of—African community in the enslavement landscape.

For these conspiracies to work, participants with knowledge of both herbs and ancestral connection were required—people who knew African Ways of Knowing, understood the power of plant life, and had facility interacting with the ancestral and spiritual forces with which concoctions must be imbued. These certain members of

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284. GOMEZ, *supra* note 15, at 152.

285. *See* DEETZ, *supra* note 61, at 96.

286. *Proceedings of the Council of Maryland, 1738/9*, ARCHIVES OF MD. 161, *supra* note 29.

287. *Proceedings of the Council of Maryland, 1753–1761*, ARCHIVES OF MD. 56–57, *supra* note 31; MD. GAZETTE, Jul. 10, 1755, *supra* note 32.

288. *Proceedings of the Council of Maryland, 1753–1761*, ARCHIVES OF MD. 79, *supra* note 33.

289. *Talbot County Court, Criminal Record, 1755–1761*, ARCHIVES OF MD., *supra* note 36; *Proceedings of the Council of Maryland, 1753–1761*, ARCHIVES OF MD. 423, *supra* note 39.

290. *Proceedings of the Council of Maryland, 1761–1769*, ARCHIVES OF MD. 16, *supra* note 42.

291. *See* JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO, *supra* note 21, at 34 (28 Md. Arch. 161, March 1739); *id.* at 39 (31 Md. Arch. 69, June 1755); *id.* at 42 (32 Md. Arch. 17, Oct. 1761); *Proceedings of the Council of Maryland, 1761–1769*, ARCHIVES OF MD. 91, https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000032/html/am32--91.html [https://perma.cc/P3KU-5MJ2] (referencing the attempted poisoning by Toe, Sambo, and Betty).

the African community possessed the traditional knowledge and exacting skill to employ substances in a way that would deliver sickness and death.[292] These people were known as "conjurers."[293] And their work is known by many names: conjure, root work, or Hoodoo, which Katrina Hazzard-Donald defines as "the indigenous, herbal, healing, and supernatural-controlling spiritual folk tradition of the African American in the United States."[294]

It is said that there was a conjurer on each sizeable enslaving estate.[295] Abolitionist William Wells Brown (c. 1814–1884) explained, "Nearly every large plantation . . . had at least one, who claimed to be a fortune-teller, and who was regarded with more than common respect by his fellow-slaves."[296] Most enslaved Africans in North America felt the influence of a conjurer in their lives.[297] Conjurers possessed knowledge from the African continent that was carried over with African people to the Western Hemisphere.[298] And this persisting knowledge included the skills for formulating and using the righteous weapon of poison—or, put another way, carrying out the Protocol of invoking divine response to wrongdoing.[299]

An obvious point that still must be stated is that African people had their own deep experience in the area of Science and Technology vis-à-vis what Westerners might characterize as the

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292. CHIREAU, *supra* note 27, at 72 ("It was frequently reported that native African slaves carried Old World knowledge of herbs, roots, and other preparations necessary for creating toxic substances with them to the New World.").

293. *See* COVEY, *supra* note 54, at 17.

294. HAZZARD-DONALD, *supra* note 209, at 4 (This system is also referenced pejoratively as "black magic, witchcraft, . . . [and] superstition.").

295. *See* Walter C. Rucker, *Conjure, Magic, and Power: The Influence of Afro-Atlantic Religious Practices on Slave Resistance and Rebellion*, 32 J. BLACK STUD. 84, 94 (2001).

296. *Id.* (quoting William Wells Brown).

297. *Id.* ("[T]here is ample proof that conjurers were an ever-present factor in the lives of the majority of North American slaves.").

298. *See* COVEY, *supra* note 54, at 76–77.

299. CHIREAU, *supra* note 27, at 73 ("Utilized in Africa as a lethal weapon, poisoning techniques survived among blacks in the diaspora."); *see also* Olaudah Equiano, *The Interesting Narrative of the Life of Olaudah Equiano, or Gustavus Vassa, the African*, *in* I WAS BORN A SLAVE: AN ANTHOLOGY OF CLASSIC SLAVE NARRATIVES 49 (Yuval Taylor ed., 1999); GENOVESE, *supra* note 25, at 616 ("Long before Africans fell prey to the slave trade they had mastered the art of poisoning as a means of dealing with enemies."); HURSTON, *supra* note 23, at 26 (providing the narrator, Kossula's, account that "wicked" men in Africa made poison from the whiskers of a leopard, so the leader of his people would confiscate leopard whiskers to prevent people from getting killed). For example, in 1445, the Portuguese got a firsthand taste of the poison expertise of Africans when Portuguese enslaver Nuno Tristão and twenty-one of his compatriots were killed on the West African coast by the poisonous arrows and darts of African fighters. FRENCH, *supra* note 12, at 72.

natural world.[300] This experience made them highly skilled in interactions with herbs, plants, and other natural substances.[301] As to the Akan, specifically, spiritual leaders in Akan-speaking society in the Gold Coast region were experts in the use of herbal remedies.[302] Of traditional Gold Coast society, Casely Hayford clarified that "the actual working of the [spiritual] system is in the hands of the Priests, who combine with their office the cure of disease."[303] These spiritual leaders employed *aduru*—medicine in the form of liquid or powder—such as herbal concoctions capable of inducing deep sleep.[304] They also used *suman* (divine objects, that is, charms and amulets) when doing their work.[305]

Enslaved Africans in Maryland had access to herbs and roots and often kept gardens.[306] Formerly enslaved James Deane explained, "[Y]es, some slaves had small garden patches which they worked by moonlight."[307] He went on: "The slaves had herbs of their

300. *See* RUCKER, *supra* note 18, at 81 (explaining that enslaved Africans had knowledge of poisons from their scientific experiences in West Africa); *see also* Carr, *supra* note 3, at 16 (defining the "Science and Technology" section of the Africana Studies framework as "ideas about how nature works . . . and devices . . . create[d] to shape the[] natural, animal, and human environment[]"). They were experienced with forests and the skill of forest clearing. *See, e.g.*, Knight, *supra* note 144, at 186 ("Furthermore, the era of the slave trade to the Americas also coincided with the Asante project of forest clearing, work which British American colonial planters also depended upon their slaves to perform.")

301. *See, e.g.*, HALL, *supra* note 142, at 61 (referencing the Bissagos' use of poisoned arrows against the Portuguese in Upper Guinea); *id.* at 67 (emphasizing the domestication of rice in the greater Senegambia, Upper Guinea, and Madagascar). *See generally* COVEY, *supra* note 54.

302. CASELY HAYFORD, *supra* note 146, at 106–07.

303. *Id.* at 106.

304. RUCKER, *supra* note 18, at 43; *see also* Rucker, *supra* note 295, at 89. The Akan have a traditional story, in which a spiritual leader's son brought a drink to his father to put him into a deep sleep. Thinking he was dead, the attendants killed the son as punishment. Then, the priest woke up, saw his son's severed head, and died—blaming those who hastily killed his son. This cautionary tale about hasty judgement also indicates the Akan community's use of concoctions to bring about profound physical reactions. *See* Mensah Sarbah, *Akan Religion*, *in* AFRICAN INTELLECTUAL HERITAGE, *supra* note 116, at 107–08.

305. RUCKER, *supra* note 18, at 43; *see also* Rucker, *supra* note 295, at 89.

306. BRACKETT, *supra* note 16, at 104 ("Generally, the slave had at least a garden and chicken coop, from whose proceeds he got such luxuries as coffee and tobacco."). For example, Thomas Foote, a formerly enslaved man in Maryland, explained that his mother, Eliza Foote, was a healer who helped another enslaved African recover from an ailment: "When this slave was searched, he had in his possession a small bag in which a stone of a peculiar shape and several roots were found. He said that mother had given it to him, and it had the power over all with whom it came in contact." Thomas Foote, *in* RAWICK, *supra* note 20, Maryland Narratives at 14–15. Eliza Foote was "accused of Voodooism by the whites of Cockeysville[, Maryland]." *Id.*

307. James V. Deane, *in* RAWICK, *supra* note 20, Maryland Narratives at 7.

own, and made their own salves."[308] Menellis Gassaway, also enslaved in Maryland, explained: "So far as being sick, we did not have any doctors . . . . [T]he colored doctored themselves with herbs, teas and salves made by themselves."[309] These accounts demonstrate the cultural continuity of African Science and Technology.

But this expertise in plant science was not science as known in the West. According to Permeative Principle, it was part of African Ways of Knowing. There was divinity in it, just as was attested with respect to "medicine" in the Gold Coast region.[310] Historian Anthony Parent explained that "enslaved midwives and herbalists" possessed, in addition to their technical expertise, a distinct spiritual power, giving rise to anxiety among enslavers.[311] Expertise in plant science went hand-in-hand with spiritual insight. This was the essence of a conjurer's work.

Bearing all of this in mind, it was probably the conjurers who prepared the poisons used against Europeans in the Western Hemisphere.[312] And conjurers were certainly in Maryland, even into the nineteenth century. Page Harris described a conjurer called "Old Pete the mechanic . . . known by some as the herb doctor and healer."[313] He worked on a farm in La Plata, Maryland.[314] Harris explained that Old Pete "would not be punished on any condition"; that he saved money and gave it to enslaved people who wanted to escape; and that he ultimately escaped himself.[315] "He eluded the dogs for several weeks, escaped, got to Boston and no one to this day has any idea how he did it; but he did."[316]

Thomas Foote, formerly enslaved in Maryland, described his mother, Eliza, of Cockeysville, who was trained in Western medicine but also known to have given an escaped African man "a small bag in which a stone of a peculiar shape and several roots

308. *Id.* at 9.

309. Menellis Gassaway, *in* RAWICK, *supra* note 20, Maryland Narratives at 18.

310. CASELY HAYFORD, *supra* note 146, at 106.

311. ANTHONY S. PARENT, JR., FOUL MEANS: THE FORMATION OF A SLAVE SOCIETY IN VIRGINIA, 1660–1740, at 231 (2003).

312. CHIREAU, *supra* note 27, at 75, 69. "Within trial accounts, depositions, and court reports spanning the Chesapeake region and the lower South, Conjurers were regularly identified as responsible for creating and administering poisons." *Id.* at 69.

313. Page Harris, *in* RAWICK, *supra* note 20, Maryland Narratives at 24.

314. *Id.*

315. *Id.*

316. *Id.*

were found."[317] The escaped man claimed that the bag "had the power over all with whom it came in contact."[318] European Americans, clearly recognizing the spiritual aspect of Eliza Foote's practice, accused her of "voodooism."[319]

Frederick Douglass, also enslaved in Maryland, referenced an elder enslaved African man named Sandy Jenkins, who Douglass called "an old adviser" and who was married to a "free" African woman.[320] Sandy directed Douglass to accompany him to find "a certain *root*" that Douglass would carry, "always on my right side."[321] Sandy asserted that the root "would render it impossible for [the brutal overseer] Mr. Covey, or any other white man, to whip me."[322] Douglass initially, "rejected the idea," but at Sandy's insistence, took the root and carried it on his right side.[323] As it turns out, Covey and Douglass had an epic fight, lasting nearly two hours.[324] Douglass noted that, during this fight, Covey did not whip him at all; in fact, "he had drawn no blood from me, but I had from him."[325] He went on to explain: "The whole six months afterwards, that I spent with Mr. Covey, he never laid the weight of his finger upon me in anger."[326] Douglass added that, over the next four years of remaining enslaved, "I had several fights, but was never whipped."[327]

Douglass also tells the story of a man named "Uncle Isaac Copper" who was alternatively referred to as "Doctor Isaac Copper." Tellingly, he describes Copper in the following way: "He was our doctor of medicine, and doctor of divinity as well . . . . He was too well established in his profession to permit questions as to his *native* skill, or his attainments."[328]

Conjurers were not solely helping to heal or prevent harm. They also knew how to inflict harm. They had "knowledge of roots

317. *Thomas Foote's Story, Dec. 16, 1937*, *in* vol. viii UNITED STATES WORK PROJECTS ADMINISTRATION, THE PROJECT GUTENBERG EBOOK OF SLAVE NARRATIVES, Maryland Narratives, at 11–12 (2004).

318. *Id.* at 12.

319. *Id.*

320. Douglass, *Narrative of the Life of Frederick Douglass*, *supra* note 23, at 63.

321. *Id.* (emphasis added).

322. *Id.*

323. *Id.*

324. Douglass, *Narrative of the Life of Frederick Douglass*, *supra* note 23, at 64–65.

325. *Id.*

326. *Id.* at 65.

327. *Id.*

328. Douglass, *My Bondage and My Freedom*, *supra* note 23, at 164–65 (emphasis added).

and herbs [that] gave them the simultaneous ability to cure the ailing and to poison wrongdoers."[329] Wielding such an arsenal of spiritual and chemical weaponry would have required meticulous skill, as the difference between healing and killing is often a matter of dosage: "It is really sometimes a very thin line between what is a medicine and what can be a murder weapon."[330] This dynamic substantiates a key guiding principle in our investigation: to find the poisoners, look at the healers.[331]

Considering this evidence, there is certainly one party in our investigation who becomes a person of interest, and that is Anthony, who worked with Jenny to poison their enslaver, Jeremiah Chase, in 1755. Maryland newspaper records reference Anthony as "a Negro Doctor."[332] "Negro Doctor" was another term for "conjurer."[333] He was also referenced as "Toney the Poison Doctor."[334] Toney, a healer and a poisoner. A conjurer.

Toney the conjurer and others like him in Maryland likely possessed intergenerational expertise in the Ways of Knowing related to the power of plants and the power of invoking ancestors and other divine entities to cause chemical control,[335] sickness, and "swift or slow deaths" in response to the wrongdoing in their midst.[336] What was known as poison to Whites was not only Protocol of addressing wrongdoing, but it was also a form of practicing

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329. Rucker, *supra* note 295, at 98.

330. Reactions, *Raychelle Burks on Poisons, Medicine, and Communicating Science*, YOUTUBE (Apr. 28, 2014), https://www.youtube.com/watch?v=kb-XDGcAuLM (last visited Feb. 21, 2025); *see also* COVEY, *supra* note 54, at 79 ("What is true is that those who successfully worked with such toxic plants must have been well trained in herbal and plant cures because the line between poisoning a patient and curing them can be very fine."); PARENT, *supra* note 311, at 232 ("[T]hey also assumed the capacity to poison as well as to heal."). African expertise also probably included *healing the poisoned*, as a 1750 advertisement in the *Maryland Gazette* suggests: "Negro Caesar's Cure for Poison, and the Bite of a Rattle Snake." MD. GAZETTE, Dec. 19, 1750, at 3,
https://www.msa.maryland.gov/megafile/msa/speccol/sc4800/sc4872/001278/html/m1278-1304.html [https://perma.cc/Q8G2-VXMH].

331. CHIREAU, *supra* note 27, at 69 ("Within trial accounts, depositions, and court reports spanning the Chesapeake region and the lower South, Conjurers were regularly identified as responsible for creating and administering poisons.").

332. MD. GAZETTE, Jun. 26, 1755, *supra* note 34.

333. CHIREAU, *supra* note 27, at 69–70, 74.

334. MD. GAZETTE, July 10, 1755, *supra* note 32 ("On Friday last, William Stratton, Negro Toney the Poison Doctor, and Negro Jemmy [sic] were all executed . . . for poisoning the late Mr. Chase . . . .").

335. Interview with Raychelle Burks, *supra* note 50 (explaining "chemical control").

336. MORGAN, *supra* note 25, at 618 ("Thomas Anburey heard from Virginians about the 'remarkable' abilities of slaves to cause swift or slow deaths 'agreeable to their ideas of revenge.'").

African Ways of Knowing.[337] Poison was both harmful and "spiritually powerful."[338] Accordingly, African conjurers served a potent cocktail of functions: plant scientists, botanists, doctors, spiritual leaders, priests, healers, poisoners, executioners.[339]

## VII. Motive: The Wrongs Being Addressed

Considering Akan Protocol practices together with cultural continuity and collective action in Maryland helps us step back to look at our proverbial investigation board and see the broad connections. If any of our poisonings involved Akan speakers, or were influenced by Akan speakers, or other Africans with similar Ways of Knowing and practices, our poisonings were likely grounded in (1) the idea that ritual can bring about someone's bad death, or *owu bon*; (2) the notion that ancestors and other divine entities can be called upon to act as executioners, or *abrafo*; and (3) the expertise from the Continent in using natural and ingestible substances to cause sickness and death.[340] Through an Africana lens, these are all aspects of Protocol. What is usually seen through a Western lens as merely the crime of poisoning, we have reframed as Protocol addressing wrongdoing.[341]

I can feel us getting closer now to the key findings of our investigation. If poisoning was a practice included in the Protocol of addressing wrongdoing, this raises the question: What wrongs were enslaved Africans addressing?

### *A. Enslavement and Legal Restrictions on Freedom*

> Slaves know enough of the rudiments of theology to believe that those go to hell who die slaveholders.
> – Frederick Douglass, 1855[342]

337. *See* Paton, *supra* note 27, at 235 ("Makandal [leader of uprising in Saint Domingue] inspired a network of Maroons and plantation slaves whose secret spiritual medicine, understood by slaveholders as poison, was used in religious ceremonies.").

338. *Id.* at 235 ("[T]he ritual use of spiritually powerful substances to strengthen attacks on the plantocracy."); *id.* at 248 ("Poison was relative: its effect was not a simple physiological matter but one intimately related to the spiritual world.").

339. Interview with Raychelle Burks, *supra* note 50. The Akan speakers, in particular, were trained in social organizations like the *Nnoboa*, who helped tend to activities such as farming and removing weeds. Appiagyei-Atua, *supra* note 135, at 183–84.

340. *See* THE AKAN PEOPLE, *supra* note 143, at 17.

341. *See* CHIREAU, *supra* note 27, at 71 ("Poisoners were viewed by many African Americans as arbiters of justice and, certainly, revenge.").

342. Douglass, *My Bondage and My Freedom*, *supra* note 23, at 163.

Africans poisoned their oppressors specifically in the context of enslavement. This collective action largely stopped when enslavement ended.[343] When we consider poison as Protocol, therefore, the Protocol must have related to the wrongdoing of enslavement itself.[344] As we have explored, some posit that enslaved Africans' resistance was merely self-defense and not a greater challenge to enslavement as a system.[345] But why can't both be true? The acts could be self-defense *and* a principled way of addressing a larger wrong. This is easier to contemplate with an awareness of labor systems in Africa.

Enslavement in Maryland would have been offensive to the Akan—similar to how it would have been offensive to most enslaved Africans in the Western Hemisphere. As Nora Wittmann put it, "transatlantic slavery was not 'slavery' such as practised in some African societies, but indeed a crime against humanity and genocide."[346] Despite the Western insistence on characterizing the Akan and other African polities as enslavers of the same kind and on equal footing as European traders, this was not so: the European system of enslavement was materially distinct from the systems of labor and integration found in West Africa.

The Western-centered tendency to point to African labor systems as some sort of rebuttal to enslavement in the Western Hemisphere is no more than what critical anti-trafficking scholar Lyndsey Beutin characterizes as a "rhetorical alibi[] for white historical innocence."[347] Unfortunately for those relying upon it, the alibi doesn't hold up.

Indeed, the Akan labor system—like other neighboring systems—"was not, as in chattel slavery, an irreversible rejection from the society that employed it: on the contrary, it supposed an organic absorption of subjected persons into the society that used them."[348] Casely Hayford noted in 1903 that "ill-informed writers"

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343. DEETZ, *supra* note 61, at 95 ("Post-emancipation records show a striking absence of poisoning convictions, suggesting that the crime was associated with resistance to enslavement.").

344. One might argue that, after enslavement, access to the act of poisoning also ended, but this is not true. Blacks and whites remained in close proximity, as post-enslavement life for Blacks was still dominated by service roles to whites.

345. *See* MCKIVIGAN & HARROLD, *supra* note 22, at 4.

346. WITTMANN, *supra* note 139, at 35.

347. LYNDSEY P. BEUTIN, TRAFFICKING IN ANTIBLACKNESS: MODERN-DAY SLAVERY, WHITE INDEMNITY, AND RACIAL JUSTICE 3 (2023).

348. DAVIDSON, *supra* note 127, at 58. "The characterisation of a slave as *chattel* was however, not part of the Ghanaian slavery experience. In Ghana the slave was

characterize the Gold Coast as having a "slave-raiding propensity" with Hayford stating, "You may as well call the war of the North and the South of the United States, or the struggle in the British Isles to preserve the integrity of Great Britain, slave-raiding wars."[349] He went on to explain that the proper interpretive frame would conclude that the (Akan-speaking) Asante federation made efforts "by war or otherwise . . . to keep the Union together."[350]

The Akan labor system maintained distinct reasons for relegating a person to dependent status: war captivity, punishment for wrongdoing, and failure to pay debt owed.[351] While the West had and still has its prison system, Akan society had this dependency system, where valuable work was the method of vindicating one's wrong.[352] This dependency system was never large-scale or central to Akan society—it was marginal and small-scale.[353] Wittman explained, of "slaves" in Africa, "Many of them lived and worked just as their so-called masters did, and Europeans, and often even other Africans, could not tell them apart."[354] In relative terms then, the Akan system of labor was "not oppressive in comparison with the classic plantation-type of the Americas during the 18th century."[355]

It must also be stated that, while the Asante are well-known to have sold many people to European enslavers during the 1700s and 1800s, this was *after* the *Maafa* had begun, and consequently

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regarded as a human being and was entitled to certain rights and privileges." AKOSUA ADOMA PERBI, A HISTORY OF INDIGENOUS SLAVERY IN GHANA: FROM THE 15TH TO THE 19TH CENTURY 4 (2004); *see also* DAVIDSON, *supra* ("Slaves bought or captured for farming work were normally accepted into the family or other unit for which they toiled."); FRENCH, *supra* note 12, at 103 ("For the Akan, a sprawling collection of ethnic groups whose languages shared a high degree of mutual intelligibility, slaves had traditionally been acquired during internecine competition, as well as during expansionary drives against unrelated groups . . . . [T]he general emphasis was on assimilating them into society as rapidly as possible."); CASELY HAYFORD, *supra* note 146, at 82. ("Gold Coast slavery was neither the slavery of ancient Rome, nor that of Afro-American history."). There was also pawnship: "The uncle pledged his nephew, or his niece, for a sum of money, with a proviso for redemption upon the first opportunity." CASELY HAYFORD, *supra* note 146, at 83.

349. CASELY HAYFORD, *supra* note 146, at 20.

350. *Id.*

351. WITTMANN, *supra* note 139, at 52; *see* PERBI, *supra* note 348, at 3.

352. WITTMANN, *supra* note 139, at 51 ("Please consider in that context that slaves were usually convicted criminals or war captives, and that there were no prisons."); *see also id.* at 53 ( "It was an absolute principle in Akan society that no human being could be punished without trial.").

353. *Id.* at 52; *see also* PAUL E. LOVEJOY, TRANSFORMATIONS IN SLAVERY: A HISTORY OF SLAVERY IN AFRICA 21 (2d ed. 2000) (explaining the dynamics of slavery in Africa before it became integrated into the international network of slavery as an area of supply).

354. WITTMANN, *supra* note 139, at 41.

355. *Id.* at 38 (quoting Raymond Dumett).

after European demand for captives had grown and degraded many various African polities into a kill-or-be-killed spiral.[356] In fact, the expansion of the Asante empire was in large part due to the European trade in enslaved Africans.[357] And "slavery" generally did not start in the region that would later be known as the Gold Coast until the late 1400s, which is in tandem with the beginnings of the *Maafa* on the Gold Coast.[358]

Before the *Maafa* devastated the region, the Akan speakers of the region had a system of labor with an established Protocol that was downright humane in contrast to European enslavement.[359] While their social status was certainly discrete and imposed constraints on association and certain conduct (some of which was punishable by death),[360] people in the "lowest social group" were "integrated as part of the family" and had what one using a Legal orientation might characterize as "rights."[361] Akan labor Protocol allowed those in this lowest social group to marry, make independent income, have children considered to be "free," inherit, and participate in Protocol, generally—including participation in processes to address wrongdoing, make promises, and similar activities.[362] They could also employ their own dependents (referred to by some as "slaves").[363] Akan Protocol prohibited mutilating or killing workers.[364] Furthermore, grueling gold mining work was limited to those who had committed wrongdoing in the community or those who had been captured during war with neighboring polities.[365]

Such contours and "rights" were painfully absent in the lives of those racially enslaved or designated as "free" under European

356. *See id.* at 47.

357. Manning, *supra* note 18, at 107.

358. WITTMANN, *supra* note 139, at 48.

359. PERBI, *supra* note 348, at 117 ("On the whole, the records portray a picture of humane treatment."); WITTMANN, *supra* note 139, at 47. "[A]ll ethnic groups studied by Perbi carry oral traditions that stress how slaves were generally well treated in pre-Maafa Ghana." *Id.* at 50.

360. WITTMANN, *supra* note 139, at 51.

361. *Id.* at 49–51; *see also* PERBI, *supra* note 348, at 4, 111.

362. WITTMANN, *supra* note 139, at 50.

363. *Id.* at 53.

364. *Id.* at 47 ("Anyone who killed a human being, free or slave, without royal permission, was persecuted for murder."). Both acts required permission from the ruler. *Id.*

365. *Id.* at 49. Given the Akan labor system relegated war captives and wrongdoers to its lowest laboring social status, this form of social organization was part of the Akan Protocol of addressing wrongdoing.

rule.[366] In Maryland, aside from the obvious day-to-day suffering and terror experienced by enslaved Africans, Africans could not meaningfully participate in the Legal system. They could not testify in cases against Europeans.[367] A separate and unequal (lesser) Legal regime was established and maintained for African people.[368] Additionally, enslavement was a "lifetime condition" for enslaved Africans, and it was passed down to the children they birthed.[369] How preposterous, then, it would have been for the Akan to find themselves in a worse situation in the Western Hemisphere, an inhumane labor system, complete with torture, psychological terror, and no escape—all absent their own wrongdoing.

Even if individual enslaved Africans had committed some wrongdoing or had been prisoners of war, the consequence of enslavement was not commensurate with any wrongful act, as it was excessively long (lifelong), extensive (intergenerational, did not allow for any social mobility),[370] and cruel (included physical and psychological torture).[371] Such arbitrarily-imposed mistreatment ran counter to Akan labor Protocol and Protocol of addressing wrongdoing. Its unjust imposition must have felt like the most severe violation. It was, thus, a uniquely egregious wrong that required punishment in the ways that were possible. Spiritual attack, for example death by poison, was surely a just remedy.

### *B. Taking Life and Other Offenses*

Another clear wrong that the Akan and other Africans[372] would have sought to address was the taking of precious life, the

366. For restrictions on the lives of Africans Legally designated as "free," *see* BRACKETT, *supra* note 16.

367. Pursuant to a law of 1717, no Indigenous person or African person ("negro")—enslaved or "free"—or biracial person ("mulatto") could testify in any case concerning a Christian white person. *Id.* at 191; Douglass, *Life and Times of Frederick Douglass*, *supra* note 23, at 486 ("The criminal was always dumb, and no slave was allowed to testify other than against his brother slave."). *But see* Wiecek, *supra* note 64, at 269 (stating that in Maryland, unlike other slaving states, enslaved Africans *could* testify against European-Americans in lawsuits).

368. *See generally* MORRIS, *supra* note 87 (detailing the development of this regime through the 17th, 18th, and 19th centuries).

369. Wiecek, *supra* note 64, at 262–63.

370. In Maryland, "[t]he act of 1664 and its successors, declar[ed] the children of slaves to be slaves." BRACKETT, *supra* note 16, at 37.

371. *See, e.g.*, *Caroline Hammond, A Fugitive, 1938*, *in* UNITED STATES WORK PROJECTS ADMINISTRATION, *supra* note 317, at 14 (referencing the statewide reputation of the Revells family for their brutality toward those they enslaved in Anne Arundel County).

372. In referencing other Africans belonging to other African polities here, I am

slaughter of their fellow captives, or, in Legal terms, murder.[373] Death was frequently being dealt by European enslavers, to an extent which we may never be able to ascertain.[374] In Maryland, enslavers killed enslaved Africans "under [their] correction."[375] And, as Douglass noted, the Legal system did not address this wrong: "I speak advisedly when I say that in Talbot Co[unty], Maryland, killing a slave, or any colored person, was not treated as a crime, either by the courts or the community."[376]

In pre-*Maafa* Akan Protocol, killing a person was considered a grave mistake, and a dependent or "slave" could not be killed by the person under whom they labored.[377] Only the *Asantahene* (leader) and others in leadership positions possessed the authority to end life.[378] Death as a punishment could be imposed only by a certain high level of leadership in the community—leaders who exercised power with the approval of the community.[379]

However, in Maryland and elsewhere, such Governance was absent.[380] European enslavers—from the barracoons at the initial site of capture on the Gold Coast, to the ships during the horrendous voyage, to the enslaving estates—tortured and killed enslaved Africans with impunity and with no regard for process.[381] Aside from the salient tragedy and pain involved here, the lack of structure and procedure in determining whose life was to be cut short and for what reason would have gone against Akan Protocol.[382]

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recognizing the cultural unity of Africa and the likely commonalities in various systems of Protocol in pre-*Maafa* Africa: "If one were to make a comparative listing of political structures in precolonial Africa, the result would confirm that precolonial political cultures undoubtedly displayed a great diversity, but an even greater unity of underlying concept." DAVIDSON, *supra* note 127, at 63.

373. For more on enslavement-era jurisprudence regarding killing of enslaved Africans, *see* MORRIS, *supra* note 87, at 162–64.

374. *See, e.g.*, GENOVESE, *supra* note 25, at 39 ("Despite the efforts of the authorities and the courts, masters and overseers undoubtedly murdered more slaves than we shall ever know.").

375. BRACKETT, *supra* note 16, at 142–43.

376. Douglass, *Life and Times of Frederick Douglass*, *supra* note 23, at 515.

377. PERBI, *supra* note 348, at 118–19; WITTMANN, *supra* note 139, at 51.

378. PERBI, *supra* note 348, at 119 ("The Akans say *Ohene nkoara na owo sikan* (it is only the chief who wields the sword)."); WITTMANN, *supra* note 139, at 51.

379. Brookman-Amissah, *supra* note 170, at 79.

380. *See* ch. 7 *Southern Law and the Homicides of Slaves*, *in* MORRIS, *supra* note 87, at 161–81.

381. Two examples in Maryland of torture included enslavers attaching an iron collar and a ball and chain to enslaved Africans. BRACKETT, *supra* note 16, at 142–43.

382. *See* WITTMANN, *supra* note 139, at 51.

It is at this point that we might recall the Akan proverb about the divine entity who poisoned Death itself: *Odomankoma na oma owuo di akane*, or "It was none but *Odomankoma* who made Death eat poison."[383] With death all around them, the Akan in Maryland may have considered it divinely appropriate to make the personification of that Death eat poison.

### *C. Displacement*

We learned that kidnapping was considered a wrong in Akan internal Protocol.[384] How, then, would the collective kidnapping by Europeans have been perceived as other than a profound wrong?

Akan oral traditions hold that the ancestors "emerged from the ground," emphasizing the importance of land and place.[385] "For the Akan, the land belonged to the ancestors," and land was associated with *Asase Yaa* (an divine earth mother entity).[386] Furthermore, land is kept by the ancestors and the living community; communalism undergirds the Akan Protocol regarding how people interact with land.[387]

This consciousness and relationship to land would have colored the Akan experience of separation from their native land and forced placement onto the land originally inhabited by Algonquin speakers and other Indigenous North American peoples, yet at the same time occupied by European enslavers and extractors. "Displacement was . . . a traumatic, personality-altering experience," Gomez explained, "especially as it terminated in a sugar cane or tobacco field on the other side of the world."[388] Displacement would have not only had a profound impact on Akan speakers, but it would have been seen as a violation of the order of things, of Protocol.

### *D. Community Disruption*

Enslavement was a full-scale attack on African social organization, including family life—and to appreciate what that

383. Brookman-Amissah, *supra* note 170, at 83–84.

384. CASELY HAYFORD, *supra* note 146, at 29–30.

385. *See* RUCKER, *supra* note 143, at 28.

386. GOMEZ, *supra* note 15, at 112.

387. *See* SARBAH, *supra* note 155, at 57. Sarbah also notes the communalism of the Akan: "In this country joint property is the rule, and must be presumed to exist in each individual case until the contrary is proved . . . . Absolute, unrestricted, exclusive ownership, enabling the owner to do anything he likes with his immoveable property, is the exception." *Id.* at 61–62.

388. GOMEZ, *supra* note 15, at 112.

means, we must consider that an African notion of "family" at this time would have been broader than the European definition.[389] The Akan, specifically, had an extensive definition of "family";[390] it meant "the entire lineal descendants of a head *materfamilias*."[391] The Akan people organized themselves into *abusua* or kinship groups based on matrilineage.[392] They believed "that the welfare of the community transcended that of the individual."[393] This is suggested in the Akan proverb *Abusua ye dom*, or "There is strength and bond where there is unity in the family."[394] Nana Akua Kyerewaa Opokuwaa explained this further:

> When you speak of parent it means your mother or father, your uncle, your aunt, an elder in the village. When you speak of sister and brother you may be referring to what we call cousin, your friend or some other peer relationship. In Akan culture, we are all members of the same family.[395]

Enslavement, including enslavement in Maryland, was incredibly destructive to the notion of family, even if defined in the closely-held sense of the European nuclear family. Africans were capriciously "divided into families," as one enslaver phrased it—nuclear families in the Western sense—and then enslavers proceeded to break apart *those* families.[396] Africans were also arbitrarily coupled by enslavers.[397] And the bonds that Africans themselves developed were not respected.[398] Forced family separations by fickle enslavers were commonplace.[399]

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389. *See* Niara Sudarkasa, *Conceptions of Motherhood in Nuclear and Extended Families, With Special Reference to Comparative Studies Involving African Societies*, JENDA: A JOURNAL OF CULTURE & AFRICAN WOMEN STUDIES, at 3 (2004) ("I consider the term 'nuclear family' to be an inaccurate description for both the monogamous and polygamous families that made up indigenous African extended families."); PERBI, *supra* note 348, at 112 ("It [the family] went beyond that of the nuclear family to include members of the extended family, servants and slaves.").

390. Brookman-Amissah, *supra* note 170, at 80 ("For the Akans as also other African peoples the concept of 'family' extends beyond the limits of what is known in industrial societies as the 'nuclear' family.").

391. CASELY HAYFORD, *supra* note 146, at 76.

392. *See* Brookman-Amissah, *supra* note 170, at 78–80.

393. GOMEZ, *supra* note 15, at 112.

394. Appiagyei-Atua, *supra* note 135, at 172.

395. OPOKUWAA, *supra* note 146, at 119; *see also* PERBI, *supra* note 348, at 112 ("The family was of great sociological significance in pre-colonial Ghana.").

396. LEVINE, *supra* note 14, at 102.

397. *See id.* at 102-03; *see also* Cade, *supra* note 23, at 302 ("The utter helplessness of the slave both as regards the selection and retention of a bosom mate is clearly illustrated by these testimonies.").

398. LEVINE, *supra* note 14, at 102–03; Cade, *supra* note 23, at 305 ("The sanctity of this so-called slave family was not at all regarded by the master, as many witness.").

399. LEVINE, *supra* note 14, at 102–03; Cade, *supra* note 23, at 306.

Furthermore, as Douglass put it, "[s]lavery ha[d] no use for either fathers or families, and its laws do not recognize their existence in the social arrangements of the plantation."[400] Enslavement in Maryland included violation of sexual consent and targeting of couples.[401] Enslaved African women were under frequent attack from both White men and women. Formerly enslaved in Charles County, Maryland, Richard Macks provided his thoughts on these attacks:

> Let me explain to you very plain without prejudice one way or the other, I have had many opportunities, a chance to watch white men and women in my long career, colored women have many hard battles to fight to protect themselves from assault by employers, white male servants or by white men, many times not being able to protect, in fear of losing their positions. Then on the other hand they were subjected to many impositions by the women of the household through woman's jealousy.[402]

This attack on African women was perceived as a community-wide issue for African women and men together.[403]

All of this—family separations, sexual assaults, community fragmentation—would have been considered by many Africans, including the Akan, to be intensely wrong.[404] Poisoning, as Protocol, could challenge all these wrongs while also championing an African vision for society and how it should work. And given what we know about Akan Protocol and the notion of collective responsibility, it would be no surprise if some African poisoners viewed entire

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400. Douglass, *My Bondage and My Freedom*, *supra* note 23, at 151.

401. Douglass, *Life and Times of Frederick Douglass*, *supra* note 23, at 495–97; *see also Personal Interview with Richard Macks, Ex-slave*, *in* UNITED STATES WORK PROJECTS ADMINISTRATION, *supra* note 317, at 29–30 ("This attack was the result of being goodlooking, for which many a poor girl in Charles County paid the price. There are several cases I could mention, but they are distasteful to me.").

402. *Personal Interview with Richard Macks, Ex-slave*, *in* UNITED STATES WORK PROJECTS ADMINISTRATION, *supra* note 317, at 30.

403. The fact that Richard Macks spoke of this demonstrates his own concern, as an African man, about this problem. Africana Studies professor Valethia Watkins cautions against seeing the assault on Black women as a solely Black women problem, noting that Western narratives siloing issues into gendered categories "function[s] as a Trojan horse for the global intellectual imperialism of Western scholars' interpretation of the cultural order." Valethia Watkins, *Contested Memories: A Critical Analysis of the Black Feminist Revisionist History Project*, 9 J. PAN-AFR. STUD. 271, 284 (2016). She emphasizes community in African consciousness, pointedly asking, "Why should our history remain severed along gender lines? Whose interests does this serve?" *Id.* She explains that the specific problems experienced by African women or men in the past and today were and are "our shared burden as a group as well as our mutual responsibility to address since the ramifications were rarely limited to a specific gender but impacted the quality of life of all African people, regardless of gender." *Id.* at 285.

404. *See* Wiecek, *supra* note 64, at 272 n.63 (Act of 1723, chap. 15, and Act of 1751, chap. 15, Laws of Md.).

European families as the proper responsible parties to answer for these egregious acts.[405]

*E. Conflicts of Law and Protocol*

In his section, "The Conflict of Systems,"[406] Casely Hayford explains that "the idea of representative government . . . is the very essence of the Native [Akan] State System."[407] The legitimacy of leadership goes hand-in-hand with moral righteousness, as suggested by the following Akan proverb: *Nea adee wo no na odie*, or "It is the rightful person who is entitled to rule."[408]

Take, for a moment, this simple fact that Akan peoples in the enslavement colonies came from a homeland where their Protocol included community participation at a deep level. In their memory, they had Governance that *they* shaped. Why in the world, then, would they respect a system of Governance—Maryland Law—that afforded them no engagement or representation?

To the Akan, Law, including its prohibitions against poisoning, was not legitimate. And especially where Law is viewed as illegitimate, inadequate, alien, backward, or ineffective, Protocol is—and, from an African-centered orientation, should be—used.[409] Even if enslaved Africans had the desire to use Legal methods to respond to their circumstances (and we should not assume that they always did), they were most often unable to effectively do so.[410]

It might take an eyewitness account to help on this point. Frederick Douglass explained, reflecting on his enslaved life in Maryland, that the plantation on which he was enslaved was

> a little nation of its own, having its own language, its own rules, regulations and customs. The laws and institutions of the state, apparently touch it nowhere. The troubles arising here, are not settled by the civil power of the state. The overseer is generally accuser, judge, jury, advocate and executioner. The criminal is

405. SARBAH, *supra* note 155, at 39.

406. CASELY HAYFORD, *supra* note 146, at 119.

407. *Id.* at 126.

408. Appiagyei-Atua, *supra* note 135, at 175.

409. *Cf.* Tweneboah, *supra* note 157, at 212 ("In the absence of effective monitoring of state legislations and implementation of its secular and modern ideals, people rely on the invisible forces—which the modern state casts as irrational superstitions—to settle crucial disputes of national concern."); *id.* at 225, 228. Additionally, Law was not effective, especially its prohibition against African testimony in cases concerning Europeans, that is, people of European descent. *See* BRACKETT, *supra* note 16, at 119–20.

410. *See* BRACKETT, *supra* note 16, at 191 (explaining that African people could not testify in cases concerning Christian whites).

always dumb. The overseer attends to all sides of a case.[411]

Such a condition made it clear to enslaved Africans that the Legal process was not available and was not going to work. Such a Governance system holds no allure for those who already have their own.

## VIII. Notes for the File, For Future Investigations

Let us ponder what we learned in this investigation.

### *A. Preliminary Findings: The Illuminating Function of the Orientation Shift*

Thinking back to "self-defense" as a frame for African action or reaction in the Western Hemisphere, let us contemplate a notion of "self-defense" in Akan Protocol. Such a notion might exist in Akan Protocol. But assuming so and leaning on this Legal construct means that we use the shortcut of Law to think about African governance. We chain "African ideas to European ideas," and without even studying or understanding the African ideas we are attempting to chain.[412]

Doing this creates a big risk of missing the intricacies of Akan Protocol, ignoring the broader cultural logic that the Protocol lives in, and failing to see the relationships between multiple Akan Protocol concepts. All of this is a bad side-effect of the Qualified Law Orientation (or "QLO"), which is the improper imposition of European Legal constructs onto peoples and polities where they do not belong.[413]

By skipping to the familiar and sharply-defined Legal construct and by not beginning with Akan thought and world senses, we make the erroneous assumption that the pre-*Maafa* Akan viewed the world as a set of scenarios where a 'self' defended against personal attacks—where actions were taken by self on behalf of self. What if that were not the case in the Akan world-sense? What if the 'self' was not the primary identity? What if identity was primarily collective and the world of the living was brimming with a community of ancestors and divine entities (*obosum*), who participated in attacking various parties in response to some precedent request, a broken promise, or widely understood wrong?

411. Douglass, *My Bondage and My Freedom*, *supra* note 23, at 160.
412. Carruthers, *supra* note 90, at xviii.
413. *See* Porter, *supra* note 4, at 256.

As with all Legal terms of art, the term 'self-defense' misses these questions, and is therefore incapable of capturing the richness and depth of the African world-sense. Accordingly, in *all* of our investigations, we must confront the assumptions attached to Legal terms of art by releasing them as our primary mode of describing African governance and doing our damnedest to articulate the messages in the African Deep Well on their own terms.[414]

### *B. Interviews Outstanding: Oral and Non-English Language Sources*

This investigation mostly engaged with written, English-language sources. It is limited by the knowledge of the investigator. Collective work is required to push similar investigations to deal primarily in African-language sources and information in the oral tradition. As Kwame Daaku has explained, "[d]espite shortcomings, the Akan oral traditions, like similar traditions of other African people, are the best evidence the historian of Africa can employ to understand the Africans and their history."[415] We want the best evidence.

### *C. Still at Large: What About Law?*

We could talk more about Law. We could talk about the severe sentences and punishments faced by Africans who poisoned their enslavers.[416] We could talk about laws prohibiting enslaved Africans from practicing medicine.[417] We could talk about the

414. *See* Carruthers, *supra* note 90, at xviii ("African Deep Thought must now speak for itself.").

415. Kwame Y. Daaku, *History in the Oral Traditions of the Akan*, *in* THE AKAN PEOPLE, *supra* note 143, at 101; *see also* OPOKUWAA, *supra* note 146, at 16 ("Akan tradition is an oral tradition.").

416. Wiecek, *supra* note 64, at 274 ("Colonial statutes severely punished blacks who committed . . . poisoning and attempted poisoning.") (citing Act of 1751, chap. 14, Laws of Md., 1). Beyond hanging enslaved Africans who committed serious crimes, Maryland legislators resolved to cut off an offender's right hand before hanging them; to the Europeans of the colony, deterrence was furthered by mutilation and public display of a person's body after death. BRACKETT, *supra* note 16, at 120.

417. The Virginia Slave Code of 1860 contained a provision on the "Sale of Poisons to Negroes Prohibited": "It shall not be lawful for any apothecary, druggist or other person to sell to any free negro, or to any slave without the written permission of the owner or master of such slave, any poisonous drug." 1 DOCUMENTS OF AMERICAN CONSTITUTIONAL & LEGAL HISTORY, VOL. 1, FROM SETTLEMENT THROUGH RECONSTRUCTION 397 (Melvin I. Urofsky ed., 1989).

statutes meant to preserve the system of enslavement and quell European fear of African justice.[418]

We could talk about the unfairness of the Legal system, including the fact that Africans were governed by not only slave codes but also criminal codes, the fact that sentences under the criminal code imposed on Africans were more harsh than those imposed on Whites for similar conduct, the fact that enslaved Africans and "free" Blacks could not testify in cases against Whites.[419] We could talk about how Law attempted to interfere with Protocol by seeking to lessen the collective power of enslaved Africans and the collective nature of their Protocol with restrictions on assembly and on practicing African Ways of Knowing.[420]

We could talk about how capitalist greed could trump the operation of Law, when enslavers concealed the illegal conduct of those they enslaved so that they could avoid the monetary loss that would result if they were executed.[421] We could also talk about how enslaved Africans knew about the Law and used this knowledge to navigate the Legal landscape (or, perhaps more appropriately, hellscape) in which they found themselves.[422]

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418. PARENT, *supra* note 311, at 129 ("Armed with a formidable array of laws and punishments, white society in 1705 was prepared to preserve racial slavery to the death.").

419. *See, e.g.*, 1 DOCUMENTS OF AMERICAN CONSTITUTIONAL & LEGAL HISTORY, *supra* note 417, at 397 ("Slave codes . . . regulated the daily life of the slaves, but if they broke the law, they also had to contend with the state's criminal code, which often punished slaves far more harshly than it did white men for the same crime."); BRACKETT, *supra* note 16, at 119–20 (explaining that the testimony of enslaved and so-called "free" Africans was deemed legally invalid in any case concerning European-Americans).

420. Paton, *supra* note 27, at 258.

421. *See* BRACKETT, *supra* note 16, at 119 ("It was also found that some masters of slaves who had committed heinous offences had concealed the crimes, thus hindering the execution of justice, rather than lose the slaves."); *see, e.g.*, GENOVESE, *supra* note 25, at 36 (describing how, after enslaved Africans killed an overseer, the enslaver "calmly sold them" and "protected his investment").

422. For example, Dennis Simms' interview shows the knowledge of Law in Maryland:

> Simms asserted that even as late as 1856 the Constitution of Maryland enacted that a Negro convicted of murder should have his right hand cut off, should be hanged in the usual manner, the head severed from the body, divided into four quarters and set up in the most public places of the county where the act was committed. *He said that the slaves pretty well knew about this barbarous Maryland law*, and that he even heard of dismemberments for atrocious crimes of Negroes in Maryland.

Dennis Simms, *in* RAWICK, *supra* note 20, Maryland Narratives at 61 (emphasis added). James Wiggins, formerly enslaved in Anne Arundel County, Maryland, explained that his father could read and write, and "once he was charged with writing passes for some slaves in the county." James Wiggins, *in id.* Maryland Narratives at 66.

But before we engage in these interrogations and depositions, we cannot shortchange this important moment. A moment that should be extended. That is, the moment when Protocol stands alone and is respected and valued in its own right.

Law need not be the focus at the moment.[423] Law is not the accrediting body for Protocol. Protocol stands on its own. Stated differently, it is enough to explore the fact that Law and its punishments could not stop these Africans from championing the system of Governance that they brought with them from their long history. [424]

**Conclusion: Leaving the File Open**

Based on the foregoing, the investigator has reasonable cause to believe that the African poisoners in eighteenth century Maryland—and elsewhere—were carrying out the Protocol of their homelands. This investigation was one piece in the larger collective work of African-centered thinkers. Here, we tracked one example of Protocol—that of Akan speakers—to one place in the Western Hemisphere—colonial Maryland. But the lessons from this investigation are grand.

The Protocol orientation shift obliterates the notion of Black criminality, as it reveals the subjective nature of the term "criminal" and the fragility of the idea of "crime." The Protocol orientation reveals the hidden hand driving these notions: Western-centered thought. The myth that Black criminality will always necessarily rely on Law, a self-serving system of Governance that has defined what is "criminal." What is criminal is not the same as what is wrong; and what is wrong depends on a people's world-sense, their orientation in the universe.

Through the orientation shift facilitated by this investigation, we have seen that one Governance system's criminals are another Governance system's champions. A fearful objection might worry that such an orientation shift might be used to justify violence today. Such fear should be met with deep contemplation and exploration of the concept of violence in general and on the specific violence at issue. The thoughts around violence and "crimes" by

423. Centering Law promotes a narrative I call the "We did it too!" narrative. This narrative may be appropriate for children, to counteract the Black Lack deficit narratives they are bombarded with. However, as a serious scholarly endeavor, the "We did it too!" narrative necessarily centers a non-African audience, and therefore, is by definition *not* African-centered.

424. RUCKER, *supra* note 18, at 27 ("[N]o set of laws could effectively destroy the spirit of insurrection among the enslaved.").

African actors ought to be investigated and interrogated. Is there precedent violence that should be made visible? Is there a conflict between Law and Protocol at play? The answers will not always be yes, but the questions should be asked.

Relatedly, we are at the scene of a bigger "crime"—wrongdoing at a grander scale—that we must investigate: the "crime" of miscasting our ancestors, mischaracterizing their actions, and burying alive their experiences of governing themselves according to their own Ways of Knowing. We seek to bring justice to them. And not through co-optation or integration into a singular narrative. Such a strategy would be led by the "delusion of inclusion," because in such a project, the Western center is always maintained.[425] Other perspectives are only nominally referenced, while the narrator ultimately genuflects before the original, Western-centered conclusions.

There is no one narrative. The notion that there can or should be one—and that that one would be adequate, meaningful, or useful—is a fantasy. We do not need fantasy. We need power. And power flows from truth, *our* truth, in the presence of several truths. We need not only a wealth of information, but a wealth of perspective on that information—the proverbial "arc shot."[426] Only with a "plurality of centres" do we have the full arc of perspectives, giving us the power and the freedom to make meaningful choices about the facts and the consequences.[427] Legal thinkers, of all people, cannot deny this idea: the entire trial process is built around it.

African thinkers must build. We must be bold in our work, undeterred by the prospect of mistake, and unrelenting in the face of hostility. We must define our world, not as adrift hallucinators, but as anchored visionaries animated by the undying African spirit. In this grounded fashion, we may successfully restore an African center to serve as the basis for innovation, imagination, and future

425. *See* Porter, *supra* note 4, at 281.

426. Kyle Deguzman, *The Arc Shot—Examples and Camera Movements Explained*, STUDIOBINDER, Apr. 30, 2023, studiobinder.com/blog/arc-shot-in-film-definition/ [https://perma.cc/TNZ9-H4EW]; *see also* WILLIAM BROWN, SUPERCINEMA FILM-PHILOSOPHY FOR THE DIGITAL AGE 98 (2013) (referencing the 360-degree "bullet time" shot in the film *The Matrix*, when the camera circles around the character Neo to showcase the bullet approaching him from all angles) ("[S]uch shots, which for spectators seem easy to follow but the complexity of which is hard to explain, offer multiple, parallel perspectives . . . .").

427. NGŨGĨ, *supra* note 75, at 11.

investigation.[428] Fortunately, we have the brilliance and resilience of our ancestors to draw from. Their voices enable us to "break the chain" and make our plan for today based on our stories, our traditions, our lessons learned, our Protocol.[429]

428. CARRUTHERS, *supra* note 90, at xi ("The task before the Africans both at home and abroad is to restore to their memory what slavery and colonialism made them forget.").

429. *Id.* at xviii.

# What's So Compelling About Diversity Anyway?: How the Affirmative Action Diversity Rationale Was Built to Fail Under Today's Equal Protection Doctrine

Fariza Hassan†

> "[I]f we don't take seriously the ways in which racism is embedded in structures of institutions, if we assume that there must be an identifiable racist . . . who is the perpetrator, then we won't ever succeed in eradicating racism."
>
> — Angela Davis[1]

> "None of us got where we are solely by pulling ourselves up by our bootstraps. We got here because somebody . . . helped us pick up our boots."
>
> — Thurgood Marshall[2]

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†. J.D. Candidate 2025, University of Minnesota Law School, and Editor-in-Chief of *Minnesota Journal of Law & Inequality*, Vol. 43. I am incredibly grateful for all who helped bring this Note to life. First and foremost, I want to thank my parents, Ishret and Tanvir, for their unconditional love and support. They are the reason I am able to write these words, and without their guidance, I would never have become the woman I am today. To my brother Zuhair, thank you for being you, and of course, for always keeping me humble. Thank you to the members of this Journal, especially Zinaida Carroll, for your hard work and editorial support throughout this Note process—it has been a privilege working with you all on Volume 43. To Professor Susanna Blumenthal and Alexandra Schrader-Dobris, thank you both for pushing me to dream while also keeping me grounded throughout the many versions of this Note. To Professor Liliana Zaragoza and my peers in the Racial Justice Law Clinic, thank you for sharing this passion for racial justice and for inspiring me to keep up the good fight, every day. Finally, to my Bangladeshi community here in Minnesota, thank you for teaching me that it truly does take a village. This Note is entering the legal sphere at a time where the law is being used to divide and erase many of us. In a world where knowledge, empathy, and compassion can be much more powerful tools towards change, I hope this Note serves as a push for us to question the language we use and the power we hold in both law and life, and to dream a bit harder. In solidarity, always.

1. ANGELA Y. DAVIS, FREEDOM IS A CONSTANT STRUGGLE 18 (Frank Barat ed., 2016).

2. Daniel J. Almeida, Andrew M. Byrne, Rachel M. Smith & Saul Ruiz, *How Relevant is Grit? The Importance of Social Capital in First-Generation College Students' Academic Success*, 23 J. OF COLL. STUDENT RETENTION: RSCH. THEORY & PRAC. 539, 554 (2021).

**Introduction**

On September 4, 1957, Elizabeth Eckford put on a new dress—one she had hand sewn with the help of her sister—and styled her hair with the help of her mother.[3] Like any 15-year-old, Elizabeth spent the morning of her first day of school preoccupied with what she was wearing and how she looked, especially since this would be a completely new school with completely new people.[4] When she got off the city bus and headed towards Little Rock Central High School, however, Elizabeth wasn't met with the typical excitement of a new school year.[5] Instead, a growing crowd and a line of armed guards controlling the flow of students entering the school grounds swarmed the street in front of her.[6] Elizabeth was bombarded with jeers and racist chants from the crowd as she made her way to the entrance of the school.[7] "Two, four, six, eight, we don't wanna integrate!"[8] Elizabeth approached the sidewalk where a line of guards were stationed.[9] She assumed they were there to protect her and other students from the rowdy crowd.[10] Expecting the guards to let her pass as she had seen them do with the white students, Elizabeth, however, stood face-to-face with crossed rifles that barred her entrance into the school and refuge from the angry mob.[11] She then tried to enter the school from a different entrance point, at which she was met with the same staunch and threatening refusal by the guards who stood between her and her promised education.[12] Afraid and confused, Elizabeth left the school grounds altogether, attempting to maintain composure while waiting for the bus as the crowd grew more violent in their threats.[13] Elizabeth would later learn that the armed guards were not called to the school for *her* protection as a student, but rather for the *high school's* protection from the violence towards integration that she

3. *In Elizabeth Eckford's Words*, FACING HISTORY & OURSELVES, https://www.facinghistory.org/resource-library/elizabeth-eckfords-words [https://perma.cc/6N5W-2M25] (Jan. 5, 2015) [hereinafter *Eckford's Words*].

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*; DAVID MARGOLICK, ELIZABETH AND HAZEL 58–68 (2011).

and the eight other Black students enrolled at Little Rock Central High School were forced to endure.[14]

On the day before Elizabeth was barred from entering Little Rock Central High School, Governor Orval E. Faubus called for the Arkansas National Guard to block all desegregation efforts, including the physical blocking of Black students, like Elizabeth Eckford, from entering the school.[15] Faubus called for military enforcement in clear defiance of federal authority, claiming that such measures were necessary in order to mitigate the civil disorder that threatened to erupt in response to such integration efforts.[16] Three weeks of discourse followed—involving Faubus, the local school board, the NAACP, federal courts, and President Dwight D. Eisenhower—until Faubus finally complied with a federal order to withdraw the National Guard.[17] However, three days after the removal of the Guard, the nine Black students attending Little Rock Central High School were forcefully removed from their classes when a large and dangerous crowd formed outside of the building.[18] In response to the crowd, President Eisenhower dispatched paratroopers to the city and federalized the Arkansas National Guard as a means of enforcing the court's desegregation mandate.[19] The National Guard remained stationed at the high school until the end of the academic school year.[20]

The Supreme Court's ruling in *Brown v. Board of Education* (also known as *Brown I*), declaring segregation within educational facilities as an unconstitutional violation of the Equal Protection Clause, is one of the United States' most aspirational attempts at enacting social change through the law.[21] Expecting that such an aspiration would be met with great resistance, the Court revisited the decision one year later in *Brown II*, holding that local courts must push public schools to make a "prompt and reasonable start" towards desegregation efforts within educational facilities, which

14. *Id.*; *see also* Karen Anderson, *The Little Rock School Desegregation Crisis: Moderation and Social Conflict*, 70 J. OF S. HIST. 603, 603–636 (2004).

15. Tony A. Freyer, *Enforcing* Brown *in the Little Rock Crisis*, 6 J. OF APP. PRAC. AND PROCESS 67–78 (2004) [hereinafter Freyer: *Enforcing* Brown].

16. *Id.*

17. *Id.*

18. *Id*.

19. *Id.*

20. *Id.*

21. Brown v. Bd. of Educ. (Brown I), 347 U.S. 483 (1954) (holding that separate educational facilities are inherently unequal and have detrimental effects on Black children); TONY A. FREYER, THE LITTLE ROCK CRISIS: A CONSTITUTIONAL INTERPRETATION 4 (1984) [hereinafter Freyer: *The Little Rock Crisis*].

ought to proceed "with all deliberate speed."[22] The case of Elizabeth Eckford and the other Black students at Little Rock Central High School, known as the Little Rock Nine, is one that exemplifies such visceral resistance and stagnant efforts towards desegregation.[23]

Since the rulings of *Brown I* and *Brown II*, efforts to rectify racial inequities within the realm of education have evolved in various ways. As exemplified in the case of the Little Rock Nine, one of the first affirmative steps towards the removal of de jure segregation—segregation enforced and protected by the law—was the federal requirement to desegregate schools, as ordered in *Brown II*.[24] While a sizeable step towards legalized racial equality, such desegregation efforts resulted in an onslaught of de facto racial discrimination—racial imbalance resulting from societal patterns and practices allowed under, and as a result of, the law.[25] A prominent example of de facto segregation still present today is the gerrymandering of attendance zones in residential neighborhoods that further the racial divides of Black and white students in public schools.[26] In the fall of 2021, 37% of Black children across the U.S. attended high-poverty primary and secondary schools compared to only 7% of white students.[27] Such racially divided primary education opportunities inevitably result in skewed racial makeups

22. Brown v. Bd. of Educ. (Brown II), 349 U.S. 294, 300, 301 (1955); Freyer: *Enforcing* Brown, *supra* note 15, at 67; Daniel H. Pollitt, *Equal Protection in Public Education: 1954-61*, 47 AM. ASS'N. UNIV. PROFESSORS BULL. 197, 198 (1961).

23. *Eckford's Words*, *supra* note 3; Freyer: *Enforcing* Brown, *supra* note 15, at 67–68 (discussing the role of Governor Orval Faubus in defying federal authority to desegregate by bringing in the state's National Guard to block Black students like Elizabeth Eckford from entering Little Rock Central High School).

24. *See* Georgina Verdugo, *Edited Comments on Defining Affirmative Action by Reference to History*, 1995 ANN. SUV. AM. L. 383, 384 (1995) ("Simply put, affirmative action programs are an effective means of insuring opportunities for groups that have been the victims of historical discrimination or for groups presently denied equal opportunity.").

25. Brown II, 349 U.S. 294 (1955); *see also* Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275 (1972) ("However, the problem of de facto segregation—racial imbalance resulting merely from adherence to the traditional, racially neutral, neighborhood school policy in a community marked by racially segregated residential patterns—has yet to be faced.") (footnote omitted).

26. *Id.* at 283; *see also* Richard Rothstein, De Facto *Segregation: A National Myth*, *in* FACING SEGREGATION: HOUSING POLICY SOLUTIONS FOR A STRONGER SOCIETY 15–34 (Molly W. Metzger & Henry S. Webber, eds., 2018) (discussing the role of racial segregation in public housing facilitated by the Fair Housing Act of 1968, resulting in ongoing discrimination that continues to permeate).

27. National Center for Education Statistics, *Concentration of Public School Students Eligible for Free or Reduced-Price Lunch*, U.S. DEP'T OF EDUC., INST. OF EDUC. SCIENCES (May 2023), https://nces.ed.gov/programs/coe/indicator/clb/free-or-reduced-price-lunch [https:// https://perma.cc/P2UE-XVSW].

within higher education as well. In 2022 alone, the number of bachelor's degrees conferred to Black students by postsecondary institutions was approximately 17.7% of the total number of degrees conferred to white students.[28]

Solving explicit de jure segregation policies seemed straightforward enough, for any explicit race-based division of students that impacted educational opportunities and outcomes was a clear violation of the Fourteenth Amendment's Equal Protection Clause, as found in *Brown I*.[29] Addressing the equally harmful effects of de facto racial discrimination, however, seemed a more difficult feat, for it is a very rare occurrence that the Supreme Court declares a facially race-neutral law unconstitutional on the sole basis of statistical disproportionate impact on members of a certain racial group.[30] Over time, the threshold for the Court in deciding whether a race-neutral law produces unconstitutional, racially imbalanced outcomes has only heightened, making it much more difficult for Black and other racially marginalized communities to seek redress for de facto harms.[31]

Within the realm of higher education, efforts to remediate racial imbalances and lingering effects of racial discrimination have been pursued through methods known as affirmative action, which are targeted policies and programs that "came into existence specifically to rectify the history of race-based exclusion, legally enforced segregation, and quota systems" that limited the number of racially marginalized students permitted to enroll at colleges and universities across the United States.[32] For example, the requirement to desegregate schools upheld in *Brown I* and *II* is an

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28. National Center for Education Statistics, *Bachelor's Degrees Conferred by Postsecondary Institutions, by Race/Ethnicity and Sex of Student: Selected Academic Years, 1976-77 through 2021-22*, DIG. OF EDUC. STAT. (2023), https://nces.ed.gov/programs/digest/d23/tables/dt23_322.20.asp?current=yes [https://perma.cc/CKW4-JF9N ] (displaying that in the 2021-2022 school year, the number of degrees conferred to Black students was 199,962, while the number of degrees conferred to white students was 1,129,570).

29. Brown I, 347 U.S. 483, 495 (1954).

30. *See* Goodman, *supra* note 25, at 301.

31. *See* Katherine Lambert, *Discriminatory Purpose: What It Means under the Equal Protection Clause–Washington v. Davis*, 26 DEPAUL L. REV. 650, 650–665 (1977) (citing Washington v. Davis, 426 U.S. 229 (1976)) (discussing the role of statistical evidence needed to demonstrate unconstitutional discrimination involving a facially neutral law, as seen in *Washington v. Davis*).

32. Adewale A. Maye, *The Supreme Court's Ban on Affirmative Action Means Colleges Will Struggle to Meet Goals of Diversity and Equal Opportunity*, ECON. POL'Y INST.: WORKING ECON. BLOG (June 29, 2023, 04:29 PM), https://www.epi.org/blog/the-supreme-courts-ban-on-affirmative-action-means-colleges-will-struggle-to-meet-goals-of-diversity-and-equal-opportunity/ [https://perma.cc/N4X5-6TVV].

example of affirmative action, where actionable measures were taken in attempting to rectify unconstitutional, racially disproportionate education systems. Since the *Brown* cases, race-based admissions policies aiming to rectify racial disproportionality have been some of the most prominent and impactful forms of affirmative action in U.S. colleges and universities.[33] Under modern-day Equal Protection doctrine, however, explicit race-based practices are not constitutional, regardless of their intent to redress the lingering effects of a racist history.[34] In order to bypass the heightened scrutiny of the Equal Protection doctrine and achieve the inherent goals of affirmative action, a serious butchering of the policy and its practices have taken place over time.[35] Despite its roots targeting the unique plights of Black students to receive the same educational opportunities as white peers, affirmative action has all but dwindled down to one buzzword that dictates its future in the realm of higher education: diversity.[36]

While the Constitution does not explicitly use the word "diversity" in its language, the legal lexicon has carefully contoured it, in true legal fashion, to a variety of applications within constitutional law. On a broad level, for example, diversity jurisdiction facilitates the federal review of cases in which parties lack state commonality.[37] On a more narrow level, laws protecting

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33. *See* Susan P. Sturm, *Reframing Affirmative Action: From Diversity to Mobility and Full Participation*, 2020 U. CHI. L. REV. 59 (2020) (highlighting the use of affirmative action in higher education institutions and their admissions decision-making); *see also* Jamie Gullen, *Colorblind Education Reform: How Race-Neutral Policies Perpetuate Segregation and Why Voluntary Integration Should Be Put Back on the Reform Agenda*, 15 U. PA. J. L. & SOC. CHANGE 251, 273 (2012) ("While integrated schools often do not provide equal educational experiences to students of all races, the vast majority of research indicates that students of color do achieve higher levels of academic success in integrated schools.") (citing Roslyn Arlin Mickelson, *Subverting Swann: First- and Second-Generation Segregation in the Charlotte-Mecklenburg Schools*, 38 AM. EDUC. RES. J. 215 (2001)).

34. Sturm, *supra* note 33, at 60 ("[T]he Supreme Court's racial jurisprudence has developed in an area that triggers strict scrutiny because [higher education institution]s' use of race in admissions has been found to operate as a classification allocating benefits and opportunities to individuals based on race.").

35. *See* Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381 (1998) (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)) (analyzing the diversity rationale used in affirmative action cases since its introduction in *Bakke* in 1978).

36. *Id.*

37. *See generally* U.S. CONST. art. 3, § 2 (discussing the federal review of cases involving differing citizenship between parties, also known as "diversity jurisdiction"); Legal Information Institute, *Diversity Jurisdiction*, CORNELL L. SCH. (Sept. 2022) https://www.law.cornell.edu/wex/diversity_jurisdiction [https://perma.cc/BZ3D-TB2L].

plant and animal diversity attempt to preserve different native species and varieties of ecosystems.[38] At its core, the use of "diversity" in the legal sphere, often without being explicitly defined, seems to entail notions of difference or variety of some sort, taking shape as lawmakers deem fit. Today, diversity as a legal and social concept has stood at the forefront of the historical affirmative action debates, namely within the realm of higher education.[39] Ranging from a "robust exchange of ideas[,]"[40] to a vehicle for "livelier, more spirited, and simply more enlightening and interesting" classroom discussions,[41] diversity has been stretched and contorted in a manner that subverts the inherent goals of affirmative action, catering to a white-centered narrative as it attempts to make room for itself under the Equal Protection doctrine.[42] In the most recent affirmative action case, *Students for Fair Admissions (SFFA) v. Harvard*, the plaintiffs are a nonprofit organization alleging that race-based admissions violates the Equal Protection Clause given that diversity is an immeasurable concept, thus failing the strict scrutiny test of narrow tailoring.[43] In a major shift in the historical affirmative action discussion, the Court in *SFFA* struck down race-based affirmative action in higher education institutions altogether on the very basis that diversity *is* essentially unqualifiable and thus, unjustifiable under the current Equal Protection doctrine.[44] While such an outcome came as a shock to many, the evolution and whittling of affirmative action policy

38. *See* 36 C.F.R. § 219.9 (2016).

39. *See generally* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (introducing the potential of using diversity as a rationale in an applicant's admissions decision); *see also* Students for Fair Adm., Inc. (SFFA) v. Pres. & Fellows of Harvard Coll., 600 U.S. 181 (2023) (holding that the diversity rationale is not a narrowly tailored compelling interest and thus the consideration of race in higher education admissions is unconstitutional)*; see also* The Learning Network, *What Students Are Saying About the End of Race-Based Affirmative Action in College Admissions*, N.Y. TIMES: CURRENT EVENTS CONVERSATION (Sept. 21, 2023) https://www.nytimes.com/2023/09/21/learning/what-students-are-saying-about-the-end-of-race-based-affirmative-action-in-college-admissions.html [https://perma.cc/8WXS-88HK**]** (highlighting the voices of high school students and the impact on their future college careers in the aftermath of the Supreme Court's ruling in *SFFA v. Harvard*).

40. *Bakke*, 438 U.S. at 330.

41. Grutter v. Bollinger, 539 U.S. 306, 330 (2003) (internal quotation marks omitted).

42. *See* Wendy Leo Moore & Joyce M. Bell, *Maneuvers of Whiteness: 'Diversity' as a Mechanism of Retrenchment in the Affirmative Action Discourse*, 37(5) CRITICAL SOCIO. 597, 602 (2011) ("Nearly the instant that 'diversity' in education became a rationale recognized by the Court . . . the concept gets de-racialized; securely fitted to the color-blind sub-frame.").

43. 600 U.S. 181, 197 (2023).

44. *Id.* at 221–22.

demonstrates that the diversity rationale was built to fail all along, for today's Equal Protection Clause framework—one that fails to account for the unique plights of Black and racially subordinate groups in the U.S.—is inherently incompatible with a policy that requires targeted, intentional race-based action in order to achieve authentic racial justice.

This Note explores how the diversity rationale used in trying to justify affirmative action, and its ultimate failure, demonstrates that racial justice and remediation of historical racial discrimination require transformative jurisprudence: a radical shift in legal framework that deliberately centers race-consciousness in order to enact concerted, targeted remedial action. Part I examines the structural goals of affirmative action: remediation of historical racial discrimination targeting the unique barriers faced by subordinated racial groups, also known as race-conscious remedy.[45] This section discusses the doctrinal requirements necessary in the effective implementation and facilitation of affirmative action policies. Part II analyzes the concept of diversity as a white-centered narrative, highlighting that any attempt to use a colorblind concept, one that refuses to acknowledge the role and impact of race, for inherently race-conscious efforts will ultimately fail, no matter how the law tries to contort it. Part III looks at the history of the diversity rationale as used in previous affirmative action cases, leading to its eventual failure in *SFFA v. Harvard*. By dissecting the various ways in which the Supreme Court warps the definition and contours of diversity, the anticipated failure of its application in *SFFA v. Harvard* can be better understood. Finally, this Note concludes by challenging the current scheme of the race-based equal protection doctrine at large, questioning the ability for genuine remedy of racial discrimination to even take place under the modern-day regime. This Note does not offer concrete legal solutions to reinstating affirmative action, but instead argues that such an occurrence is incredibly unlikely under the current equal protection scheme. While such an argument may seem bleak or defeatist in nature, this Note pushes for greater thought on efforts toward intentional and effective racial justice in the realm of education and beyond. This Note pushes against the narrative that critical methods of achieving racial justice must be diluted to fit into neatly packaged legal framework only to be met with occasional and symbolic "wins" as the Court deems fit.[46]

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45. *See* Sally Chung, *Affirmative Action: Moving beyond Diversity*, 39 N.Y.U. REV. L. & SOC. CHANGE 387, 390 (2015).

46. *See* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL, 19 (1992) (internal

## I. Affirmative Action: An Inherently Race-Conscious Effort

The aftermath of *Plessy v. Ferguson*, particularly within the realm of education, emboldened segregation and its violent effects under the renowned guise of "separate but equal."[47] In the late 1930s, the American Council on Education (ACE) conducted a survey of Black schools in the segregated Deep South.[48] The survey reported common threads of small, extremely dilapidated buildings housing up to four grades at once, few if any books all in battered condition, high rates of dropout among students who left school to assist in farm work and raise money for their families, and many other factors contributing to severely underdeveloped education for these Black students.[49] Included in this report were testimonies of students, such as 15-year-old Maggie Red, who shared that she "just loves to go to school" and would walk twelve miles on a daily basis to attend due to the lack of transportation provided by the city.[50] "Sometimes it rains so hard I just can't go . . . . If I just had some way of getting to school when it rains I'd be so much further along in school than I am now," Maggie noted.[51] Despite Black children outnumbering white children in rural counties of the Deep South, blatant disparities persisted in the attention Black students were receiving by states.[52] In 1930, Alabama school boards spent $37 on each white child and just $7 on each Black child; in Georgia, $32 and $7; in Mississippi, $31 and $6; in South Carolina, $53 and $5.[53] As a result of such skewed and racist policies, educational achievements of Black Americans were abysmally low, resulting in continued economic and societal subordination justified by law and racism.[54]

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quotation marks omitted) ("From the Emancipation Proclamation on, the Man been handing us a bunch of bogus freedom checks he never intends to honor. He makes you work, plead, and pray for them, and then when he has you either groveling or threatening to tear his damn head off, he lets you have them as though they were some kind of special gift. As a matter of fact, regardless of how great the need is, he only gives *you* when it will do *him* the most good!").

47. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

48. CHARLES S. JOHNSON, GROWING UP IN THE BLACK BELT: NEGRO YOUTH IN THE RURAL SOUTH 102–134 (1941) https://hdl.handle.net/2027/heb02853.0001.00 [https://perma.cc/9LHR-Y6FW] (reporting the ACE findings among Black youth and schools in the Deep South).

49. *Id.*

50. *Id.* at 113.

51. *Id.*

52. Peter Irons, *Jim Crow's Schools*, AM. FED'N. OF TCHRS (2004) https://www.aft.org/ae/summer2004/irons [https://perma.cc/SB4F-R2PP].

53. *Id.*

54. *Id. See also Segregation in Education*, 12 NEGRO HIST. BULL. 5, 98 (Albert

The Supreme Court's holding in *Brown I* was a perceived first step towards alleviating such severe and jarring segregation practices in education.[55] In the 1960s and 1970s, for example, court-mandated busing plans were implemented to provide transportation to Black children in efforts to further desegregate schools—an affirmative action that could have helped Maggie attend school more often back in the 1930s.[56] However, white resistance and the new burdensome framework of proving de facto segregation in order to seek redress remained persistent in a post-*Brown* era.[57] A prominent example is the anti-busing movement that became a common-sense way for white parents to describe their opposition to school desegregation efforts, essentially masking their racist opposition towards integration.[58] White parents and politicians would frame their resistance to school desegregation in terms of "busing" and "neighborhood schools," allowing them to support white schools and neighborhoods without using explicitly racist language.[59] Rather than explicitly voicing their opposition towards racial integration in schools, white parents and politicians would claim that busing policies, bringing Black students into now-integrated white schools, was taking Black students out of their neighborhoods and bringing them into white neighborhood schools, creating issues of overcrowding and displacement.[60] Such rhetoric—abusing an important affirmative step towards racial justice for Black children to attend schools they once could not—underscores the theme of resistance to racial equality that persists to this day.

In the realm of higher education, affirmative action has been interpreted to serve as a tool to counter de facto barring of Black

N.D. Brooks et al., eds., 1949) ("The former states engaged in slave-holding resorted to [segregation in schools] to secure the subordination of the Negroes to the whites and after emancipation extended it more widely and in multifarious ways to perpetuate the lower status of the former bondmen. Now that experience has shown that the system handicaps not only the Negro but works detrimentally to the entire nation[,] citizens of vision would like to uproot the system.").

55. 347 U.S. 483 (1954).

56. *See* Swann v. Charlotte-Mecklenburg Bd. Of Ed., 402 U.S. 1 (1971) (deciding that providing a means of bus transportation was a permissible tool in desegregation efforts and remedy of past constitutional violations); JOHNSON, *supra* note 48, at 113.

57. *See* MATTHEW F. DELMONT, WHY BUSING FAILED: RACE, MEDIA, AND THE NATIONAL RESISTANCE TO SCHOOL DESEGREGATION (Univ. of Cal. Press, 2016); *see also* Paul Aster, *De-Facto Segregation*, 6 WM. & MARY L. REV. 41, 41 (1965) (defining de facto segregation as "a situation in which schools are attended predominantly by one race, due to the racial composition of the neighborhoods served by those schools[,]" and highlighting that such illicit segregation produced feelings of inferiority among its students).

58. DELMONT, *supra* note 57, at 8.

59. *Id.* at 3.

60. *See id.* at 168–89.

and racially subordinated students in the admissions process.[61] On February 2, 1999, eight Black, Latinx, and Asian students filed suit against the University of California – Berkeley for their inherently racialized admissions preferences of white students, initiating the case *Rios v. Regents of the University of California*.[62] The students argued that the fairness of criteria used in the admissions process consistently demonstrated lower achievement among Black and brown students, such as SAT preparation and subsequent scores, and Advanced Placement (AP) courses that were not offered at most high schools with higher Black and brown student populations.[63] The *Rios* complaint alleged impermissible disparate treatment of students of color, demanding a targeted, race-conscious alleviation of such barriers in the school's selection process.[64] Though ultimately unsuccessful in its claims, the *Rios* complaint is a remarkable and important demonstration of how de facto exclusion of non-white students is ignored and misconstrued under the modern-day equal protection doctrine.[65] Additionally, the *Rios* complaint reflects how drastically efforts to repackage legal justification for affirmative action have changed over time.[66] The disparate treatment argument of the *Rios* complaint wavered due to its inability to pinpoint specific examples and elements of disparate treatment under the Equal Protection doctrine.[67] Conversely, most contemporary affirmative action cases focus on highlighting statistical and quantifiable analyses to try to demonstrate racial harms, which fail to touch on the inherent and underlying elements of historical discrimination and systemic harm faced by subordinated racial groups.[68] By painting over the persistent injuries of societal racism and white supremacy, affirmative action cases have evolved into colorblind narratives that appeal to a colorblind legal system.[69]

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61. *See* Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 942 (2001) (discussing Rios v. Regents of the Univ. of Cal., (N.D. Cal. Feb. 2, 1999) (No. C.99-0525)).

62. *Id.* at 942–58.

63. *Id.*

64. *Id.* at 949–50 ("[T]he *Rios* suit is grounded in antisubordination theory, a theory that takes the vantage point of those who are victimized by societal racism.").

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 949 ("The claim in the *Rios* suit . . . present[s] [an] example[]of how different the river of equality looks when viewed from the vantage point of those who are subordinated by America's racism rather than from the vantage point of the privileged.").

To understand how affirmative action and the Fourteenth Amendment work—or don't work—in conjunction with one another, an analysis of the two main Equal Protection doctrines must take place: antisubordination and anticlassification.

### *A. Affirmative Action and Antisubordination*

At the heart of affirmative action—from Jim Crow era segregation of public schools to modern day segregation in higher education—is the inherent attempt to rectify a long history of race-based exclusion and its lingering effects.[70] This notion is housed within an antisubordination framework.[71] Introduced into the legal sphere by Owen Fiss in 1976, antisubordination theory encompasses the idea that justice is rooted in a theory of compensation for a subordinated group, like Black Americans, who were put into a position by the dominant social group (whites), and that redistributive measures are owed to the subordinated group as a form of compensation and remedy for historical harms.[72] This framework, Fiss argues, lies in the original intentions of the enactment of the Equal Protection Clause that, though not explicitly, attempts to rectify the long history of constitutionally subjugating Black Americans.[73] Antisubordination theory, thus, aims to allow for the full enjoyment of constitutional rights by members of a subordinated group, which entails targeted, race-conscious redistributive efforts like affirmative action to ensure such rights are fully protected.[74] This race-centered form of redress is an imperative value of affirmative action, and thus requires an inherently race-centered legal framework—antisubordination—in its application.

The first, and only, instance in which the Supreme Court has acknowledged the antisubordination doctrine as a vehicle for striking down de facto racism was in *Loving v. Virginia*, where laws banning interracial marriage were deemed unconstitutional under the Equal Protection Clause.[75] In *Loving*, the Court explicitly noted

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70. Maye, *supra* note 32.

71. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107–177 (1976).

72. *Id.* at 150.

73. *Id.* at 147; *see also* Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L.J. 1, 7 (2021) (noting that antisubordination scholars are less concerned with even-handed treatment of government, but rather the effects such actions have on disadvantaged groups and whether the treatment facilitates dominance of one social group by another).

74. Bernick, *supra* note 73.

75. 388 U.S. 1 (1967).

the white supremacist nature of anti-miscegenation laws that aimed to preserve the "purity" of the white race.[76] For the first and only time in the history of racial segregation cases, the consideration of white supremacy was used by the Supreme Court in striking down race-based laws.[77] The explicit justification of white purity seemed to force the hand of the Court in acknowledging such a clear example of white supremacy.[78] While *Loving* symbolizes the capability of the Court to recognize explicit methods of upholding white supremacy, it failed to acknowledge a system of racial hierarchy in any prior case involving other measures like segregation that upheld white supremacy, such as in *Brown I* and *Plessy*.[79] Had the Court applied the lens of *Loving*—one that considered the role of white supremacy in the subordination of Black Americans and acted accordingly to counter such an embedded ideology—in curtailing state sanctioned racism, perhaps today's equal protection jurisprudence would have evolved in a manner that accepted the legitimacy of affirmative action measures to remedy discrimination.[80] However, the current scheme of the Equal Protection Clause did not follow the trend of *Loving*, and pushes aside the antisubordination framework that emphasizes the need to address historical racist wrongs. Instead, today's framework focuses squarely on explicit race-based laws, which Courts have stretched into a catchall for *all* races, including those who have not faced historical racial subordination.[81] This modern-day framework is known as the anticlassification doctrine.[82]

### *B. Affirmative Action and Anticlassification*

Anticlassification, also referred to as antidiscrimination theory, encompasses the prohibition of any and all laws that seemingly disadvantage members of a racial group through explicit race-based classification.[83] The late Alan Freeman notes that at the

76. *See id.* at 7; *see also* Peggy Cooper Davis, *Loving v. Virginia and White Supremacy*, 92 N.Y.U. L. REV. ONLINE 48–54 (2017) (discussing the role white supremacism played in the *Loving* decision).

77. Davis, *supra* note 76, at 54.

78. *Id.*

79. *Id.*

80. *Id.*

81. *See* Alan D. Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

82. *Id.*

83. *Id.* at 1054 (highlighting that the principal task of the antidiscrimination principle is to "select from the maze of human behaviors those particular practices that violate the principle, outlaw the identified practices, and neutralize their

core of the antisubordination doctrine is the perspective of the victim, while the anticlassification doctrine is the perspective of the perpetrator.[84] Freeman argues that anticlassification theory is only violated by *intentional* discrimination, and thus a perpetrator can evade responsibility for ostensibly discriminatory conduct by showing the action was made in good faith with no inherent desire to produce discriminatory harm.[85] Thus, anticlassification theory creates a much higher threshold for racially discriminatory law that does not explicitly subordinate a certain group, allowing for facially neutral laws to pass through the cracks of the Equal Protection Clause without strict judicial review of potential undertones of white supremacy.[86]

The Supreme Court's attempt at curtailing explicitly race-based laws in the name of equality is carried out through the anticlassification model of strict scrutiny. Strict scrutiny is triggered by any race-based classification and requires a compelling government interest that is narrowly tailored to pass as constitutional under the Equal Protection Clause.[87] Affirmative action, then—as it has historically included the use of race in remedying historical discrimination of Black and marginalized students of color in higher education—is immediately subject to the highest level of scrutiny used by the Court.[88] The disconnect

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specific effects.").

84. *Id.* at 1053–54 ("The victim, or 'condition,' conception of racial discrimination suggests that the problem will not be solved until the conditions associated with it have been eliminated. To remedy the condition of racial discrimination would demand affirmative efforts to change the condition. The remedial dimension of the perpetrator perspective, however, is negative. The task is merely to neutralize the inappropriate conduct of the perpetrator . . . . The perpetrator perspective presupposes a world composed of atomistic individuals whose actions are outside of and apart from the social fabric and without historical continuity. From this perspective, the law views racial discrimination not as a social phenomenon, but merely as the misguided conduct of particular actors.").

85. *Id.* at 1055 (emphasis added).

86. *See id.* at 1056 (noting the nearly impossible burden of a victim in isolating particular conditions of discrimination produced by conditions of discrimination and perpetrators who utilize such conditions against them).

87. *See* U.S. v. Carolene Products Co., 304 U.S. 144 n.4 (1938) (noting for the first time a suggestion of heightened scrutiny for discrete and insular minorities); *see also* Korematsu v. U.S., 323 U.S. 214 (1944) (holding that race is a suspect group that immediately triggers the most rigid scrutiny offered by the Court); Loving v. Virginia, 388 U.S. 1 (1967) (solidifying strict scrutiny as the level of review for race-based classification).

88. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); *see also* Grutter v. Bollinger, 539 U.S. 306 (2003) (holding that diversity, as it relates to produced educational benefits, is compelling enough to justify a consideration of race under strict scrutiny). *Cf. SFFA*, 600 U.S. 181 (2023) (holding that the diversity rationale is not a narrowly tailored compelling interest and thus the consideration of race in

between the goals of affirmative action and the modern framework of the Equal Protection Clause lies in the inherent reliance on race-consciousness in affirmative action policies.[89] Such efforts are virtually impossible to implement under an anticlassification framework given the level of strict scrutiny used in any matter concerning race-based classification.[90] This brings us to today's debates surrounding affirmative action and its ultimate demise in *SFFA v. Harvard*.

From *Regents of University of California v. Bakke* (establishing that diversity can serve as an educational benefit for *all* students),[91] to *Grutter v. Bollinger* (attempting to qualify diversity as it benefits *all* students, both in the classroom and in future workplaces),[92] to the most recent affirmative action case, *SFFA v. Harvard* (holding that diversity is inherently amorphous and thus, unjustifiable),[93] the main vehicle in upholding affirmative action has been the concept of diversity as a compelling government interest.[94] By eventually carving out race-consciousness—an implicit requirement in affirmative action—to make room for a white-centered concept of equality, the diversity rationale was built to fail under the modern Equal Protection doctrine of anticlassification. Analyzing diversity through a sociological lens helps clarify how affirmative action cases have distorted the word as used within the legal context.

## II. Defining Diversity

### *A. Diversity as Defined by Whiteness*

One of the central narratives proffered by critics of the term and concept "diversity" is the focus on whiteness that it holds at its

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higher education admissions is unconstitutional).

89. *See* Sturm, *supra* note 33, at 61 ("When affirmative action is the primary strategy for racial justice, it offers a narrow, at-the-margins response to exclusion, which deflects attention from more central problems with the current system and invites zero-sum reactions to racial justice efforts.").

90. *Id.*

91. 438 U.S. 265 (1978).

92. 539 U.S. 306 (2003).

93. 600 U.S. 181 (2023).

94. This Note will look primarily at the following affirmative action cases: *Bakke*, 438 U.S. 265 (Powell, J., concurring) (introducing the possibility of using diversity as a factor in higher education admissions); *Grutter*, 539 U.S. 306 (arguing that the value of diversity as a factor in the University of Michigan Law School admissions process produces benefits for white and students of color alike through diversity of thought and exposure in the classroom); *SFFA*, 600 U.S. 181 (holding that diversity is an amorphous concept that cannot be narrowly tailored, thus violating anticlassification doctrine under the Fourteenth Amendment).

core.[95] This narrative is embodied in what is known as the *white racial frame*, coined by sociologist Joe Feagin in 2006, and defined as "an organized set of racialized ideas, stereotypes, emotions, and inclinations to discriminate. This frame and associated discriminatory actions are consciously or unconsciously expressed in the routine operation of racist institutions of this society."[96] The white racial frame, in essence, speaks to how whiteness is so pervasive in our society that any deviation from such is to challenge the norm.[97] Given its centering of whiteness, conventional uses of "diversity" are often synonymous with racially marginalized individuals.[98] Thus, those who do not fall within the general white racial frame are a deviation, or in other words, diverse.

i. Colorblindness

Colorblindness, a principle which "minimizes the relevance of race and racism, and discursively divorces structural racial inequality from historical and present day racism," plays a key role in the application of diversity in cases of affirmative action.[99] One of the most prominent supporters of colorblindness in the realm of affirmative action, Chief Justice Roberts, has stated that "to the extent [that] the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end."[100] This line of thinking contributes to racial inequity by painting over the inherent harms of racial discrimination and ignoring any need for systematic changes to address it.[101] At the root of colorblindness is the threat to power held by white people that measures like affirmative action may impose.[102] By applying diversity in colorblind ways, such as mitigating its definition to incorporate that of talent or merit,[103] the term dilutes its inherent goals of remedying

95. Moore & Bell, *supra* note 42, at 598.

96. JOE R. FEAGIN, SYSTEMIC RACISM: A THEORY OF OPPRESSION 25 (2006).

97. Moore & Bell, *supra* note 42, at 598–99.

98. Amy L. Petts, *It's All in the Definition: Color-Blind Interpretations of School Diversity*, 35 SOCIO. F. 465, 468 (2020).

99. Moore & Bell, *supra* note 42, at 601.

100. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 733 (2007).

101. Petts, *supra* note 98, at 465 (noting that many whites assume that civil rights legislation created equality and that additional protections against discrimination are not necessary and may disadvantage them).

102. *Id.* at 469.

103. *See* Grutter v. Bollinger, 539 U.S. 306 (2003) (pointing to the many ways in which diversity can be considered, such as musical talent).

racial imbalances and instead contorts them in ways that center and reinforce the protection of whiteness and its power.[104]

ii. Interest-Convergence

Coined by the renowned Derrick Bell in the aftermath of *Brown v. Board of Education*, interest-convergence is the idea that checkpoints of success towards racial equality result primarily when there is a concurrent benefit to the dominant white group as well.[105] The manipulation of diversity not only provides higher education institutions with opportunities to prioritize white interests over students of color, but it also skirts any justification to implement practices that may directly benefit racially marginalized students.[106]

Colleges and universities across the U.S. espouse their efforts in increasing the number of racially 'diverse' students and programming on their campuses.[107] Schools often perceive diversity as a "win-win" scenario, where students of color benefit from access to education and opportunity, while the school benefits from higher rankings and prestige for their inclusion efforts.[108] In addition to rank and prestige, schools can also boast an uptick in exposing their white students to the vast array of perspectives and experiences that racially "diverse" students provide.[109] However, while students of color are condensed to numbers and marketing tactics, they are often left unsupported, tokenized, and othered while attending these predominantly white schools, ultimately resulting in "wins" only for institutions and white students.[110] Thus, the use of diversity is contorted once again in a manner that centers

104. Petts, *supra* note 98, at 470.

105. Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518–533, 523 (1980).

106. Amy L. Petts & Alma Nidia Garza, *Manipulating Diversity: How Diversity Regimes at US Universities Can Reinforce Whiteness*, SOC. COMPASS 1–12, 2 (2021).

107. *Id. See also* Susan L. Krinsky, *The Incoming Class of 2021 — The Most Diverse Law School Class in History*, LAW SCH. ADMISSIONS COUNCIL (December 15, 2022), https://www.lsac.org/blog/incoming-class-2021-most-diverse-law-school-class-history [https://perma.cc/L46J-XLW7]; *see also* Susan L. Krinsky, *Incoming Class of 2022: A Major Advance in Diversity, More Work to Do,* LAW SCH. ADMISSIONS COUNCIL (December 20, 2022), https://www.lsac.org/blog/incoming-class-2022-major-advance-diversity-more-work-to-do [https://perma.cc/6HDS-DMHR]; James Leipold, *Incoming Class of 2023 Is the Most Diverse Ever, But More Work Remains*, LAW SCH. ADMISSIONS COUNCIL (December 15, 2023), https://www.lsac.org/blog/incoming-class-2023-most-diverse-ever-more-work-remains [https://perma.cc/KW2L-3ZV4].

108. Petts & Garza, *supra* note 106, at 2.

109. *Id.*

110. *Id.*; Chung, *supra* note 45, at 390.

whiteness, this time using what is known as the "interest-convergence" principle.[111]

As applied to the realm of affirmative action, cases like *Bakke* and *Grutter* paint the concept of diversity as a benefit to *all* by curating a fruitful academic experience for white students through the presence of nonwhite peers, ultimately better preparing students for their professional careers after graduating.[112] Here, again, the concept of diversity is stretched to shift the focus away from remedial efforts for Black and racially marginalized students in higher education, instead centering arguments around whiteness. Today, the Supreme Court has manipulated a definition of diversity that fundamentally sideswipes any focus on race and ethnicity as it pertains to accomplishing the inherent goals of affirmative action, placing characteristics like talent and merit on a higher pedestal in the name of equality and inclusion of white students.[113]

Having endured severe distortion by the Court and higher education institutions in questioning the validity of affirmative action, diversity was essentially set up to fail. By centering whiteness and ignoring inherent values of race-conscious remedy, the legal application of diversity as a compelling interest under an anticlassification lens of strict scrutiny fails to achieve the underlying goals of affirmative action.

## III. Diversity as a Compelling Interest

The anticlassification framework under the modern equal protection regime imposes a high standard in determining what constitutes a compelling interest for cases of racial classification.[114] A persuasive legal argument for the diversity rationale must do

111. Petts & Garza, *supra* note 106, at 2; Bell, *supra* note 105, at 523.

112. *See* Regents of Univ. of California v. Bakke, 438 U.S. 265, 313 (1978) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'") (citing U.S. v. Associated Press, D.C., 52 F. Supp. 362, 372 (D.C.N.Y. 1943); *see also* Grutter v. Bollinger, 539 U.S. 306, 330 (2003) ("These benefits are 'important and laudable,' because 'classroom discussion is livelier, more spirited and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'") (citing the application for petition for certiorari from the district court below for the same case).

113. *SFFA*, 600 U.S. 181, 220 (2023) ("The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well.").

114. *See* Liu, *supra* note 35, at 430 (describing the high evidentiary standard for educational diversity in affirmative action cases).

more than merely articulate why or how diversity is important to education, it must elaborate on why educational diversity is a (compelling) interest for *government* action.[115] In the existing scheme of the diversity rationale for affirmative action cases, attaining a racially diverse student body is compelling only so far as race is but one factor among many additional considerations, such as personal talents, life experiences, or other avenues that open doors for applicants to "promote beneficial educational pluralism."[116] Conversely, any arguments rationalizing affirmative action using historical remedy of societal discrimination as a compelling government interest failed early on, where such a rationale was considered to have rested on "an amorphous concept of injury that may be ageless in its reach into the past."[117] By knocking down any potential compelling interest resting on a notion of race-based remedy, the surviving vehicle for any future of affirmative action rested on the diversity rationale and its focus on appealing to the anticlassification doctrine by centering whiteness.[118]

Walking through the history of affirmative action cases demonstrates the clear gaps in its application of a restorative racial remedy in higher education. By looking at *Bakke*, *Grutter*, and *SFFA* specifically, the evolution of diversity as applied through a white-centered lens lays out a clear picture of how it was destined to fail in upholding a policy meant to serve the needs of Black and underrepresented students.

### *A.* Bakke

Diversity was first established as a compelling government interest for affirmative action in *Regents of University of California v. Bakke*, where Justice Powell highlighted its value in the name of pursuing and upholding academic freedom.[119] Allan Bakke, the thirty-five-year old white male plaintiff, argued that his rejection from the University of California Davis Medical School was due to

115. *Id.* at 384–85 (emphasis added).

116. *Id.* at 389 (quoting *Bakke*, 438 U.S. at 317).

117. *Id.* at 397 (quoting *Bakke*, 438 U.S. at 290).

118. *See id.* at 402; *see also* Moore & Bell, *supra* note 42, at 603 ("Relying on a diversity justification for affirmative action creates limitations on its potential as a tool for redistributive or corrective racial justice.").

119. 438 U.S. 265, 312 (1978) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.").

his race.[120] The Court in *Bakke* was very cautious in applying strict scrutiny, making sure not to open any potential floodgates of antisubordination equal protection theories of historical societal discrimination remedy.[121] Ultimately, the Court ruled in favor of Bakke, holding that any explicit consideration of race in an admissions process was unconstitutional.[122] *Bakke* was a turning point in the affirmative action discussion, however, because it provided the groundwork for diversity to serve as a potentially compelling government interest within the strict scrutiny framework.[123]

In elaborating on this rationale, Powell, however, only grazes the surface in explaining *what* diversity is or how it constitutes such a uniquely compelling government interest.[124] The crux of his claim lies in the "robust exchange of ideas" and training future leaders through "wide exposure to the ideas and mores of students as diverse as this Nation of many peoples" that diversity provides in the realm of higher education.[125] Powell's main contention to such a seemingly liberal and open-ended claim is the notion that diversity, particularly that of ethnic or racial diversity, is but one element among many that furthers this compelling interest of a qualified and capable student body.[126] Goodwin Liu set forth how the *Bakke* court fundamentally "defined the contours of the diversity rationale" within the affirmative action framework:

> Attaining a racially diverse student body is a "compelling interest" —but only insofar as race is valued alongside other characteristics, such as geography, personal talents, or life experiences, that may enable an applicant "to promote beneficial educational pluralism."[127]

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120. *Id*.

121. *See id*. at 310 ("Hence, the purpose of helping certain groups . . . perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons . . . who bear no responsibility for whatever harm the beneficiaries . . . are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved.").

122. *Id*. at 319.

123. *Id*. at 311–16 ("The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.").

124. *Id*.

125. *Id*. at 313.

126. *Id*. at 314.

127. Liu, *supra* note 35, at 389 (quoting *Bakke*, 438 U.S. at 315).

*i.* *Bakke*'s preservation of whiteness in the name of diversity.

It is important to examine the concept of diversity that Powell connects to the compelling government interest of academic freedom and enrichment in *Bakke*. Powell's conception of diversity is "grounded in a colorblind frame, which includes, but is not limited to, an amorphous form of racial diversity (race as a 'plus factor' along with other 'pertinent elements of diversity') which limits the legally recognized basis for affirmative action policies in higher education admissions."[128] This framing of diversity results in a reduction of power that affirmative action could hold in altering existing racial hierarchy norms.[129] By arguing that the primary justification for affirmative action is the potential benefit of an individual's contribution to educational diversity in *Bakke*, the Court plays into the colorblind notion that the only relevant reason to discuss race or ethnicity in the realm of higher education is to welcome difference from the norm that is whiteness.[130] Students that fulfill an element of diversity within a *Bakke* framework are perceived as a form of "exposure" for white students.[131] Diversity as a rationale for compelling interest under strict scrutiny "neutralizes and conceals whiteness," creating an 'us versus them' dichotomy and preserving whiteness under the guise of equal protection.[132]

ii. *Bakke*'s uncertainty in future affirmative action cases.

The discursive framing of race and ethnicity in *Bakke* laid the groundwork to severely limit the potential force of affirmative action policies in effectuating racial change and justice in higher education.[133] While the Supreme Court has never formally established Powell's opinion as binding,[134] in *Wygant v. Jackson Board of Education*, the Court affirmed the compelling interest of promoting racial diversity in the context of higher education.[135] On the contrary (while not in the educational context), the court in *City*

128. Moore & Bell, *supra* note 42, at 602.

129. *Id.*

130. *Id.*

131. Regents of Univ. of California v. Bakke, 438 U.S. 265, 312 (1978).

132. *See* Moore & Bell, *supra* note 42, at 603.

133. *Id.*

134. Liu, *supra* note 35, at 391; *see SFFA*, 600 U.S. 181, 211 (2023) ("In the years that followed our 'fractured decision in Bakke,' lower courts 'struggled to discern whether Justice Powell's" opinion constituted 'binding precedent.'") (citing Grutter v. Bollinger, 539 U.S. 306, 325 (2003)).

135. 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) (citing *Bakke*, 438 U.S. at 311–15).

*of Richmond v. J.A. Croson Co.* highlighted the dangers of racial classification in carrying out a compelling government interest, noting that "[c]lassifications based on race carry a danger of stigmatic harm," and unless reserved for remedial settings, "they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."[136] Additionally, the unstable logic of Powell's diversity rationale and its promised educational benefits places the future of affirmative action on shaky ground. Using the logic proffered in *Bakke*, if diversity *fails* to provide any benefits, then it cannot serve as a compelling government interest under current doctrine.[137] If diversity cannot serve as a compelling government interest, then affirmative action programs have little to stand on within an anticlassification theory of equal protection.

This contentious line of analysis was the tightrope upon which affirmative action walked from *Bakke* onwards. The coupling of shaky precedent and the amorphous definition and application of diversity paved way for the legal basis of affirmative action to drift further and further away from enacting legal and societal racial equity. *Bakke*'s application of diversity dug deeper into a white-centered entrenchment of equal protection doctrine, inevitably cracking under the magnifying glass of strict scrutiny.

### *B. Grutter*

*Grutter v. Bollinger* is often labeled as a "win" for supporters of affirmative action, namely for its perceived victory in using the diversity rationale under strict scrutiny.[138] Where *Bakke* was limited in that it merely specified that diversity could serve as a compelling governmental interest, *Grutter* attempted to fill in the gaps. Barbara Grutter, another white plaintiff, was rejected from the University of Michigan Law School and brought suit on the grounds that her rejection was on the basis of her race.[139] The Court in *Grutter* relied heavily on Powell's concurrence in *Bakke*, namely regarding the compelling interest of educational benefits that racial diversity yielded.[140] *Grutter* takes Powell's reading a step further, however, highlighting the role of deference owed to an educational institution in fulfilling their mission:

> Our conclusion that the Law School has a compelling interest

136. 488 U.S. 469, 493 (1989) (plurality opinion) (O'Connor, J.).

137. Adam Chilton, Justin Driver, Jonathan S. Masur & Kyle Rozema, *Assessing Affirmative Action's Diversity Rationale*, 122 COLUM. L. REV. 331, 336 (2022).

138. 539 U.S. 306 (2003).

139. *Id.*

140. *Id.*

> in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary."[141]

Within this scope of deference provided to the University of Michigan Law School in *Grutter*, the Court then elaborates on the vast educational benefits that can be qualified under a lens of diversity. Such educational benefits include "livelier, more spirited, and simply more enlightening and interesting classroom discussions" stemming from cross-racial understanding that "breaks down racial stereotypes and enables students to better understand persons of different races," expert studies and reports elaborating on the role of diversity in promoting learning outcomes and "better preparing students for an increasingly diverse workforce and society," and real benefits that "can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints," as deemed by major American businesses.[142] In essence, the Court in *Grutter* attempts to break down the amorphous nature of diversity that Powell laid the groundwork for in *Bakke* using qualifiers and quantifiers.

#### i. *Grutter*'s preservation of whiteness in the name of diversity.

Like *Bakke*, the diversity rationale applied in *Grutter* follows a similar path of incorporating colorblindness and othering of students of color.[143] Within this line of thinking, Black, brown, and other racially marginalized students at large are perceived as an ornament of curiosity, whose presence benefits white students and provides an element of inquiry for white students and faculty.[144] The Court in *Grutter* also made a point to highlight prior relevant cases pertaining to affirmative action in areas outside of higher education to reaffirm how critical the rationale of racial diversity is in preserving equal protection.[145] One argument to be made in this seemingly liberal and open-ended application of such a diversity

141. *Id.* at 308 (quoting Regents of Univ. of California v. Bakke, 438 U.S. 265, 318–19 (1978)).

142. *Id.* at 326–34.

143. *See* Moore & Bell *supra* note 42, at 603–04.

144. *Id.*; Chilton et al., *supra* note 137, at 350–51 (discussing critiques on both the left and right condemning the diversity rationale).

145. Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("[G]overnment may treat people differently because of their race only for the most compelling reasons.") (citing Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1998)); *see also id.* ("We are 'free people whose institutions are founded upon the doctrine of equality.'") (citing Loving v. Virginia, 388 U.S. 1, 11 (1967)).

rationale is the power of the Court to decide when and how to use it, and for which legal analyses it ought to comply with a compelling government interest and when it ought not.[146]

Furthermore, the *Grutter* Court, knowing the breadth of their diversity rationale may exceed the strict scrutiny standard of narrow tailoring, made a point to include a time limitation.[147] The Court noted that "race-conscious admissions policies must be limited in time," and that it trusts that the law school "would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial preferences as soon as practicable."[148] With this qualification, *Grutter* essentially strapped affirmative action with a time-bomb, paving a clear path for opponents of affirmative action to strike down the policy upon any finding that the educational benefits proffered cannot be determined and quantified within the 25-year time limit imposed by the Court. The goals of affirmative action were once again reduced to adhere to a flawed theory of equal protection, preserving the exact elements of social inequality it aimed to redress.[149]

### ii. *Students for Fair Admissions v. Harvard*

Founded in 2014, Students for Fair Admissions is a non-profit organization that purports to "defend human and civil rights secured by law, including the right of individuals to equal protection under the law."[150] This organization is dedicated to filing lawsuits challenging race-based admissions processes like affirmative action.[151] In a somewhat predictable manner, the Court in *SFFA* uses the premise of diversity as an amorphous concept to find that

146. *See* Chilton et al., *supra* note 137, at 356 (pointing to the empirical tenuousness and theoretical implausibility of the premises underlying the diversity rationale for race-based affirmative action); *see also* Jamin B. Raskin, *From Colorblind White Supremacy to American Multiculturalism*, 19 HARV. J. L. & PUB. POL'Y 743, 744 (1996) ("It is important for those who champion the principle of "colorblindness" today to remember its origin and complete context. It was seen by its author as a principle of formal neutrality that would allow white people to continue their absolute dominance of American life.").

147. *Grutter*, 539 U.S. at 343.

148. *Id.*

149. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 19 (2003).

150. *SFFA*, 600 U.S. 181, 197 (2023).

151. Students for Fair Admissions, *About*, https://studentsforfairadmissions.org/about/ [https://perma.cc/D6BN-3XF8] ("Our mission is to support and participate in litigation that will restore the original principles of our nation's civil rights movement: *A student's race and ethnicity should not be factors that either harm or help that student to gain admission to a competitive university*.") (emphasis in original).

the educational benefits put forth by the defendant schools, while commendable, "are not sufficiently coherent for purposes of strict scrutiny."[152] The Court goes on to find:

> At the outset, it is unclear how courts are supposed to measure any of these [educational benefit] goals. How is a court to know whether leaders have been adequately 'trained'; whether the exchange of ideas is 'robust'; or whether 'new knowledge' is being developed? . . . the question whether a particular mix of minority students produces 'engaged and productive citizens,' sufficiently 'enhances appreciation, respect and empathy,' or effectively 'trains future leaders' is standardless . . . [and] inescapably imponderable.[153]

Essentially, *SFFA* pinpoints the very weak spot of the diversity rationale: the vague definition and application of diversity as it has been passed from one affirmative action case to the next. The requirement of the diversity defense to rely on empirical evidence was one meant to fail under the Equal Protection Clause, particularly within the exact arena in which the vague definition was born.[154] Advocates of affirmative action were compelled to generate a plethora of scholarship in attempting to quantify diversity since *Grutter* to try and denounce any claim of its "amorphous" nature.[155] The Court in *SFFA* tiptoed this contrarian line of thinking by finding that there could never be "enough" evidence to demonstrably prove the educational benefits of diversity under a lens of strict scrutiny.[156]

The Court in *SFFA* uses the rejection of diversity as a compelling interest as a reminder: attempts at remedying racial imbalances that don't ultimately benefit white systems in tangible or observable ways can be discarded with ease.[157] Under today's Equal Protection doctrine, one of the most pertinent constitutional questions brought forth by race-based affirmative action is whether the equal protection of whites are violated in the purposeful assistance of Black and non-white racial groups.[158] The answer to such a question essentially determines the likelihood of implementing such policies—any threat to the status of white individuals by selectively granting opportunities to racially marginalized communities is unlikely to prevail under modern-day

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152. *SFFA*, 600 U.S. at 214.

153. *Id.* at 214–15.

154. Chung, *supra* note 45, at 391.

155. *Id.* at 392–93.

156. *Id.*

157. *See* Petts & Garza, *supra* note 106, at 4; *see also* Liu, *supra* note 35, at 405.

158. Jed Rubenfeld, *Affirmative Action*, 107 YALE L. J. 427, 429 (1997) (discussing the role of strict scrutiny as applied to affirmative action).

law and social practice.[159] Thus, to work towards any successful affirmative action measures requires critical analysis of current legal framework, as well as the societal influences that uphold such framework.

## Conclusion: Affirmative Action and the Equal Protection Clause: Can They Co-Exist?

Classification-driven strict scrutiny cannot account for the goals of affirmative action, as it protects a colorblind theory of equal protection doctrine that upholds facial neutrality and ignores the experiences of those impacted.[160] It is only under an antisubordination theory of equal protection that the goals of affirmative action can be upheld to their fullest intent.[161]

A substantive approach that responds to the violence and persistent harms of social group domination, particularly in the realm of race, is necessary when the constitutional interpretation of the Equal Protection Clause is questioned.[162] Antisubordination theory of equal protection embodies this approach, forcing courts to examine social group hierarchy and any power disparities that exist between groups.[163] The goals of affirmative action—remediating lingering disparities that persist from legal and societal race-based discrimination—require a substantive approach that then allows for a more targeted means of legal action.

Two fundamental shifts in the affirmative action battle must take place: 1) a shift in focus from rationalizing the practice as one that centers and benefits white individuals, instead highlighting the historical disparities impacting Black and racially marginalized groups, and 2) a shift in jurisprudence that can effectively carry out the first goal. Seeking a full transformation in a legal framework existing and evolving since the 1970s is no small ask. However, such a concept should not be entirely out of mind either. It is clear that legal efforts toward racial equality that fundamentally instill social change are possible.[164] The question arises in how or when social

159. *Id*.

160. Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L. J. 1, 5 (2021) (citing Balkin & Siegel, *supra* note 149, at 10) (noting that anticlassification theories condemn governmental differentiation explicitly based on the basis of forbidden categories like race and differentiation that targets people despite facial neutrality).

161. *See id*. at 7.

162. Darren L. Hutchison, *"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CAL. L. REV. 371, 417 (2022).

163. *Id*.

164. *See* Brown I, 347 U.S. 483 (1954); *see also* Brown II, 349 U.S. 294 (1955).

and legal interests toward achieving racial justice will align and work hand-in-hand to shape our legal framework.

The future of affirmative action in higher education, where it sits now post-*SFFA*, rests in the hands of the Court. It is difficult to say, under today's doctrine of Equal Protection, if or how affirmative action will be revived. With the concept of diversity now thrown out of courtrooms, perhaps there is ground for a transformative interpretation of affirmative action. Or, as some scholars posit, efforts should not be directed toward other means of achieving restoring racial imbalances.[165] For example, affirmative action efforts should not focus on urging colleges and universities to increase enrollment of students of color using facially neutral criteria, or targeting racially discriminatory practices that lead to eventual racial divides in higher education, such as housing policies and primary education disparities.[166] Instead, policies should aim to address the harms of racial inequities within education from their roots, rather than alleviate harms with temporary bandages and seemingly progressive optics.

This Note finds that yes, affirmative action and the Equal Protection Clause *can* co-exist. This relationship, however, requires a transformative approach to what equal protection means in the constitutional realm. The modern anticlassification doctrine does not meet this requirement, as seen in the downfall of affirmative action in *SFFA v. Harvard*.[167] Racial justice efforts through affirmative action cannot be pursued with vigor and potential success until legal doctrine is reformatted to uphold an antisubordination framework. It is only when moving beyond white-centered rationales like diversity, and towards race-centered efforts of remedy that true advancement of racial justice can pursue.

165. Chung, *supra* note 45, at 407–08.
166. *Id.*; *see also* Gullen, *supra* note 33, at 283.
167. 600 U.S. 181 (2023).

# Uneven Scales: How the Symbiotic Relationship Between Prosecutors and Judges Results in Unfair Criminal Proceedings

Edward Adams†

## Introduction

Eighteen years in the Louisiana State Penitentiary, fourteen of which were spent on death row: that is how long John Thompson spent in the Louisiana criminal justice system.[1] Thompson had "[h]is death warrant . . . signed eight times."[2] However, Thompson spent all those years in prison—having his "death warrant" signed countless times—for not one, but two wrongful convictions.[3] It was not until a few weeks before Thompson's execution date that his attorneys found evidence proving his innocence.[4] The most troubling aspect of this case is that the prosecutors knew of this evidence, but hid it from Thompson's attorneys for years.[5] Yet only one prosecutor faced any discipline for this matter, despite a prosecutorial culture focused on "both willfully ignoring evidence that could have led to . . . exoneration, [and] blatantly withholding it."[6]

Another tragic tale is that of Florida resident, Herbert Smith.[7] Smith was just twenty-three years old when he was sentenced to sixty years in prison after he was pulled over while his license was

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1. *See* Radley Balko, *The Untouchables: America's Misbehaving Prosecutors, and the System that Protects Them*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffpost.com/entry/prosecutorial-misconduct-new-orleans-louisiana_n_3529891 [https://perma.cc/XNY2-CNUK].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Josie Duffy Rice, *A Florida Judge Sentenced a Man to 60 Years in Prison for This?*, DAILY KOS (Feb. 2, 2016), https://www.dailykos.com/stories/2016/02/02/1478743/-A-judge-in-Florida-sentenced-a-man-to-60-years-in-prison-for-this [https://perma.cc/JZE8-QTKF].

suspended.[8] Upon discovering Herbert was on probation, police conducted a search of his vehicle and found a magazine of bullets—a violation of his probation.[9] His sentencing was heard before Florida Circuit Court Judge, and former prosecutor, Matthew Destry.[10] The same judge had sentenced Herbert four years earlier.[11] The prosecutor asked the judge to sentence Herbert to thirteen years as a result of the violation.[12] Alternatively, Judge Destry could have simply required Herbert to complete the remaining four years of probation in prison given his "youth offender status."[13] Instead, the "unpredictable" and "harsh" judge ignored the prosecutor's recommendation and sentenced him to sixty years in prison.[14] Unfortunately, Herbert was not the only victim of Judge Destry. Destry sentenced Kate Peacock to ten years in prison for possession of Oxycodone and cocaine after she missed a sentencing hearing.[15] At the scheduled hearing, she was supposed to sign a plea agreement for one year in jail.[16] Ms. Peacock missed her sentencing hearing because she was in the hospital resulting from an attempted suicide.[17] Nevertheless, Judge Destry handed down a decade-long sentence.[18]

Another involves a defendant, Omar Loureiro, who was sentenced to death on first degree capital murder charges by Judge Ana Gardiner.[19] Just five days before Judge Gardiner handed down the sentence, Gardiner and the prosecutor against Loureiro, Howard Scheinberg, shared drinks and discussed the case at length.[20] The discussions included derogatory comments towards those involved in the case as well as criticizing a juror who had fainted during the presentation of evidence at trial.[21] These ex parte communications were heard by a law student who was so appalled

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. Bob Norman, *Judging Ana*, BROWARD PALM BEACH NEW TIMES (Apr. 24, 2008), https://www.browardpalmbeach.com/news/judging-ana-6311564 [https://perma.cc/W4MU-DCGX].
20. *Id.*
21. *Id.*

that they left the table where the discussion was happening.[22] Shortly after the interaction, Omar was sentenced to death, in part due to gruesome photographic evidence the defense unsuccessfully attempted to exclude as "unfairly prejudic[ial]."[23] Instead, Judge Gardiner sided with prosecutor Scheinberg, denying the motion to exclude the evidence and ultimately sending Omar Loureiro to death row.[24] Gardiner was confronted about hundreds of phone calls and text messages she sent to Scheinberg, initially lying under oath about the extent of their relationship.[25] It was determined that she was actively engaged in a sexual relationship with Scheinberg *during* the time of Omar's trial.[26] Besides her sexual relationship with Howard Scheinberg, Gardiner was allegedly romantically involved with another prosecutor that practiced before her as well.[27] As a result of these infractions, Gardiner was ultimately disbarred by the Florida Supreme Court—and Omar's death sentence was overturned on appeal.[28]

In 2023, the Oklahoma Court of Appeals determined Robert Leon Hashagen III was entitled to a new trial after it was discovered that Judge Timothy Henderson was sleeping with one of the prosecutors involved when he sentenced Robert to life in prison for first-degree murder.[29] Even though the relationship was no longer ongoing at the time of the trial, the Oklahoma Court of Criminal Appeals was not persuaded that "the trial judge's potential bias" was eliminated.[30] The Court of Criminal Appeals ultimately decided that the undisclosed relationship "violated Hashagen's due process rights" and overturned Judge Henderson's 2021 decision.[31] Judge Henderson resigned from the bench in 2021

22. *Id.*

23. *Id.*

24. *Id.*

25. Chris Joseph, *Broward Judge Ana Gardiner Disbarred by Florida Supreme Court*, BROWARD PALM BEACH NEW TIMES (June 5, 2014), https://www.browardpalmbeach.com/news/broward-judge-ana-gardiner-disbarred-by-florida-supreme-court-6458985 [https://perma.cc/2ERZ-QQDG].

26. *Id.*

27. Norman, *supra* note 19.

28. Joseph, *supra* note 25.

29. *Oklahoma Murder Conviction Reversed Due to Sexual Relationship Between Judge, Prosecutor*, ASSOCIATED PRESS (July 13, 2023), https://apnews.com/article/judge-prosecutor-sexual-relationship-murder-conviction-overturned-6cbfb0ff1f5e0af802b8ea04c0b61f0a [https://perma.cc/ZC95-TAH3].

30. Praveena Somasundaram, *Murder Conviction Reversed Over Relationship Between Judge and Prosecutor*, WASH. POST (July 17, 2023), https://www.washingtonpost.com/nation/2023/07/17/judge-relationship-prosecutor-conviction-overturned (last visited Feb. 12, 2025).

31. *Id.*

after being accused of sexual misconduct committed against three female prosecutors who had tried cases before him.[32]

Sadly, the stories of John Thompson, Herbert Smith, Omar Loureiro, and Robert Leon Hashagen III are far from unique when it comes to prosecutorial and judicial misconduct. In April 2023, the Oklahoma Court of Criminal Appeals ruled against a criminal defendant's appeal from death row.[33] In doing so, the Oklahoma Court of Criminal Appeals rejected the Oklahoma Attorney General's recommendation to vacate the conviction and death sentence because the accused had an "unfair and unreliable" trial.[34] Even the Oklahoma Legislature questioned the alleged defendant's guilt.[35] Notably, of the two justices that wrote opinions,[36] both were former prosecutors in Oklahoma.[37] In a different case in 1990, Charles Dean Hood was sentenced to death-row for the murder of two people.[38] After Hood's conviction, it came to light in 2008 that the prosecutor and judge in Hood's case had engaged in "a years-long extramarital affair" that both the prosecutor and judge denied ever existed.[39] Hood brought a legal challenge to the Texas Court of Criminal Appeals, which was ultimately rejected.[40] The United States Supreme Court then denied hearing Hood's appeal.[41]

The rise of both judicial and prosecutorial misconduct is nothing new. Judicial misconduct has become increasingly present

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32. *Id.*

33. Mark J. Stern, *Oklahoma's Top Prosecutor Doesn't Want to Execute a Likely Innocent Man*, SLATE (Apr. 21, 2023), https://slate.com/news-and-politics/2023/04/richard-glossip-attorney-general-innocent-execution.html [https://perma.cc/UUC6-RPMN].

34. *Id.*

35. *Id.*

36. *Id.* (mentioning that Justice David B. Lewis wrote the majority opinion and Justice Gary L. Lumpkin wrote a concurrence).

37. *See* OKLA. CT. OF CRIM. APPEALS, *David B. Lewis*, http://okcca.net/judges/david-b-lewis/ [https://perma.cc/ET4T-WW2L]; OKLA. CT. OF CRIM. APPEALS, *Gary L. Lumpkin*, http://okcca.net/judges/gary-l-lumpkin/ [https://perma.cc/KH39-9REQ].

38. Dahlia Lithwick, *The Most Outrageous Thing About the Texas Judge Who Slept with the Prosecutor in a Death-Penalty Case*, SLATE (Apr. 24, 2010), https://slate.com/news-and-politics/2010/04/the-most-outrageous-thing-about-the-texas-judge-who-slept-with-the-prosecutor-in-a-death-penalty-case.html [https://perma.cc/9J2V-RVYJ].

39. *Id.*

40. *Id.*

41. *Id.* Hood was eventually granted a new sentencing hearing due to improper jury instructions, but the prosecutors in the case still sought the death penalty against Hood.

in the public eye at all levels of the judiciary.[42] Prosecutorial misconduct has continued to be a focus of the criminal justice system.[43] Nevertheless, it is a pernicious issue within our criminal justice system and raises many concerns about whether criminal defendants receive a fair trial.

However, judicial and prosecutorial misconduct are only a piece of the issues surrounding the criminal justice system. There are continued concerns of overcriminalizing individuals,[44] especially those accused of drug offenses.[45] Many prosecutors rely on plea bargaining to resolve criminal charges; so much so that plea bargaining accounts for "95 percent of all criminal convictions today" instead of a jury trial.[46] This is all regardless of how coercive plea bargains may be.[47] What is most concerning is that the legal

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42. *See, e.g.*, Lydia Wheeler & Kimberly Strawbridge Robinson, *'New Era' of Scrutiny Brings Calls for Supreme Court Ethics Code*, BLOOMBERG L. (Mar. 20, 2023), https://news.bloomberglaw.com/us-law-week/new-era-of-scrutiny-brings-calls-for-supreme-court-ethics-code-22 [https://perma.cc/9P86-D34S] (discussing the need for Supreme Court justices to have a code of ethics to abide by); Joshua Kaplan, Justin Elliot & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow [https://perma.cc/2KUR-C8DZ] (highlighting how Justice Clarence Thomas has taken multiple lavish trips from a notable GOP donor); Michael Siconolfi, Coulter Jones, Joe Palazzolo & James V. Grimaldi, *Dozens of Federal Judges had Financial Conflicts: What You Need to Know*, WALL ST. J. (Apr. 27, 2022), https://www.wsj.com/articles/dozens-of-federal-judges-broke-the-law-on-conflicts-what-you-need-to-know-11632922140 (last visited Feb. 12, 2025) (finding over 130 federal judges presiding over cases in which they or their family members personally had a financial interest).

43. *See* Joaquin Sapien, *He Went to Prison After a Prosecutor Hid Evidence. Seven Years After Our Story, He Walked Free*, PROPUBLICA (Feb. 20, 2020), https://www.propublica.org/article/he-went-to-prison-after-a-prosecutor-hid-evidence-seven-years-after-our-story-he-walked-free [https://perma.cc/HTR9-HJH5]; Maura Dolan, *U.S. Judges See 'Epidemic' of Prosecutorial Misconduct in State*, L.A. TIMES (Jan. 31, 2015), https://www.latimes.com/local/politics/la-me-lying-prosecutors-20150201-story.html [https://perma.cc/9P3P-EHQA]; Dana Gentry, *'Rummaging' Through Cells Prompts Allegations of Systemic Prosecutorial Misconduct*, NEV. CURRENT (Mar. 8, 2023), https://www.nevadacurrent.com/2023/03/08/rummaging-through-cells-prompts-allegations-of-systemic-prosecutorial-misconduct/ [https://perma.cc/Y45N-HZTS].

44. *See* Clark Neily, *America's Criminal Justice System is Rotten to the Core*, CATO INST. (June 7, 2020), https://www.cato.org/blog/americas-criminal-justice-system-rotten-core [https://perma.cc/3RAJ-JTAL] (discussing how 726 individuals in Louisiana were arrested for violating a law against wearing saggy pants).

45. *Id.* (highlighting the almost 29,000 arrests in Virginia for marijuana offenses in 2019).

46. Clark Neily, *Overcriminalization and Plea Bargaining Make Criminal Justice Like Shooting Fish in a Barrel*, CATO INST. (July 20, 2020), https://www.cato-unbound.org/2020/07/20/clark-neily/overcriminalization-plea-bargaining-make-criminal-justice-shooting-fish/ [https://perma.cc/8PCJ-T4TG].

47. Neily*, supra* note 44 ("The judiciary's collective indifference to the use of

system protects this abuse—from police misconduct to prosecutorial misconduct.[48]

These broader and more specific criticisms against the criminal justice system are warranted. But in understanding these criticisms, it is important to look at the judicial and prosecutorial functions, how they operate together, and how that may contribute to the broader issues within the criminal justice system. More specifically, it is crucial to recognize how the judiciary can encourage prosecutorial misconduct and how prosecutors can encourage and welcome judicial misconduct. As of 2021, almost 50% of the federal judiciary is comprised of former prosecutors or a former government attorney.[49] Given their past experiences as former prosecutors, judges may have biases that favor prosecutors during criminal proceedings.[50] As there are vacancies on the federal judicial bench,[51] it is important to recognize how changing the makeup of the judiciary can change the favoritism prosecutors receive.

It is not too outlandish to consider how judges being former prosecutors may favor the prosecution during a criminal proceeding. Assume there is a basketball game between University A and University B. The referees adjudicating the game are all graduates of University B, played basketball at University B, and are in regular and close contact with the basketball coaching staff and players at University B. As referees, they know they should be impartial during the basketball match. However, it is likely that during close calls these referees may either subconsciously or intentionally make a call that favors University B over University A. In fact, University B players may even know that the referees will give them grace and allow the players to foul some University A players without calling the foul or allow the University B players to lightly travel. This is in essence how the symbiotic relationship between prosecutors and judges operates.

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coercion in plea bargaining has resulted in the practical elimination of jury trials and enables the government to obtain convictions without the expense and inconvenience of that constitutionally prescribed procedure.").

48. *Id.*

49. Clark Neily, *Are a Disproportionate Number of Federal Judges Former Government Advocates?*, CATO INST. (May 27, 2021), https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates [https://perma.cc/TX73-5USD].

50. *Id.*

51. Myj Saintyl, *Upcoming Article III Judicial Vacancies*, BALLOTPEDIA (Apr. 6, 2023), https://news.ballotpedia.org/2023/04/06/upcoming-article-iii-judicial-vacancies-4 [https://perma.cc/2G6X-VKXW].

This Article maintains that the symbiotic relationship between judges and prosecutors results in unfair and unjust criminal proceedings against defendants. Because most judges in the judiciary are former prosecutors, these judges have subconscious and apparent biases that favor the prosecution. This Article reviews data of judicial decisions, especially judges who were former prosecutors, to prove the pervasive influence of this symbiotic relationship. To overcome and diminish the power of the symbiotic relationship, this Article argues that the composition of the judiciary must change along with how prosecutors and judges function both together and separately.

Part I will provide a general overview of the prosecutorial function, discussing how lawyers become prosecutors at the state and federal level, the general role of the prosecutor in the criminal setting, and the standards prosecutors are held to and special protections they receive. Part II will explain the judicial function and how one becomes a judge at the state and federal level, the role of the judge in a criminal trial, and the standards and protections for the judiciary. From understanding the basic functions of each role, Part III will then break down each stage and the mechanics of a criminal trial. Part IV will then argue, first, that there is a symbiotic relationship between prosecutors and judges in criminal trials. The Part will then turn to how this symbiotic relationship leads to prosecutors receiving more favors in a trial, allows prosecutors to avoid complying with laws and ethical rules, and ultimately results in more unjust prosecutions of defendants. The Part will conclude by assessing how the special protections and lack of enforcement against prosecutors and judges perpetuates and encourages judges and prosecutors to engage in their symbiotic relationship. Finally, Part V will offer different solutions to dissolve the symbiotic relationship between prosecutors and judges by, first, changing the composition of the judiciary and, second, implementing and enforcing greater accountability standards for the prosecutorial and judicial functions. Through such actions, the judiciary can focus more on conducting fair criminal proceedings rather than bolstering the symbiotic relationship between prosecutors and judges.

## I. Prosecutorial Function

The prosecutorial function is one of the most powerful functions within the executive branch. This Part starts by briefly describing how one becomes a prosecutor and obtains this power. From there, this Part delves into the role of the prosecutor and what

powers the prosecutor has. Through understanding the vast powers a prosecutor has, this Part concludes with explaining the ethical and legal obligations prosecutors are supposed to abide by along with the special legal and practical protections prosecutors have.

### *A. How One Becomes a Prosecutor*

Becoming a prosecutor does not have as many complexities as becoming a judge. For many prosecutorial jobs, one can just apply to the office.[52] However, certain prosecutorial positions are elected or appointed positions.[53] How someone becomes a prosecutor is important and it influences how a prosecutor may act. In general, the public has little knowledge over how prosecutors operate and little say in who can and cannot be a prosecutor.[54] For non-elected prosecutors, they can manipulate their workload to their own advantage.[55] For example, a non-elected prosecutor can choose to try strong cases, while attempting to plea bargain others, in hopes to gain more public exposure for an elected prosecutorial position.[56]

The public gets the most say over who gets to be District Attorney for their state, as this is an elected position.[57] Importantly to these elected prosecutorial positions, "campaign issues boil down to boasts about conviction rates, a few high-profile cases, and maybe a scandal."[58] Similar to non-elected prosecutors, elected prosecutors have control of their docket and what cases they select in hopes they can remain elected.[59] Prosecutors who are up for election may intentionally manipulate their case load to ensure they have high-profile cases and a strong win-loss record.[60] Prosecutors can do this "at the expense of victims and the public."[61] Thus, how one acts as a prosecutor and fulfills the role is crucial to continuing to be a prosecutor.

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52. *See generally Learn About Being a Prosecutor*, INDEED (Aug. 18, 2024), https://www.indeed.com/career-advice/careers/what-does-a-prosecutor-do [https://perma.cc/ABS8-6K7G] (explaining the process of becoming a prosecutor after graduating law school).

53. *See* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PENN. L. REV. 959, 983 (2009).

54. *Id.* at 961 ("[P]rosecution is a low-visibility process about which the public has poor information and little right to participate.").

55. *Id.* at 961–62.

56. *Id.* at 962.

57. *Id.* at 961.

58. *Id.*

59. *Id.* at 961–62.

60. *Id.* at 962.

61. *Id.*

### *B. Role of the Prosecutor*[62]

After understanding how one becomes a prosecutor, it is important to know what the role of a prosecutor entails. A prosecutor represents the State in criminal prosecutions against criminal defendants.[63] Within the criminal justice system and while representing the State, prosecutors play a variety of functions. Prosecutors decide whether to even accept a case and which charges to bring forward, choose whether to engage in plea bargaining or not, set pretrial and trial strategy, and recommend what sentence a convicted individual should receive.[64] Because of these various decisions prosecutors get to make, many find that "[p]rosecutors are the most powerful officials in the criminal justice system."[65] A prosecutor essentially "makes the law, enforces it against particular individuals, and adjudicates their guilt and resulting sentences."[66] Importantly though, this is power that goes unchecked.[67]

First, prosecutors hold the power to accept or deny a case. After a police officer makes an arrest, a prosecutor will typically receive the police report and determine whether to file charges or not.[68] In reviewing the report, prosecutors have to determine if there is probable cause or not to bring forward the charge.[69] This is a relatively low bar for prosecutors to clear and is not where their power truly lies—determining which charges to bring forward.

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62. This Subpart will only cover the main functions of what a prosecutor does throughout a criminal proceeding as these are the areas ripest for abuse with the symbiotic relationship between judges and prosecutors.

63. Durham District Attorney's Office, *Explained: The Role of the District Attorney*, MEDIUM (Feb. 12, 2021), https://medium.com/durham-district-attorneys-office/explained-the-role-of-the-district-attorney-7dbebd69b132 [https://perma.cc/QAM5-ZSKZ]; *Learn About Being a Prosecutor*, *supra* note 52.

64. Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1415 (2010).

65. ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 5 (2007). Former U.S. Attorney General Robert H. Jackson may have stated the power of the prosecutor best:

> The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations.

Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 1, 3 (1940).

66. Luna & Wade, *supra* note 64, at 1415.

67. *See id.*

68. Paul Bergman updated by Rebecca Pirius, *How Do Prosecutors Decide Which Cases to Charge?*, NOLO (Feb. 2, 2023), https://www.nolo.com/legal-encyclopedia/how-prosecutors-decide-which-cases-charge.html [https://perma.cc/KFS2-8UEE].

69. *Id.*; U.S. Dep't of Just., Just. Manual § 9-27.200 (2018).

Second, prosecutors get wide discretion in deciding which charges to bring against a defendant. This power "is arguably the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion."[70] The charging function carries so much power with it because a prosecutor can decide to only charge what the police arrested the individual for, charge a lesser sentence, or opt to charge for more severe crimes.[71] The charging function plays a crucial role in the later functions, especially plea bargaining and the pretrial strategy. For plea bargaining, the charging function can heavily influence one's desire to accept a plea bargain because the more and varied charges a prosecutor brings, the more likely an individual will want to accept a plea bargain.[72] For pretrial strategy, prosecutors may choose to overcharge an individual to convince "a grand jury to indict a defendant for more and greater charges than they can establish."[73]

Third, a prosecutor has great discretion when deciding whether to offer a plea bargain[74] or not. This function grants a prosecutor broad leeway in deciding when they will reduce a charge, how much of a reduction there will be, and for what charges a defendant would plead to.[75] Similar to the charging function, the plea bargain function also holds immense power as "98% of criminal cases in the federal courts end with a plea bargain."[76] The plea bargaining process is under significant scrutiny because of how

70. Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408 (2001).

71. *Id.* at 409 ("[Prosecutors] may decline to bring charges, bring only charges that they believe they can prove, or 'inflate' the charges . . . ."); *see also* Bergman, *supra* note 68 (describing a prosecutor's discretion in making charging decisions).

72. *See* Davis, *supra* note 70, at 409 (discussing how defendants often do not want "to run the risk of additional and more serious convictions and more prison time" by going to prison rather than accepting a plea deal); LINDSEY DEVERS, BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 2 (2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf [https://perma.cc/RNS9-UNB8].

73. Davis, *supra* note 70, at 409.

74. A plea bargain "is an agreement between the prosecution and the defendant where the defendant agrees to plead guilty to the charges against them . . . . In exchange for the self-conviction, the defendant is usually offered lesser criminal charges . . . ." *Plea Bargain*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/plea_bargain [https://perma.cc/538Y-X45B].

75. *See* DEVERS, *supra* note 72, at 2.

76. Carrie Johnson, *The Vast Majority of Criminal Cases End in Plea Bargains, a New Report Finds*, NPR (Feb. 22, 2023), https://www.npr.org/2023/02/22/1158356619/plea-bargains-criminal-cases-justice [https://perma.cc/LF2N-PDDA].

frequently it is used and potential constitutional[77] and fairness concerns.[78]

Fourth, prosecutors set the pretrial strategy from the preliminary hearing to determining what evidence to gather to filing different pretrial motions. At the preliminary hearing,[79] a prosecutor is tasked with presenting evidence to charge a defendant.[80] The prosecutor will have to determine which witnesses to call and what evidence to use.[81] Additionally, prosecutors file motions crucial to a case that "can affect the trial, courtroom, defendants, evidence, or testimony."[82] The pretrial strategy coincides with charging and plea bargaining as all of these functions interact with one another to enhance the prosecutor's power over the defendant.

Fifth, prosecutors get significant discretion in how they want to present and handle their case. Prosecutors work with defense counsel on selecting jurors, but both sides get a limited number of "peremptory challenges" to dismiss jurors without reason.[83] Once a jury is selected, prosecutors then present the State's case by making an opening statement, examining different witnesses, and objecting to questions the defense may have on cross-examination.[84] After the prosecution and defense both rest their cases, then the prosecution presents a closing argument and awaits a verdict after both sides close.[85]

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77. *See* DEVERS, *supra* note 72, at 2 ("These findings are problematic because they demonstrate that if a defendant opts to invoke the Sixth Amendment right to a trial by jury, [they] will likely have a more unfavorable outcome.").

78. *Id.* at 3 ("[O]ne study found that [Black people] are also less likely to receive the benefits of shorter or reduced sentences as a result of the exercise of prosecutorial discretion during plea bargaining."); Davis, *supra* note 70, at 413 ("Indigent defendants with overworked counsel and limited resources often lack the ability to investigate the strength of the government's charges and may plead guilty out of fear of the unknown."); *see also* Johnson, *supra* note 76 (highlighting how innocent defendants may accept plea deals to plead guilty at the advice of their own lawyers).

79. See *infra* Part III.B. for a discussion on how the preliminary hearing works in general and how it proves important for trial.

80. *See* Offices of the U.S. Atty's, *Preliminary Hearing*, DEP'T OF JUST., https://www.justice.gov/usao/justice-101/preliminary-hearing [https://perma.cc/4ZA7-X8DH].

81. *Id.*

82. *See* Offices of the U.S. Atty's, *Pre-Trial Motions*, DEP'T OF JUST., https://www.justice.gov/usao/justice-101/pretrial-motions [https://perma.cc/TT3E-5DZ3].

83. *See* Offices of the U.S. Atty's, *Trial*, DEP'T OF JUST., https://www.justice.gov/usao/justice-101/trial [https://perma.cc/7RUW-T269].

84. *Id.*

85. *Id.*

Sixth, and lastly, the prosecutor assists with sentencing. The first involvement a prosecutor may have with sentencing is within the charging function. Many jurisdictions use sentencing guidelines, so whatever charges a prosecutor chooses to bring against a defendant can then essentially set what sentence a defendant receives.[86] Outside of that process, a prosecutor may help the judge determine what sentence to give.[87] While the prosecutor does not determine the actual sentence the defendant receives,[88] they can influence a probation officer's sentencing recommendation.[89] The prosecutorial function enjoys significant power throughout a criminal proceeding, yet the function has ethical rules it must follow. The prosecutorial function also receives protections from these rules.

### *C. Prosecutorial Ethics and Special Protections*

Through these different roles, prosecutors have general and specific ethical guidelines they must follow. As the American Bar Association states, these ethical guidelines are needed because lawyers have a "special responsibility for the quality of justice."[90] However, prosecutors are also afforded a multitude of legal protections and lack of oversight when prosecutors perform their function. Thus, it is important to understand how the ethical rules and specific rules for prosecutors coincide and conflict with the special protections given to the prosecutorial function. This Subpart will first discuss the ethical standards for lawyers generally, the unique rules for prosecutors, and the rationale for having such

86. *See* Davis, *supra* note 70, at 408 ("In federal and state jurisdictions governed by sentencing guidelines, these decisions often predetermine the outcome of a case since the sentencing judge has little, if any, discretion in determining the length, nature, or severity of the sentence.").

87. *See* Offices of the U.S. Atty's, *Sentencing*, DEP'T OF JUST., https://www.justice.gov/usao/justice-101/sentencing [https://perma.cc/WY7F-EPDE] (explaining how judges "receive guidance and assistance from several sources" in sentencing, including a presentence report, victim-impact statements, and statements from the defendant and attorneys).

88. *How Courts Work: Steps in a Trial: Sentencing*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/sentencing [https://perma.cc/5RAC-E9MC].

89. Probation officers conduct presentence investigations to prepare their sentencing recommendations. *Presentence Investigations,* U.S. CTS., https://www.uscourts.gov/services-forms/probation-and-pretrial-services/presentence-investigations [https://perma.cc/G3XK-2VQC]. While prosecutors do not directly assist in this investigation, they do give recommendations after the report is complete, which the probation officer can implement prior to sentencing. *Id.*

90. MODEL RULES OF PRO. CONDUCT Preamble (AM. BAR ASS'N 2018).

standards in place.[91] From there, this Subpart will turn to the unique legal and practical protections prosecutors receive as prosecutors act within their function.[92]

i. Prosecutorial Ethics

Attorneys in the United States must abide by their respective state ethics laws known generally as the Model Rules of Professional Conduct ("the Rules").[93] Of particular note are Rules 3.1 and 3.4 and how they interact with the prosecutorial function and how a prosecutor should act as an attorney. Rule 3.1 states that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that *is not frivolous*, which includes *a good faith argument* . . . ."[94] Included within this rule is the prosecutorial function of accepting cases and deciding on the charges to bring.

Rule 3.4 relates to the pretrial strategy prosecutorial function. The Rule states that "[a] lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."[95] This Rule helps to ensure the adversarial system maintains a level of fair competition.[96] Specific to the criminal justice system, Rule 3.4 exists to ensure defendants can adequately establish a defense.[97] This Rule, in conjunction with *Brady* as will be discussed below, corresponds with the prosecutorial functions to bring forward charges and pretrial strategy work. With respect to bringing forward charges, prosecutors should ensure they have evidence to support each claim.[98] This Rule relates to the pretrial strategy of the prosecutorial function, as prosecutors will have to know what evidence they have to turn over to the defense and how that may impact the State's case.

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91. *See infra* Part I.C.i.

92. *See infra* Part I.C.ii.

93. *See generally*, MODEL RULES OF PRO. CONDUCT (establishing rules for States to adopt for ethical standards). This Article will rely on the Model Rules of Professional Conduct given they are more generally applicable to the legal profession as compared to state-specific rules.

94. MODEL RULES OF PRO. CONDUCT r. 3.1 (emphasis added).

95. MODEL RULES OF PRO. CONDUCT r. 3.4(a).

96. MODEL RULES OF PRO. CONDUCT r. 3.4 cmt.

97. *Id.*

98. MODEL RULES OF PRO. CONDUCT r. 3.4(a); *see also* MODEL CODE OF PRO. CONDUCT r. 3.1 (requiring attorneys to bring forward good faith arguments).

Prosecutors have additional ethical rules[99] and standards[100] that they are supposed to abide by. The Rule unique to the prosecutorial function is Rule 3.8, and different components of the Rule apply to different aspects of the prosecutorial function.[101] First, in relation to bringing forward charges, prosecutors shall "refrain from prosecuting a charge that the prosecutor *knows* is not supported by *probable cause*."[102] Similar to Rule 3.1, Rule 3.8(a) is supposed to restrain a prosecutor in what charges the prosecutor wants to bring forward and ensure that defendants are not overcharged.[103] The American Bar Association's standards for prosecutors also endorses this notion of bringing forward charges supported with evidence.[104]

Second, prosecutors have specific rules as it pertains to disclosing evidence to the defense. Rule 3.8(d) requires prosecutors to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . ."[105] Under *Brady v. Maryland*, the Supreme Court requires prosecutors to disclose evidence to the defense as a matter of due process.[106] These requirements directly impact the charging, pretrial, and trial prosecutorial functions, as the evidence will shape what charges a prosecutor reasonably believes they can bring and planning how that evidence will influence the overall pretrial and trial strategy.

Third, Rules 3.8(g) and 3.8(h) pertain to the prosecutorial function as a whole. Rule 3.8(g) requires prosecutors to disclose credible, material evidence that a "defendant did not commit an

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99. MODEL RULES OF PRO. CONDUCT r. 3.8.

100. AM. BAR ASS'N, *Prosecution Function*, CRIM. JUSTICE STANDARDS: PROSECUTION FUNCTION (4th ed. 2017).

101. MODEL RULE OF PRO. CONDUCT r. 3.8.

102. MODEL RULE OF PRO. CONDUCT r. 3.8(a) (emphasis added).

103. *Id.*; MODEL RULES OF PRO. CONDUCT r. 3.1.

104. AM. BAR ASS'N, *Prosecution Function*, *supra* note 100, at Standard 3-1.2(b) ("The prosecutor . . . should act with integrity and balanced judgment . . . by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances."); *Id.* at Standard 3-4.4(d) ("The prosecutor should not file or maintain charges greater in number or degree than can *reasonably be supported with evidence* at trial and are necessary to fairly reflect the gravity of the offense or deter similar conduct.") (emphasis added); *Id.* at Standard 3-4.4(a) (providing various considerations for prosecutors when deciding which criminal charges to file or maintain).

105. MODEL RULE OF PRO. CONDUCT r. 3.8(d).

106. Brady v. Maryland, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

offense of which the defendant was convicted . . . ."[107] Rule 3.8(h) goes further and requires a prosecutor to remedy a conviction when the prosecutor "knows of clear and convincing evidence establishing that a defendant" did not commit an offense.[108] Therefore, under the ethical guidelines for prosecutors, the prosecutorial function plays a crucial role in ensuring a defendant receives due process and safeguarding a defendant's innocence.

ii. Special Protections for Prosecutors

Along with these immense ethical requirements for the prosecutorial function, prosecutors also receive a variety of legal and practical protections. The Supreme Court has carved out and reinforced many of the legal protections granted to prosecutors. Most importantly is prosecutorial immunity from *Imbler v. Pachtman*.[109] Prosecutorial immunity prevents a defendant from suing a prosecutor for prosecutorial misconduct.[110] The Court's rationale for this protection was to prevent prosecutors from second-guessing themselves for different decisions they make during a criminal trial.[111] Even if there is blatant wrongdoing, the Court found that prosecutors are still protected.[112] Therefore, prosecutors can falsify evidence[113] and suppress evidence[114] without facing any significant, personal consequences.

Not only do prosecutors enjoy the absolute immunity protection, but an entire prosecutor's office can enjoy the protection as well. In *Connick v. Thompson*, a district attorney's office had its entire office uninformed about *Brady* requirements and failed to provide *Brady* training to prosecutors.[115] The Supreme Court found

107. MODEL RULE OF PRO. CONDUCT r. 3.8(g).

108. MODEL RULE OF PRO. CONDUCT r. 3.8(h).

109. Imbler v. Pachtman, 424 U.S. 409 (1976).

110. *See* Katie McCarthy & Kiah Duggins, *Absolute Immunity for Prosecutors*, NAT'L POLICE ACCOUNTABILITY PROJECT (July 16, 2020), https://www.nlg-npap.org/absolute-immunity/ [https://perma.cc/G3CX-A756].

111. *Imbler*, 424 U.S. at 428 ("In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.") (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

112. *Id.* at 427 ("To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty.").

113. *See* Dory v. Ryan, 25 F.3d 81, 81–83 (2d Cir. 1994) (finding that a prosecutor working with a police officer to solicit false testimony against a defendant did not overcome *Imbler*'s absolute immunity for prosecutors).

114. *See* Cousin v. Small, 325 F.3d 627, 636 (5th Cir. 2003).

115. Connick v. Thompson, 536 U.S. 51, 93–94 (2011) (Ginsburg, J., dissenting). The summary facts of this case are discussed in the introduction.

that a district attorney's office cannot be "held liable under § 1983 for failure to train based on a single *Brady* violation."[116] Thus, many prosecutors' offices have autonomy to craft internal policies that are consistent or inconsistent with the ethical and legal rules prosecutors are supposed to abide by.[117]

There are practical protections in place for prosecutors when it comes to potential misconduct. First, the prosecutorial function operates under a shield of discretion.[118] When a prosecutor brings a charge, she should determine whether to bring the charge under a probable cause standard.[119] Rule 3.8, however, provides no limit on *how much* evidence is needed to bring forward such a charge, just that it is sufficient enough.[120] Moreover, the ethical rules only impact the decision to prosecute or not, but do not apply to the plea bargaining function, pretrial function, or sentencing function.[121]

Second, prosecutors rarely see individuals enforce the ethical rules against them. Judges, other prosecutors, defense attorneys, and a defense attorney's client could report a prosecutor's misconduct.[122] Defense attorneys may fear bringing forward a complaint as it could damage their client's case and subsequent proceedings, while also harming the relationship between defense attorneys and prosecutors who routinely work together.[123] Importantly, filing a bar complaint is one of the few ways to acknowledge prosecutorial misconduct given the vast legal protections prosecutors have.[124] Thus, one of the main mechanisms for holding prosecutors accountable lacks an enforcement ability.

There are different pathways to becoming a prosecutor, which influence how a prosecutor acts when in the role. The prosecutorial

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116. *Id.* at 54.

117. *See* David Keenan, Deborah Jane Cooper, David Lebowitz, & Tamar Lerer, *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 210 (2011).

118. *See* DAVIS, *supra* note 65, at 6–9; Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1588 (2003)

119. MODEL RULE OF PRO. CONDUCT r. 3.8(a).

120. *See* Green, *supra* note 118, at 1590 ("But Rule 3.8(a) sets no limits except with respect to the sufficiency of the evidence.").

121. *Id.* at 1590–91.

122. *See* Keenan et al., *supra* note 117.

123. *Id.* at 211 ("[A] bar complaint could itself negatively impact the outcome of ongoing litigation, if the prosecutor's need to defend against disciplinary proceedings, or simple resentment at being reported to the authorities, results in less favorable treatment of the defendant.").

124. *See* Imbler v. Pachtman, 424 U.S. 409 (1976) (granting absolute immunity to prosecutors for misconduct); Connick v. Thompson, 563 U.S. 51 (2011) (granting absolute immunity to prosecutors' offices for misconduct).

function itself gives a prosecutor great power within the criminal justice system as a prosecutor can shape the entire case for a defendant. Given prosecutors have this power, there are general and specific ethical rules and standards prosecutors are supposed to abide by. However, prosecutors enjoy absolute immunity and experience little enforcement of the ethical rules. Nevertheless, while the prosecutorial function has this immense power and protection, the judicial function also experiences similar protections and power.

## II. Judicial Function

Similar to Part I, this Part will explain the different nuances of how one becomes a judge. In particular, this Part will discuss how a judge's record and past legal experiences are relevant to becoming a judge. From there, this Part will explain the role of the judge in a criminal proceeding and how a judge can and cannot influence a criminal proceeding. Finally, this Part will conclude by discussing the ethical rules and guidelines judges are supposed to abide by, and the special and practical protections judges receive. Through understanding both the prosecutorial and judicial functions, one can start to piece together how both functions form a symbiotic relationship that can result in unfair trials for criminal defendants.

### *A. How One Becomes a Judge*

Judges are either elected or appointed to the bench. At the state level, most judges are elected.[125] Across the country, these elections account for 87% of state judgeships.[126] State judges preside over a significant number of criminal cases. For felony convictions, 94% of those cases are heard in state courts.[127] At the federal level, criminal cases make up about 19% of the federal docket.[128] The

125. *Significant Figures in Judicial Selection*, BRENNAN CTR. FOR JUST. (May 8, 2015), https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures [https://perma.cc/EQJ5-3Q7U] (finding that 38 states use elections to select judges at some level of the court); David E. Pozen, *The Irony of Judicial Elections*, 108 COL. L. REV. 265, 266 (2008) (discussing how the United States is the only advanced democracy that elects such a sizeable amount of its judiciary).

126. KATE BERRY, BRENNAN CTR. FOR JUST., HOW JUDICIAL ELECTIONS IMPACT CRIMINAL CASES 1 (2015), https://www.brennancenter.org/our-work/research-reports/how-judicial-elections-impact-criminal-cases [https://perma.cc/U6FS-MFJL].

127. *Id.*

128. UNITED STATES CTS., FEDERAL JUDICIAL CASELOAD STATISTICS (Mar. 31, 2022) (finding 380,213 civil cases filed in federal court and 71,111 criminal cases filed in federal court).

judicial election and appointment processes and the criminal justice system are therefore deeply intertwined, and it is important to understand how judicial elections and appointments operate and how these elections and appointments influence judicial behavior.

Judicial elections have some parallels to other elected positions. Similar to other elected positions, people can donate to campaigns,[129] interest groups can become involved,[130] political parties can play a role,[131] and the different candidates can engage in media advertising.[132] Nevertheless, judicial elections also vary from typical elections. Depending on the state, a judge's political affiliation may or may not be on the ballot.[133] In some states, judicial candidates are not allowed to announce their viewpoint on certain issues.[134] However, the Supreme Court has allowed judicial candidates in certain states to discuss their stance on disputed legal and political issues.[135]

Given how judicial elections operate, a judicial candidate's stance on issues and previous record as a judge greatly influence

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129. *Id.* at 3; *see also* Pozen, *supra* note 125, at 267–68 (mentioning the shift in how judicial elections operate).

130. *See* DOUGLAS KEITH, PATRICK BERRY, & ERIC VELASCO, BRENNAN CTR. FOR JUST., THE POLITICS OF JUDICIAL ELECTIONS, 2017-2018: HOW DARK MONEY, INTEREST GROUPS, AND BIG DONORS SHAPE STATE HIGH COURTS 1–2 (2019), https://www.brennancenter.org/our-work/research-reports/politics-judicial-elections-2017-18 [https://perma.cc/LR7W-MEXF] (discussing the increase in interest group spending for state judicial elections).

131. Pozen, *supra* note 125, at 267–68; A Martinez, *How State and Local Judicial Elections Became So Politicized*, NPR (Apr. 6, 2023), https://www.npr.org/2023/04/06/1168327289/how-state-and-local-judicial-elections-became-so-politicized [https://perma.cc/5TKU-CK2M] (discussing the 2023 Wisconsin Supreme Court election and how Supreme Court elections in Wisconsin have "gotten increasingly partisan over time. The campaign finance donation networks have gotten more partisan over time. The advertising has gotten more partisan and sharper and more negative over time").

132. *See* BERRY, *supra* note 126, at 3 ("From 2000 to 2014, a total of nearly $129 million was spent on TV airtime in state supreme court races.").

133. *See Judicial Election Methods by State*, BALLOTPEDIA, https://ballotpedia.org/Judicial_election_methods_by_state [https://perma.cc/V7WW-SHFE] (highlighting how judicial elections can be partisan, nonpartisan, or retention elections, with partisan elections requiring a candidate to list their political affiliation and nonpartisan elections requiring candidates to not list their party affiliation). There is greater disparity in partisan and nonpartisan elections at the trial court level. *Id.*

134. *See* Pozen, *supra* note 125, at 268.

135. Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002); *see, e.g.*, KEITH ET AL., *supra* note 130, at 8 ("Three candidates ran ads touting themselves as judges who would defend individual rights against the Trump administration, while one Alabama Republican ran a primary ad tying herself to Trump and claiming, 'Like President Trump, Judge Sarah Stewart will protect our Second Amendment gun rights.'").

their chance at being elected to the bench. Specifically, one's record on crime significantly influences an election.[136] First, many judicial elections will focus on whether the judicial candidate was soft on crime or not.[137] For example, in a 2014 Illinois Supreme Court race, Justice Lloyd Karmeier had an ad run against him stating that "in one case Judge Lloyd Karmeier gave easy bail to a woman later found guilty of murdering her 4-year-old stepson and gave probation instead of prison to a man who sexually assaulted a child."[138] Even representing criminal defendants can be seen as being soft on crime.[139] Second, many ads and judicial campaigns focus on whether a candidate is tough on crime.[140] This is not unique to judicial elections in the highest state courts either. In 2000, Ferrill McRae ran for Mobile County trial judge and ran an ad mentioning how "he had presided over more than 9,000 cases, including some of the most heinous murder trials in our history."[141]

Judicial appointments to a state bench or the federal bench are also intertwined with the criminal justice system. Most judicial candidates for appointment are vetted by a judicial nominating commission.[142] These commissions are comprised of governor-appointed commissioners who normally align with the governor's political views.[143] These commissions will review an applicant in great detail to see if the candidate is sound for the bench.[144] Thus, whoever the commission selects becomes a political decision[145] and

136. *See* BERRY, *supra* note 126, at 3 (discussing how outside interest groups fund TV ads for judicial elections with an increased focus "on candidates' criminal justice decisions").

137. *Id.* ("In the 2013-14 election cycle, 82 percent of ad spots attacking candidates discussed criminal justice issues. Of the negative criminal justice-themed ads that cycle, all but one attacked candidates for judicial decisions they had made — focusing either on particular decisions or their criminal justice records as a whole.").

138. *Id.* at 4 (internal quotations omitted).

139. *Id.* (discussing how Bridget McCormack's 2012 judicial campaign experienced attack ads against her for representing detainees at Guantanamo Bay).

140. *Id.* at 5 ("In the 2013-14 election cycle, there were 26 ads promoting candidates' rulings in criminal cases, of which 22 discussed candidates' overall records, two focused on judges' decisions in individual cases, and two considered both.").

141. *Id.* at 6 (internal quotations omitted).

142. *See Significant Figures in Judicial Selection*, *supra* note 125.

143. DOUGLAS KEITH, BRENNAN CTR. FOR JUST., JUDICIAL NOMINATING COMMISSIONS 1 (2019), https://www.brennancenter.org/our-work/research-reports/judicial-nominating-commissions [https://perma.cc/447S-WBGP].

144. *Id.* at 3 ("Typically commissioners solicit applications, review written submissions from applicants, conduct interviews, call references, and discuss candidates as a group.").

145. *Id.* at 11 ("[B]ecause governors are likely to appoint commissioners who share

an appointed judge may then reflect on that decision and want to ensure it is not damaging politically.

Magistrate judges, similarly, are elected by a majority of the district court judges to serve an eight-year term.[146] Most district court judges will select individuals who they have a close relationship with to become a magistrate judge.[147] The only limitation to selection of magistrate judges is a set of qualifications from legislation from 1979.[148] Appointment to the federal bench also has a keen focus on a candidate's record on crime. Many federal district court judges have to go through the blue slip process, which requires a home-senator to return a piece of paper showing approval for a federal judicial nominee.[149] The blue slip process makes appointing a federal judge political and has led home-state senators to scrutinize a nominee's record.[150] One can even look to Justice Ketanji Brown Jackson's Supreme Court confirmation hearing where there was significant focus on Justice Jackson's record sentencing criminals.[151] Thus, what a judge did before being on the bench and while on the bench, especially in the criminal justice context, plays a crucial role in one becoming a judge.

### *B. Role of the Judge in Criminal Cases*

In understanding how one becomes a judge, it is important to distinguish the different roles and powers a judge has during a criminal case. Judges are supposed to be "impartial arbitrators in criminal cases."[152] As Chief Justice John Roberts said, "Judges are

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their political views, it may be that a different political makeup of governors would lead to nominating commissioners that more closely resembled non-gubernatorial appointees.").

146. *FAQs: Federal Judges*, U.S. CTS., https://www.uscourts.gov/faqs-federal-judges#faq--What-are-federal-magistrate-judges? [https://perma.cc/996C-4QW8].

147. Edward S. Adams, Edward R. Adams & William C. Price Jr., *An Empirical Constitutional Crisis: When Magistrate Judges Exercise De Facto Article III Power*, 2023 MICH. ST. L. REV. 195, 211 (2023).

148. *Id.*

149. *Blue Slip (Federal Judicial Nominations)*, BALLOTPEDIA, https://ballotpedia.org/Blue_slip_(federal_judicial_nominations) [https://perma.cc/KP84-8C6W].

150. *See To Transform Our Courts: End or Reform the Blue Slip*, ALL. FOR J., https://afj.org/to-transform-our-courts-end-or-reform-the-blue-slip/ [https://perma.cc/78AP-NPGK]; CONG. RSCH. SERV., ROLE OF HOME STATE SENATORS IN THE SELECTION OF LOWER FEDERAL COURT JUDGES 29–31 (2013), https://crsreports.congress.gov/product/pdf/RL/RL34405.

151. *See, e.g.*, Devin Dwyer, *Fact Check: Judge Ketanji Brown Jackson Child Porn Sentences 'Pretty Mainstream'*, ABC NEWS (Mar. 21, 2022), https://abcnews.go.com/Politics/fact-check-judge-ketanji-brown-jackson-child-porn/story?id=83565833 [https://perma.cc/RB7Y-BNE7].

152. *See* BERRY, *supra* note 126, at 1.

not politicians, even when they come to the bench by way of the ballot."[153] Judges play an integral role at many stages in the trial process. Judges have minimal, if any, influence during the charging and plea-bargaining stages, but judges have considerably more power at the pretrial motion, trial, and sentencing stages.[154]

Theoretically, judges have little to no power when it comes to the charges of a criminal defendant. The charging function is reserved for the prosecution, so the State can decide whether to prosecute a case or not.[155] However, judges do have the ability to dismiss charges and stay proceedings.[156] First, a judge can dismiss charges if there are not enough sufficient facts to bring forward the charge.[157] Second, a judge may dismiss charges if a prosecutor has impermissible motives for bringing forward the charge.[158] Third, a judge may dismiss charges against a defendant for some other form of prosecutorial misconduct.[159] Lastly, in some states, judges may dismiss a charge in the interest of justice.[160] This power to dismiss

153. Williams-Yulee v. Fla. Bar, 575 U.S. 433, 437 (2015).

154. *Compare* Davis, *supra* note 70 (explaining that prosecutors decide when and how to charge an individual, whether to offer a plea, the terms of the plea, and whether the conditions have been met), *and* Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1697 (1992) (describing how sentencing guidelines increase prosecutorial powers during the charging and plea-bargaining stages, while rendering the judge a "handcuffed decisionmaker"), *with Pre-Trial Motions*, DEP'T OF JUST., https://www.justice.gov/usao/justice-101/pretrial-motions [https://perma.cc/3JC7-5VC4] ("Only judges decide the outcome of [pre-trial] motions."), Samuel Strom, *What is a Judge's Role in Court?*, FindLaw, https://www.findlaw.com/litigation/legal-system/what-is-a-judges-role-in-court.html [https://perma.cc/GW82-U3ED] (equating a judge in a jury trial to a "referee in charge of a sporting event"), *and* Janet Portman, *Federal Sentencing Guidelines: Mandatory or Not?*, NOLO, https://www.nolo.com/legal-encyclopedia/federal-sentencing-guidelines-mandatory-not.html [https://perma.cc/J62D-9VWY] ("[F]ederal court trial judges often have considerable sentencing discretion . . . .").

155. *See* Darryl Brown, *The Judicial Role in Criminal Charging and Plea Bargaining*, 46 HOFSTRA L. REV. 63, 63 (2018).

156. *Id.* at 66–67 (noting how judges, like prosecutors, can "dismiss previously filed charges" and have "powers to stay (or halt, temporarily or indefinitely) a prosecution from proceeding").

157. *See id.* at 67–68.

158. *Id.* at 68–69 ("Judges should dismiss charges motivated by vindictiveness, retaliation for exercising First Amendment or other fundamental rights, or racial bias."). However, it is a high standard that must be met for a judge to dismiss a charge based on impermissible motives. *Id.* at 69.

159. *Id.* at 69–70.

160. This is not the majority rule in United States' jurisdictions. Fourteen states "permit judges to dismiss charges on their own initiative if they conclude doing so is in the interest of justice," four states permit judges to dismiss charges if "the defendant's conduct constituted only a de minimus violation of a criminal offense," and several states recognize an "inherent judicial power to dismiss charges without statutory authorization." *Id.* at 70–71.

charges in the interest of justice where it is permitted is largely not utilized by judges.[161]

Judges can play some role during the plea-bargaining process, but only once a deal has been made: importantly, judges cannot oversee what negotiation tactics prosecutors may employ during plea bargaining to ensure that the process is fair.[162] Judges can ensure there is "a proper legal and factual basis" for a given plea deal.[163] Additionally, the judicial function can opt to "reject [plea bargain] proposals as unjust or inconsistent with the public interest."[164] The extent of a judge's power to reject a guilty plea as inconsistent with the public interest is, however, limited by "practical as well as customary limits."[165]

Arguably, judges have the most power during a criminal trial when it comes to pretrial motions and the ability to help prosecutors and police investigate crimes.[166] As stated above, judges can dismiss a case or charge if there is a motion to dismiss.[167] More importantly to a trial, judges rule on motions to suppress, which "attempt to keep certain statements or evidence from being introduced as evidence"[168] and motions in limine, which "can be used to affirmatively admit evidence . . . [or] exclude admission of and any reference to a certain piece of evidence."[169] These pretrial motions can greatly shape how a case will turn out and weaken or strengthen one side's case.[170] Additionally, judges can assist with

161. *Id.* at 71 ("Most state courts have interpreted their power under these statutes exceedingly narrowly, so that they overwhelmingly defer to prosecutorial preferences about whether cases should proceed or be dismissed.").

162. *See id.* at 76–77 ("[J]udges have relatively little legal basis for policing the fairness of party *negotiation* tactics—in particular, prosecutors' tactical conduct—in the plea bargaining process.").

163. *Id.* at 77.

164. *Id.*

165. *See id.* at 80 ("As a practical matter, judges can reject plea bargains and offer reasons for doing so that provide guidance to—and thus influence—the parties on the terms of a disposition that the court would find acceptable. But they generally cannot of their own accord adjust charges to which they will accept a guilty plea. It is no surprise that judges cannot demand or file on their own a more serious charge than those that prosecutors have filed.").

166. *See* Offices of the U.S. Atty's, *Pre-Trial Motions*, *supra* note 82 ("Only judges decide the outcome of motions.").

167. *See id.*

168. *Id.*

169. Jordan Dickson, *Writing for Trial: The Motion in Limine*, GEO. L.: THE WRITING CTR. (2018), https://www.law.georgetown.edu/wp-content/uploads/2018/11/Updated-Writing-Center-Handout-Motions-in-Limine.pdf [https://perma.cc/P42T-PRMT].

170. *See id.* ("A motion in limine is a powerful weapon for advocates that can alter the entire makeup of the case.").

an investigation, as judges can issue search warrants that allow for a broad search.[171]

During the trial, judges play a more limited role, but have power that can heavily influence the outcome of the case. First, judges rule on objections to evidence a party tries to introduce.[172] Rulings on these objections matter as they can determine whether key evidence is introduced and presented to the jury.[173] Similarly, judges also play a role in sustaining or overruling on objections to testimony, which influences what testimony the jury may hear.[174] In general, a judge ruling on any objection can influence a jury, for "if a judge consistently overrules a practitioner's objections, the jury may conclude that the practitioner is untrustworthy and, as a result, disregard his or her arguments."[175] Second, judges decide the jury instructions for the case.[176] Both prosecutors and defense attorneys can request the judge to give certain instructions, but the judge ultimately decides whether to go with one of the party's instructions or to present their own instructions.[177]

Finally, judges play a role in sentencing, but it can be regulated by the prosecutorial function.[178] Depending on the jurisdiction, a judge follows sentencing guidelines to determine what sentence to give a convicted defendant.[179] However, the judge can choose to follow the guidelines or not.[180] The judge ultimately makes the decision on what sentence to give. Some sources a judge

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171. *See* Edward S. Adams & William C. Price Jr., *When Taint Teams Go Awry: Laundering Unconstitutional Violations of the Fourth Amendment*, 75 ARK. L. REV. 753, 755–58 (arguing how taint teams can access information from search warrants despite possible constitutional violations).

172. *See* Jonathan J. O'Konek, *To Object or Not Object, That is the Question: A Criminal Law Practitioner's Guide to the "Five W's" of Evidentiary Objections*, 95 N.D. L. REV. 155, 160 (2020).

173. *See id.* at 161 (explaining how an attorney may object to evidence of a murder weapon if there is insufficient foundation or relevance).

174. *See id.* at 161–62 ("The purpose behind objecting prior to the witness' answer is to prevent the jury from ever hearing the objectionable testimony.").

175. *Id.* at 166.

176. *See How Courts Work: Steps in a Trial: Instructions to the Jury*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryinstruct/ [https://perma.cc/36MR-9XP8].

177. *Id.*

178. *See supra* Part I.B.

179. *See How Courts Work: Steps in a Trial: Sentencing*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/steps_in_a_trial/ [https://perma.cc/Z2E3-HLFM].

180. *Id.*; Carissa B. Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1110–11 (2008).

considers in this decision are the pre-sentence investigation and impact statements from a victim and/or their family.[181]

### *C. Judicial Ethics and Special Protections*

Judges, much like prosecutors, also have their own set of ethical rules and guidelines that they are supposed to abide by. The American Bar Association prescribes specific guidelines that judges should follow through the Model Code of Judicial Conduct ("the Code"). The Code "consists of four Canons" with numbered Rules that judges are supposed to follow.[182] Each Canon and the rules underneath it are important when understanding how judges are supposed to act. However, similar to prosecutors, judges also have special protections through judicial immunity and often lack of enforcement of the Code.[183]

#### i. Judicial Ethics

The first Canon and its Rules that apply to judges pertain to promoting the "independence, integrity, and impartiality of the judiciary."[184] Rule 1.2 is most relevant to how a judge should act. Under Rule 1.2, "A judge shall act at all times in a manner that promotes public confidence in the *independence, integrity, and impartiality* of the judiciary, and shall avoid *impropriety and the appearance of impropriety*."[185] To determine if a judge has engaged in impropriety, the Code employs a reasonable minds standard.[186] As the Code states, it is important for judges to remain impartial as impropriety can erode public confidence in the judiciary.[187]

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181. *See Victim Impact Statements*, DEP'T OF JUST., https://www.justice.gov/criminal/criminal-vns/victim-impact-statements [https://perma.cc/S3GK-LDQN] ("The victim impact statement assists the judge when he or she decides what sentence the defendant should receive.").

182. *See* MODEL CODE OF JUD. CONDUCT Scope 1 (AM. BAR ASS'N 2020).

183. *See* Charles Gardner Geyh, *Judicial Ethics and Discipline in the States*, STATE CT. REP. (Dec. 14, 2023), https://statecourtreport.org/our-work/analysis-opinion/judicial-ethics-and-discipline-states [https://perma.cc/2KKA-HS45] ("[J]urisdictions vary in the aggressiveness with which they police judicial misconduct and have been called to task for underenforcing ethical lapses.").

184. MODEL CODE OF JUD. CONDUCT Canon 1 (AM. BAR ASS'N. 2020).

185. MODEL CODE OF JUD. CONDUCT Canon 1, r. 1.2 (AM. BAR ASS'N. 2020) (emphasis added).

186. MODEL CODE OF JUD. CONDUCT Canon 1, r.1.2, cmt. 5 (AM. BAR ASS'N. 2020) ("The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.").

187. *See* MODEL CODE OF JUD. CONDUCT Canon 1, r.1.2. (AM. BAR ASS'N. 2020). It

Therefore, it is vital for the judiciary that judges avoid giving an impression that they are biased toward one party over another.

The second Canon relates to how a judge is supposed to perform the judicial function and that it should be done "impartially, competently, and diligently."[188] The relevant rules are Rules 2.2, 2.3, 2.4, 2.11, and 2.15. Rule 2.2 requires judges to perform their duties "fairly and impartially,"[189] and Rule 2.3 ensures that judges perform their duties "without bias or prejudice."[190] Rule 2.4(B) then addresses external influences on how a judge should act by not letting a judge's "family, social, political, financial, or other interests or relationships . . . influence the judge's judicial conduct or judgment."[191] Rule 2.11 instructs a judge to disqualify or recuse themself from a proceeding when they may be partial or when they are faced with any of the situations mentioned in Rules 2.2, 2.3, or 2.4.[192] Different from the other Rules, Rule 2.15 concerns judicial and lawyer misconduct, requiring a judge to report any known misconduct of another judge or of an attorney.[193]

The third Canon and subsequent Rules pertain to a "judge's personal and extrajudicial activities" to mitigate a conflict with one's role in the judiciary.[194] Most relevant to the symbiotic relationship between judges and prosecutors is Rule 3.13. Under this Rule, judges are required to disclose "gifts, loans, bequests, benefits, or other things of value . . . ."[195] However, judges are not required to disclose "ordinary social hospitality"[196] or "gifts, loans,

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is important to note that Rule 1.2 applies to *both* the professional and personal conduct of a judge. *Id.*

188. MODEL CODE OF JUD. CONDUCT Canon 2 (AM. BAR ASS'N. 2020).

189. MODEL CODE OF JUD. CONDUCT Canon 1, r. 2.2 (AM. BAR ASS'N. 2020).

190. MODEL CODE OF JUD. CONDUCT Canon 2, r. 2.3(A) (AM. BAR ASS'N. 2020). The comment for this Rule highlights how easily a judge can show bias or prejudice, and arguably impropriety, as "[e]ven facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice." MODEL CODE OF JUD. CONDUCT Canon 2, r.2.3, cmt. 2 (AM. BAR ASS'N. 2020).

191. MODEL CODE OF JUD. CONDUCT Canon 2, r. 2.4(B) (AM. BAR ASS'N. 2020).

192. *See* MODEL CODE OF JUD. CONDUCT Canon 2, r. 2.11 (AM. BAR ASS'N. 2020). Disqualification from a proceeding does not require defense counsel to file a motion to disqualify. MODEL CODE OF JUD. CONDUCT Canon 2, r. 2.11 cmt 2 (AM. BAR ASS'N. 2020). The decision to recuse oneself presiding over a case is evaluated under a reasonableness standard. *See* MODEL CODE OF JUD. CONDUCT Canon 2, r.2.11, cmt. 1 (AM. BAR ASS'N. 2020).

193. MODEL CODE OF JUD. CONDUCT Canon 2, r. 2.15 (AM. BAR ASS'N. 2020).

194. MODEL CODE OF JUD. CONDUCT Canon 3 (AM. BAR ASS'N. 2020).

195. MODEL CODE OF JUD. CONDUCT Canon 3, r. 3.13(A) (AM. BAR ASS'N 2020).

196. MODEL CODE OF JUD. CONDUCT Canon 3, r. 3.13(B)(3) (AM. BAR ASS'N. 2020).

bequests, benefits, or other things of value from . . . lawyers, whose appearance or interest in a proceeding pending[] or impending[] before the judge would in any event require disqualification of the judge under Rule 2.11."[197]

Canon Four, the final Canon, relates to judicial campaigns and ensuring that such campaigns are not "inconsistent with the independence, integrity, or impartiality of the judiciary."[198] Most relevant is Rule 4.1.[199] Under this Rule, judicial candidates are not supposed to "make pledges, promises, or commitments that are inconsistent with the impartial[] performance of the adjudicative duties of judicial office."[200] Further, judges and judicial candidates are supposed to "take reasonable measures to ensure that other persons" do not engage in any other behaviors listed in Rule 4.1.[201]

ii. Special Protections for Judges

While there are various ethical rules judges are supposed to follow, judges are also afforded legal protections from liability and the ethical rules are rarely enforced against them. Similar to prosecutors, judges enjoy absolute immunity from any damages that may have resulted from a judicial act.[202] The only limitation to this immunity is that the judicial act cannot extend beyond the judge's jurisdiction.[203] For example, a judge can find someone to be "in contempt of court and order[] them incarcerated" as long as that "judge had subject matter jurisdiction over the case."[204] This absolute immunity applies to both state and federal judges at all levels of the judiciary.[205]

Also parallel to prosecutors is a lack of enforcement of judicial ethical rules. Notably, many judges do not even know they are in violation of the judicial code of ethics.[206] Often times, punishment for judicial misconduct is minor.[207] Many judges can return to the

197. MODEL CODE OF JUD. CONDUCT Canon 2, r. 3.13(B)(2) (AM. BAR ASS'N. 2020).

198. MODEL CODE OF JUD. CONDUCT Canon 4 (AM. BAR ASS'N 2020) (capitalization omitted).

199. Importantly, the rules concerning judicial campaigns vary greatly by state and have been upended by Supreme Court precedent. *See infra* Part II.B.

200. MODEL CODE OF JUD. CONDUCT r. 4.1(A)(13) (AM. BAR ASS'N 2020).

201. MODEL CODE OF JUD. CONDUCT Canon 2, r. 4.1(B) (AM. BAR ASS'N. 2020).

202. Stump v. Sparkman, 435 U.S. 349, 359 (1978).

203. Jeffrey M. Shaman, *Judicial Immunity*, 27 SAN DIEGO L. REV. 1, 7 (1990).

204. *Id.*

205. *Id.* at 5.

206. *See* Siconolfi et al., *supra* note 42.

207. Michael Berens & John Shiffman, *Thousands of U.S. Judges Who Broke*

bench after receiving a misconduct sanction.[208] These cases can range from a judge interrupting jury deliberations in order to express his own opinion on a criminal case to a judge violating nepotism rules.[209] One of the main issues with trying to remove a judge is that the oversight commissions that review judicial misconduct are typically comprised of other judges.[210] This underenforcement of the judicial ethical rules occurs at the expense of many people who are negatively impacted by judicial misconduct.[211]

Moreover, the processes for filing judicial misconduct claims are challenging. It can be difficult to file a complaint against a judge for judicial misconduct. For example, in Alabama, complaints need to be notarized, in writing, and include the complainant's name on the complaint.[212] Louisiana state law imposes a confidentiality requirement, under threat of being held in contempt of court, for anyone who files a complaint against a judge unless and until the Judiciary Commission recommends public discipline to the Louisiana Supreme Court.[213] Such public discipline is "a remarkably rare occurrence."[214] Moreover, in some jurisdictions, the oversight commission "must keep a judge who is under scrutiny fully informed throughout an investigation."[215] In South Carolina, the Commission on Judicial Conduct—the body tasked with overseeing and adjudicating ethical complaints against judges—is

*Laws or Oaths Remained on the Bench*, REUTERS (June 30, 2020), https://www.reuters.com/investigates/special-report/usa-judges-misconduct/ [https://perma.cc/DY42-EFR7] (quoting Stephen Gillers, a law professor at New York University, stating that "the public 'would be appalled at some of the lenient treatment judges get' for substantial transgressions.")

208. *Id.* (analyzing 5,122 judicial misconduct cases and finding "9 of every 10 judges were allowed to return to the bench after they were sanctioned for misconduct . . . .").

209. *Id.*

210. *Id.*

211. *Id.* (finding that "at least 5,206 people . . . were directly affected by a judge's misconduct").

212. Berens & Schiffman, *supra* note 207. It is important to highlight that requiring the complaint to be notarized means any misstatement about the judge opens the complainant up to being prosecuted for perjury. *Id.*

213. Andrea Gallo & John Simerman, *Jeff Hughes Case Shows how a Judge's Misbehavior can Remain Hidden Forever in Louisiana*, ADVOCATE (Aug. 11, 2019), https://www.theadvocate.com/baton_rouge/news/courts/article_56cceb18-b3ad-11e9-9946-e7afe5a9c1a4.html [https://perma.cc/8DBV-MTTA].

214. *Id.* Between 2014 and 2019, the Judiciary Commission opened "in-depth investigations" for 317 complaints, but only recommended 12 to the Supreme Court for further judicial discipline. *Id.*

215. Berens & Schiffman, *supra* note 207. The judge can even receive copies of issued subpoenas. *Id.*

comprised of 54% judges.[216] Thus, judges have protection from the system itself as it imposes barriers to those who want to complain about judicial misconduct. As a result, many judges who have misconduct complaints filed against them receive no punishment at all.[217]

Becoming and remaining a judge is intertwined with the criminal justice process. Judges and judicial candidates cannot be seen as weak on crime. Given the judicial function, there are different powers judges have, such as granting or denying crucial pretrial motions, sustaining or overruling certain objections during trials, and the ability to decide what sentence a convicted defendant receives. However, this power rarely goes checked and, even when this power is checked, no real punishment is given to the judge. Because judges have this safety net and great power, it is important to dissect how criminal proceedings work, how the prosecutorial and judicial functions interact with one another during a criminal proceeding, and where these issues of abuse can arise.

## III. Steps and Mechanics of a Criminal Proceeding

Now that the basic functions and rules governing the prosecutorial and judicial functions have been laid out, it is important to understand how criminal proceedings work at a foundational level. This Part will walk through the steps of a criminal proceeding, covering the steps that typically involve prosecutors and judges interacting with one another the most. Through detailing out each of these steps, it will become clearer how the symbiotic relationship between prosecutors and judges allows for unfair trials against criminal defendants at every step.

### *A. Step One: Bringing Charges Against the Defendant*

After a person is arrested to be tried, criminal charges must be brought against them. There are three different ways charges are

216. Joseph Cranney, *South Carolina: The State Where Judges Rule Themselves in Secret*, PROPUBLICA (Apr. 25, 2019), https://www.propublica.org/article/what-happens-when-judges-police-themselves-in-secret-not-much [https://perma.cc/F3GV-WJGK].

217. *See* Erik Ortiz, *Robed in Secrecy: How Judges Accused of Misconduct can Dodge Public Scrutiny*, NBC NEWS (Dec. 26, 2021), https://www.nbcnews.com/news/us-news/robed-secrecy-judges-accused-misconduct-can-dodge-public-scrutiny-rcna7638 [https://perma.cc/ZZC6-AWTA] (stating that "[m]isconduct findings are rare in the judicial complaint process" and that 90% of judicial misconduct cases end with the sanctioned judge returning to the bench according to a Reuter's analysis).

brought. First, a grand jury can vote on an indictment.[218] Second, a prosecutor can file charges or, on occasion, have another individual file a criminal complaint.[219] Third, and least relevant to the criminal trial setting, a police officer can file a citation for a minor offense or petty misdemeanor.[220] Important to the second option, prosecutors choose which charges to file.[221] Prosecutors decide what charges to bring based on the evidence gathered from the arrest and ultimately present those charges to the court.[222]

### *B. Step Two: The Grand Jury or Preliminary Hearing*

Grand juries and preliminary hearings both operate in similar manners but have some distinct differences. A grand jury is a group of jurors who hear evidence from a prosecutor to decide whether there is enough evidence to believe that an individual committed a crime and that the case should be formally tried.[223] It only takes a majority of the grand jury members to bring forward an indictment against someone.[224] Importantly, "there is no presentation of defense evidence or cross-examination of the prosecution's evidence."[225] The fact that the prosecution can present such evidence uncontested gives prosecutors certain advantages during a trial.[226] The grand jury process also benefits prosecutors as it gives prosecutors a chance to test evidence in front of a jury.[227]

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218. *How Courts Work: Steps in a Trial: Bringing the Charge,* AM. BAR ASS'N (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bringingcharge [https://perma.cc/H3WF-NHC4].

219. *Id.*

220. *Id.*

221. *See* Davis, *supra* note 70, at 409.

222. *Id.*

223. Catherine Garcia, *How Do Grand Juries Work?*, THE WEEK (Mar. 30, 2023), https://theweek.com/us/1022196/how-do-grand-juries-work [https://perma.cc/679X-ZKUC].

224. *Id.* (noting that grand juries comprise sixteen to twenty-three members). There is a common saying that one could "indict a ham sandwich," suggesting how easy it is for prosecutors to bring a successful indictment. Josh Levin, *The Judge Who Coined "Indict a Ham Sandwich" Was Himself Indicted*, SLATE (Nov. 25, 2018, 1:20 PM), https://slate.com/human-interest/2014/11/sol-wachtler-the-judge-who-coined-indict-a-ham-sandwich-was-himself-indicted.html [https://perma.cc/84EY-6DKD].

225. Garcia, *supra* note 223.

226. Under FED. R. EVID. 801(d)(1)(A), a prosecutor can have a witness on the stand during the grand jury, have that person become a witness for the defense during the trial, and then use the grand jury testimony to show that the witness has made prior inconsistent statements and avoid a hearsay objection.

227. *See* Garcia, *supra* note 223 (quoting Peter Joy, a professor at Washington University School of Law).

Additionally, the grand jury process is secretive as "only the grand jurors, prosecutors, witnesses, and a court reporter are allowed in the room."[228]

Other pretrial hearings depend on the types of charges being brought against the defendant. For misdemeanors, the individual appears before a magistrate or a judge of a lower court.[229] The judge will read to the defendant the charges and explain any penalties while also advising the defendant of their right to counsel.[230] Additionally, at this step, the defendant chooses to enter a plea for guilty or not guilty.[231] If the defendant pleads not guilty, then the judge sets bail.[232]

For felonies, the process is similar to the misdemeanor process but with some additional protections. First, the defendant will appear in front of a magistrate or lower court judge to have the charges read and be advised of the right to counsel.[233] Defendants charged with a felony do not enter a plea of guilty or not guilty, but rather have bail set by the judge and then wait for a preliminary hearing.[234] The preliminary hearing requires the government to prove to a magistrate or judge that the State has probable cause that the defendant committed the crimes with which he or she is charged.[235] Similar to the grand jury process, the defendant is present but the defense does not offer evidence.[236] If the court finds there is probable cause, then the matter goes to trial; if there is not probable cause, then the defendant is released.[237]

### *C. Step Three: The Option to Engage in Plea Bargaining*

Once someone has a formal charge brought against them, the defendant can start engaging in the plea bargaining process. In general, plea bargaining is a negotiation between both parties to

228. *Id.*

229. *How Courts Work: Steps in a Trial: Pre-Trial Court Appearances in Criminal Cases*, AM. BAR ASS'N (Sept. 9, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pretrial_appearances [https://perma.cc/VB6K-HRFP].

230. *Id.*

231. *Id.* If a defendant requests counsel or is appointed counsel, then the court will enter a plea of not guilty. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *How Courts Work: Steps in a Trial: Pre-Trial Court Appearances in Criminal Cases*, *supra* note 229.

236. *Id.*

237. *Id.*

reach an agreement as to which charges a defendant will plead guilty to and what the respective punishment will be.[238] The prosecutor will provide a recommended sentence to the court.[239] However, the court must approve the plea bargain and can choose to give a different sentence than the prosecution recommends.[240]

Plea bargaining helps resolve many criminal cases.[241] There are various reasons one chooses to engage in the process and accept a plea bargain. First, a plea bargain can allow a defendant to receive a lesser punishment while not having the risk and expense of going to trial.[242] Similar for the prosecution, the prosecutor does not have to prepare for trial nor run the risk of losing at trial.[243] Lastly, a plea bargain frees up the court and allows a judge to hear other cases.[244]

### *D. Step Four: Pretrial Motions*

If a defendant decides to not accept a plea bargain and wants to proceed to trial, then the defendant and prosecution will file various pretrial motions. Pretrial motions are important as they can help shape the trial to one party's benefit.[245] A common pretrial motion is a motion to dismiss. A defense attorney will file this motion if she believes there was a violation of the law, the prosecution did not follow the rules, or the facts of the case do not support the alleged crime.[246] A motion to suppress is another frequently filed pretrial motion. Simply, a motion to suppress serves as a means to exclude certain evidence from trial.[247] These motions are commonly filed if the defense believes certain evidence was obtained in violation of the defendant's Fourth Amendment rights.[248] However, these motions can also be filed if the defense

238. *How Courts Work: Steps in a Trial: Plea Bargaining*, AM. BAR ASS'N (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleabargaining [https://perma.cc/P6N6-M2UP].

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Pre-Trial Motions in Criminal Cases*, GILLES LAW: BLOG (Oct. 5, 2018), https://gilleslaw.com/pre-trial-motions-in-criminal-cases [https://perma.cc/84PS-CDRE].

246. *Id.*

247. *Id.*

248. Micah Schwartzbach, *What Is a Motion to Suppress?*, NOLO (May 5, 2024),

believes the police investigation was improper.[249] Whether a judge grants or dismisses a motion to suppress is consequential to a trial, as a granted motion to suppress evidence could uproot the prosecution's entire case.[250]

The most common and, arguably, most important pretrial motion is the motion *in limine*. A motion *in limine* allows a party to exclude certain testimony of witnesses and prevent attorneys from making particular statements during the trial.[251] Additionally, a motion in limine can prevent an expert from testifying under *Daubert*.[252] Importantly, though, motions in limine serve as a means to communicate with the court.[253] This communication can allow a party to more successfully object to certain evidence and testimony.[254] Further, it tells the court and opposing counsel a party's theory of the case.[255] Therefore, the court has a better understanding of what the case will be about and what arguments and evidence the court expects to hear.

### *E. Step Five: The Criminal Trial*[256]

After most pretrial motions are resolved, the criminal trial can begin. The start of the trial begins with jury selection.[257] This process involves the prosecution and defense counsel asking questions to the jurors.[258] Moreover, the judge presiding over the case can ask the jurors questions.[259] Important to jury selection is

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https://www.nolo.com/legal-encyclopedia/what-motion-suppress.html [https://perma.cc/9HAK-8NJ9].

249. *Id.* ("A defendant might argue that the identification procedure was so unfair that the judge should bar the prosecution from mentioning its results at trial.").

250. *Id.*

251. *Pre-Trial Motions in Criminal Cases*, *supra* note 245.

252. *Motion in Limine*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/motion_in_limine [https://perma.cc/FQ3S-VH4U].

253. Jeffrey M. Pollock, *Use in Limine Motions to Frame the Field of the Courtroom Battle*, N.J.L.J., Aug. 7, 2017 ("One benefit of in limine motions is that, by discussing them with the court in advance, you educate the court of your concerns regarding the admissibility of certain evidence.").

254. *Id.* ("If the court understands your perspective, you may have more success in barring that evidence at trial because the court is sensitized to the issue.").

255. *Id.*

256. Criminal trials have various different components to them. This subpart will only cover a few of the components that are most relevant to how prosecutors and judges interact.

257. *How Courts Work: Steps in a Trial: Selecting the Jury*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryselect [https://perma.cc/TZ5Q-6QA6].

258. *Id.*

259. *Id.*

the ability to strike a juror. Either lawyer can ask to dismiss a juror for cause, meaning that the juror likely has some prejudice about the case.[260] Each attorney can dismiss any number of jurors for cause, but each request must be approved by the judge.[261] However, each lawyer also receives a set number of peremptory challenges.[262] These preemptory challenges allow a lawyer to dismiss a juror without providing a reason why.[263] Once enough jurors are selected, the trial begins.

In a criminal trial, the prosecution and defense will give their respective opening statements and present their respective cases.[264] During the presentation of either case, the prosecution and defense will attempt to admit evidence,[265] question witnesses and object to questions,[266] and, after the prosecution rests its case, the defense may ask to dismiss the case.[267] Once both sides rest their case, both parties may recommend jury instructions to the judge to be read to the jury.[268] The judge may accept or deny either party's jury

260. *Id.; see, e.g.*, *Schitt's Creek: The Rollout* (Pop TV television broadcast Apr. 3, 2018) (demonstrating juror prejudice when character Moira Rose is struck as a juror for a criminal case involving alleged tax fraud given her previous experience with alleged tax evasion).

261. *How Courts Work: Steps in a Trial: Selecting the Jury*, *supra* note 257.

262. *Id.*

263. *Id.* However, attorneys cannot dismiss a juror for a discriminatory purpose. *Id.*

264. *How Courts Work: Steps in a Trial: Opening Statements*, AM. BAR ASS'N (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/openingstatements [https://perma.cc/A6BJ-UDDF]. Depending on the jurisdiction, some courts allow the defendant to save their opening statement until the prosecution rests its case. *Id.*

265. *How Courts Work: Steps in a Trial: Evidence*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/evidence [https://perma.cc/7PYF-QHHC].

266. *How Courts Work: Steps in a Trial: Direct Examination*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/directexam/ [https://perma.cc/RH5C-LWQ2]; *How Courts Work: Steps in a Trial: Cross-Examination*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/crossexam [https://perma.cc/HN3M-6W3Q].

267. *How Courts Work: Steps in a Trial: Motion for Directed Verdict/Dismissal*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/motiondismiss [https://perma.cc/828T-LTTM]. A defense attorney would, with the jury out of the courtroom, make a motion to dismiss the case if the attorney believes the prosecution failed to prove its case. *Id.* The judge decides whether to dismiss the case. *Id.*

268. *How Courts Work: Steps in a Trial: Instructions to the Jury*, AM. BAR ASS'N

instructions and will then instruct the jury on what laws it must follow to reach a verdict.[269] After the jury deliberates, the jury then reaches a verdict to find the defendant guilty or not guilty on all, some, or none of the charges brought against them.[270]

### *F. Step Six: Sentencing*

If a defendant is found guilty, then the criminal proceeding transitions to sentencing. Prior to the sentencing hearing, a pre-sentence investigation takes place.[271] The pre-sentence investigation is typically conducted by a probation officer who will look at "the defendant's prior criminal record, family situation, health, work record, and any other relevant factor."[272] This information helps the judge determine what sentence to give the convicted defendant.[273]

Besides a pre-sentence investigation, sentencing guidelines also influence a judge's sentence. Sentencing guidelines typically work as a grid that considers the severity of the convicted offense and the convicted defendant's criminal history.[274] The judge would find the convicted offense and the correlated criminal history score to then find the sentence range.[275] The judge would proceed to do this for each charge.[276] In determining what sentence to give within the range, a judge will often consider the defendant's prior bad acts and charges, if any.[277] Once the judge has made that determination, the judge then issues their sentence on the defendant.

## IV. Uneven Scales: How the Prosecutor-Judge Symbiotic Relationship Results in Unequal and Unfair Criminal

(Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryinstruct [https://perma.cc/BZ2H-3E3Z].

269. *Id.*

270. *How Courts Work: Steps in a Trial: Verdict*, AM. BAR ASS'N (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/verdict [https://perma.cc/J4LW-GPFF].

271. *How Courts Work: Steps in a Trial: Sentencing*, *supra* note 179.

272. *Id.*

273. *Id.*

274. *See, e.g.*, MINN. SENT'G GUIDELINES GRID § 4.A (MINN. SENT'G COMMENT. 2022).

275. *Id.* For example, under Minnesota's sentencing guidelines, if an individual was convicted of First-Degree Burglary and had a criminal history score of two, the judge could issue a sentence between fifty-eight to eighty-one months with a presumptive length of sixty-eight months. *Id.*

276. *Id.*

277. *See* Hessick, *supra* note 180, at 1114–15.

**Proceedings for Defendants**

Through detailing how both the prosecutorial and judicial functions work and the steps and mechanics of a criminal proceeding, this Part will argue that a symbiotic relationship exists between prosecutors and judges. Specifically, this Part maintains that prosecutors and judges routinely work hand-in-hand to best serve their respective functions such that defendants can rarely receive a fair trial. This Part first starts by describing the symbiotic relationship between prosecutors and judges, discussing how many judges are former prosecutors, how the judicial and prosecutorial election system benefits prosecutors, and how it is difficult for judges to truly be impartial when presiding over cases with former colleagues. From there, this Part will assert that prosecutors receive a variety of judicial favors during a criminal proceeding because of this symbiotic relationship. Finally, this Part will conclude by discussing how prosecutors and judges can circumvent the ethical and legal rules surrounding their functions to avoid facing any real consequences.

### *A. The Symbiotic Relationship between Prosecutors and Judges*

The symbiotic relationship between judges and prosecutors starts with the fact that many judges are former prosecutors. As of 2021, 263 federal judges used to be prosecutors.[278] However, only 66 federal judges were criminal defense attorneys.[279] Thus, the current federal judiciary has an almost four to one ratio of former prosecutors to former defense attorneys.[280] When factoring in whether a judge previously worked as an advocate for the government,[281] the number increases to 389, a ratio of approximately six to one.[282] More generally, judges who previously served as advocates for the government outnumber judges who

278. Clark Neily, *Are A Disproportionate Number of Federal Judges Former Government Advocates?*, CATO INST. (May 27, 2021), https://www.cato.org/study/are-disproportionate-number-federal-judges-former-government-advocates [https://perma.cc/TX73-5USD].

279. *Id.* There are fifty-five judges who were both prosecutors *and* criminal defense attorneys. *Id.*

280. *Id.*

281. For purposes of the study, an individual is considered to have worked as an advocate for the government if they were a "prosecutor, noncriminal courtroom advocate on behalf of government, [or] nonlitigating government lawyer (e.g., agency general counsel) . . . ." *Id.*

282. *Id.* There is some overlap in the data, as some judges used to be both prosecutors and advocates for the government. *Id.*

previously advocated against the government by almost seven to one.[283] At the state supreme court level, there is little difference, as 39% of state supreme court justices were former prosecutors as of 2022.[284] Only 7% of sitting state court justices were public defenders.[285]

Historically, there has been a trend of having more prosecutors on the bench than criminal defense attorneys. During President Obama's administration in 2015, 41% of his nominees had some work experience as a prosecutor.[286] Only 14% of President Obama's nominees at that time were former public defenders.[287] State courts also follow this trend. In 2011, 33% of sitting state justices had experience as a prosecutor while 15% had experience in public defense.[288]

This imbalance between the number of former prosecutors and former criminal defense attorneys who serve as judges plays a significant role in the outcome of cases. To start, someone challenging the government has an almost 45% chance of being assigned a judge who previously worked for the government.[289] Judges' former experiences color their ability to be impartial.[290] This bias can come in two different forms. First, a former judge who is a prosecutor can have confirmation bias.[291] Under confirmation bias, judges will make decisions "that confirm[] or support[] prior beliefs, attitudes, or values."[292] Thus, what a judge learned as a

283. *Id.* It is important to note that this data does not cover magistrate judges and their former careers, although magistrate judges also play a key role in criminal proceedings. *Id.* However, as of 2019, there were 549 full-time magistrate judges. *See* Adams et al., *supra* note 147, at 205.

284. Amanda Powers & Alicia Bannon, *State Supreme Court Diversity – May 2022 Update*, BRENNAN CTR. FOR JUST. (May 25, 2022), https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-may-2022-update [https://perma.cc/Q779-VVXU].

285. *Id.*

286. Casey Tolan, *Why Public Defenders are Less Likely to Become Judges—And Why That Matters*, SPLINTER (Mar. 18, 2016), https://splinternews.com/why-public-defenders-are-less-likely-to-become-judges-a-1793855687 [https://perma.cc/5FT8-RYR2].

287. *Id.*

288. *Id.*

289. Neily, *supra* note 278.

290. *Id.*; *see also* Rodney J. Uphoff, *On Misjudging and Its Implications for Criminal Defendants, Their Lawyers and the Criminal Justice System*, 7 NEV. L. J. 521, 530 (2007) ("Absolute impartiality is an unattainable goal, then, because all judges bring their own perspective and biases with them into the courtroom.").

291. Colleen M. Berryessa, Itiel E. Dror & Bridget McCormack, *Prosecuting from the Bench? Examining Sources of Pro-Prosecution Bias in Judges*, 28 LEGAL & CRIM. PSYCH. 1, 7 (2022).

292. *Id.*

prosecutor can influence how a judge views a case. Second, judges who were former prosecutors experience role-induced bias.[293] Under role-induced bias, a judge who was a prosecutor will likely subconsciously view their role as prosecutorial, depending on how long they worked as a prosecutor.[294] These biases are felt by criminal defense attorneys. In a study of 101 criminal defense attorneys, 87% somewhat or strongly agreed that judges are pro-prosecution, and 79% somewhat or strongly agreed that judges protect police witnesses.[295]

Judges who were former prosecutors are likely to hear cases in front of former colleagues and friends as well. Judges hearing cases from their colleagues or former division may trust the attorney or office over the defense.[296] Therefore, defendants face a significant hurdle to prove their innocence. This also raises ethical concerns. Judges are supposed to be impartial and not even show the appearance of impropriety.[297] However, judges who routinely hear cases from former colleagues will likely have some bias and favoritism toward those colleagues.

How one acts as a prosecutor, and how one becomes a judge, reinforces and bolsters the symbiotic relationship between prosecutors and judges. Judicial elections have a strong focus on being "tough on crime."[298] Any previous criminal defense work can negatively harm one's chances of being elected or appointed to the bench.[299] It is why there is a team mentality between prosecutors and judges, as "[b]oth the judge and prosecutor benefit from a cooperative relationship."[300] There is an incentive for prosecutors to bring forward more charges and for judges to not question the charges brought. Indeed, the electoral and appointment systems require prosecutors and judges to be careful of how they handle criminal cases from rulings on evidence to sentencing. For example,

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293. *Id.* at 8.

294. *Id.*

295. Esther Nir & Siyu Liu, *Defending Constitutional Rights in Imbalanced Courtrooms*, 111 J. CRIM. L. & CRIMINOLOGY 501, 525 (2021).

296. *See* Berryessa et al., *supra* note 291, at 8 (finding that those assigned prosecutorial training and then acting as a third-party neutral tend to favor the prosecution's evidence and arguments over the defense).

297. *See supra* Part II.C.i and accompanying notes 182–98.

298. *See* BERRY, *supra* note 126, at 3.

299. *Id.*; Tolan, *supra* note 286 (discussing how Jane Kelly's potential appointment to the United States Supreme Court became untenable because Kelly previous represented a defendant who was "charged with murder and possession of child pornography . . . .").

300. Roberta K. Flowers, *An Unholy Alliance: The Ex Parte Relationship Between the Judge and Prosecutor*, 79 NEB. L. REV. 251, 269 (2000).

if a judge tries to curb the prosecutor's power, the judge could be labeled an "activist" judge and harm their chances for re-election.[301] Thus, defendants in criminal proceedings are participating in a system that is designed to disadvantage them and encourages unfair treatment towards defendants.

But the symbiotic relationship is not reserved solely to what happens in the courtroom. For example, in one case, a judge secretly met with prosecutors and government witnesses to discuss potential witness intimidation.[302] The judge said that he would grant a mistrial, but would convince the defense to file a motion for a mistrial to then bring forward a new trial.[303] The judge successfully convinced defense counsel to bring a motion for a mistrial and the judge granted it, allowing for the prosecution to try the case again.[304] These relationships can be more personal as well. Judges and prosecutors frequently attend the same parties.[305] Prosecutors and judges are also known to text one another.[306] Thus, defendants do not only have to overcome the professional connection the symbiotic relationship creates, but the deeply personal connection as well.

### *B. Prosecutors Receive Judicial Favors*

In understanding the symbiotic relationship between prosecutors and judges, it is important to observe the real effects the relationship has on criminal defendants and their ability to have a fair trial. First, the symbiotic relationship encourages prosecutors to bring forward multiple, unwarranted charges and for the judge to not dismiss any of the charges. Prosecutors hold the power to bring whatever charges they want.[307] Judges have little incentive to dismiss the charges as it can be seen as them being weak on crime[308] and judges likely trust that prosecutors have enough evidence for each charge.[309] This is despite the fact that

301. Luna & Wade, *supra* note 64, at 1528.
302. *See* Flowers, *supra* note 300, at 267.
303. *Id.*
304. *Id.*
305. *See* Balko, *supra* note 1.
306. John G. Browning, *Prosecutorial Misconduct in the Digital Age*, 77 ALBANY L. REV. 881, 884–85 (2014) (discussing a Florida criminal case for first-degree murder where the prosecutor and judge "exchanged 471 text messages and 949 cellphone calls, averaging nearly 10 ex parte communications *per day*") (emphasis in original).
307. *See supra* Part I.B.
308. *See* BERRY, *supra* note 126, at 3.
309. *See* Berryessa et al., *supra* note 291, at 8.

prosecutors are supposed to be restrained in what charges they bring[310] and judges should be ensuring a trial is fair and not partial to one party.[311] Thus, charged individuals have a greater burden placed on them to prove their innocence and run the risk of receiving a harsher punishment if convicted on all charges.

Because prosecutors can bring forward so many charges, there is a greater incentive for defendants to accept unfair plea deals with little judicial interference. Defendants often choose to take plea deals because the risk of trial can be great and the punishment can be more severe.[312] However, the symbiotic relationship distorts any check to ensure the plea deal is actually fair. Judges will typically defer to the prosecutor for plea bargaining and setting bail requirements.[313] Prosecutors could thus bring severe charges against a defendant with little evidence to support the charge, but have the ultimate goal to have the defendant plead to a lower charge they may have never been convicted of in the first place. Thus, the symbiotic relationship hinders criminal defendants from exercising their right to trial and proving they are not guilty of a crime.

Additionally, the symbiotic relationship gives prosecutors a significant advantage in trial strategy when it comes to obtaining evidence and receiving favorable rulings on pretrial motions. First, the symbiotic relationship makes it easier for prosecutors to obtain evidence. Because judges who were prosecutors have more trust in the prosecution, these judges will often sign search warrants for prosecutors with little review.[314] These search warrants can be vast and intrude into evidence that is potentially irrelevant to the trial.[315] The prosecution can accumulate more evidence against a

310. MODEL RULES OF PRO. CONDUCT r. 3.8(a) (AM. BAR ASS'N 1983).

311. MODEL CODE OF JUD. CONDUCT Canon 1, r. 1.2 (AM. BAR ASS'N 2020).

312. *See supra* Part II.C and accompanying notes 234–40.

313. Michael W. Smith, *Making the Innocent Guilty: Plea Bargaining and the False Plea Convictions of the Innocent*, 46 CRIM. L. BULLETIN No. 5, Art. 4 (2010) ("This is also a symbiotic relationship, whereby judges customary [sic] agree with prosecutions' recommendations for bail/pre-detention and allow prosecutors to control the court dockets, thereby increasing the likelihood of false guilty pleas or wrongful convictions by trial.").

314. *See* FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 53 n.18 (Frank J. Remington ed., 1969) ("One judge responsible for the signing of warrants stated that he, being a former prosecutor himself, placed much faith in the ability of the present prosecutor to screen cases. Consequently, he did little more than scan the information contained in the warrant before signing it."); David S. D'Amato, *Judges and Prosecutors are Complicit in Injustice*, THE HILL (July 2, 2020), https://thehill.com/opinion/judiciary/505582-judges-and-prosecutors-are-complicit-in-injustice [https://perma.cc/X4MZ-9UYF] (finding that judges regularly uphold illegal searches and arrests).

315. *See* Adams & Price, *supra* note 171.

criminal defendant and require the defendant to file a motion to suppress unlawfully obtained evidence. However, such motions would then require the judge to question the authority of the prosecutor. The relationship between prosecutor and judge likely results in the judge denying the motion.

Data on judicial decisions supports this notion that judges who were former prosecutors rule in favor of the prosecution more often. In a review of 727 cases, 50 cases resulted in judges allowing "prosecutors to introduce questionable . . . and often improper . . . evidence."[316] Conversely, in almost "50 other cases, defense attorneys were restricted from introducing their own evidence."[317]

Below, the author will analyze Alabama's and Georgia's district court judges who were former prosecutors and their records on different motions.[318] In conducting this review, the author found that most judges who were former prosecutors ruled on motions in favor of the prosecution.

To start, Judge Terry F. Moorer was an Assistant U.S. Attorney for seventeen years before being appointed to the bench in 2018. Over the course of five years, Judge Moorer has denied 22 out of 29 motions to suppress. Similarly, Chief Judge Kristi DuBose, who was a prosecutor for six years before being appointed to the bench, has denied 12 out of 18 motions to suppress evidence. Judge Liles C. Burke, a former municipal prosecutor for seven years, has denied 9 motions to exclude evidence out of 13. Judge L. Scott Coogler, who was a prosecutor for one year, has denied 27 out of 33 motions to suppress evidence.

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316. Fredric N. Tulsky, *How Judges Favor the Prosecution*, MERCURY NEWS (Jan. 31, 2007), https://www.mercurynews.com/2007/01/31/part-four-how-judges-favor-the-prosecution [https://perma.cc/NGN7-VN4Z].

317. *Id.* ("For example, in one manslaughter trial, the judge permitted the jury to hear the portion of a defendant's statement to police in which he confessed to striking the victim with a board, but not the portion in which he explained that it happened in a frenzy, after he was stabbed, and that he had not intended to kill the man.").

318. The author utilized data provided from the CATO Institute on federal judges' background experience and searched their motion history in Lexis to generate the following analysis on Alabama and Georgia judges' history and records. https://advance.lexis.com/contextprofile/index?crid=88020f19-dd22-4f79-8680-e3f812cb0e2d&pdtabname=overview&pdprofileid=urn%3Aentity%3Ajud-100066258&pdprofiletype=judge&pdmfid=1518492&pdisurlapi=true (search "Judge [judge's first and last name]" to locate the judge's "Lexis Context Profile." Within a particular judge's profile, the "Analytics" tab provides a breakdown of the judge's previous motion decisions). It is important to note that Lexis does not have access to every motion filed in one judge's chambers nor does this account for the numerous amounts of criminal cases that are resolved through a plea deal.

In Georgia, the data is similar. Chief Judge Thomas W. Thrash, Jr., who was an Assistant District Attorney for three years, has denied 96 out of 136 motions to suppress evidence. Judge William S. Duffey, Jr., who was a prosecutor for four years and a government advocate for six years, has denied 69 out of 99 motions to suppress evidence and has denied all motions for acquittal before him. Judge Steve C. Jones, a former six-year prosecutor and a judge appointed by President Obama, has denied 39 out of 61 motions to suppress evidence and denied 26 out of 73 motions to dismiss a criminal case. Lastly, Judge Eleanor L. Ross, who served in various prosecutorial functions from 1994 to 2011, has denied 28 out of 43 motions to suppress evidence. Thus, the data shows the symbiotic relationship between prosecutors and judges in action and how it can unfairly treat criminal defendants.

However, this does not account for magistrate judges who see significantly more motions to suppress evidence or dismiss a case. From October 2018 to September 2019, "magistrate judges handled 244,367 felony pretrial matters and conducted 34,964 felony guilty plea proceedings."[319] What is concerning is that most district court judges sign off on whatever recommendation a magistrate judge makes.[320] Indeed, magistrate judges may choose to rule on motions that would favor the prosecution or align with the district court judge in order to keep the appointment.[321]

The symbiotic relationship also encourages judicial activism while on the bench. Judges may help the prosecution by examining a witness themselves in front of the jury.[322] Even worse, some judges may interrupt defense counsel and take over the defense counsel's examination.[323] In Tulsky's review, he found ten cases where "judges made explicit remarks or took actions in the presence of the jury that suggested their bias against the defendant."[324] Such advocacy by the judge can benefit the prosecution significantly.[325]

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319. *See* Adams et al., *supra* note 147, at 205–06; *U.S. Magistrate Judges — Judicial Business 2019*, U.S. CTS., https://www.uscourts.gov/statistics-reports/us-magistrate-judges-judicial-business-2019 [https://perma.cc/W2HC-JPGD]. Unfortunately, the CATO Institute data does not include data on magistrate judges.

320. Adams et al.*, supra* note 147, at 224.

321. *Id.* at 244 ("[Magistrate judges] may alter their work in order to increase their reputation with the judge, tailoring each R&R to the overseeing judge's preferences to enhance their reputation and thus their chances for reappointment.").

322. Michael Pinard, *Limitations on Judicial Activism in Criminal Trials*, 33 CONN. L. REV. 243, 260–63 (2000).

323. *Id.*

324. *See* Tulsky, *supra* note 316.

325. MODEL CODE OF JUD. CONDUCT Canon 2, r. 2.3 cmt. 2 (AM. BAR ASS'N 2020) (discussing how a judge's facial expressions could show impropriety).

However, this advocacy does not have to be confined solely to judicial comments. The symbiotic relationship also incentivizes judges to follow whatever orders prosecutors may file. Judges may opt to copy exactly what a prosecutor writes in an order rather than write their own.[326] With respect to jury instructions, judges can choose to use the prosecution's jury instructions, despite them being inappropriate for the jury.[327]

Lastly, the symbiotic relationship encourages judges to give harsher punishments. From the outset of a criminal proceeding, defendants can be subjected to harsher punishments because prosecutors have great discretion in what charges to bring and judges are rarely willing to challenge these charges.[328] For states that use the sentencing guidelines, the increase in severity of charges allows a judge to give a higher sentence than what a criminal defendant might justly deserve.[329] Moreover, the symbiotic relationship incentivizes prosecutors to recommend higher sentences and for judges to issue higher sentences. Given both prosecutors and judges do not want to be seen as weak on crime,[330] prosecutors will want to recommend higher sentences for defendants and judges are likely to comply with that to avoid any negative reaction for giving too lenient a sentence. Overall, though, this results in an unjust and unwarranted punishment for the defendant.

### *C. How Special Protections Perpetuate the Symbiotic Relationship*

The ways that judges act have real impacts on defendants and the judiciary as a whole. In Tulsky's study, he found "more than 100 instances when the appellate courts found that trial judges erred in ways that helped prosecutors, and more than 40 additional instances of troubling conduct that the appellate courts declined to assess."[331] Therefore, the symbiotic relationship results in many defendants receiving unfair trials and unjustly serving time for

326. Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 BOS. U. L. REV. 759, 803 (1995).

327. *See* Tulsky, *supra* note 316 ("In 48 cases, judges failed to give the jury appropriate guidance on the law – in ways that either bolstered the prosecution's view of the case or undermined the defense's contentions.").

328. *See supra* Part I.B.

329. *See* MINN. SENT'G GUIDELINES & COMMENT., SENT'G GUIDELINES GRID § 4.A (2022).

330. *See supra* Part II.A.

331. *See* Tulsky, *supra* note 316.

crimes they potentially did not commit. This diminishes trust within the judiciary as, when the symbiotic relationship is brought to light, it shows the inherent impartiality that the judiciary is supposed to avoid.[332] However, this only happens if misconduct charges are brought and enforced.

Problematically, there is a general lack of enforcement of the ethical rules against prosecutors. Prosecutors have little incentive to bring misconduct charges against one another.[333] Additionally, when misconduct is found, there is no real deterrence mechanism. An ethical complaint filed against a prosecutor does not carry a significant punishment with it, and because prosecutors have absolute immunity, prosecutors can continue to act in violation of the ethical rules and the law.[334] Through the underenforcement of ethical rules and the absolute immunity of prosecutors, the symbiotic relationship between judges and prosecutors is able to continue.

The same applies to prosecutorial offices as well. Because of the Court's ruling in *Connick*, prosecutorial offices are allowed to have policies in place that directly harm defendants: these offices can refuse to turn over necessary *Brady* evidence, seek potentially illegal evidence, overcharge defendants, and not update policies to remain current with the law.[335] In particular, these protections incentivize departments to have policies that unconstitutionally harm defendants, especially if these policies result in more arrests and longer sentences for individuals, as it can make the department seem tough on crime.[336]

Lastly, the special protections judges receive further perpetuate the symbiotic relationship and the abuses the relationship permits against defendants. Given judges are supposed to be tough on crime,[337] judges have an incentive to assist prosecutors more, even if doing so may violate a judge's ethical obligations.[338] Further, when one does file an ethical complaint against a judge, the consequences are minimal and the judge can

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332. MODEL CODE OF JUD. CONDUCT Canon 2, r. 2.3 (AM. BAR ASS'N 2020).

333. *See supra* Part I.C.ii.

334. *Id.*

335. *Id.*

336. *See supra* Parts I.A, II.A.

337. *See supra* Part II.A.

338. *See* BERRY, *supra* note 126, at 7–8 ("Ten prominent empirical studies examining the relationship between judicial elections and criminal case outcomes all found that retention and re-election pressures impact judges' rulings — to the detriment of defendants.").

usually return to the bench.[339] Even if misconduct is found, judicial immunity prevents any real accountability by the judge.[340] The lack of ethical and legal enforcement against both judges and prosecutors allows for prosecutorial and judicial misconduct to continue. Even the system's design, which focuses on punishing criminals, encourages and incentivizes prosecutors and judges to engage in the symbiotic relationship. Thus, changes to the judiciary and its accountability mechanisms are necessary to give defendants fairer and more just trials.

## V. Balancing the Scales: The Need to Change the Judiciary, Prosecutorial Function, and Judicial Function

Because the symbiotic relationship between prosecutors and judges provides unfair criminal proceedings for criminal defendants, this Part will advocate for rebalancing the scales of justice. First, changing the makeup of the judiciary by incorporating different legal backgrounds can shift how people view the judicial function. Second, there needs to be a change in how prosecutors function and are held accountable. Lastly, the judicial function itself must change and have greater accountability. Through these reforms, the symbiotic relationship between prosecutors and judges can start to diminish and defendants can experience fairer trials.

### *A. Changing the Judiciary: The Need for More Public Defenders as Judges*

First, having more public defenders or criminal defense attorneys in the judiciary can start to change how individuals view the judiciary and allow for fairer trials for defendants. Only fifty-seven federal judges as of 2021 were advocates for individuals against the government.[341] This only accounts for 10% of the judiciary.[342] While President Biden nominated more public defenders to the federal bench,[343] there were numerous issues regarding whether those public defenders would get appointed or

339. *See* Berens & Shiffman, *supra* note 207.

340. *See supra* Part II.C.ii.

341. *See* Neily, *supra* note 278.

342. *Id.*

343. Kenichi Serino, *How Having a Former Public Defender on the Supreme Court Could be 'Revolutionary'*, PBS NEWS (Mar. 21, 2022), https://www.pbs.org/newshour/politics/few-public-defenders-become-federal-judges-ketanji-brown-jackson-would-be-the-supreme-courts-first [https://perma.cc/F6Q9-D243] (finding that 30% of President Biden's nominations were former public defenders).

not.[344] Nevertheless, there are still many vacancies on the federal bench[345] and continuous state judge elections. There should be greater attention given to public defenders or criminal defense attorneys to fill those positions.

Increasing the number of public defenders serving as judges can change how people perceive the judiciary. With so many prosecutors as judges, the public does not view the judiciary as being fair.[346] Having different legal backgrounds for the judiciary can change this negative perception.[347] Having more public defenders serve as judges can also shift the focus of the judge's role from fighting crime to ensuring a fair trial. This in turn can encourage former prosecutors who are judges to conduct criminal proceedings in a fairer manner.[348] Thus, the judiciary as a whole can become less biased and be viewed more favorably if there is diversity in background on the bench.[349]

Additionally, public defenders can change how the judiciary operates during criminal proceedings. A judge who was a public defender will likely recognize that prosecutors bring excessive charges because of their experience as a public defender.[350] This judge can then be more critical and willing to dismiss certain charges or find certain plea deals to be unfair.[351] Public defenders or criminal defense attorneys who serve as judges can make

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344. *See* Jennifer Haberkorn, *White House Pulls Its Punches over GOP Judicial Nomination Blockade*, POLITICO (Apr. 6, 2023), https://www.politico.com/news/2023/04/06/white-house-pulls-punches-over-gop-judicial-nomination-blockade-00090824 (last visited Feb. 11, 2025).

345. *Judicial Vacancies*, U.S. CTS. (Apr. 25, 2023), https://www.uscourts.gov/judges-judgeships/judicial-vacancies [https://perma.cc/A8B2-9Q4V] (stating that there are 78 federal judgeship vacancies with 36 nominees pending).

346. *See* Berryessa et al., *supra* note 291, at 8.

347. *Id.*

348. *Id.* at 9 ("Thus, expanding professional diversity on the bench may lead to more balanced, socio-cultural perspectives on the law, precedent, and legal philosophy. By doing so, pro-prosecution bias may become less pervasive, and defence [sic] backgrounds may be less of a liability for potential judges.") (citation omitted).

349. *See* Neily, *supra* note 278.

350. *See* Berryessa et al., *supra* note 291, at 8.

351. *See supra* Part II.B; *see also* Amber Saddler, *From the Defense Table to the Bench: The Importance of Public Defenders as Judges*, ALL. FOR JUST. (Apr. 26, 2021), https://www.afj.org/article/from-the-defense-table-to-the-bench-the-importance-of-public-defenders-as-judges [https://perma.cc/ZCB5-CCEK] ("When a judge decides whether a claim is 'plausible,' or whether a witness is 'credible,' or whether police officers, when they stopped and searched a pedestrian, acted 'reasonably,' her determination is necessarily influenced by the nature of her work as a lawyer up to that point.").

criminal proceedings as a whole more empathic towards criminal defendants.[352] Therefore, public defenders serving as judges can weaken the symbiotic relationship between prosecutors and judges and draw more focus on having an equitable criminal proceeding.

### *B. Changing the Prosecutorial Function: The Need for Greater Prosecutorial Accountability*

Second, there are several changes necessary to the prosecutorial function as presently constructed. This includes restraining the powers prosecutors have, ensuring greater enforcement of ethical rules, and limiting the special protections prosecutors receive. The prosecutorial function has a significant amount of power, especially at the charging stages of a criminal proceeding. Limiting a prosecutor's ability to bring an abundance of charges can allow for fairer criminal proceedings. This could be done by increasing the necessary burden prosecutors need to meet to bring a charge or allowing for more public involvement in charging decisions.[353] By limiting the number and types of charges prosecutors can bring, criminal defendants can better pursue their defenses and not feel compelled to accept a plea bargain. Moreover, changing the charging function could result in fairer sentences for defendants, as judges would not have to follow the more extreme sentences set through statutory sentences and the sentencing guidelines.[354]

However, changing the prosecutorial function and the charging power is unlikely. First, it is difficult to know what standard to use, and courts are generally reluctant to review the decision to prosecute or not.[355] Second, involving the public in the charging function can slow judicial efficiency.[356] Thus, it is important to explore other means to rein in the power of prosecutors and their ability to engage in the symbiotic relationship with judges.

One of the better methods to change the prosecutorial function is by increasing the accountability of prosecutors. Enforcing ethical rules against prosecutors can help shed more light on whether a prosecutor is properly advocating for the state. Public pressure

352. *See* Berryessa et al., *supra* note 291, at 8–9.

353. *See, e.g.*, Bibas, *supra* note 53, at 990 (advocating for citizen advocates within a prosecutor's office to consult with prosecutors on what charges to bring).

354. MINN. SENT'G GUIDELINES & COMMENT., SENT'G GUIDELINES GRID § 4.A (2022).

355. *See* Bibas, *supra* note 53, at 970.

356. *Id.* at 990.

against prosecutors who constantly violate ethical rules can either result in a prosecutor being ousted at the next election or the prosecutor changing their behavior.[357] This would also change *how* individuals view prosecutorial elections. While convictions may be important, having more information about what prosecutors are doing and how they are doing it can shift the public's perception of what a prosecutor is supposed to do in criminal proceedings.[358] Thus, the prosecutorial function itself can be pressured to focusing more on ensuring criminal proceedings are fair and that prosecutors are not abusing their power.

Lastly, limiting prosecutorial immunity will require prosecutors to more aptly follow ethical rules and the law. By stripping away individual prosecutorial immunity, wrongly-accused or wrongly-tried defendants can raise § 1983 claims against prosecutors and have some form of monetary recourse.[359] If a defendant can successfully bring a § 1983 claim against a prosecutor, then the defendant can get monetary damages and the public can have more information about the prosecutor's misconduct to assess if the person is fit to be a prosecutor.[360] Notably, a lack of individual prosecutorial immunity could greatly hamper the prosecutorial function and impair prosecutors who do not violate the law or ethical rules.[361] However, this outcome is not likely to arise. First, a defendant would have to successfully plead and have enough facts to show a prosecutor engaged in such misconduct.[362] Second, this would require a prosecutor to engage in more egregious misconduct that was readily discernable.

In addition to individual prosecutorial immunity, removing immunity from prosecutorial offices will also better ensure prosecutors follow the law and ethical rules. Similar to removing individual immunity, holding entire departments accountable would allow the public to know more about how prosecutorial offices are managed.[363] This public pressure would encourage prosecution

357. *Id.* at 989–90.

358. *Id.* at 990 ("[T]he public is not always as punitive as one might think. In recent years, drug courts and similar criminal justice alternatives have flourished, reflecting the public's willingness to soften enforcement.").

359. *See* McCarthy & Duggins, *supra* note 110.

360. *See* Bibas, *supra* note 53 at 989–90.

361. Imber v. Pachtman, 424 U.S. 409, 427–28 (1976).

362. There are also questions as to whether the *Twiqbal* standard would apply to such a claim. Martain Flumenbaum & Brad S. Karp, *Pleading Standards for § 1983 Claims Against Govt. Supervisors*, 265 N.Y. L. J., Jan. 27, 2021.

363. *See* Bibas, *supra* note 53, at 989–90.

offices to be more compliant with the law.[364] Moreover, by being able to challenge entire departments in court, wrongly-convicted or wrongly-tried defendants can hold a prosecutor's office accountable to provide proper training, ensure prosecutors know the law, and make offices comply with the law.[365] Ultimately, removing such broad immunity for entire prosecutorial departments can better criminal proceedings by making them more fair and compliant with the law.

### *C. Changing the Judicial Function: The Need for Greater Judicial Accountability*

Similar to the prosecutorial function, the judicial function needs greater accountability. This can be done first by changing how judicial elections operate, second by changing the ethical rules for judges, and finally by holding judges accountable for ethics violations. First, and most importantly, changing how judicial elections work can better ensure that judges focus on how they conduct criminal proceedings instead of the outcomes. Rather than elections focusing on criminal punishments,[366] elections should pay more attention to broader policy ideas and how a judge acts within the courtroom.[367] Moreover, there must be greater regulation on special interest group involvement in judicial elections, as these are the groups that typically air attack ads against judges and their records on crime or previous work.[368] This focus on judicial conduct and broader ideas can restore trust and impartiality in the judiciary.[369] Importantly, judges will spend more time ensuring a criminal proceeding is fair and less time worrying about how the public may perceive them based on how they handle a particular criminal proceeding.

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364. *Id.*

365. *See* Connick v. Thompson, 563 U.S. 51, 93 (2011) (Ginsburg, J., dissenting).

366. *See* BERRY, *supra* note 126, at 7–8 (discussing how judicial elections shape how judges sentence convicted defendants in order to appear tougher on crime).

367. For example, by removing the lack of transparency in judicial proceedings found in some states. *Compare* Gallo & Simerman, *supra* note 213 (discussing Supreme Court Justice Jefferson Hughes III who was the subject of an FBI probe and issued multiple apology letters without any public disclosure of wrongdoing) *with* Ortiz, *supra* note 217 (observing that states such as New Jersey, Pennsylvania, and Vermont have an automatic public notification requirement immediately upon the filing of ethics charges against a judge).

368. *See* BERRY, *supra* note 126, at 3 (reporting that 82% of ad spots in the 2013–14 judicial election cycle discussed criminal justice issues and "all but one attacked candidates for judicial decisions they had made . . . .").

369. *See* Berryessa et al., *supra* note 291, at 8–9.

Second, the ethical rules for judges need to change. Currently, the rules are vague for judges in determining whether a judge has a personal conflict with a matter.[370] The ethical rules should be more explicit about what counts as a personal relationship or friendship with someone involved in a case. Additionally, the ethical rules should have judges recuse themselves from cases where an attorney assigned to a case before them is someone they previously directly supervised.[371] More clarity from the American Bar Association can better prevent judges feeling uncertain as to whether to recuse themselves from a case. By having judges acknowledge when they have a conflict with hearing a case, defendants can have more assurance that their case is fair.

Third, there needs to be greater enforcement of the ethical rules against judges and increased penalties for judges who violate the rules. It is easy for judges to circumvent the ethical rules, or to remain unaware of them.[372] Even when found to be in violation judicial misconduct, penalties are minor.[373] Penalties for judicial misconduct should increase and be made public. Parallel to knowing about prosecutorial misconduct,[374] this would allow the public to better understand how a judge acts and whether the judge is fit for the role. This can serve as a means to hold judges accountable. Additionally, judges need to more dutifully follow Rule 2.15 on reporting misconduct from other judges or attorneys.[375] By doing so, judges can serve as an additional check on prosecutorial and judicial misconduct in criminal cases. Overall, this can create a more just system for criminal defendants by ensuring their cases are brought in front of judges who will fairly adjudicate their criminal proceedings.

## Conclusion

The symbiotic relationship between judges and prosecutors allows for a vicious cycle of unjust and unfair criminal proceedings. Judges who were former prosecutors have ties to their former roles

370. *See, e.g.*, MODEL CODE OF JUD. CONDUCT Canon 1, r. 1.2 cmt. (AM. BAR ASS'N 2020) (stating a reasonableness standard for determining whether there is impropriety).

371. This would be fair to both former prosecutors and public defenders who become judges to better ensure that the judge does not have any personal biases towards a former colleague.

372. Berens & Shiffman, *supra* note 207.

373. *Id.* (finding judges could return to the bench after gross judicial misconduct, receive a censure, or private reprimand).

374. *See* Bibas, *supra* note 53, at 989–90.

375. MODEL CODE OF JUD. CONDUCT Canon 2, r. 2.15 (AM. BAR ASS'N 2020).

as prosecutors and are deeply influenced by their experiences as prosecutors. Moreover, these judges have close personal ties with the prosecutors in their district. Because of this influence, prosecutors know they can overcharge defendants, obtain illegal evidence, and have trials conducted in their favor.

Prosecutors have almost unlimited discretion when it comes to how they want to conduct a case. Under this discretion, prosecutors are allowed to overcharge defendants, recommend excessive bail, and offer unfair plea deals to criminal defendants. Importantly, prosecutors can be selective in their cases and will want to try cases where they are more likely to receive favorable rulings. With this great power, prosecutors are supposed to abide by ethical rules and laws that make criminal proceedings fair. However, prosecutors have little incentive to follow these rules and guidelines, and there are few consequences when prosecutors do violate these rules and laws.

Judges have more limited discretion, but judges can heavily influence a criminal case. Additionally, because many judges are elected or want to be appointed, judges are cognizant of how their decisions in criminal proceedings can impact their continued service on the bench. If judges are lenient on sentencing or are seen as soft on crime, they may face significant challenges in being re-elected or elected in the first place. This aspect of being a judge further supports judges following what prosecutors want. Despite there being ethical rules for judges to follow to avoid such impartiality, there is little enforcement of these rules.

Moreover, judges who were previously prosecutors have biases that align with the prosecution. Because of these biases, these judges will typically follow what prosecutors recommend. These judges often sign warrants that allow prosecutors to gather illegal evidence, rule on motions in ways that benefit the prosecution, and do not challenge the charges prosecutors bring. Because there are few enforced checks on either the prosecutor or the judge, this symbiotic relationship can continuously grow.

To make criminal proceedings fair, it is important to recognize this symbiotic relationship and how it influences criminal proceedings. Appointing and electing more public defenders or criminal defense attorneys to the judiciary can serve as a first step to disrupting the symbiotic relationship between judges and prosecutors. Further, enforcing ethical rules and holding prosecutors and judges accountable for misconduct can make prosecutors and judges more cognizant of their own interests and biases. These solutions can result in more fair and equal trials,

finally balancing the scales that have been tilted to one side for so many years.

# Minding the Gaps: How Intimate Partner Violence Legislation Is Failing to Address Coercive Control

Sydney Koehler†

## Introduction

It has been thirty years since Congress first passed the Violence Against Women Act (VAWA), the first federal legislative initiative to address intimate partner violence (IPV).[1] VAWA cemented on a national scale the piecemeal efforts taking place in local legislatures and law enforcement agencies to counter intimate partner violence through state action.[2] In the three decades since VAWA's enactment, the United States has pledged more federal funds, and expended more law enforcement and judicial resources, to address the social and criminal costs of IPV than ever before.[3] Yet IPV remains the "single largest cause of injury to women in the United States"[4] and accounts for 15% of all reported violent crime in the U.S.,[5] with law enforcement studies estimating the actual incidence of IPV is likely four times the reported amount.[6]

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1. Violence Against Women Act, 42 U.S.C. §§ 13925–14045d (1994).

2. *See infra* Part II.A.

3. United States v. Morrison, 529 U.S. 598, 632 (2000) (Souter, J., dissenting) ("[E]stimates suggest that we spend $5 to $10 billion a year on health care, criminal justice, and other social costs of domestic violence.") (quoting S. REP. NO. 101-545, at 41); Carolyn N. Ko, *Civil Restraining Orders for Domestic Violence: The Unresolved Question of "Efficacy"*, 11 S. CAL. INTERDISC. L.J. 361, 361–62 (2002).

4. *Morrison*, 529 U.S. at 632 (Souter, J., dissenting); *see also* David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1158 (1995) ("Domestic violence remains the greatest cause of serious injury to American women, accounting for more injurious episodes than rape, auto accidents, and mugging combined.").

5. JENNIFER L. TRUMAN & RACHEL E. MORGAN, NONFATAL DOMESTIC VIOLENCE, 2003–2012 1 (Vanessa Curto & Jill Thomas, eds., 2014), https://www.govinfo.gov/app/details/GOVPUB-J29-PURL-gpo118103 [https://perma.cc/T7AK-YMMX].

6. Zlotnick, *supra* note 4, at 1159 (explaining that for each reported domestic

This Note suggests the problem of IPV has persisted in the United States, despite increased efforts to counteract it, because the primary legal framework through which IPV is addressed—the criminal protective order—is unfit to confront the dynamics of coercive control that occur in intimate relationships. Part I tracks the gradual criminalization of IPV over time and highlights ways criminal protective orders are ill-suited to respond to IPV. Part II proposes changes to improve the legal response to IPV. First, Part II argues statutory definitions of abuse[7] must be amended to encompass all forms of abuse that occur in intimate relationships, regardless of their criminality. Secondly, and relatedly, Part II suggests IPV should be addressed through a dual protective order framework that offers criminal and civil remedies to victims.

## I. Background

### *A. The Historical Progression of IPV Law from Nonintervention to Criminalization*

For much of American history, IPV was explicitly or implicitly sanctioned by existing social and legal systems. In the early United States, the law of coverture explicitly authorized IPV by classifying women as the property of their husbands, thus subjecting women to physical, sexual, and financial subjugation.[8] Even after coverture laws were repealed and many state and local governments adopted legislation banning "wife beating,"[9] the legal system continued to implicitly sanction IPV through an emphasis on "marital privacy."[10]

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crime, three go unreported); TRUMAN & MORGAN, *supra* note 5, at 10 (indicating that between 2003 and 2012, only 24% of victims of intimate partner violence received assistance from a victim service agency).

7. This Note discusses statutory definitions of "abuse" for the sake of consistency, recognizing statutes differ in the verbiage they use to describe IPV. Many states use the terms "domestic violence" or "domestic abuse," which encompass not just IPV but also other abusive relationships within a shared household.

8. Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1494–547 (2008); Dana Harrington Conner, *Financial Freedom: Women, Money, and Domestic Abuse*, 20 WM. & MARY J. WOMEN & L. 339, 343 (2014).

9. *See generally* Elizabeth Pleck, *Criminal Approaches to Family Violence, 1640–1980*, 11 CRIME & JUST. 19, 22 (1989) (providing an overview of the historical development of domestic violence laws from the colonial period to the twentieth century).

10. Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 11–12 (2006) (explaining that even as coverture laws were repealed and the "chastisement prerogative" for domestic violence disappeared, "a judicial discourse of marital privacy emerged and continued to legitimate wife beating under a revised rhetorical and ideological framework. The protective boundary of the home continued to shield DV from criminal prosecution for another century."); Pleck, *supra* note 9, at 28

Courts largely avoided intervening in family law matters,[11] viewing the private activities of the domicile to be largely immune to the reach of criminal law.[12]

Frustrated by underenforcement of existing domestic violence laws, feminist advocates in the early twentieth century began calling for a civil legal response to IPV.[13] In the 1970s, states began passing legislation making civil protective orders available to victims of IPV, allowing victims to obtain court orders enjoining future conduct constituting abuse under applicable state statutes,[14] and providing victims recourse to address violations of these orders through contempt proceedings in civil court.[15] These civil protective orders were designed to be victim-initiated and victim-driven, in an effort to counteract the widespread underenforcement of criminal IPV laws by law enforcement agents and prosecutors.[16] Civil orders quickly became the primary legal response to IPV, and by the early 1990s all 50 states and the District of Columbia had passed civil protective order legislation.[17]

Civil protective orders provided an effective, empowering legal remedy for victims of IPV. Victims who receive civil protective orders report high levels of satisfaction with the orders.[18] Victims also report increased safety[19] and well-being[20] after being issued

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(discussing the distinction drawn by eighteenth-century legal theorists such as William Blackstone between public mischievous behavior, which was a crime, and private behavior, which was a vice not suited for criminal intervention, to justify the doctrine of marital privacy).

11. Pleck, *supra* note 9, at 33 (citing case law from the nineteenth century including the 1868 case *State v. Rhodes*, in which the North Carolina Supreme Court held it would "not interfere with family government in trifling cases").

12. *Id.* at 20; Suk, *supra* note 10, at 5 ("The idea that criminal law may not reach into this quintessentially private space has been rightly criticized for enabling the state's acquiescence in violence against women.").

13. Suk, *supra* note 10, at 15; Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817, 820 (2000).

14. Suk, *supra* note 10, at 15.

15. *Id.* at 7; Conner, *supra* note 8, at 378–79.

16. Goldfarb, *supra* note 8, at 1508.

17. Ko, *supra* note 3, at 361–62.

18. Goldfarb, *supra* note 8, at 1510 (explaining that 86% of victims in a Wisconsin study reported satisfaction with the order they received, and 94% of victims "felt that their decision to obtain a protection order was a good one").

19. *Id.* (describing various studies in which over 70% of participants reported feeling safer after receiving a protective order); TK Logan & Robert Walker, *Civil Protective Order Outcomes: Violations and Perceptions of Effectiveness*, 24 J. INTERPERSONAL VIOLENCE 675, 682–83 (2009) (indicating 77% of victims involved in the study felt "extremely safe" or "fairly safe" after receiving a protective order, and 78% felt the protective order was "effective").

20. Ko, *supra* note 3, at 369 (highlighting a study in which 90% of victims reported increased emotional well-being six months after receiving a protective

civil protective orders.[21] At the end of the day, however, civil protective orders were just pieces of paper, and their effectiveness in preventing future incidence of IPV depended on legal and judicial enforcement.[22] In response to the significant underenforcement of domestic violence laws,[23] the "tough on crime" movement[24] and the feminist movement[25] united behind an increasingly criminalized strategy to address IPV toward the end of the twentieth century. Police departments throughout the nation began adopting mandatory arrest policies, requiring officers to arrest upon finding probable cause of battery.[26] Prosecutor's offices implemented no-drop prosecution policies to prevent prosecutors or victims from dismissing domestic violence charges.[27] State legislators adopted

order); Goldfarb, *supra* note 8, at 1510 (discussing a study by the National Center for State Courts which found 85% of victims felt their lives had improved within six months of receiving a protective order).

21. Ko, *supra* note 3, at 371 (theorizing victims' high levels of satisfaction with civil protective orders can be better attributed to the psychological benefits the orders can provide to victims than to the practical effectiveness of the orders themselves).

22. NICOLA SHARP-JEFFS, A REVIEW OF RESEARCH AND POLICY ON FINANCIAL ABUSE WITHIN INTIMATE PARTNER RELATIONSHIPS 15 (2015), https://repository.londonmet.ac.uk/1482/1/Review-of-Research-and-Policy-on-Financial-Abuse.pdf [https://perma.cc/8DRD-YQ9Q] (explaining that for victims whose partners fail to comply with civil protective orders, the only available redress is "going back to court" because courts have not adopted oversight measures). Goldfarb, *supra* note 8, at 1516 ("[P]oor enforcement may be largely responsible for the results of studies showing high rates of non-compliance with protection orders.").

23. Jane K. Stoever, *Freedom From Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 OHIO ST. L.J. 303, 314 (2011) ("Even after instituting laws to criminalize domestic violence, police and prosecutorial conduct remained largely unchanged, so legislatures eventually instituted mandatory policies to ensure vigorous responses to domestic violence."); Ko, *supra* note 3, at 380; Zlotnick, *supra* note 4, at 1172; *see generally* Janell D. Schmidt & Lawrence W. Sherman, *Does Arrest Deter Domestic Violence?*, 36 AM. BEHAV. SCIENTIST 601, 602 (1993) (finding that police officers do not consistently adhere to the mandatory arrest policies set by local police departments).

24. Shelly L. Jackson & Thomas L. Hafemeister, *Using the Criminal Law to Respond to the Financial Exploitation of Older Adults: The Statutory Evolution in the United States from 2000 to 2020*, 29 ELDER L.J. 315, 319 (2022).

25. Pleck, *supra* note 9, at 51; *see generally* Mimi Kim, *Dancing the Carceral Creep: The Anti-Domestic Violence Movement and the Paradoxical Pursuit of Criminalization, 1973–1986* (Inst. for Study of Societal Issues, Working Paper Series, 2015), https://escholarship.org/uc/item/804227k6 [https://perma.cc/AC72-FJ3A] (critiquing "the paradoxical alignment of feminism with increasingly punitive carceral policies" and explaining the negative impacts of pursuing feminist social change through criminal policy).

26. Zlotnick, *supra* note 4, at 1172. States also passed legislation reinforcing the practice of mandatory arrest. Schmidt & Sherman, *supra* note 23, at 602 ("[W]ithin 8 years legislatures in 15 states . . . and the District of Columbia moved to enact laws requiring police to arrest in all probable cause incidents of domestic violence.").

27. Suk, *supra* note 10, at 13.

criminal enforcement mechanisms for protective orders, such that violations were addressed through criminal misdemeanor charges rather than civil contempt sanctions.[28]

The 1994 passage of VAWA solidified this criminalization strategy by declaring violence against women a federal crime[29] and providing states monetary incentives to arrest perpetrators of IPV.[30] While the move toward criminalization was, in many ways, a logical response to the underenforcement that plagued the civil protective order, the legal response to IPV is now marked by an overreliance on arrest as a remedy, with undesirable consequences for both victims and perpetrators of IPV.

### *B. The Failure of the Criminal Protective Order*

Today, the criminalized protective order dominates the legal response to IPV.[31] Criminal protective orders employ misdemeanor arrest as the primary, and sometimes exclusive, legal remedy for a protective order violation.[32] Criminal protective orders typically enjoin the abuser from committing specified future acts of abuse or violence.[33] Criminal protective orders also frequently include stay-away provisions that prohibit an abuser from coming within a certain distance of the victim or the victim's place of residence or employment, and no-contact provisions that prohibit an abuser from contacting the victim, including through electronic communication.[34] Through an emphasis on stay-away provisions,[35] arrest, and incarceration, criminal protective orders aim to incapacitate abusers in order to mitigate IPV; however, incapacitation does not appear to be effective at deterring future violence within intimate relationships.

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28. *Id.* at 16 (arguing protective orders have "been subsumed by the criminalization strategy" and are now "primarily enforced through criminal misdemeanor charges."); Kim, *supra* note 25, at 1 (describing VAWA's incorporation into the Violent Crime Control and Law Enforcement Act as "symbolically and materially cementing an already robust collaboration between one strand of a broader feminist social movement and the criminal justice system."); *see infra* Part II.B (suggesting contempt sanctions may be a more effective legal response to protective order violations than misdemeanor arrest).

29. Kim, *supra* note 25, at 1.

30. *Id.*

31. *See* Suk, *supra* note 10, at 16; Kim, *supra* note 25, at 1.

32. For a state-by-state breakdown of the criminal penalties state legislatures attach to protective order violations, *see infra* note 99.

33. Suk, *supra* note 10, at 15.

34. *Id.* at 14.

35. *See id.* at 42 (discussing stay-away provisions as a mechanism of "state-imposed de facto divorce").

Studies indicate abusers violate the provisions of criminal protective orders issued against them in approximately 50% of cases, despite the criminal consequences of a violation.[36] While the threat of arrest has a higher deterrent effect on some abusers than others,[37] by and large research indicates the presence of a criminal protective order has little to no impact on the likelihood an abuser will perpetrate future abuse in the relationship.[38] This may be in part because most arrests for IPV end in dismissed charges,[39] plea

36. Judith McFarlane, Ann Malecha, Julia Gist, Kathy Watson, Elizabeth Batten, Iva Hall & Sheila Smith, *Protection Orders and Intimate Partner Violence: An 18-Month Study of 150 Black, Hispanic, and White Women*, 94 AM. J. PUB. HEALTH 613, 616 (2004) (describing a study in which 44% of victims of interpersonal violence experienced one or more incidents of abuse in violation of their protective order within eighteen months of issuance); Durant Frantzen, Claudia San Miguel & Dae-Hoon Kwak, *Predicting Case Conviction and Domestic Violence Recidivism: Measuring the Deterrent Effects of Conviction and Protection Order Violations*, 26 VIOLENCE & VICTIMS 395, 401 (2011) (finding that 63% of abusers are charged with protective order violations); Logan & Walker, *supra* note 19, at 677 (identifying a 40% protective order violation rate across thirty-two studies); Ko, *supra* note 3, at 373 (discussing two studies, by Harrell and Smith and Grau, both identifying a 60% violation rate of protective orders).

37. Goldfarb, *supra* note 8, at 1513 ("[A]rrest had a stronger deterrent effect among men who were married and employed than among those who were unmarried, unemployed and lived in poor, high-crime neighborhoods . . . . Paradoxically, the abusers who are most likely to be deterred by protection orders—namely, 'middle- or upper-class abusers who do not have prior [criminal] records'—are apparently underrepresented in protection order proceedings."); Ko, *supra* note 3, at 375 (describing a study finding that temporary restraining orders were more likely to be violated by perpetrators who were unemployed or working part-time, and by those who had drug or alcohol problems); Zlotnick, *supra* note 4, at 1174 (arguing that for abusers with criminal histories and low social capital, "a short-term arrest will have little deterrent effect on their willingness to commit another act of domestic violence"); Schmidt & Sherman, *supra* note 23, at 606 ("Arrest reduces domestic violence among employed people but increases it among unemployed people.").

38. Various studies suggest that a victim having a protective order has no effect on the level of future violence in an intimate relationship. *See* Ko, *supra* note 3, at 373; McFarlane et al., *supra* note 36, at 616. Even further, research suggests protective orders, like arrest, have a stronger deterrent effect for abusers who are white, middle-class, and employed than others. *See* Ko, *supra* note 3, at 375; Goldfarb, *supra* note 8, at 1540; *see also* Nina A. Kohn, *Elder (In)Justice: A Critique of the Criminalization of Elder Abuse*, 49 AM. CRIM. L. REV. 1, 18 (2012) (explaining that prosecuting domestic violence crimes could reduce instances of violence against white and middle-class women while increasing the violence experienced by other women).

39. Suk, *supra* note 10, at 47 n.196 ("More than half of all DV cases result in dismissal . . . ."); Charles L. Diviney, Asha Parekh & Lenora M. Olson, *Outcomes of Civil Protective Orders: Results from One State*, 24 J. INTERPERSONAL VIOLENCE 1209, 1213 (2009) (noting that of 279 protective order violation cases brought in Utah's largest court district in 2002, 143—over half—were dismissed outright).

bargains,[40] not guilty verdicts,[41] or reduced sentences.[42] Thus many victims and abusers—especially those whose abuse frequently brings them in contact with the criminal justice system—are often acutely aware that the threat of arrest and subsequent criminal prosecution is a largely empty one.[43]

Many police officers and prosecutors blame victims for the low rates of enforcement of criminal protective orders, citing victims' reluctance to report protective order violations or to testify against their abusers.[44] However, evidence suggests it is criminalization itself that has hampered the criminal justice response to IPV. Mandatory arrest and no-drop policies have crowded court dockets and strained judicial resources, making dismissals and plea bargains an administrative necessity.[45] Even when cases are not dismissed or pled out, the criminal process is often sympathetic to abusers in protective order violation cases, with juries being "more willing to find a reasonable doubt for what they perceive as a minor crime."[46] In the rare cases where prosecution of a protective order violation results in a guilty verdict for the defendant, the criminal process still fails most victims by handing down a low sentence.[47] The criminal protective order framework therefore forces victims to seek legal recourse from IPV through criminal prosecutions that are set up to fail them.

The criminalization of protective orders has transformed them into a vehicle to reinforce the power of the carceral state, rather than to empower victims of IPV and facilitate their safety.[48] The

40. Suk, *supra* note 10, at 55–56 (explaining that plea bargains are common due to "defendants' desire to resolve their cases quickly without much or any jail time and defense attorneys' need to manage large caseloads . . . .").

41. Diviney et al., *supra* note 39, at 1213 (noting that of the 133 protective order violation cases brought in Utah's largest court district in 2002 that were not dismissed outright, 83% of defendants were found not guilty).

42. *Id.* at 1213 (noting that among the mere 8% of defendants in Utah's largest court district who were found guilty of protective order violations in 2002, nearly half had their charges reduced from felonies to misdemeanors); Cahn, *supra* note 13, at 828.

43. Cynthia G. Bowman, *The Arrest Experiments: A Feminist Critique*, 83 J. CRIM. L. & CRIMINOLOGY 201, 203 (1992) ("[A]busers and their victims cannot fail to notice that ninety-five percent of domestic violence cases are not subsequently prosecuted. Finally, even if convicted, very few abusers ever serve any time in prison.").

44. Zlotnick, *supra* note 4, at 1167; Suk, *supra* note 10, at 47.

45. Zlotnick, *supra* note 4, at 1210–11.

46. *Id.* at 1211.

47. Cahn, *supra* note 13, at 828 ("Prosecution rarely results in significant jailtime . . . .").

48. Kim, *supra* note 25, at 22 ("[S]uccess against the state paradoxically transforms social movement victors into unwitting agents of the state. Each

violation of a criminal protective order is treated as a crime against the state first and a crime against the victim second.[49] Victims' priorities are given a backseat to the state's carceral aim to vindicate the public interest by incapacitating criminal offenders through stay-away provisions and mandatory arrests.[50] The criminal protective order framework thus revictimizes IPV victims by offering future protection from violence only to those who are willing to undergo the additional trauma of participating in criminal action against their abusers.[51]

The proliferation of stay-away provisions among criminal protective orders discourages many victims of IPV from seeking orders and deters many more who receive temporary orders from finalizing them.[52] Many victims are unwilling to submit to stay-away provisions because they do not wish to end their relationship,[53] and many more are practically unable to abide by stay-away provisions on account of their financial dependence on, or shared child custody with, their abuser.[54] However, the criminal protective order promises safety to a victim "only if [they are] willing to leave [their] partner, thereby sacrificing [their] right of

successful demand for criminalization enhances the power of the criminal justice system through institutional transformations that change this constitution to the benefit of, and, hence, the relative power of law enforcement."); Kohn, *supra* note 38, at 22 (explaining that by overriding victims' wants and needs, the criminal approach to intimate partner violence "may reduce the victim's personal autonomy to such a degree that it creates a new form of victim oppression" by the state).

49. Kohn, *supra* note 38, at 22; Stoever, *supra* note 23, at 315 (discussing the paternalism of criminalized IPV policies); Jane H. Aiken & Jane C. Murphy, *Evidence Issues in Domestic Violence Civil Cases*, 34 FAM. L.Q. 43, 44 (2000) (discussing the ways criminal proceedings often disempower, and inflict additional trauma upon, victims of abuse by pressuring or forcing them to testify or provide evidence against their abusers).

50. Goldfarb, *supra* note 8, at 1508 ("Criminal protection orders pose intrinsic difficulties for victims because the prosecutor controls the criminal process with the goal of advancing the interests of the general public.").

51. *See* Kim, *supra* note 25, at 22 (noting that the criminalization of domestic violence benefits the criminal system more than it benefits victims themselves); Kohn, *supra* note 38, at 22 (explaining that criminalization effectively re-victimizes victims of domestic violence by making their needs secondary to the goals of the criminal system).

52. Goldfarb, *supra* note 8, at 1522; Ko, *supra* note 3, at 373 (describing a study in which only 60% of victims who obtained temporary protective orders returned to court to receive a permanent protective order).

53. Goldfarb, *supra* note 8, at 1520 (arguing that stay-away orders force victims to end their relationship without guaranteeing an end to the violence they experience, which is "the exact opposite of what many [victims] seek").

54. *Id.* at 1519–21.

autonomy as expressed through [their] decision to stay in an intimate relationship."[55]

Similarly, overreliance on arrest also discourages many victims from seeking criminal protective orders because they do not wish to see their intimate partners incarcerated.[56] Given the disproportionate impact of criminal prosecution on Black, Latinx, Indigenous, and immigrant populations, victims of IPV who share these marginalized identities are often hesitant to seek protective orders that will expose their abusive partners to the carceral system.[57] Just as stay-away provisions are unrealistic for many victims of IPV, arrest is an unrealistic enforcement mechanism for many victims who depend upon their abusers for subsistence as a result of coercive control.[58] The prevalence of the arrest remedy therefore serves as a roadblock that prevents many victims of IPV from accessing protective orders in the first place.

### *C. Coercive Control: The Missing Piece in the Legal Response to IPV*

An overcriminalized approach to IPV has resulted in protective orders that ignore the realities of coercive control underlying abusive relationships.[59] Abusers gain and maintain control of victims by engaging in behaviors designed to limit victims' agency[60] and promote their dependence.[61] While our societal

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55. *Id.* at 1489.

56. Jackson & Hafemeister, *supra* note 24, at 369.

57. *See* WOMEN OF COLOR NETWORK, WOMEN OF COLOR NETWORK FACTS & STATS: DOMESTIC VIOLENCE IN COMMUNITIES OF COLOR, 2–6 (2006), https://womenofcolornetwork.org/docs/factsheets/fs_domestic-violence.pdf [https://perma.cc/PNR6-D2NG] (explaining that Black women are less likely to report an abusive partner to the police due to in part to "African American men's vulnerability to police brutality," and Native American and Alaskan Indian women are less likely to report abuse because their historical oppression has resulted in a "deep mistrust for white agencies and service providers"); Goldfarb, *supra* note 8, at 1508 (positing that women of color and immigrants may be particularly hesitant to expose their abusive partners to the criminal justice system); Cahn, *supra* note 13, at 819–20 (noting that Black and Latinx victims of IPV who report their abusers to the police may be viewed as betraying their communities); *see also* Frantzen et al., *supra* note 36, at 404 (finding the odds of a defendant's conviction for a protective order violation increase by 58% if the defendant has a prior assault arrest, even outside the context of IPV).

58. *See infra* Part II.C.

59. EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 513 (2nd ed. 2023), https://academic.oup.com/book/55149?login=true [https://perma.cc/3PME-HYDW].

60. Angela Littwin, *Coerced Debt: The Role of Consumer Credit in Domestic Violence*, 100 CAL. L. REV. 951, 974 (2012).

61. Judy L. Postmus, Gretchen L. Hoge, Jan Breckenridge, Nicola Sharp-Jeffs &

conception of IPV places heavy emphasis on its physical and sexual components,[62] abusers do not maintain control through force alone.[63] Victims of IPV are subject to overlapping tactics of physical, psychological, and economic abuse that reinforce the abuser's power and the victim's dependence within the relationship.[64] These psychological and economic tactics—which are largely overlooked in a criminalized approach to IPV—are at the root of coercive control and are often the driving force behind a victim's decision to remain in, or return to, an abusive relationship.

Psychological abuse involves an abuser intentionally lowering a victim's emotional well-being through tactics such as verbal abuse, intimidation, humiliation, degradation, exploitation, harassment, rejection, withholding, and isolation.[65] Psychological abuse is the most prevalent form of IPV, with nearly all victims reporting experiencing psychological abuse during their relationship.[66] Even further, psychological abuse plays a significant role in the perpetuation of cycles of abuse.[67] Abusers employ

Donna Chung, *Economic Abuse as an Invisible Form of Domestic Violence: A Multicountry Review*, 21 TRAUMA, VIOLENCE, & ABUSE 261, 262 (2018).

62. Marie Ericksson & Richard Ulmestig, *"It's Not All About Money": Toward a More Comprehensive Understanding of Financial Abuse in the Context of VAW*, 36 J. INTERPERSONAL VIOLENCE 1625, 1626 (2021) (arguing studies of violence against women typically minimize or fail to account for financial abuse, partly because this form of violence is "focused on sexuality and the body").

63. Conner, *supra* note 8, at 357 ("An individual whose power rests solely on physical acts of abuse and intimidation will likely have little success maintaining a lasting relationship with his intimate partner. Often, there are additional links that tie a woman to her abusive partner and draw her back again and again should she break free."); Kristy Candela, *Protecting the Invisible Victim: Incorporating Coercive Control in Domestic Violence Statutes*, 54 FAM. CT. REV. 112, 115 (2016) ("An increasing body of research suggests that coercive control may be a more accurate measure of conflict, distress, and danger to victims than the presence of physical violence.").

64. *See generally* Judy L. Postmus, Sara-Beth Plummer & Amanda M. Stylianou, *Measuring Economic Abuse in the Lives of Survivors: Revising the Scale of Economic Abuse*, 22 VIOLENCE AGAINST WOMEN 692, 693 (2016) (finding the vast majority of victims of IPV have experienced a combination of physical, psychological, and economic abuse).

65. AM. PSYCH. ASS'N, APA DICTIONARY OF PSYCHOLOGY 751 (Gary R. VandenBos ed., 1st ed. 2007) (defining psychological abuse, which references emotional abuse that "may involve verbal abuse, demeaning or shaming the victim, emotional control, or withholding of affection or financial support, or any combination of these").

66. Adrienne E. Adams, Cris M. Sullivan, Deborah Bybee & Megan R. Greeson, *Development of the Scale of Economic Abuse*, 14 VIOLENCE AGAINST WOMEN 563, 580 (2008) (describing a study in which 100% of participants had experienced psychological abuse in their abusive relationship); Postmus et al., *supra* note 61, at 701 (describing a study of 120 victims of intimate partner violence in which 95% reported experiencing psychological abuse in the preceding twelve months).

67. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered*

psychologically manipulative tactics to socially isolate victims from friends, family, and community in order to reinforce their dependence on the abuser and limit their access to an external support system.[68] Considering the significant role psychological abuse plays in cultivating dynamics of coercive control in abusive relationships, psychological elements of abuse are vastly underrepresented in IPV legislation.[69]

Through economic abuse, an abuser similarly restricts a victim's propensity for self-sufficiency by manipulating their ability to acquire and use financial capital.[70] Economic abuse is extremely common, with research suggesting its occurrence in 75% to 99% of abusive intimate relationships.[71] Like psychological abuse,

*Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 872 (1993) (suggesting emotional abuse may have a more significant impact on victims of IPV than physical abuse); Aiken & Murphy, *supra* note 49, at 46 ("Research reveals that a battered woman remains in her abusive relationship because her abuser convinces her that she cannot survive outside the relationship.").

68. Conner, *supra* note 8, at 368–69.

69. Only five states define abuse, for the purposes of a protective order, to include psychological abuse generally. MICH. COMP. LAWS SERV. § 400.1501 (West 2024) (defining abuse to include placing a victim in fear of "physical or mental harm"); N.M. STAT. ANN. § 40-13-2 (West 2019) (defining abuse to include causing "severe emotional distress"). *See infra* Part II.A.ii,(discussing four other states—California, Connecticut, Hawaii, and Massachusetts—that define abuse to include "coercive control," which involves aspects of psychological abuse). Various other states define abuse to include acts intended to harass, threaten, or intimidate as defined within the state's criminal code, precluding consideration of non-criminal aspects of psychological abuse. *See, e.g.*, ALASKA STAT. § 18.66.990 (2023); N.J. STAT. ANN. § 2C:25-19 (West 2016).

70. Adams et al., *supra* note 66, at 564 ("Economic abuse involves behaviors that control a woman's ability to acquire, use, and maintain economic resources, thus threatening her economic security and potential for self-sufficiency."); Postmus et al., *supra* note 61, at 262 (defining economic abuse as involving "behaviors that control, exploit, or sabotage an individual's economic resources including employment"); Ericksson & Ulmestig, *supra* note 62, at 1626 ("Financial abuse is one important tool in exercising power and gaining control over a partner, depriving her of financial resources to fulfill her basic needs, diminish her ability to live independently and deter her from leaving or ending the relationship."); Sundari Anitha, *Understanding Economic Abuse Through an Intersectional Lens: Financial Abuse, Control, and Exploitation of Women's Productive and Reproductive Labor*, 25 VIOLENCE AGAINST WOMEN 1854, 1855 (2019) (describing "economic abuse" as involving behaviors through which an abuser controls "a woman's ability to acquire, use and maintain financial resources" including by exploiting women's productive and reproductive labor).

71. Adams et al., *supra* note 66, at 580 (describing a study in which 99% of participants had experienced economic abuse in their abusive relationship); Postmus et al., *supra* note 61, at 701 (describing a study of 120 victims of intimate partner violence, in which 94% reported experiencing economic abuse in their relationship, 92% reported experiencing economic control, 88% reported experiencing employment sabotage, and 79% reported experiencing economic exploitation); SHARP-JEFFS, *supra* note 22, at 17 (describing studies finding financial abuse in 80% to 90% of abusive relationships); Ericksson & Ulmestig, *supra* note 62, at 1628 (finding that

economic abuse is strongly linked to other forms of IPV,[72] serving to perpetuate cyclical violence by "creat[ing] the ultimate dependent relationship" and ensuring victims who attempt to leave will lack the resources to do so safely or successfully.[73]

Abusers use a variety of tactics to strip victims of the financial resources to leave an abusive relationship. Most commonly, abusers overtly deny or limit victims' access to money by requiring victims to turn over their paychecks to the abuser,[74] blocking victims' access to joint bank accounts,[75] restricting victims to a set allowance for household spending,[76] hindering victims' receipt of public assistance,[77] or preventing victims' acquisition of real property and other meaningful assets.[78] Abusers also frequently deplete victims'

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75% of victims of physical or psychological abuse had also experienced financial abuse, indicating "a strong correlation between financial abuse and other forms of abuse in analyses of VAW"); Littwin, *supra* note 60, at 972 (quoting an attorney who estimates 95% of her domestic violence cases involve elements of financial abuse); Eva PenzeyMoog & Danielle C. Slakoff, *As Technology Evolves, So Does Domestic Violence: Modern-Day Tech Abuse and Possible Solutions*, EMERALD INT'L HANDBOOK TECH.-FACILITATED VIOLENCE & ABUSE, 643, 645 (2021) (describing a study finding 94% of victims enrolled in a financial literacy program had experienced financial abuse).

72. SHARP-JEFFS, *supra* note 22, at 8 ("[E]conomic abuse is highly correlated with other forms of intimate partner violence."); Postmus et al., *supra* note 61, at 791.

73. Conner, *supra* note 8, at 359.

74. SHARP-JEFFS, *supra* note 22, at 17 (explaining abusers deny money to victims in "more than half of all abusive relationships"); Littwin, *supra* note 60, at 982 (describing abusers often control victims' finances by "requiring the victim to turn over to the abuser any income [they receive], and putting the victim on an allowance"); Adams et al., *supra* note 66, at 566 (stating abusers "control[] how resources are distributed and . . . monitor[] how they are used"); CYNTHIA K. SANDERS, DOMESTIC VIOLENCE, ECONOMIC ABUSE, AND IMPLICATIONS OF A PROGRAM FOR BUILDING ECONOMIC RESOURCES FOR LOW-INCOME WOMEN: FINDINGS FROM INTERVIEWS WITH PARTICIPANTS IN A WOMEN'S ECONOMIC ACTION PROGRAM 31 (2007), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1183&context=csd_research [https://perma.cc/3XQG-7GZ8] (identifying the strongest theme among victims of intimate partner abuse as "lack of access, or limited access to household financial resources and conversely the often complete control of money and financial decisions by abusers").

75. Conner, *supra* note 8, at 363–65; Littwin, *supra* note 60, at 982; Adams et al., *supra* note 66, at 566.

76. Anitha, *supra* note 70, at 1856 (explaining that abusers provide an "inadequate allowance" to victims "as a control mechanism"); Littwin, *supra* note 60, at 984 (stating allowances often lead to the "two spouses in a marriage hav[ing] radically different standards of living").

77. Adams et al., *supra* note 66, at 566 (describing how abusers prevent victims from acquiring independent funds "by interfering with the receipt of other forms of support, such as child support, public assistance, disability payments, and education-based financial aid").

78. *Id.* ("[Abusers] prevent women from acquiring assets by refusing to put their names on the deeds to their houses and on the titles of their cars . . . ."); Conner,

existing financial resources, leaving them with inadequate funds to survive outside the relationship[79] and creating "coerced debt" that often sticks with victims long after abusive relationships end.[80]

Abusers seek to lower victims' financial and social capital, thereby reinforcing their dependence on the abuser and creating ties that repeatedly draw the victim back into the relationship.[81] Economic abuse destroys victims' credit,[82] making it difficult for victims to find housing, employment, or insurance if they attempt to leave their abusers.[83] Many abusers also aim to keep their victims out of the workforce completely by sabotaging their attempts to gain or maintain education or employment.[84] By preventing victims from acquiring earning power, abusers are able to exert long-term control in intimate relationships.[85]

Economic abuse is used to secure victims' continued dependence and insecurity long after an abusive relationship has ended.[86] Financial reliance on abusers is one of the primary obstacles victims face in attempting to leave abusive

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*supra* note 8, at 363 (explaining abusers often title property solely in their own name). *See* Littwin, *supra* note 60, at 1002 (noting that when abusers title property solely in their names, they prevent victims from building credit history).

79. Conner, *supra* note 8, at 365–66 ("Exploitation takes many forms: liquidating the bank accounts, charging items on the victim's credit card, and taking, damaging, or destroying the victim's property."); Adams et al., *supra* note 66, at 567 (describing a study in which 38% of victims reported their abusive partner stole money from them).

80. *See generally* Littwin, *supra* note 60, (discussing the long-term impacts of coerced debt on victims of IPV).

81. *Economic Justice Policy*, NAT'L NETWORK TO END DOMESTIC VIOLENCE, https://nnedv.org/content/economic-justice-policy/ [https://perma.cc/B52Z-9CP2] ("Even after a victim has left the abuser, the impact of ruined credit scores, sporadic employment histories, and legal issues caused by the violence may make it extremely difficult to pursue long-term economic security while staying safe.").

82. Conner, *supra* note 8, at 366. *See generally* Littwin, supra note 60 (discussing the concept of "coerced debt," whereby an abuser accumulates debt in their intimate partner's name as a means of exerting control).

83. Conner, *supra* note 8, at 366; Littwin, *supra* note 60, at 1000 (describing good credit as "an essential tool for economic survival").

84. Anitha, *supra* note 70, at 1856. *See* Adams et al., *supra* note 66, at 565 (explaining that abusers not only prevent victims from seeking education or employment, but also actively interfere with their education and employment, often through harassment at work or school); SANDERS, *supra* note 74, at 36 ("In some cases partners simply prohibited and threatened violence if women expressed a desire to work or gain further education. In other cases partners used tactics to disrupt employment or education. Tactics included initiating conflict just before women were leaving for a job interview or class, calling and harassing women at work or showing up at school or place of employment and causing a scene; in some cases causing women to lose their jobs.").

85. Conner, *supra* note 8, at 362.

86. Ericksson & Ulmestig, *supra* note 62, at 1634.

relationships.[87] Victims of IPV leave abusive relationships with limited resources, substantial debts, and few places to turn for support.[88] Victims who leave their abusers have a 50% chance of falling below the poverty line.[89] Economic abuse, and subsequent economic insecurity, is therefore one of the main reasons many victims stay in, or return to, abusive relationships.[90]

Victims who stay in, or return to, abusive relationships do so not just out of love, fidelity, or irrationality, but because their self-sufficiency has been constrained through a process of coercive control.[91] Thus, while protective orders can be a potent remedy to IPV,[92] they will remain ineffective at breaking the cycles of power and control that dominate abusive relationships—and thus fail to protect victims of IPV from future harm—unless they are reimagined to account for, and provide relief from, psychological and economic abuse.

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87. Adams et al., *supra* note 66, at 568 ("[L]ow-income women with abusive partners report a lack of resources needed for day-to-day survival, such as money, housing, child care, and transportation.").

88. Conner, *supra* note 8, at 391 ("[T]here is much to suggest that poverty is not the cause of intimate partner violence nor does its presence alone indicate that intimate partner violence is to be expected in a particular relationship. Instead, it is the batterer's ability to restrict his victim's access to financial and social capital that places her at a greater risk of experiencing poverty at the time of separation."); SHARP-JEFFS, *supra* note 22, at 15 ("After leaving, women may lose their possessions, have no assets in their name and may face immediate homelessness. If their financial standing has also been destroyed by an abusive ex-partner, then it will be particularly difficult to access credit and mainstream financial services that would help enable them to become self-sufficient.").

89. Njeri M. Rutledge, *Looking a Gift Horse in the Mouth—The Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims*, 19 DUKE J. GENDER L. & POL'Y 223, 228 (2011); Conner, *supra* note 8, at 390; United States v. Morrison, 529 U.S. 598, 631 (2000) (Souter, J., dissenting) (quoting S. REP. NO. 101-545, at 37) ("As many as 50 percent of homeless women and children are fleeing domestic violence.").

90. Conner, *supra* note 8, at 340 ("[F]inancial instability is one of the greatest reasons why, after gaining freedom, a woman who experiences battering has limited choices and may ultimately acquiesce to her partner's attempts to reconcile.").

91. *See* Goldfarb, *supra* note 8, at 1498 ("The cumulative effect of these reforms was a transformation of legal policy from the assumption that battered [women] should stay to the assumption that they should leave."); *see also* Zlotnick, *supra* note 4, at 1186 (arguing the prevalence of separation assault indicates that "serious domestic violence is frequently the result of leaving, not the failure to leave" and therefore "explodes the myth that battered women are passive creatures who share the blame for their plight because they knowingly elect to remain in the path of violence").

92. Many victims of IPV report satisfaction with protective orders despite high rates of recidivism. Scholars reconcile this by attributing victim satisfaction largely to the act of seeking a protective order, which is an exercise in self-determination and autonomy. *See* Ko, *supra* note 3, at 371; Goldfarb, *supra* note 8, at 1514–15; *see also* Aiken & Murphy, *supra* note 49, at 44.

## II. Analysis

The criminalization of protective orders has hampered their effectiveness as a response to IPV, not only because victims are hesitant or unwilling to engage with the criminal justice system,[93] but because criminal protective orders are unfit to address the non-criminal aspects of abuse, such as economic abuse. An effective protective order must be accessible to victims of IPV and responsive to the factors that create and perpetuate IPV. To do the former, victims must be able to access protective orders by alleging physical, sexual, psychological, or economic abuse; Subpart II.A thus argues statutory definitions of abuse must be expanded to align with the realities of coercive control. To do the latter, protective orders must provide victims with a wide variety of remedies, beyond arrest, to counteract cyclical violence. Subpart II.B thus advocates for a dual framework of civil and criminal protective orders for victims of IPV.

### *A. Improving Access to Protective Orders with Expansive Definitions of Abuse*

Many victims of IPV do not qualify for protective orders under a criminalized framework.[94] To qualify for a protective order, a victim must allege abuse as defined under an applicable state statute.[95] While states vary significantly in their definitions of abuse, the vast majority of states adopt a definition of abuse that is limited to physical violence, sexual violence, and various other enumerated criminal acts.[96] Only six states define abuse to include forms of non-criminal behavior.[97] This trend of narrow, crime-

93. *See supra* Part I.B. (discussing the varied reasons victims avoid seeking help from the criminal justice system when attempting to secure safety from IPV).

94. Candela, *supra* note 63, at 112 ("[T]he definition of abuse under these statutes is crucial, as it determines who qualifies as a victim of abuse and as a result is afforded legal protection.").

95. *Id.*

96. Ten states define abuse extremely narrowly to include only physical violence, sexual violence, or threats or fear thereof. *See* ARK. CODE ANN. § 9-15-103 (2023); DEL. CODE ANN. tit. 13 § 703A (2023); IOWA CODE § 236.2 (2023); KAN. STAT. ANN. § 60-3102 (2017); § 1; NEB. REV. STAT. ANN. § 42-903 (LexisNexis 2023); N.C. GEN. STAT. § 50B-1 (2023); OHIO REV. CODE ANN. § 2919.25 (LexisNexis 2019); S.C. CODE ANN. § 20-4-20 (2023); TEX. FAM. CODE ANN. § 71.0021(West 2023) (adopting a limited definition of abuse for the purposes of "dating violence"); WYO. STAT. ANN. § 35-21-102 (2024). In other states, the criminal acts commonly included in statutory definitions of abuse include harassment, stalking, kidnapping, and trespass. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3601 (2024); KY. REV. STAT. ANN. § 403.720 (LexisNexis 2023); MINN. STAT. ANN. § 518B.01(West 2024).

97. Four states define abuse to include "coercive control." CAL. FAM. CODE § 6320 (Deering 2024); CONN. GEN. STAT. § 46b-1 (2024); HAW. REV. STAT. § 586-1 (2024); MASS. ANN. LAWS ch. 209A, § 1 (2024). Notably, New York and Washington have also

centric definitions of abuse is largely attributable to the criminalization of protective orders.[98] Because the default law enforcement response to a protective order violation is mandatory arrest for a criminal misdemeanor,[99] states generally adopt

recently promulgated statutes establishing initiatives to investigate the impact of coercive control on victims of IPV. N.Y. EXEC. LAW § 576 (LexisNexis 2024); WASH. REV. CODE ANN. § 7.105.903 (LexisNexis 2024). Tennessee defines abuse to include "behavior that amounts to financial abuse." TENN. CODE ANN. § 36-3-601(D) (2024). Michigan and New Mexico define abuse to include elements of psychological abuse. *See supra* text accompanying note 69.

98. *See supra* Part I.A.

99. In forty-three U.S. states, the penalty for an initial protective order violation is a criminal charge punishable by a term of incarceration, a fine, or both. Forty-one states classify a protective order violation as a misdemeanor offense. ALA. CODE § 13A-6-142(b) (2024); ALASKA STAT. § 11.56.740(b) (2024); ARIZ. REV. STAT. § 13-3602(m) (2024) (indicating that disobeying an order of protection constitutes interfering with judicial proceedings); ARIZ. REV. STAT. § 13-2810(b) (declaring interfering with judicial proceedings a class one misdemeanor); ARK. CODE ANN. § 5-53-134(b) (2024); CAL. PENAL CODE § 273.6(a) (Deering 2024); COLO. REV. STAT. § 18-6-803.5(2)(a) (2024); DEL. CODE ANN. tit. 11, § 1271A(b) (2024); FLA. STAT. ANN. § 784.047(1) (2024); GA. CODE ANN. § 16-5-95(c) (2024); HAW. REV. STAT. ANN. § 586-11(a) (2024); IDAHO CODE § 39-6312(1) (2024); 720 ILL. COMP. STAT. ANN. 5/12-3.4(d) (2024); IND. CODE ANN. § 35-46-1-15.1(a) (2024); KAN. STAT. ANN. § 21-5924(b)(1) (2024); KY. REV. STAT. § 403.763(4)(b) (2024); LA. REV. STAT. ANN. § 14:79(b) (2024) ("[T]he offender shall be fined not more than five hundred dollars or imprisoned for not more than six months, or both."); LA. REV. STAT. ANN. § 14:2(a)(6) (2024) (defining a misdemeanor offense as "any crime other than a felony"); ME. REV. STAT. tit. 17-A, § 506-B(1) (2024) (classifying a protective order violation a Class D crime); ME. REV. STAT. tit. 17-A, § 1604(1)(d) (setting the maximum term of imprisonment for a Class D crime at one year); MD. CODE ANN. FAM. LAW § 4-509(b) (2024); MASS. ANN. LAWS ch. 209A, § 7 (2024) ("Any violation of . . . [a protection order issued in Massachusetts or another jurisdiction] shall be punishable by a fine of not more than five thousand dollars, or by imprisonment for not more than two and one-half years in a house of correction, or by both such fine and imprisonment."); MASS. ANN. LAWS ch. 274, § 1 (2024) (defining a misdemeanor as any non-felony offense); MINN. STAT. § 518B.01 Subd. 14(b) (2024); MISS. CODE ANN. § 93-21-21(1) (2024); MO. REV. STAT. § 455.085(7) (2024); MONT. CODE ANN. § 45-5-626(3) (2023) ("An offender convicted of violation of an order of protection shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both, for a first offense."); MONT. CODE ANN. § 45-2-101(42) (2023) (defining a misdemeanor as an offense carrying a prison sentence in a state prison for a term of one year or less); NEB. REV. STAT. ANN. § 42-924(4) (2024); NEV. REV. STAT. ANN. § 33.100 (2024); N.H. REV. STAT. ANN. § 173-B:9(III) (2024); N.J. STAT. § 2C:29-9(a)(1) (2024); N.M. STAT. ANN. § 40-13-6 (2024); N.C. GEN. STAT. § 50B-4.1(a) (2024); N.D. CENT. CODE § 14-07.1-06 (2023); OHIO REV. CODE ANN. § 2919.27(b)(2) (LexisNexis 2024); OKLA. STAT. TIT. 22, § 60.6(a)(1) (2024); R.I. GEN. LAWS § 15-15-3(n)(1) (2024); S.C. CODE ANN. § 16-25-20(h) (2024); S.D. CODIFIED LAWS § 25-10-13 (2024); TEX. PENAL CODE § 25.07(g) (2023); UTAH CODE ANN. § 76-5-108(3) (2024); VT. STAT. ANN. tit. 13, § 1030(a) (2024) ("A person who intentionally commits an act prohibited by a court or who fails to perform an act ordered by a court, in violation of an abuse prevention order . . . shall be imprisoned not more than one year or fined not more than $5,000.00, or both."); VT. STAT. ANN. tit. 13, § 1 (defining a misdemeanor as any offense that carries a maximum term of imprisonment of less than two years); VA. CODE ANN. § 18.2-60.4 (2024); WASH. REV. CODE ANN. § 7.105.450(1)(a) (2024); W. VA. CODE § 48-27-903(a) (2024); WIS. STAT. § 813.12(8) (2024) ("Whoever knowingly violates a temporary

restrictive definitions of abuse that, while congruent with a criminal misdemeanor remedy, are completely divorced from the realities of coercive control.

i. The Benefits of an Expansive Definition of Abuse

Expansive statutory definitions of abuse that allow victims to qualify for protective orders on the basis of physical, sexual, psychological, or economic abuse would enable many more victims of IPV to access protective orders and related social services. The current restrictive, crime-centric definitions of abuse adopted in many states inhibit many at-risk victims of IPV from obtaining protection: for example, victims who lack sufficient evidence of physical or sexual violence to bring a viable claim,[100] victims who are unwilling to accuse their abuser of criminal behavior for personal or practical reasons,[101] or victims experiencing coercive

restraining order or injunction issued under sub. (3) or (4) shall be fined not more than $10,000 or imprisoned for not more than 9 months or both."); WIS. STAT. § 939.51(3)(a) (2024) (attaching to a Class A misdemeanor a fine not to exceed $10,000 or a prison term not to exceed 9 months, or both); WYO. STAT. § 6-4-404(a) (2024). In Connecticut, a protective order violation is a Class D or C felony. CONN. GEN. STAT. § 53a-223b (2024). The remaining seven states, including the District of Columbia, address initial protective order violations through contempt proceedings. D.C. CODE § 16-1005(f)(1) (2024) (indicating that a criminal contempt charge carries a fine, imprisonment for not more than 180 days, or both); IOWA CODE § 664A.7(1) (2024) (indicating that a protective order violation triggers summary contempt proceedings that involve the defendant being confined in county jail for a minimum of seven days); MICH. COMP. LAWS SERV. § 600.2950(11)(a)(i) (2024) (indicating an individual who violates a personal protective order will be subjected to "immediate arrest and the civil and criminal contempt powers of the court and, if he or she is found guilty of criminal contempt, imprisonment for not more than 93 days and a fine of not more than $500.00"); N.Y. FAM. CT. ACT § 846-a (2024) (penalizing a protective order violation with a criminal contempt charge, for which the court "may commit the respondent to jail for a term not to exceed six months"); OR. REV. STAT. ANN. § 107.720(4) (indicating that an individual who allegedly violates a restraining order will be arrested pending a contempt hearing); 23 PA. CONS. STAT. ANN. § 6114(b)(1) (2024) (penalizing a protective order violation with a criminal contempt charge, the sentence for which may include "a fine of not less than $300 nor more than $1,000 and imprisonment up to six months; or . . . a fine of not less than $300 nor more than $1,000 and supervised probation not to exceed six months"); TENN. CODE ANN. § 36-3-610(a) (2024) ("Upon violation of the order of protection . . . the court may hold the defendant in civil or criminal contempt and punish the defendant in accordance with the law.").

100. *See generally* Aiken & Murphy, *supra* note 49 (arguing that traditional rules of evidence create barriers to relief for victims of intimate partner violence because victims are rarely able to provide sufficient, admissible evidence of abuse).

101. *See supra* Parts I.B–C (arguing that traditional rules of evidence create barriers to relief for victims of intimate partner violence because victims are rarely able to provide sufficient, admissible evidence of abuse).

control that has not yet escalated to the level of physical or sexual violence.[102]

Defining abuse broadly also serves to empower victims of IPV. Expansive definitions of abuse will enable courts to issue comprehensive, flexible protective orders that recognize, and admonish, all forms of abuse that may manifest in an intimate relationship, regardless of whether the abuse constitutes criminal conduct.[103] Comprehensive orders provide victims an opportunity to declare what will and will not be tolerated within their relationship, and places "the force of law behind the individual [victim's] choices."[104] In particular, victims would benefit from access to protective orders that allow them to qualify for relief upon alleging psychological or economic abuse, rather than conditioning state protection on the occurrence or threat of violence.

ii. Expansive Definitions of Abuse in Practice

Legislation and scholarship have been slow to develop understandings of the role coercive control plays in intimate partner violence.[105] Only five states have amended their statutory definitions of abuse to include economic aspects of coercive control.[106] In 2020, Hawaii became the first state to explicitly

102. When victims must show physical or sexual abuse to qualify for a protective order, protective orders are confined to taking a reactive, rather than a proactive, response to IPV, because victims must wait until they have experienced sufficiently serious physical or sexual violence before they can approach the state for help. This process necessarily subjects victims to harm before providing them assistance. *See* SANDERS, *supra* note 74, at 35 (explaining conflicts often begin with financial issues and escalate into other physical, sexual, or psychological forms of abuse); Ericksson & Ulmestig, *supra* note 62, at 1628 (indicating financial issues are often "an impetus" to other forms of abuse in intimate relationships).

103. Goldfarb, *supra* note 8, at 1507 (footnotes omitted) ("[S]ome judges do not take advantage of the opportunity to customize the order by spelling out the relief granted in detail, and instead rely on the general provisions in the standard form. This lack of individualization and specificity impairs the order's effectiveness."). *See* Edward W. Gondolf, Joyce McWilliams, Barbara Hart & Jane Stuehling, *Court Response to Petitions for Civil Protection Orders*, 9 J. INTERPERSONAL VIOLENCE 503, 513 (1994).

104. Goldfarb, *supra* note 8, at 1490 ("By customizing each order to express the victim's preferences for how much and what kinds of contact should be allowed, these orders can put the force of law behind the individual woman's choices.").

105. Anitha, *supra* note 70, at 1854 ("Compared with other forms of domestic violence such as physical, sexual, and emotional abuse and coercive and controlling behaviors, there is comparatively little—though growing—scholarship on economic aspects of abuse.").

106. CAL. FAM. CODE § 6320 (Deering 2024); CONN. GEN. STAT. § 46b-1 (2024); HAW. REV. STAT. § 586-1 (2024); TENN. CODE ANN. § 36-3-601 (2024). In some other states, abuse is defined to include specific acts that are characteristic of coercive control or economic abuse. *See* 750 ILL. COMP. STAT. ANN. 60/103 (2024) (defining

identify "coercive control" as an aspect of abuse enjoinable by a protective order.[107] Similar amendments were passed in California and Connecticut in 2021 and in Massachusetts in 2024.[108] Tennessee added "financial abuse" to its definition of abuse in 2023.[109] Because these amendments are relatively new and have generated little applicable case law, it is difficult to discern the impact an expansive definition of abuse will have on the accessibility and efficacy of protective orders. However, the available data suggests a definitional expansion, without additional changes to the protective order framework, is insufficient to address the IPV problem.

The sole reported protective order case in Hawaii involving a coercive control allegation was vacated and remanded on procedural grounds, with the appellate court finding the petitioner's allegations of coercive control not credible.[110] In Connecticut, allegations of coercive control, and in particular financial control, have been used as a basis for the irretrievable breakdown of the marital relationship in at least two divorce cases.[111] In Tennessee, the 2023 legislative amendment has yet to generate any applicable case law.[112]

California courts have generated considerably more case law on the subject of coercive control. Although California only explicitly amended its definition of abuse to include the phrase "coercive

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abuse to include "interference with personal liberty or willful deprivation"); N.J. REV. STAT. §§ 2C:25-19, 2C:13-5(a)(7) (2024) (defining abuse to include "criminal coercion" which, as defined, includes aspects of coercive control); N.M. STAT. ANN. § 40-13-2 (2024) (defining abuse to include "repeatedly driving by residence or workplace"); N.Y. SOC. SERV. LAW § 459-a (LexisNexis 2024) (defining abuse to include "identity theft, grand larceny or coercion"); UTAH CODE ANN. § 77-36-1 (LexisNexis 2024) (defining abuse to include "robbery"). Various states define abuse to include aspects of property damage, which can fall under the ambit of economic abuse or coercive control. *See, e.g.,* ARIZ. REV. STAT. ANN. § 13-3601 (2024) (defining abuse to include "criminal damage"); 12 R.I. GEN. LAWS § 12-29-2 (2024); WIS. STAT. ANN. § 813.12 (2024).

107. HAW. REV. STAT. § 586-1 (2024).

108. CAL. FAM. CODE § 6320 (Deering 2024); CONN. GEN. STAT. § 46b-1 (2024); MASS. ANN. LAWS ch. 209A, § 1 (2024).

109. TENN. CODE ANN. § 36-3-601 (2024).

110. K.T. v. K.H., 539 P.3d 945 (Haw. Ct. App. 2023), *reconsideration denied*, No. CAAP-22-0000128, 2024 WL 75506 (Haw. Ct. App. Jan. 8, 2024).

111. Guimaraes v. Graziano, No. HHD-FA21-5070460-S, 2023 WL 7637452, at *6–7 (Conn. Super. Ct. Apr. 26, 2023), *Reconsideration denied sub. nom.* No. HHD-FA21-5070460-S, 2024 WL 3158496 (Conn. Super. Ct. June 18, 2024); Beatman v. Beatman, No. FST-FA-21-6051356-S, 2023 WL 8889726, at *9, *16 (Conn. Super. Ct. Dec. 21, 2023), *motion to reopen granted*, No. FST-FA-21-6051356-S, 2025 WL 251742 (Conn. Super. Ct. Jan. 16, 2025).

112. H.B. 0944, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023); *see* TENN. CODE ANN. § 36-3-601 (2024).

control" in 2021, its definition has been relatively expansive since 1998, when it was amended to include, among other things, behavior "disturbing the peace of the other party" (a phrase which the California legislature has since defined to encompass coercive control).[113] Because the amendment did not initially define behavior "disturbing the peace of the other party," California courts applied practical guidance[114] and tools of statutory construction[115] to ascertain whether a victim's allegations of abuse fell within its framework. This resulted in inconsistent judicial treatment of protective order applications, as many judges remained unwilling to grant protective orders on the basis of non-criminal allegations of violence, even if these allegations disturbed the peace of the victim.[116]

In 2009 the California Supreme Court clarified the issue by holding, consistent with many lower court conclusions, that behavior "disturbing the peace of the other party" necessarily encompasses non-physical or sexual acts of abuse.[117] The California legislature reified this move in 2015 by amending its statutory definition of abuse to emphasize that abuse need not be physical or sexual.[118] Despite this clarification, courts in California continued to treat protective order applications inconsistently, so in 2021 the California legislature again amended its statutory definition of abuse, this time emphasizing that "disturbing the peace of the other party" may include non-criminal acts:

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113. CAL. FAM. CODE § 6320(a) (Deering 1998) (amended 2021) ("The court may issue an ex parte order enjoining a party from contacting, molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, contacting repeatedly by mail with the intent to annoy or harass, or disturbing the peace of the other party . . . ."). Notably, CAL. FAM. CODE § 6230 was first promulgated in 1993 using the "disturbing the peace" language, but this language was not made relevant to the CAL. FAM. CODE § 6203 definition of abuse for the purposes of a protective order until 1998, when CAL. FAM. CODE § 6203 was amended to include Subpart (d), which refers directly to CAL. FAM. CODE § 6320.

114. Conness v. Satram, 18 Cal. Rptr. 3d 577, 580 (Cal. Ct. App. 2004) (looking to practical guidance to interpret the phrase "disturbing the peace of the other party" and concluding this phrase indicates "the requisite abuse need not be actual infliction of physical injury or assault" for the purposes of a protective order).

115. Cofield v. Brown, No. A123113, 2009 WL 2106127, at *10–11 (Cal. Ct. App. July 17, 2009) (relying on methods of statutory interpretation, including dictionary definitions, to interpret the phrase "disturbing the peace of the other party").

116. *See, e.g., In re* Marriage of Santos, No. A109899, 2006 WL 172534 (Cal. Ct. App. Jan. 24, 2006) (affirming the denial of a protective order despite allegations of threats); Nakamura v. Parker, 67 Cal. Rptr. 3d 286 (Cal. Ct. App. 2007) (reversing the denial of a protective order on account of allegations of stalking).

117. *In re* Marriage of Nadkarni, 93 Cal. Rptr. 3d 723, 732 (Cal. Ct. App. 2009).

118. The 2014 amendment, which became effective January 1, 2015, added to the definition of abuse: "Abuse is not limited to the actual infliction of physical injury or assault." Act of Sept. 26, 2014, ch. 635, 2014 Cal. A.B. 2089.

> "Disturbing the peace of the other party" refers to conduct that, based on the totality of the circumstances, destroys the mental or emotional calm of the other party . . . . This conduct includes, but is not limited to, coercive control, which is a pattern of behavior that in purpose or effect unreasonably interferes with a person's free will and personal liberty.[119]

The amendment provides a non-exhaustive list of examples of coercive control—including social isolation, control over the victim's daily behavior, deprivation of basic necessities, and control over the victim's access to financial and government resources[120]—to assist courts in recognizing when aspects of psychological and economic abuse are present in a given case.[121]

Despite this clear statutory language, lower courts in California are still struggling to apply the framework of coercive control to protective order applications. Since the 2021 amendment, California appellate courts have already overturned numerous lower court decisions for abuse of discretion, reversing orders denying protective order requests to plaintiffs whose descriptions of abuse fall clearly within California's statutory definition of coercive control—and therefore under California's statutory definition of abuse.[122] In one notable case, *Hatley v. Southard*, a lower court judge told a plaintiff her claim "does not rise to meeting the definition of domestic violence or abuse" despite the plaintiff having made, as noted on appeal, "allegations of a pattern of control and isolation by limiting her access to money, communication, and transportation" that constituted abuse as defined by California statute.[123] In another, *Vinson v. Kinsey*, a lower court denied a victim's request for a protective order for herself and her three children, despite her allegations that her abuser repeatedly stalked

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119. CAL. FAM. CODE § 6320 (Deering 2022).

120. CAL. FAM. CODE § 6320(c) (Deering 2022).

121. S.R. COMM., UNFINISHED BUSINESS S.B. 1141, at 6 (Cal. 2020) ("This bill sets forth a non-exhaustive list of examples of coercive control that should help courts recognize coercive control when hearing these cases and in no way limit what a court may consider coercive control to just these instances. Finally, this bill specifically states that it does not limit any remedies available under the DVPA or any other provision of law. This provision ensures that this bill builds on existing law and is not, in any way, meant to reduce the protections available under existing law to victims of domestic violence.").

122. *See, e.g.,* Hatley v. Southard, 312 Cal. Rptr. 3d 370 (Cal. Ct. App. 2023); Vinson v. Kinsey, 311 Cal. Rptr. 3d 628 (Cal. Ct. App. 2023); Jan F. v. Natalie F., 314 Cal. Rptr. 3d 369 (Cal. Ct. App. 2023); *In re* Marriage of F.M. & M.M., 279 Cal.Rptr.3d 522 (Cal. Ct. App. 2021). *But see* Parris J. v. Christopher U., 314 Cal. Rptr. 3d 225 (Cal. Ct. App. 2023); R.C. v. I.K., No. C096596, 2023 WL 8481987 (Cal. Ct. App. Dec. 7, 2023); Sophy v. Voss, No. B323691, 2023 WL 9015196 (Cal. Ct. App. Dec. 29, 2023).

123. *Hatley*, 312 Cal. Rptr. 3d at 379 ("I understand that you're upset, Ms. Hatley, but what you're telling me does not rise to meeting the definition of domestic violence or abuse.").

her and threatened to kill her, reasoning that the victim's continued contact with her abuser suggested she was "not particularly concerned" or threatened by her abuser's actions and therefore had not been abused.[124]

Early data from these four states, and particularly from California, suggest solely expanding the definition of abuse will not improve outcomes for victims of IPV. Many of the abusive tactics that fall under the umbrella of coercive control are not acts that courts, or the public, deem fit for criminal action.[125] Thus, while expansive definitions of abuse better reflect the realities of IPV, they are at odds with and untenable under the criminalized protective order framework.

### *B. Aligning the IPV Response with the Realities of Coercive Control: Reinvigorating the Civil Protective Order*

Expansive definitions of abuse make protective orders more accessible to victims in theory, but the criminal consequences associated with protective order violations make them inaccessible to many victims in practice. Victims of abuse are generally averse to seeking criminalized protective orders for various reasons.[126] Arrest is also generally ineffective at breaking the cycle of power and control that persists in abusive relationships.[127] Efforts to improve the efficacy of protective orders—such as by expanding statutory definitions of abuse—are therefore unlikely to succeed until protective orders are decoupled from the arrest remedy. It is imperative that victims of IPV be able to access civil as well as criminal protective orders, and civil as well as criminal relief, for protective orders to provide a comprehensive, long-term solution to IPV.

While civil protective orders have waned in popularity in recent years on account of the criminalization of IPV,[128] many states still authorize courts to issue them to victims of IPV.[129] Civil orders,

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124. *Vinson*, 311 Cal. Rptr. 3d at 635.

125. Efforts to expand the reach of protective orders to non-criminal aspects of IPV are often criticized for enabling the use of protective orders for pretextual purposes. *See* Suk, *supra* note 10, at 18–21.

126. *See supra* Part I.B. The unwillingness of victims of abuse to engage with the criminal system is not unique to the context of IPV. One of the primary difficulties in enforcing elder abuse legislation is the unwillingness of victims to report their abusers, who are often friends or family members, on account of criminalization. *See, e.g.,* Jackson & Hafemeister, *supra* note 24; Kohn, *supra* note 38.

127. *See supra* Part I.B.

128. *See supra* Part I.A.

129. Suk, *supra* note 10, at 15–16; Zlotnick, *supra* note 4, at 1189.

which are enforced by victims through contempt proceedings, provide a valuable mechanism for courts to restore agency to victims[130] and enjoin non-criminal acts of coercive control.[131] Civil protective orders are a vastly underutilized remedy that, if made readily available, would empower victims to access protective orders and receive comprehensive relief.

i. Improving Access to Protective Orders Through the Civil Framework

For many victims of IPV, civil protective orders are an attractive alternative to the criminal process because they offer an increased degree of agency.[132] Unlike criminal protective orders, which are often issued against victims' wishes,[133] civil protective orders are exclusively sought by victims and are therefore more likely to reflect victims' choices.[134] Further, civil protective orders are enforced by victims through contempt sanctions,[135] vesting victims with the agency to respond to protective order violations on their own terms, and placing the power of the court behind victims' actions.[136] Because civil protective orders allow victims to decide if and when their abuser should be penalized for continued abuse in violation of the order, they are a more effective remedy for many victims who—knowing their abusers better than law enforcement, prosecutors, or judges—are in a far better position to dictate productive paths to increasing their safety.[137]

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130. Zlotnick, *supra* note 4, at 1154, 1198.

131. *See supra* Part I.B. (suggesting criminal protective orders are unfit to enjoin non-criminal acts of abuse such as psychological and economic abuse).

132. Stoever, *supra* note 23, at 320 ("[A] civil protection order case is a survivor's own case, not the government's. The survivor defines the nature of the problem and chooses when to bring the case, which events to allege, and what relief to pursue in an attempt to meet her particular safety needs.").

133. Protective orders can be sought by a victim themselves, or by a prosecutor on behalf of a victim who was involved in a domestic incident. An undesired law enforcement response to a domestic dispute can therefore lead to the issuance of a protective order to a victim who never intended to seek one. *See* Suk, *supra* note 10, at 59.

134. Goldfarb, *supra* note 8, at 1546; Candela, *supra* note 63, at 116.

135. Jurisdictions differ procedurally as to whether victims may personally file contempt motions to notify the court of abuse in violation of the protective order, or whether the victim must notify the prosecutor, who files the motion on the victim's behalf. Regardless, the victim remains more involved in the process of enforcing the civil protective order, when compared with the enforcement of criminal protective orders. *See* Zlotnick, *supra* note 4, at 1197–98.

136. Stoever, *supra* note 23, at 321. *See generally* Zlotnick, *supra* note 4 (highlighting the importance of allowing victims to exercise autonomy through civil protective orders).

137. Goldfarb, *supra* note 8, at 1503 ("[E]mpowerment through decision-making

The availability of a civil protective option, enforced by contempt sanctions, will also improve the efficacy of protective orders in multiple ways. When a victim knows that reporting their abuser's violation of a protective order will not immediately lead to their abuser's arrest or incarceration, they may be more willing to seek a protective order in the first place, and once they have obtained the order, more willing to disclose, and enlist the court's help in addressing violations of the order.[138] The availability of civil protective orders is thus likely to improve the overall accessibility of protective order to victims of IPV.

Contempt sanctions may also be more effective than arrest at deterring further abuse in intimate relationships. Where the criminal prosecution of a protective order violation is a drawn-out process, contempt hearings are typically expedited, offering necessary resolution and continued safety to victims.[139] Compared to the slow criminal process, the expedited contempt process may have a greater deterrent effect on abusers because "deterrence is generally more potent when a quick punishment follows an infraction."[140] The contempt sanction, while less severe than arrest, is therefore an ideal initial response to a protective order violation because its decisiveness makes it a more reliable mechanism for victims to access security in the face of continued abuse.[141]

A dual protective order framework, through which victims can elect to pursue either civil or criminal protective orders, will empower victims to regain control in their intimate relationships in ways that make sense for them and their families.[142] This will be particularly true if a dual protective order framework is coupled with an expansion of statutory definitions of abuse to encompass coercive control. While civil protective orders may not be a proper

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is an important step in women's psychological recovery from the effects of domestic violence . . . . Although forcing every victim to make a clean break with her abuser might seem neater, safer, or easier, the complex realities of women's lives demand a more nuanced response.").

138. *See supra* Part I.B.

139. Zlotnick, *supra* note 4, at 1154, 1210.

140. *Id.* at 1201–02 ("A directive from a family court judge that he or she will lock up the batterer for contempt, which is then followed by a contempt hearing before the same judge, is therefore more effective than the general threat of criminal prosecution—especially since many batterers do not regard their behavior as criminal.").

141. *Id.* at 1214 (footnote omitted) ("[C]ontempt should be the preferred initial remedy because it can be faster and it offers a better chance of some sobering jail time before a sufficiently violent act yields the rare pretrial detention.").

142. *Id.* at 1198 (arguing that providing a contempt option above and beyond an arrest response "increases the flexibility of a battered woman's available remedies" and "[t]he very experience of having a choice can itself be empowering").

response in all cases of IPV—for example, when law enforcement responds to a domestic incident involving serious physical violence[143]—they can fill a gaping hole in the contemporary legal response to IPV. Civil orders create a mechanism through which various non-criminal forms of IPV, such as psychological and economic abuse, can be enjoined.[144] Civil orders also offer an alternative form of support to victims of IPV who require state assistance to regain safety but are unable or unwilling to seek a criminal protective order against their abuser.[145] Allowing victims to choose between a civil and a criminal protective order could therefore "encourage more [victims] to come into contact with the legal system, and to do so sooner."[146]

### ii. Offering Comprehensive Relief to Victims of IPV Through the Civil Framework

The civil protective order can provide victims of IPV "relief well beyond the limitations of our criminal justice system."[147] Many states already authorize courts to grant various forms of social and economic relief in conjunction with both civil and criminal protective orders, but judges rarely issue orders offering auxiliary relief to victims, perhaps on account of the criminalized focus of domestic violence proceedings.[148] Instead, most victims receive little to no state assistance to recover from their experience of abuse, aside from the temporary arrest and potential incarceration of their

143. *Id.* at 1214–15 ("For the most hard-core violent batterer, severe criminal penalties will still be the only solution . . . . On the other hand, in cases involving purely technical violations of specific provisions of a protection order such as a stay-away clause, criminal contempt sanctions alone should generally be sufficient and will offer the best chance for incarceration, if necessary."); *see also* Suk, *supra* note 10, at 70 (suggesting state-imposed de facto divorce may still be an appropriate response to some cases of intimate partner violence that involve "serious physical injury").

144. Gondolf et al., *supra* note 103, at 513–14; Candela, *supra* note 63, at 112.

145. For example, civil protective orders can include "no abuse" provisions that allow the victim and abuser to maintain contact and even a shared residence, while explicitly prohibiting the abuser from continuing to abuse the victim, whether by physical, sexual, psychological, or economic means. No abuse orders offer an appealing alternative to the stay-away order by setting clear, non-criminalized boundaries in the relationship that can be enforced through contempt proceedings. For an in-depth discussion of the promise of no abuse orders, as compared to stay-away orders, *see* Goldfarb, *supra* note 8, at 1523–50.

146. *Id.* at 1523.

147. Conner, *supra* note 8, at 373.

148. Stoever, *supra* note 23, at 320–21, 363–64. *See generally* Gondolf et al., *supra* note 103 (explaining that judges can, but rarely do, grant auxiliary relief to victims of domestic violence).

abuser,[149] because the criminalized framework is ill-equipped to recognize and respond to the non-criminal psychological and economic challenges victims face when attempting to leave, or obtain safety within, an abusive intimate relationship.[150]

A dual civil and criminal protective order framework will improve victims' access to non-carceral remedies to IPV, such as social and economic forms of relief, that can directly improve their independence.[151] Reinvigorating the use of the civil protection order will therefore pave the way for courts to offer more comprehensive, flexible, and individualized protective orders, and to grant remedies in conjunction with these orders that respond to the practical constraints that allow cycles of IPV to perpetuate.[152] Because economic insecurity so often prevents victims from leaving abusive relationships, providing financial support to victims is key to an effective legal response to IPV.[153] Financial support granted to victims through protective orders may include rent or food assistance,[154] transitional housing,[155] child support and

149. Stoever, *supra* note 23, at 320–21; Goldfarb, *supra* note 8, at 1507.

150. Cahn, *supra* note 13, at 828–29 ("Because criminalization does not address the emotional or financial obstacles faced by battered women, criminalization alone is insufficient . . . . [T]he criminal justice system must work with, must provide support to, and must be supported by a civil remedial system that pays attention to the needs of both victims and perpetrators.").

151. Conner, *supra* note 8, at 341 ("[A]s long as she remains financially dependent upon her abuser it is exceedingly difficult for a woman who experiences intimate partner violence to put a stop to the batterer's control over her . . . . [W]ithout ensuring that a survivor of domestic violence has food security, housing stability, healthcare, childcare, adequate transportation, as well as reasonable assurances of continuing resources or a guarantee of enforcement of any court ordered relief, a batterer will continue to maintain his power to abuse and control.").

152. Gondolf et al., *supra* note 103, at 514 ("While protection orders appear to be readily attainable, provisions that might make orders more practical and more effective are less likely to be granted. The progress in legislative reform to strengthen the protection order statutes, and in court reform to improve access to relief, need to be matched by legislative and judicial efforts to expand the relief granted to abused women and their children, especially in the form of financial support and restricted child visitation. More comprehensive protection orders are likely to contribute to meeting the overall objective of enhancing the safety and autonomy of abused women."); Goldfarb, *supra* note 8, at 1507; Stoever, *supra* note 23, at 353–54.

153. *Economic Justice Policy*, *supra* note 81 ("Many victims remain in abusive relationships or unsafe situations because they cannot afford to leave. When victims do flee, many do so without any financial resources. Addressing the basic financial needs and rights of survivors and their children significantly improve survivors' ability to find safety, while building long-term security for themselves and their children."); Stoever, *supra* note 23, at 370 ("[E]conomic dependence is the greatest predictor of a survivor's inability to end an abusive relationship . . . ."); *see* Ko, *supra* note 3, at 386; Conner, *supra* note 8, at 370.

154. Ko, *supra* note 3, at 386; Conner, *supra* note 8, at 375.

155. Rutledge, *supra* note 89, at 227 ("Violence tends to increase when a victim separates herself from her abuser; consequently, one of her first and most crucial

childcare,[156] education and employment assistance,[157] or compensation for a victim's court costs or medical expenses resulting from the abuse.[158] As more states expand their statutory definitions of abuse to encompass aspects of coercive control, they may also consider creating additional statutory remedies to help victims obtain financial independence.[159]

Decoupling the protective order regime from the carceral system will also increase overall contact between the legal system and victims of IPV.[160] When victims know they can rely on the legal system not only to incapacitate their abuser but also to support them in recovering from their abuse, they are far more likely to turn to the state for assistance.[161] System contact—even a failed application for a protective order—can improve outcomes for victims by reducing the likelihood of re-abuse[162] and improving victims' access to other social safety nets that can contribute to improved financial security.[163] A comprehensive system comprised

needs may be for safety. Actions to increase a victim's safety may include changing the locks or moving and finding a new place to live. Establishing a new residence often requires security and utility deposits, which can be difficult for victims of domestic violence to afford.").

156. *Id*. at 228. *See generally Economic Justice Policy*, *supra* note 81 (explaining that victims of domestic violence benefit from having access to affordable childcare).

157. Ko, *supra* note 3, at 386.

158. Rutledge, *supra* note 89, at 228.

159. For example, California now provides victims of abuse a remedy, effective July 1, 2023, to relieve themselves of debt liability and have that liability reassigned to their abuser upon providing proof the debt was coerced. *See* CAL. CIV. CODE § 1798.97 (2023). Scholars have also suggested states improve the relief provided to victims of IPV through crime victim compensation funds. *See, e.g.,* Rutledge, *supra* note 89, at 232; Stoever, *supra* note 23, at 373.

160. *See supra* Part II.B.i (arguing a civil protective order alternative improves victims' agency in addressing the abuse within their relationships); *see also* Goldfarb, *supra* note 8, at 1509 ("[C]ivil protection orders make it easier for victims to avail themselves of the criminal justice system later if they choose to do so, since police are often more willing to arrest a batterer for abuse if a protection order is in place.").

161. Bowman, *supra* note 43, at 207 (describing a study in London, Ontario showing that "when the police pressed charges against abusers *and* the community provided a broad range of services, including shelters and therapy, for victims of abuse, there was a 25-fold increase in domestic violence filings, no reduction in the willingness of victims to request the help of the police, a higher level of satisfaction with the police, and a reduction in victim-reported incidents of violence").

162. McFarlane et al., *supra* note 36, at 616 (explaining that victims from the study who sought assistance from the system experienced "significantly lower levels of violence . . . irrespective of the justice system outcome").

163. *See* Goldfarb, *supra* note 8, at 1509 ("A major advantage of civil protection orders is that they bring the domestic violence victim into contact with the legal system, which in turn opens the door to other community resources, such as social services agencies and battered women's support groups."); *see also Economic Justice Policy*, *supra* note 81 ("Access to social safety nets like TANF (including Family Violence Option waivers), SNAP, and SSDI are also critical in providing increased

of both civil and criminal relief for victims of IPV is therefore the most effective way to ensure victims can access protective orders and use them to secure long-term independence.

**Conclusion**

The criminal protective order has its place in the legal response to IPV, but it is far from a panacea. Overreliance on arrest and incarceration to address IPV runs counter to scholarly understandings of coercive control and ignores the practical ineffectiveness of arrest as a deterrent to future violence in intimate relationships. Most importantly, the overcriminalization of protective orders serves the interests of the carceral state at the expense of victims' safety.

A comprehensive, long-lasting legal response to IPV must shift its focus away from incapacitating abusers and toward returning agency to victims. Expanding statutory definitions of abuse to better capture the realities of coercive control, in addition to expanding the protective order framework to encompass both civil and criminal remedies, will improve victims' access to IPV remedies and allow victims to use these remedies to regain control and independence after experiencing abuse.

economic stability for survivors.").

# The Legacy of *Dobbs*: How the Supreme Court's Decision to Review Gender-Affirming Care Bans Signals Its Intent to Eliminate The Protections of *Bostock* and *Obergefell* Against Laws Designed to Discriminate Against LGTBQ+ Individuals

Jennifer S. Bard†

> "[Escalating conservative attacks on LGBTQ people in the United States are] all happening in the same context that we're seeing the criminalization of abortion care, that we're continuing to see [in] the massive suppression of votes across the country . . . . All of these things are interconnected and creating chaos and fear among individuals, families, and communities."
>
> — Chase Strangio, ACLU attorney, Co-director for Transgender Justice with the organization's LGBT & HIV Project[1]

## Introduction[2]

On June 24, 2024, at the end of its 2024 term, the United States Supreme Court granted the petition of the U.S. Solicitor General's office, filed six months earlier,[3] to review a decision by the

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1. *Chase Strangio: Alabama Ban on Trans Youth Healthcare Is Part of Wider GOP Attack on Bodily Autonomy*, DEMOCRACY NOW! (May 30, 2022), https://www.democracynow.org/2022/5/30/chase_strangio_alabama_ban_on_trans [https://perma.cc/HH6U-GYRX].

2. A note on terminology: This article follows the GLAAD glossary of terms for media. *Glossary of Terms: LGBTQ*, GLAAD, https://glaad.org/reference/terms/ [https://perma.cc/CC7Y-GRNR]. However, the judicial opinions and secondary material quoted in this article span many decades and therefore quoted material will reflect the language of the source.

3. Petition for Writ of Certiorari at *4–6, United States v. Skrmetti, 144 S. Ct. 2679 (Nov. 6, 2023) (No. 23-477), 2023 WL 7327440. *Cf.* L.W. *ex rel.* Williams v.

Sixth Circuit Court of Appeals not to stay enforcement of a Tennessee law imposing criminal penalties on physicians providing gender-affirming care to minors (hereinafter, "Bans").[4] Based on a close analysis of recent Supreme Court decisions, the reasoning of the Sixth Circuit and other appellate courts that have supported these Bans, and the advocacy efforts of organizations promoting them, this Article predicts that in the coming term, the Supreme Court will not only uphold Tennessee's ban but will also set a precedent that undermines existing protections for the LGBTQ+ community against discriminatory state laws.

Specifically, if the Supreme Court upholds Tennessee's ban by adopting the arguments of the Sixth Circuit, the Court will also have the opportunity to:

1. Limit its holding in *Bostock v. Clayton County*, that discrimination based on transgender status was a form of gender stereotyping to cases brought under Title VII's prohibition against sex discrimination.[5]
2. Extend its holdings in *Dobbs v. Jackson Women's Health Organization* by finding both that there is no constitutional right to make any decisions related to reproduction and that such laws do not meet the criteria for sex discrimination even though they disproportionally affect women.[6]
3. Limit its holding in *Obergefell v. Hodges* to clarify that LGBTQ+ status is not entitled to heightened scrutiny as a protected class.[7]
4. Narrow its holding in *Troxel v. Granville*, which has been interpreted as giving parents a protected interest in directing the health care of their children.[8]

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Skrmetti, 83 F.4th 460, 471 (6th Cir. 2023) (holding that plaintiffs could not prove a likelihood of success on the merits because the issue of prescribing hormones to treat gender-affirming care was unresolved and citing the "recent proliferation of legislative activity across the country"), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

4. *See* United States v. Skrmetti, 144 S. Ct. 2679 (2024); Amy Howe, *Supreme Court Takes Up Challenge to Ban on Gender-affirming Care,* SCOTUSBLOG (June 24, 2024), https://www.scotusblog.com/2024/06/supreme-court-takes-up-challenge-to-ban-on-gender-affirming-care/ [https://perma.cc/W9K7-RSG7]; *US Supreme Court Decisions: The Biggest Cases This Term and Their Outcomes*, THE GUARDIAN (July 1, 2024), https://www.theguardian.com/us-news/ng-interactive/2024/jul/01/supreme-court-cases-decisions-rulings-2023-2024-term [https://perma.cc/CU4U-SV56].

5. 590 U.S. 644, 659–60 (2020).

6. 597 U.S. 215, 230–31, 235–38 (2022).

7. 576 U.S. 644, 663–676 (2015).

8. 530 U.S. 57, 72–73 (2000).

5. Extend deference to state decisions made on behalf of health and safety to the extent of not recognizing the existence of a "standard of care" to which states are required to respect in making laws.[9]
6. Excuse states from the obligation of offering any evidence in support of a law related to health care.[10]

The Court's decision in *Skrmetti* will mirror in magnitude the consequences of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, which although specific to abortion, effectively dismantled established rights.[11] As with the detrimental impact of near-total abortion bans, the prohibition of gender-affirming care for minors and adults poses severe risks to health and well-being.[12] This is because once states are no longer prohibited from passing laws that discriminate based on LGBTQ+ status and can substitute their own judgment for that of medical professionals, they will be free to enact and enforce a wide variety of laws that, as professors Jon D. Michaels and David L. Noll argue in their article "Vigilante Federalism," serve to "stoke politically salient grievances, rally their base, and further silence or weaken would-be opposition forces."[13]

This Article begins with a brief overview of the relevant statutes and the role of advocacy organizations in promoting them. I will then explore the plaintiffs' petitions, the district court rulings on stays, and the appellate court decisions that reviewed these cases. These judicial outcomes suggest a trajectory of jurisprudence that could empower states to pursue increasingly discriminatory agendas by dismantling existing barriers to state authority in healthcare matters.

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9. Doe 1 v. Thornbury, 679 F. Supp. 3d 576 (W.D. Ky. 2023), *rev'd and remanded sub nom.* L. W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023), *and cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023).

10. *See infra* Part III.A.iii.

11. *Human Rights Crisis: Abortion in the United States After Dobbs*, HUM. RTS. WATCH (Apr. 18, 2023), https://www.hrw.org/news/2023/04/18/human-rights-crisis-abortion-united-states-after-dobbs [https://perma.cc/GCP2-NRCA].

12. Brooke Migdon, *Transgender Youth Health Care Bans Have a New Target: Adults*, THE HILL (Jan. 13, 2023), https://thehill.com/homenews/state-watch/3810926-transgender-youth-health-care-bans-have-a-new-target-adults/ [https://perma.cc/7XQL-N7N4].

13. Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 108 CORNELL L. REV. 1187, 1219–20 (2023) ("Vigilante federalism is not simply a novel regulatory technique; it is the confluence of specific power, a partisan mandate at a moment of surging Christian nationalism, and imputed institutional significance that in many respects positions governors and state legislators to push especially stridently on tools that will stoke politically salient grievances, rally their base, and further silence or weaken would-be opposition forces.").

Next, I analyze the aspects of the Sixth and Eleventh Circuit opinions that present the Supreme Court with opportunities to expand state powers under the rational basis test.

Finally, I conclude by predicting the immediate consequences of an opinion upholding Bans on gender-affirming care and predicting the extended consequences of a holding that strips LGBTQ+ individuals of quasi-protected class status and endangers the fundamental rights of parents to direct the medical care of their children and of all individuals to equal "respect, dignity, and rights."[14]

## I. Background

### *A. Defining Gender-Affirming Care*

The restrictive laws now under constitutional review "mostly take aim at gender-affirming medical treatments" prescribed for minors diagnosed with gender dysphoria that delay the onset of puberty.[15] As the Association of American Medical Colleges (AAMC), a nonprofit organization that issues position statements on behalf of the academic medicine community, explains, "[s]uch care for young people often begins at puberty with medications—the effects of which are reversible—that halt changes like a

14. Caroline Medina, Sharita Gruberg, Lindsay Mahowald & Thee Santos, *Improving the Lives and Rights of LGBTQ People in America*, CTR. FOR AM. PROGRESS (Jan. 12, 2021), http://www.americanprogress.org/article/improving-lives-rights-lgbtq-people-america/ [https://perma.cc/5EQ4-GDT2].

15. Stacy Weiner, *States are Banning Gender-affirming Care for Minors. What Does that Mean for Patients and Providers*?, ASSOC. OF AM. MED. COLLS. (Feb. 20, 2024), https://www.aamc.org/news/states-are-banning-gender-affirming-care-minors-what-does-mean-patients-and-providers [https://perma.cc/A54Y-MTMS]; *see also* Joseph H. Bonifacio, Catherine Maser, Katie Stadelman & Mark Palmert, *Management of Gender Dysphoria in Adolescents in Primary Care*, 191 CANADIAN MED. ASS'N J. E69, E72 (2019) ("The Endocrine Society's clinical practice guidelines recommend hormonal suppression for adolescents with gender dysphoria because many experience extreme discomfort with their changing bodies during puberty.") (citing Wylie C. Hembree, Peggy T. Cohen-Kettenis, Louis Gooren, Sabine E. Hannema, Walter J. Meyer, M.Hassan Murad, Stephen M. Rosenthal, Joshua D. Safer, Vin Tangpricha & Guy G. T'Sjoen, *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLINICAL ENDOCRINOLOGY & METABOLISM, 3869 (2017)*; AACE Position Statement: Transgender and Gender Diverse Patients and the Endocrine Community*, AM. ASSOC. OF CLINICAL ENDOCRINOLOGY (Mar. 7, 2022), https://pro.aace.com/recent-news-and-updates/aace-position-statement-transgender-and-gender-diverse-patients [https://perma.cc/Z4HS-VCK6] (recommending gender-affirming care in updated guidance).

deepening voice."[16] This is a treatment only available to children who have not yet gone through puberty and who have been diagnosed as having gender dysphoria.[17] The American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (DSM) defines gender dysphoria as an incongruence in gender identity and assigned sex causing significant impairment and distress.[18] The purpose of hormone therapy in young children who have not yet developed secondary sex characteristics is to prevent or "delay the onset of puberty."[19] The medications prescribed to delay puberty are FDA-approved for delaying puberty in children with certain diagnoses, of which gender dysphoria is not included.[20] Many, but not all, public and private insurers routinely

16. Weiner, *supra* note 15. These laws also ban surgical procedures, but they are being challenged solely on the issue of access to medications that delay puberty. *See also Get the Facts on Gender-Affirming Care*, HUM. RTS. CAMPAIGN (July 25, 2023), https://www.hrc.org/resources/get-the-facts-on-gender-affirming-care [https://perma.cc/HX3S-HC82] ("Transgender and non-binary people typically do not have gender-affirming surgeries before the age of 18. In some rare exceptions, teenagers under the age of 18 have received gender-affirming surgeries in order to reduce the impacts of significant gender dysphoria, including anxiety, depression, and suicidality.").

17. *Get the Facts on Gender-Affirming Care*, *supra* note 16.

18. *What Is Gender Dysphoria?*, AM. PSYCH. ASSOC. (Aug. 2022), https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria [https://perma.cc/J37X-3545]. *See also* Arthur S. Leonard, *Supreme Court Declines to Review 4th Circuit Ruling That Gender Dysphoria Is A "Disability" Under the Americans with Disabilities Act*, 2023 LGBT L. NOTES 6, 7 (2023) (describing the Supreme Court's decision to deny certiorari in *Kincaid v. Williams* with particular attention to Justice Alito's skepticism of "Americans who suffer from 'feeling[s] of stress and discomfort' resulting from their 'assigned sex'" in his dissent) (quoting Kincaid v. Williams, 143 S. Ct. 2414, 2415 (2023) (Alito, J. dissenting), *cert. denied*).

19. Patrick Boyle, *What is Gender-affirming Care? Your Questions Answered*, ASSOC. OF AM. MED. COLLS. (Apr. 12, 2022), https://www.aamc.org/news/what-gender-affirming-care-your-questions-answered [https://perma.cc/KT8P-32W9]; *see also Gender Dysphoria*, MAYO CLINIC (May 14, 2024), https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/diagnosis-treatment/drc-20475262 [https://perma.cc/3W5U-L525] ("Medical treatment of gender dysphoria might include . . . hormone therapy to better align the body with gender identity."); Johanna Olson-Kennedy, Laer H. Streeter, Robert Garofalo, Yee-Ming Chan & Stephen M. Rosenthal, *Histrelin Implants for Suppression of Puberty in Youth with Gender Dysphoria: A Comparison of 50 mcg/Day (Vantas) and 65 mcg/Day (SupprelinLA)*, 6 TRANSGENDER HEALTH 36–42 (2021) (recommending delayed puberty for adolescents experiencing gender dysphoria).

20. Simona Giordano & Søren Holm, *Is Puberty Delaying Treatment "Experimental Treatment"?*, 21 INT'L J. TRANSGENDER HEALTH 113–21 (2020) ("[P]rovision of puberty delaying medications to adolescents with gender dysphoria is not experimental, or at least not any more experimental than standard pediatric practice when there are no licensed treatment options for a pediatric patient population.").

cover this medication as a treatment for minors with gender dysphoria.[21]

### *B. Using State Laws to Target Transgender Individuals*

Tennessee's ban on gender-affirming care is similar to twenty-five others passed since 2021 that "criminalize" the practice of providing what can be life-saving gender-affirming care treatment "for trans youth, and in some cases, adults."[22] There is no single, standard definition, or even spelling, of the term "gender-affirming care." However, the U.S. Department of Health and Human Services, Office of Population Affairs (OPA) defines it as "a supportive form of healthcare" consisting of "an array of services that may include medical, surgical, mental health, and non-medical services for transgender and nonbinary people."[23] PFLAG, "the nation's largest organization dedicated to supporting, educating, and advocating for LGBTQ+ people and those who love them,"[24] describes gender-affirming care as "safe, medically sound, affirming—and . . . life-saving."[25] A recent report by the Columbia University Department of Psychiatry explains that "[i]t is well documented that (TGNB) [transgender and nonbinary] adolescents and young adults experience anxiety and depression, as well as suicidal ideation, at a much higher rate than their cisgender peers," and that "gender-affirming care leads to improved mental health among TGNB youth."[26] The American Academy of Pediatrics (AAP) agrees and has joined other medical organizations, including the

21. Ivette Gomez, Usha Ranji, Alina Salganicoff, Lindsey Dawson, Carrie Rosenzweig, Rebecca Kellenberg & Kathy Gifford, *Update on Medicaid Coverage of Gender-Affirming Health Services*, KFF (Oct. 11, 2022), https://www.kff.org/womens-health-policy/issue-brief/update-on-medicaid-coverage-of-gender-affirming-health-services/ [https://perma.cc/5CSC-9BFK]; Nadia L. Dowshen, Julie Christensen & Siobhan M. Gruschow, *Health Insurance Coverage of Recommended Gender-Affirming Health Care Services for Transgender Youth: Shopping Online for Coverage Information*, 4 TRANSGENDER HEALTH 131–35 (2019).

22. *Far-Right Groups Flood State Legislatures with Anti-Trans Bills Targeting Children*, S. POVERTY L. CTR. (April 26, 2021), https://www.splcenter.org/hatewatch/2021/04/26/far-right-groups-flood-state-legislatures-anti-trans-bills-targeting-children [https://perma.cc/Z9HV-4J2D].

23. *Gender-Affirming Care and Young People*, OFF. OF POPULATION AFFS., https://opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf [https://perma.cc/9HWA-QX4C].

24. *About Us*, PFLAG, https://pflag.org/about-us/ [https://perma.cc/FZ2T-HBD9].

25. *Medical Bans*, PFLAG, https://pflag.org/resource/medical-bans/ [https://perma.cc/EU3C-ESY8].

26. Kareen M. Matouk & Melina Wald, *Gender-affirming Care Saves Lives*, COLUMBIA UNIV. DEP'T PSYCH. (Mar. 30, 2022), https://www.columbiapsychiatry.org/news/gender-affirming-care-saves-lives [https://perma.cc/55VV-UGJ8].

American Medical Association, the American College of Obstetricians and Gynecologists, and the World Health Organization to "support giving transgender adolescents access to the health care they need."[27]

Today, "[t]ransgender people under 18 face laws that bar them from accessing gender-affirming health care in 25 states—just a few years ago, not a single state had such a law."[28] As described by the Human Rights Campaign, these laws represent a "coordinated push led by national anti-LGBTQ+ hate groups, [where] legislators across the country have overridden the recommendations of the American medical establishment and introduced hundreds of bills that target transgender, non-binary and gender-expansive youth's access to age-appropriate, medically necessary care."[29] Taking the leadership position among these anti-LGBTQ+ hate groups is the Alliance Defending Freedom (ADF), which describes itself as "the world's largest legal organization committed to protecting religious freedom, free speech, marriage and family, parental rights, and the sanctity of life."[30] It does so by drafting state laws that test the limits of Supreme Court precedent, lobbying for the passage of those laws, and then vigorously defending them in court.[31] It has, so far,

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27. Alyson Sulaski Wyckoff, *AAP Reaffirms Gender-affirming Care Policy, Authorizes Systematic Review of Evidence to Guide Update*, AM. ACAD. OF PEDIATRICS (Aug. 4, 2023), https://publications.aap.org/aapnews/news/25340/AAP-reaffirms-gender-affirming-care-policy [https://perma.cc/6GAZ-6BFQ].

28. Selena Simmons-Duffin & Hilary Fung, *In Just a Few Years, Half of All States Passed Bans on Trans Health Care for Kids*, NPR (July 3, 2024), https://www.npr.org/sections/shots-health-news/2024/07/03/nx-s1-4986385/trans-kids-health-bans-gender-affirming-care [https://perma.cc/M7SP-2UR5].

29. *Map: Attacks on Gender Affirming Care by State*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map [https://perma.cc/3RHW-STJL].

30. *Who We Are*, ALL. DEFENDING FREEDOM, https://adflegal.org/about-us [https://perma.cc/JT2D-JR5W] (describing ADF as an organization that "advances the God-given right to live and speak the Truth" and that "contend[s] for the Truth in law, policy, and the public square, and equip[s] the alliance to do the same"); *see Alliance Defending Freedom*, ALL. DEFENDING FREEDOM, https://adflegal.org/about/ [https://perma.cc/JP3S-VJGR].

31. *See ADF at the Supreme Court*, ALL. DEFENDING FREEDOM, https://adflegal.org/us-supreme-court [https://perma.cc/W8MC-MLAZ] ("Within only a few short weeks of our launch in 1994, ADF was funding a case at the U.S. Supreme Court and supported our first victory. Since then, we have played various roles in 77 Supreme Court victories, and since 2011, we have directly represented parties in 15 victories at the Supreme Court.") (emphasis omitted); *Alliance Defending Freedom: Staunch Enemy of Equality*, HUM. RTS. CAMPAIGN (Jan. 22, 2024), https://www.hrc.org/news/alliance-defending-freedom-staunch-enemy-of-equality [https://perma.cc/5SG4-QZLP] ("ADF poses an existential threat to our community, writing anti-transgender legislation for school boards and statehouses across the

been extremely successful, claiming "15 U.S. Supreme Court wins" in cases where it served as lead or co-counsel.[32] These "wins" include *Dobbs v. Jackson Women's Health Organization* in 2022 which overturned *Roe v. Wade*.[33] Although ADF is not counsel of record in *Skrmetti*, it filed amicus briefs supporting Tennessee's ban to both the Sixth Circuit and the Supreme Court.[34]

Writing in June 2023, Jae A. Puckett, a psychology professor at Michigan State University, noted that "[t]here have been almost 500 bills proposed this legislative cycle seeking to limit the rights of LGBTQ+ people and their access to essential resources like medical care, nearly twelve times as many as there were in 2018."[35] The Human Rights Campaign (HRC) describes these bills as a "weaponization of public policy" that "has been driven by extremist groups that have a long history in working to oppress the existence and rights of LGBTQ+ people."[36] Among these groups, the ADF has been deemed a hate group by the Southern Poverty Law Center.[37]

Even as it continues its attacks on reproductive freedom, the Alliance Defending Freedom is pursuing its "next priority," which Kristen Waggoner, ADF's chief executive and general counsel, described as "fighting 'the radical gender-identity ideology

country and arguing against same-sex marriage, conversion therapy bans and reproductive rights at the federal level, all the way up to the U.S. Supreme Court . . . . ADF also reaches out to legislators to write anti-equality bills directly. In 2022 alone, it authored at least 130 bills in 34 states; more than 30 were passed into law.").

32. *ADF at the Supreme Court*, *supra* note 31.

33. *Id.*; 597 U.S. 215 (2022); 410 U.S. 113 (1973).

34. Brief of Alliance Defending Freedom as Amicus Curiae in Support of Respondents, United States v. Skrmetti, No. 23-477, (U.S. Oct. 15, 2024) 2024 WL 4546386; Brief of Alliance Defending Freedom as Amicus Curiae in Support of Appellants and for Reversal, L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023) (No. 23-5600) 2023 WL 4901836.

35. Jae A. Puckett, *Anti-trans Bills and Political Climates Are Taking a Significant Mental Health Toll on Trans and Nonbinary People–Even During Pride*, THE CONVERSATION (June 12, 2023), http://theconversation.com/anti-trans-bills-and-political-climates-are-taking-a-significant-mental-health-toll-on-trans-and-nonbinary-people-even-during-pride-199859 [https://perma.cc/HA5V-GASJ]. *See also Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2024*, ACLU, https://www.aclu.org/legislative-attacks-on-lgbtq-rights [https://perma.cc/JU5G-VDL3]; Annette Choi, *Record Number of Anti-LGBTQ Bills Have Been introduced This Year*, CNN (Apr. 6, 2023), https://www.cnn.com/2023/04/06/politics/anti-lgbtq-plus-state-bill-rights-dg/index.html [https://perma.cc/78J2-WMQ8].

36. Cullen Peele, *Roundup of Anti-LGBTQ+ Legislation Advancing in States Across the Country*, HUM. RTS. CAMPAIGN (May 23, 2023), https://www.hrc.org/press-releases/roundup-of-anti-lgbtq-legislation-advancing-in-states-across-the-country [https://perma.cc/35LV-X2RD].

37. *Id.*

infiltrating the law'"—in other words, transgender rights.[38] This effort has been highly successful. The laws ADF has advanced have led HRC to "officially declare[] a state of emergency for LGBTQ+ people in the United States."[39] What these hundreds of bills passed and proposed all over the country that have "begun to radically reshape life for trans youth across the nation, bringing restrictions on everything from health care to how their gender identity is treated at school" have in common is that they fall under the nearly unreviewable plenary powers states have to protect the health and safety of children.[40]

In January 2023, Matt Sharp, senior counsel and Director of the Center for Public Policy at ADF, posted an open memo on ADF's website to state legislators subtitled, "State Legislators Must Enact Laws Protecting Minors From Life-Altering, Dangerous Gender Transition Procedures," which contained both a call to action and detailed instructions on how to draft laws banning gender-affirming care.[41] The memo addressed to state legislatures urged them to pass laws that ban gender-affirming medical care for minors, including

38. *See* David D. Kirkpatrick, *The Next Targets for the Group That Overturned Roe*, NEW YORKER (Oct. 2, 2023), https://www.newyorker.com/magazine/2023/10/09/alliance-defending-freedoms-legal-crusade [https://perma.cc/H2K5-3MUR] ("A.D.F. began a pushback against 'gender identity' in 2014, shortly after Waggoner joined the organization, as the head of its allied-attorney program. Its first effort centered on public bathrooms and school locker rooms, implicitly portraying transgender girls as a menace to others.").

39. *National State of Emergency for LGBTQ+ Americans*, HUM. RTS. CAMPAIGN, https://www.hrc.org/campaigns/national-state-of-emergency-for-lgbtq-americans [https://perma.cc/74CV-JD59] (declaring a state of emergency for LGBTQ+ Americans "for the first time following an unprecedented and dangerous spike in anti-LGBTQ+ legislative assaults sweeping state houses this year"); *see also* Russell Contreras, *The Forces Behind Anti-Trans Bills Across the U.S.*, AXIOS (Mar. 31, 2023), https://www.axios.com/2023/03/31/anti-trans-bills-2023-america [https://perma.cc/NWP4-V5T6] ("The sudden flood of state-level efforts to restrict transgender rights is being fueled by many of the Christian and conservative groups that led the charge against *Roe v. Wade*."); Terry Gross, *How One Christian Legal Group is Shaping Policy, from Abortion to LGBTQ Rights*, NPR (Oct. 18, 2023), https://www.npr.org/2023/10/18/1206760032/how-one-christian-legal-group-is-shaping-policy-from-abortion-to-lgbtq-rights [https://perma.cc/XF5N-KTN5] ("The Alliance Defending Freedom, the ADF, is an activist legal group that works through the courts where it's been very successful.").

40. Koko Nakajima & Connie Hanzhang Jin, *Bills Targeting Trans Youth Are Growing More Common—and Radically Reshaping Lives*, NPR (Nov. 28, 2022), https://www.npr.org/2022/11/28/1138396067/transgender-youth-bills-trans-sports [https://perma.cc/S6Y9-LJ3M].

41. Matt Sharp, *We Must Protect Minors from Gender Transition Procedures*, ALL. DEFENDING FREEDOM (Feb. 8, 2023), https://adflegal.org/article/we-must-protect-minors-gender-transition-procedures [https://perma.cc/XY9S-H9FU] ("It is imperative that we encourage our state lawmakers to stand for truth by passing these critical protections for our children.").

"puberty blockers . . . hormones, and surgeries."[42] Sharp ended his memo with a progress report, writing that although "[a]s of January 2023, only two states have enacted laws completely protecting children from these harmful medical procedures: Alabama and Arkansas . . . . [O]ver a dozen states are already considering similar bills in the 2023 legislative session . . . ."[43] It has been a highly successful endeavor.[44]

ADF is not acting alone. The Southern Poverty Law Center identifies ADF as part of a much larger "pseudoscience network" of organizations working together to "provide scientific justification for the political priorities of conservative Christians."[45] An analysis by the Associated Press found that "the texts of more than 130 bills in 40 state legislatures" to restrict gender-affirming care for youths "as introduced or passed, are identical or very similar to some model legislation" or ready-made bills suggested to lawmakers by interest groups.[46] A March 2023 article in *Mother Jones* magazine discussing the newly passed ban in South Dakota reported that they had obtained "a trove of emails" between the senator sponsoring the bill and "representatives of a network of activists and organizations at the forefront of the anti-trans movement."[47] The article described these emails as "show[ing] the degree to which these activists shaped [the South Dakota representative's] repressive

42. *Id.*

43. *Id.*

44. *See* Annette Choi & Will Mullery, *19 States Have Laws Restricting Gender-Affirming Care, Some with the Possibility of a Felony Charge*, CNN (June 6, 2023), https://www.cnn.com/2023/06/06/politics/states-banned-medical-transitioning-for-transgender-youth-dg/index.html [https://perma.cc/W2H3-AERQ]; *see also* Dan Avery, *State Anti-Transgender Bills Represent Coordinated Attack, Advocates Say*, NBC NEWS (Feb. 17, 2021), https://www.nbcnews.com/feature/nbc-out/state-anti-transgender-bills-represent-coordinated-attack-advocates-say-n1258124 [https://perma.cc/8EGA-83RS] ("Bills in at least 20 states are targeting the transgender community in what LGBTQ advocates say is an organized assault by conservative groups.").

45. *Group Dynamics and Division of Labor within the Anti-LGBTQ+ Pseudoscience Network*, S. POVERTY L. CTR. (Dec. 12, 2023), https://www.splcenter.org/captain/defining-pseudoscience-network [https://perma.cc/J63M-32SW].

46. Jeff McMillan, Kavish Harjai & Kimberlee Kruesi, *Many Transgender Health Bills Came from a Handful of Far-Right Interest Groups, AP Finds*, AP NEWS (May 20, 2023), https://apnews.com/article/transgender-health-model-legislation-5cc4a7cb4ab69150f670d06fd0f361ab [https://perma.cc/3RFQ-3SDX].

47. Madison Pauly, *Inside the Secret Working Group That Helped Push Anti-Trans Laws Across the Country*, MOTHER JONES (Mar. 8, 2023), https://www.motherjones.com/politics/2023/03/anti-trans-transgender-health-care-ban-legislation-bill-minors-children-lgbtq/ [https://perma.cc/9TJS-KEEC].

legislation . . . and the tactics, alliances, and goals of a movement that has sought to foist their agenda on a national scale."[48]

There is evidence from as early as 2014 that ADF has been lobbying states to adopt laws and targeting students identified as transgender.[49] A 2021 overview of legal developments published by the Harvard Law Review declared that "[g]ender-affirming healthcare for minors has become a new frontier in the culture war."[50] It reported that "[i]n the first months of 2020 alone, legislators in at least fifteen states introduced bills that would have prohibited and, in many cases, criminalized providing gender-affirming healthcare services to minors."[51] It concluded, however, that "[n]one of these bills became law."[52] That changed quickly. According to a briefing prepared by the Kaiser Family Foundation (KFF) in January 2024, "In less than two years, the number of states with laws or policies limiting minor access to gender affirming care has increased more than five-fold, climbing from just four states in June 2022 . . . to 23 states by January 2024 . . . ."[53]

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48. *Id.*

49. *See* R. G. Cravens, *Documents Reveal ADF Requested Anti-Trans Research from American College of Pediatricians*, S. POVERTY L. CTR. (June 5, 2023), https://www.splcenter.org/hatewatch/2023/06/05/documents-reveal-adf-requested-anti-trans-research-american-college-pediatricians [https://perma.cc/3W7U-RDDV] ("Between Sept. 30 and Dec. 1, 2014, ADF sent letters to school boards in Minnesota, Rhode Island, Virginia and Wisconsin warning that they could be open to litigation for policies allowing transgender students to use appropriate facilities such as bathrooms and locker rooms.").

50. *Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 134 HARV. L. REV. 2163, 2164 (2021) [hereinafter *Outlawing Trans Youth*].

51. *Id.* (citing *Past Legislation Affecting LGBT Rights Across the Country*, ACLU (Jan. 20, 2021), https://www.aclu.org/past-legislation-affecting-lgbt-rights-across-country-2020) [https://perma.cc/NY8J-JZR9]).

52. *Id.*

53. Lindsey Dawson & Jennifer Kates, *The Proliferation of State Actions Limiting Youth Access to Gender Affirming Care*, KFF (Jan. 31, 2024), https://www.kff.org/policy-watch/the-proliferation-of-state-actions-limiting-youth-access-to-gender-affirming-care/ [https://perma.cc/2HYN-BE3K] (identifying states with laws in 2022 as Alabama, Arkansas, Texas, and Arizona versus states with laws in 2024 as Alabama, Arkansas, Arizona, Florida, Georgia, Iowa, Idaho, Indiana, Kentucky, Louisiana, Missouri, Mississippi, Montana, North Carolina, North Dakota, Nebraska, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, and West Virginia); *see also Map: Attacks on Gender Affirming Care by State*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map [https://perma.cc/2YMQ-6YZK] ("In a coordinated push led by national anti-LGBTQ+ hate groups, legislators across the country have overridden the recommendations of the American medical establishment and introduced hundreds of bills that target transgender, non-binary and gender-expansive youth's access to age-appropriate, medically-necessary care."); Elana Redfield, Kerith J. Conron, Will

### *C. Using* Dobbs *to Defend Gender-Affirming Care Bans*

Many commentators make a direct link between the passing of laws targeting the LGBTQ+ community and the Supreme Court's 2022 ruling in *Dobbs v. Jackson Women's Health Organization*,[54] reversing *Roe v. Wade*. *Dobbs* reversed prior courts' holdings that laws restricting abortion warranted strict scrutiny review.[55] It also rejected arguments that these laws should be subject to intermediate scrutiny because they discriminated based on sex.[56]

As an article in the Illinois Bar Journal explained, "hundreds of bills have been introduced nationwide targeting the LGBTQ+ community."[57] This is because in *Dobbs*, "Justice Clarence Thomas' [concurrence] gave the first warning shot over the bow" by "declaring that the Due Process Clause does not secure any substantive rights, including the right to an abortion and, by extension, the right to same-sex marriage."[58]

Not only did *Dobbs* leave states free to limit access to reproductive care for people who are pregnant, it has "also endangered other constitutional privacy matters that determine the right to purchase and use contraception, the right of same-sex intimacy and marriage, and the right to marry across racial lines."[59] What connects *Dobbs* to Bans on gender-affirming care is a "coordinated push led by national anti-LGBTQ+ groups" directed at state legislators.[60]

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Tentindo & Erica Browning, *Prohibiting Gender-Affirming Medical Care for Youth*, THE WILLIAMS INST., UCLA SCH. OF L. 6–9 (2023), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Youth-Health-Bans-Mar-2023.pdf [https://perma.cc/38FS-VSTY] (documenting states with Bans as of March 2023).

54. 597 U.S. 215 (2022).

55. *See id*. at 300.

56. *See id*. at 236; *see also* Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in* Dobbs *and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. 67, 67 (2022) (offering a full discussion of equal protection claims in *Dobbs*) ("In two paragraphs at the beginning of *Dobbs v. Jackson Women's Health Organization*, the Supreme Court rejected the Equal Protection Clause as an alternative ground for the abortion right.").

57. *See* Brian Fliflet, *Refusing the Right: Gender-Affirming Care and LGBTQ+ Rights Under Assault Nationwide*, 111 ILL. B.J. 42, 42 (2023).

58. *Id*. at 43 (citing *Dobbs*, 597 U.S. at 331).

59. Zane McNeill, *The Supreme Court Ruling the Right Is Using to Eradicate Transgender People*, NEW REPUBLIC (Feb. 14, 2024), https://newrepublic.com/article/178681/dobbs-ruling-war-trans-community [https://perma.cc/38FS-VSTY].

60. Peele, *supra* note 36; *see also* Christy Mallory, Madeline G. Chin & Justine C. Lee, *Legal Penalties for Physicians Providing Gender-Affirming Care*, 329 JAMA

But while all of these rights remain very much in danger, "what's become clear is that the far right intends to test the judicial system for future breaches by first targeting transgender people's access to gender-affirming care."[61] This fear has become real. As laid out below, the opinions of the Sixth and Eleventh Circuits rely heavily on *Dobbs* in finding the gender-affirming care bans constitutional.

## II. The Path to the Supreme Court

### *A. Seeking the Protection of the Fourteenth Amendment: From Legislation to Litigation*

Almost as soon as these laws were passed, they were challenged in court by parents of children diagnosed with gender dysphoria.[62] The plaintiffs filing complaints seeking stays of their states' gender-affirming care bans are primarily parents of children who will be deprived of treatment.[63] Plaintiffs challenging the Bans argue that laws violate the Equal Protection Clause of the Fourteenth Amendment by imposing "disparate treatment on the basis of transgender status" and "based on sex" with no justification that this disparate treatment is "substantially related to an

1821, 1821 (2023) ("The policy landscape on gender-affirming care has significantly changed within the past decade, with high variability in access to care between states. By 2022, approximately half of US states had implemented protective state-level health policies related to gender-affirming care coverage in private and public insurance.").

61. McNeill, *supra* note 59; *see generally,* Emily Kaufman, *On Liberty: From Due Process to Equal Protection — Dobbs' Impact on the Transgender Community*, 14 U. MIA. RACE & SOC. JUST. L. REV. 81 (2023) (tracing parallels between the consequences of the *Dobbs* decision and the likely consequences of the bans on gender-affirming care).

62. *See Gender Dysphoria*, *supra* note 19.

63. *See* Koe v. Noggle, 688 F. Supp. 3d 1321 (N.D. Ga. 2023); Petition for a Writ of Certiorari, Doe 1 v. Kentucky *ex rel.* Cameron, No. 23-492 (6th Cir. Nov. 3, 2023), 2023 WL 7549199; Brandt v. Rutledge, 551 F. Supp. 3d 882 (E.D. Ark. 2021), *aff'd sub nom.* Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022); Doe v. Ladapo, 676 F. Supp. 3d 1205 (N.D. Fla. 2023); Poe *ex rel.* Poe v. Labrador, 709 F. Supp. 3d 1169 (D. Idaho Dec. 26, 2023), *appeal filed sub nom.* Poe, v. Labrador, no. 24-142 (9th Cir. 2024); *see, e.g.*, *Brandt et al v. Rutledge et al*, ACLU (2021), https://www.aclu.org/cases/brandt-et-al-v-rutledge-et-al [https://perma.cc/Z2ZB-5TC7] (providing an example of the fact that some of the plaintiffs are no longer minors and some doctors have joined in the claims).

important state interest."[64] Therefore, they claim, the statute is unconstitutional as written.[65]

As of January 2024, KFF has been tracking legal challenges of the twenty-three state laws banning some form of gender-affirming care.[66] Although there is no single organization representing all the plaintiffs, there is considerable overlap with the ACLU, Lambda Legal, and the Southern Poverty Law Center filing appearances in more than one case.[67] In general, many of the same individuals and organizations have filed amicus briefs on behalf of plaintiffs.[68] ADF is as active in defending the laws banning gender-affirming care as it was in lobbying for their passage. Its website boasts that "ADF was honored to work alongside Mississippi in drafting and defending the Gestational Age Act before the Supreme Court."[69] ADF either directly represents or files amicus briefs in support of the states whose laws are being challenged.[70]

The laws banning gender-affirming care are a subset of "an unprecedented wave of state legislation and executive action" targeting "LGBTQIA+ (or, collectively, 'queer') people in the United States, with special virulence aimed at transgender, nonbinary, and gender-nonconforming (collectively, 'transgender' or 'trans')

64. *See, e.g.*, L.W. *ex rel.* Williams v. Skrmetti, 679 F. Supp. 3d 368 (M.D. Tenn. 2023), *rev'd and remanded*, 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

65. *See id*.

66. Dawson & Kates, *supra* note 53.

67. *See, e.g.*, *Lambda Legal Sues to Block Louisiana's Ban on Gender-Affirming Medical Care for Transgender Youth*, LAMBDA LEGAL (2024), https://lambdalegal.org/newsroom/soela20240108_ll-sues-to-block-ban-on-genderaffirming-medical-care-for-transgender-youth/ [https://perma.cc/N8JK-9KE5]; *Poe v. Drummond*, ACLU (2023), https://www.aclu.org/cases/poe-v-drummond [https://perma.cc/77K5-2UP9]; Aryn Fields, *Federal Judge Issues Injunction That Restores Health Care for Georgia Transgender Children*, HUM. RTS. CAMPAIGN (2023), https://www.hrc.org/press-releases/federal-judge-issues-injunction-that-restores-health-care-for-georgia-transgender-children [https://perma.cc/JVL7-79BB].

68. *See, e.g.*, *AAMC Joins 3 Amicus Briefs Opposing State Bans on Gender-Affirming Care*, ASS'N OF AM. MED. COLLS. (Dec. 15, 2023), https://www.aamc.org/advocacy-policy/washington-highlights/aamc-joins-3-amicus-briefs-opposing-state-bans-gender-affirming-care [https://perma.cc/UVT2-YKW4]; Samantha Riedel, *Trans Celebs Are Asking SCOTUS to Strike Down Gender-Affirming Care Bans Once and For All*, THEM (Dec. 15, 2023), https://www.them.us/story/trans-celebs-legal-brief-scotus-strike-down-gender-affirming-care-bans [https://perma.cc/3NDR-E9JC].

69. *ADF at the Supreme Court*, *supra* note 31.

70. *Id.*

people."[71] In response, the parents challenged these laws on behalf of their children based on the Fourteenth Amendment's promise of Equal Protection and Substantive Due Process.[72] The parents argued, and the district courts agreed, that the laws targeting LGBTQ youth discriminate on the basis of sex and transgender status without the justification of an important government interest.[73]

### *B. The District Courts*[74]

Federal district court is the first stop for individuals seeking to stay the implementation of laws that they claim violate their right to equal protection of the law protected by the Fourteenth Amendment. To stay the enforcement of state law, plaintiffs must present a "clear showing" that they are likely to prevail on the merits, that they face irreparable harm without an injunction, that the balance of equities favors them, and that the public interest supports an injunction.[75] When a complaint involves a "constitutional challenge, the likelihood-of-success inquiry is the first among equals."[76]

Making this determination of the likelihood of success requires identifying the legal criteria for making a successful claim. When that claim involves a violation of civil rights, the key determination is what level of scrutiny the state's action must survive.[77] Suppose a district court does find that a plaintiff has proved a "likelihood" of success on the merits. In that case, it must also consider the other

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71. Anne Alstott, Melisa Olgun, Henry Robinson & Meredithe McNamara, *"Demons and Imps": Misinformation and Religious Pseudoscience in State Anti-Transgender Laws*, 35 YALE J.L. & FEMINISM 223, 226 (2024).

72. *See, e.g.*, L.W. *ex rel.* Williams v. Skrmetti, 679 F. Supp. 3d 368 (M.D. Tenn. 2023), *rev'd and remanded*, 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

73. *See, e.g.*, Jeannie Baumann, *Early Transgender Care Challenge Wins Falter at Appeals Courts*, BLOOMBERG L. (Aug. 24, 2023), https://news.bloomberglaw.com/health-law-and-business/early-transgender-care-challenge-wins-falter-at-appeals-courts [https://perma.cc/3JJ2-DQRJ].

74. For a chart comparing the District Court cases and analyzing the background of the Judge, see Appendix.

75. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20–22 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.").

76. L.W. *ex rel.* Williams v. Skrmetti, 73 F.4th 408, 414 (6th Cir. 2023).

77. Brandt *ex. rel.* Brandt v. Rutledge, 47 F.4th 661, 669 (8th Cir. 2022) ("[t]o evaluate Plaintiffs' likelihood of success on the merits of their equal protection claim, we must first determine the appropriate level of scrutiny").

criteria outlined in *Winter v. Natural Resources Defense Council, Inc.,* including that the plaintiff "is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[78]

In assessing whether or not a plaintiff is likely to succeed in their constitutional claim, a district court judge is not supposed to evaluate a law based on their views but rather on precedent in their circuit. Nor are they supposed to criticize the precedent on which they base their decision. As Professor Oren Kerr explains, even if a lower court disagrees with the conclusions of a higher court, "[w]hen you write a judicial opinion, you should limit yourself to what you have formal authority to decide."[79] Rather than express disagreement in an opinion, lower court judges "should respect that role by resolving the case and controversy before them in their opinions and saving commentary for other forums, like law reviews."[80]

Once the district court has made its decision, the losing party has a right to appeal to the federal circuit court of appeals in their jurisdiction.[81] That court will review certain district court decisions for "abuse of discretion."[82] While a district court's factual findings are usually given deference, its determination of legal issues, as the Sixth Circuit explained, is reviewed with "fresh eyes."[83] While there

78. 555 U.S. 7 at 20.

79. *See* Orin Kerr & Michael C. Dorf, *Criticizing the Court: How Opinionated Should Opinions Be?*, 105 JUDICATURE, Fall/Winter 2021–2022, at 84 (stating that lower court judges should respect their role "by resolving the case and controversy before them in their opinions and saving commentary for other forums, like law reviews").

80. *Id.*; *see also id.* ("[J]udges shouldn't use their legal opinions to criticize U.S. Supreme Court decisions. Lower court judges were not nominated and confirmed to a seat on the Supreme Court, and they are bound by the Supreme Court's decisions.").

81. *About the U.S. Courts of Appeals*, U.S. COURTS, https://www.uscourts.gov/about-federal-courts/court-role-and-structure/about-us-courts-appeals [https://perma.cc/86S5-5GHL]; *see also Introduction to the Federal Court System*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/usao/justice-101/federal-courts [https://perma.cc/5HRS-2M8N] (describing the federal court system and its appeals process); 28 U.S.C. § 41 (describing the composition of each circuit under statute).

82. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) (finding that "an abuse of discretion" occurs when a court's decision represents a "clear error of judgment"); *see generally* Kevin Casey, Jade Camara & Nancy Wright, *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 309–16 (2002) (summarizing the abuse of discretion standard in detail).

83. *L.W.* ex. rel. *Williams v. Skrmetti*, 73 F.4th at 414 (quoting Arizona v. Biden, 40 F.4th 375, 381 (6th Cir. 2022)).

are other factors, failure to provide a likelihood of success is fatal to a claim alleging violation of the Fourteenth Amendment. [84]

A series of federal district courts found that plaintiffs met this burden in cases challenging the constitutionality of gender-affirming care bans, and issued stays to prevent the implementation of laws banning youth with gender dysphoria from accessing a continuum of gender-affirming care.[85] To illustrate, on July 28, 2023, two federal district judges, one in Tennessee and one in Kentucky, issued stays on nearly identical laws that "prohibit[ed] any minor . . . from receiving certain medical procedures if the purpose of receiving those procedures [was] to enable that minor to live with a gender identity that is inconsistent with that minor's sex at birth."[86]

Initially, the parents' success in obtaining stays from eight different federal district courts and the Eighth and Ninth Circuit Courts of Appeals seemed like a much-needed infusion of good news amidst the unfolding consequences of states limiting access to reproductive care in the wake of the Supreme Court's reversal of *Roe v. Wade*.[87] Almost all of the legal challenges brought against gender-affirming care bans were successful.[88] The majority of courts hearing these challenges wrote strongly worded opinions based on

84. *Id.* at 419 (noting plaintiffs were unlikely to succeed since a state law need only a "rational basis" to survive an equal protection challenge) ("It's highly unlikely, as an initial matter, that the plaintiffs could show that the Act lacks a rational basis. The State plainly has authority, in truth a responsibility, to look after the health and safety of its children.").

85. Sarah Parshall Perry, *More Courts Uphold Bans on "Gender-Affirming" Care for Minors. Is Supreme Court Next Stop?*, HERITAGE FOUND. (Aug. 30, 2023), https://www.heritage.org/gender/commentary/more-courts-uphold-bans-gender-affirming-care-minors-supreme-court-next-stop [https://perma.cc/Z5PX-NX6S].

86. L.W. *ex rel.* Williams v. Skrmetti, 679 F.Supp.3d 668, 677 (M.D. Tenn. 2023), *rev'd and remanded*, 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023) (addressing Tennessee's SB1); Doe 1 v. Thornbury, 679 F. Supp. 3d 576, 582 (W.D. Ky. 2023), *rev'd and remanded sub nom.* L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023), *and cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023) (addressing Kentucky's parallel SB 150).

87. *Cf.* BECCA DAMANTE & KIERRA B. JONES, A YEAR AFTER THE SUPREME COURT OVERTURNED ROE V. WADE, TRENDS IN STATE ABORTION LAWS HAVE EMERGED, CTR. FOR AM. PROGRESS (2023) https://www.americanprogress.org/article/a-year-after-the-supreme-court-overturned-roe-v-wade-trends-in-state-abortion-laws-have-emerged/ [https://perma.cc/Z55Q-B47P] (summarizing the change in access to abortion care across the nation after the Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*).

88. *See* Ian Millhiser, *The Case for Optimism about LGBTQ Rights in the United States*, VOX (June 26, 2023), https://www.vox.com/politics/2023/6/26/23752360/supreme-court-lgbtq-transgender-bathrooms-sports-gender-affirming-care-bostock [https://perma.cc/LHP7-AQ9M].

Supreme Court precedent and precedent within their circuits that the Bans were unconstitutional based on the protections of the Fourteenth Amendment.[89]

The *New York Times* described the first victory in obtaining a stay in Arkansas as "a significant victory for the L.G.B.T.Q. community."[90] Rather than being an outlier, as the summer of 2023 continued, "federal judges [around the country] were consistently blocking bans on gender-affirming care from taking effect."[91] Not only were these judges "[s]iding with LGBTQ+ and civil rights groups, [they] repeatedly found that banning gender-affirming care is likely unconstitutional on the grounds of the equal protection and due process clauses of the 14th Amendment."[92] However, the tide turned when the Sixth and Eleventh Circuits issued opinions reversing their decisions and withdrawing the stays.[93]

## III. The Sixth and Eleventh Circuits' Opinions

The plaintiffs' winning streak ended on August 21, 2023, when the Eleventh Circuit Court of Appeals in *Eknes-Tucker v. Governor of Alabama* vacated the preliminary injunction issued by the district court, writing that the court had "abused its discretion" when staying the enforcement of Alabama's ban on gender-affirming care "because it applied the wrong standard of scrutiny" to both of plaintiffs' constitutional claims.[94] First, the court found that the plaintiff parents' assertion of "a constitutional right to 'treat [one's] children with transitioning medications subject to

89. *See id*. ("[T]he Supreme Court has long held that any law or government policy that discriminates on the basis of sex is presumptively unconstitutional").

90. Rick Rojas & Emily Cochrane, *Judge Strikes Down Arkansas Law Banning Gender Transition Care for Minors*, N.Y. TIMES, (June 20, 2023), https://www.nytimes.com/2023/06/20/us/arkansas-transgender-care-ban.html [https://perma.cc/MFW7-SNQ6]; *see also* Millhiser, *supra* note 88 ("[T]he picture for LGBTQ litigants has thus far been more favorable than anyone reasonably could have predicted on the day Kennedy announced his retirement.").

91. *See* Orion Rummler, *The 19th Explains: The Groundwork for a Supreme Court Case on Gender-Affirming Care Is Being Laid Now*, 19TH (Oct. 12, 2023), https://19thnews.org/2023/10/supreme-court-transgender-rights-gender-affirming-care/ [https://perma.cc/83NU-DFM6] [hereinafter Rummler, *Groundwork for SCOTUS*]; *see also* Orion Rummler, *Anti-LGBTQ+ Laws Are Being Blocked in Federal Courts Across the Country*, 19TH (July 5, 2023), https://19thnews.org/2023/07/anti-lgbtq-laws-blocked-federal-courts/ [https://perma.cc/3M9J-M529] [hereinafter Rummler, *Anti-LGBTQ+ Laws*].

92. Rummler, *Groundwork for SCOTUS*, *supra* note 91.

93. Rummler, *Anit-LGBTQ+ Laws*, *supra* note 91.

94. 80 F.4th 1205, 1210 (11th Cir. 2023) (vacating district court order to stay Alabama's gender-affirming care ban); *see also* Perry, *supra* note 85.

medically accepted standards'" was without "any authority that supports the existence of" such right.[95] Second, the court held that plaintiffs had failed to show that Alabama's Ban on gender-affirming care "classifies on the basis of sex or any other protected characteristic."[96] Therefore, the court concluded that the Ban "is subject only to rational basis review"—not subject to strict scrutiny for the parents' substantive Due Process claim, nor to intermediate scrutiny based on a finding of sex- and transgender-based discrimination as applied by the district court.[97]

Then, on September 28, 2023, the Court of Appeals for the Sixth Circuit issued an opinion reversing orders granted by federal district court judges in Kentucky and Tennessee on grounds that closely mirrored those of the Eleventh Circuit.[98] In affirming the state's right to declare a specific form of medical treatment illegal, the Sixth Circuit framed the issue of gender-affirming care as a choice between whether a state or the courts should have the final word in a debate over access to medical treatment rather than recognizing the right of an individual patient or the doctor's right to make a medical judgment.[99]

Unlike the Eleventh Circuit's opinion, which had not reached the stage of final review, the Sixth Circuit's opinion was final.[100] Eventually, the list of published opinions would include the Eighth[101] and Ninth Circuit Courts of Appeals.[102]

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95. *Eknes-Tucker*, 80 F.4th at 1224.

96. *Id*. at 1210.

97. *Id*. *See also* Perry, supra note 85 (summarizing *Eknes-Tucker*).

98. *See* L.W. *ex. rel.* Williams v. Skrmetti, 73 F.4th 408 (6th Cir. 2023) *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).; *cf.* Doe 1 v. Thornbury, 75 F.4th 655 (6th Cir. 2023) (declining to lift the stay in Kentucky, in light of *Skrmetti*).

99. *Skrmetti*, 73 F.4th at 412–13.

100. *See e.g.,* Rummler, *Groundwork for SCOTUS*, *supra* note 91; Chris Geidner, *LGBTQ Cases Are Coming to the Supreme Court. A Law Dork Guide on What to Watch.*, L. DORK (Oct. 27, 2023), https://www.lawdork.com/p/lgbtq-cases-coming-to-scotus [https://perma.cc/B4Z6-63KK] (predicting that for procedural reasons, the bans on gender-affirming care were most likely "headed to the Supreme Court within the coming year"); *see generally* Alstott et al., *supra* note 71, at 271 (analyzing the Sixth Circuit's 2023 summer litigation up to the September 28, 2023 decision).

101. Brandt *ex. rel.* Brandt v. Rutledge, 47 F. 4th 661, 669–70 (8th Cir. 2022) (citing United States v. Virginia, 518 U.S. 515, 531 (1996)) (concluding that the gender-affirming care ban was illegal sex discrimination and required heightened scrutiny).

102. Hecox v. Little, 79 F.4th 1009, 1026 (9th Cir. 2023) (concluding that, with a gender-based athletics Ban, "discrimination on the basis of transgender status is a form of sex-based discrimination"), *opinion withdrawn,* 99 F.4th 1127 (9th Cir. 2024).

Both the Sixth and Eleventh Circuit Court of Appeals reversed the district courts' grants of stays because, the courts held, the district courts applied the wrong standard of review. In summary, both circuits held that the gender-affirming care bans were presumed constitutional as legitimate exercises of their plenary powers.[103] They then rejected the plaintiffs' claims of discrimination against minors under the Equal Protection Clause and the parents' claims that the laws violated their fundamental liberty to direct the medical care of their children.[104] Having dismissed all of the plaintiffs' arguments for heightened scrutiny, both courts applied the rational basis test and found it likely that on full review they would be found constitutional.[105]

### *A. How States Use Their Plenary Powers*

States' use of their plenary powers has changed as the understanding of what it means to provide for the public's health has evolved.[106] When the Constitution was ratified in 1787, the former colonies were already making laws related to maintaining health and safety within their geographic boundaries.[107] They did so by preventing contamination of public drinking water sources and isolating people showing symptoms of serious diseases such as yellow fever or smallpox.[108]

However, nothing like the "practice of medicine" existed until the 1860s, when there was still "little public support for medical professionalism" and there were "no powerful medical organizations."[109] As these groups grew in number and influence, they lobbied their state legislatures to adopt these standards and

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103. L.W. *ex. rel.* Williams v. Skrmetti, 73 F.4th 408, 413 (6th Cir. 2023) *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024); Eknes-Tucker v. Governor of the State of Alabama, 80 F.4th 1205, 1210 (11th Cir. 2023).

104. *Skrmetti*, 73 F.4th at 421; *Eknes-Tucker* 80 F.4th at 1229.

105. *Skrmetti*, 73 F.4th at 419; *Eknes-Tucker*, 80 F.4th at 1225.

106. *See generally* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012) (discussing historical development of police powers).

107. Ed Richards, *The Police Power and the Regulation of Medical Practice: A Historical Review and Guide for Medical Licensing Board Regulation of Physicians in ERISA-Qualified Managed Care Organizations,* 8 ANNALS HEALTH L. 201 (1999) (providing a history of how laws related to health and sanitation developed into regulating the practice of medicine).

108. *See generally* Paige Gibbons Backus, *Medicine has Scarcely Entered its Threshold*: *Medicine in the 1700s,* AM. BATTLEFIELD TR. (Jan. 18, 2021), https://www.battlefields.org/learn/articles/medicine-has-scarcely-entered-its-threshold-medicine-1700s [https://perma.cc/M554-UZBM] (describing medicine in the 1700s).

109. Richards, *supra* note 107, at 210.

give them the power of law.[110] This set the scene for legal conflicts between states and individuals over the extent of state authority to decide who could be licensed as a medical doctor and the grounds on which that license could be rescinded.[111] In 1898, one of these disputes over the removal of a license reached the United States Supreme Court, giving it the opportunity to describe the scope of state authority over the practice of medicine that it continues to follow today.[112]

The dispute between Dr. Hawker and the state of New York arose over a law passed while Dr. Hawker was in prison, which prohibited convicted felons from holding a license to practice medicine.[113] Dr. Hawker complained that the law should not apply to him because it was passed after he had already been licensed.[114] Writing for the U.S. Supreme Court, Justice Brewer upheld New York's right to create and apply new licensing criteria based on the state's "police power" to "prescribe the qualifications of one engaged in any business so directly affecting the lives and health of the people as the practice of medicine."[115] This decision established a state's plenary power to control both who could practice medicine and the parameters of that practice.

Since then, states have exercised this authority by creating licensing boards staffed by professional peers.[116] These boards can operate independently based on standards set by state law but have only the power that the state is willing to give them.[117] For example, in *Missouri Board of Registration for the Healing Arts v. Levine*, a Missouri court held that a state licensing board could not, against the wishes of the state, discipline a physician for conduct relating to serving as an expert witness.[118] This, the court wrote, was

110. *Id.*

111. *Id.* at 210–11.

112. *See generally* People v. Hawker, 152 N.Y. 234, 46 N.E. 607 (1897), *aff'd sub nom.* Hawker v. People of New York, 170 U.S. 189 (1898).

113. Hawker v. People of New York, 170 U.S. 189, 191 (1898).

114. *Id.*

115. *Id.*

116. *About Physician Discipline*, FED'N STATE MED. BDS., https://www.fsmb.org/u.s.-medical-regulatory-trends-and-actions/guide-to-medical-regulation-in-the-united-states/about-physician-discipline/ [https://perma.cc/RJK5-ATHK].

117. *See generally* Robert J. Thornton & Edward J. Timmons, *The De-Licensing of Occupations in the United States* U.S. BUREAU LAB. STATS. (2015), https://www.bls.gov/opub/mlr/2015/article/the-de-licensing-of-occupations-in-the-united-states.htm [https://perma.cc/9FTP-TGBG] (providing more information about professional licensing at the state level).

118. Mo. Bd. Registration for Healing Arts v. Levine, 808 S.W.2d 440, 443 (Mo. Ct. App. 1991).

because "[i]f the legislature had wanted to regulate the conduct of a physician acting as a non-treating expert medical witness, it would have statutorily so provided."[119]

Another example of a state's power over the delivery of healthcare comes in the form of laws that protect healthcare providers from the legal consequences of failing to provide care that violates their religious or personal beliefs, also known as "conscience clauses."[120] Originally, these laws were advanced by Catholic doctors and hospitals that did not want to be forced to perform abortions or provide birth control.[121] Their reach today has expanded beyond religiously affiliated hospitals as loosening restrictions on hospital mergers allowed many previously secular institutions to merge with national Catholic chains.[122]

These laws shield providers from the liability they would otherwise have to patients harmed by their failure to provide what would otherwise be the standard of medical care.[123] This not only protects providers from the consequences of refusing to offer care, but also relieves them of the responsibility to tell patients what is happening.[124] Many also excuse providers from the obligation of

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119. *Id.*

120. *See e.g.*, Isa Ryan, Ashish Premkumar & Katie Watson, *Why the Post-Roe Era Requires Protecting Conscientious Provision as We Protect Conscientious Refusal in Health Care*, 24 AMA J. ETHICS E906 (2022); *see Physician Exercise of Conscience*, AM. MED. ASS'N, https://code-medical-ethics.ama-assn.org/ethics-opinions/physician-exercise-conscience [https://perma.cc/3LSP-H9ZN] (conveying a provider's perspective of conscience clauses).

121. *See* Nancy B. Shuger, *Does the State Action Doctrine Compel Nominally Private Hospitals to Make Abortion Services Available despite "Conscience Clauses?"*, 4 MD. L. FORUM 113 (1974) (providing an early analysis of the effect of conscience clauses); *see also* Nancy Berlinger, *Conscience Clauses, Health Care Providers, and Parents*, HASTINGS CTR. (June 30, 2023), https://www.thehastingscenter.org/briefingbook/conscience-clauses-health-care-providers-and-parents/ [https://perma.cc/NK59-9GCC] ("Debates about the practice and limits of conscientious objection in health care often arise in relation to the beginning or end of life – specifically, to pregnancy termination, pregnancy prevention, and actions that may hasten death in the context of terminal illness.").

122. *See generally* Janet D. Steiger, Former Chairman, Fed. Trade Comm'n, *Health Care Antitrust Enforcement Issues*, (Nov. 9, 1995) (discussing hospital mergers); Maya Inka Ureno-Dembar, *Shifting Antitrust Laws and Regulations in the Wake of Hospital Mergers: Taking the Focus off of Elective Markets and Centering Health Care*, 86 BROOK. L. REV. 763 (2021) (arguing that hospital mergers between secular and nonsecular hospitals result in patients being forced to travel further for reproductive care).

123. *See* AM. MED. ASS'N, *supra* note 120.

124. *See* Am. Acad. of Pediatrics, Comm. on Bioethics, *Policy Statement—Physician Refusal to Provide Information or Treatment on the Basis of Claims of Conscience*, 124 AM. ACAD. OF PEDIATRICS, 1689 (2009).

referring patients to a doctor who will provide the care.[125] Today, conscience clauses are being used in many states to deny care related to contraception, miscarriage management, and assisted reproductive technologies, among other treatments.[126] Finally, the most recent example of states using their plenary power came during the COVID-19 public health emergency when states granted all providers immunity from liability for what would, again, otherwise be negligent behavior.[127]

Under intermediate scrutiny review, a state must justify a statute that discriminates even if the discrimination was not deliberate.[128] So, for example, Judge Richardson in Tennessee concluded that the ban could not survive heightened scrutiny because "the benefits of the medical procedures banned . . . are well established," and the state had not established that the Ban was "substantially related to an important government interest."[129] Similarly, Judge Jane Kelly of the Eighth Circuit found that the statutes did constitute sex discrimination "[b]ecause the minor's sex at birth determines whether or not the minor can receive certain types of medical care under the law" and that such discrimination was not justified by "an 'exceedingly persuasive justification.'"[130]

Along the same theme, Judge B. Lynn Winmill of the District of Idaho explained that the answer to whether Idaho's gender-affirming care ban violated the Fourteenth Amendment was

125. *See Conscience Protections*, U.S. DEP'T HEALTH AND HUM. SERVS., https://www.hhs.gov/conscience/conscience-protections/index.html [https://perma.cc/43PQ-PDJS].

126. *See* Elizabeth Sepper & James D. Nelson, *Disestablishing Hospitals*, 49 J. L. MED. ETHICS 542, 543 (2021).

127. *See e.g.,* Elaine S. Povich, *States Braced for a Wave of COVID Lawsuits. It Never Arrived.*, STATELINE (July 21, 2021), https://stateline.org/2021/07/21/states-braced-for-a-wave-of-covid-lawsuits-it-never-arrived/ [https://perma.cc/C8NC-43W4] ("[N]ew liability protection laws vary, but most of them seek to protect all or specific kinds of businesses from lawsuits that attempt to establish culpability. Exceptions are usually made for negligence, willful misconduct or a provable failure to follow public health orders.").

128. Doe v. Ladapo, 676 F. Supp. 3d 1205, 1219 (N.D. Fla. 2023) (plaintiffs challenged the Ban, arguing that even if not intentional, the statute "discriminate[d] on the basis of sex and transgender status and that either alone would be sufficient to trigger intermediate scrutiny").

129. L.W. *ex rel.* Williams v. Skrmetti, 679 F.Supp.3d 668, 712 (M.D. Tenn. 2023), *rev'd and remanded*, 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024) (holding that the Ban was not sufficiently related to the state's asserted interest of protecting minors from the risk of the covered treatments since only a "tiny fraction" of the minors to whom it was prescribed were receiving it as a treatment for gender dysphoria).

130. Brandt *ex. rel.* Brandt v. Rutledge, 47 F. 4th 661, 669–670 (8th Cir. 2022) (quoting United States v. Virginia, 518 U.S. 515, 531 (1996).

"intuitive and obvious to lawyers and laypeople alike . . . [p]arents should have the right to make the most fundamental decisions about how to care for their children."[131]

He explained that the Ban warrants heightened scrutiny both because it relies on "sex-based classifications" and because it discriminates based on transgender status, which satisfies all of the Ninth Circuit's traditional criteria for recognizing a suspect classification.[132] But there is no justification sufficient for a statute that was passed with the intent to discriminate.[133] As Judge Hinkle explained, the Ban in his state was "motivated in substantial part by the plainly illegitimate purposes of disapproving transgender status and discouraging individuals from pursuing their honest gender identities. This was purposeful discrimination against [transgender people]."[134]

### i. Reviewing Constitutionality of Laws Passed Under State Plenary Powers

When the former colonies ratified the 1787 Constitution in order to create a strong federal government, they did not intend to give up any of "the authority [they had] . . . 'to provide for the public health, safety, and morals'" of their citizens."[135] This is evidenced by their refusal to sign without the promise that the document would be immediately amended to include a guarantee that "[t]he powers not delegated to the United States by the Constitution, nor

131. Poe *ex rel.* Poe v. Labrador, 709 F. Supp. 3d 1169, 1178 (D. Idaho Dec. 26, 2023), *appeal filed sub nom.* Poe, v. Labrador, no. 24-142 (9th Cir. 2024) ("[T]he Fourteenth Amendment's primary role is to protect disfavored minorities and preserve our fundamental rights from legislative overreach . . . . It is no less true for transgender children and their parents in the 21st Century.").

132. *Id.* at 1190–92; *see also id*. at 1178 ("Time and again, these cases illustrate that the Fourteenth Amendment's primary role is to protect disfavored minorities and preserve our fundamental rights from legislative overreach.").

133. *Ladapo*, 676 F. Supp. 3d at 1220.

134. *Id.*; see also *id.* at 1216 (finding that plaintiffs were substantially likely to succeed on the merits for their claim that Florida's ban violated parents' rights under the Due Process Clause) ("I find that the plaintiffs' motivation is love for their children and the desire to achieve the best possible treatment for them. This is not the State's motivation.").

135. WEN W. SHEN, CONG. RSCH. SERV., R46745, STATE AND FEDERAL AUTHORITY TO MANDATE COVID-19 VACCINATION 3 (2022) (quoting Barnes v. Glen Theatre, Inc., 501 U.S. 560, 569 (1991)) ("Under the United States' federalist system, states and the federal government share regulatory authority over public health matters, with states traditionally exercising the bulk of the authority in this area pursuant to their general police power. That power authorizes states, within constitutional limits, to enact laws 'to provide for the public health, safety, and morals' of the states' inhabitants. In contrast to this general power, the federal government's powers are confined to those enumerated in the Constitution.").

prohibited by it to the States, are reserved to the States respectively, or to the people."[136] Until the Civil War, not only did the federal government leave it to the states to pass and enforce laws related to its authority over the public health, safety, and morals of their citizens, it also "relied on the state courts to vindicate essential rights arising under the Constitution and federal laws."[137] However, "that policy was completely altered after the Civil War when nationalism dominated political thought and brought with it congressional investiture of the federal judiciary with enormously increased powers."[138]

Part of those increased federal powers was the authority to review state statutes that, while within their plenary powers, infringed on rights protected by the U.S. Constitution.[139] Faced with this new task of reviewing state law for infringement of Constitutional rights, the Supreme Court developed, or as one scholar put it more bluntly, "invented" a hierarchy of rights.[140] Justice Alito writing for the Court in *Dobbs*, described the rights at the top of the hierarchy as "first" those "guaranteed by the first eight Amendments" to the U.S. Constitution.[141] Then second, "a select list of fundamental rights that are not mentioned anywhere in the Constitution."[142] In contrast, laws that do not infringe on guaranteed or fundamental rights are entitled to a "strong presumption of validity," and "must be sustained if there is a rational basis on which the legislature could have thought it would serve legitimate state interests."[143] Among all the laws that a state

136. U.S. CONST. amend. X.

137. Zwickler v. Koota, 389 U.S. 241, 245 (1967).

138. *Id.* at 246

139. Michelle D. Deardorff, *Equal Protection of the Laws*, CTR. FOR THE STUDY OF FEDERALISM (2018), https://federalism.org/encyclopedia/no-topic/equal-protection-of-the-laws/ [https://perma.cc/5HLZ-L5EG].

140. Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 GEO. J.L. & PUB. POL'Y 373, 374 n.2 (2016) (quoting United States v. Carolene Products *Co.* 304 U.S. 144, 152 (1938)) ("[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some *rational* basis within the knowledge and experience of the legislators.") (emphasis added).

141. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 237 (2022).

142. *Id.*

143. *Id.* at 221 (citing Heller v. Doe, 509 U.S. 312, 319–20 (1993)) ("A law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity.' It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.") (internal citation omitted).

might pass, those related to health and safety are given the most deference and assumed constitutional.[144]

In contrast to state laws that might infringe on rights "guaranteed" in the first eight amendments, state laws that infringe on the right to equal protection of the laws protected by the Fourteenth Amendment are evaluated differently.[145] Today, when the U.S. Supreme Court evaluates laws or policies that may violate the Fourteenth Amendment's guarantee of equal protection of the laws, it describes them as laws that "discriminate."[146] However, using the language of the time, instead of "discrimination," the Court used the term "classification."[147] "Classification" is often used to refer to laws that discriminate based on race.[148] However, "[n]othing in the text of the Fourteenth Amendment limits Congress to the protection of racial minorities, and nothing in the text of the Amendment treats *racial* discrimination differently from discrimination on account of sex, religion, disability, or any other factor."[149] In sum, whether a state law exercising its plenary power over health and safety infringes on a fundamental liberty or discriminates by treating people in similar situations differently, individuals affected have the right to seek the protection of a federal court.[150]

Plaintiffs challenging the Bans on gender-affirming care argued that they were unconstitutional both because they engaged

144. Wendy E. Parmet, *Regulation and Federalism: Legal Impediments to State Health Care Reform*, 19 AM. J. L. & MED. 121, 130 (1993) (citing Gibbons v. Goden 22 U.S. (9 Wheat.) 1 (1824)) ("Although the Supreme Court has recognized since *Gibbons v. Ogden* that the Supremacy Clause requires state police power laws to give way to federal laws, this seldom posed a difficulty for states because the federal government rarely regulated health care.").

145. Deardorff *supra* note 139; *cf.* Michael Les Benedict, *The Ratification of the Fourteenth Amendment*, OHIO STATE UNIV.: ORIGINS (June 2018), https://origins.osu.edu/milestones/july-2018-150-years-fourteenth-amendment?language_content_entity=en [https://perma.cc/HE64-P24F] (providing a history of ratification for the Fourteenth Amendment).

146. Deardorff *supra* note 139; *see also* Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 16 (2020) (applying strict scrutiny review to a set of COVID-19 era limits on occupancy that "violate 'the minimum requirement of neutrality' to religion" because "they single out houses of worship for especially harsh treatment").

147. Selene C. Vázquez, *The Equal Protection Clause & Suspect Classifications: Children of Undocumented Entrants*, 51 UNIV. MIA. INTER-AM. L. REV., 63, 65 (2020) (reviewing historical cases where the Supreme Court "has found that race, national origin, and alienage are all suspect classifications").

148. Jonathan F. Mitchell, *Textualism and the Fourteenth Amendment*, 69 STAN. L. REV. 1237, 1241 (2017) (noting the Supreme Court's "oft-repeated mantra that the Fourteenth Amendment prohibits all racial classifications in government").

149. *Id.* at 1244.

150. Deardorff, *supra* note 139.

in illegal discrimination and because they violated fundamental rights.[151] Whether or not the plaintiffs ultimately succeed in either of these challenges depends first on how the U.S. Supreme Court categorizes the rights they claim have been violated, and second, whether they categorize the state's behavior as discrimination, and if so, whether that discrimination violates the constitution.[152] In making these determinations, the Court is not bound by decisions of previous courts evaluating similar statutes or even its own previous decisions.[153] However, the criteria it applies in reviewing these Bans is likely to indicate how it would evaluate laws raising similar issues of fundamental rights and discrimination in the future. As the *Dobbs* dissenters warned, "no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation."[154]

Moreover, not only is the Supreme Court the sole judge of which liberties are identified as "substantial," but it has also granted itself the sole authority to determine whether a state law denies individual citizens equal protection.[155] Because the jurisprudence of substantial fundamental liberties and illegal classifications is entirely the creation of the Supreme Court and not

151. *See, e.g.,* L.W. *ex. rel.* Williams v. Skrmetti, 73 F.4th 408, 413 (6th Cir. 2023) *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

152. *See* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439–40 (1985) ("[A]bsent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."); Mitchell *supra* note 148, at 1275 ("[T]he Supreme Court interprets 'equal protection of the laws' to require equal treatment on account of race and sex (most of the time), to forbid discrimination with respect to a court-defined category of 'fundamental rights,' and to forbid discrimination that a court deems irrational."). *See also* Daniels v. Williams, 474 U.S. 327, 332 (1986) ("The Fourteenth Amendment is a part of a Constitution generally designed to allocate governing authority among the Branches of the Federal Government and between that Government and the States, and to secure certain individual rights against both State and Federal Government.").

153. See Michael Gentithes, *Janus-Faced Judging: How the Supreme Court Is Radically Weakening Stare Decisis*, 62 WM. & MARY L. REV. 83, 142 (2020) (arguing that the Supreme Court's declining deference to its own precedent "is only likely to increase on the Court in the years to come, as more Justices find it a convenient mechanism for overturning decisions with which they substantively disagree").

154. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 362 (2022).

155. *See, e.g., id.* (overturning the precedent of *Roe. v. Wade*).

in the text of the Constitution, the Court retains the sole power to determine when state law violates the Fourteenth Amendment.[156]

ii. Health Care As a "Legitimate State Interest"

The Supreme Court has consistently identified health and safety as the paradigms of legitimate state interests.[157] Therefore, a state law related to protecting health or children, as in the case of laws banning gender-affirming care, is presumed constitutional unless it infringes on substantial fundamental liberty or discriminates in violation of the standards of the Fourteenth Amendment.[158]

While the Supreme Court has yet to "elaborate[e] on the standards for determining what constitutes a 'legitimate state interest,'" it has identified a "broad range of governmental purposes and regulations [that] satisfies these requirements."[159] Among these, the two that are consistently held to be legitimate and often compelling are laws that protect the health of the population at large[160] or the safety of children.[161] The Sixth and Eleventh Circuits held that the Gender-Affirming Care Bans were rationally related to both reasons. The Sixth Circuit held that the state could "rationally take the side of caution before permitting irreversible medical treatments of its children."[162] Using very similar language, the Eleventh Circuit held that "states have a compelling interest in protecting children from drugs, particularly those for which there is

156. *See* Mitchell *supra* note 148, at 1279 ("Today the Supreme Court acts as if the word 'protection' had never been enacted. The Justices think that *any* law that classifies or discriminates implicates the Equal Protection Clause, and they have concocted their own criteria for determining whether a discriminatory law gets 'rational basis review,' 'intermediate scrutiny,' or 'strict scrutiny.'").

157. *Dobbs*, 597 U.S. at 221 (internal citation omitted) (citing Heller v. Doe, 509 U.S. 312, 319–20 (1993)) ("A law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity.' It must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.").

158. *Outlawing Trans Youth*, *supra* note 50, at 2183.

159. *See, e.g.,* Nollan v. Cal. Coastal Comm'n., 483 U.S. 825, 834–85 (1987).

160. *See Dobb*s, 597 U.S. at 301 ("A law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity.'").

161. *See* New York v. Ferber, 458 U.S. 747, 757 (1982) (noting the state's "compelling interest in prosecuting those who promote the sexual exploitation of children" in the context of pornography); *see also Dobbs*, 597 U.S. at 301 (identifying "fetal pain" as among the compelling interests a state could have in regulating abortion).

162. L.W. *ex rel.* Williams v. Skrmetti, 73 F.4th 408, 414 (6th Cir. 2023).

uncertainty regarding benefits, recent surges in use, and irreversible effects."[163]

The U.S. Supreme Court, in *Williamson v. Lee Optical*, established the criteria for evaluating a state's method of making a choice in the face of irreconcilable differences in expert opinion on issues related to health care.[164] In *Williamson*, an optometrist challenged the constitutionality of an Oklahoma law that prohibited them from making eyeglasses without a prescription from a licensed ophthalmologist.[165] In upholding Oklahoma's decision, Justice William O. Douglas agreed with the plaintiff that "[t]he Oklahoma law may exact a needless, wasteful requirement in many cases."[166] However, in words often quoted, he explained that "the law need not be in every respect logically consistent with its aims to be constitutional."[167] Rather, "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[168] Justice Douglas explained that "[f]or protections against abuses by legislatures the people must resort to the polls, not the courts."[169]

*Williamson* continues to be cited in conjunction with the Court's 1905 decision in *Jacobson v. the Commonwealth of Massachusetts* upholding the authority of the Cambridge Board of Health to issue criminal penalties for failure to provide proof of small pox vaccination.[170] In *Jacobson,* the Court upheld the authority of the Cambridge Board of Health to mandate smallpox vaccination despite a lack of consensus in the medical community that the threat justified the risk. [171] The Court held that absent any

163. Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1225 (11th Cir. 2023).

164. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 490 (1955).

165. *Id.* at 486.

166. *Id.* at 487.

167. *Id.*

168. *Id.* at 488.

169. *Id.* (quoting Munn v. State of Illinois, 94 U.S. 113, 134 (1876)).

170. *See* Josh Blackman, *The Irrepressible Myth of Jacobson v. Massachusetts*, 70 BUFF. L. REV. 131, 259–60 (2022) (citations omitted) ("The standard of review from *Jacobson* does not resemble modern day constitutional law . . . . If anything, *Jacobson* was more rigorous than modern rational basis review. In *Jacobson,* Justice Harlan suggested that laws enacted for pretextual reasons would be unconstitutional. But under precedents like *Williamson v. Lee Optical*, courts uphold pretextual laws so long as there is some 'conceivable' basis to justify them."). *See also* 28 U.S.C. § 2282 (repealed 1976) (requiring, *at that time*, that an action seeking to declare a state statute unconstitutional be heard by a panel of three district court judges before it could be appealed directly to the U.S. Supreme Court).

171. Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905) (stating that unless the state's action "has no real or substantial relation [to public health], or is, beyond all

violation of fundamental liberty, a state's plenary powers allowed it to choose among competing scientific views so long as it did so using a process that was neither arbitrary nor capricious.[172] *Jacobson* continues to be cited in support of a state's discretion in choosing among competing medical opinions.[173]

iii. Establishing Minimum Levels of Evidence

The U.S. Supreme Court has never quantified the outer limits of holding that a state law lacks logical consistency. This may change if the Supreme Court adopts either the Sixth or Eleventh Circuit's arguments relying on a lower threshold of evidence. As Professor Ann Alstott explains, "by lowering the standard of review to rational basis from heightened or intermediate scrutiny, [the Sixth and Eleventh circuits] have signaled their willingness to uphold health care bans based on even flimsy evidence by the state."[174] The Sixth Circuit Court of Appeals explained its decision to reject the factual findings of two different courts that the majority of the medical evidence favored the plaintiffs by stating "[p]lenty of rational bases exist for these laws, with or without evidence."[175]

The petitions seeking to stay gender-affirming care bans are characterized by extensive reliance on medical testimony. The district courts granting stays made frequent references to what Judge Hale in Kentucky called "the evidence-based standard of care accepted by all major medical organizations in the United States."[176] Similarly, Judge Hinkle of the Northern District of Florida wrote that "[t]he overwhelming weight of medical authority

question, a plain, palpable invasion of rights secured by the fundamental law, it is the [constitutional] duty of the courts" to defer to the state's decision).

172. *Id.*

173. *See, e.g.,* Phillips v. City of New York, 775 F.3d 538, 542 (2d Cir. 2015) ("Plaintiffs argue that a growing body of scientific evidence demonstrates that vaccines cause more harm to society than good, but as *Jacobson* made clear, that is a determination for the legislature, not the individual objectors.") (citing *Jacobson*, 197 U.S. at 37–38).

174. Alstott, *supra* note 71, at 271; *see also* Brandon Azevedo, Angela Taylor & Derrick Matthews, *Impact of Gender-Affirming Care Bans on Transgender Youth of Color*, HEALTH AFFS. (July 7, 2023), https://www.healthaffairs.org/content/forefront/impact-gender-affirming-care-bans-transgender-youth-color [https://perma.cc/3DP4-ARBU] (stating, contrary to states' arguments, that "[t]he evidence is clear that gender-affirming health care is safe and appropriate for youth").

175. L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 489 (6th Cir. 2023) *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

176. Doe 1 v. Thornbury, 679 F. Supp. 3d 576, 581 (W.D. Ky. 2023), *rev'd and remanded sub nom.* L. W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023), *and cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023).

supports the treatment of transgender patients with GnRH agonists and cross-sex hormones in appropriate circumstances."[177] He noted, specifically, that "[o]rganizations who have formally recognized this include the American Academy of Pediatrics, American Academy of Child and Adolescent Psychiatry, American Academy of Family Physicians, American College of Obstetricians and Gynecologists, American College of Physicians, American Medical Association, American Psychiatric Association, and at least a dozen more."[178] In addition to the evidence from organizations, Judge Hinkle noted that the "record also includes statements from hundreds of professionals supporting this care."[179] In comparing the evidence provided by plaintiffs with that offered by defendants, he wrote, "[a]t least as shown by this record, not a single reputable medical association has taken a contrary position."[180]

Judge Hinkle scolded the state of Florida for dismissing "[t]he great weight of medical authority supports these treatments . . . ."[181] It is, he concluded, "fanciful to believe that all the many medical associations who have endorsed gender-affirming care, or who have spoken out or joined an amicus brief supporting the plaintiffs in this litigation, have so readily sold their patients down the river."[182]

The Sixth and Eleventh Circuits were completely unpersuaded by the lower courts' reliance on medical testimony. The Eleventh Circuit Court of Appeals, presented with the same evidence as the District court judges, acknowledged the imbalance in the evidence, writing that "a group of at least twenty-two professional medical and mental health organizations" had jointly filed an amicus brief in support of the plaintiffs.[183] But rather than finding the testimony persuasive, it wrote that "none of the binding decisions regarding substantive due process establishes that there is a fundamental right to 'treat [one's] children with transitioning medications subject to medically accepted standards.'"[184]

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177. Doe v. Ladapo, 676 F. Supp. 3d 1205, 1213 (2023) (N.D. Fla. 2023).

178. *Id.*

179. *Id.*

180. *Id.*; *see also* Gary Fineout, *Federal Judge Rips into Florida's Ban on Gender-Affirming Care for Kids,* POLITICO (June 6, 2023, 5:53 PM), https://www.politico.com/news/2023/06/06/florida-gender-affirming-care-ruling-00100387 [https://perma.cc/7YW4-7826] ("The American Academy of Pediatrics and the American Medical Association support gender-affirming care for adults and adolescents.").

181. *Ladapo*, 676 F. Supp. 3d at 1223.

182. *Id.*

183. Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1215 (11th Cir. 2023).

184. *Id.* (alteration in original).

The Eleventh Circuit wrote that the question that we ask in conducting a rational relationship review "is simply whether the challenged legislation is rationally related to a legitimate state interest."[185] "Such a relationship," the court continued in the emphasized text, "may merely 'be based on rational speculation' and *need not be supported 'by evidence or empirical data*.'"[186] Making the point even more clearly, the court wrote, "Generally, we ask whether there is *any* rational basis for the law, even if the government's proffered explanation is irrational, and even if it fails to offer any explanation at all."[187]

The Sixth Circuit Court of Appeals also dismissed the extensive evidence submitted in support of the safety and efficacy of puberty-blocking drugs to treat gender dysphoria by concluding that although it "is surely relevant" that "many members of the medical community support the plaintiffs . . . it is not dispositive."[188] Making a comparison between a state legislature and a federal court, it noted that neither had any obligation to "defer" even to "a consensus" among experts.[189] In language that bears full attention, the court asked:

> What is it in the Constitution, moreover, that entitles experts in a given field to overrule the wishes of elected representatives and their constituents? Is this true in other areas of constitutional law? Must we defer to a consensus among economists about the proper incentives for interpreting the impairment-of-contracts or takings clauses of the Constitution? Or to a consensus of journalists about the meaning of free speech? Or even to a consensus of constitutional scholars about the meaning of a constitutional guarantee?[190]

The court then concluded that "[p]lenty of rational bases exist for these laws, with or without evidence."[191] Therefore, "[a]t bottom, the challengers simply disagree with the States' assessment of the risks and the right response to the risks. That does not suffice to invalidate a democratically elected law on rational-basis grounds."[192]

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185. *Id.* at 1224–25 (quoting Lofton v. Sec'y of Dep't of Child. & Fam. Servs., 358 F.3d 804, 818 (11th Cir. 2004)).

186. *Id.* (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993)) (emphasis added).

187. *Id.* (quoting Jones v. Governor of Florida, 950 F.3d 795, 809 (11th Cir. 2020).

188. L.W. *ex rel.* Williams v. Skrmetti, 73 F.4th 408, 416 (6th Cir. 2023).

189. *Id.* at 416.

190. L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 479 (6th Cir. 2023) *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

191. *Id.* at 489.

192. *Id.*

Because Tennessee did engage in a process of gathering and hearing medical evidence opposed to a ban, the Sixth Circuit's statement that "[p]lenty of rational bases exist for these laws, with or without evidence" is only dicta.[193] But its suggestion that a dispute over the basis of a decision related to medical care could be made with no evidence of supporting facts is concerning. While the Sixth Circuit was accurately following Justice Thomas's opinion in *FCC v. Beach Communications, Inc.*, that "rational basis review requires only the possibility of a rational classification for a law," the evidence in FCC involved the regulation of cable television facilities, not the medical care of children.[194] Justice Thomas himself made the point in *Beach* that such distinction matters: "In areas of *social and economic policy*, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."[195] The issue addressed by the Court in *Beach*, a decision to exempt some forms of cable TV providers from regulation and not others, is very different from a decision to ban a medical treatment prescribed by physicians and sought by parents of children with gender dysphoria. As Justice Stevens explained in his *Beach* concurrence, "Freedom is a blessing. Regulation is sometimes necessary, but it is always burdensome. A decision *not to regulate* the way in which an owner chooses to enjoy the benefits of an improvement to his own property is adequately justified by a presumption in favor of freedom not to regulate."[196]

However, if the Supreme Court extends the Sixth Circuit's application of *Beach*'s standard for a decision related to cable television to healthcare—if it endorses the upholding of a law targeting specific medical interventions so long as there is "the possibility of a rational classification for a law"—then it clears a path for states to pass any restriction on health care, no matter how widely endorsed.[197]

193. *Id.*

194. *Id.* (citing FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993)).

195. *Beach*, 508 U.S. at 313 (emphasis added).

196. *Id.* at 320 (Stevens, J., concurring).

197. L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 489 (6th Cir. 2023) *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

### *B. Classifications Based on Sex*

Defining whether a law classifies based on sex is entirely at the discretion of the reviewing court.[198] The Supreme Court defined sex discrimination in *United States v. Virginia* as denying "to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities."[199] In holding that Tennessee's gender-affirming care ban was unconstitutional, the federal district court cited *Virginia,* writing that the law, as written, "subjects individuals to disparate treatment on the basis of sex."[200]

However, the majority in the Sixth and Eleventh Circuits disagreed that the plaintiffs' children had experienced sex-based discrimination for any reason.[201] Having found that the plaintiffs had failed to meet their burden to prove that they were entitled to heightened scrutiny, the Sixth Circuit concluded that even if the plaintiffs could have proved sex discrimination, the Bans would survive intermediate scrutiny. [202] Judge Brasher's concurrence in the Eleventh Circuit's opinion went even further, arguing that if the statute did discriminate based on sex, "it is likely to satisfy intermediate scrutiny" because it would be "otherwise impossible to regulate these drugs differently when they are prescribed as a treatment for gender dysphoria than when they are prescribed for other purposes."[203] He continued, "[a]s long as the state has a substantial justification for regulating differently the use of puberty blockers and hormones for different purposes, then I think this law satisfies intermediate scrutiny."[204] Adding further emphasis to its

198. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 236 (2022) (explaining precedent holding that a state's regulation of abortion is not a sex-based classification and therefore not subject to heightened scrutiny).

199. United States v. Virginia, 518 U.S. 515, 532 (1996).

200. L.W. *ex rel.* Williams v. Skrmetti, 679 F. Supp. 3d 668, 695 (M.D. Tenn. 2023) (citing U.S. v. Virginia, 518 U.S. 515, 524 (1996)) ("SB1 on its face subjects individuals to disparate treatment on the basis of sex . . . the Court also agrees with Plaintiffs that SB1 subjects individuals to disparate treatment on the basis of sex because it imposes disparate treatment based on transgender status."), *rev'd and remanded*, 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

201. L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460, 487 (6th Cir. 2023); Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1224 (11th Cir. 2023).

202. L.W. *ex rel.* Williams v. Skrmetti, 73 F.4th 408, 419 (6th Cir. 2023) ("The State plainly has authority, in truth a responsibility, to look after the health and safety of its children.").

203. *Eknes-Tucker*, 80 F.4th at 1232 (Brasher, J., concurring).

204. *Id.*

conclusion that the statutes satisfied the criteria for constitutionality under rational relationship review, the Sixth Circuit continued in dicta to explain why the Bans would succeed under higher tiers of scrutiny, writing that "[t]he State plainly has authority, in truth a responsibility, to look after the health and safety of its children," far exceeding the rational relationship standard.[205]

What makes laws imposing criminal penalties for facilitating access to gender-affirming care different from the larger category of laws targeting transgender youth by limiting their participation in athletics or access to bathrooms is that their connection to children's health places them in a category of laws based on the extraordinary plenary powers retained by the states when they ceded some of their authority by ratifying the 1787 Constitution which created a strong federal government.[206]

#### i. Redefining Sex Discrimination Under the Equal Protection Clause of the Fourteenth Amendment

To balance the right of states to exercise their plenary power over matters related to health and the protection of individual rights, the Supreme Court has distinguished between discrimination based on the identity of individuals affected and discrimination caused by the deprivation of a protected constitutional right.[207] Within those two categories, the Court has created a hierarchy in which laws that discriminate based on sex

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205. *Skrmetti*, 73 F.4th at 419.

206. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012) (quoting THE FEDERALIST NO. 45, at 293 (J. Madison)) ("Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which 'in the ordinary course of affairs, concern the lives, liberties, and properties of the people' were held by governments more local and more accountable than a distant federal bureaucracy."); *see also* Mitchell, *supra* note 148, at 1275 ("[T]he Supreme Court interprets 'equal protection of the laws' to require equal treatment on account of race and sex (most of the time), to forbid discrimination with respect to a court-defined category of 'fundamental rights,' and to forbid discrimination that a court deems irrational."); Daniels v. Williams, 474 U.S. 327, 332 (1986) ("The Fourteenth Amendment is a part of a Constitution generally designed to allocate governing authority among the Branches of the Federal Government and between that Government and the States, and to secure certain individual rights against both State and Federal Government.").

207. *See* Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 121 (1989) (explaining that the Equal Protection Clause "places strict limits on the government's ability to infringe fundamental constitutional rights of all classes of persons").

are given less scrutiny than those based on race.[208] Plaintiffs challenging their states' gender-affirming care bans argue that the Bans discriminate based on sex and transgender status in violation of the Equal Protection Clause of the Fourteenth Amendment.[209] They claim that the Bans are discriminatory on their face, as written, and that they were passed with the intent to discriminate.[210] If they meet their burden of proof, then the state must justify the law by proving that it serves important governmental objectives and is substantially related to the achievement of those objectives.[211]

The Equal Protection Clause of the Fourteenth Amendment provides for "the absolute equality of all citizens of the United States politically and civilly before their . . . laws." [212] Even when states are using their plenary power to regulate health and safety, they cannot "deny any person the equal protection of the laws."[213] If a plaintiff can prove that a statute was passed with discriminatory intent, then the burden shifts to the state to offer a justification.[214] Discrimination based on race, color, or national origin or on the

208. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–42 (1985) (contrasting a higher level of review for when "a statute classifies by race, alienage, or national origin" from one that classifies based on "gender" or "illegitimacy").

209. *See* Arthur S. Leonard, *6th Circuit Panel Reaffirms Denial of Preliminary Injunction Against Kentucky and Tennessee Laws Banning Gender-Affirming Care for Minors; Plaintiffs Seek Supreme Court Review*, LGBT L. NOTES (Aug. 2023); Arthur S. Leonard, *11th Circuit Panel Vacates Preliminary Injunction Against Alabama's Ban on Gender-Affirming Care for Minors*, LGBT L. NOTES (Sept. 2023).

210. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631 (1996) ("[E]qual protection . . . must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.").

211. *Id*.

212. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA), 600 U.S. 181, 201 (2023) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 431 (1866) (statement of Rep. Bingham)); *see also* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (explaining that the Equal Protection Clause of the Fourteenth Amendment also requires that "all persons similarly situated should be treated alike").

213. *See, e.g.,* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 535, (2012) (explaining that while individual states "do not need constitutional authorization to act" when exercising their plenary powers, "[t]he Constitution may restrict state governments" from acting "by forbidding them to deny any person the equal protection of the laws").

214. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) ("In considering whether state legislation violates the Equal Protection Clause of the Fourteenth Amendment, U.S. Const., Amdt. 14, § 1, we apply different levels of scrutiny to different types of classifications. At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose."). For further discussion of tiers of scrutiny, *see* Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 GEO. J.L. & PUB. POL'Y 475 (2016).

exercise of fundamental constitutional rights can only be justified by a compelling government interest.[215] As Justice Roberts explained in *Students for Fair Admissions v. Harvard*, if the discrimination is based on race, the state actor faces "a daunting two-step examination known in our cases as 'strict scrutiny.'"[216]

Citizens are not being treated equally when a state action or law treats or "classifies" groups of people differently without adequate justification.[217] When a law classifies based on "race, color, or national origin" it is presumed discriminatory and the state must justify their action by proving that the law serves a compelling government interest.[218] But, when, as in the challenges to gender-affirming care bans, the plaintiffs are complaining of sex discrimination, the burden on the state is lower.[219] To withstand heightened scrutiny, classification by sex "must serve important governmental objectives and must be substantially related to the achievement of those objectives."[220] The Court describes this lower standard of review of "classifications based on sex" as "intermediate scrutiny."[221]

Finally, just because a law treats people differently does not alone make it unconstitutional. As the Court explained in *Romer*, the requirement to provide equal protection "must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons."[222] In contrast to classifications that warrant heightened scrutiny, the Court has set the general standard of review for a statute that classifies on more "prosaic grounds" than race, religion,

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215. *See SFFA*, 600 U.S. at 308–09 (Gorsuch, J., concurring) ("[C]ourts apply strict scrutiny for classifications based on race, color, and national origin . . . and rational-basis review for classifications based on more prosaic grounds.").

216. *Id*. at 206 (quoting Adarand Constructors v. Pena, 515 U.S. 200, 207 (1995)); *see also* Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 16–17 (2020) (applying strict scrutiny review to a COVID-19 era limit on occupancy that "violate[s] 'the minimum requirement of neutrality' to religion" because "they single out houses of worship for especially harsh treatment").

217. *See SFFA*, 600 U.S. at 206–07 (quoting Grutter v. Bollinger, 539 U.S. 306, 326 (2003)) ("[W]e ask, first, whether the racial classification is used to 'further compelling governmental interests.'").

218. *Id*. at 308–09 (Gorsuch, J., concurring).

219. *Id*.

220. Craig v Boren, 429 U.S. 190, 197 (1976); *see also SFFA*, 600 U.S. at 309 (describing the standard of review for sex discrimination as "intermediate scrutiny").

221. *SFFA*, 600 U.S. at 309 (Gorsuch, J., concurring) (citing United States v. Virginia, 518 U.S. 515, 555–56 (1996); Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 366–67 (2001)).

222. Romer v. Evans, 517 U.S. 620, 631 (1996).

or gender.[223] These laws are presumed constitutional unless the plaintiff can prove that there is no "rational means to serve a legitimate end."[224]

### ii. Narrowing Bostock: Declining to Characterize Transgender-Based Discrimination as Sex Discrimination

All of the courts holding that states' gender-affirming care bans constituted sex discrimination cited *Bostock v. Clayton County*, in which the Supreme Court held that discrimination based on transgender status was a form of gender stereotyping and also violated Title VII's prohibition against sex discrimination.[225] This is consistent with ADF's goal to "bring cases 'at the edges' of Bostock" in order to limit its application.[226]

In *Bostock,* the Court interpreted the prohibition against discrimination in employment "because of sex" to incorporate discrimination based on sexual orientation or gender identity.[227] It held that "[a]n employer who fires an individual merely for being gay or transgender defies the law."[228] What was remarkable about *Bostock* was not just the holding, but the forcefulness with which it was explained. Justice Gorsuch, writing for the Court, described its holding as proclaiming that the "simple but momentous" message

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223. *SFFA*, 600 U.S. at 308–09 (Gorsuch, J., concurring).

224. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985); *see also id.* at 440 ("These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others."); *In re* Griffiths, 413 U.S. 717, 721–22 (1973) (citations omitted) ("In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest.").

225. Bostock v. Clayton Cnty., 590 U.S. 644 (2020). One of the cases joined in the *Bostock* decision was from the Sixth Circuit. *See* Equal Emp. Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018) (quoting Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004)) ("'[D]iscrimination based on a failure to conform to stereotypical gender norms' was no less prohibited under Title VII than discrimination based on 'the biological differences between men and women.'"), *aff'd sub nom*. Bostock v. Clayton Cnty., 590 U.S. 644 (2020).

226. *See* David D. Kirkpatrick, *The Next Targets for the Group That Overturned Roe*, NEW YORKER (Oct. 2, 2023),
https://www.newyorker.com/magazine/2023/10/09/alliance-defending-freedoms-legal-crusade [https://perma.cc/DYK4-9E3T].

227. *Bostock*, 590 U.S. at 659–60; *see also* William N. Eskridge, Jr., Brian G. Slocum & Kevin Tobia, *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1616 (2023) (describing the majority's reference to the plain language of Title VII as the Court's "most salient intratextualist methodological battle").

228. *Bostock*, 590 U.S. at 683.

of Title VII was that an employee's gender is "not relevant to the selection, evaluation, or compensation of employees."[229] Extending its interpretation beyond transgender status, the Court wrote that "[f]or an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex."[230] This, it explained, is because under the ordinary public meaning of sex discrimination an employee "fired for being gay or transgender" had experienced illegal discrimination "based on sex."[231] It continued that "a policy of firing any employee known to be homosexual . . . must, along the way, intentionally treat an employee worse based in part on that individual's sex."[232] This is because an employer's decision to fire an employee on discovering that they have a spouse of the same gender inherently involves sex-based considerations.[233]

The significance of the majority's decision can be gauged by the highly critical dissent authored by Justices Alito and Thomas.[234] They immediately warned that the case would have constitutional implications because transgender individuals would argue its extension to "the Equal Protection Clause['s] [prohibition against] sex-based discrimination unless a 'heightened' standard of review is met."[235] They also criticized the justification for interpreting the words "because of sex" as meaning "discrimination because of sexual orientation or gender identity."[236] Instead, they argued that the Court should have considered the meaning of the statute's words at the time it was written.[237] Looking at the 1960s, the dissenters concluded that, at the time, "'on the basis of sex' was well understood . . . as having [nothing] to do with discrimination

229. *Id.* at 659 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989)) ("Title VII's message is 'simple but momentous': An individual employee's sex is 'not relevant to the selection, evaluation, or compensation of employees.'"). Justice Gorsuch used the word "simple" eleven times in the context of discrimination based on transgender status failing the most "simple test" of whether or not an employer had engaged in sex discrimination. *Id.* at 656–73.

230. *Id.* at 662.

231. *Id.* at 646–47 (2020).

232. *Id.* at 661–662.

233. *Id.*

234. *Id.* at 685 (Alito, J., dissenting) ("Many will applaud today's decision because they agree on policy grounds with the Court's updating of Title VII. But the question in these cases is not whether discrimination because of sexual orientation or gender identity *should be* outlawed. The question is *whether Congress did that in 1964*.") (emphasis in original).

235. *Id.* at 733.

236. *Id.*

237. *Id.* at 685.

because of sexual orientation or transgender status."[238] This, the dissenters explained, is because "[i]f every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time."[239]

The press immediately characterized *Bostock* as a major victory for LGBTQ+ employees.[240] Masha Gessen of the New Yorker described the decision as "the most consequential in the decades-long history of the American L.G.B.T.Q. movement."[241]

On January 25, 2021, President Biden issued an executive order extending *Bostock*'s definition of sex discrimination to all federal programs, not just those involving employment discrimination.[242] *Bostock* is cited frequently by federal courts in cases of transgender discrimination that do not fall under the jurisdiction of Title VII.[243] More broadly, "*Bostock* prompted dozens

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238. *Id.* at 709.

239. *Id.*

240. *See e.g.,* Katie Keith, *Supreme Court Finds LGBT People Are Protected From Employment Discrimination: Implications For The ACA*, HEALTH AFFAIRS FOREFRONT (June 16, 2020), https://www.healthaffairs.org/content/forefront/supreme-court-finds-lgbt-people-protected-employment-discrimination-implications-aca [https://perma.cc/UKM5-C7A4]; Ariane de Vogue & Devan Cole, *Supreme Court Says Federal Law Protects LGBTQ Workers From Discrimination,* CNN (June 15, 2020), https://www.cnn.com/2020/06/15/politics/supreme-court-lgbtq-employment-case/index.html [https://perma.cc/BMK4-RZBQ].

241. Masha Gessen, *The L.G.B.T.Q.-Rights Movement Wins Its Biggest Supreme Court Victory*, NEW YORKER (June 15, 2020), https://www.newyorker.com/news/our-columnists/the-lgbtq-rights-movement-wins-its-biggest-supreme-court-victory [https://perma.cc/6A59-QFAA].

242. *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, 86 Fed. Reg. 7023 (Jan. 20, 2021) ("All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation . . . these principles are reflected in the Constitution, which promises equal protection of the laws.").

243. *See e.g.,* Katie Eyer, *Transgender Equality and* Geduldig *2.0,* 55 ARIZ. ST. L.J. 475, 492 (2023) ("In some cases, this has followed inexorably from the courts' determination that facial discrimination based on transgender status exists—since many circuits have, like the Supreme Court in *Bostock v. Clayton County*, concluded that anti-transgender discrimination is necessarily also sex discrimination."); *see also* Jon W. Davidson, *How the Impact of Bostock v. Clayton County on LGBTQ Rights Continues to Expand,* ACLU (June 15, 2022) https://www.aclu.org/news/civil-liberties/how-the-impact-of-bostock-v-clayton-county-on-lgbtq-rights-continues-to-expand [https://perma.cc/68JA-9EKP] ("Moreover, the ruling has had far-reaching effects beyond that long-sought breakthrough and its immediate impact on federal employment discrimination law . . . . Numerous courts have since followed the Supreme Court's compelling reasoning—which did not depend upon the particulars

of lower and state courts to find that LGBTQ discrimination is illegal *because* it is sex discrimination."[244]

Yet despite the vigor of the dissent and the very public characterization of *Bostock* as an extension of transgender rights, there has been no indication by the Court that it was misunderstood or mistaken. So far, there has been no indication that the majority of the Court believes that *Bostock* has been taken too far—quite the opposite. In 2023, Justice Gorsuch cited *Bostock to* emphasize the relationship between definitions of discrimination under Equal Protection and Federal Civil Rights Law.[245] So, while *Bostock* does not mention the words "Equal Protection" or cite *Virginia*, nothing in the opinion extended the holding beyond Title VII, and nothing explicitly excluded extension.[246]

Several courts have extended *Bostock*'s interpretation of "because of sex" to the Equal Protection Clause. For example, a district judge in the Eleventh Circuit, Judge Geraghty,[247] cited *Price Waterhouse v. Hopkins*, a Title VII sex discrimination case, in determining that the state bans were unconstitutional under the Equal Protection Clause.[248] Judge Geraghty of the Northern District of Georgia wrote her application of the *Bostock* standard was not just consistent with "Eleventh Circuit precedent" but actually compelled her conclusion.[249] A 2011 Eleventh Circuit opinion involving the firing of a transgender state employee based on gender stereotyping held that "discriminating against someone on the basis of [their] gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause."[250]

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of the federal employment discrimination law—to hold that other federal laws barring sex discrimination in other settings also protect against sexual orientation and gender identity discrimination.").

244. Courtney Megan Cahill, *Sex Equality's Irreconcilable Differences*, 132 YALE L.J. 1065, 1078 (2023) (citing further cases that identify LGBTQ discrimination as sex discrimination based on *Bostock*).

245. SFFA, 600 U.S. 181, 308 (2023) (Gorsuch, J., concurring) ("The Equal Protection Clause addresses all manner of distinctions between persons and this Court has held that it implies different degrees of judicial scrutiny for different kinds of classifications.").

246. Nina Totenberg, *Supreme Court Delivers Major Victory to LGBTQ Employees*, NPR, (June 15, 2020),
https://www.npr.org/2020/06/15/863498848/supreme-court-delivers-major-victory-to-lgbtq-employees [https://perma.cc/U96W-435G].

247. Koe v. Noggle, 688 F. Supp. 3d 1321, 1346–47 (N.D. Ga. 2023).

248. Price Waterhouse v. Hopkins, 490 U.S. 228, 256 (1989) (holding that a private employer who denied "an aggressive female employee" partnership based on gender stereotyping had a claim for sex discrimination under Title VII).

249. Koe v. Noggle, 688 F. Supp. 3d 1321, 1344 (N.D. Ga. 2023).

250. Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)).

Similarly, Judge Hinkle of the Northern District of Florida meticulously addressed and refuted all of the defendant's arguments in a gender-affirming care ban case.[251] Specifically, he wrote:

> Transgender and cisgender individuals are not treated the same. Cisgender individuals can be and routinely are treated with GnRH agonists, testosterone, or estrogen when they and their doctors deem it appropriate. Not so for transgender individuals—the challenged statute and rules prohibit it. To know whether treatment with any of these medications is legal, one must know whether the patient is transgender. And to know whether treatment with testosterone or estrogen is legal, one must know the patient's natal sex.[252]

Judge Hale, the district court judge that heard the case ultimately overturned by the Sixth Circuit, rejected "the Commonwealth['s] attempts to distinguish *Bostock*'s reasoning as limited to the Title VII context," writing that "the Sixth Circuit found nearly two decades ago that discrimination based on transgender status 'easily' constitutes sex discrimination for purposes of the Equal Protection Clause . . . and in any event, the analysis under Title VII and the Equal Protection Clause is the same."[253]

The Sixth and Eleventh Circuits overturned the lower courts' holdings that the *Bostock* definition of sex discrimination should be applied to the Bans and completely repudiated their past decisions equating the standard of sex discrimination for Title VII with the standard for violations of the Equal Protection Clause. Rejecting Judge Hale's interpretation of *Smith v. City of Salem*, a Sixth Circuit Case predating *Bostock*, the Sixth Circuit was forced to counter that although the precedent cited does "inconclusively *sa[y]* that claims under the Equal Protection Clause and Title VII involve the 'same elements,'" it is does not extend "beyond claims about discrimination over dress or appearance."[254] Distinguishing it

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251. Doe v. Ladapo, 676 F. Supp. 3d 1205, 1226 (N.D. Fla. 2023) (finding that plaintiffs were substantially likely to succeed on the merits for their claim that Florida's ban violated parents' rights under Equal Protection and the Due Process Clause); *see also,* Ashton Hessee, *Florida District Court Judge Rules in Favor of Transgender Minors Receiving Hormone Therapy, Proclaiming That "Gender Identity Is Real"*, LGBT L. NOTES (July 2023).

252. *Doe*, 676 F. Supp. 3d at 1219.

253. Doe 1 v. Thornbury, 679 F. Supp. 3d 576, 582 (W.D. Ky. 2023), *rev'd and remanded sub nom.* L. W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023) *(*citing Smith v. City of Salem, Ohio, 378 F.3d 566, 577 (6th Cir. 2004)).

254. L. W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460, 485–86 (6th Cir. 2023)

further, the Sixth Circuit noted without analysis that *Smith* "predate[s] *Bostock*," and involved a different form of behavior.[255]

In language that seems like a direct invitation for the Supreme Court to limit *Bostock* to Title VII cases, the Sixth Circuit further wrote that in *Bostock*, "the employers fired adult employees because their behavior did not match stereotypes of how adult men or women dress or behave."[256] However, "[i]n this case, the laws do not deny anyone general healthcare treatment based on any such stereotypes; they merely deny the same medical treatments to all children facing gender dysphoria if they are 17 or under, then permit all of these treatments after they reach the age of majority."[257] It further distinguishes the two situations, concluding that "[a] concern about potentially irreversible medical procedures for a child is not a form of stereotyping."[258] The Eleventh Circuit was equally dismissive, writing that *Bostock* did not "deal[] with the Equal Protection Clause as applied to laws regulating medical treatments."[259]

Yet in rejecting the district court's application of *Bostock*'s intermediate scrutiny standard of review to gender-affirming care bans, the Sixth and Eleventh Circuits gave no reason for abandoning their prior precedents and did not even acknowledge that they were doing so. The Sixth Circuit baldly stated that *Bostock's* reasoning "applies only to Title VII."[260] Therefore, the district courts were improperly "exten[ding] . . . existing Supreme Court and Sixth Circuit precedent" in a manner "not justified in this setting."[261]

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(citing Smith v. City of Salem 378 F.3d 566 (6th Cir. 2004)), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

255. *Id.* at 485.

256. *Id.*

257. *Id.*

258. *Id.* at 485 (noting further that "a case about potentially irreversible medical procedures available to children falls far outside Title VII's adult-centered employment bailiwick").

259. Eknes-Tucker v. Governor of the State of Alabama, 80 F.4th 1205, 1228 (11th Cir. 2023) (distinguishing Glenn v. Brumby, 663 F.3d 1312, 1314, 1317 (11th Cir. 2011), a case before *Bostock* in which the Eleventh Circuit wrote that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination," finding in favor of a state employee dismissed on the basis that, according to their supervisor, their "intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make Glenn's coworkers uncomfortable").

260. Skrmetti, 83 F.4th at 484.

261. *Id.* at 488.

Judge White of the Sixth Circuit highlighted the lack of justification when she wrote in her dissent, "[t]o be sure, Title VII and the Equal Protection Clause are not identical . . . . But the majority does not explain why or how any difference in language requires different standards for determining whether a facial classification exists in the first instance."[262] She noted that the lack of explanation was especially puzzling since the Supreme Court often refers back and forth between federal anti-discrimination statutes and the equal protection analysis.[263]

If the Court accepts the Sixth and Eleventh Circuit Courts' invitations to narrow its opinion in *Bostock*, it will be consistent with a prediction made by Professor Kim Forde-Mazrui in 2022: "I suspect . . . that the Court will find a way to avoid" extending *Bostock* to "sex discrimination not involving sexual orientation and gender identity" because "it is inconsistent with politically conservative views."[264]

### iii. Sex Discrimination Directly Based on Transgender Status

One of the *Skrmetti* plaintiffs' arguments is that the gender-affirming care bans discriminate against their children based on transgender status, and that such discrimination is sex discrimination on its face because transgender status is a quasi-protected class.[265] This is different from an argument based on *Bostock* that discrimination based on transgender status is sex discrimination.[266]

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262. *Id*. at 503 (White, J.) (dissenting).

263. *Id*.

264. Kim Forde-Mazrui, *Dobbs and the Future of Liberty and Equality*, 72 CLEV. ST. L. REV. 1, 21–22 (2023).

265. L.W. *ex. rel.* Williams v. Skrmetti, 679 F. Supp. 3d 668, 689-690 (M.D. Tenn.) (quoting Ray v. McCloud, 507 F. Supp. 3d 925, 937 (S.D. Ohio 2020)) ("'There is no binding precedent from the United States Supreme Court or the Sixth Circuit regarding whether transgender people are a quasi-suspect class.' . . . The overwhelming majority of courts to consider the question, however, have found that transgender individuals constitute a quasi-suspect class for the purposes of the Equal Protection Clause."), *rev'd and remanded,* 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

266. Bostock v. Clayton County, 590 U.S. 644, 662 (2020) ("For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex."); *see also Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, 86 Fed. Reg. 7023 ("[T]he Supreme Court held that Title VII's prohibition on discrimination 'because of . . . sex' covers discrimination on

Judge Richardson found that Tennessee's gender-affirming care ban was discriminatory on its face because "the law plainly proscribes treatment for gender dysphoria—and Defendants do not contest that only transgender individuals suffer from gender dysphoria."[267] Judge Hinkle also found Florida's statute discriminatory on its face and went further, writing that "[t]he statute and rules at issue were motivated in substantial part by the plainly illegitimate purposes of disapproving transgender status and discouraging individuals from pursuing their honest gender identities. This was purposeful discrimination against [transgender people]."[268]

The Sixth Circuit preemptively dismissed claims that the law was based on hatred because "a law premised only on animus toward the transgender community would not be limited to those 17 and under. The legislature plainly had other legitimate concerns in mind."[269]

Another basis for denying the existence of sex discrimination is based on Justice Alito's holding in *Dobbs* that "regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against the members of one sex or the other.'"[270]

Judge Sarah Geraghty of the Northern District of Georgia confronted this issue directly and argued that abortion was different from the ban on gender-affirming care because it was not just "a medical procedure that only one sex can undergo" like abortion; rather, "prior to the passage of [the ban]" she noted that

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the basis of gender identity and sexual orientation. Under *Bostock's* reasoning, laws that prohibit sex discrimination—including Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681 *et seq.*), the Fair Housing Act, as amended (42 U.S.C. 3601 *et seq.*), and section 412 of the Immigration and Nationality Act, as amended (8 U.S.C. 1522), along with their respective implementing regulations—prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.").

267. *Skrmetti*, 679 F. Supp. 3d at 686–87 (quoting Fain v. Crouch, 618 F. Supp. 3d 313, 326 (S.D. W. Va. 2022)) ("To show that a law violates the Equal Protection Clause based on transgender status or sex, '[g]enerally, a plaintiff must show that [ ] [the] policy . . . had discriminatory intent. But such a showing is unnecessary when the policy tends to discriminate on its face.'").

268. Doe v. Ladapo, 676 F. Supp. 3d 1205, 1220 (N.D. Fla. 2023) (holding that plaintiffs were substantially likely to succeed on the merits for their claim that Florida's ban violated parents' rights under the Due Process Clause).

269. L.W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460, 487 (6th Cir. 2023) *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

270. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 236 (quoting Geduldig v. Aiello, 417 U.S. 484, 496, n.20 (1974)).

"any child could—if medically indicated—receive hormone therapy with either estrogen or testosterone."[271]

### iv. Narrowing Obergefell by Refusing to Identify LGBTQ+ Status as a Suspect Class

Plaintiffs also claim that gender-affirming care bans discriminate against their children not just because transgender-based discrimination is sex discrimination but also because transgender-based discrimination, on its own, warrants heightened scrutiny.[272] They base their claim on two arguments, one based on general principles and one on specific precedent. In general, they argue that a state should be required to provide a non-discriminatory justification if the group being treated differently is historically subject to discrimination.[273] Any group claiming discrimination has the opportunity to prove (1) "obvious, immutable, or distinguishing characteristics that define them as a discrete group," and that (2) the group is "a minority or politically powerless."[274]

One route to finding heightened scrutiny applicable to claims of discrimination against transgender individuals is by applying *Obergefell*, which held that laws prohibiting same-sex marriage were unconstitutional.[275] While the Court in *Obergefell*, as Professor Autumn L. Bernhardt explains, "did not use the magic words of 'suspect class,'" it did "expend[] a considerable amount of language and space describing gays and lesbians in terms of the four factors of the Suspect Class Doctrine."[276] This interpretation has always

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271. Koe v. Noggle, 688 F. Supp. 3d 1321, 1348 (N.D. Ga. 2023) (citing Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (quoting Geduldig v. Aiello, 417 U.S. 484, 496, n.20 (1974))).

272. *See* L.W. *ex. rel.* Williams v. Skrmetti, 679 F. Supp. 3d 668, 689 (M.D. Tenn. 2023) (quoting Lyng v. Castillo, 477 U.S. 635, 638 (1986); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–41 (1985)) (discussing the four factors "to determine whether a class . . . is quasi-suspect" and therefore subject to intermediate scrutiny), *rev'd and remanded*, 83 F.4th 460 (6th Cir. 2023*), cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* U.S. v. Skrmetti, 144 S. Ct. 2679 (2024).

273. Lyng v. Castillo, 477 U.S. 635, 638 (1986).

274. *Id.*

275. Obergefell v. Hodges, 576 U.S. 644, 663–76 (2015) (holding that laws banning same-sex marriage were unconstitutional on both equal protection and due process grounds).

276. Autumn L. Bernhardt, *The Profound and Intimate Power of the* Obergefell *Decision: Equal Dignity as a Suspect Class*, 25 TUL. J.L. & SEXUALITY 1, 11 (2016); *see also*, Ann E. Tweedy, *Bisexual Erasure, Marjorie Rowland, and the Evolution of LGBTQ Rights*, 46 HARV. J.L. & GENDER 265, 332-333 (2023) (citing *Obergefell*, 576

been a matter of dispute.[277] As the always even-handed Congressional Record Service cautions in its analysis of laws restricting access to bathrooms for transgender youth, while "intermediate scrutiny for sex-based classifications is well established, the Supreme Court has not addressed the proper standard of review for government classifications involving transgender individuals."[278]

The Sixth Circuit, however, took the Supreme Court's silence on the issue of suspect class status as rejection. It wrote, "If plaintiffs and the federal government were correct that the only material question in a heightened review case is whether a law contains a reference to sex or gender, the Court would have said so in invalidating bans on same-sex marriage in *Obergefell v. Hodges*. But it did not."[279] The Sixth Circuit noted that "[t]he Court, indeed, did not even apply heightened review to the laws."[280] Instead, it continued, the Supreme Court held only that state laws banning same-sex marriage infringed on the fundamental right to marry, not that they engaged in illegal classification.[281] Thus, in the Sixth Circuit's view, not only did the *Obergefell* Court decline to conclude that transgender individuals are a suspect class, but the Court could not have so concluded, because "transgender identity" is not "immutable" and because transgender people do not lack political power.[282]

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U.S. at 672) ("[I]n *Obergefell v. Hodges*, decided a few years before *Bostock*, the Court relied on equal protection in conjunction with due process in the context of same-sex marriage, although it was unclear about what level of scrutiny it was applying in its equal protection analysis.").

277. Brian T. Fitzpatrick & Theodore M. Shaw, *The Equal Protection Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/702 [https://perma.cc/LTW3-N7U2] ("One of the greatest controversies regarding the Equal Protection Clause today is whether the Court should find that sexual orientation is a suspect classification. In its recent same-sex marriage opinion, *Obergefell v. Hodges* (2015), the Court suggested that discrimination against gays and lesbians can violate the Equal Protection Clause. But the Court did not decide what level of scrutiny should apply, leaving this question for another day.").

278. Jared P. Cole, TRANSGENDER STUDENTS AND SCHOOL BATHROOM POLICIES: EQUAL PROTECTION CHALLENGES DIVIDE APPELLATE COURTS 3 CONG. RSCH. SERV. (2023), https://crsreports.congress.gov/product/pdf/LSB/LSB10902 [https://perma.cc/6KL7-KA9Z].

279. L.W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460, 487 (6th Cir. 2023) (citing Obergefell v. Hodges, 576 U.S. 644 (2015)), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

280. *Id.* at 484.

281. *Id.*

282. *Id.* at 487.

Here, again, Judge White disagreed, finding that because the bans draw a line based on gender nonconformity, which includes transgender status, they "trigger heightened scrutiny."[283] In her dissent, Judge White again called out the Sixth Circuit's interpretation of silence as rejection. She wrote that "[t]rue, the Court did not specify in *Obergefell* the appropriate degree of judicial scrutiny. But the Court's silence [on identifying a suspect class] is just that—silence."[284] She continued, "[w]e should be wary of reading much (if anything) into the Court's resolution of the issues presented there without discussion of the applicable level of scrutiny."[285] The relevant fact, she argued, is that "[t]he Court held that laws prohibiting same-sex marriage were unconstitutional under the Equal Protection Clause all the same."[286] The Fourth Circuit also disagreed, holding that "transgender people constitute at least a quasi-suspect class."[287] Now that the U.S. Supreme Court has granted certiorari, it will be able to resolve the dispute among the courts which have considered this issue and definitively exclude transgender or any LGBTQ+ status from the protection granted by being given status as a quasi-protected class.

### *C. Expanding Deference to States in Applying the Rational Relationship Test*

Once the Sixth and Eleventh Circuits rejected all of the plaintiffs' arguments that the law warranted heightened scrutiny, they were left, as the Sixth Circuit explained, with the burden of proving "that *no set of circumstances* exists under which the [statute] would be valid."[288] This standard of review is from the Supreme Court's 1934 decision in *Nebbia v. People of New York*.[289]

283. *Id.* at 498 (White, J., dissenting).

284. *Id.* at 502 (White, J., dissenting).

285. *Id.*

286. *Id*. at 502–03.

287. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 610 (4th Cir. 2020) ("[W]e conclude that heightened scrutiny applies because transgender people constitute at least a quasi-suspect class."), *as amended* (Aug. 28, 2020); *see also* Hecox v. Little, 79 F.4th 1009 (9th Cir. 2023) (holding, before its withdrawal subsequent to the Supreme Court's order in Labrador v. Poe *ex. rel.* Poe, 144 S.Ct. 921 (2024), that Idaho's ban was likely unconstitutional because discrimination against transgender individuals warranted heightened scrutiny), *opinion withdrawn*, 99 F.4th 1127 (9th Cir. 2024).

288. L.W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460, 489 (6th Cir. 2023) (emphasis in original) (quoting United States v. Hansen, 599 U.S. 762 (2023)), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

289. Nebbia v. People of New York, 291 U.S. 502 (1934).

In *Nebbia*, the Court held that to comply with due process, a state law "shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[290] This is usually called "rational basis review."[291] Since *Nebbia*, the Supreme Court has addressed two different aspects of this test: first, what a legitimate state interest is, and second, what it means for a state law to be rationally related to such an interest.[292] As the Sixth Circuit explained, "plaintiffs must rule out every potentially valid application" of the statute "before we may declare a law facially invalid."[293] Ultimately, the Sixth Circuit concluded that "[p]lenty of rational bases exist for these laws," pointing to the evidence offered by the states of Kentucky and Tennessee suggesting that gender-affirming care treatment holds unique health risks.[294] Though this evidence was disputed by the law's challengers, the court held that this was a matter of disagreeing with "the States' assessment of the risks and the right response to those risks," rather than something that might undermine a rational basis for the law.[295]

### *D. Narrowing the Rights of Parents: Due Process Analysis*

The petition for certiorari filed by the United States only addresses the failure to apply intermediate scrutiny to the aspects of the law that classify based on sex and gender.[296] However, both the Sixth and Eleventh Circuits addressed and rejected claims by the parent plaintiffs that the laws should be evaluated under the strict scrutiny standard because they infringe on their rights as parents to direct the medical care of their children.[297] In line with

290. *Id.* at 525.

291. Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. 14, 24 (Gorsuch, J., concurring) ("Rational basis review is the test this Court normally applies to Fourteenth Amendment challenges, so long as they do not involve suspect classifications based on race or some other ground, or a claim of fundamental right.").

292. *See generally* Todd W. Shaw, *Rationalizing Rational Basis Review*, 112 NW. U. L. REV. 487, 492–98 (2017) (describing rational basis review in depth).

293. *Skrmetti*, 83 F.4th at 489–90; *see also* Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1224 (11th Cir. 2023) (citing Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 301 (2022)) ("Because the Due Process Clause does not guarantee the described right, state regulation of the use of puberty blockers and cross-sex hormone treatment for minors would be subject only to rational basis review.").

294. *Skrmetti*, 83 F.4th at 489.

295. *Id.*

296. Petition for Writ of Certiorari, United States v. Skrmetti, 144 S. Ct. 2679 (Nov. 6, 2023) (No. 23-477), 2023 WL 7327440.

297. *See e.g.,* Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131 (M.D. Ala. 2022), *vacated sub nom.* Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205 (11th

*United States v. Carolene Products Co.*, the parents argued that these laws violate the Fourteenth Amendment's protection against state actions that deprive individuals of their "life, liberty or property" without due process of law.[298] The protection is heightened if the deprivation interferes with certain fundamental rights and liberty interests.[299] This heightened scrutiny is, like that applied to laws that classify based on race, also called "strict scrutiny."[300] Therefore, if a plaintiff "demonstrate[s] infringement of [a fundamental right] . . . the focus then shifts to the defendant to show that its actions were nonetheless justified and tailored consistent with the demands of our case law."[301]

The Alliance Defending Freedom's (ADF) position opposing parental rights seems inconsistent with its "goal . . . to persuade the Supreme Court to establish 'parental rights' as a constitutional principle" in a case where "the Court could say, 'Parental rights are fundamental rights.'"[302] ADF describes the basis for its support of gender-affirming care bans and other laws that target transgender children as supporting the rights of parents.[303] ADF is campaigning

Cir. 2023); Poe *ex. rel.* Poe v. Labrador, No. 1:23-CV-00269-BLW, 2024 WL 170678 (D. Idaho Jan. 16, 2024).

298. United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.").

299. Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1220 (11th Cir. 2023) (quoting Lofton v. Sec'y of Dep't of Child. & Fam. Servs., 358 F.3d 804, 815 (11th Cir. 2004)) ("Laws that burden the exercise of a fundamental right require strict scrutiny and are sustained only if narrowly tailored to further a compelling government interest.").

300. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 526 (2022); *see also* Fulton v. City of Philadelphia, Pennsylvania, 593 U.S. 522, 524 (2021) ("A government policy can survive strict scrutiny only if it advances compelling interests and is narrowly tailored to achieve those interests.").

301. *Kennedy*, 597 U.S. at 524 (holding a high school football coach not allowed to pray with his team at games was deprived of his rights to free speech and free exercise of religion).

302. *See* David D. Kirkpatrick, *The Next Targets for the Group That Overturned Roe*, NEW YORKER (Oct. 2, 2023), https://www.newyorker.com/magazine/2023/10/09/alliance-defending-freedoms-legal-crusade [https://perma.cc/4PSR-3XQS] (quoting Kristen Waggoner).

303. *See, e.g., ADF to 10th Circuit: OK Law Protects Children from Harmful, Unnecessary Medical Intervention*, ALL. DEFENDING FREEDOM (Dec. 18, 2023), https://adflegal.org/press-release/adf-10th-circuit-ok-law-protects-children-harmful-unnecessary-medical-intervention [https://perma.cc/D7PK-MBRE] ("Oklahoma is right to protect children from risky drug interventions that may permanently harm them without any proven long-term benefit."); *Michigan School District Treats Girl as Boy behind Parents' Backs*, ALL. DEFENDING FREEDOM (Dec. 18, 2023), https://adflegal.org/press-release/michigan-school-district-treats-girl-boy-behind-parents-backs [https://perma.cc/HJF8-6JGC].

for a "fundamental constitutional right" for parents' "moral duty to guide the upbringing, education, and health care of their children."[304]

It is difficult to predict whether the Supreme Court will have the opportunity to address the parental rights issue in reviewing the Tennessee law or if that will be left to another opportunity. By not seeking certiorari on the parental rights issue, the holdings of the Sixth and Eleventh Circuits may remain, such that the parental right, whatever its contours, does not include access to gender-affirming care.

The lower courts, however, recognized the fundamental rights of parents. Judge Richardson of Tennessee agreed that parents had the right to direct their children's medical care, the gender-affirming care bans violated it, and the state lacked a sufficiently compelling reason to justify their action.[305] In support of his conclusion, he cited Sixth Circuit precedent holding that parents "possess a fundamental right to make decisions concerning the medical care of their children."[306] He also cited two Supreme Court cases, *Troxel v. Granville*[307] and *Parham v. J.R*[308] for the principle that a parent has a right "to make decisions regarding the 'care, custody, and control of their children.'"[309] Judge White of the Sixth Circuit later described this as one of "the oldest of the fundamental liberty interests recognized by the Supreme Court."[310] Judge Liles C. Burke of Alabama reached a similar result, noting that "[e]ncompassed within this right is the more specific right to direct

304. *Parental Rights*, ALL. DEFENDING FREEDOM, https://adflegal.org/issues/parental-rights/ [https://perma.cc/5EWZ-URCM] (containing links to resources and analysis on Supreme Court cases discussing parental rights).

305. L.W. *ex rel.* Williams v. Skrmetti, 679 F. Supp. 3d 668, 684 (M.D. Tenn. 2023) (citing Kanuszewski v. Michigan Dep't of Health & Hum. Servs., 927 F.3d 396 (6th Cir. 2019)) ("The Court therefore agrees with Plaintiffs that under binding Sixth Circuit precedent, parents have a fundamental right to direct the medical care of their children, which naturally includes the right of parents to request certain medical treatments on behalf of their children."), *rev'd and remanded*, 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

306. *Id.*

307. 530 U.S. 57, 65–66 (2000).

308. 442 U.S. 584, 604 (1979).

309. *Skrmetti*, 679 F. Supp. 3d at 683.

310. L.W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460, 507 (6th Cir. 2023) (White, J., dissenting) (citing Troxel v. Granville, 530 U.S. 57, 65 (2000)), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

a child's medical care."[311] "Accordingly," he concluded, "parents 'retain plenary authority to seek such care for their children, subject to a physician's independent examination and medical judgment.'"[312]

In rejecting the parents' arguments that the laws violated their fundamental rights, the Sixth Circuit followed a line of argument advanced by the state of Kentucky in defending its gender-affirming care ban.[313] While not denying that parents have fundamental rights related to making decisions about their children, Kentucky argued that this right did not extend "to obtain[ing] a medical treatment reasonably prohibited by the State."[314] This argument was reflected in the Sixth Circuit's opinion when it emphasized that the parent plaintiffs were claiming "*a constitutional right to obtain reasonably banned treatments for their children*."[315] This right was not reflected by a "'deeply rooted' tradition of preventing governments from regulating the medical profession in general or certain treatments in particular, whether for adults or their children."[316]

Similarly, the Eleventh Circuit held that "plaintiffs have not presented any authority that supports the existence of a constitutional right to 'treat [one's] children with transitioning medications subject to medically accepted standards.'"[317] It continued that, in contrast to recognized parental rights, "[n]o Supreme Court case extends [parental rights] to a general right to receive new medical or experimental drug treatments."[318] Making an analogy to a case in which a dying woman's family sought access to a drug not yet approved by the FDA, the Sixth Circuit concluded that "[o]ther courts have drawn the same sensible line . . . reject[ing] arguments that the Constitution provides an

311. Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, 1144 (M.D. Ala. 2022) (citing Bendiburg v. Dempsey, 909 F.2d 463, 470 (11th Cir. 1990)) (recognizing "the right of parents to generally make decisions concerning the treatment to be given to their children"), *vacated sub nom*. Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205 (11th Cir. 2023).

312. *Id.* (citing Parham v. J.R. 442 U.S. 584, 604 (1979)).

313. *Skrmetti*, 83 F.4th at 476.

314. The Commonwealth of Kentucky's Reply Brief at *5, L.W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460, 507 (6th Cir. 2023), (Aug. 17, 2023) (No. 23-5609), 2023 WL 5500631.

315. *Skrmetti,* 83 F. 4th at 475 (emphasis in original).

316. *Id.* at 473.

317. Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1210 (11th Cir. 2023).

318. *Id.* (quoting Troxel v. Granville, 530 U.S. 57, 66 (2000)).

affirmative right of access to particular medical treatments reasonably prohibited by the Government."[319]

Having saddled plaintiffs with this impossible-to-defend burden—the right to harm their children—both the Sixth and Eleventh Circuit Courts of Appeal held that that the plaintiffs had failed to satisfy it. The Sixth Circuit acknowledged that the "[p]arents, it is true, have a substantive due process right 'to make decisions concerning the care, custody, and control of their children,'" but concluded that those rights do not extend "to a general right to receive new medical or experimental drug treatments."[320]

The Sixth Circuit then went beyond the scope of the question before it by writing that the Supreme Court intended to limit parental rights to "narrow fields, such as education and visitation rights."[321] The court explained that even if plaintiffs could meet the criteria for establishing a new fundamental right, it is likely that right would still be outweighed by two of the government's "abiding interest[s]:"[322] "preserving the welfare of children"[323] and "protecting the integrity and ethics of the medical profession."[324] The existence of these "interests gives States broad power, even broad power to 'limit parental freedom,' particularly in an area of new medical treatment."[325] Without Constitutional protection, a parent has no more right to demand that their child receive gender-affirming care than they would have to demand that their child receive an alternative cancer treatment.[326]

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319. L.W. *ex. rel.* Williams v. Skrmetti, 73 F.4th 408, 418 (citing Abigail All. for Better Access to Developmental Drugs v. von Eschenbach, 495 F.3d 695, 710 n.18 (D.C. Cir. 2007)), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

320. *Id.* at 417 (citing Troxel v. Granville, 530 U.S. 57, 66 (2000)).

321. *Id.*

322. *Id.* at 417.

323. *Id.* (citing Kanuszewski v. Mich. Dep't of Health & Hum. Servs., 927 F.3d 396, 419 (6th Cir. 2019); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022)).

324. *Id.* (citing Washington v. Glucksberg, 521 U.S. 702, 731 (1997)).

325. *Id.* (citing Prince v. Massachusetts, 321 U.S. 158 (1944)); *see* Parham v. J.R., 442 U.S. 584, 606 (1979).

326. Kavitha V. Neerukonda, *Choosing Alternative Treatments for Children*, 13 VIRTUAL MENTOR 369 (2011), http://dx.doi.org/10.1001/virtualmentor.2011.13.6.hlaw1-1106 [https://perma.cc/FYQ8-KNMM]; Mariah Taylor, *Court Orders Cancer Treatment for 5-Year-Old, but Parents Want Alternative Treatments*, BECKER'S HOSP. REV. (Feb. 9, 2023), https://www.beckershospitalreview.com/oncology/court-orders-cancer-treatment-for-5-year-old-but-parents-want-alternative-treatments.html [https://perma.cc/FTP3-NNZR].

Judge White of the Sixth Circuit's dissenting opinion clarifies how different this Sixth Circuit opinion was from earlier decisions. She described the gender-affirming care bans in Tennessee and Kentucky as statutes that "infringe on [parents'] fundamental right to control medical choices for their children, a right deeply rooted in this nation's history and protected as a matter of Supreme Court and binding circuit precedent."[327] Therefore, the statutes "violate the Due Process Clause because they prohibit Parent Plaintiffs from deciding whether their children may access medical care that the states leave available to adults."[328] Summarizing her objections, Judge White wrote that the majority was giving states the authority to "simply deem a treatment harmful to children without support in reality and thereby deprive parents of the right to make medical decisions on their children's behalf."[329] This, she argued, "is tantamount to saying [parents have] no fundamental right" to take care of their children.[330]

Similarly, Judge Hinkle in the Northern District of Florida criticized such a mischaracterization of the plaintiffs' parents claims:

> The defendants say a parent's right to control a child's medical treatment does not give the parent a right to insist on treatment that is properly prohibited on other grounds. Quite so. If the state could properly prohibit the treatments at issue as unsafe, parents would have no right to override the state's decision. But as set out above, there is no rational basis, let alone a basis that would survive heightened scrutiny, for prohibiting these treatments in appropriate circumstances.[331]

The Eleventh Circuit went further than the Sixth Circuit by questioning the existence of any parental right associated with a prescription medication. It wrote that "the use of these medications in general—let alone for children—almost certainly is not 'deeply rooted' in our nation's history and tradition."[332] The court wrote that "*Parham* does not at all suggest that parents have a fundamental right to direct a particular medical treatment for their child that is prohibited by state law."[333] It noted further that "*Parham* therefore offers no support for the Parent Plaintiffs' substantive due process

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327. L.W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460, 506 (6th Cir. 2023) (White, J., dissenting), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

328. *Id.* at 507.

329. *Id.* at 511.

330. *Id.*

331. Doe v. Ladapo, 676 F. Supp. 3d 1205, 1220 (N.D. Fla. 2023).

332. Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1220 (11th Cir. 2023).

333. *Id.* at 1223.

claim."[334] Even more notable, the Eleventh Circuit cited *Troxel* for the negative proposition that "none of the binding decisions regarding substantive due process establishes that there is a fundamental right to 'treat [one's] children with transitioning medications subject to medically accepted standards.'"[335]

Taken together, the opinions of the Sixth and Eleventh Circuit substantially limit what has been the longstanding interpretation of lower courts that *Parnham* and *Troxel* provide parents with a "fundamental right to control medical choices for their children" that is "a right deeply rooted in this nation's history and protected as a matter of Supreme Court . . . precedent."[336]

## IV. The Petition for Certiorari and Its Potential Ramifications

What makes review of a now granted certiorari petition relevant is that it highlights the gulf between the Sixth Circuit's legal holdings and those made in similar circumstances by the Supreme Court.

The Solicitor General's petition challenged the Sixth Circuit's decision allowing the enforcement of a Tennessee law that

> prohibits healthcare providers from 'prescribing . . . any puberty blocker or hormone' if that treatment is provided 'for the purpose' of '[e]nabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex' or 'treating purported discomfort or distress from a discordance between the minor's sex and asserted identity.'[337]

The petition noted that the law does not, however, prevent providers from prescribing drugs to children for other medical purposes.[338] Further, although the petition challenges only

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334. *Id*.

335. *Id.* at 1124 ("Instead, some of these cases recognize, at a high level of generality, that there is a fundamental right to make decisions concerning the 'upbringing' and 'care, custody, and control' of one's children.").

336. L.W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460, 507 (6th Cir. 2023) (White, J., dissenting), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024); *see, e.g.,* Troxel v. Granville, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the] Court."); *see generally* Katie Eyer, *Anti-Transgender Constitutional Law*, 77 VAND. L. REV. 1113, 1152–55 (2024) (discussing parents' rights in relation to the care of their children).

337. Petition for Writ of Certiorari at *8–9, United States. v. Skrmetti, 144 S. Ct. 2679 (Nov. 6, 2023) (No. 23-477), 2023 WL 7327440 (citing Tenn. Code Ann. §§ 68-33-102(5)(B), 68-33-103(a)(1) (2023)).

338. *Id.* at *9 ("[P]rohibition applies only when a covered treatment is prescribed

Tennessee's law, it notes that this is one of a series of almost identical laws being challenged all over the country.[339] Again, while only the Sixth Circuit's decision to reverse the stay is before the Court, the certiorari petition acknowledges a nearly identical decision by the Eleventh Circuit, which also reversed a stay issued by an Alabama federal district court.[340]

On November 6, 2023, the Solicitor General, on behalf of the intervening party, the United States of America, filed a petition for certiorari to review the decision of the Sixth Circuit Court of Appeals reversing a stay entered on June 28, 2023, by Judge Eli Richardson.[341] The petition asks the Court "to review the judgment of the United States Court of Appeals for the Sixth Circuit" in the case of *L.W. by and through Williams v. Skrmetti* which reversed a district court's decision to stay "Tennessee officials' enforcement of the law."[342] The question presented was:

> Whether Tennessee Senate Bill 1 (SB1), which prohibits all medical treatments intended to allow 'a minor to identify with, or live as, a purported identity inconsistent with the minor's sex' or to treat 'purported discomfort or distress from a discordance between the minor's sex and asserted identity' violates the Equal Protection Clause of the Fourteenth Amendment.[343]

This petition marked the end of a legal process that began on April 20, 2023, with the filing of a complaint in the Federal District Court for the Western District of Kentucky seeking a stay of Tennessee's gender-affirming care ban and ended with an order by

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to allow individuals to live in conformity with a gender identity other than their sex assigned at birth, the law does not restrict the provision of puberty blockers or hormones for any other purpose.").

339. *Id.*

340. Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1224 (11th Cir. 2023) (overturning district court order to stay Alabama's gender-affirming care ban); *see also* Perry, *supra* note 85 (criticizing lower court stays of gender-affirming care bans).

341. Petition for Writ of Certiorari at *4–6, United States v. Skrmetti, 144 S. Ct. 2679 (Nov. 6, 2023) (No. 23-477), 2023 WL 7327440; *see also* L.W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460, 470 (6th Cir. 2023) ("Kentucky appealed and moved for a stay of the injunction. The district court granted the stay, and we declined to lift it . . . . We consolidated the appeals, expedited them, and agreed to resolve them by the end of September 2023.") (citations omitted), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024); Adriel Bettelheim, *DOJ Asks Supreme Court to Review Tennessee's Ban on Gender-affirming Care,* AXIOS (Nov. 6, 2023), https://www.axios.com/2023/11/07/biden-doj-supreme-court-trans-care-tennessee [https://perma.cc/DBX8-RK9X] (summarizing the petition for certiorari).

342. Petition for Writ of Certiorari at *1–2, United States v. Skrmetti, 144 S. Ct. 2679 (Nov. 6, 2023) (No. 23-477), 2023 WL 7327440.

343. *Id.*

the Sixth Circuit Court of Appeals on September 28, 2023, holding that plaintiffs had failed to meet their burden of proof.[344]

There is no public explanation for the six month delay between when the petition for certiorari was filed and when it was granted. It is, however, possible to track its history during that time period, as it was put on the agenda for the Court's review but rescheduled at least three times.[345]

Over the course of the term, while the Court delayed considering the Solicitor General's petition for certiorari, it made two decisions that strongly signaled the likelihood that it will directly uphold the opinion of the Sixth Circuit. The first was on December 12, 2023, when it denied certiorari in *Tingley v. Ferguson* and effectively upheld the State of Washington's right to ban conversion therapy.[346] Although three justices filed dissenting statements, all concerned First Amendment issues raised by ADF on behalf of the licensed family therapist they were representing.[347]

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344. L.W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460, 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024); *see* Doe 1 v. Thornbury, 679 F. Supp 3d 576 (W.D. Ky. June 28, 2023), *rev'd and remanded sub nom*. L. W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom*. Doe v. Kentucky, 144 S. Ct. 389 (2023); Doe 1 v. Thornbury, 75 F.4th 655 (6th Cir. 2023).

345. Personal Communication with Chris Geidner, legal journalist, (April 19, 2024); *see also The Secret Supreme Court: Late Nights, Courtesy Votes And The Unwritten 6-Vote Rule*, CNN (Oct. 17, 2021), https://www.cnn.com/2021/10/17/politics/supreme-court-conference-rules-breyer/index.html [https://perma.cc/R2NP-G6VJ] (accounting the process of reviewing petitions for certiorari according to Justice Breyer) ("'What happens,' Breyer told CNN, 'is it's highly professional. People go around the table. They discuss the question in the case . . . the chief justice and Justice (Clarence) Thomas and me and so forth around . . . . People say what they think. And they say it politely, and they say it professionally.'"). *But see*, Kenneth Jost, *The Justices' Secretive and Evolving Conference,* CASETEXT: THOMSON REUTERS (Oct. 23, 2015), https://casetext.com/analysis/the-justices-secretive-and-evolving-conference [https://perma.cc/F64G-ZPNE] (criticizing the system) ("[M]ost of the Court's real work is done behind the scenes: reading briefs, researching cases, and drafting and circulating opinions. In addition, the justices' only collective face-to-face meetings to discuss and vote on cases are conducted in super secrecy, with no staff present, no leaks, and no accounts disclosed until long afterward if ever.").

346. Tingley v. Ferguson, 144 S. Ct. 33 (2023); *see also*, Amy Howe, *Justices Won't Hear "Conversion Therapy"* Case, SCOTUSBLOG, https://www.scotusblog.com/2023/12/justices-wont-hear-conversion-therapy-case/ [https://perma.cc/6DLM-RF5R] (summarizing the denial of certiorari for *Tingley v. Ferguson*).

347. *See* Arthur S. Leonard, *Supreme Court Avoids Ruling on Conversion Therapy Bans* , LGBT L. NOTES (Dec. 11, 2023), at 3 ("Justice Thomas's dissenting opinion channels ADF's petition for Tingley and focuses more on gender identity and transition than on sexual orientation, which has traditionally been the main focus of both the conversion practice and the laws banning it.").

Nothing in those statements suggested a weakening of the Court's commitment to upholding a state's plenary power to pass laws related to health and safety. Second, on April 15, 2024, the Court denied an application for a stay which effectively reversed the Ninth Circuit and allowed Idaho to enforce its law against all but the two individual plaintiffs who had won a temporary stay for the state's ban on gender-affirming care.[348]

While there is seemingly no direct relationship between *Tingley*, which involved a challenge to Washington's law banning conversion therapy, and *Skrmetti*, which concerns Tennessee's law banning gender-affirming care, ADF was counsel of record in *Tingley* and filed amicus briefs in *Skrmetti*.[349] In *Tingley*, ADF represented the plaintiff challenging Washington's conversion therapy ban, but in *Skrmetti*, they supported the interests of the State of Tennessee seeking to uphold the constitutionality of laws banning gender-affirming care.[350] In *Tingley*, the Court denied ADF's petition for certiorari on behalf of a therapist challenging Washington State's ban on conversion therapy.[351] Although the upholding of that law was, in isolation, a victory for the same stakeholders opposing gender-affirming care bans, in general, it is not good news. The language of the dissenters contains language hostile to those treating transgender youth.[352]

Now that *Skrmetti* will be taken up for review, the resulting opinion is very likely to result in the same kind of sudden reduction of rights as *Dobbs*, but on a much broader scale. This is not only

348. Labrador v. Poe *ex. rel.* Poe, 144 S. Ct. 921(2024); *see also*, Ian Millhiser, *The Supreme Court's Confusing New Anti-Trans Decision, Explained*, VOX (Apr. 15, 2024), https://www.vox.com/scotus/2024/4/15/24131456/supreme-court-transgender-health-care-labrador-poe [https://perma.cc/SP6T-JZA9] (summarizing the Court's denial of the application for stay in *Labrador v. Poe*).

349. Tingley v. Ferguson, 557 F. Supp. 3d 1131, 1134 (W.D. Wash. 2021); Brief of Alliance Defending Freedom as Amicus Curiae in Support of Respondents, United States v. Skrmetti, No. 23-477, (U.S. Oct. 15, 2024), 2024 WL 4546386; Brief of Alliance Defending Freedom as Amicus Curiae in Support of Appellants and for Reversal, L.W. *ex rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023) (No. 23-5600), 2023 WL 4901836.

350. *Tingley*, 557 F. Supp. 3d at 1134 (involving Attorneys David A. Cortman and Kristen K. Waggoner from Alliance Defending Freedom serving as counsel); L.W. v. Skrmetti, 83 F.4th 460 (6th Cir. 2023) (involving Attorneys John J. Bursch and Jacob P. Warner from Alliance Defending Freedom serving as counsel).

351. Tingley v. Ferguson, 144 S. Ct. 33 (2023).

352. *Id.* at 34 (Thomas, J., dissenting) ("Under SB 5722, licensed counselors can speak with minors about gender dysphoria, but only if they convey the state-approved message of encouraging minors to explore their gender identities. Expressing any other message is forbidden—even if the counselor's clients ask for help to accept their biological sex. That is viewpoint-based and content-based discrimination in its purest form.").

because of the Court likely finding the Bans constitutional, but because if they do so based on the arguments made by ADF on the states' behalf and adopted by the Sixth and Eleventh Circuits, the way will be cleared for even more sweeping laws designed to promote a retrogressive social agenda.

As with abortion, ADF is not hiding its agenda for the future. In addition to laws banning gender-affirming care, states have been actively signaling their intent to limit access to contraception[353] and to limit parents' control over embryos created through IVF.[354] Additionally, very public statements by ADF and others who share its views on issues such as making it more difficult to obtain no-fault divorces, reducing restrictions on marriage among close relatives, and limiting access to medication to prevent HIV suggest that translating these social goals into binding legislation may not be far behind.[355]

The current speaker of the House of Representatives, Mike Johnson, was previously a lawyer for ADF and has been quite open about his commitment to their agenda in relation to establishing an "eighteenth-century" form of marriage.[356] That includes a prohibition against no-fault divorce.[357] As ADF explains, their agenda is to defend what they describe as "[t]he timeless truth of God's design for male and female."[358]

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353. Michael Ollove, *Some States Already Are Targeting Birth Control*, STATELINE (May 19, 2022), https://stateline.org/2022/05/19/some-states-already-are-targeting-birth-control/ [https://perma.cc/DUY7-W74F]; *see also*, *Refusing to Provide Health Services*, GUTTMACHER INSTITUTE (2016), https://www.guttmacher.org/state-policy/explore/refusing-provide-health-services [https://perma.cc/7MQT-PJKD].

354. Caleb Taylor, *Alabama Supreme Court Rules IVF Embryos Ae Protected under Wrongful Death of a Minor Act*, 1819 NEWS (Feb. 16, 2024), https://1819news.com/news/item/alabama-supreme-court-rules-ivf-embryos-are-protected-under-wrongful-death-of-a-minor-act [https://perma.cc/8GGH-HXYE].

355. *State Laws About Prescribing May Limit Access to HIV Pre-exposure Prophylaxis*, WOLTERS KLUWER (Jan. 21, 2022), https://www.wolterskluwer.com/en/news/state-laws-about-prescribing-may-limit-access-to-hiv-pre-exposure-prophylaxis [https://perma.cc/T2N4-S4XA].

356. Marci A. Hamilton, *Mike Johnson, Theocrat: the House Speaker and a Plot Against America*, THE GUARDIAN (Nov. 4, 2023), https://www.theguardian.com/us-news/2023/nov/04/mike-johnson-theocrat-house-speaker-christian-trump [https://perma.cc/CB8F-EG42].

357. Katie Herchenroeder, *The Most Powerful Man in the House Doesn't Like Divorce*, MOTHER JONES (Oct. 26, 2023), https://www.motherjones.com/politics/2023/10/speaker-mike-johnson-divorce-covenant-marriage/ [https://perma.cc/DD5V-B6RT].

358. Kristen Waggoner, *Gender Ideology Imperils Freedom*, WORLD (Aug. 15, 2023), https://wng.org/opinions/gender-ideology-imperils-freedom-1692099057 [https://perma.cc/6RA2-PC9A].

The Alliance Defending Freedom is "the world's largest legal organization committed to protecting religious freedom, free speech, marriage and family, parental rights, and the sanctity of life."[359] It was developed in 1994 by a "a group of 35 Christian leaders, who led various churches and ministries across the United States" and "were growing more and more concerned about the future of religious freedom in the United States."[360] Among them were Dr. James Dobson who had already founded Focus on the Family.[361]

In addition to its work in the courts, "ADF's Center for Public Policy [supports] laws that protect religious freedom, free speech, the sanctity of life, marriage and family, and parental rights." [362] It does this by "provid[ing] legal analysis, valuable resources, and expert testimony on our nation's most pressing First Amendment legislation in state legislatures across the country."[363]

In a 2021 blog post, Focus on the Family advises that the source of unhappiness in marriage is confusion about the roles that each spouse should play and that, therefore, happiness depends on adopting the injunction that, "Wives, submit to your husbands, as to the Lord. For the husband is the head of the wife even as Christ is the head of the church, his body, and is himself its Savior. Now as the church submits to Christ, so also wives should submit in everything to their husbands."[364] Using the language of "parental rights," ADF asserts parents' "God-given duty to care for, raise, and educate their children" and protect them from being "manipulated and told they can adopt a different gender identity."[365]

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359. *Who We Are*, ALL. DEFENDING FREEDOM, *supra* note 30. *See also Alliance Defending Freedom*, S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom [https://perma.cc/A28P-CDJB].

360. Scott Blakeman, *A Vision for Freedom Series (Part 1): The Roots of Alliance Defending Freedom*, CHURCH & MINISTRY ALLIANCE (Apr. 21, 2022), https://www.adfchurchalliance.org/post/the-roots-of-alliance-defending-freedom [https://perma.cc/TM84-FR2S].

361. *Id.*

362. *Who We Are*, ALL. DEFENDING FREEDOM, *supra* note 30.

363. Natalie Allen, *State Legislatures Are at the Front Lines of Securing Generational Wins*, ALL. DEFENDING FREEDOM (Sept. 14, 2022), https://web.archive.org/web/20240405031936/https://adflegal.org/article/state-legislatures-are-front-lines-securing-generational-wins.

364. Heather Drabinsky, *Healthy Gender Roles In Marriage*, FOCUS ON THE FAMILY (May 3, 2021), https://www.focusonthefamily.com/marriage/healthy-gender-roles-in-marriage/ [https://perma.cc/SPJ9-UXN9].

365. *Stand For Parental Rights*, ALL. DEFENDING FREEDOM, https://adflegal.org/support/defending-parental-rights/ [https://perma.cc/9AYM-DXPB].

There is considerable reason to worry that this power to shape society through access to health care could quickly impact the economic independence of people able to conceive children.[366] ADF and others are clear that they hope to limit access to contraception.[367] This is not just an issue for young people. The consequences of losing access to all forms of contraception are, if anything, even greater for people able to conceive children well into middle age.[368]

Finally, if *Bostock* is restricted to Title VII of the Civil Rights Act and *Obergefell* is either reversed or narrowed, there will be nothing preventing states from passing even more intrusive laws involving health care.[369] Members of ADF's coalition are highly critical of psychiatric drugs.[370] Another target may be drugs to

366. *See* Paul Krugman, *An Economics Nobel for Showing How Much Women Matter: Paul Krugman*, NEW YORK TIMES (Oct. 12, 2023), https://www.nytimes.com/2023/10/12/opinion/columnists/claudia-goldin-nobel-prize.html (last visited Jan. 31, 2025) (interviewing the 2023 winner of the Noble Prize in Economics, Claudia Goldman, who directly links access to contraception with a dramatic shift in women's progress towards equality because they could "be more serious in college, plan for an independent future, and form their identities *before* marriage and family"); *see also*, Marc Spindelman, *Dobbs' Sex Equality Troubles*, 32 WM. & MARY BILL RTS. J. 117, 136 (2023) (citing Ric Segall, *The Year Originalism Became a Four-Letter Word*, DORF ON LAW (Dec. 12, 2022), http://www.dorfonlaw.org/2022/12/the-year-originalism-became-four-letter.html [https://perma.cc/76T7-3BKN]) ("[M]any people may presently believe that *Dobbs*' tolerance for the legal return of male-dominant sex-based hierarchies will remain limited to the abortion setting, based on the theory that no rational Supreme Court would ever endorse eliminating Fourteenth Amendment sex equality rights across the board, and especially not quickly out of the post-*Dobbs* gate.").

367. Lisa Marshall, *Post-Roe, Contraception Could Be Next*, CU BOULDER TODAY (Oct. 9, 2023), https://www.colorado.edu/today/2023/10/09/post-roe-contraception-could-be-next [https://perma.cc/UQL8-D2YF] ("We are seeing abortion and contraception restricted and stigmatized in tandem again now."); *see also* Kat Tenbarge, *Conservative Influencers Push Anti-Birth Control Message*, NBC NEWS (July 1, 2023), https://www.nbcnews.com/tech/internet/birth-control-side-effects-influencers-danger-rcna90492 [https://perma.cc/K2QM-75D2] ("Major conservative influencers on social media platforms such as Twitter and Rumble have coalesced in recent months around talking points that connect birth control with a variety of negative health outcomes.").

368. Judith A. Berg & Nancy Fugate Woods, *Overturning Roe v. Wade: Consequences for Midlife Women's Health and Well-Being*, 9 WOMEN'S MIDLIFE HEALTH, at 2 (2023), http://dx.doi.org/10.1186/s40695-022-00085-8 (last visited Jan. 31, 2025) ("With the loss of *Roe v. Wade*, women of reproductive potential (menarche to menopause) in states that restrict or completely ban abortion likely will face critical access issues.").

369. *See supra* Part III.B.

370. Jeremy Pierre, *Psychiatric Medication and the Image of God*, THE GOSPEL COALITION (Sept. 24, 2012), https://www.thegospelcoalition.org/article/psychiatric-medication-and-the-image-of-god/ [https://perma.cc/PCP7-49QT] (making the Christian case against psychiatric medication).

prevent HIV.[371] One community health director made this connection directly, saying:

> We must be increasing access to life-saving medications like PrEP, not using it as the latest political wedge to attack LGBTQ people in the South. Whether it's access to abortion, trans-affirming care, birth control, or PrEP, we are seeing dangerous action from activist courts intervening in Americans' healthcare decisions—and we must push back.[372]

A frightening corollary to bans on accessing medical treatment is the recission of rights to refuse it. Bioethicist Rebecca Dresser warned recently that one of the direct results of the Supreme Court's attack on rights connected to personal privacy is the right to refuse medical care for our children or us.[373] In sum, by deeming any activity unknown in 1865 as outside the scope of constitutional protection, states can be free to overrule parents on any medical decision, from vaccination to contraception to psychiatric medication.[374]

## Conclusion

As demonstrated throughout this article, having granted certiorari to review the Sixth Circuit's opinion, the Supreme Court is well on its way to further enhancing states' plenary power to achieve discriminatory social goals. Although the specific gender-

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371. Braidwood Mgmt. v. Becerra, 627 F. Supp. 3d 624 (N.D. Tex. 2022); *see, e.g.*, Adam Polaski, *Judge Rules Against Federal Mandate for Coverage of HIV Prevention Medication PrEP, Signaling New Attack on LGBTQ Health in the South*, CAMPAIGN FOR S. EQUAL. (Sept. 7, 2022), https://southernequality.org/judge-rules-against-federal-mandate-for-coverage-of-hiv-prevention-medication-prep-signaling-new-attack-on-lgbtq-health-in-the-south/ [https://perma.cc/Y4MQ-MN7F]; Meredithe McNamara, Dini Harsono, E. Jennifer Edelman, Aliza Norwood, Samantha V. Hill, A. David Paltiel, Gregg Gonsalves & Anne Alstott, *Braidwood Misreads the Science: the PrEP Mandate Promotes Public Health for the Entire Community* (Feb. 13, 2023), https://law.yale.edu/sites/default/files/documents/pdf/prep_report_final_feb_13_2023_rev.pdf [https://perma.cc/8APQ-LBCF]; *PrEP and Mifepristone Rulings: What's The Deal?*, AIDS UNITED (Apr. 17, 2023), https://aidsunited.org/prep-and-mifepristone-rulings-whats-the-deal/ [https://perma.cc/7U8J-NTV9] ("A number of courts have released decisions in the first months of 2023 that attack evidence-based health care.").

372. Polaski, *supra* note 371 (quoting Ivy Hill, Community Health Program Director of the Campaign for Southern Equality).

373. Rebecca Dresser, Cruzan *after* Dobbs*: What Remains of the Constitutional Right to Refuse Treatment?*, 53 HASTINGS CTR. REP. (Apr. 24, 2023), at 9 http://dx.doi.org/10.1002/hast.1469 (last visited Feb. 24, 2025).

374. *See, e.g.*, Don Sapatkin, *Idaho Bill Would Criminalize Giving an mRNA Vaccine: "It Feels like an Attack on Our Profession,"* MANAGED HEALTHCARE EXEC. (Mar. 27, 2023), https://www.managedhealthcareexecutive.com/view/idaho-bill-would-criminalize-giving-an-mrna-vaccine-it-feels-like-an-attack-on-our-profession-[https://perma.cc/FU4A-CD49].

affirming care ban under review is limited to restrictions on gender-affirming care for minors, many states are already considering expanding existing laws or passing new ones to incorporate adults.[375] If the Supreme Court adopts the reasoning of the Sixth Circuit and upholds bans on gender-affirming care for minors, it will have significant implications for many areas of constitutional doctrine:

1. **Substantive Due Process and Bodily Autonomy:**
   - **Right to Privacy Narrowed:** The Court could curtail the long-standing understanding of a fundamental right to privacy and bodily autonomy. This would weaken protections for personal decisions around issues like contraception, abortion, and end-of-life care.
   - **State Interference Legitimized:** Laws infringing on the personal medical choices of individuals and their families would gain more legitimacy, setting a precedent for expanded state control over private matters.
2. **Equal Protection Under the Law:**
   - **Transgender Youth Targeted:** Upholding such bans would signal that transgender individuals are not afforded the same equal protection of the laws as cisgender individuals. It could lead to further discriminatory laws based on sexual orientation and gender identity.
   - **Medical Consensus Disregarded:** The Court would lower even further states' obligations to credit widely recognized medical and scientific consensus on any health-related issue.
3. **Federalism and States' Rights:**
   - **Increased State Power:** The ruling would enhance states' abilities to regulate medical care and personal decisions typically left to individuals and medical professionals.
4. **Potential Broader Implications:**
   - **Weakened Precedent:** Such a ruling could jeopardize broader protections for LGBTQ+

375. *See* Maya Goldman, *States Are Limiting Gender-Affirming Care For Adults, Too*, AXIOS (Jan. 10, 2024), https://www.axios.com/2024/01/10/trans-care-adults-red-states [https://perma.cc/S4VC-G6B7].

individuals based on precedent from landmark cases like *Obergefell v. Hodges* (same-sex marriage).

- **Emboldened Discriminatory Legislation:** The decision could inspire other states to enact laws restricting healthcare and rights for LGBTQ+ people and other marginalized groups.

Any one of these changes would be enough to fundamentally alter the current framework of laws providing protection for everyone against discriminatory state and federal laws. Taken together, these changes will profoundly shift the balance of power between individuals and the state, prioritizing legislative control over personal autonomy and undermining decades of civil rights progress.

## Appendix

**Chart of Cases**

| Case Name | Violation of Due Process | Standard of Review | Current Status |
|---|---|---|---|
| *Koe v. Noggle*, (N.D. Ga. Aug. 20, 2023)[376] | Yes | Intermediate Scrutiny | Stayed based on Eleventh Circuit |
| Doe 1 v. Thornbury (W.D. Ky. 2023)[377] | Yes | Intermediate Scrutiny | Reversed by Sixth Circuit |
| Brandt v. Rutledge (E.D. Ark.)[378] | Yes | Intermediate Scrutiny | Upheld by Eighth Circuit |
| *Doe v. Ladapo* (N.D. Fla.)[379] | Yes | Intermediate Scrutiny & Rational-Basis Scrutiny | Pending[380] |
| *Poe by and through Poe v. Labrador* (D. Idaho)[381] | Yes | Intermediate Scrutiny | Ongoing |
| *Eknes-Tucker v. Marshall* | Yes | Intermediate Scrutiny | Vacated by 11th Circuit |

376. Koe v. Noggle, 688 F. Supp. 3d 1321 (N.D. Ga. 2023).

377. Doe 1 v. Thornbury, 679 F.Supp.3d 576 (W.D. Ky. 2023), *rev'd and remanded sub nom.* L. W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023), *and cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023).

378. Brandt v. Rutledge, 551 F. Supp. 3d 882 (E.D. Ark. 2021), *aff'd sub nom.* Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022).

379. Doe v. Ladapo, 676 F. Supp. 3d 1205 (N.D. Fla. 2023).

380. *Doe v. Ladapo*, GLAD LEGAL ADVOC. & DEF., https://www.glad.org/cases/doe-v-ladapo/.

381. Poe *ex rel.* Poe v. Labrador, 709 F.Supp.3d 1169 (D. Idaho Dec. 26, 2023), *appeal filed sub nom.* Poe, v. Labrador, no. 24-142 (9th Cir. 2024).

| | | | |
|---|---|---|---|
| (M.D. Ala.)[382] | | | |
| *L.W. by and through Williams v. Skrmetti* (M.D. Tenn.)[383] | Yes | Intermediate & Strict Scrutiny | Reversed by Sixth Circuit; certiorari granted *sub nom. United States v. Skrmetti* |
| *K.C. v. Individual Members of Med. Licensing Board of Indiana* (S.D. Indiana)[384] | N/A | Intermediate Scrutiny | Reversed by Seventh Circuit |

**Experience of District Court Judges Applying Intermediate Scrutiny and Finding Gender-Affirming Care Bans Violate Equal Protection**

| **District Court** | **Date** | **Judge** | **Years on the Bench** | **Graduated Law School** |
|---|---|---|---|---|
| District of Idaho (9th Cir.)[385] | 12/26/2023 | B. Lynn Winmill | 29 | 1977 |

382. Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131 (M.D. Ala. 2022), *vacated sub nom.* Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205 (11th Cir. 2023).

383. L.W. *ex rel.* Williams v. Skrmetti, 679 F. Supp. 3d 368 (M.D. Tenn. 2023), *rev'd and remanded*, 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

384. K. C. v. Individual Members of Med. Licensing Bd. of Indiana, 677 F. Supp. 3d 802 (S.D. Ind. 2023), *rev'd and remanded*, No. 23-2366, 2024 WL 4762732 (7th Cir. Nov. 13, 2024).

385. Poe *ex rel.* Poe v. Labrador, 709 F.Supp.3d 1169 (D. Idaho Dec. 26, 2023), *appeal filed sub nom.* Poe, v. Labrador, no. 24-142 (9th Cir. 2024).

| | | | | |
|---|---|---|---|---|
| Northern District of Georgia (5th Cir.)[386] | 8/20/2023 | Sarah E. Geraghty | 1 | 1999 |
| M.D. Tennessee (6th Cir.)[387] | 6/28/2023 | Eli Richardson | 5 | 1992 |
| W.D. Kentucky (6th Cir.)[388] | 6/28/2023 | David J. Hale | 9 | 1992 |
| Arkansas (8th Cir.)[389] | 6/20/2023 | James M. Moody Jr. | 9 | 1989 |
| S.D. Indiana (7th Cir.)[390] | 6/16/2023 | James Patrick Hanlon | 5 | 1996 |
| N.D. Florida (11th Cir.)[391] | 6/06/2023 | Robert Hinkle | 7 | 1976 |
| M.D. Alabama (5th Cir.)[392] | 5/13/2022 | Liles C. Burke | 5 | 1994 |

386. Koe v. Noggle, 688 F. Supp. 3d 1321 (N.D. Ga. 2023).

387. L.W. *ex rel.* Williams v. Skrmetti, 679 F. Supp. 3d 368 (M.D. Tenn. 2023), *rev'd and remanded*, 83 F.4th 460 (6th Cir. 2023), *cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023), *and cert. granted sub nom.* United States v. Skrmetti, 144 S. Ct. 2679 (2024).

388. Doe 1 v. Thornbury, 679 F.Supp.3d 576 (W.D. Ky. 2023), *rev'd and remanded sub nom.* L. W. *ex. rel.* Williams v. Skrmetti, 83 F.4th 460 (6th Cir. 2023), *and cert. dismissed in part sub nom.* Doe v. Kentucky, 144 S. Ct. 389 (2023).

389. Brandt v. Rutledge, 551 F. Supp. 3d 882 (E.D. Ark. 2021), *aff'd sub nom.* Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022).

390. K. C. v. Individual Members of Med. Licensing Bd. of Indiana, 677 F. Supp. 3d 802 (S.D. Ind. 2023), *rev'd and remanded*, No. 23-2366, 2024 WL 4762732 (7th Cir. Nov. 13, 2024).

391. Doe v. Ladapo, 676 F. Supp. 3d 1205 (N.D. Fla. 2023).

392. Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131 (M.D. Ala. 2022), *vacated sub nom.* Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205 (11th Cir. 2023).

# Busting Ghosts: How Regulatory Gaps Fail to Address Ghost Guns, and What Can Be Done Post-*Bruen*

Wyatt Lutenbacher†

## Introduction

Gaps in federal regulation have allowed "privately made firearms," or "ghost guns," to proliferate.[1] Until August 2022, "firearm kits," which allowed for easy assembly of functional firearms without serial numbers, could be purchased without a background check.[2] Federal law and the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") have historically regulated assembled weapons rather than firearm components, and as a result, firearm kits have circumvented traditional firearm regulations.[3] As a result, state and federal regulations have now had to try to adapt accordingly.[4] Yet in *New York State Rifle & Pistol*

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1. Ghost guns can also refer to 3D-printed firearms. *See* Champe Barton & Chip Brownlee, *What Are 3D-Printed Guns, and Why Are They Controversial?*, THE TRACE (Apr. 8, 2022), https://www.thetrace.org/2021/02/3d-printer-ghost-gun-legal-liberator-deterrence-dispensed [https://perma.cc/JG99-ZVE]. This note focuses solely on privately made firearms (PMFs).

2. OFF. OF PUB. AFFS., U.S. DEP'T OF JUST., Press Release No. 22-904, FRAME AND RECEIVER RULE GOES INTO EFFECT (2022) ("Last year, the Justice Department committed to modernizing our regulations to address the proliferation of 'ghost guns' . . . .").

3. *See Ghost Guns,* GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE (citing 18 U.S.C. § 921(a)(3)), https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/ghost-guns/ [https://perma.cc/2N72-2YY4] ("[F]ederal law (and most state laws) define the term 'firearm' to include the frame or receiver of the weapon alone without any other parts or components . . . . If the frame or receiver of a firearm is *completed* or can be 'readily converted' to shoot, it is considered a 'firearm' . . . meaning it must . . . have a serial number imprinted on it . . . and that retail sellers . . . generally have to be licensed as firearm dealers, conduct background checks, and retain sale records.").

4. *Id.* ("On April 26, 2022, the Biden Administration took executive action to begin to address the ghost gun crisis . . . . Fourteen states . . . and the District of

*Association v. Bruen*, the United States Supreme Court unsettled many firearm regulations by creating a new test for the Second Amendment that focuses on history and tradition.[5]

This Note posits that ghost guns are a problem not seriously addressed by federal regulations. To address these regulatory gaps, this Note will analyze proposed and potential administrative and legislative solutions, then defend them under the *Bruen* test. First, this Note will begin by describing the ghost gun epidemic and the relevant Second Amendment law, specifically the *Bruen* test.[6] Next, it will present and analyze both current and proposed federal regulations and legislation targeting ghost guns.[7] Finally, this Note will conclude by arguing that these current and proposed solutions are constitutional under *Bruen*.[8]

## I. Defining Ghost Guns and the Second Amendment Landscape

### *A. What Are Privately Made Firearms, or "Ghost Guns?"*

"Privately made firearms" (PMFs) or "ghost guns" colloquially refer to do-it-yourself firearms made with the help of firearm kits or unfinished receivers.[9] Because prior regulations held that PMF buyers were only buying firearm components—not ready-to-use firearms—the purchase was not subject to background checks or other safety measures.[10] After buying the parts, the firearm is not assembled by a federally licensed manufacturer, dealer, or importer; instead, it is designed to be easily assembled at home with the use of common tools.[11]

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Columbia have enacted laws to . . . regulate the sale and manufacture of untraceable, unserialized ghost guns.").

5. *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 24 (2022) (citing Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 n.10 (1961)) ("[W]hen the Second Amendment's plain text covers . . . conduct, the Constitution presumptively protects that conduct . . . [and] the government must then justify its regulation by demonstrating that it is consistent with this Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'").

6. *See infra* Part I.

7. *See infra* Parts II–III.

8. *See infra* Part IV.

9. *Ghost Guns*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/ghost-guns/ [https://perma.cc/JQK7-XEP6].

10. *See id.*

11. *See id.*

PMFs are dangerously easy to assemble. At the core of PMFs is an "80% receiver," which is a firearm's unfinished receiver, lacking the last 20% of assembly, which in some cases requires as little as the drilling of three holes and some machining.[12] PMF retailers also sell "jigs," mechanical templates that allow buyers to easily identify where holes need to be drilled into 80% receivers and sometimes even include the necessary drill and mill bits.[13] With such a jig, even an inexperienced user can make an unfinished receiver fully functional in "under an hour."[14] Once finished, the receiver must be assembled with the firearm's other necessary parts, which, prior to the new regulations, were also unregulated because they did not constitute complete and regulated firearms.[15] And these remaining parts were often either included in the firearm kit or sold alongside unfinished receivers by the same retailer.[16]

Ghost guns are particularly appealing for criminal activity because they lack a serial number[17] and can be purchased and assembled without a background check.[18] Serial numbers and background checks are essential parts of firearm regulation, but

12. *See What Is an 80% Lower?*, 80% LOWERS (Sept. 6, 2022), https://www.80-lower.com/80-lower-blog/what-is-an-80-percent-lower/ [https://perma.cc/SQA5-EUWN] ("So, what parts of an 80 percent lower aren't finished? These are the areas you must complete yourself, through drilling and fabrication, to make it a functional firearm: Drill the hammer pinhole[;] Drill the trigger pinhole[;] Drill the safety selector lever hole[;] Machine the fire control group cavity[.]").

13. *80 Lower Jigs*, 80PERCENTARMS, https://www.80percentarms.com/80-jigs/ [https://perma.cc/Y9KM-DD3S] ("The 80% jig is a collection of tools, measurements, and physical guides used to make a firearm on your own . . . . [T]he jigs and parts are made specially to cater to the firearm being built . . . .").

14. *Id.* ("Why Use 80% Lower Jigs? . . . [q]uicker and easier build process that can complete a lower or frame in under an hour . . . [.] The good thing about . . . jigs is that you do not need a lot of experience . . . .The only thing you need to know is the basics of firearm assembly.").

15. Keegan Hamilton, *Ghost Guns Are Causing Chaos in American Courts*, VICE (Oct. 27, 2022), https://www.vice.com/en/article/ghost-gun-loopholes-lawsuit-court/ [https://perma.cc/SE4M-ADB9].

16. *See, e.g.*, *1911 Build Kit*, 80% LOWERS, https://www.80-lower.com/1911-build-kit/ [https://perma.cc/6XFF-BR6V] ("Sure, you could upgrade an existing 1911 frame with a parts kit like this. But why not . . . build a truly custom handgun . . . ? Pair up your 1911 build kit with a Stealth Arms 1911 80% frame."); *Gun Build Kits*, 80 PERCENT ARMS, https://www.80percentarms.com/complete-build-kits/ [https://perma.cc/H859-R9W6] ("Our Rifle Build Kits are everything you need to build your own AR15, AR10, or AR9 pattern rifles.").

17. *Ghost Guns*, BRADY, https://www.bradyunited.org/resources/issues/what-are-ghost-guns [https://perma.cc/4FV8-CBDR].

18. *Id.* ("As a result of this lack of regulation and serialization, prohibited and dangerous individuals have turned to ghost guns to evade federal and state gun regulations, emerging as the weapon of choice for criminal activity.").

ghost guns circumvent both, resulting in them being easier to traffic and use in gun violence.[19]

i. Why Ghost Guns Have Gone Unregulated

Serial numbers play a vital role in gun violence prevention by being significant investigatory leads and allowing law enforcement to analyze trends or sources of gun crime.[20] The National Gun Control Act of 1968 (GCA) requires that federally licensed firearm importers and manufacturers "identify by means of a serial number engraved or cast on the receiver or frame of the weapon, in such manner as the Attorney General shall by regulations prescribe, each firearm imported or manufactured . . . ."[21] Until 2022, the ATF defined frames and receivers as "[t]hat part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel."[22] Frames and receivers are both firearm parts and thus considered "firearms" under the GCA.[23] For that reason, frames and receivers must carry serial numbers even when sold alone.[24] To sell firearms, receivers, and frames, one needs a Federal Firearm License (FFL), which has strict rules and obligations, including a duty to conduct background checks on customers.[25]

But it is unclear exactly when a piece of metal becomes a frame or receiver.[26] Because of this uncertainty, retailers have been able to sell firearm kits containing unfinished receivers, or unfinished receivers alone, all without serial numbers or background checks.[27]

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19. *See id.*

20. *See* BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, NATIONAL TRACING CENTER (NTC) FACT SHEET (2023), https://www.atf.gov/resource-center/docs/undefined/ntc-fact-sheet-may-2023/download [https://perma.cc/C4YL-MD6U]; *see also* Philip J. Cook, *Gun Theft and Crime*, 95 J. URB. HEALTH 305, 308 (2018) (discussing the role serial numbers play in tracking gun crime).

21. 18 U.S.C. § 923(i) (2018).

22. Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24652, 24652 (Apr. 26, 2022) (quoting 27 C.F.R. § 479.11 (2021)).

23. 18 U.S.C. § 921(a)(3)(B) (2018); *see also* 27 C.F.R. § 478.12(a)(1)–(2) (2025).

24. *See* 18 U.S.C. §§ 923(i), 921(a)(3) (2018).

25. *See* 18 U.S.C. §§ 923(a), 922(t) (2018); *Federal Firearms Licenses*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, NATIONAL TRACING CENTER, https://www.atf.gov/firearms/federal-firearms-licenses [https://perma.cc/6QQ2-GNGX].

26. Definition of "Frame or Receiver" and Identification of Firearms, 86 Fed. Reg. 27720, 27729 (May 21, 2021) ("The crucial inquiry, then, is the point at which an unregulated piece of metal, plastic, or other material becomes a regulated item under Federal law.").

27. *See, e.g.*, *What Is an 80% Lower?*, *supra* note 12. Retailers of firearm kits and 80% receivers openly use the serial number's absence as a selling point. *See id.* ("The ATF says that any receiver blank that doesn't meet the definition of a firearm is,

Since these retailers do not sell "firearms," they do not need an FFL.[28] Without an FFL, these retailers do not have to abide by the ATF's vital recordkeeping requirements or screen customers using the National Instant Criminal Background Check System ("NICS").[29]

ii. Consequences of the Ghost Gun Epidemic

Ghost guns have become a weapon of choice in criminal activity. Between 2017 and 2021, there was a 1,083% increase in ghost gun trace requests submitted to the ATF, totaling 37,980 suspected ghost guns recovered by law enforcement.[30] In more recent years, they have only grown in popularity. In 2022 alone, federal law enforcement recovered 25,785 ghost guns in the United States,[31] a number that the Department of Justice admits "significantly underrepresents" the actual number recovered, since state and local law enforcement are still learning to identify and report ghost guns.[32]

By evading the NICS, ghost guns can be easily obtained by those otherwise prohibited from possessing firearms. In 2022, the NICS denied 131,856 firearm sales,[33] and one analysis of federal prosecutions involving ghost guns found that "[i]n nearly half of the prosecutions reviewed the defendants were prohibited from possessing any firearm and would not have passed a background check if one were required."[34]

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well, just that: *Not* a firearm. If an 80% lower isn't considered a firearm, then it doesn't need a serial number. A background check and FFL aren't required to buy one, either.") (emphasis in original).

28. *Cf.* 27 C.F.R. § 478.11 (2023) (defining a "dealer" as "[a]ny person engaged in the business of selling firearms at wholesale or retail; any person engaged in the business of repairing firearms or of making or fitting special barrels, stocks, or trigger mechanisms to firearms; or any person who is a pawnbroker").

29. *See* BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, No. 5300.15, FEDERAL FIREARMS LICENSEE QUICK REFERENCE AND BEST PRACTICES GUIDE (2021) (outlining FFL's recordkeeping, background check, and security duties).

30. 2 BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, NATIONAL FIREARMS COMMERCE AND TRAFFICKING ASSESSMENT (NFCTA): CRIME GUNS, pt. III, at 5 (2023) [hereinafter "NFCTA"].

31. OFF. OF PUB. AFFS., U.S. DEP'T OF JUST., FACT SHEET: UPDATE ON JUSTICE DEPARTMENT'S ONGOING EFFORTS TO TACKLE GUN VIOLENCE (2023).

32. NFCTA, *supra* note 30, at 5.

33. FED. BUREAU OF INVESTIGATION, CRIM. JUST. INFO. SERVS. DIV., NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM 2022 OPERATIONAL REPORT 32 (2022).

34. EVERYTOWN FOR GUN SAFETY, UNTRACEABLE: THE RISING SPECTER OF GHOST GUNS 17 (2020), https://everytownresearch.org/report/the-rising-specter-of-ghost-guns/ [https://perma.cc/G5S7-DNWJ].

Ghost guns also pose a serious threat by way of interstate trafficking. Typically, FFL holders are required to file a report upon selling two or more pistols to the same person within five business days.[35] But because ghost gun retailers don't need an FLL, they can skip this requirement, allowing traffickers to avoid this report when purchasing in bulk, assemble the firearms at home, and then traffic them into stricter states. In one instance, a six-time convicted Massachusetts felon was charged for allegedly buying firearm kits online, assembling them in his basement using a milling machine, and selling them across state lines, profiting $300 on each gun.[36]

For these reasons, ghost guns are a barrier to gun violence prevention. Yet the *Bruen* decision's new Second Amendment test could threaten effective regulation.

### *B. The* Bruen *Decision*

In *Bruen*, the Supreme Court struck down New York's "special need" permitting system and adopted a new test for Second Amendment regulations focused on history and tradition.[37] Prior to *Bruen*, appellate courts had generally adopted a two-step test.[38] At the first step, the government could justify the challenged regulation by showing it regulated an activity outside the scope of the Second Amendment as originally understood.[39] If successful, the inquiry ended and the law was constitutional.[40] But if the evidence was inconclusive, or the regulated activity was protected, the court then weighed the "severity of the law's burden."[41] At this second step, courts applied intermediate or strict scrutiny, with laws that regulated activities that were crucial to the Second Amendment at the Founding being analyzed under strict scrutiny.[42]

*Bruen* found this test to be "one step too many."[43] The Court relied on its decisions in *District of Columbia v. Heller* and *McDonald v. Chicago* and adopted a new test based on *Heller*'s "historical approach and its rejection of means-end scrutiny."[44]

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35. 27 C.F.R. § 478.126(a) (2022).

36. *See* Affidavit in Support of a [sic] Application for a Crim. Complaint at 3–16, United States v. Blackmer, No. 1:16-CR-00009 (D.N.H. Nov. 9, 2015).

37. N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 8 (2022).

38. *Id.* at 17.

39. *Id.* at 18 (quoting Kanter v. Barr, 919 F.3d 437, 441 (CA7 2019) (internal quotation marks omitted)).

40. *Id.*

41. *Id.* (quoting Kanter, 919 F.3d at 441 (internal quotation marks omitted)).

42. *Id.* at 18–19.

43. *Id.* at 19.

44. *Id.* at 24.

*Bruen* found that conduct under the umbrella of the Second Amendment's plain text is "presumptively protect[ed]" and that regulations on such conduct may survive only if the Government demonstrates that the regulations are consistent with the "Nation's historical tradition of firearm regulation," meaning that the regulation has sufficient historical analogues.[45] The consistency of regulations is judged by "how and why the regulations burden a law-abiding citizen's right to armed self-defense."[46] And for cases "implicating unprecedented societal concerns or dramatic technological changes," the Court held that a "more nuanced approach" may be required.[47] At bottom, *Bruen* requires courts to ask if the current law imposes a "burden on the right of armed self-defense" that is comparable to a historical tradition of regulation.[48]

*Bruen* caused an upheaval in the lower courts. Challenges to felon firearm prohibitions,[49] serial number requirements,[50] and bans on large capacity magazines and assault weapons[51] were all brought under the new standard. The Supreme Court has already heard a *Bruen* challenge to a federal statute prohibiting firearm possession for individuals with a restraining order against them.[52]

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45. *Id.* at 17.

46. *Id.* at 28–29 ("[W]hether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are 'relevantly similar.'") (quoting Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 773 (1993)).

47. *Id.* at 27.

48. *Id.* at 29 (citing McDonald v. City of Chi., 561 U.S. 742, 767 (2010) (quoting District of Columbia v. Heller, 554 U.S. 570, 599 (2008)) (internal quotation marks omitted).

49. Range v. U.S. Att'y Gen., 69 F.4th 96, 106 (3d Cir. 2023) (upholding an as-applied challenge to 18 U.S.C. § 922(g)(1)); *cf.* United States v. Jackson, 110 F.4th 1120, 1125, 1129 (8th Cir. 2024) (rejecting as-applied and facial challenges to 18 U.S.C. § 922(g)(1)).

50. United States v. Price, 635 F. Supp. 3d 455, 465 (S.D. W. Va. 2022) (finding 18 U.S.C. § 922(k)'s prohibition of firearms with removed or obliterated serial numbers inconsistent with the historical tradition of firearm regulation), *rev'd* 111 F.4th 392, 408 (4th Cir. 2024); *cf.* United States v. Holton, 639 F. Supp. 3d 704, 712 (N.D. Tex. 2022) (upholding § 922(k) as consistent with the historical tradition of firearm regulation); United States v. Walter, No. 3:20-cr-0039, 2023 U.S. Dist. LEXIS 69163, at *13 (D.V.I. Apr. 20, 2023) (same); United States v. Bradley, No. 2:22-cr-00098, 2023 U.S. Dist. LEXIS 49521, at *12 (S.D. W. Va. Mar. 23, 2023) (same).

51. Bevis v. City of Naperville, 85 F.4th 1175, 1203 (7th Cir. 2023) (upholding Illinois' assault weapons ban because "military weapons lie outside the class of Arms to which the [Second Amendment] applies"); Duncan v. Bonta, 83 F.4th 803, 805–07 (9th Cir. 2023) (reversing lower court's grant of a preliminary injunction against California's large capacity magazine ban).

52. United States v. Rahimi, 602 U.S. 680, 701–02 (2024) (upholding 18 U.S.C. 922(g)(8), which prohibits an individual from possessing a firearm when they are subject to a domestic violence restraining order that contains a credible threat of

Because of how recent this new test is, the effectiveness of any ghost gun regulation must weigh its chances of survival under *Bruen*.

## II. Current Ghost Gun Regulations

### *A. The ATF's Attempt at Addressing Ghost Guns*

On April 8, 2021, former President Biden described "[g]un violence in this country" as an "international embarrassment" and signed six executive actions directing the Department of Justice to issue Rules on ghost guns.[53] On April 26, 2022, the resulting Rule, titled "Definition of 'Frame or Receiver' and Identification of Firearms," was published in the Federal Register.[54]

The Rule aims to address the ambiguities that previously allowed ghost guns to proliferate.[55] Most importantly, the Rule: (1) expands the definition of "frame or receiver" to include more unfinished and 80% receivers,[56] (2) amends the definition of "firearm" to clarify when a firearm kit is a "firearm,"[57] and (3) defines "privately made firearm."[58] In total, these changes allow for regulation of a previously near-untouched market.

The Rule amends 27 C.F.R. § 478.12, which defines frames and receivers for purposes of federal regulation, by clarifying that the definitions of "frame" and "receiver" both include a "partially complete, disassembled, or nonfunctional frame or receiver, including a frame or receiver parts kit, that is designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver . . . ."[59] The Rule excludes any "forging, casting, printing, extrusion, [or] unmachined body . . . that

violence).

53. Lauren Egan & Shannon Pettypiece, *Biden Targets 'Ghost Guns' and 'Red Flag' Laws in New Gun Control Measures*, NBC NEWS (Apr. 8, 2021), https://www.nbcnews.com/politics/white-house/biden-target-ghost-guns-red-flag-laws-new-gun-control-n1263438 [https://perma.cc/2P2E-ASL4].

54. Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. § 24652 (Apr. 26, 2022).

55. *Id.* ("The Department of Justice . . . is amending Bureau of Alcohol, Tobacco, Firearms, and Explosives . . . regulations to remove and replace the regulatory definitions of 'firearm frame or receiver' and 'frame or receiver' because current regulations fail to capture the full meaning of those terms.").

56. *See id.* at 24689.

57. *See infra* notes 62–63.

58. Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. § 24655 (Apr. 26, 2022).

59. 27 C.F.R. § 478.12(c) (2023).

has not yet reached a stage . . . where it is clearly identifiable as an unfinished component . . . ."[60]

Additionally, the Rule authorizes the ATF to consider "any associated templates, jigs, molds, equipment, tools, instructions, guides, or marketing materials that are sold, distributed, possessed with the item or kit, or otherwise made available by the seller or distributor of the item or kit," language that directly targets the sale of firearm kits or parts.[61]

The Rule also expands the definition of firearm to include a "weapon parts kit that is designed to or may readily be completed, assembled . . . or otherwise converted to expel a projectile by . . . explosive."[62] Because of this change, retailers selling full firearm kits must now have a Federal Firearm License (FFL), conduct background checks on buyers, serialize the frame or receiver, and abide by FFL recordkeeping requirements.[63]

Finally, the Rule specifically defines a PMF as "[a] firearm, including a frame or receiver, completed, assembled, or otherwise produced by a person other than a licensed manufacturer, and without a serial number placed by a licensed manufacturer at the time the firearm was produced."[64] With this definition, the Rule also created a process seeming to require FFLs to keep records of any PMFs received and engrave them with unique serial numbers.[65]

### *B. Mile-Wide Gaps in the ATF's New Rule*

While these regulations are a positive step toward the regulation of ghost guns, they leave open dangerous loopholes by *still allowing* the sale of unfinished receivers without background checks, serialization, or an FFL license. Such an interpretation comes from the examples provided in 27 C.F.R. § 478.12(c), which defines when "partially complete, disassembled, or nonfunctional frame or receivers" become regulated frames and receivers.[66]

60. *Id.*

61. *Id.*

62. 27 C.F.R. § 478.11 ("Firearm") (2023).

63. OFF. OF. PUB. AFF., U.S. DEP'T OF JUST., FACT SHEET: PRIVATELY MADE FIREARMS (PMFS), AKA "GHOST GUNS," "BUY-BUILD-SHOOT" KITS, AND THE "FRAME OR RECEIVER" FINAL RULE, https://www.justice.gov/opa/press-release/file/1493431/download [https://perma.cc/MUV6-FULC] ("The 'Frame or Receiver' Final Rule updates the regulatory definition and makes clear that weapon parts kits that can be readily converted into a fully assembled firearm will be subject to the same regulations that apply to commercially manufactured, fully assembled firearms.").

64. 27 C.F.R. § 478.11 ("Privately Made Firearm (PMF)") (2023).

65. 27 C.F.R. § 478.124 (2023); 27 C.F.R. § 478.92(a)(2) (2023).

66. 18 U.S.C. § 921(a)(3) (2023) ("The term 'firearm' means (A) any weapon

Example 1 to subsection (c) provides that "[a] frame or receiver parts kit containing a partially complete or disassembled billet or blank of a frame or receiver that is sold, distributed, or possessed with a compatible jig or template *is a frame or receiver* . . . ."[67] But in Example 4, the rule seemingly contradicts itself, finding that "[a] billet or blank of an AR–15 variant receiver without critical interior areas having been indexed, machined, or formed *that is not sold, distributed, or possessed with instructions, jigs, templates, equipment, or tools* such that it may readily be completed *is not a receiver*."[68]

In other words, Example 4 states that an unfinished receiver is not regulated so long as it is not sold in the same transaction with a jig, other required parts for assembly, or with instructions, and is not machined in certain areas. The ATF has even adopted this interpretation in subsequent publications[69] and in court.[70] Polymer80, seemingly a company of choice for criminal use of ghost

(including a starter gun) which will or is designed to or may *readily be converted to* expel a projectile by the action of an explosive; (B) *the frame or receiver* of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device.") (emphasis added).

67. 27 C.F.R. 478.12(c) (Example 1) (2023) (emphasis added).

68. *Id.* at Example 4 (emphasis added).

69. ATF, U.S. DEP'T OF JUST., FINAL RULE 2021R-05F, DEFINITION OF "FRAME OR RECEIVER" AND IDENTIFICATION OF FIREARMS, https://www.atf.gov/firearms/docs/guide/overview-final-rule-2021r-05f-definition-%E2%80%9Cframe-or-receiver%E2%80%9D-and-identification/download [https://perma.cc/8FZE-CWAD] ("A billet or blank of an AR-15 variant receiver without critical interior areas having been indexed . . . that is not sold, distributed, or possessed with instructions, jigs, templates, equipment, or tools such that it may readily be completed is not a receiver."); ATF, U.S. DEP'T OF JUST. TRAINING AID FOR THE DEFINITION OF FRAME OR RECEIVER & IDENTIFICATION OF FIREARMS: OVERVIEW OF FINAL RULE 2021R-05F at 7 (2022), https://www.atf.gov/firearms/docs/guide/new-training-aid-overview-final-rule-2021r-05f-definition-frame-or-receiver-and/download [https://perma.cc/7P4A-V5JQ] (same).

70. Defendant's Opposition to Plaintiffs' Motion for Preliminary and/or Permanent Injunction, at 23–24, Morehouse Enters., LLC v. BATFE, 2022 BL 295293 (D.N.D. Aug. 23, 2022) (No. 3:22-cv-00116-PDW-ARS) ("[An] [unfinished] frame or receiver is not [regulated] if it still requires . . . certain machining operations."); Transcript of Hearing on Plaintiff's Motion for Preliminary Injunction at 16, Div. 80 v. Garland, 2022 WL 3648454, (D.S.D. Tex. Aug. 23, 2022) (No. 3:22-cv-00148), ECF No. 68 (confirming that retailers can "sell[] receiver blanks . . . without a [FFL]" and that separate transactions do not violate the Rule); Defendants' Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction at 26, VanDerStok v. Garland, 633 F. Supp.3d 847 (D.N.D. Tex. 2022) (No. 4:22-cv-00691-O), ECF No. 41 (quoting 87 Fed. Reg. § 24,700) (same).

guns,[71] continues to sell unserialized 80% receivers, saying that this is completely permissible under the Rule.[72]

This loophole was challenged in a case filed by the Giffords Law Center and the state of California against the ATF.[73] The complaint highlights this "separate transaction" loophole and asks the ATF to address it,[74] alleging that the Rule violates the Administrative Procedure Act by contravening the text and purpose of its authorizing law, the GCA.[75] On February 26, 2024, in a decision on the merits, a California district court vacated Example 4 and heavily criticized the ATF, arguing that the ATF's definition was "made without taking into account all relevant data" and that the ATF "failed to explain why it is not regulating such partially complete receivers *given that jigs and tools are easily obtainable.*"[76] The court declared Example 4 arbitrary and capricious, holding that while the ATF can "be engaged in reform one step at a time," it does not do so by enacting a "categorical bar" on defining unfinished receivers as firearms "regardless of the availability of such jigs/tools in the open . . . ."[77]

## III. Potential Regulations on Ghost Guns

Laws proposed at the federal level can serve as illustrative examples of the path forward in regulating ghost guns. Action at

71. Joshua Eaton, *Polymer80's Name Has Become Synonymous with 'Ghost Guns.' Now It's in the Crosshairs*, NBC NEWS (Mar. 27, 2022), https://www.nbcnews.com/news/us-news/polymer80-ghost-guns-kits-crime-rcna20864 [https://perma.cc/TDT6-VNKB] (claiming that almost 90 percent of ghost guns recovered by the LAPD were made from Polymer80 kits); Complaint for Violations of the Consumer Protection Procedures Act, at ¶ 1, District of Columbia v. Polymer80, Inc., No. 2020-CA-002878-B (D.C. Super. Ct. June 24, 2020) (alleging that 83.2% of recovered ghost guns since 2017 have been from Polymer80).

72. David Lane, *Polymer80 Changes Product Line to Comply with BATFE Rule*, RECOILWEB (Aug. 31, 2022), https://www.recoilweb.com/polymer80-changes-product-line-to-comply-with-batfe-rule-176438.html [https://perma.cc/E2SB-R8AE] ("Polymer80 has launched three new options for . . . legal firearms. OPTION 1 is an unserialized 80% frame . . . . No jig or tools are included with this product."); *See also 80% Lower Jig for AR-10 and AR-15 - Ultimate Jig*, JUGGERNAUT TACTICAL, https://jtactical.com/products/47 [https://perma.cc/7MDP-BWVQ] ("Note: Due to ATF final rule 2021R-05F . . . you cannot order an 80% Lower and jig-related products at the same time. If you have both in your cart, you will not be able to . . . checkout.").

73. California v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, No. 20-cv-06761-EMC, 2023 U.S. Dist. LEXIS 22517, at *4 (N.D. Cal. Feb. 9, 2023).

74. First Amended Complaint for Declaratory and Injunctive Relief, at ¶16, California v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 2023 U.S. Dist. LEXIS 22517 (N.D. Cal. Feb. 9, 2023) (No. 20-cv-06761-EMCB), ECF No. 144.

75. *Id.* at ¶¶ 142, 150.

76. California v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 20-CV-06761-EMC, 2024 WL 779604, at *27 (N.D. Cal. Feb. 26, 2024).

77. *Id.* at *26.

the federal level is essential in meaningfully combating gun violence and trafficking since states with weak gun laws allow for firearm trafficking into stricter states.[78]

### *A. The Ghost Guns and Untraceable Firearms Act of 2023*

In 2023, the "Ghost Guns and Untraceable Firearms Act of 2023" (the Act) was introduced into the United States Senate.[79] The Act regulates ghost guns by creating a new "frame or receiver" definition[80] and by criminalizing the unlicensed manufacture, sale, and possession of "ghost guns," or firearms that lack a serial number in accordance with the law.[81]

The Act modifies 18 U.S.C. § 921(a) to define a "frame or receiver" as "a part of a weapon that provides or is intended to provide the housing or structure to hold or integrate 1 or more fire control components . . . ."[82] "Fire control components" are defined in the Act as a weapon's "hammer, bolt or breechblock, cylinder, trigger mechanism, firing pin, striker, and side rails."[83] Notably, the Act seems to address the separate transaction loophole by excluding consideration of "whether the housing . . . has been indexed, drilled, or machined in any way" or "whether the article is sold, distributed, or marketed with or for any associated template, jig, mold, equipment, tool, instructions, or guide . . . ."[84] The Act also includes "object[s] . . . marketed or sold to become or be used as the frame or receiver of a functional firearm once completed, assembled, or

78. Brian Knight, *State Gun Policy and Cross-State Externalities: Evidence from Crime Gun Tracing*, 5 AM. ECON. J. 200, 224 (2013) ("[T]rafficking flows respond to gun regulations, with guns imported from states with weak regulations into states with strict regulations . . . . [C]riminal possession rates tend to be higher in states exposed to weak regulations in other states."); Daniel W. Webster & Garen J. Wintemute, *Effects of Policies Designed to Keep Firearms from High-Risk Individuals*, 36 ANN. REV. PUB. HEALTH 21, 30 (2015) (citing D. W. Webster, J, S. Vernick & L. M. Hepburn, *Relationship Between Licensing, Registration, and Other Gun Sales Laws and the Source State of Crime Guns*, 7 INJ. PREVENTION 184, 187 (2001)) ("The share of crime guns that originated from in-state retail sales in states with both [permit to purchase] policies and handgun registration was, on average, 37 percentage points lower relative to the comparison states lacking either policy . . . ."); Leo H. Kahane, *Understanding the Interstate Export of Crime Guns: A Gravity Model Approach*, 31 CONTEMP. ECON. POL'Y 618, 631 (2013) ("[T]he empirical results in this paper . . . find that differences in state laws can explain, in part, the pattern of illegal gun flow across state lines . . . . [G]uns tend to flow from states where gun laws are weak to states where gun laws are strict.").

79. S. 2652, 118th Cong. (as introduced on July 27, 2023).

80. *Id.* § 3(a)(2), *2–3.

81. *Id.* § 3(a)(3), *4.

82. *Id.* § 3(a)(2), *2–3.

83. *Id.* § 3(a)(3), *5.

84. *Id.* § 3(a)(2), *3.

converted," which allows agencies to look at how an 80% receiver is marketed when making a regulatory determination.[85]

While the Act's emphasis on firing components aligns closely with the ATF Rule's new definitions of frames and receivers,[86] the Act goes further by specifically including objects that are "marketed or sold to become" or can "readily be . . . assembled, or otherwise converted to" frames or receivers, even if sold without the remaining necessary parts.[87] In contrast, the current Rule does not consider marketing in making regulatory determinations nor does it regulate unfinished receivers that are sold alone.[88] The Act's definition of frames and receivers significantly improves on the recent Rule. By including unfinished receivers that are sold alone[89] and considering how the unfinished receiver is marketed,[90] the Act can address the Rule's gaps. Finally, the Act criminalizes, beginning one year after its enactment,[91] possession of "ghost guns"[92] by unlicensed individuals, with or without an intent to sell or transfer it or make a firearm.[93] The Act, if enacted, would codify what has long been recommended by gun violence prevention groups.[94]

### *B. Fixing the Current Federal Rule by Vacating Example 4*

As it stands, Example 4 in 27 C.F.R. § 478.12(c) creates the previously discussed "separate transaction loophole" that allows for unregulated sale of unfinished receivers.[95] By allowing this, the loophole seems to contradict the Rule's purpose of cracking down on

85. *Id.*

86. 27 C.F.R. § 478.12(a)(1)–(2) (2023) (defining "frame" and "receiver" as the parts that "provide[] housing" for components related to the "firing sequence").

87. S. 2652, 118th Cong. § 3(a).

88. 27 C.F.R. § 478.12(c) (Example 4) (2023).

89. S. 2652 § 3(a)(2), *3.

90. *Id.*

91. *Id.* at * 7.

92. Defined as any firearm, including frames and receivers, which lacks a serial number engraved by a licensed manufacturer or importer. *Id.* at *4.

93. *Id.* at *7.

94. *See* EVERYTOWN FOR GUN SAFETY, *supra* note 34, at 21 (suggesting that "frame" or "receiver" should be defined as: "That part . . . which provides housing for the trigger group, including any such part (1) that is designed, intended, or marketed to be used in an assembled, operable firearm, or (2) that, without the expenditure of substantial time and effort, can be converted for use in an assembled, operable firearm"); Plaintiff's Amended Complaint at ¶ 3, California v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 2023 U.S. Dist. LEXIS 22517 (N.D. Cal. Feb. 9, 2023) (No. 20-cv-06761-EMC) (arguing that unfinished receivers, sold alone, should be considered firearms because they can be "readily . . . converted" into a functional firearm).

95. *See supra* Part II.A.

the unregulated PMF market.[96] Example 4 holds that unfinished receivers, simply because they lack a few easily machined holes and are sold without jig kits, instructions, other parts, or templates, are outside the scope of regulation.[97] 27 C.F.R. § 478.12's plain text, aside from Example 4, does not suggest[98] that an unfinished receiver is not a receiver simply because it lacks a few machining operations and is not sold with a jig or instructions.[99] Removing Example 4 would bring unfinished receivers sold alone within the scope of federal regulation because the Rule's text and the GCA's purpose seem to support such a finding.

The GCA's purpose, according to the Rule's own interpretation, is to limit firearm trafficking and allow for firearm tracing.[100] The Rule purports to advance this purpose by restricting persons prohibited from owning firearms from purchasing or making PMFs,[101] and by combatting the role of PMFs in gun violence and trafficking.[102] But, contrary to these purposes, Example 4 allows for the easy, legal, and unregulated purchase of unfinished receivers.[103]

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96. 87 Fed. Reg. 24652, 24656–60 (Apr. 26, 2022) (discussing the barriers ghost guns pose to effective enforcement of the GCA as reasoning for the Rule).

97. *See supra* note 70.

98. *Compare* 27 C.F.R. § 478.12(c) (Examples 1–3) (2023) (finding that an unfinished receiver sold with "template holes" and an unfinished receiver sold with a "compatible jig" is a frame or receiver), *with* 27 C.F.R. § 478.12(c) (Example 4) (2023) (finding that a receiver that lacks indexing in "critical interior areas" and is not sold with "instructions" is not a frame or receiver).

99. Defendants' Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction, VanDerStok v. Garland, No. 4:22-cv-00691-O (N.D. Tex. Aug. 29, 2022), ECF No. 41 (quoting 87 Fed. Reg. 24668)

100. 87 Fed. Reg. 24665 (Apr. 26, 2022) ("Consistent with the language and purpose of the GCA, . . . this proposed provision [is] necessary to allow ATF to trace all firearms acquired and disposed of by licensees, prevent illicit firearms trafficking, and provide procedures for FFLs and the public to follow . . . .").

101. *Id.* at 24714 ("As explained in this rule, PMFs are being assembled from parts without background checks . . . .[T]hey are easily acquired by persons prohibited by law from receiving or possessing firearms, and they therefore pose a significant threat to public safety.").

102. *Id.* at 24674 ("[T]his rule is intended . . . to address the proliferation of unserialized 'ghost guns,' which are increasingly being recovered at crime scenes . . . ."); *Id.* at 24656 (discussing cases of ghost gun trafficking as reason for promulgating the Rule).

103. *See* Plaintiff's Amended Complaint at ¶ 94, California v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 718 F. Supp. 3d 1060 (N.D. Cal. 2024) (No. 3:20-cv-06761) ("In other words, ATF has determined that the one-stop-shop purchase of single-transaction *kits* are firearms are subject to the GCA, but that 80 percent frames and receivers brought separately *are not* . . . .").

This gap in regulation is not faithful to the Rule's authorizing statute, the GCA, and its definition of "firearm."[104] The GCA defines a "firearm" as "any weapon . . . *which will or is designed to or may be readily converted* to expel a projectile" and includes within this definition "the frame or receiver of any such weapon."[105] Yet, the Rule says that unfinished frames or receivers, which are "designed" to be "readily" converted into a functional weapon, are not firearms if sold alone absent some machining.[106]

Example 4 facially contradicts the Rule's own definition of a frame or receiver. Unfinished receivers sold alone are excluded from the definition, despite the fact that unfinished receivers are "designed to or may readily be completed" or "converted to function as" a frame or receiver.[107] What is the purpose of an unfinished receiver, if not to be readily converted into a complete or functioning frame or receiver? Marketing surrounding unfinished receivers only emphasizes this point: one retailer directly links buyers to part kits and assembly instructions in the item's description.[108] Another retailer offers bulk pricing on AR-15 lower receivers while touting their products as only needing a "small amount of finishing" to be functional, and not being subject to any "red tape" like registration because they are not considered "firearm[s]."[109]

Example 4 makes even less sense when one weighs the factors to be considered in defining "readily," as codified in 27 C.F.R. § 478.11. "Time," "ease," "expertise," and "parts availability" are all factors to be considered in determining whether a weapon may "readily" be converted to expel a projectile.[110] As already discussed, completing an unfinished receiver takes minimal time and

104. This is also argued by the plaintiffs in the previously mentioned case, California v. Bureau of Alcohol, Tobacco, Firearms, & Explosives. *Id.* at ¶ 142 ("ATF's . . . determinations are 'not in accordance with law' because they disregard the GCA . . . . Namely, . . . 80 percent receivers and frames—sold as part of an assembly kit, with associated templates, or alone—fall within the statutory definition . . . . They are 'designed' to be 'readily converted' into firearms, as is evident from their design and marketing . . . .").

105. 18 U.S.C. § 921(a)(3) (2023) (emphasis added).

106. *See supra* note 70 (laying out ATF's interpretation of the Rule).

107. 27 C.F.R. § 478.12(c) (2023).

108. *80% Lower Patriot Pack*, 80-LOWER, https://www.80-lower.com/products/80-lower-patriot-pack/ (last visited Jan. 18, 2024).

109. *80% Lowers*, 80% ARMS, https://www.80percentarms.com/80-lowers/ (last visited Jan. 18, 2024) ("*[T]he ATF does NOT recognize an 80% complete lower as a firearm*, and therefore an unfinished receiver is not subject to the same regulations . . . .This means, no RED TAPE including: *NO* [*r*]*egistering an 80% Lower, No FFL Required, Ships right to your door, No*[*t*]*ransfer fees like a typical firearm*.") (emphasis in original).

110. 27 C.F.R § 478.11 ("Readily") (2023).

expertise, even without a jig.[111] And that is assuming buyers *aren't* using a jig, because a single transaction containing the unfinished receiver and jig would be regulated.[112] But buyers can still receive both by simply making two separate transactions.[113] Because buyers under the current Rule can still order jigs and other parts helpful for assembly in another transaction, the "parts availability" factor also cuts in favor of regulating the sale of *all* unfinished receivers.[114] This reasoning was used in part in *California v. ATF*, where the court said that the ATF's failure to consider these factors, like time, is "particularly troubling."[115]

To better align with the GCA's purpose and text, courts should continue to uphold the vacatur of Example 4 granted in *California v. ATF*,[116] and the ATF should move toward an interpretation of the Rule that regulates unfinished receivers, even sold alone, as "firearms" because they are designed to be readily converted into functional firearms.

## IV. Defending Current and Proposed Laws Under *Bruen*

### *A.* Bruen*'s First Step*

*Bruen* requires courts to first determine if the Second Amendment's "plain text" covers the regulated conduct.[117] The *Bruen* decision analyzed its previous Second Amendment decisions, *Heller* and *McDonald*, to hold that the Second Amendment's plain text enshrines a law-abiding citizen's right to armed self-defense.[118]

111. *See What Is an 80% Lower?*, *supra* note 12. *See also How to Build an AR-15: The Ultimate Guide for Beginners*, 80-LOWER, (Nov. 9, 2022) https://www.80-lower.com/80-lower-blog/how-to-build-an-ar15-the-ultimate-guide-for-beginners/ [https://perma.cc/VW7A-5LGM] ("Building an AR-15 is easy[.] That's probably why you're here: Building an AR-15 requires just a few common tools and no professional gunsmithing knowledge.").

112. *See* C.F.R. § 478.12(c) (Example 1) (2023) ("A frame or receiver parts kit containing a partially complete or disassembled billet or blank of a frame or receiver that is sold, distributed, or possessed with a compatible jig or template is a frame or receiver . . . .").

113. *Id*.

114. *Id.*; 27 C.F.R. § 478.11 (2024) ("Readily") (defining the factors relevant to making a determination that a firearm is "readily" available, including "parts availability").

115. California v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 718 F. Supp. 3d 1060, 1090 (N.D. Cal. 2024).

116. *Id*. at 1098.

117. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 24 (2022).

118. *See id*. at 29 (quoting McDonald v. Chicago, 561 U.S. 742, 767 (2010)) ("Therefore, whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are 'central' considerations . . . ."); *id.* at 26 (quoting District of Columbia v. Heller,

Many courts have narrowly read the Second Amendment's plain text in determining what rights it affords. Courts have held that the Second Amendment's plain text does not protect a right to sell and transfer firearms,[119] to carry dangerous and unusual weapons,[120] or to carry a firearm as a convicted felon.[121]

In determining if conduct is protected under the Second Amendment, *Heller* remains influential because it contains Justice Scalia's "[non]exhaustive" discussion of the Second Amendment's boundaries.[122] Justice Scalia wrote that the Second Amendment right is not one to "keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose" and does not cast doubt on "conditions and qualifications on the commercial sale of arms."[123]

i. Justice Kavanaugh's *Bruen* Concurrence

Justice Kavanaugh's *Bruen* concurrence may support finding that ghost gun regulations do not encroach on constitutionally protected conduct and are thus justified at the first step.[124] Justice Kavanaugh and Chief Justice Roberts wrote separately in *Bruen* to emphasize that the test is not a "regulatory straitjacket" nor a "blank check,"[125] and quoted from *McDonald v. Chicago* to argue

554 U.S. 570, 635 (2008)) ("The Second Amendment . . . 'surely elevates above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense.").

119. United States v. Tilotta, No. 3:19-cr-04768-GPC, 2022 WL 3924282, at *5 (S.D. Cal. Aug. 30, 2022) (quoting *Bruen*, 597 U.S. at 20) ("The plain text of the Second Amendment does not cover . . . commercially sell[ing] and transfer[ing] firearms . . . .").

120. *Heller*, 554 U.S. at 627 ("We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'").

121. *See* United States v. Washington, No. 3:23-CR-00171-01, 2023 WL 6118532, at *4 (W.D. La. Sep. 18, 2023); United States v. Bivens, No. 1:22-cr-23, 2023 WL 8101846, at *5 (E.D. Tenn. Nov. 21, 2023) ("Section § 922(g)(1)'s ban on felons possessing firearms remains presumptively lawful because felons are not among 'the people' covered by the plain text of the Second Amendment."); United States v. Drake, No. 1:23-CR-21-HAB, 2023 WL 8004876, at *8 (N.D. Ind. Nov. 16, 2023) (same). *Cf.* United States v. Ball, No. 22-cr-00449, 2023 WL 8433981, at *13 (N.D. Ill. Dec. 5, 2023) (finding that felons are not excluded from the right to bear arms); Range v. Att'y Gen. United States, 69 F.4th 96, 103 (3d Cir. 2023) (quoting *Heller*, 554 U.S., at 582) (same).

122. *Heller*, 554 U.S. at 626–27.

123. *Id*.

124. The Act's prohibition on possession cannot be justified under this reasoning since it would criminalize possession and not just impose a condition on a commercial sale.

125. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 24 (2022) (Kavanaugh, J., concurring) (quoting *id*. at 30).

that *Bruen* does not cast doubt on "presumptively lawful . . . measures" like laws "imposing conditions and qualifications on the commercial sales of arms."[126]

Because the concurrence built on *Heller* and *McDonald*'s language about "presumptively lawful" regulations,[127] determining if a regulation is a condition or qualification on the commercial sales of arms should take place before the first step. But some courts have held that this presumption of legality can still be overcome if the regulation eliminates a law-abiding population from acquiring firearms entirely.[128]

Determining what is a "condition or qualification" on a commercial sale of arms can be difficult and is an issue that the Ninth Circuit has grappled with already. Despite the phrase now having been litigated in several of its cases, the Ninth Circuit has nonetheless "strained to interpret the phrase . . . ."[129] In *Renna v. Bonta*, the Government argued that a law prohibiting the sale of handguns unable to meet certain safety standards, like microstamping,[130] was a presumptively lawful condition on a commercial sale. Yet, the court held that the "conditions and qualifications" phrase was too "opaque" to be relied on alone.[131] For that reason, and because the law was a "functional prohibition" on state-of-the-art firearms, the court held that the law was not presumptively lawful and thus required historical analogues.[132]

Other courts have come to opposite conclusions on laws imposing restrictions on firearm sales. Laws requiring licensed

126. *Id.* at 80–81 (quoting McDonald v. City of Chicago, 561 U.S. 742, 786 (2010)).

127. *Id.*

128. *See* Gazzola v. Hochul, 88 F.4th 186, 196 (2d Cir. 2023) ("It follows that commercial regulations on firearms dealers, whose services are necessary to a citizen's effective exercise of Second Amendment rights, cannot have the effect of eliminating the ability of law-abiding, responsible citizens to acquire firearms."). *See infra* note 130.

129. Renna v. Bonta, No. 20-cv-2190-DMS-DEB, 2023 WL 2756981, at *9 (S.D. Cal. Mar. 31, 2023) (quoting Pena v. Lindley, 898 F.3d 969, 976 (9th Cir. 2018)).

130. *Microstamping & Ballistics in California*, GIFFORDS LAW CTR., https://giffords.org/lawcenter/state-laws/microstamping-ballistics-in-california/ [https://perma.cc/LNM5-STPS] (last updated Dec. 31, 2023) ("Microstamping technology causes a firearm to etch a unique microscopic code onto ammunition cartridge cases when the gun is fired that identifies the firearm's make, model, and serial number. This technology could enable law enforcement to match cartridges found at crime scenes directly to the gun that fired them . . . .").

131. *Bonta*, 2023 WL 2756981 at *9 (quoting *Pena*, 898 F.3d at 976).

132. *Id.* (quoting Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives, 5 F.4th 407, 416 (4th Cir. 2021)) ("If the commercial sales limitation identified in *Heller* were interpreted as broadly as the State suggests, the exception would swallow the Second Amendment.").

firearm dealers to have a place of business,[133] prohibiting an unlicensed transfer of a firearm to an unlicensed individual residing in a different state than the transferor,[134] imposing a firearm waiting period,[135] and requiring licensed dealers to maintain accurate and truthful records of sales,[136] have all been successfully defended as conditions on commercial sales, thus not requiring a "second step" analysis.

There is a strong argument that requiring unfinished receivers to have a serial number is a presumptively lawful commercial regulation under Justice Kavanaugh's concurrence, *Heller*, and *McDonald*, since such a requirement is a "condition" on the "commercial sale" of a "firearm."[137] This is especially true because, unlike in the *Renna* case, serial numbers are not a "functional prohibition"[138] on the sale of unfinished receivers as they are not a new or prohibitive technology or unheard of requirement.[139] Most courts weighing the constitutionality of serial number requirements have upheld them.[140] *Bruen* also seems to bless background check

133. Knight v. City of N.Y., No. 22-CV-3215 (VEC)(VF), 2024 WL 1126309, at *17 (S.D.N.Y. Jan. 17, 2024) (quoting United States v. Tilotta, No. 3:19-cr-04768-GPC, 2022 WL 3924282, at *5 (S.D. Cal. Aug. 30, 2022)) ("Knight claims that the place-of-business requirement impedes his ability to sell handguns . . . . But this conduct concerns the commercial sale of firearms. The plain text of the Second Amendment . . . right 'does not imply a further right to sell and transfer firearms.'").

134. United States v. James, 677 F. Supp. 3d 329, 344 (D.V.I. 2023) (quoting N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 37 n.9 (2022) ("The Supreme Court stated that these regulatory prerequisites to acquiring firearms are presumptively lawful, so long as they do not act as to 'deny ordinary citizens their right to public carry.' . . . Rather, the statute prevents non-law-abiding citizens from circumventing reasonable commercial regulations.").

135. Rocky Mt. Gun Owners v. Polis, 701 F. Supp. 3d. 1121, 1136 (D. Colo. 2023) ("Because it imposes a condition on the commercial sale . . . the Act is presumptively lawful under *Heller*, and . . . Plaintiffs have failed to rebut that presumption by demonstrating that the plain text of the Second Amendment covers [the conduct].").

136. *Tilotta*, 2022 WL 3924282 at *15.

137. *Bruen*, 597 U.S. at 80–81 (Kavanaugh, J., concurring).

138. Renna v. Bonta, No. 20-cv-2190-DMS-DEB, 2023 WL 2756981, at *10 (S.D. Cal. Mar. 31, 2023).

139. United States v. Sharkey, 693 F. Supp. 3d. 1004, 1008 (S.D. Iowa 2023) (citing R.L. WILSON, COLT: AN AMERICAN LEGEND 16, 362 (1985)) ("Serial numbers, although rare on American-made firearms during the founding era, gained prominence during the mid-19th Century. Samuel Colt was an early adopter, incorporating serial numbers . . . as early as 1837, while other manufacturers followed suit in the 1850s and 1860s.").

140. United States v. Bradley, No. 22-cr-00098, 2023 U.S. Dist. LEXIS 49521, at *11 (S.D. W. Va. Mar. 23, 2023) (finding 18 U.S.C. § 922(k), which prohibits firearms with altered serial numbers, to be constitutional and not regulating protected conduct); United States v. Holton, 639 F.Supp.3d 704, 710 (N.D. Tex. 2022) (same); United States v. Dangleben, No. 3:23-MJ-0044, 2023 WL 6441977, at *9 (D.V.I. Oct. 3, 2023) (same); United States v. Serrano, 651 F. Supp. 3d 1192, 1210 (S.D. Cal. 2023) (same). *Cf.* United States v. Price, 635 F. Supp. 3d 455, 464 (S.D. W. Va. 2022)

requirements as constitutional in the context of firearm permits,[141] so it is unlikely that a court would find background checks suddenly objectionable for unfinished receivers.

### ii. The Second Amendment's Plain Text and Ghost Guns

Assuming that the Rule and Act are *not* "presumptively lawful" commercial regulations, then regulations requiring serial numbers and background checks on ghost guns and prohibiting ghost gun possession may still be defended as not regulating conduct protected by the Second Amendment's plain text.[142]

A plausible argument could be made that the Act and the Rule infringe on the right to manufacture firearms at home.[143] These arguments were brought forth in one challenge to the Rule in *Polymer80 v. Garland*.[144] There, the plaintiff argued that unfinished receivers are equally protected by the Second Amendment's plain text because of how closely related and necessary they are to the right to bear arms.[145] In response, the Government argued that the Rule does not prevent law-abiding citizens from making, buying or possessing firearms and therefore does not infringe on the right afforded by the Second Amendment's plain text.[146] While the court did not rule on these Second Amendment claims,[147] the precedent of courts narrowly

(finding that 922(k) infringes on protected conducts and lacks historical analogues).

141. *Bruen*, 597 U.S. at 38 n.9 (quoting Drake v. Filko, 724 F.3d 426, 442 (3d Cir. 2013) (Hardiman, J., dissenting)) ("[N]othing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes . . . . Rather, it appears that these shall-issue regimes, which often require applicants to undergo a background check . . . are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'").

142. *Id.*

143. While one could argue that these laws restrict one's right to keep and bear an unserialized firearm, serial number requirements have been regularly upheld. *See, e.g., Bradley*, 2023 U.S. Dist. LEXIS 49521 at *11. For that reason, this section focuses on potential challenges alleging that the Rule and Act infringe on a historical right to privately manufacture firearms.

144. Polymer80, Inc. v. Garland, Civil Action No. 4:23-cv-00029-O, 2023 U.S. Dist. LEXIS 91311, at *10–11 (N.D. Tex. Mar. 19, 2023) ("Plaintiff attacks ATF's Final Rule . . . as unlawful in several respects: . . . that the Final Rule in conjunction with the ATF letters violate Polymer80's Second Amendment rights by regulating constitutionally protected conduct 'in a way that is inconsistent with the Nation's historical tradition of firearm regulation' . . . .").

145. Brief in Support of Motion for Temporary Restraining Order and Preliminary Injunction at 16, *id.*

146. Defendant's Opposition to Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction at 18, *id.* (quoting *Bruen*, 597 U.S. at 70).

147. *Polymer80*, 2023 U.S. Dist. LEXIS 91311, at *33–34.

interpreting the Second Amendment's plain text[148] makes it unlikely that a court would buy this argument and find the Rule to infringe on a plain text right, since it does not restrict a law-abiding citizen's right to possess a firearm for self-defense.

One Delaware district court *has* found that the Second Amendment's plain text "implies a corresponding right to manufacture firearms."[149] There, a Delaware statute criminalized possession and manufacturing of unserialized, unfinished receivers.[150] The court found that the Second Amendment's right to keep and bear arms would be "meaningless" if no entity could manufacture a firearm.[151] But these arguments are extremely weak when applied to the Act's prohibition on possessing or manufacturing "ghost guns;" even if the Second Amendment implies a right to manufacture firearms, such a right is not infringed here. The Act would only prohibit manufacturing of "ghost guns" specifically, which are not firearms in common use for a lawful purpose and protected by the Second Amendment.[152] By their very nature "ghost guns" are preferable for criminal purposes, since

148. *See, e.g.,* Knight v. City of N.Y., No. 22-CV-3215 (VEC)(VF), 2024 WL 1126309, at *17 (S.D.N.Y. Jan. 17, 2024) (narrowly interpreting the Second Amendment's plain text so as to not include the commercial sale of firearms*);* Rocky Mt. Gun Owners v. Polis, 701 F. Supp. 3d. 1121, 1136 (D. Colo. 2023) (same); United States v. James, 677 F. Supp. 3d 329, 344 (D.V.I. 2023) (holding that the Second Amendment's plain text focuses on one's right to publicly carry a firearm).

149. Rigby v. Jennings, 630 F. Supp. 3d 602, 615 (D. Del. 2022)

150. DEL. CODE ANN. tit. 11, § 1459A(b) (2023); DEL. CODE ANN. tit. 11, § 1463(b) (2023).

151. *Rigby*, 630 F. Supp. 3d at 615.

152. Based on *Heller* dicta, courts have found that "dangerous and unusual" weapons or weapons not in common use are not afforded Second Amendment protections. *See* United States v. Alaniz, 69 F.4th 1124, 1128 (9th Cir. 2023) (quoting N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 21 (2022)) ("*Bruen* step one involves a threshold inquiry. In alignment with *Heller*, it requires a textual analysis, determining . . . whether the weapon at issue is 'in common use' today for self-defense . . . ."); United States v. Miller, No. 3:23-CR-0041-S, 2023 U.S. Dist. LEXIS 172594, at *5 (N.D. Tex. Sep. 27, 2023) (quoting *Bruen*, 597 U.S. at 21) ("[C]ourts must determine whether the weapon at issue is 'in common use' today for self-defense.'"); Bevis v. City of Naperville, 85 F.4th 1175, 1193 (7th Cir. 2023) (citing *Heller*, 554 U.S. at 625) ("We take from this that the definition of 'bearable Arms' extends only to weapons in common use for a lawful purpose. That lawful purpose . . . is at its core the right to individual self-defense."); Del. State Sportsmen's Ass'n, Inc v. Del. Dep't of Safety & Homeland Sec., Civil Action No. 22-951-RGA, 2023 U.S. Dist. LEXIS 51322, at *12 (D. Del. Mar. 27, 2023) ("I think that Defendants' narrower view of that requirement—that is, the view that a bearable arm must be "in common use" for self-defense—is the correct one."); Or. Firearms Fed'n v. Kotek, No. 2:22-cv-01815-IM, 2023 U.S. Dist. LEXIS 92513, at *10 (D. Or. May 26, 2023) ("This court agrees . . . that whether a weapon is in common use for lawful purposes . . . is the first question—not the only question—that a court must consider under *Bruen*.").

they skirt record-keeping and serial number requirements.[153] Other courts have found similarly, holding that weapons with altered or obliterated serial numbers, despite being firearms, are not protected by the Second Amendment because they are not in common use for a lawful purpose.[154] The same logic applies here. A serialized firearm is preferable for a law-abiding person and self-defense purposes because it can more easily be returned after being stolen or lost.[155]

### *B.* Bruen's *Second Step: Historic Analogues to Ghost Gun Regulations*

If the Act or Rule is found to infringe on a right recognized in the Second Amendment's plain text, sufficient historical analogues must then be provided to show that such regulations are part of the nation's "historical tradition" by way of analogical reasoning.[156]

*Bruen* provides that regulations addressing a longstanding societal problem undergo a "straightforward" analysis, and the Government must show them to have "distinctly similar" historical regulation.[157] But regulations addressing new societal problems or technological changes require a "more nuanced approach" and only need to be "relevantly similar"[158] to historical analogues.[159] Under this more nuanced approach, *Bruen* asks courts to compare how and why the laws burden a law-abiding citizen's right to armed self-defense.[160] Whether the laws impose a comparable burden on the right to armed self-defense is a "'*central*' consideration[]."[161]

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153. *See supra* Part II.A.ii.

154. *See* United States v. Bradley, No. 22-cr-00098, 2023 U.S. Dist. LEXIS 49521, at *11 (S.D. W. Va. Mar. 23, 2023); United States v. Walter, No. 3:20-cr-0039, 2023 U.S. Dist. LEXIS 69163, at *13 (D.V.I. Apr. 20, 2023).

155. *Report Firearms Theft or Loss*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, https://www.atf.gov/firearms/report-firearms-theft-or-loss (last visited Jan. 19, 2023).

156. *Bruen*, 597 U.S. at 17 ("[W]e hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct . . . . [T]he government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.").

157. *Id.* at 26.

158. While *Bruen*'s dicta seems to create a dichotomy between regulations addressing longstanding problems and unprecedented problems, it does not articulate exactly how courts should apply a "straightforward" approach versus a "nuanced" approach aside from using "distinctly" and "relevantly." This Note will assume that *Bruen* affords more leniency by using the word "relevantly."

159. *Bruen*, 597 US. at 27–29.

160. *Id.* at 29.

161. *Id.* (citing McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) (quoting District of Columbia v. Heller, 554 U.S. 570, 599 (2008)).

i. Ghost Guns Require a "More Nuanced Approach"

The Act and Rule both target a "dramatic technological change" and unprecedented societal concern that was unimaginable at the founding: the proliferation of easily built, untraceable firearms.[162] In the eighteenth century, "[m]aking fine guns . . . was a most respectable and important craft open to anyone who had the requisite skill . . . "[163] Most gunpowder and bullets were made at home, and most weapons at the time came from small, individual gunsmiths.[164] Gunsmithing was an acquired skill and craft, either used as a primary trade or a secondary trade by tradesmen.[165] But now, because of advances in firearm technology, ghost guns are easily and quickly assembled by even the most inexperienced builders.[166] America faces an unprecedented need for firearm tracing due to the widespread and cheap availability of firearms and their parts, a result of mass production.[167] Therefore, ghost gun regulations should receive a more nuanced approach. Some courts have agreed, finding the rise of mass production to be evidence of such a need.[168]

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162. *Id.* at 29.

163. Joseph G.S. Greenlee, *The American Tradition of Self-Made Arms*, 54 ST. MARY'S L. J. 35, 79 (2023).

164. *See id.* at 45–49.

165. *Id.* at 66–68.

166. *See supra* notes 12–14.

167. *See* Richard Moore, *The Production of Muskets and Their Effects in the Eighteenth Century*, UNIV. OF PITT., (2014) https://www.forbes5.pitt.edu/article/production-muskets-and-their-effects-eighteenth-century [https://perma.cc/C9YW-YM8V] ("Before the Industrial Revolution, the scarcity of muskets due to lower production meant that armies and battles were relatively small in scale . . . . The introduction of machinery, standardization, and constant production meant more muskets to make larger armies."); David Yamane, *The Sociology of Gun Culture*, SOCIO. COMPASS, July 2017, at 2 (citing PAMELA HAAG, THE GUNNING OF AMERICA (2016)) ("The 19th century shift from craft to industrial production . . . dramatically increased manufacturing capacities . . . . And like other mass produced commodities, the guns had to be sold to the public; where markets for them did not already exist, they had to be created. As the nation developed, so too did gun culture.").

168. *See, e.g.*, United States v. Sharkey, 693 F. Supp. 3d 1004, 1008 (S.D. Iowa 2023) (holding that serial numbers are "rooted" in the development of mass production and increased availability of firearms); United States v. Dixson, No. 4:21-CR-00054-AGF-JSD, 2023 U.S. Dist. LEXIS 193268, at *13 (E.D. Mo. Aug. 30, 2023) (acknowledging the role of mass production in the creation of serial number requirements).

ii. Historical Analogues

The Act and Rule's serial number requirements and prohibition on the possession or creation of ghost guns have several historical analogues.

In 1807, Massachusetts imposed a fine for selling, delivering or purchasing firearms that lacked the proper "marks of proof."[169] These marks were placed onto firearms by stamping the prover's name and the year that it was proved.[170] Penalties were imposed on those that falsely forged or altered a proof.[171] This law is a strong historical analogue because the law similarly regulates the right to armed self-defense in the same "how" and "why" as the current law.[172] Serial numbers require that a firearm be marked in a way that identifies the manufacturer,[173] are promulgated for the safety of the community,[174] and impose a minimal burden on the right to self-defense. Both laws require that those manufacturing weapons place a proof[175] or a serial number.[176] The current law may be even less burdensome. While Massachusetts' law implicitly requires firearm owners to bring in their own firearms for proofing,[177] the Act and Rule seem to expand licensed manufacturers' duty to serialize to unfinished frames and receivers[178] so that unfinished receivers are serialized before consumers purchase them.

This law was not an outlier, either.[179] In 1821, Maine passed a law requiring musket barrels to be similarly proved for safety and

169. LAWS OF THE COMMONWEALTH OF MASSACHUSETTS FROM NOVEMBER 28, 1780, TO FEBRUARY 28, 1807, 261 (Manning & Loring, 1807).

170. *Id.* at 260.

171. *Id.* at 261.

172. *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 28–29 (2022).

173. *See* 18 U.S.C. § 923(i) (2023) (requiring licensed manufacturers and importers to identify each firearm).

174. LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra* note 169, at 259 ("Whereas no provision hath been made by law for the proof of fire arms manufactured . . . that many may be introduced into use which are unsafe, and thereby the lives of the citizens be exposed . . . .").

175. LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra* note 169, at 260 ("[I]f any person . . . shall manufacture within this Commonwealth, any musket or pistol, without having the barrels proved and stamped . . . [they] shall forfeit and pay for every such or pistol the sum of ten dollars . . . .").

176. BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, NATIONAL TRACING CENTER (NTC) FACT SHEET (2023); *see also* Philip J. Cook, *Gun Theft and Crime*, 95 J. URB. HEALTH 305, 308 (2018) (discussing the role serial numbers play in tracking gun crime).

177. LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra* note 169, at 259 (allowing governor to appoint firearm "provers" that are required to prove all musket and pistol barrels).

178. *See supra* Part IV.A.; Part III.A.

179. *See* An Act Providing for the Inspection of Gunpowder, ch. 337, 1794 Pa. Laws

compliance with existing regulations before their sale and imposing a fine for altering such proof.[180] In 1820, New Hampshire similarly required that gunpowder barrels be proved and imposed fines on those who sold unproved barrels or misrepresented a barrel's proofing.[181]

Colonies and states also regulated gunpowder production and sales by way of licensing, further supporting a historical tradition of regulating even private firearm manufacturing. For example, in 1651, Massachusetts law required that one needed approval from two magistrates before they could move gunpowder out of the district.[182] Connecticut went further in 1775, requiring a license for gunpowder production and transportation.[183] Finally, Providence, Rhode Island also required a license for selling gunpowder.[184]

Further support can be found in colonial era census and trade laws, like Virginia's 1631 law requiring that censuses be taken that

764 (1794), https://firearmslaw.duke.edu/laws/1794-pa-laws-764-an-act-providing-for-the-inspection-of-gunpowder-chap-337 [https://perma.cc/2CYB-BKVM] (creating an inspection and regulatory scheme for gunpowder manufacture); An Act for the Inspection of Gunpowder, ch. 6, § 1, 1776–1777 N.J. Laws 6 (1776), https://firearmslaw.duke.edu/laws/1776-1777-n-j-laws-6-an-act-for-the-inspection-of-gunpowder-ch-6-c2a7-1 [https://perma.cc/7F9K-4FP9] (fining those who sell gunpowder without prior inspection); An Act for Encouraging the Manufacture of Salt Petre and Gun Powder, The Public Records of the Colony of Connecticut, vol. 15 (1775), https://firearmslaw.duke.edu/laws/the-public-records-of-the-colony-of-connecticut-hartford-1890-page-190-192-image-194-196-available-at-the-making-of-modern-law-primary-sources [https://perma.cc/4RE3-8F2F] (requiring licenses for gunpowder manufacture).

180. An Act to Provide For the Proof of Fire Arms, ch.162 § 1–3, Laws of the State of Maine, 802–03, https://hdl.handle.net/2027/hvd.32044097923528?urlappend=%3Bseq=268%3Bownerid=27021597765509246-274 (last visited Feb. 19, 2025).

181. An Act to Provide For the Appointment of Inspectors and Regulating the Manufactory of Gunpowder, tit. 62, ch. 2 § 1–9, Laws of the State of New Hampshire (1830), https://www.google.com/books/edition/The_Laws_of_the_State_of_New_Hampshire/q4MlvgAACAAJ?hl=en&gbpv=1&pg=PA277&printsec=frontcover&dq=gunpowder (last visited Feb. 19, 2025).

182. Colonial Laws of Massachusetts Reprinted from the Edition of 1672, at 186 (1890) (1651 law), https://archives.lib.state.ma.us/items/e271ee1f-b113-48d1-a270-7b94d3e422fe/full [https://perma.cc/967J-9NZ2].

183. 15 The Public Records of the Colony of Connecticut 191 (1890) (1775 law), https://firearmslaw.duke.edu/laws/the-public-records-of-the-colony-of-connecticut-hartford-1890-page-190-192-image-194-196-available-at-the-making-of-modern-law-primary-sources [https://perma.cc/DD5Q-KDZF].

184. The Charter and Ordinances of the City of Providence, with the General Assembly Relating to the City 37 (1835) (1821 law), https://firearmslaw.duke.edu/laws/the-charter-and-ordinances-of-the-city-of-providence-together-with-the-acts-of-the-general-assembly-relating-to-the-city-page-89-96-image-89-96-1854-available-at-the-making-of-modern-law-primary [https://perma.cc/7U4S-RAZS].

track the "arms and munition" belonging to the population.[185] And in 1651, Massachusetts required merchants importing any ammunition to provide notice of the quantity to the notary within a month of the ammunition's importation.[186]

With the rise of mass production in the mid-nineteenth century,[187] the sale and manufacture of firearms and gunpowder was increasingly regulated. Several city charters specifically delegated themselves power to regulate the sale or manufacture of gunpowder.[188]

These laws demonstrate an ample historical tradition of regulating the sale or manufacture of gunpowder by means of licensing, registration, and early forms of serialization. Many of these laws have been recognized as sufficiently analogous to modern laws prohibiting the altering or removal of serial numbers.[189] These laws represent a pattern of regulating the "who,"

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185. Act LIII, Laws of Virginia (1632), https://archive.org/details/statutesatlargeb01virg/page/200/mode/2up?q=lhi (last visited Feb. 19, 2025).

186. Colonial Laws of Massachusetts Reprinted from the Edition of 1672, at 186 (1890) (1651 statute), https://archives.lib.state.ma.us/items/e271ee1f-b113-48d1-a270-7b94d3e422fe/full (last visited Feb. 19, 2025).

187. *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 29 (2022).

188. An Act to Reduce the Law Incorporating the City of Madison, and the Several Acts Amendatory Thereto Into One Act, and to Amend the Same, 1847 Ind. Acts 93, ch. 61, § 8, pt. 4, https://firearmslaw.duke.edu/laws/1847-ind-acts-93-an-act-to-reduce-the-law-incorporating-the-city-of-madison-and-the-several-acts-amendatory-thereto-into-one-act-and-to-amend-the-same-chap-61-c2a7-8-pt-4 [https://perma.cc/URX4-2NCT] (granting the power to regulate and license gunpowder manufacture and storage); An Act to Incorporate and Establish the City of Dubuque, 1845 Iowa Laws 119, ch. 123 § 12, https://firearmslaw.duke.edu/laws/1845-iowa-laws-119-an-act-to-incorporate-and-establish-the-city-of-dubuque-chap-123-c2a7-12 [https://perma.cc/VY7L-Z5YX] (empowering city council to regulate and impose fines on gunpowder manufacturing); An Act to Incorporate the Mayor and Board of Aldermen of the City of Charlotte, 1866 N.C. Pvt. Laws 63, § 19, https://heinonline.org/HOL/P?h=hein.ssl/ssnc0235&i=63 (last visited Feb. 19, 2025) (giving power to Aldermen to levy taxes on pistols, knives and deadly weapons); An Act to Amend an Act Entitled "An Act to Incorporate the Village of Rutland," 1865 Vt. Acts & Resolves 213, § 10, https://firearmslaw.duke.edu/laws/1865-vt-acts-resolves-213-an-act-to-amend-an-act-entitled-an-act-to-incorporate-the-village-of-rutland-approved-november-15-1847-c2a7-10 [https://perma.cc/S6FW-JG93] (allowing fire wardens to inspect gunpowder manufacturing and storage, with the power to order how it may be stored and created); An Ordinance to Regulate the Sale of Gunpowder, The Charter and Ordinances of the City of St. Paul 1866–67, § 1–2, https://firearmslaw.duke.edu/laws/the-charter-and-ordinances-of-the-city-of-st-paul-to-august-1st-1863-inclusive-together-with-legislative-acts-relating-to-the-city-page-166-167-image-167-168-1863-available-at-the-making-of [https://perma.cc/K4M4-PAA5] (prohibiting selling of gunpowder without obtaining a permit marking their name and location from local government and paying a fine).

189. *See* United States v. Patton, No. 4:21-CR-3084, 2023 U.S. Dist. LEXIS 171232, at *6–7 (D. Neb. Sep. 26, 2023) (holding marks of proof "synonymous with

"what," and "where" of manufacturing gunpowder. And the ghost gun regulations discussed in this Note do not infringe on the Second Amendment right to self-defense, but instead continue this historical tradition by regulating the kinds of firearms that are produced and sold so that serial numbers are available to track these questions of "who," "what," and "where."

**Conclusion**

Today's easy access to homemade firearms is a massive barrier to significantly addressing gun violence and firearm trafficking.[190] The ATF's recent Rule redefining frames and receivers is a step forward.[191] But the Rule leaves open a massive loophole that defeats the Rule's purpose by allowing for the unregulated sale of unfinished receivers, so long as they are sold alone.[192]

This problem is solvable. To meaningfully address it, current regulations should be amended so that the definition of frames and receivers includes the sale of standalone unfinished receivers,[193] and courts should continue to uphold the *California v. ATF* vacatur.[194] Congress can look towards legislative steps like the Untraceable Firearms and Ghost Guns Act,[195] which would regulate the sale of unfinished receivers while criminalizing the possession, creation, and sale of untraceable firearms. And despite *Bruen*'s drastic changes to the legal landscape of the Second Amendment, these laws are completely defensible as the next steps in our Nation's longstanding history of regulating the manufacture and sale of gunpowder and firearms.[196]

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serial numbers in this context"); United States v. Dangleben, No. 3:23-MJ-0044, 2023 WL 6441977, at *9 (D.V.I. Oct. 3, 2023) ("[T]he historical regulations discussed above can be viewed as an antecedent to Section 922(k). Thus, in light of these historical analogues, the Court holds that 922(k) is consistent with this Nation's tradition of firearm regulations."); United States v. Sharkey, 693 F.Supp.3d 1004, 1008 (S.D. Iowa 2023) ("This burden is no more onerous than the historical regulations governing the sale and marking of firearms and gunpowder. Importantly, neither the historical regulations, nor § 922(k), deprived individuals of their ability to employ firearms for self-defense.").

190. *See supra* Part II.A.ii.

191. *See supra* Part III.A.

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

193. *See supra* Part IV.B.

194. California v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 718 F. Supp. 3d 1060, 1097–98 (N.D. Cal. 2024).

195. *See supra* Part IV.A.

196. *See supra* Part V.

# Gender-Based Persecution, Protection, and Particularity: The Case for Returning to *Acosta*

Meg Keiser†

## Introduction

Waiting for her chance in Mexico to cross the border into the United States, a Honduran woman, Karen Paz, remarked that "[h]itting a woman for a man is as normal as eating a tortilla from a food stand on the way to work," referring to the high prevalence of gender-based and domestic violence in Honduras.[1] Ms. Paz revealed a scar on her shoulder—the result of her husband burning her with a hot pan containing boiling butter.[2] Despite reporting this attack to the police, Ms. Paz's husband was detained for only twenty-four hours before being released.[3] Wanting to protect her daughter from violence and fearing that her husband would kill her the next time she was attacked, Ms. Paz left San Pedro Sula, Honduras in search of safety and a new start in the United States.[4] She planned to apply for asylum.

Ms. Paz's story mirrors that of many women in Honduras. Though domestic violence is the leading crime reported in Honduras, domestic violence complaints rarely result in a conviction for perpetrators.[5] From 2012–2014, out of 4,992 domestic

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1. Federica Valabrega, *'I'm a Survivor of Violence': Portraits of Women Waiting in Mexico for U.S. Asylum*, NAT'L PUB. RADIO (Jan. 16, 2019, 5:51 PM), https://www.npr.org/sections/pictureshow/2019/01/16/684812592/i-m-a-survivor-of-violence-portraits-of-women-waiting-in-mexico-for-u-s-asylum [https://perma.cc/Z7G7-W7CH].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

violence complaints, there were only 134 convictions.[6] Honduras also claims one of the highest rates of femicide in the world.[7] Ms. Paz's experience is representative of a greater theme of women fleeing gender-based persecution in hopes of being granted asylum in the United States.

However, fleeing this persecution is unfortunately only one part of the equation. Asylum seekers like Ms. Paz must navigate through the U.S. immigration system and the dense, ever-changing asylum law it applies to have a chance at a meritorious claim. To be granted asylum, among other requirements, applicants must meet the statutorily defined definition of a refugee in the Immigration and Nationality Act (INA): someone who has faced persecution or has a fear of persecution "on account of [their] race, religion, nationality, membership in a particular social group (PSG), or political opinion . . . ."[8] With the grounds of race, religion, nationality, and political opinion being rather straightforward, the remaining category, membership in a PSG, allows for breadth in claims, and many asylum seekers must default to this protected ground should their persecution not fit within any other category.[9] For individuals like Ms. Paz who have experienced gender-based persecution, the PSG protected ground is the only category she could tie her domestic violence-based asylum claim to.

PSG is not defined under the INA and is thus reliant on case law for interpretation.[10] Persecution on the basis of a PSG was first interpreted by the Board of Immigration Appeals (BIA) in the 1985 decision *Matter of Acosta* to mean persecution directed at a member of a group whose persons all share a common, immutable characteristic, and all PSGs are to be subject to case-by-case analysis.[11] However, more recently, there has been a departure from the *Acosta* framework, with more limitations and constraints being placed on PSGs, such as adding "particularity" and "social distinction" requirements.[12] This more stringent approach to the

6. *Id.*

7. *Id.*

8. Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101.

9. *See* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985); *see also* Mattie L. Stevens, *Reorganizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category*, 3 CORNELL J.L. & PUB. POL'Y 179, 190–91 (1993) ("The Ninth Circuit also recognizes that 'the 'social group' category is a flexible one which extends broadly to encompass many groups who do not otherwise fall within the other categories of race, nationality, religion, or political opinion.'") (citing Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986)).

10. *Acosta*, 19 I. & N. Dec. at 232.

11. *Id.* at 233.

12. M-E-V-G-, 26 I. & N. Dec. 227, 228 (B.I.A. 2014).

PSG category has led to less frequent success in gender-based asylum claims.[13] Although case law does provide some guidance for PSG classifications, there remains a significant lack of consensus regarding this protected ground.

Due to the breadth of this protected category and lack of a concrete definition of PSG, as well as different applications and interpretations of the PSG category in federal circuit courts, many immigration advocates have found that PSG asylum claim adjudications related to gender-based persecution are inadequate and inconsistent, and they have criticized this protected ground.[14] This issue has motivated advocacy to amend the INA to include a sixth protected category: gender.[15] On its face, this solution appears to be an apt method to address the apparent gap in the INA in the context of gender-based asylum claims. However, scholar Karen Musalo claims that "[a]dding a sixth ground may 'fix' the problem for one category of asylum seekers, but it will leave out in the cold all the others who rely on the particular social group ground for their claims . . . ."[16]

Though there is merit to the argument that a sixth category should be added to the INA, this Note posits that this is not the solution to address gender-based asylum claims. Rather than add an additional category and remain in the ever-changing and ever-constraining modern PSG framework, recent case law reflecting a return to the *Acosta* framework suggests that the law as it currently stands is sufficient to successfully capture asylum claims based on gender-based persecution.[17]

Part I of this Note provides background on U.S. asylum law and the development of the PSG protected ground and how it has applied to gender-based asylum claims. First, this Note investigates the evolution of PSG jurisprudence by the BIA, and then focuses on applications in the U.S. Courts of Appeals. Part II discusses the suggestion of adding a sixth protected ground, gender, to the INA and highlights why this is not the correct solution for the future of PSG jurisprudence. This Note argues and advocates for a return to the *Acosta* framework to simplify the PSG cognizability analysis,

13. *See e.g.,* Valle-Montes v. Att'y Gen., 342 Fed App'x. 854, 857 (3d Cir. 2009).

14. *See e.g.,* Stevens, *supra* note 9, at 191–207.

15. *Id.* at 215.

16. Karen Musalo, *Guest Post: The Wrong Answer to the Right Question: How to Address the Failure of Protection for Gender-Based Claims*, IMMIGRATIONPROF BLOG (Mar. 9, 2021), https://lawprofessors.typepad.com/immigration/2021/03/guest-post-the-wrong-answer-to-the-right-question-how-to-address-the-failure-of-protection-for-gende.html#google_vignette [https://perma.cc/UTS7-94H2].

17. *See* De Pena-Paniagua v. Barr, 957 F.3d 88, 95–96 (1st Cir. 2020).

which benefits not just those with gender-based asylum claims, but all asylum-seekers applying within the PSG classification.

## I. A Primer on Asylum Law and the Particular Social Group Protected Ground

There is an international obligation to assist individuals who meet the definition of a refugee as established by the 1951 United Nations Convention Relating to the Status of Refugees (1951 Convention).[18] The 1951 Convention serves as a "realistic" guide "to be framed in such a way as to secure as universal application as possible."[19] Asylum is not an option for everyone in a difficult situation, but rather for individuals who have faced persecution tied to a specific protected ground: race, religion, nationality, membership in a PSG, or political opinion.[20] All protected categories have some flexibility, but PSG stands out as being the least concrete, and the jurisprudential evolution of the category has only solidified this reputation.[21]

To qualify for asylum in the U.S., an individual must meet the definition of a refugee:

> [Someone] who is outside any country of such person's nationality . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . .[22]

In other words, an asylum applicant must be able to tie their claim to one of the five protected grounds defined by the INA.[23] Asylum claims are either adjudicated affirmatively through the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS), or defensively in removal proceedings by the Department of Justice Executive Office for

18. Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S. 150.

19. Irial Glynn, *The Genesis and Development of Article 1 of the 1951 Refugee Convention*, 25 J. REFUGEE STUD. 134, 136–37 (2012).

20. Immigration and Nationality Act § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

21. NAT'L IMMIGRANT JUST. CTR., PARTICULAR SOCIAL GROUP PRACTICE ADVISORY: APPLYING FOR ASYLUM BASED ON MEMBERSHIP IN A PARTICULAR SOCIAL GROUP 6–7 (2021), https://immigrantjustice.org/for-attorneys/legal-resources/file/practice-advisory-applying-asylum-based-membership-particular [https://perma.cc/EQ7F-R3AZ].

22. 8 U.S.C. § 1101(a)(42)(A).

23. *Id.*

Immigration Review (EOIR).[24] The body of case law regarding asylum comes from asserting asylum as a defense in removal proceedings.[25]

### *A. Agency Interpretations of Membership in a Particular Social Group*

The BIA first interpreted the 1951 Convention's "membership in a particular social group" in *Matter of Acosta*.[26] Due to the lack of clear legislative intent, the BIA relied on the statutory interpretation tool of ejusdem generis, meaning "of the same kind."[27] Interpreting membership in a PSG in relation to the other four categories—race, religion, nationality, and political opinion—the BIA concluded that all of the protected grounds encompassed characteristics that were innate and could not be changed, or had a characteristic that should not have to be changed.[28] *Acosta* specifically pointed out that "sex"[29] could be a PSG due to the common, immutable characteristic that members of this group share.[30]

Following *Acosta* was the BIA's landmark 1996 decision in *Matter of Kasinga*, which was one of the first cases to address a gender-based PSG.[31] *Kasinga* held that female genital mutilation (FGM) was persecution and was based on the respondent's nexus to a particular social group involving her gender: "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice."[32] *Kasinga* opened the door to more PSG jurisprudence, and led many stakeholders to believe

24. *Asylum in the United States*, AM. IMMIGR. COUNCIL (Jan. 15, 2024), https://www.americanimmigrationcouncil.org/research/asylum-united-states [https://perma.cc/5EH5-63QA].

25. *Id.*

26. Acosta, 19 I. & N. Dec. 211, 232 (B.I.A. 1985).

27. *Id.* at 233.

28. *Id.*

29. Though we understand "sex" and "gender" as two distinct concepts as definitions, immigration law often conflates these words. As such, some decisions use "gender" verbiage, while others use "sex." *See* Elaine Wood, *Advancing Gender and Sex Equality in Asylum Protections*, AM. IMMIGR. LAWS. ASS'N. (Dec. 21, 2023), https://www.aila.org/blog/advancing-gender-and-sex-equality-in-asylum-protections#:~:text=In%20asylum%20cases%2C%20the%20distinction,sexism%20within%20U.S.%20immigration%20law [https://perma.cc/29WD-Q6N6].

30. *Acosta,* 19 I. & N. Dec at 233.

31. *See* Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996).

32. *Id.* at 358.

that the gender-based PSG body of law would expand and adapt to protect asylum seekers facing gender-based persecution.[33]

Although *Acosta* remained the key case governing PSG asylum claims for decades, and still remains a highly precedential decision, the guidance provided by *Acosta* also sparked a fear of the so-called floodgates opening—an overwhelming increase of asylum applications and grants—and many cases with a PSG nexus arising, especially pertaining to claims involving gender-based persecution.[34] This led courts to narrow the PSG protected ground in an attempt to limit PSG asylum claims.[35]

Despite its broad relation to *Kasinga*, the BIA was previously silent on asylum claims relating to domestic violence.[36] In 1999, the gender-based PSG landscape changed drastically when the BIA decided *Matter of R-A-*.[37] The Guatemalan respondent in *R-A-* suffered domestic violence and persecution at the hands of her husband, and was not offered protection by the government.[38] The BIA even admitted: "[w]e struggle to describe how deplorable we find the husband's conduct to have been."[39] Despite recognition that Ms. R-A-'s treatment was cruel and inhumane, she was denied asylum.[40] The BIA determined that the PSG Ms. R-A- identified was not, in fact, a PSG: "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."[41] The BIA took issue with the idea that this was not a cognizable group within Guatemalan society:

> [T]he group is defined largely in the abstract . . . for the group to be viable for asylum purposes . . . there must also be some showing of how the characteristic is understood in the [noncitizen]'s society, such that we . . . may understand that the potential persecutors in fact see persons sharing the characteristic as warranting suppression or the infliction of harm.[42]

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33. *See* Musalo, *supra* note 16.

34. *See* Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y. L.119, 132 (2007).

35. NAT'L IMMIGRANT JUST. CTR., *supra* note 21.

36. *Id.* at 3.

37. *See* R-A-, 22 I. & N. Dec. 906, 945–46 (B.I.A. 1999).

38. *Id.* at 908–09.

39. *Id.* at 910.

40. *Id.* at 927.

41. *Id.* at 911.

42. *Id.* at 918.

The BIA found that Ms. R-A-'s identified PSG was too amorphous to qualify for asylum and did not meet its newly invented test of determining cognizability.[43]

In *Matter of R-A-*, the BIA also reiterated the idea that not all "social ills" classify as persecution warranting an asylum grant. The BIA stated: "Congress did not intend the 'social group' category to be an all-encompassing residual category for persons facing genuine social ills that governments do not remedy. The solution to the respondent's plight does not lie in our asylum laws as they are currently formulated."[44] Though vacated in 2001, *R-A-* symbolized a shift from the more straightforward *Acosta* standard to a more stringent approach towards PSG asylum claims.[45]

Beginning in 2006, the BIA began to reference the terms "social visibility" and "particularity" in reference to determining PSG.[46] In 2007, the BIA mentioned these terms again, conflating particularity and social visibility with the *Acosta* framework, despite these terms not being a binding part of the PSG test.[47] In response to a large wave of Central American asylum seekers with gang-related PSG claims in 2008, the BIA issued two precedential decisions, *Matter of S-E-G-* and *Matter of E-A-G-*, making particularity and social visibility requirements for PSG asylum claims.[48] Now, asylum seekers with PSG claims would have to satisfy the following criteria: the group must be composed of members who share a common, immutable characteristic *and* it must be defined with particularity and be socially distinct.[49]

In an attempt to "provide guidance to courts and those seeking asylum," the BIA echoed its holdings in 2008 from *S-E-G-* and *E-A-G-* with its 2014 decisions in *Matter of M-E-V-G-* and *Matter of W-G-R-*.[50] These decisions reaffirmed the 2008 precedent in adding additional requirements to PSG.[51] Under this new precedent, asylum seekers with a PSG nexus must demonstrate that the group is: "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially

43. R-A-, 22 I. & N. Dec. 906, 918 (B.I.A. 1999).

44. *Id.* at 928.

45. *See* Musalo, *supra* note 16.

46. C-A-, 23 I. & N. Dec. 951, 957, 959 (B.I.A. 2006).

47. A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 74, 76 (B.I.A. 2007).

48. S-E-G-, 24 I. & N. Dec. 579, 582–83 (B.I.A. 2008); E-A-G-, 24 I. & N. Dec. 591, 593–94 (B.I.A. 2008).

49. *Id.*

50. M-E-V-G, 26 I. & N. Dec. 227 (B.I.A. 2014); W-G-R, 26 I. & N. Dec., 208 (B.I.A. 2014).

51. M-E-V-G, 26 I. & N. Dec. 227 (B.I.A. 2014).

distinct within the society in question."[52] Though social visibility does not mean literal ocular visibility, the PSG must be recognized as distinct in society.[53] The "particularity" requirement relates to the group's boundaries and "the need to put 'outer limits' on the definition of a 'particular social group.'"[54] While these decisions intended to provide clarity, the PSG category was left more confusing and unclear than ever.

Also in 2014, the BIA issued its decision in *Matter of A-R-C-G-* holding that asylum was still a possibility for individuals with PSG claims who were fleeing domestic violence.[55] *A-R-C-G-* held that, depending on the circumstances of the case, "married women in Guatemala who are unable to leave their relationship" can constitute a cognizable PSG for an asylum claim.[56] While this decision provided clarity in that domestic violence survivors could be eligible for asylum, *A-R-C-G-* also contributed to the overall confusion regarding PSGs.[57] The PSG analysis remained inconsistent with BIA precedent, calling into question what the true PSG test was.[58] *A-R-C-G-* held that the PSG in question was socially distinct and defined with particularity.[59] Somewhat contradictory to *S-E-G-* and *E-A-G-*, *A-R-C-G-* attempted to distinguish itself by remarking that everything must be analyzed on a case-by-case basis: "[i]n some circumstances, the terms can combine to create a group with discrete and definable boundaries."[60] The PSG category and definition remained in flux.

The most drastic shift in the PSG framework came in 2018 during the Trump Administration when Attorney General Sessions certified *Matter of A-B-* to himself and imposed severe limitations on PSG jurisprudence, especially pertaining to asylum claims relating to domestic violence.[61] Overruling *A-R-C-G-*, Sessions established a new test for determining whether a PSG claim was valid or not—the strictest iteration yet.[62] Under *A-B-*, a PSG-based asylum claim must demonstrate: (1) membership in a PSG composed of members who share a common immutable

52. *Id.* at 237.
53. *Id.* at 240–41.
54. *Id.* at 238.
55. A-R-C-G, 26 I. & N. Dec. 388 (B.I.A. 2014).
56. *Id.* at 389.
57. NAT'L IMMIGRANT JUST. CTR., *supra* note 21.
58. *Id.*
59. *A-R-C-G-*, 26 I. & N. Dec. at 393.
60. *Id.*
61. A-B-, 27 I. & N. Dec. 316 (Att'y Gen. 2018).
62. *Id.* at 320.

characteristic, is defined with particularity, and is socially distinct within society; (2) membership in the PSG is a central reason for their persecution; and (3) the alleged harm is inflicted by the government or by an actor the government is unable or unwilling to control.[63] The decision goes as far as to explicitly state that:

> Generally, claims by [noncitizens] pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum . . . . [I]n practice such claims are unlikely to satisfy the statutory grounds . . . . The mere fact that a country may have problems effectively policing certain crimes . . . cannot itself establish an asylum claim.[64]

This decision was highly criticized by immigration and feminist advocates.[65]

When the Biden Administration took office in 2021, Attorney General Merrick Garland issued a decision vacating *A-B-*.[66] Attorney General Garland argued that vacating *A-B-* would increase the Department of Homeland Security's flexibility in the rulemaking process, as well as encourage the case-by-case analysis of asylum claims by not imposing a categorical bar on certain PSGs.[67] Attorney General Garland returned PSG jurisprudence to pre-Trump Administration practices while simultaneously reducing, though not eliminating, uncertainty in PSG asylum claim adjudications and expanded eligibility for asylum for survivors of domestic violence.[68]

With seemingly countless and ever-changing agency decision defining PSGs in asylum cases, there is an overwhelming lack of clarity for PSG asylum claims. From the humble, straightforward origins of PSG jurisprudence in *Acosta*, to increasing specificity of PSGs in *Kasinga,* to applying various tests and factors in *M-E-V-G-*, and most recently an attack on survivors of domestic violence seeking asylum in *A-B-* (now vacated), the PSG boundaries continue to create more confusion, often disadvantaging asylum seekers with gender-based claims. Because of this lack of clarity, the advocacy for a sixth protected ground, gender, emerged.

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63. *Id.*

64. *Id.*

65. *AG Garland Vacates Asylum Precedent That Harmed Victims of Violence*, AM. IMMIGR. L. ASS'N: AILA PUBLIC STATEMENTS, PRESS RELEASES (June 16, 2021), https://www.aila.org/library/ag-garland-vacates-asylum-precedents [https://perma.cc/9YJM-6RYY].

66. A-B- III, 28 I. & N. Dec. 307 (Att'y Gen. 2021).

67. *Id.* at 308–09.

68. *Recent Case,* Matter of A-B-, *28 I. & N. Dec. 307 (A.G. 2021)*, 135 HARV. L. REV. 1174, 1180 (2022).

### *B. U.S. Courts of Appeals Interpretations of Membership in a Particular Social Group*

While binding for the BIA and immigration judges, federal U.S. Courts of Appeals are not bound to BIA precedent.[69] As such, different jurisdictions have handled the issue of PSG jurisprudence, especially relating to gender-based persecution claims, differently. The different circuits have toyed with how specific or narrow a PSG must be to qualify for asylum, and standards set by the BIA are not binding on courts of appeals.[70] The circuit split among courts of appeals has led to inconsistent adjudication of PSG asylum claims. As such, the success of an asylum applicant's gender-based PSG claim can heavily depend on the jurisdiction in which the claim is processed.

A prime example of a circuit court straying from the BIA precedent in a gender-based persecution PSG claim is the Seventh Circuit's 2013 holding in *Cece v. Holder*.[71] The Seventh Circuit had not adopted the "particularity" and "socially distinct" criteria imposed by the BIA in 2008, and thus applied *Acosta* in *Cece*.[72] Cece was a young Albanian woman who was being targeted for forced prostitution.[73] The Seventh Circuit recognized her PSG as "young Albanian women who live alone."[74] Noting that members of this PSG cannot alter their "age, gender, nationality, or living situation . . . [t]hese characteristics qualify Cece's proposed group as a protectable social group under asylum law."[75] The Court also remarked that PSGs can be defined in part by shared persecution, but this cannot be the only common immutable characteristic.[76]

Another example out of the Ninth Circuit is *Perdomo v. Holder*.[77] With high rates of young Guatemalan women being murdered with impunity, petitioner Lesly Yajayra Perdomo sought asylum in the U.S.[78] Perdomo filed her asylum application based on

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69. *See e.g.*, Cece v. Holder, 733 F.3d 662, 669 (7th Cir. 2013) (describing the BIA's decision determining Cece's social group was not cognizable as "not a reasoned conclusion"); Perdomo v. Holder, 611 F.3d 662, 664 (9th Cir. 2010) (finding the BIA's decision inconsistent and remanding for further proceedings).

70. *See Cece*, 733 F.3d at 669; *Perdomo*, 611 F.3d at 664.

71. *Cece*, 733 F.3d at 673.

72. *See* S-E-G-, 24 I. & N. Dec. 579 (B.I.A. 2008); E-A-G-, 24 I. & N. Dec. 591 (B.I.A. 2008); *Cece*, 733 F.3d at 669.

73. *Cece*, 733 F.3d at 666.

74. *Id.* at 673.

75. *Id.*

76. *Id.* at 672.

77. Perdomo v. Holder, 611 F.3d 662, 663 (9th Cir. 2010).

78. *Id.*

her fear of being murdered due to her membership in the PSG of women between the ages of fourteen and forty who are Guatemalan and live in the U.S.[79] She later revised her PSG to "all women in Guatemala."[80] The BIA affirmed the immigration judge's decision that this group is too broad to qualify as a protected social group.[81] The BIA reasoned that the PSG "Guatemalan women" is internally diverse and a demographic division rather than a PSG.[82] The Ninth Circuit has recognized that gender is an "innate characteristic" that is "fundamental to [one's] identit[y] . . . ."[83] Further, the Ninth Circuit "reject[ed] the notion that an applicant is ineligible for asylum merely because all members of a persecuted group might be eligible for asylum."[84] However, in 2010, the court remanded to the BIA to determine whether Guatemalan women constitute a PSG.[85]

The body of law regarding gender-based asylum claims has continued to grow, with a major victory coming out of the First Circuit in the 2020 decision *De Pena-Paniagua v. Barr*.[86] Ms. De Pena-Paniagua's case mirrors the cases of many women who have come before her—she was a woman escaping domestic violence by seeking asylum in the U.S.[87] In the Dominican Republic, Ms. De Pena-Paniagua experienced abuse at the hands of her partner, including verbal, physical, and sexual abuse.[88] Despite reporting the abuse to the police, Ms. De Pena-Paniagua's abuser was not arrested.[89] Ms. De Pena-Paniagua applied for asylum based on the persecution she faced as a member of the PSG "Dominican women unable to leave a domestic relationship," which was subsequently denied by an immigration judge.[90] The immigration judge, inter alia, found that Ms. De Pena-Paniagua's PSG "d[id] not meet the requirements under the law."[91]

Ms. De Pena-Paniagua appealed the immigration judge's decision to the BIA, which affirmed the decision, specifically relying on *Matter of A-B-*, the 2018 Trump-era decision stating that PSGs

79. *Id.* at 664.
80. *Id.* at 663.
81. *Id.* at 665.
82. *Id.* at 669.
83. *Id.* at 669 (citing Mohammed v. Gonzales, 400 F.3d 785, 797 (9th Cir. 2005)).
84. *Id.* at 674 (citing Singh v. INS, 94 F.3d 1353, 1359 (9th Cir. 1996)).
85. *Id.*
86. De-Pena-Paniagua v. Barr, 957 F.3d 88 (1st Cir. 2020).
87. *Id.* at 89.
88. *Id.* at 89–90.
89. *Id.* at 90.
90. *Id.* at 91–92.
91. *Id.* at 92.

defined by domestic violence are often ineligible for asylum.[92] The First Circuit criticized the BIA's conclusion in Ms. De Pena-Paniagua's case that she was automatically ineligible for asylum based on her PSG.[93] While *A-B-* does not view domestic violence-based PSGs favorably and notes that most will be ineligible for asylum, the First Circuit noted that there was no categorical bar on these groups for asylum, though their success may be limited or unlikely.[94] In its analysis, the First Circuit tackled the argument that gender-based PSGs, such as "Dominican women" are too broad.[95] The court noted that "it is difficult to think of a country in which women are not viewed as 'distinct' from other members of society . . . . [G]ender serves as a principal, basic differentiation for assigning social and political status and rights . . . ."[96] However, referencing *Acosta*, the court reasoned that the shared characteristics for protected grounds (race, religion, nationality, and political opinion) may "refer to large classes of persons," so it is unsurprising that a PSG could do the same.[97] Despite the court's conclusion, it was obligated to remand to the immigration judge to determine if the PSG "Dominican women" was cognizable.[98]

There has been similar case law out of the Second, Eighth, and Ninth Circuits, rejecting the notion that gender-based PSGs are categorically ineligible for asylum.[99] This rejection of the heightened requirements for PSGs attempts to address the lack of clarity coming from the BIA.[100] This type of jurisprudence advocating for a return to the more scaled-back and less restrictive PSG approach as put forth in *Acosta*, like the opinion in *De Pena-Paniagua*, is certainly a step in the right direction for adjudicating PSG asylum claims. However, without uniform guidance and application, Courts of Appeals decisions often only further

92. De-Pena-Paniagua v. Barr, 957 F.3d 88, 92–93 (1st Cir. 2020); A-B-, 27 I. & N. Dec. 316, 320 (Att'y Gen. 2018).

93. *De Pena-Paniagua,* 957 F.3d at 93–94.

94. *Id.* at 92–93; *See also A-B-*, 27 I. & N. Dec. at 335–36 (holding that "there is significant room for doubt" that victims of domestic abuse constitute a particular social group).

95. *De Pena-Paniagua,* 957 F.3d at 96–98.

96. *Id.* at 96.

97. *Id.*

98. *Id.* at 98.

99. Diaz-Reynoso v. Barr, 968 F.3d 1070, 1074–79 (9th Cir. 2020); Ticas-Guillen v. Whitaker, 744 F. App'x 410, 410 (9th Cir. 2018); Paloka v. Holder, 762 F.3d 191, 192–93 (2d Cir. 2014); Hassan v. Gonzales, 484 F.3d 513, 518 (8th Cir. 2007).

100. Harv. L. Rev. Ass'n, *Recent Case: Asylum Law – Particular Social Group – First Circuit Indicates Receptiveness to Gender Per Se Social Groups - De Pena-Paniagua v. Barr, 957 F.3d 88 (1st Cir. 2020)*, 134 HARV. L. REV. 2574, 2574 (2021) [https://perma.cc/72JV-U55Q].

contribute to the murkiness of the PSG asylum claim. Once again, this lack of clarity and uniformity in applying PSG law has sparked renewed calls to add gender as a protected ground for asylum claims.[101]

## II. The Solution? A Return to *Acosta*

A return to the *Acosta* framework would ensure more clarity and uniformity within PSG jurisprudence. With all of the confusion and evolution of case law surrounding PSG asylum claims, some feminist scholars and immigration attorneys have advocated for the addition of a sixth protected ground in addition to race, religion, nationality, political opinion, and membership in a PSG.[102] For instance, many advocates believe that "[o]nly a new category can ensure that the refugee definition will cover harms specific to women—like female genital mutilation, rape, and gender-based discrimination—and will recognize these harms as persecution."[103] It is understandable why this proposal of a sixth protected ground has gained popularity, especially in the wake of decisions such as *Matter of A-B-*.

A prime example of PSG jurisprudence failing an asylum-eligible woman is seen in *Valle-Montes v. Attorney General*.[104] Ms. Valle-Montes, a Salvadoran woman, was approached by gang members who threatened and raped her.[105] Despite her real fear of returning to El Salvador based on this gender-based harm, the Third Circuit denied her asylum claim: "[e]ven if gender, standing alone, would be a cognizable particular social group, criminal activity, such as rape, does not constitute persecution when it is not motivated by a protected ground."[106] The court found that it was not clear if the rape was motivated based on her gender.[107] Though this

101. Michelle Shapiro, *Revitalizing and Reforming International Asylum Law: A Proposal to Add Gender to the Refugee Definition*, 36 GEO. IMMIGR. L.J. 795, 797–98 (2022).

102. *See, e.g.*, Stevens, *supra* note 9, at 179 (suggesting that a sixth category for asylum "is the only viable remedy to the inequities in the United States' current refugee definition"); Nathan Schneider, *The Sixth Ground: Why Adding Gender/Sexuality to the Grounds for Asylum Would Better Serve the Needs of LGBT Asylum Seekers*, 38 GEO. IMMIGR. L.J. 89, 91 (2023) (advocating that a gender category could support LGBT asylum applicants); Shapiro, *supra* note 101 (arguing that a sixth ground would offer more uniformity among international asylum law and provide greater protections to women and girls feeling gender-based violence).

103. Stevens, *supra* note 9, at 179.

104. *See* Valle-Montes v. Att'y Gen., 342 Fed. Appx. 854, 854 (3rd Cir. 2009).

105. *Id.* at 855.

106. *Id.* at 857.

107. *Id.*

case demonstrates a denial on the basis of nexus, it is easy to see the disconnect that often arises with gender-based PSGs and nexus to persecution.[108] The U.S. immigration system failed Ms. Valle-Montes, and it is cases like hers that have driven advocacy for a sixth protected ground to ensure individuals who have experienced gender-based harm receive the protection they need and are eligible for.

In addition to the near impossibility of passing comprehensive immigration reform in Congress,[109] what this perspective fails to consider is that, if the law were applied correctly under the *Acosta* framework, an additional protected ground would not be necessary.[110] While well-intentioned, proponents of a sixth category based on gender fail to "diagnose the illness"—*why* our immigration system is failing asylum seekers with gender-based claims.[111] When PSG jurisprudence came about in the 1985 *Acosta* decision, determining a cognizable PSG was relatively simple: members of the PSG should share a common, immutable characteristic.[112] The BIA then applied this straightforward test in *Matter of Kasinga*, finding a gender-based PSG to be cognizable: "young women of the Tchamba-Kunsuntu Tribe who have not had [female genital mutilation], as practiced by that tribe, and who oppose the practice."[113] It was only in *Matter of R-A-* that the BIA began to hint at a more stringent approach to PSG cognizability, noting that a common immutable characteristic may not be sufficient in and of itself.[114]

From the BIA's 1999 decision in *R-A-*, the elements of particularity and social distinction were introduced.[115] However, neither particularity nor social distinction have any basis in the INA, the 1951 Convention, or United Nations High Commissioner for Refugees (UNHCR) guidance.[116] Many advocates saw hope in the 2014 *Matter of A-R-C-G-* decision, but when President Trump

108. *Id.*

109. *See* William A. Galston, *The Collapse of Bipartisan Immigration Reform: A Guide for the Perplexed*, BROOKINGS INST. (Feb. 8, 2024), https://www.brookings.edu/articles/the-collapse-of-bipartisan-immigration-reform-a-guide-for-the-perplexed/ [https://perma.cc/WH9D-D3M3].

110. *See* Musalo, *supra* note 16.

111. *Id.*

112. Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

113. Kasinga, 21 I. & N. Dec. 357, 358 (B.I.A. 1996).

114. R-A-, 22 I. & N. Dec. 906, 918 (B.I.A. 2001).

115. S-E-G-, 24 I. & N. Dec. 579, 579 (B.I.A. 2008); E-A-G-, 24 I. & N. Dec. 591, 591 (B.I.A. 2008); M-E-V-G-, 26 I. & N. Dec. 227, 227 (B.I.A. 2014); W-G-R-, 26 I. & N. Dec., 208, 208 (B.I.A. 2014).

116. *See* Musalo, *supra* note 16.

entered office, the administration began to dismantle the more favorable framework for gender-based PSGs.[117] With *Matter of A-B-* vacated, PSG jurisprudence is closer to its pre-2018 iterations, but the category as a whole remains in flux. It is within this context that the advocacy for a sixth category has gained traction, but the addition of a sixth category is not the answer needed to solve the challenges that come with the PSG category. Rather, a return to the *Acosta* framework would suffice.

### *A. The Addition of "Gender" Fails to Protect Non-Gender-Based PSGs and is Contrary to International Law*

PSG is an intentionally broad category meant to redress claims that do not fall within race, nationality, religion, or political opinion. Adding gender as a sixth category may "fix" the PSG challenges and asylum outcomes for individuals with specific gender-based claims.[118] However, this viewpoint has narrowed in on gender-based asylum claims and has forgotten about the myriad of other individuals utilizing the PSG ground for their cases.[119] "[B]e they young men fleeing gangs, street children, individuals with physical or mental incapacity . . . [t]hey will continue to be impacted by the BIA's departure from *Acosta*, and the addition of particularity and social distinction."[120] As a whole, we should be advocating for a return to the PSG guidelines set forth in *Matter of Acosta*. Though seemingly counterintuitive, adding a sixth category would keep the PSG category underinclusive, as it would retain its stringent requirements, such as social distinction and particularity.[121] The addition of a sixth category for gender-based claims may be beneficial for many but may come at the expense of PSG jurisprudence remaining complex and underinclusive.

U.S. asylum law is based in the 1951 Convention, but its current PSG construction does not align with international law.[122] U.S. courts are required to interpret statutes in a way that aligns with international law whenever possible.[123] The UNHCR has

117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *See* M-E-V-G-, 26 I. & N. Dec. 227, 227 (B.I.A. 2014).
122. *See* Sabrineh Ardalan & Deborah Anker, *Re-setting Gender-Based Asylum Law*, HARV. L. REV.: BLOG ESSAYS, (Dec. 30, 2021), https://harvardlawreview.org/blog/2021/12/re-setting-gender-based-asylum-law/ [https://perma.cc/UN2K-EKXM].
123. INS v. Cardoza-Fonseca, 480 U.S. 421, 436–37 (1987) (noting Congress intended to conform U.S. asylum and refugee law "to the United Nation's Protocol to

confirmed that "sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently than men."[124] Adding gender as a sixth protected ground for asylum "would only exacerbate confusion about the meaning of the term particular social group."[125] Adding a sixth category and diverging from the UNHCR guidance would only further distance U.S. asylum law from the internationally accepted refugee definition.[126] Congress intended to align U.S. asylum law with the UN guidelines, and the addition of a sixth ground would undermine this effort. Adding a sixth ground would create further confusion and imply that the 1951 Convention did not encapsulate gender-based claims in the PSG ground and could also have the effect of signaling to other countries that PSG rejects gender-based claims altogether.

### *B. No Lawyer? No PSG Asylum Claim*

Another important consideration is the practical impact of adding a sixth gender protected ground, thereby leaving PSG jurisprudence in a state of flux. One of these considerations is how an asylum seeker will represent their claim to an asylum officer or immigration judge. In the immigration court context, according to a 2016 report, only 37% of all noncitizens and 14% of detained noncitizens were represented in immigration court.[127] This means that most individuals in removal proceedings do not have representation from an attorney and instead represent themselves pro se throughout their case. It is also extremely difficult to win in removal proceedings—only 5% of winning cases between 2007–2012 did so without representation.[128] Unfortunately, without

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which the United States has been bound since 1968").

124. *See* U.N. High Comm'r for Refugees, *Guidelines on International Protection: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, at 3, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), https://www.unhcr.org/us/media/guidelines-international-protection-no-2-membership-particular-social-group-within-context [https://perma.cc/XSH5-VTYE].

125. *See* Ardalan & Anker, *supra* note 121.

126. *Id.*

127. Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL (Sept. 28, 2016), https://www.americanimmigrationcouncil.org/research/access-counselimmigration-court [https://perma.cc/U2ZX-63RL].

128. Karen Berberich & Nina Siulc, *Why Does Representation Matter? The Impact of Legal Representation in Immigration Court*, VERA INST. OF JUST. (Nov. 2018), https://www.vera.org/downloads/publications/why-does-representation-matter.pdf [https://perma.cc/HTU4-73G4].

representation, noncitizens are highly unlikely to prevail on their claims.[129]

While the addition of a sixth protected ground would assist individuals with gender-based asylum claims, the addition of "gender" would leave the PSG category in its unclear, technical, and ever-changing state. While "gender" would make the asylum application easier for a number of asylum seekers, it would leave a whole group of other asylum seekers with the same challenges that sparked the movement for a sixth protected group.[130] With the vast majority of individuals in removal proceedings representing themselves, a PSG claim is practically bound to be unsuccessful in immigration court.[131] A PSG's cognizability "often makes or breaks an asylum or withholding claim" and even experienced immigration attorneys have trouble articulating the nuances required with a PSG claim.[132] The Fourth Circuit articulated this concern in *Quintero v. Garland*:

> [W]e deem it unreasonable and fundamentally unfair to expect *pro se* asylum seekers—many of whom suffer from the effects of trauma and lack literacy, English proficiency, formal education, and relevant legal knowledge—to even understand what a particular social group is, let alone fully appreciate which facts may be relevant to their claims and articulate a legally cognizable group.[133]

The current PSG jurisprudence from the BIA forces an individual, often with limited resources, to articulate a highly complex legal framework.[134] Often, an asylum applicant's entire case rests upon the cognizability of their PSG and requires ample evidence to support this assertion.[135] From there, articulating the nexus poses an additional hurdle.[136] Without an attorney, this

129. *Id.*

130. *See* Musalo, *supra* note 16.

131. *See* Berberich and Siulc, *supra* note 128.

132. Quintero v. Garland, 998 F.3d 612, 632 (4th Cir. 2021).

133. *Id.*

134. W-Y-C- & H-O-B-, 27 I. & N. Dec. 189, 191–92 (B.I.A. 2018) ("[I]t is an applicant's burden to specifically delineate her proposed social group.").

135. *See Quintero*, 998 F.3d at 632 ("While a particular social group's cognizability often makes or breaks an asylum or withholding claim, it is a highly technical legal issue, and '[e]ven experienced immigration attorneys have difficulty articulating the contours of a [cognizable social group].'") (quoting Cantarero-Lagos v. Barr, 924 F.3d 145, 154 (5th Cir. 2019) (Dennis, J., concurring)).

136. In all asylum cases, applicants must establish a link, or nexus, between the harm they experienced and the protected ground they are basing their asylum claim on, such as PSG. Even if a PSG is found to be cognizable, an applicant still must articulate that this was a reason for their harm. *See* NAT'L IMMIGRANT JUST. CTR., *supra* note 21, at 22 ("One may clearly be a member of one or more cognizable PSGs, but if there is no nexus between that PSG and the harm experienced and/or feared,

simply is not feasible for most pro se applicants. The Seventh Circuit has argued that the substance of the claim rather than the framing of the PSG should drive the adjudicator's analysis, but this is not uniformly applied.[137] By adding a sixth protected ground and leaving the PSG classification in its current state—unclear and complex—pro se asylum applicants are at a disadvantage and are unlikely to prevail on their PSG asylum claims.

### *C. The Necessity of Clarification from the Supreme Court*

As seen throughout this Note, PSG jurisprudence and determining what makes a PSG "cognizable" is an immensely complicated area of law that is relatively new, remains changing, and is inconsistently applied in different jurisdictions. With the U.S. immigration crisis continuing, and greater number of migrants entering the country and filing for asylum (many of whom are representing themselves), it is crucial that U.S. law address this important issue of PSG cognizability.[138] Because BIA precedent is not binding on U.S. Courts of Appeals, and there are various iterations of PSG cognizability tests, there is inconsistent application among jurisdictions and asylum cases.[139] In order to resolve the murkiness of the PSG protected ground, the U.S. Supreme Court must address the issue directly and rectify the current circuit split and misapplication of PSG tests by adjudicators.[140]

The BIA has demonstrated its lack of willingness to create a uniform approach to the PSG protected group, demonstrated by its myriad of decisions addressing the issue.[141] The current so-called "guidance" from the BIA results in vast differences in who is granted asylum.[142] There is a current desperate need for consistency to ensure "that all applicants will be treated fairly regardless of

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the asylum claim ultimately fails.").

137. Cece v. Holder, 733 F.3d 662, 672 (7th Cir. 2013).

138. *See generally* Valabrega, *supra* note 1 (detailing the increasing number of migrants arriving at the U.S. southern border); Eagly and Shafer, *supra* note 127 (describing the challenges in obtaining immigration representation and pro se representation).

139. *See, e.g.,* Perdomo v. Holder, 611 F.3d 662, 662 (9th Cir. 2010); *cf.* Valle-Montes v. Att'y Gen., 342 Fed. Appx. 854, 854 (3rd Cir. 2009).

140. *See* Kenneth Ludlum, *Defining Membership in a Particular Social Group: The Search for a Uniform Approach to Adjudicating Asylum Applications in the United States*, 77 U. PITT. L. REV. 115, 133 (2015).

141. *See* Liliya Paraketsova, *Why Guidance from the Supreme Court is Required in Redefining the Particular Social Group Definition in Refugee Law*, 51 U. MICH. J.L. REFORM 437, 438 (2018).

142. *Id.* at 437.

where they apply for asylum."[143] This is currently not the case, and who receives asylum is often dependent on which circuit court jurisdiction they fall into.[144] In the interest of fairness and uniformity, the U.S. Supreme Court should return to the PSG definition proffered by *Acosta*.[145] The *Acosta* definition most closely aligns with the INA and international refugee law, is the simplest way to ensure uniformity across circuits and asylum adjudications, and allows the law to adapt to changing conditions and trends in migration to allow protection to people who are fleeing persecution.[146] Adding a gender protected ground to the INA would not address the root of the problem in the adjudication of PSG asylum claims. If the Supreme Court provided clarity and consistency for PSG jurisprudence, there would be no need for a sixth protected ground.

A source of hesitancy among courts is the floodgates argument: "that a grant of asylum will result in a deluge of claims."[147] As Musalo writes, "the spectre of thousands . . . of women arriving at the borders of the United States to request asylum is raised as a reason to not recognize their legitimate claims to protection."[148] However, this hesitancy is unfounded and not a legitimate reason to avoid giving clarity to PSG asylum claims. For example, after the *Acosta* framework was applied in *Kasinga*, the Immigration Service published a notice saying that it had not seen an appreciable increase in the number of claims after *Kasinga*.[149] Countering this concern regarding the floodgates, a firm definition of PSG and concrete factors for adjudication may actually improve efficiency and lead to faster adjudications in the immigration system. With a clear, consistent definition of PSG, case outcomes will be more accurate, and lead to less factual and legal error, thereby decreasing appeals. A decision providing clarity and consistency for the PSG category from the Supreme Court would not "open the floodgates," and the addition of a sixth protected category is not necessary for successful adjudications of gender-based PSG claims.

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143. *Id.*

144. *Id.* at 438.

145. *See* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

146. *See* Lauren Cherney, *Returning to Acosta: How In re A-B- Exemplifies the Need to Abolish the "Socially Distinct" and "Particularity" Requirements for a Particular Social Group*, 38 LAW & INEQ. 169, 195–96 (2020).

147. Musalo, *supra* note 34, at 120.

148. *Id.* at 132 (internal quotations omitted).

149. *Id.*

**Conclusion**

The PSG protected ground allows for flexibility and breadth in asylum claims. For those fleeing gender-based persecution, their asylum claims must fit into the PSG category. *Matter of Acosta* first interpreted the PSG category to constitute a group with a common, immutable characteristic.[150] However, since *Acosta*, the PSG category has taken on multiple iterations, with requirements becoming more stringent for a PSG to be seen as cognizable. The application of PSG jurisprudence has been inconsistent and frequently disadvantages individuals with gender-based asylum claims. The lack of consensus and confusion within the PSG protected ground has led many advocates to desire the creation of a sixth protected ground—gender. However, the addition of gender as a sixth protected category for asylum claims is not the solution to the problem with adjudicating gender-based asylum claims. The addition of a gender category would leave the PSG jurisprudence in flux, thereby disadvantaging individuals with non-gender-based PSG claims, misaligning with international law, and limiting the success of pro se asylum applicants. The Supreme Court must provide guidance once and for all and return to the *Acosta* framework, which would eliminate the need for a sixth category. The PSG category, at its core, is sufficient to capture gender-based asylum claims without the unintended consequences associated with a sixth category.

150. *See Acosta*, 19 I. & N. Dec. at 233.

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