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The New Abortion Borders for Immigrant Women

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Abstract

In the wake of the Supreme Court's decision in Dobbs v. Jackson Women's Health Organization*, the United States has become a fragmented patchwork of state laws imposing varying degrees of restrictions and penalties on abortion. This paper examines the profound implications of these developments for noncitizen women, whose rights and mobility are already constrained by federal immigration laws and policies. Employing reproductive justice and feminist geography frameworks, it argues that the intersection of state-level abortion restrictions and federal immigration enforcement creates de facto internal borders, uniquely curtailing the reproductive freedoms of noncitizens.*

This paper situates current U.S. policies within a historical context of reproductive control and interference with immigrant families, revealing how contemporary laws perpetuate a legacy of subjugation. It highlights the geographic mobility challenges faced by noncitizens, exacerbated by immigration detention, surveillance programs, and localized enforcement practices. These barriers not only limit access to abortion services but also subject noncitizens to heightened risks and punitive measures, further marginalizing an already vulnerable population.

Through the lenses of reproductive justice and feminist geography, the paper interrogates traditional conceptions of borders and mobility, emphasizing the need for a holistic understanding of reproductive oppression. It calls for an intersectional approach to advocacy, recognizing the compounded vulnerabilities of immigrants and seeking to dismantle systemic barriers impeding their reproductive autonomy. This paper contributes to the broader

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†. Assistant Professor of Law, University of Baltimore School of Law. I would like to thank Karla McKanders, Ragini Shah, Anita Sinha, Laila Hlass, Yolanda Vázquez, Jennifer Lee, and Marcy Karin, as well as the participants of the 2023 Emerging Immigration Scholars Conference incubator sessions, 2023 Clinical Law Review Clinical Writers' Workshop, the 2024 Clinical Law Review Clinical Writers' Workshop and the 2024 AALS New Voices in Immigration Workshop. I also thank Georgina Aguirre Lopez for her exceptional research assistance.

dialogue on reproductive justice, advocating for inclusive and equitable policies that respect and uphold the bodily and familial agency of all individuals, regardless of citizenship status.

Introduction

Since the Supreme Court of the United States eliminated the fundamental right to an abortion in *Dobbs v. Jackson Women's Health Organization*,[1] the ability to access an abortion has increasingly depended on where a person lives.[2] After the *Dobbs* decision, numerous states enacted legislation restricting abortion access and criminalized the provision of abortion care and the distribution and consumption of abortifacient medication,[3] resulting in a geographic patchwork of laws on reproductive healthcare and abortion deserts that span hundreds of square miles.[4] Because abortion access increasingly depends on a person's physical location, abortion travel has become a central focus of advocacy and fundraising, with the aim of transporting pregnant people in need of abortion care from states with abortion-restrictive laws to states, territories, and even countries where abortions are still lawfully accessible and available.[5]

While a large-scale mobilization effort may very well allow many women and pregnant people[6] to access abortion-related

1. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022).

2. *See* David Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV 1, 9 (2022).

3. Jolynn Dellinger & Stephanie Pell, *Bodies of Evidence: The Criminalization of Abortion and Surveillance of Women in a Post-Dobbs World*, 19 DUKE J. CONST. L. & PUB. POL'Y 1, 11–12 (2024).

4. *See*, *Abortion Access Mapped by Congressional District*, CENTER FOR AMERICAN PROGRESS (Apr. 21, 2024), https://www.americanprogress.org/article/abortion-access-mapped-by-congressional-district/ [https://perma.cc/TG72-NJKT]; *New Data Show that Interstate Travel for Abortion Care in the United States Has Doubled Since 2020*, GUTTMACHER INSTITUTE (Dec. 7, 2023), https://www.guttmacher.org/news-release/2023/new-data-show-interstate-travel-abortion-care-united-states-has-doubled-2020 [https://perma.cc/2Q8Q-KYNB]; Cohen et al., *supra* note 2, at 11.

5. *See*, Laura Ungar, *After Roe, An "Underground" Network Helps Others Get Abortions*, AP NEWS (May 4, 2024), https://apnews.com/article/abortion-help-navigators-pills-roe-v-wade-f760b2817126d56e6cfa5144c9f7e547 [https://perma.cc/N9FB-M4XM].

6. The author recognizes that people of a variety of genders can menstruate, become pregnant, and need abortion and reproductive healthcare, including women, trans men, and nonbinary individuals. Because some of the concepts, studies, and historical events discussed in this paper rely centrally on the intersection of female identity with other identities, social factors, and laws, at times this paper will specifically refer to women. In recognition of the diversity of genders that abortion

services, reproductive justice[7] advocates must intentionally consider the ways that mobilization efforts fail to serve certain marginalized communities. Among these marginalized communities are noncitizen immigrants, particularly those present without authorization or with an uncertain immigration status, whose movements are surveilled, policed, restricted, obstructed, compelled, and criminalized by state and federal laws and policies in ways that make them uniquely vulnerable to suffering severe consequences for their attempts to access abortion care. Absent such intentional consideration, abortion-access mobilization efforts may further marginalize or even harm the very people they aim to serve.

This paper aims to build on the existing literature addressing the effects of abortion-restricting legislation on the freedom of immigrant women to make decisions about their reproductive health care and family structure. The paper focuses on how the new and expanding patchwork of state laws creates de facto internal borders that trap and uniquely limit the reproductive freedom of those present in the United States without citizenship status. In particular, this paper exposes a different angle of the injustices resulting from the *Dobbs* decision by detailing the unique geographic barriers to immigrant mobility resulting from federal and state laws and policies, including immigration detention policies, post-release surveillance programs, and other immigration enforcement practices that restrict, control, surveil, and punish noncitizens' movements within the United States. Using a reproductive justice and feminist geography lens, this paper will situate current U.S. law and policy within a tradition of historical policies aimed at interfering with immigrant women's ability to exercise agency in their family lives. Lastly, this paper will illustrate how the interplay of current federal and state laws on reproductive healthcare and immigration enforcement policy continues a legacy of subjugation through the policing of the bodies, families, and reproductive choices of immigrants.

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policy and access affects, this paper will nonetheless attempt to use a variety of terms to describe the pregnant-capable people affected by the post-*Dobbs* legal landscape. For further reading on legal interests, sex, gender, and pregnancy, *see* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 954–57 (2019).

7. See *infra* Part I.A.

I. Background

A. Theoretical Frameworks

In its assessment and analysis of the ways that law and policy affect immigrants' reproductive lives, this paper draws on two theoretical frameworks: the reproductive justice framework and feminist geography framework. These frameworks allow us to recognize the harms of the *Dobbs* decision on noncitizens holistically, beyond the simple question of abortion access, and to interrogate traditional conceptions of borders and mobility.

The term reproductive justice was coined in the 1990s by Black women activists who recognized that the contemporary women's rights movement was largely led by middle class, wealthy white women that did not represent (and at times undermined) the needs of women of color and other marginalized women.[8] Grounded in critical race theory, reproductive justice advocates call for an intersectional and systemic assessment of reproductive oppression, highlighting how social positions and identities—such as race, gender, class, sexual orientation, gender identity, immigration status, and physical ability—combine to impact women's access to reproductive agency.[9] By centering the lived experiences of marginalized individuals, the reproductive justice framework allows us to recognize how traditional abortion "rights" advocacy, which focuses on the legal recognition of a right to terminate a pregnancy, does not account for the experiences of those who cannot exercise this right due to their vulnerability to state power or societal oppression.[10]

The reproductive justice framework goes beyond the traditional rights framework by treating the existence of a right to abortion as just one piece of the reproductive freedom puzzle. Reproductive justice requires that all women and pregnant-capable people have the ability to exercise "the right to not have children, the right to have children, the right to parent with dignity, and the means to achieve these rights," including the right to raise children in safe and healthy environments.[11] The reproductive justice framework allows us to recognize state practices involving forced

8. *Reproductive Justice*, SISTERSONG, https://www.sistersong.net/reproductive-justice [https://perma.cc/BU9W-F34Y]; Rachel Rebouché, *Reproducing Rights: The Intersection of Reproductive Justice and Human Rights Symposium Issue: Baby Markets*, 7 UC IRVINE L. REV. 579, 592–93 (2017).

9. SisterSong, *supra* note 8; Rebouché, *supra* note 8, at 593.

10. Rebouché, *supra* note 8, at 594.

11. Rebouché, *supra* note 8; SisterSong, *supra* note 8, at 594–95.

birth, sterilization, and familial intervention as different iterations of the same harm—a fundamental disregard for the bodily and familial agency of women, trans men, nonbinary people, and all others with the capacity to give birth.

Just as the reproductive justice framework facilitates a more comprehensive view of reproductive freedom and autonomy for marginalized communities, feminist geography interrogates traditional notions of space, boundaries, and hierarchies. Expanding the human geography concept of "scale," defined broadly in the field as "nested hierarchy, in terms of size or area, of different objects or zones."[12] Feminist geographers consider these hierarchies as interconnected, socially constructed, and contested.[13] Feminist geographers recognize that "even formal and higher-level policies are embodied in daily lives and personal experiences" and that examinations of more local scales, including the home and the body itself, reveal how "abstract political discourses and decisions shape actual experiences."[14] Feminist geographers view the body itself as a site where power dynamics, social norms, identities, and other processes are implemented and challenged.[15] Like the reproductive justice framework, the feminist geographic lens addresses how different social identities intersect and are experienced across different spatial hierarchies.[16]

Migration research rooted in feminist geography differs from traditional migration research by challenging the notion that borders are fixed, definite, or resolved. Rather, feminist migration scholars treat borders as "socially constructed, laden with power, and inflected by gender and difference."[17] As such, feminist migration scholars "make[] boundaries themselves the focus of

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12. Alisdair Rogers, Noel Castree & Rob Kitchin, *Scale*, *in* A DICTIONARY OF HUMAN GEOGRAPHY (2013), https://www.oxfordreference.com/display/10.1093/acref/9780199599868.001.0001/acref-9780199599868-e-1629 [https://perma.cc/9PJN-27PA].

13. Rachel Silvey, *Power, Difference and Mobility: Feminist Advances in Migration Studies*, 28 PROG. HUM. GEOGRAPHY 490, 492–94 (2004).

14. Nancy Hiemstra, *Mothers, Babies, and Abortion at the Border: Contradictory U.S. Policies, or Targeting Fertility?*, 39 ENV'T & PLAN. C: POL. & SPACE 1692, 1694 (2021).

15. *See* Rachel Silvey, *Borders, Embodiment, and Mobility: Feminist Migration Studies in Geography*, *in* A COMPANION TO FEMINIST GEOGRAPHY 138, 142 (Lise Nelson & Joni Seager eds., 2005); Pamela Moss, *A Bodily Notion of Research: Power, Difference, and Specificity in Feminist Methodology*, *in* A COMPANION TO FEMINIST GEOGRAPHY 41, 50 (Lise Nelson & Joni Seager eds., 2005).

16. *See* Hiemstra, *supra* note 13, at 1693–94.

17. Silvey, *supra* note 15, at 139.

inquiry," interrogating how political and gender-specific processes tie to the conception of a border.[18] This framework provides a lens through which to examine "how the individual, gendered, sexualized, racialized body can be viewed as a threat to the nation, as well as to the international order of bordered territories."[19] As feminist migration scholar Nancy Hiemstra has noted, this framework allows consideration of topics such as the ways that immigration policies define and reinforce sexual and gendered markers of national belonging, the effect of colonial legacies on modern norms and policies, and the role of the potentially fertile body on immigration law, policy, and enforcement.[20] A feminist geography lens is particularly well-suited for the study of how federal and state restrictions on immigrants' movements affect immigrants' reproductive health and autonomy; for, as geographer Sydney Calkin notes, "abortion is a spatial phenomenon."[21] This framework allows us to think more broadly about the types of "borders" that restrict the freedoms of noncitizen immigrants and to recognize that, when it comes to accessing comprehensive reproductive healthcare, the "border" that constrains immigrants is not just the United States's international borders. State borders, surveillance, and even the human body itself can confine a person and determine the extent to which immigrants can exercise reproductive agency.

The reproductive justice and feminist geography frameworks allow us make sense of the interrelated ways that governments and dominant groups have subjugated immigrant women and their families through law, policy, and practice. By recognizing these patterns, we can identify how today's immigration-related policies, including those that compel, restrict, surveil, and criminalize immigrant movement, constrain an immigrant's ability to exercise agency over their sexual and familial lives.

B. A History of U.S. Interference with Immigrant Families and Fertility

Political geographer Sydney Calkin has theorized reproduction as "a core component of nation and state-making processes, in which the alignment between population, territory,

18. *Id.*

19. Hiemstra, *supra* note 14, at 1694.

20. *Id.* at 1695.

21. Sydney Calkin, *Towards a Political Geography of Abortion*, 69 POL. GEOGRAPHY 22, 23 (2019).

and community is deliberately forged."[22] When a state engages in reproduction control through policies or practices that promote, force, discourage, or prohibit procreation and child-rearing, the state is necessarily expressing "political claims about the rightful occupants of a particular piece of territory or the categories of citizen entitled to protections by the state."[23] The United States is no exception to this pattern of state-making through reproductive control.

i. Federal Immigration Statutes Targeting Immigrant Women's Sexual and Familial Relationships

Throughout its history, the United States has demonstrated a preoccupation with the fertility and reproductive capacities of immigrant women. From laws that prohibited the admission and enfranchisement of certain immigrant women, to practices that have robbed certain women of their ability to procreate, the United States has espoused policies to control immigrant women's bodies and reproductive capabilities in attempts to assert control over the wielders of power and the makeup of its citizenry.[24]

To use the words of anthropologist Risa Cromer, "[i]mmigration, like all politics, is reproductive politics too."[25] From the outset, U.S. immigration and naturalization laws have revealed attempts to regulate sex and gender through federal law.[26] In her article on the Page Act,[27] the United States's first ever restrictive federal immigration statute, scholar Kerry Abrams describes how the United States used federal immigration law to control marriage and family creation in an effort to "shape the racial and cultural population of the United States . . . ."[28] On its face, the Page Act generally precluded the admission of any women who would enter the United States pursuant to contracts for "lewd and immoral purposes."[29] The statute's legislative history, historical context, and enforcement, however, reveal that legislators' intent in passing the

22. *Id.* at 22.

23. *Id.*

24. Claudia S. Pepe, Altaf Saadi & Rose L. Molina, *Reproductive Justice in the U.S. Immigration Detention System*, 142 OBSTETRICS & GYNECOLOGY 804, 804 (2023).

25. Risa Cromer, *Jane Doe*, 34 CULTURAL ANTHROPOLOGY 18, 18 (2019).

26. Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 674, 690, 697 (2005).

27. Page Act of 1875, ch. 141, 18 Stat. 477 (repealed 1974).

28. Abrams, *supra* note 26, at 647.

29. Page Act § 1.

statute was to specifically exclude Asian women from the United States.[30] Though the statute forbade the admission of any female sex worker,[31] ostensibly rendering the statute race-neutral, the statute singled out Asian women by requiring (only) Asian women to obtain an immigration certificate from a United States consul as a prerequisite for admission.[32] United States consuls refused to issue these certificates and precluded admission if they "ascertained" that a woman would have "entered into a contract or agreement for a term of service . . . for lewd and immoral purposes."[33] Because all but the wealthiest of Chinese women were assumed to be entering the U.S. with the intent of engaging in sex work,[34] the implementation of the statute effectively excluded almost all Chinese women from immigrating to the United States.[35]

One impetus behind the passage of the Page Act was the preservation of "traditional" U.S. conceptions of marriage and sexuality in the face of a perceived Chinese acceptance of polygamy and prostitution.[36] Crucially, however, the Page Act was also aimed at controlling the racial and cultural population of American citizenry by inhibiting the creation of Chinese families.[37] At the time the Page Act was enacted, the Naturalization Act's racial restrictions barred Chinese immigrants from becoming United States citizens.[38] But if Chinese women could enter the United States, they could essentially "create" Chinese-American citizens through procreation.[39] As Abrams poignantly explains, "[i]f women were allowed to immigrate, they would produce Chinese culture both literally and figuratively: by creating Chinese American children and by perpetuating Chinese culture."[40] Immigrant women, and the families they created and reared, were viewed as

30. Abrams, *supra* note 26, at 698.

31. Page Act § 3.

32. Specifically, the statute required immigration certificates from individuals embarking from "China, Japan, or any Oriental country." Page Act § 1.

33. Page Act § 1; *see* Abrams, *supra* note 26, at 695.

34. *See* Abrams, *supra* note 26, at 698 (quoting GEORGE ANTHONY PEFFER, IF THEY DON'T BRING THEIR WOMEN HERE: CHINESE FEMALE IMMIGRATION BEFORE EXCLUSION, at 9 (U. of Ill. Press, 1999)).

35. *See id.* at 701 (noting that in 1882 alone, of the 39,579 Chinese individuals who entered the United States, only 136 were women).

36. *Id.* at 647.

37. *Id.* at 662.

38. *See* Naturalization Act of 1870, Pub. L. 41-254, 16 Stat. 254 (1870) (extending naturalization rights to "aliens of African nativity and to persons of African descent" but maintaining racial restrictions denying naturalization rights to other non-white groups, including Chinese immigrants).

39. Abrams, *supra* note 26, at 664.

40. *Id.*

threats to the patriarchal, white, and heterosexual hegemony of the United States.

Throughout the twentieth century, Congress continued passing immigration statutes that prohibited the admission of women suspected of entering the United States to engage in sex work, or non-marital and non-monogamous sexual relationships.[41] When Congress passed comprehensive immigration legislation in 1907, for example, the United States continued targeting women (and exclusively women) who entered the United States to engage in sex work, or "for any other immoral purpose."[42] Immigration law scholar Pooja Dadhania notes the phrase "immoral purpose" was a catch-all intended to include any other sexual practices deemed to be unacceptable for women,[43] including concubinage.[44] The statute also punished female sex work by authorizing the deportation of women (but not men) found to be living at a house of prostitution or practicing prostitution within three of years of entry.[45] Three years later, Congress would amend the statute to remove its gendered language, but it would not include any corresponding penalties for the buyers of sex, who were generally presumed to be predominately male.[46] Other amendments "removed the temporal limitation of three years after entry from the 1907 Act" rendering the punishment of prostitution harsher than that of certain violent

41. *See* Pooja Dadhania, *Deporting Undesirable Women*, 9 UC IRVINE L. REV. 53, 62–63 (2018).

42. Act of Feb. 20, 1907, ch. 1134, § 2, 34 Stat. 898.

43. *Id.* at 62. Dadhania notes that the legislative history for the statute is largely silent on the meaning of the term "immoral purpose," with only one House of Representatives report noting that the term was used "in order effectively to prohibit undesirable practices alleged to have grown up." *Id.* at 62 n.50 (quoting H.R. REP. NO. 59-4558, at 19 (1906)). In 1934, the Supreme Court interpreted the term, deciding that the term did not include extramarital relations that did not amount to concubinage. Hansen v. Haff, 291 U.S. 559, 562 (1934). In a dissenting opinion, Justice Butler adopted the Secretary of Labor's understanding of the term "concubinage," defining a concubine as "a woman who cohabits with a man without being his wife," and argued that the statute did not require an immigration officer to specify which immoral purpose the woman would be excluded for. *See id.* at 565 (J. Butler, dissenting) ("Refinements in nomenclature adopted for the sake of decency in speech may not be used to conjure up doubts and distinctions that obscure the real substance of the statute. The meaning of the findings is that petitioner's doings and course of living constitute a kind of immorality that bars admission.").

44. *See* Act of Feb. 20, 1907, ch. 1134 § 2, 34 Stat. 898.

45. *Id.* at 3.

46. *See* Act of March 26, 1910, ch. 128, § 2, 36 Stat. 263; Dadhania, *supra* note 43, at 65.

crimes.[47] To this day, the Immigration and Nationality Act (the "INA" or the "Act") renders inadmissible any person who is coming to the United States with the intent to participate in sex work, or who has engaged in sex work in the past ten years.[48] The Act still lacks a comparable inadmissibility provision for the purchasers of sexual services.[49]

ii. Immigrant Sterilization Practices

The above immigration policies occurred within a context of a long history of reproductive abuses by governments in the United States toward people of color, immigrants, and others of marginalized identities deemed inferior by the dominant classes. As Professors Pepe, Saadi, and Molina have highlighted, the United States has executed the most egregious abuses in situations where nativist ideals produced and reinforced pronounced racial and economic inequality.[50] A notable way the United States has controlled noncitizen reproduction has been through the "negative eugenic" practice of sterilizing poor women of color without consent—people who the American hegemony has not historically considered to be deserving of full citizenship within the United States.[51] Notably, a determining factor in the rise of the eugenics movements in the United States was the belief that the United States' population and culture was becoming diluted by rising numbers of "degenerate" immigrants and the families they produced.[52] The United States's sordid history with both sterilization and coerced birth reveals a preoccupation with the perceived fertility of immigrants and a concerted effort to exert power over those regarded as undeserving of full inclusion in American society.[53]

A prime example of this reproductive abuse lies in the sterilization of hundreds of women of Mexican origin at the University of Southern California – Los Angeles County Medical

47. *See* Dadhania, *supra* note 43, at 64; Act of March 26, 1910, ch. 128, §§ 2, 3, 36 Stat. 263.

48. 8 U.S.C. § 1182(a)(2)(D).

49. *See id.*

50. Pepe et al., *supra* note 24, at 805.

51. *See generally* DOROTHY E. ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY (2d Vintage Edition ed. 2017) (discussing the intersecting racial and reproductive oppression of Black women in the United States).

52. PETER SCHRAG, NOT FIT FOR OUR SOCIETY: IMMIGRATION AND NATIVISM IN AMERICA 77–107 (U.C. Press 2010).

53. *See* Pepe et al., *supra* note 24, at 805; *see generally* SCHRAG, *supra* note 52 (discussing eugenics and sterilization policies).

Center ("USC-LAC Medical Center") during the late 1960s and early 1970s.[54] Against a backdrop of national discourse on overpopulation and resource distribution, the hospital pushed medical personnel to promote the sterilization of Spanish-speaking women of Mexican descent who came to the hospital for reproductive healthcare services like prenatal care and birth.[55] Doctors and nurses used coercive tactics to force these women to sign consent forms authorizing their sterilization, including by failing to provide interpretation or translated consent forms, pressuring women to sign consent forms during difficult labors and while under the influence of pain medication or partial anesthesia, threatening deportation for refusing to consent to sterilization, falsely stating that sterilization procedures could be reversed, isolating women patients from their family members, and, in some cases, using physical violence.[56]

In 1978, ten of these abused women brought a class-action lawsuit, *Madrigal v. Quilligan*,[57] in which they asserted that the sterilizations had been performed without informed consent and were violations of their civil rights and their rights to bear children.[58] In the hearing, the plaintiffs, expert witnesses, and other witnesses testified to the customary coercive practices of the USC-LAC Medical Center medical personnel, with a former medical student testifying that the head of the hospital's Obstetrics and Gynecology department had bragged that he used federal grant money to demonstrate "how low we can cut the birth rate of the Negro and Mexican populations in Los Angeles County."[59] Notwithstanding evidence that substantiated the USC-LAC

54. *See* Elena R. Gutierrez, *Policing "Pregnant Pilgrims": Situating Sterilization Abuse of Mexican-Origin Women in Los Angeles County*, *in* WOMEN, HEALTH, AND NATION: CANADA AND THE UNITED STATES SINCE 1945 239, 385–89 (Georgina Feldberg, Molly Ladd-Taylor, Alison Li & Kathryn McPherson eds., 2003).

55. Antonia Hernandez, *Chicanas and the Issue of Involuntary Sterilization: Reforms Needed to Protect Informed Consent*, 3 CHICANX LATINX L. REV. 3, 4–7 (1976)

56. *Id.*; Guitierrez, supra note 54, at 385–88.

57. Madrigal v. Quilligan, Civ. 75-2057 (C.D. Cal., June 30, 1978).

58. Gutierrez, *supra* note 54, at 392; Alexandra Minna Stern, *STERILIZED in the Name of Public Health*, 95 AM. J. PUB. HEALTH 1128, 1134 (2005). Many of the abused women could not join the lawsuit due to the statute of limitations or would not join due to a fear of deportation or other forms of immigration-related retaliation. Gutierrez, *supra* note 54, at 392.

59. Stern, *supra* note 58, at 1135.

Medical Center doctors' practices of coercion, a federal judge found in favor of the defendant doctors.[60]

While this reproductive abuse took place at a time of general concern over overpopulation, resource scarcity, and government benefits, racist and anti-immigrant assumptions rooted the push to focus sterilizations on Mexican and Mexican-origin women.[61] Mexican and Mexican-origin women were viewed as particularly dangerous to the United States, due to the unabating fears of the hyper-fertile immigrant, and particularly undeserving of social benefits like medical care, due to beliefs that women of Mexican origin were not "really 'American.'"[62] Of course, children born in the United States are citizens of the United States who, by virtue of their citizenship status, deserve the same services, protections, and health benefits as every other citizen.[63] But the USC-LAC Medical Center doctors, like many government officials, delegitimized American children born to immigrant women by using rhetoric much like that of the "anchor baby" rhetoric used today.[64]

This historical context of immigrant reproductive oppression illuminates the pervasiveness of state control over immigrant bodies but also sets the stage for understanding contemporary issues. One pressing concern today is the potential negative immigration consequences individuals may face for convictions related to abortion, a reality that continues to reflect the enduring legacy of nativist and discriminatory policies.

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60. Gutierrez, *supra* note 54, at 392. In ruling in favor of the doctors, the judge found that the doctors had operated in "good faith" and that "one [could] hardly blame the doctors for relying on these indicia of consent which appeared to be unequivocal on their face and are in constant use in the Medical Center." *Id*.

61. *Id.* at 389–91; Stern, *supra* note 58, at 1135.

62. *See* Gutierrez, *supra* note 54, at 389–91.

63. Supreme Court precedent has firmly established birthright citizenship as a right protected by the Fourteenth Amendment of the U.S. Constitution. *See* U.S. Const. amend. XIV, § 1; United States v. Wong Kim Ark, 169 U.S. 649 (1898). *But see* Alexander Bolton, *Donald Trump Girds to Battle Dems, Supreme Court over Birthright Citizenship*, THE HILL, Dec. 16, 2024, https://thehill.com/homenews/senate/5040111-trump-proposal-birthright-citizenship/ [https://perma.cc/Q46R-Y9P6] ("Republican lawmakers on Capitol Hill say the 14th Amendment's language, which grants all people born in the United States citizenship, is being exploited in a way the amendment's framers never anticipated.").

64. *See* Gutierrez, *supra* note 54, at 390–91; *see also* Carly Hayden Foster, *Anchor Babies and Welfare Queens: An Essay on Political Rhetoric, Gendered Racism, and Marginalization*, 5 WOMEN, GENDER, & FAMILIES OF COLOR 50 (2017); Priscilla Huang, *Anchor Babies, Over-Breeders, and the Population Bomb* 2 HARV. L. & POL'Y REV. 385 (2008).

II. Abortion Restriction as a Form of Immigrant Control: Potential Immigration Consequences Resulting from Abortion-Related Restrictions

While an in-depth analysis of every potential immigration consequence that could result from the criminalization of abortion goes beyond the scope of this paper, a general overview illustrates the unique ways that these state offenses can affect noncitizen immigrants. The potential ramifications of abortion-related statutes on immigrants are vast, given the breadth of laws that could be invoked to prosecute either a pregnant person or an assisting individual.[65] As such, identifying which criminal statutes may trigger immigration consequences for abortion-related care is a particularly challenging task. While many state statutes explicitly exempt the pregnant person from prosecution, some lack this exception[66] or are ambiguously worded regarding self-managed abortions[67] and the use of abortion-inducing substances.[68] Despite these ostensible prosecutorial exemptions, states have increasingly charged pregnant individuals with offenses such as homicide or child endangerment, often under the expansive scope of fetal personhood statutes.[69] The resulting legal framework creates a complex web of statutes capable of ensnaring pregnant persons.[70] Moreover, many criminal abortion statutes impose penalties on those who assist or facilitate abortions, including individuals who transport pregnant people across state lines to obtain care.[71] This implicates not only immigrant family members but also social

65. *See* Dellinger & Pell, *supra* note 3, at 27–72.

66. *See id.* at 44–51.

67. The term self-managed abortion "generally refers to abortions obtained outside of the formal health care system," such as when "a pregnant person buy[s] medication abortion online directly from an international pharmacy" or "interact[s] with an international or out-of-state provider via telemedicine," who then either ships the medication directly to the pregnant person or orders a prescription from an international pharmacy for them. *Id.* at 20–21 (quoting Greer Donley & Rachel Rebouché, *The Promise of Telehealth for Abortion*, *in* DIGITAL HEALTH CARE OUTSIDE OF TRADITIONAL CLINICAL SETTINGS: ETHICAL, LEGAL, AND REGULATORY CHALLENGES AND OPPORTUNITIES 79, 86 (I. Glenn Cohen et al. eds., 2024)).

68. Dellinger & Pell, *supra* note 3, at 51–64; WENDY BACH & MADALYN K. WASILCZUK, *Pregnancy as a Crime: A Preliminary Report on the First Year After Dobbs* (2024), https://www.pregnancyjusticeus.org/resources/pregnancy-as-a-crime-a-preliminary-report-on-the-first-year-after-dobbs/ [https://perma.cc/C6SP-NRFK].

69. BACH & WASILCZUK, *supra* note 68, at 5; Dellinger & Pell, *supra* note 3, at 38–44.

70. *See* Dellinger & Pell, *supra* note 3, at 28–29.

71. *See* B. Jessie Hill, *The Geography of Abortion Rights*, 109 GEO. L. J. 1081, 1093–94 (2020).

service providers and medical professionals, further exacerbating the disproportionate impact of these laws on immigrant communities.

Simply put, the stakes are different for noncitizens. For immigrants present without any form of authorization, any state law enforcement action can bring the individual to the attention of federal immigration authorities, placing the individual in serious risk of deportation, even if an arrest does not result in a prosecution or conviction.[72] Yet while risks resulting from state enforcement actions are greatest for unauthorized immigrants, even those with lawful permanent resident status may find themselves at risk of deportation or unable to naturalize following an abortion-related conviction.[73]

While the federal government treats abortion criminalization as largely a state law issue, federal immigration agencies' stances on abortion care will materially impact the extent to which state law enforcement measures on abortion can impact a noncitizen's immigration status and presence in the United States.[74] The salience of this dichotomy becomes more obvious given the second Trump Administration's extreme measures to deport non-citizens from the United States.[75] Some of the looming open questions on the interplay of state and federal law and the potential immigration consequences that could ensue from state laws criminalizing abortion-related acts are set forth below.

A. Potential Immigration Consequences Resulting from a Finding that Abortion-Related Offenses Constitute Crimes Involving Moral Turpitude

For those present in the United States without authorized status, a conviction for or admission to the commission of an abortion-related offense could permanently foreclose a person's ability to regularize status through a temporary visa, lawful permanent resident status, or even certain liminal statuses. Even for those present with some form of lawful immigration status, including those with lawful permanent resident status, a state abortion-related conviction could constitute a deportable offense. Whether a commission of or conviction for a state abortion-related offense could result in immigration consequences largely depends

72. *See infra* Part II.C.
73. *See infra* Part II.A.
74. *Id.*
75. *Id.*

on how the Attorney General, Board of Immigration Appeals, or federal courts define the term "crime involving moral turpitude," a term that is undefined in the INA and corresponding regulations, but which can nonetheless trigger substantial immigration-related consequences for a broad swath of noncitizens.[76]

Under the INA, before an individual without authorized status can regularize their legal status through the issuance of a temporary or permanent visa status they must be deemed "admissible" as defined by the statute.[77] Temporary Protected Status, which provides certain temporary benefits and protection from deportation for noncitizens from certain designated countries, also conditions eligibility on an individual's admissibility.[78]

To prove admissibility, a noncitizen must show that they do not trigger any of the grounds of inadmissibility enumerated in Section 212 of the INA.[79] The INA's list of inadmissibility grounds is extensive. In relevant part, a person who has been convicted of, admits to having committed, or admits to committing acts which constitute the essential elements of "a crime involving moral turpitude" is inadmissible to the United States.[80] The inadmissibility ground also encompasses attempts or conspiracies to commit crimes involving moral turpitude,[81] and has very few narrow exceptions.[82]

While the term "crime involving moral turpitude" is not defined in the INA or any corresponding federal regulations, the Board of Immigration Appeals (BIA), which has interpretive

76. 8 U.S.C. § 1182(a)(2)(A).

77. *See id.* § 1182(a) ("[A]liens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States."); 8 U.S.C. § 1255(a) (stating that a person who is inspected, admitted, or paroled into the United States can adjust their status to that of "alien lawfully admitted for permanent residence" if the person "is admissible to the United States for permanent residence"). Those seeking to be admitted into the United States from abroad are subjected to the same admissibility requirements. *Id.* § 1882(a).

78. *See id.* § 1254a.

79. *Id.* § 1182.

80. *Id.* § 1182(a)(2)(A)(i)(I).

81. *Id.*

82. The statute provides exceptions for individuals who have only committed one crime and who either (a) were under eighteen years old when they committed the crime, and committed and were confined for committing the crime more than five years before the date of application for visa status; or (b) committed a crime for which the maximum possible penalty did not exceed one year of incarceration and, if convicted, were not sentenced to a term of imprisonment of more than six months. *Id.* § 1182(a)(2)(A)(ii).

authority over the INA,[83] has stated that moral turpitude involves conduct that is "inherently base, vile, depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general."[84] Under BIA precedent, to constitute a crime involving moral turpitude, a crime must involve "reprehensible conduct" and be committed with a culpable mental state of specific intent, knowledge, willfulness, or recklessness.[85] This definition remains highly subjective, of course; the true meter for whether a criminalized conduct is "reprehensible" is essentially whether the BIA or Attorney General says it is.

Because state statutes vary widely in the ways they define state crimes, immigration authorities use a form of statutory analysis known as the "categorical approach" to determine whether a state offense constitutes a crime involving moral turpitude for immigration purposes.[86] For every crime stated in the INA, a federal "generic" definition is determined by federal courts, the BIA, or by reference to another federal statute; this federal generic definition sets forth the required elements for the INA crime.[87] In essence, the categorical approach requires that immigration adjudicators compare the elements of the crime for which an individual was convicted in state law to the elements of the generic federal crime. Depending on the criminal offense and conduct in question, the categorical approach can be an involved, multi-step statutory analysis. Generally speaking, however, if the minimum possible conduct that has a realistic probability of being prosecuted under the state criminal statute is equal to or narrower than the conduct that could be prosecuted under the generic federal definition, such that there would be no way to trigger a state conviction without triggering a conviction under the generic federal definition, the state law conviction is deemed a "categorical match" to the federal crime.[88] A conviction for a state crime that is a categorical match to a crime listed in the INA will trigger whatever immigration-related consequences the INA prescribes.[89]

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83. *See* 8 C.F.R. § 1003.1(d)(1) (2025).

84. Aguilar-Mendez, 28 I. & N. Dec. 262, 264 (B.I.A. 2021) (internal citations omitted).

85. *Id.*

86. Silva-Trevino, 26 I. & N. Dec. 826, 833 (B.I.A. 2016).

87. *Id.* at 831.

88. *Id.* at 833.

89. The explanation of the categorical approach analysis has been largely simplified to meet the aim of this paper. For a more detailed explanation of the categorical approach analysis for crimes listed in the INA, see MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITIES 159–214 (10th ed. 2024).

The risk resulting from a "crime involving moral turpitude" finding affects not only those who aspire to regularize an unauthorized immigration status; immigrants admitted with lawful immigration status, including lawful permanent resident status, could also face immigration consequences if abortion-related offenses are found to constitute crimes involving moral turpitude. The INA contains two provisions that can render a lawfully admitted noncitizen deportable. First, a single conviction for a crime involving moral turpitude can render a noncitizen deportable when the offense carries a maximum possible sentence of a year or more of imprisonment, if said offense was committed within five years after the person's date of admission to the United States.[90] As of August 2024, nineteen states have enacted laws that punish the provision or facilitation of abortions performed before fetal viability with sentences that could trigger this ground of deportability.[91] Second, a noncitizen is deportable if, at any time after admission, they are convicted of two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.[92] These multiple convictions for crimes involving moral turpitude do not have to result in confinement to result in deportability.[93]

For individuals facing deportation in removal proceedings, a conviction for a crime involving moral turpitude can foreclose several forms of relief from deportation. For example, cancellation of removal (a form of relief from removal that can lead to lawful

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90. *See* 8 U.S.C. § 1227(a)(2)(A)(i).

91. *See* ALA. CODE § 26-23H-6 (2019); ARIZ. REV. STAT. ANN. § 36-2322 (2022); ARK. CODE ANN. § 5-61-404 (2021); FLA. STAT. § 390.0111 (2023); GA. CODE ANN. § 16-12-141 (2024); IDAHO CODE § 18-622 (2023); IND. CODE § 16-34-2-7 (2022); KY. REV. STAT. § 311.772 (West 2019); LA. STAT. ANN. § 14:87.7 (2022); MISS. CODE ANN. § 97-3-3 (2025); MO. REV. STAT. § 188.17 (2022); N.D. CENT. CODE § 12.1-19.1-02 (2023); OKLA. STAT. TIT. 63, § 1-731.4 (2022); S.C. CODE ANN. § 44-41-80 (2023); TENN. CODE ANN. § 39-15-213 (2023); TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (West 2022); UTAH CODE ANN. § 76-7A-201 (West 2024); W. VA. CODE § 61-2-8 (2022); WYO. STAT. ANN. § 35-6-125 (2023). Note, however, that the legal landscape related to abortion access is rapidly changing, and as such, this number is likely to change. On November 5, 2024, for example, Arizona and Missouri passed measures aimed at reversing abortion-restrictive statutes. On November 5, 2024, Arizona voters voted in favor of a constitutional amendment to establish a fundamental right to an abortion through fetal viability. *See Arizona Abortion Laws*, KRIS MAYES ARIZ. ATT'Y GEN., https://www.azag.gov/issues/reproductive-rights/laws [https://perma.cc/X73F-FBGN] (announcing passing of the amendment to Ariz. Const. art. II, § 8.1). On the same day, Missouri voters voted in favor of a constitutional amendment that would protect a person's right to obtain an abortion up through fetal viability. *See* Mo. Const. amend. 3 (approved Nov. 5, 2024).

92. 8 U.S.C. § 1227(a)(2)(A)(ii).

93. *Id.*

permanent resident status for certain unauthorized immigrants that have been present in the United States for ten or more years), is unavailable for individuals who have been convicted of a crime involving moral turpitude.[94] In certain cases, a conviction of a crime involving moral turpitude may preclude an otherwise eligible individual from applying for voluntary departure (a discretionary form of relief that allows otherwise deportable individuals to leave the country at their own expense to avoid the negative immigration consequences that result from a formal order of removal).[95] Additionally, convictions for crimes involving moral turpitude may result in an individual's mandatory immigration detention,[96] wherein the Department of Homeland Security will take custody of an individual and hold them in carceral immigration detention spaces until the resolution of the individual's removal proceedings or the effectuation of their removal from the country.[97]

Other forms of immigration benefits predicate eligibility on whether an applicant is a "person of good moral character."[98] Because the INA's definition of "a person of good moral character" excludes anyone who, during the statutory period in question, was convicted of or admitted to the commission of a crime involving moral turpitude,[99] an individual's conviction for or commission of a crime involving moral turpitude could preclude or delay their access to any immigration benefit that lists good moral character as an

94. 8 U.S.C. § 1229b(b)(1) ("The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States, if the alien . . . (C) has not been convicted of an offense under section 1182(a)(2).").

95. 8 U.S.C. § 1229c(b)(1) ("The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense if, at the conclusion of [removal proceedings], the immigration judge enters an order granting voluntary departure in lieu of removal and finds that . . . (B) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure.").

96. *See* 8 U.S.C. § 1226(c) ("The Attorney General shall take into custody any alien who (A) is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title, (B) is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii) . . . of this title; [or] (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year.").

97. For a more detailed description of immigration detention, see *infra* Part III.A.

98. *See* 8 U.S.C. §§ 1427(a)(3), 1229b(b), 1229c(b)(1)(B), 1154a(1)(A)(i) (establishing that immigration benefits that require a finding of "good moral character" include naturalization, cancellation of removal, voluntary departure, and self-petitions for battered spouses under the Violence Against Women Act (VAWA)).

99. 8 U.S.C. § 1101(f) (defining a person of good moral character).

eligibility requirement, such as naturalization.[100] Notably, then, even if an abortion-related offense did not lead to the potential deportation of a lawful permanent resident, its inclusion as an act that could exclude someone as someone with "good moral character" could nonetheless continue to disenfranchise those with lawful permanent resident status by blocking them from obtaining citizenship status, and thus keeping such individuals susceptible to deportation and marginalized in the democratic process.

Whether state abortion-related crimes will be found to constitute crimes involving moral turpitude remains unclear. In decisions issued before *Roe v. Wade*, the BIA held that abortion-related crimes did constitute crimes involving moral turpitude,[101] though the current viability of such precedent is unknown given modern societal attitudes towards abortion.[102] A detailed categorical-approach-based assessment of the extent to which convictions (for explicit abortion offenses or for other criminal offenses in fetal personhood states) for procuring an abortion, providing an abortive services or medication, or facilitating an abortion would constitute a crime involving moral turpitude is beyond the scope of this paper, though other legal commentators have thoroughly considered this question.[103]

The open question of whether an abortion constitutes a crime involving moral turpitude underscores the heightened significance of the federal government's stance on abortion, particularly in light of Donald Trump's second presidency. As explained above, abortion access and criminalization are not exclusively state law issues; the federal government plays a critical role in determining the immigration-related consequences of abortion-related offenses.

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100. *See* 8 U.S.C. § 1427 (requiring as a prerequisite to naturalization "good moral character").

101. *See* M-, 2 I. & N. Dec. 525 (B.I.A. 1946) (finding that performing an abortion was a crime involving moral turpitude regarding a male respondent convicted of the crime of "abortion" under New York law for providing an abortion to a woman); K-, 9 I. & N. Dec. 336 (B.I.A. 1961) (same); *see also* Lauren Murtagh, *Is Performing an Abortion a Removable Offense? Abortion Within the Crimes Involving Moral Turpitude Framework*, 109 VA. L. REV. 1807, 1818–19 (2023).

102. *See* Murtagh, *supra* note 101, at 1814–15.

103. *See, e.g.*, *id.* Following an exhaustive assessment of state statutes criminalizing abortion-related conduct, federal, state, and BIA precedent on abortion, and analogous implementation of the categorical approach on other crimes involving moral turpitude, Lauren Murtagh predicts that a modern BIA would not consider the provision of an abortion to be a crime involving moral turpitude in light of the variability in statutes, abortion support in much of the public opinion, and the previously recognized constitutional right to an abortion. *Id.* at 1841.

Under a Trump administration, which has promised to champion anti-abortion and anti-immigration policies,[104] there is an increased likelihood that federal authorities will take a punitive stance towards immigrants by way of abortion-related acts.[105]

B. Immigration Consequences Dictated by State Legislation

Although the federal government could avoid certain abortion-related immigration consequences by defining federal generic crimes in ways that exclude abortion-related conduct, other provisions of the INA trigger negative immigration consequences in ways that do not involve "crimes involving moral turpitude" or require a categorical match to a federal crime.[106] In such cases, absent a federal policy of prosecutorial discretion, the federal government would have no say in the immigration consequences resulting from certain state abortion-related offenses. In these situations, the material factor becomes the sentences that the state law sets forth as potential punishment for the violation of an abortion-related crime or the actual sentence imposed for a conviction. In essence, then, the power to trigger these immigration consequences lies entirely in the state legislatures and prosecutors.

Take as an example the inadmissibility grounds, the triggering of which could preclude individuals from acquiring a temporary or permanent visa status, preclude holders of temporary

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104. See, e.g., Exec. Order No. 14159, Protecting the American People Against Invasion, 90 Fed. Reg. 8443 (Jan. 20, 2025); Exec. Order No. 14160, Protecting the Meaning and Value of American Citizenship, 90 Fed. Reg. 8449 (Jan. 20, 2025); Exec. Order No. 14165, Securing Our Borders, 90 Fed. Reg. 8467 (Jan. 20, 2025); Exec. Order No. 14182, Enforcing the Hyde Amendment, 90 Fed. Reg. 8751 (Jan. 24, 2025); The Mexico City Policy: Memorandum for the Secretary of State[,] the Secretary of Defense[,] the Secretary of Health and Human Services[, and] the Administrator of the United States Agency for International Development, 90 Fed. Reg. 8753 (Jan. 24, 2025).

105. As it relates to crimes involving moral turpitude, a Trump-appointed Attorney General or the Board of Immigration Appeals could define the generic crime of abortion in a manner that emphasizes its "moral reprehensibility," or could refuse to differentiate between abortion and murder, homicide, or abuse in fetal personhood states, thereby broadening the scope of immigration-related consequences for individuals involved in abortion-related actions.

106. For example, a state abortion-related crime could also be found to constitute the crime of "murder" under 8 U.S.C. § 1101(a)(43)(i), particularly in states that have adopted fetal personhood statutes. *See, e.g.*, ALA. CODE § 26-23H-2 (2019); ARK. CODE ANN. § 5-1-102(13) (2021); LA. STAT. § 40:1061.1 (2022); MISS. CODE ANN. § 97-3-37 (2025); MO. REV. STAT. § 188.026 (2019); N.D. CENT. CODE ANN. §14-02.1-02 (2023); OKLA. STAT. tit. 21, § 691 (2006); TEX. HEALTH & SAFETY CODE § 170A.002 (West 2022); W. VA. CODE § 61-2-30 (2023); WYO. STAT. ANN. § 6-1-104 (2025). Given that federal statutes have already explicitly excluded abortions from the federal definition of murder, however, the likelihood of this interpretation is unlikely. *See* 10 U.S.C. § 919a(a)–(b).

visa statuses from adjusting their status to that of lawful permanent resident, and trigger removal proceedings for immigrants present without authorization. The INA inadmissibility grounds include a provision that penalizes noncitizens with multiple convictions for certain offenses.[107] These convictions need not be categorical matches to any other federal crimes in the INA; the only requirement for inadmissibility is that the aggregate sentence resulting from these multiple convictions amounts to five or more years of confinement.[108] Given the harsh penalties provided for in state statutes criminalizing abortion care, this provision could easily be triggered by an immigrant who helps more than one person obtain an abortion or a person whose conduct during a single abortion could be charged under more than one criminal offense, such as criminal homicide, abuse of a corpse, child abuse, or an abortion-specific crime.[109]

Further, a myriad of immigration consequences could result from convictions that do not require categorical matches to federal generic crimes. For example, an individual cannot meet the definition of a person with good moral character if, at any time during the statutory period in question, the individual was confined to a penal institution as a result of a conviction for an aggregate period of one-hundred-and-eighty days or more.[110] For another example, for individuals whose presence in the United States is authorized through the Deferred Action for Childhood Arrivals program (commonly known as DACA), a state conviction can result in a loss of or inability to renew DACA status if the state conviction meets the federal regulations' definition of a felony or a significant misdemeanor.[111]

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107. *See* 8 U.S.C. § 1182(a)(2)(B) ("Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.").

108. *Id.*

109. *See* BACH & WASILCZUK, *supra* note 68, at 13–14 (reporting that between June 24, 2022, and June 23, 2023, prosecutors brought at least 210 criminal cases against pregnant people with crimes related to pregnancy, pregnancy loss, or birth. The majority of the charges asserted some form of child abuse, neglect, or endangerment, criminal homicide, drug charges, abuse of a corpse, abortion-specific crimes (one charge, charged under a repealed statute) and other miscellaneous crimes).

110. 8 U.S.C. § 1101(f)(7).

111. *See* 8 C.F.R. § 236.22(b)(6) (2025). For immigration purposes, a felony is a

C. Admissions, Plea Deals, and Other Minefields

Crucially, many of the immigration consequences outlined above do not require a formal state conviction, meaning that noncitizens are vulnerable to severe immigration consequences due to the mere existence of statutes that criminalize abortion-related conduct. Additionally, because of the INA's complicated definition of what constitutes a conviction for immigration purposes, individuals may agree to pretrial diversions, rehabilitative relief, and other forms of plea deals without realizing that these arrangements may still amount to a conviction under the INA. Because of this, immigrants in states that criminalize abortion-related conduct cannot take solace in the fact that prosecutors in their states may decline to prosecute abortion-related crimes or pursue plea deals that would allow defendants to avoid harsh sentences.[112]

First, as noted previously, some immigration consequences can be triggered by a mere admission to having committed relevant offenses. For example, the inadmissibility grounds addressing a crime involving moral turpitude are triggered when an individual is convicted of, admits to having committed, or admits committing acts which constitute the essential elements of a crime involving moral turpitude.[113] The admissions that can trigger this ground of inadmissibility can come about in several ways. For example, the

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crime committed in the United States that is punishable by imprisonment for a term of more than one year, regardless of the term actually served. *Id.* § 245a.1(p). The felony definition provides an exception for convictions of offenses that a state has categorized as a misdemeanor when the sentence actually imposed amounts to one year or less, regardless of the term actually served. *Id.* The definition of a significant misdemeanor includes a crime that is punishable by imprisonment for a term of five days to one year, regardless of the term actually served, where the individual was sentenced to imprisonment for more than ninety days. *Id.* § 236.22(b)(6)(ii). To qualify as an actual sentence for purposes of the significant misdemeanor definition, a sentence must actually involve time served in custody. For this reason, a suspended sentence would not lead to a significant misdemeanor finding if completely precluded time in custody). *Id.* §§ 236.22(b)(6), 245a.1(o).

112. As of May 9, 2023, over ninety local prosecutors pledged to not press charges against those providing or seeking abortions. *See* Fair and Just Prosecution, *Joint Statement from Elected Prosecutors* (2023), https://fairandjustprosecution.org/wp-content/uploads/2022/06/FJP-Post-Dobbs-Abortion-Joint-Statement.pdf [https://perma.cc/GU75-4JSL]. Certain other state executives have centralized authority to prosecute abortion-related crimes to state-level prosecutors and away from local and county-level prosecutors. *See* Ariz. Exec. Order No. 2023-11 (2023), available at https://azgovernor.gov/sites/default/files/executive_order_2023_11.pdf [https://perma.cc/9DTG-4U7N]. In response, several states have passed or proposed legislation to punish prosecutors who refuse to prosecute abortion offenses. *See*, *e.g.*, TEX. LOC. GOV'T CODE ANN. § 87.001(3)(b) (West 2023); S.B. 92, 2023 Leg., 2023 Reg. Sess. (Ga. 2023).

113. 8 U.S.C. § 1182(a)(2)(A)(i)(I).

immigration form an individual would file to adjust their status to that of a lawful permanent resident directly asks applicants, in a yes or no format, about any past criminal activity: "Have you **EVER** committed a crime of any kind (even if you were not arrested, cited, charged with, or tried for that crime)?"[114] Similarly, an individual may admit to criminal activity in response to an immigration officer's questioning during a hearing for immigration benefits or in other documents that might reach the hands of an immigration officer. Although BIA precedent decisions provide some limitations on the kinds of statements that can lead to an admission of a crime for purposes of the INA,[115] because an applicant faces severe consequences for materially misrepresenting information to obtain immigration benefits, the broad scope of this provision can ensnare even those individuals against whom a prosecutor might decline to press charges or pursue a prison sentence.

Secondly, because of the INA's broad definition of the term "conviction," prosecutorial arrangements such as pretrial diversions, rehabilitative sentences, and other plea deals can lead to a conviction for immigration purposes.[116] The INA defines a conviction as:

> a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.[117]

Pursuant to this definition, an individual can be found to have been convicted of a crime, even when the state withdraws an adjudication of guilt or expunges a conviction pursuant to the

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114. DEP'T OF HOMELAND SEC. & U.S. CITIZENSHIP & IMMIGR. SERVS., APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS, USCIS FORM 1-485 (Jan. 20, 2025) [hereinafter USCIS FORM 1-485], https://www.uscis.gov/sites/default/files/document/forms/i-485.pdf [https://perma.cc/4XDU-5WFT] (emphasis in original) (explaining that providing false answers to immigration forms can lead to the denial of the requested benefit and open the door to deportation); 8 U.S.C. §§ 1182(a)(9)(A), 1227(a)(1)(A).

115. *See* R-, 1 I. & N. Dec. 118 (B.I.A. 1941); M-, 1 I. & N. Dec. 229 (B.I.A. 1942); 22 C.F.R. § 40.21(a) (2025); B-M-, 6 I. & N. Dec. 806 (B.I.A. 1955); A-, 3 I. & N. Dec. 168 (B.I.A. 1948); Espinosa, 10 I. & N. Dec. 98 (B.I.A. 1962); K-, 9 I. & N. Dec. 715 (B.I.A. 1962).

116. *See* Roldan, 22 I. & N. Dec. 512, 516 (B.I.A. 1999) ("[W]hether or not a conviction exists for immigration purposes is a question of federal law and is not dependent on the vagaries of state law."); Mohamed, 27 I. & N. Dec. 92 (B.I.A. 2017).

117. 8 U.S.C. § 1101(a)(48)(A).

conditions of an agreement,[118] so long as there is an admission of guilt, of no contest, or of sufficient facts to warrant a finding of guilt. As such, pretrial diversions that predicate dismissal on a defendant's guilty plea or an admission of material facts will meet the definition of a conviction under the INA, even if the charge is later dismissed at the state court level. Because the INA only requires "some form" of punishment, penalty, or restraint on an individual's liberty, even nominal impositions of a diversionary program's costs and surcharges, orders for periods of community supervision and community service, and orders to attend rehabilitative classes can meet the definition of a conviction under the INA.[119] While criminal defense attorneys have a general obligation under the Sixth Amendment to inform noncitizen clients that immigration consequences could potentially result from taking a plea,[120] in practice, the advice that immigrant defendants receive is often cursory and does not fully apprise defendants of potential immigration consequences.[121] As a result, well-meaning prosecutors and criminal defense attorneys may inadvertently trigger severe immigration consequences in their attempts to work around harsh sentencing for abortion-related offenses.

III. Migrant Mobility and the Map of Abortion Access

Because of federal and state policies that regulate, control, surveil, and punish a noncitizen's movements within the United States, the geographic landscape of abortion access in the United States creates unique barriers for noncitizens seeking abortion-related healthcare. The proliferation of state laws that significantly restrict or completely ban abortion have produced expansive reproductive healthcare deserts that leave large regions of the United States without access to abortion care. Though the advent of abortifacient medication and telehealth can disaggregate abortion access from a person's physical presence at an abortion clinic,[122] states have nonetheless re-territorialized their power over pregnant people's bodies by criminalizing the mailing of abortion-

118. *See Roldan*, 22 I. & N. Dec. at 523.

119. *See Mohamed*, 27 I. & N. Dec.

120. *See* Padilla v. Kentucky, 559 U.S. 356, 367 (2010).

121. *See, e.g.*, U.S. v. Singh, 95 F.4th 1028, 1033 (6th Cir. 2024) (holding that courts are only required to provide a "generic warning" that pleading guilty "may" have immigration consequences and need not detail how, when, or under what circumstances such consequences could occur).

122. Calkin, *supra* note 21, at 27. Political geographer Sydney Calkin refers to this phenomenon as the "spatial transformation of abortion." *Id.*

inducing medication,[123] forbidding telehealth for abortion-related healthcare,[124] punishing or criminalizing the facilitation of travel to access an abortion out-of-state,[125] and by proposing legislation that would punish residents who access abortions outside the United States.[126] As a result, many immigrants seeking abortion care must still travel long distances, in some cases traversing several states, to reach a jurisdiction where abortion care is accessible.[127]

While this abortion-care desert significantly reduces abortion access to all people residing in the United States, especially those at the intersection of historically marginalized racial identity, gender, class,[128] and rurality,[129] federal and state immigration policies that result in the arrest, detention, deportation, and family separation of immigrants uniquely impact immigrant access to abortion care.[130] Federal practices like immigration detention, post-release restrictions on mobility, immigrant surveillance, border zone checkpoints, and federal-state immigration enforcement agreements all significantly restrict noncitizens' ability to engage in healthcare-related movement within the United States. The

123. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2160 (2021); GA. CODE ANN. § 16-12-140 (2025); OKLA. STAT. tit. 63, § 1-756.3 (2021).

124. *See, e.g.*, IND. CODE ANN. § 16-34-2-1(d) (2022).

125. Currently, several states have passed statutes that criminalize or impose civil penalties for the recruiting, harboring, or transporting of unemancipated minors out-of-state for purposes of obtaining an abortion. *See, e.g.*, IDAHO CODE § 18-623(1) (2022); MO. REV. STAT. § 188.250 (2024); TENN. CODE ANN. § 39-15-202 (West 2019). While these statutes generally provide an "exception" where a parent consents to the travel, some of these exceptions are set forth as affirmative defenses to the crimes, meaning that even when a parent consents to the travel, an individual who facilitates or transports a minor out-of-state can nonetheless be arrested, charged, and even subject to a jury trial. *See, e.g.*, IDAHO CODE § 18-623(1)-(2) (2022).

126. *See* S.B. 603, 101st Gen. Assembly, 2021 Reg. Sess. (Mo. 2021); H.B. 2012, 101st Gen. Assembly, 2nd Reg. Sess. (2022) (proposing amendment 4488H03.01H). While not specifically addressing abortion, some states criminalize a conspiracy to commit an act that is legal in a destination state but illegal in the home state. *See* ALA. CODE § 13A-4-4 (2025) ("A conspiracy formed in this state to do an act beyond the state, which, if done in this state, would be a criminal offense, is indictable and punishable in this state in all respects if such conspiracy had been to do such act in this state."). For a detailed analysis of the complex jurisdictional and constitutional issues arising from extraterritorial statutes, *see* Cohen et al., *supra* note 2, at 22–51.

127. *Interactive Map: US Abortion Policies and Access After Roe*, GUTTMACHER INST., https://states.guttmacher.org/policies/ [https://perma.cc/E4JU-UB42].

128. Madeline M. Gomez, *Intersections at the Border: Immigration Enforcement, Reproductive Oppression, and the Policing of Latina Bodies in the Rio Grande Valley*, 30 COLUM. J. GENDER & L. 84, 89–91 (2015).

129. Lisa R. Pruitt & Marta R. Vanegas, *Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law*, BERKELEY J. GENDER L. & JUST. (2015).

130. Gomez, *supra* note 128, at 86.

combination of immigration enforcement systems with the proliferation of abortion-restrictive zones uniquely encumbers immigrant access to reproductive healthcare and autonomy, particularly for those with unauthorized status.

A. Immigration Detention

Immigration detention is a civil carceral space overseen by the Department of Homeland Security and its subcontractors that warehouses noncitizen people suspected of being removable from the United States.[131] Generally, the federal government has broad authority to detain noncitizens as they await final adjudications on immigration proceedings or, if already ordered removed, as they wait for the U.S. government to deport them to another country.[132] Although immigration detention is a civil form of custody that, in the government's words, is "non-punitive,"[133] conditions in immigration detention facilities are generally indistinguishable from those in prisons.[134] By incarcerating immigrants in detention centers that they cannot freely leave and limiting their access to the outside world, immigration detention centers strip detained people of their agency to make decisions about their reproductive health; to make use of the knowledge, support, and resources of their communities; and to access the healthcare they are entitled to under the law.[135]

The government's broad authority to detain noncitizens raises significant concerns for all immigrants who can become pregnant in the United States. Through immigration detention, the Department of Homeland Security exercises near complete control over detained people's bodies, meaning that detained individuals can exercise little bodily autonomy or agency over healthcare decisions that may impact them and their families. Reports from government investigators and advocates alike reveal that immigration detention facilities regularly fail to provide the spectrum of

131. *See Detention Management*, U.S. DEP'T OF HOMELAND SEC., U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/detain/detention-management [https://perma.cc/NT94-HVJS]; U.S. GOV'T ACCOUNTABILITY OFF., IMMIGRATION DETENTION: ACTIONS NEEDED TO IMPROVE PLANNING, DOCUMENTATION, AND OVERSIGHT OF DETENTION FACILITY CONTRACTS 11–12, (2021) [hereinafter GAO ACTIONS], https://www.gao.gov/assets/gao-21-149.pdf [https://perma.cc/6L3K-LBKP].

132. *See* 8 U.S.C. § 1226.

133. *Detention Management*, *supra* note 131.

134. CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS 87–90 (New Press 2019).

135. Ariella J. Messing, Rachel E. Fabi & Joanne D. Rosen, *Reproductive Injustice at the US Border*, 110 AM. J. PUB. HEALTH 339, 341–42 (2020).

reproductive healthcare that is supposed to be available to detained individuals, including routine preventative gynecological healthcare services and pregnancy-related care.[136] Notwithstanding detention standards that claim to provide detained noncitizens with access to abortion care, even noncitizens confined to detention centers in states where abortion is legal often cannot readily exercise their right to an abortion. The Trump Administration's stated commitment to expanding immigration detention raises alarm about the increased detention of pregnant noncitizens in facilities where access to abortion and other reproductive healthcare is severely limited.[137] Furthermore, the proliferation of detention centers in states with restrictive abortion laws under such a policy framework poses new and significant barriers for pregnant noncitizens seeking abortion care.

i. Overview of Immigration Detention and National Detention Standards for the Care for Pregnant People

Between 2016 and 2018, the Department of Homeland Security confined pregnant women 4,600 times in immigration detention.[138] As of the time of the drafting of this article, the Department of Homeland Security is keeping over 37,000 individuals[139] in immigration detention facilities that the agency

136. *See* Messing et al., *supra* note 135; *Immigration Detention: ICE Can Improve Oversight and Management*, U.S. GOV'T ACCOUNTABILITY OFF. (Jan. 9, 2023), https://www.gao.gov/products/gao-23-106350 [https://perma.cc/67CU-LQ46]); *Barriers to Reproductive Justice While Detained*, ACLU OF NORTHERN CA (Nov. 17 2020), https://www.aclunc.org/RJdetained [https://perma.cc/SYP6-H7GT]; ACLU OF PA., LEGAL SERVS. OF N. J. & UNIV. OF PA. CAREY L. SCH., COMPLAINT TO THE DEP'T OF HOMELAND SEC. OFFICE OF C.R. & C.L. 48–50 (2024), https://www.aclupa.org/sites/default/files/field_documents/2024.07.10_crcl_complaint_-_moshannon.pdf [https://perma.cc/9LM2-AF3F].

137. Julia Ainsley, Didi Martinez & Laura Strickler, *Incoming Trump Admin Is Eyeing New Immigrant Detention Centers Near Major U.S. Cities*, NBC NEWS (Nov. 12, 2024), https://www.nbcnews.com/politics/immigration/incoming-trump-admin-eyeing-new-immigrant-detention-centers-major-us-c-rcna179843 [https://perma.cc/Y5CZ-BFFC].

138. U.S. GOV'T ACCOUNTABILITY OFF., IMMIGRATION DETENTION: CARE OF PREGNANT WOMEN IN DHS FACILITIES 5 (2020), https://www.gao.gov/assets/gao-20-330.pdf [https://perma.cc/U9KW-QM5A]. Note that the Government Accountability Office only accounts for women in its report on pregnancy-related medical care. It is not clear whether it uses the term to refer to all people assigned female at birth, or whether ICE reported no pregnant transmen or nonbinary people in the data that the GAO reviewed.

139. *Immigration Detention Quickfacts*, TRANSACTIONAL RECORDS ACCESS

operates or subcontracts to private corrections corporations and other local, state, or federal government agencies through intragovernmental service agreements.[140] These numbers have remained staggeringly high in both Republican and Democratic administrations like.[141]

The Department of Homeland Security (DHS) has promulgated several sets of national detention standards that each adult detention facility must agree to follow as a matter of law or, for subcontractors, as a condition of their operating contract.[142] These national detention standards outline a facility's immigration detention obligations and describe the services the facility must provide to each detained individual.[143]

The most recently revised detention standards, the 2019 National Detention Standards, set forth detention facility obligations for detained pregnant people.[144] Once detention facility

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CLEARINGHOUSE (July 14, 2024), http://web.archive.org/web/20240801001102/https://trac.syr.edu/immigration/quickfacts/ [https://perma.cc/P953-UUQZ].

140. GAO ACTIONS, *supra* note 131, at 7.

141. *See* Jessica Rofé, *Peripheral Detention, Transfer, and Access to the Courts*, 122 MICH. L. REV. 867, 893–94 (2024).

142. *ICE Detention Standards*, IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/factsheets/facilities-pbnds [https://perma.cc/P2BD-2W83].

143. *Id.* Facilities that detain children have their own sets of standards. Family detention centers, where children are detained with a parent, are likewise administered by ICE or an ICE contractor, and are governed by the 2020 Family Residential Standards. Unaccompanied children held in the custody of the Office of Refugee Resettlement, an agency within the U.S. Department of Health and Human Services, are governed by the ORR Unaccompanied Children Program Policy Guide. *See* IMMIGR. & CUSTOMS ENF'T, FAMILY RESIDENTIAL STANDARDS: PROGRAM, PHILOSOPHY, GOALS, AND EXPECTED OUTCOMES (2020), https://www.ice.gov/doclib/frs/2020/2020family-residential-standards.pdf [https://perma.cc/3M9U-J3TN]; *ORR Unaccompanied Alien Children Bureau Policy Guide*, OFF. OF REFUGEE RESETTLEMENT, https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide [https://perma.cc/LM68-GFA7]*; see also*, Valeria Gomez & Marcy L. Karin, *Menstrual Justice in Immigration Detention*, 41 COLUM. J. GENDER & L. 123 (2021) (describing how the varying standards of care between detention facilities can significantly curtail a detained person's ability to ascertain and assert healthcare rights).

144. IMMIGR. & CUSTOMS ENF'T, NATIONAL DETENTION STANDARDS FOR NON-DEDICATED FACILITIES 112 (2019) [hereinafter NATIONAL DETENTION STANDARDS FOR NON-DEDICATED FACILITIES], https://www.ice.gov/doclib/detention-standards/2019/nds2019.pdf [https://perma.cc/2EGT-QH5E]. The 2011 Performance-Based National Detention Standards, which were last revised in 2016, sets forth substantially similar abortion-related standards, though it outlines more specific goals and obligations related to women-specific medical care. *See* IMMIGR. & CUSTOMS ENF'T, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011, at 322 (2011) [hereinafter ICE NATIONAL DETENTION STANDARDS]. For purposes of simplicity, this paper will focus on the 2019 National Detention Standards to assess the rights of detained pregnant people.

personnel receive medical confirmation that a detained person is pregnant, the facility must provide "close medical supervision," which includes access to prenatal care and "comprehensive counseling" on topics including family planning and "abortion services."[145] The facility administrator must notify ICE that a detained person is pregnant within seventy-two hours of reaching such a determination, and to inform all security staff and facility authorities if a pregnant person has particular needs such as a specialized diet, housing arrangement, or accommodations such as the provision of extra pillows.[146]

If the pregnant individual chooses to terminate a pregnancy, ICE is required to arrange for transportation to the medical appointment for the pregnancy termination at no cost to the detained individual; if requested, ICE is also required to facilitate access to religious counseling and "non-directive (impartial) medical resources and social counseling."[147] Because federal legislation popularly known as the Hyde Amendment forbids the federal government from paying abortion-related expenses,[148] ICE does not pay any abortion expense, except where proceeding with the pregnancy would endanger the pregnant person's life, or in situations where the pregnancy is a consequence of rape or incest.[149] The national standards are silent, however, on what kinds of consequences are considered life endangering, or on how a person would have to substantiate allegations of rape or incest.

ii. Shortcomings and Violations of the Pregnancy-Related Detention Standards

Notwithstanding these recently revised detention standards, reports and first-hand accounts reveal that the detention standards claiming to protect an individual's rights to reproductive healthcare

145. NATIONAL DETENTION STANDARDS FOR NON-DEDICATED FACILITIES, *supra* note 144, at 125. Note that not all immigration detention facilities have an on-location medical staff (referred to as the ICE Health Service Corp or "IHSC"). In non-IHSC, facility administrators are obligated to ensure that detained individuals receive appropriate healthcare at outside medical facilities. *See ICE Can Improve Oversight and Management*, *supra* note 136.

146. NATIONAL DETENTION STANDARDS FOR NON-DEDICATED FACILITIES, *supra* note 144, at 125.

147. *Id.* at 125–26.

148. *See* Consolidated Appropriations Act, Pub. L. No. 118–42, tit. II, § 202-03, 138 Stat. 25 (2024).

149. NATIONAL DETENTION STANDARDS FOR NON-DEDICATED FACILITIES, *supra* note 144.

do not square with the lived experiences of those trying to attain adequate reproductive healthcare and effectuate their reproductive healthcare choices.[150] As reproductive justice advocates have long observed, the existence of a legal right does little to protect members of marginalized communities who lack the power to assert those rights.[151] Nowhere is that more evident than in carceral spaces like immigration detention, where incarcerated individuals live under the threat of deportation; have no control over their physical location; depend on guards to access medical care; and are often isolated in facilities far from hometowns, emotional and religious support systems, or cities where advocates, nonprofit organizations, lawyers, or other healthcare providers might be able to provide support, information, or assistance in asserting their healthcare rights.[152]

Accounts from detained individuals, former employees of detention facilities, and nonprofit organizations lay bare how detention facilities fail to respect the physical integrity or reproductive healthcare choices of those detained.[153] Immigration detention, by its nature, is dangerous to maternal health, as evidenced by the experiences of this 23-year-old asylum seeker in New Mexico:

> A 23-year-old asylum seeker was detained at a U.S. port of entry when she was 12 weeks pregnant. She was held in ICE custody for three months and transferred between facilities six times. One transfer between New Mexico and Texas took 23 hours and landed her in the hospital for exhaustion and dehydration. She experienced nausea, vomiting, weakness, headaches, and abdominal pain during her detention and did

150. *See, e.g.*, Alexandria Doty, *ICE Detainees Denied Access to Abortion*, IMMIGR. & HUM. RTS. L. REV. BLOG (Mar. 25, 2022), https://lawblogs.uc.edu/ihrlr/2022/03/25/ice-detainees-denied-access-to-abortion/ [https://perma.cc/VJG3-YRF4]; Messing et al., *supra* note 135.

151. *See* ROBERTS, *supra* note 51, at 294–312 ("The concept of the already autonomous individual who acts freely without government intrusion is a fallacy that privileges decisionmaking by the most wealthy and powerful members of society. It ignores the communities and social systems that both help and hinder an individual in determining her reproductive life."); *Reproductive Justice*, *supra* note 8; Rebouché, *supra* note 8.

152. Rofé, *supra* note 141, at 894; Kevin Sieff, *Access Denied*, THE TEXAS OBSERVER (Feb. 20, 2009), https://www.texasobserver.org/2963-access-denied/ [https://perma.cc/WU2S-Q7AZ] (noting that immigration detention centers are impenetrable to abortion clinics and family planning centers, and quoting Brownsville Planned Parenthood CEO as stating that once people are in immigration detention "it feels like they're lost").

153. Messing et al., *supra* note 135; Marissa McFadden, Christine Marie Velez & Maria Mercedes Ávila, *Pregnant Migrant Latinas at the US Border: A Reproductive Justice Informed Analysis of ICE Health Service Policy During "Zero-Tolerance"*, 7 J. HUM. RTS. & SOC. WORK 349 (2022).

> not receive sufficient prenatal vitamins or adequate medical attention.[154]

The failure to provide even the most basic prenatal care is particularly alarming give the prevalence of sexual violence in immigration detention facilities. Notwithstanding the passing of laws like the Prison Rape Elimination Act, ostensibly enacted to promote systems that protect individuals in federal and state custody from sexual violence,[155] journalists and advocacy groups continue to uncover accounts of systemic sexual assault and sexual harassment of detained women and children[156] at immigration detention facilities by guards[157] and even medical personnel.[158]

Whistleblowers have also alleged that severe medical malpractice has permanently stripped some detained women of their reproductive capacities. In September 2020, for example, advocacy organizations filed a complaint with the DHS Office of the Inspector General on behalf of women detained at the Irwin County Detention Center and of whistleblower Dawn Wooten, a former nurse at the same facility.[159] This complaint made national

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154. McFadden et al., *supra* note 153, at 356 (quoting Victoria López, *Working to Uncover How ICE Treats Pregnant Women in Detention*, AM. CIV. LIBERTIES UNION (May 3, 2018), https://www.aclu.org/news/immigrants-rights/working-uncover-how-ice-treats-pregnant-women) [https://perma.cc/UE8B-BGJV]).

155. *See* 34 U.S.C. § 30302, *et seq*.

156. *See, e.g.*, Caitlin Owens, Stef W. Kight & Harry Stevens, *Thousands of Migrant Youth Allegedly Suffered Sexual Abuse in U.S. Custody*, AXIOS (Feb. 26, 2019), https://www.axios.com/2019/02/26/immigration-unaccompanied-minors-sexual-assault [https://perma.cc/JR65-9HBL].

157. *See* Lomi Kriel, *ICE Guards "Systematically" Sexually Assault Detainees in an El Paso Detention Center, Lawyers Say*, PROPUBLICA (Aug. 14, 2020), https://www.propublica.org/article/ice-guards-systematically-sexually-assault-detainees-in-an-el-paso-detention-center-lawyers-say [https://perma.cc/S8ML-5M9T]; *see also* Valerie G. Zarate, *Disposable Immigrants: The Reality of Sexual Assault in Immigration Detention Centers*, 53 ST. MARY'S L. J. 619 (2022) (describing the convoluted system in place for reporting sexual assault in immigration detention and the barriers detained individuals face in reporting and seeking justice).

158. Jose Olivares & John Washington, *ICE Jail Nurse Sexually Assaulted Migrant Women, Complaint Letter Says*, THE INTERCEPT (July 13, 2022), https://theintercept.com/2022/07/13/ice-stewart-detention-sexual-misconduct/ [https://perma.cc/S72S-V2VR] (describing allegations of sexual assault by a nurse employed by a privately owned immigration detention center in Georgia); Kriel, *supra* note 157.

159. Letter from Project South, Georgia Detention Watch, Georgia Latino Alliance for Human Rights, South Georgia Immigrant Support Network to Joseph V. Cuffari, Inspector Gen., Dep't of Homeland Sec., Cameron Quinn, Officer for C.R. & C.L., Dep't of Homeland Sec., Thomas P. Gies, Acting Dir. of Atlanta ICE Field Off., U.S. Immigr. and Customs Enf't Atlanta Field Off., David Paulk, Warden of the Irwin Cnty. Det. Ctr., (Sept. 14, 2020), https://projectsouth.org/wp-

headlines after alleging that an alarming number of women confined at the detention facility had been subjected to hysterectomies without their informed consent.[160] It was not until the news of these alleged abuses made national headlines that ICE took steps to end its immigration detention contract with the Irwin County Detention Center, despite numerous investigations by the Office for Civil Rights and Civil Liberties (CRCL), which repeatedly investigated and substantiated problems with the facility's the provision of healthcare.[161]

By design and through implementation, the carceral immigration detention system also obstructs the detained noncitizen's access to abortion care. This obstruction is particularly troubling when considering the context in which many individuals find themselves in the custody of the Department of Homeland Security—after traversing one or more countries by land in an attempt to seek asylum or another form of refuge in the United States. Reports show that, tragically, migrants commonly suffer sexual assault and rape along the journey to the United States; in fact, migrants traveling to the United States often take oral contraceptives to proactively avoid becoming pregnant in the event of rape along the way.[162] With stakes like these, access to reproductive healthcare in the form of gynecological counseling, pre- and post-natal care, or abortion care takes on an urgent significance.

As noted previously, however, people confined to immigration detention facilities have little control over their healthcare and are

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content/uploads/2020/09/OIG-ICDC-Complaint-1.pdf [https://perma.cc/BB28-ZK93]; *see also* Wendy Dowe, *"The Traumas of Irwin Continue to Haunt Me": Non-Consensual Surgery Survivor Seeks Restitution, Calls to Shut Down Detention Centers*, MS. MAGAZINE (Dec. 9, 2021), https://msmagazine.com/2021/12/09/immigrants-ice-detention-center-georgia-irwin-women-reparations-sexual-violence/ [https://perma.cc/2TKL-R7BR] (describing her experience of having been subjected to an involuntary gynecological surgery at the Irwin County Detention Center and the subsequent retaliation and eventual deportation she experienced after protesting her treatment).

160. Dowe, *supra* note 159.

161. Memorandum from Peter E. Mina, Senior Off. Performing the Duties of the Officer for C.R. and C.L. & Susan Mathias, Assistant Gen. Couns., Legal Couns. Div. Off. of the Gen. Couns. to Tae D. Johnson, Acting Dir., U.S. Immigr. and Customs Enf't & Kerry E. Doyle, Principal Legal Advisor, Off. of the Principal Legal Advisor U.S. Immigr. and Customs Enf't, *Recommendations Memo to ICE Concerning Irwin County Detention Center in Ocilla, Georgia*, (Sept. 12, 2022), https://www.dhs.gov/sites/default/files/2023-02/rec-memo-ice-irwin-icdc-09-12-22.pdf [https://perma.cc/FUC9-RFEN].

162. Paola Letona, Erica Felker-Kantor & Jennifer Wheeler, *Sexual and Reproductive Health of Migrant Women and Girls from the Northern Triangle of Central America*, 47 PAN AM. J. OF PUB. HEALTH 59 (2023).

at the complete mercy of facility employees to communicate their medical needs, facilitate access to healthcare providers, vet the competence of healthcare providers, provide prescribed alimentary regimens, medication, or treatment, and follow up with healthcare providers. Because statutes explicitly forbid the federal government from covering the costs of abortion-related care, those detained are forced to find a way to pay for their own abortions while incarcerated. Being forcibly confined in detention, pregnant detained people cannot save for abortion-related expenses (absent resorting to "voluntary" employment by providing services for the immigration detention center for as little as a dollar a day).[163] As a result, abortion costs render abortions out of reach for many detained individuals. While the Hyde Amendment does make an exception for those who became pregnant as a result of rape or incest, such survivors of rape or incest are nonetheless forced to "prove" this to immigration officials in order to access their right to a government-funded abortion.[164] This requires that survivors of rape relive their experiences through disclosure to as many officials as required to access this right, and they must do so without ready access to potential witnesses, foreign medical records, and trauma-informed mental healthcare.[165] All of this must happen within the window of time in which an abortion can still be legally performed in the state.

For unaccompanied immigrant children in the custody of the Office for Refugee Resettlement, abortion access can be even harder to obtain. Generally, states that allow minors to receive abortions[166] have judicial bypass procedures, whereby certain minors can reach decisions relating to abortion without the consent of a parent or guardian.[167] Access to a judicial bypass and to abortion-providing facilities may often be obstructed by agency policy, however, as

163. Anita Sinha, *Slavery by Another Name: "Voluntary" Immigrant Detainee Labor and the Thirteenth Amendment*, 11 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 31–36 (2015); Jonathon Booth, *Ending Forced Labor in ICE Detention Centers: A New Approach*, 34 GEO. IMMIGR. L. J. 573, 590–92 (2020).

164. *See* Lauren Holter, *Detained Immigrant Women Are Facing a Grueling Abortion Struggle*, BUSTLE (May 10, 2017), https://www.bustle.com/p/detained-immigrant-women-are-facing-a-grueling-abortion-struggle-50388 [https://perma.cc/R8DZ-Z4BB] (noting that rape survivors must bear the burden of reliving the trauma to prove they were raped).

165. *Id.*

166. *See An Overview of Consent to Reproductive Health Services by Young People*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/overview-minors-consent-law [https://perma.cc/NL5Z-B2ED].

167. *See* 1 C.J.S. Abortion & Birth Control § 24 (2024).

experienced by Jane Doe, the teenage asylum-seeker at the center of *Garza v. Hargan*.

Garza v. Hargan was an intensely litigated case challenging an abortion-obstructive Trump Administration policy well before the *Dobbs* decision.[168] In March 2017, the Office of Refugee Resettlement ("ORR") informed ORR shelter employees that they were "'prohibited from taking any action that facilitates an abortion without direction and approval from the Director of ORR.'"[169] The ORR directive required ORR staff to immediately notify the agency of any minor's request to terminate a pregnancy, and informed staff that they were not permitted to "support[] abortion services pre or post-release; only pregnancy services and life-affirming options counseling."[170] The ORR directive required parental consent before any abortion facilitation would occur, and labeled the pursuance of judicial bypasses as a form of prohibited "facilitation."[171]

While this policy was in place, Jane Doe entered the United States unaccompanied at the age of seventeen and learned she was pregnant shortly after she was placed in an ORR shelter in Texas, a state that required parents of pregnant minors to consent to a minor's abortion.[172] With the assistance of counsel, Jane immediately recognized that she did not want to continue her pregnancy and expressed her desire to obtain an abortion.[173] Jane pursued and obtained a judicial bypass of Texas's consent laws, secured private funding for her abortion, and secured her own

168. *See* Garza v. Hargan, Civil Action No. 17-cv-02122 (TSC), 2017 U.S. Dist. LEXIS 175415 (D.D.C. Oct. 18, 2017) (granting Garza's temporary restraining order and ordering the Office of Refugee Resettlement to facilitate her access to an abortion); Garza v. Hargan, No. 17-5236, 2017 U.S. App. LEXIS 20711, at *2 (D.C. Cir. Oct. 20, 2017) (vacating the district court's temporary restraining order under the notion than the government's anti-abortion policy did not constitute an undue burden to an abortion); Garza v. Hargan, 874 F.3d 735 (D.C. Cir. 2017) (en banc) (vacating panel order and remanding the case to district court); Azar v. Garza, 584 U.S. 726 (2018) (vacating D.C. Circuit's en banc order, and remanding the case to the D.C. Circuit with instructions to dismiss for mootness).

169. Garza v. Hargan, 304 F. Supp. 3d 145, 150 (D.D.C. 2018).

170. *Id.*

171. *Id.*

172. *Id.* at 151; *see also After a Month of Obstruction by the Trump Administration, Jane Doe Gets Her Abortion*, AM. CIV. LIBERTIES UNION (Oct. 25, 2017) [hereinafter ACLU, *After Obstruction by Trump Administration, Jane Doe Gets her Abortion*], http://www.aclu.org/press-releases/after-month-obstruction-trump-administration-jane-doe-gets-her-abortion [https://perma.cc/V9VV-BCAX] (including statement from the principal plaintiff, Jane Doe, about her experiences in ORR custody).

173. ACLU, *After Obstruction by Trump Administration, Jane Doe Gets her Abortion*, *supra* note 172.

transportation to an abortion clinic.[174] When it came time to leave the shelter to effectuate the abortion, however, the ORR refused to allow Jane to be transported to the abortion clinic, claiming that such action would be contrary to the ORR directive.[175] The ORR contended that the only way Jane could access an abortion would be if she could identify an appropriate adult sponsor to pass agency vetting and take custody over her, or to voluntarily self-deport to the country from which she had initially fled, where abortion was illegal.[176]

The ORR tried other measures to dissuade Jane from having an abortion.[177] The agency forced Jane to undergo counseling at a religiously affiliated crisis pregnancy center and made her view a sonogram.[178] And without regard to the fact that Jane had previously informed the agency that her parents had abused her—indeed this was the reason she had fled her country of origin in the first place—the ORR informed Jane's parents of her desire to terminate her pregnancy without her consent.[179] The U.S. District Court for the District of Columbia granted Jane's request for injunctive relief, a decision which the ORR appealed all the way to the Supreme Court.[180] Eventually, after extensive litigation, and with the window for an abortion rapidly narrowing, Jane was able to secure her abortion.[181]

The ACLU, which represented Jane in her case, notes that Jane's case was not unique.[182] In the case of another pregnant teenager in ORR custody, ORR Director Scott Lloyd "personally visited a young woman who was seeking an abortion to attempt to dissuade her from her decision."[183] On another occasion, the ORR forcibly rushed another teenager to the emergency room after she

174. *Garza*, 304 F. Supp. 3d at 151.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*
181. ACLU, *After Obstruction by Trump Administration, Jane Doe Gets her Abortion*, *supra* note 172.
182. *Id.*
183. *Garza v. Hargan - Challenge to Trump Administration's Attempts to Block Abortions for Young Immigrant Women*, AM. CIV. LIBERTIES UNION (Aug. 8, 2018) [hereinafter ACLU, *Challenge to Trump Administration's Abortions Blocks for Immigrant Women*], https://www.aclu.org/cases/garza-v-hargan-challenge-trump-administrations-attempts-block-abortions-young-immigrant-women [https://perma.cc/X5WC-2LBM].

took an abortion-inducing pill, in attempts to prevent the abortion from taking place.[184] Even after the *Garza* litigation ended and the ORR changed its official policy on abortion obstruction, journalists reported that the ORR was still meticulously tracking the menstrual cycles of the girls in ORR custody in attempts to ascertain whether they might be pregnant.[185]

iii. Abortions in Detention in a Post-*Dobbs* World

Garza secured Jane Doe's access to an abortion in a time before *Dobbs*, when courts still recognized a federal constitutional right to abortion. Without a constitutional right to abortion, however, Jane likely would not have obtained the injunctive relief that secured her abortion. Jane's case also reveals another vulnerability present in the immigration system: abortion access for individuals in immigration detention is dependent on the policies and politics of the executive administration in power at any given time.

Under the Biden Administration, both ICE and the ORR ostensibly have had directives in place to facilitate abortion access for individuals held in ICE or ORR custody.[186] Under these directives, agencies have committed to facilitating the transfer of pregnant individuals confined in anti-abortion states to facilities in states that do allow abortions.[187] News outlets report that Acting ICE Director Tae Johnson issued a memorandum shortly after the *Dobbs* decision, instructing ICE officials to ensure that pregnant individuals in ICE custody had access to "full reproductive

184. *Id.*

185. Jennifer Wright, *The U.S. Is Tracking Migrant Girls' Periods to Stop Them from Getting Abortions*, HARPER'S BAZAAR (Apr. 2, 2019), www.harpersbazaar.com/culture/politics/a26985261/trumpadministration-abortion-period-tracking-migrant-women/ [https://perma.cc/632S-8N93].

186. *See* ADMIN. OF CHILD. & FAMS., OFF. OF REFUGEE RESETTLEMENT, FIELD GUIDANCE – REVISED NOVEMBER 10, 2022 (FIRST ISSUED OCTOBER 1, 2021) 1, 3 (2022) [hereinafter ORR GARZA FIELD GUIDANCE], https://assets.law360news.com/1548000/1548745/field-guidance-21.pdf [https://perma.cc/H54Y-LGD5] (RE: Field Guidance #21 – Compliance with Garza Requirements and Procedures for Unaccompanied Children Needing Reproductive Healthcare) (stating that the ORR will, "to the greatest extent possible," transfer pregnant unaccompanied minors to a state-licensed ORR facility in a state where the minor can lawfully obtain an abortion); Michelle Hackman, *ICE Says Immigrant Women in Custody Still Entitled to Abortion Services*, WALL ST. J., (July 12, 2022), https://www.wsj.com/articles/ice-says-immigrant-women-in-custody-still-entitled-to-abortion-services-11657639375 [https://perma.cc/4M4F-3UFD] (reporting that ICE Acting Director directed a memo to the head of ICE ERO after the *Dobbs* decision, advising that ICE may need to transfer detained pregnant individuals to facilities "when appropriate and practicable" to ensure abortion access).

187. ORR GARZA FIELD GUIDANCE, *supra* note 186, at 3.

healthcare."[188] This memorandum called for detention facilities to transfer detained pregnant individuals seeking abortions to facilities where abortion would be accessible "when appropriate and practicable," in accordance with "existing ICE policy."[189]

Though these media reports suggest that the Biden Administration prioritizes abortion access for detained pregnant immigrants, the circumstances surrounding the memorandum still leave cause for concern. Precisely what Acting Director Johnson meant by "existing ICE policy" regarding abortion-related travel is unclear. ICE has since provided no additional information as to what the transfer process would look like, what constitutes a "practicable" transfer, or, perhaps more importantly, what kind of transfer would be "impracticable" under current policy.

It is not clear that these directives ever translated to the actual facilitation of abortion access in detention centers, given that even when abortion was a recognized constitutional right, detained pregnant people nonetheless struggled to have their abortion decisions respected. But these directives point to a more concerning problem. Any such abortion directives are precarious stances that exist solely as products of agency policy. With the Supreme Court's elimination of the constitutional right to an abortion, and absent federal legislation or regulations cementing ICE and ORR's obligation to facilitate abortion-related transfers, these directives and detention standards are readily subject to change.

The precarity of Biden-era abortion-protective directives is particularly dire considering the current immigration detention landscape. As of August 2, 2024, the states with the most detained immigrants are Texas (13,448 detained), Louisiana (6,186 detained), California (2,596 detained), Arizona (2,457 detained), and Georgia (2,404 detained).[190] Of these five states, four of them––Texas, Louisiana, Georgia, and Arizona—have abortion-restrictive statutes on the books, with Texas and Louisiana having a total abortion ban in effect,[191] Georgia having a six-week abortion

188. Hackman, *supra* note 186. Journalists reported that they had reviewed this memorandum before reporting on it, *id.*, but to date, ICE has not made this memorandum readily available to the public.

189. *Id.*

190. *Immigration Detention Quickfacts*, *supra* note 139. *See Arizona Abortion Laws, supra* note 91 (announcing passing of the amendment to the Arizona Constitution to establish a fundamental right to an abortion through fetal viability); ARIZ. CONST. art. II, § 8.1.

191. *See* TEX. HEALTH & SAFETY CODE ANN. § 170A.002 (2022); LA. STAT. ANN. § 14:87.7 (2022).

ban in effect,[192] and Arizona having a fifteen-week abortion ban in effect.[193] As of August 2, 2024, ICE detained over 67% of its detained population in states in which abortion is either completely banned or is banned upon the detection of a fetal heartbeat.[194] Effectively, ICE's detention capacity is greatest in states where abortion access is completely or significantly restricted. Following Donald Trump's election victory, his administration's anticipated expansion of immigration detention and commitment to anti-abortion policies suggest a significant risk of agency directives that discourage or outright forbid the facilitation of abortions or detainee transfers to states where abortion remains legal, echoing the troubling policies at issue in *Garza*.

Concerningly, the immigration detention map continues trending towards confinement in abortion-restrictive states, as ICE increasingly builds or contracts with detention centers located in regions where abortion access has been severely restricted or is banned.[195] While detention facilities have multiplied in recent years in states like Louisiana,[196] ICE has closed facilities or terminated contracts with facilities in states where abortion is more accessible

192. *See* GA. CODE ANN. § 16-12-141 (2024) (criminalizing abortions of any fetus with a detectable heartbeat, generally understood to be six weeks into a pregnancy).

193. ARIZ. REV. STAT. ANN. § 36-23-2322 (2002); H.B. 2677, 2024 Leg. Sess., 2d Reg. Sess. (Arizona 2024) (repealing 1864 territorial statute instituting a total abortion ban); *see Arizona Abortion Laws*, *supra* note 91; ARIZ. CONST. art. II, § 8.1.

194. *Detention Facilities Average Daily Population*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, https://trac.syr.edu/immigration/detentionstats/facilities.html [https://web.archive.org/web/20240804164745/https://trac.syr.edu/immigration/detentionstats/facilities.html] [perma.cc/GM8C-M4BL].

195. *See* Rofé, *supra* note 141, at 907; Nomann Merchant, *Louisiana Becomes New Hub in Immigrant Detention Under Trump*, AP NEWS (Oct. 9, 2019), https://apnews.com/article/donald-trump-us-news-ap-top-news-ar-state-wire-immigration-c72d49a100224cb5854ec8baea095044 [https://perma.cc/4RA3-F2YY] (commenting that Louisiana had become an "epicenter for immigrant detention" under President Trump and noting how over the past year, eight Louisiana jails had started housing asylum-seekers and other migrants). Conversely, ICE has recently closed detention centers or ended contracts with facilities located in states where abortion is more accessible or protected by state law. *See, e.g.*, Brian Witte, *Maryland Lawmakers Override Immigrant Detention Bill Veto*, AP NEWS (Dec. 7, 2021), https://apnews.com/article/immigration-larry-hogan-maryland-redistricting-congress-bbe562a766a32a2436cfd245063b274c [https://perma.cc/Y6PY-GHW8]; Marc Fortier, *ICE to Close Detention Center in Massachusetts After Allegations of Mistreatment*, NBC BOS. (May 20, 2021), https://www.nbcboston.com/news/local/ice-to-close-detention-center-in-massachusetts-after-allegations-of-mistreatment/2385676/ [https://perma.cc/88ME-C9T2].

196. Merchant, *supra* note 195.

or protected by state law, such as Maryland[197] and Massachusetts.[198]

Immigration detention facilities systematically fail to uphold basic standards of reproductive justice, subjecting detained individuals to inadequate medical care, barriers to abortion access, and violations of their bodily autonomy. Because immigration detention keeps people in confinement, often in locations that are far removed from noncitizens' homes,[199] immigration detention also obstructs noncitizens' ability to parent their children with dignity and agency. Whether through obstructionist abortion policies or immigrant sterilization practices, immigration detention interferes with immigrants' rights to craft their own families and is an embodiment of the state's preoccupation with controlling immigrants' bodies and reproductive choices.[200] As the *Garza* and Irwin County Detention Center cases demonstrate, immigration detention policies can shackle pregnant immigrants to a lose-lose binary: remain in detention, where you may be effectively forced to give birth against your will and lose agency over your body and family life, or accept deportation and give up your claims to protection in the United States. In essence, the detention system's supreme control over the female and pregnant-capable body makes the pregnant body its own locus of immigration enforcement and control.

B. Post-Detention Surveillance and Conditions of Release

The sphere of ICE's control over immigrant bodies does not end with immigration detention. Noncitizens released from immigration detention, or subjected to so-called "Alternatives to Detention," also find that the conditions of such release can severely limit their ability to access abortion-related care and even render them especially vulnerable to prosecution in abortion-restrictive states.[201] These conditions of release can range from restrictions on geographic mobility (such as restrictions on interstate travel), in-

197. Witte*, supra* note 195.

198. Fortier, *supra* note 195.

199. Rofé, *supra* note 141, at 891.

200. *See* Rebouché, *supra* note 8**,** at 594; Messing et al., *supra* note 135, at 339; DOROTHY E. ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 56 (2d Vintage ed. 2017) (noting that the policies of forcing enslaved Black women to give birth and of reducing Black women's fertility share in common the belief that "Black women's childbearing should be regulated to achieve social objectives").

201. *See infra* Part III.B.ii.

person check-ins or visits, and home curfews, to electronic surveillance through the use of GPS ankle monitors, geo-locating phone services, and data-collecting apps.[202] By conditioning a person's release from detention on geographic restrictions, the government imposes another form of carceral control,[203] exerts additional power over the reproductive agency of noncitizens in the United States, and uniquely impacts their access to reproductive justice in the post-*Dobbs* legal landscape.

i. Conditions of Release

As noted above, the Department of Homeland Security exercises broad discretion in its immigration detention policies.[204] As part of this broad discretion, ICE has carte blanche to define the conditions under which a detained individual may be subjected to release. Conditions of release can vary widely, including: (a) release on an individual's own recognizance, whereby the released individual signs paperwork committing to appear for all scheduled immigration court hearings and to comply with specified conditions of release; (b) on an Order of Supervision, for individuals who have been ordered removed and are unlikely to be deported within the foreseeable future;[205] (c) through conditional parole, a form of permission to reside in the United States for a finite time for humanitarian reasons, such as a medical emergency;[206] and (d) after a payment of a bond of at least $1,500[207] (and up to the tens of

202. *See* U.S. DEPT. OF HOMELAND SEC., DHS/ICE/PIA-062, PRIVACY IMPACT ASSESSMENT FOR THE ALTERNATIVES TO DETENTION (ATD) PROGRAM (Mar. 30, 2023) [hereinafter PRIVACY IMPACT ASSESSMENT FOR ATD PROGRAM], https://www.dhs.gov/publication/dhsicepia-062-alternatives-detention-atd-program [https://perma.cc/BN4E-YZQX] (describing the structure of the program).

203. *See* Sarah Sherman-Stokes, *Immigration Detention Abolition and the Violence of Digital Cages*, 95 U COLO. L. REV. 219, 256–57, 263–66 (2024); Constantine Gidaris, *Rethinking Confinement Through Canada's Alternatives to Detention Program*, 1 INCARCERATION 1, 5 (2020).

204. *See* 8 U.S.C. § 1226(c); 8 C.F.R. § 236.1(b), (c), (g) (2024).

205. *See* PRIVACY IMPACT ASSESSMENT FOR ATD PROGRAM, *supra* note 202, at 3; AM. IMMIGR. COUNCIL, SEEKING RELEASE FROM IMMIGRATION DETENTION 2 (2019) [hereinafter AILA, SEEKING RELEASE FROM IMMIGRATION DETENTION], https://www.americanimmigrationcouncil.org/research/release-immigration-detention [https://perma.cc/DHV2-SNME].

206. *See* 8 U.S.C. § 1226(a)(2)(B).

207. 8 U.S.C. § 1226(a)(2)(A); *see* 8 C.F.R. § 236.1(g) (2024) (referencing the issuance of a Notice of Custody Determination, which determines the conditions of a detained individual's release, including the payment of an ICE-determined bond amount); *see* 8 C.F.R. § 1003.19 (2017) (establishing that certain instances, an immigration judge can hold a bond hearing, also called a Custody Redetermination Hearing, through which it can (re-)set the bond amount a detained person must pay to ICE in order to secure their release); 8 C.F.R. § 1236.1(d) (2022).

thousands of dollars, as there is no statutory maximum for immigration bonds).[208] Except for certain limited exceptions, the INA prohibits federal courts from overturning ICE's custody determinations and conditions of release.[209] ICE can generally revoke its custody determination and re-detain a noncitizen at will, especially if noncitizens violate their conditions of release.[210]

As alluded to above, ICE may predicate an individual's release from detention on the meeting of certain conditions.[211] While some of these conditions may be minimally invasive, such as the promise to appear to all scheduled immigration court hearings (something a noncitizen with a pending immigration court case is required to do anyway to avoid being ordered removed in their absence),[212] others seriously restrict a noncitizen's movement and conduct. For example, as a condition for release, ICE may forbid an individual from traveling outside of their state of residence, or forbid them from violating federal, state, or local laws,[213] without regard to

208. Sarah Betancourt, *Immigrants Pay Cripplingly High Bail Bonds to Be Released from Detention Across US*, THE GUARDIAN (Aug. 25, 2021), https://www.theguardian.com/us-news/2021/aug/25/immigrants-pay-high-bonds-released-detention-us [https://perma.cc/3CT9-S9R6]; *Immigration Court Bond Hearings and Related Case Decisions*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (2023) [hereinafter TRAC, *Immigration Court Bond Hearings and Related Case Decisions*], https://trac.syr.edu/phptools/immigration/bond/ [https://web.archive.org/web/20230603041518/https://trac.syr.edu/phptools/immigration/bond/] [https://perma.cc/8692-CQJ5].

209. *See* 8 U.S.C. § 1226(e); HILLEL R. SMITH, CONG. RSCH. SERV., IF1343, THE LAW OF IMMIGRATION DETENTION: A BRIEF INTRODUCTION 2 (2022), https://www.congress.gov/crs-product/IF11343 [https://perma.cc/UCF7-E4BD] (discussing that these exceptions generally relate to constitutional challenges to detention decisions, such as suits challenging the indefinite custody of nonremovable noncitizens after a removal order and the conditions of confinement in immigration detention).

210. 8 C.F.R. § 236.1(c)(9) (2022).

211. AILA, SEEKING RELEASE FROM IMMIGRATION DETENTION, *supra* note 205.

212. *See* 8 U.S.C. § 1229a(b)(5) (establishing that the consequences for failing to appear are severe; generally, an immigration judge can order a noncitizen removed in absentia if the noncitizen does not appear to any scheduled immigration court hearing); 8 U.S.C. § 1229(b)(5)(C), (b)(7), (e) (noting that an in absentia removal order can only be rescinded if an immigration judge grants a noncitizen's motion to reopen, which requires a showing of exceptional circumstances, a threshold that is difficult to meet).

213. *See, e.g.*, U.S. DEP'T OF HOMELAND SEC., U.S. IMMIGR. & CUSTOMS ENF'T, ICE FORM I-220B [hereinafter ICE FORM I-220B], https://www.ice.gov/doclib/detention/checkin/I_220B_OSUP.pdf [https://perma.cc/LF3Y-J587] (form that ICE issues to individuals released on an Order of Supervision, which provides a checklist of potential conditions of release which includes, among other conditions, restrictions on traveling outside of a

whether the individuals are actually prosecuted for said violations or whether the laws conflict with federal public policy (such as statutes that restrict medical or reproductive freedom). During the Biden administration, for example, ICE piloted a house arrest program for certain asylum-seeking families, which required individuals to remain at their stated residence from eleven p.m. to five a.m., or else risk re-arrest and detention.[214]

ii. Geo-Tracking and Electronic Surveillance as an "Alternative to Detention"

Under the guise of "assist[ing] enrolled noncitizens' compliance with release conditions,"[215] ICE established the "Alternatives to Detention" (ATD) program in 2004.[216] The ATD program acts a "supplemental requirement" for release, wherein released individuals are subject to more "intensive supervision through case management and electronic monitoring," than those who are otherwise released without having to enroll in the ATD

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specified geographic region "for more than 48 hours without first having notified this agency office of the dates and places, and obtaining approval from this agency office of such proposed travel" and requirements that noncitizens provide information under oath about their "circumstances, habits, associations, and activities and such other information as the agency considers appropriate"); U.S. DEP'T OF HOMELAND SEC., U.S. IMMIGR. & CUSTOMS ENF'T, ICE FORM I-220A [hereinafter ICE FORM I-220A], https://www.ice.gov/doclib/detention/checkin/I_220A_OREC.pdf [https://perma.cc/6USM-CJY3] (form ICE issues to individuals released on an Order of Release on Recognizance, which provides a checklist of potential conditions of release that includes, among other conditions, restrictions on being able to change one's place of residence "without first securing the written permission" from the agency, and refraining from "violat[ing] any local, State or Federal laws or ordinances").

214. *See Statement Regarding the Family Expedited Removal Management Program*, U.S. DEP'T OF HOMELAND SEC., U.S. IMMIGR. & CUSTOMS ENF'T (Aug. 2, 2023) [hereinafter ICE Statement Regarding the Family Expedited Removal Program], https://www.ice.gov/news/releases/statement-regarding-family-expedited-removal-management-program [https://perma.cc/7L49-MGSM]; Jason Fernandes, *Alternatives to Detention and the For-Profit Immigration System*, CTR. FOR AM. PROGRESS (June 9, 2017), https://www.americanprogress.org/article/alternatives-detention-profit-immigration-system/ [https://perma.cc/87P2-LZ3T]. The house arrest pilot program, which launched in Baltimore and Houston, only provided exceptions to accommodate work schedules of those authorized to work and "extraordinary circumstances." Ted Hesson, *U.S. to Try House Arrest for Immigrants as Alternative to Detention,* REUTERS (Feb. 8, 2022), https://www.reuters.com/world/us/us-try-house-arrest-immigrants-alternative-detention-2022-02-08/ [https://perma.cc/ZSP2-SDQN].

215. PRIVACY IMPACT ASSESSMENT FOR ATD PROGRAM, *supra* note 202, at 3.

216. U.S. GOV'T ACCOUNTABILITY OFF., ALTERNATIVES TO DETENTION: ICE NEEDS TO BETTER ASSESS PROGRAM PERFORMANCE AND IMPROVE CONTRACT OVERSIGHT 10 (2022) [hereinafter GAO Alternatives to Detention Report], https://www.gao.gov/assets/gao-22-104529.pdf [https://perma.cc/5R6X-HAP7].

program.[217] The ATD program has evolved significantly since its inception, in tandem with the growing capabilities of electronic surveillance systems. The current iteration of the ATD program, known as Intensive Supervision Appearance Program IV (ISAP), has been in effect since 2020 and is managed by contractor BI Incorporated, a subsidiary of The GEO Group, a private prison corporation most known for operating for-profit immigration detention centers.[218] Officers with ICE's Enforcement and Removal Operations determine whether individuals released from detention will be subject to the ISAP surveillance program on a case-by-case basis, weighing factors such as criminal and immigration history, family and community ties, status as a caregiver or provider, and general humanitarian or medical factors.[219] At minimum, noncitizens subject to ISAP surveillance must be released from DHS custody, be at least 18 years old, and be believed to be removable from the United States and in some stage of immigration proceedings.[220]

In reality, the term "Alternatives to Detention" operates as a misnomer, particularly when it comes to the ISAP program. Tellingly, ICE itself repeatedly emphasizes that ATD programs are not a "substitute for detention."[221] To leave or avoid imprisonment through immigration detention, noncitizens are required to sign forms warning that their freedom from detention is contingent on allowing the government to surveil them and even impose curfews:

> Your release is contingent upon your enrollment and successful participation in an ATD program as designated by the U.S.

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217. *Id.* at 8.

218. U.S. DEP'T OF HOMELAND SEC., IMMIGR. & CUSTOMS ENF'T, INTENSIVE SUPERVISION APPEARANCE PROGRAM FISCAL YEARS 2017, 2018, 2019, & 2020: FISCAL YEAR 2020 REPORT TO CONGRESS 2–3 (2022), https://www.dhs.gov/sites/default/files/2022-06/ICE%20-%20Intensive%20Supervision%20Appearance%20Program%2C%20FYs%202017%20-%202020.pdf [https://perma.cc/6QXP-ZMCP]; *see GEO Group History Timeline*, THE GEO GROUP, INC., https://www.geogroup.com/about-us/history-timeline/ [https://perma.cc/5466-EYVQ] (establishing that BI Incorporated was acquired by GEO in 2011).

219. PRIVACY IMPACT ASSESSMENT FOR ATD PROGRAM, *supra* note 202, at 9. *See* Sara DeStefano, *Unshackling the Due Process Rights of Asylum-Seekers*, 105 VA. L. REV. 1667, 1677–82 (2019) (providing more detail on the ISAP enrollment process).

220. *Alternatives to Detention Frequently Asked Questions*, U.S. DEP'T OF HOMELAND SEC., U.S. IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/atd-faq [https://perma.cc/7GQZ-LQQZ].

221. AUDREY SINGER, CONG. RSCH. SERV., R45804, IMMIGRATION: ALTERNATIVES TO DETENTION (ATD) PROGRAMS 6 (2019) https://www.congress.gov/crs-product/R45804 [https://perma.cc/T34B-7BEA]; *see also* Sherman-Stokes, *supra* note 203, at 265–66.

> Department of Homeland Security. As part of the ATD program, you will be subject to electronic monitoring and may be subject to a curfew. Failure to comply with the requirements of the ATD program will result in a redetermination of your release conditions or your arrest and detention.[222]

As the release forms indicate, ISAP monitors and controls individuals through the use of surveillance technology and case management.[223] In light of ICE's intense surveillance and control over released individuals' mobility and conduct,[224] some scholars have concluded that ISAP is not an "Alternative *to* Detention," but rather, is an "Alternative *Form of* Detention."[225]

ISAP surveils immigrants in a number of ways. ISAP case managers surveil individuals by requiring scheduled in-person or telephonic meetings.[226] Case managers can also monitor ISAP enrollees through the use of both scheduled and unannounced in-home visits, wherein contractors travel to individuals' homes, document information about any other individuals residing at the residence (citizens and noncitizens alike), and generally observe and record any information related to an individual's likelihood of future compliance.[227]

Using surveillance technology, ISAP contractors also track noncitizens through the use of telephonic reporting, GPS ankle

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222. *See* ICE FORM I-220B, *supra* note 213; ICE FORM I-220A, *supra* note 213.

223. *See* PRIVACY IMPACT ASSESSMENT FOR ATD PROGRAM, *supra* note 202, at 3; *see also* AM. IMMIGR. COUNCIL, ALTERNATIVES TO IMMIGRATION DETENTION: AN OVERVIEW 3–4 (2023) [hereinafter AILA, ALTERNATIVES TO IMMIGRATION DETENTION OVERVIEW], https://www.americanimmigrationcouncil.org/research/alternatives-immigration-detention-overview [https://perma.cc/DG68-6AJL].

224. Perhaps a more accurate description of the program would be "Alternatives to Release Without Surveillance," given that increased use of the ATD program has not coincided with a significant decrease in immigration detention numbers. *See* AILA, ALTERNATIVES TO IMMIGRATION DETENTION OVERVIEW, *supra* note 223, at 3–4; *see generally* ALY PANJWANI & HANNAH LUCAL, TRACKED AND TRAPPED: EXPERIENCES FROM ICE DIGITAL PRISONS (May 2022), https://notechforice.com/digitalprisons/ [https://perma.cc/79GH-C5K2]; Gidaris, *supra* note 203, at 5–6; Johana Bhuiyan, *'Constantly Afraid': Immigrants on Life under the US Government's Eye*, THE GUARDIAN (Mar. 8, 2022), https://www.theguardian.com/us-news/2022/mar/08/us-immigrants-isap-ice-bi-ankle-monitor [https://perma.cc/G5GX-ML5T].

225. Tosca Giustini, Sarah Greisman, Peter Markowitz, Ariel Rosen, Zachary Ross, Alisa Whitfield, Christina Fialho, Brittany Castle & Leila Kang, *Immigration Cyber Prisons: Ending the Use of Electronic Ankle Shackles*, ONLINE PUBLICATIONS, 21 (2021) (emphasis added), https://larc.cardozo.yu.edu/faculty-online-pubs/3 [https://perma.cc/2YEE-J35L].

226. *See* GAO Alternatives to Detention Report, *supra* note 216, at 14, 46; SINGER, *supra* note 221, at 7.

227. *See* GAO Alternatives to Detention Report, *supra* note 216, at 14, 46; SINGER, *supra* note 221, at 7–8.

monitors, and SmartLINK, a smartphone application.[228] ICE determines on a case-by-case basis which forms of technological surveillance it will use to monitor an individual.[229] The three electronic surveillance modalities vary, but all make use of geo-tracking[230] to determine the location of an individual at a given "check-in" moment.[231]

The telephonic reporting modality makes use of voice-recognition and geolocation technology, calling individuals periodically to verify their identities and locations.[232] At the time of check-in, the individual will receive a notification call from the telephone reporting system, and thereafter will have only a limited window of time in which to return the call through a pre-authorized phone.[233] The telephone reporting system then matches the voiceprint of the individual to the voiceprint stored at the moment of ISAP enrollment and maps a caller's geographic information.[234] The system will alert contractors if the ISAP enrollee fails to return a notification call within five minutes, if the caller returns the call from an unauthorized phone number, or if the voice captured does not match the voiceprint on file.[235]

The second surveillance modality, the GPS ankle monitor,[236] uses GPS technology, wireless internet, and mobile phone

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228. PRIVACY IMPACT ASSESSMENT FOR ATD PROGRAM, *supra* note 202, at 27; *see* AILA, ALTERNATIVES TO IMMIGRATION DETENTION OVERVIEW, *supra* note 223, at 3.

229. SINGER, *supra* note 221, at 7; *see* PRIVACY IMPACT ASSESSMENT FOR ATD PROGRAM, *supra* note 202, at 3.

230. *See Geotracking*, OXFORD ADVANCED LEARNER'S DICTIONARY, https://www.oxfordlearnersdictionaries.com/definition/english/geotracking?q=geo-tracking [https://perma.cc/VQ9Z-CTQM] (geo-tracking technology is technology that enables users to find the exact position of a subject "by obtaining data from a smartphone or other device").

231. GAO Alternatives to Detention Report, *supra* note 216, at 13.

232. *Id.*

233. *See* JUST FUTURES LAW & MIJENTE, ICE DIGITAL PRISONS 8 (2021), https://static1.squarespace.com/static/62c3198c117dd661bd99eb3a/t/62de8b2537755401fac9368d/1658751793934/ICE+Digital+Prisons+Report_FINAL+%281%29.pdf [https://perma.cc/8UB5-25B5].

234. *See id.*

235. *See id.* at 11; U.S. IMMIGR. & CUSTOMS ENF'T, ATD AND BOND BASICS FOR FOJCS JUVENILE AND FAMILY RESIDENTIAL MANAGEMENT UNIT 19 [hereinafter ICE ATD AND BOND BASICS FOR FOJCS POWERPOINT], https://immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2021-02/Remedies-ICE_PowerPoint_on_Bond_and_Alternatives_to_Detention.pdf [https://perma.cc/QH7F-9TJN].

236. Government agencies often use the term "ankle bracelet" euphemistically when referring to the GPS ankle monitor. Those wearing the GPS ankle monitors

technology to track an individual's location at any given moment.[237] These ankle monitors require regular charging and can only be removed or adjusted by ISAP contractors.[238] GPS ankle monitors can send alerts to contractors if an individual moves beyond the geographic limitations set as a condition of their release, the ankle monitor is not adequately charged, or if its anti-tampering feature detects that an individual has moved the ankle monitor in a way that suggests that they are trying to remove it.[239]

SmartLINK, the most recently implemented form of electronic surveillance, utilizes individuals' own phones to track them via a smartphone app.[240] Individuals selected for SmartLINK tracking must download the app upon release from ICE custody.[241] Individuals on SmartLINK use the smart phone app to check-in with ISAP caseworkers through the app, which uses facial recognition and geo-locating software to confirm individuals' identities and collect and provide their latitude and longitude points.[242] The SmartLINK app may also require released individuals to upload any requested documents, confirm scheduled appointments, and can provide updates on immigration court proceedings.[243]

ICE's use of ISAP surveillance has increased exponentially since ICE introduced the Alternatives to Detention program. From 2015 to 2020, the number of people surveilled through the ISAP program more than doubled, from 53,000 to 111,000.[244] From 2020 to 2023, the number of people surveilled nearly doubled again, up

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often use the term "shackle" instead. *Compare* GAO Alternatives to Detention Report, *supra* note 216 (using the terms "ankle bracelet" and "GPS tracking ankle bracelet" and refraining from the use of "GPS monitor" or "ankle monitor"), *with* PANJWANI & LUCAL, *supra* note 224, at 36 n.5 (noting that the individuals whose experiences are highlighted in the report used the terms "ankle shackle," "ankle monitor," and "GPS monitor" interchangeably).

237. GAO Alternatives to Detention Report, *supra* note 216, at 13.

238. AILA, ALTERNATIVES TO IMMIGRATION DETENTION OVERVIEW, *supra* note 223, at 4.

239. JUST FUTURES LAW & MIJENTE, *supra* note 233, at 11; GAO Alternatives to Detention Report, *supra* note 216, at 13.

240. For those who do not own their own phone, ICE will issue a device that is only capable of operating the SmartLINK app, which must be returned to ICE upon the completion of the ISAP program. *Alternatives to Detention*, U.S. DEP'T OF HOMELAND SEC., IMMIGR. & CUSTOMS ENF'T (2023) [hereinafter ICE, Alternatives to Detention], https://www.ice.gov/features/atd [https://perma.cc/Q8G8-DLM2].

241. SINGER, *supra* note 221, at 7; JUST FUTURES LAW & MIJENTE, *supra* note 233, at 8.

242. SINGER, *supra* note 221, at 7 n.53.

243. *Id.*

244. GAO Alternatives to Detention Report, *supra* note 216, at 17.

to over 209,000 as of July 1, 2023.[245] Of the three forms of electronic surveillance methods employed by ISAP, the use of the SmartLINK app has quickly become the most dominant form of electronic surveillance modality used.[246] In December 2020, ICE surveilled 32% of noncitizens in ISAP using GPS ankle monitors, 30% using telephonic reporting, and 35% using SmartLINK.[247] One year later, GPS ankle monitors were used in 19% of cases, telephonic reporting in 16% of cases, and SmartLINK in 63% of cases.[248]

iii. Concerns about Conditions of Release and Surveillance in a Post-*Dobbs* World

The fact that ICE may release a person from a carceral detention space does not mean that the agency cedes control over the location and movements of that person. For those residing in states that limit access to abortion care, the requirements that ICE imposes as conditions of release pose serious limitations on the ability to privately access reproductive healthcare for themselves and their family members. This is especially true for those who may have to traverse several state borders to access or help others access abortion-related care.

a. Geographic and Physical Limitations as Conditions of Release

As described above, ICE can impose restrictions on an individual's movements or require them to remain in an authorized

245. *Alternatives to Detention Table*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE [hereinafter TRAC, *Alternatives to Detention Table*], https://trac.syr.edu/immigration/detentionstats/atd_pop_table.html [https://web.archive.org/web/20230727192640/https://trac.syr.edu/immigration/detentionstats/atd_pop_table.html] [https://perma.cc/N4WG-XDZL]. Note that the Transactional Research Access Clearinghouse, a research organization that receives and validates data from ICE source documents it receives, has noted that some of the 2022 ATD figures ICE released to the organization were inaccurate. *See id.* This data error reflects a long history of error-ridden data reporting on behalf of ICE. *See ICE's Sloppy Public Data Releases Undermine Congress's Transparency Mandate*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE (Sept. 20, 2022) [hereinafter TRAC, *ICE's Sloppy Public Data*], https://trac.syr.edu/reports/696/ [https://web.archive.org/web/20220920181602/https://trac.syr.edu/reports/696/] [https://perma.cc/94ZC-MB76] (providing a list of ICE data releases that have contained verifiable data errors).

246. TRAC, *Immigration Court Bond Hearings and Related Case Decisions*, *supra* note 208.

247. *Id.*

248. *Id.*

region as a condition of release.[249] Release conditions that forbid unapproved out-of-state-travel can have the effect of making ICE the decisionmaker in questions of reproductive healthcare, as an individual's access to abortion-related care may be contingent on ICE's (timely) decision to allow interstate travel. In addition, if the request for interstate travel reveals an intent to engage in conduct that might violate state abortion laws—for example, if an individual in Idaho requests permission to leave the state to help a minor sibling access an abortion out of state—they may be admitting to an intent to violate state law, an act which itself could trigger a different violation of the conditions of release and could subject the individual to criminal prosecution if the information is shared with state law enforcement.[250] As discussed in Part II, such an admission or prosecution could likewise bring immigration consequences beyond re-confinement.

For those surveilled through GPS ankle monitors, the nature of life with an ankle monitor may likewise make long-distance travel within the United States practically impossible. In addition to accounts that the ankle monitors can cause physical and mental injury[251] and bring social stigma,[252] those subject to GPS ankle monitoring note that that they are required to charge their monitors frequently, at least twice a day.[253] Those on GPS ankle monitors

249. *See supra* Part III.B.i.

250. *See* IDAHO CODE § 18-623 (2023) *declared unconstitutional by* Matsumoto v. Labrador, 122 F.4th 787 (9th Cir. 2024).

251. *See* Johana Bhuiyan, *A US Surveillance Program Tracks Nearly 200,000 Immigrants. What Happens to Their Data?*, THE GUARDIAN (Mar. 14, 2022) [hereinafter Bhuiyan, *US Surveillance Tracking Program*], https://www.theguardian.com/us-news/2022/mar/14/us-immigration-surveillance-isap [https://perma.cc/EXT6-HD5N] (highlighting the experiences of a woman whose GPS ankle monitor overheated, leading to burning and bleeding skin); PANJWANI & LUCAL, *supra* note 224, at 12–34 (sharing experiences of individuals with GPS monitors who noted that the GPS ankle monitors caused the skin under the monitor to peel, bruising, foot pain, headaches, and anxiety, and interfered with sleep); *Shackling of Asylum Seekers Interferes With Due Process, Causes Serious Health Problems*, CENTRO LEGAL DE LA RAZA (May 27, 2016), https://www.centrolegal.org/shackling-of-asylum-seekers-interferes-with-due-process-causes-serious-health-problems/ [https://perma.cc/A735-KGFZ] (reporting on a complaint filed by fifteen asylum seekers with GPS ankle monitors).

252. PANJWANI & LUCAL, *supra* note 224, at 12–34 (noting that monitors were bulky and nearly impossible to hide, leading to bias from community members that assumed those with ankle monitors were criminals and even subjecting one individual to physical violence).

253. *Fact Sheet: Electronic Monitoring Devices as Alternatives to Detention*, NAT'L IMMIGR. F. (2019), https://immigrationforum.org/article/fact-sheet-electronic-monitoring-devices-as-alternatives-to-detention/ [https://perma.cc/U6SS-V5LG]; Julie Pittman, *Released into Shackles: The Rise of Immigrant E-Carceration*, 108 CALIF. L. REV. 587, 602–03 (2020).

must charge the monitors while they are still attached to their bodies by using a power cord that connects to a power outlet.[254] Practically speaking, this means that individuals cannot be away from electric outlets for longer than a few hours at a time without potentially triggering an alert that could lead to immigration enforcement action. A recent report on the effects of ISAP surveillance highlighted how the ankle monitors' limited battery life inhibits freedom of movement:

> They say 8 hours of battery life, but after 2 or 3 hours, the GPS starts emitting cries, and if you don't charge the battery quickly, you receive a call. If you do not answer, your relatives or friends will receive calls . . . a friend, a cousin, a nephew. It can be 4 AM, but that doesn't prevent them from calling. It weighs heavily.[255]

Other accounts corroborate that GPS ankle monitor batteries "start to die" and broadcast loud charging notifications, even after wearers have "just finished charging it."[256] As innocuous as a charging requirement may seem, an individual whose GPS ankle monitor requires charging every two or three hours may find it impossible to travel hundreds of miles through car, bus, train, or plane to access abortion care.

GPS ankle monitors also continuously track the movements of its wearers, alerting agencies when immigrants travel outside of "assigned zone[s]"[257] (generally, within eighty-five miles of an ISAP contractor office).[258] When combined with separate conditions that explicitly forbid individuals from traveling outside of an authorized zone, this tracking feature can materially limit the extent to which an individual can venture out of their geographic region to access healthcare. The following first-hand account, for example, describes how GPS ankle monitor surveillance interfered with a woman's attempts to secure healthcare for her child out-of-state:

> My son has many special medical needs and the restrictions with this shackle impeded me in being able to seek adequate medical care for him. I eventually found a hospital in Philadelphia that could treat him, but I report to ISAP in NYC. I had to ask for permission from ISAP to leave NYC, and even when they would give it, sometimes I'd be on the bus leaving NYC and the shackle would start to beep and everyone would

254. *Fact Sheet: Electronic Monitoring Devices as Alternatives to Detention*, *supra* note 253; Pittman, *supra* note 253.

255. PANJWANI & LUCAL, *supra* note 224, at 12.

256. *Id.*

257. PRIVACY IMPACT ASSESSMENT FOR ATD PROGRAM, *supra* note 202, at 14.

258. Pittman, *supra* note 253.

> look at me as though I were trying to escape from something, then the office would call me.[259]

Other wearers report that the ankle monitor will loudly play a pre-recorded message along with loud beeping, with one noncitizen recounting how his ankle monitor repeatedly announced, "You are exiting your master zone," when he traveled a few blocks outside of his authorized zone during his honeymoon.[260]

Consequences for traveling beyond the authorized zone can be dire. After Marco Tulio Hernandez, a noncitizen released on ISAP conditions, secured permission to travel beyond his authorized zone to visit an out-of-state relative, he was nonetheless arrested by ICE agents and re-incarcerated in an immigration detention facility for allegedly violating the conditions of his release by traveling outside of the authorized zone, notwithstanding ICE's pre-authorization and a four-year track record of ISAP compliance.[261]

Home visits and office appointments may also clash with the need to travel and access abortion-related care. Reports from people subjected to case manager home visits describe ISAP case managers who appear several hours late to their scheduled home visits and conduct unannounced visits.[262] A person whose freedom is predicated on being available for unannounced visits cannot plan for and execute travel that requires them to be absent from home for hours or days.

b. Geo-Tracking, Data Collection, and Privacy Concerns

Since the *Dobbs* decision, advocates, scholars, and even tech workers have sounded the alarm to the dangers that data-collecting devices, websites, programs, and apps pose for those seeking to access comprehensive reproductive healthcare.[263] In an economy

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259. PANJWANI & LUCAL, *supra* note 224, at 13.

260. Pittman, *supra* note 253, at 602.

261. Fernandes, *supra* note 214.

262. *Id.*; PANJWANI & LUCAL, *supra* note 224, at 12–34.

263. *See, e.g.*, Elizabeth E. Joh, *Dobbs Online: Digital Rights as Abortion Rights*, FEMINIST CYBERLAW (Amanda Levendowski & Meg Leta Jones, eds., forthcoming 2023) (manuscript at 3–4) https://papers.ssrn.com/abstract=4210754 [https://perma.cc/ZYT7-SNP7]; Michele Estrin Gilman, *Periods for Profit and the Rise of Menstrual Surveillance*, 41 COLUM. J. OF GENDER & L. 100, 102–05 (2021); Joseph Cox, *Data Broker Is Selling Location Data of People Who Visit Abortion Clinics*, VICE (May 3, 2022), https://www.vice.com/en/article/m7vzjb/location-data-abortion-clinics-safegraph-planned-parenthood [https://perma.cc/RE54-M88T]; Rina Torchinsky, *How Period Tracking Apps and Data Privacy Fit into a Post-*Roe v. Wade *Climate*, NPR (Jun. 24, 2022), https://www.npr.org/2022/05/10/1097482967/roe-v-wade-supreme-court-abortion-period-apps [https://perma.cc/6YHN-C76R]; Lil

where technology access is commonly paid for not through fees, but through agreements to share vast amounts of personal information, social media platforms, search engines, smart appliances, and smart phone apps continuously collect, store, and sell user information in ways that are not always obvious to the consumer.[264] With the advent of the *Dobbs* decision, advocates warn that law enforcement agencies in states criminalizing abortion might acquire data collected by websites, apps, and devices, and use this data as evidence in abortion-related prosecutions.[265] As scholar Elisabeth E. Joh notes, "[W]hen abortion becomes a crime, the massive amounts of data we produce every day become criminal evidence."[266]

As described previously, immigration agencies already exert control over immigrants through an enforcement system that increasingly relies on the surveillance, data-collection, and tracking of immigrants as part of what Professor Anil Kalhan has dubbed "the immigration surveillance state."[267] Given that all ISAP tech modalities engage in some form of geo-tracking, and that some modalities, such as the SmartLINK app, may have the capacity to capture and store vast troves of personal information, the potential use of immigrants' ISAP-collected data for abortion-related prosecution or abortion-related civil litigation (such as for bounty-hunter civil suits in states like Texas[268]) merits scrutiny. Because agency policy can change with future administrations, and

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Kalish, *Meet Abortion Bans' New Best Friend: Your Phone*, MOTHER JONES (Feb. 16, 2022), https://www.motherjones.com/politics/2022/02/meet-abortion-bans-new-best-friend-your-phone [https://perma.cc/YQ4E-PAPG]; Daly Barnett, *Digital Security and Privacy Tips for Those Involved in Abortion Access*, ELEC. FRONTIER FOUND. (2022), https://www.eff.org/deeplinks/2022/05/digital-security-and-privacy-tips-those-involved-abortion-access [https://perma.cc/7244-NAJU]; Gerrit De Vynck, Caroline O'Donovan, Nitasha Tiku & Elizabeth Dwoskin, *Abortion Is Illegal for Millions. Will Big Tech Help Prosecute It?*, WASH. POST (Jun. 30, 2022), https://www.washingtonpost.com/technology/2022/06/29/google-facebook-abortion-data/ [https://perma.cc/V82Q-UXR3].

264. *See* Aziz Z. Huq & Rebecca Wexler, *Digital Privacy for Reproductive Choice in the Post-*Roe *Era*, 98 N.Y.U. L. REV. 555, 569–72 (2023).

265. *See* Kalish, *supra* note 263; Barnett, *supra* note 263; Cox, *supra* note 263. For a detailed discussion about the legal mechanisms that states could employ to further abortion-related prosecutions and their implications, *see* Huq & Wexler, *supra* note 264.

266. Joh, *supra* note 263, at 4.

267. Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 27 (2014).

268. *See* TEX. HEALTH & SAFETY CODE ANN. § 171.208 (West 2023) (allowing any private citizen to bring a civil lawsuit against anyone who performs, aids, or abets an abortion after a fetal heartbeat is detected and providing for injunctive relief, attorneys' fees, and damages of at least $10,000 for each illegal abortion performed).

contractual agreements between ICE and BI, Inc. can be amended, an assessment of ISAP's potential risks vis-à-vis abortion access should include analysis of ICE's current practices and of the potential capabilities and future uses of ISAP technologies, including potential capabilities that go beyond current use. Notwithstanding ICE's assertions that ISAP devices and technology only engage in limited location tracking and data storage,[269] there are already indications that ISAP technology is being used for purposes beyond simply ensuring immigrants' compliance with terms of release.[270]

GPS ankle monitors, by design, continuously track the movements of the immigrants on which they are affixed. To do this, the device's transmitter stores a person's GPS coordinates and uploads the amassed coordinates to a monitoring database every four hours.[271] In addition, the GPS ankle monitor allows ICE to obtain "an immediate and accurate one-time location fix in real time."[272] Through the GPS ankle monitor, ICE can track the latitude and longitude coordinates through "global positioning triangulation via satellites, cell tower triangulation via cell towers, and Wi-Fi positioning technologies,"[273] and obtain "'turn-by-turn directions' to the location of the device."[274] According to the Department of Homeland Security, ISAP case managers "can view, search, and review the participants' historical ICE ATD data via the ISAP ATD case management system by retrieving the participants' record at any time."[275] ICE has not disclosed how, how much of, or for how long the GPS ankle monitor tracking information is stored, raising concerns that a monitored person's movement history information can be subpoenaed as evidence for criminal prosecutions or civil suits.

While ICE claims that, as a matter of general practice, it does not continuously monitor the location of those on GPS ankle monitors,[276] ICE has already used GPS ankle monitor location data in immigration enforcement and criminal law enforcement operations, such as it did in the 2019 investigation of Koch Foods,

269. ICE, *Alternatives to Detention*, supra note 240; *BI SmartLINK® Privacy Policy*, BI INC., https://bi.com/bi-smartlink-privacy/ [https://perma.cc/6QZW-EJL9].

270. *See* Bhuiyan, *US Surveillance Tracking Program*, *supra* note 251.

271. JUST FUTURES LAW & MIJENTE, *supra* note 233, at 8.

272. *Id.*

273. PRIVACY IMPACT ASSESSMENT FOR ATD PROGRAM, *supra* note 202, at 14.

274. JUST FUTURES LAW & MIJENTE, *supra* note 233, at 8.

275. *Id.*

276. *See id.* at 14 n.20.

Inc.,[277] which led to the largest workplace ICE raid in U.S. history to date.[278] In an application for the search warrant, an ICE HSI agent explicitly referred to the historical GPS coordinates recorded from the GPS ankle monitors of certain Koch employees who wore the monitors pursuant to their release on the ISAP program.[279] The agent's affidavit revealed how extensively ICE surveils those on GPS ankle monitors, as well as how readily the agency can retrieve the information captured by these monitors to pursue unrelated investigations.[280] For the three GPS-tracked individuals featured in the affidavit, the agent described the precise time that each individual arrived at the Koch Foods plant on a given day, how long she[281] remained at the plant, the precise time that she left the plant, and where she went after leaving the plant.[282] Even though the GPS-monitor data was ostensibly intended to further the *criminal* investigation of the noncitizens' *employer*, and was not intended solely for immigration enforcement purposes, the raid led to the arrest of approximately 680 noncitizens for immigration-related infractions.[283]

Likewise, SmartLINK's data-collecting capabilities have alarmed advocates and privacy experts, who question the amount and kinds of information the smartphone app can capture, store, and share.[284] Legislators have expressed "serious concerns" over SmartLINK's potential ability to "track individuals in real-time and collect and repurpose the data" on noncitizens and U.S. citizens, as

277. *See* Affidavit by Homeland Security Investigations Special Agent Anthony Todd Williams in Support of Application for Search Warrant, *In re* Koch Foods Mississippi, No. 3:19-mj-00205-LRA (S.D. Miss. Aug. 5, 2019) [hereinafter Affidavit by Special Agent Williams], https://www.ice.gov/sites/default/files/documents/Document/2019/kochfoods-319mj.pdf [https://perma.cc/M262-GFFU].

278. Miriam Jordan, *ICE Arrests Hundreds in Mississippi Raids Targeting Immigrant Workers*, N.Y. TIMES (Aug. 7, 2019), https://www.nytimes.com/2019/08/07/us/ice-raids-mississippi.html [https://perma.cc/AGV3-5T2Y].

279. *Id.* The search warrant application sought judicial authorization for a workplace raid and asserted that Koch Foods was unlawfully employing certain noncitizens in violation of federal law. *Id.*

280. *Id.*

281. All of the GPS-tracked individuals described in the affidavit were women.

282. Affidavit by Special Agent Williams, *supra* note 277, at 12, 14–15.

283. *See* Jordan, *supra* note 278.

284. *See* Jake Wiener, *New ICE Privacy Impact Assessment Shows All the Ways the Agency Fails to Protect Immigrants' Privacy*, ELECTRONIC PRIV. INFO. CTR. (Apr. 20, 2023), https://epic.org/new-ice-privacy-impact-assessment-shows-all-the-way-the-agency-fails-to-protect-immigrants-privacy/ [https://perma.cc/F8MG-7LEV].

well as concerns over BI, Inc.'s vague privacy policies.[285] On its website, ICE contends that BI SmartLINK "does not access" a phone's call history, contact information, "text messages made outside of the SmartLINK app," "location data outside of single data points gathered through the application at login or pre-scheduled check-in times," or other personal data from personally owned phones.[286]

Advocates, privacy experts, and even former BI, Inc. employees question the reliability of these statements, however.[287] As privacy watchdog Jake Wiener has recently noted, ICE has yet to mention, either in its 2023 Privacy Assessment report or in any other statement, whether any party has tested BI, Inc.'s claims about the technical surveillance limitations of the SmartLINK app.[288] Recent reporting similarly calls into question whether SmartLINK truly limits its data collection as claimed. For example, *The Guardian* has reported that BI case managers have instructed ISAP enrollees "to always keep their phones on so the company could track them."[289] Certain immigrants interviewed by the publication reported that their case managers told them that the app "was always running," that they had to keep location services on at all times, and that they could not let their phone batteries die.[290] When a reporter asked ICE why SmartLINK participants were told that location services always had to remain on, ICE did not respond.[291]

On May 11, 2023, the federal government implemented the "Circumvention of Lawful Pathways" rule, which requires that asylum-seekers at the U.S.-Mexico border download and use a smartphone app called CBP One to schedule a screening interview.[292] Failure to use CBP One results in a rebuttable

285. Letter from Reps. Rashida Tlaib, Jesus G. Garcia, Ayanna Pressley, et al., to Alejandro Mayorkas, Sec'y, Dep't of Homeland Sec. (Feb. 22, 2022), https://epic.org/wp-content/uploads/2022/02/ICE-ISAP-Congressional-Letter_final.pdf [https://perma.cc/M7JH-CGU3].

286. ICE, *Alternatives to Detention*, *supra* note 240.

287. *See* Bhuiyan, *US Surveillance Tracking Program*, *supra* note 251 ("But former BI case managers said they were able to access the images and location data that immigrants had uploaded to the app for their weekly check-ins in previous months.").

288. Wiener, *supra* note 284.

289. Bhuiyan, *US Surveillance Tracking Program*, *supra* note 251.

290. *Id.*

291. *Id.*

292. *CBP One ™ Mobile Application*, U.S. CUSTOMS & BORDER PROT. (Jan. 21, 2025), https://www.cbp.gov/about/mobile-apps-directory/cbpone [https://perma.cc/W28P-TBCS].

presumption of asylum ineligibility.[293] Like the SmartLINK app, the CBP One app uses geolocation and facial recognition technology to keep track of asylum-seekers at the border, which the Department of Homeland Security itself admits could be used "to conduct surveillance on travelers or to track travelers' movements."[294] Human rights advocates, privacy experts, and even the United Nations have raised similar concerns to those raised in the case of SmartLINK, alerting that the CBP One's privacy policy does not fully disclose the contractors and agencies with which user information will be shared; that use of CBP One is functionally involuntary; and that the conditions under which certain technologies are engaged are not clearly delineated.[295] Undeterred, the Department of Homeland Security continues piloting new immigrant surveillance technologies like VeriWatch, a geo-tracking smart watch.[296]

Precisely understanding the extent to which BI, Inc. technology can collect monitored noncitizens' smart-tech data becomes particularly crucial in a post-*Dobbs* world. Any information collected by this technology could presumably be requested for a criminal prosecution or civil suit through discovery or a court subpoena. Under the upcoming Trump administration, which has signaled a hardline stance on immigration and reproductive rights, the risks of such data being weaponized against noncitizens—including in abortion-related criminal investigations or

293. Circumvention of Lawful Pathways, 88 Fed. Reg. 31314 (May 16, 2023) (to be codified at 8 C.F.R. pts. 208, 235, 1003, 1208, 1235).

294. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR CBP ONE™ 9 (2021), https://www.dhs.gov/publication/dhscbppia-068-cbp-one-mobile-application [https://perma.cc/9REL-87WY]. The Department of Homeland Security assures that geolocation information is only used when the app user "pushes the submit button" when submitting the requisite information. *Id.* at 10.

295. *See, e.g.*, AMNESTY INT'L, CBP ONE: A BLESSING OR A TRAP? 45–47 (2024), https://www.amnesty.org/en/documents/amr51/7985/2024/en/ [https://perma.cc/K7LY-9VUV]; E. TENDAYI ACHIUME, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMMISSIONER, RACIAL AND XENOPHOBIC DISCRIMINATION AND THE USE OF DIGITAL TECHNOLOGIES IN BORDER AND IMMIGRATION ENFORCEMENT 16 (2021), https://www.ohchr.org/en/documents/thematic-reports/ahrc4876-racial-and-xenophobic-discrimination-and-use-digital [https://perma.cc/AAK8-3SGE]; *EPIC Comments to CBP and OMB on CBP One Expansion for Biometric Exit*, ELEC. PRIV. INFO. CTR. (Apr. 26, 2024), https://epic.org/documents/epic-comments-to-cbp-and-omb-on-cbp-one-expansion-for-biometric-exit/ [https://perma.cc/JBP6-R96W].

296. *ICE Begins Testing Wrist-Worn GPS Monitoring Technology*, U.S. IMMIGR. & CUSTOMS ENF'T (Apr. 24, 2023), https://www.ice.gov/news/releases/ice-begins-testing-wrist-worn-gps-monitoring-technology [https://perma.cc/ZLJ3-NZ9E].

immigration enforcement proceedings—are significantly heightened.

C. The Immobilizing Effect of Spatialized Immigration Enforcement

Federal and state immigration enforcement policies, particularly those operating within border zones and through spatialized enforcement programs, immobilize noncitizens and exacerbate their vulnerability. The extensive network of checkpoints operated by Customs and Border Patrol (CBP) near U.S. borders, for example, weaponizes transportation routes and creates a unique form of geographic isolation for unauthorized noncitizens, trapping them in border areas and limiting their access to reproductive care.[297] Additionally, states have increasingly taken active roles in immigration enforcement, especially through cooperative programs that enable state and local law enforcement to perform federal immigration duties, creating a patchwork of regions that pose risk for transversing immigrants.[298] These programs often lead to racial profiling and further restrict the movement of noncitizens, posing significant challenges to their reproductive rights and overall wellbeing. Together, these immigration enforcement policies compound the oppressive effects of restrictive state abortion policies on the reproductive autonomy and health of noncitizens in the United States.

i. Immobilization Through Border-Zone Checkpoints

The INA authorizes immigration officials to interrogate individuals and search vehicles for potentially removable individuals within "a reasonable distance" from the border, defined in regulation as one hundred air miles from an external boundary of the United States.[299] As an exercise of this authority, Customs and Border Patrol (CBP) officers operate a web of checkpoints near U.S. border areas, with the goals of intercepting individuals suspected of being present in violation of immigration laws and preventing them from traveling to the interior of the United

297. *See infra* Part III.C.i.

298. *See infra* Part III.C.ii.

299. 8 U.S.C. § 1357(a)(3); 8 C.F.R. § 287.1(a)(1) (2025). The regulations define an external boundary as "the land boundaries and the territorial sea of the United States extending 12 nautical miles from the baselines of the United States determined in accordance with international law." 8 C.F.R. § 287.1(a)(1) (2025).

States.[300] These border-zone checkpoints trap certain unauthorized noncitizens in a form of geographic isolation under the threat of detection and deportation.

CBP generally positions its checkpoints along major highways and secondary roads in the interior of the United States, generally between twenty-five and one-hundred miles inland from the northern and southern U.S. borders.[301] Border Patrol officials strategically place these checkpoints far enough inland to detect individuals traveling to the interior of the United States after having entered the United States without inspection, but close enough to the border to siphon off access to major population centers near the border.[302] Between 2016 and 2020, CBP operated seventy-two checkpoints along the southwest U.S. border; of these checkpoints, fifty-eight operated during all five fiscal years.[303]

Checkpoints can be permanent or temporary in nature. Permanent checkpoints consist of brick-and-mortar structures that impede traffic and are situated in terrain that limits a vehicle's ability to circumvent the checkpoint.[304] CBP generally places permanent checkpoints near the convergence of significant highways that lead away from the border.[305] Permanent checkpoints are typically equipped with surveillance technology, such as electric sensors, video surveillance, license plate readers, closed circuit televisions, and other remote surveillance capabilities.[306] On the other hand, temporary (or "tactical") checkpoints are strategically placed checkpoints that lack permanent infrastructure, but otherwise operate like permanent checkpoints.[307]

At checkpoints, CBP agents may stop a vehicle, question its occupants about their immigration status, visually inspect the

300. U. S. GOV'T ACCOUNTABILITY OFF., BORDER PATROL: ACTIONS NEEDED TO IMPROVE CHECKPOINT OVERSIGHT AND DATA 6 (2022) [hereinafter GAO Border Patrol Checkpoint Report], https://www.gao.gov/products/gao-22-104568 [https://perma.cc/8VEX-46RQ].

301. *Id.*

302. *Id.* at 6–7.

303. *Id.* at 9.

304. Kate Huddleston, *Border Checkpoints and Substantive Due Process: Abortion Rights in the Border Zone*, 125 YALE L. J. 1746, 1752 (2016); *see also* U.S. v. Martinez-Fuerte, 428 U.S. 543, 553 (1976) (summarizing Border Patrol's requisites for effective physical checkpoints).

305. GAO Border Patrol Checkpoint Report, *supra* note 300, at 6–7.

306. Huddleston, *supra* note 304, at 1752; GAO Border Patrol Checkpoint Report, *supra* note 300, at 13.

307. GAO Border Patrol Checkpoint Report, *supra* note 300, at 11.

exterior, and use drug- and human-detection canines to sniff outside of the vehicle.[308] Upon completing this inspection, agents may refer the vehicle for a "secondary" inspection, in which agents question individuals further and may use fingerprint readers and iris scanners to collect biometric data from the vehicle's occupants.[309] If agents have probable cause of an immigration violation or a criminal offense, agents may also search vehicles' interiors during a secondary inspection.[310]

While the Fourth Amendment protects individuals from the government's unreasonable searches and seizures of their persons and property, the Supreme Court has endorsed border policing practices that would otherwise be considered Fourth Amendment violations in other contexts.[311] In *United States v. Martinez-Fuerte*, the Court held that the Fourth Amendment permits immigration officials to operate immigration checkpoints in the interior of the country without a warrant.[312] Although use of non-immigration checkpoints, like DUI checkpoints, generally requires officers to provide justification for referring drivers to more intensive follow-up inspections,[313] the Court held that the Fourth Amendment does not require immigration officials to articulate reasonable suspicion that the occupants of a vehicle are removable or are committing any crimes, or to otherwise provide *any* justification for the referral.[314] As such, government agents have "wide discretion" at checkpoints,[315] and can refer vehicles and their occupants to secondary inspection for additional questioning and biometrics data collection for any reason at all, including reasons grounded in racial or ethnic profiling.[316] For this reason, scholars have referred to these border zones as "anomalous zones," spaces "in which certain

308. *Id.* at 7.

309. *Id.* at 13.

310. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973).

311. *See* Jennifer M. Chacon, *Border Exceptionalism in the Era of Moving Borders*, 38 FORDHAM URB. L.J. 129, 134 (2010); Alameida-Sanchez v. United States, 413 U.S. 266 (1973); United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

312. United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

313. *See* Chacon, *supra* note 311, at 142 (citing Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990)).

314. *Martinez-Fuerte*, 428 U.S. at 547.

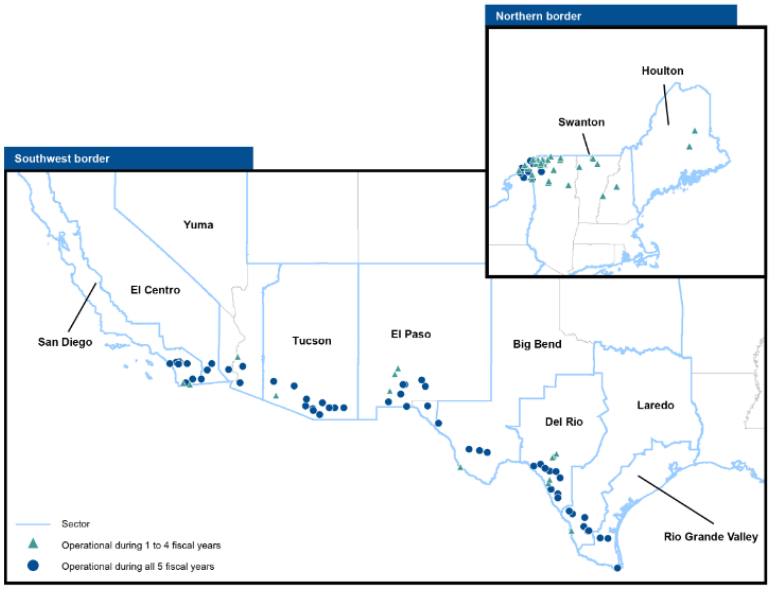
315. *Id.* at 564.

316. *See id.* at 563 ("[E]ven if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation."); *see also* César Cuauhtémoc García Hernández, *La Migra in the Mirror: Immigration Enforcement and Racial Profiling on the Texas Border*, 23 NOTRE DAME J.L., ETHICS, & PUB. POL'Y 167, 180–84 (2009) (discussing the broad discretion granted to Border Patrol agents at checkpoints which facilitate racial profiling); Chacon, *supra* note 311, at 142.

legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended."[317]

Although the government operates immigration checkpoints along the northern and southern border, the majority of checkpoints operate in the CBP sectors located in California, Arizona, New Mexico, and Texas—the states bordering Mexico.[318] With little to check immigration officials' power during these checkpoints, unauthorized immigrants who live between the southern border and an immigration checkpoint find themselves trapped in a narrow sliver of land, unable to travel further north to other parts of the country without risking detection, detention, and removal.[319] A map published by the Government Accountability Office in 2020,[320] which depicts the locations of checkpoints operating between Fiscal Years 2016 and 2020, illustrates the confinement of those stuck between the border and a checkpoint:

Figure 2: Border Patrol Sector and Checkpoint Locations, Fiscal Years 2016 through 2020



Source: GAO analysis of information from U.S. Border Patrol sectors. | GAO-22-104568

317. Huddleston, *supra* note 304, at 1754 (quoting Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201 (1996)).

318. GAO Border Patrol Checkpoint Report, *supra* note 300, at 9–10. Arrests at southern border checkpoints overwhelmingly outnumber those along the northern border; of all checkpoint apprehensions tracked between fiscal year 2016 and 2020, less than 1% of those took place in northern border sectors. *Id.* at 22.

319. *See* Huddleston, *supra* note 304, at 1752; Gomez, *supra* note 128, at 94–95.

320. GAO Border Patrol Checkpoint Report, *supra* note 300, at 10.

Scholars and advocates have long sounded the alarm about the deleterious health effects that checkpoint-induced confinement can have on those unable to travel beyond immigration checkpoints, including harms affecting border-zone residents' access to reproductive care.[321] Years before *Dobbs* eliminated the substantive due process right to abortion, for example, Kate Huddleston described how Texas's laws restricting abortion led to the closures of many abortion clinics and increased the distance that many Texas residents had to travel to access surviving abortion clinics.[322] Huddleston recognized that the border zone—and the spatially selective immigration enforcement actions that operate within it—trapped unauthorized immigrants between the border and immigration checkpoints, who had to risk their liberty in the United States to travel beyond the immigration checkpoints to access their fundamental rights to an abortion.[323]

Madeline M. Gomez used the framework of intersectional subordination to illustrate how Texas's abortion-restricting legislation and federal border-zone immigration enforcement worked together to enact a particular form of reproductive violence against undocumented Latinas in Texas.[324] Gomez noted that immigration enforcement at border checkpoints, together with abortion-restrictive legislation that drastically decreased the number of abortion clinics in the border zone, has led many undocumented women to rely solely on whatever medical facilities exist within the narrow region between the checkpoints.[325] These checkpoints have the practical effect of forcing women to forgo reproductive healthcare, which has not only rendered abortion care inaccessible, but has also resulted in higher rates of contraceptive failure, incidents of untreated sexually transmitted infections, maternal mortality, and family separation.[326]

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321. *See, e.g.*, Huddleston, *supra* note 304; Gomez, *supra* note 128; Mary Giovagnoli, *Overturning Roe Creates More Barriers for Asylum-Seekers and Immigrants*, MS. MAG. (May 24, 2022), https://msmagazine.com/2022/05/24/abortion-immigration-laws-roe-v-wade-asylum-women/ [https://perma.cc/VP6Q-ZLN8]; Sofia Ahmed, *Abortion Worries Heightened for Unauthorized Immigrants in the U.S.*, REUTERS (Jul. 5, 2022), https://www.reuters.com/world/us/abortion-worries-heightened-unauthorized-immigrants-us-2022-07-05/ [https://perma.cc/67VU-P3CR]; Manny Fernandez, *Checkpoints Isolate Many Immigrants in Texas' Rio Grande Valley*, N.Y. TIMES (Nov. 23, 2015), https://www.nytimes.com/2015/11/23/us/checkpoints-isolate-many-immigrants-in-texas-rio-grande-valley.html [https://perma.cc/J8ZB-M5CF].

322. Huddleston, *supra* note 304, at 1747–50.

323. *Id.* at 1761–93.

324. Gomez, *supra* note 128, at 89–104.

325. *Id.* at 99–108.

326. *Id.* at 108–09.

The predicament for those trapped in the immigration checkpoint web has only worsened since the *Dobbs* decision. At the drafting of this article, two of the four states with regular immigration checkpoints, Texas and Arizona, have enacted legislation that outlaws abortion care early in a pregnancy, with Arizona outlawing abortion after fifteen weeks of pregnancy[327] and Texas outlawing abortion outright.[328] With these more restrictive policies in effect, undocumented pregnant immigrants, particular those in the state of Texas, have no options for accessing safe abortion care absent leaving the state, something they cannot freely do without risking arrest and deportation. The risk of becoming ensnared by the immigration checkpoint system is not theoretical. From fiscal year 2016 to fiscal year 2020, almost 65% (23,180) of the 35,742 checkpoint apprehensions took place in two Texas sectors, the Laredo and Rio Grande Valley sectors.[329]

ii. State Involvement in Specialized Immigration Enforcement

Thus far, this paper has focused on federal laws and policies that restrict immigrant movement in ways that interfere with reproductive freedom. Increasingly, however, states have taken more active roles in immigration enforcement, through cooperative agreements with federal immigration agencies,[330] or by involving the state in migration management through state laws that punish those who transport or host unauthorized immigrants within the state.[331] While the constitutionality and enforceability of some of these measures continues to be contested, the resulting chilling effect that these measures have, both on immigrants and on those who would otherwise be inclined to assist them, poses serious barriers for immigrants' ability to travel through abortion-restrictive zones and increases the risk that traveling for reproductive healthcare services could lead to arrest, detention, and deportation.

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327. *See* ARIZ. REV. STAT. ANN. § 36-2322 (2022). *But see supra* note 91 (regarding Arizona's constitutional amendment enshrining abortion rights into the Arizona Constitution after the state passed a fifteen-week abortion ban).

328. TEX. HEALTH & SAFETY CODE ANN. § 170A.004 (West 2023).

329. GAO Border Patrol Checkpoint Report, *supra* note 300, at 21.

330. *See infra* Part III.C.ii.a.

331. *See infra* Part III.C.ii.b.

a. Risks of Traversing 287(g) Jurisdictions to Access Abortion Care

Generally speaking, the constitutional law doctrine of federal preemption prevents states from regulating migration and from creating and enforcing immigration law.[332] The INA does, however, authorize certain state and local involvement in the enforcement of federal immigration law through cooperative enforcement agreements.[333] To participate in these cooperative enforcement arrangements, colloquially known as "287(g) programs" after the provision of the INA that provides for them, state and local law enforcement agencies enter into formal written memoranda of agreement, commit designated officers to training on federal immigration law and enforcement practices, and answer to the Secretary of the Department of Homeland Security on matters of federal immigration enforcement.[334] The memoranda of understanding generally set forth the specific eligibility standards and training requirements for the 287(g) designated law enforcement officers and describe the immigration enforcement duties that said officers are authorized to carry out.[335] Pursuant to the INA, memoranda of agreement may authorize 287(g) designated law enforcement officers to perform the functions of federal immigration officers in relation to the investigation, apprehension, or detention of noncitizens in the United States, including the issuance of immigration detainers[336] and the transportation of noncitizens to detention centers across state lines.[337] In short, the 287(g) program enables ICE to expand its footprint to any jail or

332. *See* Arizona v. United States, 567 U.S. 387, 402–10 (2012). The Supreme Court ruled that three provisions of the sweeping Arizona statute were federally preempted: (1) a provision that made it a crime under state law to be unlawfully present in the United States, (2) a provision that made it a crime under state law to work or seek work without authorization, and (3) a provision that authorized warrantless arrests of noncitizens believed to be removable from the United States. *Id.*

333. *See* 8 U.S.C. § 1357(g).

334. *Id.*

335. *See* 8 U.S.C. § 1357(g)(1)–(2);

336. An immigration detainer is a notice from ICE to a federal, state, or local law enforcement agency that articulates probable cause for a noncitizen's removability and requests that such agency detain and transfer custody of a noncitizen to ICE. *See* U.S. GOV'T ACCOUNTABILITY OFF., IMMIGRATION ENFORCEMENT: ICE CAN FURTHER ENHANCE ITS PLANNING AND OVERSIGHT OF STATE AND LOCAL AGREEMENTS 7 (2021) [hereinafter GAO ICE Can Enhance Planning and Oversight of State and Local Agreements Report], https://www.gao.gov/products/gao-21-186 [https://perma.cc/5D6E-2UKS].

337. *See* 8 U.S.C. § 1357(g)(1).

correctional facility operated by participating state and local law enforcement agencies.[338]

In theory, the 287(g) program enables designated officers to enforce immigration laws in the execution of the law enforcement agencies' already-existing state and local law enforcement activities. Studies have suggested, however, that after implementing the programs, many law enforcement agencies participating in 287(g) adapt their usual state law enforcement practices by engaging in increased racial profiling against Latino and other non-white groups.[339] Twice, the Department of Justice has sued participating law enforcement agencies for engaging in arrest and detention practices that targeted Latinos.[340] Additionally, subsequent studies suggest that the implementation of 287(g) programs may even lead to racial profiling by *non*-participating law enforcement agencies that are geographically near a participating agency.[341] Worryingly as it relates to immigrant mobility, reports show that a substantial portion of

338. *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. DEP'T OF HOMELAND SEC., IMMIGR. & CUSTOMS ENF'T, https://www.ice.gov/identify-and-arrest/287g [https://perma.cc/TF5Z-NEQW].

339. *See* Michael Coon, *Local Immigration Enforcement and Arrests of the Hispanic Population*, 5 J. MIGRATION & HUM. SEC. 645, 663 (2017) (empirical study identifying changes in arrest patterns following the Frederick County Sherrif's Office implementation of 287(g), suggesting that the FCSO had redirected its resources to increase arrests of the Hispanic community); Huyen Pham & Pham Hoang Van, *Sheriffs, State Troopers, and the Spillover Effects of Immigration Policing*, 64 ARIZ. L.R. 463, 473 (2022) (citing statements by participating 287(g) law enforcement agencies that revealed that the agencies' goals would be to arrest as many unauthorized immigrants as possible); U.S. GOV'T ACCOUNTABILITY OFF., IMMIGRATION ENFORCEMENT: BETTER CONTROLS NEEDED OVER PROGRAM AUTHORIZING STATE AND LOCAL ENFORCEMENT OF FEDERAL IMMIGRATION LAWS 23 (2009) [hereinafter GAO Better Controls Needed Over Program Authorizing State and Local Enforcement of Immigration Law Report], https://www.gao.gov/products/gao-09-109 [https://perma.cc/5K3Q-AXSR] (finding that some participating agencies used the 287(g) program to process immigrants for minor crimes, like speeding, instead of focusing on more serious crimes).

340. Debbie Cenziper, Madison Muller, Monique Beals, Rebecca Holland & Andrew Ba Tran, *Under Trump, ICE Aggressively Recruited Sheriffs as Partners to Question and Detain Undocumented Immigrants*, WASH. POST (Nov. 23, 2021), https://www.washingtonpost.com/investigations/interactive/2021/trump-ice-sheriffs-immigrants-287g/ [https://perma.cc/TAY9-H9S5].

341. Pham & Van, *supra* note 339, at 490 (finding that North Carolina and South Carolina's State Highway Patrols, which were not 287(g) signatories, displayed changes in arrest patterns suggesting racial profiling after jurisdictions with whom they shared jail facilities entered into 287(g) agreements).

immigration detainers issued as part of the 287(g) program have resulted from arrests for traffic-related stops.[342]

The fact that traffic-related stops account for so many of the 287(g)-related immigration detainers means that undocumented immigrants driving through regions with a 287(g) presence face a substantial risk of being detained and arrested and facing potential negative immigration consequences. As such, the existence of 287(g) programs can significantly interfere with noncitizens' access to reproductive healthcare, particularly for those who leave their state or otherwise traverse large distances to access care. The scope of the 287(g) program reveals the gravity of this risk. As of June 2024, ICE had operative 287(g) agreements with 136 state and local law enforcement agencies in 22 different states.[343] Of these 287(g) agencies, 131 agencies—95.6%—operate in states that explicitly deny driver's licenses to noncitizens that cannot prove authorized status in the United States,[344] namely Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Louisiana, Montana, Nebraska, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Wisconsin, and Wyoming.[345] Because unauthorized noncitizens residing in these states are unable to obtain driver's licenses, law enforcement officers in 287(g) agencies may target drivers that they

342. RANDY CAPPS, MARC R. ROSENBLUM, CRISTINA RODRÍGUEZ & MUZAFFAR CHISHTI, MIGRATION POL'Y INST., DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT (2011), https://www.migrationpolicy.org/sites/default/files/publications/287g-divergence.pdf, [https://perma.cc/W58T-R3J7]; Mat Coleman & Austin Kocher, *Rethinking the "Gold Standard" of Racial Profiling: §287(g), Secure Communities and Racially Discrepant Police Power*, 63(9) AM. BEHAV. SCIENTIST 1185, 1196 (2019).

343. *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, *supra* note 338. Of those 136 participating law enforcement agencies, five are state-level law enforcement agencies and 131 are local or county-level law enforcement agencies. All five state law enforcement agencies are state departments of correction, specifically, the Alaska Department of Corrections, the Arizona Department of Corrections, the Florida Department of Corrections, the Georgia Department of Corrections, and the Massachusetts Department of Corrections. *Id*.

344. *Id*.

345. *See* ALA. CODE § 32-6-10.1(e) (2025); ALASKA ADMIN. CODE tit. 2, § 90.420(b) (2024); ARIZ. REV. STAT. ANN. § 28-3153.D. (2024); ARK. CODE ANN. §§ 27-16-604(a)(10), 27-16-111(a)(2)-(b) (2025); FLA. STAT. § 322.05(c)(8) (2024); GA. CODE ANN. § 40-5-21.1(a) (2024); IDAHO CODE ANN. § 49-303(14) (2024); KAN. STAT. ANN. § 8-237(i) (2024); LA. STAT. ANN. § 32:409.1(d)(iv) (2024); MONT. CODE ANN. § 61-5-105(10) (2023); NEB. REV. STAT. § 60-484.04 (West 2025); N.C. GEN. STAT. § 20-7(b1) (2025) (requires valid social security number); OKLA. STAT. tit. 47 § 6-103(A)(9) (2024); S.C. CODE ANN. § 56-1-40(7) (2025); TENN. CODE ANN. §§ 55-50-303(a)(9), 55-50-331(g) (2025); TEX. TRANSP. CODE ANN. § 521.142(a) (West 2023); WIS. STAT. § 343.14(2)(es) (2025); WYO. STAT. ANN. § 31-7-108(b)(vi) (2024).

determine "look" like an unauthorized immigrant, under the assumption that they can be arrested for driving without a license.[346]

This risk is not hypothetical. Investigations by Department of Justice Civil Rights Division have already uncovered rampant racial profiling in the policing practices of certain 287(g) agencies.[347] In 2011, for example, the DOJ revealed that with Arizona's Maricopa County Sheriff's Office, then a 287(g) agency, Latino drivers were four to nine times more likely to be stopped for alleged traffic-related violations than similarly situated non-Latino drivers.[348] Investigators found that officers arrested and detained Latinos without legal justification, essentially using their state policing power as a way to enforce federal immigration law.[349] In the report, the DOJ detailed how officers stopped and detained individuals solely on the characteristics like having "dark skin" or speaking Spanish.[350] Over a three-year period, DOJ investigators discovered that about one-fifth of all traffic-related incident reports generated by the Maricopa County Sheriff's Office "Human Smuggling Unit" were unconstitutional; almost all of these reports involved Latinos.[351]

Just one year later, the DOJ made similar findings of discriminatory policing in an investigation of the Alamance County Sheriff's Office in North Carolina.[352] The DOJ's report on the Alamance County Sherriff's Office lay bare the intent to enforce immigration law through local policing practices, including through reports that the Alamance County Sheriff had instructed his

346. *See* Coon, *supra* note 339, at 663; Pham & Van, *supra* note 339, at 473.

347. *See* Letter from Thomas E. Perez, Asst. Att'y Gen., Dept. of Justice to Clyde B. Albright, Cnty. Att'y, Alamance Cnty. and Chuck Kitchen, Turrentine Law Firm (Sept. 18, 2012) [hereinafter Letter from Asst. Att'y Gen. Perez to Alamance Cnty. Att'y Albright], https://www.justice.gov/iso/opa/resources/17120129181246248819 8.pdf [https://perma.cc/S8PW-JBM8]; Letter from Thomas E. Perez, Asst. Att'y Gen., Dept. of Justice to Bill Montgomery, Cnty. Att'y, Maricopa Cnty. (Dec. 15, 2011) [hereinafter Letter from Asst. Att'y Gen. Perez to Maricopa Cnty. Att'y Montgomery], https://www.justice.gov/sites/default/files/crt/legacy/2011/12/15/mcso_findletter_12-15-11.pdf [https://perma.cc/WKZ9-R66N].

348. Letter from Asst. Att'y Gen. Perez to Maricopa Cnty. Att'y Montgomery, *supra* note 347, at 3.

349. *Id.*

350. *Id.*

351. *Id.*

352. Letter from Asst. Att'y Gen. Perez to Alamance Cnty. Att'y Albright, *supra* note 347.

deputies to target Latinos, ordering, "If you stop a Mexican, don't write him a citation. Arrest him."[353]

Given that 287(g) designated officers are authorized to issue immigration detainers and hold immigrants in custody while ICE assesses their legal status, it follows that immigrants arrested in these programs may also be trapped in these 287(g) jurisdictions for some time, which could pose a problem for those stuck in abortion-restrictive states. Indeed, there is significant overlap between the states with 287(g) agencies and states with restrictive abortion laws. As of June 2024, thirteen of the twenty-two states with 287(g) agencies have enacted abortion-restrictive laws that ban abortion at fifteen weeks or earlier—Alabama (total ban), Arizona (fifteen-week ban), Arkansas (total ban), Florida (six-week ban), Georgia (six-week ban), Idaho (total ban), Louisiana (total ban), Nebraska (twelve-week ban), North Carolina (twelve-week ban), Oklahoma (total ban), South Carolina (six-week ban), Tennessee (total ban), and Texas (total ban).[354] In total, 85% of participating law enforcement agencies are found in states with restrictive abortion laws.[355]

b. On the Horizon: State Restrictions on the Movements of Noncitizens

In recent months, states have increasingly passed laws that aim to restrict the ingress and intrastate movement of immigrants suspected of being present without authorization. While the constitutionality of these statutes remains an open question,[356] the

353. *Id*. at 5.

354. *Compare Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, *supra* note 338, *with Interactive Map: US Abortion Policies and Access After Roe* , *supra* note 127. *See also* ALA. CODE § 26-23H-4 (2025); ARIZ. REV. STAT. ANN. § 36-2322 (2022); ARK. CODE ANN. § 5-61-102 (2025); FLA. STAT. § 390.0111 (2024); GA. CODE ANN. § 16-12-141 (2024); IDAHO CODE ANN. § 18-622 (2024); LA. STAT. ANN. § 40:1061.1 (2024); NEB. REV. STAT. § 71-6915 (West 2025); N.C. GEN. STAT. § 14-45 (2025); N.C. GEN. STAT. § 90-21.81A (2025); OKLA. St. tit. 21, § 861 (2024); S.C. CODE ANN. § 44-41-630 (2025); TENN. CODE ANN. § 39-15-213 (2025); TEX. HEALTH & SAFETY CODE ANN. § 170A.004 (West 2023).

355. This 85% statistic was calculated by the author by comparing the comprehensive list of 287(g) jurisdictions as of June 2024, finding which were in abortion-restrictive states, and finding which proportion of the total number this amounted to. *But see supra* note 91 (regarding Arizona's constitutional amendment enshrining abortion rights into the Arizona Constitution after the state passed a fifteen-week abortion ban).

356. The U.S. District Court for the Southern District of Florida issued a preliminary injunction on Section 10 of Florida S.B. 1718 on May 22, 2024. The court found that the Section 10 of the bill was likely preempted by 8 U.S.C. § 1324, the

existence of these statutes nonetheless serves to chill immigrant movements through state enforcement of immigration law. These state immigration statutes, which target both unauthorized immigrants and any state residents who aid them, makes unlawful cargo of immigrant bodies and creates further barriers to an immigrant's ability to access healthcare, abortion care, and other important services.

Florida's recently enacted S.B. 1718[357] paints a dismal picture of how an immigration-oriented state statute uses potential criminal prosecution to discourage residents from helping immigrants move safely within the state. Signed into law in May 2023,[358] this statute is sweeping in scope, though certain provisions specifically impact immigrant mobility within and outside of the state. For example, the statute invalidates any out-of-state driver's license if it is a license specially designated for unauthorized immigrants.[359] If an unauthorized immigrant with a valid driver's license from Maryland[360] were to drive into Florida, for example, that driver would be subject to arrest and prosecution for driving without a license upon entering the state, essentially becoming arrestable upon any traffic stop. Given that Florida already has forty-eight law enforcement agencies participating in the 287(g) program, this statute raises serious concerns about potential racial profiling and the use of perfunctory traffic stops to further immigration-enforcement aims.[361] Although parts of Florida S.B. 1718 have been enjoined by a federal court, the driver's license

federal statute that criminalizes bringing unauthorized individuals into the country and harboring said individuals within the United States. *See* Order Granting Motion for Preliminary Injunction at 20–29, 40, Farmworker Ass'n of Fla. v. Moody, No. 23-cv-22655-ALTMAN/Reid (S.D. Fla. May 22, 2024) [hereinafter *Moody* Order Granting Preliminary Injunction], https://assets.aclu.org/live/uploads/2024/05/PI-ORDER-THE-FARMWORKER-ASSOCIATION-OF-FLORIDA-v.-MOODY.pdf [https://perma.cc/XJ2N-HXL5].

357. 2023-40 Fla. Laws 1.

358. *Id.* at 2.

359. *Id.* at 3–4.

360. Maryland law allows for special driver's licenses for individuals who cannot demonstrate authorized presence in the United States. *See* MD. CODE ANN., TRANSP. § 16-122(a) (West 2024).

361. *See, e.g.*, Foreign Relations Ministry, *The Government of Mexico Expresses Its Repudiation and Concern Regarding Florida's Anti-immigrant Law SB1718*, GOV'T OF MEX. (2023), http://www.gob.mx/sre/prensa/the-government-of-mexico-expresses-its-repudiation-and-concern-regarding-florida-s-anti-immigrant-law-sb1718?idiom=en [https://perma.cc/2EDA-JXQD]; Raymond G. Lahoud, *Florida's Controversial Immigration Law: Examining the Impact*, NAT'L REV. (2023), https://natlawreview.com/article/floridas-controversial-immigration-law-examining-impact [https://perma.cc/W4VP-PDSK].

invalidation provisions remain in effect.[362] Concerningly, other states have proposed similar bills to invalidate driver's licenses issued to unauthorized noncitizens.[363]

Section 10 of the new law, disingenuously titled "Human Smuggling," also punishes those who help unauthorized immigrants travel within the state.[364] Under that provision, a person commits a third-degree felony, punishable by a maximum of five years in prison and a $5,000 fine,[365] when they knowingly and willfully transport into the state a person they know "or reasonably should know" has entered the United States in violation of law, or when they conceal, harbor, or shield such person from detection.[366] A person commits a separate offense for each person that is transported or "harbored;"[367] when five or more people are transported in a single episode, the offense becomes a second-degree felony.[368] The statute requires that an individual arrested under this statute be held in state custody until they have a custody hearing with a judge,[369] a concerning issue for abortion care, where the window of time to obtain an abortion may already be limited.

Community advocates have already testified to the chilling effect that this statute has had on people's willingness and ability to help immigrants within the state. As support for its decision to enjoin Section 10 of the statute, the Southern District of Florida cited residents of Florida who feared criminal prosecutions for helping immigrants get to their immigration agency appointments or access lifesaving healthcare in a Florida hospital.[370] Other witnesses described the way the law had separated their families: witnesses included parents and grandparents who were afraid of visiting relatives in other states with their undocumented children, out of fear of being arrested and prosecuted upon their reentry to Florida.[371]

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362. *Moody* Order Granting Preliminary Injunction, *supra* note 356, at 20–29, 40 (enjoining Section 10 of Florida S.B. 1718 on federal preemption grounds).

363. *See, e.g.*, S.B. 108, 2024 Leg., Reg. Sess. (Ala. 2024).

364. S.B. 1718, § 10, 2023 Leg. Sess., Reg. Sess. (Fla. 2023), codified as FLA. STAT. ANN. § 787.07 (West 2024).

365. FLA. STAT. ANN. §§ 775.082(e), 775.083(c) (West 2024).

366. S.B. 1718, § 10(1)(a)-(b), 2023 Leg. Sess., Reg. Sess. (Fla. 2023), codified as FLA. STAT. ANN. § 787.07 (West 2024).

367. S.B. 1718, § 10(2).

368. S.B. 1718, § 10(3). Second-degree felonies are punishable by a term of imprisonment of up to fifteen years in prison or a $10,000 fine. *Id.*

369. S.B. 1718, §10(6).

370. *See Moody* Order Granting Preliminary Injunction, *supra* note 356, at 30 (quoting Declaration of Mendoza).

371. *Id.* at 31–32 (quoting Declarations of Aragon and Medrano-Rios).

This statute, and others that may follow,[372] pose serious concerns for the ability of immigrants to safely leave or travel through the state for abortion access and reproductive healthcare. The statute makes no exceptions for emergency situations, healthcare access, or family unity. State laws similar to those of Florida limit immigrants' ability to move freely within the United States by converting an immigrant's body into a form of contraband. A pregnant unauthorized immigrant's body becomes double contraband, and a locus of immigration enforcement. Being in Florida, she is unable to access an abortion within the state after the sixth week of pregnancy,[373] and runs considerable risk by leaving the state for a location where an abortion is available.

Conclusion

Migration control fundamentally revolves around the control of movement, and this control becomes particularly invasive when directed at pregnant immigrant bodies. Current immigration policies do not only limit physical movement; when combined with a patchwork of state laws that restrict abortion-related healthcare, they also impede immigrants' autonomy over their health and family decisions. By treating the bodies of pregnant immigrants as sites for immigration enforcement, these policies extend the reach of migration control into the intimate realm of reproductive health. This form of control curtails the ability of immigrants to make crucial decisions about their health and the shape of their families, illustrating a deeply entrenched intersection of immigration enforcement and reproductive regulation.

The results of the 2024 presidential election have only intensified this reality. With the Trump administration's stated goals of escalating immigration enforcement and curtailing reproductive rights, the intersection of oppressions faced by immigrants, particularly those capable of pregnancy, is set to deepen. Immigration detention, surveillance, and localized enforcement practices like border-zone checkpoints and 287(g) programs already restrict physical movement and amplify barriers

372. *See, e.g.*, H.B. 4156, 59th Leg., 2d Reg. Sess. (Okla. 2024) (codified as OKLA. STAT. tit. 21 § 1795 (2024)), *preempted by* United States v. Oklahoma, 739 F. Supp. 3d 985 (W.D. Okla. 2024) (granting preliminary injunction); S.B. 4, § 2, 88th Legis., 4th Spec. Sess. (Tex. 2023) (codified as TEX. PENAL CODE § 51.02(a) (West 2023)), *preempted by* United States v. Texas, 719 F. Supp. 3d 640 (W.D. Tex. 2024), *vacated*, 144 S. Ct. 797 (2024).

373. *See* FLA. STAT. ANN. § 390.0111(1)(a) (West 2024).

to accessing reproductive healthcare. Now, under an administration committed to increasing both immigration enforcement and restrictions on reproductive autonomy, the risks and vulnerabilities faced by immigrant communities will likely escalate. The threat of detention, deportation, and punitive measures for seeking reproductive healthcare will not only endanger the physical and mental health of noncitizens but also further isolate them from critical support systems.

When viewed through the lens of feminist geography and reproductive justice, the unique challenges faced by immigrants under these policies become even more stark. Feminist geography underscores how control over physical movement and space translates into broader social and political domination, particularly for marginalized groups. Reproductive justice, with its emphasis on the right to have children, not have children, and parent children in safe and sustainable environments, exposes how immigration enforcement and reproductive restrictions jointly undermine these rights for immigrant communities. Pregnant immigrants navigating a web of immigration surveillance and restrictive abortion laws are forced to contend with an environment where their bodies are simultaneously politicized and criminalized.

This moment calls for urgent action. Reproductive justice advocates must recognize and respond to the interconnected nature of immigration policy and reproductive health regulation. Advocacy efforts must address not only the systemic barriers to abortion access, but also the broader structures of surveillance and enforcement that disproportionately target immigrants. Collaborative approaches that bridge reproductive justice and immigrant rights frameworks are essential to dismantling these systems of oppression. Advocates must engage in federal, state, and local policy advocacy to resist efforts to further restrict reproductive and migratory autonomy. They should also invest in community-based support networks that provide resources, legal assistance, and healthcare access to immigrant populations.

To ensure that reproductive freedom is truly accessible to all, the movement must center the experiences and leadership of immigrant communities. This includes amplifying the voices of immigrant women and gender-diverse individuals who are directly affected by these intersecting oppressions. By adopting an intersectional approach and building coalitions across movements, reproductive justice advocates can challenge the dual control of movement and bodily autonomy imposed by the state, working

toward policies that respect and uphold the dignity and agency of all individuals, regardless of citizenship status.

An Examination of Public Benefit Enrollment Data in Minnesota Immigrant Households as Evidence of Public Charge Chilling Effect

Ana Pottratz Acosta†

Introduction

A hallmark of the first Trump Administration was its pervasive attacks against immigrant communities. While President Trump often touts his efforts to ramp up immigration enforcement to secure the southern border, other policies aimed at limiting legal immigration to the U.S. through administrative action had a far greater impact on U.S. immigration policy during his first term. One such action, the promulgation of regulations setting forth more subjective standards to determine if an immigrant was subject to the public charge grounds of inadmissibility, led to the denial of many family-based permanent residence applications that were otherwise approvable under existing law.

In addition to increased denials of permanent residence applications under this new standard for public charge, there was significant anecdotal evidence the public charge regulations, together with earlier leaked drafts, caused a chilling effect within immigrant communities. Specifically, many immigrant and mixed status families opted to forego public benefits they were otherwise entitled to receive on behalf of themselves or eligible U.S. Citizen children due to fear it would cause them to be ineligible for future immigration benefits or result in deportation.

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In this Article, the Author will examine means-tested benefit enrollment data for Minnesota immigrant households to see if this data supports existence of a chilling effect through decreased immigrant household enrollment in these programs following publication of the public charge regulations. Additionally, while several previous studies using survey data support the existence of a public charge chilling effect, this Article will build on this previous work by analyzing primary enrollment data provided directly by the Minnesota Department of Human Services (MN-DHS), the agency administering these programs.

Part I of this Article will define the public charge ground of inadmissibility under section 212(a)(4) of the Immigration and Nationality Act (INA) and will provide a history of the public charge ground of inadmissibility and enforcement of the public charge statute prior to 2016.

Part II of this Article will summarize the rollout of the public charge regulations by the first Trump Administration. This Part will include discussion of leaked draft executive orders and proposed regulations in 2017 and 2018, changes to the Foreign Affairs Manual (FAM) guidance on public charge in early 2018, and the proposed and final public charge regulations in 2018 and 2019, respectively. Part II will also provide a summary of litigation challenging the final public charge regulations in 2019, including the February 2020 U.S. Supreme Court Order lifting a lower court preliminary injunction and allowing the final regulation to go into effect.

Part III of this Article will discuss the chilling effect of the public charge regulations within immigrant communities, both in terms of contemporaneous anecdotal reports and recent studies, using survey data, to determine impact of the public charge rule on immigrant receipt of means-tested benefits. Part III will also discuss the resulting harm to immigrant households when families forgo means-tested public benefits, such as food insecurity and poor health outcomes due to lack of medical coverage.

Part IV of the Article will then examine enrollment data from 2013 to 2021 for federal means-tested programs in Minnesota, provided directly by MN-DHS, to determine if there were reductions in enrollment following publication of leaked drafts and the proposed and final public charge regulations in the Federal Register. This examination will include an analysis of immigrant household enrollment data for the Minnesota Family Investment Program (MFIP), the Minnesota state-based family cash assistance program funded by Temporary Assistance to Needy Families

(TANF) federal block grant funds, and the Supplemental Nutrition Assistance Program (SNAP). Finally, Part V will provide recommendations to states on how to combat fear within immigrant communities and encourage eligible immigrant families to enroll in means-tested benefit programs.

I. The Public Charge Ground of Inadmissibility: Definition and History

To better understand the regulatory changes to the public charge ground of inadmissibility during the Trump Administration, it is important to understand "inadmissibility" and "public charge" as legal terms under the Immigration and Nationality Act (INA) and the historic background of these terms.

A. "Inadmissibility" and "Public Charge," as Defined by the INA

Consistent with the federal government's plenary power over matters related to national sovereignty, including the enactment and enforcement of immigration laws,[1] Congress has passed laws establishing criteria for immigrants to legally enter the U.S. and be granted lawful permanent resident status. Under these laws, Congress has also established grounds of inadmissibility, found at section 212 of the INA,[2] which make certain "aliens"—the legal term used in the INA to refer to non-citizens[3]—ineligible to enter the U.S. or receive certain immigration benefits, including lawful permanent resident status. The grounds of inadmissibility under section 212 of the INA are varied and include health-related

1. *See* Arizona v. United States, 567 U.S. 387, 394 (2012) (striking down the Arizona State Statute, S.B. 1070 in a 5-3 decision, and holding that "[t]he Government of the United States has broad, undoubted power over the subject of immigration and the status of aliens").

2. *See* Immigration and Nationality Act (INA) of 1952 § 212, 8 U.S.C. § 1182.

3. *See* INA § 101(a)(3). In this Article, the term "alien" will be used when quoting relevant immigration statutes and regulations. The term "alien" is legally defined in INA § 101(a)(3) as "any person not a citizen or national of the United States." *Id.* Because the term "alien" is viewed as a discriminatory, in all parts of this article not directly quoting an immigration statute or regulation, individuals who are not citizens of the U.S. will be referred to as "non-citizens" or by their immigration status within the U.S., such as "lawful permanent resident," "non-immigrant," or "undocumented immigrant."

grounds,[4] criminal grounds,[5] national security grounds,[6] prior violations of immigration law,[7] and the public charge ground of inadmissibility, described further below.

Conceptually, the best way to understand inadmissibility under section 212 is imagining a non-citizen knocking on a door, requesting permission to enter the U.S., and being told by the U.S. government they cannot enter for one of the reasons set forth at section 212. Under the law, a non-citizen may be deemed inadmissible at various points in time when they are knocking on the metaphorical door to request admission to the U.S. In some cases, the non-citizen may literally be "knocking on the door" at our country's border to request admission to the U.S. at an air, land, or sea port of entry and deemed inadmissible by a Customs and Border Protection (CBP) Officer. In other cases, a non-citizen may be deemed inadmissible outside the U.S., when their application for a visa to enter the U.S. as a temporary visitor with a nonimmigrant visa[8] or permanent resident with an immigrant visa[9] is denied at a U.S. consular post abroad due to a ground of inadmissibility under section 212. Lastly, some non-citizens previously admitted to the U.S. with a temporary visa, for example, as a tourist or a temporary

4. *See* INA § 212(a)(1)(A) (deeming a non-citizen who has a communicable disease of public health significance or who has failed to prove that they have received vaccinations for specified vaccine-preventable illnesses, such as measles, mumps, diphtheria, and polio inadmissible to the U.S.).

5. *See* INA § 212(a)(2) (deeming a non-citizen who has been convicted of a certain crime set forth under the statute or who is believed to be engaged in certain criminal activity, such as trafficking of controlled substances, prostitution, human trafficking, or money laundering inadmissible to the U.S.).

6. *See* INA § 212(a)(3) (setting forth "[s]ecurity and related grounds" of inadmissibility).

7. *See* INA § 212(a)(6) (setting forth inadmissibility grounds for "Illegal entrants and immigration violators").

8. *See* INA § 101(a)(15). Under this section, the legal term for non-citizens who are admitted to the U.S. or are present in the U.S. with a temporary form of status valid for a specific period of time, such as F-1 student visa status or H-1B specialty occupation worker status, is "nonimmigrant." *Id.* The INA also lays out specific categories of nonimmigrant status in section 101(a)(15)(A)-(V). *See generally* 9 FAM 401.1 (2024) (directing that non-citizens seeking admission to the U.S. in nonimmigrant status typically must apply for a nonimmigrant visa at the U.S. Embassy or Consulate in their country of citizenship or origin and present evidence of their eligibility for the specific nonimmigrant visa they are seeking (e.g., B-1/B-2 visitor, F-1 student, H-1B specialty occupation worker) and proof they are not subject to any grounds of inadmissibility under the Immigration and Nationality Act § 212).

9. *See generally* INA § 101(a)(20) (defining "lawfully admitted for permanent residence" as a non-citizen granted lawful permanent residence in accordance with immigration laws, which includes after admission as an "immigrant" or adjustment of status from "nonimmigrant" to "immigrant" status as a permanent resident). Non-citizens holding lawful permanent resident status have the right to live in the U.S. indefinitely. *Id.*

worker, may later ask to walk through a second figurative door, inside of the U.S., and exit the second door as a permanent resident by filing an application for adjustment of status to permanent resident.

The main instance when a non-citizen must demonstrate they are admissible and not subject to any of the grounds of inadmissibility under 212 is when they are applying for permanent residence. Eligible non-citizens may apply for lawful permanent residence through one of two processes: filing an application for adjustment of status or consular processing.[10] The first option, adjustment of status, is a process that occurs inside of the U.S. where the non-citizen files an I-485 Application for Adjustment of Status with U.S. Citizenship and Immigration Services (USCIS) and is granted lawful permanent resident status by USCIS after the I-485 application is approved by the agency.[11] Alternatively, permanent residence through consular processing occurs outside of the U.S. when a non-citizen applies for an immigrant visa to enter the U.S. as a permanent resident at a U.S. Embassy or Consulate abroad.[12] After the non-citizen's application for an immigrant visa is approved and the U.S. Consulate issues the non-citizen an immigrant visa, the non-citizen will then travel and enter the U.S. with their immigrant visa. After being admitted to the U.S. by CBP with their immigrant visa, the non-citizen will officially become a permanent resident. In both cases, before a non-citizen can be granted permanent residence through either adjustment of status or consular processing, they are required to demonstrate they are not subject to any ground of inadmissibility under section 212.[13] If the non-citizen applying for permanent residence is deemed inadmissible by USCIS or a Consular Officer, their application for adjustment of status or an immigrant visa will be denied.

Turning to the public charge ground of inadmissibility, any non-citizen deemed "likely at any time to become a public charge is inadmissible" under section 212(a)(4).[14] Historically and under

10. *See* INA § 245. In certain cases, those inside the U.S. may apply for permanent residence through adjustment of status under section 245 by filing Form I-485 with USCIS. Non-citizens outside the U.S. seeking admission to the U.S. as a permanent resident must apply for an "immigrant visa" at a U.S. Embassy or Consulate in their country of origin and establish they are not subject to any grounds of inadmissibility under section 212 before they will be issued an immigrant visa and admitted to the U.S. with an immigrant visa as a lawful permanent resident. 9 FAM 501.1 (2024).

11. *See* INA § 245(a); 8 C.F.R. §§ 245.1–245.2 (2024).

12. *See* 9 FAM 501.1 (2024); 9 FAM 504.1 (2023).

13. *See* INA § 212; 9 FAM 301.1–2, 4 (2024).

14. *See* INA § 212(a)(4).

current interpretation of the law, the U.S. government generally defines "public charge" as a non-citizen who is primarily or wholly dependent on the government or government benefits to support themselves.[15] Because the language of section 212(a)(4) refers to a non-citizen "likely . . . to become a public charge," the assessment of public charge inadmissibility is a forward-looking test of whether the non-citizen is likely to become primarily or wholly dependent on the government or government benefits after admission to the U.S.[16]

In addition to the public charge ground of inadmissibility, at section 212(a)(4),[17] the INA also includes a public charge ground of deportability, at section 237(a)(5).[18] In contrast to public charge inadmissibility, public charge deportability at section 237(a)(5) looks at conduct after admission to the U.S., finding any non-citizen who "within five years after [admission to the U.S.], has become a public charge from causes not affirmatively shown to have arisen since entry" deportable and subject to removal from the U.S. through removal proceedings under section 240.[19]

While certain categories of non-citizens applying for permanent residence are exempt[20] from the public charge ground of inadmissibility, namely humanitarian categories,[21] most non-citizens applying for permanent residence through a family-based[22]

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15. *Green Card: Public Charge Resources*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge/public-charge-resources [https://perma.cc/348G-RWRW].

16. *See* INA § 212(a)(4).

17. *Id.*

18. *See* INA § 237(a)(5).

19. *Id.*

20. *See, e.g.,* INA § 320; INA § 245; 9 FAM 501.1 (2024). Under the law, certain non-citizens applying for permanent residence are exempt from the public charge ground of inadmissibility. Such categories include 1) children under 18 sponsored for permanent residence by a U.S. citizen parent, who will automatically acquire citizenship upon admission as a permanent resident as U.S. citizens are not subject to public charge or other grounds of inadmissibility and 2) certain humanitarian categories for permanent residence. *See* INA § 320.

21. *See* INA § 212(a)(4)(E) (exempting certain qualified non-citizens applying for permanent residence in specified humanitarian categories from the public charge ground of inadmissibility). The categories include: 1) refugees and asylees applying for permanent residence through a refugee or asylee adjustment of status application; 2) non-citizens applying for permanent residence through a Violence Against Women Act (VAWA) self-petition; 3) non-citizens applying for permanent residence through a Special Immigrant Juvenile Status (SIJS) petition; 4) non-citizens applying for permanent residence through a U-visa as a victim of a qualifying crime or a T-visa as the victim of international trafficking; and 5) Cuban nationals applying for permanent residence through the Cuban Adjustment Act. *See id.*

22. *See* INA § 201(b)(2)(A) (providing that a U.S. citizen can sponsor their spouse,

or employment-based[23] petition must present evidence they are not inadmissible as a public charge. In cases of non-citizens applying for permanent residence through a family-based petition, the biggest hurdle is often the public charge ground of inadmissibility at INA § 212(a)(4). Since passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) in 1996, overcoming public charge inadmissibility in family-based cases requires, at minimum, that the petitioner or co-sponsor execute an I-864 Affidavit of Support, with evidence of current income above 125% of the poverty line.[24]

B. History of Public Charge Inadmissibility in U.S. Immigration Law: 1700s to 1990s

Although the public charge ground of inadmissibility has garnered significant attention in recent years, laws and policies prohibiting the admission of immigrants on account of public charge are as old as our country. In viewing the various iterations of laws barring the admission of immigrants likely to become a public charge, from the colonial era to the present, two common and distinctly American themes emerge. First, the negative presumption that certain immigrants will be a drain on society and

children under 21 years of age, and, if the U.S. citizen child is over 21 years of age, their parents, as their immediate relative, a family-based permanent resident category not subject to annual numerical limits). *See also* 8 U.S.C. § 1153(a)(1)–(4) (providing that U.S. citizens and lawful permanent residents can file a family-based petition in specified preference categories, subject to annual limits set by Congress) (family members covered under this section for citizens include adult unmarried children over 21 (FB-1), married children (FB-3) and their siblings (FB-4); for lawful permanent residents, spouse and children under 21 (FB-2A) and unmarried children over 21 (FB-2B)).

23. *See* INA § 203(b)(1)–(5) (providing that non-citizens may also apply for permanent residence in a preference system, ranging from first preference (EB-1) to fifth preference (EB-5), through an employment-based petition filed as either a self-petition or a petition by their employer sponsoring them for permanent residence, subject to annual numeric limitations set by Congress).

24. *See* INA § 212(a)(4)(C)(ii); INA § 213a. In family-based petitions for permanent residence, the petitioning U.S. citizen or lawful permanent resident relative must execute an I-864 Affidavit of Support under section 213a. The I-864 Affidavit of Support must also include evidence of the U.S. citizen or lawful permanent resident's income, including a copy of the petitioner's tax returns or Internal Revenue Service (IRS) tax transcripts for the three most recent years and copies of recent paystubs to show current earnings above 125% of the federal poverty line, as determined by the petitioner's household size. *Id.* If the U.S. citizen or lawful permanent resident family petitioner's income is not above 125% of the poverty line, they must submit an I-864A from other members of the household to show the earnings of the household are above 125% of the poverty line, or from a U.S. citizen or permanent resident co-sponsor with household income above 125% of the poverty line. *Id.*

should be excluded on that basis. Secondly, the distinctly American value of rugged individualism, which views poverty as an individual moral failure, caused by a person's idle nature and unwillingness to work, instead of a failure of society to care for its most vulnerable members.

The earliest public charge laws in the U.S. were enacted during the colonial era in the form of "poor laws," which were enacted at the municipal level in cities and towns throughout the thirteen original colonies.[25] These poor laws in Colonial America were modeled after the British system of poor laws to distribute aid to poor residents, with a presumption that all were capable of working and limiting aid only to residents deemed *worthy* of assistance due to infirmity.[26] Poor laws in Colonial America also contained a law of settlement, which allowed cities and towns to expel, remove and banish non-local poor people and which was frequently used to bar immigrants from residing in the community.[27]

For the first hundred years of our country, from 1776 to 1875, there were no significant federal laws regulating or limiting the admission of immigrants to the U.S.[28] However, in the mid-19th century, New York and Massachusetts, the two states receiving a majority of immigrants at the time, adopted laws and policies at the state level regulating the admission and deportation of immigrants, including public charge related restrictions.[29] The push in Massachusetts and New York to enact laws regulating and restricting immigration at the state level was driven by a rise in nativism and anti-immigrant sentiment at the time against Irish immigrants.[30] In 1847, New York established of the Board of Commissioners of Emigration of the State of New York, a state agency authorized to prohibit the landing and entry of "any lunatic, idiot, deaf and dumb, blind or infirm persons, not members of

25. *See* William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 U. RICH. L. REV. 111, 113–19 (1997).

26. *Id.* at 115.

27. *See id.* at 140–49.

28. *See generally* D'vera Cohn, *How U.S. Immigration Laws and Rules Have Changed Through History,* PEW RSCH. CTR. (Sept. 30, 2015), https://www.pewresearch.org/short-reads/2015/09/30/how-u-s-immigration-laws-and-rules-have-changed-through-history/ [https://perma.cc/8KKF-S7V9] (providing a brief overview of U.S. immigration law over the years).

29. *See* Anna Shifrin Faber, *A Vessel for Discrimination: The Public Charge Standard of Inadmissibility and Deportation,* 108 GEO. L.J. 1364, 1370–71 (2020).

30. *See* Brief of Legal Historians as Amici Curiae in Support of Plaintiffs-Appellees and Urging Affirmance at 7, California v. U.S. Dep't of Homeland Sec., 981 F.3d 742 (9th Cir. 2020) (No. 19-17214).

emigrating families*, and who . . . are likely to become permanently a public charge*" unless the shipmaster provided a bond for the passenger.[31] Later, in 1850, Massachusetts began deporting foreign-born "paupers" to their country of origin, on account of public charge, based on the broad reading of a statute authorizing the state of Massachusetts to transfer or send "the inmates of a state almshouse, state lunatic hospital, or the hospital at Rainsford Island [an immigrant hospital] . . . to any state or *place where they belong*."[32] However, these public charge state laws in Massachusetts and New York were not widely enforced and were primarily used in a targeted manner against Irish immigrants as a pretext to deny them admission or deport them back to Ireland.[33]

In the late 19th century, Congress passed a series of laws imposing significant restrictions on legal immigration at the federal level for the first time. These included three laws, the Page Act of 1875[34] and the Chinese Exclusion Act of 1882,[35] which explicitly restricted immigration to the U.S. from China and other Asian countries, and the Immigration Act of 1882,[36] widely considered to be the first general immigration law at the federal level.

Following passage of the Immigration Act of 1882, the federal government assumed control over the regulation of immigration to the U.S. The Immigration Act of 1882 also delegated cabinet level executive authority over enforcement of immigration law to the Department of Treasury,[37] a power still held by the federal executive branch today under the Department of Homeland Security (DHS). Additionally, the Immigration Act of 1882 required the screening of all immigrants prior to their admission to the U.S. and granted the Secretary of the Treasury authority to exclude any immigrant who was a "convict, lunatic, idiot, or *any person unable to take care of himself or herself without becoming a public charge*."[38] This marked the first restriction to immigration under federal law excluding immigrants on account of public charge. Later, in 1891,

31. *Id.* at 7 (emphasis added).

32. *See id.* at 7–8 (emphasis added).

33. *Id.* at 8–9.

34. *See* Page Act of 1875, Pub. L. No. 43-141, 18 Stat. 447 (repealed 1974) (restricting the admission of laborers from Asia and the admission of Asian women suspected of being prostitutes).

35. *See* Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58 (repealed 1943) (barring the admission of immigrants who were nationals of China).

36. *See generally,* Immigration Act of 1882, Pub. L. No. 47-376, 22 Stat. 214 (amended 1891).

37. *Id.* at § 2.

38. *Id.* (emphasis added).

Congress passed a second immigration law entitled an Act in Amendment to the Various Acts Relative to Immigration and the Importation of Aliens Under Contract or Agreement to Perform Labor.[39] This 1891 law further expanded the categories of excludable immigrants and granted the federal government authority to exclude any immigrant "likely to become a public charge."[40] This language from 1891 mirrors the language found in our current law at section 212(a)(4) of the Immigration and Nationality Act, setting forth the public charge ground of inadmissibility in effect today.[41]

Adopting the public charge category as a ground for excluding immigrants from the U.S. had an immediate and significant impact on the admission of immigrants in the late 19th and early 20th centuries. Between 1892 and 1920, public charge was the most common ground of excludability used to deny immigrants admission to the U.S. During this period, approximately 55% of the 308,000 immigrants excluded from the U.S. were denied admission on account of public charge.[42] Nonetheless, the total number of immigrants excluded between 1892 and 1920 amounted to a fraction of the large number of immigrant arrivals to the U.S. during this period. Between 1891 and 1920, over 18 million people immigrated to the U.S.,[43] primarily from Italy and Eastern Europe, as part of the last major wave of immigrant arrivals to the U.S. from the European continent.[44]

The next significant change in federal immigration law was the Immigration Act of 1924, also known as the Johnson-Reed Act, which significantly limited legal immigration to the U.S. through a

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39. Immigration Act of 1891, Pub. L. No. 51-551, 26 Stat. 1084 (amended 1903).

40. *Id.* § 1.

41. Immigration and Nationality Act (INA) § 212(a)(4), 8 U.S.C. § 1182(a)(4).

42. *See* IMMIGR. & NATURALIZATION SERV., U.S. DEP'T. OF JUST., 2001 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 258 tbl.66, (2003) [hereinafter 2001 INS STATISTICAL YEARBOOK] https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2001.pdf [https://perma.cc/WV9S-JVXJ] (showing that between 1892 and 1920, a total of 168,426 immigrants were excluded and denied admission to the U.S. on account of public charge, accounting for 54.54% of the 308,835 immigrants excluded from the U.S. during this time period).

43. *See id.* at 16 tbl.1 (illustrating that between 1891 and 1920, a total of 18,218,761 individuals immigrated to the U.S.).

44. *See id.* at 18 tbl.2. Of the 18.2 million total immigrants who were admitted to the U.S. between 1891 and 1920, approximately 16 million were immigrants from Europe. *Id.* During this time period, 3.8 million individuals immigrated from Italy, 3.6 million from the Austro-Hungarian Empire, and 3 million from countries that were part of the former Soviet Union. *Id.*

nationality-based quota system.[45] Under the Johnson-Reed Act quota system, legal immigration from each country was limited to 2% of the foreign-born population from that country present in the U.S. as determined by the 1890 Census.[46] Exemptions from the quota system under the Johnson-Reed Act were limited to dependent wives and unmarried children under 18 of U.S. Citizens, foreign students, college and university professors, religious workers, and immigrants from the Western Hemisphere.[47]

Passage of the Johnson-Reed Act in 1924 was largely driven by xenophobic attitudes against Southern and Eastern European immigrants and the eugenics movement in the U.S., which viewed these newer immigrants as genetically inferior to earlier waves of immigrants from Northern Europe.[48] The choice to use census data from the 1890 Census was made to ensure the 2% quota was higher for the favored Northern European immigrants who had arrived in the U.S. before 1890 and lower for the less desirable immigrants who arrived between 1890 and 1920.[49] The impact of the Johnson-Reed Act was immediate and dramatic. In 1925, the first year the Johnson-Reed Act of 1924 was in effect, the total number of immigrants admitted to the U.S. fell to 294,314, a decrease of approximately 60% from the previous year when 706,896 immigrants were admitted to the U.S.[50] Immigration to the U.S. fell

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45. *See generally* Immigration (Johnson-Reed) Act of 1924, Pub. L. 68-139, 43 Stat. 153 (repealed 1965).

46. *Id*. § 11.

47. *Id*. § 4.

48. The Johnson-Reed Act was influenced by the eugenics movement and the work of Charles Davenport, a eugenicist who supported restrictions immigration from Southern and Eastern Europe and argued that "allowing the wrong races into America could adulterate our national germ plasm with socially unfit traits." Gordon F. Sander, *100 Years After Immigration Law Shut America's Doors, its Legacy Revives,* WASH. POST, (May 24, 2024), https://www.washingtonpost.com/history/2024/05/24/johnson-reed-act-immigration-quotas-trump/ [https://perma.cc/TF8A-3DWV]. The influence of the eugenics movement and xenophobic bias against Southern and Eastern Europeans was also seen in an opinion piece by Sen. David Reed, one of the lead sponsors of the 1924 law, published in the New York Times one month before the Johnson-Reed Act was signed into law, where he stated, "The races of man who have been coming in recent years are wholly dissimilar to the native-born Americans [and were] untrained in self-government, a faculty that has taken the Northwestern peoples many centuries to acquire." *See id.*; *see also,* Muzaffar Chishti & Julia Gelatt, *A Century Later, Restrictive 1924 U.S. Immigration Law has Reverberations in Immigration Debate,* MIGRATION POL'Y INST., (May 15, 2024), https://www.migrationpolicy.org/article/1924-us-immigration-act-history#origins [https://perma.cc/V9GV-B8CJ]. (discussing the history of immigration laws in the United States and its effect on the current state of the law).

49. *See* Sander, *supra* note 48.

50. 2001 INS STATISTICAL YEARBOOK, *supra* note 42, at 16 tbl.1. In Fiscal Year

even further in the years after passage of the Johnson-Reed Act. Between 1931 and 1940, only 528,431 immigrants were admitted to the U.S., approximately one tenth of the number admitted between 1911 and 1920, when 5,735,811 immigrants were admitted over a ten-year period.[51]

While the xenophobic bias against Southern and Eastern European immigrants and a belief these immigrants would be a burden on the U.S. drove passage of the Johnson-Reed Act, the public charge ground of excludability statutory language remained unchanged from the Immigration Act of 1891. However, after implementation of the Johnson-Reed Act and quota system limiting annual immigration to the U.S. based on nationality, the total number of immigrants denied admission to the U.S. on account of public charge dramatically decreased. According to figures from the former Immigration and Naturalization Service (INS), between 1931 and 1960, fewer than 14,000 immigrants were deemed excludable on account on public charge, accounting for fewer than 15% of the 119,000 immigrants deemed inadmissible during this time period.[52] This decrease can be attributed, in part, to the significant reduction in overall immigration to the U.S. after 1924 under new quota system. However, another explanation for this decrease in public charge-based exclusions from the U.S. is that the Johnson-Reed Act created a process for U.S. Citizen sponsors to post a cash bond or provide an assurance to the U.S. government of their ability and willingness to economically support intending immigrants to prevent them from becoming a public charge.[53] This assurance of economic support by U.S. citizen sponsors contained in the Johnson-Reed Act served as a precursor to the I-864 Affidavit of Support, a form used in family-based permanent residence applications today to overcome the public charge ground of inadmissibility.[54]

Ultimately, the quota system created by the Johnson-Reed Act was repealed and replaced by the Immigration and Nationality Act

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1924, prior to the Johnson-Reed Act taking effect, the U.S. admitted 706,896 immigrants. *Id.* In contrast, only 294,314 immigrants were admitted in FY 1925, marking a reduction of 58.4% in total immigration to the U.S. in a single year. *Id.*

51. *Id.*

52. *Id.* at 258 tbl.66. Between 1931 and 1960, 13,740 immigrants were denied admission on account of public charge excludability, accounting for 11.54% of the 119,065 immigrants denied admission during this period. *Id.*

53. *See* Johnson-Reed Act of 1924, Pub. L. 68-139, § 9(b), 43 Stat. 153, 157–58 (repealed 1965).

54. *See* Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689, 28693 (Mar. 26, 1999) [hereinafter 1999 Legacy INS Memo].

of 1965, the law establishing the framework of our modern immigration system of family-based and employment-based petitions for permanent residence.[55] After the Immigration Act of 1965 went into effect, exclusion of immigrants on account of public charge became even more rare. This was because the U.S. Department of State (DOS) and Immigration and Naturalization Service (INS)[56] had a general policy of accepting an affidavit of support presented by the U.S.-based petitioner or sponsor as sufficient evidence the immigrant would not become a public charge.[57] According to statistics published by the INS, only 176 total immigrants were deemed excludable between 1961 and 1980 on account of public charge.[58]

C. Changes to the Public Charge Ground of Inadmissibility and Deportability Under IIRAIRA and Non-Citizen Eligibility for Means-tested Public Benefits Under the PRWORA

After passage of the Immigration Act of 1965, submission of an affidavit of support or employment verification letter was generally sufficient to overcome the public charge ground of inadmissibility. However, this changed in 1996 when Congress passed two laws: the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA)[59] and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),[60] or Welfare Reform, which

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55. *See* Immigration and Nationality Act of 1965, Pub. L. 89-236, § 201(a), 79 Stat. 911 (1965) (current version at 8 U.S.C. 1101 *et seq*.).

56. The Immigration and Naturalization Service (INS) was a sub-agency of the Department of Labor and later the Department of Justice responsible for immigration enforcement and adjudication of applications for immigration benefits between 1933 and 2003. Following creation of the Department of Homeland Security (DHS) as a cabinet level agency in 2003, the functions of the former INS were transferred to three new subagencies under the DHS: Customs and Border Protection (CBP), Immigration and Customs Enforcement, (ICE) and US Citizenship and Immigration Services (USCIS). Since 2003, adjudication of immigration benefits, including applications for permanent residence, is completed by USCIS. *See generally* U.S. CITIZENSHIP & IMMIGR. SERV. HIST. OFF. & LIBR. DEP'T, OVERVIEW OF INS HISTORY (2012), https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf [https://perma.cc/TV6V-5Y8M] (discussing the history of the Immigration and Naturalization Service).

57. *See* Robert A. Mautino, *Sponsor Liability for Alien Immigrants: The Affidavit of Support in Light of Recent Developments,* 7 SAN DIEGO L. REV. 314, 315–16, (1970).

58. *See* 2001 INS STATISTICAL YEARBOOK, *supra* note 42, at 258.

59. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546 (1996) (codified as amended at Immigration and Nationality Act, 8 U.S.C. §§ 1101–1107).

60. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (amended 1997).

changed the statutory language of the public charge ground of inadmissibility and non-citizen eligibility for means-tested public benefits.

Both IIRAIRA and PRWORA were part of a series of laws passed in the 1990s during the Clinton Administration that marked a rightward shift in the national political landscape in the U.S. Other prominent laws passed during this period include the North American Free Trade Agreement (NAFTA)[61] and the Violent Crime Control and Law Enforcement Act of 1994,[62] more commonly known as the 1994 Crime Bill. Like other laws and policies implemented in the 1990s by the Gingrich Congress and Clinton Administration, both IIRAIRA and PRWORA were driven by animus and negative stereotypes against the poor and communities of color.[63] Both IIRAIRA[64] and PRWORA[65] were passed by the 104th Congress in 1996 on a bipartisan basis.

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61. *See* North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057 (1993) (repealed 2020).

62. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796 (1993) (current version at 34 U.S.C. § 12101).

63. *See infra* notes 84–85.

64. IIRAIRA was initially passed by the House of Representatives, as part of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, on June 13, 1996, with a vote of 278 to 126, with 88 Democratic Representatives voting in favor of the bill. *See* Fiscal Year 1997 Department of Defense Appropriations: H.R. Roll Vote No. 247, 104th Cong., H.R. 3610 (June 13, 1996), https://clerk.house.gov/Votes/1996247 [https://perma.cc/S644-UDA7]. The Fiscal Year 1997 Omnibus Bill, which included IIRAIRA, was passed by the Senate on July 18, 1996, with a vote of 72 to 27, with 22 Democrats voting to pass the bill. *See* Omnibus Consolidated Appropriations Act, 1997: S. Roll Vote No. 200, 104th Cong., H.R. 3610 (July 18, 1996), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1042/vote_104_2_00200.htm [https://perma.cc/KE4V-QVBE]. Notable Democratic politicians who voted in favor of the Omnibus bill incorporating IIRAIRA include Tom Daschle, Diane Feinstein, Harry Reid, and Bernie Sanders. After being sent to Conference Committee, the final version of the Omnibus Consolidated Appropriations Act, including IIRAIRA, passed the House on September 28, 1996, by a vote of 370 to 37, with 167 Democrats and 1 Independent voting in favor of the bill. *See* Conference Report Department of Defense Appropriations for F.Y. 1997: H.R. Roll Vote No. 455, 104th Cong., H.R. 3610 (Sept. 28, 1996), https://clerk.house.gov/Votes/1996455 [https://perma.cc/Z44C-6R8Y]. The final Omnibus Bill, including IIRAIRA, was passed by voice vote in the Senate on September 30, 1996, and was signed into law by President Clinton that same day. *See* H.R.3610 - Omnibus Consolidated Appropriations Act, 1997, 104th Cong., Bill History (1996), https://www.congress.gov/bill/104th-congress/house-bill/3610/all-actions?overview=closed#tabs [https://perma.cc/7N9B-MLNX].

65. PRWORA initially passed by the House of Representatives on July 18, 1996, by a vote of 256 to 170, with 30 Democrats voting in favor of the bill. *See* Welfare and Medicaid Reform Act of 1996: H.R. Roll Vote 331, 104th Cong., H.R. 3734 (July 18, 1996), https://clerk.house.gov/Votes/1996331 [https://perma.cc/NB84-A356]. PRWORA was then passed by the Senate on July 23, 1996, by a vote of 74 to 24, with 22 Democrats voting in favor of the bill, including President Joe Biden, Former Secretary of State John Kerry, and Sen. Harry Reid. Welfare and Medicaid Reform

i. Changes Under IIRAIRA to the Public Charge Inadmissibility Statutory Language

The Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA), which was passed by Congress and signed into law on September 30, 1996, was the last major piece of immigration legislation passed by Congress and signed into law.[66] Unlike past immigration laws, like the Johnson-Reed Act and Immigration Act of 1965 which reformed the systems and procedures to legally immigrate to the U.S., IIRAIRA was an enforcement-only bill increasing penalties against undocumented immigrants and immigrants convicted of a crime. IIRAIRA was also the law that effectively invented our modern system of immigration enforcement, granting the executive branch authority to create the deportation machine that exists under current immigration law.

One key feature of IIRAIRA was the creation of expedited removal along land borders and ports of entry, granting front line immigration agents the authority to issue a removal order against any non-citizen without authorization to enter the U.S.[67] Under expedited removal, non-citizens have very limited procedural due process protections and can only assert an asylum claim or credible fear of persecution as a defense to removal.[68] With respect to the criminalization of non-citizens, IIRAIRA included a significant expansion of criminal convictions deemed *aggravated felonies*[69] and

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Act of 1996: S. Roll Vote 232, 104th Cong., H.R. 3734 (July 23, 1996) https://www.senate.gov/legislative/LIS/roll_call_votes/vote1042/vote_104_2_00232.htm [https://perma.cc/56VT-ZMQF]. After passing out of Conference Committee, the final version of PWORA was passed by the House of Representatives on July 31, 1996, with a vote of 328 to 101, with 98 Democrats voting to pass the final bill. *See* Welfare and Medicaid Reform Act of 1996, Conference Report: H.R. Roll Vote 383, 104th Cong., H.R. 3734 (July 31, 1996) https://clerk.house.gov/Votes/1996383 [https://perma.cc/D6N3-3P7X]. The Senate passed the final version of PRWORA on August 1, 1996, with a vote of 78 to 21, with 25 Democratic Senators voting in favor of the final bill. *See* Welfare and Medicaid Reform Act of 1996, Conference Report : S. Roll Vote 262, 104th Cong., H.R. 3734 (Aug. 1, 1996), https://www.senate.gov/legislative/LIS/roll_call_votes/vote1042/vote_104_2_00262.htm [https://perma.cc/FW6Q-92B9]. PRWORA was signed into law by Bill Clinton on August 22, 1996. *See* H.R. 3734 - Welfare and Medicaid Reform Act of 1996, 104th Cong., Bill History (1996) https://www.congress.gov/bill/104th-congress/house-bill/3734/all-actions [https://perma.cc/6L78-BMGQ].

66. *See* Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) of 1996, Pub. L. 104-208, 110 Stat. 3009-546 (1996) (codified as amended at Immigration and Nationality Act, 8 U.S.C.§§ 1101–1107).

67. Immigration and Nationality Act, Pub. L. No. 414, § 235(b)(1)(A)(i), 66 Stat. 163 (as amended through Pub. L. 119-1); 8 U.S.C. § 1225(b)(1)(A)(i).

68. Immigration and Nationality Act (INA), § 235(b)(1)(A)(i), (B), 8 U.S.C. § 1225(b)(1)(A)(i), B.).

69. *See* IIRAIRA § 321.

increased penalties for non-citizens convicted of an aggravated felony, including mandatory detention[70] and removal from the U.S. with a permanent bar on ever returning.[71] IIRAIRA also included a provision known as the three- and ten-year bar,[72] a provision penalizing non-citizens who departed after being present in the U.S. without authorization by barring their reentry to the U.S. for up to ten years. One consequence of the three- and ten-year bar is that undocumented immigrants with significant periods of unlawful presence were effectively stuck inside the U.S. and could not depart the U.S. to regularize their status through consular processing without triggering this bar.[73] Consequentially, in the decade following passage of IIRAIRA and creation of the three- and ten-year bar, the undocumented immigrant population in the U.S. rose from 5 million in 1996[74] to 11.8 million in 2007.[75]

With respect to the public charge ground of inadmissibility, IIRAIRA included significant changes to the statutory language defining public charge and expanded the criteria that could be expressly considered by the government in determining whether a non-citizen was likely to become a public charge. This statutory language, as amended by IIRAIRA, retained the language from past laws deeming non-citizens likely to become a public charge as inadmissible and expanded the factors to be considered in determining whether a non-citizen was likely to become a public charge, through the following:

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70. *Id.* § 303(a); INA § 236(c)(1)(B).

71. IIRAIRA § 301(b)(1); INA § 212(a)(9)(A)(ii).

72. The Illegal Immigration Reform and Immigration Responsibility Act of 1996 expanded the grounds of inadmissibility under INA § 212(a)(9)(B) to include the three- and ten-year bars. Pursuant to INA § 212(a)(9)(B), if a non-citizen is unlawfully present in the U.S. for between six months and one year and departs the U.S., they are inadmissible and barred from reentering the U.S. for three years. INA § 212(a)(9)(B). For non-citizens unlawfully present for more than one year prior to departure from the U.S. if they departed after being unlawfully present for between six months and one year and barring reentry for ten years if they departed the U.S. after accumulating more than one year of unlawful presence. IIRAIRA § 301(b)(1).

73. *See The Three- and Ten-Year Bars: How New Rules Expand Eligibility for Waivers,* AM. IMMIGR. COUNCIL 1 (Oct. 2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/three_and_ten_year_bars.pdf [https://perma.cc/M4PY-29FK].

74. U.S. DEP'T OF HOMELAND SEC., *Illegal Alien Resident Population* 6 (1996), https://www.dhs.gov/xlibrary/assets/statistics/illegal.pdf [https://perma.cc/6WGL-Y7A3].

75. MICHAEL. HOEFER, NANCY RYTINA & BRYAN C. BAKER, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2007, U.S. DEP'T OF HOMELAND SEC. 1 (2008), https://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2007.pdf [https://perma.cc/8NP7-48Y2].

> (a) IN GENERAL.—Paragraph (4) of section 212(a) (8 U.S.C. 1182(a)) is amended to read as follows:
>
> (4) PUBLIC CHARGE.—
>
> (A) IN GENERAL.—Any alien who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission or adjustment of status, is likely at any time to become a public charge is excludable.[76]
>
> (B) FACTORS TO BE TAKEN INTO ACCOUNT.—
>
> (i) In determining whether an alien is excludable under this paragraph, the consular officer or the Attorney General shall at a minimum consider the alien's—
>
> (I) age;
>
> (II) health;
>
> (III) family status;
>
> (IV) assets, resources, and financial status; and
>
> (V) education and skills.[77]

In addition to expanding the factors that could be considered by the government in determining if a non-citizen was inadmissible on account of public charge, IIRAIRA also created new requirements under INA § 213A for the Affidavit of Support completed by U.S. petitioners on behalf of sponsored non-citizens to overcome the public charge ground of inadmissibility. Under IIRAIRA and INA § 213A, the Affidavit of Support needed to be executed as a legally enforceable contract between the U.S. petitioner or sponsor and the government where the U.S. petitioner or sponsor affirms they will economically support to the sponsored non-citizen after their admission to the U.S.[78] Additionally, INA § 213A required the U.S. petitioner or sponsor submit evidence demonstrating their household earnings were above 125% of the federal poverty line.[79] The Affidavit of Support contract, under IIRAIRA, also contained a legally enforceable requirement binding the U.S. petitioner or sponsor to reimburse the federal or state

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76. While the statutory language in the IIRAIRA Bill passed by Congress notes grounds of excludability, under IIRAIRA, prior grounds of exclusion and excludability under the Immigration and Nationality Act (INA) § 212 became grounds of inadmissibility. Following passage of IIRAIRA, all sections of the INA referencing "exclusion" and "excludable aliens" were amended to the terms "inadmissible", "inadmissibility" and "inadmissible alien." *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 301(b)(1), 110 Stat. 3009-546, 576–78, (1996) (codified as amended at INA, 8 U.S.C.§§ 1182(a)); INA, Pub. L. No. 414, § 212, 66 Stat. 163 (2025) (as amended through Pub. L. 119-1).

77. *See* IIRAIRA, Pub. L. No. 104, § 531(a), 110 Stat. 3009-784, (1996), (codified as amended at INA, 8 U.S.C. § 1182(a)).

78. *Id*. § 531(a)(4)(C)(ii), § 551(a); INA, § 213A, 8 U.S.C. § 1183a.

79. *See* IIRAIRA § 551(a); INA § 213(A)(1)(A).

government for any means-tested public benefits received by the sponsored non-citizen for five years after the date they were granted permanent residence.[80] The requirements for the Affidavit of Support marked a significant change in policy prior to 1996, where only an informal assurance or affidavit by the U.S. petitioner pledging to support the non-citizen was sufficient to overcome the public charge ground of excludability.[81] IIRAIRA also amended the INA to require that all non-citizens applying for permanent residence through a family-based petition provide an Affidavit of Support meeting the requirements of INA § 213A executed by the U.S. citizen or permanent resident relative sponsoring them for permanent residence.[82]

ii. Changes Under the PRWORA of 1996 to Non-Citizen Eligibility for Means-tested Benefits

The other law passed in 1996 related to public charge was the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),[83] more commonly known as welfare reform. PRWORA was passed in response to years of negative rhetoric demonizing *welfare queens* abusing the system[84] and perceptions that poor individuals receiving means-tested benefits would become dependent on these programs.[85] Additionally, many of the policy arguments prompting the passage of PRWORA contained

80. IIRAIRA § 551(a).

81. *See* Mautino, *supra* note 57.

82. IIRAIRA § 531(a)(4).

83. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

84. The trope of the "welfare queen" was frequently promoted by President Ronald Reagan, who shared the story of Linda Taylor, a Black woman in Chicago, charged and convicted of welfare fraud after allegedly using four aliases to fraudulently collect $3,000 in welfare benefits. In an exaggerated retelling of Linda Taylor's story in a 1976 campaign speech, President Reagan stated, "She has 80 names, 30 addresses, 12 Social Security cards and is collecting veterans' benefits on four non-existing deceased husbands. . . . And she's collecting Social Security on her cards. She's got Medicaid, getting food stamps, and she is collecting welfare under each of her names. Her tax-free cash income alone is over $150,000." *See 'Welfare Queen' Becomes Issue in Reagan Campaign,* N.Y. TIMES (Feb. 15, 1976), https://www.nytimes.com/1976/02/15/archives/welfare-queen-becomes-issue-in-reagan-campaign-hitting-a-nerve-now.html [https://perma.cc/XS5U-2AT6].

85. A 2001 NPR/Kaiser Family Foundation/Kennedy School poll found that 52% of those surveyed believed "lack of motivation was a major cause of poverty" and 44% did not believe "most welfare recipients today really want to work." *See* Daniel T. Lichter & Martha L. Crawley, *Poverty in America: Beyond Welfare Reform*, 57 POPULATION BULLETIN, 1, 18–19 (June 2002) [hereinafter *PRB 2002 Report*], https://www.prb.org/wp-content/uploads/2021/02/06052002_57.2PovertyInAmerica.pdf [https://perma.cc/62AV-HSNR].

significant Anti-Black and Anti-Latinx racist undertones.[86] The final version of PRWORA, signed into law by President Clinton on August 22, 1996, contained a number of measures effectively gutting the social safety net created by the New Deal in the 1930s and the Great Society in the 1960s.

Arguably, the most notable change under PRWORA was elimination of the guaranteed federal cash benefit program for low-income families, Aid to Families with Dependent Children (AFDC), which was replaced with the Temporary Assistance to Needy Families (TANF) program.[87] Unlike the AFDC program, where eligible households received federally funded cash benefits,[88] funding for the TANF program was issued as block grants to each state.[89] Under the TANF block grant system, states were given discretionary authority to spend block grant funds on cash benefits or programing for low-income residents, like job training programs.[90] The TANF program also included time limits on receipt of TANF cash benefits, including an individual lifetime cap of five years on TANF benefits,[91] and requirements that TANF beneficiaries begin working within two years of receiving benefits.[92]

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86. Many policy arguments in support of welfare reform included negative Anti-Black and Anti-Latino stereotypes painting Black and Latino welfare recipients as "lazy" and "taking advantage of the system" and Latina immigrants as "hyper-fertile" women who deliberately gave birth on U.S. soil to benefit from social welfare programs. *See* ELISA MINOFF, ISABELLA CAMACHO-CRAFT, VALERY MARTÍNEZ & INDIVAR DUTTA-GUPTA, CTR. FOR THE STUDY OF SOC. POL'Y & CTR. ON POVERTY & INEQ. GEORGETOWN L., HOW THE LAW THAT BROUGHT US TEMPORARY ASSISTANCE FOR NEEDY FAMILIES EXCLUDED IMMIGRANT FAMILIES & INSTITUTIONALIZED RACISM IN OUR SOCIAL SUPPORT SYSTEM 11, 12 (2021) [hereinafter CSP/Georgetown Report], https://www.georgetownpoverty.org/wp-content/uploads/2021/08/LastingLegacyExclusion-Aug2021.pdf [https://perma.cc/V9B4-XYKK].

87. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103, 110 Stat. 2105, 2212–61 (codified as amended at 42 U.S.C. §§ 601–19).

88. *See Aid to Families with Dependent Children (AFDC) and Temporary Assistance for Needy Families (TANF) - Overview,* OFF. ASSISTANT SEC'Y FOR PLAN. & EVALUATION, U.S. DEP'T OF HEALTH & HUM. SERVS., https://aspe.hhs.gov/aid-families-dependent-children-afdc-temporary-assistance-needy-families-tanf-overview [https://perma.cc/TFW5-VYM2].

89. *PRB 2002 Report*, *supra* note 85, at 4.

90. *See Policy Basics: Temporary Assistance for Needy Families,* CTR. ON BUDGET & POL'Y PRIORITIES 2–4 (Mar. 1, 2022) [hereinafter *TANF Policy Basics*], https://www.cbpp.org/sites/default/files/atoms/files/7-22-10tanf2.pdf [https://perma.cc/8KQQ-KW2].

91. *Id.* at 4. There are some exceptions to this five-year cap on TANF benefits: states can exceed the sixty-month limit for up to 20% of recipient families, there is no limit on families that lack an adult recipient, and there is no limit on families receiving funds that are entirely from the state. *Id.*

92. *Id.* at 5–6; *see also* 42 U.S.C. § 602(a)(1)(A)(ii) (outlining the structure of the

These requirements under TANF were established as part of the "work first" provisions contained in PRWORA, intended to convert cash assistance to a short-term benefit to assist individuals and families experiencing temporary financial hardship.[93] Changes to cash assistance programs under TANF were also aimed at encouraging low income individuals to become self-sufficient through work instead of becoming indefinitely reliant on welfare benefits.[94] However, these goals were never fully realized. In the twenty-five years since PRWORA was passed, studies have found the work reporting requirements to receive TANF cash benefits combined with use of TANF block grant funding for non-cash benefit programs have significantly limited resources available to low-income households and exacerbated issues faced by U.S. households living in poverty.[95]

The other major component of PRWORA relevant to public charge was Title IV of the Act, which limited non-citizen eligibility for federally funded means-tested public benefits.[96] Under PRWORA, non-citizen eligibility for federally funded means tested public benefits—including TANF cash assistance, Supplemental Security Income (SSI), Supplemental Nutrition Assistance Program (SNAP) benefits, and Medicaid coverage—was limited to "qualified aliens."[97]

"Qualified aliens," as defined under PRWORA, generally referred to non-citizens with lawful immigration status allowing them to reside in the U.S. indefinitely and immigrants holding specific humanitarian status identified by Congress in the law.[98] The specific forms of immigration status falling under the definition of "qualified alien" included: lawful permanent residents (LPRs), refugees, asylees, immigrants granted withholding of removal status, and humanitarian parolees.[99] All other non-citizens present in the U.S.—including those present with temporary non-immigrant visa status, Temporary Protected Status (TPS) holders,

program).

93. *See PRB 2002 Report*, *supra* note 85, at 3–4.

94. *Id.* at 8.

95. *See TANF Policy Basics*, *supra* note 90, at 6–8.

96. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 400–451, 110 Stat. 2105 (1996).

97. *See id.* § 401, 110 Stat. 2105, 2261–62 (codified as amended at 8 U.S.C. § 1611).

98. *Id.*; *id.* § 403, 110 Stat. 2105, 2274 (codified as amended at 8 U.S.C. § 1641).

99. *Id.* § 431, 110 Stat. at 2274 (codified as amended at 8 U.S.C. § 1641); *see also* Alison Siskin, *Noncitizen Eligibility for Federal Public Assistance: Policy Overview*, CONG. RSCH. SERV. 1–2 (Dec. 12, 2016), https://sgp.fas.org/crs/misc/RL33809.pdf [https://perma.cc/8TWQ-89FZ].

asylum applicants, those with deferred action, and undocumented immigrants—were deemed "non-qualified immigrants" ineligible for federal means-tested benefits.[100] This marked a significant change to the policy in effect prior to PRWORA which allowed immigrants to receive federally funded means-tested benefits—including cash assistance, SSI, SNAP and Medicaid—so long as they could establish they were "permanently residing under color of law" (PRUCOL).[101] PRWORA also prohibited undocumented immigrants without a valid social security number from receiving Earned Income Tax Credit (EITC) when filing a federal income tax return.[102]

In addition to limiting non-citizen eligibility for means-tested benefits to "*qualified immigrants*," Section 403 of PRWORA contained a rule prohibiting LPRs granted permanent residence on or after August 22, 1996 from receiving federal means-tested public benefits for five years from the date they were granted LPR status.[103] The only exceptions to the five-year bar on eligibility for federal means-tested benefits noted in the statute were for the humanitarian categories of "qualified immigrants" including refugees, asylees, non-citizens granted withholding of removal[104] and certain humanitarian parolees and qualified immigrants who had served in the military.[105] Section 403(c) also noted that certain federally funded programs, including emergency disaster assistance, Women, Infant and Children (WIC) nutrition benefits, Head Start, free and reduced school lunch programs, and federal financial aid for higher education, were not subject to the five-year bar.[106]

PRWORA, together with IIRAIRA, also strengthened provisions from earlier law related to sponsor deeming for LPR's sponsored through a family-based petition in the Affidavit of Support completed by the petitioner or co-sponsor in their case.

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100. *See* Siskin, *supra* note 99, at Appendix A.

101. Historically, prior to the change in the law in 1996 under PRWORA, a person "permanently residing under color of law" or PRUCOL referred to any non-citizen present in the U.S. who the federal government knew to be present but had no plans to remove or deport from the U.S. *See id.* at 4 (citing ALISON SISKIN, CONG. RSCH. SERVS., UNAUTHORIZED ALIENS' ACCESS TO FED. BENEFITS: POL. & ISSUES 4 (2016), https://sgp.fas.org/crs/misc/RL33809.pdf [https://perma.cc/G7LA-MH4C]).

102. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 451, 110 Stat. 2105, 2276–77 (codified as amended at 26 U.S.C. § 32).

103. *Id.* § 403(a).

104. *Id.* § 403(b)(1).

105. *Id.* § 403(b)(2).

106. *Id.* § 403(c).

Under the sponsor deeming rule, codified at 8 U.S.C. § 1631, the income of the sponsor who completed an Affidavit of Support on behalf of an LPR sponsored through a family-based petition is deemed to the LPR when calculating their household income.[107] As a result, because the sponsor's income is deemed to an LPR under the sponsor deeming rules, typically they will not meet the income requirements to receive means-tested benefits prior to becoming a U.S. citizen through naturalization or accumulating forty quarters of Social Security covered earnings.[108]

a. The 1999 Legacy INS Memo and Enforcement of the Public Charge Ground of Inadmissibility by the INS and DHS: 1999 to 2017

Following passage of IIRAIRA and PRWORA in 1996, there was considerable confusion and fear within immigrant communities around the public charge ground of inadmissibility and penalties for past receipt of federal means-tested benefits.

With respect to PRUCOL, non-citizens lawfully receiving federal means-tested public benefits prior to PRWORA taking effect on August 22, 1996, Sections 401 and 402 of PRWORA allowed these PRUCOL non-citizens to remain eligible for SSI and Medicaid, if tied to their SSI benefits.[109] Section 402 of PRWORA also allowed qualified immigrants, namely LPRs lawfully residing in the U.S. on August 22, 1996, to apply for SSI benefits after the law went into effect.[110] This section also gave states the discretion to use TANF block grant funding to issue state cash benefits to qualified immigrants, regardless of their date of entry, so long as they were not subject to the five-year bar on eligibility for receipt of means-tested benefits.[111] Nonetheless, many immigrants who have lawfully received means-tested benefits prior to 1996 remained concerned that their prior receipt benefits would put their immigration status at risk and limit their ability to sponsor family members for permanent residence.[112]

In response to these concerns, on March 26, 1999, the INS issued an Agency Field Guidance Memorandum in the Federal Register to clarify the standards used by the agency to determine

107. 8 U.S.C. § 1631(a).

108. *See* Siskin, *supra* note 99, at 4.

109. *See* Personal Responsibility and Work Opportunity Reconciliation Act, §§ 401–02, 110 Stat. at 2261–65 (codified as amended at 8 U.S.C. §§1611–12).

110. *Id.* § 402.

111. *Id.* § 402(b).

112. *See* Faber, *supra* note 29, at 1378.

whether a non-citizen is inadmissible under INA section 212(a)(4) or deportable under INA 237(a)(5) as a public charge.[113] This Agency Field Guidance, known as the "1999 Legacy INS Memo," became the primary authority used by the INS and later USCIS when adjudicating permanent residence applications and determinations of public charge inadmissibility.[114] With respect to public charge inadmissibility determinations under INA section 212(a)(4), made when a non-citizen is applying for permanent residence through consular processing or adjustment of status, the 1999 Legacy INS Memo clarified a number of ambiguities under the new statutory language. First, the agency clarified that "public charge" was defined as someone "*primarily dependent on the government* for subsistence," as evidenced by "receipt of public cash assistance for income maintenance" or Medicaid benefits to cover the cost of institutionalization at a long term care facility.[115] The 1999 Legacy INS memo also clarified that submission of a validly executed I-864 Affidavit of Support with evidence of the sponsor's income above 125% of the poverty line should be given significant weight in determining whether an non-citizen was inadmissible as likely to become a public charge.[116]

Following publication of the 1999 Legacy INS Memo, from 1999 to 2017, it was the general policy of USCIS and consular officers to deem submission of a validly executed I-864 Affidavit of Support as sufficient to overcome the public charge ground of inadmissibility in family-based permanent residence cases.[117]

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113. *See* 1999 Legacy INS Memo, *supra* note 54.

114. *Id.* at 28689.

115. *Id.*

116. *See id.* at 28690, 28693 (stressing the I-864 affidavit of support as a positive factor); *see also* IMMIGR. LEGAL RES. CTR., A QUICK LEGAL BACKGROUND, PUBLIC CHARGE AND IMMIGRATION LAW 3 (2021) [hereinafter ILRC Public Charge Background], https://www.ilrc.org/sites/default/files/resources/public_charge-_a_quick_legal_background_0.pdf [https://perma.cc/3YPN-8FUH] ("The Affidavit of Support offers strong evidence that the immigrant will not become primarily dependent on the government.");

117. ILRC Public Charge Background, *supra* note 116, at 3; *see also* Catholic Legal Immigration Network, Inc., FAQ on Public Charge for Intending Immigrants 2 (2019), https://www.cliniclegal.org/resources/ground-inadmissibility-and-deportability/faq-public-charge-intending-immigrants [https://perma.cc/F7XE-R2V8] (noting that the I-864 was the primary factor used to determine public charge inadmissibility).

II. Changes to Public Charge Inadmissibility Under the Trump Administration

Within weeks of President Trump taking office on January 20, 2017, it became clear that the Trump Administration intended to use executive authority to reshape immigration policy. Notable Executive Orders issued by President Trump within his first week in office included Executive Orders on Border Security,[118] Interior Immigration Enforcement,[119] and the first version of the Travel Ban.[120]

In addition to these official Executive Orders by the Trump Administration in January 2017, leaked drafts of three additional immigration Executive Orders were published by Vox on January 25, 2017.[121] These leaked draft Executive Orders included plans to terminate the Deferred Action for Childhood Arrivals (DACA) program, changes to the H-1B program and other areas of employment-based immigration, and reinterpretation of the public charge ground of inadmissibility.[122] Of note, a version of each of the policies outlined in these leaked drafts were eventually implemented by the Trump Administration. The final version of these policies included the Buy American, Hire American Executive Order,[123] issued April 18, 2017, to reform the H-1B program; termination of the DACA program on September 5, 2017,[124] a policy eventually struck down by the Supreme Court in June 2020;[125] and the proposed and final public charge regulations in October 2018[126]

118. *See* Exec. Order No. 13767, 3 C.F.R. 263 (2018).

119. *See* Exec. Order No. 13768, 3 C.F.R. 268 (2018).

120. Under the first version of the Travel Ban, issued on January 27, 2017, admission of refugees through the U.S. Refugee Admissions Program was suspended for 120 days, admission of immigrants from Iran, Iraq, Libya, Somalia, Sudan and Yemen was suspended for 90 days and admission of Syrian refugees was suspended indefinitely. *See* Exec. Order No. 13769, 3 C.F.R. 272 (2018).

121. *See* Matthew Yglesias & Dara Lind, *Read Leaked Drafts of 4 White House Executive Orders on Muslim Ban, End to DREAMer Program, and More*, VOX (Jan. 25, 2017), https://www.vox.com/policy-and-politics/2017/1/25/14390106/leaked-drafts-trump-immigrants-executive-order [https://perma.cc/WPB2-9W2R].

122. *Id*.

123. *See* Exec. Order. No. 13788, 3 C.F.R. 325 (2018).

124. *See* U.S. DEP'T. OF HOMELAND SEC., MEMORANDUM ON RECISSION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) https://www.dhs.gov/archive/news/2017/09/05/memorandum-rescission-daca [https://perma.cc/43LB-2RW8]

125. *See* U.S. Dep't. of Homeland Sec. v. Regents of the Univ. of Cal., 591 U.S. 1 (2020).

126. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248).

and August 2019,[127] respectively. While these policies were not implemented for some time after publication of the leaked drafts, the circulation of these leaked drafts signaled President Trump intended to follow through on campaign promises to crack down on immigration.[128] Additionally, the January 2017 Executive Orders and published leaked drafts further amplified uncertainty and fear within immigrant communities following the election of President Trump in November 2016.[129]

A. Summary of Leaked Drafts of the Public Charge Executive Order and Regulations: 2017 and 2018

Prior to the official publication of the proposed public charge regulations in the Federal Register on October 10, 2018, leaked drafts of executive orders and regulations on public charge were published by various news outlets in January 2017[130] and early 2018.[131] These leaked drafts, which are summarized below, further

127. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248).

128. *See* Yglesias & Lind, *supra* note 121.

129. *See generally* Samantha Artiga & Petry Ubri, *Living in an Immigrant Family in America: How Fear and Toxic Stress are Affecting Daily Life, Well-Being, & Health*, KAISER FAMILY FOUND. (Dec. 2017), https://files.kff.org/attachment/Issue-Brief-Living-in-an-Immigrant-Family-in-America [https://perma.cc/NMJ2-N6SX] (reporting findings from interviews with focus groups of 100 parents from 15 countries and pediatricians regarding how immigration policy was affecting the "daily lives, well-being, and health of immigrant families, including their children").

130. *See* Abigail Hauslohner & Janell Ross, *Trump Administration Circulates More Draft Immigration Restrictions, Focusing on Protecting U.S. Jobs,* WASH. POST (Jan. 31, 2017), https://www.washingtonpost.com/world/national-security/trump-administration-circulates-more-draft-immigration-restrictions-focusing-on-protecting-us-jobs/2017/01/31/38529236-e741-11e6-80c2-30e57e57e05d_story.html [https://perma.cc/2UCW-D44T]; *see also* Dara Lind, *A Leaked Trump Order Suggests He's Planning to Deport More Legal Immigrants for Using Social Services,* VOX (Jan. 31, 2017) [hereinafter Lind, *A Leaked Trump Order*], https://www.vox.com/policy-and-politics/2017/1/31/14457678/trump-order-immigrants-welfare [https://perma.cc/N6EC-A598].

131. *See* Yeganeh Torbati*, Trump Administration May Target Immigrants Who Use Food Aid, Other Benefits,* REUTERS (Feb. 8, 2018), https://www.reuters.com/article/us-usa-immigration-services-exclusive/exclusive-trump-administration-may-target-immigrants-who-use-food-aid-other-benefits-idUSKBN1FS2ZK/ [https://perma.cc/5EXB-ZMT7]; *see also* Dara Lind, *Exclusive: Trump's Draft Plan to Punish Legal Immigrants for Sending US-Born Kids to Head Start,* VOX (Feb. 8, 2018) [hereinafter Lind, *Exclusive: Trump's Draft Plan*], https://www.vox.com/2018/2/8/16993172/trump-regulation-immigrants-benefits-public-charge [https://perma.cc/7FYF-G3YX]; Nick Miroff, *Trump Proposal Would Penalize Immigrants Who Use Tax Credits and Other Benefits,* WASH. POST (Mar. 28, 2018), https://www.washingtonpost.com/world/national-security/trump-proposal-would-penalize-immigrants-who-use-tax-credits-and-other-benefits/2018/03/28/4c6392e0-2924-11e8-bc72-077aa4dab9ef_story.html [https://perma.cc/4W5T-Q4TL].

stoked fear and confusion within immigrant communities and mixed status households regarding penalties for receiving means-tested public benefits.[132]

i. January 2017 Draft Public Charge Executive Order Published by the Washington Post and Vox

By the second week of the Trump presidency, several news outlets reported that the Trump Administration was considering issuing an executive order penalizing immigrant and mixed status households for receipt of means-tested public benefits.[133] According to the draft executive order[134] published by the Washington Post and Vox on January 31, 2017,[135] the Trump Administration planned to issue new regulations on the application and enforcement of the public charge grounds of inadmissibility under INA section 212(a)(4)[136] and deportability under INA section 237(a)(5).[137]

At the outset, Section 1 of the draft executive order indicated the purpose of the executive order was "to protect American taxpayers and promote immigrant self-sufficiency."[138] Section 1 also contained a misleading statement that households headed by immigrants are more likely than those headed by citizens to use federal means-tested benefits.[139] These statements in Section 1

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132. *See* Artiga & Ubri, *supra* note 129, at 15.

133. Hauslohner & Ross, *supra* note 130; Lind, *A Leaked Trump Order*, *supra* note 130.

134. Memorandum for the President: Executive Order on Protecting Taxpayer Resources by Ensuring Our Immigration Laws Promote Accountability and Responsibility (Jan. 23, 2017) [hereinafter Jan. 2017 Draft Public Charge EO], https://platform.vox.com/wp-content/uploads/sites/2/chorus/uploads/chorus_asset/file/7872571/Protecting_Taxpayer_Resources_by_Ensuring_Our_Immigration_Laws_Promote_Accountability_and_Responsibility.0.pdf?_gl=1*fs1f5c*_ga*NjA0MDYxNTQ3LjE3MjA2OTQ4OTM.*_ga_C3QZPB4GVE*MTcyMzc1ODM4MC44LjEuMTcyMzc1ODM5MS40OS4wLjA [https://perma.cc/7V3L-B9YA].

135. Hauslohner & Ross, *supra* note 130; Lind, *A Leaked Trump Order*, *supra* note 130.

136. Immigration and Nationality Act (INA) § 212(a)(4), 8 U.S.C. § 1182(a)(4).

137. INA § 237(a)(5).

138. *See* Jan. 2017 Draft Public Charge EO, *supra* note 134, at 3.

139. While there is some ambiguity in the available data regarding use of means-tested benefits by immigrant households, namely mixed status households comprised of non-citizens and citizens entitled to receive means-tested benefits, a majority of research shows that individual immigrants use means-tested public benefits at lower rates and at lower portions than native-born U.S. citizens. *See* Tim O'Shea & Cristobal Ramón, *Immigrants and Public Benefits: What Does the Research Say?,* BIPARTISAN POL'Y CTR. (Nov. 2018), https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2019/03/Immigrants-and-Public-Benefits-What-Does-the-Research-Say.pdf [https://perma.cc/ZA9S-XLM7]; *see also* Michael Howard & Alex Nowrasteh,

appeared to indicate the Trump Administration's intent to penalize mixed status households, particularly households comprised of undocumented immigrant parents and U.S. citizen children, receiving means-tested benefits.[140]

With respect to public charge inadmissibility under INA section 212(a)(4), Section 2 of the draft executive order began by stating, "it is the policy of the United States to deny admission to any alien who is likely to become a public charge," effectively reiterating statutory language in effect since 1882.[141] However, Section 3 of the draft executive order indicated an intention by the Trump Administration to overhaul agency interpretation and enforcement of the public charge grounds of inadmissibility and deportability. First, Section 3 instructed the Secretary of Homeland Security to rescind any field guidance interpreting the public charge grounds of inadmissibility or deportability, presumably to rescind the 1999 Legacy INS Memo.[142] Section 3 also instructed the Secretary of Homeland Security to issue new regulations providing standards for "determining which aliens are inadmissible or deportable on public-charge grounds" along with new regulations defining "means-tested public benefits."[143] The latter directive, to issue a new rule defining means-tested public benefits, indicated an intention to expand the list of benefits that would make an immigrant inadmissible or deportable as a public charge specifically excluded from consideration under the 1999 Legacy INS Memo.[144] The draft executive order also sought to strengthen the enforceability of I-864 Affidavits of Support to seek reimbursement from petitioners and sponsors for the cost of federal means-tested public benefits provided to sponsored immigrants after their admission to the U.S.[145] Additionally, Section 2 of the draft executive order stated it was the policy of the U.S. to "identify and remove, as expeditiously as possible, any alien who has become a

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Immigrant and Native Consumption of Means-Tested Welfare and Entitlement Benefits in 2020, CATO INST. (Jan. 31, 2023), https://www.cato.org/sites/cato.org/files/2023-01/BP148.pdf [https://perma.cc/W2UH-JYNM].

140. Jan. 2017 Draft Public Charge EO, *supra* note 134.

141. *Id.* at 3.

142. *Id.*

143. *Id.*

144. *See* Hauslohner & Ross, *supra* note 130 (discussing the leaked draft of the public charge executive order, immigration advocates expressed concerns that the definition of *means-tested public benefit* could be expanded to include programs like federally funded free and reduced school lunch and Children's Health Insurance Program (CHIP) benefits); Lind, *supra* note 130 (same).

145. *See* Jan. 2017 Draft Public Charge EO, *supra* note 134, at 3, 5.

public charge and is subject to removal,"[146] indicating the Trump Administration's intention to ramp up removal of immigrants on account of public charge deportability under INA section 237(a)(5).

Other portions of the draft executive order further reiterated the Trump Administration's intention to target mixed status families comprised of undocumented immigrant parents and U.S. citizen children. Specifically, Section 3(d) of the executive order instructed the Secretary of the Treasury to issue regulations requiring all household members to have a social security number to be eligible for the child tax credit,[147] effectively eliminating this benefit for undocumented immigrants filing a tax return with an individual tax identification number (ITIN).[148] Section 3(f) of the draft executive order also required the Council of Economic Advisers to provide an annual report on "the cost to American taxpayers of providing means-tested public benefits . . . to households headed by illegal immigrants,"[149] a measure clearly targeting mixed status households.

The draft executive order also contained language throughout the document promoting the narrative that immigrants are a drain on the system at the expense of native-born U.S. citizens. Specifically, Section 3 of the draft executive order required the Council of Economic Advisors to provide a report on "the impact of low-skilled immigrant workers on the long-term solvency of the Social Security Trust Fund."[150] Ironically, such a report would illustrate that undocumented workers pay an estimated $12 to $13 billion each year in unclaimed payroll taxes and these funds are what keep the Social Security system solvent.[151] The draft executive

146. *Id.* at 3.

147. *Id.* at 4.

148. *See* AM. IMMIGR. COUNCIL, THE FACTS ABOUT THE INDIVIDUAL TAXPAYER IDENTIFICATION NUMBER (ITIN) 1 (2022), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_facts_about_the_individual_tax_identification_number_0.pdf [https://perma.cc/RK4M-JUTA] ("The Individual Taxpayer Identification Number (ITIN) is a tax-processing number issued by the Internal Revenue Service (IRS) to ensure that people–including undocumented immigrants–pay taxes even if they do not have a Social Security Number (SSN) and regardless of their immigration status.") ("According to []the IRS, in 2015, '4.4 million ITIN files paid over $5.5 billion in payroll and Medicare taxes and $23.6 billion in total taxes.'").

149. *See* Jan. 2017 Draft Public Charge EO, *supra* note 134, at 5.

150. *Id.* at 5.

151. *See,* Nina Roberts, *Undocumented Immigrants Quietly Pay Billions Into Social Security and Receive No Benefits*, NPR MARKETPLACE, https://www.marketplace.org/2019/01/28/undocumented-immigrants-quietly-pay-billions-social-security-and-receive-no/ [https://perma.cc/8V72-N6WQ] ("According to New American Economy, undocumented immigrants contributed $13 billion into

order also instructed the Secretary of State, Secretary of Homeland Security and Commissioner of Social Security to enact measures "to prohibit aliens from receiving[, for Social Security benefit eligibility purposes,] credit for wages earned during periods of unauthorized work."[152] However, existing law bars undocumented immigrants from receiving Social Security Retirement, Survivors and Disability Insurance (RSDI) benefits, despite their payment of payroll taxes from unauthorized work.[153]

ii. February 8, 2018, Publication of Leaked Initial Draft of Proposed Public Charge Regulations by Reuters and Vox and March 28, 2018 Publication of Leaked Revised Draft Regulations by the Washington Post

On February 8, 2018, the news outlets Reuters[154] and Vox[155] published stories on new leaked draft regulations on public charge inadmissibility under consideration by the Trump Administration. According to these reports and the copy of the leaked draft regulations published by Vox,[156] the Trump Administration planned to rescind the 1999 Legacy INS Memo and significantly expand the criteria that could be considered when evaluating public charge inadmissibility.[157] This revised standard in the leaked draft regulations marked a major departure from the 1999 Legacy INS Memo, which only penalized receipt of cash benefits and Medicaid benefits for long term care, and weighed receipt of additional non-cash benefits as a negative factor when evaluating public charge

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the Social Security funds in 2016 . . .") ("Three years prior, the Chief Actuary of the Social Security Administration, Stephen Gross, wrote a report that estimated undocumented immigrants contributed $12 billion into Social Security."); *see also* CARL DAVIS, MARCO GUZMAN & EMMA SIFRE, INST. TAX'N AND ECON. POL'Y, TAX PAYMENTS BY UNDOCUMENTED IMMIGRANTS 6 (2024), https://sfo2.digitaloceanspaces.com/itep/ITEP-Tax-Payments-by-Undocumented-Immigrants-2024.pdf [https://perma.cc/5QAB-Y7L3] (discussing a more recent report by the Institute on Taxation and Economic Policy in 2022, finding the employer and employee share of Social Security payroll taxes was $25.7 billion).

152. *See* Jan. 2017 Draft Public Charge EO, *supra* note 134, at 5.

153. Social Security Act § 1137(d)(2)–(3), 42 U.S.C. § 1320b(d)(2)–(3).

154. Torbati, *supra* note 131.

155. Lind, *A Leaked Trump Order*, *supra* note 130.

156. *See* Dep't of Homeland Sec., Staff Level Draft – Not Cleared by Leadership: Inadmissibility on Public Charge Grounds (Feb. 8, 2018) [hereinafter Feb. 2018 Draft Public Charge Regulations], https://platform.vox.com/wp-content/uploads/sites/2/chorus/uploads/chorus_asset/file/10188201/DRAFT_NPRM_public_charge.0.pdf?_gl=1*y1tw37*_ga*NjA0MDYxNTQ3LjE3MjA2OTQ4OTM.*_ga_C3QZPB4GVE*MTcyMzg0Mjg2NS4xMS4wLjE3MjM4NDI4NzIuNTMuMC4w [https://perma.cc/38KM-6N45].

157. *Id.* at 236–38.

inadmissibility.[158] Even more troubling, the leaked draft regulations allowed DHS to consider receipt of means-tested benefits by an immigrant's eligible dependent family members, namely the immigrant's U.S. citizen children, as a negative factor when evaluating public charge inadmissibility.[159] While the leaked draft regulations stated that immigrants would only be penalized for receipt of the expanded list of benefits after the effective date of the final regulations,[160] many immigration advocates expressed concerns about the broad scope of benefit programs listed in the drafted regulations.[161]

According to the leaked draft regulations, immigrants could be deemed inadmissible as a public charge if anyone in their household received non-cash means-tested benefits under the following programs:

- Supplemental Nutritional Assistance Program (SNAP);
- Special Supplemental Nutritional Program for Women, Infants and Children (WIC);
- Children's Health Insurance Program (CHIP);
- Transportation vouchers or non-cash transportation services;
- Public Housing or Section 8 benefits funded by the U.S. Department of Housing and Urban Development (HUD);
- Energy benefits, including the Low-Income Home Energy Assistance Program (LIHEAP); and
- Educational benefits, including benefits under the Head Start Act.[162]

Another major shift from the 1999 Legacy INS Memo was moving away from accepting an I-864 Affidavit of Support as sufficient to overcome public charge inadmissibility to a "totality of the circumstances" approach. Under the totality of the circumstances approach, USCIS officers would weigh positive and negative factors in a forward-looking test to determine if the immigrant is "likely to become a public charge" after being granted permanent resident status.[163] However, the list of negative factors

158. *See* 1999 Legacy INS Memo, *supra* note 54.

159. *Id.* at 234.

160. *See* Feb. 2018 Draft Public Charge Regulations, *supra* note 156, at 236–37.

161. *See* Torbati, *supra* note 131; *see also* Lind, *A Leaked Trump Order*, *supra* note 130.

162. *See* Feb. 2018 Draft Public Charge Regulations, *supra* note 156, at 237–38.

163. *See id.* at 233–36 (discussing how under the leaked draft regulation 8 CFR § 212.22, when determining whether an immigrant is inadmissible as a public charge, DHS was required, at minimum, to consider the immigrant's age, health, family

that could be considered was expansive and included factors like the immigrant having a "costly medical condition" and being unable to show proof of "unsubsidized health insurance," effectively penalizing use of subsidized health insurance plans purchased on the ACA state exchanges.[164]

On March 28, 2018, the Washington Post published a story detailing a second revised leaked draft of the proposed public charge regulations that were even more punitive than the draft regulations described by Reuters and Vox the previous month.[165] In particular, while the March 2018 revised leaked draft excluded Head Start and educational programs from evaluation of public charge inadmissibility, it added receipt of income tax refunds and credits, including the earned-income tax credit as a negative factor to be considered.[166] Given the widespread use of tax credits, the move to add an immigrant's use of tax refunds and credits to the list of criteria to be considered when determining public charge inadmissibility significantly expanded the number of individuals who could be deemed inadmissible as a public charge.[167] The March 2018 revised leaked draft, as reported by the Washington Post, also contained language indicating the Trump Administration was considering issuing new regulations on public charge deportability under INA section 237(a)(5), making it easier to remove lawfully present immigrants as a public charge.[168]

Additionally, the Washington Post story connected the leaked draft public charge regulations to the Trump Administration's desire to limit legal immigration, particularly family-based immigration, often referred to as "chain migration" by Trump Administration officials.[169] In a report analyzing the February 2018 and March 2018 leaked draft public charge regulations, the

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status, assets, resources and financial status and education and skills, as well as other factors, including previous receipt of means-tested benefits, previous receipt of a fee waiver for an immigration application filed with USCIS, and receipt of means-tested benefits by eligible members of the immigrant's household).

164. *Id.* at 233–35.

165. *See* Miroff, *supra* note 131.

166. *Id.*

167. *Id.* (reporting nearly one-fifth of American taxpayers use the Earned Income Tax Credit (EITC)).

168. *Id.*

169. *Id.* ("[T]he overhaul is part of the Trump Administration's broader effort to curb legal immigration to the United States, and groups favoring a more restrictive approach have long insisted that immigrants are a drag on federal budgets and a siphon on American prosperity.") (discusses how President Trump "blames [the family-based immigration] model for facilitating what he calls 'horrible chain migration'").

Migration Policy Institute (MPI) noted the proposed changes to public charge inadmissibility had the potential to reshape the make-up of future legal immigration flows, particularly in the family-based categories.[170]

B. January 2018 Amendments to the Foreign Affairs Manual Sections on Public Charge Inadmissibility

On January 3, 2018, DOS revised sections of the Foreign Affairs Manual (FAM), the field guidance used by consular officers adjudicating immigrant visa and nonimmigrant visa applications at U.S. Consular posts, amending the standard for determining public charge inadmissibility.[171] Of note, these January 3, 2018 revisions to the FAM (2018 FAM Revisions) occurred months before the DHS Public Charge Inadmissibility Proposed Rule was published in the Federal Register on October 10, 2018[172] and over a year before publication of Final DHS Public Charge Inadmissibility Rule on August 14, 2019[173] and DOS Interim Final Public Charge Rule on October 11, 2019.[174] The 2018 FAM Revisions were in effect and used by Consular Officers until February 24, 2020, when the 2019 DOS Interim Final Public Charge Rule took effect.[175] Further, as detailed below, the 2018 FAM Revisions had a significant impact on

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170. *See* JEANNE BATALOVA, MICHAEL FIX & MARK GREENBERG, MIGRATION POL'Y INST., CHILLING EFFECTS: THE EXPECTED IMPACT PUBLIC CHARGE RULES AND ITS IMPACT ON LEGAL IMMIGRANT FAMILIES' PUBLIC BENEFITS USE 29–30 (2018), https://www.migrationpolicy.org/sites/default/files/publications/ProposedPublicChargeRule-Final-Web.pdf [https://perma.cc/33UV-W249].

171. *See* 9 FAM 302.8-2(B)(2) (2018); *see also* NAT'L IMMIGR. L. CTR., CHANGES TO "PUBLIC CHARGE" INSTRUCTIONS IN THE U.S. STATE DEPARTMENT'S MANUAL (2018), https://www.nilc.org/wp-content/uploads/2018/02/NILC-FAM-Summary-2018.pdf [https://perma.cc/3RPS-FZXV] (describing two main changes to public charge test: how the agency will not treat affidavits of support as conclusive to the question of public charge, and how the agency will consider non-cash assets of applicants, sponsors, and family members); IMMIGR. LEGAL RES. CTR., LEGAL SERVICES TOOLKIT — PUBLIC CHARGE CONSIDERATIONS: ADJUSTMENT OF STATUS VS. CONSULAR PROCESSING (2019), https://www.ilrc.org/sites/default/files/resources/2019.12_public_charge_considerations.pdf [https://perma.cc/43AV-HPYK] (describing which public charge rules apply when applying for a green card after 2018 changes).

172. *See* Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248).

173. *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248).

174. Visas: Ineligibility Based on Public Charge Grounds, 84 Fed. 54996 (Oct. 11, 2019).

175. *See* Make the Road New York v. Pompeo, 475 F. Supp. 3d 232, 246 (S.D.N.Y. 2020).

the adjudication and approval rates of immigrant visas for those applying for permanent residence through consular processing.[176]

With respect to the language in the 2018 FAM Revisions, it mirrored the leaked draft public charge inadmissibility regulations published by Reuters and Vox in February 2018 and the Washington Post in March 2018. Notably, these changes shifted public charge inadmissibility determinations away from heavily weighing the I-864 Affidavit of Support to a forward looking totality of the circumstances approach to determine if an immigrant visa applicants was likely to become a public charge.[177] Similar to the February 2018 and March 2018 leaked draft regulations, the 2018 FAM Revisions greatly expanded the evidence considered by consular officers determining if an immigrant visa applicant was likely to become a public charge.[178] However, the expanded evidence to be considered under the 2018 FAM Revisions was even broader than the factors listed in the leaked draft regulations and included *receipt of public assistance of any type by the visa applicant or a family member in the applicant's household,* including the immigrant's petitioning spouse or U.S. citizen children.[179] Additionally, under the 2018 FAM Revisions, the penalty for the immigrant or their household member receiving any type of public assistance was retroactive and instructed consular officers to consider both past and current receipt of public benefits.[180] By granting consular officers broad discretion to consider past receipt of any form of public assistance by anyone in the immigrant's household, the 2018 FAM Revisions made it far easier to deny an applicant's immigrant visa and block them from entering the U.S. as a permanent resident on public charge grounds.

Shortly after the 2018 FAM Revisions took effect in January 2018, immigration attorneys began reporting denials of immigrant visa applications at consulates after a finding the immigrant visa applicant was inadmissible as a public charge, even where the applicant has submitted a valid I-864 Affidavit of Support.[181]

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176. *Id.*

177. *See* 9 FAM 302.8-2(B)(2) (2018).).

178. *Id.*

179. *Id.*

180. *Id.*

181. *See* Yeganeh Torbati & Kristina Cooke, *Denials of U.S. Immigrant Visas Skyrocket After Little-Heralded Rule Change,* REUTERS (Apr. 15, 2019), https://www.reuters.com/article/us-usa-immigration-visas-insight/denials-of-u-s-immigrant-visas-skyrocket-after-little-heralded-rule-change-idUSKCN1RR0UX/ [https://perma.cc/A4EB-MZRD]; *see also* Ted Hesson, *Exclusive: Visa Denials to Poor Mexicans Skyrocket Under Trump's State Department,* POLITICO (Aug. 6, 2019),

Statistics from the DOS for Fiscal Year 2018 also noted 13,450 immigrant visa applications were denied on account of public charge,[182] a fourfold increase from Fiscal Year 2017 where only 3,237 immigrant visa applications were denied on this basis.[183] In Fiscal Year 2019, DOS denied a total of 20,941 immigrant visa applications on account of public charge,[184] nearly doubling the number of denials from Fiscal Year 2018. News reports from 2019 on this increase in immigrant visa denials at U.S. Consulates on account of public charge also noted a significant portion of these denials were immigrant visa applications filed by Mexican nationals at the U.S. Consulate in Ciudad Juarez.[185] An April 15, 2019 article by Reuters noted that in Fiscal Year 2018 Mexican nationals received 11% fewer immigrant visas compared to 2017.[186] Additionally, an August 6, 2019 Politico story, reported that between October 1, 2018 and July 29, 2019, 5,343 of the 12,197 immigrant visa applications denied by DOS on account of public charge were denied by the U.S. Consulate in Ciudad Juarez.[187]

C. Trump Administration Publication and Implementation of Proposed DHS Regulations (October 2018), Final DHS Regulations (August 2019), and Interim Final DOS Regulations (October 2019) on Public Charge Inadmissibility

After the 2018 FAM Revisions and publication of the leaked draft regulations on public charge inadmissibility in early 2018, many immigration lawyers and advocates anticipated the Trump

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https://www.politico.com/story/2019/08/06/visa-denials-poor-mexicans-trump-1637094 [https://perma.cc/5MA4-DN52] (discussing how denials of immigrant visa applications increased in 2018 and 2019).

182. *See* TABLE XX IMMIGRANT AND NONIMMIGRANT VISA INELIGIBILITIES (BY GROUNDS FOR REFUSAL UNDER THE IMMIGRATION AND NATIONALITY ACT) FISCAL YEAR 2018, U.S. DEP'T OF STATE (2019), https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2018AnnualReport/FY18AnnualReport%20%20-%20TableXX.pdf [https://perma.cc/5ZS2-5J74].

183. *See* TABLE XX IMMIGRANT AND NONIMMIGRANT VISA INELIGIBILITIES (BY GROUNDS FOR REFUSAL UNDER THE IMMIGRATION AND NATIONALITY ACT) FISCAL YEAR 2017, U.S. DEP'T OF STATE (2018), https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2017AnnualReport/FY17AnnualReport-TableXX.pdf [https://perma.cc/F39T-ZFRE].

184. *See* TABLE XX IMMIGRANT AND NONIMMIGRANT VISA INELIGIBILITIES (BY GROUNDS FOR REFUSAL UNDER THE IMMIGRATION AND NATIONALITY ACT) – FISCAL YEAR 2019, U.S. DEP'T OF STATE (2020), https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2019AnnualReport/FY19AnnualReport-TableXX.pdf [https://perma.cc/4SRA-DJF3].

185. *See* Hesson, *supra* note 181.

186. *See* Torbati & Cooke, *supra* note 181.

187. *See* Hesson, *supra* note 181.

Administration would formally issue and implement new public charge regulations sometime in 2018.[188] Ultimately, on October 10, 2018, DHS formally published Proposed Regulations on Inadmissibility on Public Charge Grounds in the Federal Register,[189] in accordance with the Administrative Procedures Act (APA) notice and comment requirement when promulgating new regulations.[190] On August 14, 2019, after consideration of the public comments received during the 60 day notice and comment period, DHS published the Final Regulations on Inadmissibility on Public Charge Grounds in the Federal Register, to take effect 60 days after publication of the final rule on October 15, 2019.[191] Additionally, on October 11, 2019, DOS published an Interim Final Rule on Visa Ineligibility Based on Public Charge Grounds in the Federal Register, to take effect on October 15, 2019, the same effective date as the DHS Final Rule.[192] The sections below will provide a summary of the DHS Proposed and Final Regulations and DOS Interim Final Regulations on Public Charge Inadmissibility, litigation challenging the proposed and final regulations and implementation of the final regulations.

i. Summary of DHS Proposed and Final Regulations and DOS Interim Final Regulations on Public Charge Inadmissibility

The DHS Proposed Regulations on Inadmissibility on Public Charge Grounds were formally issued through publication in the Federal Register on October 10, 2018.[193] When these proposed regulations were promulgated by the Trump Administration, some portions of the proposed regulations were largely the same as the leaked draft regulations and 2018 FAM Revisions and other portions differed.

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188. *See* BATALOVA et al., *supra* note 170, at 6 (discussing how the Trump administration was in the process of developing a public charge rule that would likely mirror language from leaked drafts of the regulations published by news outlets in January and March 2018).

189. *See* Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248).

190. *See* Administrative Procedure Act, 5 U.S.C. § 553.

191. *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248).

192. *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248).

193. *See* 2018 DHS Proposed Public Charge Regulations, 83 Fed. Reg. 51114, 51114 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. parts 103, 212, 213, 214, 245, 248).

Like the 2018 FAM Revisions and leaked draft regulations, the 2018 DHS Proposed Regulations rescinded the 1999 Legacy INS Memo, which heavily weighed the I-864 Affidavit of Support as evidence an immigrant was not inadmissible as a public charge, to a more subjective totality of the circumstances approach.[194] Under this totality of the circumstances approach, adjudication of public charge inadmissibility would be a forward looking test evaluating a number of factors to determine whether an immigrant is *likely to become a public charge* in the future after being granted permanent residence.[195] Under the totality of the circumstances approach, the I-864 Affidavit of Support was just one of many factors that would be considered by a DHS/USCIS officer evaluating whether an immigrant applying for permanent residence is inadmissible as a public charge.[196] In addition to a completed I-864, the factors to be considered were: "age; health; family status; assets, resources, and financial status; education and skills."[197] The 2018 DHS Proposed Regulations also set forth presumptively positive and negative factors and highly weighed positive and negative factors when applying the totality of the circumstances approach.[198] Presumptively positive factors included being of working age between eighteen and sixty-one,[199] having no chronic health conditions,[200] financial support from family,[201] having sufficient assets and resources to support oneself,[202] English language proficiency,[203] and having a bachelor's degree or higher.[204] Presumptively negative factors included: being a minor under 18 or over 61,[205] having a chronic medical condition with a high cost of

194. *Id.* at 51177 ("DHS is proposing to consider the affidavit of support in the totality of the circumstances when determining whether the alien is likely at any time to become a public charge.").

195. *Id.* at 51178(C)(2)–51206(L)(2).

196. *Id.* at 51146.

197. *Id.* at 51178(C)(2), 51291 (detailing the "Minimum factors to consider" for a public charge inadmissibility determination under 8 C.F.R. § 212.22(b)).

198. *Id.* at 51178(C)(2).

199. *Id.* at 51180, 51291. The proposed rule determines the upper age limit by "the minimum 'early retirement age'" set forth in 42 U.S.C. 416(I)(2) which was sixty-one at the time. *Id.* at 51178.

200. *Id.* 51181–84, 51291. Chronic health conditions need not arise to the level that "would render an alien inadmissible under health-related grounds." *Id.* at 51182.

201. *Id.* at 51184–86, 51291.

202. *Id.* at 51186–-89, 51291.

203. *Id.* at 51189, 95–96, 51291.

204. *Id.* at 51189–95, 51291

205. *Id.* at 51180–81, 51291.

care limiting ability to work,[206] having a large family with a high number of dependents,[207] lacking financial resources[208] or education,[209] and lacking English language proficiency.[210] Additionally, having a high net worth or earnings above 250% of the poverty line was deemed a highly-weighed positive factor.[211] Conversely, lack of employment or job prospects,[212] current receipt of one or more public benefits,[213] past receipt of public benefits within 36 months of applying for permanent residence,[214] and diagnosis of a medical condition that is likely to require extensive medical treatment and government subsidized health coverage[215] were listed as highly-weighted negative factors. As part of this new totality of the circumstances approach, immigrants applying for permanent residence through adjustment of status were required to submit the new Form I-944 Declaration of Self-Sufficiency, together with evidence they will not become a public charge.[216]

With respect to past or current receipt of means-tested benefits as a highly weighed negative factor, the language in the 2018 DHS Proposed Regulations was less severe than the 2018 FAM Revisions and the leaked draft regulations. First, while the 2018 DHS Proposed Regulations did expand the list of means-tested public benefits to include certain non-cash benefits, the published regulations only penalized receipt of cash benefits and a limited list of non-cash benefits including: SNAP, Section 8 and other HUD funded housing assistance, and certain Medicaid benefits.[217] The proposed regulations also clarified that an immigrant would be presumptively deemed a public charge only if they received cash public benefits totaling 15% of the poverty line within 12 consecutive months or non-cash benefits for a cumulative of 12 months in a 36-month period.[218] The 2018 DHS Proposed

206. *Id.* at 51182–84, 51291.
207. *Id.* at 51184–86, 51291.
208. *Id.* at 51187–89, 51291.
209. *Id.* at 51190–95, 51291.
210. *Id.* at 51195–96, 51291.
211. *Id.* at 51204, 51292.
212. *Id.* at 51198, 51292.
213. *Id.* at 51198–99, 51292.
214. *Id.* at 51199–200, 51292.
215. *Id.* at 51200–01, 51292.
216. *Id.* at 51228, 51290.
217. *Id.* at 51158–59, 51290; Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248).
218. Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248).

Regulations also clarified that immigrants would only be penalized for their own receipt of means-tested benefits and would not be penalized by receipt of benefits by their dependents or household members.[219] However, the 2018 DHS Proposed Regulations did clearly state that an immigrant would be deemed inadmissible as *likely at any time to become a public charge* if the DHS/USCIS officer determined they were likely *at any time in the future* to receive one or more of the public benefits listed in the proposed regulation.[220]

The 2018 DHS Proposed Regulations attempted to frame the new totality of the circumstances approach to adjudicate public charge inadmissibility as an objective metric consistent with the statute.[221] However, it was clear the new standard for evaluating public charge would favor wealthy and high-skilled immigrants in the employment-based categories over poor immigrants lacking English proficiency applying for permanent residence in the family-based categories.

On August 14, 2019, after receiving over 266,000 comments on the proposed rule, the DHS Inadmissibility on Public Charge Grounds Final Regulations were published in the Federal Register. The 2019 DHS Final Regulations were largely the same as the proposed rule, with several minor changes, including changing the test for receipt of both cash and non-cash benefits to receipt for 12 cumulative months over a 36-month period.[222] The 2019 DHS Final Regulations also clarified that the standard for determining whether an immigrant would be deemed likely to become a public charge is by preponderance of the evidence.[223] The August 14, 2019 publication of the final regulations in the Federal Register also stated that the 2019 DHS Final Regulations would take effect on October 15, 2019.[224]

On October 11, 2019, approximately two months after publication of the 2019 DHS Final Regulations, the DOS Interim Final Rule: Visas: Ineligibility Based On Public Charge Grounds

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219. *Id.* at 51165–66, 51290.

220. *Id.* at 51174, 51290.

221. *Id.* at 51284 ("The data collected on [the I-944] forms will be used by USCIS to determine the likelihood of a declarant becoming a public charge based on [the aforementioned factors] . . . . The forms serve the purpose of standardizing public charge evaluation metrics . . . .").

222. *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292, 41298 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, 248).

223. *Id.* at 41506.

224. *Id.* at 41292.

was published in the Federal Register.[225] The 2019 DOS Interim Final Public Charge Regulations largely mirrored the language used in the 2019 DHS Final Regulations,[226] and the purpose of the DOS Interim Final Regulations was to ensure consistency between DHS and DOS when evaluating public charge inadmissibility in permanent residence cases.[227] Under the 2019 DOS Interim Final Regulations, certain visa applicants would be required to complete the new DS-5540, Public Charge Questionnaire, similar to the I-944 Declaration of Self-Sufficiency, to help consular officers determine whether the applicant was inadmissible as a public charge.[228] The Federal Register publication of the 2019 DOS Interim Final Regulations also noted they would take effect on October 15, 2019, the same effective date as the 2019 DHS Final Regulations.[229]

ii. Litigation Challenging DHS Final Public Charge Regulations and DOS Interim Final Public Charge Regulations and Implementation of DHS and DOS Public Charge Regulations

Shortly after the 2019 DHS Final Regulations were promulgated by the Trump Administration, several legal challenges were filed in federal district court challenging the legality of the new public charge regulations on statutory and Constitutional grounds. These legal challenges included suits by the State of Washington and thirteen other states in the Eastern District of Washington (E.D. Wash.);[230] the State of California and four other states in the Northern District of California (N.D. Cal.);[231] the State of New York and two other states and the City of New York in the Southern District of New York (S.D.N.Y.);[232] Cook County in the Northern

225. *See* Visas: Ineligibility Based on Public Charge Grounds, 84 Fed. Reg. 54996, 54996 (Oct. 11, 2019).

226. *Id.* at 55000-06.

227. *Id.* at 55000 (stating that the purpose of the Department's new standards was to avoid contradicting determinations about a non-citizen's public charge evaluation with DHS).

228. *Id.* at 55011.

229. *Id.* at 54996.

230. *See* Complaint for Declaratory and Injunctive Relief, Washington v. U.S. Dep't of Homeland Sec., 408 F. Supp. 3d 1191 (E.D. Wash. 2019) (No. 4:19-cv-05210), 2019 WL 3823975.

231. *See* Complaint for Declaratory and Injunctive Relief, California v. U.S. Dep't of Homeland Sec., 476 F. Supp. 3d 994 (N.D. Cal. 2019) (No. 3:19-cv-04975), 2019 WL 3926611.

232. *See* Complaint for Declaratory and Injunctive Relief, New York v. U.S. Dep't of Homeland Sec., 475 F. Supp. 3d 208 (S.D.N.Y. 2020) (No. 1:19-cv-07777), 2019 WL 3936551.

District of Illinois (N.D. Ill.);[233] and CASA de Maryland, Inc. in the District of Maryland (D. Md.).[234]

The plaintiffs in each of these cases challenging the legality of the 2019 DHS Final Regulations filed a motion for preliminary injunction. On October 11, 2019, four days before the final public charge regulations were set to go into effect, nationwide preliminary injunctions were issued by E.D. Wash.,[235] N.D. Cal.,[236] and S.D.N.Y.[237] and on October 14, 2019, a fourth nationwide injunction was issued by D. Md.[238] Additionally, on October 14, 2019, N.D. Ill. issued a preliminary injunction in the Cook County case limited to the State of Illinois.[239] However, on December 5, 2019 the Ninth Circuit granted the government's motion to stay the preliminary nationwide injunctions issued by the E.D. Wash. and N.D. Cal.;[240] on December 9, 2019, the Fourth Circuit stayed the D. Md. injunction.[241] Additionally, on January 27, 2020, the U.S. Supreme Court granted the government's application for stay of the preliminary nationwide injunction issued by the S.D.N.Y., which allowed the 2019 DHS Final Rule to go into effect across the U.S., with the exception of Illinois.[242]

On January 30, 2020, three days after the U.S. Supreme Court issued a stay blocking the nationwide preliminary injunction, USCIS announced that it would begin implementing the 2019 DHS Public Charge Regulations on February 24, 2020.[243] The following week, on February 5, 2020, USCIS issued a second announcement publishing updated versions of USCIS application forms, with

233. *See* Complaint for Declaratory and Injunctive Relief, Cook Cnty. v. McAleenan, 417 F. Supp. 3d 1008 (N.D. Ill. 2019), *aff'd on other grounds sub nom.* Cook Cnty. v. Wolf, 962 F.3d 208 (7th Cir. 2020) (No. 1:19-cv-06334).

234. *See* Complaint for Declaratory and Injunctive Relief, CASA de Md., Inc. v. Trump, 414 F. Supp. 3d 760 (D. Md. 2019) *rev'd and remanded,*. 971 F.3d 220 (4th Cir. 2020) (No. 8:19-cv-02715), 2020 WL 1643927,

235. Washington v. U.S. Dep't of Homeland Sec., 408 F.Supp.3d 1191(E.D. Wash. 2019).

236. City & Cnty. of San Francisco v. U.S. Citizenship & Immigr. Servs., 408 F. Supp. 3d 1057 (N.D. Cal. 2019).

237. Make the Road New York v. Cuccinelli, 419 F. Supp. 3d 647 (S.D.N.Y. 2019).

238. Casa De Md., Inc. v. Trump, 414 F. Supp. 3d 760 (D. Md. 2019).

239. Cook Cnty. v. McAleenan, 417 F. Supp. 3d 1008 (N.D. Ill. 2019).

240. City & Cnty. of San Francisco v. U.S. Citizenship & Immigr. Servs., 944 F.3d 773 (9th Cir. 2019).

241. Casa De Md., Inc. v. Trump, 971 F.3d 220, 237 (4th Cir. 2020).

242. Dep't of Homeland Sec. v. New York, 140 S. Ct. 599 (2020).

243. *See USCIS Announces Public Charge Rule Implementation Following Supreme Court Stay of Nationwide Injunction*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 30, 2020), https://www.uscis.gov/archive/uscis-announces-public-charge-rule-implementation-following-supreme-court-stay-of-nationwide [https://perma.cc/JHZ4-PAEX].

questions regarding public charge inadmissibility, under the implementation of the final public charge regulations.[244] Additionally, the February 5, 2020 USCIS announcement stated that all I-485 applications for adjustment of status to permanent residence received on or after February 24, 2020, save for applications in Illinois covered by the Seventh Circuit injunction, must include the newly created I-944 Declaration of Self Sufficiency.[245] Later, on February 21, 2020, the U.S. Supreme Court issued a second ruling granting a stay of the Northern District of Illinois preliminary injunction, allowing the 2019 DHS Final Rule to go into effect nationwide on February 24, 2020.[246]

While there were nationwide preliminary injunctions issued by U.S. federal district courts enjoining the 2019 DHS Final Regulations in late 2019, there were no similar rulings enjoining implementation and application of the DOS Interim Final Regulations or the 2018 FAM Revisions in consular processing cases. Accordingly, the DOS Interim Final Rule also went into effect on February 24, 2020, with the DOS issuing revisions to the FAM, modifying the 2018 FAM Revisions to match the language in the interim final regulations.[247] For those attending a consular interview to apply for an immigrant visa to enter the U.S. as a permanent resident, in addition to providing a completed I-864 Affidavit of Support, the applicant was also required to compete Form DS-5540, Public Charge Questionnaire.[248] The DS-5540 Public Charge Questionnaire required immigrant visa applicants to provide information regarding their assets, liabilities, education, job skills, health, and receipt of public benefits for determination of public charge inadmissibility by consular officers under the DOS Interim Final Regulations.[249] On July 29, 2020, several months after the 2019 DOS Interim Final Regulations went into effect, the

244. *See Public Charge Inadmissibility Final Rule: Revised Forms and Updated Policy Manual Guidance*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Feb. 5, 2020), https://www.uscis.gov/archive/public-charge-inadmissibility-final-rule-revised-forms-and-updated-policy-manual-guidance [https://perma.cc/5D9L-Q8QT].

245. *Id.*

246. Wolf v. Cook Cnty., 140 S. Ct. 681 (2020).

247. *See The State Department's New FAM on Public Charge and Form DS-5540: Summary for Immigration Practitioners,* CATH. LEGAL IMMIGR. NETWORK (Feb 24, 2020), https://www.cliniclegal.org/sites/default/files/2020-03/The%20State%20Department%E2%80%99s%20New%20FAM%20on%20Public%20Charge%20and%20Form%20DS-5540%20Summary%20for%20Immigration%20Practitioners.pdf [https://perma.cc/LDK5-4TWS].

248. *Id.*

249. *Id.*

S.D.N.Y. issued a nationwide preliminary injunction in *Make the Road New York v. Pompeo*, enjoining the implementation or application of the 2018 FAM Revisions and DOS Interim Final Regulations.[250] However, this S.D.N.Y. preliminary injunction was largely a symbolic victory as full implementation of DOS Interim Final Regulations were effectively halted in March 2020 when consular posts closed and suspended visa processing at the start of the COVID-19 pandemic.[251]

On July 29, 2020, the S.D.N.Y. issued a second nationwide preliminary injunction of the 2019 DHS Final Regulations in *New York v. U.S. Department of Homeland Security*, granting plaintiff's motion to enjoin application of the DHS final rule during the COVID-19 Public Health Emergency.[252] The next day, on July 30, 2020, USCIS announced it would apply the 1999 Legacy INS Memo to adjudicate I-485 adjustment of status applications while the S.D.N.Y. injunction was in place.[253] However, this nationwide preliminary injunction was short lived. On August 4, 2020, the Second Circuit issued a partial stay of the July 29, 2020 S.D.N.Y. preliminary injunction, limiting its applicability to New York, Connecticut and Vermont.[254] On September 11, 2020, the Second Circuit issued a second order granting a full stay of the July 29, 2020 nationwide injunction, allowing DHS to resume implementation of the 2019 DHS Final Regulations nationwide, including in New York, Connecticut, and Vermont.[255] Lastly, on November 2, 2020, the N.D. Ill. issued a ruling finding the 2019 DHS Final Regulations violated the APA on procedural and substantive grounds and vacated the regulations nationwide.[256]

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250. *See* Make the Road New York v. Pompeo, 475 F. Supp. 3d 232 (S.D.N.Y. 2020).

251. *See Suspension of Routine Visa Services*, U.S. DEP'T OF STATE–BUREAU OF CONSULAR AFFS. (July 22, 2020), https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/visas-news-archive/suspension-of-routine-visa-services.html [https://perma.cc/7K5Y-346Y].

252. *See* New York v. U.S. Dep't of Homeland Sec., 475 F.Supp.3d 208 (S.D.N.Y. 2020).

253. *See Inadmissibility on Public Charge Grounds Final Rule: Litigation*, U.S. CITIZENSHIP & IMMIGR. SERVS. (2021) [hereinafter USCIS Public Charge Litigation Summary], https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge/inadmissibility-on-public-charge-grounds-final-rule-litigation [https://perma.cc/QJK3-8JJR].

254. *See* New York v. U.S. Dep't of Homeland Sec., 969 F.3d 42 (2d Cir. 2020).

255. *See* New York v. U.S. Dep't of Homeland Sec., 974 F.3d 210 (2d Cir. 2020); *see* USCIS Public Charge Litigation Summary, *supra* note 253.

256. *See* Cook Cnty. v. Wolf, 498 F. Supp. 3d 999 (N.D. Ill. 2020).

However, this ruling was stayed by the Seventh Circuit on November 19, 2020 pending appeal.[257]

On February 5, 2021, several weeks after taking office, President Biden issued an executive order entitled *Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans*.[258] This executive order set forth the Biden Administration's plans to roll back changes to the U.S. immigration system implemented by the Trump Administration, including the DHS and DOS Public Charge Regulations.[259] On March 9, 2021, the Department of Justice (DOJ), together with the parties to the pending public charge litigation, filed a joint stipulation to dismiss the pending petitions for writ of certiorari before the U.S. Supreme Court from the Second, Seventh, and Ninth Circuit Courts of Appeals and the petitions were dismissed.[260] This same day, the DOJ also withdrew its pending appeal before the Seventh Circuit, allowing the November 2, 2020 N.D. Ill. judgement to take effect, vacating the 2019 DHS Final Regulations.[261] In a March 9, 2021 DHS press release announcing the DOJ would no longer pursue appellate review of lower court rulings enjoining enforcement of the 2019 DHS Public Charge Final Regulations, DHS also announced it would use the 1999 Legacy INS Memo to assess public charge inadmissibility pending promulgation of new regulations.[262] Eventually, in 2022, the Biden Administration promulgated new public charge regulations, codifying the guidelines set forth in the 1999 Legacy INS Memo, which took effect on December 23, 2022.[263]

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257. USCIS Public Charge Litigation Summary, *supra* note 253.

258. *See* Exec. Order No. 14012, 86 Fed. Reg. 8277 (Feb. 5, 2021).

259. *Id.* at 8278.

260. *See* U.S. Dep't of Homeland Sec. v. New York, 141 S. Ct. 1292 (2021); Mayorkas v. Cook Cnty., 141 S. Ct. 1292 (2021); U.S. Citizenship & Immigr. Servs. v. City & Cnty. of San Francisco, 141 S. Ct. 1292 (2021); *see also DHS Statement on Litigation Related to Public Charge Ground of Inadmissibility*, U.S. DEP'T OF HOMELAND SEC. (Mar. 9, 2021), https://www.dhs.gov/news/2021/03/09/dhs-statement-litigation-related-public-charge-ground-inadmissibility [https://perma.cc/WWU8-XUQ4] (explaining that DHS, under the Biden administration, "determined that continuing to defend the final rule, Inadmissibility on Public Charge Grounds . . . is neither in the public interest nor an efficient use of limited government resources") (citation omitted).

261. *See* Cook Cnty. v. Wolf, No. 20-3150, 2021 WL 1608766 (7th Cir. Mar. 9, 2021).

262. *DHS Statement on Litigation Related to Public Charge Ground of Inadmissibility*, *supra* note 260.

263. *See* Public Charge Ground of Inadmissibility, 87 Fed. Reg. 10570 (proposed Feb. 24, 2022); Public Charge Ground of Inadmissibility, 87 Fed. Reg. 55472 (Sept. 9, 2022).

III. Anecdotal Evidence of Chilling Effect of Public Charge Regulations and Summary of Studies to Date on Chilling Effect of Public Charge Regulations

A significant collateral consequence of the DHS and DOS Public Charge Regulations was the resulting chilling effect where immigrant households opted to forgo means-tested benefits they were entitled to receive due to fear of deportation or other negative immigration consequences connected to public charge. This chilling effect was first observed, anecdotally, by immigration lawyers, social workers, healthcare workers, and others who worked with immigrant communities beginning in late 2017 and 2018. Existence of this chilling effect was further supported by studies using survey data from the American Community Survey (ACS) and the Well-Being and Basics Needs Survey (WBNS) to examine decreased benefit enrollment by immigrant households following publication of the public charge regulations.

A. Anecdotal Evidence of a Chilling Effect in Response to Leaked Draft Regulations, 2018 FAM Revisions and DHS Proposed and Final Public Charge Regulations

Following publication of the leaked draft public charge executive order in January 2017, the 2018 FAM Revisions and leaked draft public charge regulations in early 2018, lawyers and others observed an uptick in immigrants expressing concerns about receiving public benefits. This anecdotal evidence included caseworkers observing an increase in immigrant and mixed status households opting to forgo benefits they were entitled to receive,[264] and educators observing reluctance by immigrant families to enroll children in free and reduced school lunch programs.[265]

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264. *See* Riham Feshir, *Public Charge Rule Blamed for Chilling Effect Among Immigrants,* MINN. PUB. RADIO (Oct. 23, 2018), https://www.mprnews.org/story/2018/10/23/public-charge-rule-blamed-for-chilling-effect-among-immigrants [https://perma.cc/6WK7-9NX4]; *see also* Yesinia Amaro & Barbara Anderson, *'We Don't Know What to Do.' Proposed Trump Rule Strikes New Fear in Immigrant Communities,* FRESNO BEE (Oct. 9, 2019), https://www.fresnobee.com/news/local/article219129850.html [https://perma.cc/AU3Z-HBLG] ("The proposed changes are making legal immigrants reconsider applying for public benefits that they are entitled to . . . [and] [u]ndocumented immigrants . . . are afraid that the few services they are able to receive would prevent them from gaining legal residency.").

265. *See* Ibrahim Hirsi, *Low-Income Immigrants in MN Shying Away From Benefits, Even With Trump Rules Still Weeks Away,* MINN. PUB. RADIO (Aug. 15, 2019), https://www.mprnews.org/story/2019/08/15/lowincome-immigrants-in-mn-shying-away-from-benefits-even-with-trump-rules-still-weeks-away

Several news stories from this time corroborate the chilling effect observed by service providers following publication of the leaked draft regulations, which was exacerbated further after publication of the DHS Proposed Regulations in October 2018. A Fresno Bee story, published October 9, 2018, included quotes from an undocumented mother of a U.S. citizen child with autism who feared receiving state Medicaid insurance benefits on behalf of her son for his care.[266] Another October 2018 report by Minnesota Public Radio (MPR) included an interview with a caseworker in Albert Lea, Minnesota, whose client discontinued WIC benefits, despite being a permanent resident and exempt from the proposed public charge rule, due to concerns it would negatively impact her immigration status.[267]

Additionally, many individuals and organizations who provided comments to the 2018 DHS Public Charge Proposed Regulations gave accounts of immigrant families forgoing immigration benefits due to fear surrounding public charge. In comments submitted by Causa Oregon and Codman Square Health Center in Boston, Massachusetts, the comment authors noted declining WIC enrollment by immigrants due to fear of potential adverse immigration consequences.[268] Many healthcare providers, including Dr. Josephine Henderson-Frost from the Albert Einstein College of Medicine and Triny Health in Michigan, also noted an uptick in immigrants cancelling medical appointments and disenrolling in medical benefit programs due to fears that use of these services would be held against them or their family members.[269] Additionally, a comment by Hope Nakamura, the

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[https://perma.cc/3Y2K-RA3N]; *see also* Dr. Christine Walker, Comment Letter on Proposed Rule on Inadmissibility on Public Charge Grounds (Dec. 3, 2018), https://www.regulations.gov/comment/USCIS-2010-0012-59349 [https://perma.cc/UMQ5-C68N] (describing the "chilling effect" that the proposed rule would have on immigrant communities, causing "reductions in [school] attendance, family engagement, and immigrant families accessing needed federal assistance programs, regardless of immigration status enrolling in the free and reduced priced meals program").

266. *See* Amaro & Anderson, *supra* note 264.

267. *See* Feshir, *supra* note 264.

268. *See* Andrea Williams on behalf of Causa Oregon, Comment Letter on Proposed Rule on Inadmissibility on Public Charge Grounds (Oct. 29, 2018), https://www.regulations.gov/comment/USCIS-2010-0012-7139 [https://perma.cc/87E8-XUMU]; Codman Square Health Center, Comment Letter on Proposed Rule on Inadmissibility on Public Charge Grounds (Dec. 6, 2018), https://www.regulations.gov/comment/USCIS-2010-0012-36252 [https://perma.cc/7YUC-NER3].

269. *See* Dr. Josephine Henderson-Frost, Comment Letter on Proposed Rule on Inadmissibility on Public Charge Grounds (Oct. 29, 2018), https://www.regulations.gov/comment/USCIS-2010-0012-55285

Directing Attorney of the Legal Aid Society of San Mateo County, California, noted her agency had to spend over $100,000 in resources since publication of the leaked drafts in 2017 and 2018 to allay fears and reduce the chilling effect in immigrant communities.[270] Ms. Nakamura's comment also noted that the Legal Aid Society of San Mateo anticipated it would need to divert additional funding in 2019 toward community education efforts to encourage immigrant families to enroll in benefits they are entitled to receive to reduce food insecurity and negative health outcomes.[271]

B. Studies Examining Survey Data Corroborating Existence of a Chilling Effect and Reduced Public Benefit Utilization by Immigrant Households Due to Fear Surrounding Public Charge

The anecdotal reports of the chilling effect caused by the 2017 and 2018 leaked drafts, 2018 FAM revisions and DHS and DOS public charge regulations were confirmed by empirical research examining utilization of public benefits by immigrant households after 2016. These studies, using survey data, universally illustrated existence of a chilling effect and decreased use of means-tested public benefits by immigrant households on account of public charge.

One study by MPI, examining data from the U.S. Census Bureau's American Community Survey (ACS), found a 37% decrease in TANF cash benefits and SNAP benefit utilization and a 20% decrease in Medicaid and CHIP healthcare benefit utilization by non-citizens in the U.S. between 2016 and 2019.[272] The MPI study also found a significant decrease in benefit utilization by U.S. citizen children in mixed status households, with a 36% reduction in TANF cash benefits and SNAP benefits and a 20% reduction in

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[https://perma.cc/56XX-D8CZ]; Tina Grant, Comment Letter on Proposed Rule on Inadmissibility on Public Charge Grounds (Dec. 10, 2018), https://www.regulations.gov/comment/USCIS-2010-0012-37621 [https://perma.cc/NS3S-MV6R].

270. *See* Hope Nakamura, Comment Letter on Proposed Rule on Inadmissibility on Public Charge Grounds (Dec. 9, 2018), https://www.regulations.gov/comment/USCIS-2010-0012-47311 [https://perma.cc/59RV-PZQN].

271. *Id.*

272. *See* Randy Capps, Michael Fix & Jeanne Batalova, *Anticipated "Chilling Effects" of the Public-Charge Rule are Real: Census Data Reflect Steep Decline in Benefits Use by Immigrant Families*, MIGRATION POL'Y INST. (Dec. 2020), https://www.migrationpolicy.org/news/anticipated-chilling-effects-public-charge-rule-are-real [https://perma.cc/CFC4-F5RL].

Medicaid and CHIP benefits by this group during this period.[273] While this study noted a universal decrease in means-tested public benefit utilization in the U.S. between 2016 and 2019, likely due to improved economic conditions, the reduction in benefit utilization by immigrant households was two times higher than U.S. born citizen households.[274] The MPI study also concluded that the steep decline in benefit enrollment by non-citizens and U.S. citizen children in mixed-status households was likely caused by the public charge regulations and other anti-immigrant policies by the Trump Administration.[275]

Another study by the Urban Institute examining data from the 2019 Well-Being and Basic Needs Survey (WBNS), a nationally representative, internet-based annual survey, also supported existence of a public charge chilling effect.[276] Among 2019 WBNS survey participants who were foreign-born adults or adults living with an immigrant family member, nearly half said their families avoided Medicaid/CHIP or SNAP benefits and one-third avoided housing subsidies due to fear of adverse immigration consequences.[277] 2019 WBNS survey participants also reported avoiding other non-cash benefit programs excluded from the 2019 DHS Public Charge Final Regulations, including WIC, ACA health insurance subsidies and free and reduced lunch, because of fear

273. *Id.*

274. *Id.*

275. *Id.*

276. The Well-Being and Basic Needs Survey (WBNS) is an annual survey, launched by the Urban Institute in December 2017 to track individual and family well-being and access to social safety net programs. The 2019 WBNS included responses from 1,747 nonelderly adults in the U.S. who were either foreign-born or lived with one or more foreign-born family members who responded to survey questions regarding the impact of the public charge regulations on household benefit utilization. *See generally The Well-Being & Basic Needs Survey*, URB. INST., https://www.urban.org/policy-centers/health-policy-center/projects/well-being-and-basic-needs-survey [https://perma.cc/8MS6-GUSM] (presenting data on the alleged chilling effect); *see also* HAMUTAL BERNSTEIN, DULCE GONZALEZ, MICHAEL KARPMAN & STEPHEN ZUCKERMAN, URB. INST., AMID CONFUSION OVER THE PUBLIC CHARGE RULE, IMMIGRANT FAMILIES CONTINUED AVOIDING PUBLIC BENEFITS IN 2019 (2020) https://www.urban.org/sites/default/files/publication/102221/amid-confusion-over-the-public-charge-rule-immigrant-families-continued-avoiding-public-benefits-in-2019_3.pdf [https://perma.cc/77JX-85RY] (same); JENNIFER M. HALEY, GENEVIEVE M. KENNEY, HAMUTAL BERNSTEIN & DULCE GONZALEZ, ONE IN FIVE ADULTS IN IMMIGRANT FAMILIES WITH CHILDREN REPORTED CHILLING EFFECTS ON PUBLIC BENEFIT RECEIPT IN 2019 (2020), https://www.urban.org/sites/default/files/publication/102406/one-in-five-adults-in-immigrant-families-with-children-reported-chilling-effects-on-public-benefit-receipt-in-2019_1.pdf [https://perma.cc/FTY2-XBTU] (same).

277. *Id.* at 2.

related to public charge.[278] The 2019 WBSN also found that two-thirds of adults in immigrant families were aware of the public charge regulations and 26.2% of adults in low-income immigrant households reported a chilling effect where they avoided public benefits for fear of risking future permanent resident status.[279] Subsequent WBNS survey results from 2020–2022 reported a continuing chilling effect and reluctance by immigrant households to utilize means-tested benefits, despite rescission of the 2019 DHS Public Charge Regulations by the Biden Administration in March 2021.[280] Other studies from 2020 and 2021 also found a decrease in healthcare utilization by children in immigrant households due to public charge-related concerns, which was a particularly troubling statistic in light of the COVID-19 pandemic.[281]

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278. *Id.*

279. *Id.* at 5.

280. *See generally* JENNIFER M. HALEY, GENEVIEVE M. KENNEY, HAMUTAL BERNSTEIN & DULCE GONZALEZ, Urb. Inst., MANY IMMIGRANT FAMILIES WITH CHILDREN CONTINUED TO AVOID PUBLIC BENEFITS IN 2020, DESPITE FACING HARDSHIPS, (2021), https://www.urban.org/research/publication/many-immigrant-families-children-continued-avoid-public-benefits-2020-despite-facing-hardships [https://perma.cc/8RVE-C3KP] (explaining that many immigrant families in 2020 avoided public programs out of fear of immigration-related consequences); JENNIFER M. HALEY, DULCE GONZALEZ & GENEVIEVE M. KENNEY, Urb. Inst., IMMIGRATION CONCERNS CONTINUED TO DETER IMMIGRANT FAMILIES WITH CHILDREN FROM SAFETY NET PROGRAMS IN 2021, COMPOUNDING OTHER ENROLLMENT DIFFICULTIES (2022), https://www.urban.org/research/publication/immigration-concerns-continued-deter-immigrant-families-children-safety-net [https://perma.cc/RW5U-VKZB] (explaining that immigrant families in 2021 continued to avoid non-cash benefits for fear of immigration consequences); DULCE GONZALEZ, JENNIFER M. HALEY & GENEVIEVE M. KENNEY, Urb. Inst., ONE IN SIX ADULTS IN IMMIGRANT FAMILIES WITH CHILDREN AVOIDED PUBLIC PROGRAMS IN 2022 BECAUSE OF GREEN CARD CONCERNS (2023), https://www.urban.org/research/publication/one-six-adults-immigrant-families-children-avoided-public-programs-2022 [https://perma.cc/8BU8-PF92] (explaining that one-sixth of adults in immigrant families with children reported they avoided non-cash government benefits in 2022 due to immigration concerns).

281. *See generally* ALMA GUERRERO, LUCIA FELIX BELTRAN, RODRIGO DOMINGUEZ & ARTURO BUSTAMENTE, UCLA LATINO POL'Y & POLITICS INITIATIVE, FOREGOING HEALTHCARE IN A GLOBAL PANDEMIC: THE CHILLING EFFECTS OF THE PUBLIC CHARGE RULE ON HEALTH ACCESS AMONG CHILDREN IN CALIFORNIA (2021), https://escholarship.org/content/qt7t28n2kg/qt7t28n2kg.pdf [https://perma.cc/3GVK-F8W8] (outlining the chilling effect public charge changes have on immigrant families with children and the resulting underutilization of healthcare); Marina Masciale, Michelle A. Lopez, Xian Yu, José Domínguez, Karla Fredricks, Heather Haq, Jean L. Raphael & Claire Bocchini, *Public Benefits Use and Social Needs in Hospitalized Children with Undocumented Parents,* 148 PEDIATRICS, July 2021 (finding that families in California with undocumented parents were more likely to have higher levels of poverty and food insecurity than documented families, but use of public benefits was largely the same, implying immigration-related fear may be a barrier to use of benefits); Benjamin D. Sommers, Heidi Allen, Aditi Bhanja, Robert J. Blendon, E. John Orav & Arnold M. Epstein, *Assessment of Perceptions of the Public Charge Rule Among Low-Income Adults in Texas*, JAMA

IV. Examination of Means-tested Public Benefit Enrollment Data for Minnesota Immigrant Households, 2013-2021

Building on the work of the previous studies establishing existence of a chilling effect in response to the 2019 DHS Final Regulations, this section will examine benefit enrollment data for Minnesota immigrant households from 2013 to 2021 to see if there was a decline in enrollment on account of public charge. As discussed further below, the reduction in benefit enrollment rates for Minnesota immigrant households during this period is largely consistent with previous studies and further corroborates existence of a chilling effect due to public charge. Further, the data described in this section corroborating existence of a public charge chilling effect is particularly valuable because it is primary data obtained directly from the Minnesota Department of Human Services (MN-DHS), the state agency administering these programs.

A. The Value of Examining Minnesota Immigrant Household Public Benefit Enrollment Data Demographics of Minnesota's Immigrant Population and Minnesota's Social Safety Net

In addition to the general statistical value of obtaining primary data directly from the state agency administering these programs, versus relying on survey data, there are several other reasons why it is valuable to examine immigrant public benefit enrollment data from Minnesota.

First, while the foreign-born population in Minnesota comprises 8.7% of the state's population,[282] which is slightly lower than the foreign-born percentage of the U.S. population of 13.9%,[283] the ethnic demographic breakdown of Minnesota's immigrant population provides a useful representative sample. Looking

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NETWORK OPEN (July 15, 2020), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2768245 [https://perma.cc/7SN7-CC37] (finding that one in eight low-income Texans had friends or family who avoided public programs and medical care because of immigration-related concerns).

282. *See* "Selected Social Characteristics in the United States," *American Community Survey, ACS 1-Year Estimates Data Profiles, Table DP02*, U.S. CENSUS BUREAU (2022), https://data.census.gov/table/ACSDP1Y2022.DP02?q=Minnesota%20immigrant%20population [https://perma.cc/5MNG-FD4G] (providing population statistics for Minnesota in 2022, where the total foreign born population was 498,826 and the total population was 5,717,184 for a foreign born population of 8.7%).

283. *New Report on the Nation's Foreign-Born Population*, U.S. Census Bureau (Apr. 9, 2024), https://www.census.gov/newsroom/press-releases/2024/foreign-born-population.html [https://perma.cc/LU9D-AFSR].

specifically at the world region of birth for Minnesota's foreign-born population, according to the 2022 ACS, 36.3% were born in Asia, 29.4% were born on the African continent and 22.3% were born in Latin America.[284] This differs from national ACS data showing roughly half (50.3%) of the U.S. foreign-born population originating from Latin America.[285]

However, one reason for these differences in the region of birth for Minnesota's foreign-born population—particularly the large segment of Minnesota's foreign-born Asian and African populations—is the state's history of welcoming displaced persons through the U.S. Refugee Resettlement Program.[286] Following passage of the Refugee Act of 1980, creating the U.S. Refugee Resettlement Program, Minnesota became a leading destination for refugees from Southeast Asia displaced by the Vietnam War.[287] Between 1979 and 1999, Minnesota resettled approximately 15,000 Vietnamese refugees and 15,000 Laotian refugees, many of whom were of Hmong descent, and 8,000 Cambodian Refugees.[288] Minnesota is currently home to one of the largest Hmong diaspora populations in the U.S., with a population of over 94,000, and Hmong, along with Spanish, being the top non-English language spoken in Minnesota homes.[289] Minnesota has also resettled a large number of East African refugees from Ethiopia and Somalia and West African refugees from Liberia.[290] Presently, Minnesota is home to approximately 30,000 Ethiopians, 20,000 Liberians, and 80,000 Somalis; between 1993 and 2019, Minnesota resettled 24,000 refugees from Somalia.[291] In total, between 1979 and 2020,

284. "Selected Characteristics of the Foreign-Born Population by Period of Entry Into the United States", *American Community Survey, ACS 1-Year Estimates Data Profiles, Table DP02*, U.S. CENSUS BUREAU (2022), https://data.census.gov/table/ACSST1Y2022.S0502?q=Minnesota%20immigrant%20population [https://perma.cc/69MD-CWB3].

285. *See* SHABNAM SHENASI AZARI, VIRGINIA JENKINS, JOYCE HAHN & LAUREN MEDINA, U.S. Census Bureau, THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2022 (2024), https://www2.census.gov/library/publications/2024/demo/acsbr-019.pdf [https://perma.cc/Y3PU-NTFQ].

286. *See* Sheila Mulrooney Eldred & Ibrahim Hirsi, *Looking Back at Minnesota's Refugee History,* MPLS. ST. PAUL MAG. (Dec. 19, 2021), https://mspmag.com/arts-and-culture/looking-back-at-minnesotas-refugee-history/ [https://perma.cc/E9FY-877B].

287. *Id.*

288. *Id.*

289. Yuqing Liu, *How did Minnesota Become a Hub for Hmong People?,* SAHAN J. (Sept. 8, 2023), https://sahanjournal.com/news-partners/minnesota-how-did-hmong-people-become-largest-asian-group-in-minnesota-curious-minnesota/ [https://perma.cc/89K8-JTWG].

290. Eldred & Hirsi, *supra* note 286.

291. *Id.*

Minnesota has resettled a total of 111,109 refugee arrivals, including nearly 20,000 refugee arrivals between 2010 and 2020.[292]

Minnesota's high refugee population is particularly relevant when examining immigrant public benefit utilization, as refugees are a humanitarian immigrant category exempt from public charge inadmissibility under INA section 212(a)(4).[293] Refugees are also classified as *qualified immigrants* eligible to receive means-tested benefits under PRWORA.[294] Additionally, refugees who arrive in the U.S. through the U.S. Refugee Resettlement Program receive reception and placement services for the first 90 days after their arrival through local Voluntary Agencies tasked with receiving refugees and providing integration services.[295] These reception and placement services provided by Voluntary Agencies include assisting refugees with enrollment in public benefits programs.[296]

Lastly, Minnesota has a very robust state social safety net that is ranked as one of the most generous in the nation according to several key indicators. In a recent study by the Brookings Institute examining the generosity of each state's social safety net, factoring for cost of living, Minnesota ranked third in cash and food safety net, first in TANF and state-funded cash benefits, and first in state-directed funding for benefits.[297] Minnesota also offers state-funded healthcare, cash assistance and other non-cash benefits for certain lawfully present immigrants who are ineligible for federal public benefits under PRWORA.[298] These benefits include MinnesotaCare, Minnesota's state health coverage program which covers low-income lawfully present immigrants using state funds, state-funded Minnesota Family Investment Program (MFIP) cash benefits and

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292. *Primary Refugee Arrivals to Minnesota, 1979-2020*, MINN. DEP'T OF HEALTH — REFUGEE AND INT'L HEALTH PROGRAM (Apr. 2022), https://www.health.state.mn.us/communities/rih/stats/refcumm.pdf [https://perma.cc/D22U-EMDX].

293. Immigration and Nationality Act (INA) § 212(a)(4), 8 U.S.C. § 1182(a)(4).

294. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105, 2261–62 (1996).

295. *See U.S. Refugee Admissions Program: Reception and Placement*, U.S. DEP'T OF STATE, https://2017-2021.state.gov/refugee-admissions/reception-and-placement/ [https://perma.cc/K6ED-AKYX].

296. *Id.*

297. *See State Safety Net Interactive Map,* BROOKINGS INST. (June 4, 2024), https://www.brookings.edu/articles/state-safety-net-interactive/ [https://perma.cc/Y724-PTKK].

298. *See* RANDALL CHUN & DANYELL PUNELLI, MINN. HOUSE RSCH. DEP'T, ELIGIBILITY OF NONCITIZENS FOR HEALTH CARE AND CASH ASSISTANCE PROGRAMS (2019), https://www.house.mn.gov/hrd/pubs/ncitzhhs.pdf [https://perma.cc/3KUJ-VF3E].

state-funded food assistance.[299] Given that Minnesota has a strong social safety net offering benefits to both citizens and lawfully present non-citizens, the state's benefit enrollment data may better capture a chilling effect within certain immigrant households, namely mixed status households with undocumented parents and U.S. citizen children.

B. Summary of Public Benefit Enrollment Data from MN-DHS for Minnesota Immigrant Households: 2013-2021

The Minnesota public benefit enrollment data examined in this section of the article was obtained by the Author in response to a data request made to the Minnesota Department of Human Services (MN-DHS) Economic Assistance and Employment Supports Division (EAESD) Research Unit.[300] The data analyzed in this article was released to the Author by the MN-DHS EAESD Research Unit after obtaining appropriate authorization from the agency and confirmation by the Author that the data was being requested for academic research purposes.

In the Author's data request to the MN-DHS EAESD Research Unit, the Author requested various data sets relevant to the analysis of public benefit enrollment data for immigrant households in Minnesota. First, with respect to the timeframe, the Author requested public benefit enrollment data from January 2013 to December 2021 to capture baseline enrollment figures prior to *relevant events* (e.g., publication of 2018 DHS Proposed Regulations) and changes after the event occurred. Secondly, the Author requested enrollment data for two programs: SNAP non-cash food support and MFIP cash benefits, Minnesota's state cash assistance program funded by TANF. The Author requested enrollment data for SNAP and MFIP benefits because receipt of these federally funded benefits by immigrants was penalized in the

299. *Id*. at 2–4.

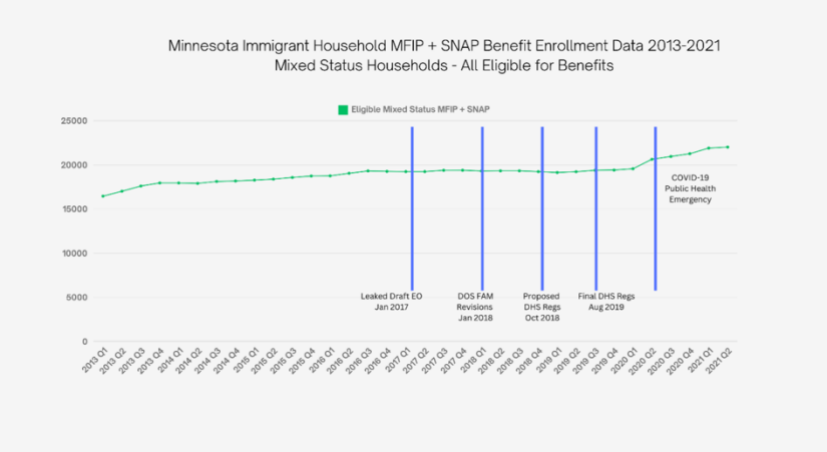
300. The Minnesota MFIP and SNAP immigrant household enrollment data discussed in Section V was provided by MN-DHS EAESD Research Unit on March 21, 2023 in response to a records request by the Author and was sent to the Author in an Excel Spreadsheet Document with monthly enrollment data for each category described in Section V, B. Records Request Response from Minn. Dep't of Hum. Servs. to Professor Ana Pottratz Acosta (Mar. 21, 2023) (on file with author) [hereinafter MN-DHS, *Records Request*]; *see also Data Requests*, Minn. Dep't of Hum. Servs., https://mn.gov/dhs/general-public/about-dhs/data-requests/ [https://perma.cc/3MB3-892M] (providing additional information about the public data request process for MN-DHS data).

leaked draft regulations, the 2018 FAM Revisions and the 2019 DHS Public Charge Final Regulations.[301]

Lastly, the Author requested public benefit enrollment data for three distinct categories of immigrant households. The first category was the *Mixed Status-All Eligible* household category, with both non-citizens and U.S. citizens, where all members of the household were eligible for SNAP and MFIP benefits. This first category intended to capture enrollment data for mixed status households with non-citizens who were qualified immigrants, particularly immigrants who had entered as refugees or another humanitarian category, eligible to receive federally funded means-tested benefits. The second category was the *Foreign-Born U.S. Citizen* household category where all members were citizens, but at least one member of the household was foreign born and obtained citizenship through naturalization or acquired citizenship after birth. The third category was the *Mixed Status-Ineligible* household category, with both non-citizens and U.S. citizens, where at least one non-citizen member of the household was ineligible for SNAP and MFIP benefits. This third category intended to capture enrollment data for mixed status households comprised of at least one undocumented parent with U.S. citizen children.

301. *See* Torbati, *supra* note 131; Lind, *A Leaked Trump Order, supra* note 130; 9 FAM 302.8-2(B)(2) (2018); 2018 DHS Proposed Public Charge Regulations, 83 Fed. Reg. 51114, 51187–88 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. parts 103, 212–14, 245, 248).

i. In Mixed Status Households Where All Household Members Were Eligible for Benefits, There Were No Statistically Significant Changes in Benefit Enrollment Due to Public Charge



Graph A - representing average total number of MN-DHS Open MFIP and SNAP Benefit Cases per quarter for Mixed Status Households – All Household Members Eligible for Benefits, 2013-2021.

For the first category of immigrant households, *Mixed Status-All Eligible*, a review of the data established that there were no statistically significant reductions in benefit enrollment between January 2013 and December 2021. Between January 2014 and March 2020, the percentage of quarterly average combined total benefit cases in the *Mixed Status-All Eligible* household category remained relatively static and did not fluctuate upward or downward by more than 1.6%.[302] The only instances between 2013 and 2021 where there were significant deviations in the average number of combined MFIP and SNAP cases were in 2013, when average total cases increased by 9.06%,[303] and in 2020 at the start of the COVID-19 pandemic with an increase of 11.97% in average total cases.[304]

302. MN-DHS, *Records Request*, *supra* note 300. According to the data provided by MN-DHS to the author, between Q1 2014 and Q2 2020, the average total number of MFIP and SNAP cases in the *Mixed Status-All Eligible* household category fluctuated between a decrease of -0.49% and an increase of 1.53% (Variation = -0.49 to 1.53%).

303. *Id.* Between Q1 2013 and Q1 2014, the average total number of MFIP and SNAP cases in the *Mixed Status-All Eligible* household category increased from 16,467.6 cases to 17,959.3, marking an increase of 8.3% between Q1 2013 and Q1 2014.

304. *Id.* Between Q1 2020 (Jan-Mar 2020) and Q1 2021 (Jan-Mar 2021), the

Additionally, there were no significant variations or marked reductions in the quarterly average combined number of MFIP and SNAP benefit cases in the *Mixed Status-All Eligible* household category following key *relevant events*[305] between January 2017 and August 2019 linked to public charge. Specifically, while there was a modest reduction of 0.84% in average total MFIP and SNAP cases in this household category between Q1 2018 and Q1 2019,[306] the average total MFIP and SNAP cases increased by 0.339% between Q1 2017 and Q1 2018 and by 2.185% between Q1 2019 and Q1 2020.[307] Additionally, during the time period examined in this article, the annual average number of combined MFIP and SNAP cases in the *Mixed Status-All Eligible* household category increased from 17,264 cases in 2013 to 21,403 cases in 2021, an increase of 19.34%.[308]

Based on this data, the Author concludes the *relevant events* connected to public charge, including the leaked drafts, 2018 FAM Revisions and DHS Proposed and Final Public Charge Regulations, had no significant impact on public benefit utilization and did not cause a chilling effect for this household category.

While additional qualitative research would likely be required to draw more definitive conclusions, this result is likely due to several factors relevant to the demographic makeup of this household category. First, because non-citizen members of the *Mixed Status-All Eligible* household category are likely *qualified*

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average total number of MFIP and SNAP cases in the *Mixed Status-All Eligible* household category increased from 19,568 to 21,911, marking an increase of 10.69% between Q1 2020 and Q1 2021.

305. Note that Graph A in this section and Graph B in Section V, B.1. contain an annotation marking five key events relevant to the analysis of MN-DHS MFIP and SNAP Enrollment Data for Immigrant Households: 1) Publication of the Leaked Draft Executive Order (Jan 2017); 2) 2018 FAM Revisions (Jan 2018); 3) Publication of 2018 DHS Public Charge Proposed Regulations (Oct. 2018); 4) Publication of 2019 DHS Public Charge Final Regulations (Aug. 2019); and 5) Declaration of COVID-19 Public Health Emergency (Mar. 2020).

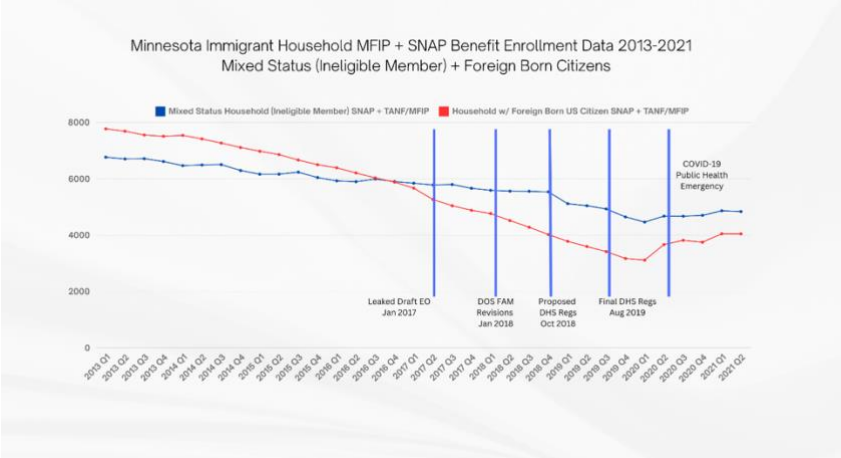
306. CHUN ET AL., *supra* note 298 (according to the data provided by MN-DHS to the Author, between Q1 2018 and Q1 2019 there was a reduction in the quarterly average total combined MFIP and SNAP cases in the *Mixed Status-All Eligible* household category from 19,311.6 in Q1 2018 to 19,149.6 in Q1 2019, marking a reduction of 0.839%.).

307. *Id.* Between Q1 2017 and Q1 2018 there was an increase in the quarterly average total MFIP and SNAP cases in the *Mixed Status-All Eligible* household category from 19,246.3 in Q1 2017 to 19,311.6 in Q1 2018, marking an increase of 0.339%. Additionally, between Q1 2019 and Q1 2020 there was an increase in the quarterly average total combined MFIP and SNAP cases in the *Mixed Status-All Eligible* household category from 19,149.6 in Q1 2019 to 19,568 in Q1 2020, marking an increase of 2.185%.

308. *Id.*

immigrants eligible to receive federally funded SNAP and TANF benefits, they are more likely to hold refugee, asylee or other forms of humanitarian status exempt from INA section 212(a)(4) public charge inadmissibility. Assuming most non-citizen household members in this category hold humanitarian immigration status exempt from public charge inadmissibility, this household category is less likely to be concerned about negative immigration consequences on account of public charge. Additionally, many immigrants granted humanitarian status, particularly refugees, are eligible for case management and other support services to assist them with accessing means-tested benefits and allay concerns related to public charge.

ii. Mixed Status Households with Ineligible Non-Citizen Members and U.S. Citizen Households with a Foreign-Born U.S. Citizen Members Had Statistically Significant Reductions in Benefit Enrollment Following the *Relevant Events* Connected to Public Charge



**Graph B - representing average total number of MN-DHS Open MFIP and SNAP Benefit Cases per quarter for Mixed Status Households with Non-Citizen Household Members Ineligible for Benefits and U.S. Citizen Households with Foreign-Born U.S. Citizen Household Members, 2013-2021.

In contrast to the *Mixed Status-All Eligible* household category, a review of the data shows a statistically significant reduction in total combined MFIP and SNAP benefit cases in the *Foreign-Born U.S. Citizen* and *Mixed Status-Ineligible* household categories following *relevant events* connected to public charge. Additionally, while both categories saw a temporary increase in

MFIP and SNAP enrollment in 2020 at the start of the COVID-19 pandemic, by the end of 2021, MFIP and SNAP benefit enrollment for *Foreign-Born U.S. Citizen* and *Mixed Status-Ineligible* households had decreased to pre-pandemic levels.

a. The Mixed Status-Ineligible Household Category Saw Statistically Significant Reductions in Benefit Enrollment in 2018, 2019, and 2021

Looking specifically at the *Mixed Status-Ineligible* household category, MN-DHS benefit enrollment data demonstrates that there was a statistically significant reduction in total combined MFIP and SNAP benefit cases following *relevant events* connected to public charge in 2018 and 2019. Additionally, while this household category saw a temporary increase in MFIP and SNAP enrollment in 2020 at the start of the COVID-19 pandemic, the level of increased enrollment was much lower compared to the other immigrant household categories examined in this Article. The *Mixed Status-Ineligible* household category also continued to see statistically significant reductions in MFIP and SNAP enrollment in 2021.

In examining MFIP and SNAP enrollment data in the *Mixed Status-Ineligible* household category prior to the first *relevant event* in January 2017, this category saw decreased enrollment between 2013 and 2016 with reductions ranging from 1.43% to 4.7% per year.[309] These reductions in enrollment between 2013 and 2017 were not statistically significant and were consistent with overall reductions in public benefit utilization in Minnesota due to improving economic conditions after the Great Recession.[310]

309. *Id.* Between Q1 2013 and Q1 2014, the quarterly average total combined MFIP and SNAP cases in the *Mixed Status-Ineligible* household category decreased from 6,766 average combined MFIP and SNAP cases in Q1 2013 to 6,467.3 average combined MFIP and SNAP cases in Q1 2014, marking a reduction of 4.414%. Between Q1 2014 and Q1 2015, the quarterly average total combined MFIP and SNAP cases in the *Mixed Status-Ineligible* household category decreased from 6,467.3 average combined MFIP and SNAP cases in Q1 2014 to 6,163.3 average combined MFIP and SNAP cases in Q1 2015, marking a reduction of 4.7%. Between Q1 2015 and Q1 2016, the quarterly average total combined MFIP and SNAP cases in the *Mixed Status-Ineligible* household category decreased from 6,163.3 average combined MFIP and SNAP cases in Q1 2015 to 5,927.3 average combined MFIP and SNAP cases in Q1 2016, marking a reduction of 3.829%. Between Q1 2016 and Q1 2017, the quarterly average total combined MFIP and SNAP cases in the *Mixed Status-Ineligible* household category decreased from 5,927.3 average combined MFIP and SNAP cases in Q1 2016 to 5,842.6 average combined MFIP and SNAP cases in Q1 2017, marking a reduction of 1.428%.

310. *See generally Economic Supports, Cash, Food: News, Initiatives, Reports, Work Groups*, MINN. DEP'T OF HUM. SERVS. [hereinafter MN-DHS, *Economic*

Following publication of the leaked draft public charge executive order in January 2017, delineated in Graph A and Graph B as the first *relevant event,* the *Mixed Status-Ineligible* household category saw a decrease of 4.33% in average total combined MFIP and SNAP cases between Q1 2017 and Q1 2018.[311] However, because this decrease did not deviate significantly from previous reductions in quarterly average MFIP and SNAP combined cases or overall reductions in public benefit utilization in Minnesota in 2017, this 4.33% reduction in average total combined MFIP and SNAP cases is not viewed as statistically significant.

Yet, the *Mixed Status-Ineligible* category did see significant reductions in average combined total MFIP and SNAP cases following the three *relevant events* in 2018 and 2019 delineated in Graph A and Graph B. The three *relevant events* that occurred in 2018 and 2019 were: the 2018 FAM Revisions on January 3, 2018; publication of the 2018 DHS Proposed Regulations on October 10, 2018; and publication of the 2019 DHS Final Regulations on August 14, 2019. With respect to reductions in total MFIP and SNAP benefit cases in the *Mixed Status-Ineligible* household category, between Q1 2018 and Q1 2019 there was a 8.48% decrease in average combined total MFIP and SNAP cases.[312] This decline in MFIP and SNAP enrollment continued in 2019, with a 12.75% decrease in average combined total MFIP and SNAP cases between Q1 2019 and Q1 2020 for this household category.[313] These reductions in MFIP and SNAP benefit enrollment in the *Mixed*

Reports], https://mn.gov/dhs/partners-and-providers/news-initiatives-reports-workgroups/economic-supports-cash-food/ [https://perma.cc/Y8T9-93G7] (scroll down to the SNAP heading and select "Characteristics of People and Cases on the Supplemental Nutrition Assistance Program" to access annual reports from 2013 to 2021 (showing that between December 2013 and December 2014 the total number of SNAP Stand Alone Cases ((i.e. cases not receiving SNAP and MFIP cash or food support)) decreased by 14.93%. SNAP Stand Alone Cases decreased by 4.25% in December 2015, increased by .34% in December 2016 and decreased by 3.08% in December 2017) .

311. MN-DHS, *Records Request*, *supra* note 300. Between Q1 2017 and Q1 2018, the quarterly average total combined MFIP and SNAP cases in the *Mixed Status-Ineligible* household category decreased from 5,842 average combined MFIP and SNAP cases in Q1 2017 to 5,589.6 average combined MFIP and SNAP cases in Q1 2018, marking a reduction of 4.33%.

312. *Id.* Between Q1 2018 and Q1 2019, the quarterly average total combined MFIP and SNAP cases in the *Mixed Status-Ineligible* household category decreased from 5,589.6 average combined MFIP and SNAP cases in Q1 2018 to 5,115.6 average combined MFIP and SNAP cases in Q1 2019, marking a reduction of 8.48%.

313. *Id.* Between Q1 2019 and Q1 2020, the quarterly average total combined MFIP and SNAP cases in the *Mixed Status-Ineligible* household category decreased from 5,155.6 average combined MFIP and SNAP cases in Q1 2019 to 4463.3 average combined MFIP and SNAP cases in Q1 2020, marking a reduction of 12.75%.

Status-Ineligible household category in 2018 and 2019 were much higher than prior years, making them statistically significant. This marked decrease in MFIP and SNAP enrollment in 2018 and 2019 also supports existence of a chilling effect following the delineated *relevant events* connected to public charge.

After declaration of the COVID-19 Public Health Emergency in March 2020, the *Mixed Status-Ineligible* household category did see a temporary increase in MFIP and SNAP enrollment, notably with a 4.73% increase in average combined total MFIP and SNAP cases between Q1 and Q2 of 2020.[314] However, while the average number of MFIP and SNAP cases in this household category did increase by 8.95% between Q1 2020 and Q1 2021,[315] this rate of increase was lower compared to other immigrant household categories[316] and total increased public benefit utilization in Minnesota during the first year of the COVID-19 pandemic.[317] Additionally, the *Mixed Status-Ineligible* household category continued to see statistically significant declines in MFIP and SNAP benefit enrollment in 2021, with a 15.73% reduction in average combined total MFIP and SNAP cases between Q1 2021 and Q4 2021.[318] While a portion of this decrease in enrollment in 2021 can be attributed to improved economic conditions, in December 2021 there were only 4,033 total combined MFIP and SNAP cases, approximately 500 fewer open cases than in January 2020 prior to the start of the pandemic.[319] The lower utilization of

314. *Id.* Between Q1 2020 and Q2 2020 the average total combined MFIP and SNAP cases in the *Mixed Status-Ineligible* category increased by 4.735% from 4,463.3 in Q1 2020 to 4,674.6 in Q2 2020.

315. *Id.* Between Q1 2020 and Q1 2021 the average total combined MFIP and SNAP cases in the *Mixed Status-Ineligible* category increased by 8.95% from 4,463.3 in Q1 2020 to 4,836.3 in Q1 2021.

316. *Id.* By comparison, between Q1 2020 and Q1 2021, the *Mixed Status-All Eligible* household category saw an increase of 11.97% and the *Foreign-Born U.S. Citizen* household category saw an increase of 30.01% in average total combined MFIP and SNAP cases.

317. *See* MINN. DEP'T OF HUM. SERVS., CHARACTERISTICS OF PEOPLE AND CASES ON THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM 2020, at 12 (2023) https://edocs.dhs.state.mn.us/lfserver/Public/DHS-5182O-ENG [https://perma.cc/ZXL2-HQ8V]. In the 2020 MN-DHS annual report on SNAP program benefits in Minnesota, MN-DHS reported that in December 2020, 440,300 individuals were enrolled in Minnesota's SNAP caseload, marking a 13% increase from December 2019. *Id.*

318. MN-DHS, *Records Request*, *supra* note 300. Between Q1 2021 and Q4 2021 the average total combined MFIP and SNAP cases in the *Mixed Status-Ineligible* category decreased by 15.73% from 4,836.3 in Q1 2021 to 4,098 in Q4 2021.

319. *Id.* On December 1, 2021, there were a 4,033 total combined MFIP and SNAP cases in the *Mixed Status-Ineligible* category. By comparison, on January 1, 2020, prior to the start of the COVID-19 pandemic there were a 4,525 total combined MFIP and SNAP cases.

MFIP and SNAP benefits by *Mixed Status-Ineligible* households during the pandemic and the statistically significant reductions in MFIP and SNAP benefit enrollment in 2021 both suggest an ongoing reluctance by this household category to utilize public benefits due to ongoing fear related to public charge. Of note, this ongoing fear of utilizing public benefits in the *Mixed Status-Ineligible* household category appears to persist through late 2021 despite reversal of the 2019 DHS Public Charge Regulations by the Biden Administration in March 2021.

b. Between 2017 and 2019 and in 2021 There Were Statistically Significant Reductions in Benefit Enrollment for U.S. Citizen Households with One Foreign-Born U.S. Citizen

The immigrant household category that saw the largest reduction in MFIP and SNAP benefit enrollment between 2017 and 2019, when the four *relevant events* connected to public charge occurred, was the *Foreign-Born U.S. Citizen* household category. Additionally, after an increase in MFIP and SNAP benefit enrollment in 2020 at the start of the COVID-19 pandemic, the *Foreign-Born Citizen* household category also saw a large decrease in MFIP and SNAP enrollment in the second half of 2021.

With respect to enrollment data prior to 2017, the *Foreign-Born U.S. Citizen* household category did have slightly larger year-to-year reductions in MFIP and SNAP enrollment from 2013 to 2016 compared to the *Mixed Status-Ineligible* household category and benefit recipients in Minnesota during this period. Of note, the annual rate of reduction in average total combined MFIP and SNAP cases between 2013 and 2016 ranged from 2.98% to 8.45%,[320] which

320. *Id.* Between Q1 2013 and Q1 2014, the quarterly average total combined MFIP and SNAP cases in the *Foreign-Born U.S. Citizen* household category decreased from 7,771.6 average combined MFIP and SNAP cases in Q1 2013 to 7,540.3 average combined MFIP and SNAP cases in Q1 2014, marking a reduction of 2.97%. Between Q1 2014 and Q1 2015, the quarterly average total combined MFIP and SNAP cases in the *Foreign-Born U.S. Citizen* household category decreased from 7,540.3 average combined MFIP and SNAP cases in Q1 2014 to 6,978.3 average combined MFIP and SNAP cases in Q1 2015, marking a reduction of 7.45%. *Id.* Between Q1 2015 and Q1 2016, the quarterly average total combined MFIP and SNAP cases in the *Foreign-Born U.S. Citizen* household category decreased from 6,978.3 average combined MFIP and SNAP cases in Q1 2015 to 6,388 average combined MFIP and SNAP cases in Q1 2016, marking a reduction of 8.45%. *Id.* Between Q1 2016 and Q4 2016, the quarterly average total combined MFIP and SNAP cases in the *Foreign-Born U.S. Citizen* household category decreased from 6,388 average combined MFIP and SNAP cases in Q1 2016 to 5,883 average combined MFIP and SNAP cases in Q4 2016, marking a reduction of 7.90%. Between Q4 2016 (Oct-Dec 2016) and Q1 2017 (Jan-Mar 2017) there was a 3.63% reduction in

can be attributed, in part, to improved economic conditions during this period.[321]

The more statistically significant results are apparent, however, upon review of MFIP and SNAP enrollment data in the *Foreign-Born U.S. Citizen* household category between 2017 and 2019, the time period when all of the four delineated *relevant events* related to public charge occurred. First, between Q1 2017 and Q1 2018, the average total combined MFIP and SNAP cases in this household category decreased by 15.96%.[322] These reductions in MFIP and SNAP enrollment in the *Foreign-Born U.S. Citizen* category increased further in 2018 and 2019, with a 20.68% reduction between Q1 2018 and Q1 2019 and a 17.6% reduction between Q1 2019 and Q1 2020 in average total combined MFIP and SNAP cases.[323] Additionally, these reductions in MFIP and SNAP enrollment in the *Foreign-Born U.S. Citizen* household category were significantly higher than general reductions in benefit utilization in Minnesota between 2017 and 2019 which only decreased by 2 to 3% annually during this period.[324] Because these statistically significant annual reductions in MFIP and SNAP enrollment were not attributable to general reductions in public benefit utilization between 2017 and 2019, the data further supports a existence of the public charge chilling effect.

During first year of the COVID-19 pandemic, there was a temporary 30% increase in average combined MFIP and SNAP

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average combined MFIP and SNAP cases, with a decrease from 5,883 to 5,669.3 cases during this period, indicating evidence of a chilling effect in the *Foreign-Born U.S. Citizen* category as early as Q1 2017, following publication of the leaked draft executive order in January 2017. *Id.*

321. *See* MN-DHS, *Economic Supports, supra* note 310.

322. MN-DHS, *Records Request*, *supra* note 300. Between Q1 2017 and Q1 2018, the quarterly average total combined MFIP and SNAP cases in the *Foreign-Born U.S. Citizen* household category decreased from 5,669.3 average combined MFIP and SNAP cases in Q1 2017 to 4,764 average combined MFIP and SNAP cases in Q1 2018, marking a reduction of 15.96%.

323. *Id.* Between Q1 2018 and Q1 2019, the quarterly average total combined MFIP and SNAP cases in the *Foreign-Born U.S. Citizen* household category decreased from 4,764 average combined MFIP and SNAP cases in Q1 2018 to 3,778.6 average combined MFIP and SNAP cases in Q1 2019, marking a reduction of 20.68%. *Id*. Between Q1 2019 and Q1 2020, the quarterly average total combined MFIP and SNAP cases in the *Foreign-Born U.S. Citizen* household category decreased from 3,778.6 average combined MFIP and SNAP cases in Q1 2019 to 3,113.3 average combined MFIP and SNAP cases in Q1 2020, marking a reduction of 17.6%**.** *Id.*

324. *See* generally MN-DHS, *Economic Supports*, *supra* note 310 (providing publicly available data from MN-DHS on SNAP program benefits that between December 2016 and December 2017 the total number of SNAP Stand Alone Cases (i.e. cases not receiving SNAP and MFIP cash or food support) decreased by 3.08%. SNAP Stand Alone Cases decreased by 2.22% between December 2017 and December 2018 and decreased by 2.02% between December 2018 and December 2019).

cases between Q1 2020 and Q1 2021 in the *Foreign-Born U.S. Citizen* household category.[325] However, in 2021 MFIP and SNAP enrollment rates once again decreased with a 19% reduction in average total combined MFIP and SNAP cases in this household category between Q1 2021 and Q4 2021.[326] By December 2021, there were 3212 open MFIP and SNAP cases in this household category, roughly the same number of open in January 2020, prior to the pandemic.[327]

While additional qualitative research is required to reach more conclusive results, several factors may explain the sharp contemporaneous decline in MFIP and SNAP enrollment in the *Foreign-Born U.S. Citizen* household category following the *relevant events* linked to public charge. First, with respect to the 20.68% decline in enrollment in 2018 and 17.6% decline in enrollment in 2019, this may be partially attributable to the impact of the 2018 FAM Revisions on the *Foreign-Born U.S. Citizen* household category. More specifically, for naturalized U.S. citizens sponsoring their spouse, child or parent located outside the U.S. for permanent residence through a family-based petition, their relatives would have been impacted by the 2018 FAM Revisions when they applied for permanent residence through consular processing. Because the 2018 FAM Revisions contained broad language penalizing receipt of any public benefit by the immigrant or their U.S. citizen family sponsor, naturalized citizens in the *Foreign-Born U.S. Citizen* category may have opted to forgo public benefits to avoid negative consequences for relatives undergoing consular processing. In addition to concerns surrounding the 2018 FAM Revisions, it is also possible naturalized citizens in the *Foreign-Born U.S. Citizen* household category continued to fear they were at risk of deportation, despite being a U.S. citizen, because of misinformation within immigrant communities around public charge.

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325. MN-DHS, *Records Request*, *supra* note 300. Between Q1 2020 and Q1 2021, the quarterly average total combined MFIP and SNAP cases in the *Foreign-Born U.S. Citizen* household category increased from 3,113.3 average combined MFIP and SNAP cases in Q1 2020 to 4,047 average combined MFIP and SNAP cases in Q1 2021, marking an increase of 30.01%.

326. *Id.* Between Q1 2021 and Q4 2021, the quarterly average total combined MFIP and SNAP cases in the *Foreign-Born U.S. Citizen* household category decreased from 4,047.6 average combined MFIP and SNAP cases in Q1 2021 to 3,279 average combined MFIP and SNAP cases in Q4 2021, marking a reduction of 19%.

327. *Id*. On December 1, 2021, there were a 3,212 total combined MFIP and SNAP cases in the *Foreign-Born U.S. Citizen* category. By comparison, on January 1, 2020, prior to the start of the COVID-19 pandemic there were a 3,115 total combined MFIP and SNAP cases.

VI. Conclusions and Recommendations

As previously discussed, analysis of MN-DHS public benefit enrollment data for Minnesota immigrant households from 2013 to 2021 demonstrates statistically significant reductions in benefit enrollment for certain immigrant households, further corroborating existence of a public charge chilling effect. This chilling effect was particularly evident in the *Mixed Status-Ineligible and Foreign-Born U.S. Citizen* immigrant household categories, which saw statistically significant declines in benefit enrollment between 2017 and 2019. Even more troubling, data from 2021 shows that public benefit enrollment has continued to decrease in both of these household categories after rescission of the 2019 DHS Public Charge Regulations by the Biden Administration in March 2021. This continuing decline in enrollment in 2021 points to a continuing chilling effect due to ongoing concerns related to public charge, despite reversal of this policy by President Biden. This chilling effect may be exacerbated further with the start of President Trump's second term in January 2025 and potential regulatory changes to the public charge ground of inadmissibility under the incoming Trump administration.[328]

Because this data, along with other recent studies,[329] demonstrates the existence of an ongoing reluctance by immigrant households to utilize public benefits likely to worsen under a second Trump administration, state and local government officials should allocate additional resources to reverse the public charge chilling effect. These efforts should include community education initiatives to combat misinformation within immigrant communities around public charge and additional resources at the city, state, and county level to help immigrant households enroll in benefit programs. Evidence of the success of such efforts can be seen in the absence of a chilling effect in the *Mixed Status-All Eligible* household category, which likely includes refugees who benefited from supportive integration services through a Voluntary Agency upon arrival. An increase in similar integration services for other immigrant

328. *See* David J. Bier, *Trump Will Likely Cut Legal Entries More Than Illegal Entries,* Cato Inst. (Jan. 21, 2025), https://www.cato.org/blog/trump-will-cut-legal-entries-more-illegal-entries [https://perma.cc/BMW9-Z2NM]; Drishti Pillai &Samatha Artiga, *Expected Immigration Policies Under a Second Trump Administration and Their Health and Economic Implications,* KFF (Nov. 21, 2024), https://www.kff.org/racial-equity-and-health-policy/issue-brief/expected-immigration-policies-under-a-second-trump-administration-and-their-health-and-economic-implications [https://perma.cc/8PJN-ZKJM].

329. *See generally,* Guerrero et al., *supra* note 281 (assessing the "chilling effect" on immigrant children's access to healthcare in California).

household categories would likely limit further declines in public benefit enrollment due to fear around public charge.

Additionally, state and local governments should also invest resources in universal programs to address food insecurity and other negative collateral consequences that occur when immigrant households forgo public benefits on account of public charge. An example of such a program is the universal free school meals program, passed by the Minnesota legislature in 2023 and signed into law by Governor Tim Walz.[330] Such programs address food insecurity and other structural barriers caused by poverty while also eliminating the stigma associated with government programs and fears about negative consequences, such as public charge inadmissibility, by making this assistance universal versus need-based.

330. *See* Elizabeth Shockman, *Walz Signs Universal School Meals Bill into Minnesota Law,* MINN. PUB. RADIO (Mar. 17, 2023), https://www.mprnews.org/story/2023/03/17/gov-signs-universal-school-meals-bill-into-law [https://perma.cc/999J-WD8W].

Thinking Beyond Confinement: The Suspension of Minnesota's 48-Hour Law and the False Choice Between Incarceration or Institutionalization

Sophie Herrmann†

Introduction

Anthony Swope was never supposed to go to jail.[1] Yet, he spent over fifty days behind bars.[2] Brandon Hegg-Mclaughlin was also never supposed to be incarcerated.[3] Still, he spent more than sixty days in jail.[4] John Schilz never should have gone to jail either.[5] He was held for over ten months in county jail.[6] All of these individuals were found incompetent to stand trial in the State of Minnesota and were subsequently civilly committed.[7] The state was required to

†. J.D. Candidate 2025, University of Minnesota Law School, and Note and Comment Editor of *Minnesota Journal of Law & Inequality,* Vol. 43. First, I would like to thank Professor Susanna Blumenthal for her invaluable feedback, support, and guidance during the note-writing process. I'd also like to thank Geoffrey Isaacman and Melissa Fraser from the Hennepin County Public Defender's Office. Clerking for HCPD has been my most formative law school experience and the lessons you've taught me are woven all throughout this Note. To Luke, thank you for your constant encouragement and, through it all, making me laugh every single day. To my mom and sisters, I'll never understand how I got so lucky. Thank you for showing me what it looks like to build a life and a career dedicated to caring for others. You will always be my first and biggest role models. Finally, I am forever indebted to all the brilliant abolitionist scholars and organizers whose labor, genius, dedication, and compassion inspired this Note. One day may the carceral state finally fall—and may we be lucky enough to be there to see it happen.

1. Findings of Fact, Conclusions of Law, and Order Denying Demurrer, and Peremptory Writ of Mandamus at 1–2, Swope v. Harpstead, No. 70-CV-22-13153 (Minn. 1st Jud. Dist. Ct. Feb. 22, 2023) [hereinafter Swope Findings of Fact].

2. *Id.* at 1.

3. Petition for Writ of Mandamus and Writ of Habeas Corpus at 3-5, Ly v. Harpstead, No. 70 CV-22-13781 (Minn. 1st Jud. Dist. Ct. Nov. 5, 2022) [hereinafter Ly Petition].

4. *Id.*

5. Complaint at 4, Schilz v. Harpstead, No. 72-CV-23-135 (Minn. 1st Jud. Dist. Ct. July 17, 2023) [hereinafter Schilz Complaint].

6. Louis Krauss, *Inmates Sue State over Delays in Treatment Center Transfers*, STAR TRIB. (Aug. 6, 2023), https://www.startribune.com/mentally-ill-inmates-sue-minnesota-hospital-jail-transfer-48-hour-rule/600295288 [https://perma.cc/9TRB-22YZ].

7. Swope Findings of Fact, *supra* note 1, at 1–2; Ly Petition, *supra* note 3, at 3–5; Schilz Complaint, *supra* note 5, at 4.

provide them with mental health treatment.[8] Instead, Minnesota jailed the men and refused to provide them with the care they needed–the care the state was required to provide them.[9]

Minn. Stat. § 253.B.10, better known as the 48-hour law, mandated that civilly committed individuals in Minnesota who were being held in a jail or correctional institution "must be admitted to a state-operated treatment program within 48 hours."[10] The law was enacted in July 2013, but in the spring of 2023 Minnesota lawmakers suspended it through June 2025.[11] Since the law's enactment, the state has struggled to remain in compliance, resulting in individuals waiting months before being transferred from jail to a mental health facility.[12] Minnesota's continued inability to comply with the 48-hour law led to many lawsuits being filed against the state's Department of Human Services (DHS).[13] In response to the multitude of lawsuits, in May 2023 Attorney General Keith Ellison asked the Minnesota legislature to temporarily suspend the 48-hour law in order "to give DHS enough flexibility so [they] can meet the requirements of the law."[14] The legislature complied with Ellison's request and suspended the law.[15]

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8. MINN. STAT. § 253B.10 (2020) (suspended 2023).

9. Swope Findings of Fact, *supra* note 1, at 1–2; Ly Petition, *supra* note 3, at 3–5; Schilz Complaint, *supra* note 5, at 4.

10. MINN. STAT. § 253B.10 (2020) (suspended 2023) ("(a) When a person is committed, the court shall issue a warrant or an order committing the patient to the custody of the head of the treatment facility, state-operated treatment program, or community-based treatment program. The warrant or order shall state that the patient meets the statutory criteria for civil commitment. (b) The commissioner shall prioritize patients being admitted from jail or a correctional institution who are: (1) ordered confined in a state-operated treatment program for an examination under Minnesota Rules of Criminal Procedure, rules 20.01, subdivision 4, paragraph (a), and 20.02, subdivision 2; (2) under civil commitment for competency treatment and continuing supervision under Minnesota Rules of Criminal Procedure, rule 20.01, subdivision 7; (3) found not guilty by reason of mental illness under Minnesota Rules of Criminal Procedure, rule 20.02, subdivision 8, and under civil commitment or are ordered to be detained in a state-operated treatment program pending completion of the civil commitment proceedings; or (4) committed under this chapter to the commissioner after dismissal of the patient's criminal charges. Patients described in this paragraph must be admitted to a state-operated treatment program within 48 hours.").

11. Krauss, *supra* note 6.

12. OFF. OF THE LEGIS. AUDITOR, STATE OF MINN., PROGRAM EVALUATION DIV., MENTAL HEALTH SERVICES IN COUNTY JAILS 93 (2016) ("One of every four placements subject to the 48-hour law has failed to occur within 48 hours of the time when DHS was notified of the court order."); Krauss *supra* note 6 ("In May, Attorney General Keith Ellison asked state legislators to suspend the [48-hour] law, noting a 'vast' amount of litigation targeting DHS from inmates and their families.").

13. Krauss, *supra* note 6.

14. *Id.*

15. *Id.*

Minnesota has struggled to provide accessible and adequate mental healthcare to its entire population, but especially to those incarcerated.[16] A commonly cited indicator of this problem is a lack of beds in Minnesota's psychiatric treatment facilities.[17] Minnesota does not have enough beds for those voluntarily seeking longer-term care, nor enough beds to accommodate its civilly committed population.[18] Therefore, civilly committed individuals are often forced to wait in jails until a bed opens for them in a mental health facility.[19]

The story often goes as follows: individuals who find themselves civilly committed are first processed through the criminal legal system.[20] They are arrested for some crime, a court concludes that they are in need of mandatory psychiatric treatment, and they are civilly committed.[21] However, the lack of space in psychiatric facilities has, in part, led to the civilly committed having to wait in jails for a bed to open up for them.[22] So, while they wait, these civilly committed inmates often receive either no mental health care or mental health care inside of the jails where they are being held.[23] Jails provide neither adequate nor effective mental health care.[24] Therefore, a significant portion of the civilly

16. OFF. OF THE LEGIS. AUDITOR, *supra* note 12, at ix ("Problems with service availability in Minnesota's adult mental health system have persisted for years, limiting peace officers' options for referring persons with mental illness they take into custody.").

17. Riham Feshir, *Despite Law, Mentally Ill Wait in Jail Without Treatment*, MINN. PUB. RADIO NEWS (Feb. 29, 2016), https://www.mprnews.org/story/2016/02/29/jailed-mentally-ill-wait-for-treatment [https://perma.cc/5P3H-7GSY] ("Hennepin County Sheriff Rich Stanek argues that jails aren't medical facilities appropriate for treating mentally ill inmates. He said DHS officials need to secure funding to open up more beds for people with mental illness.").

18. Krauss, *supra* note 6 ("Minnesota is 'not meeting the requirements of the 48-hour law, and people are suing,' said [Attorney General Keith] Ellison, whose office is representing DHS. 'I don't believe we can meet the resource needs in an instant, but we can change the law to give DHS enough flexibility so we can meet the requirements of the law.'"); OFF. OF THE LEGIS. AUDITOR, *supra* note 12, at x ("Community hospital psychiatric beds are often full, partly because they have had problems discharging patients to state-run psychiatric facilities . . . . Meanwhile, DHS's smaller psychiatric hospitals have had significant staffing reductions, and they are now operating well below their capacity.").

19. Krauss, *supra* note 6.

20. *See* OFF. OF THE LEGIS. AUDITOR, *supra* note 12, at 5–15 (discussing the arrest, jailing, and civil commitment process).

21. *Id.* at 79.

22. Krauss, *supra* note 6.

23. *Id.*; OFF. OF THE LEGIS. AUDITOR, *supra* note 12.

24. OFF. OF THE LEGIS. AUDITOR, *supra* note 12; Tom Robbins, *The Tragedy of Mental Illness in Prisons*, ATLANTIC (Nov. 17, 2018), https://www.theatlantic.com/politics/archive/2018/11/american-prisons-cant-handle-

committed population in Minnesota finds themselves incarcerated and without any type of real mental health care.[25] At the same time, many scholars, medical experts, and activists question the efficacy, ethics, and constitutionality of civil commitment in the first place.[26]

While the suspension of the 48-hour law represents a failure to take care of some of the most vulnerable people in our community, it is also an opportunity to pursue more just alternative treatment options for those with severe mental illness in Minnesota. Instead of enlarging the role of jails in providing mental health care or expanding the capacity of mental health facilities to institutionalize more people, Minnesota should take the suspension as an opportunity to invest in community-based, non-carceral mental health treatment options.

I. Background

A. The 48-Hour Law Sought, Yet Ultimately Failed, to Address the Mental Health Needs of Minnesotans

Passed in 2013, the 48-hour law mandated that civilly-committed jail inmates be transferred to a mental health facility within 48 hours.[27] Admissions made pursuant to the 48-hour law were called "priority admissions."[28] Four populations were covered under the law. First, the law covered individuals who were being held in a jail or a correctional institution while awaiting a competency examination under the Minnesota Rules of Criminal Procedure, rule 20.01, subdivision 2.[29] Second, it covered jail

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mentally-ill-inmates/576634/ [https://perma.cc/V43W-43LB].

25. OFF. OF THE LEGIS. AUDITOR, *supra* note 12, at 93 ("One of every four placements subject to the 48-hour law has failed to occur within 48 hours of the time when DHS was notified of the court order.").

26. LIAT BEN-MOSHE, DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION 16 (2020) ("[C]alling for certain populations to be released from jails and prisons often sends them to be reincarcerated in other institutions or by other means, including by forced drugging or by indefinite detention in detention centers, psychiatric hospital, or psych forensic units."); Eliot T. Tracz, *Mentally Ill, or Mentally Ill and Dangerous?: Rethinking Civil Commitments in Minnesota*, 42 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 137, 137–39 (2019).

27. MINN. STAT. § 253B.10 (2020) (suspended 2023).

28. DEP'T OF HUM. SERVS, TASK FORCE ON PRIORITY ADMISSIONS TO STATE-OPERATED TREATMENT PROGRAMS REPORT AND RECOMMENDATIONS TO THE MINNESOTA LEGISLATURE (2024) [hereinafter TASK FORCE REPORT], https://mn.gov/dhs/partners-and-providers/news-initiatives-reports-workgroups/behavioral-health/priority-admissions-task-force/ [https://perma.cc/V7BX-94HF].

29. MINN. STAT. § 253B.10, subd. 2 (2020) (suspended 2023).; MINN. R. CRIM. P. 20.01, subd. 2 (repealed 2024) ("A defendant is incompetent and must not plead, be tried, or be sentenced if the defendant due to mental illness or cognitive impairment

inmates who were "under civil commitment for competency treatment and continuing supervision under Minnesota Rules of Criminal Procedure, rule 20.01, subdivision 7," which details the process under which a defendant, who has been previously held incompetent to stand trial, must be reevaluated at least every six months for competency.[30] Third, the 48-hour law covered those who are "found not guilty by reason of mental illness . . . and under civil commitment or are ordered to be detained in a state-operated treatment program pending completion of the civil commitment proceedings . . . ."[31] Lastly, the law covered individuals "committed under this chapter to the commissioner after dismissal of the patient's criminal charges."[32] For the ten years that the 48-hour law was in effect, approximately 2,413 individuals were admitted to state mental health facilities from jails or correctional institutions under the authority of the statute.[33]

B. 48-Hour Law's Reception

After Minnesota passed the 48-hour law, many groups voiced their opposition to the legislation, citing unintended consequences.

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lacks the ability to: (a) rationally consult with counsel; or (b) understand the proceedings or participate in the defense.").

30. MINN. STAT. § 253B.10, subd. 2 (2020) (suspended 2023); MINN. R. CRIM. P. 20.01, subd. 7 (repealed 2024) ("The head of the institution to which the defendant is committed, or if the defendant is not committed to an institution, the person charged with the defendant's supervision, must report to the court periodically, not less than once every six months, on the defendant's mental condition with an opinion as to competency to proceed.").

31. MINN. STAT. § 253B.10, subd. 3 (2020) (suspended 2023).

32. *Id.*, subd. 4. The statute was amended in 2024. MINN. STAT. § 253B.10 (2024). In addition to removing the 48-hour requirement for admissions, the amendment altered the covered populations that qualify for "priority admission." *Id.* Under the amended statute, the two populations eligible for priority admission are "civilly committed patients being admitted from jail or a correctional institution," or "civilly committed patients . . . who are referred to a state-operated treatment facility for competency attainment or a competency examination . . . using a priority admissions framework." *Id.* The amended statute provides that "a priority admissions framework" involves the evaluation of a number of factors "including but not limited to: (1) the length of time the person has been on a waiting list for admission . . . (2) the intensity of the treatment the person needs . . . (3) the person's revoked provisional discharge status; (4) the person's safety and safety of others in the person's current environment; (5) whether the person has access to necessary or court-ordered treatment; (6) distinct and articulable negative impacts of an admission delay on the facility referring the individual for treatment; and (7) any relevant federal prioritization requirements." *Id.*

33. TASK FORCE REPORT, *supra* note 28; DEP'T OF HUM. SERVS., TASK FORCE ON PRIORITY ADMISSIONS TO STATE-OPERATED TREATMENT PROGRAMS: DATA ON ADMISSIONS TO KEY PROGRAMS AND FACILITIES 4 (2023) [hereinafter TASK FORCE DATA ON ADMISSIONS], https://mn.gov/dhs/assets/priority-admissions-key-data_tcm1053-585905.pdf [https://perma.cc/Y93V-GE8G].

Hospitals criticized the law because prioritizing inmates for placement in mental health facilities led to bed shortages and longer wait times for other, non-incarcerated individuals seeking inpatient mental health care.[34] Hospital administrators argued that the law caused "more mentally ill and violent patients [to be] kept longer in hospitals where staff are less prepared to deal with possible flare-ups . . . ."[35] This initial opposition from hospitals began a fervent debate that continues to this day: what should the state do when there is limited space in psychiatric institutions, and should the state grant priority admission status to individuals who are being forced into treatment through the civil commitment process over those who seek treatment voluntarily?[36]

i. The Department of Human Services Failed to Comply with the 48-Hour Law

Since its enactment, Minnesota's Department of Human Services has struggled to comply with the requirements of the 48-hour law. When the law's impact was reviewed by the state Office of the Legislative Auditor in 2015, it found that "about one-fourth of all individuals subject to the 48-hour law had not been placed within 48 hours of DHS's notification of the order."[37] Anoka-Metro Regional Treatment Center, Minnesota's largest psychiatric hospital, reported that individuals referred to the center through the 48-hour law waited an average of 23.8 days in 2021, 35.9 days in 2022, and 41.9 days in 2023 before they were admitted to the treatment center.[38] Therefore, individuals covered under the 48-hour law were held in jail an average of 764.8 hours *longer* than they should have been under the statute. The state's continued noncompliance resulted in some individuals spending hundreds of days in jail waiting to be transferred to a mental health facility.[39] In response to this noncompliance, multiple inmates sued the state

34. Chris Serres, *New Minnesota Law Pushes Mental Health System to a Crisis Point,* STAR TRIB. (Dec. 8. 2014), https://www.startribune.com/new-minnesota-law-pushes-mental-health-system-to-a-crisis-point/275076241 [https://perma.cc/H9CZ-R2DQ] ("The law enables some inmates who are deemed by the courts to be mentally ill to be admitted ahead of hospital patients who may have been waiting weeks or months to get proper treatment.").

35. *Id.*

36. *Id.*; Krauss, *supra* note 6.

37. OFF. OF THE LEGIS. AUDITOR, *supra* note 12, at xii.

38. TASK FORCE DATA ON ADMISSIONS, *supra* note 33, at 11.

39. Krauss, *supra* note 6 ("One Ramsey County jail inmate stayed there 264 days before being transferred to a state hospital Aug. 1 . . . . In Hennepin County, an inmate has waited 175 days for transfer since being ordered to a state hospital . . . .").

for failing to transfer them to mental health facilities in a timely manner.[40]

Anthony Swope was one such inmate-turned-plaintiff. Mr. Swope was charged with two counts of felony assault in 2022. A judge subsequently found him incompetent and ordered him to be civilly committed.[41] This meant that Mr. Swope should not have spent more than 48 hours in a Minnesota jail before being transferred to a mental health facility. However, Mr. Swope was held for 57 days at the Scott County Jail.[42] Mr. Swope eventually sued Jodi Harpstead, the Commissioner of the Minnesota Department of Human Services, for failing to comply with the 48-hour law.[43] The Court found that "[Mr. Swope] sat at the Scott County Jail, while in the Commissioner's custody, receiving no treatment of any kind, with little to no oversight of his well-being, and his symptoms worsened. [Mr. Swope] was held without due process or treatment for 57 days (1,368 hours)."[44] Mr. Swope is only one of many civilly committed individuals forced to wait in jail without receiving mental health treatment due to the state's failure to comply with the 48-hour law.[45]

ii. Inmates Sued the State After Suspension of the 48-Hour Law

Inmates have continued to sue DHS even after the suspension of the 48-hour law, with some arguing that the suspension itself constitutes a violation of the rights of civilly committed inmates.[46] For example, John Schilz, an inmate, civil commit, and eventual plaintiff sued Harpstead arguing that the suspension of the 48-hour law is unconstitutional and that it gives DHS "unfettered discretion in the timing of transfer and effectively legalizes extrajudicial incarceration and punishment of vulnerable individuals who have not been convicted of any crime."[47] As of August 6, 2023, Mr. Schilz was still being held in a county jail where he had been waiting for "more than 10 months to be transferred to a mental health facility."[48]

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40. Krauss, *supra* note 6.
41. Swope Findings of Fact, *supra* note 1, at 1–2.
42. *Id.* at 2.
43. *Id.* at 1.
44. *Id.* at 14.
45. Krauss, *supra* note 6.
46. Schilz Complaint, *supra* note 5, at 2, 5–12.
47. *Id.* at 4.
48. Krauss, *supra* note 6.

Additionally, Mr. Swope and others facing similar circumstances have continued to try to litigate their cases since the suspension of the 48-hour law. On September 8, 2023, a Ramsey County judge ordered that six cases, including Mr. Swope's and Mr. Schlitz's, be consolidated and assigned to a single judge.[49] However, on October 20, 2023, the Ramsey County District Court granted Defendant Harpstead's motion to temporarily stay the proceedings.[50] According to the Ramsey County district court judge, the temporary stay was granted because there is currently "a putative class-action now pending in federal court that raises very similar, if not the same, due process claims under Minnesota's Constitution that are alleged by the Plaintiffs" in *Swope v. Harpstead*.[51] In that case, *Dalen v. Harpstead*, Harpstead filed a motion to dismiss, and the temporary stay granted in *Swope v. Harpstead* remained in place until the federal court ruled on Harpstead's motion.[52]

On January 16, 2024, the federal court granted in part Defendant Harpstead's motion to dismiss, stating that "Mr. Dalen has Article III standing to bring this case, his federal claims are not plausibly alleged, and they will be dismissed without prejudice for failure to state a claim."[53] In issuing its order, the court gave Mr. Dalen the opportunity to file an amended complaint that "cure[s] the dismissal-worthy problems."[54] Following this order, Mr. Dalen did not file an amended complaint and the court dismissed his complaint *with* prejudice on February 7, 2024.[55] Mr. Dalen filed an appeal of this decision to the Eighth Circuit Court of Appeals on

49. Order to Consolidate at 1, Swope v. Harpstead, No. 70-CV-22-2496 (Minn. 1st Jud. Dist. Ct. Sept. 8, 2023) ("District Court files Sweigert v. Harpstead, 19HA-CV-23-2461; Conway v. Harpstead, 62-CV-23-3160; Hasan v. Harpstead, 27-CV-23-9514; Yanez v. Harpstead, 14-CV-23-2295; Schilz v. Harpstead, 72-CV-23-135; as well as any additional cases that may be filed in any District court in Minnesota asserting the same claims against the Commissioner of the Minnesota Department of Human Services, in her individual and official capacities, are consolidated into file Swope v. Harpstead, 70-CV-23-2496.").

50. Order to Stay at 3, Swope v. Harpstead, No. 70-CV-23-2496 (Minn. 1st Jud. Dist. Ct. Oct. 20, 2023).

51. *Id.* at 4.

52. *Id.* at 6 ("[T]his Court grants the motion to stay until further order of the Court. Whether it is appropriate to continue this stay is dependent upon the scope and breadth of the *Dalen* Court's decision related to the pending motion to dismiss.").

53. Ct. Docket at Entry 42, Opinion and Order at 2, Dalen v. Harpstead, No.0:23-cv-01877 (D. Minn. Jan. 16, 2024).

54. *Id.* at 29.

55. Ct. Docket at Entry 45, Order, Dalen v. Harpstead, No.0:23-cv-01877 (D. Minn. Feb. 7, 2024).

March 7, 2024.[56] After a series of hearings, the Eighth Circuit affirmed the dismissal of Mr. Dalen's complaint on the same grounds, finding that Mr. Dalen's complaint failed to plead sufficient facts regarding his claims that DHS showed a "deliberate indifference to serious medical needs," that DHS's "failure to transfer him from jail to a treatment facility was punitive," and that DHS "unreasonabl[y] restrain[ed]" Mr. Dalen while he was in jail awaiting treatment.[57] While Mr. Dalen had recently been admitted to a state-operated treatment facility when his attorney filed the amended complaint, as of July 2023 there were still forty-five civilly committed individuals waiting in jails to be transferred to mental health institutions.[58]

Since the *Dalen* dismissal, the stay in Mr. Swope's class action case was lifted. The case proceeded on January 22, 2024.[59] While Defendant Harpstead filed a motion to dismiss on March 12, 2025, no ruling has yet been issued.[60]

Moreover, after the initial order dismissing Mr. Dalen's case was handed down in federal court, the Scott County District Court reviewed Commissioner Harpstead's motion to dismiss in Swope v. Harpstead.[61] On Februrary 22, 2023, Commissioner Harpstead's motion to dismiss was denied, as the court found that:

> [T]he Petition pled sufficient facts to survive Defendant's Motion to Dismiss/Demurrer because the Petition pleads facts indicating the facture of Defendant to perform an official duty imposed by law, that said law is unambiguous and mandatory, that Plaintiff has suffered a public wrong due to Defendant's failure to perform that has specifically injured him, and that there is no other adequate legal remedy.[62]

Since Defendant's initial motion to dismiss was denied, Defendant has repeatedly failed to successfully appeal the district court's order.[63] As of March 2025, Mr. Swope's case is still pending.

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56. Docket at Entry 49, Dalen v. Harpstead, No. 0:23-CV-01877 (D. Minn. Mar. 7, 2024).

57. Ct. Docket at Entry 60, Dalen v. Harpstead, No. 0:23-CV-01877 (D. Minn. June 21, 2023).

58. TASK FORCE REPORT, *supra* note 28, at 23 fig.1.

59. Notice of Remote Hearing with Instruction, Swope et al. v. Harpstead No. 70-cv-23-2496 (Jan. 22, 2024).

60. Motion to Dismiss, Swope et al. v. Harpstead No. 70-cv-23-2496 (Mar. 12, 2025).

61. Order Denying Motion, Swope v. Harpstead, No. 70-cv-22-13153 (Feb. 22, 2023).

62. *Id.* at 16.

63. Appellate Court Order, Swope v. Harpstead, A23-0594 (June 13, 2023); Supreme Court Order, Swope v. Harpstead, A23-0594 (July 10, 2024).

C. Commonly Proposed Solutions

While there is cross-coalitional agreement that the lack of mental health care for the civilly committed in Minnesota jails is a problem, there is not similar agreement regarding the best solution. Some leaders suggest expanding the role of jails in providing mental health care, which would allow the state to keep civilly committed individuals in jails for longer periods of time, under the rationale that the civilly committed are receiving "adequate" care while they wait to be placed in an institution.[64] Another popular proposed solution is to expand the capacity of mental health care facilities in the state[65] by building more physical facilities, adding beds to existing facilities, and increasing staffing at existing and new facilities.[66] This solution is often rooted in the belief that "deinstitutionalization," or "the emptying of state psychiatric hospitals that began in the 1950s," directly led to homelessness (because the formerly institutionalized had nowhere to go) which then led to the mass incarceration of those same individuals.[67] This hypothesis that individuals with mental illness have been functionally relocated from state mental health institutions to jails and prisons is often referred to as the "New Asylums" Theory.[68]

i. Minnesota's Priority Admissions Task Force

When the 48-hour law was suspended in May of 2023, the Minnesota Legislature created a task force, the Priority Admissions Task Force, to "study" the 48-hour law.[69] According to the task

64. *See* DEP'T OF HUM. SERVS., PRIORITY ADMISSION TASK FORCE MEMBER RECOMMENDATIONS 4, https://mn.gov/dhs/assets/priority-admission-task-force-member-recommendations-part2_tcm1053-592546.pdf [https://perma.cc/HS26-GQZC] ("Incentivize jails to provide prompt treatment that meets the standard of care for psychiatric/SUD treatment. . . . Create funding and partnership between the state and criminal justice system where the state could provide the resources to jails to help manage and care for such individuals.").

65. *See* Krauss, *supra* note 6 ("Attorney Dan Gustafson, whose firm is handling multiple lawsuits over 48-hour law violations, said he thinks the solution is obvious. 'We need more mental health facilities,' he said."); Feshir, *supra* note 17 (noting that Hennepin County Sheriff Rich Stanek similarly argues that jails are inappropriate facilities for mental health treatment).

66. *See* Krauss, *supra* note 6; Feshir, *supra* note 17.

67. Alisa Roth, *The Truth About Deinstitutionalization*, ATLANTIC (May 25, 2021), https://www.theatlantic.com/health/archive/2021/05/truth-about-deinstitutionalization/618986/ [https://perma.cc/3N58-85GZ].

68. *Id.* ("When the hospitals were shut down, the story goes, patients were discharged with no place to get psychiatric care. They ended up on the streets, eventually committing crimes that got them arrested. As a result, jails and prisons essentially became the new asylums."); BEN-MOSHE, *supra* note 26, at 15.

69. *Priority Admissions Task Force*, DEP'T OF HUM. SERVS., https://mn.gov/dhs/partners-and-providers/news-initiatives-reports-

force's webpage, its job is to "evaluate the impact of priority admissions . . . on the ability of the state to serve all individuals in need of care in state-operated treatment programs," "develop policy and funding recommendations for improvements or alternatives to the current priority admissions requirement," and "identify and recommend options for providing treatments to individuals . . . who require treatment at state-operated treatment programs."[70] The task force is made up of seventeen members including DHS Commissioner Jodi Harpstead, Minnesota Attorney General Keith Ellison, and a variety of individuals from legal, medical, law enforcement, mental health advocacy, and criminal legal reform advocacy backgrounds, as well as one "member of the public with lived experience directly related to the Task Force's purposes."[71]

The task force published its final report and recommendations to the state legislature on February 12, 2024.[72] The task force's recommendations include "[i]ncreas[ing] capacity" of mental health treatment facilities, "[p]rovid[ing] funding to administer mental health medications to individuals in custody," changing the criteria for who gets "priority admission" to mental health facilities status, and "[i]ncreas[ing] access to services provided in the community," among other recommendations.[73]

Overall, the task force's report emphasizes two main avenues of solutions to the problem: increasing the capacity of mental health institutions and expanding the role of jails in providing mental health care to civilly committed inmates while they await institutionalization.[74] While the report does contain a recommendation section on "[i]ncreas[ing] access to services provided in the community," the first specific recommendation in this section is to "expand access to Intensive Residential Treatment Services (IRTS) level of care to allow locked programing and expand the length of treatment beyond 90 days."[75]

The sixth recommendation section in the report is titled "Administer Medication in Jails."[76] The section begins with the statement: "Jails are not a replacement for mental health hospitals or secure treatment facilities, and it is not our recommendation that

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workgroups/behavioral-health/priority-admissions-task-force/ [https://perma.cc/Z85M-2T4J] (click "About the task force").

70. *Id.*

71. *Id.* (click "Task force members").

72. TASK FORCE REPORT, *supra* note 28.

73. *Id.* at 8.

74. *Id.*

75. *Id.* at 30.

76. *Id.* at 31.

they become so."[77] However, the task force continues to provide many recommendations that would expand the role of jails in providing mental health care, including expanding state capacity to administer forced medication.[78] The report even states that the task force's recommendations regarding the administration of medication *in jails* "has the possibility to significantly prevent the need for hospitalization of some individuals."[79] This assertion appears to be in direct contradiction with the report's statement stating they do not see jails as "a replacement for mental health hospitals."[80]

ii. An Abolitionist Approach: Decarceration and Deinstitutionalization

Some argue that the solution to this problem is expanding the capacity of mental health facilities and institutions or making "improvements" to the mental health care offered by jails to lessen the need to transfer civilly committed inmates to existing facilities; however, abolitionists disagree.[81]

A school of abolitionist thought—led primarily by Liat Ben-Moshe, a disability scholar and associate professor of Criminology, Law, and Justice at the University of Illinois, Chicago—argues that neither jails nor institutions are safe or just places for those with mental illnesses.[82] Ben-Moshe and others draw on the history of asylums and state institutions to argue that institutionalization is itself a form of incarceration, that both systems operate through carceral logics (defined as "the system of thinking that makes punitive systems possible" by categorizing as bad, dangerous, or guilty), and that it is a false choice to force individuals into either jails or institutions.[83]

Ben-Moshe also refutes the "new asylums" thesis,[84] arguing that "deinstitutionalization did not lead to homelessness and

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. BEN-MOSHE, *supra* note 26, at 16 ("[C]alling for certain populations to be released from jails and prisons often sends them to be reincarcerated in other institutions or by other means, including by forced drugging or by indefinite detention in detention centers, psychiatric hospital, or psych forensic units.").

82. *Liat Ben-Moshe*, UNIV. OF ILL. CHI., https://clj.uic.edu/profiles/ben-moshe-liat/ [https://perma.cc/3ZRN-7XVE]; BEN-MOSHE, *supra* note 26, at 159.

83. BEN-MOSHE, *supra* note 26, at 159; Emma Peyton Williams, *The Carceral Logic of the Family Policing System*, UPEND MOVEMENT, https://upendmovement.org/carceral-logic/ [https://perma.cc/8ARU-GCQZ].

84. BEN-MOSHE, *supra* note 26, at 135–37 (explaining that Ben-Moshe's "new

increased incarceration. Racism and neoliberalism did, via privatization, budget cuts in all service/welfare sectors, and little to no funding for affordable and accessible housing and social services while the budgets for corrections, policing, and punishment (of mostly poor people of color) skyrocketed."[85] Moreover, Ben-Moshe cautions that the new asylums theory is often used "as rationalization for the creation of new jail facilities (for 'the good of' those with mental health differences) or of psychiatric wards within existing jails and prisons. As many activists forewarn, . . . these will likely increase the scope of incarceration."[86] Therefore, Ben-Moshe argues for *both* decarceration and deinstitutionalization.[87] She defines deinstitutionalization as "the movement of people with psychiatric and intellectual or developmental disabilities from state institutions and hospitals into community living and supports. Deinstitutionalization is also the accompanying closure of carceral locales, the shuttering of large, mostly state-sponsored/funded, institutions and hospitals for people with intellectual and psychiatric disabilities."[88] Ben-Moshe's theory of deinstitutionalization as a form of decarceration, and her argument that neither jails *nor* mental health institutions are safe or just places for those who find themselves under civil commitment, justifies this Note's argument: for a better solution to the problems the 48-hour law sought to address, Minnesota should look beyond expanding the institutionalization system and the role of jails in providing mental health care.

II. Analysis

A. The Suspension of the 48-Hour Law Presents Minnesota with an Opportunity to Invest in Non-Carceral Mental Health Treatment

The suspension of the 48-hour law presents the state with an opportunity to invest in non-carceral mental health treatment for those who were previously covered under the 48-hour law.[89] Since

asylums" thesis refers to messages from popular media that "mass closure of psychiatric hospitals in the United States led to waves of homelessness and to prisons becoming the new asylums").

85. BEN-MOSHE, *supra* note 26, at 3.

86. *Id.* at 15.

87. *Id.* at 281 ("Institutionalization is state-sponsored violence against people with disabilities, many of whom are currently people of color and elderly."); *id.* at 8.

88. *Id.* at 3–4.

89. *See* Krauss, *supra* note 6 (indicating some attorneys litigating 48-hour violation cases believe the solution is "more mental health facilities"); Feshir, *supra*

the suspension of the 48-hour law, two paths forward have been commonly proposed, but both present serious constitutional problems. Specifically, both (1) expanding mental health services inside jails to postpone the need to transfer civilly committed inmates and (2) expanding the institutionalization and civil commitment system by increasing the capacity of psychiatric facilities are approaches that threaten the constitutional right to due process and the constitutional protection against false imprisonment.

First, the solution to this problem is not to expand the role of jails in providing mental health care. Jails, by their nature, are inadequate sites for providing mental health care as the jail environment is directly counterproductive to the goals of mental health care.[90] Therefore, relegating civilly committed individuals to the inadequate mental health care provided by jails infringes on their rights to due process.[91] Moreover, the state's aim in "providing access to necessary [mental] health care" in jails is to allow the state to keep civilly committed individuals in jails for longer periods.[92] This practice directly infringes upon the rights of civilly committed individuals to be free from false imprisonment.[93] Additionally, from a policy perspective, the role of jails in providing mental health care should not be expanded because doing so will further enlarge our system of mass incarceration.

Second, expanding psychiatric treatment facility capacity to house the civilly committed population is not an adequate solution to the problems the 48-hour law sought to address. Civil commitment, otherwise known as institutionalization, itself poses serious constitutional problems—especially for those who are civilly committed and have not been convicted of a crime.[94] Instead of building out a more expansive involuntary psychiatric treatment

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note 17 (quoting Hennepin County Sheriff Rich Stanek, who argues DHS officials should provide additional beds for mentally ill individuals in medical facilities).

90. BEN-MOSHE, *supra* note 26, at 8.

91. *Id.* at 8; Swope Findings of Fact, *supra* note 1, at 1–2 ("[Mr. Swope] was held without due process or treatment for 57 days.").

92. TASK FORCE REPORT, *supra* note 28, at 31.

93. BEN-MOSHE, *supra* note 26, at 8.

94. *See* Cynthia A. Frezzo, *Treatment Under Razor Wire: Conditions of Confinement at the Moose Lake Sex Offender Treatment Facility*, 52 AM. CRIM. L. REV. 653, 653 (2015); Alexander Tsesis, *Due Process in Civil Commitments*, 68 WASH. & LEE L. REV. 253 (2011); Susan Hawthorne & Amy Ihlan, *Rethinking Civil Commitment: The Radical Resources of the Ethics of Care*, 1 PUB. PHIL. J. 1 (2018); O'Connor v. Donaldson, 422 U.S. 563, 576 (1975) ("In short, a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.").

system, Minnesota should consider solutions that decrease the rate of civil commitment overall and favor mental health treatments that are grounded in community care and preserving individual liberty.

Civilly committed inmates who have sued Commissioner Harpstead and DHS for violating the 48-hour law, and later for suspending it, have not challenged their civil commitment or the system itself.[95] However, the arguments they have offered in their suits, specifically their arguments regarding due process and false imprisonment, can be applied to the civil commitment system more generally and serve to question the constitutionality of broadly implemented civil commitment.

Overall, conducting a due process and false imprisonment analysis highlights the flaws of the civil commitment system and shows that the problems that the 48-hour law tried and failed to address cannot be fully solved by expanding the role of jails in providing mental health care or by expanding the civil commitment system.

B. Expanding the Role of Jails in Providing Mental Health Care is Not a Solution to the Lack of Mental Health Care for Civilly Committed Inmates

i. Forcing Civilly Committed Inmates to Receive Mental Health Care in Jail Violates Their Due Process Rights

Forcing civilly committed inmates to receive mental health care inside of jails violates their due process rights because the state is required to provide adequate mental health care to those it places under civil commitment and jails are incapable of providing that mental health care.[96] The Minnesota Priority Admissions Task Force itself recognizes that "[p]roviding access to necessary health

95. *See, e.g.*, Schilz Complaint, *supra* note 5 (claiming that DHS Commissioner Harpstead violated Plaintiff's procedural and substantive due process rights by failing to transfer him from jail to a mental health facility within forty-eight hours, that DHS Commissioner Harpstead violated Minnesota's separation of power doctrine by seeking to eliminate DHS's obligation to transfer civilly committed inmates within forty-eight hours, and that Commissioner Harpstead's failure to transfer Plaintiff within forty-eight hours constituted intentional and negligent infliction of emotional distress and false imprisonment); Swope Findings of Fact, *supra* note 1 (denying Defendant's motion to dismiss where Plaintiff claimed that DHS Commissioner Harpstead violated Plaintiff's due process rights and committed false imprisonment by failing to comply with the 48-hour law).

96. BEN-MOSHE, *supra* note 26, at 8; Swope Findings of Fact, *supra* note 1, at 1–2.

care to individuals in custody is a constitutional right."[97] Additionally, the task force pointed out that "two federal courts have indicated that a civilly committed person's inability to challenge a DHS determination that a person does or does not fall within criteria of the Priority Admissions Law could violate the Fourteenth Amendment's procedural due process protections."[98] In addition to the federal courts mentioned by the task force, a Minnesota state court has also held that when a civilly committed individual is not provided adequate mental health care by the state, their due process rights have been violated.[99] The task force went as far as to say that, if mental health institution capacity is not increased, "people will continue to be held in jail without due process."[100] These concessions show that Minnesota leaders are aware that the current system violates the due process rights of civilly committed individuals.

Jails are not a place of healing, recovering, or care—by design.[101] Jails not only fail to address the mental health struggles that people come into the system with, but jails *create* additional or worse mental health struggles as individuals spend more time behind bars.[102] Thus, they both fail to address the problem *and* they ensure its continuation, all while violating the due process rights of civilly committed individuals.

One reason why jails or correctional facilities can never provide adequate healthcare is because jails and prisons are disabling *in and of themselves.*[103] The prevalence of suicide inside jails provides insight into the disabling nature of correctional facilities and why they are antithetical to the goals and aims of mental health care and treatment. Both in Minnesota and nationally, suicide is the leading cause of jail inmate death.[104] However, while "nationally, suicides account for 31% of jail deaths . . . suicides accounted for 60% of deaths in Minnesota jails"

97. TASK FORCE REPORT *supra* note 28, at 31.

98. *Id*. at 18–19 (first citing Chairse v. Dep't of Human Services, 23-CV-355, at 11–12 (D. Minn. Sept. 14, 2023); and then citing Dalen v. Harpstead, 23-CV1877 (D. Minn. Jan. 16, 2024)).

99. Swope Findings of Fact, *supra* 1, at 14 ("[Mr. Swope] was held without due process or treatment for 57 days.").

100. TASK FORCE REPORT *supra* note 28, at 28.

101. BEN-MOSHE, *supra* note 26, at 8.

102. *Id*.

103. *Id*.

104. E. ANN CARSON, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., MORTALITY IN STATE AND FEDERAL PRISONS 2001– 2019 – STATISTICAL TABLES (Dec. 2021).

from 2015 to 2020.[105] The data on inmate suicide shows that jails cannot be relied upon as places where individuals can become mentally stable or healthy because the environment itself is harmful to inmates' mental health.[106] Liat Ben-Moshe explains in her book *Decarcerating Disability* that jails both contribute to the pervasiveness of mental illness and exacerbate the mental illnesses that inmates struggled with prior to their incarceration:

> [T]he prison environment itself is disabling so that even if an individual enters prison without a disability or mental health diagnosis, she is likely to get one–from the sheer trauma of incarceration in enclosed, tights spaces with poor air quality and circulation; to hard labor with toxic conditions and materials; to circulation of drugs and unsanitary needles as well as the spread of infectious diseases, some of which result from environmental toxins related to the sites on which prisons are built; to lack of medical equipment and medication, or at times overmedication.[107]

Therefore, because jails cannot, by their nature, provide adequate mental health care, civilly committed individuals are denied due process when they are forced to receive "[mental] health care" inside of jails.[108] Simply expanding the role of jails in this endeavor by providing them with more funding cannot solve the problem of inadequate mental health care for civilly committed individuals.

ii. Forcing Civilly Committed Inmates to Receive Mental Health Care Inside of Jails Violates Their Right Against False Imprisonment

Those who have been civilly committed have not been convicted of any crime; therefore, forcing them to languish in jails until a bed is available in a psychiatric treatment facility constitutes false imprisonment. The Minnesota legislature has defined false imprisonment as "knowingly lacking lawful authority to do so, intentionally confin[ing] or restrain[ing] . . . any other person without the person's consent."[109] Because civilly committed individuals have not committed any crime, the state does not have

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105. Brandon Stahl, *KARE 11 Investigates: Minnesota Jail Failures Costing Taxpayers Millions*, KARE 11 NEWS (Oct. 29, 2021), https://www.kare11.com/article/news/investigations/jail-failures-costing-millions/89-519c65ec-0b35-4912-8966-b764e8bd2b5c [https://perma.cc/F3RC-HXAY].

106. BEN-MOSHE, *supra* note 26, at 147–51.

107. *Id.* at 8.

108. TASK FORCE REPORT, *supra* note 28, at 31.

109. MINN. STAT. § 609.255 subd. 2. (2023).

the "lawful authority" to hold these individuals in jail for indefinite periods.[110]

Several civilly committed inmates have filed suit against DHS Commissioner Jodi Harpstead alleging false imprisonment.[111] While their cases have yet to be resolved, the State's and DHS's refusal to promptly remove civilly committed individuals from jail constitutes false imprisonment. A similar case that arose in Washington state is illustrative on this point. In *Trueblood v. Washington State*, the court found as follows:

> Our jails are not suitable places for the mentally ill to be warehoused while they wait for services. Jails are not hospitals, they are not designed as therapeutic environments, and they are not equipped to manage mental illness or keep those with mental illness from being victimized by the general population of inmates. Punitive settings and isolation for twenty-three hours each day exacerbate mental illness and increase the likelihood that the individual will never recover.[112]

The civil commitment process serves as a way to protect those with severe mental illness from being unfairly punished by the criminal legal system.[113] Thus, the state's choice to imprison civilly committed individuals not only constitutes false imprisonment, but runs counter to the entire purpose of the civil commitment system itself.[114]

iii. Forcing Civilly Committed Inmates to Receive Mental Health Care Inside of Jails Will Expand the Carceral System and Exacerbate Mass Incarceration

From a policy perspective, the state should not expand the role of jails in providing mental health care to civilly committed inmates. Not only are jails innately incapable of providing adequate mental health care, but expanding the role of jails in this way will enlarge the carceral system and exacerbate mass incarceration because it

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110. *Id.*

111. Schilz Complaint, *supra* note 5, at 2; Swope Findings of Fact, *supra* note 1, at 1–2.

112. Trueblood v. Wash. State Dep't of Soc. & Health Servs., 101 F. Supp. 3d 1010, 1013 (W.D. Wash. 2015), *vacated and remanded*, 822 F.3d 1037 (9th Cir. 2016).

113. NAT'L ALL. ON MENTAL ILLNESS, UNDERSTANDING THE MINNESOTA CIVIL COMMITMENT PROCESS 1 (2021) [hereinafter NAMI], https://namimn.org/wp-content/uploads/sites/48/2021/04/NAMI_CivilCommitmentMarch2021OP-1.pdf [https://perma.cc/GHC5-H6AF]; TASK FORCE REPORT *supra* note 28, at 27.

114. NAMI, supra note 113, at 1, 28–29.

will result in civilly committed inmates spending *more* time in jail.[115]

Expanding the role of jails in providing mental health care to civilly committed inmates would qualify as what abolitionist scholars sometimes call a "reformist reform."[116] Abolitionist and scholar Ben-Moshe describes reformist reforms as "situated in the discursive formation of the system as is, so that any changes made within or against this existing framework."[117] Generally, however, abolitionists do not oppose all reformist reform efforts, so long as they are "concrete and direct" and do not inadvertently make total abolition less possible in the future.[118] Legal scholar Amna A. Akbar, in her Yale Law Review Feature titled "Non-Reformist Reforms and Struggles over Life, Death, and Democracy," explains that "non-reformist reforms aim to undermine the prevailing political, economic, social order, construct an essentially different one, and build democratic power toward emancipatory horizons. They seek to redistribute power and reconstitute who governs and how."[119] Overall, "[n]on-reformist reforms imagine a different

115. *See* MINN. DEP'T OF HUM. SERVS., DRAFT RECOMMENDATIONS FOR PRIORITY ADMISSIONS TASK FORCE (2023), https://mn.gov/dhs/assets/draft-recommendations_tcm1053-604889.pdf [https://perma.cc/QT5K-GELX] (highlighting the importance of individuals with mental illness being "treated in the least restrictive setting when receiving services in and discharging to the community"); *see also* MINN. DEP'T. OF HUM. SERVS., PRIORITY ADMISSION TASK FORCE MEMBER RECOMMENDATIONS, *supra* note 64; Feshir, *supra* note 17 (describing how, as a result of the 48-hour rule, many mentally ill Minnesotans "languish in jail longer than they should" before being placed in a psychiatric facility).

116. CRITICAL RESISTANCE, REFORMIST REFORMS VS. ABOLITIONIST STEPS TO END IMPRISONMENT (2021), https://criticalresistance.org/wp-content/uploads/2021/08/CR_abolitioniststeps_antiexpansion_2021_eng.pdf [https://perma.cc/43UZ-KTNT] (referring to efforts to make jails and prisons more "rehabilitative" or spending more money to allow jails and prisons to provide special services and resources as "reformist reforms"). *See* Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES (Apr. 17, 2019), https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html [https://perma.cc/9TRS-H4MU] (quoting Ruth Wilson Gilmore) ("So many of these proposed remedies don't end up diminishing the system. They regard the system as something that can be fixed by removing and replacing a few elements. . . . Instead of trying to fix the carceral system, [Gilmore] is focused on policy work to reduce its scope and footprint by stopping new prison construction and closing prisons and jails one facility at a time, with painstaking grass-roots organizing and demands that state funding benefit, rather than punish, vulnerable communities.").

117. LIAT BEN-MOSHE, *The Tension Between Abolition and Reform*, *in* THE END OF PRISONS 87 (Mechthild E. Nagel & Anthony J. Nocella II eds., 2013).

118. *Id.* at 86–87 (citing Bonnie Burstow's keynote speech at the 2009 PsychOut conference).

119. Amna A. Akbar, Feature, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 YALE L. REV. 2497, 2507 (2023).

horizon that should be realizable for the improvement of humanity and are not limited by a discussion of what is possible at present."[120]

Expanding the role of jails in providing mental health care to civilly committed inmates qualifies as a reformist reform because it requires putting *more* money into jails and correctional facilities. Such a "solution" would expand the carceral state because it would lead to more people being employed by the carceral state, and the carceral state would have more power over the lives of our community members because it would serve as the primary health care provider for these individuals.[121]

Additionally, expanding the role of jails in this way is a reformist reform because:

> The unequivocal claims that the 'mentally ill' do not belong in prison or jail only leave the carceral logic intact and gives it more credence, as there are now clearer divisions among those who truly belong and those who do not belong under carceral regimes. In other words, if the 'mentally ill' do not belong in prison, surely others do.[122]

Therefore, if Minnesota values shrinking mass incarceration and the carceral state more broadly, it should not expand the role of jails in providing mental health care.

C. Expanding the Institutionalization System Is Not a Solution to the Lack of Mental Health Care for Civilly Committed Inmates

Many believe that the problem that the 48-hour law sought to address would be solved by expanding the capacity of psychiatric treatment facilities. They argue if there were simply "more beds" available for the civilly committed population, the state would be able to transfer civilly committed inmates from jails to the psychiatric treatment facilities within 48 hours.[123] However, Minnesota should not rely on expanding the institutionalization system to solve the problems that sought to be addressed by the 48-hour law. Expanding the institutionalization system should be

120. BEN-MOSHE, *supra* note 117, at 87.

121. *Id.*; *see* MINN. DEP'T OF HUM. SERVS., DRAFT RECOMMENDATIONS FOR PRIORITY ADMISSIONS TASK FORCE, *supra* note 115; (recommending providing additional funding to jails); *see also* MINN. DEP'T OF HUM. SERVS., PRIORITY ADMISSION TASK FORCE MEMBER RECOMMENDATIONS, *supra* note 64.

122. BEN-MOSHE, *supra* note 26, at 17; CRITICAL RESISTANCE, *supra* note 116 (critiquing "[l]egislative and other efforts to single out some conviction categories as 'exceptions'" because "[t]his strategy entrenches the idea that anybody 'deserves' or 'needs' to be locked up. Prioritizing only some people for release justifies expansion").

123. Feshir, *supra* note 17 (citing the Hennepin County Sheriff's belief that "DHS officials need to secure funding to open up more beds for people with mental illness").

approached with skepticism because institutionalization can violate individuals' rights to due process and can qualify as false imprisonment.[124]

Expanding the institutionalization system will not solve the problem that the 48-hour law sought and ultimately failed to address.[125] This is because institutionalization is not all that different from jail and prison.[126] For many scholars and abolitionists, this is the problem with the solution posed by believers of the "new asylums" theory (that deinstitutionalization caused mass incarceration so institutions should be rebuilt and expanded in order to transfer inmates to mental health facilities); they argue that more institutionalization cannot be the solution when that system is also fraught with injustice, neglect, and abuse.[127] As journalist Alisa Roth wrote in her piece in *The Atlantic*, "[i]t's easy to think that if people with mental illness could be housed and treated in asylums or similar institutions, they wouldn't be policed and incarcerated at such high rates. But it's important to remember that those hospitals had deteriorated to conditions shockingly similar to today's worst correctional facilities."[128]

While civil commitment has been upheld as constitutional many times, including by the Supreme Court of the United States, the constitutionality of broadly-implemented civil commitment should be reexamined.[129]

i. Institutionalization Can Violate the Due Process Rights of the Civilly Committed

Institutionalization can violate the due process rights of civilly committed individuals because institutionalization can fail to provide the adequate mental health care to which civilly committed individuals are entitled. Ben-Moshe explains in *Decarcerating*

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124. Tracz, *supra* note 26.

125. Krauss, *supra* note 6.

126. BEN-MOSHE, *supra* note 26, at 146; Roth, *supra* note 67. The Prison Industrial Complex is defined as "the profit-driven relationship between the government, the private companies that build, manage, supply, and service prisons, and related groups (such as prison industry unions and lobbyists) regarded as the cause of increased incarceration rates especially of poor people and minorities and often for nonviolent crimes." *Prison industrial complex*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/prison%20industrial%20complex [https://perma.cc/WM6K-LT8Y].

127. BEN-MOSHE, *supra* note 26, at 146; Roth, *supra* note 67.

128. Roth, *supra* note 67.

129. Kansas v. Hendricks, 521 U.S. 346, 365–66 (1997); United States v. Comstock, 560 U.S. 126 (2010).

Disability how examining our nation's past history of mass institutionalization shows that, while it may look like institutionalization is effective from the outside, institutions still often fail to provide adequate mental health care to those on the inside, thereby denying civilly committed individuals their due process rights.[130]

Psychiatric hospitals in the 1950s and 1960s were warehouses for people with mental health diagnoses; indeed, the people who resided there were less visible to those outside these institutions. But that does not mean that these were places of quality care and treatment or that those receiving psychiatric services consented, in the broadest sense of the word, to having their freedom taken and to be confined in these enclosures. During this time, the United States did not have to contend with extreme variances in behavior or thought, as many people experiencing mental illness were 'out of sight, out of mind' to the public eye. But it does not logically follow that people who were placed in psychiatric facilities were better off, in the "good old days" of mass confinement in the field of mental health and developmental disability, than they are now.[131]

ii. Institutionalization Can Constitute a Violation of a Civilly Committed Individual's Right Against False Imprisonment

As previously stated, the Minnesota legislature has defined false imprisonment as follows: "[w]hoever, knowingly lacking lawful authority to do so, intentionally confines or restrains . . . any other person without the person's consent."[132] Institutionalization can constitute false imprisonment because people are confined and restrained without their consent.[133] Moreover, civil commitment can constitute false imprisonment because courts often extend individuals' terms of civil commitment repeatedly, such that individuals can be committed—and stripped of much of their liberty and autonomy—indefinitely.[134] While the Minnesota civil commitment statute requires that an individual's initial commitment is not to exceed six months, the average total

130. BEN-MOSHE, *supra* note 26, at 4.

131. BEN-MOSHE, *supra* note 26, at 146.

132. MINN. STAT. § 609.255 subd. 2. (2023).

133. *See* Frezzo, *supra* note 94, at 654, 666, 667.

134. *See* Tracz, *supra* note 26, at 137; Frezzo, *supra* note 94; NAMI, *supra* note 113, at 28 (noting that individuals who are civilly committed because they "ha[ve] mental illness and [are] dangerous to the public" can be civilly committed for an indefinite period of time).

commitment time in the Forensic Mental Health Program, the typical program to which a Minnesotan is civilly committed, is five to eight years.[135]

Under influential precedents in U.S. constitutional law, as well as in the popular imagination, physical confinement in a secure mental hospital or treatment facility can be characterized as a "massive curtailment of liberty."[136] Under this view, civil commitment is the effective equivalent of incarceration under a potentially indefinite sentence. Understood in this light, involuntary treatment for mental illness, whether in the form of forced medication or mandatory participation in either inpatient or outpatient treatment programs, directly conflicts with the fundamental values of individual freedom, autonomy, and self-determination.[137]

The civil commitment system grants the state enormous authority as it allows the state to order the confinement, punishment, and the forced treatment of individuals, sometimes indefinitely.[138] Civil commitment is a system that should be used sparingly, if at all, due to both the potential for indefinite confinement of those who are civilly committed and the similarities between institutions and jails.[139]

D. Alternative Approaches Beyond Mass Institutionalization or Expanding the Role of Jails in Providing Mental Health Care

Considering the shortcomings of both mass institutionalization and relying on jails to provide adequate mental health care, Minnesota should consider non-carceral, community-based treatment options for the civilly committed population.

This strategy also has a basis in the law, as the Minnesota civil commitment statute provides that "the court is to consider 'reasonable alternative dispositions' including but not limited to, dismissal of the petition, voluntary outpatient care, voluntary admission to a treatment facility, appointment of a guardian or

135. MINN. STAT. § 253B.09, subd. 5 (2023); NAMI, *supra* note 113, at 28–29.

136. Hawthorne & Ihlan, *supra* note 94, at 2 (quoting Humphrey v. Cady, 405 U.S. 504, 509 (1972)); Tracz, *supra* note 26, at 149 ("[B]ecause the level of dangerousness must be great enough to outweigh the severe deprivations in individual liberty, very few people should be committable under the police power.").

137. *Id.*

138. *See* Tracz, *supra* note 26, at 137; Frezzo, *supra* note 94; NAMI, *supra* note 113.

139. Roth, *supra* note 67*; see* Frezzo, *supra* note 94.

conservator, or release before commitment."[140] "If the court finds that no suitable alternative to judicial commitment exists, the court is directed to commit the patient to the least restrictive treatment or an alternative treatment program which meets the patient's treatment needs."[141]

Mass institutionalization specifically presents logistical concerns, in addition to the ethical and constitutional concerns examined above. "The Department of Corrections has not collected reliable data from jails on the number of inmates assessed for mental illness. However, . . . surveys of sheriffs suggest that one-third of jail inmates may be on medications for a mental illness."[142] Choosing institutionalization as the answer to this problem requires continued reliance on the civil commitment process to determine who is mentally ill *enough* to be removed from jails and correctional facilities.

Conclusion

The suspension of Minnesota's 48-hour law, which mandated that civilly committed inmates be transferred from jail to a mental health facility within 48 hours, presents the state with an opportunity to reexamine the role that jails play in providing mental health care and the civil commitment system overall. Commonly proposed solutions to the problems that the 48-hour law sought to address include expanding the role of jails in providing mental health care or expanding the capacity of mental health facilities in order to accommodate the civilly committed population. This Note argues that both of those solutions pose serious constitutional concerns regarding due process and false imprisonment. Accordingly, the state should consider solutions that decrease the size of the civilly committed population, and for those that remain in the civilly committed population, the state should prioritize non-carceral, community based mental health treatment.

140. Tracz, *supra* note 26, at 139; MINN. STAT. § 253B.09, subd. 1(a) (2023).
141. *Id.* at 141.
142. OFF. OF THE LEGIS. AUDITOR, *supra* note 12, at ix.

(Law) School to Prison Pipeline

Cheyenne Petrich†

"Mass incarceration is also a legal phenomenon, and the role of the legal profession needs scrutiny. Unless we are to characterize the legal profession as unthinking or malevolent, we need an account of why so many lawyers have chosen and still choose to pursue convictions and prison sentences on such a massive scale."
– Alice Ristroph[1]

Introduction

If students come to law school to learn the tools of a trade they plan to use to achieve justice, as John O. Calmore puts it, they're "learning the wrong lessons."[2] Students that arrive for their first year of law school following high-minded ideals, guided by an ethical northern star of sorts, regularly find that light obfuscated by the rational, the logical, and the precedential. While casebooks and lectures are often explicit in their rejection of wooly concepts like morality or justice, the lesson is subtly reinforced by the school's engineered cultural landscape that emphasizes "legal professionalism" and "legal ethics" above all. These value-laden students are liable to experience a painful reconfiguration of their views on the role of law in society, their philosophies and ideologies, even the *way* that they think. Some of these changes are a necessary part of understanding the field and practice of law, but a student is not often well positioned to determine which lessons to take onboard and which to politely decline. As withdrawal from a J.D. program is heavily disincentivized by the high cost of attendance, and

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1. Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1636–37 (2020) [hereinafter Ristroph, *Curriculum of the Carceral State*].

2. John O. Calmore, *"Chasing the Wind": Pursuing Social Justice, Overcoming Legal Mis-Education, and Engaging in Professional Re-Socialization*, 37 LOY. L.A. L. REV. 1167, 1168 (2004).

achieving academic success requires conformity to certain policies, rules, codes, and beliefs, the disillusioned law student may be left with the impression that they're receiving an education at gunpoint.

As an unabashed critique of contemporary legal education through a progressive lens, this Note is fairly unoriginal—to the discredit of contemporary legal education. The recitation of critiques established decades prior is necessary only because many of the same issues with legal pedagogy and the administration of legal education persist. This Note differs from former critiques, however, as serious consequences stemming from those issues left unresolved have now flowered: hyper-incarceration, unfettered state surveillance, and the proliferation of carceral institutions. While these phenomena may seem disconnected from the ins and outs of legal education and administration of law schools, this Note argues that the dominant pedagogical and ideological approach to institutional legal education has performed a necessary role in the development and maintenance of the American carceral state.

Contemporary American legal education has failed time and time again to meet the challenges presented by our criminal legal system, a condition made dire by the construction and rapid expansion of the carceral state. The dominant, near hegemonic educational approach of the modern law school both miseducates students on the realities of criminal legal practice and attempts to socialize students into a monolithic identity under the banner of the legal professional. The consequences of this dual approach to lawyer-making are the mass production of lawyers with a propensity to blindly preserve and expand mechanisms of the carceral state and a diminished capacity for progressive reimagining of the approach to crime, punishment, and order in the United States.

I. Early American Law Schools, Prisons, and Criminality

The history of crime and punishment in the United States, as described by Lawrence Meir Friedman, is "a story of social changes, character changes, personality changes; changes in culture; changes in the structure of society; and ultimately, changes in the economic, technological, and social orders."[3] The law and its derivatives, such as legal education, are an integral part of this story of change. As elucidated by Professor Stephen R. Alton,

3. LAWRENCE MEIR FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 11 (1993).

> Legal education has never taken place in a vacuum. It is no more possible to divorce eighteenth-, nineteenth-, or twentieth-century American legal education from its social, intellectual, political, and professional settings than it is to divorce contemporary American legal education from such settings. Legal education is inextricably bound up with the social, intellectual, political, and professional currents of the contemporaneous American scene. Those currents have always moved and shaped legal education in this country, and they continue to do so.[4]

This relationship, this Note argues, is a reciprocal one. By examining the development of American law and legal education in the context of historical shifts in American social, political, and economic responses to crime and punishment, Part I establishes a backdrop for the succeeding analyses contained in Part II and III that examine the role of contemporary legal education in reifying the current incarceration crisis and expansion of carceral institutions in the United States.

A. Colonial Era

The early American legal landscape was heavily influenced by English common law tradition,[5] a mode of lawmaking wherein the collective principles rendered from numerous individual disputes by judicial decisions accrue and evolve around a "distinctive set of habits and practices" that inform a "shared legal culture."[6] For common law nations, the criminal legal system includes the

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4. Stephen R. Alton, *Roll over Langdell, Tell Llewellyn the News: A Brief History of American Legal Education*, 35 OKLA. CITY U. L. REV. 339, 341 (2010) [hereinafter Alton, *History of American Legal Ed.*].

5. Mark L. Jones, *Fundamental Dimensions of Law and Legal Education: An Historical Framework – A History of U.S. Legal Education Phase I: From the Founding of the Republic Until the 1860s*, 39 J. MARSHALL L. REV. 1041, 1056 (2006). The proliferation of the English common law was supported by a growing number of trained lawyers living in the Colonies and the increasing availability of legal texts, such as William Blackstone's *Commentaries on the Laws of England*. Blackstone's *Commentaries*, available in American editions, remained highly influential throughout the nineteenth century. *Id*. *See* FRIEDMAN, *supra* note 3, at 19–20 (describing the battles between French, Spanish, English, and Native American conceptions of criminal punishment).

6. Jones, *supra* note 5, at 1097, 1100 (quoting MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 181-82 (1994)). Mary Ann Glendon describes the development of common law as a "living tradition," one that "constantly points beyond itself," wherein common law judges must fairly decide individual cases and expound legal principles that transcend those particular facts. *Id*. at 1096–97.

institution of juries,[7] emphasis on oral testimony, examination, and cross-examination,[8] and is primarily steered by lawyers rather than judges.[9] The English classified crimes in accordance with their purported seriousness into felonies and misdemeanors (or petty crimes).[10] These familiar elements of the criminal legal system provided the foundation for colonial American criminal law and procedure.[11]

The colonies' early iterations of criminal adjudication were amateurish, and their methods of punishment were markedly more brutal. The early criminal codes were sourced from what colonists could remember of English law and a core of norms extracted from religion,[12] while the roles of magistrate, constable, sheriff, and watchman were filled by ordinary members of the community.[13] The theories of punishment favored by the insular colonial communities were public shame, restitution, and repentance; common punishments included fines, forced labor, sewing a letter into the criminal's clothing representing their crime, as depicted in *The*

7. Civil law states and nations do not use juries, only judges. FRIEDMAN, *supra* note 3, at 20.

8. *Id.*

9. *Id.* at 20–21 (noting the differences with civil law nations where criminal cases are mostly judge-led).

10. Felonies required indictment by a grand jury before charges would be filed and later decided by a petit jury (trial jury). Petty crimes were managed by local courts and justice of the peace, a squire or gentleman living in the area, without the complicated process of using a jury. *Id.* at 21.

11. *Id.* at 22–23 ("Criminal justice in the colonies was cobbled together from . . . as much of the law and customs as the colonists brought with them from England and remembered . . . . The physical and social environment . . . that . . . produced problems that . . . English law had nothing to say about[,] [such as] [n]ative tribes and black slaves . . . . Also, the colonies were small, struggling communities . . . isolated, teetering on the brink of starvation, and at the edge of the wilderness.").

12. *Id.* at 33 ("The core of the criminal code consisted of norms that were not man-made but the gift and command of God. This was the colonial ethos. The goal of legal authority, as David Flaherty put it, was 'to translate the divine moral law into criminal statutes, in the interests of popular morality.'"); *see, e.g.*, Samuel Buisman, *Definite Convictions:* United States v. Alt *and the Seventh Circuit's Prohibition on Defining "Beyond a Reasonable Doubt,"* 109 MINN. L. REV. 413, 423 (2024) (discussing the religious tradition undergirding the American norms of criminal procedure).

13. This was before policing existed as it does in the modern context, wherein serving as sheriff or constable was a civic duty. FRIEDMAN, *supra* note 3, at 29 ("The system depended on lay people, as Pauline Maier has pointed out, on traditional institutions, such as the '"hue and cry," by which the community in general rose to apprehend felons.' In other cases, magistrates would turn 'to the posse comitatus . . . able-bodied men a sheriff might call upon to assist him.' As a result, 'the difference between legal and illegal applications of mass force was distinct in theory, but sometimes indistinguishable in practice.'").

Scarlet Letter, whippings, commitment to stockades, branding, dismemberment, and exile.[14] Death sentences were executed infrequently.[15] Friedman explains that the colonists' approach to crime and punishment was partially utilitarian, with colonies' survival dependent on maintaining already sparse populations with high mortality rates, and partially related to the deep religiosity that predominated colonial America.[16] Meanwhile, jails were primarily an "administrative apparatus aiding criminal courts" used for holding accused persons awaiting trial and debtors.[17] The use of incarceration as the primary method of punishment for criminal convictions would not emerge until the nineteenth century.

The eighteenth century was a time of increasing professionalism in the colonial American legal sphere, with lawyers enjoying increasing social and economic successes.[18] By the latter half of the century, each colony had a bar of respected legal professionals, and lawyers were particularly active in politics.[19] Attaining a legal education required students to study both legal treatises on the common law and influential Western literature on culture and political authority.[20] Aspiring lawyers who couldn't travel to England for study either pursued the career after some years of independent study of legal texts,[21] or completed apprenticeships with practicing lawyers.[22] Early American lawyers

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14. *Id.* at 36–40; *see* NATHANIEL HAWTHORNE, THE SCARLET LETTER (Dover Publications 2024) (1850).

15. *Id.*

16. *Id.* at 48 ("Nobody in the colonial period had yet advanced the idea that it was good for the soul, and conductive to reform, to segregate people who committed crimes, and keep them behind bars. Quite the contrary: rubbing the noses of offenders in community context was an essential part of the process of ripping and healing, which criminal justice was supposed to embody.").

17. Ashley T. Rubin, *Prison History*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF CRIMINOLOGY (2018), https://doi.org/10.1093/acrefore/9780190264079.013.455 [https://perma.cc/JNM8-59G2]; *see* FRIEDMAN, *supra* note 3, at 48–49.

18. FRIEDMAN, *supra* note 3, at 66–67.

19. Jones, *supra* note 5, at 1056. Notably, twenty-five of the fifty-six signers of the Declaration of Independence were lawyers. *Id.*

20. Etienne C. Toussaint, *The Purpose of Legal Education*, 111 CALIF. L. REV. 1, 42 (2023) [hereinafter Toussaint, *Legal Education*].

21. A famous example of a self-educated lawyer is Abraham Lincoln, who studied the law in the early 1830s and was admitted to the Illinois bar in 1836. Jones, *supra* note 5, at 1061.

22. *Id.* at 1059. *See also* Charles R. McManis, *The History of First Century American Legal Education: A Revisionist Perspective*, 59 WASH. U. L. Q. 597, 600–06 (1981) (providing a survey of the methods of legal education during the colonial period).

"engaged important moral and ethical questions of the day, such as the meaning of justice in America's burgeoning democratic project."[23] Legal mentors, primarily judges, sought to impart upon their apprentices the lawyer-statesman ideal's emphasis on leadership, commitment to practical wisdom, and exemplary skills of deliberation, judgment, and persuasion.[24] Through study and practical training, law students learned to apply common law theory, which required using analogical reasoning to compare similar cases and utilized reflective reasoning to justify decisions based on the underlying general principles.[25] These analytical tools are the most consistent aspect of American legal education from its earliest iterations.[26]

As the colonies urbanized, courts hewed more closely to the English legal system in formality and "niceties," but with some marked differences that would impact the burgeoning American legal framework.[27] The utilization of public criminal prosecution by every colony by 1776,[28] for example, is believed to have weighed into the eventual inclusion of the right to counsel in the Bill of Rights.[29] Colonial lawyers experienced criminal trials that discarded the private prosecutor but neglected criminal defense;[30] mandating a right to counsel reflected the drafter's concerns over imbalanced power dynamics between the government and the individual.[31] Following the American Revolution, the ratification of the United States Constitution, the first ten amendments of the Bill of Rights,

23. Toussaint, *Legal Education*, *supra*, note 20, at 42. Apprenticeships followed a broad and humanistic curriculum, including foundational courses in the law of nature, political theory, practical training through case studies and legal precedents, and a theoretical framework based on general treatises on common, natural, and civil law. Jones, *supra* note 5, at 1064.

24. Jones, *supra* note 5, at 1125.

25. *Id.* at 1101.

26. Legal educators still rely on the classic case method and train students to "think like a lawyer." *See, e.g.*, David T. ButleRitchie, *Situating Thinking Like a Lawyer Within Legal Pedagogy*, 50 CLEV. ST. L. REV. 29 (2002) (arguing that "it is vitally important that all law students be exposed to the narrow notion of 'thinking like a lawyer.'").

27. FRIEDMAN, *supra* note 3, at 54.

28. *Id.* at 21. This is different than in England, which utilized private prosecution, which required the person accusing someone of a crime to personally pay a prosecutor to bring charges. *Id.* at 29–30.

29. *Id.* at 58.

30. Throughout the early eighteenth century, statutes were developed within individual colonies that would allow for legal assistance or representation under particular circumstances. *Id.* at 56–58.

31. *Id.*

and the creation of a federal court structure by the Judiciary Act of 1789 established the new American legal system.[32]

The reformation of American criminal law, codified in the Bill of Rights, rejected the autocratic aspects of British law in favor of republicanism by ascribing authority to the law, as opposed to the king,[33] and setting basic requirements for fair trials.[34] The founders sought for criminal law to be embodied in a clear and definitive code, not rendered incoherent by the whims of the powerful,[35] terminating the power of federal judges to form new common law crimes.[36] While the revolutionary era is commonly considered "a time of fundamental critique of every aspect of state power," the state's power to punish notably went unchallenged.[37]

In the federalist compromise, states retained the police power and ceded only those limited powers specifically enumerated in the federal Constitution. The power to punish, if it attracted any attention (if not critique), was simply identified as an obvious instance of the power to police. The power to police, however, as the manifestation of sovereignty, was essentially unlimited in scope, discretionary in nature, and defined by its indefinability. To limit the state's power to punish would have meant limiting its police power and therefore, ultimately, its sovereignty.[38]

Although the founding documents exhibit a respect for criminal defense and the protection of individual liberties alongside a commitment to restraining governmental power,[39] the state's

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32. *Id.* at 71.

33. *Id.* at 62. ("Law was the locus of legitimate authority, and the people were the source of law. The new 'fountain of justice' was the popular will.").

34. *Id.* at 71.

35. *Id.* at 63 (quoting Edward Livingston's proposed penal code for Louisiana in 1822) ("Laws, to be obeyed and administered, must be known; to be known they must be read; to be administered they must be studied and compared. To know them is the right of the people.").

36. *Id.* at 64.

37. Markus D. Dubber, *Histories of Crime and Criminal Justice and the Historical Analysis of Criminal Law*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF CRIME AND CRIMINAL JUSTICE 597, 605 (Paul Knepper & Anja Johnsen eds., 2016) ("[T]he English conception of crime as an essential attribute of sovereignty was accepted without question and simply adapted to the new political environment . . . .").

38. *Id.* at 605–06.

39. The Constitution contains some text relating to criminal justice. *See* U.S. CONST. art. I, § 8–10 (counterfeiting, piracies and felonies at sea, Bill of attainder, ex post facto Law); *id.* art. III § 2 (trial by jury); *id.* art. IV § 2 (extradition). About half of the Bill of Rights is related to criminal justice. FRIEDMAN, *supra* note, 3 at 72;

unfettered power to police and punish as a tenet of state and national sovereignty rendered these safeguards toothless.[40]

B. Post-Revolutionary Era

Due to lawyers' key placement within structures of governance and commerce, and a presumably inherent "disinterestedness,"[41] professional lawyers were considered best suited to wield influence over the nation—much as they did their individual clients.[42] Categorized by some scholars as a "nomiocracy,"[43] the founding elites determined that a governing class of "disinterested" lawyers were required to realistically and successfully promote the common good of the nation.[44] The concept of disinterested parties originated with the belief that the "landed gentry" were best suited to lead as they were not influenced by the market.[45] Professionals, too, were considered to be "somehow free of the marketplace" and "less selfish."[46] This arrangement was also deeply connected to the ideal of the classically republican lawyer-statesman; a highly educated,

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see, *e.g.*, U.S. CONST. amend. IV (unreasonable searches and seizures, probable cause); *id*. amend. V (grand jury, double jeopardy, self-incrimination); *id*. amend. VI (speedy trial); *id*. amend. VIII (excessive bail, cruel and unusual punishment).

40. *See* Thomas Y. Davies, *The Fictional Character of Law-And-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 252 (2002) ("Modern procedure, which is structured to accommodate proactive enforcement of criminal laws and investigation aimed at 'ferreting out' complaintless crimes, accords police officers far more power than the Framers ever imagined or intended. Thus, any claim that broad police authority is consistent with the original understanding of constitutional criminal procedure is fictional. Law-and-order originalism is rooted in modern ideological commitments, not in historical fact.").

41. Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 385 (2001) (citations omitted) ("The civic virtue necessary to republican government required 'equal, active, and independent citizens' who were willing to be 'disinterested' and 'to sacrifice . . . private interests for the good of the community.'").

42. *Id*. at 383 n.9 ("Although other legal traditions envisioned lawyers as disinterested and as having some responsibility for governance, none were so ambitious as the American conception of the disinterested governing class."); *id*. at 386 n.39 (citing Talcott Parsons, *The Law and Social Control*, L. & SOCIO. 69 (1962)) ("Parsons describes lawyers as serving a vital role in capitalist society as 'a kind of buffer between the illegitimate desires of . . . clients and the social interest.'").

43. Jones, *supra* note 5, at 1152 n.393 (citing PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 186–87 (1997)) (defining "nomiocracy" as rule by lawyers).

44. *Id*.

45. Pearce, *supra* note 41, at 385–86 (explaining that the failures of this ideal led to the inclusion of professionals in the governing class, which is how lawyers came to be included).

46. *Id*. at 386.

civic-minded leader tasked with balancing common welfare, minority rights, and the law within a system of majority rule and self-interested constituents.[47]

It was shortly after the American revolution that the roots of institutionalized legal education were planted. The first attempt to refine the pedagogy of legal apprenticeship occurred with the creation of the Litchfield School, America's first independent law school, founded in 1784 and highly influential in legal and political circles.[48] Shortly thereafter, a small number of colleges began to include legal studies as a part of the general curriculum.[49] The contemporary model of separately established law schools within universities began in the early nineteenth century with Harvard Law School.[50] Two controlling models of curricula reflected a developing ideological divide in legal pedagogy.[51] The Harvard model utilized a narrow curriculum focusing on the common law and the Constitution,[52] whereas the Virginia model emulated the broader, Jeffersonian ideal of legal education which "located law in a 'seamless web' of cultural and political authority that also included great religious, philosophical, and literary texts."[53] While "the chief method of legal education [in the United States] was the

47. Jones, *supra* note 5, at 1125 n.308 (citing ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 14 (1993)) ("This 'spirit of citizenship' sets him apart from 'those who use the law merely to advance their private ends,' and from the 'purely self-interested practitioner of law.'").

48. *Id.* at 1161–64. Litchfield's graduates, many from the social elite, held significant social and political positions, including roles in the U.S. Supreme Court, Congress, and state governments. *Id.*

49. *Id.* at 1069–75. Notable historical lawyers such as Thomas Jefferson, John Marshall, and Henry Clay were educated on law at one such college, William and Mary. *Id.* at 1070.

50. *Id.* at 1080–82. There was an increasing effort towards uniformity under American law in the early nineteenth century that saw the publication of national treatises such as James Kent's *Commentaries on American Law* published between 1826 and 1830, and nine works by Supreme Court Justice and Harvard Law professor, Joseph Story. *Id.* at 1057–58.

51. *Id.* at 1083–85.

52. *Id.* at 1084 ("[T]he typically narrower approach towards the law school curriculum appears to reflect the great influence of Harvard Law School after its reorganization by Joseph Story."). Despite creating a comparatively narrow curriculum at Harvard and his removal of law school entrance requirements for the subsequent fifty years, Story stressed the value of a broad legal education for lawyers during his 1829 inaugural address and showed appreciation for David Hoffman's *A Course of Legal Study*. *Id.* at 1084–86 (citations omitted).

53. Jones, *supra* note 5, at 1070 n.451. *A Course of Legal Study* by David Hoffman served as the foundation of the Virginia model and unequivocally promoted the idea of lawyers as committed to the common good and responsible for governance. Pearce, *supra* note 41, at 388.

apprenticeship served in the office of an established practitioner of the law" well into the nineteenth century,[54] the rapid proliferation of law schools across the states signaled the approaching era of American institutionalization.

Another early indication of the nation's tilt towards institutionalization is observable from reformist approaches to crime and punishment that emerged in the nineteenth century. As American cities developed and began the process of industrialization, outpaced only by their rapidly growing populations, the newly emerging consensus was that the "waves of crime" experienced in large cities were the product of "bad company, vice-rotten cities, temptations, [and] weaknesses in the family."[55] The conception of a "standing army of professional law enforcers" emerged in response to this perceived spike in crime,[56] increasing prosecution of "victimless crimes" like gambling and public drunkenness by greatly reducing prosecutorial reliance on complaints from individuals directly harmed by criminal

54. Alton, *History of American Legal Ed.*, *supra* note 4, at 343–44 ("The apprenticeship system served as a device to keep the practicing bar small and to keep senior lawyers in firm command of the bar.").

55. FRIEDMAN, *supra* note 3, at 77. *See* Jill Lepore, *The Invention of the Police*, NEW YORKER (July 13, 2020), https://www.newyorker.com/magazine/2020/07/20/the-invention-of-the-police [https://perma.cc/M3D2-D3WE] ("New York established a police department in 1844; New Orleans and Cincinnati followed in 1852, then, later in the eighteen-fifties, Philadelphia, Chicago, and Baltimore. Population growth, the widening inequality brought about by the Industrial Revolution, and the rise in such crimes as prostitution and burglary all contributed to the emergence of urban policing. So did immigration, especially from Ireland and Germany, and the hostility to immigration . . . .").

56. FRIEDMAN, *supra* note 3, at 67–68. Before the formation of "standing arm[ies]," earlier forms of English and colonial policing revolved around recruiting local males to take turns on the "watch." Jill Lepore emphasizes slave patrols as the underrecognized foundation of modern policing, writing,

> The government of slavery was not a rule of law. It was a rule of police . . . . It is [] often said that modern American urban policing began in 1838, when the Massachusetts legislature authorized the hiring of police officers in Boston. This . . . ignores the role of slavery in the history of the police.

Lepore, *supra* note 55 (explaining the relationship between modern policing and slavery through examining the history of slave patrols in Cuba, Barbados, and eventually the American colonies of South Carolina (1702), Virginia (1726), and North Carolina (1753)).

behavior.[57] At this time, the nation also began to shift towards incarceration as the centerpiece of correctional theory.[58]

The emergence of the early American prison was part of a "century-long search for alternatives to capital and public corporal punishment"[59] with reformers seeking to substitute "a system of reason and justice" in place of arbitrary punishment.[60] Early prisons were to act as both a deterrent and a balm to crime; the desire to avoid tortuous incarceration was to deter the public from criminal behavior, while both the removal from corrupting influences and the purifying effect of hard labor were to reform the criminal themselves.[61] By incarcerating those who had been influenced into "deviant behavior" by the evils prevalent in society, prisons served as an "artificially created and therefore corruption-free environment."[62] These early American prisons suffered

57. FRIEDMAN, *supra* note 3, at 70–71. In the mid-nineteenth century, state police forces were increasingly armed with guns, thus becoming a powerful weapon for both crime control and state oppression. *Id.* at 71. *See also* Lepore, *supra* note 55 ("American police carried guns because Americans carried guns, including Americans who lived in parts of the country where they hunted for food and defended their livestock from wild animals, Americans who lived in parts of the country that had no police, and Americans who lived in parts of North America that were not in the United States. Outside big cities, law-enforcement officers were scarce.").

58. FRIEDMAN, *supra* note 3, at 67–68, 77–80. The harsh penitentiaries of the early 1800s sought to deter crime through fear of the harshly limited conditions and isolation of prison life while reforming prisoners through grueling servile labor. *Id.* at 80.

59. Michael Meranze, *Histories of the Modern Prison: Renewal, Regression and Expansion*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF CRIME AND CRIMINAL JUSTICE 672, 673 (2016) ("Linked in the first instance with crime control, the prison since the eighteenth century has repeatedly been used as a mode of government over populations the state has defined as dangerous. But precisely because it emerged as a response to crisis of the old order, the prison has served as a means to legitimate states and to prove their essential modernity. It is the connection between state legitimacy and the modern prison that has so long sustained the commitment to thinking that the prison is, at its core, a necessary and reformist institution.").

60. Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 321 (2007) ("As early as 1776, Thomas Jefferson had drafted a bill for the Virginia legislature that called for punishment based on the theory of prevention outlined by Cesare Beccaria and developed by Jeremy Bentham.").

61. FRIEDMAN, *supra* note 3, at 78–79; *see also* Meranze, *supra* note 59, at 676 (explaining that the prison reorganization effort proceeded "on the belief that the creation of an ordered social and work life under reconstituted authority, and not a deliberately constructed physical environment, held the key to successful reformation of inmates").

62. FRIEDMAN, *supra* note 3, at 77 (quoting Gerard C. Brandon, *The Unequal Application of the Criminal Law*, 1 J. CRIM. L. 893, 896-97 (1911)) ("This was, of course, quite different from the classic colonial view, which located the source of sin in individual weaknesses, or in the devil and his minions.").

frequent escapes, eruptions of violence, and open resistance while also failing to serve as an observable deterrent to crime.[63] On the heels of this failure came a new paradigm for prisons that sought to "control the smallest elements of the prisoner's environments through the power of architecture and construction."[64] The new prison model relied heavily on solitary confinement, triggering one of nineteenth century prison history's greatest debates—labor or solitude?[65] Reformer concerns underlying the debate were threefold: the economic burden of solitary confinement,[66] whether labor or solitude had the most efficacious reformative power on the incarcerated,[67] and which method was less humane.[68]

C. Antebellum Era

While the nation's developing legal and carceral systems largely kept pace with the rapid expansion and industrialization that marks the pre-Civil War era,[69] the turn of the century saw a growing popular movement of disdain for elites, including lawyers.[70] Alexis de Tocqueville famously observed that lawyers had become the "technicians" of change during American economic and geographic expansion in the nineteenth century,[71] concluding that "[t]he American aristocracy is at the lawyers' bar and on the

63. Meranze, *supra* note 59, at 676.

64. *Id.* at 677. There were two models for prisons at this time, one referred to as the "silent system" and another called the "separate system," both involving penal servitude and solitary confinement. The "silent system" prisons had prisoners work in a shared space and return to solitary afterwards, whipping prisoners who spoke to one another. The "separate system" kept prisoners working in their individual cells. See Rubin, *supra* note 17.

65. Meranze, *supra* note 59, at 678.

66. *Id. See also* FRIEDMAN, *supra* note 3, at 155–56 (highlighting the expense of solitary confinement).

67. Meranze, *supra* note 59, at 678 (explaining how proponents of solitary confinement in the United States believed solitude was so powerful a reformatory force that sentences could be dramatically reduced through its application).

68. *Id*. ("Was it crueler to force people to spend their time in almost-absolute solitude . . . or to strike at their bodies through whipping and debilitating work?").

69. Susan Katcher, *Legal Training in the United States: A Brief History*, 24 WIS. INTL. L.J. 335, 345 (2006).

70. *Id.*

71. *Id.* at 340 (first quoting Alexis de Tocqueville; and then citing ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 7 (1983)) ("[T]he new nation was almost inevitably bound to rely on lawyers to perform a wide range of functions. Lawyers became the technicians of change as the country expanded economically and geographically.").

judges' bench."[72] Sometimes referred to as the "Golden Age" of American law, the courts were marked by great "judicial creativity" in support of the nation's economic vitality.[73] American judges stepped into "the void" left by legislators of the era accompanied by American lawyers, making "[t]he law, lawyers, and judges . . . instruments of American economic and geographic expansion."[74] An "attack on the legal profession" was fully underway by the late 1830s, with many states moving to freely admit persons to the practice of law without educational or training requirements.[75] The influx of unregulated and undereducated lawyers across the nation, threatening the professionalism of the field and weakening American lawyers' social and economic standing, persisted until the American Bar Association intervened in the post-Civil War era.[76]

American prisons, too, would face a reckoning following the Civil War. Despite increasing social, political, and economic divisions between Northern and Southern states prior to the war, the states' approaches to punishment were fairly uniform.[77] Though Southern states comparatively utilized capital and corporal punishment to a greater degree than in the North, even external to the separate system of state supported private criminal justice associated with chattel slavery,[78] methods of carceral punishment mirrored those in the North.[79] Nearly every state had a prison by 1860, and all states with prisons aside from Pennsylvania had adopted the "Auburn system."[80] Under this system, prisoners were made to silently perform factory work by day in large workshops under threat of violent suppression, returning at night to solitary confinement in tiny cells.[81] This general uniformity of carceral punishment in the United States was disrupted by Northern and

72. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 439 (James T. Schleifer trans., Eduardo Nolla ed., 2010).

73. Alton, *History of American Legal Ed.*, *supra* note 4, at 345.

74. *Id.* at 346.

75. Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 DICK. L. REV. 551, 557–58 (2018).

76. *Id.*

77. Rubin, *supra* note 17.

78. *Id.*

79. *Id.*

80. *Id.* ("This approach was variously called the 'Auburn system,' the 'congregate system,' or the 'silent system.'").

81. *Id.* This system is the origin for the classic black-and-white-striped prison uniforms. *Id.*

Southern states' reactions to regional consequences stemming from the American Civil War.[82]

During the Civil War, Southern states suffered the destruction of many of their prisons, which had served as de facto factories, and were additionally confronted with the need for "some new punishment" to control a "newly liberated black population" following the passage of the Thirteenth Amendment.[83] The slavery loophole provided in the Thirteenth Amendment for convicted criminals catapulted the use of penal servitude to new heights.[84] A racially-tiered system of carceral punishment developed in the South. The rebuilt prisons were primarily used to incarcerate white criminal offenders, while Black Americans were targeted by the draconian "Black Codes," which prescribed excessive sentences for minor offenses, and subjected those convicted under the Black Codes to forced labor via "convict leasing."[85] Later, some Southern states would create "plantation style" prisons to manage growing populations of Black people convicted of crimes to replace "convict leasing," some of which still stand today and operate in a similar manner.[86]

Meanwhile, Northern state prisons suffered financial strain under turbulent post-war economic conditions and a dramatic increase in prison populations, causing significant issues of overcrowding and breakdowns of the strict penal methods utilized by the "Auburn system."[87] Post-war overcrowding led to early notions of modernly relevant prisoner classifications. For example, the influx created a sufficiently sized female prisoner population to warrant the construction of separate prisons.[88] Young adult and first-time offenders were also identified as a separate class of

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82. *Id.*

83. *Id.*

84. *Id.*; U.S. CONST. amend. XIII, § 1.

85. Rubin, *supra* note 17 ("Initially, forced labor took place through convict leasing in which the state leased mostly black prisoners to private entrepreneurs. These entrepreneurs then employed the prisoners in extremely difficult and dangerous work assignments . . . [and] had no incentive to keep their convicts healthy, which led to high mortality rates. This characteristic has led some scholars to call convict leasing 'worse than slavery.'").

86. Rubin, *supra* note 17. ("These new plantation-style prisons (e.g., Parchman Farm [Mississippi] or Angola [Louisiana]) were generally farms consisting of thousands of acres, often situated on former slave plantations.").

87. *Id.*

88. *Id.* Women had long ago gained the attention of reformers and been the frustration of prison administrators due to the expense and insufficient profitability associated with incarcerating them alongside men. *Id.*

convict that required separate facilities and penal methods when traumatized returning soldiers poured into Northern prisons.[89] Shortly after the war, however, the combined strain of overcrowding and new legislation in the 1870s that limited the sale of prison-made goods—enacted at the behest of increasingly powerful labor unions in the industrial North—would trigger the beginning of the end for the "Auburn system."[90]

Following the conclusion of the American Civil War and reestablishment of national stability over the following decade and a half, the legal community turned its attention inward once again. The ABA, newly formed in 1880, included a Committee on Legal Education and Admissions to the Bar tasked with putting forth a plan to set uniform requirements for bar admission across the Union.[91] By "imposing educational requirements that made entrance into the legal profession more time-consuming and costly," the ABA "shored up the status of lawyers by restricting entrance to the legal profession."[92] Around this time, the Dean of Harvard Law, Christopher Columbus Langdell, introduced radical changes to legal pedagogy and formalized the institution, creating what are now recognized as defining characteristics of modern legal education.[93] As Etienne C. Toussaint describes it, "Langdell crafted an epistemology of law as a science."[94] To Langdell, law was a body of work distinctly separate and complete; thus, legal education

89. *Id.* ("[P]risoners would perform labor to aid their rehabilitation and acquire skills, they would spend time in educational classes, and they would receive religious instruction. Prisoners entering the system would be diagnosed, evaluated, and their treatment designed accordingly. Upon completing their prison sentence, prisoners would continue to some form of supervision on parole or in some other community setting.").

90. *Id.*

91. Joy, *supra* note 75, at 556.

92. *Id.* at 558. In the following years, the ABA's leadership would push states to require bar examinations, three years of law school, and a mandatory apprenticeship, allowing for part of the apprenticeship to be replaced by law school; *id*. (citing ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, 25 (1983)). By requiring part of legal training to occur in law school, the ABA sought to improve overall competency within the profession while also making access more exclusive. *Id.* at 558 n.39. This exclusivity function disproportionately impacted immigrants and their children. *Id.*

93. ROBIN WEST, TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM 101–02 (2014).

94. Toussaint, *Legal Education*, *supra* note 20, at 35. *Id.* at 42 ("By confining the content of legal education to the black letter law itself under the guiding normative theory of legal formalism, Langdell repositioned the lawyer's stance from ideological spokesman of neoclassical ideals to professional advocate for the so-called common man.").

should rely only on common law jurisprudence devoid of influence from the humanities.[95] By utilizing critical thinking and deductive reasoning to discern legal conclusions from abstract factual scenarios, law students learned how to "think like a lawyer."[96]

Langdell popularized the Socratic method of questioning students that has become emblematic of the law school experience.[97] He also sequenced coursework into foundational courses and advanced electives,[98] implemented written examinations containing complex hypothetical problems based on specific facts,[99] and propagated the "casebook" and case method of teaching.[100] Langdell's methods rapidly spread to law schools across the country, particularly the newly designed casebooks, which were successful for a multitude of reasons:

> It was inexpensive – one professor could teach a class of 75 students. It was "designed for the university," making it less accessible to poorer students, and "may have proved attractive to an initially recalcitrant bar because of the opportunities . . . to preserve [the cultural status quo] by barring 'undesirables' from the practice of law." The "professional law teacher," one (such as Ames) with little or no experience in practice but trained under the case method, was a product of the hiring practice of the time; law schools used recent graduates as well as practicing attorneys to teach. In addition, "the case method supported the status quo."[101]

Langdell is also credited with creating the academic meritocratic model of professional education, a type of educational formalism that, coupled with the goal of fostering academic merit, treated professional education as a "formal system of rational,

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95. WEST, *supra* note 93, at 77.

96. Toussaint, *Legal Education*, *supra* note 20, at 35–36.

97. *Id.* Pre-Langdellian legal instruction was critiqued as patently boring, from "mind-numbing recitation," to long and unvaried lectures that were often a running commentary on the law professors' own series of treatises. BRUCE A. KIMBALL, THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C. C. LANGDELL, 1826–1906, at 130 (2009).

98. KIMBALL, *supra* note 97, at 140.

99. *Id.* at 131. Written exams of this sort were a radical innovation in American professional education, wherein students previously only needed to attend the requisite courses to receive their degree. *Id.* at 160.

100. *Id.* at 131. Justice-critical views of Langdell's case method and casebooks describe Langdell as disproportionately responsible for the contemporary law school curriculum and pedagogy. *See, e.g.,* WEST, *supra* note 93, at 28 n.57 ("Langdell himself sought to describe law as both autonomous from history and politics and as internally just. His 'case method' and casebook, which contained hundreds of cases and literally no other materials, vividly illustrate both jurisprudential commitments.").

101. Katcher, *supra* note 69, at 361.

impersonal policies and rules guiding incremental progress that could be measured objectively."[102] Even Langdell's hiring practices set a new precedent for the teaching of law as a separate career distinct from the practice of law, and prioritized aspiring professors' academic merit "as determined by achievement in professional school."[103] These revolutionary changes faced strong opposition from students, professors, and the American Bar Association alike, as Langdell's model entailed "the uncomfortable transformation of gentlemen into professionals,"[104] but aligned with the increasingly bureaucratic and institutional nature of the industrial-era United States.[105]

II. American Legal Education: Debates and Critiques

While the administrative and pedagogical model of the American law school attributed to Christopher Langdell have largely persisted to the modern day, the heavily embattled territory of legal education has experienced various transformations and renovations in response to debates and critiques from those in and around the legal academy.[106] This Part will explore two reoccurring components of these larger ideological disagreements that have shaped, or attempted to shape, modern legal education: Subpart II.A. deals with the more abstract of the two components, focusing on the connection between law and the related (yet, distinct) concepts of morality and justice; Subpart II.B. addresses the more particularized component of criminal legal education, detailing the debates that shaped modern approaches to, and problems with, training future criminal practitioners.

For decades, critics of legal education from a wide range of disciplines and political ideological backgrounds have argued that law schools degrade their students' moral sensibilities and

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102. KIMBALL, *supra* note 97, at 2.

103. *Id.* at 169; *see also id.* at 192 ("Some historians consider this alone 'the most important development' in legal, if not professional, education during the late nineteenth century."); JOEL SELIGMAN, THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL 32–42 (1978) (quoting Langdell) ("What qualifies a person, therefore, to teach law, is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of cases, not experience, in short, in using law, but experience in learning law.").

104. KIMBALL, *supra* note 97, at 194 (quoting STOW PERSONS, THE DECLINE OF AMERICAN GENTILITY 247 (1973)).

105. *Id.* at 203–04.

106. *See generally* WEST, *supra* note 93 (describing the modern "crises" for law schools in connection to historical critiques and debates around legal education).

disconnect them from conceptions of justice.[107] While popular representations of law frequently use language implicating justice as an inextricably related concept—through common references to the various institutions and processes involved in crime regulation and punishment as the "criminal justice system"[108] or the various phrases indicating that judges "serve" justice upon a rightful conviction—the layperson may be surprised to learn just how irrelevant the concept of justice is to law's academic and practical application.[109] Some critics have pointedly accused law schools of creating amoralists;[110] others claim that legal education has a narrowing effect on the their "felt obligation to serve justice into a narrow concern for fidelity to clients."[111] Debates around these distinct but related concepts of morality and justice have sparked some changes to legal pedagogy;[112] whether those changes properly responded to the concerns posed by critics, or engendered the desired results that prompted them, is debatable.[113]

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107. *Id*. at 43–44.

108. Because of widespread recognition of injustice in American criminal courts, some scholars have opted to use different language to refer to the various institutions that regulate and punish deviant or criminal acts, such as the "criminal legal system," the "criminal punishment system," or even the "prison industrial complex." *See, e.g.,* Benjamin Levin, *After the Criminal Justice System*, 98 WASH. L. REV. 899 (2023).

109. WEST, *supra* note 93, at 25–26 (critiquing the irrelevance of justice in legal education and scholarship by analogizing excluding the concept of justice from legal education to excluding the concept of health from the study of medicine).

110. *Id.* at 64 (citing Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, HARV. L. REV. 96 (1983); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987)).

111. WEST, *supra* note 93, at 44.

112. Examples include the inclusion of Professional Responsibility as a requirement for all ABA certified law schools, and the addition of elective seminars and clinical programs that engage with critical legal thought at some law schools. *See generally* Mark Curriden, *The Lawyers of Watergate: How a '3rd-Rate Burglary' Provoked New Standards for Lawyer Ethics*, ABA J. (June 1, 2012), https://www.abajournal.com/news/article/the_lawyers_of_watergate [https://perma.cc/86GD-ET7K] ("After Watergate, schools began to make legal ethics a required class. Bar examinations added an extra section on ethics. . . . In 1977, the ABA created the Commission on Evaluation of Professional Standards, whose work led to the adoption of the Model Rules of Professional Conduct by the association's policymaking House of Delegates in August 1983."); Amna A. Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 368 (2015) ("We leave critical theory, the relationship of law to inequality, and social movements to seminars or clinics.").

113. *See* Toussaint, *Legal Education*, *supra* note 20, at 64 ("Even efforts to integrate experiential learning across the law curriculum, which some have falsely deemed the answer to the concerns of critical legal theorists, fall short. Law school clinics can, and in rare cases do, perpetuate legal formalist ideals that reinforce conditions of hierarchy and subordination in society.").

Another longstanding point of disagreement and frustration between different schools within the legal academy, as well as the larger legal professional community, centers the education and training of students on criminal law. The criminal law, both as a field of law and an academic discipline, has been on the receiving end of critique since early in the United States' history. Many of the issues surrounding criminal law can be connected to a longstanding belief within the legal academy in its "exceptionalism"—a belief that the criminal law is unique from other types of law in important ways that make a poor fit for the regular standards and approaches that typically apply to law. In the earlier years of legal education, this meant that criminal law was largely overlooked, even looked upon as a discipline unworthy of study. After successful advocacy on behalf of the subject, more contemporary critiques have emphasized criminal law's ill-fitted incorporation into the greater legal academic canon. At the heart of both complaints is concern over the consequences of miseducating lawyers on the criminal law for American society. As this Note will address in Part III, these concerns were not ill-founded.

A. Critiquing the Culture: Justice and Morality in Absentia

The dismissal of morality as a concept worthy of study in American legal education can be traced back to the introduction of Langdell's formalist vision for the administration and pedagogy of legal education.[114] Almost immediately following legal education's turn to formalism, fervent critics, later designated "legal realists," made their opposition known.[115] The budding school of American legal realism criticized formalism for its wholesale reliance on common law, arguing that the method was antidemocratic and

114. WEST, *supra* note 93, at 30–32 (briefly overviewing the dismissal of morality from institutional legal pedagogy under Langdellian formalism).

115. Toussaint, *Legal Education*, *supra* note 20, at 36. *See also* WEST, *supra* note 93, at 70 ("[L]egal realists and Langdellian formalists disagreed on almost every jurisprudential, constitutional, and political issue facing the academy, the Supreme Court, and the country during the first three decades of the twentieth century."). Legal realists hold that legal questions are open to multiple analyses, denying the formalistic belief in the intrinsic value of past traditions; rules drawn from centuries-old cases, often filled with gaps and based on illogical and unpragmatic premises, are unlikely to be generative of principles on which a modern judge should draw in deciding a contemporary case. *Id.* at 71 n.70 (providing a detailed overview of the disagreements between the two schools). West analogizes these competing legal theoretical models to the views of modern libertarian and progressive lawyers. *Id.* at 75, 76 n.74.

disproportionately favored elite classes.[116] Instead, realists posed, judicial reasoning should be grounded in the "rigorous, empirical, precise calculations of public policy,"[117] forming conclusions based on the judge's informed understanding of the common good and not some truth discerned from a close reading of case law.[118] By solely focusing on "objectivity and rationality in doctrinal analysis," they argued, formalism "discount[ed] the morality of law by diminishing the lawyer's unique ethical responsibilities as a public citizen."[119]

The influence of legal realism within the academy, particularly in conjunction with formalism, cannot be overstated.[120] Realists are credited with leading the expansion of law school curricula to include more than courses in private law and common law subjects (such as property and contracts), introducing "a panoply of public law courses, such as Constitutional Law and Administrative Law, as well as courses dominated by statutes and regulations."[121] Legal realists also led the charge behind incorporating legal clinics into law schools, locating the pedagogical value of clinical education in its ability to expose students to the dynamic relationship between legal theory and practice, and the challenge it presented by asking students to consider the power imbalances reflected by legal rules and political arrangements.[122]

While the law school of today is often described as largely the product of manifold and hotly contested disagreements between realists and formalists, some leading scholars on legal education have emphasized some critical commonalities between the two legal schools.[123] In *Teaching Law*, Robin West identifies an area of

116. WEST, *supra* note 93, at 75 n.73. Favoring redistribution of wealth, legal realists were also skeptical of the powerful protections of liberty and property enshrined by the Constitution. Toussaint, *Legal Education*, *supra* note 20, at 37.

117. WEST, *supra* note 93, at 31. *See also* OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881) (arguing that solely focusing on objectivity and rationality disregarded moral and political theories, public institutions, and prejudice in legal actors).

118. WEST, *supra* note 93, at 31–32. Comparable to the Jeffersonian conception, legal realists supported a broader legal curriculum. However, these proponents asserted that the law should be developed through the empirical lens of contemporary social sciences rather than the historical and cultural texts that predominated in early American legal pedagogy. *Id.* at 77–78.

119. Toussaint, *Legal Education*, *supra* note 20, at 36–37.

120. WEST, *supra* note 93, at 75.

121. *Id.* at 74.

122. Toussaint, *Legal Education*, *supra* note 20, at 37–38.

123. *See* WEST, *supra* note 93, at 29 ("What these two deeply conflicting schools of

agreement between realists and formalists that became a "cornerstone" of twentieth century legal education: their mutual certainty in "the irrelevance of an independent study of the metric of justice to a good legal education."[124] She continues:

> [Formalists] viewed the study of the concept of justice as simply unnecessary to the study of law . . . [and] to law's practice. Law, [formalists] believed, is a complete system, . . . the major premises of which are just, so legal questions can be resolved . . . justly, by resort to purely legal concepts contained and expressed in legal precedents. *Justice . . . is embedded in the legal principles* from which legal conclusions are deduced . . . . [T]he legal realists . . . also eschewed the concept of justice as the outside source to which judges could or should look when [deciding] cases . . . or to which critics should look when seeking to criticize [law] . . . . The judge seeking . . . resolution of open legal questions should turn not to . . . conceptions of justice, but rather to *rigorous, empirical, precise calculations of public policy*. Judicial decisions should . . . lead[] to the best consequences for all, and the way to determine that is through the newfound methods of the social sciences.[125]

In a similar vein, Etienne C. Toussaint explains in his article, *The Purpose of Legal Education*, that the "functionalist" view of legal education, referring to the view created by the realist-formalist dichotomy, mutually promoted a particular "moral commitment to . . . global capitalism and Western liberal democracy."[126]

The formalist view emphasizes a restrictive notion of law as judge-made and thus focuses on doctrinal reform, whereas the realist recognizes the added importance of legislation and calls for broad-based public policy reform. Yet, this false dichotomy presumes—and this insight is a key motivation for the integration of critical theory in legal education—that there is "an objective, determined, progressive social evolutionary path."[127]

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jurisprudence, pedagogy, scholarship, and politics held jointly became, basically, unquestioned dogma, in part because so much of the terrain between them was so contested.").

124. WEST, *supra* note 93, at 29–30.

125. *Id.* at 30–31 (emphasis added).

126. Toussaint, *Legal Education*, *supra* note 20, at 44–45 (citing Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 60-61 (1984)); *see also*, *id.* ("This moral commitment to modern global capitalism and Western liberal democracy as the undisputed champion of modernity must be seen as that—a moral commitment that rejects alternate conceptions of political economy, such as socialism, authoritarianism, or variations of the two.").

127. Toussaint, *Legal Education*, *supra* note 20, at 44.

Both Toussaint and West articulate that legal education under the realist-formalist conception ingrained students with a distinctive morality, alternately referred to as "legalism" or "legal liberalism."[128] West notes that the issues she identifies with legalism are reflected in the forthcoming complaint from emerging critical theories that legal education creates amoralists.[129]

The first of these critical schools to emerge was the Critical Legal Studies (CLS) movement in the 1970s.[130] Proponents of CLS questioned functionalist assumptions about the law's ability to be neutral, objective, or apolitical, arguing that the formalists' approach hindered law's responsiveness to the needs of society.[131] CLS advocates and early scholars of philosophical ethics critiqued law schools for "producing law graduates who enter the legal profession with a blunted ethical compass and dulled sense of moral responsibility."[132] Hailed as one of the CLS movement's most notable advocates, Duncan Kennedy delivered a scathing critique of law schools in his 1983 work, *Legal Education and the Reproduction of Hierarchy*, famously arguing that law schools are more suited to reproduce hierarchies and ideologies than to challenge them.[133] Brian Z. Tamanaha concisely described Kennedy's bleak portrayal of legal education:

> Kennedy argued that everything about law school, from the curriculum, to course material, to teaching styles, to the grading system and class ranking, to how law professors treat secretaries, to how people dress and talk, to the on-campus hiring system, and more, "train students to accept and participate in the hierarchical structure of life in the law."

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128. *Id.*; WEST, *supra* note 93, at 55–56.

129. Toussaint, *Legal Education*, *supra* note 20, at 64.

130. *Id.* at 45.

131. Katcher, *supra* note 69, at 368.

132. Toussaint, *Legal Education*, *supra* note 20, at 23 (citations omitted) ("For example, in 1975, Richard Wasserstom published *Lawyers as Professionals: Some Moral Issues*, which questioned whether a one-sided loyalty to clients 'renders the lawyer at best systematically amoral and at worst more than occasionally immoral in his or her dealings with the rest of mankind.' In 1978, William Simon published *The Ideology of Advocacy*, which critiqued the principles of partisanship, neutrality, and non-accountability in traditional legal ethics. Simon argued that a lawyer's moral convictions should play a central role in their lawyering activities.").

133. Duncan Kennedy, *Legal Education as Training for Hierarchy*, *in* THE POLITICS OF LAW 62 (David Kairys, ed., 1982) ("What is needed is to think about law in a way that will allow one to enter into it, to criticize without utterly rejecting it, and to manipulate it without self-abandonment to their system of thinking and doing."); *see also* Toussaint, *Legal Education*, *supra* note 20, at 24 ("Duncan Kennedy asserted that law's underlying cognitive structure embedded a contradiction between individual will and collective values.").

> Three years of law school, in Kennedy's account, amounts to indoctrination of law students to take their place serving elite power in American society.[134]

Kennedy elevated the question of morality in legal education by addressing the purposeful formation of a homogenic class of lawyer-elites, arguing that "[l]egal education structures the pool of prospective lawyers so that their hierarchical organization seems inevitable, and trains them in detail to look and think and act just like all the other lawyers in the system."[135]

The rise of the CLS movement opened the door for the introduction of various critical legal theories that make up "outsider jurisprudence" in the succeeding decades.[136] These critical approaches to law and legal education include, to name a few, critical race theory (CRT),[137] feminist legal theory,[138] LatCrit

134. Brian Z. Tamanaha, *The Failure of Crits and Leftist Law Professors to Defend Progressive Causes*, 24 STAN. L. & POL'Y REV. 309, 316 (2013).

135. Kennedy, *supra* note 133, at 71.

136. The term "outsider jurisprudence" was coined by Mari Matsuda in 1998. Toussaint, *Legal Education*, *supra* note 20, at 57.

137. As a critical analytical framework of race and the law that developed in the wake of the civil rights movement, emerging in the late 1970s, CRT recognizes that race is socially constructed and acknowledges that racism is embedded within systems that replicate racial inequality, thus racism is codified into law and public policy. CRT proponents reject the concepts of meritocracy and colorblindness in institutional education and argue that scholarship that remains "neutral" to race simply upholds the existing racial hierarchy. *See generally* KHIARA M. BRIDGES, CRITICAL RACE THEORY: A PRIMER (2019) (discussing the history and core concerns of CRT scholarship).

138. *See* Robin West, *Women in the Legal Academy: A Brief History of Feminist Legal Theory*, 87 FORDHAM L. REV. 977, 980–81 (2018) (describing feminist legal theory as an offshoot of 1960–70s feminist jurisprudence that emerged alongside critical race theory in the 1980s as "a body of scholarship in search of a theoretical understanding of the relation of law to women's subordination or, more simply, of law and patriarchy").

theory,[139] AsianCrit theory,[140] TribalCrit,[141] and QueerCrit.[142] While contemporary critical theories incorporate some elements of legal realism, positing the law as inherently political and approaching legal rules with skepticism,[143] these theories also present the existing order (e.g., distribution of wealth and power) as fundamentally unfair, arguing this order is upheld by "illegitimate structures of domination" based on race, gender,

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139. *See* FRANCISCO VALDES & STEVEN W. BENDER, LATCRIT: FROM CRITICAL LEGAL THEORY TO ACADEMIC ACTIVISM 1 (2021) (describing the dual goals of LatCrit, which emerged as an offshoot of CRT in the 1990s, as "(1) to develop a critical, activist, and interdisciplinary discourse on law and policy toward Latinas/os/x; and (2) to foster both the development of coalitional theory and practice as well as the accessibility of this knowledge to agents of social and legal transformative change").

140. *See generally* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1243 (1993) (arguing that CRT didn't account for Asian-Americans' unique issues, such as nativistic racism and myth of the model minority, and providing a framework for AsianCrit that acknowledged different positionalities of disempowered groups while maintaining the ultimate aim of solidarity); Vinay Harpalani, *DesiCrit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 N.Y.U. ANN. SURV. AM. L. 77, 78 (2013) (designating the term "DesiCrit" to describe the positionality of South Asians as "racially ambiguous beings" under CRT frameworks).

141. Bryan McKinley Jones Brayboy, *Toward a Tribal Critical Race Theory in Education*, 37 URB. REV. 425, 427 (2005) (describing TribalCrit as rooted in CRT and other non-legal academic disciplines, with the aim of providing a framework "to address the complicated relationship between American Indians and the United States federal government and begin to make sense of American Indians' liminality as both racial and legal/political groups and individuals"); *see also* Lauren Ashley Week, *Cultural Resources, Conquest, and Courts: How State Court Approaches to Statutory Interpretation Diminish Indigenous Cultural Resources Protections in California, Hawai'i, and Washington*, 12 MICH. J. ENV'T & ADMIN. L. 103, 103 (2022) (providing a modern CRT/TribalCrit analysis of state courts' continuing tendency to "uphold interpretations rooted in white supremacy and settler colonialism that diminish indigenous cultural resources protections and thereby perpetuate modern day conquest").

142. *See generally* Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship*, 75 DENV. U. L. REV. 1409 (1998) (outlining the field of sexual orientation scholarship that developed beginning in the late 1970s and rallying for intersectional queer scholarship in the CRT/outsider jurisprudence tradition); Nick J. Sciullo, *Defending Critical Race Theory*, 47 SEATTLE U. L. REV. 75, 77–78 (2024) (citing LIBBY ADLER, GAY PRIORI: A QUEER CRITICAL LEGAL STUDIES APPROACH TO LAW REFORM (2018) (applying QueerCrit to a variety of legal issues)) (referencing the term "QueerCrit" in a list of other "critical projects designed to better investigate systematic unfairness in the legal system").

143. Toussaint, *Legal Education*, *supra* note 20, at 43–44 ("By using empirical social science to promote skepticism about legal rules and legal facts, legal realists exposed the indeterminacy of legal judgments and their tendency to 'pass off contingent judgments as inexorable.'").

and/or class.[144] West's summary of the main thrust of these critical scholars' critiques is instructive:

> [B]oth the moral value of legalism writ large – basically, the respect it instills for the goodness and rationality of the American Rule of Law, as well as the worthiness of the moral values it encompasses taken individually (respect for precedent and tradition; a high regard for the importance of fair process, and more generally for procedural justice, understanding and commitment to horizontal or formal equality; and a near-reverential attitude toward constitutional rights)— – is entirely contingent on the moral value, or lack of moral value, of the legal system in which it is embedded.[145]

Legal education received particular attention from the critical legal movements, which recognized the historic structural privileging of whiteness in law schools to the exclusion of all others and legal education as an instrumentality of colonial power that teaches students to "assimilate . . . in the name of progress and prosperity" in order to keep each generation "socially tranquilized, culturally subjugated, and politically subordinated."[146] Though critical theories, including the early CLS movement, did not greatly disrupt the dominant "formalist" structure of legal education, their influence has subtly reshaped the discourse of legal academia and encouraged a broadening of legal pedagogy.[147]

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144. Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 AM. U. L. REV. 1, 52 (1999).

145. WEST, *supra* note 93, at 64.

146. Toussaint, *Legal Education*, *supra* note 20, at 57–58 (quoting Francisco Valdes, *Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education*, 10 ASIAN L.J. 65, 69 (2003)). For example, CRT challenged the underlying liberalist and supremacist assumptions embedded in legal education by recognizing that the United States is "fundamentally a 'racial capitalist' state." *Id*. at 63 (first citing Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013); and then citing Etienne C. Toussaint, *Black Urban Ecologies and Structural Extermination*, 45 HARV. ENV'T L. REV. 449 (2021)). Critical theorists seek to substantively prioritize marginalized and subordinated groups in the United States in an effort to overcome the "conditions of historical and contemporary subordination[.]" *Id*. at 57 (quoting Valdes, *supra*).

147. Toussaint, *Legal Education*, *supra* note 20, at 61–63. Proponents of CLS influenced the development of clinical education by advocating for legal clinics to be more responsive to community needs. Instead of being viewed and administrated primarily as sources for practical legal training of law students, CLS advocates proposed that clinical legal education should imbue law students with ethical literacy and a commitment to the public welfare. Since the turn of the twenty-first century, a growing number of law school curriculums have offered electives that engage with various critical theories—alongside a general trend of greater interdisciplinary offerings. Though some law professors engage in critical theoretical discussions of the law in core courses, it is still a deviation from the norm. *Id*. at 63–64.

B. The Criminal Law Problem

Criminal law has long been considered the problem child of the legal family, both in real-world application and as a course of study for budding American lawyers. Critiques over the state of American criminal law came to a head at the turn of the twentieth century, with criminal codes generally maligned as disjointed, repetitive, and inexplicable to the public.[148] According to Ristroph, the inelegance of these criminal statutes was attributable to the ever-changing composition of state legislatures, which "did not adhere to precedent nor attempt the coherence and consistency that judge-made law purports to display."[149] The "typical American criminal code" was more like "a collection of ad hoc statutory enactments,"[150] and forty-nine distinct and diverse criminal codes were operating simultaneously in the United States alongside the federal criminal code.[151] Though attempts were made at codifying American criminal law with varying success during the nineteenth century,[152] nothing near an "American Criminal Code" would exist until the development of the Model Penal Code (MPC) in the middle of the twentieth century.[153]

Within the legal academy, "the whole field of criminal law was seen as a messy array of often irrational policies and erratic enforcement practices, and on the scholarly side, an intellectual backwater in comparison to the rational, coherent fields of private law."[154] The content, and even necessity, of criminal law courses was up for debate throughout early twentieth century.[155] Criminal

148. Kimberly Kessler Ferzan, *From Restatement to Model Penal Code: The Progress and Perils of Criminal Law Reform in* AM. L. INST., A CENTENNIAL HISTORY 293, 295 (Andrew S. Gold & Robert W. Gordon eds., 2023).

149. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1641.

150. *See* Robinson & Dubber, *supra* note 60, at 322.

151. *Id.* at 319. Hawai'i and Alaska were not yet admitted as states. The count of forty-nine includes the District of Columbia.

152. *See* Robinson & Dubber, *supra* note 60, at 319.

153. *Id.* at 320–22. Edward Livingston made the first attempt by crafting ambitiously utilitarian and systematic federal and Louisiana criminal codes in 1826 that ultimately failed to be codified into law. David Dudley Field's New York criminal code was successfully enacted into law in 1881, pragmatically focused on making the law accessible to lawyers by simplifying extensive common law opinions. Both of these attempts at codification would influence later influence the development of the MPC. *Id.*

154. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1641–42.

155. *Id.* at 1640–41 ("When law emerged as an academic and intellectual discipline in the nineteenth century in the United States, criminal law almost got

practice was largely looked down upon by the legal academy as "not fitting for law students interested in a respectable career and superior 'social position.'"[156] Criminal law was difficult to comport with the dominant formalist pedagogy of the time, which viewed law as a precise science and focused narrowly on appellate opinions as the source of law:

> Unlike private law subjects . . . American criminal law is not a field of appellate cases. Quite the contrary; our criminal justice system is in reality a field of administrative law, organized by statutes that vest very broad discretionary power in public officials, especially prosecutors.

Only a tiny fraction of criminal prosecutions results in trials, and only some fraction of those include disputed points of criminal law. If there is a conviction and an appeal, those points of law will turn less on distinguishing precedents than on interpreting statutory language.[157]

While some early attempts to conform with the formalist vision of legal education were made, as demonstrated by the few criminal law casebooks that existed at the turn of the century,[158] criminal law would not be consistently included in law school curricula until the 1930s.[159] The push for criminal law to be viewed as a discipline worthy of attention was driven by the growing influence of legal realism,[160] the proponents of which placed greater

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left behind . . . [e]ven as criminal law began to creep into the legal curriculum, it struggled for respect, remaining "the Cinderella of the law course" . . . until at least the 1930s.").

156. Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO ST. J. CRIM. L. 217, 217–18 (2009) (quoting George Wilfred Stumberg, *Book Review*, 89 U. PA. L. REV. 1123, 1123 (1941)).

157. Donald A. Dripps, *On Cases, Casebooks, and the Real World of Criminal Justice: A Brief Response to Anders Walker*, 7 OHIO ST. J. CRIM. L. 257, 257 (2009).

158. Walker, *supra* note 156, at 221–22. The primary author of these casebooks, Joseph Henry Beale, was an adamant follower of the Langdellian tradition. *See id.* at 221–23. These early attempts did not provide commentary, outside sources, or even statutes, instead simply illustrating common law examples of criminal acts through cases. *Id.*

159. *See* Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1641 n.38 (citing *Proceedings of the Association of American Law Schools*, 1931 AM. ASS'N L. SCH. PROC. 132, 150). Langdell did include Criminal Law and Procedure in the Harvard curriculum within a few years of becoming dean, though only for one hour a week. *Id.* (citing Bruce A. Kimball, *Students' Choices and Experience During the Transition to Competitive Academic Achievement at Harvard Law School*, 1876–1882, 55 J. LEGAL EDUC. 163, 172 tbl.2 (2005)).

160. Professor Albert J. Harno, speaking at the annual Association of American

value than formalists on legislation and believed that the law should be responsive to the needs of society.[161] Roscoe Pound and other prominent legal realists of the early twentieth century vigorously advocated for the creation of a "sophisticated intellectual paradigm" for the mostly overlooked *substantive* criminal law in academia, desiring that the subject be organized and taught alongside civil legal courses.[162] Herbert Wechsler and Jerome Michael of Columbia Law responded to these requests with the publication of *Criminal Law and Its Administration* in 1940, an integrated casebook of *substantive* criminal law, cases, and social science materials that, in addition to serving as the model for every succeeding generation of casebooks, completely revolutionized criminal legal pedagogy.[163]

Wechsler and Michael's casebook was a massive success within the legal academy in part because their approach seemed to civilize the unruly and low-class nature of that beast, criminal law. To the authors, the substantive criminal law was more valuable as an academic pursuit than criminal procedure.[164] Invested in the legal realist vision of law, Wechsler and Michael weren't interested

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Law Schools (AALS) symposium in 1922, advocated emphatically for legal realism in criminal law. *Minutes of the Twentieth Annual Meeting*, 1922 AM. ASS'N L. SCH. PROC. 50, 140 ("Perhaps no field of law has been more neglected than the criminal law."); *see also id.* (quoting Roscoe Pound, *The Administrative Application of Legal Standards*, 42 ANNU. REP. A.B.A. 445, 449 (1919)) (calling for greater attention to the "actual social effects of legal institutions and legal doctrines").

161. WEST, *supra* note 93, at 71 n.70 ("The concept of 'law,' in the realist imagination, and then in realist creations, was the product of legislation, as well as adjudication, but more deeply the product of the human will, not reason: it was a creation designed to better the lives of those from whom it came, not a deduction from rules and principles inherited in the past.").

162. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1642. *See also* Roscoe Pound, *What Can Law Schools Do for Criminal Justice?*, 12 IOWA L. Rev. 105, 113 (1927) ("A better organized, scientifically developed criminal law, such as can come only from legal scholars, would do much to relieve the pressure upon some of the most hopeful achievements of American inventive genius as applied to the problems of penal treatment . . . [l]et us not forget that we have yet to do for criminal law what we should have been doing a generation ago.").

163. JEROME MICHAEL & HERBERT WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION: CASES, STATUTES, AND COMMENTARIES (1940). Anders Walker believes this integration of social science and law in Wechsler and Michael's criminal course material was only possible due to the legal academy's general inattention to the discipline. *See* Walker, *supra* note 156, at 227–28.

164. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1646. The concept of substantive criminal law had recently been severed from that of procedural criminal law, a division that some leading criminal legal scholars now identify as problematic, as it separates the criminal (substantive) law from its (procedural) "human interpreters and enforcers." *Id.* at 1642, 1701.

in applying "old ideas to new facts," and instead sought to encourage students to "think about changing the law" rather than just applying it.[165] Reorienting the aims of criminal legal courses away from training criminal practitioners,[166] Wechsler and Michael's new iteration would prepare students for positions of greater social and political importance, teaching them how to be "'enlightened leaders,' as legislators, administrators, or simply influential citizens, to make criminal law the best that it could be."[167] Wechsler and Michael also emphasized law as an aspect of governance:

> It was part and parcel of Michael and Wechsler's approach to the study of law that it be regarded as an instrument of social control, a rational instrument of governance: "[T]he criminal law, like the rest of the law, should serve the end of promoting the common good; and . . . its specific capacity for serving this end inheres in its power to prevent or control socially undesirable behavior."[168]

Additionally, Wechsler and Michael's inclusion of the social sciences was an important repudiation of the "case-centered, doctrine-dominated teaching method . . . that successfully changed the way substantive criminal law was taught in law schools to this day."[169] Subsequent versions of Wechsler and Michael's casebook were heavily laden with references to the Model Penal Code (MPC),[170] of which Wechsler was the primary architect.[171] The MPC is a set of proposed criminal laws designed to serve as a model for state criminal codes that provide a comprehensive framework for defining crimes and their corresponding punishments.[172] First

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165. Angela P. Harris & Cynthia Lee, *Teaching Criminal Law from A Critical Perspective*, 7 OHIO ST. J. CRIM. L. 261, 261 (2009).

166. Walker, *supra* note 156, at 218 (citing JULIUS GOEBEL, JR., A HISTORY OF THE SCHOOL OF LAW: COLUMBIA UNIVERSITY 325 (1955)) (describing how Columbia Law School "modified their criminal law offering, hoping to use the class as a means of preparing students not for criminal practice, but for 'the phenomenal increase in governmental functions,' and rapidly increasing 'demand for competent lawyers' in Franklin Delano Roosevelt's New Deal").

167. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1645 (quoting Walker, *supra* note 156, at 230).

168. Lloyd L. Weinreb, *Teaching Criminal Law*, 7 OHIO ST. J. CRIM. L. 279, 284 (2009) (citing MICHAEL & WECHSLER, *supra* note 163, at 10).

169. Harris & Lee, *supra* note 165, at 261.

170. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1648.

171. *Id.* at 1644. The Code contained four parts: Part I stated the statement of general principles of liability, Part II defined specific offenses, and Parts III and IV addressed the sentencing, treatment, and corrections. *See* Robinson & Dubber, *supra* note 60, at 326.

172. *See generally* Robinson & Dubber, *supra* note 60 (providing an overview of the purpose, history, and structure of the MPC).

published in 1951, the MPC profoundly influenced modern American criminal law, prompting extensive reform of state codes throughout the sixties and seventies and dominating American criminal legal pedagogy since its promulgation.[173]

Ristroph has called the dominant mode of teaching criminal law the "curricular canon."[174] She describes Wechsler's MPC as an "abstract vision of criminal law as the backbone of civilized society," one that depicts criminal law as "exceptional" from all other law,[175] created to address the "deepest injuries"[176] with a distinct set of solutions or interventions that presume no alternatives to criminal legal recourse.[177] Seeking both to subvert the "irrationalities and overreach of criminal law" and engender acceptance and respect from the legal academy,[178] Wechsler's criminal law curriculum developed from a forward-looking, aspirational vision of criminal law.[179] Since its creation, excerpts from the MPC have been included and prominently featured in nearly every criminal law casebook since the 1960s,[180] including the clear successor of

173. *See* Robinson & Dubber, *supra* note 60, at 326; Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1648 ("[N]early every criminal law casebook published since 1962 has featured the MPC prominently.").

174. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1637.

175. Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1976–77 (2019) [hereinafter Ristroph, *Intellectual History*].

176. *Id.* at 1977 (quoting Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952)).

177. *Id.* Ristroph defines criminal law exceptionalism as a model that "targets a narrow set of specific problems ('the deepest injuries') with a distinctive set of interventions, and society has no other recourse for these problems than criminal law." *Id*. (quoting Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952)). Ristroph notes that Wechsler's previous work with his colleague Jerome Michael maintained some skepticism regarding criminal law exceptionalism. *Id*. at 1977 n.111. *See* MICHAEL & WECHSLER, *supra* note 163, at 20 ("[T]he criminal law can not be viewed in proper perspective unless it is remembered that making behavior criminal and treating criminals are only one of many methods that the state can and does employ in order to regulate social life; that the criminal law must not be considered in isolation of other methods of social control, especially education . . . .").

178. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1635.

179. *Id.* at 1648. As this Note addresses in Part III, Ristroph argues this vision bears little resemblance to the actual criminal legal system. *Id.* Wechsler acknowledged that when balancing the utilitarian goals of the MPC with the pragmatic requirements of the existing criminal legal system, he didn't "quite know how to draw a line between what is practical and what is ideal," a sentiment shared by some of his most vocal critics. Ferzan, *supra* note 148, at 302 (quoting Thursday Morning Session—May 20, 1954, 31 A.L.I. Proc. 71 (1954)).

180. *Ristroph, Curriculum of the Carceral State, supra* note 1, at 1648.

Wechsler and Michael's casebook: *Criminal Law and Its Processes* by Sanford Kadish and Monrad Paulsen, published in 1962.[181]

Modeled after the basic framework of its predecessor,[182] Kadish and Paulsen's casebook is still widely used (and commonly imitated) in contemporary criminal legal education.[183] Though primarily concerned with substantive criminal law, the normative model in Kadish and Paulson's casebook "emphasizes certain procedures, such as a presumption of innocence and the requirement of proof beyond a reasonable doubt, that give legitimacy to substantive law."[184] The casebook emphasized theories of punishment rather than theories of criminalization,[185] as the authors were very critical of the scope of actual criminal law and desirous of invigorating "meaningful limitations on the penal power."[186] This normative, sanitized version of criminal law provided in Kadish and Paulson's casebook garnered the respect of the Academy and, by the late twentieth century, was a part of most law schools' required curriculum.[187]

III. Modern Miseducation and Carceral Consequences

In her book *From the War on Poverty to the War on Crime*, Elizabeth Hinton asked "why, in the land of the free, one in thirty-one people is under some form of penal control."[188] When Hinton wrote her book in 2016, the rate of incarceration in the United States was five to ten times greater than other comparable nations,

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181. *Id.* (citing MONRAD G. PAULSEN & SANFORD H. KADISH, CRIMINAL LAW AND ITS PROCESSES (1st ed. 1962)).

182. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1649 ("With a few slight adjustments discussed below, *Criminal Law and Its Processes* kept Michael and Wechsler's basic framework in which students were provided both cases and extrajudicial materials and invited to imagine the best design for the law.").

183. *Id.* at 1648–49 ("This book replaced Michael and Wechsler's text as 'the classic in the field,' and [is] now in its tenth edition . . . .").

184. *Id.* at 1649.

185. *Id.*

186. *Id.* at 1650. Ristroph notes that Kadish also coined the term "overcriminalization" that same year, 1962. *Id.* (citing Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Process*, 75 HARV. L. REV. 904, 909–11 (1962)).

187. *Id.* at 1651 (noting that unlike criminal law, criminal *procedure* has never become a regularly required course).

188. ELISABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME 6 (2016) (describing the government's response to crime since the Civil Rights era to modern day, and how government actions have led to the exponential growth of the prison population).

representing 25% of the world's prison population.[189] Hyperincarceration, the beginning of which academics have traced to the 1970s,[190] encompasses not only the exponential growth of the prison population in the United States,[191] but also a massive expansion of "non-custodial sanctions such as fines or probation."[192] The criminal codes are so vast that the majority of Americans do not know how many laws there are, or even when they are breaking them.[193] Empirical evidence shows that harsh sentences do not deter crime,[194] and incapacitation is utilized with little regard to proportionality.[195] Still, "[t]he way we deal with people who have caused serious harm has been more resistant to scientific and

189. *Id.* at 5 ("The American carceral state has continued its rapid growth ever since [the Civil War], so that today 2.2 million citizens are behind bars—representing a 943 percent increase over the past half century.").

190. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1636 n.20 (first citing MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 1, 16 fig.1.3 (2015); and then citing MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 28–29 (1995)).

191. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL'Y INITIATIVE (Mar. 14, 2023), https://www.prisonpolicy.org/reports/pie2023.html [https://perma.cc/TA27-SFA8] ("The growth in the *total* jail population over the last 25 years is the direct result of increases in pretrial detention, not increases in the number of people held in jails."). In May of 2023 there were 1.9 million people in confinement nationwide, roughly a third of whom are in jail. *Id.* Pretrial detention is largely correlated to the ability of the accused to pay bail. A majority of those people have not been convicted. *Id.* Furthermore, roughly three quarters of those legally innocent people confined are accused of non-violent property, drug, or "public order" crimes—these include parole violations, traffic incidents, and "obstruction of justice" (such as not giving an officer their real name). *Id.*

192. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1697 n.19 (first citing SALLY T. HILLSMAN, JOYCE L. SICHEL & BARRY MAHONEY, NAT'L INST. OF JUST., FINES IN SENTENCING: A STUDY OF THE USE OF THE FINE AS A CRIMINAL SANCTION 7–9 (1984); then citing Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 149 (1997)). Michelle Alexander's now famous book contends that the criminal legal system is used as an instrument of racialized social control; disproportionate incarceration and the severe collateral consequences of incarceration serve to strip Black Americans of their social and economic mobility. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

193. Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 261 (2018).

194. Mirko Bagaric & Sandeep Gopalan, *Saving the United States from Lurching to Another Sentencing Crisis: Taking Proportionality Seriously and Implementing Fair Fixed Penalties*, 60 ST. LOUIS U. L.J. 169, 188 (2016). General deterrence is the view that harsh penalties discourage crime; specific deterrence theorizes that criminal offenders are less likely to reoffend if the penalties are serious enough. *Id.* at 187–88.

195. *Id.* at 189.

technological advances than any other aspect of society."[196] Hyperincarceration requires participation from individuals who are willing to put upwards of 1% of American adults in prison.[197] Absent malicious intent, these individuals must view prosecution and incarceration as necessary, legitimate, and legally sanctioned.[198] In large part, they also must be lawyers.

The legal profession has failed "to scrutinize the evidentiary and logical foundations of modern policing and mass incarceration," while simultaneously failing in "everyday practice to ensure that the contemporary criminal legal system functions consistently with our rights and values."[199] There has not been a proper interrogation into the societal costs of our carceral system nor its "purported benefits," like actual crime reduction.[200] Mandatory minimums and other mechanized methods of determining criminal sentences, combined with the "limited efficacy of appellate review," result in decisions to incarcerate human beings for which no individual must bear the blame, nor face scrutiny for afterward.[201] Prosecutorial discretion[202] (coupled with broad criminal codes and their power to

196. *See* Mirko Bagaric, Dan Hunter, & Jennifer Svilar, *Prison Abolition: From Naïve Idealism to Technological Pragmatism*, 111 J. CRIM. L. & CRIMINOLOGY 351, 353 (2021) (advocating for the expansion of surveillance technology to reduce the prison population by 90%). *But see* Isaiah Strong, *Surveillance of Black Lives as Injury-In-Fact*, COLUM. L. REV. 1019, 1022 (2022) (noting that surveillance technology in the hands of the carceral state exacerbates many of the issues with current policing and surveillance, particularly of minority and poor communities).

197. Katherine Beckett, *Mass Incarceration and Its Discontents*, 47 CONTEMP. SOCIO. 11, 11 (2018) (providing contemporary prison statistics).

198. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1633. *See also* MARY DOUGLAS, HOW INSTITUTIONS THINK 3 (1986) (arguing that the survival of an institution depends on its ability to structure the thinking of the individuals that participate in and perpetuate the institution, wherein they view the institution as necessary and natural).

199. Alec Karakstanis, *Policing, Mass Imprisonment, and the Failure of American Lawyers*, 128 HARV. L. REV. F. 253, 254 (2015).

200. *Id*. at 254 (arguing that courts should be applying strict scrutiny to the benefits of the carceral state based on constitutional precedent).

201. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1633 (citing Andrea Roth, *Trial by Machine*, 104 GEO. L.J. 1245, 1266–69 (2016)).

202. With upwards of 90% of all criminal cases resolving in guilty pleas rather than a factual determination of guilt or innocence, contemporary pleading standards undercut the protections theoretically afforded by the criminal legal system. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1632–33 (citing Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 7 (2013)); John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 161–62 (2014).

define sentencing differentials) is one of the most frequently cited causal factors for the boom in incarceration,[203] but these discussions focus on the discretionary power itself—not the lawyers who wield it. The pathologies necessary to support our violent carceral system are ingrained within the profession; removed from ordinary morality, lawyers normalize brutality behind a shield of bureaucratic justifications.[204]

While the carceral infrastructure in the United States has endured under a system of near constant reform, ouroboros-like in an eternal cycle of destruction and recreation,[205] contemporary law schools bear a remarkable resemblance to the model that developed between formalists and realists roughly a century ago. Despite the growing number of scholars developing complicated theoretical and practical responses to the current criminal legal system, these voices remain the minority in the larger scheme of legal academia.[206] Considering the dire condition of the American carceral state, why do most lawyers seem completely disengaged from these critical legal issues? And what is our way forward? These

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203. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1632; Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1233 (2016). Another common cause centers the lack of funding for, and overwhelming caseloads of, public defenders, though Paul D. Butler argues that even under the best circumstances, lawyers cannot protect the poor from a criminal legal system designed to incarcerate them. *See* Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2178 (2013).

204. Karakstanis, *supra* note 199, at 255 ("The legal profession and the doctrines that it produces exhibit a willful blindness to the extent of the physical and psychological punishments that we perpetrate."); *see also* W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW 10 (2010) (arguing that lawyers' morality should be based on fidelity to law and supported by democratic processes rather than relying on ordinary morality).

205. Meranze, *supra* note 59, at 677 (citations omitted) ("Beyond failure, the initial decades of the prison also indicated a series of continuing themes in its history: the importance of professionals and commercial forces in its spread, its recurring practice of taking over older institutions and practices rather than instituting a 'clean break,' and the recurrent insistence that the answer to the prison's failures was more prison . . . ."); *see also Ouroboros in* ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/topic/Ouroboros [https://perma.cc/W6Q2-C5PH] ("Ouroboros, emblematic serpent of ancient Egypt and Greece represented with its tail in its mouth, continually devouring itself and being reborn from itself. A gnostic and alchemical symbol, Ouroboros expresses the unity of all things, material and spiritual, which never disappear but perpetually change form.").

206. *See* Franklin E. Zimring, *Is There a Remedy for the Irrelevance of Academic Criminal Law?*, 64 J. LEGAL EDUC. 5, 6 (2014) ("Over a thousand of the best and the brightest criminal minds in America have been missing in action from two of the key debates of their field. How did this happen? How can we create closer links between legal education and scholarship and the critical policy turns in American criminal justice?") (describing his study of legal scholarship in regards to mass incarceration).

are the questions Part III of this Note seeks to answer. Subpart III.A. addresses the pro-carceral nature of legal education that has limited either the ability or the desire for contemporary lawyers to seriously engage in anti-carceral criminal legal discourse and furthermore has trained criminal practitioners to religiously uphold the carceral state despite the incomprehensible amount of human suffering that it perpetuates. Subpart III.B. argues that legal education can, and must, incorporate an anti-carceral approach to the law and legal practice. This Subpart presents two steps that, it argues, are necessary to decarceralize legal education: (1) Expand the theoretical underpinnings of legal education to include new frameworks, such as movement lawyering and abolitionism; and (2) change the culture of law schools that serves to limit students' morality and imagination.

A. The "Pipeline"

So, why do so many lawyers continue to blindly and faithfully participate in the administration of the ever-expanding American carceral system despite obvious moral provocation to act otherwise? The central argument advanced by this Note lays the blame, at least in part, at the feet of contemporary legal education. The modern law school resocializes law students, distancing them from their natural morality and sense of justice, with the goal of creating a homogeneous legal professional identity. In conjunction, the dominant criminal legal pedagogy provides students with a distorted understanding of criminal practice that inherently favors carceral institutions. The result is a seemingly endless stream of lawyers that willingly uphold and defend the carceral state, or, at best, comply with its demands due to their inability to imagine a better world. This Subpart will explore both critiques of contemporary legal education in connection with its carceral consequences in turn, starting with the socialization of law students that displaces their conceptions of morality and justice.

Echoing the concerns expressed by Duncan Kennedy in his seminal critique of legal education as hierarchical, but with particular attention to the criminal law, Shaun Ossei-Owusu argues that "law schools reproduce the penal status quo by socializing students into understanding law primarily as a science that is superordinate to social, political, and economic concerns—

particularly as it relates to marginalized groups."[207] Because students are being socialized to "understand criminal justice issues within narrow legal frameworks," he argues that that students are left unprepared for practice.[208] Robin West describes the students that lose the moral sensibility they had upon enrolling in law school as "morally" and "psychologically[] unhinged," with their concern for social justice rewired on behalf of "technocratic competency."[209]

While some scholars have decried the creation of "amoralist" law students, West and Toussaint share the position that legal education instead imbues students with a "distinctive morality"—what West terms "legalism," as was briefly overviewed in Part II's explanation of the formalist-realist dichotomy developed in the early twentieth century.[210] Even contemporary "reformed" pedagogical approaches uncritically center the key tenets of legalism,[211] which Toussaint argues "elides cultural context, obscures systemic racism, and legitimates structural oppression by teaching law students how to sustain the status quo."[212] The thrust of West's critique of legalism is that it puts concern for justice "out of bounds:"

> Legalism is so encompassing a world view, and so effective a way of being in the world, and so morally ambitious, that it "crowds out" the law student's or scholar's inquiry regarding . . . the justice or injustice, of a law, regulation, or legal regime. It crowds out worries over whether the substantive injustice of a law or social arrangement requires a political or legal response . . . [or] worries over whether . . . an entire legal system[] is just or unjust. Substantive justice becomes "not the worry" of the law student or scholar, and therefore not the worry of the legally trained professional.[213]

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207. Shaun Ossei-Owusu, *Criminal Legal Education*, 58 AM. CRIM. L. REV. 413, 426 (2021).

208. *Id.* at 426.

209. WEST, *supra* note 93, at 46 ("[O]nce students lose the moral sensibility that in some cases brought them to law school in the first place, they are morally, as well as often psychologically, unhinged. Their concerns for social justice become displaced, basically, by a concern for technocratic competency.").

210. *Id.* at 55; Toussaint, *Legal Education*, *supra* note 20, at 13.

211. *See* Anthony V. Alfieri, *Against Practice*, 107 MICH. L. REV. 1073, 1074 (2009) (arguing that the pedagogies of clinical and skills courses exhibit the rise of new formalism in their claims of neutral lawyer judgement, technical lawyering based values, and client-centered representation in disregard of all others and of community building).

212. Toussaint, *Legal Education*, *supra* note 20, at 47.

213. WEST, *supra* note 93, at 66.

West lays out four ways in which legalism "crowds out" concern for justice. First, legalism overstates the virtue of process. If process is "applied scrupulously and fairly, then there's no grounds for lawyerly concern over the justice of the law itself."[214] Second, legalism overemphasizes horizontal equity,[215] for which the inquiry is not whether a general rule is unjust, but whether a particular case falls under that general rule—whether they are alike.[216] Third, legalism distinctly privileges individual rights. A law's "goodness or justice" is determined by whether it "promotes or violates rights."[217] Laws that promote rights are assuredly good, while laws that simply do not violate rights cannot do serious harm.[218] Fourth, and last, legalism touts the law as autonomous and complete.[219] The question "what is the law" must be answered "by resort to law and law alone."[220]

Replacing students' personal understanding of morality and justice with a commitment to legalism has many negative implications for future criminal practitioners. Prosecuting and defending individuals suspected of criminally punishable acts "undeniably implicates questions of right and wrong or good and bad, [but] the pedagogy producing these vocations submerges those binaries beneath rules and processes."[221] Combined with the general belief in criminal law exceptionalism, a tenet of which is the idea that criminal procedures are stronger and more extensive than

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214. *Id.* at 66 n.61 (citing Robert Cover, Justice Accused (1975)) (providing an example from Robert Cover's *Justice Accused*, which discusses "the capitulation of northern judges who were antislavery to legalist values when deciding cases under the Fugitive Slave Act, returning slaves to their masters").

215. Toussaint, *Legal Education*, *supra* note 20, at 25 ("[L]aw students are attuned to the moral value of horizontal equity (also known as legal equality, whereby a legal system treats 'like cases alike' as a way of maintaining faith in ancestral wisdom, establishing the predictability of the law, and furthering social conservatism), whether by comparing categories of injury in torts, or by measuring types of damages in contracts.").

216. WEST, *supra* note 93, at 67 ("The demands of morality, again, are exhausted by the legalist demand that 'likes' be grouped in a way that is morally defensible.").

217. *Id.*

218. *Id.* ("So long as we have freedom to speak, to associate, to worship, to not be discriminated against, and to hire a lawyer, that is all justice demands of our positive law . . . .").

219. *Id.* (stating that the autonomy and completeness of law is perhaps the central jurisprudential commitment of legalism).

220. *Id.* at 68 (allowing that "law" can include "moral principles" where those principles are "fairly inferable from past existing legal decisions").

221. RIAZ TEJANI, LAW MART: JUSTICE, ACCESS, AND FOR-PROFIT LAW SCHOOLS 209–10 (2017).

in other areas of the law,[222] legalism encourages students' faith that criminal process has justice built in and discourages them from examining substantive law more closely for injustice.[223] As this approach fails to introduce students to the ways in which the law perpetuates inequality,[224] future criminal practitioners are trained without critical insight on how to best serve diverse clients across gender, class, and race.[225]

In light of the extreme circumstances of the American carceral state, a small number of legal scholars are now scrutinizing the conceptual curricular model used to teach criminal law, particularly the selection of cases, narratives, and ideas utilized in the classes and casebooks of first-year law students. In *Curriculum of the Carceral State*, Alice Ristroph contends that "the uncritical endorsement of pro-carceral messages, in what is typically the only required first-year criminal justice course, is responsible for producing a 'law school to prison pipeline' that entails lawyers who are partially responsible for mass incarceration."[226] The standard curricular model, Ristroph argues, perpetuates a false narrative that criminal law is "limited in scope, careful in its operation, and uniquely morally necessary," teaching students to accept and embrace criminal law and, therefore, reinforcing the American carceral state with willing participants.[227] Some areas of concern in the modern casebook highlighted by Ristroph are the overemphasis

222. Ristroph, *Intellectual History*, *supra* note 175, at 1977.

223. Toussaint, *Legal Education*, *supra* note 20, at 26–27 ("[W]hile law students grow accustomed to debating the *procedural* fairness of law, rarely do they engage the *substantive* justice of those very same legal rules, which tend to imbue the unfair power dynamics that current notions of justice would oppose.").

224. WEST, *supra* note 93, at 56 ("[S]tudents are not encouraged to even ponder, let alone develop arguments regarding the social, corrective, or distributive justice of the substantive rules they are being taught, apart from the procedural regularity or irregularity with which they are fairly or unfairly applied. In fact, such inquiry is quite routinely marginalized or discouraged.").

225. Ossei-Owusu, *Criminal Legal Education*, *supra* note 207, at 427 ("The legal system tasks a relatively unrepresentative set of attorneys with prosecuting and representing criminal defendants in a world where race, gender, and poverty influence assumptions about crime as well its regulation. In the courses that are central to their legal education, they are socialized to believe that these categories are either irrelevant or additive in ways that may actually be the case in some instances, and not in others.").

226. *Id*. at 420 (citing Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1685–90).

227. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1636.

of "supposed constraints" provided by putative limits on substantive criminal law and near exclusive reliance on punishment theory.[228]

According to Ristroph, casebooks legitimate the punitive power in criminal law by emphasizing the constraints placed on the criminal law to prevent abuse of this great power,[229] particularly the principle of legality and presumption of innocence.[230] When coupled, these two concepts theoretically constrain criminal liability and "prevent[] prosecutors or courts from choosing who will be made a criminal."[231] Other key sections that provide criminal law with much needed legitimacy are the "void-for-vagueness" principle,[232] a culpability principle,[233] constitutional limits such as the prohibitions of cruel and unusual punishment,[234] and "possibly, rules of lenity and strict construction for penal statutes."[235] Ristroph notes that these principles and doctrines are rarely presented as "philosophical aspirations," but instead as "positive law with meaningful effects," providing reassurance to students that the harshness of criminal sanctions are frugally applied and only when justifiable.[236] She further argues that the heavy reliance on the MPC "creates a false impression of constraint" upon the administration of criminal law, often crafting a false dichotomy between sections of the Code and the common law.[237] Neither is a realistic depiction of any given state's criminal codes, as no state has wholly and solely codified the MPC without modifications or

228. *Id.* at 1688.

229. *Id.* at 1653.

230. *Id.* ("Legality, as an academic and curricular term, is meant to express something more than the mere distinction between permitted and prohibited conduct. As a legal term of art and in criminal law casebooks, legality encompasses the idea that criminal liability must not be imposed unless the defendant's conduct was prohibited by a *preexisting statute*; the ex post designation of conduct as criminal by an executive official or a judge is prohibited.").

231. *Id.* at 1653–54 (noting the "beyond a reasonable doubt" standard applied to the presumption of innocence).

232. *Id.* at 1654 (explaining that the doctrine "prohibits criminal statutes that are sufficiently vague to allow enforcers, or judges, to decide after the fact what is criminal").

233. *Id.* at 1657. Culpability refers to the requirement that criminal liability exists when both a blameworthy act *and* mental state are present. *Id.* at 1657 n.118.

234. Otherwise known as the constitutional proportionality requirement. *Id.* at 1656–57. *See also* WEST, *supra* note 93, at 113 ("Students learn in criminal law and procedure classes of the *Miranda* and *Gideon v. Wainwright* cases protecting the rights of criminal defendants, but nowhere of the excesses of punishment or the cruelty of prison life, all a function of state and federal legislation.").

235. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1658.

236. *Id.* at 1654.

237. *Id.* at 1658.

other statutory codification in conjunction, nor has a "common law of crimes" ever truly existed.[238] Though useful for testing purposes, the idea of coherency in criminal codes is both wildly inaccurate and, Ristroph argues, further promotes the legality principle as reasonably capable of constraining criminal law.[239]

Ristroph also alleges that the overrepresentation of punishment theory in the standard criminal law casebook is harmful to students' conceptions of criminal law, as they simultaneously legitimize the authority to restrict individual liberties and affirmatively argue for "the good that criminal law can achieve."[240] The four broad justificatory theories most often presented as the rationalization for criminal legal doctrines, what Ristroph coins as "the four horsemen of the carceral state," are retribution, deterrence, incapacitation, and rehabilitation.[241] These rationales are rarely explored in depth, preventing students from meaningfully engaging with questions about whether criminal punishment effectively serves the purported goal of a given rationale, or whether the punishment is justified at all.[242] Professor Benjamin Levin critiques criminal law casebooks for asking the wrong questions.[243] Rather than "*how severely* each defendant should be punished . . . or *how blameworthy* the conduct," Levin argues that the important question is a threshold one, asking, "Why is the problem at issue one that requires a criminal legal solution rather than some other sort of political, institutional, or regulatory response?"[244] Though some scholars believe that punishment theory would serve as a limitation on criminal law, Ristroph finds it unsurprising that "[a]rticulating the justification of a practice . . . is unlikely to foster restraint among those who engage in that practice."[245]

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238. *Id.* at 1659.

239. *Id.*

240. *Id.* at 1660.

241. *Id.*

242. *Id.* ("Indeed, the appropriateness of punishment is often presented as self-evident; students are asked to consider *why* punishment is justified, not whether.").

243. Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381, 1382–83 (2022).

244. *Id.*

245. Ristroph, *Curriculum of the Carceral State*, *supra* note 1, at 1662.

B. Decarceralizing Legal Education

To change the culture of law school, school administrations should reclaim the role of the lawyer in society and engage in those discussions of morality and justice that have been largely shelved since Langdell. Toussaint advocates for educating law students using the "foundational pedagogical principles of public citizenship lawyering."[246] Public citizenship in lawyering embodies a "democratic conception of professional responsibility whereby lawyers engage in routine critique of their lawyering practice through the lens of justice as a moral virtue."[247] Toussaint notes that the ideal of "public citizenship,"[248] though an important part of civil rights and social justice advocacy, has remained on the periphery of legal education,[249] allowing many law students to view the public purpose of legal education as optional.[250] Ossei-Owusu proposed that student initiatives should be supported and encouraged, describing students as critical players in attempts to modify criminal legal education.[251] Student primacy, he argues, fits into consumerist frameworks of education that have become popular in last few decades.[252] He additionally posits that faculty initiatives are imperative to internal change; though often seen as resistant to change, recent awareness of state-violence against racial minorities has challenged faculty within law schools to respond accordingly.[253]

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246. Etienne Toussaint, *The Miseducation of Public Citizens*, 29 GEO. J. POVERTY L. & POL'Y 287, 294 (2022) [hereinafter Toussaint, *Miseducation*].

247. *Id.* at 287.

248. Toussaint, *Legal Education*, *supra* note 20, at 32 (describing public citizenship as the "lawyer fueled by righteous indignation *against* those with corrupted power").

249. *Id.*

250. *Id.* at 55–56.

251. Shaun Ossei-Owusu, *The New Penal Bureaucrats*, 170 U. PA. L. REV. 1389, 1441 (2022).

252. *Id.* at 1441. Ossei-Owusu provides two examples of student initiatives that had success: The Federalist Society was student founded by conservatives and libertarians who felt their views were boxed out of legal education, and Critical Race Theory, the school of thought that helped diversify the general legal curriculum at the end of the twentieth century, was partially student led. *Id.* at 1397.

253. *Id.* at 1444–45. Ossei-Owusu recommends utilizing open-source content, like "The Guerrilla Guides to Law Teaching," to supplement or substitute standard legal materials for content that simultaneously gets at the policy implications as well as the traditional content of criminal justice courses. *Id.*

To make the injustice and bias embedded in law visible, discourse must be interrogated, early and often.[254] Simply critiquing the system (disruption) is insufficient; students must be trained to both critique and create within the legal framework.[255] Susan A. McMahon states that the primary way law schools interrogate the pedagogy of legal reasoning is by "marrying it with legal theory."[256] These frameworks should not only be available on the fringes, through optional elective courses or clinical education. Though clinics are a key piece in providing an anticarceral education, the theory needs to be presented in doctrinal law courses—what Toussaint calls a pedagogy of "reconstructive ordering" that will provide students alternative framings of the legal system to present "their client's worldview in the language of the court."[257] The foundation for a young lawyer's mind is built in the first year of law school, and this is a purposeful action aimed at training students as quickly as possible to "think like a lawyer." What kind of lawyer each student wants to be is not a part of the equation:

> Rather than focusing solely on procedural rules or appellate decisions, students should also be taught how to select, evaluate, and explore law's sources and the narratives that impact them. Students can engage more fully with transformational legal analysis by going beyond law's immediate sources to consider its social and cultural contexts. This will help students become archaeologists of the lawyering process, more adept at determining what the law is, and at articulating visions of what the law could and even should be.[258]

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254. Susan A. McMahon, *What We Teach When We Teach Legal Analysis*, 107 MINN. L. REV. 2511, 2535 (2023).

255. *Id.* at 2548 ("Disruption could lead to a wholesale restructuring of the legal system, a radical reimagining of what law could be. Yet this kind of large-scale reform work can be slow and painstaking; it often engenders a backlash from those who prefer (and benefit from) the status quo. It also does not help students create a new legal order. They know what's wrong with the old ways, but they don't have the skills to make it right. For these reasons, disruption alone is rarely successful. Instead, it should be paired with training in creation, particularly in creative reasoning, giving students the skills to craft new rules and argue for their adoption. This approach operates within the boundaries of traditional legal reasoning precepts, but aims to use the flexibility inherent in those structures to change law, move it forward, and make it more just.").

256. *Id.* at 2544.

257. Toussaint, *Miseducation*, *supra* note 246, at 328.

258. L. Danielle Tully, *The Cultural (Re)turn: The Case for Teaching Culturally Responsive Lawyering*, 16 STAN. J. CIV. RTS. & CIV. LIBERTIES 201, 244 (2020).

There needs to be space in these doctrinal courses for different perspectives. For those who want to diminish or wholly uproot the carceral state, this is particularly true for criminal law courses.

Law schools, and law professors, should consider incorporating abolitionist frameworks into legal education.[259] Abolitionist theory provides the methodologies that can uncover legal pathways towards transformative change and radically reshape legal analysis, allowing law students to think creatively through complex legal issues and solutions.[260] Activists view abolition as a way of thinking and theorizing about change, not simply a desire to remove specific institutions such as prisons.[261] It is the practice, analytical model, creation, and ideology of critical resistance.[262] Dorothy E. Roberts describes the three tenets of abolitionist theory as (1) the roots of today's carceral punishment system are in slavery and racial capitalism; (2) the expanding system oppresses Black people and other marginalized groups to maintain the racial capitalist regime; (3) we can build something new and more humane.[263]

Legal scholars have already begun advocating for the importance of abolitionist theory in law. Allegra McLeod employs the prison abolitionist framework, a set of principles and projects, toward "substituting a constellation of other regulatory and social projects for criminal law enforcement."[264] Jamelia Morgan presents abolitionist methodologies in legal education as a partner to critical legal studies and Critical Race Theory, another tool for deep critique of law and legal structures that provides students with the ability to think beyond the neoliberal approach to social problems.[265] Abolitionism has obvious applications to criminal legal education, where it would serve to challenge traditional theories of

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259. For a thorough understanding of abolitionist theory applied to law, *see* Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015); Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis, We Do This 'Til We Free Us*, 120 MICH. L. REV. 1199, 1200 (2022); Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 5 (2019).

260. Morgan, *supra* note 259, at 1202.

261. Roberts, *supra* note 259, at 6–7.

262. *Id.* (quoting Professor Dylan Rodriguez, founding member of Critical Resistance).

263. *Id.* at 7–8.

264. Morgan, *supra* note 259, at 1200 (quoting Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015)).

265. *Id.* at 1221 (citing Sameer M. Ashar, *Deep Critique and Democratic Lawyering in Clinical Practice*, 104 CALIF. L. REV. 201, 218 (2016)).

punishment and crime.[266] Morgan argues that it serves a larger purpose:

> [I]ncorporating abolitionist thinking into legal analysis enables greater possibilities for change and building power through law, but in a way that does not center legal rights, lawyers, and other institutional actors in legal institutions. Instead, it centers lived experiences and communities. Inspiring this thinking in law students and new lawyers is imperative.[267]

Professor Brendan Roediger's four approaches to practicing abolitionist law are (1) demystifying; (2) delegitimizing; (3) disempowering/dismantling; and (4) dreaming.[268] These are useful as frameworks for teaching abolitionist legal theory to law students. Professors should demystify the legal system or its various apparatuses, exploring what it actually does as opposed to what it is *supposed* to be doing. They can then delegitimize the system by explaining the underlying reasons the system works that way. Disempowering and dismantling would best be implemented in clinical education, where students can learn and work to collectively implement interventions that diminish suffering while weakening the legal system or apparatus.[269] The fourth approach, "dreaming," is not a throwaway but instead a critical piece of abolitionist theory. Professors should encourage their students to use their imagination and express their vision for a better future, rather than constantly cementing them in the realities of our current legal system.

Abolitionism aligns with other theoretical frameworks that have been gaining steam in the legal academy over the last decade. Movement lawyering is an offshoot of "public-interest" lawyering that is collaborative, community-centric, movement-oriented, and resistant to the idea that legal problems are best solved through the courts. Movement lawyering requires lawyers to reframe legal

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266. *Id.* at 1223.

267. *Id.*

268. Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in A Criminal Defense Clinic*, 45 N.Y.U. REV. L. & SOC. CHANGE 159, 168 (2021) (citing Brendan Roediger, *Abolish Municipal Courts: A Response to Professor Natapoff*, 134 HARV. L. REV. F. 213, 215 (2021)).

269. Clinical education has long been used in similar ways. Some schools have developed clinics specific to movements and decarceration, such as NYU Law's Racial Justice and Abolition Clinic and UC Berkeley Law's Abolitionist Lawyering Project. *See Racial Justice and Abolition Clinic*, NYU L., https://www.law.nyu.edu/academics/clinics/RJAC [https://perma.cc/D2M3-TTYT]; *Berkeley Abolitionist Lawyering Project*, UC BERKELEY L., https://www.law.berkeley.edu/experiential/pro-bono-program/slps/inactive-student-initiated-legal-services-projects-slps/berkeley-abolitionist-lawyering-project/ [https://perma.cc/58PF-6CBV].

practice as an opportunity to work in solidarity with community members struggling against "sociopolitical systems of oppression, not merely individuals with legal problems."[270] Rather than prioritizing "fidelity to law,"[271] movement lawyering centers a "fidelity to community,"[272] which rejects the idea that the legal system is imbued with moral value that precludes the necessity of lawyers to "consider ordinary morality."[273] Gerald Lopez describes movement lawyering as a departure from the traditional approaches that "filter the experiences of subordinated clients through dominant cultural narratives and political economic power structures."[274] Rather than focusing solely on rights, Lopez infuses "human dignity[] and moral agency" into legal discourse, emphasizing the autonomy and individual determination of the poor.[275] Movement lawyers work with social movements both in their professional capacity, challenging the laws at issue, and in their individual capacity, becoming involved in direct action and fundraising.[276] By committing to the community and grassroots social organizing, lawyers are held morally accountable to the injustices and inequality created and upheld by law.[277]

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270. Toussaint, *Legal Education*, *supra* note 20, at 68.

271. Theoretically, fidelity to law provides positive law with the legitimacy necessary to protect the rights and entitlements of citizens by elevating procedural fairness over the individual; this fosters democratic stability while maintaining the adversarial nature of the court. Toussaint, *Legal Education*, *supra* note 20, at 28. Toussaint explains that "Wendel grounds the fidelity to law framing in the standard conception of *legal* ethics, which confines the lawyer's role to the ethical principles of: (1) partisanship; (2) neutrality; and (3) moral nonaccountability, ultimately affirming the amorality of law practice." *Id.* (emphasis added) (citing WENDEL, *supra* note 204, at 10).

272. Toussaint, *Legal Education*, *supra* note 20, at 30 (quoting Anthony V. Alfieri, *Educating Lawyers for Community*, WIS. L. REV. 115, 146–55 (2012)) ("Anthony Alfieri points toward a 'fidelity to community' and social justice movements that 'builds spiritual kinship,' 'permits lawyers to reflect emotionally and intellectually in situations of partisan conflict,' and 'enables lawyers to listen and communicate across boundaries of difference, power, and privilege.'").

273. *Id.* at 29.

274. *Id.* at 66–67 (quoting GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE 23 (1992)).

275. *Id.* at 67 (quoting Anthony V. Alfieri, *Rebellious Pedagogy and Practice*, 23 CLINICAL L. REV. 5, 10 (2016)).

276. *Id.* (citing Amna A. Akbar, Sameer Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 850–51 (2021)).

277. *Id.* at 30.

Toussaint advocates for inclusion of movement lawyering in the legal curriculum.[278] He explains that law professors should explore the harms associated with "lawyer-centric" practices while teaching doctrine:[279]

> Both critical legal theories of law and movement law share two fundamental aims in U.S. law practice: (1) achieving political legitimacy, notwithstanding law's historic role in the sociopolitical construction of systemic domination and hierarchy; and (2) striving for justice, where the lawyer serves as a public citizen aspiring to dismantle vestiges of racial and economic oppression embedded in the law. Collectively, these insights point toward the need for a reformed legal pedagogy that will guide the strivings of law students toward new visions of American democracy.[280]

Providing law students with community-based lawyering strategies and justice-based critiques of legal practice decreases the likelihood of those students underestimating the probability of injustice in their future work as lawyers.[281] Toussaint believes that the inclusion of community organizers and political activists in clinical education particularly could help "law students develop a critical consciousness of the political implications of their professional lawyering identity" and "greater awareness of the scope of their calling as public citizens."[282] Some schools have already begun to expand their clinical experiential education programs to interact with social movements,[283] but there is little evidence of a shift in doctrinal criminal law courses.

An anti-carceral legal education can be achieved by examining alternative theoretical frameworks that redefine criminal law as a human endeavor, moving away from its portrayal as an infallible, self-sufficient system separate from all other law. By familiarizing students with abolitionist and community law theories, criminal legal education can incorporate critiques and challenges to the

278. *Id.* at 70 ("While many law students across the country engage in social movements and law reform efforts through public interest clinics and student-led organizations, some law students graduate without ever meddling in political questions of power and resource allocation that are generally deemed outside the realm of legal education.").

279. *Id.* at 68.

280. *Id.* at 57 (citations omitted).

281. *Id.* at 68 (relying on psychologists Amos Tversky and Daniel Kahneman's definition of the "availability heuristic" which impacts a person's estimation of the probability of an event happening based on how easily it comes to mind).

282. *Id.*

283. *Id.*

penal bureaucracy and hierarchy, encouraging students to understand their role in the carceral state.

Conclusion

In light of the current political and legal climate in the United States, this Conclusion will restate the underlying arguments of the piece with even greater urgency. First, law schools are failing to meet their duty to the public by miseducating future lawyers to disastrous effect. The United States has led the world in prison, policing, and surveillance technology for much of its history, which is reflected in the way the carceral state—and particularly the criminal legal system—has developed and expanded to subsume large portions of American life. Mass incarceration began to capture the attention of the public twenty-five years ago, but it still receives very little attention from the legal academy. Meanwhile, law schools ingrain students with the necessary pathologies to uphold a brutal, excessive system of punishment and control by proscribing procedures and naming them as evidence, even guarantees, of justice, and warping students' sense of morality to comport with the legal profession. The legal academy *must* change tack and reorient legal education away from operating on behalf of, or at the behest of, the executive administration, big business, and the academy itself, and instead recommit itself to advocating for the public and defending the health of this nation's legal institutions.

Second, this Note argues that the way forward for legal education is by incorporating abolitionist and movement lawyering strategies in legal pedagogy. Both abolitionism and movement lawyering have theoretical and practical components that center humanity and community. Incorporating these approaches to criminal legal education is particularly important, as they can provide the necessary framework to critique and challenge hyper-carcerality and educate future penal bureaucrats on their role in the carceral state. While originally this Note called for teaching students to challenge injustices that flow from the status quo, it is apparent that there is a new vision for the nation being forcibly implemented by the current administration that inevitably requires more from all of us. Now more than ever, students need to feel empowered to challenge injustice perpetuated by powerful institutions.

While these recommendations are made in earnest, shouted upwards from the depths of educational despair, they are also made with the full awareness that they will not likely be heeded—or even

heard—by the decision-makers within the legal academy. So, instead, this Note is dedicated to the many law students around the country that are struggling to comport their worldview, ethics, or general sense of humanity with the lessons being taught (and not taught) within the four imposing walls of their school. The chasm between regular morality and the synthetic morality of legalism has widened drastically over the two years spent developing this Note, so our numbers are growing. As the executive branch of the United States barrels through our legal system's procedural guardrails, law students watch as powerful lawyers provide "legal" cover for the unconstitutional (and otherwise repugnant) actions of this administration in a manner so dishonorable, it would put Nixon's lawyers to shame. While law students find themselves in the crosshairs of the carceral state for exhibiting the exact qualities that were considered archetypical of the great American lawyer, that spirit of citizenship and commitment to common welfare, minority rights, and the law, they stand without the protection of the institutions that they've poured their time, money, and talent into. The disorientation is severe.

In *Teaching Law*, West explained that the moral value of legalism is contingent upon the moral value of the legal system in which it is ingrained—or lack thereof.[284] Under legalism, students are taught to prioritize individual rights, but individual rights are under attack in new and creative ways.[285] The purported autonomy of the law has been drawn into question by continuous instances of executive overreach.[286] Particularly in the realm of "crimmigration," it is increasingly clear that legalism's wholesale reliance on procedural protections is inapt and cannot stand in as a proxy for justice.[287] So, what conclusions are we law students meant to draw about the morality of our legal system? Perhaps our own.

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284. WEST, *supra* note 93, at 64.

285. *Cf. id.* at 67.

286. *Id.*

287. *Id.* "Crimmigration" refers to the increasing overlap between criminal and immigration law, immigration enforcement resembling criminal law enforcement, and immigration proceedings assuming some features of criminal procedure. *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 381 (2006).

People Power and Police Policy: How Denying Intervenors in Pattern-or-Practice Police Litigation Undermines Police Accountability

Alexander Lindenfelser†

"'The master's tools will never dismantle the master's house.' Who will?"[1]
Dr. Ruth Wilson Gilmore

Introduction

Policing is a pressing civil rights issue in our time. Policing, as Amna Akbar describes it, "advance[s] inequality through [its] distribution of violence and surveillance, death, and debt."[2] This is not a new phenomenon by any means—the same Civil Rights Movement activists who won the fight for equal access to schools and the ballot box went to rallies holding signs saying, "*We demand an end to police brutality now!*"[3] The signs may be old, but their calls to action have been answered across decades, when people took to the streets to demand justice for Rodney King, Amadou Diallo, Sean Bell, Eric Garner, Michael Brown, Freddy Gray, Alton Sterling, Philando Castile, George Floyd, Breonna Taylor, Jacob Blake, Tyre

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1. RUTH WILSON GILMORE, ABOLITION GEOGRAPHY 91 (2022) (quoting Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in SISTER OUTSIDER: ESSAYS AND SPEECHES 110–14 (2007)).

2. Amna Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781, 1786 (2020).

3. Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, SMITHSONIAN (May 29, 2020), https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098/ [https://perma.cc/9PAW-GU9M].

Nichols, and far too many others.[4] The lack of accountability for police violence is a continuing struggle.

The number of police killings is higher in the United States than in England, Wales, Canada, and Australia.[5] Though police violence has been inflicted on white people, such as Daniel Shaver, it is overwhelmingly experienced by Black people, Indigenous people, and people of color, as just one part of the violence of the criminal legal system's project of mass incarceration.[6] Black people are about three times more likely to be killed by police than white people.[7] The distribution of the infliction of police violence is intersectional: it is racial as well as class-based violence.[8] It has historical roots in the control of the labor of enslaved and free Black people in the American South and the repression of organized labor

4. Linda Poon and Marie Patino, *Rodney King to Tyre Nichols: A Timeline of U.S. Police Protests*, BLOOMBERG NEWS (Jan. 30, 2023), https://www.bloomberg.com/news/articles/2020-06-09/a-history-of-protests-against-police-brutality [https://perma.cc/7YGY-XHQG].

5. Paul J. Hirschfield, *Lethal Policing: Making Sense of American Exceptionalism*, 30 SOCIO. F. 1109, 1111–12 (2015).

6. Jeffery Robinson, *'You're Fucked': The Acquittal of Officer Brailsford and the Crisis of Police Impunity*, ACLU (Dec. 12, 2017), https://www.aclu.org/news/criminal-law-reform/youre-fucked-acquittal-officer-brailsford-and [https://perma.cc/3QE8-NNWT]; GBD 2019 Police Violence US Subnational Collaborators, *Fatal Police Violence by Race and State in the USA, 1980–2019: A Network Meta-regression*, 398 THE LANCET 1239, 1239 (2021) ("Systemic and direct racism, manifested in laws and policies as well as personal implicit biases, result in Black, Indigenous, and Hispanic Americans being the targets of police violence.").

7. Rahwa Haile, Tawandra Rowell-Cunsolo, Marie-Fatima Hyacinthe & Sirry Alang, *"We (still) charge genocide": A Systematic Review and Synthesis of the Direct and Indirect Health Consequences of Police Violence in the United States*, 322 SOC. SCI. & MED. 1, 3 (2023); *id.* at 4 ("[B]lack people in the United States are far more likely than white people to be killed, shot, severely injured by, and to experience physical and psychological violence by the police."); *People Shot to Death by the U.S. Police from 2017 to 2024, by Race,* STATISTA (2024), https://www.statista.com/statistics/585152/people-shot-to-death-by-us-police-by-race/ [https://perma.cc/KU68-VL5F].

8. Derecka Purnell, *The Cost of Doing Business*, 112 CAL. L. REV. 1107, 1125 (2024) (quoting JOHN A. HANNAH ET AL., UNITED STATES COMMISSION ON CIVIL RIGHTS REPORT: JUSTICE 2–3 (1961)) ("The victims of lawlessness in law enforcement are usually those whose economic and social status afford little or no protective armor—the poor and racial minorities. Members of minority races, of course, are often prevented by discrimination in general from being anything but poor. So, while almost every case of unlawful official violence or discrimination studied by the Commission involved [Black] victims, it was not always clear whether the victim suffered because of his race or because of his lowly economic status. Indeed, racially patterned police misconduct and that directed against persons because they are poor and powerless are often indistinguishable. However, brutality of both types is usually a deprivation of equal protection of the laws and of direct concern to the Commission.").

in the American North.[9] Challenging and changing this reality of police violence is the central demand of the Movement for Black Lives, one of the largest protest campaigns in United States history.[10]

Past attempts to demand accountability for police violence through reform failed to meet expectations, as demonstrated in Minneapolis.[11] Minneapolis activists who demanded accountability from police over a decades-long movement considered it a "futile cycle."[12] On May 25, 2020, the failure of institutions to change

9. Ariama C. Long & Tandy Lau, *The Fight for Liberation: Modern Abolitionists Seek to End Police and Prisons*, AMSTERDAM NEWS (June 15, 2023), https://amsterdamnews.com/news/2023/06/15/the-fight-for-liberation-modern-abolitionists-seek-to-end-police-and-prisons/ [https://perma.cc/SPH7-FTJS]. Modern police forces have their origins in controlling labor, separate though convergent in the American South and North. JLI Vol. 39 Editorial Board, *Refunding the Community: What Defunding MPD Means and Why It Is Urgent and Realistic*, 39 J. L. & INEQ. 511, 517 (2021) ("Policing in the early United States followed two distinct but ultimately complementary approaches in the North and the South."). In the South, policing originated in slave patrols, and following emancipation, policing enforced a program of continued economic exploitation and special segregation. *Id.* at 519–20 (detailing how policing restricted the liberty of Black Americans in the United States following emancipation); *The Origins of Modern Day Policing*, NAACP, https://naacp.org/find-resources/history-explained/origins-modern-day-policing [https://perma.cc/GE8P-WBMN]; ALEX S. VITALE, THE END OF POLICING 45–48 (2021). In the North, this manifested in private and public battalions violently repressing nonviolent strike actions by organized laborers. *Id.* at 40–45; Alex Gourevitch, *Police Work: The Centrality of Labor Repression in American Political History*, 13 PERSPS. ON POL., 762, 767 (2015) ("Strikes prompted the growth not just of the police but of a variegated repressive apparatus.").

10. Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, NEW YORK TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/2R9Z-2M6H].

11. Purnell, *supra* note 8, at 1109–10 ("'[R]eform' discourse can overpromise and underdeliver, especially to Black families who have suffered police homicides. They may expect these legal reforms to yield 'justice,' and more specifically, to stop police killings. Their expectations can impact their legal pursuits, political demands, and even the political outcomes regarding police. Painfully, their hopes that singular statutes or doctrines can stop police killings weigh on their grief, health, and livelihoods."); *see* Samuel Walker, *Institutionalizing Police Accountability Reforms: The Problem of Making Police Reforms Endure*, 32 ST. LOUIS U. PUB. L. REV. 57 (2012); Michael Brenes, *Police Reform Doesn't Work*, BOSTON REVIEW (Apr. 26, 2021), https://www.bostonreview.net/articles/police-reform-doesnt-work/ [https://perma.cc/5ZW7-K92A]; Sam Levin, *'It's not about bad apples': How US Police Reforms Have Failed to Stop Brutality and Violence*, THE GUARDIAN (June 16, 2020), https://www.theguardian.com/us-news/2020/jun/16/its-not-about-bad-apples-how-us-police-reforms-have-failed-to-stop-brutality-and-violence [https://perma.cc/6KJL-4DH9].

12. Gordon Severson, *A History of Fatal Police Encounters in Minneapolis, 11 Cases Since 2010*, KARE 11 (May 26, 2020), https://www.kare11.com/article/news/local/minneapolis-police-fatal-encounters/89-

resulted in the violent killing of George Floyd by Minneapolis Police.[13] In George Floyd Square, a public memorial and community protest that still stands, activists temporarily closed the intersection of 38th and Chicago, declaring "no justice, no streets."[14] Protests occurred in cities across the country demanding justice for George Floyd and all others who suffered police violence.[15] The police who killed George Floyd were convicted of homicide and the Minneapolis Police Department is subject to a consent decree with the Minnesota Department of Human Rights and ongoing litigation with the Department of Justice.[16] States around the nation

660b1880-fd20-4bcf-adbc-85144d9c33e4 [https://perma.cc/BJ2F-6MPR]; Amudalat Ajasa & Lois Beckett, *Before Chauvin: Decades of Minneapolis Police Violence that Failed to Spark Reform*, THE GUARDIAN (Apr. 25, 2021), https://www.theguardian.com/us-news/2021/apr/25/minneapolis-police-incidents-promises-reform [https://perma.cc/68JL-2GAL]; MPD150, ENOUGH IS ENOUGH: A 150 YEAR PERFORMANCE REVIEW OF THE MINNEAPOLIS POLICE DEPARTMENT (2020), https://www.mpd150.com/wp-content/uploads/reports/report_2_uncompressed.pdf [https://perma.cc/K4QT-7MCW] (tracing the history of failures of reforming the Minneapolis Police Department). The MPD150 report includes a graphic illustrating the "futile cycle of police reform." In the aftermath of an unacceptable act of police violence, the public responds with outrage, protest, or calls for change. System actors sometimes respond with rhetoric of reform, but other times create substantive reforms with laudable intentions. That progress toward reform stops short or retreats as reforms are whittled away. The inevitable outcome of this cycle is another act of unacceptable police violence that reforms once again failed to prevent. The image below the graphic is titled "The Minneapolis Police Oversight Graveyard" and features five headstones, four for the previous civilian oversight agencies of the Minneapolis Police Department and one for the existing agency. *Id.* at 52.

13. Jamiles Lartey and Simone Weichselbaum, *Before George Floyd's Death, Minneapolis Police Failed to Adopt Reforms, Remove Bad Officers*, MARSHALL PROJECT (May 28, 2020) (detailing problematic Minneapolis Police policies), https://www.themarshallproject.org/2020/05/28/before-george-floyd-s-death-minneapolis-police-failed-to-adopt-reforms-remove-bad-officers [https://perma.cc/MH6P-V5KL].

14. Josh Cobb, Ngoc Bui, Matthew Alvarez, Emily Reese & Emily Bright, '*No Justice, No Streets': 4 Years After Murder, George Floyd Square Stands in Protest*, MPR NEWS (May 25, 2024), https://www.mprnews.org/story/2024/05/25/no-justice-no-streets-4-years-after-murder-george-floyd-square-stands-in-protest [https://perma.cc/NUM7-JWQA].

15. *How George Floyd's Death Became a Catalyst for Change*, NAT'L MUSEUM OF AFRICAN AM. HISTORY & CULTURE https://nmaahc.si.edu/explore/stories/how-george-floyds-death-became-catalyst-change [https://perma.cc/2RJQ-R22S].

16. Samantha Fischer, *3 Years Later: Where are the Ex-MPD Officers Convicted in George Floyd's 2020 Murder?*, KARE 11 (May 24, 2023), https://www.kare11.com/article/news/local/george-floyd/former-minneapolis-police-department-officers-convicted-in-george-floyds-murder-where-are-they-now/89-20bba151-5877-4d27-b1f4-be3da43fed37 [https://perma.cc/HS9P-8CGB]; *Court Approves Consent Decree Requiring Minneapolis, MPD to Implement Changes*, FOX 9 (July 13, 2023), https://www.fox9.com/news/court-approves-consent-decree-requiring-minneapolis-mpd-to-make-changes [https://perma.cc/6R24-TMXQ]; *Press Release: Justice Department Finds Civil Rights Violations by the Minneapolis Police*

enshrined community demands in legislative victories.[17] But not all the demands of this movement to prevent the repetition of this police violence were met. Efforts to transcend reform by abolishing the Minneapolis Police through a ballot initiative were unsuccessful.[18] However, the seeds of change did bring abolitionist imaginaries into reality through the unarmed non-police Behavioral Crisis Response program.[19] As Minneapolis activist and artist Ricardo Levins Morales observed, now is the time for critical reflection: "I liken the emergence of movements to an incoming tide and the first wave comes up the beach and recedes. . . . It's opportunity to look back and say, 'Well, what were the constraints of the landscape that caused the wave to crash?'"[20]

It is time to reflect on the potential, pitfalls, and promise of federal action to ensure accountability for police violence. Federal action offered a promising avenue to transcend failures in police reform at local and state levels. Under 34 U.S.C. § 12601 (formerly 42 USC § 14141, and hereinafter "pattern-or-practice litigation"), the Department of Justice is empowered to "obtain equitable and declaratory relief to eliminate" a "pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution

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Department and the City of Minneapolis, DEP'T OF JUST. (June 16, 2023), https://www.justice.gov/archives/opa/pr/justice-department-finds-civil-rights-violations-minneapolis-police-department-and-city [https://perma.cc/HM5Q-5Q68].

17. RAM SUBRAMANIAN & LEILY ARZY, BRENNAN CTR. FOR JUST. STATE POLICING REFORMS SINCE GEORGE FLOYD'S MURDER (2021), https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder [https://perma.cc/4YMP-KJJG].

18. Ernesto Londoño; *How 'Defund the Police' Failed*, NEW YORK TIMES (June 16, 2023), https://www.nytimes.com/2023/06/16/us/defund-police-minneapolis.html [https://perma.cc/NRP8-XVSF].

19. Jon Collins, *Minneapolis at Forefront of Alternatives to Policing, Mental Health Crisis Response*, MPR NEWS (Mar. 27, 2024), https://www.mprnews.org/story/2024/03/27/minneapolis-at-forefront-of-alternatives-to-policing-mental-health-crisis-response [https://perma.cc/5DBM-96RR]. Currently, 9% of calls for service are redirected to the Behavioral Crisis Response team, and over the next ten years that number is intended to increase to 20% of calls for service. Renée Cooper, *'Pleasantly Surprised': Minneapolis City Leaders React to Independent Public Safety Data Analysis*, KSTP (Nov. 23, 2024), https://kstp.com/kstp-news/top-news/pleasantly-surprised-minneapolis-city-leaders-react-to-independent-public-safety-data-analysis/ [https://perma.cc/CAZ3-59AQ]; *but see* Christopher Ingraham, *Four Years After George Floyd, Minnesota's Racial Gaps Remain Stark*, MINNESOTA REFORMER (May 23, 2024), https://minnesotareformer.com/2024/05/23/four-years-after-george-floyd-minnesotas-racial-gaps-remain-stark/ [https://perma.cc/SX6T-HTLJ] (detailing disparities between Black and White Minnesotans in graduation gaps, income, and homeownership that have experienced only modest improvements and noting that disparities in arrests and deaths of despair have increased).

20. Londoño, *supra* note 18.

or laws of the United States."[21] This law is a "critical pillar of civil rights legislation"[22] intended to "close [the] gap in the law" of police accountability.[23] In practice, pattern-or-practice litigation is a narrow mechanism whose use has been limited to a select few major cities. In those cities, pattern-or-practice litigation takes years with little change to show for it. Empirical research suggests that pattern-or-practice litigation generally has at best mixed results for reducing police killing, use of force, and racial disparities.[24]

In Part I, I explain that police violence presents a philosophical problem for law. Police violence is lawmaking. It undermines the normativity of law by destroying the normative communities of people affected. In so doing, it replicates the worst harms of our nation's history. To reify an order rooted in law, there must be substantive remedies in the form of guarantees of non-repetition and reparations as well as procedural remedies in the form of increasing democratic participation in shaping police policy.

In Part II, I outline the legal scheme of accountability for police violence in its totality. I survey and critically evaluate several legal channels for accountability. I conclude, as did the drafters of 34 U.S.C. § 12601, that the existing scheme of accountability for police violence is inadequate. I characterize this gap as a "grey hole" in

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21. 34 U.S.C. § 12601. Surprisingly, this provision is from the Violent Crime Control and Law Enforcement Act of 1994, a law better known for exacerbating rather than remedying the worst maladies of the criminal justice system. Uni Offer, *How the 1994 Crime Bill Fed the Mass Incarceration Crisis*, ACLU (June 4, 2019), https://www.aclu.org/news/smart-justice/how-1994-crime-bill-fed-mass-incarceration-crisis [https://perma.cc/76HM-6DTE].

22. Sigourney Norman, *Strengthening Section 14141: Using Pattern or Practice Investigations to End Violence Between Police and Communities*, 33 J. CIV. RTS. & ECON. DEV. 263, 266 (2019).

23. Eugene Kim, *Vindicating Civil Rights under 42 U.S.C. 14141: Guidance from Procedures in Complex Litigation*, 29 HASTINGS CONST. L. Q. 767, 769 (2002).

24. Li Sian Goh, *Going Local: Do Consent Decrees and Other Forms of Federal Intervention in Municipal Police Departments Reduce Police Killings?*, 37 JUST. Q. 900, 922–23 (2020) (studying the effect of pattern-or-practice litigation on police killings and concluding that DOJ investigations reduce police killings by 27% and using court-appointed monitors to oversee the implementation of settlements, consent decrees, or court judgments reduces police killings by 29.1%. In contrast, Goh finds that, when the DOJ only intervenes by providing a technical assistance letter, police killings increase by 85.7%. Notably, however, Goh notes that robustness checks revealed that "these results are relatively fragile"). *See generally* Rodney D. Green & Jillian Aldebron, *In Search of Police Accountability: Civilian Review Boards and Department of Justice Intervention*, 56 PHYLON 111 (2019) (examining quantitative data from Portland, the District of Columbia, and Cincinnati and finding neither civilian review boards nor DOJ intervention produced indicia of police accountability. These indicia were quantified as a decrease in volume of complaints and racial disparities in complaints, a lack of decrease in complaints involving use of force, and an increase in the percentage of allegations sustained).

law, which scholars have identified as a legal regime providing for insubstantial constraints that provide the illusion of legality.

In Part III, I overview 34 U.S.C. § 12601 as legislation and as administered. I outline its potential, pitfalls, and promise. Drawing on a historical case study of strategic voting rights litigation during the democratization of the Deep South, I demonstrate the power of federal action to overcome limitations in state and local government. Then, drawing on school desegregation litigation, I outline the importance of including community groups as intervenors to democratize litigation, which has not happened in pattern-or-practice litigation. I present the strategic advantages of moving to join in pattern-or-practice litigation, while also setting realistic expectations that doing so will have limitations.

In Part IV, I present a case study of Portland, Oregon. After the Portland Police Bureau killed Aaron Campbell, a Black man experiencing a mental health crisis, the gap in existing legal channels for accountability in Portland became evident. Movements called on the Department of Justice to investigate, and they responded. A broad coalition of community groups supported the Department of Justice's investigation by providing information and data. However, the Department of Justice excluded race from the ultimate litigation. In response, a coalition of community groups called the Albina Ministerial Alliance moved to join the litigation as intervenors. Their motion was blocked. While community groups were able to leverage their position to make important gains in accountability for police violence, as evidenced by the struggle against the infamous "48-hour rule," their exclusion was detrimental to the litigation.

I conclude by discussing the uncertainty for pattern-or-practice litigation in the United States and in Minneapolis. I recognize the unity of struggle against policing, mass incarceration, and bordering. I recognize work done historically and presently to challenge systems of policing at the international level. Acknowledging good reason to be pessimistic about the possibilities for change in this political moment, I echo Amna Akbar and Alex S. Vitale's call for us to continue building toward abolitionist futures.

I. Accountability for Police Violence is Necessary to Resolve a Normativity Crisis for Law

The modern conversation about policing is a conversation driven and dominated by images. The conversation around policing is a polarized one, and empirical research suggests this is due in large part to the construction of these images through media

framing.[25] Police have a "dual role" and, in addition to conducting law enforcement functions, frequently step in to fill the gaps of other social services.[26] On the one hand, police are members of their communities and play positive roles in the communities where they operate.[27] On the other hand, police damage the communities where they operate. People's disparate perspectives of police depend on their lived experiences and largely fall along racial and class lines. Policing therefore presents a semiotic double-image where one of these faces is more visible, and therefore more believable, to some individuals than others based on their race and class. One community may see only one image and reject the other.[28] The current public consciousness surrounding police violence may have less to do with an increase in police violence or a change in societal attitudes, and more to do with the proliferation of technologies that allow acts to be recorded and disseminated to people that may not otherwise have seen them.[29] In fact, the modern movement against police violence began with the widespread dissemination of George Holliday's video of the Los Angeles Police's violence against Rodney King, which is considered to be the first viral video of police violence.[30]

But police violence is not an aberration, it is the job. The law-enforcement-related tasks which are the *sine qua non* of policing involve some degree of violence or potential violence.[31] Micol Seigel has characterized policing as "violence work," where police are tasked with representing and distributing State violence through their labor.[32] The essence of police power comes from "suspended,"

25. *See, e.g.,* Kim Fridkin, Amanda Wintersieck, Jillian Courey & Joshua Thompson, *Race and Police Brutality: The Importance of Media Framing*, 11 INT'L J. OF COMM. 3394 (2017).

26. Clare Torrible, *Reconceptualising the Police Complaints Process as a Site of Contested Legitimacy Claims*, 28 POLICING & SOC'Y 464, 468 (2018).

27. *Id.* at 469.

28. *See* Akbar, *supra* note 2, at 1823 ("Policing and prisons mark people outside of the [larger political, economic, and social order] as undeserving of social provision or care.").

29. Kendal Harden, *Exposure to Police Brutality Allows for Transparency and Accountability of Law Enforcement*, 33 J. MARSHALL J. INFO. TECH. & PRIV. L. 75, 75–76 (2017) ("Thanks to the advancements in technology and valor of citizens, the public is finally able to understand the true severity of police brutality within the United States.").

30. Ryan Watson, *In the Wakes of Rodney King: Militant Evidence and Media Activism in the Age of Viral Black Death*, 84 THE VELVET LIGHT TRAP 34, 37 (2019).

31. *See* Graham v. Connor, 490 U.S. 386, 396 (1989) ("Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.").

32. MICOL SEIGEL, VIOLENCE WORK 11 (Duke Univ. Press 2018).

"latent," and "withheld" "*potential* violence."[33] Police are State actors imbued at a departmental and individual level with the power to enforce the laws of the State through violence.[34] With the promise of protecting its constituents from private violence, the State equips police with the instrumentalities to carry out such violence with the understanding that these instrumentalities can and will be used on its own constituents. Persuasion is supplanted by violence.[35]

The conversation about police accountability is a conversation about *whether* police violence is justified and, if so, *what* violence is justified. The latter conversation distinguishes *acceptable* police violence from *unacceptable* police violence. This threshold may be easily answered by reference to law: there is police violence that is authorized by law, and the rest is police violence that is committed under color of law. But as a matter of institutional legitimacy, legal justification provides only the mandate to use state-sanctioned violence.[36] The relationship to the community provides the organizational legitimacy for policing as an institution to be worthy of the power to use violence.[37] Accountability for police violence thus is a necessary aspect of the legal and institutional legitimacy of policing. Like Llewellyn's dueling canons, accountability is a contested space between police and the public in agonistic tension.[38]

When police violence is prohibited by law, accountability requires the reification of law through substantive guarantees of non-repetition. Police as individuals must be held to account for practices violating law or policy, but police violence cannot be reduced solely to individual "bad apples" upon whom blame entirely rests—civil rights problems in policing are the product of *systems* that produce the social conditions of police violence. Policing as an institution must make structural change. But policing as an institution must be accountable to affected communities not only when something goes wrong. Police policies and practices must be

33. *Id.* at 9 (emphasis in original).

34. Throughout this Article, the term "State" is capitalized to refer to a political entity that holds a monopoly on violence, distinct from the traditional usage of the uncapitalized term "state," which refers to subnational actors instead of the federal government. For example, Minnesota is a "state," but the United States is a "State."

35. William A. Westley, *Violence and the Police*, 59 AM. J. SOCIO. 34, 35 (1953).

36. Torrible, *supra* note 26, at 468.

37. *Id.*

38. *See* Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909 (2016) (outlining Llewellyn's theory of dueling canons); Sunita Patel, *Toward Democratic Police Reform: A Vision for 'Community Engagement' Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 804 (2016) (defining agonism as adversarial engagement over differences with institutions in power).

the product of a meaningful, contested process involving the community that police are supposed to serve. At bottom, accountability for police violence requires de jure and de facto police authority that is answerable to the constituencies that employ police. This perspective of accountability is rooted in abolitionist literature but also finds support in reformist literature.[39]

Police violence is the expression of power. That power may be lawfully vested in the police by the State, reflecting the will of the electorate expressed through a democratic process (though its existence may itself limit that democratic process—more on this below). Or the police may abuse their vested power and breach external checks on their power with impunity. When police violence represents the expression of power separate from that of the State, the normative community no longer forms a critical pillar of law; instead, that pillar is replaced with an order of complete domination. This order of complete domination is disproportionately inflicted on lines of race and class and replicates the worst of this nation's history. To reify law and the promises of an order based on rule of law, there must be remedies. These remedies must be substantive remedies in the form of reparations and guarantees of non-repetition. But they must also include procedural remedies in the form of involving communities affected by police violence in the procedure of determining the scope of police practices through police policy.

A. Police Violence Undermines the Normativity of Law

Walter Benjamin stated bluntly that police violence is "lawmaking."[40] Police violence is State violence.[41] But for Benjamin, police are vested with the power not just to enforce legal ends but also to issue commands having the force of law on their own

39. Mariame Kaba, *Police "Reforms" You Should Always Oppose*, TRUTHOUT (Dec. 7, 2014), https://truthout.org/articles/police-reforms-you-should-always-oppose/ [https://perma.cc/3GVK-5DRM] ("This is not a problem of individually terrible officers rather it is a problem of a corrupt and oppressive policing system built on controlling and managing the marginalized while protecting property."); Philip Matthew Stinson, John Liederbach, Steven P. Lab & Steven L. Brewer, Jr., *Police Integrity Lost: A Study of Law Enforcement Officers Arrested*, DEP'T. OF JUST. 191 (Jan. 2016) (unpublished technical report) (on file with Department of Justice) ("[T]he data show that police crime is not solely or even primarily the product of deviant or defective people; but rather, deviant or defective people who work within an occupational context that provides them unique and unprecedented opportunities to perpetrate crimes whether they are on or off-duty.").

40. WALTER BENJAMIN, SELECTED WRITINGS VOL. 1 1913–1926 243 (Marcus Bullock & Michael W. Jennings, eds., 1996).

41. SEIGEL, *supra* note 32, at 9 ("[P]olice are the human-scale expression of the state.").

authority.[42] Because of this, Benjamin says police power "is formless, like its nowhere-tangible, all-pervasive, ghostly presence in the life of civilized states."[43] In other words, police are vested with a large degree of *discretion* in their disposal of the state-given authority to conduct coercive acts. If not properly bounded by enforceable constraints, this authority is arbitrary and capricious.[44] Because police work, as Seigel observes, involves "*potential* violence," abuse of police power is not just consequential in individual instances.[45] Without accountability, the expression of police power through police violence becomes the articulation of the new rules regulating existence.

But can police violence be called law? H.L.A. Hart, the eminent scholar in the legal positivist tradition of jurisprudence philosophy, outlines three core components of the concept of law: that it is a content-independent, peremptory, and normative command.[46] *Content-independent* refers to the requirement that a command be followed simply because of the fact that it was issued.[47] You must follow the law, not because of a reason you have to follow it, but because it is law. *Peremptory* refers to the requirement that obedience be to the command, not to the will of the commander.[48] You must follow the letter of the law without further consideration, not waste time in search of its spirit.[49] *Normative* refers to social, moral, or rational reasons to conform with a command on its face simply because it was issued.[50] Normativity does not necessarily mean morality: though you have many reasons to follow the law (or not to follow it), you need not accept law as a reason unto itself to correctly understand its requirements.[51]

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42. Benjamin, *supra* note 40, at 242–43 ("[Police violence] is violence for legal ends (it includes the right of disposition), but with the simultaneous authority to decide these ends itself within wide limits (it includes the right of decree).").

43. *Id.* at 243.

44. Benjamin provides an example of police violence used pretextually when "interven[ing] 'for security reasons' in countless cases where no clear legal situation exists" or without any proffered legal authorization. *Id.*

45. SEIGEL, *supra* note 32, at 9.

46. H.L.A. HART, *Commands and Authoritative Legal Reasons, in* ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 254 (1982).

47. *Id.* at 253–54.

48. *Id.*

49. Where there are ambiguities in the statute, principles of statutory interpretation diverge on this premise, but we need not reach these interminable debates here.

50. Hart, *supra* note 46, at 256–57.

51. Brian H. Bix, *Kelsen, Hart, and Legal Normativity*, 34 REVUS: J. CONST. THEORY & PHIL. (2018).

Normativity must be understood sociologically. Normativity may be present in the alignment between the morality of a community and the law.[52] Normativity may not be present, and compliance with the law may merely result from the invisible coercive pressures that create compliance with a state, as Gramscian hegemony posits.[53] In our democratic society, law should normatively be obeyed because it is supposed to be based on consent: it is mandated by a democratically elected legislature that represents the will of the community. Law should normatively be obeyed because it is supposed to be an equalizing force under which might does not make right. Law should normatively be obeyed even when democratic processes fail, because we are supposed to have universal enforceable obligations enshrined in our state and federal constitutions as substantive rights. Importantly for the strictest definitions of normativity, the authority of law is supposed to be supreme and to exclusively possess the force of law. Police are therefore supposed to be obeyed not because they are *authorities* in and of themselves, but because they are *authorized* to act by law. Police violence thus locates the capacity to issue peremptory and content-independent commands not in the state through its laws, but in the police through their actions. Police violence represents the destruction of a normative community and the infliction of a new one of complete domination.

As Robert M. Cover observed, the legal system is "the practice of political violence."[54] After all, the etymology of "rule" is the Latin word for "straight stick."[55] Drawing on Elaine Scarry, Cover defines torture as "[t]he deliberate infliction of pain in order to destroy the victim's normative world and capacity to create shared realities[.]"[56] It is "designed to demonstrate the end of the normative world of the victim[.]"[57] The pain and fear of torture is directed toward crushing the victim's individual values and severing their ties to their

52. *See generally* TOM R. TYLER, WHY PEOPLE OBEY THE LAW (2006).

53. *See* Joseph A. Buttgieg, *The Contemporary Discourse on Civil Society: A Gramscian Critique*, 32 BOUNDARY 2, 33 (2005).

54. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1606 n.15 (1986); *id.* at 1601 ("Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur.").

55. ONLINE ETYMOLOGY DICTIONARY, *Rule*, https://www.etymonline.com/word/rule [https://perma.cc/XA5D-HPN4].

56. Cover, *supra* note 54, at 1603.

57. *Id.*

community.[58] Torture replaces this world with a logic of "complete domination[.]"[59] For the victim, torture does not communicate any moral content: "justification for the violence recedes in reality and significance in proportion to the overwhelming reality of the pain and fear that is suffered."[60] Through punishment, the legal system inflicts pain on defendants who avoid it only by acquiescence. The purpose of this pain is to destroy and reform the defendant's moral world to be consistent with that of the legal system. Though judges are detached from this violence in experience, their opinions are "preconditions" and "implements" of it.[61] "[T]he interpretive commitments of officials are realized, indeed, in the flesh[]" and this infliction of pain "will always require the active or passive acquiescence of other judicial minds[.]"[62] In short, for Cover, the legal system is violence amounting to torture.[63]

A sociological case study of a police department during the 1950s shows how police violence is justified according to a code separate from that of law.[64] Police in the study believed that "private or group ends constitute a moral legitimation for violence which is equal *or superior* to the legitimation derived from the law" and that "the monopoly of violence delegated to the police, by the state" is a "personal resource to be used for personal and group ends."[65] Police violence was the product of interpretation—specifically, the individual officer's interpretation of their occupational experience and interests.[66] Rooted in experience with perpetrators of private violence, "police develop a justification for the use of violence[,]" viewing it "as good, as useful, and as their own[]" and "enlarge the area in which violence may be used."[67] In addition to using violence to apprehend individuals accused of serious crimes, such as felonies or sex crimes, police perceived that violence was justified when the victim had been exhibiting disrespect for the police.[68] In the latter cases, violence was employed

58. *Id.*
59. *Id.*
60. *Id.* at 1629.
61. *Id.* at 1608 ("The 'interpretations' or 'conversations' that are the preconditions for violent incarceration are themselves implements of violence."); *id.* at 1629.
62. Cover, *supra* note 54, at 1605, 1627.
63. *Id.* at 1603.
64. Westley, *supra* note 35, at 39.
65. *Id.*
66. *Id.* at 41.
67. *Id.*
68. *Id.* at 35–39.

as a corrective measure, as one officer said, "to set a man down, make him show a little respect."[69] Police presumed disrespect and threatened or employed corrective violence against communities of color and the poor.[70] While the study found that police violence was limited by personal beliefs and by fears of legal accountability and public reaction, in practice police reduced these limitations by refraining to punish their colleagues and refusing to condemn violence committed by their colleagues.[71]

Through physical and symbolic power, police violence inflicts devastating psychological consequences on the communities it affects.[72] This is due in part to the trauma of witnessing the infliction of pain on the body. It is the mind and body reacting to torture. The semiotic double-image magnifies the horror by creating a cognitive dissonance: the people who are supposed to help you are the same people who hurt someone. Furthermore, police violence is disproportionately visited upon the bodies of Black Americans and upon communities of color.[73] This lends further support to the conclusion that police violence is racialized, embedded within and replicative of the systems of racial domination and white Supremacy which have poisoned this nation since before its founding.[74] Understood in context, the normative order of police violence represents not merely an institution accumulating greater influence for itself, but a replication of systems of de facto and de jure structural racial discrimination, subjugation, and apartheid.

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69. *Id.* at 39.

70. Westley, *supra* note 35, at 40.

71. *Id.*

72. *See* Haile et al., *supra* note 7, at 4 (summarizing the devastating mental health consequences of police violence on victims, families, and communities).

73. *Id.* (describing direct consequences of police violence as well as indirect consequences of police violence as an "ecological exposure" and "vicarious and collective").

74. *See* Emmanual Mauleón, *Legal Endearment: An Unmarked Barrier to Transforming Policing, Public Safety, and Security*, 112 CAL. L. REV. 755, 771 (2024) ("Policing has been and continues to be one of the mechanisms through which Whiteness (again, the range of social meanings that attach to White people) is fabricated. Policing's racial disparities reflect both negative police practices that denigrate Black people and other people of color and preferential treatment that elevates White people. In this way, policing fabricates and reinforces not only the negative social meanings of Blackness but also the positive social meanings of Whiteness. Put differently, White people benefit from racially disparate policing practices through both the quality of their individual policing experiences and the symbolic messages that such experiences communicate about the group.").

B. Police Violence Requires Accountability

Accountability for police violence is necessary to reassert the normativity of law and counteract the reactionary social forces to which it contributes. In addition to crushing the normative values of victims and their communities—as is absolutely true of forms of private violence—police violence strikes through the heart of the legal system. Under our Constitutional jurisprudence, individuals have fundamental rights. For those rights to be meaningful, they must be actionable and enforceable—they must have a remedy. When these rights are not enforced against those who are there to protect them, the result is a destruction of the normativity of law. When the State fails to reconstitute the boundaries of law by sanctioning police violence committed "under color of law," the State has accepted the actions of its agents done using the power it imbued them with. It is irrelevant whether that salutary neglect constitutes affirmative endorsement. There has been no effort to commit to non-repetition by word or act, and the perpetrator continues to be imbued with the authority of the State. Police violence committed "under color of law" becomes a distinction without a difference: all channels for accountability through the State have acquiesced to this violence. This strikes through the very heart of the concept of law. The current gap in accountability for police violence fails to resolve this problem. Without accountability, police violence under color of law *is law*.

Accountability for police violence requires substantive remedies. As Richard Rothstein articulates in his bold and radical theory of judicial review in *The Color of Law*, an infringement on a legal right warrants a remedy.[75] The question of what remedy is required necessitates consideration of substantive outcomes. Rothstein, in the spirit of popular Constitutionalism, locates the power to issue and implement such remedies in the people.[76] But accountability for police violence must go farther. It must be a total refutation of extreme domination and a reconstruction of the normative world of victims, their families, and their communities.

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75. RICHARD ROTHSTEIN, THE COLOR OF LAW XIV (Liveright Publ'g Corp. 2017) ("The core argument of this book is that African Americans were unconstitutionally denied the means and the right to integration in middle-class neighborhoods, and because this denial was state-sponsored, the nation is obligated to remedy it."); *id.* at XV ("As citizens in this democracy, we—all of us . . . bear a collective responsibility to enforce our Constitution and rectify past violations whose effects endure.").

76. *Id.* at XI ("There is generally no *judicial* remedy for a policy that the Supreme Court wrongheadedly approved. But this does not mean there is no constitutionally required remedy for such violations. It is up to the people, through our elected representatives, to enforce our Constitution by implementing the remedy.").

This is a difficult requirement, but one of utmost importance. The concept of a remedy under human rights law includes a duty to provide reparations for the harms that have been done so that impacted communities can heal.[77] In Chicago, victims of torture at the hands of officers under the direction of John Burge were promised reparations that model how this may look.[78] Police violence requires symbolic and material recompense. And police violence requires substantive guarantees of non-repetition and the infrastructure to make those guarantees credible.

In addition to substantive remedies, accountability for police violence requires that procedures be employed to make police as an institution answerable to the people against whom police violence will be employed. Jurisprudence philosophy holds that legal interpretation should be guided toward correcting for failures in democratic participation and securing minority rights.[79] In *Democracy and Distrust*, John Hart Ely argues for "a participation-oriented, representation-reinforcing approach to judicial review."[80] Ely interprets the often-discussed footnote 4 of *Carolene Products* as protecting and providing participation in political processes.[81] He interprets *McCulloch v. Maryland* to provide for a democratic requirement that representatives serve the "entirety of their constituencies without arbitrarily severing disfavored minorities[.]"[82] For Ely, courts should correct for failures in the democratic process and not substantive outcomes because courts do

77. Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶16, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004) ("Article 2, paragraph 3 requires that States Parties make reparation to individuals whose Covenant rights have been violated. . . . Reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.").

78. *See* Logan Jaffee, *The Nation's First Reparations Package to Survivors of Police Torture Included a Public Memorial. Survivors Are Still Waiting*, PROPUBLICA (July 3, 2020),
https://www.propublica.org/article/the-nations-first-reparations-package-to-survivors-of-police-torture-included-a-public-memorial-survivors-are-still-waiting#:~:text=The%20%245.5%20million%20reparations%20package,and%20the%20creation%20of%20a [https://perma.cc/4SS6-SR5Q].

79. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (Harvard Univ. Press 1980).

80. *Id.*

81. *Id.* at 77 ("[T]hey ask us to focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted.").

82. *Id.* at 86.

not have the democratic mandate to do so.[83] Whether a specific act of police violence is tolerable is not an objective fact, but an artifact of *who* had the power to decide *how much* police violence is tolerable as well as *who* had the power to decide whether police violence *per se* is tolerable.[84] Legal police violence should therefore not be beyond scrutiny. Accountability requires communities affected by that violence to be included in the procedure of determining the justifiability of police violence.

But there is a question of whether even all this is enough to justify police violence *qua* violence. Political philosopher Robert Paul Wolff posits that the only justification for infringement upon individual autonomy by general authority is through genuinely democratic government, and perhaps only through direct democracy.[85] However, the State's deprivation of the liberty of some is in inherent tension with the notion of free expression for all in the political process. Scholars contend that populations under violence do not have the means or opportunity to provide genuine consent to that violence.[86] This structure presents a contradictory tension, revealing the limits of accountability in its social context.[87]

II. Accountability for Police Violence is a "Grey Hole" in Existing Law

Internal affairs divisions, legislatures, courts, prosecutors, employment sanctions, and civilian oversight bodies fail to provide legal pathways to accountability for police violence. Victims of police violence, families of victims of police violence, and communities that

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83. *Id.* at 8 ("The noninterpretivist would have politically unaccountable judges select and define the values to be placed beyond majority control . . . .").

84. Nickolas John James, *Law and Power: Ten Lessons from Foucault*, 30 BOND L. REV. 31, 39 (2018) (quoting MICHEL FOUCAULT, THE WILL TO KNOWLEDGE: THE HISTORY OF SEXUALITY 87 (vol. 1, 1998)) ("Law was not simply a weapon skillfully wielded by monarchs: it was the monarchic system's mode of manifestation and the form of its acceptability. In Western societies since the Middle Ages, the exercise of power has always been formulated in terms of law.").

85. *See generally* ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM (Harper Torchbook 1970).

86. Akbar, *supra* note 2, at 1804 ("Fundamentally, the 'more democracy' frame fails to account for the anti-democratic nature of the carceral state. Police and prisons lock people out of formal political channels. Incarceration removes a person from their family and community and undermines their ability to engage in civic and social life. Governments deploy arrests and criminal records to deny people the right to vote, to participate in a jury, to find legal work, or to receive government benefits; arrests and criminal records can further create grounds for eviction, deportation, license suspension, and the loss of custodial rights.").

87. For a critical perspective of accountability, *see* PINKO COLLECTIVE, AFTER ACCOUNTABILITY: A CRITICAL GENEALOGY OF A CONCEPT (Haymarket Books, 2d ed. 2025).

police are duty-bound to serve and protect are therefore incapable of accessing accountability through law.[88] They do not comport with international standards.[89] This is what David Dyzenhaus calls a "grey hole," "a legal space in which there are some legal constraints on [government] action—it is not a lawless void—but the constraints are so insubstantial that they pretty well permit government to do as it pleases."[90] Such grey holes provide a "veneer of legality."[91]

In this Part, I discuss and evaluate several pieces of the legal mosaic of police accountability. Each Subpart critically evaluates how each legal regime responds to individual cases of police violence and implements structural change. This critical evaluation draws on existing empirical research that provides insight as to how each regime functions in practice. This review makes one thing clear of the disjointed and incoherent scheme of police regulation as it is now: the need for something else to transcend the procedural and substantive limitations of existing institutions and law.

A. Internal Accountability

Internal Affairs divisions have been widely criticized for failing to objectively investigate and unfairly dismissing civilian complaints due to pathologies such as group loyalty.[92] Indeed, the movement against police violence began in response to the failures of internal affairs divisions to provide any accountability to police perpetrators.[93]

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88. Human Rights Council, *International Independent Expert Mechanism to Advance Racial Justice and Equality in the Context of Law Enforcement*, ¶28, U.N. Doc. A/HRC/54/CRP.7 (Sept. 26, 2023) [hereinafter UN Report].

89. *Id.*

90. David Dyzenhaus, Schmitt v. Dicey*: Are States of Emergency Inside or Outside the Legal Order?*, 27 CARDOZO L. REV. 2005, 2018 (2006). *See also* Alicia G. Solow-Niederman, *Algorithmic Grey Holes*, 5 J. L. & INNOVATION 116, 120–22 (2023) (outlining Dyzenhaus' theory).

91. Dyzenhaus, *supra* note 90, at 2040; *see also* Anthony O'Rourke, Rick Su & Guyora Binder, *Disbanding Police Agencies*, 121 COLUM. L. REV. 1334 (2021) ("The dense network of state, county, and local laws governing those agencies produces a structure democratic in form, which in practice serves to insulate police from meaningful reforms.").

92. Tim Prenzler & Carol Ronken, *Models of Police Oversight: A Critique*, 11 POLICING & SOC'Y: INT'L J. 151, 157–59 (2001).

93. Peter L. Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines to Prosecute*, 53 MD. L. REV. 271, 279 (1994) (citing Rochelle Sharpe, *Policing Brutality: How Cops Beat the Rap*, GANNETT NEWS SERVICE (1992)) ("Los Angeles has no monopoly on ineffective civilian complaint systems.").

In modern times, confidence in Internal Affairs is lacking, and for good reason.[94] Empirical research suggests few citizen complaints are sustained.[95] Where internal mechanisms do sustain complaints, the deterrent effect is reduced by limited sanctions.[96] Consider that of 1,924 complaints against the Minneapolis Police Department from 2013 to 2019, about 60% resulted in no discipline, 35% resulted in coaching (a non-disciplinary measure per the Police manual) and only 2.7% resulted in any kind of disciplinary action.[97]

B. Judicial Accountability

There are two critical mechanisms for challenging police violence through judicial mechanisms. First, the exclusionary rule of the Fourth Amendment, which provides that all evidence collected in violation of a criminal defendant's constitutional rights must be excluded from a criminal proceeding brought against that defendant.[98] Second, the civil rights statute 42 U.S.C. § 1983, which provides that individuals whose Constitutional rights have been violated may seek civil remedies.[99] These legal devices were first created to remedy police violence on the basis of race.[100] But they are fundamentally inadequate at implementing change at a systematic level.[101] Indeed, Akbar states plainly that Fourth

94. Prenzler & Ronken, *supra* note 92, at 160 (citations omitted) (summarizing a survey of complainants to the Metropolitan Toronto Police finding that "over 70% did not feel confident with police investigating their complaint. At the end of the process, only 14% felt their complaint had been dealt with fairly, 35% believed police were biased in their handling of the complaint investigation and 15% claimed police did not look at all of the evidence").

95. William Terrill & Jason R. Ingram, *Citizen Complaints Against the Police: An Eight City Examination*, 19 POLICE Q. 150, 172 (2016) (conducting an empirical study of citizen complaints against the police in eight cities and concluding that "few citizen complaints were sustained, especially use of force allegations").

96. Prenzler & Ronken, *supra* note 92, at 156.

97. Max Nesterak & Tony Webster, *The Bad Cops: How Minneapolis Protects its Worst Police Officers Until It's Too Late*, MINNESOTA REFORMER (Dec. 15, 2020), https://minnesotareformer.com/2020/12/15/the-bad-cops-how-minneapolis-protects-its-worst-police-officers-until-its-too-late/ [https://perma.cc/L29R-76K6].

98. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

99. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1846, 1865–69 (2015).

100. Brandon Garrett & Christopher Slobogin, *The Law on Police Use of Force in the United States*, 21 GERMAN L.J. 1526, 1528–29 (2020).

101. Rachel A. Harmon, *Promoting Civil Rights through Proactive Policing Reform*, 62 STAN. L. REV. 1, 1 (2009) ("Yet traditional legal means for deterring misconduct, such as civil suits under § 1983 and the exclusionary rule, have proved inadequate to force departmental change.").

Amendment jurisprudence "facilitates, rather than constrains, police violence."[102]

i. The Exclusionary Rule

Though it is not typically thought of as a mechanism of police accountability, the exclusionary rule is a critical means of oversight of police practices and procedures.[103] The exclusionary rule is most prominently invoked in criminal proceedings.[104] Despite its broad influence on police procedure, this mechanism is not conducive to public buy-in. Community members with access to legal resources can step in only as *amicus curiae* and sometimes do.[105]

The exclusionary rule is permissive. The Fourth Amendment recognizes a proto-right to bodily autonomy in the form of the expectation of privacy and possessory interest in the person.[106] The analysis turns not on the bodily autonomy of the individual accused, but on the expectation of privacy or possessory interest in the location where the criminal evidence was discovered by search or seizure.[107] Additionally, judges are unprepared, if not unwilling, to reject evidence produced by unconstitutional police conduct.[108] Judges are provided an insufficient evidentiary basis to properly evaluate police conduct and procedures—after all, the criminal defendant is the one standing accused.[109] Selection bias means

102. Akbar, *supra* note 2, at 1790.

103. United States v. Leon, 468 U.S. 897, 906 (1984) (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)) (stating the exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."); *see also* Arizona v. Evans, 514 U.S. 1, 2 (1995) ("The exclusionary rule was historically designed as a means of deterring police misconduct.").

104. Brooks Holland, *The Exclusionary Rule as Punishment*, 36 RUTGERS L. REC. 38, 38 (2009) (defining the exclusionary rule as "the rule that evidence obtained in violation of a defendant's constitutional rights is inadmissible at trial").

105. *See Williams v. City of Chicago*, MACARTHUR JUST. CTR.: POLICE ABUSE, https://www.macarthurjustice.org/case/williams-v-city-of-chicago/ [https://perma.cc/4BKB-YQFC] ("MJC filed an amicus brief on behalf of community organizations Brighton Park Neighborhood Council, Lucy Parsons Labs, and Organized Communities Against Deportations, outlining its study's findings in support of a motion by the Cook County Public Defender that challenged the scientific validity of the ShotSpotter system's gunfire reports, which prosecutors have attempted to use as evidence in a criminal prosecution.").

106. *See* Katz v. United States, 389 U.S. 347 (1967).

107. Rakas v. Illinois, 439 U.S. 128, 143 (1978) ("Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.").

108. Friedman & Ponomorenko, *supra* note 99, at 1891.

109. *See id.* at 1846–47, 1891.

suppression motion practice gives judges a distorted picture of the effectiveness of police tactics because judges see the cases where those tactics produced criminal evidence and not a complete picture of the true harmfulness of those tactics.[110]

Further, the exclusionary rule does not provide a path for racial justice. Direct evidence of racial pretext and metrics of racial disparities are *irrelevant* to a claim for relief brought under the exclusionary rule.[111] Police disproportionately stop people of color and disproportionately arrest people of color.[112] And as Paul Butler observed, "[i]t is possible for police to selectively invoke their powers against African-American residents, and, at the same time, act consistently with the law."[113] The fact of the matter is, existing Fourth Amendment jurisprudence sanctifies the initial intrusions by police that disproportionately target Black Americans and can—and do—escalate into acts of devastating violence.[114]

But even when police engage in conduct that is recognized as unconstitutional, three main doctrines may foreclose remedy.[115] The first doctrine is the standing doctrine, which places unconstitutional police searches outside the reach of a passing guest in an apartment or passenger in a car.[116] The second doctrine is the attenuation doctrine, which allows courts to base a holding on a value judgment as to how directly the harm affected the defendant.[117] The third doctrine is the good faith doctrine, which immunizes police from mistakes in warrant affidavits and deprives

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110. *Id.* at 1866.

111. Whren v. United States, 517 U.S. 806, 813 (1996) (holding that probable cause is an objective standard and evidence of an officer's subjective motivations, including racial bias, are irrelevant to Fourth Amendment analysis).

112. Zach Huffman, *Systemic Inequality | Recasting the Exclusionary Rule's Net*, 89 FORDHAM L. REV. 99, 104–05 (2020).

113. Paul Butler, *The System is Working the Way it is Supposed to: The Limits of Criminal Justice Reform*, 2019 FREEDOM CTR J. 75, 80 (2020).

114. Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125 (2017) (detailing hypothetical situations in which police conduct that often escalates to acts of violence would be lawful under the Fourth Amendment).

115. *See* Friedman & Ponomorenko, *supra* note 99, at 1866.

116. *See, e.g.*, Minnesota v. Carter, 525 U.S. 83 (1998) (holding that defendants who had spent two and a half hours in an apartment had no standing to challenge drug evidence seized in a warrantless search of that apartment); *see also* United States v. Gama-Bastidas, 142 F.3d 1233 (10th Cir. 1998) (holding that a passenger had no standing to challenge drug evidence discovered in trunk of car); United States v. Campbell, 741 F.3d 251 (1st Cir. 2013) (holding that passengers had no standing to challenge the search of a glove box).

117. Wong Sun v. United States, 371 U.S. 471, 488 (1963).

pending cases of the application of existing constitutional law.[118] Together, these doctrines create wide gaps in the law and give judges discretion in declining to penalize police for unconstitutional conduct by excluding evidence.

ii. 42 U.S.C. § 1983

42 U.S.C. § 1983 provides for civil remedies to individuals whose constitutional rights are violated by state actors.[119] For victims of police violence, § 1983 actions are designed to compensate victims and their families through awards of compensatory damages and therefore deter police departments from unconstitutional conduct through financial incentives.[120] It is the "primary weapon used by civil rights lawyers to remedy police abuse."[121] It bears mentioning that § 1983 is an opportunity for victims and their families to contend that their harm *mattered*, their lives *mattered*, and the system must respond with a judgment that accurately reflects the high value of their harm or loss to our society.[122]

§ 1983 was enacted "during Reconstruction to provide individuals with a federal remedy for discriminatory treatment by state actors resisting segregation in the South."[123] § 1983 was passed as possibly the least controversial feature of the Ku Klux Klan Act and supported Congress' effort to respond to widespread violations of Constitutional rights by public and private actors in the Reconstruction South by giving newly freed Black citizens a Federal court remedy of first resort.[124] Actions were rare prior to

118. United States v. Leon, 468 U.S. 897 (1984); Herring v. United States, 555 U.S. 135 (2009).

119. 42 U.S.C. § 1983 (providing in relevant part that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress").

120. Paul Hoffman, *The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America*, 66 S. CAL. L. REV. 1453, 1504 (May 1993).

121. *Id.*

122. *See generally* KENNETH R. FEINBERG, WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 (2018) (discussing the dilemmas of compensating victims' families by placing a dollar value on the victims of the 9/11 attacks).

123. Matthew J. Silveira, *An Unexpected Application Of 42 U.S.C. § 14141: Using Investigative Findings For § 1983 Litigation*, 52 UCLA L. REV. 601, 606–07 (2004).

124. MICHAEL G. COLLINS, SECTION 1983 LITIGATION IN A NUTSHELL 4 (6th ed. 2024).

Monroe v. Pape.[125] In *Monroe*, James Monroe sued the City of Chicago for violations of his Fourth Amendment rights when Chicago Police illegally broke into his house, forced him to stand naked in the living room, ransacked his house, arrested him, and held him for ten hours without contact with family, counsel, or a judge.[126] The Supreme Court held that prospective § 1983 plaintiffs need not exhaust state law remedies before bringing action in Federal court, and that state "action 'under color of' law' did not mean that the action itself was legal, but that the actor was 'clothed with the authority of state law.'"[127] In *Monell v. Department of Social Services*, the Supreme Court overturned *Monell* in part to hold that municipalities and local government units could be sued under § 1983 but could only be vicariously liable where the "execution of a government's policy or custom . . . inflicts the injury."[128]

But relief under § 1983 for victims of police violence is narrowed by qualified immunity. The doctrine of qualified immunity shields "officials from damages liability, even when they have violated the Constitution, if they have not violated 'clearly established law.'"[129] To overcome qualified immunity, a plaintiff must claim a violation of a Constitutional right, and that the right was clearly established at the time of the violation.[130] Since *Pearson v. Callahan*, it is more difficult for plaintiffs to assert as a matter of law that a right was "clearly established."[131] Courts can and do avoid setting a precedential basis for future cases by rejecting § 1983 claims solely on the basis that the law was not clearly

125. *Id.* at 7–15; Osagie K. Obasogie, *Section 1983 and Police Use of Force: Towards a Civil Justice Framework*, 112 CAL. L. REV. 1001, 1003 (2024) ("In light of this active participation in criminal behavior by police, prosecutors, local judges, and juries, § 1983 was meant to give newly freed Black citizens access to federal courts so that they could at least have a legal forum outside of indifferent (if not complicit) localities, where they could bring civil charges against public officials who violate their constitutional rights.").

126. Monroe v. Pape, 365 U.S. 167, 169 (1961).

127. Silveira, *supra* note 123, at 608 (citing *Monroe*, 365 U.S. at 183, 184, 187).

128. *Id.* at 608 (citing Monell v. Department of Social Services, 436 U.S. 658, 694 (1978)).

129. Joanna Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801 (2018) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

130. Mitchell Zamoff, *Determining the Perspective of a Reasonable Police Officer: An Evidence-Based Proposal*, 65 VILL. L. REV. 585, 597 (2020).

131. Colin Rolfs, *Qualified Immunity after Pearson v. Callahan*, 59 UCLA L. REV. 468, 474 (2011) (finding that in the aftermath of *Pearson v. Callahan* "[c]ircuit courts have begun to use the discretion granted by *Pearson* to avoid constitutional determinations far more than they did under the *Saucier* sequencing rule. District courts, on the other hand, are avoiding constitutional determinations at a level similar to the *Saucier* period").

established, without deciding whether plaintiffs' Constitutional rights were violated.[132] The burden of this doctrine on plaintiffs is most shockingly and most tragically displayed in *Castle Rock v. Gonzales*, where the Supreme Court affirmed the lower court's holding that police had qualified immunity against a grieving mother's § 1983 claim for compensation for the murder of her three daughters after police failed to investigate her ex-husband's violation of a restraining order despite her pleas for them to do so.[133]

Plaintiffs who get past a qualified immunity defense still have the deck stacked against them. Plaintiffs must demonstrate that police violence violated their Constitutional rights. For police violence, the standard established by *Graham v. Connor* is whether police conduct was that of a "reasonable officer on the scene."[134] The fact that police violated a person's Constitutional rights is not enough on its own; courts must balance "'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake" and recognize that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[135] Mitchell Zamoff has criticized this standard for being unfairly deferential to police because "juries deciding excessive force claims are routinely instructed to consider the uncertainties and stress of policing, as well as the conduct of the civilian who was harmed, but not the training and experience of the officers involved or their compliance with policies and procedures."[136]

In addition to qualified immunity, justiciability doctrine forecloses any possibility of plaintiffs accessing departmental guarantees of non-repetition as a remedy through injunctive relief.[137] This is the "most profound limitation on private civil rights police abuse litigation."[138] In *Rizzo v. Goode*, the Supreme Court drastically curtailed the availability of equitable remedies to

132. Eva Dickey, *Qualified Immunity under Section 1983: The Protective Veil of "Clearly Established"*, 96 CHI.-KENT L. REV. 247, 249 (2023) (citing Jack M. Beermann, *Qualified Immunity and Constitutional Avoidance*, 2009 SUP. CT. L. REV. 139, 141 (2009)).

133. Castle Rock v. Gonzalez, 545 U.S. 748 (2005).

134. Zamoff, *supra* note 130, at 599 (citing Graham v. Connor, 490 U.S. 386, 396 (1989)).

135. *Id.* at 598–99 (quoting Graham v. Connor, 490 U.S. 386, 396–97 (1989)).

136. *Id.* at 589–90.

137. City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

138. Hoffman, *supra* note 120, at 1511.

victims of police violence in § 1983 litigation.[139] The lower court conducted twenty-one days of hearings and collected "a staggering amount of evidence" from thirty-six incidents of violence by Philadelphia Police.[140] The purpose of these efforts "was to lay a foundation for equitable intervention . . . because of an assertedly pervasive pattern of illegal and unconstitutional mistreatment by police officers" that was "directed against minority citizens in particular and against all Philadelphia residents in general."[141] The lower court ordered a set of reforms.[142] In *Goode*, the Rehnquist Court applied standing and federalism doctrines to hold that a statistical pattern was not enough, § 1983 did not create a duty to prevent future Constitutional violations, and plaintiffs needed to show "direct responsibility" of the entire police force for the actions of individual police.[143] In *City of Los Angeles v. Lyons*, the Rehnquist Court rejected an effort brought by Mr. Adolph Lyons for injunctive relief against the Los Angeles Police Department's practice of chokeholds, which harmed him and disproportionately killed Black Angelenos.[144] In order to access injunctive relief, said the Rehnquist Court, plaintiff "would have had not only to allege that he would have another encounter with the police" but "make the incredible assertion (1) that *all* police officers in Los Angeles *always* choke any

139. Rizzo v. Goode, 423 U.S. 362 (1976).

140. *Id.* at 367.

141. *Id.* at 366–67.

142. *See id.* at 369–70.

143. *Id.* at 376.

144. City of Los Angeles v. Lyons, 461 U.S. 95 (1983). The facts of this case are horrific. *Id.* at 114–15 (Brennan, J., dissenting) (footnote omitted) ("Respondent Adolph Lyons is a 24-year-old [Black] male who resides in Los Angeles. According to the uncontradicted evidence in the record, at about 2 a.m. on October 6, 1976, Lyons was pulled over to the curb by two officers of the Los Angeles Police Department (LAPD) for a traffic infraction because one of his taillights was burned out. The officers greeted him with drawn revolvers as he exited from his car. Lyons was told to face his car and spread his legs. He did so. He was then ordered to clasp his hands and put them on top of his head. He again complied. After one of the officers completed a pat-down search, Lyons dropped his hands, but he was ordered to place them back above his head, and one of the officers grabbed Lyons' hands and slammed them onto his head. Lyons complained about the pain caused by the ring of keys he was holding in his hand. Within five to ten seconds, the officer began to choke Lyons by applying a forearm against his throat. As Lyons struggled for air, the officer handcuffed him and continued to apply the chokehold until he blacked out. When Lyons regained consciousness, he was lying face down on the ground, choking, gasping for air, and spitting up blood and dirt. He had urinated and defecated. He was issued a traffic citation and released."); *id.* at 115 n.3 (Brennan, J., dissenting) ("Thus in a City where Negro males constitute 9% of the population, they have accounted for 75% of the deaths resulting from the use of chokeholds. In addition to his other allegations, Lyons alleged racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.").

citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning, or (2) that the City ordered or authorized police officers to act in such manner."[145] This strips courts of the power to block police policy that is inconsistent with constitutional requirements, rendering them "limited to levying a toll for such systematic constitutional violations."[146]

Even without these legal restrictions, the deterrence logic of § 1983 judgments frequently falls flat.[147] In one expansive study, Joanna Schwartz found that "[l]aw enforcement officers employed by the forty-four largest jurisdictions in [her] study were personally responsible for just .02% of the over $730 million paid to plaintiffs in police misconduct suits between 2006 and 2011," and police in the thirty-seven small- and mid-sized departments paid nothing toward settlements and judgments.[148] This means that individual police officers are not deterred from engaging in violent conduct by the risk that they will be personally forced to pay the judgment resulting from that conduct because responsible governments often indemnify them from liability.[149] In many ways, this is a good thing for plaintiffs, because it means that plaintiffs receive the full value of their judgments.[150] However, departments that have the ability to pay are indemnified by those same governments, so departments do not have an incentive to protect their budgets by implementing policies that deter police violence—the money instead comes out of

145. *Id.* at 105–06 (emphasis in original).

146. Peter C. Douglas, City of Los Angeles v. Lyons: *How Supreme Court Jurisprudence of the Past Puts a Chokehold on Constitutional Rights in the Present*, 17 NW. J. L. & SOC. POL'Y 81, 133 (2021) (quoting *Lyons*, 461 U.S. at 113 (Marshall, J., dissenting)).

147. Hoffman, *supra* note 120, at 1509 ("The civil remedies available under existing federal civil rights statutes, while essential tools in the struggle to contain police abuse, are not sufficient to achieve the pressing goals of police accountability and the prevention of police abuse.").

148. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 960 (2014).

149. *Id.* at 953 (footnotes omitted) ("Although indemnification furthers § 1983's compensation goals, it frustrates § 1983's deterrence goals by limiting the impact of compensatory and punitive damages awards on individual officers. In most jurisdictions, officers can have no reasonable expectation that their misconduct will lead to financial sanctions. Lawsuits appear infrequently to have negative ramifications for officers' employment. And available evidence suggests that the threat of being sued does not significantly influence officer behavior.").

150. *Id.* at 952 ("Widespread indemnification facilitates § 1983's goal of compensating plaintiffs after a settlement or judgment in their favor . . . . Because many law enforcement officers could not pay the settlements and judgments entered against them, many plaintiffs would go uncompensated even after a fact finder concluded that their rights were violated.").

the common fund.[151] But as Schwartz observed, the result of this indemnification is that "most governments are not taking aggressive enough action to investigate and discipline their officers and do not effectively manage their law enforcement agencies."[152]

C. Prosecutorial Accountability

Charging police violence as violent crime offers a tantalizing possibility to close the accountability gap. Prosecutors have substantial influence over police department conduct.[153] Where other systems fail, a "blue desk" prosecutor could step in to charge police violence as assault, battery, manslaughter, or homicide.[154]

However, criminal charges are rarely brought against police and convictions are even rarer.[155] Only 1.9% of police killings from 2013–2022 resulted in police officers being charged with a crime.[156] This is because prosecutors who bring charges against officers must overcome major obstacles. Prosecutors depend on the cooperation of

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151. *Id.* at 955.

152. *Id.* ("My study reveals, however, that governments are already absorbing the costs of individual officer liability. Despite this significant financial outlay—over $730 million from 2006 to 2011 in forty-four large jurisdictions and over $9.1 million during that same period in thirty-seven small and mid-sized jurisdictions—the general consensus is that most governments are not taking aggressive enough action to investigate and discipline their officers and do not effectively manage their law enforcement agencies."); *see also* Hoffman, *supra* note 120, at 1509 ("[C]ity officials may decide to pay the cost of damage awards instead of taking the politically unpopular steps necessary to remedy a pattern of police abuse. Politicians and police chiefs may prefer to blame civil rights lawyers and the courts for imposing these costs on the taxpayers.").

153. Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV. 895, 900–01 (2020) ("[P]olice misconduct *needs* prosecutors to enable it. As such, to understand its prevalence and persistence on a national scale, one must examine how police and prosecutors are interdependent institutions that share culture, norms, resources, and goals.").

154. VITALE, *supra* note 9, at 23.

155. Alex Leeds Matthews, *The Shocking Numbers Behind Police Prosecutions*, U.S. NEWS (Apr. 30, 2021), https://www.usnews.com/news/national-news/articles/2021-04-30/the-shocking-numbers-behind-police-prosecutions [https://perma.cc/7PR2-X74T]; Martin Kaste, *Are More Police Officers Facing Prosecution? As the Data Shows, it's Complicated.*, NPR (Sept. 25, 2023), https://www.npr.org/2023/09/25/1201620935/are-more-police-officers-facing-prosecution-as-the-data-shows-its-complicated [https://perma.cc/EF2W-ARP9].

156. UN Report, *supra* note 88, at ¶ 68.Alex Leeds Matthews, *The Shocking Numbers Behind Police Prosecutions*, U.S. NEWS (Apr. 30, 2021), https://www.usnews.com/news/national-news/articles/2021-04-30/the-shocking-numbers-behind-police-prosecutions [https://perma.cc/7PR2-X74T]; Martin Kaste, *Are More Police Officers Facing Prosecution? As the Data Shows, it's Complicated.*, NPR (Sept. 25, 2023), https://www.npr.org/2023/09/25/1201620935/are-more-police-officers-facing-prosecution-as-the-data-shows-its-complicated [https://perma.cc/EF2W-ARP9].

police to gather the evidence necessary to pursue a charge or secure a conviction.[157] This dependence is an obstacle to prosecutors' capacities to collect evidence of police violence, and doing so risks damaging the relationship or reputation necessary for collecting evidence in this case and other cases.[158] Some have contended this relationship between prosecutors and police departments should be a disqualifying conflict of interest in police violence cases that requires independent counsel from outside the jurisdiction to take the case.[159] Others have called for victims to have direct access to grand juries to override any disincentives to prosecute police violence.[160] Line prosecutors who speak out about police misconduct in cases they are handling without blessing from their superiors are not protected by the First Amendment, placing them at risk of losing their jobs or being demoted.[161]

Criminal law has its limits. The substantive criminal law in most jurisdictions makes defenses more available to police defendants than other defendants.[162] And prosecutors can only prosecute individual officers. They have no mandate to require structural remedies where institutional culpability can be found. As is true of § 1983 litigation, prosecutors cannot require proactive measures to prevent violence before it happens. As Mary Cheh succinctly put it, "[c]riminal law can punish, and in some instances, deter police brutality, but it cannot of itself force fundamental

157. VITALE, *supra* note 9, at 18.

158. *Id.*; Marshall Miller, *Police Brutality*, 17 YALE L. & POL. REV. 149, 153 (1998).

159. *See* Trivedi & Gonzalez Van Cleve, *supra* note 153, at 930 ("[I]n cases where criminal prosecution of police officers for violence or other misconduct is appropriate, prosecutors should voluntarily—or be forced by law to—submit cases to independent counsel from outside the jurisdiction to cure the local conflict of interest this Article delineates."); *see also* Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1488 (2016).

160. *See* Davis, *supra* note 93, at 296–98.

161. Garcetti v. Ceballos, 547 U.S. 410 (2006); *see also* Brief of Association of Deputy District Attorneys and California Prosecutors Association as Amici Curiae Supporting Respondent at 2, Garcetti v. Ceballos, 547 U.S. 410 (2006) (No. 04-473) (writing in support of Ceballos, a prosecutor who testified for the defense regarding potential police dishonesty in a warrant affidavit following the Rampart Scandal in the LAPD, and stating that Ceballos "reasonably concluded in good faith that ongoing prosecutions of criminal defendants were proceeding on the basis of false evidence and determined that the ethical duties that apply to him as a prosecutor licensed by the California bar required him to express this speech").

162. *See* Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 641–64 (2018).

change in how a department is run, supervised, led, and made accountable."[163]

When charges are brought, they inherently place hope for accountability in the deployment of the criminal legal system, which is itself counterproductive to lasting change.[164] As Kate Levine has persuasively observed, pressing for fewer restrictions and harsher penalties for police defendants contradicts the abolitionist project of dismantling the violence of mass incarceration.[165] Police prosecution attempts to erase the systemic causes of police violence by prosecuting individual officers and replicating the racist pathologies endemic in the criminal legal system.[166] Prosecuting police reaffirms "the prominent role the criminal legal system is expected to play in righting societal wrongs, even in the minds of those who are generally aware of its brokenness."[167] Indeed, Levine theorizes that one reason the "defund the police" movement failed in Minneapolis is because it focused on the prosecution of Derek Chauvin instead of more robust structural solutions that would have resulted in less police violence overall.[168]

D. Legislative Accountability

State legislatures impose alarmingly few statutory boundaries on police departments.[169] The limits of police departments are defined by internal policies without public participation.[170] State and municipal governments require alarmingly little democratic oversight of policing.[171] Regulation and rulemaking concerning police conduct are "notably sparse."[172] Most police rules are

163. *Id.* at 638 (quoting Mary M. Cheh, *Are Lawsuits an Answer to Police Brutality?*, *in* POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE 247, 247 (Geller & Toch eds., 1996)).

164. Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997, 1003 (2021) ("[A] project to increase the harshness of the criminal legal system against police officers will, far from its proponents' goals, legitimize and increase the footprint of our current criminal legal system.").

165. Kate Levine, *The Progressive Love Affair with the Carceral State*, 120 MICH. L. REV. 1225, 1233 (2022).

166. Levine, *Police Prosecutions and Punitive Instincts*, *supra* note 164, at 1035.

167. *Id.* at 1043.

168. Levine, *The Progressive Love Affair with the Carceral State*, *supra* note 165, at 1236–37.

169. Friedman & Ponomorenko, *supra* note 99, at 1843–44.

170. *Id.* at 1845–46, 1857.

171. *Id.* at 1835.

172. *Id.* at 1831.

generated internally without democratic processes nor opportunity for public comment.[173]

State legislatures pass laws undermining oversight and accountability.[174] These laws are called "Law Enforcement Officers' Bills of Rights" (LEOBRs) and have been passed in seventeen states.[175] Provisions such as statutes of limitations on discipline and criminal penalties for civilian complaints limit accountability.[176] The seventeen states that have passed LEOBRs account for 54% of police shootings of civilians, 51% of police shootings of Black civilians, and 80% of police shootings of Latine civilians, suggesting

173. *Id.* at 1845–46.

174. One may object that these laws cannot present a democratic problem for policing because they were passed by a democratic process. Just as a community should have the capability to decide the scope of police authority, they should have the capability to cede that decision to the police departments that do the job. Indeed, some scholars have argued that criticisms of much of LEOBRs are misplaced—not all provisions that insulate officers from accountability are equal. Some of the procedural protections provided by LEOBRs for police suspected of misconduct are a *model* for the rights of defendants and accurate due process. Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197, 1197 (2016). We need not reach here objections that can be made to the democratic character of such processes given the disenfranchisement of people with felony convictions, the outsized role of police unions in politics, and special problems of minority rights in first-past-the-post electoral systems. These laws need not uniformly be produced by undemocratic processes to be criticized because police are vested with the coercive force of the state. If this force is deployed arbitrarily or discriminatorily, principles fundamental to democratic participation such as freedom of speech, freedom of assembly, freedom of the press, rule of law, and the right to bodily autonomy may be denied. Democratic society is therefore under threat without systems in place to prevent arbitrary enforcement by providing meaningful oversight and accountability of police.

175. Richard Deshay Elliott, Impact of the Law Enforcement Officers' Bill of Rights on Police Transparency & Accountability 6 (Nov. 19, 2020), (Conference paper, S. Pol. Sci. Ass'n) (SSRN), https://ssrn.com/abstract=3690641 [https://perma.cc/L8EU-G54A].

176. Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 PUB. INT. L.J. 185, 241 (2005) (finding that provisions in Law Enforcement Bills of Rights that impede police accountability include "(1) language that sets the scope of the LEOBORs too broadly, such that it might apply to routine supervisory activities; (2) formal waiting periods that delay investigations; (3) prohibitions on the use of non-sworn investigators in misconduct investigations; (4) pre-disciplinary hearings that include rank-and-file officers on the hearing board; and (5) statutes of limitations on the retention and use of data on officer misconduct"); *id.* at 236–37 (criticizing statutory limits on police discipline because "delays are often due to inadequate staffing of complaint investigation units, including both police internal affairs units and external civilian review boards" and concluding "[s]uch factors should not allow officers to avoid investigation and discipline"); *id.* at 238–41 (finding that "[i]mposing criminal penalties for filing false complaints raises potential First Amendment issues" and collateral impacts, and that "[l]imitations on the retention of citizen complaints and related information pose a barrier to one of the most important new police accountability mechanisms: Early Intervention Systems (EISs)").

that LEOBRs are "a detriment to police accountability and transparency to the general public."[177]

One reason why legislatures are unresponsive to community demands is the dominance of police unions in legislative politics.[178] Police unionism only became widespread as a reaction to the Civil Rights Movement.[179] Police unions adopted a militaristic culture rejecting police oversight and discipline as against the interests of their members.[180] Police unions have successfully lobbied for legislation such as LEOBRs and elected politicians supportive of their interests.[181] By contrast, civil society organizations' demands for accountability lacked the institutional longevity or the technical expertise to lobby for reforms and were not as effective in pressing for legislation representative of their interests.[182] In *The Toughest Beat*, Joshua Page articulates how the California Correctional Peace Officers Association pushed for laws that furthered mass incarceration by creating well-funded Political Action Committees and an office of professional lobbyists, becoming a major financial contributor to legislative and gubernatorial politicians from both parties in exchange for support for their positions, and aggressively attacking opposing views to effectively undermine reforms of the criminal justice system and push for legislation that expanded mass incarceration.[183] To be sure, public-sector unions should have the opportunity to represent the concerns of labor to legislators. The issue is not *per se* the existence of police unions that represent the interests of police officers, but that they perceive that impunity is in their interests and they have the influence to push that agenda

177. Elliot, *supra* note 175, at 14.

178. Davis, *supra* note 93, at 281–82.

179. Catherine Fisk & L. Song Richardson, *Police Unions*, 86 GEO. WASH. L. REV. 713, 736 (2017).

180. *Id.* at 744–46 (detailing how police unions were involved in legislative politics and resisted civilian oversight across cases, as well as how police unions criticized the Supreme Court, the Communist Party, the ACLU, reform-oriented chiefs, and civilian review boards).

181. Keenan & Walker, *supra* note 176, at 196 (2005) ("Unions not only secured collective bargaining agreements that contained many protections but also became a political force that helped to elect sympathetic public officials and to secure enactment of protective legislation, notably LEOBORs.").

182. *Id.* at 202 (footnote omitted) ("Public outrage over particular incidents of police misconduct is a blunt instrument that is rarely able to focus on the minutia of the disciplinary process. Public outrage is also fleeting, replaced by other concerns, and outlasted by the political power of police unions. As such, the decision-making process usually does not include a full, fair airing and balancing of all the interests of all the parties. Rather, the debate has been tilted toward the interests of unions and management.").

183. JOSHUA PAGE, THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS' UNION IN CALIFORNIA 5, 10–14, 50–68, 76–80 (2011).

over the interests of the people to whom they are beholden to by their mandate.[184]

This inequality at the statehouse is compounded by two invidious forms of inequality at the ballot box: felony disenfranchisement and racial restrictions on voting rights. In forty-eight states, felony disenfranchisement laws deny people with felony convictions the ability to vote.[185] The result of these laws is that the people subjected to mass incarceration, the criminal legal system, and the police power are denied the democratic voice to advocate for change at the legislative level.[186] These laws disproportionately affect Black voters, disenfranchising six percent of the Black population nationwide and one in seven Black voters in Alabama, Florida, Kentucky, Mississippi, Tennessee, Virginia, and Wyoming.[187] Further, voters of color are disenfranchised through racial gerrymandering and restrictions of access to the ballot box.[188] These inequalities are enhanced following *Shelby County v. Holder*, which gutted critical federal oversight of the Voting Rights Act in the Southern States.[189]

At the very least, police who commit acts of violence should be removed from their positions and the employee manual should set lines for what is permissible on the job. However, police are insulated from this form of accountability as well. In practice, even police who perpetrate an outsized share of high-profile incidents of

184. Patrick Brooks, *Black & Blue: Black Letter Law & Police Union Collective Bargaining Impede Reform*, 51 U. BALT. L. REV. 449, 454–55 (2022) (citations omitted) ("[P]roblems arise as these unions gain the financial, political, and statutory strength to protect their interests by resisting officer discipline and systemic reform."). *But see* Benjamin Levin, *What's Wrong with Police Unions?*, 120 COLUM. L. REV. 1333, 1398–99 (2020) (arguing that opponents to police unions have not articulated what is wrong about police unions as opposed to other public unions and that anti-police union arguments for reform undermine abolitionist goals and further neoliberal and carceral ends).

185. Manoj Mate, *Felony Disenfranchisement and Voting Rights Restoration in the States*, 22 NEV. L.J. 967, 968 (2022) ("At its core, felony disenfranchisement in the United States is a manifestation of deep-seated structural discrimination within the US criminal justice system, and the utilization of that discrimination perpetuates exclusionary discrimination in voting and political systems.").

186. *Id.* at 970.

187. *Id.* at 968.

188. Patricia Okonta, *Race-Based Political Exclusion and Social Subjugation: Racial Gerrymandering as a Badge of Slavery*, 49 COLUM. HUM. RTS. L. REV. 254, 269–86 (Winter 2018).

189. Shelby County v. Holder, 570 U.S. 529 (2013); Abhay P. Aneja & Carlos F. Avenancio-León, *Disenfranchisement and Economic Inequality*, 109 AEA PAPERS & PROC. 161 (2019).

violence are rarely removed or disciplined.[190] Blame for this may be directed at anti-accountability provisions in police union contracts. In negotiations with city governments, police unions push for the inclusion of anti-accountability provisions in collective bargaining agreements.[191] Even in states or cities that have not enacted LEOBRs, similar provisions are often included in police collective bargaining agreements.[192] These provisions foreclose accountability in the form of employment sanctions for officers' misconduct.[193]

The mechanisms by which police collective bargaining agreements impede accountability to the public is a developing body of research with strong empirical support. A historical analysis reveals a statistical association between the emergence of state-level collective bargaining rights for police unions and increases in deaths of people of color.[194] In "Police Union Contracts," Stephen Rushin identifies seven anti-accountability provisions endemic in present-day collective bargaining agreements.[195] Rushin concludes that "police union contracts may pose an underappreciated barrier to police reform" including consent decrees.[196] In Florida, quantitative evidence suggested an association between increased collective bargaining rights for police unions and increased police violence.[197] From 2014 to 2017, Campaign Zero compiled a database of police union contracts.[198] A quantitative study of those contracts by Abdul Nasser Rad established a statistical association between

190. Max Schanzenbach, *Policing the Police: Personnel Management and Police Misconduct*, 75 VAND. L. REV. 1523, 1567 (2022) ("[B]ad cops are a serious problem, are identifiable, and are rarely removed or disciplined.").

191. Fisk & Richardson, *supra* note 179, at 737.

192. *Id.*

193. Paige Fernandez, *Police Unions Should Never Undermine Constitutional Policing*, ACLU (May 15, 2019) ("Time and again, we witness transformative advances on use of force and biased police and civilian oversight, just to have them undermined behind the closed doors of collective bargaining with police unions. Indeed, historically in the U.S., police union contract negotiations have been used as vehicles for rolling back accountability, transparency, and civilian oversight. In doing so they have further damaged relationships with community members, whom the police are meant to serve.").

194. JAMEIN CUNNINGHAM, DONNA FEIR & ROB GILLEZEAU, IZA DP NO. 14208 COLLECTIVE BARGAINING RIGHTS, POLICING, AND CIVILIAN DEATHS 18 (IZA Inst. of Lab. Econ. Ed., 2021).

195. Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191, 1220 (2017).

196. *Id.* at 1243.

197. Dhammika Dharmapala, Richard H. McAdams & John Rappaport, The Effect of Collective Bargaining Rights on Law Enforcement: Evidence from Florida 33, (U. Chi. L. Sch., Chi. Unbound, Pub. L. & Legal Theory Paper Series, Working Paper No. 655, 2018).

198. Fisk & Richardson, *supra* note 179, at 749.

an index of twelve anti-accountability provisions and police violence.[199]

E. Civilian Accountability

Civilian oversight bodies are intended to fill the "oversight gap" left by state and municipal institutions.[200] They exist in an overwhelming majority of American cities.[201] These bodies seem to have the strongest potential for correcting for the democratic failures in policing and providing responsive mechanisms to challenge police misconduct.[202] In practice, however, "oversight bodies have failed to foster community trust in police departments."[203] Indeed, "there is no evidence [to] date to indicate that civilian oversight leads to some tangible benefit such as a higher sustained complaint rate."[204]

Actions by civilian oversight bodies have traditionally been limited by the mandates given to them by municipal governments or by statutory limits imposed by state legislatures. For instance, most civilian oversight bodies can only recommend disciplinary action or changes in departmental procedures and depend on the cooperation of police departments.[205] Civilian oversight bodies are often contained within police Investigative Affairs departments or limited to a supervisory function.[206] When cities create standing bodies with investigative powers, they often under-resource them, limiting their ability to carry out their mandate.[207] LEOBRs can further limit the authority of civilian review boards to oversee police

199. Abdul Nasser Rad, Police Institutions and Police Abuse: Evidence from the US (Jan. 11, 2018) (masters of philosophy in politics thesis, Oxford University) (SSRN).

200. Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How it Fails*, 43 COLUM. J. L. & SOC. PROBS. 1, 2 (2009) (citations omitted) ("Local executive branch officials, local legislatures, criminal courts, and civil courts generally do little to punish and deter routine acts of police misconduct or to reform problematic police-department policies. When scandals erupt, crises occur, and police misconduct obtains momentary political salience, cities create civilian-oversight bodies to fill this oversight gap.").

201. *Id.* ("Civilian oversight bodies exist in roughly eighty percent of the large cities in America, and approximately one-hundred different civilian-oversight bodies currently operate in the United States.").

202. JOEL MILLER, CIVILIAN OVERSIGHT OF POLICING: LESSONS FROM THE LITERATURE, VERA INSTITUTE OF JUSTICE 3 (2002).

203. O'Rourke et al., *supra* note 91, at 1351.

204. Terrill & Ingram, *supra* note 95, at 154.

205. Miller, *supra* note 202, at 11–12.

206. *Id.* at 12–16.

207. *Id.* at 17.

use of force by reducing them to an "advisory role" and denying them authority to issue subpoenas or punitive measures.[208]

Additionally, civilian oversight bodies are vulnerable to "regulatory capture," wherein the group being regulated—police—"subverts the impartiality and zealousness of the regulator"—the civilian oversight body.[209] This problem can emerge when these bodies are "co-opted" by police norms from causes as benign as the exchange of staff and values through routine contact.[210] For these reasons, activists who demand civilian accountability often become disheartened by its failure to live up to expectations and criticize it as "inefficient and ineffective."[211]

III. Pattern-or-Practice Litigation Fails to Bridge the "Grey Hole" in Accountability for Police Violence.

Pattern-or-practice litigation is the best existing method for bridging the gap in police accountability.[212] But it does not go far enough.

34 U.S.C. § 12601 was intended to "close [the] gap in the law" of accountability for police violence.[213] Existing civil rights statutes, including 18 U.S.C. §§ 241 and 242, provide the Department of Justice a limited power to seek injunctive relief because the specific intent requirement is so difficult to meet.[214] Supreme Court cases *City of Los Angeles v. Lyons* and *United States v. City of Philadelphia* restricted the ability of private individuals and the federal government to enjoin unconstitutional police practices.[215] 34 U.S.C. § 12601 was initially introduced by Representative Don Edwards of California as part of the Police Accountability Act,

208. NAACP, *Resolution: Thorough Reformation of Law Enforcement Officers' Bill of Rights* (2021) ("WHEREAS, LEOBORs also limit the authority of civilian review boards to review determinations regarding complaints filed against police officers by only granting the boards an advisory role without the ability to issue subpoenas or actually impose punitive action.").

209. Tim Prenzler, *Civilian Oversight of Police: A Test of Capture Theory*, 40 BRIT. J. CRIMINOLOGY 659, 662 (2000).

210. *See id.* at 662–63.

211. Miller, *supra* note 202, at 3.

212. In the absence of action by federal authorities, state attorneys general can initiate civil suit against police departments and develop consent decrees through parens patriae standing in civil rights lawsuits, though scholars have identified problems in this legal base for standing that may be better suited by a federal statute granting standing. *See* Jason Mazzone & Stephen Rushin, *State Attorneys General as Agents of Police Reform*, 69 DUKE L.J. 999 (2020). This Note does not explore this avenue of reform.

213. Kim, *supra* note 23, at 769; Miller, *supra* note 158, at 163.

214. Kim, *supra* note 23, at 769–70.

215. Silveira, *supra* note 123, at 611.

impelled by the violence of the Los Angeles Police Department against Rodney King.[216] In its initial drafting, the bill gave a private right of action to both the Attorney General and victims of police violence to obtain injunctive relief to eliminate the pattern or practice.[217] The private right of action for victims was dropped in the Conference Committee's compromise version of the bill.[218] The bill had previously failed to overcome a filibuster by Senate Republicans and a threatened veto by President George H.W. Bush, but was passed as part of the Violent Crime Control and Law Enforcement Act of 1994.[219]

Only the Department of Justice may bring suit for patterns or practices of unconstitutional and unlawful conduct within a police department under 34 U.S.C. § 12601.[220] This statute is directed toward systematic practices, not singular instances of police misconduct.[221] Unlike reviews of police department practices from the DOJ's Office of Community Oriented Policing Services, the initiation of review brought under this statutory mechanism is not voluntary on the part of departments, and its findings compel police departments to act through court orders or court-enforced agreements.[222] It is invoked in rare situations: out of the nation's 12,300 police departments, only 78 have come under investigation under this statute.[223] DOJ action under this statute typically proceeds in five stages: case selection, initial inquiry, formal investigation, settlement negotiation, and monitored reform.[224]

"Pattern or practice" is undefined in the statute, and other sources provide "no definitive answer" regarding the definition of the term.[225] The DOJ defines "pattern or practice" as "[w]hen officers engage in unlawful conduct repeatedly or over a period of

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216. Adam J. Smith, *Police Reform through Section 1983*, 43 N. ILL. U. L. REV. 51, 64–65 (2022).

217. Miller, *supra* note 158, at 163.

218. *Id.*

219. Kim, *supra* note 23, at 772–73.

220. Silveira, *supra* note 123, at 612.

221. John Guzman, *What Is a Pattern-or-Practice Investigation? Why It's Important to Understand This Police Accountability Process — and Its Limitations*, LEGAL DEF. FUND (Mar. 8, 2023), https://www.naacpldf.org/police-pattern-practice-investigation/ [https://perma.cc/ZQP8-24EX].

222. *Id.*

223. Jason W. Ostrowe, *A Framework to Forestall Systemic Police Misconduct: Applying DOJ'S Pattern or Practice Findings to Municipal Police*, 18 POLICING 1, 1 (2024).

224. Ellen A. Donnelly & Nicole J. Salvatore, *Emerging Patterns in Federal Responses to Police Misconduct: A Review of "Pattern or Practice" Agreements over Time*, 20 CRIMINOLOGY, CRIM. JUST. L & SOC'Y 23, 25 (2019).

225. Miller, *supra* note 158, at 165.

time, the police department, as a whole, may be engaging in a pattern or practice of conduct that violates the law."[226] With respect to the number of incidents, the DOJ says only that "[a] single incident of excessive force or one unlawful stop does not establish a pattern or practice," but can be an indicator of one.[227]

In pursuing pattern-or-practice litigation, the Civil Rights Division of the Department of Justice first conducts a preliminary investigation.[228] This inquiry is typically not public.[229] If the DOJ finds systemic problems that police departments cannot fix on their own, the DOJ then conducts a formal investigation.[230] The DOJ has not publicly provided a list of indicators of systemic problems, but has historically focused on police use of force, ineffective early intervention systems, racial or ethnic bias in policing, gender bias during investigation of sexual assaults, and harm against persons with mental illness.[231] The initiation of the investigative process is highly variable by administration: the Obama Administration initiated twenty-five pattern-or-practice investigations, under the Trump Administration there were zero.[232]

If the general findings of the preliminary investigation demonstrate "signs of serious misconduct," the DOJ proceeds with a formal investigation.[233] The city and the public are noticed of this investigation.[234] The DOJ collects information from a variety of sources, including the police department and community.[235] This investigation lasts years.[236] If the DOJ finds evidence of a pattern or practice of unconstitutional police conduct, the DOJ then

226. U.S. DEP'T OF JUST., FAQ ABOUT PATTERN OR PRACTICE INVESTIGATIONS, https://www.justice.gov/d9/2023-10/pattern_or_practice_investigation_faqs_english.pdf [https://perma.cc/MBF6-DCQB].

227. *Id.*

228. Norman, *supra* note 22, at 277.

229. Donnelly & Salvatore, *supra* note 224, at 25.

230. *Id.* at 277–78.

231. POLICE EXEC. RSCH. FORUM, CIVIL RIGHTS INVESTIGATIONS OF LOCAL POLICE: LESSONS LEARNED (2013), https://www.policeforum.org/assets/docs/Critical_Issues_Series/civil%20rights%20investigations%20of%20local%20police%20-%20lessons%20learned%202013.pdf [https://perma.cc/W9M4-PECH].

232. Smith, *supra* note 216, at 68.

233. Donnelly & Salvatore, *supra* note 224, at 25.

234. Silveira, *supra* note 123, at 613.

235. *Id.*

236. Smith, *supra* note 216, at 66.

publishes a public report summarizing its findings.[237] Otherwise, the DOJ will "walk away" and the process ends there.[238]

If the DOJ's formal investigation produces evidence of "repeated, systematic unlawful behavior," the DOJ then files suit.[239] Historically, the DOJ's strategy has been to pursue negotiations first, resorting to litigation only when those efforts fail.[240] Thus, the DOJ has pursued consent decrees, settlements, or memoranda of understanding instead of court judgments.[241] Through these agreements, the DOJ implements a comprehensive set of provisions to bring police departments into compliance with the Constitution. To access injunctive relief, the DOJ must demonstrate "reasonable cause," but on this issue, courts are highly deferential to the judgment of the DOJ.[242] Once formally implemented, the court appoints a "special monitor" to oversee the execution of the terms and determine compliance.[243] Once the police department satisfactorily completes the requirements of the agreement, the case is closed.

A. Potential of Pattern-or-Practice Litigation

The potential of pattern-or-practice litigation is the power of federal action to enforce civil rights despite state and local obstacles. As political scientist Robert Mickey observed, outside intervention by the federal government and national Democratic party were necessary to democratize the southern states by breaking the post-secession consolidation of power under white supremacist minority rule in "authoritarian enclaves."[244] For Mickey, key events in the decades-long timeline of democratization included the Supreme Court decisions *Smith v. Allwright*, *Brown v. Board of Education*, and *Cooper v. Aaron*; the passing of the 1964

237. *Id.*

238. Silveira, *supra* note 123, at 613.

239. Norman, *supra* note 22, at 278 ("[A] cause of action is only substantiated when investigations reveal repeated, systematic unlawful behavior including, but not limited to, patterns of excessive use of force, promotion systems rewarding those who engage in excessive force, and systems suppressing citizen complaints against officers.").

240. Kim, *supra* note 23, at 773.

241. Donnelly & Salvatore, *supra* note 224, at 25. While consent decrees are typically overseen and enforceable by federal courts, memoranda of understanding usually are not. *Id.*

242. Miller, *supra* note 158, at 180.

243. Smith, *supra* note 216, at 66.

244. ROBERT MICKEY, PATHS OUT OF DIXIE: THE DEMOCRATIZATION OF AUTHORITARIAN ENCLAVES IN THE DEEP SOUTH, 1944-1972, at 33–34, 55, 61–63 (Princeton Univ. Press 2015).

Civil Rights Act and the 1965 Voting Rights Act; the embrace of racial equality in the national Democratic party; and the deployment of U.S. Marshals to protect Black students and vindicate their right to an education.[245] These watershed victories were accomplished by effective pressure and "good trouble" by movement lawyers such as Thurgood Marshall in radical legal organizations, political activists such as Fannie Lou Hamer in Democratic splinter parties, and all participants young and old in the mass mobilization of the Civil Rights Movement.[246] Federal action was forced by the overwhelming courage and sacrifice of these individuals, all of whom faced overwhelming state repression. Mickey's description of the twenty-year battle largely between the NAACP and the Texas legislature in the lead-up to *Smith v. Allwright* is a case study for how strategic and aggressive civil rights litigation can challenge and change democratic failures.[247]

In 1927, the Supreme Court in *Nixon v. Herndon* overturned a Texas statute that banned Black people from voting in the state's Democratic party primaries.[248] The Texas legislature responded by passing a statute that allowed political parties' executive committees to determine membership qualifications, and inevitably, the Texas Democratic party passed a rule forbidding Black Texans from voting in primary elections.[249] The Supreme Court struck down the statute in *Nixon v. Condon*, but, by limiting the extension of constitutional voting rights to "state action," the ruling lacked foresight that white-only primaries in single-party states violated voting rights whether the restriction came from the party or the state.[250] The Texas Democratic Party did just that, passing an internal rule prohibiting Black people from participating.[251]

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245. *Id.* at 62–63.

246. Kenneth T. Andrews & Kay Jowers, *Lawyers and Embedded Legal Activity in the Southern Civil Rights Movement*, 40 L. & POL'Y 10 (2018); Susan Johnson, *Fannie Lou Hamer: Mississippi Grassroots Organizer*, 2 UCLA NAT'L BLACK L.J. 155 (1972); Juliet R. Aiken, Elizabeth D. Salmon & Paul J. Hanges, *The Origins and Legacy of the Civil Rights Act of 1964*, 28 J. BUS. PSYCH. 383, 388 (2013) ("Following mass protests in the African American community and subsequent violent responses, Kennedy laid the groundwork for a civil rights bill in a series of speeches over the summer of 1963.") (citing SUSAN WRIGHT, THE CIVIL RIGHTS ACT OF 1964: LANDMARK ANTIDISCRIMINATION LEGISLATION (2005)).

247. MICKEY, *supra* note 244, at 96. Note that the institution of the white-only primary was present not just in Texas but throughout the South. *Id.* at 412–13 n.5.

248. Nixon v. Herndon, 273 U.S. 536 (1927); MICKEY, *supra* note 244, at 97.

249. MICKEY, *supra* note 244, at 97.

250. *Id.* at 98–99; Nixon v. Condon, 286 U.S. 73 (1932).

251. MICKEY, *supra* note 244, at 98.

In the 1935 case *Grovey v. Townsend*, the Court upheld the Texas Democratic Party's ability to exclude Black people from party primaries on the basis it was not "state action."[252] Six years later, the Department of Justice's Civil Rights Section created the ground to walk back *Grovey* in *U.S. v. Classic*, where the Court found that a primary was within the definition of an "election" for purposes of Article 1, Section 4 of the Constitution.[253] The state NAACP chapter successfully persuaded the national NAACP chapter to litigate *Smith v. Allwright*—before, the Texas NAACP were fighting the battle for voter rights in defiance of the national NAACP.[254] This was the decisive moment: a coalition of activist legal organizations submitted briefs in amicus curiae, including the National Lawyers Guild, the American Civil Liberties Union, and the Workers' Defense League (but, notably, not the Department of Justice).[255] The Court's holding finally outlawed the white-only primary. The Court held that the party primary was an integral feature of Texas' elections because Texas excluded losing primary candidates from general elections.[256] Though the short-term impact of this ruling was limited by white supremacist mob violence and repression of Black voters, *Smith v. Allwright* was the bedrock for subsequent challenges to the power of Southern authoritarian rulers.[257]

This historical anecdote demonstrates the power of federal action. Where communities mobilize into movements but fail to overcome barriers at the state and local level, the federal government can weigh in to break the tie. Here, the work of the Department of Justice's Civil Rights Section—the same division that works on pattern-or-practice litigation—laid the groundwork for successful strategic litigation brought by movement lawyers in the NAACP and supported by a coalition of progressive and radical legal organizations. The legal victory in this case produced political power for Black people in the southeastern states. For pattern-or-practice litigation, this historical narrative is aspirational. Federal actors can support movements calling for accountability for police violence to overcome local and state obstacles. As will be shown in the case study of Portland, activists sometimes call for the DOJ to act when confronted by the limitations of local systems. This

252. *Id.*; Grovey v. Townsend, 295 U.S. 45 (1935).

253. United States v. Classic, 61 U.S. 1031 (1941); MICKEY, *supra* note 244, at 98, 414 n.13.

254. MICKEY, *supra* note 244, at 98.

255. *Id.* at 100, 414 n.15.

256. Smith v. Allwright, 321 U.S. 649 (1944); MICKEY, *supra* note 244, at 99.

257. MICKEY, *supra* note 244, at 62–63.

organizing base provides good conditions for implementing lasting reform, but only if community actors are treated as equal partners.

B. Pitfalls of Pattern-or-Practice Litigation

Existing research has discussed many limitations of pattern-or-practice litigation: capacity,[258] cost,[259] lack of resilience to change in administration,[260] among others. This Note focuses on one: the lack of buy-in from community stakeholders.

Community groups may join the DOJ in pattern-or-practice litigation in their cities as intervenors. Under Rule 24 of the Federal Rules of Civil Procedure, there are two kinds of intervenors: intervenors of right and permissive intervenors.[261] Intervenors of right must be allowed to intervene if one of two conditions are true. First, that the prospective intervenor has an unconditional right to intervene provided by a federal statute.[262] Second, that they have a protectable interest related to the litigation, that interest may be harmed by the litigation, and the parties to that litigation do not "adequately represent" the prospective intervenor's interest.[263] The court has discretion to allow an outside nongovernmental party to join litigation as a permissive intervenor if one of two conditions are true. First, that the prospective intervenor has a conditional right to intervene by federal statute.[264] Second, that the prospective intervenor has a claim that has a common question of law or fact to the original claim.[265] Intervenors of right and permissive intervenors may only join if that party's intervention will not "unduly delay or prejudice" the original party's case.[266]

Much ink has been spilled about the phenomenon of "depolicing," a form of "dissent shirking" where police reduce

258. Smith, *supra* note 216, at 68 ("[E]ven a reform-minded administration cannot account for every instance of unconstitutional policing.").

259. Mark Puente & Cid Standifer, *Federal Oversight of Police Has Cost Cleveland Millions. What's Changed?*, MARSHALL PROJECT (Sept. 12, 2022).

260. Smith, *supra* note 216, at 68 ("Still, the statute suffers a number of significant flaws. First, and most damningly, its enforcement depends entirely on whether a presiding administration is sympathetic to police reform."); *see also* Jessica Huseman & Annie Waldman, *Trump Administration Quietly Rolls Back Civil Rights Efforts Across Federal Government*, PROPUBLICA (June 15, 2017).

261. FED. R. CIV. P. 24.

262. *Id.* 24(a)(1).

263. *Id.* 24(a)(2).

264. *Id.* 24(b)(1)(A).

265. *Id.* 24(b)(1)(B).

266. *Id.* 24(c).

performance of their duties in protest of increased oversight.[267] This phenomenon is where police react to oversight or criticism by the public by withholding necessary protection from that public.[268] Depolicing—and the associated increase in violent crime—is thought to be a common phenomenon in the early years of pattern-or-practice litigation.[269] Because of these concerns, the Department of Justice has often avoided challenging provisions in police collective bargaining agreements despite their contribution to police violence.[270] This is a concern for the capacity of the DOJ: the DOJ has limited resources and depends on buy-in by police departments

267. Joshua Chanin & Brittany Sheats, *Depolicing as Dissent Shirking: Examining the Effects of Pattern or Practice Misconduct Reform on Police Behavior*, 20 CRIM. JUST. REV. 1, 3 (2017) ("The logic of depolicing is well recognized in the organizational behavior literature. As a form of dissent shirking, this behavior 'stems directly from an organization member's opposition to some policy. Not working thus serves as silent protest.'").

268. O'Rourke, *supra* note 91, at 1350 ("The phenomenon of 'de-policing' further illustrates how rank-and-file culture can stymie reforms . . . when police are criticized by the public they police, they close ranks and leave that public unprotected. In short, it is democratic supervision that police culture finds particularly intolerable.") (emphasis omitted).

269. Statistical evidence suggests depolicing reactions are present in police departments subject to pattern-or-practice litigation in the immediate years, then decline over time, but this claim is contested. *Compare* Stephen Rushin & Griffin Sims Edwards, *De-Policing*, 102 CORNELL L. REV. 722 (2017), *with* Chanin & Sheats, *supra* note 267. Whether depolicing causes increases in violent crime is a controversial question, and statistical evidence suggests that depolicing is associated with no statistical effect on instances of violent crime. *See* Richard Rosenfeld, *Is De-Policing the Cause of the Spike in Urban Violence? Comment on Cassell*, 33 FED. SENT'G REP. 142, 143 (2020) ("In summary, Professor Cassell has not made a convincing case for de-policing as the primary source of the recent increase in urban violence in the United States."); John A. Shjarback, David C. Pyrooz, Scott E. Wolfe, & Scott H. Decker, *De-Policing and Crime in the Wake of Ferguson: Racialized Changes in the Quantity and Quality of Policing Among Missouri Police Departments*, 50 J. CRIM. JUST. 42, 42 (2017) ("Changes in police behavior had no appreciable effect on total, violent, or property crime rates."); Richard Rosenfeld & Joel Wallman, *Did De-Policing Cause the Increase in Homicide Rates?*, 18 CRIMINOLOGY & PUB. POL. 51 (2019). Whether the phenomenon of depolicing actually occurs or produces these harms is immaterial for purposes of this argument.

270. Stephen Rushin & Allison Garnett, *State Labor Law and Federal Police Reform*, 51 GA. L. REV. 1209, 1224–25 (2017) ("Given the obstacles that certain police union contracts may pose for § 14141 reform efforts, some may wonder—why doesn't the DOJ simply challenge the terms of collective bargaining agreements as contributing to a pattern of unconstitutional misconduct? Why is it that, generally, the DOJ has been reluctant to try and immediately reform the police union contract? . . . . In order to be successful, federal officials need frontline officers to buy in to the reform process."); *see id.* at 1220 ("[B]ringing about constitutional reform in police departments may require not just changes in leadership and enhanced training, but also a renegotiation of internal disciplinary procedures via the collective bargaining process.") (footnotes omitted); Fisk & Richardson, *supra* note 179, at 758 ("[C]ollective bargaining agreements, including seniority systems, union power over conditions of work, and the structure and incentives of police unions can all be barriers to reform.").

to institute reform.[271] But the DOJ does not depend only on police buy-in. The DOJ and the police depend on community buy-in. But there has been astoundingly little discussion of the lack of involvement of community stakeholders, including groups from the protected classes in whose name the DOJ acts.

As Derrick Bell observed of post-*Brown v. Board of Education* school desegregation litigation, political-economy problems limit the democratic representativeness of civil rights representation.[272] The group affected by civil rights litigation is not the group that decides the course of that litigation.[273] Bell adopts a distinction between "clients" and "constituents."[274] Clients are the people on whose behalf civil rights attorneys act, including named plaintiffs in and communities affected by civil rights litigation.[275] Constituents are the people the attorney must answer to for their actions, identifiable by who directly decides the goals of litigation with the attorney.[276] In school desegregation litigation, white people and middle-class Black people were the constituents, while lower-class Black parents and children were "merely clients."[277] Though civil rights attorneys owed ethical obligations to the clients and classes they represented, these obligations necessarily gave way to financial obligations to attorneys' employer organizations (who were themselves beholden to upper-class donors).[278] Therefore, middle- and upper-class donors had the power to steer the goals of

271. Rushin, *supra* note 195, at 1224–25.

272. Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L. J. 470, 514 (1976) ("'[R]ule' change, without a political base to support it, just doesn't produce any substantial result because rules are not self-executing: they require an enforcement mechanism.").

273. *Id.* at 491 ("Edmonds suggests that, more than other professionals, the civil rights attorney labors in a closed setting isolated from most of his clients. No matter how numerous, the attorney's clients cannot become constituents unless they have access to him before or during the legal process.").

274. *Id.* at 490–91.

275. *Id.*

276. *Id.*

277. *Id.*

278. Bell, *supra* note 272, at 504 (citations omitted) ("The *Code* approach . . . is simply the wrong answer to the right question in civil rights offices where basic organizational policies where basic organizational policies such as the goals of school desegregation are often designed by lawyers and then adopted by the board or other leadership group . . . . Admonitions that the lawyer make no important decisions without consulting the client and that the client be fully informed of all relevant considerations are, of course, appropriate. But they are difficult to enforce in the context of complex, long term school desegregation litigation where the original plaintiffs may have left the system and the members of the class whose interests are at stake are numerous, generally uninformed, and, if aware of the issues, divided in their views.").

school desegregation litigation that clients and communities did not.[279] The outcome was, Bell charges, that organizations' donor-driven interests eclipsed the interest of clients.[280]

Bell's solution to inadequacies in civil rights representation is twofold. First, courts ought to vigilantly monitor class action civil rights litigation and step in to make inquiries "on behalf of large classes unable to speak effectively for themselves."[281] Second, courts ought to recognize that inadequate democratic representativeness translates to inadequate legal representation and allow themselves to hear dissident views from community groups with legal representation by granting them intervenor status.[282]

For many of the cities under consent decrees, Washington D.C. is as physically and metaphorically inaccessible as the civil rights organizations described in Bell's work.[283] The Department of Justice has increased space for community groups over time, most promisingly requiring a Community Police Commission in the City of Seattle.[284] While these reforms are laudable, the DOJ has continued to resist community groups' intervention in litigation undertaken in their name.[285] In several cities where DOJ pursued

279. *Id.* at 491 (quoting Edmonds, *Advocating Inequity: A Critique of the Civil Rights Attorney in Class Action Desegregation Suits*, 3 BLACK L.J. 176, 178 (1974)) ("[A] class action suit serving only those who pay the attorney fee has the effect of permitting the fee paying minority to impose its will on the majority of the class on whose behalf suit is presumably brought."); *id.* at 489–90 ("The lawyers' freedom to pursue their own ideas of right may pose no problems as long as both clients and contributors share a common social outlook. But when the views of some or all of the clients change, a delayed recognition and response by the lawyers is predictable."); *id.* at 500 ("Although a plaintiff could withdraw from the suit at any time, he could not influence the primary goals of the litigation. Except in rare instances, policy decisions were made by the attorneys, often in conjunction with the organizational leadership and without consultation with the client.").

280. *Id.* at 492 ("The position of the established civil rights groups obviates any need to determine whether a continued policy of maximum racial balance conforms with the wishes of even a minority of the class.").

281. *Id.* at 511.

282. *Id.* at 508–09 ("These problems can be avoided if, instead of routinely assuming that school desegregation plaintiffs adequately represent the class, courts will apply carefully the standard tests for determining the validity of class action allegations and the standard procedures for protecting the interests of unnamed class members. Where objecting members of the class seek to intervene, their conflicting interests can be recognized under the provisions of Rule 23(d)(2).").

283. *See* Bell, *supra* note 272, at 513 ("In the closest of lawyer-client relationships this continual reexamination can be difficult; it becomes much harder where much of the representation takes place hundreds of miles from the site of the litigation.").

284. Ayesha Bell Hardaway, *Creating Space for Community Representation in Police Reform Litigation*, 109 GEO. L. J. 523, 539 (2021).

285. *Id.* at 548 ("The presumption that a governmental authority can speak for marginalized communities impacted by police violence promotes paternalistic, hierarchal principles that are antithetical to contemporary notions of democracy.").

pattern-or-practice litigation against a police department, a community organization attempted to intervene under Federal Rules of Civil Procedure 24 to be party to the litigation.[286] Every attempt has been opposed by the DOJ and rejected by the court.[287] The DOJ shoots itself in the foot by doing so—without partners to continue litigation when it lacks the political capital or will, progress is stalled or reversed.

Ayesha Bell Hardaway powerfully and persuasively argues that the problem is that courts are failing to "appropriately consider whether impacted communities are adequately represented in DOJ-initiated police reform litigation" under existing case law.[288] Applying *Trbovich v. United Mine Workers of America*, the standard under Rule 24(a) is that the original parties "may be" inadequate representatives of the prospective intervenor's interests.[289] In police civil rights litigation, the presumption that the government inherently adequately represents prospective intervenors' interests ought to be rebutted because adequate representation requires more than merely shared general interest, the federal government is unlikely to make the arguments of impacted communities, and the federal government has historically neglected the perspectives and experiences of community groups harmed by police.[290] To the extent that the law does not, scholars have argued that the law should change to give community stakeholders a seat at the table in the consent decree process.[291] Sigourney Norman has proposed a "legal mechanism compelling police departments to set a concurrent agreement with stakeholder groups."[292]

C. Promise of Pattern-or-Practice Litigation

Despite the failure of pattern-or-practice litigation to bridge the "grey hole" in police accountability, this is not to say legal

286. *Id.* at 526; Patel, *supra* note 38, at 879.

287. Patel, *supra* note 38, at 879.

288. Hardaway, *supra* note 284, at 531.

289. *Id.* at 568.

290. *Id.* at 569–74.

291. *Id.*

292. Norman, *supra* note 22, at 290 ("The amendment to § 14141 would read: Any department entering a memorandum of agreement or consent decree with the United States government will enter a concurrent agreement with stakeholder groups from its jurisdiction. The stakeholder agreement shall include as plaintiffs both groups representing police and groups representing community civil rights advocates. The stakeholder agreement will remain in effect until the settlement agreement or consent decree closes.").

strategy is not a powerful tool to achieve system change.[293] At critical moments, sleepless movement lawyers have achieved hard-won victories for clients and communities despite the law being stacked against them. While it may seem difficult to imagine with the composition of our courts today, history shows that they once provided leverage to build the political power of the Civil Rights Movement. But movements must be realistic in what they can expect from law and be deliberate in how they use law in broader strategy.

Pattern-or-practice litigation has such promise. Paul Butler observed that pattern-or-practice litigation can create *stronger* protections than would otherwise be afforded under existing law.[294] As Butler observed, while law can create false consciousness by creating impossibly high expectations, it can also defeat false consciousness by demonstrating that people in movement can change the status quo.[295] In the context of pattern-or-practice litigation, Portland demonstrates how movements can use legal coalitions as a vector to build power by moving to intervene in pattern-or-practice litigation and turn them into spaces of meaningful contestation. While pattern-or-practice litigation on its own is not sufficient to end police violence or provide accountability, it is powerful and influential. Although law is not a panacea to police violence, movements can use law as a platform to challenge police violence and should learn from the Albina Ministerial Alliance Coalition's troubles and triumphs in intervening in pattern-or-practice litigation.[296]

Community groups can use their position in the litigation to their advantage. Pattern-or-practice litigation does not have some of the same limitations that block change in other areas. The DOJ process is conciliatory—prioritizing negotiation—and it is integral that community voices demand to be included in highly consequential decision-making regarding their public safety.[297]

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293. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 5 (2008, 2nd ed.).

294. Butler, *supra* note 113, at 119–20 (detailing that the Ferguson consent decree provides stronger protections than United States v. Whren, Atwater v. City of Lago Vista, Pennsylvania v. Mimms, Schneckloth v. Bustamonte, and United States v. Drayton).

295. *Id.* at 123, 127.

296. *See* discussion *infra* Part IV.

297. DEPARTMENT OF JUSTICE, HOW DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION CONDUCTS PATTERN-OR-PRACTICE INVESTIGATIONS, https://www.justice.gov/archives/file/how-pp-investigations-work/dl

Community groups can counter police unions' involvement and work towards ensuring subsequent agreements have real teeth.[298] Perhaps most importantly, community groups in the room can resist the terms and implementation of the litigation becoming another obstacle to abolitionist futures.[299]

Through their legal work, community groups can raise consciousness about police violence. Where litigation succeeds, community groups can show that movement has the power to challenge and change the power of police. Where litigation fails, community groups can show the shortcomings of reform through the highly publicized litigation process. The legal work may also be an end in itself: community groups can unite the broad coalitions precedent to actualizing a truly democratic vision of public safety.

One objection may be that participation in pattern-or-practice litigation may be seen as legitimating police violence. The argument follows that if police violence is illegitimate because of a lack of democratic accountability, then participating in systems that have the power to create accountability will create the democratic smokescreen to contend those policies have consent of the communities they are used against. Sunita Patel responds that "[r]ather than viewing the various methods of police reform as consensus building, legitimizing, or transparency mechanisms . . . community engagement elevates the role of stakeholders and affected individuals through a *contested* process."[300] As shown by the Albina Ministerial Alliance Coalition's work in Portland, community groups can elevate the salience of constituencies and issues that may have been passed over during the DOJ's investigation and negotiation.[301] However, there is a theoretical limit to community groups' participation. By getting involved in pattern-or-practice litigation, community groups can

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[https://perma.cc/TTP7-YA38] ("If an investigation reveals patterns or practices of unlawful policing, the division will seek to work with the department, with input from community stakeholders, to effectively and sustainably remedy any unlawful practices. This usually takes the form of a negotiated agreement that incorporates specific remedies and that becomes a federal court order overseen by an independent monitor.").

298. Hardaway, *supra* note 284, at 577.

299. *See* Mike Carter, *Federal judge to Seattle City Council: Tread Carefully with Efforts to Defund Police or Risk Violating Consent Decree*, SEATTLE TIMES (Feb. 4, 2021), https://www.seattletimes.com/seattle-news/federal-judge-to-seattle-city-council-tread-carefully-with-efforts-to-defund-police-or-risk-violating-consent-decree/ [https://perma.cc/L8Z5-E2WD] (detailing how a federal court obstructed efforts to defund the police in Seattle).

300. Patel, *supra* note 38, at 798 (emphasis in original).

301. *See* discussion *infra* Part IV.

advantage their position to try to reduce police violence, contain police violence, and limit police violence, but they cannot eliminate police violence.

IV. Case Study: Portland

In response to the killing of Aaron Campbell, a Black man experiencing a mental health crisis when grieving the loss of his brother, community groups called for change. System actors responded to community demands by taking the laudable step of requesting the assistance of the DOJ, and the DOJ responded. However, the DOJ made a shocking decision to exclude race from its lawsuit, despite the intersectionality of race and mental health in the killing of Aaron Campbell. In this context, *U.S. v. City of Portland*, where the district court decided whether community groups could intervene in the process, became a critical inflection point. If the community groups were entitled to a seat at the table, they would be able to make the DOJ respond to their demands or provide a good reason why they hadn't and secure their gains against the police union. Instead, the Court granted the community groups only "enhanced *amicus*" status.[302]

The outcome of the DOJ litigation in Portland was a settlement that provided for some concessions to community groups, such as community involvement in police oversight. This was a step in the right direction. But these reforms failed to live up to their potential. Violence by the Portland Police Bureau continued and escalated in the police violence against nonviolent demonstrations in 2020. Portland is still under court oversight and enforcement of the settlement.[303] This case study aspires to be a "history from the bottom up" of the Portland police reform litigation process.[304] It does so by centering the activism in community groups in spurring the DOJ to take action against Portland Police and how those same groups formed a coalition to participate in the litigation process. Despite the DOJ resisting if not blocking community demands, this coalition used the DOJ litigation as a powerful platform for increasing the salience of community demands.

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302. *See* discussion *infra* Part IV.D.

303. *See* Courtney Vaughn, *Portland Settles Lawsuit With Journalists, Legal Observers Targeted By Police During Protests*, PORTLAND MERCURY (Mar. 5, 2025), https://www.portlandmercury.com/news/2025/03/05/47675016/portland-settles-lawsuit-with-journalists-legal-observers-targeted-by-police-during-protests [https://perma.cc/E3G8-VRHP] ("The DOJ found PPB ran afoul of a longstanding consent decree it has with the federal government.").

304. *See* STAUGHTON LYND, DOING HISTORY FROM THE BOTTOM UP xi–xvii (2014).

A. Existing Systems Failed to Provide Accountability for the Killing of Aaron Campbell by Portland Police.

On January 29, 2010, Portland Police responded to a call that a man named Aaron Campbell was experiencing a mental health crisis.[305] He was despondent over the death of his brother that same morning and was threatening suicide.[306] During constructive dialogue with Officer James Quackenbush, Campbell "specifically and emphatically said he was not going to hurt himself or anyone else."[307] Campbell left his apartment and approached police outside with his hands on the back of his head.[308] Officer Ryan Lewton told him to "do exactly as we say, or you will be shot."[309] Lewton commanded Campbell to put his hands straight up in the air, but Campbell kept his hands behind his head.[310] Lewton fired a beanbag round at Campbell's lower back.[311] Campbell began to run back to his apartment. Lewton fired six more beanbag rounds.[312] Officer Ron Frashour fired a round from an AR-15, striking Campbell in the back.[313] Frashour had a history of excessive force

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305. *Aaron Campbell: Officer-Involved Shooting Summary,* PORTLAND.GOV, https://www.portland.gov/police/open-data/aaron-campbell [https://perma.cc/7D5P-QQSY].

306. Maxine Bernstein, *Portland Police Told Aaron Campbell's Mother That Her Son Committed Suicide Though Police Shot Him, Court Records Say*, THE OREGONIAN (Mar. 18, 2011), https://www.oregonlive.com/portland/2011/03/portland_police_told_mother_of.html [https://perma.cc/YLG8-HDZX].

307. Letter from Grand Jury 1 Session 1 2010 to Michael D. Schrunk, Dist. Att., Portland, Or. (Feb. 10, 2010) (on file with The Oregonian).

308. *Aaron Campbell: Officer-Involved Shooting Summary*, *supra* note 305.

309. Portland Police Bureau, Taped Statement Transcription: Officer Ryan Lewton, Case No. 10-8352, at 20 (Jan. 29, 2010) [hereinafter Lewton Transcript] (on file with the City of Portland). The transcript details the exchange further:

> Kammerer: Okay.
>
> Lewton: I tell him, "stop", and he stops, right about here. And I said, "walk backwards, slowly". So, he starts walking backwards slowly, to about right here. And I tell him to "stop". I said, I told him, "do exactly as we say, or you will be shot".

Id.

310. *Id.* at 21 ("Lewton: But, I told him again, 'put your hands straight up in the air'. Um, and he didn't do that. He did not put his hands straight up in the air. He just stood there with his hands behind his head. Okay. So, I shot him with the bean bag gun. I-I-I fired a round at him, I-I-um, I uh, my first round, um, um, hit in the, hit in the rearend.").

311. *Id.*

312. *Id.* at 23. ("Kammerer: Okay. So, uh, how many rounds in total did you fire at him? Lewton: Six.").

313. Portland Police Bureau, Taped Statement Transcription: Officer Craig Andersen, Case No. 10-8352, at 10 (Jan. 29, 2010) [hereinafter Andersen transcript]

against civilians.[314] Campbell fell forward and did not receive medical care for a half hour.[315] He was left on wet pavement, and when officers approached to administer aid, they handcuffed his hands behind his back.[316] By that point, Aaron Campbell had died. He was twenty-five years old.

Administrative paths for accountability failed.[317] Frashour claimed he thought Campbell was reaching for a gun and running for cover to fire at police.[318] In fact, Campbell was unarmed and posed no threat to police.[319] In November 2010, Portland Police Chief Reese terminated Frashour's employment and disciplined other officers.[320] The Portland Police Association—the police union—filed a grievance challenging the firing, and an arbitrator ordered the city to rehire Frashour.[321] The city refused to comply with the order.[322] The Portland Police Association then went to the Oregon state Employment Relations Board, which ordered the city

(on file with the City of Portland) ("Foulke: Okay. How, how quickly after the, the, the shot was fired did SERT arrive? Any, any idea? Andersen: I have no idea. I, I would guess a half an hour maybe.").

314. Brief for the Albina Ministerial Coalition Alliance for Justice and Police Reform as Amicus Curiae in the public interest, Portland Police Association v. City of Portland (June 8, 2012) (No. UP-023-12) [hereinafter AMA Amicus Brief 2012].

315. James Pitikin, *"We're Better Than All This" And Nine Other Things We've Learned in the Past Week About the Fatal Police Shooting of Aaron Campbell* (Feb. 23, 2010), https://www.wweek.com/portland/article-11686-were-better-than-all-this.html [https://perma.cc/RF8J-UBBG].

316. Lisa Loving, *Slim Chance for Civil Rights Remedy in Campbell Case*, THE SKANNER (Feb. 25, 2010), https://www.theskanner.com/news/17-news/northwest/6697-slim-chance-for-civil-rights-remedy-in-campbell-case-2010-02-25 [https://perma.cc/28MZ-6BC3].

317. KGW Staff, *$1.2M Settlement in Campbell Police Shooting*, KGW 8 (Feb. 2, 2012), https://www.kgw.com/article/news/12m-settlement-in-campbell-police-shooting/283-414042077 [https://perma.cc/RR7H-E4AS].

318. Portland Police Chief Mike Reese later testified that Campbell posed no immediate threat to police. Maxine Bernstein, *Aaron Campbell Wasn't an Immediate Threat, Portland Police Chief Testified, so Officer Ron Frashour Didn't Have a Right to Shoot Him*, THE OREGONIAN (June 13, 2012), https://www.oregonlive.com/portland/2012/06/aaron_campbell_wasnt_an_immedi.html [https://perma.cc/XBG6-E9JQ].

319. *Id.*

320. Press Release, Portland Police Bureau, Statement from Chief Michael Reese on the Death of Aaron Campbell (Nov. 16, 2010) (on file with OregonArchive).

321. Maxine Bernstein, *Arbitrator Orders Portland Reinstate Ronald Frashour as an Officer, With Lost Wages*, THE OREGONIAN (Mar. 30, 2012), https://www.oregonlive.com/portland/2012/03/arbitrator_orders_portland_rei.html [https://perma.cc/844R-2EWT].

322. Maxine Bernstein, *Portland Mayor Won't Honor Arbitrator's Ruling to Reinstate Ronald Frashour as a PPB Officer*, THE OREGONIAN (Apr. 12, 2012), https://www.oregonlive.com/portland/2012/04/portland_mayor_wont_honor_arbi.html [https://perma.cc/Q4C8-JKXJ].

to comply.[323] The union won again at the Oregon Court of Appeals.[324] Fashour returned to work in 2016.[325]

In February 2010, a grand jury declined to indict Frashour, though the jury members released a spirited letter declaring "[n]o one person is responsible for this tragedy, and the errors of many people in the PPB need to be identified and addressed" and that "Portland deserves better. Aaron Campbell deserved better."[326] Aaron Campbell's death was a "[t]urning point for Portland Police accountability."[327]

B. Community Groups Demand Accountability for the Killing of Aaron Campbell.

Community groups' reaction to the grand jury's refusal to hold Officer Frashour accountable was the impetus for the subsequent DOJ litigation.[328] These community groups provided a strong political base for DOJ action, and DOJ had the mandate and the authority to correct for the failures of existing systems. These groups became critical actors in the community response and prospective intervenors in the legal proceedings against the violence of the Portland Police Bureau:

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323. Maxine Bernstein, *State Employment Board Orders City of Portland to Reinstate Ron Frashour*, THE OREGONIAN (Sept. 24, 2012), https://www.oregonlive.com/portland/2012/09/state_employment_board_orders.html [https://perma.cc/T5C3-XZFA].

324. Everton Bailey Jr., *Portland Must Rehire Cop Fired After Killing Unarmed Man in 2010, Court Rules*, THE OREGONIAN (Dec. 30, 2015), https://www.oregonlive.com/portland/2015/12/portland_must_rehire_cop_fired.html [https://perma.cc/84VX-8YTZ].

325. *Aaron Campbell: Officer-Involved Shooting Summary*, *supra* note 305.

326. Letter from Grand Jury, *supra* note 312, at 3.

327. PORTLAND OCCUPIER, *Aaron Campbell's Death: Six Years on from the Turning Point for Portland Police Accountability* (Feb. 3, 2016), https://www.portlandoccupier.org/2016/02/03/aaron-campbells-death-six-years-on-from-the-turning-point-for-portland-police-accountability/ [https://perma.cc/NU8Q-QM7Z]; *see also* Steve Duin, *Portland Police Training Leaves Many of Us Fuming After Shooting Death*, THE OREGONIAN (Feb. 3, 2010), https://www.oregonlive.com/news/oregonian/steve_duin/2010/02/portland_police_training_leave.html [https://perma.cc/D9XK-HFEG]; *"Basically, we shot an unarmed black guy running away from us": Aaron Campbell Killed in Third Avoidable Sniper Shooting in Five Years*, PORTLAND COPWATCH: PEOPLE'S POLICE REPORT (2010) [hereinafter Portland Copwatch, Aaron Campbell Killed], https://www.portlandcopwatch.org/ppr50web.pdf [https://perma.cc/SQP6-J6MS].

328. Portland Copwatch, Aaron Campbell Killed, *supra* note 327 ("The community response was quick and clear: Aaron Campbell's death was unacceptable, and those responsible need to be held accountable. A series of news conferences, marches and rallies, including a gathering of over 1200 people headlined by Rev. Jesse Jackson on February 16, continued to put pressure on the City's elected leadership and the Police Bureau.").

- **Albina Ministerial Alliance Coalition on Justice and Police Reform (AMA Coalition):** This organization has its roots in the Albina Ministerial Alliance, a coalition of 125 churches with predominantly Black congregations founded in 1964 to provide a voice and social services to people of color in Northeast Portland.[329] Historically, the Albina neighborhood was the center of the Black community where police operated as colonial agents harassing residents rather than providing protection.[330] In 2003, in response to the killing of Kendra James by Portland police, the AMA Coalition rallied a number of community groups to coalesce into the Coalition on Justice and Police Reform.[331] The AMA Coalition led protests in response to police violence and the police killings of Kendra James, James Jahar Perez, and James Chasse.[332] The AMA Coalition developed a set of five demands for police accountability and follows three principles, including non-violent direct action.[333] During the

329. Rich Mealey, *Albina Ministerial Alliance (CA. 1964–*), BLACKPAST (Apr. 8, 2012), https://www.blackpast.org/african-american-history/albina-ministerial-alliance-ca-1964/ [https://perma.cc/WP7W-E9GU].

330. Leanne Claire Serbulo & Karen J. Gibson, *Black and Blue: Police-Community Relations in Portland's Albina District, 1964–1985*, 114 OR. HIST. Q. 6, 7–8 (2013) (footnotes omitted) ("In the Albina neighborhood, citizen harassment and social control were higher Police Bureau priorities than public safety. At that time, African Americans comprised more than 60 percent of some Albina District neighborhoods, yet they made up just 1 percent of Portland's 720 police officers . . . . Patterns of residential segregation and racial isolation led many residents in Albina and similar inner-city neighborhoods across the country to view their communities as internal colonies, dependent on outsiders for political and economic resources and subject to the authority of white-dominated institutions such as the school district, police, and welfare bureaucracy. After an uprising in the summer of 1967, youth worker Frank Fair spoke of a 'new awareness' among Albina youth: 'They come to realize that if Albina is going to be categorized as a colony, something separate and foreign from the city, they'll have to deal with their problems on those terms.').

331. *See* Mealey, *supra* note 329.

332. *Community Calls for Justice in Aaron Campbell Shooting*, OREGON MENTAL HEALTH ARCHIVE (Feb. 9, 2010), https://www.oregonarchive.org/community-calls-for-justice-in-aaron-campbell-shooting/ [https://perma.cc/5MZF-7CKX].

333. *AMA Community Demands 2010*, ALBINA MINISTERIAL ALL. (AMA) COALITION FOR JUST. & POLICE REFORM (Sept. 2012), https://albinaministerialcoalition.org/amademands2010.html [https://perma.cc/SR6Y-HAKY]. The AMA Coalition for Justice and Police Reform is working toward these five goals:

> 1. A federal investigation by the Justice Department to include criminal and civil rights violations, as well as a federal audit of patterns and practices of the Portland Police Bureau.
>
> 2. Strengthening the Independent Police Review Division and the Citizen Review Committee with the goal of adding power to compel testimony.

DOJ litigation, the AMA Coalition developed a set of 37 community demands.[334]

- **Portland Chapter of the National Lawyers' Guild:** This organization is the local chapter of the National Lawyers Guild, founded in 1937 in opposition to the anti-New Deal stances by American Bar Association and the ascendance of fascism.[335] The National Lawyers Guild was the first integrated bar association and is currently the nation's largest progressive legal organization.[336] In conjunction with the Albina Ministerial Alliance Coalition on Justice and Police Reform, this organization advocated for an elected, independent civilian oversight board for the police.[337]
- **Disability Rights Oregon (DRO):** This organization is the federally mandated system for protection and advocacy of people with disabilities. Disability Rights Oregon is authorized to "investigate incidents of abuse, neglect, and rights violations and pursue administrative, legal and other

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3. A full review of the Bureau's excessive force and deadly force policies and training with diverse citizen participation for the purpose of making recommendations to change policies and training.

4. The Oregon State Legislature narrowing the language of the State statute for deadly force used by police officers.

5. Establishing a special prosecutor for police excessive force and deadly force cases.

Id. The AMA Coalition follows three principles: "Embrace the five goals[,] [a]ccept the principles of non-violent direct action as enunciated by Dr. Martin Luther King, Jr., [and] [w]ork as a team in concert to achieve the goals." *Id*.

334. *Portland Police Shoot, Kill Third Person in Mental Health Crisis in 2010: Keaton Otis' Death Follows Racial Profiling; Office Injury; Campbell and Collins Justice Efforts Continue*, PORTLAND COPWATCH: PEOPLE'S POLICE REPORT (Sept. 2010), https://www.portlandcopwatch.org/PPR51/shootingsportland51.html [https://perma.cc/5ZHF-XJJU]; AMA Amicus Brief 2012, *supra* note 314.

335. NATIONAL LAWYERS GUILD FOUNDATION, A HISTORY OF THE NATIONAL LAWYERS GUILD 1937–1987, at 10 https://www.nlg.org/wp-content/uploads/2017/06/A-History-of-the-NLG-1937-1987.pdf [https://perma.cc/VC2F-879Q] ("The National Lawyers Guild aims to unite the lawyers of America in a professional organization which shall function as an effective social force in the service of the people to the end that human rights shall be regarded as more sacred then property interests.").

336. *About*, NAT'L LAWS. GUILD, https://www.nlg.org/about/ [https://perma.cc/E82P-2P94].

337. JoAnn Bowman, *Loss of Trust in Police Threatens the Safety of Officers and Citizens*, THE OREGONIAN, (Feb. 20, 2010), https://www.oregonlive.com/opinion/2010/02/loss_of_trust_in_police_threat.html [https://perma.cc/E76X-YHVA].

appropriate remedies to ensure the protection of people with disabilities."[338]

- **The Mental Health Alliance:** Formed in 2018, this organization consolidated multiple other organizations, including Disability Rights Oregon, Mental Health Association of Portland, the Portland Interfaith Clergy Resistance, and the Oregon Justice Resource Center.[339] The purpose of this organization was to join *United States v. City of Portland* as *amicus*.[340]
- **Oregon Action:** In 2006, this organization called for annual data on the racial characteristics of police encounters.[341] In 2011, they were training hundreds of community members on how to protect themselves in police interactions.[342]
- **Portland Copwatch (PCW):** The practice of "copwatching" emerged in the 1960s.[343] The Black Panthers and other civil rights organizations organized patrols of city streets, monitoring police activity with cameras and notepads.[344] Copwatching groups exploded over the past two decades and include activity such as uniformed patrols watching and recording police, court-watching, leading "Know Your Rights" trainings, and sometimes participating in political advocacy.[345] Portland Copwatch formed in 1992 in response to the killing of a 12-year-old boy by Portland Police and the Rodney King verdict that same year.[346] Since 1992, Portland Copwatch has maintained a report line for reports and complaints of "police misconduct, harassment, and/or brutality."[347] Portland Copwatch conducted foot patrols, or "beats" from 1995 to 1996, and continues to hold "Your Rights and the Police" seminars with volunteer

338. Complaint at 6, Wolfe v. Portland, 566 F. Supp. 3d 1069, (D. Or. Nov. 1, 2020) (No. 3:20-cv-01882-BR).

339. *Mental Health Alliance*, THE MENTAL HEALTH ALL., https://www.mentalhealthalliance.org/ [https://perma.cc/Z8CQ-PDSP].

340. *Id.*

341. Bowman, *supra* note 337.

342. *Id.*

343. Jocelyn Simonson, *Copwatching*, 104 CAL. L. REV. 391, 408–09 (2016).

344. *Id.*

345. *Id.* at 409–12, 423–24.

346. *About Portland Copwatch: Who is Portland Copwatch?*, PORTLAND COPWATCH, https://www.portlandcopwatch.org/whois.html [https://perma.cc/MA4V-T4GZ].

347. *Id.*

lawyers.[348] Since December 1993, Portland Copwatch has published a triannual circular called "The People's Police Report," which chronicled police violence, community actions, changes in the law, "Your Rights and the Police" cards, and critical reprints of the Police Union newsletter, "The Rap Sheet."[349] Portland Copwatch has been critical of the collective bargaining agreement with the Portland Police Bureau.[350]

The AMA Coalition called for a federal "pattern or practice" investigation into the Portland Police Bureau.[351] On February 11, 2010, the AMA Coalition on Justice and Police Reform organized a protest on the steps of the Justice Center in Portland.[352] On February 15, the editorial board of *The Skanner News* published an editorial warning readers from calling police and denouncing the militarized tools used against Aaron Campbell.[353] On February 16, Reverend Jesse Jackson, Jr. spoke to a standing-room only crowd of 1,200 people, decrying the killing of Aaron Campbell as "beneath the dignity of man . . . beneath the dignity of Oregonians . . . beneath the dignity of the citizens of Portland" and

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348. *Id.*

349. *The People's Police Report*, PORTLAND COPWATCH, https://www.portlandcopwatch.org/PPR.html [https://perma.cc/C63H-73FQ].

350. *Police Review Board to Get Some Teeth--Nine Years Later*, PORTLAND COPWATCH: PEOPLE'S POLICE REPORT (May 2010), https://www.portlandcopwatch.org/PPR50/iprreforms50.html [https://perma.cc/Q6CY-WKZY] ("Regarding the 'union' contract, PCW believes all workers have the right to collectively bargain for their wages, benefits, and safe working conditions. However, it is not appropriate for the PPA contract to direct public policy--dictating who will investigate alleged misconduct, and in particular, deadly force cases.").

351. *Department of Justice Investigates Portland Police Use of Force*, PORTLAND COPWATCH: PEOPLE'S POLICE REPORT (Sept. 2011), https://www.portlandcopwatch.org/PPR54/DOJ54.html [https://perma.cc/2ZLQ-MJ6L].

352. *Community Calls for Justice in Aaron Campbell Shooting*, *supra* note 332.

353. Bernie Foster, *Having an Emergency? Don't Call the Police*, THE SKANNER (Feb. 15, 2010), https://www.theskanner.com/opinion/commentary/6652-having-an-emergency-dont-call-the-police-2010-02-15 [https://perma.cc/D6LA-PMKE] ("The fact is, we at *The Skanner News* simply have to warn our readers away from calling the police when they are in a crisis situation. We cannot have faith that innocents won't get caught in the firing line when trigger-finger officers arrive in force. We need to start solving our own problems.") ("Each and every city leader should be aware of the special brand of fear – and repulsion – inspired by the use of police dogs against unarmed African Americans in this country. The tools Bull Connor used to beat down Civil Rights marchers, the weapons used by enslavers against those who would have escaped from bondage, police dogs have no place on the scene of a 'welfare check' on a suicidally-despondent Black man.").

calling for "a redemptive moment."[354] On February 17, protestors marched into City Hall.[355] The people, including the mother of Aaron Campbell, Marva Davis, confronted Mayor Sam Adams face-to-face.[356] On February 17, a special meeting of the Citizen Review Committee, a city police oversight board, heard the excessive force case of Frank Waterhouse, who had been tased by Ron Frashour.[357] On February 19, a group marched to Portland State University and confronted Attorney General John Kroger.[358] Though Kroger denounced the police and acknowledged the power of the community response, the crowd was angered that Kroger's Civil Rights Division did not have statutory jurisdiction to take legal action against the Campbell killing.[359] On February 20, JoAnn Bowman, executive director of Oregon Action, called for many systemic changes including revising the Police Bureau's union contract.[360]

C. The Department of Justice Responds to Community Demands and Investigates the Portland Police

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354. Helen Jung, *Jesse Jackson Says Shooting of Aaron Campbell Was an 'Execution'*, THE OREGONIAN (Feb. 17, 2010), https://www.oregonlive.com/news/2010/02/portland_commissioner_dan_salt.html [https://perma.cc/5G69-ZYNM]; *Rev. Jesse Jackson Coming to PDX in Light of Latest Police Shooting*, STREET ROOTS (Feb. 14, 2010), https://www.streetroots.org/news/2010/02/14/rev-jesse-jackson-coming-pdx-light-latest-police-shooting [https://perma.cc/7JZ3-N678]; *see also*; Bowman, *supra* note 337.

355. Bowman, *supra* note 337.

356. Portland Copwatch, Aaron Campbell Killed, *supra* note 327; Jim Lockhart, *Outraged Citizens Storm Portland City Hall*, YOUTUBE (Feb. 18, 2010), https://www.youtube.com/watch?v=r2IfRQNlQZA [https://perma.cc/TVF8-3KWH].

357. *Citizen Review Committee Holds 3 Hearings, Finds Excessive Force Against Shooter Cop Conducts Community Forum Despite "Pushback," Advocates for Stronger Independent Review*, PORTLAND COPWATCH: PEOPLE'S POLICE REPORT (May 2010), https://www.portlandcopwatch.org/PPR50/ipr50.html [https://perma.cc/43WX-S8SZ].

358. Portland Copwatch, Aaron Campbell Killed, *supra* note 327; Maxine Bernstein, *Aaron Campbell Protesters Want New Laws on Police Use of Deadly F xorce*, THE OREGONIAN (Feb. 24, 2010), https://www.oregonlive.com/portland/2010/02/campbell_protesters_press_legi.html [https://perma.cc/RN2A-EFLB].

359. Loving, *supra* note 316 (citing "longtime community organizer" Kathleen Sadat, who said, "The police are protected by the union and by the bureaucracy — and that leaves us at the whim of the man with the gun").

360. Bowman, *supra* note 337, ("Revise the Police Bureau's union contract, which expires June 30, to require mandatory and immediate drug testing for all officers involved in use-of-force incidents; annual evaluations of police officers; tracking and documentation of all disciplinary activities, including verbal and written reprimands and suspensions, and reporting them in reviews for promotions and/or reassignments; and reporting annually to the public.").

Bureau but Does Not Go Far Enough

In response to community demands, Portland City Commissioner Dan Saltzman submitted a letter to Senator Ron Wyden asking him to request Attorney General Eric Holder to conduct a review of the killing of Aaron Campbell and the Portland Police.[361] Senator Wyden and Congressmember Earl Blumenauer submitted a letter calling on the Department of Justice to investigate the killing of Aaron Campbell—though he is not mentioned by name—"and, if any errors were made, recommend necessary changes."[362] At the press conference where this letter was announced, community groups used it as a platform to speak truth to power.[363]

In its investigation, the DOJ seemed to make a good effort to include community groups. The DOJ attended a forum run by the Albina Ministerial Alliance Coalition for Justice and Police Reform, where the parents of Keaton Otis, Fred Bryant, Kendra James, and Deontae Keller and members of Occupy Portland testified about the brutality of the Portland Police.[364] The DOJ organized a second

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361. Dan Saltzman, Letter to Senator Ron Wyden, MENTAL HEALTH PORTLAND (Feb. 19, 2010), https://www.mentalhealthportland.org/wp-content/uploads/2014/07/Saltzman-Wyden-letter.pdf [https://perma.cc/M8FH-PRJR].

362. Ron Wyden & Earl Blumenauer, *Letter to Attorney General Eric Holder*, MENTAL HEALTH PORTLAND (Feb. 19, 2010), https://www.mentalhealthportland.org/wp-content/uploads/2014/07/Campbell-Holder-021910.pdf [https://perma.cc/MF8D-C78X].

363. Matt Davis, *Campbell Shooting: Adams, Saltzman Call for Civil Rights Probe*, PORTLAND MERCURY (Feb. 19, 2010), https://www.portlandmercury.com/news/2010/02/19/2212341/campbell-shooting-adams-saltzman-call-for-civil-rights-probe [https://perma.cc/GXL5-4DK2] ("Jim Redden at the Portland Tribune: 'Do you agree with these people that Portland Police have repeatedly violated the civil rights of Portlanders?' he asked. 'I can't say I agree,' responded Saltzman. 'I guess I'd say I don't know.'").

364. Portland Copwatch, *Forums Bring Portland Misconduct Tales to the Department of Justice*, PEOPLE'S POLICE REPORT (May 2012), https://www.portlandcopwatch.org/PPR56/doj56.html [https://perma.cc/7WVN-QLMJ]. On October 6, 2011, Occupy Portland took over a park in downtown Portland. The occupation continued until November 13. Ken Boddie, *Where We Live: Occupy Portland 'Still Ripples'*, KOIN6 (Oct. 16, 2017), https://www.koin.com/news/where-we-live-occupy-portland-still-ripples/ [https://perma.cc/V4T4-RW5U]. The 5,000 people present in the camp were violently evicted by "hundreds of militarized riot police armed with tasers, stun batons, tear gas, pepper spray, and live ammunition." THE OREGONIAN, *Occupy Portland: Eviction*, YOUTUBE (Nov. 12, 2015), 0:40–0:55, https://www.youtube.com/watch?v=TS8uJ8QJEOY (last visited Apr. 23, 2025). The scandal over the eviction forced Police Chief Mike Reese to drop out of the race for mayor. Maxine Bernstein, *Portland Police Chief Mike Reese Misled With Claim that Occupy Kept Officers Too Busy to Answer a Call*, THE OREGONIAN (Nov. 19, 2011),

forum, where a Public Defender named Chris O'Connor testified that many of his clients have been injured by police.[365]

i. The DOJ's Findings and Proposed Settlement Excluded Race Despite Having Data to Suggest Unconstitutional Practices Affecting Minority Communities

On June 7, 2011, the DOJ announced it would not criminally prosecute the officers who killed Aaron Campbell.[366] On June 8, the DOJ announced they were opening a "pattern or practice" investigation into the Portland Police Bureau.[367] On September 12, 2012, the DOJ released its findings that "PBB engages in a pattern or practice of unnecessary or unreasonable force during interactions with people who have or are perceived to have mental illness."[368] The Department of Justice found that Portland Police inappropriately used excessive force or deadly force against people having mental health crises.[369] There was systematically inadequate investigation by supervisors and an ineffective internal review process for use of force and complaints.[370] The civilian review organizations, the Police Review Board and the Citizen Review

https://www.oregonlive.com/portland/2011/11/the_portland_police_delayed_re.html [https://perma.cc/2RZQ-5W69]; Maxine Bernstein, *Portland Police Chief Mike Reese Says He Won't Run for Mayor*, THE OREGONIAN (Nov. 21, 2011), https://www.oregonlive.com/portland/2011/11/portland_chief_mike_reese_says_1.html [https://perma.cc/PRV6-E4PT].

365. Portland Copwatch, Aaron Campbell Killed, *supra* note 327.

366. Maxine Bernstein, *Feds Won't Prosecute Portland Police in Fatal Shooting of Aaron Campbell; Further Inquiry Possible*, THE OREGONIAN (June 7, 2011), https://www.oregonlive.com/portland/2011/06/federal_justice_department_won.html [https://perma.cc/2NDM-TUQG].

367. Press Release, U.S. DEP'T JUST., *Justice Department Opens Investigation into the Portland, Oregon, Police Bureau* (June 8, 2011) (on file with U.S. Department of Justice).

368. Letter from Thomas E. Perez, Assistant Att'y Gen. & Amanda Marshall, U.S. Attorney, District of Oregon, to Mayor Sam Adams, at 1 (Sept. 12, 2012) (on file with U.S. Department of Justice), https://www.justice.gov/sites/default/files/crt/legacy/2012/09/17/ppb_findings_9-12-12.pdf [https://perma.cc/9YNY-2KJ3].

369. *Id.* at 12 ("We found that PPB officers often do not adequately consider a person's mental state before using force and that there is instead a pattern of responding inappropriately to persons in mental health crisis, resulting in a practice of excessive use of force, including deadly force, against them.").

370. *Id.* at 23–24; *id.* at 27 ("Like the complaint process, the force review interactions with the complaint system are so byzantine as to undercut the efficacy of the system. In this case, PPB's own force review chart speaks volumes about this problem."); *id.* at 28–30.

Committee, were flawed.[371] The DOJ provided extensive remedial measures directed at bringing use of force practices and review mechanisms into compliance with the Constitution.[372] The same day, the DOJ and the City announced a preliminary agreement.[373]

The DOJ acknowledged that "Mayor Adams made clear that one of his reasons to call for our investigation of PPB was PPB's relationships with communities of color."[374] Based on an analysis of data provided to it by the AMA Coalition, "12-24% of PPB's traffic and pedestrian stops are of African Americans" while "only 6.4% of the City's overall [population] is African American" which the DOJ concluded "indicated that PPB disproportionately stops African Americans."[375] The DOJ also found that Portland Police "tend to

371. *Id.* at 32–33 (finding that the Police Review Board was not comprehensive and resulted in delays); *id.* at 33–34 (finding that the Citizen Review Committee applied the wrong standard in its appellate review of complaint dispositions).

372. *Id.* at 40–41.

373. *Press Release: Justice Department and the City of Portland, Ore., Reach Preliminary Agreement on Reforms Regarding Portland Police Bureau's Use of Force Against Persons with Mental Illness*, U.S. DEP'T OF JUST. (Sept. 13, 2012), https://www.justice.gov/archives/opa/pr/justice-department-and-city-portland-ore-reach-preliminary-agreement-reforms-regarding [https://perma.cc/F2RV-DGRX]. The prelimary agreement states:

> DOJ and the City of Portland have preliminarily reached an agreement that will address the following:
>
> - Use of force policies to ensure that officers have necessary guidance when encountering someone with mental illness or perceived to have mental illness. In particular, the City will enhance its policy guidance on the use of ECW and techniques to de-escalate encounters arising from non-criminally related well-being checks and arrests for low level offenses;
> - Increase capacity for crisis intervention with specially-trained officers and civilians;
> - Enhance the early warning system to identify gaps in policy, training and supervision;
> - Expedite the investigations of complaints of misconduct while preserving the thoroughness and quality of investigations and community participation; and
> - Create a body to ensure increased community oversight of reforms.

374. Letter from Thomas E. Perez, *supra* note 368, at 38. The DOJ's decision to exclude race from the scope of their investigation is baffling. This is demonstrated by the sickening comments of Scott Westerman, the head of the Portland Police Association—the police union—who callously described the killing of Aaron Campbell: "Basically, we shot an unarmed [B]lack guy running away from us." Steve Duin, *Portland Police Training Leaves Many of Us Fuming After Shooting Death*, THE OREGONIAN (Feb. 3, 2010), https://www.oregonlive.com/news/oregonian/steve_duin/2010/02/portland_police_training_leave.html [https://perma.cc/YX7M-EVYJ]; Portland Copwatch, Aaron Campbell Killed, *supra* note 327. The racialization of the killing of Mr. Campbell was recognized by the head of the police union but not by the DOJ. Future research is necessary to determine what caused this puzzling strategic decision.

375. *Id.*

blend the distinction between initiating a 'mere conversation' and a *Terry* stop," making no further conclusions but providing a stern reprimand about the requirements of the Fourth Amendment and requiring data collection on escalation of police interactions with civilians.[376] Despite all these shocking findings, the DOJ decided that "whether PBB engages in pattern or practice of bias-based policing" was outside the scope of their investigation.[377] The DOJ recommended "that PPB provide a broader and more frequent opportunity to listen and respond to the community's concerns."[378]

Based on these findings, the DOJ filed a complaint on December 17, 2012, alleging violations of the Fourth and Fourteenth Amendments by the Portland Police Bureau.[379] The complaint focuses on violations against people with mental illness, making no mention of violation of the rights of people of color or people with other kinds of disabilities.[380] The DOJ had the cooperation of the city, and the parties jointly filed a motion to conditionally dismiss based on a proposed settlement agreement.[381]

ii. Because the DOJ Excluded Race from their Findings and Proposed Settlement, Community Groups Moved to Intervene

Community groups were frustrated that the complaint failed to address racially discriminatory police practices.[382] On January 8, 2013, the Albina Ministerial Alliance Coalition for Justice and Police Reform filed for intervenor status as of right or permissive intervenor status in the alternative.[383] The motion criticized the DOJ because it "specifically declined to make a finding of a pattern or practice regarding PPB's interaction with people of color."[384] The motion further criticized the DOJ for leaving the AMA Coalition out of the negotiation of the settlement agreement when the AMA

376. Letter from Thomas E. Perez, *supra* note 368, at 40; *id.* at 41.

377. *Id.* at 38.

378. *Id.* at 39.

379. Complaint at 6, United States v. City of Portland, (Dec. 17, 2012) (No. 3:12-cv-02265-SI).

380. *Id.*

381. Memorandum in Support of Joint Motion to Enter Settlement Agreement and Conditional Dismissal of Action, U.S. v. City of Portland, (Dec. 17, 2012) (No. 3:12-cv-02265-SI).

382. Patel, *supra* note 38, at 840.

383. Opinion and Order at 3, U.S. v. City of Portland and Portland Police Bureau, (Feb. 19, 2013) (No. 3:12-cv-02265-SI) (granting in part and deferring in part motions to intervene by the Portland Police Association and by the Albina Ministerial Alliance Coalition for Justice and Police Reform).

384. *Id.* at 4.

Coalition provided the DOJ with crucial data.[385] The AMA Coalition argued they should be granted status as intervenor of right because of its long history of advocacy related to police reform and it lacks other effective means to "protect its interest in protecting its members from unlawful police practices" because of democratic failures in other attempts at reform.[386] The AMA Coalition alleged that the government would fail to adequately represent their interest based on what it had already done: refused to address use of force disparities based on race and rejected the AMA Coalition's recommendations without explanation.[387] The AMA Coalition provided concrete concerns with inadequacies in the remedies proposed by the DOJ.[388]

On December 18, 2012, the Portland Police Association also moved to intervene as an intervenor of right or as a permissive intervenor in the alternative.[389] The Portland Police Association argued the settlement agreement affected their rights to collectively bargain with the City.[390] The Portland Police Association alleged that they should be granted intervenor of right status "even if the conflict between the collective bargaining agreement and the Settlement Agreement is merely hypothetical."[391] The Portland Police Association further alleged that the DOJ would not adequately represent their interests because the government acts as an employer.[392]

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385. *Id.* at 4–7.

386. *Id.* at 10–12.

387. *Id.* at 13–15.

388. *See* Press Release, Albina Ministerial Alliance Coalition on Justice and Police Reform, Announcement of Collaborative Agreement (Jul. 18, 2013) [hereinafter Press Release, Albina Ministerial Alliance], https://www.mentalhealthportland.org/wp-content/uploads/2014/07/186170-City-Albina-Ministerial-Allianceelated-to-police-interactions-with-people-experiencing-mental-illness-testimony.pdf [https://perma.cc/6FE4-CG8B] ("The AMA Coalition, however, maintains the concerns raised in its initial comments on the proposed Settlement Agreement, as outlined in its motion to intervene. These concerns include deficiencies in: the PPB's use of force and less lethal policies; community input into police training; the Citizen Review Committee 's [sic] deferential standard of review and oversight into officer-involved shootings and deaths. The Coalition maintains it concerns that the Settlement Agreement did not eliminate the practice of providing 48 hours notice before use of force interviews with involved officers.").

389. Intervener-Defendant Portland Police Association's FRCP 24 Motion to Intervene, United States v. City of Portland, (Dec. 18, 2012) (No. 3:12-cv-02265-SI).

390. *See* Memorandum in Support of Intervener-Defendant Portland Police Association's FRCP 24 Motion to Intervene, U.S. v. City of Portland, (Dec. 18, 2012), (No. 3:12-cv-02265-SI).

391. *Id.* at 25.

392. *Id.* at 29–30.

The United States opposed both motions.[393] However, the United States conceded that the Portland Police Association had a protectable interest at the remedy stage.[394] In response to the AMA Coalition's argument, the United States argued that changes to PPB's practices "will undoubtedly have collateral benefits for minority communities" and "changes . . . will flow to the greater Portland Community, including minorities."[395]

D. U.S. v. City of Portland Blocks Community Groups from Intervening

The district court simultaneously decided on the AMA Coalition and the Portland Police Association's motions to intervene in *U.S. v. City of Portland*.[396] In this case, the district court had the opportunity to correct for the exclusion of community groups from the negotiation of the settlement agreement. The district court granted the police union intervenor of right status at the remedy stage because "representation by the City 'may not' adequately represent the PPA's interests."[397]

The district court found that "the AMA Coalition can provide a valuable voice at the table during these proceedings."[398] Nonetheless, the district court rejected their motion to intervene.[399] The court limited the AMA Coalition's protectable interest to "one that is related to the claim brought by the United States in the complaint[,]" preventing them from including race in the litigation despite the DOJ's findings.[400] However, the district court did not decide the question of whether they have a protectable interest because "that interest is not impaired and is adequately represented by the United States."[401] The court rejected the AMA

393. Memorandum in Opposition to Proposed Intervenor-Defendant Portland Police Association and Proposed Intervenor Plaintiff AMA Coalition's FRCP 24 Motions to Intervene, U.S. v. City of Portland, (Jan. 22, 2013) (No. 3:12-cv-02265-SI).

394. *Id.* at 15.

395. *Id.* at 25.

396. United States v. City of Portland, No. 3:12-cv-02265-SI, 2013 LEXIS 188465 (D. Or. Feb. 19, 2013).

397. *Id.* at *15.

398. *Id.* at *7.

399. *Cf.* Hardaway, *supra* note 284, at 560 ("[T]his finding fails on at least two fronts. First, the court failed to acknowledge that a proponent for a general resolution is quite different than an advocate for specified interests. Second, the finding negated the value and insight that those closely connected to the relevant police misconduct could add to inform the reform process.").

400. United States v. City of Portland, No. 3:12-cv-02265-SI, 2013 LEXIS 188465, at *19 (D. Or. Feb. 19, 2013).

401. *Id.* at *18.

Coalition's motion on the basis that the DOJ would adequately represent their interest because "the AMA Coalition and its members *are* the constituency the United States is seeking to protect."[402] The district court argued that the AMA Coalition could bring a § 1983 lawsuit against the Police Bureau.[403] The district court granted the AMA Coalition only enhanced *amicus curiae* status.[404] The court encouraged the United States and the City to enter into mediation with the Albina Ministerial Alliance.[405]

E. Community Involvement was Increased by the AMA Coalition's Work but was Insufficient

The result of the mediation with the Albina Ministerial Alliance was a Collaborative Agreement between the parties.[406] In the collaborative agreement, the City committed to include the AMA Coalition in the selection of a Compliance Officer and Community Liaison and broadened the selection pool for at-large members for the Community Oversight Board.[407] The City also committed to providing "an opportunity for public participation" in alternative processes.[408] The Albina Ministerial Alliance committed to not object to the acceptance of the settlement agreement, but could nonetheless "oppose any attempts to weaken or dilute the Settlement Agreement reforms that the AMA Coalition supports."[409] Though the AMA Coalition did not have an equal seat at the table to the police union, they had some power to prevent the union from using its intervenor status to dilute the impact of the

402. *Id.* at *23–24.

403. *Id.* at *26.

404. *Id.* at *26–28 ("(1) the AMA Coalition shall have the opportunity to present any briefing requested by the Court in the same manner as the parties; (2) the AMA Coalition shall have the opportunity to participate in any oral arguments to the same extent as the parties; (3) the AMA Coalition may present its arguments from counsel table along with the parties; (4) the AMA Coalition may participate in the Fairness Hearing to the same extent as the parties; and (5) to the extent that the United States, the City, and the PPA may participate in mediated settlement discussions under the authority of the Court and a court-appointed special master for settlement purposes, see discussion below, the AMA Coalition shall be invited and allowed to participate in those negotiations.").

405. *Id.* at *31–32.

406. Collaborative Agreement at 1, U.S. v. City of Portland and Portland Police Bureau, (2013) (No. 3:12-cv-02265-SI).

407. *Id.* at 4.

408. *Id.* at 3.

409. *Id.* at 4.

settlement. The court further conducted a "fairness hearing" that platformed 58 community members.[410]

The issues the AMA Coalition argued were important through their role in the litigation compelled political action in other spaces. This is demonstrated by the removal of the "48-hour rule" from the police collective bargaining agreement.[411] The AMA Coalition advocated for the removal of this rule in its initial motion to intervene.[412] The Mental Health Association also called for the renegotiation of the police contract, including the removal of the "48-hour rule."[413] This rule became a symbol of the most egregious impunity of the collective bargaining agreement. Mayor Charlie Hales sought to pass a contract removing the "48-hour provision," but it included anti-accountability provisions on body cameras that threatened defendants' rights and provided for sizeable raises.[414] Activists criticized the contract as a "trojan horse."[415] The AMA Coalition criticized the contract because it was negotiated in secret and allowed the rule to persist through a loophole for less-than-lethal force.[416] The contract was approved.[417] In 2017, however, Mayor Ted Wheeler announced that the District Attorney refused to prosecute cases where the City compelled an officer to participate in an interview too soon after a shooting.[418] In response, the Portland City Council voted unanimously to pass an ordinance that

410. Patel, *supra* note 38, at 841–43 (praising the fairness hearing as democratizing litigation).

411. Status Report of the Albina Ministerial Alliance for Justice and Police Reform at 123, U.S. v. City of Portland and Portland Police Bureau, No. 3:12-cv-02265-SI (Oct. 19, 2016).

412. Press Release, Albina Ministerial Alliance, *supra* note 386.

413. Jenny Westberg & Jasen Reneaud, *Police Accountability Starts with a New Police Union Contract*, ST. ROOTS (Jan. 7, 2016), https://www.streetroots.org/news/2016/01/07/police-accountability-starts-new-police-union-contract [https://perma.cc/4AH5-E8E3].

414. Rachel Monahan, *What's Wrong With the New Police Union Contract?*, WILLAMETTE WEEK (Oct. 11, 2016),), https://www.wweek.com/news/2016/10/12/whats-wrong-with-the-new-police-union-contract/ [https://perma.cc/R6RS-H8MT].

415. *Id.*

416. Status Report of the Albina Ministerial Alliance for Justice and Police Reform at 6–7, U.S. v. City of Portland and Portland Police Bureau, No. 3:12-cv-02265-SI (Oct. 19, 2016).

417. Rachel Monahan, *City Hall Approves Controversial New Portland Police Contract*, WILLAMETTE WEEK (Oct. 12, 2016), https://www.wweek.com/news/2016/10/12/city-hall-approves-new-portland-police-contract/./ [https://perma.cc/T54W-H69Q].

418. Katie Shepherd, *Despite City Hall Efforts, the 48-Hour Rule is Back—And Stronger Than Ever*, WILLAMETTE WEEK (July 14, 2017), https://www.wweek.com/news/city/2017/07/14/despite-city-hall-efforts-the-48-hour-rule-is-back-and-stronger-than-ever/ [https://perma.cc/25R7-G9XG].

requires officers to give statements within 48 hours of a shooting unless they are physically incapacitated.[419] On this issue, community groups got what they demanded not through their status in the litigation, but despite it. Being put in a place of powerlessness could not constrain the power they held.

Metrics of police use of lethal and nonlethal force against people of color, people with mental disabilities, and protestors consistently reflect the inadequacy of the enforcement of the settlement. In the 2020 protests, there were 6,000 documented uses of force.[420] The violence was so extreme the DOJ found the City out of compliance with the settlement agreement.[421] In 2021, Jonathan Betz Brown of the Mental Health Alliance demonstrated using statistical evidence that "the number of applications and the severity of force used in force events involving mentally impaired citizens has been rising quickly and steadily over the last four years."[422] In 2020, the AMA Coalition observed a "lack of overall change" in "incidents of violence against people of color and people with mental illness since the inception of the Settlement Agreement."[423] In 2022, the AMA Coalition found that "the PPB's own data continues to reflect disparate policing of Black people and people of color in its stops, searches, and arrests, with an increase in percentage of traffic stops and searches of Black people in 2021."[424]

F. Interpretation

Despite the struggle of community groups, despite the assistance of movement lawyers, and despite the volume of ink spilled on court documents, Portland is left with the same problems with police accountability and a settlement that has been in effect

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419. Amelia Templeton, *Portland Council, At Odds With DA, Solidifies Police Shooting Overhaul*, OREGON PUB. BROAD. (Aug. 24, 2017), https://www.opb.org/news/article/portland-police-shooting-reform-48-hours-testimony/ [https://perma.cc/UR59-S7SG].

420. Piper McDaniel, *Injury Claims from PPB's 2020 Protest Response Cost City of Portland over $2.8 million*, ST.. ROOTS (Apr. 5, 2023), https://www.streetroots.org/news/2023/04/04/injury-claims-cost-portland-over-28m [https://perma.cc/CVZ7-2Q5W].

421. Letter from Jonas Geissler, Senior Trial Att'y, and Jared Hager, Assistant U.S. Att'y, to Robert Taylor, City Att'y, and Charles Lovell, Chief of Police (Apr. 2, 2021) (on file with the Mental Health Alliance).

422. Declaration of Juan C. Chavez, United States v. City of Portland, (Apr. 15, 2021), (No. 3:12-cv-02265-SI).

423. *Id.*

424. July 2022 Status Report of The Albina Ministerial Alliance For Justice And Police Reform at 8, United States v. City of Portland, (Feb. 24, 2020) (No. 3:12-cv-02265-SI).

for more than ten years with little progress. As of August 2024, the AMA Coalition "believes we are still a long way from producing a 21st Century Community Police force that offers public safety and trust to the most vulnerable citizens in the City of Portland."[425]

In looking at Portland, we are left to wonder *what went wrong*? DOJ intervention in Portland seemed to have so much potential to correct for structural failures. The broad coalition of community groups represented a political base to support change. The DOJ did not have the same constraints that prevented sympathetic system actors from implementing reform at the city and state level. Why did reform fail? An easy answer is the change in administration. Under the Trump Administration, pattern-or-practice litigation was deprioritized.[426] However, this is a symptom of a deeper problem. Once the DOJ initiates litigation against a city police department, community groups should not have to *ask* the DOJ to represent them, they should *be* represented as part of the judicial process in litigating settlement agreements, consent decrees, or decrees by the court.

U.S. v. City of Portland represents missed potential. The events in the years following the decision demonstrate the necessity that community groups be included in police civil rights litigation as full partners—enhanced *amicus* status is not enough. The court's reasoning that the AMA Coalition was the constituency the DOJ would represent and that the interest people of color was not related to the DOJ's claim struggles to be read in a way that is not contradictory. Furthermore, § 1983 plaintiffs are foreclosed from pursuing the injunctive measures that the DOJ is empowered to implement in pattern-or-practice lawsuits. The court is simply wrong to claim that as a viable alternative. However, the court's encouragement of mediation with the AMA Coalition did lead to greater, though insufficient, community involvement. In that portion of the holding, there is hope for future progress.

Conclusion

On December 17, 1951, Paul Robeson and William Patterson submitted a petition on behalf of the Civil Rights Congress and signed by 100 activists to the United Nations entitled "We Charge

425. August 2024 Status Report Of The Albina Ministerial Alliance Coalition For Justice And Police Reform at 2, U.S. v. City of Portland and Portland Police Bureau, No. 3:12-cv-02265-SI (2013).

426. Mazzone & Rushin, *supra* note 212, at 1005–06 & nn.30–31 (2020); VITALE, *supra* note 9, at 22–23.

Genocide: The Crime of Government Against the Negro People."[427] The petition contended that the segregation, discrimination, and police violence faced by Black Americans constituted genocide under the United Nations definition.[428] The charge remains outstanding.[429]

Police violence must be challenged and changed by procedural and substantive democratic accountability. This gap in police accountability is a problem for law, it is a problem for the legitimacy of police as an institution, and it is a problem for public safety. It must be closed. Accountability for police violence requires substantive and procedural remedies. And as the case study of Portland demonstrates, true change is not made from the top down, it is built from the bottom up by the tireless work of activists and movements.

The present political moment is undoubtedly grim.[430] The George Floyd Justice in Policing Act was introduced three times under the Trump and Biden Administration and as of now has failed to pass.[431] We are once again under an administration where pattern-or-practice litigation, however flawed, will be absent.[432] The narrow window for police accountability under existing law just got a whole lot narrower. For Minneapolis, that uncertainty is compounded. Much work is necessary to provide robust guarantees of non-repetition regarding the actions of the Minneapolis Police Department detailed in the DOJ's own findings.[433] Community participation will be necessary to ensure that this change lives up to its power.

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427. *This Day in History: Dec. 17, 1951: "We Charge Genocide" Petition Submitted to United Nations*, ZINN EDUC. PROJECT, https://www.zinnedproject.org/news/tdih/we_charge_genocide_petition [https://perma.cc/C59W-DUXH].

428. *Id.*

429. Haile et al., *supra* note 7.

430. SEIGEL, *supra* note 32, at 3 ("Yet there is something unique about our moment that augurs even worse. In both of the historical periods that ours evokes, reaction followed the abolition of a great evil: slavery first, and, a century later, Jim Crow segregation. This time we are perched on the edge of reaction without having abolished anything.").

431. Ray Sanchez, *Renewed Calls for Passage of George Floyd Justice in Policing Act After Fatal Shooting of Black Woman in her Home*, CNN (July 25, 2024), https://www.cnn.com/2024/07/25/us/george-floyd-justice-in-policing-act/index.html [https://perma.cc/EVE7-YG34].

432. *Id.*

433. U.S. DEP'T OF JUST. CIV. R. DIV. AND U.S. ATTY'S OFF. DIST. OF MINN. CIV. DIV., INVESTIGATION OF THE CITY OF MINNEAPOLIS AND THE MINNEAPOLIS POLICE DEPARTMENT (2023).

In May, the United Nations Expert Mechanism to Advance Racial Justice visited Minneapolis for a single day.[434] At the Urban League over north, they met with Antonio Willaims, Breanna Buckhalton, Elizer Darris, Lucina Kayee, Myon Burrell, and Marvina Haynes.[435] They also met with family honoring Kobe Heisler, Dolal Idd, George Floyd, Emmitt Till, Amir Locke, Jaffort Smith, Howard Johnson, Courtney William, Justin Teigen, and Philando Castile.[436] Based on their testimony and testimonies of people in the District of Columbia, Atlanta, Los Angeles, Chicago, and New York City, the Human Rights Council released a major report calling for dramatic change addressing all levels of the criminal legal system in America, including policing, the school-to-prison pipeline, immigration enforcement, incarceration of children and adults, criminalization of unhoused people, and pre-trial detention.[437]

The transformative change the United Nations called on us to carry out is change activists have been demanding for a long time. Echoing Alex S. Vitale's criticism of the DOJ's proposed reforms for the police in Ferguson, Missouri, "[w]ell-trained police following proper procedure are still going to be arresting people for mostly low-level offenses, and the burden will continue to fall primarily on communities of color because *that is how the system is designed to operate*—not because of the biases or misunderstandings of officers."[438] To truly have an accountable and democratic system of public safety, transformative changes are required that address the patterns or practices not just of policing but of mass incarceration and bordering. That system would be unrecognizable to what we know now as "policing."[439]

Movements have the power to make that transformative change. In Stearns County, St. Cloud, and Cold Spring, Minnesota, community groups have engaged in dialogue with their police departments and signed community policing agreements.[440] Among

434. *Id.*

435. UN Report, *supra* note 88, at 32.

436. *Id.*

437. *Id.*

438. VITALE, *supra* note 9, at 15 (emphasis added).

439. *See id.*

440. Stearns County Sheriff, Stearns County Sheriff's Office Community Policing Agreement (May 19, 2021), https://content.civicplus.com/api/assets/7dd2d16a-c6cb-420b-8e2d-681f28b6d465?cache=1800 [https://perma.cc/RDH4-886S]; St. Cloud Police Department, St. Cloud Community Policing Agreement (Feb. 22, 2018), https://www.ci.stcloud.mn.us/DocumentCenter/View/14904/St-Cloud-Community-

other significant commitments, these agreements challenged pretextual traffic stops and arrests and detentions based solely on immigration status, and called for a consent search advisory. The community groups that made these agreements happen did it on their own, without the help of the federal government or the Department of Justice. It is doubtful that change in policing could ever be done by the federal government alone. But in the present political moment, it is all but certain that the federal government will not be a partner in transforming policing. This moment is not a limitation; it is an invitation for community groups to rise beyond the failures of law and institutions and mobilize to hold police accountable.

Policing-Agreement-English-PDF?bidId= [https://perma.cc/TL67-755N]; Cold Spring Police Department, Cold Spring Community Policing Agreement (May 4, 2022), https://coldspring.govoffice.com/vertical/sites/%7B01184721-7780-4C87-A564-E6EF5442EC4F%7D/uploads/SKMBT_C224e22050509230.pdf [https://perma.cc/Q5KN-YM9E].

Keynote Address: Envisioning Wage Justice

Ruben J. Garcia†

Abstract

In this Keynote address for the Minnesota Journal of Law & Inequality*'s Symposium, "Not Just Wages," held at the University of Minnesota Law School on April 11, 2025, I discuss the evolving concept of wage justice, using the lens of Critical Wage Theory and its origins in pioneering theories of race, labor and justice. The Article outlines the legal frameworks that have defined the content of wage justice in the twenty-first century, particularly for marginal workers. This Article raises the alarm about the impact of political change on low-wage workers, using case studies and analysis of administrative agency enforcement of rights for low wage workers in the recent past. The Article further mines the intersection of legal structures and wage justice, highlighting the gaps in protection that befall marginal workers. Arguing that a holistic approach to race and class is especially needed in these times fraught with political and organizing challenges, I argue for a continued re-envisioning of racial and wage justice.*

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Introduction

I am honored to have this symposium dedicated to my book. I want to thank everyone who contributed and traveled to join us. It's a great chance to reconnect with friends and meet new ones. Thanks to the staff of the *Minnesota Journal of Law & Inequality* for organizing and running this Symposium.

In the current times, there are renewed discussions about the rule of law, and indeed the relevance of law at all.[1] In the ensuing four to ten years, we will likely witness changes which will have significant repercussions for labor movements and the enforcement of workplace law. The bigger question is the future of the rule of law in an environment where the legitimacy of law is questioned. The justification of draconian immigration restrictions, for example, under a faux conception of "rule of law" reminds us of the co-optation of the term "rule of law" for the legal defense fund of the "Stop the Steal" crowd, known as the "Rule of Law Legal Defense Fund."[2]

The implications for safeguarding law and regulation remain uncertain. The disregard for legal norms that characterized the first Trump administration, and now the second administration, poses a substantial threat to workplace law.[3] While the record of the Department of Labor in the first Trump administration continued a general trend of de-enforcement, in the second term that de-enforcement may accelerate faster.[4]

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1. *See, e.g.*, Debra Lyn Bassett & Rex Perschbacher, *The End of Law*, 84 B. U. L. REV. 1 (2004) (analyzing how traditional legal processes are fading away and the resulting negative consequences for society); Erwin Chemerinsky, *If Trump Defies Court Orders, Then What*?, N.Y. TIMES (Mar. 7, 2025), https://www.nytimes.com/2025/03/07/opinion/trump-courts-judges.html [https://perma.cc/77V9-G3ZJ].

2. *See* Steve Contorno, *Florida's Ashley Moody Worked with Group Linked to Capitol Insurrection*, TAMPA BAY TIMES (Jan. 11, 2021), https://www.tampabay.com/news/florida-politics/2021/01/11/floridas-ashley-moody-worked-with-group-linked-to-capitol-insurrection/ [https://perma.cc/L259-SWSC].

3. *See, e.g.*, Alan Feuer, *Trump Grants Sweeping Clemency to All Jan. 6 Rioters*, N.Y. TIMES (Jan. 20, 2025), https://www.nytimes.com/2025/01/20/us/politics/trump-pardons-jan-6.html [https://perma.cc/QC8R-S3HC] (describing one such disregard for legal norms early in the second Trump administration).

4. *See* Robert Iafolla, *Trump Names GOP Labor Board Member as Agency Chair*, BLOOMBERG L. NEWS (Jan. 20, 2025), https://news.bloomberglaw.com/daily-labor-report/trump-taps-gop-labor-board-member-kaplan-as-new-agency-chair [https://perma.cc/6FSL-PQZY]; Robert Iafolla, *Trump Stymies Labor Board by Firing Democrat Gwynne Wilcox (2)*, Bloomberg L. (Jan. 28, 2025), https://news.bloomberglaw.com/daily-labor-report/trump-terminates-one-labor-board-democrat-leaving-two-members [https://perma.cc/V2TV-AVB9].

The victories won by social movements like Amazon and Starbucks workers' unionization campaigns may provoke a backlash from the dominant class.[5] When workers gain greater influence, Critical Race Theory predicts retrenchment and backlash from the hierarchical structure.[6] Certainly, with the advent of new organizing, there will be greater scrutiny of movements in the coming years. There exists a continuity between historical civil rights struggles and contemporary economic justice movements, including the emphasis on wage justice.[7] It is imperative, however, to consider how we proceed after electoral setbacks at the national level.

In Part I of this Article, I will discuss the theoretical frameworks of *Critical Wage Theory* and wage justice. In Part II, I will examine the legal framework that is supposed to produce wage justice and how it often fails to do so. In Part III, I will explore the challenges faced by low-wage workers by looking at a case study of a domestic worker, Maria Blanco. In Part IV, I will discuss the potential solutions and the role of law in protecting workers.

I. Theoretical Context for These Times

My primary objective in *Critical Wage Theory* is to develop a theory of wage justice that is informed by racial justice.[8] I assert that raising the minimum wage constitutes a matter of racial justice, particularly since I contend that economic implications should not be the sole foundation of wage justice. The book has both a theoretical and descriptive aspect. Defining wage justice is an ongoing project. The question that I will work to answer today is how much has changed in such a short time.

It has not yet been a year since I published *Critical Wage Theory* in June 2024. Nevertheless, the political landscape has been rapidly evolving in that short time.[9] It is essential to understand

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5. *See* Jenny Brown, *Strikes and Organizing Gains but Storm Clouds Loom*, LAB. NOTES (Dec. 29, 2024), https://labornotes.org/2024/12/2024-review-strikes-and-organizing-score-gains-storm-clouds-loom [https://perma.cc/7D2Z-MXNW].

6. *See generally* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (providing an important analysis of the racism innate to the entrenched systems of hierarchy in the United States).

7. *See, e.g.*, RUBEN J. GARCIA, CRITICAL WAGE THEORY: WHY WAGE JUSTICE IS RACIAL JUSTICE 2 (2024).

8. *Id.*

9. *See, e.g.*, Linda Qiu, *Trump Repeats Inaccurate Claims in Inaugural Remarks: Fact Check*, N.Y. TIMES (Jan. 20, 2025), https://www.nytimes.com/2025/01/20/us/politics/trump-fact-check-inaugural-address.html [https://perma.cc/QKR4-T9MN].

how changes both globally and domestically are going to affect movements. The question posed in this Article is how to make Critical Wage Theory relevant in the diminished nature of our politics. The concept of wage justice, and justice itself, is currently highly contested. My purpose here is to envision wage justice in the present context and ways to further wage justice even in these times of retrenchment.

The enduring debate on whether justice is based upon fixed or flexible principles has captivated thinkers since Plato's *Republic* and Immanuel Kant's "categorical imperative."[10] Prominent philosophers such as John Rawls and Robert Nozick have actively participated in this discourse.[11] I propose to employ these conceptualizations of justice to elucidate the nature of wage justice more effectively.

Wage decisions are the outcomes of multitudes of intricate human factors. They are influenced by a wide range of interrelated factors, including seniority, previous salary, educational attainment, race, and gender.[12] Critical Race Theory (CRT) emphasizes that these factors are highly contingent and loosely connected to notions of merit.[13] Consequently, wage justice implies taking appropriate actions to rectify such disparities. Critical Race Theory (CRT) is currently at the forefront of politics. Politicians have used the backlash against racial justice to demonize CRT.[14]

Amid the current backlash against Diversity, Equity, and Inclusion (DEI), *Critical Wage Theory* posits the imperative of

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10. *See generally* Plato, *The Republic* (depicting justice as based on fixed principles of virtue and rationality); *see also Distributive Justice*, STAN. ENCYCLOPEDIA PHIL. (Sept. 26, 2017), http://plato.stanford.edu/entries/justice-distributive [perma.cc/M65M-DUR2] (describing Kant's "maxim to treat people always as ends in themselves and never merely as a means" as part of a more general philosophical discussion).

11. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1st ed. 1971) (positing a theory of justice based on liberal principles); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974) (forwarding a libertarian approach to justice that eschews state intervention).

12. *See* Eileen Patten, *Racial, Gender Wage Gaps Persist in U.S. Despite Some Progress*, PEW RSCH. CTR. (July 1, 2016), https://www.pewresearch.org/short-reads/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress/ [https://perma.cc/6A5E-T5QT].

13. *See* GARCIA, CRITICAL WAGE THEORY, *supra* note 7, at 8.

14. *See, e.g.*, Stephen Sawchuck, *What is Critical Race Theory, and Why Is It Under Attack?*, EDUC. WK. (May 18, 2021), https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05 [https://perma.cc/92PB-6D7A]; Tanya Kateri Hernández, *Can CRT Save DEI?: Workplace Diversity, Equity & Inclusion in the Shadow of Anti-Affirmative Action,* 71 UCLA L. REV. DISCOURSE 282 (2024).

addressing racial wage disparities.[15] My intention is to encourage a discourse on concepts of justice, not solely because the book's subtitle promises to show "Why Wage Justice is Racial Justice," but also because of John Rawls' theory of "justice as fairness."[16] Rawls advocates for impartiality and fairness in societal structures, reconciling liberty and equality.[17] This theory encompasses the original position, two principles of justice, and fair equality of opportunity.[18]

The Living Wage Movement, which advocates for wages that ensure a decent standard of living for government contractors, has faced challenges in expanding to the private sector.[19] This raises questions about expectations of wage justice. Rawls' theory of justice provides insights into this matter. In the original position, individuals are placed in a hypothetical scenario where they are unaware of their own social status or preferences.[20] From this perspective, Rawls argues that a just society should be one where everyone has equal opportunities and resources.[21] Matsuda, on the other hand, emphasizes the importance of considering the perspectives of those at the bottom of the economic hierarchy.[22] By examining their experiences and needs, Matsuda argues that we can achieve justice.[23]

A conception of wage justice that does not prioritize race could be sufficient.[24] Some may see the tragic murder of George Floyd, which took place in Minneapolis on May 5, 2020, as not connected to wage justice.[25] In *Critical Wage Theory*, I argue that Mr. Floyd's

15. *See* GARCIA, CRITICAL WAGE THEORY, *supra* note 7, at 10; Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R-C.L. 323 (1987).

16. RAWLS, *supra* note 11, at 3.

17. *See id.* at 4 ("[I]n a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests.").

18. See generally *id.* (developing a morality-based theory of justice as an alternative to utilitarianism).

19. Jared Bernstein, *The Living Wage Movement*, ECON. POL'Y INST. (July 21, 2000), https://www.epi.org/publication/externalpubs_lwmovement/ [https://perma.cc/22HS-K5ZR].

20. RAWLS, *supra* note 11, at 12.

21. *See id.*

22. *See* Matsuda *supra* note 15, at 324.

23. *Id.*

24. *See, e.g.,* SHANNON GLEESON, PRECARIOUS CLAIMS: THE PROMISE AND FAILURE OF WORKPLACE PROTECTIONS IN THE UNITED STATES (2017) (discussing the varying degrees to which initiatives focused on different aspects of wage justice have found success).

25. *See* GEORGE SAMUELS & TOLUSE OLORUNNIPA, HIS NAME IS GEORGE FLOYD: ONE MAN'S LIFE AND STRUGGLE FOR RACIAL JUSTICE (2022) (providing a portrait of

murder is an example of why wage justice needs to be viewed as racial justice, and perhaps even survival.[26] Consequently, a more comprehensive approach to racial justice is necessary, considering labor and employment laws.[27] It is exactly because of the current conditions after January 20, 2025, the second inauguration of President Donald Trump, that abstract thought experiments devoid of current context are not a sufficient way of furthering racial justice.

A. Legal and Policy Challenges

One of the primary challenges facing advocates for wage justice is the incomplete nature of the federal Fair Labor Standards Act (FLSA). The FLSA contains various exemptions, some of which have been narrowed or eliminated over time.[28] Exemptions for live-in domestic service workers and certain types of employment, such as baby-sitting and newspaper delivery, have faced legal challenges and interpretations.[29] The impact of FLSA exemptions on employee welfare, particularly regarding minimum wage and overtime pay, remains a concern, with studies revealing a substantial portion of workers earning below the minimum wage.[30]

The FLSA establishes a regular workweek and overtime pay for time worked beyond forty hours, but there are exceptions for certain types of pay and work arrangements.[31] While commissions

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George Floyd and the pursuit of racial justice following his murder by Minneapolis police).

26. *See* GARCIA, CRITICAL WAGE THEORY, *supra* note 7, at 6.

27. *See* RUBEN J. GARCIA, MARGINAL WORKERS: HOW LEGAL FAULT LINES DIVIDE WORKERS AND LEAVE THEM WITHOUT PROTECTIONS 8–9 (2012) [hereinafter GARCIA, MARGINAL WORKERS] (discussing the failures of the political process to protect most workers).

28. *See, e.g.*, *Domestic Service Final Rule Frequently Asked Questions*, U.S. DEP'T OF LAB., WAGE & HOUR DIV., https://www.dol.gov/agencies/whd/direct-care/faq [https://perma.cc/72SV-U7JH] (discussing the narrowing of the definition of the companionship services exemption).

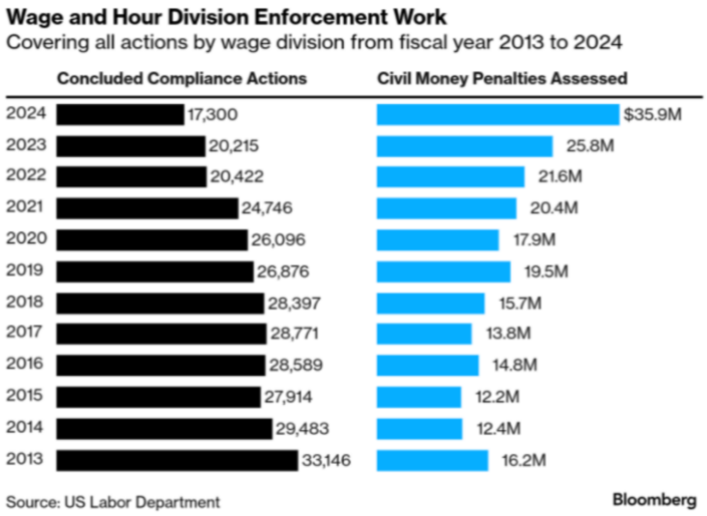
29. *See, e.g.*, NLRB v. Hearst Publ'ns., Inc., 322 U.S. 111 (1944) (analyzing the application of the National Labor Relations Act to newspaper delivery workers). Despite the exclusions in federal law, domestic and home care workers have banded together in unions and legislative campaigns for more than 30 years; *see* U.S. DEP'T OF LAB., FACT SHEET #79B, LIVE-IN DOMESTIC SERVICE WORKERS UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2013), https://www.dol.gov/agencies/whd/fact-sheets/79b-flsa-live-in-domestic-workers [https://perma.cc/78LR-VFP2].

30. *See, e.g.*, Jeounghee Kim & Skye Allmang, *Wage Theft in the United States: A Critical Review* 3–4 (Ctr. for Women & Work, Rutgers, Working Paper No. 2021-1, 2020); *see also* Fair Labor Standards Act (FLSA), 29 U.S.C. § 201.

31. *See* 29 U.S.C. § 207 (detailing the FLSA's maximum hours provision and the range of exceptions applied to it); *id.* § 213 (detailing various exemptions to the FLSA).

and incentive pay are included in calculating the regular rate, profit sharing is not.[32] The FLSA also permits compensatory time off instead of overtime pay, but this option is subject to specific requirements and limitations.[33]

Less than a year has passed since I published *Critical Wage Theory*, but it is now possible to fully evaluate the last four years. During its tenure, the Biden Administration pursued numerous initiatives to enhance the working conditions for the millions of farmworkers who endure wage theft and subpar working conditions.[34] That does not necessarily mean that there are not examples of wage theft. This trend in enforcement levels is depicted in the accompanying graph:



Source: Bloomberg News Daily Lab. Rep. (Dec. 31, 2024).

32. U.S. DEP'T OF LAB., WAGE & HOUR DIV., FACT SHEET #56A: OVERVIEW OF THE REGULAR RATE OF PAY UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2019), https://www.dol.gov/agencies/whd/fact-sheets/56a-regular-rate [https://perma.cc/M99F-5WW3].

33. *See, e.g.*, U.S. DEP'T OF LAB., WAGE & HOUR DIV., FACT SHEET #7: STATE AND LOCAL GOVERNMENTS UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2011), https://www.dol.gov/agencies/whd/fact-sheets/7-flsa-state-local-government [https://perma.cc/KW8U-7YTW] (providing an explanation of compensatory time in the context of governmental workers).

34. *See, e.g.*, *U.S. Dept. of Labor Obtains Judgment to Recover $550K in Wages, Damages for 614 Shortchanged Construction Workers*, U.S. DEPT. OF LAB. (Sept. 17, 2024), https://www.dol.gov/newsroom/releases/whd/whd20240917 [https://perma.cc/662V-5ZCQ].

Enforcement, as shown in the above graph, has generally decreased over decades, independently of the political party of the administration.[35] Litigation has largely become the province of a machinery that enriches both plaintiffs and defense lawyers.[36] As Derrick Bell has written in the context of school desegregation, the well-intentioned litigation meant to achieve racial balancing was not always in the best interest of the children.[37] Similarly, liberal legalism does well to reify the existing wage order without fundamental changes in how and what people are paid.[38] Without structural reforms, race and gender gaps will remain stubbornly persistent.

In the coming decade, how can wage justice be advanced, and what will it look like? While government intervention is undoubtedly necessary, what measures should we take if it is not forthcoming? What if, after four years, the federal minimum wage remains at $7.25 per hour? It is imperative that we explore avenues for achieving greater equity among workers. Other initiatives for wage justice have been attempted in recent years. For example, the Department of Labor (DOL) proposed a rule to facilitate unionization for agricultural workers, but it encountered legal opposition from various industry groups and states.[39] The Georgia Fruit and Vegetables Growers Association and several states filed lawsuits to prevent the rule's implementation.[40] These lawsuits were successful in blocking the rule in seventeen states where attorneys general joined the litigation, leading to a federal court injunction.[41] Given that many of the rules promulgated by the previous administration—and possibly all federal regulations[42]—are being dismantled, this time presents an opportune moment to

35. *See* DAILY LAB. REP., BLOOMBERG NEWS DAILY (Dec. 31, 2024).

36. Margaret Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782 (2011) (discussing how fee-shifting provisions incentivize increase in litigation).

37. Derrick A. Bell, *Serving Two Masters: Client Interests and Integration Ideals in Desegregation Litigation*, 85 YALE L. J. 470 (1976).

38. *See* RAWLS, *supra* note 11, at 237–39 (discussing that laws codify issues that people may otherwise not recognize as such).

39. Kayla Googin, *Georgia Judge Federal Blocks Rule Allowing Migrant Farmworkers to Join Unions in 17 States, Courthouse News*, COURTHOUSE NEWS (Aug. 26, 2024), https://www.courthousenews.com/georgia-judge-blocks-federal-rule-allowing-migrant-farmworkers-to-join-unions-in-17-states/ [https://perma.cc/2J4L-8YEB].

40. *Id.*

41. *Id.*

42. Matt Shuham, *Elon Musk Suggests Getting Rid of All Regulations in Midnight Call*, YAHOO NEWS (Feb. 3, 2025), https://www.yahoo.com/news/elon-musk-suggests-getting-rid-212557557.html [https://perma.cc/CJ8T-XGDN].

evaluate strategies for achieving wage justice without the help of federal agencies for a few years.

The current political climate poses significant challenges for social movements advocating for higher wages. While race remains a crucial aspect of many such movements, it is essential to consider how they will navigate an environment that places less emphasis on diversity, equity, and inclusion.[43] There is a possibility that social movements may eschew a focus on race, but this would be a mistake. It would belie the underlying dynamics of our society.

Case studies show wage justice advocates successful strategies. One notable example is the Fight for $15 movement.[44] This movement is not just about $15 per hour and a union, but about the fundamental principles of how our society distributes monetary rewards for work.[45] The COVID-19 pandemic served as a stark revelation of the challenges faced by workers in hazardous occupations.[46] It exposed the fact that wages are not necessarily correlated with merit and demonstrated that they are often

43. Geri Stengel, *Fearless Fund Lawsuit Spotlights Bias Against Black Female Founders*, FORBES (Aug. 11, 2023), https://www.forbes.com/sites/geristengel/2023/08/11/fearless-fund-fights-lawsuit-standing-up-for-black-female-founders/?sh=5a6e7b295619 [https://perma.cc/5GJR-RGVR]; Isabel Gottlieb, *Trump's DEI Order Creates Dilemma for Federal Contractors*, BLOOMBERG GOV'T (Feb. 13, 2025, 10:00 AM), https://www.bgov.com/news/trumps-dei-order-creates-dilemma-for-federal-contractors [https://perma.cc/3DCR-NHP3].

44. Yannet Lathrop, Matthew D. Wilson & T. William Lester, *Ten-Year Legacy of the Fight for $15 and a Union Movement*, NAT'L EMP. L. PROJECT (Nov. 29, 2022), https://www.nelp.org/insights-research/10-year-legacy-fight-for-15-union-movement/ [https://perma.cc/QR7M-NJ8B]; *see also* Emmanuel Elone, Two California Cities Announce 2025 Minimum Wage Rates, BLOOMBERG L. DAILY LAB. REP. (Oct. 25, 2024), https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-labor-report/X28FG0SG000000?bna_news_filter=daily-labor-report#jcite [https://perma.cc/F7GA-GCZ5]; Emmanuel Elone, *Half Moon Bay, California, Minimum Wage Rising to $17.47 for 2025*, BLOOMBERG L. DAILY LAB. REP. (Oct. 15, 202), https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-labor-report/XCL4964G000000?bna_news_filter=daily-labor-report#jcite [https://perma.cc/DDY4-HX4C]; Emmanuel Elone, Albuquerque, New Mexico, Announces Minimum Wage Rates for 2025, BLOOMBERG L. DAILY LAB. REP. (Oct. 21, 2024), https://news.bloomberglaw.com/daily-labor-report/albuquerque-new-mexico-announces-minimum-wage-rates-for-2025?context=search&index=25 [https://perma.cc/4FQT-JN93].

45. Lathrop et al., *supra* note 44, at 1.

46. Andrew Oxford, California Passes Bill That Places Child Labor Audits Online, BLOOMBERG L. DAILY LAB. REP. (Aug. 27, 2024), https://news.bgov.com/daily-labor-report/california-passes-bill-that-places-child-labor-audits-online?source=newsletter&item=read-text&region=top-stories-digest [https://perma.cc/5Y8W-3HBR].

inversely proportional to the inherent risks associated with the job.[47]

Movements like the Fight for $15 can be traced back to the living wage movement of the 1990s. Sociologists like Stephanie Luce were among the first to show that this movement was transforming conversations about the maldistribution of wealth in society.[48] Although the living wage movement and the Fight for $15 have yet to achieve an increase in the federal minimum wage, their alignment with other social and racial justice movements is evident in many workers' stories.

One such example is Jorel Ware, who was a fast-food worker in New York at McDonald's earning $8.75 an hour at the end of two and a half years.[49] He went from the Fight for $15 to the fight for Black Lives Matter, immigration reform, and childcare.[50] In Jorel's words, those issues are "basically the same because everybody's going through them . . . ."[51] The living wage movement was not limited to fast food workers. Nail salon workers like Berta Chacon joined the movement to advocate for immigration reform because she saw fair wages as part of the rights and dignity of immigrant workers.[52]

More than three decades have passed since the advent of the living wage movement, and like other social movements, it currently finds itself at a pivotal juncture within the prevailing political landscape.[53] As we will see in the coming days, there are many strategic choices to be made in these times. It remains to be seen whether the commitment to racial justice will endure among advocates.

The Department of Labor focused on several important priorities during the Biden Administration. While there was a focus

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47. *See* GARCIA, CRITICAL WAGE THEORY, *supra* note 7, at 118–29; *see also* Peter Dorman & Les Boden, *Risk Without Reward: The Myth of Wage Compensation for Hazardous Work*, *in* UNEQUAL POWER, ECON. POL'Y INST. (2021), epi.org/217414 [https://perma.cc/XH2X-7GAE] (presenting evidence that many high-risk workers are poorly paid).

48. STEPHANIE LUCE, FIGHTING FOR A LIVING WAGE 33–34, 36 (2004).

49. Willa Frej, *These Are the Faces of the Fight For 15 Movement*, HUFFPOST (Nov. 10, 2015), https://www.huffpost.com/entry/faces-of-fight-for-15-movement_n_56424398e4b0411d3072cc3e [https://perma.cc/9KVV-NTG9].

50. *Id.*

51. *Id.*

52. *Id.*

53. *See, e.g.,* Charles Homans, *The Trump Resistance Won't Be Putting on Pink Hats This Time*, N.Y. TIMES (Jan. 19, 2025), https://www.nytimes.com/2025/01/19/us/politics/trump-inauguration-protest-democrats.html [https://perma.cc/JD2C-ZT75].

on misclassification—which had worsened and languished, particularly in the gig economy—Europe made significant progress in many aspects of the gig economy.[54] Over the last four years, the DOL pushed ahead with some race conscious policies that were stymied in the courts.[55]

Mandated wage increases would serve several purposes. First, they would be a market-driven approach to setting wages, ensuring fair compensation for workers. Second, they would encourage greater safety on the job, providing workers with a more secure and well-paying environment. However, there is also a chilling effect. Workers in stressful positions are susceptible to wage theft that they may not feel comfortable complaining about. If the workplace is subject to other lawless activities like illegal firings, sexual harassment, or other legally hostile environments, workers may feel even less inclined to complain.

Furthermore, there are intersectional gaps in protection. Many workers are experiencing intersectional harms. For example, immigrants are disproportionately represented in hazardous occupations such as construction and meatpacking.[56] As I discuss in my book *Marginal Workers*, there are gaps in protective measures that workers fall through.[57] The data I found indicated a lack of complaints—however, the absence of complaints may not fully capture the situation.[58] There could be a chilling effect in the workplace.

The critique of liberal reform has been exemplified in various contexts. For instance, in matters like integration and affirmative

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54. European Parliament, *Gig Economy: How the EU Improves Platform Workers' Rights*, EUROPEAN PARLIAMENT NEWS, https://www.europarl.europa.eu/news/en/topics/social-protection/workers-rights/gig-economy-platform-workers-rights [https://perma.cc/8CKZ-A7YZ].

55. *See* David Hamilton & Alexandra Olson, *New Rule Tightens Worker Classification Standards; Uber, Lyft Say Their Drivers Won't Be Affected*, AP NEWS (Jan. 9, 2024), https://apnews.com/article/gig-workers-new-labor-rules-independent-contractors-df8101d6d22d5d3eda6def345fe95106 [https://perma.cc/67SV-X5CX] (discussing how the Biden administration enacted a new labor rule to prevent the misclassification of workers as independent contractors, aiming to bolster legal protections and compensation for many in the U.S. workforce. However, the implementation and enforcement of these rules have faced challenges and mixed results).

56. *See* BLOOD, SWEAT, AND FEAR: WORKERS' RIGHTS IN U.S. MEAT AND POULTRY PLANTS, HUM. RTS. WATCH (2005), https://www.hrw.org/report/2005/01/24/blood-sweat-and-fear/workers-rights-us-meat-and-poultry-plants [https://perma.cc/NYJ3-CBNF].

57. GARCIA, MARGINAL WORKERS, *supra* note 27, at 18–19 (discussing how diffused political coalitions lead to few results protecting workers).

58. *Id.*

action, liberal reforms have consistently failed to achieve significant progress over the years.[59] Therefore, there is reason to be skeptical. However, in the context of wages, there are immediate and pressing needs that demand liberal reformist interventions.

There is certainly room to debate about how far to go to achieve wage justice. This is akin to debates in criminal justice between abolitionists and reformists. There are numerous reforms that could improve the lives of many prisoners in the penal system, such as ending forced labor or sentencing reform. Abolitionists, particularly those aligned with Critical Race Theory, are more likely to advocate for significantly revamped approaches to defining crime.[60]

II. The Legal Framework for Wage Justice

The FLSA established a national minimum wage and overtime pay to safeguard workers and foster economic growth. While the FLSA has undergone amendments and expansions over time, its influence on employment remains a topic of contention among economists. Some studies suggest a negative correlation between minimum wage increases and employment, while others indicate minimal or no effect, underscoring the intricacies of the issue.[61]

Critical Wage Theory advocates for stronger worker rights by highlighting existing legal limitations and promoting fundamental labor principles. One strategy that is often touted as a solution to the challenges posed by wage labor and job displacement due to technological advancements is basic income.[62] While it may offer

59. *See* Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV. (Jul.–Aug. 2016) (examining the limitations of conventional diversity programs and proposing alternative strategies based on data analysis); WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER (1998) (examining the long-term impact of race-conscious admissions policies in higher education, providing empirical evidence from a comprehensive study); *see also* DERRICK A. BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992) (examining the limits of reforms to end racism in the United States).

60. *See* RUTH WILSON GILMORE, GOLDEN GULAG, PRISONS, SURPLUS, CRISIS AND OPPOSITION IN GLOBALIZING CALIFORNIA (2007) (discussing the implications of the growth of California's prison system); *see also* Jamelia Morgan, *Responding to Abolition Anxieties: A Roadmap for Legal Analysis*, 120 MICH. L. REV. 1199 (2022) (reviewing Mariame Kaba, We Do This 'Til We Free Us (2021)) (advocating for change in policing practices).

61. *Compare* DAVID NEUMARK, & WILLIAM L. WASCHER, MINIMUM WAGES (2008) (discussing different studies about the correlation between wage increases and employment levels.), *with* DAVID CARD & ALAN KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE (1995) (suggesting that the effect of minimum wage increases on employment is minimal or even negligible in some cases, challenging traditional views on the subject).

62. GUY STANDING, BASIC INCOME: AND HOW WE CAN MAKE IT HAPPEN (2017) (describing the concept of basic income, and its potential effects on the economy, the

certain benefits to workers, it also raises concerns about accountability and fairness. Giving a cash transfer to all citizens may not do much to subsidize the primary beneficiaries of labor through government intervention.

While basic income could theoretically be equitably designed, it will not be a viable alternative to the current wage labor system very soon. In the end, wage justice necessitates a neutral arbiter like government to establish fair wages, as racial exploitation becomes more probable without such an institution. Recent examples include wage boards.[63]

A. The Long View

As the New Deal is reaching ninety years old this year, there is fair amount of revisionist history happening. Franklin Delano Roosevelt passed the New Deal and became a folk hero to generations of unionists.[64] Harry Truman continued that legacy by vetoing the Taft-Hartley Act, even though his veto was overridden.[65] The election of John F. Kennedy in 1960 and ascension of his brother to the Attorney General of the United States led to renewed scrutiny of the labor movement through the Labor Management Reporting and Disclosure Act.[66]

The history of government involvement in wages dates to the 1930s with the enactment of the Davis-Bacon Act of 1931.[67] This act applies to all jobs that involve public money and sets a minimum wage. The Department of Labor enforces prevailing wage laws, conducts investigations, and monitors payroll records to ensure compliance. State agencies also play a role in enforcing wage laws for state-funded jobs.[68]

This interventionist approach has been proven effective over the past century. Prevailing wage laws, despite their origins in racial protectionism, have contributed to a higher standard of living

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poor and the future of work).

63. *See, e.g.,* Cesar Rosado Marzan, *Can Wage Boards Revive U.S. Labor? Marshalling Evidence from Puerto Rico*, 95 CHI.-KENT L. REV 127 (2020).

64. *FDR and the Wagner Act*, *A Better Relationship Between Management and Labor*, FRANKLIN D. ROOSEVELT PRESIDENTIAL LIBR. & MUSEUM, https://www.fdrlibrary.org/wagner-act [https://perma.cc/AH7M-46C4].

65. *Veto of the Taft-Hartley Bill*, HARRY S. TRUMAN LIBR. & MUSEUM, https://www.trumanlibrary.gov/library/public-papers/120/veto-taft-hartley-labor-bill [https://perma.cc/2SHR-QDZR].

66. 29 U.S.C. § 401.

67. 40 U.S.C. § 3141.

68. For an example of state agency enforcement, *see Labor Commissioner's Office*, STATE OF CAL. DEP'T OF INDUS. RELS., https://www.dir.ca.gov/DLSE/dlse.html [https://perma.cc/CBF3-5XCH].

for many immigrants and workers of color.[69] The question now is how the new regime will approach this intervention. On the one hand, they owe much of their victory to rank-and-file voters, but on the other hand, they are also beholden to their corporate masters and home builders. There is certainly a scenario where the status quo will prevail, and another where there will be active dismantling of prevailing wage laws.

The critique of merit as leading to wage justice can also be seen through the lens of Critical Race Theory. If wages were solely determined by merit and productivity, it could potentially serve as a viable concept of justice. Artificial intelligence may bring us closer to achieving this goal through surveillance, monitoring, and keystroke technology. Employers utilize this technology to minimize time spent on tasks, potentially reducing wages to the minute or in six-minute increments.[70] While this system may be effective for large law firms, it remains uncertain whether workers would derive any benefits from such a system. In this way, the critique of merit may also guard against invasive surveillance.

Another aspect of wage justice that has recently been curtailed by the Supreme Court's decision in *Epic Systems v. Lewis* is the procedural aspect.[71] In *Epic Systems*, the court ruled that wage injustice is not a matter of concerted activity protection, and therefore, class and collective actions can be curtailed by mandatory arbitration.[72] This means that when there is systemic wage injustice, it becomes more challenging to remedy it. In March 2022, Congress enacted a law limiting mandatory arbitration for sexual harassment claims,[73] and so we can hope, someday, similar limits will be extended to help people of color and immigrants.[74]

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69. *See* GARCIA, CRITICAL WAGE THEORY, *supra* note 7 (discussing stories of successful organizing around prevailing wage laws).

70. *See* Max Freedman, *Time Clock Rounding Best Practices*, BUS. NEWS DAILY (Jan. 22, 2024), https://www.businessnewsdaily.com/16113-time-clock-rounding.html [https://perma.cc/T6KQ-Q35G] (explaining what time-clock rounding is).

71. Epic Systems Corp. v. Lewis, 584 U.S. 497, 516 (2018).

72. *Id.* at 519.

73. *See* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, 9 U.S.C. § 402; Deborah Anne Widiss, *New Law Limits Mandatory Arbitration in Cases Involving Sexual Assault or Sexual Harassment*, AM. BAR ASS'N (Nov. 22, 2022), https://www.americanbar.org/groups/labor_law/resources/magazine/archive/new-law-limits-mandatory-arbitration-cases-sexual-assault-harassment/ [https://perma.cc/8DCN-6VW7].

74. *See,* Ruben J. Garcia, *Arbitration Law and Labor Law at the Margins: Workers of Color Caught Between Collective and Individual Visions of Alternative Dispute Resolution*, *in* THE FEDERAL ARBITRATION ACT: SUCCESSES, FAILURES, AND

One of the defining characteristics of Critical Race Theory (CRT) is its challenge to the notion of merit.[75] Critical Race theorists have compellingly demonstrated that the concept of merit in education and employment is overdetermined and often hinders other racial justice goals.[76] The CRT approach aims to destabilize the notion of merit to achieve a more equitable society.[77]

While there is much to discuss about the current political climate, my goal here is not to get bogged down in political contingencies, especially since we have been through this before. In this era of repression, we must be realistic about the possibilities that lie ahead. The current era is characterized by assaults on the very foundation of liberalism, encompassing issues like press freedom and free trade.[78] To confront these challenges, we require a concept of wage justice that is adaptable yet unwavering in its commitment to core values. These values encompass ensuring fair wages for the lowest-paid workers and acknowledging the redistributive and reparative role that wage justice plays in society.[79]

Wage justice can be understood in various ways. Here is where the Rawlsian liberal paradigm is incomplete. Liberal theory posits a universal desire for fair treatment, even for those at the bottom of the economic ladder.[80] This aligns with traditional liberal principles, but it is not the foundation of Critical Wage Theory. Rawls's theory serves as a template for liberalism, emphasizing the importance of equal treatment for all, regardless of their economic status.[81] This is grounded in the original position thought experiment, which suggests a society organized around two key principles: addressing inequalities and benefiting the least advantaged.[82] These principles are chosen from a position of

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A ROADMAP FOR REFORM (Richard Bales & Jill Gross eds. 2025).

75. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 105–07 (2001).

76. *See id.*

77. *See id.*

78. Edward Helmore, *Trump Sharpens Attacks on US Media as Voice of America Employees Put on Administrative Leave*, GUARDIAN (Mar. 15, 2025), https://www.theguardian.com/us-news/2025/mar/15/trump-media-attacks [https://perma.cc/XW6Z-5UZ4]; Fred P. Hochberg, *Tariffs Won't Make America Great Again: Export-Import Bank's Former Chairman and President*, FORTUNE (Mar. 17, 2025), https://fortune.com/2025/03/17/tariffs-trade-trump-us-economy/ [https://perma.cc/QU9E-49T5].

79. *See* Crenshaw, *supra* note 6, at 1352.

80. RAWLS, *supra* note 11, at 4.

81. *Id.*

82. *Id.* at 13.

ignorance, ensuring justice for all members of society.[83] The difference principle, based on these ideas, allows for inequalities that benefit the least advantaged, while the opportunity principle guarantees their access to positions.[84] While Rawls's theory has been criticized for prioritizing utility over natural rights,[85] it remains a central focus for discussions on justice, equality, and the role of institutions in society.

Another conception of wage justice is simply moral desert, or "to each entitled to their abilities."[86] This notion of the meritocracy and the liberal order is one of the aspects that Critical Wage Theory rejects.[87] Instead, it advocates for higher wages as a matter of justice, rather than as a definition of economic merit.[88]

Rawls's theory emphasizes impartiality and fairness in societal structures, aiming to reconcile liberty and equality.[89] It includes the original position, two principles of justice, and fair equality of opportunity.[90] The problem with the liberal paradigm is that it fails to consider the social conditions of racism in society. This is why critical theory counts these realities through the story telling of workers.

The current workplace and legal system crisis of legitimacy arises from unchecked capitalism's diminishing of law's significance.[91] Presenting this unsettling notion to law students,

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83. *Id.* at 17.

84. *Id.* at 62, 65.

85. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (Blackwell Publishers Ltd., 1974) (arguing for a libertarian approach to justice that eschews state intervention).

86. RAWLS, *supra* note 11, at 310–315; *see also Distributive Justice*, STANFORD ENCYCLOPEDIA OF PHIL., Winter 2017, https://plato.stanford.edu/entries/justice-distributive/ [https://perma.cc/M65M-DUR2] (explaining "Rawls' Difference Principle approach, that those with unequal natural endowments should receive compensation. For instance, people born with disabilities, or ill-health, who have not brought these circumstances upon themselves, can be explicitly compensated so that they are not disadvantaged by their economic prospects").

87. *See* DELGADO & STEFANCIC, *supra* note 75, at 105–07.

88. *See* RAWLS, *supra* note 11, at 7.

89. *See Justice as Fairness: John Rawls and His Theory of Justice*, 23 BILL OF RIGHTS IN ACTION, no. 3, Fall 2007, https://teachdemocracy.org/online-lessons/bill-of-rights-in-action/bria-23-3-c-justice-as-fairness-john-rawls-and-his-theory-of-justice [https://perma.cc/UU28-P74Y].

90. *See* Julian Lamont & Christi Favor, *Distributive Justice*, *in* STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta, ed., 2017), https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=justice-distributive [https://perma.cc/2XT4-MMN3] (discussing Rawls' theory of justice).

91. *See* Randy Albelda, Book Review, *The Gloves-Off Economy*, 48 BRITISH INT'L J. INDUS. EMP. REL. 201, 222 (2010) (reviewing THE GLOVES-OFF ECONOMY: WORKPLACE STANDARDS AT THE BOTTOM OF AMERICA'S LABOR MARKET, *in* LABOR AND EMPLOYMENT SERIES (Annette Bernhardt et al. eds., 2008)).

professors, and attorneys is challenging, but new justice concepts are urgently needed. Despite societal disparities, we need fresh reasons for expanding opportunity and equity amidst regressive political trends. Growing attacks on diversity, equity, and inclusion necessitate reevaluating worker justice principles.[92] Will this era be another familiar cycle or a profound transformation? Several indicators suggest it is merely a continuation: the same president that was in office in 2017 was once again elected in 2025, Republicans once again hold a narrow majority in Congress, and the Supreme Court maintains a conservative majority. However, structural shifts suggest otherwise.

The perspective of the employers in this current moment should be considered. In their eyes, justice emerges as the most practical outcome, considering the constraints imposed by the market and our own psychological inclinations. While everyone strives for this ideal, as we delve into some of the movements that emerged during the most tumultuous periods of the past century, approaching the centennial and potentially the culmination of the New Deal, it is imperative to redefine wage justice. In this Article, I argue that wage justice encompasses a substantive component that extends to racial justice.

In my work, I have highlighted the stories of marginalized workers, including low-wage workers organizing unions and farmworkers struggling with misclassification. Despite protective labor laws, significant gaps persist, especially affecting farmworkers and domestic workers. Labor law, employment, and international labor law are fragmented and siloed, primarily focusing on statutes and common law. The goal of Critical Wage Theory is to bring together disparate elements of workplace protection for the benefit of marginalized workers.

Advocates of social justice hope for ongoing efforts to raise the minimum wage at the state and local levels.[93] Many individuals still

92. *Dismantling DEI: A Coordinated Attack on American Values*, MOVEMENT ADVANCEMENT PROJECT (July 2024), https://www.mapresearch.org/2024-dei-report [https://perma.cc/N5TX-624U]; Shari Dunn, *It's Time That Corporate Attorneys Shifted from Defense to Offense on DEI,* HILL (Mar. 19, 2025), https://thehill.com/opinion/5202409-corporate-america-dei-strategy/ [https://perma.cc/4JPP-U487].

93. *See, e.g.*, McKenna Ross, *Nevada Home Health Workers Seek $20 Minimum Wage,* L.V. REV. J. (Jan. 30, 2025), https://www.reviewjournal.com/life/health/nevada-home-health-workers-seek-higher-minimum-wage-3272833/ [https://perma.cc/5DK5-DWCC]; Colton Lochhead & Bill Dentzer, *Nevada Bill Would Allow College Athletes to Profit,* L.V. REV. J. (Mar. 12, 2021), https://www.reviewjournal.com/news/politics-and-government/carson-city-journal/nevada-bill-would-allow-college-athletes-to-profit-2302358/

struggle with financial insecurity. One pernicious aspect of low-wage earner treatment is the social construction of poverty.[94] The future is uncertain, but there is a genuine possibility that fundamental New Deal safeguards may be repealed in the coming years.[95]

Workers' narratives reveal the dynamic interplay between legal frameworks and social movements, showcasing diverse outcomes in their pursuit of rights. These stories prompt us to reevaluate legal strategies for safeguarding low-wage workers. However, Work Law courses often focus solely on legal doctrines, neglecting this broader perspective. To address this gap, I propose a novel approach that reclaims narrative space and explores alternative strategies for protecting vulnerable workers.

Employers significantly influenced the development of legal bodies, leading to statutory gaps that exploit workers.[96] Understanding this role can shed light on how laws are shaped and why protection may be potentially uneven across sectors. Alternative strategies, such as grassroots organizing, collective bargaining, public awareness campaigns, and corporate social responsibility initiatives, could have been employed instead of relying solely on legal mechanisms. By evaluating these approaches, stakeholders can identify more effective ways to advance wage justice and protect workers' rights.

We must continue to explore the commonalities between workers' rights movements and other relevant social movements to achieve wage justice. We must continue to recognize the connection between wage injustice and the effects of slavery that have persisted for nearly two centuries.

[https://perma.cc/9TGG-4M9Z]; Glen Meek, *Inmate Wages Not 'Slave Labor,' Nevada High Court Rules in Dismissal*, L.V. REV. J. (Aug. 10, 2022), https://www.reviewjournal.com/news/politics-and-government/inmate-wages-not-slave-labor-nevada-high-court-rules-in-dismissal-2621234/ [https://perma.cc/T7ZH-XG6Y].

94. Lathrop et al., *supra* note 44.

95. *See* John Tarleton, *The Right Wing's Goal of Repealing the 20th Century is Now Within Reach. Who Will Stop Them?*, INDYPENDENT (Feb. 13, 2025), https://indypendent.org/2025/02/the-right-wings-goal-of-repealing-the-20th-century-is-now-within-reach-who-will-stop-them/ [https://perma.cc/MX98-7HMV]; *see also* NATALIE FOSTER, THE GUARANTEE: INSIDE THE FIGHT FOR THE NEXT ECONOMY (2024) (discussing strategies for the protection of New Deal such as economic and retirement security).

96. *See* LAWRENCE MISHEL, LYNN RHINEHART & LANE WINDHAM, ECON. POL'Y INST., EXPLAINING THE EROSION OF PRIVATE-SECTOR UNIONS (2020), https://files.epi.org/pdf/215908.pdf [https://perma.cc/RU9W-G9KG] (explaining that the decline of unionization was due to "a combination of employer tactics and weaknesses in the law").

B. Social Movements

Critical Wage Theory delves into the Los Angeles Living Wage Ordinance, requiring businesses to pay a specific wage above the California minimum.[97] Community activists successfully implemented these ordinances, like efforts in Pasadena and Santa Monica,[98] where I provided pro bono legal assistance. These campaigns paved the way for progressive change in several cities, but their impact was limited. For instance, the Santa Monica ordinance extended its coverage to the "Coastal Zone," making it more broadly applicable but also more controversial.[99] It faced legal challenges and was eventually repealed.[100] Despite these efforts being around for years, minimum wage legislation remains contentious.

Constitutional litigation has also provided inadequate remedies,[101] and court decisions often prioritize individual worker rights over collective rights, discouraging union membership.[102] Recent rulings have also compromised unions' ability to pursue political objectives and preserve their integrity, including interference with communication and democratic participation.[103] While the concept of "political power" is relative, so is the term "generous wages." Many workers in the private sector struggle with reduced wages and benefits.[104]

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97. L.A., CAL., CHARTER & ADMIN. CODE § 10.37 (2024) (Living Wage Ordinance).

98. PASADENA, CAL., MUN. CODE § 4.11.010 (2025); SANTA MONICA, CAL., CODE OF ORDINANCES §4.65.010 (2025).

99. Stephanie Luce, *Living Wage Movement: An Update*, AGAINST THE CURRENT, Jan./Feb. 2001, https://againstthecurrent.org/atc090/p1533/ [https://perma.cc/9ZNG-N84D] (discussing the expansion of the coastal zone as a grassroots movement). For an excellent discussion on the controversy surrounding the original version of the Santa Monica Living Wage Ordnance, *see* Kathleen M. Erskine & Judy Marblestone, *The Movement Takes the Lead: The Role of Lawyers in the Struggle for a Living Wage in Santa Monica, California, in* CAUSE LAW. & SOC. MOVEMENTS 249 (Austin Sarat & Stuart A. Scheingold, eds. 2006).

100. *Compare* Michael Reich, *Living Wage Ordinances in California*, in U. CAL. INST. LAB. & EMPL., THE STATE OF CALIFORNIA LABOR 202 tbl.6.1 (2003), *with* SANTA MONICA, CAL., CODE OF ORDINANCES §4.65.010 (2025).

101. *See,* Ruben J. Garcia, *Politics at Work After* Citizens United, 49 LOY. L.A. L. REV. 1, 24–25 (2016).

102. *See, e.g.*, Janus v. American Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) (requiring non-member public sector employees represented by a union to pay union dues violates the First Amendment); Knox v. Service Emps. Int'l Union, Local 1000, 567 U.S. 298 (2012) (holding that public sector unions must provide notice to employees every time assessments are made for political mobilization).

103. *See id.*

104. Bryan Robinson, *The Wage Crisis of 2025: 73% of Workers Struggling*, FORBES (Jan. 24, 2025), https://www.forbes.com/sites/bryanrobinson/2025/01/24/the-wage-crisis-of-2025-73-of-workers-struggling/ [https://perma.cc/YLG2-CS6X]

Now, we must find and define the unfulfilled promises of law. We must explore how the structure and content of law contributes to its ineffectiveness. And yet we must also see how collective action can overcome these shortcomings. I witnessed this firsthand in the case of *Michael's Painting*, which I discuss in *Critical Wage Theory*. This action involved immigrant painters who sought to be paid accurate prevailing wages and the recognition of their union.[105] The NLRB found that the workers were unlawfully terminated for organizing a union.[106] The employer directly stated the reason for firing, aiding unionization, without fear of legal repercussions.[107] The employer's actions effectively communicated that unionizing was not an option.[108]

In debates about amending and enforcing statutes, theories of justice and foundational labor principles are often overlooked. This book reveals how statutes create gaps that workers exploit.[109] I aim to strengthen arguments for workers' rights protection, fostering common ground on fundamental principles despite disagreements about their scope. Ultimately, I envision workers' rights recognized alongside critical issues like climate change, financial collapse, and healthcare, leading to improved conditions for workers. That is a long-term vision.

My objective is to develop a theory of wage justice and show why raising the minimum wage is racial justice. This is complex, especially since I have argued economic consequences aren't primary.[110] To address this issue, we must consider three distinct concepts of justice: (1) egalitarianism, which emphasizes equality; (2) focusing on the most vulnerable individuals; and, (3) most importantly, combining the first two approaches to treat the least privileged.[111] This concept also aligns with how our society distributes monetary rewards for work.

The neoclassical model of labor economics, while influential, faces strong critiques that align with legal arguments for regulating employment relationships. Regulation of the labor market, particularly regarding wages and hours, has a long history, with

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(indicating through a study that rising living costs and stagnant wage are affecting not just low-wage earners).

105. Michael's Painting, Inc., 337 N.L.R.B. 860 (2002), *enf'd*, 85 F. App'x 614 (9th Cir. 2004).

106. *Id.* at 860–62.

107. *Id.*

108. *Id.*

109. GARCIA, CRITICAL WAGE THEORY, *supra* note 7, at 25.

110. *Id.* at 26.

111. *Id.* at 118–19.

examples going back centuries.[112] The Great Depression catalyzed a shift in U.S. labor law, with the Supreme Court upholding minimum wage legislation and paving the way for broader labor protections.[113]

III. Challenges Faced by Low-Income Workers

A. The Story of Maria Blanco

The recent Eleventh Circuit opinion of *Blanco v. Samuel* provides another example of the many areas in which immigrants and people of color are often most in need of wage justice.[114] The FLSA governs overtime pay for nannies, with exemptions for those residing in the household where they work.[115] Maria Blanco, a domestic worker for the Samuel family, worked seventy-nine hours a week, primarily overnight shifts, and asserted her entitlement to overtime pay under the FLSA.[116] The parents contended that Blanco was exempt from overtime pay due to the live-in service exemption, asserting that she resided in their household.[117]

Blanco's extensive time spent at the Samuels' house was not sufficient to establish residency, as evidenced by her maintaining a separate address, spending time away from the house, and not having a key.[118] The Samuels' arguments, including occasional sleepovers and the display of personal items, were insufficient to meet the residency criteria.[119] Even considering DOL regulations, Blanco's work schedule and living arrangements did not align with the criteria for residency.[120]

The Eleventh Circuit Court of Appeals ruled that Blanco was entitled to overtime pay under the FLSA. The court found that Blanco did not "reside" at the employer's premises, as defined by the Department of Labor, and thus did not qualify as a live-in domestic worker and was entitled to overtime compensation.[121] The court also

112. *See, e.g.*, Peter Stabel, *Labour Time, Guild Time? Working Hours in the Cloth Industry of Medieval Flanders and Artois (Thirteenth-Fourteenth Centuries)*, 11 TIJDSCHRIFT VOOR SOCIALE EN ECONOMISCHE 27 (2014) (discussing the debate on labor time in the medieval industries).

113. West Coast Hotel v. Parrish, 300 U.S. 379, 399 (1937).

114. Blanco v. Samuel, 91 F. 4th 1061 (11th Cir. 2024).

115. *See* U.S. DEP'T OF LAB., FACT SHEET #79B, *supra* note 29.

116. *Blanco*, 91 F.4th at 1065.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 1071.

121. *Id.*

identified a genuine dispute of material fact regarding who should pay Blanco's overtime wages.[122]

Although the story of Maria Blanco is one of many examples of marginal workers seeking justice in the face of a challenging legal framework, her story shows the path for many whose stories we do not know. The story also reminds us of the need for collective action, particularly in this industry with a high number of immigrant and women workers.

B. Tipped Workers, Retaliation, and Secure Scheduling

The tip credit formula, established in 1996, permits employers to pay tipped employees a lower minimum wage, relying on tips to make up the difference.[123] However, this system faces interpretive challenges, particularly regarding the distinction between tips and service charges and the legality of tip pooling.[124] While the FLSA sets a federal minimum wage, state laws often provide more robust protections for tipped workers, including higher minimum wages and restrictions on tip credit practices.[125] In the next four to ten years, the movement organization One Fair Wage will continue to advocate for the end of the tipped minimum wage in the FLSA, but will likely be faced with the simplistic retort of "No Tax on Tips."[126]

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122. *Id.*

123. DAVID H. BRADLEY, CONG. RSCH. SERV., R43445, TIP CREDIT PROVISIONS OF THE FAIR LABOR STANDARDS ACT (FLSA): IN BRIEF 2 (2015); Sylvia Allgretto, *Here's a Tip: Tips Are Not Always a Gratuity*, CTR. ECON. & POL'Y RSCH. (May 20, 2024), https://cepr.net/publications/heres-a-tip-tips-are-not-always-gratuity/ [https://perma.cc/385F-E66X].

124. BRADLEY, *supra* note 123, at 1 n.2; U.S. DEP'T OF LAB., WAGE & HOUR DIV., FACT SHEET #15: TIPPED EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2024), https://www.dol.gov/agencies/whd/fact-sheets/15-tipped-employees-flsa#:~:text=An%20employer%20must%20pay%20a,is%20currently%20%247.25%20per%20hour [https://perma.cc/T4AA-JT5Z].

125. BRADLEY, *supra* note 123, at 7–9. For example, the tipped minimum wage in Oregon varies by region, but is $13.70 per hour in the non-urban counties. *See Minimum Wages for Tipped Employees*, U.S. DEP'T OF LAB. (Jan. 1, 2025), https://www.dol.gov/agencies/whd/state/minimum-wage/tipped [https://perma.cc/YD98-XN8M].

126. Kevin Sheridan, *Rosen, Cortez Masto Help Introduce Bill Exempting Tips from Federal Income Taxes*, FOX 5 LAS VEGAS (Jan. 16, 2025), https://www.fox5vegas.com/2025/01/16/rosen-cortez-masto-help-introduce-bill-exempting-tips-federal-income-taxes [https://perma.cc/UX7W-LM7Q]; *see also* Jessica Hill, *'A Tip is a Gift, Not a Guarantee': Horsford Bill Aims to End Taxes on Tips, Subminimum Wage*, LAS VEGAS REV. J. (Feb. 14, 2025), https://www.reviewjournal.com/news/politics-and-government/nevada/nevada-lawmaker-boosts-tips-act-to-end-taxes-on-tips-subminimum-wage-3304311/ [https://perma.cc/2HJY-GX6W].

Employers oppose eliminating the tip credit, fearing it will reduce employment and potentially lead to restaurant closures.[127] However, proponents argue that a two-tiered wage system is unfair and advocate for raising or eliminating the tip credit, citing successful examples of states with equal treatment policies.[128] Enforcing the FLSA presents challenges, including limited resources, employee reluctance to complain due to fear of retaliation, and reliance on incomplete or inaccurate employer records.[129]

Low-wage workers frequently encounter precarious work schedules, necessitating legislation to establish comprehensive scheduling standards.[130] While some states have enacted laws addressing volatile job schedules,[131] many workers still lack adequate protection. Historical child labor practices in the United States, characterized by exploitation and hazardous conditions, led to the formation of organizations like the National Child Labor Committee, ultimately resulting in federal regulations such as the FLSA.[132] Many of these workers are women and people of color.[133]

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127. *The Fight Against Tip Credit Elimination Across the Country*, MINIMUM WAGE FACTS & ANALYSIS (Mar. 17, 2023, 2:19 PM), https://minimumwage.com/2023/03/the-fight-against-tip-credit-elimination-across-the-country/ [https://perma.cc/8J5L-HB49] (discussing workers who are mobilizing *in favor of* the two-tier wage system).

128. SARAH JAVAID, NAT'L WOMEN'S L. CTR., ONE FAIR WAGE: WOMEN FARE BETTER IN STATES WITH EQUAL TREATMENT FOR TIPPED WORKERS 1–2 (2024), https://nwlc.org/wp-content/uploads/2024/06/Tipped-Workers-FS-2024.6.12v1.pdf [https://perma.cc/5E5C-6QUV]; *see also* L.A., CAL., ADMIN. CODE §§ 10.37 (2024).

129. *Enforce Labor Law Protections to Improve Workers' Lives*, NAT'L EMPL. L. PROJECT, https://www.nelp.org/explore-the-issues/enforcing-labor-laws/ [https://perma.cc/E9XE-7UUY].

130. NAT'L WOMEN'S L. CTR., COLLATERAL DAMAGE: SCHEDULING CHALLENGES FOR WORKERS IN LOW WAGE JOBS AND THEIR CONSEQUENCES (2017) https://nwlc.org/wp-content/uploads/2017/04/Collateral-Damage.pdf [https://perma.cc/MVP7-FMFM] (discussing the 21.6 million workers in low-wage jobs that are affected by insecure schedules).

131. *Secure Scheduling Ordinance: Questions and Answers*, SEATTLE OFF. LAB. STANDARDS (Feb. 27, 2023), https://www.seattle.gov/documents/Departments/LaborStandards/SS%20QA_FINAL_02272023%20comprehensive.pdf [https://perma.cc/8AXG-J837]; KRISTEN HARKNETT, DANIEL SCHNEIDER & VERONIQUE IRWIN, U.S. DEP'T LAB., EVALUATING THE IMPACTS OF THE SEATTLE SECURE SCHEDULING ORDINANCE (2021), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/LRE_Harknett-EvaluatingImpactsSeattleSecureSchOrdinance_December2020.pdf [https://perma.cc/VY84-EKXC] (examining the effects of Seattle's Secure Scheduling Ordinance, highlighting improvements in schedule predictability for workers).

132. *See, e.g.*, VINCENT DIGIROLAMO, CRYING THE NEWS: A HISTORY OF AMERICA'S NEWSBOYS (2019) (discussing the history and labor conditions of newsboys in the United States).

133. *See* NAT'L WOMEN'S L. CTR., *supra* note 130.

Secure scheduling has not saved the day because it just provides notice and not a stable schedule.

In a future where race and diversity are actively deemphasized, there are several potential remedies that do not explicitly prioritize race but could still be beneficial. One such approach is to impose risk premiums on wages. For instance, "dangerous jobs" could be rated and indexed based on past injuries and fatalities, and then a risk premium of 15–20% of the minimum wage could be charged for these occupations. This strategy would be particularly advantageous to many immigrants and people of color who work in hazardous industries.

IV. Looking Forward

The Thirteenth Amendment aimed to prevent forced labor in the United States, as evidenced by Congressional debates and case law involving debt-based contracts as faux-entrepreneurship.[134] Many of the arrangements that are being revived in the gig economy are framed as worker-friendly approaches, but are benefiting putative employers more than the laborers themselves.[135] What we need are real solutions, such as a higher minimum wage and the elimination of the tipped minimum wage.

Wage transparency laws are being passed, but they are not enough.[136] There are other considerations. In environments where

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134. U.S. CONST. amend. XIII. Debt peonage contracts kept workers bound to the land until they paid their debts. The Supreme Court held these to be a violation of the Thirteenth Amendment. Pollock v. Williams, 322 U.S. 4 (1944). For more information about the Congressional debate leading to the passage of the FLSA, *see* Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, MONTHLY LAB. REV., June 1978, at 24–28.

135. *See* Ben Zipperer, Celine McNicholas, Margaret Poydock, Daniel Schneider & Kristen Harknett, *National Survey of Gig Workers Paints a Picture of Poor Working Conditions, Low Pay*, ECON. POL. INST. (June 1, 2022), https://www.epi.org/publication/gig-worker-survey/ (finding that gig workers face poor working conditions, earning less than minimum wage and facing food insecurity, technological glitches, and unpaid bills).

136. *See, e.g.*, *Staying Ahead of the Curve: A Guide to California's Pay Transparency Laws*, FARELLA BAUN + MARTEL (Feb. 18, 2025) https://www.fbm.com/publications/staying-ahead-of-the-curve-a-guide-to-californias-pay-transparency-laws/ [https://perma.cc/6M68-SE8Y] (explaining California's wage transparency law, § 432.3 of the California Labor Code); *Equal Pay for Equal Work Act*, COLO. DEP'T OF LAB. & EMPL., https://cdle.colorado.gov/labor-law-stats/labor-laws-by-topic/equal-pay-for-equal-work-act [https://perma.cc/Q6GL-5MVD]) (explaining Colorado's pay transparency law, Part 2 of the Equal Pay for Equal Work Act); WASH. REV. CODE § 49.58.110 (2025); *Connecticut Law to Require Provision of Wage Ranges to Applicants and Employees*, Morgan Lewis (June 30, 2021), https://www.morganlewis.com/pubs/2021/06/connecticut-law-to-require-provision-of-wage-ranges-to-applicants-and-employees [https://perma.cc/JV9D-RFT4]

workers fear retaliation, labor and employment law have long been closely intertwined with the struggles of economically vulnerable workers. Despite the progress made by New Deal and progressive reformers, significant gaps persist, particularly affecting farmworkers and domestic workers. These workers often face misclassification and lack of statutory protections.[137] This paper delves into the historical context and current challenges, proposing innovative strategies for advocacy and education.

When examining the historical context of labor laws in the United States, it is crucial to consider the legacy of the New Deal and the progressive reforms of the early twentieth century. These initiatives were pivotal in shaping the labor landscape by introducing a series of laws aimed at safeguarding workers' rights and enhancing working conditions. Despite these advancements, substantial gaps remain, particularly impacting low-wage and vulnerable workers. These gaps are often the consequence of enduring systemic issues and policy oversights that have failed to adequately address the needs of these groups.[138]

Further, the role of interest group politics has been a pivotal factor in the evolution of labor legislation. Interest groups, such as labor unions and business organizations, have historically wielded considerable influence over political decision-making processes.[139] Their lobbying efforts can significantly impact the passage and implementation of labor laws, often reflecting the priorities and agendas of these powerful entities. This dynamic has, at times, contributed to the persistence of economic gaps,[140] as competing interests and power imbalances may overshadow the concerns of the most vulnerable workers. Understanding these historical and political contexts is essential for comprehending the current state

(explaining Connecticut's wage transparency law, Connecticut Public Act 21-30).

137. *See* BLOOD, SWEAT, AND FEAR, *supra* note 56.

138. *See* ADEWALE MAYE, ECON. POL. INST., CHASING THE DREAM OF EQUITY: HOW POLICY HAS SHAPED RACIAL ECONOMIC DISPARITIES (2023), https://files.epi.org/uploads/270308.pdf [https://perma.cc/DE7V-L95D] (arguing that failure to address economic demands after the Civil Rights Movement "has adversely impacted the economic security of people of color and exacerbated many of the long-standing racial disparities in economic outcomes present today").

139. *See* Garcia, *Arbitration Law and Labor Law at the Margins, supra* note 74, at 1.

140. *See* VALERIE WILSON & WILLIAM DARITY, JR., ECON. POL. INST., UNDERSTANDING BLACK-WHITE DISPARITIES IN LABOR MARKET OUTCOMES REQUIRES MODELS THAT ACCOUNT FOR PERSISTENT DISCRIMINATION AND UNEQUAL BARGAINING POWER (2022), https://files.epi.org/uploads/215219.pdf [https://perma.cc/9KXY-4AZB] (outlining the economic gaps between Black and white workers, including unemployment and pay disparities).

of labor laws and the challenges that persist in ensuring equitable protections for all workers.

Contemporary labor law challenges demand significant reforms, particularly in economic justice and integrating diverse theoretical perspectives. The stagnant federal minimum wage in the United States since 2009 has sparked a broader debate on economic justice and the shaping of new labor law.[141] This persistent stagnation has fueled grassroots advocacy movements for wage increases, reflecting a collective effort to address income and living standards disparities.[142]

An innovative approach to understanding these challenges lies in the emerging field of Critical Wage Theory. This theory examines the intersections of labor law and racial justice, arguing that achieving economic equity requires addressing racial disparities within the labor market.[143] It offers novel insights into crafting inclusive and equitable wage policies. Critical Wage Theory is both a normative and descriptive book.[144] I am describing the techniques that many movements are using to push for economic justice. I also argue normatively that this is needed to achieve true wage justice.

Conclusion

In this Keynote Address, I have emphasized the need to rethink labor and employment law justice. By adopting a broader educational perspective that includes historical lessons and coalition-building, we can develop more effective strategies for protecting vulnerable workers. The intersection of labor law with other social justice movements offers a rich terrain for exploration and potential reform.

As I have argued, the neoclassical analysis of employment regulation fails to acknowledge the realities of the modern workplace. The economic analysis posits that labor market

141. *See* Kimberly Sanchez Ocasio & Leo Gernter, *Fighting for the Common Good: How Low Wage Workers Identities Are Shaping Labor Law*, 126 Yale L.J. 503 (2017) (analyzing the role of workers in organizing campaigns for increased minimum wages and other workplace inequalities).

142. There are several examples of grassroots organizations that prioritize racial justice in their advocacy for economic rights. These include E.A.T. in Chicago (Black workers), Fe y Justicia in Houston (immigrant workers), and the South Asian Workers Center in Boston (South Asian low-wage immigrant workers). *See* Kenya Evans, *13 Nonprofits Fighting for Workers' Rights in America*, PHILANTHROPY TOGETHER (Aug. 29, 2024), https://philanthropytogether.org/13-nonprofits-fighting-for-workers-rights-in-america/ [https://perma.cc/AGT7-GQ8F].

143. GARCIA, CRITICAL WAGE THEORY, *supra* note 7.

144. *See id.*

regulations, such as minimum wage laws, are inefficient within the neoclassical framework and result in higher costs for employers and lower wages for employees.[145]

The neoclassical model oversimplifies the employment relationship, ignoring human elements and market imperfections like monopsony, transaction costs, and information asymmetry, leading to suboptimal outcomes for workers of color. Regulation can address these issues, potentially boosting wages, employment, and efficiency for all, while also improving the macroeconomic factors like economic cycles and human capital disinvestment emphasize the need for government regulation of wages for long-term economic growth and stability.

In the end, though, wage justice is less about economics than it is about how society values those who work. The minimum wage is one of the only vehicles in which we as a democracy puts value on labor.[146] When the monetary value of an hour of labor is irrationally low, the inference must be that the value of the person doing the work is also being undervalued. The intersection of race, gender and immigration status with that devalued labor only further highlights the suspicion that low wages and wage theft are part of the structural disadvantages that many people of color face in society today. With the attacks on diversity, equity and inclusion, the need for wage justice as racial justice is as great as ever. As Senator Edward "Ted" Kennedy said in 1980, at the cusp of another inflection point in the nation's politics: "[t]he work goes on, the cause endures, the hope still lives . . . ."[147] To paraphrase Senator Kennedy's concluding words at the 1980 Democratic National Convention, the dream of wage justice "shall never die."

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145. *See supra* Part II.

146. *See id.*

147. Senator Edward M. Kennedy, Address to the Democratic Nat'l Convention (Aug. 12, 1980) (transcript available at https://www.jfklibrary.org/learn/about-jfk/the-kennedy-family/edward-m-kennedy/edward-m-kennedy-speeches/address-to-the-democratic-national-convention-new-york-city-august-12-1980 [https://perma.cc/7CJC-CLWX]).

From ABC to OT: A Historical Critique of the FLSA's Unfair Overtime Exemption for Preschool Teachers

Anthony Alas†

Introduction

In 1971, Republicans and Democrats joined together to pass universal child care.[1] Then, President Nixon vetoed the bill, stating to the press, "Neither the immediate need nor the desirability of a national child development program of this character has been demonstrated."[2] Fifty years later, working mothers have become a force in the labor market.[3] However, this economic advancement hit a wall when COVID-19 halted women's employment rates, placing

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1. Jack Rosenthal, *President Vetoes Child Care Plan As Irresponsible*, N.Y. TIMES (Dec. 10, 1971), https://www.nytimes.com/1971/12/10/archives/president-vetoes-child-care-plan-as-irresponsible-he-terms-bill.html [https://perma.cc/4MCF-RVQG]; *see also*, Emily Badger, *That One Time America Almost Got Universal Child Care*, WASH. POST (June 23, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/06/23/that-one-time-america-almost-got-universal-child-care/ [https://perma.cc/347E-2J7K] (explaining that the Act, budgeted at $2 billion, "was supposed to be a serious first step toward alleviating the challenges of a labor force increasingly full of working mothers. The government was to fund meals, medical checkups and staff training. No family would have been required to participate, but every one would have had the option").

2. Rosenthal, *supra* note 1.

3. COUNCIL OF ECON. ADVISORS, ECONOMIC REPORT OF THE PRESIDENT 157–58 (2015) ("In 1920, only 24 percent of women worked outside the home, a share that rose to 43 percent by 1970 . . . . A similar pattern is seen in the participation rate of mothers with small children: 63 percent of whom currently work outside the home, compared to only 31 percent in 1970 . . . . More generally, our economy is $2.0 trillion, or 13.5 percent, larger than it would be without women's increased participation in the labor force and hours worked since 1970.").

the spotlight back onto the scarce availability of child care.[4] With over a quarter-million children still waiting for childcare services, the immediate need for a national child development program has never been clearer.[5]

Unfortunately, the federal government, befuddled in politicking, has failed to achieve the same bipartisan support that propelled universal child care forward in the 1970s.[6] Unnecessarily political, demonizing rhetoric[7] continues to smear universal child

4. During COVID-19, working mothers had a greater decline in employment rates and slower employment recovery than fathers. *See* LIANA CHRISTIN LANDIVAR & MARK DEWOLF, MOTHERS' EMPLOYMENT TWO YEARS LATER: AN ASSESSMENT OF EMPLOYMENT LOSS AND RECOVERY DURING THE COVID-19 PANDEMIC, U.S. DEP'T OF LAB. (2022) 1, https://downloads.regulations.gov/HHS-OS-2022-0012-4045/content.pdf [https://perma.cc/5XFE-Q3S2]. Working Hispanic mothers and Black mothers had the steepest declines, at rates of 21.2% and 15.2%, respectively. *Id.* Unsurprisingly, Hispanic and Black mothers were more likely to "reside in areas with disrupted childcare services and reduced availability of in-person school instruction." *Id.* at 2. Mothers of children aged zero to twelve also faced significant employment setbacks and slower employment recovery rates. *Id.*

5. Head Start, the federally funded preschool program, reportedly has over a quarter million children on its waiting lists. NAT'L. HEAD START ASS'N, AN UPDATE ON HEAD START'S ONGOING WORKFORCE CRISIS 1 (2023), https://nhsa.org/wp-content/uploads/2023/03/2023.02-Workforce-Brief.pdf [https://perma.cc/9FVF-DLBP]. This means that in 2023 *over one-third* of Head Start was not operating at capacity. This was not an issue of funds—the funds were in place. A quarter-million children could not enter Head Start due to staffing shortages. *Id.*

6. *See* Ellen Ioanes, *Did Joe Manchin Just Kill Build Back Better on Fox News?*, VOX (Dec. 19, 2021), https://www.vox.com/2021/12/19/22844969/manchin-build-back-better-setback-biden-social-spending-bill#:~:text=The%20Build%20Back%20Better%20Act,shaky%20ground%20for%20a%20while [https://perma.cc/X5FE-5UQ3] (describing how Democratic Senator Manchin withdrew key support for President Biden's Build Back Better Act, leading to a cut of nearly half of the bill's original $3.5 trillion budget); CONG. RSCH. SRVC., UNIVERSAL PRESCHOOL IN THE "BUILD BACK BETTER ACT" 1 (2021), https://www.congress.gov/crs-product/IN11751 [https://perma.cc/Y239-A7GR] (stating that the Build Back Better Act would have established a universal preschool program for all states, Indigenous Tribes, Tribal organizations, territories, and even organizations serving migrant and seasonal agricultural laborers); Julie Kashen, *How Congress Got Close to Solving Child Care, Then Failed*, THE CENTURY FOUND. (Dec. 12, 2022), https://tcf.org/content/commentary/how-congress-got-close-to-solving-child-care-then-failed/ [https://perma.cc/MS5U-2SLV] (providing a timeline of modern universal child care efforts in Congress, briefly detailing how both Democratic and Republican parties advocated for better child care funding).

7. 167 Cong. Rec. S8938–39 (daily ed. Dec. 7, 2021) (statement of Sen. Mitch McConnell on the Build Back Better Act) ("[T]he last time Washington Democrats pushed through a huge change that disrupted families' arrangements, it earned President Obama the 'Lie of the Year' award . . . . This year, many of the same Democrats want to write a sequel. They want to ram through a radical, reckless, multitrillion-dollar taxing-and-spending spree between now and Christmas. And a huge part of their bill would completely upend childcare and pre-K as they exist for

care efforts, stalling the educational development of young learners and restricting mothers' access to the labor market along the way. But beyond the curtain of apocalyptic rhetoric, universal child care remains incredibly popular.[8] Seventeen states have already funded, or are making progress towards, universal child care.[9]

Whether other states continue this trend, or whether Congress finally takes the same stand of unison that took place over fifty years ago, the demand for universal child care shows no signs of stopping. Inevitably, growing calls for increased access to child care creates higher demand for more teachers, placing a glaring, industry-wide question front-and-center: what do we do about teacher pay?

The Fair Labor Standards Act (FLSA) is the nation's preeminent wage protection statute, granting many employees a right to overtime wage rates.[10] However, the FLSA exempts all teachers from overtime, and of those teacher groups, preschool teachers are receiving the harshest treatment.[11] Preschool teachers—often among the lowest paid and least respected educators—are in need of better wage protections.[12] As it stands,

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families all across our country. If you like your childcare, you can keep your childcare. Well, buckle up, parents. What could possibly go wrong? The Democrats have written their toddler takeover in ways that would turn families' finances literally upside down and make already expensive childcare even costlier.").

8. JOHN HALPIN, KARL AGNE & NISHA JAIN, CTR. FOR AM. PROGRESS, WHAT DO VOTERS WANT ON CHILD CARE AHEAD OF THE 2020 ELECTIONS? 9 (2020), https://www.americanprogress.org/wp-content/uploads/sites/2/2020/09/Child-Care-Polling.pdf [https://perma.cc/AG2V-LV4L] (stating that 90% of Democrats, 76% of Independents, 67% of Republicans, and nearly nine in ten parents support guaranteed "child care assistance to low-income and middle-class families on a sliding scale based on household income"); Charlie Joughin, *National Poll Shows Voters Want Bipartisan Approach to Child Care*, FIRST FIVE YEARS FUND (Dec. 3, 2019), https://www.ffyf.org/resources/2019/12/national-poll-shows-voters-want-bipartisan-approach-to-child-care/ [https://perma.cc/RT4W-W7XF] (showing "one-in-four voters say that early childhood education is a primary factor in deciding whether to support an elected official"). Even employers have picked up the slack by funding "employer-sponsored" preschools. *See* Erin L. Kelly, *The Strange History of Employer-Sponsored Child Care: Interested Actors, Uncertainty, and the Transformation of Law in Organizational Fields*, 109 AM. J. SOCIO. 606, 617–19 (2003).

9. ALLISON H. FRIEDMAN-KRAUSS, W. STEVEN BARNETT, KATHERINE S. HODGES, KARIN A. GARVER, G.G. WEISENFELD, BETH ANN GARDINER & TRACY MERRIMAN JOST, RUTGERS GRADUATE SCH. OF EDUC., THE STATE OF PRESCHOOL 2022 at 9 (2023), https://nieer.org/sites/default/files/2023-09/yb2022_fullreport.pdf [https://perma.cc/2FRW-LDJM].

10. *See infra* Part I.A.

11. *See infra* Part I.D.

12. *See infra* Part I.A.

the FLSA's overtime exemption harms a group of vulnerable workers that the statute was designed to protect.[13]

Unfortunately, legislative history is virtually silent about why the overtime exemption was included in the FLSA, and equally silent about why teachers, and later preschool teachers, became overtime exempt.[14] To pave the way for better labor protections, history must be pieced together to unveil the congressional motive for exempting preschool teachers. This Note traces the historical justifications for overtime exemptions that, at the time, were limited to exempting only doctors and lawyers. Then, the Note looks to the explosion of early childhood education onto the public scene in the mid-1900s. Clashes of ideology rang out around universal child care. On one side, opponents of universal child care worried that a universal childcare bill "Sovietized" children, deprived women of their role as home caretaker, and erased parental authority.[15] On the other, Civil Rights Era advocates saw child care as another battleground for progress. During this time, preschool teachers became exempt from overtime alongside separate legislation for universal child care.[16] This Note posits that nation's preschool infrastructure was contemplated to function in a world that would include universal child care, and that preschool teachers became exempt from overtime in an attempt to mirror overtime exemptions for public school K-12 teachers. Failing to implement universal child care but still exempting preschool teachers from overtime protections harmed the profession for decades, creating issues for federal courts and the Department of Labor (DOL) attempting to grapple with the scope of overtime exemptions. This Note is the first scholarship that attempts to harmonize the historical justifications of overtime exemptions, the preschool politics of the mid-1900s, and an argument for overtime eligibility.

The goal of this Note is two-fold: (1) to advocate removing the FLSA's overtime exemption for preschool teachers so that they are eligible for overtime wage rates and (2) to advocate for a more nuanced overtime exemption that fulfills the FLSA's intended goal of expanding labor rights for low-wage workers.

This Note proceeds in two parts. Part I provides necessary historical background. This includes reviewing the original

13. *See infra* Part I.A.
14. *See infra* Part I.C.
15. *See infra* Part I.D.ii.
16. *See id.*

congressional purpose for enacting the FLSA, an examination of the legislative history and early case law behind overtime exemptions, a breakdown of the regulatory framework for overtime exemptions, and an overview of the ideological tensions & debates swirling around child care during the mid-1900s. Part II analyzes the modern state of preschool teachers against the historical context and case law of overtime exemptions. Part II also argues that overtime exemptions must become more nuanced. The current system unfairly exempts preschool teachers in light of the profession's historical and it's present financial reality.

I. Background

A. The FLSA's Origins—Born Out of the Fight Against Starvation Wages

> There was a girl six or seven feet away who was trying to pass an envelope to me and she was just too far away to reach. One of the policemen threw her back into the crowd and I said to Gus (*Gennerich*), "Get the note from that girl." He got it and handed it to me and the note said this: "Dear Mr. President: I wish you could do something to help us girls . . . .We have been working in a sewing factory, a garment factory, and up to a few months ago we were getting our minimum pay of $11 a week . . . .Today the 200 of us girls have been cut down to $4 and $5 and $6 a week . . . . Please send somebody from Washington up here to restore our minimum wages because we cannot live on $4 or $5 or $6 a week." . . . . [S]omething has to be done about the elimination of . . . starvation wages.[17]

Shortly after this remark, President Roosevelt was asked if something should be done to restore minimum pay and maximum hours, and his answer came quickly: "Absolutely."[18]

The FLSA was enacted during the Great Depression to combat the era's nightmarish labor conditions.[19] Financial ruin dangled over workers and anxious families struggling to get by on low

17. FRANKLIN D. ROOSEVELT, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 624–25 (1938).

18. *Id.* at 625.

19. *See* Fair Labor Standards Act of 1938, Pub. L. No. 718, 52 Stat. 1063 (1938); Robert F. Lipman, Allison Plesur & Joel Katz, *A Call For Bright-Lines to Fix the Fair Labor Standards Act*, 11 HOFSTRA LAB. L.J. 357, 359 (1994); John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 L. & CONTEMPORARY PROBS. 464, 465–66 (1938).

wages.[20] In response, the FLSA guaranteed now-familiar labor rights including minimum wage, maximum weekly hours, and the right to an overtime wage rate.[21]

These provisions were a recognition that employers maintained greater bargaining power within the employer-employee relationship.[22] Bargaining power had deteriorated to such lopsided lengths that the top 1% in the United States owned 50% of the nation's wealth.[23] Congress saw that the "unprotected, unorganized and lowest paid of the nation's working population" struggled to bargain for protections on their own.[24]

Thus, employers were presented with two choices. Employers could compensate workers accordingly for the wear and tear that their bodies bore after long hours of labor, or, employers could shorten a worker's hours due to the pressure of increased cost.[25] President Roosevelt concisely encapsulated the FLSA's purpose as a guarantee to a "fair day's pay for a fair day's work."[26] Fair pay was, in part, guaranteed through the FLSA's aforementioned overtime provision, which guarantees employees a pay rate of 1.5-times their regular hourly wage rate after they exceed forty hours in a given workweek.[27]

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20. Lipman et al., *supra* note 19, at 359 ("The Act was a response to a call upon a Nation's conscience, at a time when the challenge to our democracy was the tens of millions of citizens who were denied the greater part of what the very lowest standards of the day called the necessities of life; when millions of families in the midst of a great depression were trying to live on incomes so meager that the pall of family disaster hung over them day by day; when millions were denied education, recreation, and the opportunity to better their lot and the lot of their children; when millions lacked the means to buy the products of farm and factory and by their poverty denied work and productiveness to many other millions; and, when one-third of a Nation was ill-housed, ill-clad, and ill-nourished.").

21. Fair Labor Standards Act of 1938, Pub. L. No. 718, 52 Stat. at 1060, 1062–64 (1938).

22. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 706–07 (1945) (recognizing that industries taking advantage of vulnerable employees endangered the national health of interstate commerce).

23. SEAN WILENTZ, THE POLITICIANS & EGALITARIANS: THE HIDDEN HISTORY OF AMERICAN POLITICS 58 (2016).

24. *Brooklyn Sav. Bank*, 324 U.S. at 707 n.18.

25. Bay Ridge Operating Co. v. Aaron, 334 U.S. 446, 460 (1948).

26. FRANKLIN D. ROOSEVELT, NOTHING TO FEAR: THE SELECTED ADDRESSES OF FRANKLIN DELANO ROOSEVELT, 1932-1945 105–06 (B.D. Zevin, ed., 1946) (describing workers as "ill-nourished, ill-clad, and ill-housed"). The FLSA's declaration of policy perhaps best summarizes some of the evils that fair pay sought to remedy. *See* 29 U.S.C. § 202(a).

27. 29 U.S.C. § 202.

The FLSA also balances these employee protections against harm to employers. While eliminating poor labor conditions is a major goal, the FLSA is explicit about limiting its impact on the economy.[28] An early version of the FLSA required that tripartite committees of labor, business, and the public be formed as a check to the power delegated to government agencies under the FLSA.[29] Some industries saw the revolution of wage protections as inevitable, and sought to minimize the FLSA's reach.[30]

B. The Regulatory Framework for Overtime Exemptions

The concern for employers in the FLSA's early life makes it unsurprising that the FLSA's grand shield for workers is not impenetrable. The FLSA exempts executive, administrative, and professional employees from the right to receive overtime wages (hereinafter referred to as "EAP" or "EAP exemption").[31] This Note only focuses on criteria necessary to satisfy the overtime exemption for professionals classified under the EAP.

Under the EAP exemption, employees employed in a "bona fide . . . professional capacity" are exempt from overtime.[32] To qualify as a bona fide professional,[33] an employee must satisfy two requirements: (1) the salary basis test and (2) the primary duty test.[34] Failure to satisfy either disqualifies an employee from becoming overtime exempt as a bona fide professional.

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28. *See id.* § 202(a–b) (declaring that the FLSA seeks to eliminate labor conditions that threaten the health, efficiency, and general well-being of workers in industries "without substantially curtailing employment or earning power").

29. Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L. J. 616, 663–64 (2019).

30. *Id.* at 665 n.244.

31. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees, 29 C.F.R. § 541.0(a) (2014); *Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)*, WAGE & HOUR DIV. U.S. DEP. OF LAB. (2019), https://www.dol.gov/agencies/whd/fact-sheets/17a-overtime#:~:text=Highly%20compensated%20employees%20performing%20office,duties%20of%20an%20exempt%20executive%2C [https://perma.cc/4V6Y-Y9ED].

32. 29 C.F.R. § 541.0(a).

33. Regulations also refer to the bona fide professional exemption as a "learned professional." *See* 29 C.F.R. § 541.300–.301(a) (2024).

34. 29 C.F.R. § 541.300 (2024); *See Fact Sheet #17G: Salary Basis Requirement and the Part 541 Exemptions Under the Fair Labor Standards Act (FLSA)*, WAGE & HOUR DIV. U.S. DEP'T OF LAB. (2019), https://www.dol.gov/agencies/whd/fact-sheets/17g-overtime-salary [https://perma.cc/F78Y-5CBT] ("Job titles do not

(1) The salary basis test is a straightforward, bright line provision. Under this test, an employee must be compensated with a salary of at least $684 per week.[35] In other words, the salary basis test requires an annual salary of at least $35,568. The salary must also be paid as a predetermined amount.[36] Therefore, employees paid at an hourly rate cannot satisfy the salary basis test.[37]

(2) The primary duty test is much more fact intensive. Under this test, the employee's "primary duty" must be performing work which requires "an advanced type [of knowledge] in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction . . . ."[38] The test is easier to digest when broken into parts.

First, the employee's primary duty must be identified. A "primary duty" means the "principal, main, major, or most important duty that the employee performs."[39] According to federal regulations, a "useful guide" for identifying a primary duty is whether the employee spends more than 50% of their time performing the exempt work.[40] Other factors to help identify a primary duty include the importance of the duty relative to other duties, time spent performing the duty, freedom from direct supervision, and the relationship between the salary and wages paid to other employees compared to the employee performing the exempt duty.[41]

Second, the primary duty must require the employee to utilize "advanced knowledge" from a "field of science or learning."[42] Advanced knowledge is characterized as knowledge that is predominantly intellectual in character and which requires a

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determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations."); *Fact Sheet #17D: Exemption for Professional Employees Under the Fair Labor Standards Act (FLSA)*, WAGE AND HOUR DIV. U.S. DEP'T OF LAB., https://www.dol.gov/agencies/whd/fact-sheets/17d-overtime-professional [https://perma.cc/9UAG-LQEG].

35. 29 C.F.R. § 541.600(a) (2024).

36. *See Fact Sheet #17G*, *supra* note 34; 29 C.F.R. § 451.602(a) (2024).

37. *See Fact Sheet #17G*, *supra* note 34.

38. 29 C.F.R. § 541.300(a)(i) (2024). The test is also satisfied by employees with a primary duty that requires "invention, imagination, originality or talent in a recognized field of artistic or creative endeavor." *Id.*. § 541.300(a)(2)(ii).

39. 29 C.F.R. § 541.700(a) (2009).

40. *Id.* § 541.700(b).

41. *Id.* § 541.700(a).

42. *Id.* § 541.301(c).

consistent exercise of discretion and judgment.[43] As for which fields qualify as "field(s) of science or learning," regulations provide a non-exhaustive list including teaching, but also law, medicine, theology, accounting, actuarial computation, engineering, architecture, and the sciences.[44]

Finally, the advanced knowledge described above must be "customarily acquired by a prolonged course of specialized instruction."[45] This is restricted to professions where "specialized academic training is a standard prerequisite for entrance into the profession."[46] An academic degree is the best prima facie evidence that an employee meets this requirement.[47] As for non-degree holders, a combination of work experience and intellectual instruction may satisfy the requirement.[48] However, regulations exclude professions in which "most employees" have acquired their skills through experience rather than intellectual instruction.[49] The test is also not satisfied when the occupation can be performed with only general knowledge acquired by an academic degree in *any* field.[50]

i. The Teacher Test

The primary duty test in the previous section lists teaching as a field that may satisfy the test, indicating that the regulations expressly contemplate teaching to be subject to the primary duty test. However, teachers are not subject to the EAP's bona fide professional test. Instead, the FLSA expressly exempts teachers from its overtime provisions, placing on them a categorical label of "bona fide professionals."[51] When most employees have to meet the salary basis test and the primary duty test to qualify for overtime exemption, teachers are automatically considered bona fide professionals regardless of whether the salary basis test or primary duty test is satisfied. Albeit, on the condition that the employee fits within the regulatory definition of teachers.[52]

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43. *Id.* § 541.301(b).
44. *Id.* § 541.301(c).
45. *Id.* § 541.301(d).
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* § 541.303(a); 29 U.S.C. § 213(a)(1).
52. 29 C.F.R. § 541.303(a).

Regulations define a teacher as "any employee with a primary duty of teaching, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed."[53] Like EAP, this definition has several key components and another chain of regulatory definitions to go with it.

First, the employee must be employed in an "educational establishment."[54] The FLSA defines this as any elementary or secondary school system, a higher education institution, or "other educational institution."[55] The term "preschool" is absent from the plain text. However, the definition of "elementary and secondary school systems" allows state law to determine the scope of these terms.[56] For some states, this mostly includes grades K-12.[57] But the regulations also allow state law to include "nursery school programs in elementary education"[58] and in separate provisions, teachers of "nursery school pupils" are expressly described as exempt teachers.[59]

Regulations contemplate teachers with a teacher's certificate to be those who fit within the scope of the teacher test's exemption.[60] The regulations are unhelpful for employees without certificates—the employee can still be considered a teacher if "employed as a teacher by the employing school or school system."[61] The other requirement is that the employee's primary duty must be teaching in the activity of imparting knowledge.[62] This adopts the primary duty definition from the traditional bona fide professional test in which teaching for over 50% of the time would be a "useful guide" for identifying teachers.[63]

C. The DOL's Original Public Policy on Overtime Exemptions for Teachers in Light of

53. *Id.*
54. *Id.* § 541.204(a).
55. *Id.* § 541.204(b).
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* § 541.303(b).
60. *Id.* § 541.303(c).
61. *Id.*
62. *Id.* § 541. 303(a).
63. *Id.* § 541.700(b).

Congressional Silence

The FLSA grants authority to the Secretary of Labor to "define and delimit" the EAP exemption "from time to time."[64] Although the Secretary did so for decades following the FLSA's enactment, the DOL struggled to develop a consistent public policy stance on overtime exemptions.

Importantly, legislative history is silent about the original purpose and scope of the overtime exemptions.[65] The DOL itself acknowledged that Congress never indicated why the EAP exemption was even included in the FLSA.[66] Considering the FLSA's balancing act of protecting employees and employers, exemptions may have been rooted in a desire to protect employers, for as one scholar put it, "It is therefore, the employer who is exempt—from the burden of paying the minimum wage or mandatory overtime, while, conversely, the employee is excluded from these same protections."[67]

Whatever the scope of overtime exemptions, the DOL equally struggled with the EAP exemption's narrower bona fide professional exemption. In 1938, the same year as the FLSA's enactment, the Assistant General Counsel of the DOL's Wage and Hour Division (WHD) expressed that the agency's greatest struggle

64. 29 U.S.C. § 213(a)(1) (2018); *see also* Walling v. Yeakley, 140 F.2d 830, 831 (10th Cir. 1944) ("Congress exempted employees employed in bona fide executive, administrative, or professional capacities . . . . Congress did not undertake itself to define and delimit such phrases . . . .").

65. MARC LINDER, "TIME AND A HALF'S THE AMERICAN WAY": A HISTORY OF THE EXCLUSION OF WHITE-COLLAR WORKERS FROM OVERTIME REGULATION, 1868-2004, at 385–86 (2004) ("Virtually nothing said at the extensive 1937 congressional hearings on the FLSA (transcribed on more than 1,200 printed pages) or during the 1937-38 protracted congressional debates (transcribed over almost 600 tightly printed, double-columned pages), or written in the Senate or House committee reports of those years sheds any light whatsoever on the purpose or scope of the exclusion executive, administrative, or professional employees.").

66. U.S. DEP'T OF LAB., EMP. STANDARDS ADMIN., EXECUTIVE, ADMINISTRATIVE AND PROFESSIONAL EMPLOYEES: A STUDY OF SALARIES AND HOURS OF WORK 3 (1977).

67. LINDER, *supra* note 65, at xxii; *see* Texas v. Dep't of Lab., 756 F. Supp. 3d 361, 399 (E.D. Tex. 2024) ("The [DOL's attempt to raise the salary threshold] impacts millions of employees in every facet of the economy, as well as state and local governments, and will impose billions in costs to employers."); Hewitt v. Helix Energy Sols. Grp., Inc., 15 F.4th 289, 303 (Ho, J., concurring) ("So the goal of the Act was not to induce overtime, but to avoid it. The FLSA achieves its ends when *no* employer pays overtime—when employers meet their labor needs by hiring more workers, not by requiring more hours. To be sure, the FLSA burdens the business community and the freedom of contract.").

with overtime exemptions was attempting to define the bona fide professional exemption.[68]

In 1940, the WHD justified overtime exemptions for bona fide professionals based on such employees having "compensatory privileges" such as an implied prestige, status, and importance.[69] Other compensatory privileges included higher base pay, greater fringe benefits, improved promotion potential, and greater job security.[70] Bona fide professionals also presented overtime enforcement issues because they performed work that was "often difficult to standardize in relation to a specified period of time . . . ."[71]

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68. LINDER, *supra* note 65, at 436–37 (quoting Address by Rufus G. Poole Before the Associated Indus. of New York Annual Meeting, at 11 (Nov. 18, 1938)) ("A newspaper asks whether its boxing columnist and commentator is a professional and therefore exempt . . . . Have you ever tried to define a professional? That is hard enough, but engaged in a 'bona fide capacity' is even harder. The dictionaries do not give us the answer. They indicate that sometimes the word 'professional' is used to mean a person engaged in one of the learned professions—that is medicine, law and the ministry. Then, the dictionaries talk about education and skill and even about one who engaged in sports for money. We had to define this term so that employers and employees could use it; so they could know whether any particular employee was entitled to overtime compensation . . . . This definition and definitions of employees employed in an executive, administrative . . . capacity were worked out in conference with representatives of employers and employees. The only one that has been seriously questioned to date is our definition of the term professional capacity. Even here, those who did not like our definition did not take the view that they could write a better definition. There is a statutory duty on the Administrator to promulgate a definition. So we put out the best definition we could . . . . We tried to be fair to everyone.").

69. Defining and Delimiting the Terms "Any Employee Employed in a Bona Fide Executive, Administrative, or Professional Capacity (Including Any Employee Employed in the Capacity of Academic Administrative Personnel or Teacher in Elementary or Secondary Schools), or in the Capacity of Outside Salesmen," 35 Fed. Reg. 883, 884 (Jan. 22, 1970) (to be codified in 29 C.F.R. pt. 541) ("As pointed out in the 1940 Report, employment in such a capacity implies a certain prestige, status, and importance, and employees who qualify under the definitions are denied the protection of the Act and must accordingly be assumed to enjoy compensatory privileges—an assumption which must clearly fail unless there is an adequate differentiation between the salary normally earned by a nonexempt worker for a standard workweek and that paid the employee for whom exemption is claimed on the ground that he is performing bona fide executive, administrative, or professional functions."); U.S. DEP. OF LAB. WAGE & HOUR DIV. "EXECUTIVE, ADMINISTRATIVE PROFESSIONAL . . . OUTSIDE SALESMAN" REDEFINED 19 (1940).

70. CONRAD F. FRITSCH & KATHY VANDELL, U.S. DEP'T OF LAB., EMP. STANDARDS ADMIN., EXEMPTIONS FROM THE FAIR LABOR STANDARDS ACT: OUTSIDE SALESWORKERS AND EXECUTIVE, ADMINISTRATIVE, AND PROFESSIONAL EMPLOYEES 236 (1977).

71. *Id.* at 240.

Originally, the DOL limited the categorical exemption to doctors and lawyers.[72] In 1949, a proposal was made to extend the categorical overtime exemption to architects, engineers, librarians, nurses, and pharmacists.[73] Since Congress did not provide boundaries to the exemption in the legislative record, the DOL rejected the proposal and provided its own reasons for limiting a categorical status of bona fide professional to doctors and lawyers, citing four factors: (1) "the traditional standing of these professions," (2) "the recognition of doctors and lawyers as quasi-public officials," (3) "the universal requirement of licensing by various jurisdictions," (4) and the "relatively simple problems of classification presented by these professions."[74]

In 1966, the FLSA was amended to include schools within its provisions, thereby placing teachers under the reach of its wage protections and the EAP exemption requirements.[75] But virtually out of nowhere, in 1967, teachers were categorically labeled as bona fide professionals alongside doctors and lawyers.[76] The motive for categorically exempting all teachers is seemingly nonexistent in the legislative records.[77]

Perhaps related, the landmark Elementary and Secondary Education Act (ESEA) was passed in 1965.[78] School regulation was largely a state matter before 1965,[79] but for the first time, the federal government intervened and passed the ESEA, which included $1.3 billion in funds for school districts that met certain

72. Belt v. Emcare, 444 F.3d 403, 414 (5th Cir. 2006).

73. *Id.*

74. *Id.* (quoting U.S. DEP'T OF LAB., REPORT AND RECOMMENDATIONS ON THE PROPOSED REVISIONS OF REGULATIONS, PART 541, at 77 (1949).

75. Act of Sept. 23, 1966, Pub. L. No. 89-601, 80 Stat. 830, 831–32 (1966).

76. REBECCA S. PRINGLE, PRINCESS R. MOSS & NOEL CANDELARIA, NAT'L EDUC. ASS'N., ENDING THE FLSA TEACHER EXCLUSION: PUTTING A FLOOR UNDER THE TEACHING PROFESSION BY PROVIDING TEACHERS WITH THE SAME WAGE AND HOUR PROTECTIONS AS OTHER PROFESSIONALS 7 (2022), https://www.nea.org/sites/default/files/2022-05/Ending%20the%20FLSA%20Teacher%20Exclusion.pdf [https://perma.cc/2JPM-ZGQZ].

77. *Id.* ("The historical record provides no clear explanation for that regulatory decision. The most that one can glean from the rulemaking notices is that the Department believed that teachers, like doctors and lawyers, are part of a 'traditional profession' and therefore the salary test was not needed as an objective measure of their professional status.").

78. Act of Apr. 11, 1965, Pub. L. No. 98-10, 79 Stat. 27, 49 (1965).

79. David Casalaspi, *The Making of a "Legislative Miracle": The Elementary and Secondary Education Act of 1965*, 57 HIST. OF EDUC. Q. 247, 247 (2017).

requirements.[80] In exchange for funds, state education agencies were strongly incentivized to develop stronger teacher preparation programs in higher education institutions,[81] likewise, the funds could also have been directed to teacher salaries.[82]

Also telling about possible intent, the DOL has placed substantial weight on the salary basis test for decades. The DOL views the salary basis test as the "best single test" of exempt status.[83] Failing to meet the salary basis test tends to "overwhelmingly indicate" that an employee won't meet other requirements of the bona fide professional test.[84] In other words, under today's current framework, failing to earn a weekly salary of $684 tends to indicate that the employee will not satisfy the primary duty test. Indeed, the salary basis test has always been intended to screen out "obviously nonexempt employees" from being misclassified as bona fide professionals.[85] So much so, that the agency has not been able to find a better alternative for identifying bona fide professionals.[86]

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80. *Id.* at 254; Matthew A. Kraft & Melissa A. Lyon, *The Rise and Fall of the Teaching Profession: Prestige, Interest, Preparation, and Satisfaction Over the Last Half Century* 3 (Annenberg Brown University Working Paper No. 22-679, 2024) ("Local control and funding had given way to the district consolidation movement with states beginning to play an expanded role in funding public education and regulating its practices. The passage of the [ESEA] in 1965 marked the beginning of a more assertive role for the federal government. The teaching profession was also undergoing a major transition at this time with the rise of industrial-style unionism, changing demographics due to the women's and civil rights movements, and the implementation of court-ordered school desegregation plans.").

81. 79 Stat. at 49.

82. Albert L. Alford, *The Elementary and Secondary Education Act of 1965: What to Anticipate*, 46 PHI DELTA KAPPA INT'L 483, 484 (1965) (written by a key architect of the ESEA).

83. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 69 Fed. Reg. 22122, 22165 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 514).

84. *Id.*

85. *Id.* (quoting the DOL's position in 1949).

86. *Id.* ("[T]he salary tests, even though too low in the later years to serve their purpose fully, have amply proved their effectiveness in preventing the misclassification by employers of obviously nonexempt employees, thus tending to reduce litigation. They have simplified enforcement by providing a ready method of screening out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary. The salary requirements also have furnished a practical guide to the inspector as well as to employers and employees in borderline cases. In an overwhelming majority of cases, it has been found by careful inspection that personnel who did not meet the salary requirements would also not qualify under other sections of the regulations as the Divisions and the courts have interpreted them. In the years of experience in administering the regulation, the Divisions have found no satisfactory substitute for the salary test.").

The DOL has also emphasized that the minimum salary threshold for the salary basis test should be set at a high enough level to reflect the status of bona fide professionals.[87] At the time this statement was made, 5% of bona fide executives had been earning weekly salaries as low as the then-salary threshold of $100.[88] The Secretary reiterated that the salary basis test should not cover employees with such low salaries.[89]

It is possible that, in 1967, the DOL might have recognized teachers as earning a high enough salary to justify the categorical exemption status. In 1969, teachers earned an average annual income of $8,626.[90] At the same time, doctors and lawyers earned a median income of $40,550 and $47,638, respectively.[91] The earning power of teachers was a far cry from doctors and lawyers, but teachers still earned several thousand dollars more than the median income of men and women.[92]

This correlation of higher salary with exempt status also corresponds with legislative history. Since the FLSA's inception in 1938, the minimum salary threshold has been increased ten times.[93] From 1938 to 1975, the minimum salary threshold of the salary basis test was raised every two to four years.[94] The DOL's consistent rulemakings reflected the agency's desire to ensure that there was

87. Defining and Delimiting the Terms "Any Employee Employed in a Bona Fide Executive, Administrative, or Professional Capacity (Including Any Employee Employed in the Capacity of Academic Administrative Personnel or Teacher in Elementary or Secondary Schools), or in the Capacity of Outside Salesmen," 35 Fed. Reg. 883, 884 (Jan. 22, 1970) (to be codified in 29 C.F.R. pt. 541).

88. *Id.* at 884.

89. *See id.* at 884–85.

90. *Digest of Education Statistics*, *Table 211.60. Estimated Average Annual Salary of Teachers in Public Elementary and Secondary Schools, by State: Selected Years, 1969-70 Through 2019-20*, NAT'L CTR. FOR EDUC. STAT. (2020), https://nces.ed.gov/programs/digest/d20/tables/dt20_211.60.asp [https://perma.cc/9XRX-9W4C].

91. Nancy Ricks, *Doctors' Median Income ($40,550) Spurs Fee Debate*, N.Y. TIMES, Sept. 13, 1971, at 29 (noting that the American Bar Association calculated that attorneys earned an average income of $27,960 per year in 1970); Michael Ariens, *Making the Modern American Legal Profession, 1969–Present*, 50 ST. MARY'S L.J. 671, 686 (2019) (the $47,638 figure is adjusted for dollar value by 1983).

92. U.S. CENSUS BUREAU, P60-70, AVERAGE FAMILY INCOME UP 9 PERCENT IN 1969 (1970) (stating that, in 1969, the median income of men was about $6,430, while women sat at about $2,130).

93. The minimum salary threshold was increased in 1954, 1958, 1961, 1963, 1967, 1970, 1973, 1975, 2004, and 2019. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 88 Fed. Reg. 62152, 62155–56 (proposed Sept. 8, 2023) (to be codified at 29 C.F.R. pt. 541).

94. *Id.*

a sufficient difference between the salaries of nonexempt and exempt employees.[95]

But after 1975, the salary level was not raised for nearly thirty years. Eventually in 2004, the salary threshold was raised to $455.[96] One decade later, in a 2014 memo, President Obama criticized the EAP exemption for not keeping up with the modern economy and advocated for modernizing the EAP exemption to become more consistent with the FLSA's intent.[97] The DOL responded with an increase of the salary threshold from $455 to $921 in 2016, but the attempt was barred in the Fifth Circuit.[98] In 2019, the minimum salary threshold was raised to the current mark of $684,[99] two hundred dollars lower than the 2016 attempt. In 2024, the DOL increased the threshold to $844 by July 2024, and to $1,128 by January 2025.[100] To its credit, the DOL also implemented a requirement that the salary threshold be updated every three years, beginning first in July 2027, to reflect changing earnings data.[101] In practice, the current annual salary floor would have increased from $35,568 up to $58,656. An overtime-exempt employee sitting at the current $35,568 minimum would need to earn $23,088 more per year—*a substantial increase of 64%*—before satisfying the salary basis test. But like the attempt to modernize the EAP exemption in 2016, the attempt was swiftly barred in federal court.[102]

Aside from earning power, societal prestige may have also been a factor that warranted categorically exempting teachers from overtime. Teachers have historically been viewed as having an

95. Texas v. Dep't of Lab., 756 F. Supp. 3d 361, 371–72 (E.D. Tex. 2024) ("The Department's rulemakings in 1958, 1963, 1970, and 1975 maintained the same general approach of reviewing salary levels of exempt EAP employees and analyzing the minimum salaries they were paid compared to the higher salaries of nonexempt employees. The Department's focus in adjusting the salary-level test was to set the minimum salary level so that only a small percentage of bona fide EAP employees would be denied the exemption, while also ensuring that an adequate differentiation existed between the salaries of nonexempt workers and supervising exempt workers.").

96. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 88 Fed. Reg. at 62155.

97. Presidential Memorandum of March 13, 2014; Updating and Modernizing Overtime Regulations, 79 Fed. Reg. 18737, 18737 (Apr. 3, 2014).

98. *See* Nevada v. U.S. Dep't of Lab., 218 F. Supp. 3d 520 (E.D. Tex. 2016).

99. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 88 Fed. Reg. at 62156.

100. 29 C.F.R. 541.600(a) (2024).

101. *Id.* § 541.607(b).

102. *See* Texas v. U.S. Dep't of Lab., No. 4:24-CV-499-SDJ, 2024 WL 4806268 (E.D. Tex. Nov. 15, 2024).

elevated social status similar to doctors and lawyers.[103] In 1969, three-quarters of parents wanted their children to become teachers.[104] Similarly, a 1977 Harris poll found that two-thirds of respondents had "ranked teaching as having at least 'considerable prestige.'"[105] One out of every four college graduates completed an education degree in the early 1970s.[106] This combination of salary along with social status may have placed teachers within the quasi-public official designation that justified keeping doctors and lawyers exempt from overtime.

D. Falling Through the Cracks of Overtime Rights: Preschools, Universal Child Care, and the Political Theater of the Mid-1900s

i. Attempts by Federal Courts and the DOL to Interpret "Preschool" After the 1972 Amendments

Originally, preschools were not establishments covered by the FLSA's wage protections. Shortly after the categorical overtime exemption was applied to teachers in 1967, the FLSA was amended in 1972 to include preschools under its reach.[107] Notably, the FLSA does not differentiate between private or public, or for-profit or nonprofit.[108] However, again, the legislative record is virtually silent as to why preschools were added to the FLSA. Effectively, the 1972 amendments and the congressional silence brought about two important questions: (1) Are preschool teachers exempt from overtime? (2) At what point does an establishment qualify as a preschool? These questions overlap in many respects because the FLSA's overtime protections and exemptions are irrelevant for

103. *See* Goss v. Lopez, 419 U.S. 565, 594, 594 n.12 (1975) (Powell, J., dissenting) ("There is an ongoing relationship, one in which the teacher must occupy many roles—educator, adviser, friend, and, at times, parent-substitute. [n.12] The role of the teacher in our society historically has been an honored and respected one, rooted in the experience of decades that has left for most of us warm memories of our teachers, especially those of the formative years of primary and secondary education.").

104. *See* Kraft & Lyon, *supra* note 80, at 17.

105. *Id.*

106. *Id.* at 19.

107. Education Amendments of 1972, Pub. L. No. 92-318, sec. 906(b)(3), § 3(s)(4), 86 Stat. 235, 375 (codified as amended at 29 U.S.C. § 203(s)(4) (1976)) (amending language by deleting "an elementary or secondary school" and inserting "a preschool, elementary or secondary school").

108. *See* 29 U.S.C. § 203(s)(1)(B).

preschool teachers if the preschool they work in is not covered by the FLSA.

The 1972 amendments did not define "preschool" and so, taking competing approaches to textualism, federal appellate courts were split on whether there should be a distinction between preschool facilities that were "educational" and day care centers that were "custodial."[109] "Custodial" implies physical care, and "education" implies teaching.[110] Could an establishment really be considered a preschool even if education was not a priority? The DOL argued as much in an emerging circuit split.

For its part, the DOL tried to provide clarity to the FLSA. The DOL issued a report in 1972 to clarify and define preschools, notably not distinguishing between custodial and educational services.[111] That same year, the Ninth Circuit ruled that the FLSA's

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109. See Laura, C. Edmonds, *The Fair Labor Standards Act—Anti-Poverty Legislation in the Modern Era: Advocating Judicial Scrutiny Under a Feminist Policy-Centered Analysis*, 19 W. N. ENG. L. REV. 229, 252–57 (1997) (summarizing the early circuit split involving the Sixth, Ninth, and Tenth Circuits). *Compare* Marshall v. Rosemont, Inc., 584 F.2d 319, 321 (9th Cir. 1978) (quoting Dunlop v. Alhambra Nursery & Accredited Kindergarten, Inc., 409 F. Supp. 309, 312 (D. Ariz. 1976)) ("[I]n the trial court's view of the appellees' operations, these are organizations essentially custodial in nature. They are in no way regulated by the State of Arizona as being a part of the state's school system. The Department's position, however, is that a 'preschool' need not be certified or recognized as such under state law . . . . 'In the instant case the Department has presented no evidence to this Court upon which it could reach the conclusion the conclusion that the defendants are certified preschools under state law. However, what the evidence does indicate is that the defendants were primarily engaged in the provision of day care services for infants of working mothers.'"), *with* U.S. Dep't of Lab. v. Elledge, 614 F.2d 247, 250 (10th Cir. 1980) ("We are not impressed by the reference in the Ninth Circuit decision, and in that of the trial court, to state law . . . . The plaintiff and the trial court emphasize the difference between custodial and educational purposes. The statute does not make the distinction."), *and* Reich v. Miss Paula's Day Care Ctr., Inc., 37 F.3d 1191, 1196 (6th Cir. 1994) ("Even if Miss Paula and other 'child day care centers' were able to show that they offer no education or learning whatsoever, and that they provide nothing more than custodial child care that is comparable to professional babysitting, they would still be obligated to comply with the FLSA. Preschools are not merely educational facilities; they also perform a custodial service.").

110. Edmonds, *supra* note 109, at 251.

111. U.S. DEP'T OF LAB., Pub. 1364, PRESCHOOLS UNDER THE FAIR LABOR STANDARDS ACT, JULY 1972, at 1–2, 7 (1972) [hereinafter U.S. DEP'T OF LAB., PRESCHOOLS UNDER THE FLSA] (stating that the report should not "be considered in the same light as official statements of position contained in Interpretative Bulletins and other such releases formally adopted and published in the Federal Register," and defining preschools as "any establishment or institution which accepts for enrollment children of preschool age for purposes of providing custodial, educational, or developmental services designed to prepare the children for school in the years

plain language limited FLSA coverage to only those schools which provided "'elementary' or 'secondary education' . . . 'as determined by state law.'"[112] The preschool had to be part of the state school system, which typically involved licensure under the state's education department.[113] Otherwise, employees must only be providing custodial duties, rather than the educational duties described by the teacher test and inherent to the idea of an educational establishment.[114]

In 1980, the Tenth Circuit disagreed and ruled that "day care centers"—custodial, non-educational establishments—were covered by the FLSA as preschools.[115] In this case, the facility in question was licensed specifically as a day care center by a state statute that explicitly excluded "nursery schools, kindergartens, or other facilities of which the purpose is primarily education."[116] The day care center was not accredited by the state's board of education.[117] Despite this, the court recognized that the FLSA delineated covered entities, with a list that included elementary schools, secondary schools, and hospitals.[118] While elementary schools provide educational services, hospitals provide custodial services—this meant there should be no distinction between custodial duties, educational duties, and ultimately, whether a facility is licensed by a state education department.[119]

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before they enter the elementary schools grades" including "day care centers, nursery schools, kindergartens, head start programs and any similar facility primarily engaged in the care and protection of preschool children").

112. Marshall v. Rosemont, Inc., 584 F.2d 319, 321 (9th Cir. 1978) (quoting Fair Labor Standards Act of June 25, 1838, c. 676, 52 Stat. 1060, as amended, 29 U.S.C. § 203(v)–(w)) (rejecting the DOL's position that a preschool does not need to be certified or recognized under state law).

113. *Id.* at 321.

114. *Id.*; *see* 29 C.F.R. § 541.303(a) (2004).

115. U.S. Dep't of Lab. v. Elledge, 614 F.2d 247, 251 (10th Cir. 1980) (stating that this decision was consistent with the plain language and intent of the FLSA).

116. *Id.* at 249.

117. *Id.* at 249–50.

118. *Id.* at 250.

119. *Id.* at 250–51("[The FLSA] lists hospitals, institutions for the care of the sick, the aged, the mentally ill or defective. This list is followed by reference to a school for the handicapped, and 'a preschool, elementary or secondary school.' Thus the section covers both custodial and educational operations. On the record presented a preschool is both custodial and educational . . . . Application of FLSA may not be avoided by the assertion of primary emphasis on [custodial] and the rejection of the undenied learning opportunities afforded to children.").

In 1994, the Sixth Circuit agreed with the Tenth Circuit.[120] The Sixth Circuit plaintiffs made similar arguments to those in the Ninth Circuit, namely that a day care center is distinct from a preschool because day care centers provide custodial services while preschools provide educational services.[121] The state even distinguished day care centers and preschools for licensing purposes.[122] However, the Sixth Circuit rejected the argument, stating:

> ["]The common sense definition of a preschool includes day care centers. The words are interchangeable in the common parlance . . . .["] Ohio's licensing standards are, in any event, irrelevant to the issues at dispute in this appeal. Even if Miss Paula and other 'child care centers' were able to show that they offer no education or learning whatsoever, and that they provide nothing more than custodial child care that is comparable to professional babysitting, they would still be obligated to comply with the FLSA.[123]

In 1999, the DOL seemed to agree with the majority of the federal courts of appeals and stated that preschools should not be at the mercy of state law.[124] But the DOL contradicted itself nearly a decade later in another opinion letter by stating that exempt preschool teachers must be working at a preschool providing state-law approved curriculum—directly invoking previously rejected arguments that licensure by a state's education department weighs heavily towards determining if a day care center qualifies as a preschool for employee classification purposes.[125]

Courts have only recently started to address the issue again. Over two decades later, in 2016, the Eighth Circuit followed the lead of the Tenth and Sixth Circuits that the difference between

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120. Reich v. Miss Paula's Day Care Ctr., Inc., 37 F.3d 1191 (6th Cir. 1994).

121. *Id.* at 1195.

122. *Id.*

123. *Id.* at 1195–96 (footnotes omitted) (quoting the lower court's opinion). The court strongly believed that this interpretation of the FLSA could have an adverse economic impact on day care centers. *Id.* at 1197.

124. U.S. Dep't of Lab., Wage & Hour Div., Opinion Letter on Application of Overtime Pay Requirements to Nonexempt Employees of a Day Care/Preschool Facility (Apr. 24, 1999).

125. U.S. Dep't of Lab., Opinion Letter on Whether Employees of Daycare Centers Qualify as Exempt Teachers, (Sept. 29, 2008) ("You have represented that daycare centers are not licensed by the State Department of Education, but instead are licensed by the Department of Public Welfare. This indicate that the state does not consider the day care centers to be providing educational services. Absent any information to the contrary, we conclude that the instructors do not qualify for the teacher exemption under section 13(a)(1) of the FLSA.").

custodial and educational care is irrelevant for preschools.[126] Along the same lines, a district court in the Fifth Circuit stated the "substantial authority" holds that "preschools" should be interpreted broadly,[127] and only a few years later, a district court in the Third Circuit would follow the previous court's decision.[128]

ii. Child Care and Politics: Universal Child Care Threatens Conservative Idealizations of the "Traditional American Family"

The FLSA's 1972 amendments were pushed through alongside a landmark approval for universal child care. A child care revolution was on its way, but social forces, politics, and outdated ideologies led to President Nixon's veto of universal childcare.

Early on, nursery schools largely disregarded traditional education like reading and writing and focused on children's physical and social development.[129] The U.S. nursery school movement emerged after World War I,[130] and the number of nursery schools in the U.S. exploded from 3 to 262 between 1920 and 1930.[131]

Poverty and child care held close associations with one another because child care emerged from the social welfare system out of a need to care for families post-World War I.[132] The Great Depression exacerbated the need for child care, pushing the U.S. to take action.[133] A government-funded project established 3,000 nursery schools.[134] Beginning in 1934, "[t]he [project] had two declared purposes: (1) to provide relief for unemployed teachers, and (2) to

126. *See* Perez v. Contingent Care, LLC, 820 F.3d 288 (8th Cir. 2016).

127. Biziko v. Van Horne, No. 1:16-CV-0111-BP, 2019 WL 3928575, at *11 (N.D. Tex. Aug. 20, 2019).

128. Slater v. Yum Yum's 123 ABC, No. 2:20-cv-00382-JMG, 2021 WL 2188599, at *3 (E.D. Pa. May 28, 2021).

129. Sheldon H. White & Stephen L. Buka, *Early Education: Programs, Traditions, and Policies*, 14 REV. RSCH. EDUC. 43, 60–61 (1987) ("The nursery school should attend to diet, rest, open-air exercise, physical training, and other health factors, Growth, sight, speech, and hearing should be followed, and corrective action taken as needed . . . .[R]eading, writing, and arithmetic had no place in nursery schools.").

130. *Id.* at 60, 63.

131. *Id.* at 63.

132. EMILY D. CAHAN, PAST CARING: A HISTORY OF U.S. PRESCHOOL CARE AND EDUCATION FOR THE POOR, 1820–1965, at 14 (1989) ("Insofar as day nurseries were conceived of as a form of social welfare, their history is more closely tied in this period to that of the welfare system than it is to the history of early childhood education.").

133. White & Buka, *supra* note 129, at 63.

134. *Id.*

support the growth and well-being of children of unemployed parents."[135]

However, due to its close association to poverty and welfare, child care did not enter the scene unscathed from public opinion. In the early 1800s, being financially poor was thought to be caused by being spiritually poor.[136] The Infant School Society, an early network of infant schools in Boston between 1828 and 1835, maintained a system in which women taught preschool aged children while men spiritually educated the children as a deliberate effort at "morally reforming the poor."[137] Although this early network died out, as child care increased in the nineteenth century, some of these old sentiments remained.[138]

In the 1960s, convictions of the traditional American family clashed with the growing need for child care.[139] Socially, mothers were considered the de facto primary caretakers for children.[140] Childcare services had encroached on this idealized notion by erasing parental authority and involvement in the care of children.[141] Even in scientific fields, psychologists warned that maternal deprivation would harm the cognitive development of children.[142]

In 1961, President Kennedy created the President's Commission on the Status of Women to evaluate the progress of women in American society.[143] After two years, the Commission—which included members from the DOL—released a report that signaled the public campaign to come, stating:

> Widening the choices for women beyond their doorstep does not imply neglect of their education for responsibilities in the

135. *Id.*

136. CAHAN, *supra* note 132, at 9.

137. *Id.* at 9.

138. *Id.* at 11–13.

139. *See* MAXINE EICHNER, THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED) 177 (2020).

140. *See id.*

141. *Id.* at 180 ("The federal government's role [according to President Nixon] 'wherever possible should be one of assisting parents to purchase needed day care services in the private, open market.' For the government itself to provide such [federally funded, universal] day care risked diminishing rather than enhancing 'both parental authority and parental involvement with children.'").

142. MARGARET O'BRIEN STEINFELS, WHO'S MINDING THE CHILDREN? THE HISTORY AND POLITICS OF DAY CARE IN AMERICA 73–75 (1973).

143. PRESIDENT'S COMM'N ON THE STATUS OF WOMEN, AMERICAN WOMEN: REPORT OF THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN iv (1963). The report was created with help from members of the Department of Labor, including Assistant Secretary of Labor, Esther Peterson. *Id.* at 84.

> home . . . . At various stages, girls and women of all economic backgrounds should receive education in respect to physical and mental health, child care and development, human relations within the family. The teaching of home management should treat the subject with breadth that includes not only nutrition, textiles and clothing, housing and furnishings, but also the handling of family finances, the purchase of consumer goods, the uses of family leisure, and the relation of individuals and families to society.[144]

In short, the report advocated for women to receive more education in child care and family life so that women did not neglect the home as they received more opportunities outside its doorstep.[145] Yet at the same time, the report called for a vast expansion of child care services.[146] With conviction, it stated that a failure to provide child care reflected "a lack of community awareness of the realities of modern life."[147] This reflected a growing tension between a desire to keep women at home as the primary caretaker and the need to make child care more accessible for working mothers.

In 1964, President Johnson declared a "War on Poverty."[148] In 1965, Head Start—the federally-funded childcare program that continues today—arrived on the scene.[149] Head Start programs were implemented after a report recommended establishing a federal child care program aimed at improving the development and lifelong outcomes of children, particularly those in poverty.[150]

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144. *Id.* at 32.

145. *Id.* at 66 (stating that better health, earlier marriages, and homes with "laborsaving apparatus[es]" had been pushing women to work more and longer after children became grown).

146. *Id.* at 19–20.

147. *Id.* at 19.

148. Lyndon B. Johnson, President, Annual Message to the Congress on the State of the Union (Jan. 8, 1964) ("Unfortunately, many Americans live on the outskirts of hope—some because of their poverty, and some because of their color, and all too many because of both. Our task is to help replace their despair with opportunity. This administration today, here and now, declares unconditional war on poverty in America . . . . Our chief weapons in a more pinpointed attack will be better schools, and better health, and better homes, and better training, and better job opportunities to help more Americans, especially young Americans, escape from squalor and misery and unemployment rolls where other citizens help to carry them.").

149. *Head Start History*, U.S. DEP'T OF HEALTH & HUM. SVCS.: OFF. OF THE ADMIN. FOR CHILD. & FAMILIES (June 30, 2024), https://acf.gov/ohs/about/history-head-start [https://perma.cc/N26F-GJ5K].

150. ANGELA GIORDANO-EVANS, CONG. RSCH. SERV., EDUC. & PUB. WELFARE DIV., HEADSTART: PROGRAM DESCRIPTION AND LEGISLATIVE HISTORY 34 (1974) (quoting OFF. OF CHILD DEV., RECOMMENDATIONS FOR A HEAD START PROGRAM (1965))

Two important events occurred simultaneously during this time. First, women with children began joining the labor force. In 1950, only 11.9% of women with children under the age of six participated in the labor force, but by 1970, that number increased to 30.3%.[151] Second, as more women with children entered the labor force, a bipartisan, legislative push for universal child care gained major momentum.

The push for universal child care, later known as the Comprehensive Child Development Act (CDA) of 1971, was an outgrowth of the 1960s Civil Rights Movement. One side pushed for progressive societal changes;[152] while the other clung to notions of traditional families and gender roles, and segregated schools.[153] Marian Wright Edelman, the leader of the then-largest Head Start program in the country and advocate of the CDA, reflected on the movement "that 3,000 new jobs, free of the plantation and state system, was revolutionary. Black parents got a new vision of what their children could get, and Head Start was the most exciting thing."[154] Meanwhile, critics worried that federal child care programs would "Sovietize" children,[155] bring the U.S. into a totalitarian state,[156] and that depriving children from their mothers would harm development.[157] Others argued that it deprived women of their most fulfilling duty, claiming that most women "find spiritual and emotional satisfaction in being the hand that, through

("There is considerable evidence that the early years of childhood are the most critical point in the poverty cycle. During these years the creation of learning patterns, emotional development and the formation of individual expectations and aspirations take place at a very rapid pace. For the child of poverty there are clearly observable deficiencies in the processes which lay the foundation for a pattern of failure—and thus a pattern of poverty—throughout the child's entire life.").

151. WILLIAM LERNER, STATISTICAL ABSTRACT OF THE UNITED STATES 1971, U.S. BUREAU OF THE CENSUS 213 (1971).

152. WILLIAM ROTH, INST. FOR RSCH. ON POVERTY, THE POLITICS OF DAYCARE: THE COMPREHENSIVE CHILD DEVELOPMENT ACT OF 1971, at 6–9 (1976).

153. Kimberly Morgan, *A Child of the Sixties: The Great Society, the New Right, and the Politics of Federal Child Care*, 13 J. OF POL'Y HIST. 215, 219 (2001).

154. *Marian Wright Edelman*, *59 Stories*, THEHISTORYMAKERS https://da-thehistorymakers-org.ezp3.lib.umn.edu/storiesForBio;ID=A2001.030 (last visited Mar. 25, 2025).

155. Morgan, *supra* note 153, at 220.

156. ANDREW KARCH, EARLY START: PRESCHOOL POLITICS IN THE UNITED STATES 74 (2013).

157. *Id.* (footnote omitted) ("For example, one letter to House Speaker Carl Albert (D-OK) attributed the most serious social problems of the day to the breakdown of the family unit, noting, 'You must realize that removing children from their mothers' influence for extended periods of time during their formative years could prove disastrous.'").

rocking the cradle, as the timesworn synecdoche has it, comes to rule the world."[158] Head Start was caught in these crosshairs and faced criticisms of being ineffective.[159]

Senator Walter F. Mondale was an instrumental figure in building a bipartisan coalition for universal child care.[160] In subcommittee reports led by Mondale, testimony demonstrated some of the challenges of establishing universal child care. John Niemeyer, an original architect of Head Start and key consultant of the CDA,[161] presented testimony that universal child care would place a huge demand on qualified teachers when there were simply no early childhood teachers available.[162] The lack of teachers meant that people needed to be trained, and the training needed to focus more on practical work rather than theoretical, classroom training.[163]

Echoing similar concerns, former Head Start Director Julie Sugarman testified that there was simply a small number of teachers in the field of early childhood.[164] Senator Mondale asked whether teachers of other age groups could be retrained for the field, and Sugarman agreed but reemphasized the lack of qualified

158. *Id.* (footnote omitted).

159. *See* MARY F. BERRY, THE POLITICS OF PARENTHOOD: CHILD CARE, WOMEN'S RIGHTS, AND THE MYTH OF THE GOOD MOTHER 173 (Penguin Books 1993); White & Buka, *supra* note 129, at 74–75; Morgan, *supra* note 153, at 226.

160. ROTH, *supra* note 152, at 11–12. *See also Comprehensive Child Development Act of 1971: Joint Hearings Before the Subcommittee on Employment, Manpower, and Poverty and the Subcommittee on Children and Youth of the Committee on Labor and Public Welfare*, *United States Senate, Ninety-Second Congress, First Session on S.1512)*, 92d Cong. 5 (1971) [hereinafter Subcommittee on Employment, Manpower, and Poverty] (Sen. Mondale, Chairman, S. Comm. on Children and Youth, presiding).

161. Wolfgang Saxon, *John Harry Niemeyer, 95; Headed Bank Street College*, N.Y. TIMES (May 1, 2004), https://www.nytimes.com/2004/05/01/nyregion/john-harry-niemeyer-95-headed-bank-street-college.html [https://perma.cc/HT4E-Z79Y].

162. Subcommittee on Employment, Manpower, and Poverty, *supra* note 160, at 166–67 ("[T]hey said, we want to start 100 centers. We said, please don't. And they said, we must. They ended up by starting 15. Let me talk about the 15. Where [were] we going to get the teachers and staff? They didn't exist . . . . With very few exceptions, the staff of the 15 centers—and this was somewhere over 200 persons—were nonprofessionals. Many of them got their high school equivalency in the course of the training program. Some of them had finished high school. Almost none had gone on to any college work at the community college level . . . . [After emphasizing there was not enough proposed funds to train teachers] The second point I'd like to make is that if we have 20,000 people, there aren't 20,000 teachers who are sensitive workers with young children out there who can take the job. So we are going to have to take people right out of the neighborhoods and train them.").

163. *See id.* at 167.

164. *Id.* at 177.

personnel that could even retrain teachers.[165] Facing the practical problem of recruiting teachers into the field, Senator Mondale urged that children still required "comprehensive preschool care," to which Sugarman responded with, "There is no question about that Senator . . . [but] I am not looking for masters degrees in early childhood. But I am looking for at least sufficient funds to support continuing training."[166] Both Niemeyer and Sugarman emphasized that emerging early childhood teachers required practical training far more than a traditional classroom education.

Despite the strong ideological tensions swirling around child care, lengthy debates and coalition building led to the House and Senate passing universal child care and sending the bill to President Nixon.[167] The universal child care proposal incorporated educational, nutritional, health, and remedial services modeled after Head Start.[168] The federal government would also issue federal standards establishing a minimum baseline addressing the health, safety, and physical comfort of all children in the child care facilities.[169] It was a multifaceted approach that did not seem to prioritize education over other areas of development.[170]

Nobody knew for certain what President Nixon would do.[171] And so days after Republicans and Democrats joined together to pass universal child care, President Nixon vetoed the bill, echoing conservative fears that parental authority and involvement would be diminished.[172] He accused child care expansions of weakening the family, removing traditional family-centered approaches, and replacing the family from its "rightful position as the keystone of our civilization."[173] The Nixon administration expressed caution

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165. *Id.*

166. *Id.*

167. For a detailed dive into these congressional discussions, see KARCH, *supra* note 156, 59–85 (2013); Morgan, *supra* note 153, at 220–31.

168. *See* KARCH, *supra* note 156, at 68.

169. *See* H. REP. NO. 92-682, at 23–24 (1971); S. REP. NO. 92-523, at 23–24 (1971).

170. *See* KARCH, *supra* note 156, at 68.

171. *See* Morgan, *supra* note 153, at 230–33; KARCH, *supra* note 156, at 82.

172. *See* Rosenthal, *supra* note 1.

173. *Id.* ("The President said that he objected to committing, without wide national debate, 'the vast moral authority of the national Government to the side of [communal] approaches to childrearing over against the family centered approach' . . . . Repeatedly in the message, Mr. Nixon raised strong reservations about the principle of child development. 'We cannot and will not ignore the challenge to do more for America's children in their all-important early years . . . . But our response to this challenge must be a measured, evolutionary, painstakingly

about administrative bloat that might arise from creating a new network of preschools.[174] Following Nixon's veto, critics of universal child care controlled the public narrative and made the issue "so politically toxic that few legislators would come near it."[175]

II. Analysis

This analysis argues that preschool teachers must become eligible for overtime. In Subpart II.A., this Note posits that preschools were intended to be added under the FLSA's coverage during a time that contemplated legislation for universal child care to succeed. As a result, when universal child care failed, the DOL proceeded to regulate in a way that failed to meet the changing nature of preschools and preschool teachers. Subpart II.B. criticizes the current application of the overtime exemption to preschool teachers as being inconsistent with the original public policy and case law on overtime exemptions. Finally, Subpart II.C. completes the analysis by arguing that preschool teachers should be subject to the traditional EAP exemption test, rather than considered categorically exempt from overtime. This Note concludes that preschool teachers must be eligible for overtime because they meet every requirement for overtime eligibility, and that, at minimum, the EAP must become more nuanced so that low wage employees are no longer unfairly exempt from overtime wage rates. Otherwise, the FLSA—designed to protect low wage workers—will continue to restrict preschool teachers from full labor rights.

A. The 1972 Amendments Anticipated a Professionalized Preschool Workforce that Never Materialized Due

considered one, consciously designed to cement the family in its rightful position as the keystone of our civilization.'"). For a discussion on public perception of child care and the failure to advance universal child care measures, *see also* Anna K. D. Halperin, *An Unrequited Labor of Love: Child Care and Feminism*, 45 UNIV. CHI. J. WOMEN IN CULTURE & SOC'Y 1011 (2020) (explaining that child care expansion failed in the 1960s and 1970s due to a combination of "pro family" Christian activism, notions of the traditional family, feminist battle-fatigue, Conservative opposition, and the abandonment of child care as a priority by mainstream feminist organizations).

174. Unfortunately, political ambitions were also a priority for the Nixon administration. Part of the administration's caution was rooted in the fact that passing universal child care would overshadow other legislation that President Nixon had been trying to push for—legislation with less comprehensive childcare efforts. *See* Rosenthal, *supra* note 1.

175. Morgan, *supra* note 153, at 235–37.

to the Collapse of Universal Child Care Efforts

The 1972 amendments that placed preschools under the FLSA were likely intended to accompany the CDA's universal child care provisions. It can be difficult to make sense of congressional silence, but it is more difficult to ignore the fact that the 1972 amendments progressed through Congress alongside the CDA.

Although the amendments became effective in 1972, the amendments were passed in the Senate on August 6, 1971, and in the House on November 4, 1971.[176] The Committee on Labor and Public Welfare reported on the amendments to the Senate.[177] This was the same committee spearheaded by Senator Mondale that led the CDA discussions.[178] In fact, the 1972 amendments were ultimately passed in early November 1971, just a few weeks before the CDA—which was approved by both chambers of Congress in early December.

These bills were likely sister pieces of legislation meant to grapple with the childcare movement. The 1972 amendments were more than likely an anticipatory measure for the new national network of preschools the CDA would usher in.[179] In the same way that the federal government intervened in elementary education under the ESEA in 1965—which incentivized better teacher prep programs in higher institutions—the CDA also contemplated well-trained preschool teachers[180] and preschool facilities that would have to meet minimum federal standards.[181] But unlike the ESEA, President Nixon's veto left the 1972 amendments to stand on their own, without federal standards, and without a clear mandate to have highly qualified preschool teachers.

The DOL's efforts at interpreting the application of the 1972 amendments also parallel the final CDA bill. After the CDA was vetoed, the DOL still had to interpret how preschools and preschool teachers would interact with the rest of the FLSA after the 1972 amendments. In its interpretation, the DOL did not distinguish

176. *See All Information (Except Text) for S. 659 – Education Amendments of 1972*, CONGRESS.GOV, https://www.congress.gov/bill/92nd-congress/senate-bill/659/all-info [https://perma.cc/DL8M-8TJT].

177. S. REP. NO. 92-346, pt. 22, at 28956 (1971).

178. *See* Subcommittee on Employment, Manpower, and Poverty, *supra* note 160.

179. *Id. See infra* Part II.B.

180. Subcommittee on Employment, Manpower, and Poverty, *supra* note 160, at 177.

181. H. REP. NO. 92-682, at 23–24 (1971); S. REP. NO. 92-523, at 23–24 (1971).

between custodial or educational duties,[182] much like the CDA attempted to establish preschools that took a multifaceted approach to child development.[183]

The preschool network was also to be modeled after Head Start, which was the preeminent leader in early childhood education.[184] Under the veto's shadow, preschools continued to operate—not in a highly incentivized system like the ESEA and the universal preschool system contemplated—but through a minimally-regulated, decentralized medley of private and public preschools[185] that historically did not require licenses for teachers.[186] In 2004, only one-third of higher education institutions offered degrees in early childhood.[187] This limited offering arose from the fact that most states did not require degrees to teach in a preschool.[188] Head Start only started requiring 50% of its teachers to have at least an associate's degree in 1998,[189] and since then, only twenty-four states require bachelor's degrees for lead preschool teachers.[190]

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182. *See* U.S. DEP'T OF LAB., PRESCHOOLS UNDER THE FLSA, *supra* note 111, at 1–2 ("The term 'preschool' includes any establishment or institution which accepts for enrollment children of preschool age for purposes of provided custodial, educational, or developmental services designed to prepare the children for school in the years before they enter the elementary school grades. This includes day care centers, nursery schools, kindergartens, head start programs and any similar facility primarily-engaged in the care and protection of preschool children.").

183. KARCH, *supra* note 156, at 68.

184. *Id.*

185. Yiran Zhang, *Subsidizing the Childcare Economy*, 34 STAN. L. & POL'Y REV. 67, 73–83 (2023); *see also* Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213 (2017) (discussing social and legal forces that forcefully shape how families can raise children).

186. *See* W. STEVEN BARNETT, BETTER TEACHERS, BETTER PRESCHOOL: STUDENT ACHIEVEMENT LINKED TO TEACHER QUALIFICATIONS 9 (2004) (stating that only nine states require college credits in child care generally, and thirty-five states require credits or degrees in state financed pre-K such as Head Start). *Cf.* MARNIE KAPLAN & SARA MEAD, THE BEST TEACHERS FOR OUR LITTLEST LEARNERS 11 (2017) (explaining that in 2015, only 74% of Head Start lead teachers had bachelor's degrees).

187. KAPLAN & MEAD, *supra* note 186, at 11.

188. *Id.*

189. U.S. GEN. ACCT. OFF., HEAD START: INCREASED PERCENTAGE OF TEACHERS NATIONWIDE HAVE REQUIRED DEGREES, BUT BETTER INFORMATION ON CLASSROOM TEACHERS' QUALIFICATIONS NEEDED 6 (2003), https://www.gao.gov/assets/gao-04-5.pdf [https://perma.cc/36TF-GRB9].

190. JANET CURRIE, BROOKING INST. A FRESH START FOR HEAD START?, CHILDREN'S ROUND TABLE REPORT 5 (2001), https://www.brookings.edu/wp-content/uploads/2016/06/issue5.pdf [https://perma.cc/466Y-JJ58]; Supporting the

While preschool teachers learn the skills that make them effective educators without a formal degree, most states still do not require preschool teachers to have degrees.[191] Instead, a bare minimum child development certificate is awarded after a preschool teacher completes a mix of on-the-job experience and school credits (although the certificate is generally not a requirement to teach).[192] This reflects the congressional testimony that the field of early childhood had lacked infrastructure to develop qualified teachers.[193] Had universal child care successfully pushed through, higher institutions could be expected to have developed more early childhood programs much like ESEA.[194]

Preschool teachers were intended to have mirrored the professionalized nature of teachers in the public school system. The fact that preschools had to be explicitly added to the FLSA nearly five years *after* teachers had become exempt, and after public schools were added, lends further credibility to the notion that preschools and preschool teachers were going to be joining the ranks of other schools and teachers as far as structure and regulation were concerned. The 1972 amendments likely contemplated a stringently regulated, highly educated profession, but the field of preschool teachers evolved into something different. The traditional

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Head Start Workforce and Consistent Quality Programming, 88 Fed. Reg. 80818, 80826 (Nov. 20, 2023) (noting that only 20% of Early Head Start teachers have bachelor's degrees); CENT. FOR THE STUDY OF CHILD CARE EMP., EARLY CHILDHOOD WORKFORCE INDEX 2020, at 76 (2020), https://cscce.berkeley.edu/workforce-index-2020/wp-content/uploads/sites/3/2021/02/Early-Childhood-Workforce-Index-2020.pdf [https://perma.cc/847E-E2QD].

191. For a directory of state licensing requirements for preschool teachers, *see National Database of Child Care Licensing Regulations*, CHILD CARE TECH. ASSISTANCE NETWORK, https://licensingregulations.acf.hhs.gov/ [https://perma.cc/K2KF-ZUT6].

192. *Id.*; CENT. FOR THE STUDY OF CHILD CARE EMP., *supra* note 190, at 78 (reporting that eight states do not require *any* credential for preschool teachers, while eleven only require a high school diploma or GED); NAT'L RSCH. COUNCIL, TRANSFORMING THE WORKFORCE FOR CHILDREN BIRTH THROUGH AGE 8: A UNIFYING FOUNDATION 1 (LaRue Allen & Bridget B. Kelly, eds., 2015) ("Despite their shared objective of nurturing and securing the future success of young children, these professionals are not acknowledged as a cohesive workforce, unified by their shared contributions and the common knowledge base and competencies needed to do their jobs well. They work in disparate systems, and the expectations and requirements for their preparation and credentials have not kept pace with what the science of child development and early learning indicates children need.").

193. *See* Subcommittee on Employment, Manpower, and Poverty, *supra* note 160, at 166–77.

194. *Id.* at 167.

justifications for overtime exemptions, as discussed in the next section, fail to harmonize with this reality.

B. Preschool Teachers Do Not Fit Within the Original Scope of Overtime Exemptions

The status of bona fide professional was originally limited to doctors and lawyers,[195] but the historical justifications for limiting this exemption to doctors and lawyers does not align with both the history and modern state of preschool teachers. As previously noted, the legislative history is silent about the scope of the EAP exemption. However, early case law and the DOL's Wage and Hour Division (WHD) interpretations should be afforded persuasive deference because they were established shortly after the enactment of the FLSA. Central to the WHD were the "compensatory privileges" such as an implied prestige, status, and importance that exempt professions held.[196]

As for case law, courts recognized that the DOL limited the exemption to doctors and lawyers because of: (1) "the traditional standing of these professions," (2) "the recognition of doctors and lawyers as quasi-public officials," (3) "the universal requirement of licensing by the various jurisdictions," (4) "and the relatively simple problems of classification presented by these professions."[197]

Certainly, teachers have traditionally enjoyed heightened prestige and social status. As Justice Blackmun wrote:

> There is an ongoing relationship, one in which the teachers must occupy many roles—educator, adviser, friend, and, at times, parent-substitute . . . . The role of the teacher in our society historically has been an honored and respected one, rooted in the experience of decades that has left for most of us warm memories of our teachers, especially those of the formative years of primary and secondary education.[198]

Even in the critical years of the 1960s and 1970s, parents overwhelmingly approved of their children becoming teachers and viewed the profession favorably.[199] However, preschool teachers had

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195. Belt v. Emcare, 444 F.3d 403, 414 (5th Cir. 2006).

196. Defining and Delimiting the Terms "Any Employee Employed in a Bona Fide Executive, Administrative, or Professional Capacity (Including Any Employee Employed in the Capacity of Academic Administrative Personnel or Teacher in Elementary or Secondary Schools), or in the Capacity of Outside Salesmen," 35 Fed. Reg. 883, 884 (Jan. 22, 1970) (to be codified in 29 C.F.R. pt. 541).

197. *Emcare*, 444 F.3d at 414.

198. Goss v. Lopez, 419 U.S. 565, 594 n.12 (1975) (J. Blackmun, J., dissenting).

199. Kraft & Lyon, *supra* note 80, at fig.2.

not yet been accepted as a teacher group and profession that could enjoy an elevated standing.

When teachers became exempt from overtime, the campaign against child care was raging. While three quarters of parents wanted their children to become teachers,[200] political theater swayed the public into viewing child care as a service for poor people that harmed child development.[201] The Nixon Administration and child care critics did not create this narrative out of a vacuum. Parents overwhelmingly preferred familial care for their children over a preschool teacher within structured child care.[202] Child care maintained strong ties to poverty and the social welfare system, so early childhood educators had been attached to perceptions that child care was for the poor,[203] the unemployed,[204] the anti-American,[205] and the immoral.[206] Any reverence extended to most teachers was not extended to preschool teachers.

These perceptions also cut against the view that preschool teachers present a "simple problem[] of classification."[207] The circuit split regarding the scope of the FLSA provisions on preschools was premised on the issue that some preschools offer custodial services while others offer education services.[208] Even decades after the stigmatization that child care received in the 1960s, the Sixth Circuit viewed preschools and day care centers as one and the same[209]—regardless of the fact that day care centers focused on mere supervision (i.e. custodial services) and preschools on education. Federal courts blurred the line between an employee

200. *Id.* at 17.

201. *See supra* Part I.D.ii.

202. BERRY, *supra* note 159, at 180 (stating that less 8% of white working women had children in child care, while that number doubled for Black working women; also noting that polls showed that families largely preferred relatives to care for children while at work). For another discussion on public perception of child care and the failure to advance universal child care measures, *see* Halperin, *supra* note 173 (explaining that child care expansions failed in the 1960s and 1970s due to a combination of "pro family" Christian activism, idealizations of the traditional family, feminist battle-fatigue, Conservative opposition, and the abandonment of child care as a priority by mainstream feminist organizations).

203. CAHAN, *supra* note 132, at 14.

204. White & Buka, *supra* note 129, at 63.

205. *See* Morgan, *supra* note 153, at 220 (noting that critics worried federal childcare programs would "Sovietize" children).

206. CAHAN, *supra* note 132, at 11.

207. Belt v. Emcare, 444 F.3d 403, 414 (5th Cir. 2006).

208. *See supra* Part I.D.i.

209. Reich v. Miss Paula's Day Care Ctr., Inc., 37 F.3d 1191, 1195 (6th Cir. 1994).

providing high-quality education and an employee providing only basic supervision for parents while they work.

For many courts in the circuit split, these classification problems do not present any issue. And yet, stories are in abundance of preschool teachers presenting disdain for this failure to provide a distinction.[210] "Babysitters" and "daycare workers" are two terms that insult the preschool teacher who prides themself on carefully providing developmentally appropriate learning opportunities for children to develop.[211] The legal system has historically ignored the field of early childhood,[212] and so it is unsurprising that courts cannot discern between a legitimate educator that receives a degree in early childhood to develop a career working with children, and a day care worker providing basic supervision.

Preschool teachers do not present a simple problem of classification that applies much more easily to doctors and lawyers. What is true today could only have been doubly true nearly fifty years ago when the field of early childhood was just burgeoning. The gap between quality education and mere day care was also not as evident. Head Start, as influential as it is today, had only just been created in 1965.[213] When preschools were added to the FLSA, Head Start was criticized as poorly run and had been labelled as a program with inadequate educational standards and quality, with claims that it did not produce educational gains.[214] Head Start's regulations and influential performance standards set the mark for quality, educational child care but were not created until 1975.[215]

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210. *See* Mina Kim, *Constructing Occupational Identities: How Female Preschool Teachers Develop Professionalism*, 1 UNIVERSAL J. OF EDUC. RSCH. 309 (2013).

211. *See* Lillian Mongeau Hughes, *What Do Preschool Teachers Need to Do a Better Job?*, THE HECHINGER REP. (Aug. 16, 2016), https://hechingerreport.org/what-do-preschool-teachers-need-to-do-a-better-job/ [https://perma.cc/8Y97-NQ6V] (reporting on New York City's attempt to strengthen the public's perception of preschool teachers by centralizing the industry and increasing program quality); *see also California's Early Childhood Caregivers: 'We Are Not Babysitters. We Are Educators'*, LAIST (June 9, 2021), https://laist.com/news/education/californias-early-childhood-caregivers-we-are-not-babysitters-we-are-educators [https://perma.cc/3QZB-GBSQ].

212. *See generally* Clare Huntington, *Early Childhood Development and the Law*, 90 S. CAL. L. REV. 755 (2017) (advocating for the legal field to begin engaging with the field of early childhood after historically ignoring it).

213. *Head Start History*, *supra* note 149.

214. BERRY, *supra* note 159, at 173; White & Buka, *supra* note 129, at 74–75; Morgan, *supra* note 153, at 226.

215. *Head Start History*, *supra* note 149.

Limiting the scope of the EAP exemption to professions with universal licensing requirements also presents challenges, as the preschool industry, echoing points made in the previous section, is a decentralized mix of private and public preschools that historically has not required teaching licenses.[216] The CDA would have incentivized more centralized, regulated infrastructure much like the ESEA did. The universal child care discussions included key testimony from leaders in the field who recognized a lack of higher education infrastructure, degree offerings, and credentialed teachers in the field.[217] These discussions remain relevant even in recent decades. In 2004, only 30% of higher education institutions offered early childhood degree programs,[218] Head Start only recently made undergraduate degrees a widespread requirement for its educators,[219] many states do not mandate licenses or degrees to practice,[220] and a significant majority of early childhood educators still lack college degrees.[221]

The on-the-job experience combined with bare minimum school credits that most preschool teachers must gain is more akin to the DOL's definition of a "blue collar worker."[222] The DOL explains in 29 C.F.R. § 541.3 that "blue collar workers" do not fall under the EAP exemption because they gain the necessary skill and knowledge through apprenticeships and on-the-job training, rather than "prolonged course[s] of specialized intellectual instruction."[223] The DOL's position is that police officers, firefighters, paramedics,

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216. *See supra* Part II.A.

217. *Id.*

218. KAPLAN & MEAD, *supra* note 186, at 8.

219. Supporting the Head Start Workforce and Consistent Quality Programming, 88 Fed. Reg. 80818, 80904 (Nov. 20, 2023) (to be codified in 45 C.F.R. pts. 1301–05).

220. Linda K. Smith & Caroline Osborn, *Who Can Work in a Child Care Center? What is Good Enough?*, BIPARTISAN POL'Y CTR. (Feb. 8, 2024), https://bipartisanpolicy.org/blog/who-can-work-in-a-child-care-center/ [https://perma.cc/7KX8-HPQ7].

221. The percentage of early childhood educators with some college and/or a high school diploma or less is 52% at center-based facilities, 62% at licensed home-based providers, and 69% at unlicensed home-based providers. *The Early Childhood Workforce Index 2024*, *About the Early Childhood Workforce*, CENT. FOR THE STUDY OF CHILD CARE EMP., https://cscce.berkeley.edu/workforce-index-2024/the-early-childhood-educator-workforce/about-the-early-childhood-workforce/ [https://perma.cc/MM7C-5VKF] (see fig. 2.1.11).

222. As opposed to the EAP, which is commonly known as the "white collar" exemption. *See* 29 C.F.R. § 541.3(a) (2024) (defining "blue collar" workers as those workers who gain skills and knowledge through "on-the-job training," not prolonged education).

223. *Id.*

emergency medical technicians, and other similar employees cannot be considered bona fide professionals because, although they may have college degrees, "a specialized academic degree is not a standard prerequisite for employment in such occupations."[224] Obviously, firefighters and paramedics are not unskilled because they lack academic credentials and gain experience through on-the-job training and apprenticeships. But just as blue collar workers can be justified as safe from overtime exemption on the basis of a lack of academic credentials and the prevalence of on-the-job training, so too can preschool teachers. On-the-job training is key to training preschool teachers[225]—a point emphasized during congressional testimony in the 1960s—due to a widespread lack of academic credentials throughout the field.[226] Yet preschool teachers fall within the EAP exemption.

Exempting preschool teachers from overtime appears to have been an *anticipatory* interpretation from the WHD that saw indications that preschools would explode in quantity and quality under the CDA. But the original scope of the EAP exemption was not anticipatory, it was about compensatory privileges, tradition, prestige, and social standing.[227] Architects, engineers, librarians, nurses, and pharmacists were rejected from categorical overtime exemptions,[228] and they did not face smear campaigns like those that child care workers faced.[229] Preschool teachers did not stand on the same social level as accepted, time-honored professionals like

224. *Id.* § 541.3(b)(4).

225. NAT'L RSCH. COUNCIL, *supra* note 192, at 367 ("Unlike educators in elementary schools, many of these [early childhood] educators do not participate in preservice education; their participation in formal education or training for their profession may not commence until after they have become employed in the field. As a result, for many of these educators, their first job serves as their opportunity for 'practice teaching,' but rarely with a formal induction period or structure of close supervision with an educational aim.").

226. Subcommittee on Employment, Manpower, and Poverty, *supra* note 160, at 166–67.

227. *See* Defining and Delimiting the Terms "Any Employee Employed in a Bona Fide Executive, Administrative, or Professional Capacity", 35 Fed. Reg. 883, 884 (Jan. 22, 1970) (to be codified in 29 C.F.R. pt. 541) ("As pointed out in the 1940 Report, employment in such a capacity implies a certain prestige, status, and importance, and employees who qualify under the definitions are denied the protection of the Act and must accordingly be assumed to enjoy compensatory privileges . . . .").

228. Belt v. Emcare, 444 F.3d 403, 414 (5th Cir. 2006).

229. *See supra* Part I.D.ii (explaining early societal and political factors that led to conservative views dismissive of child care).

doctors, lawyers, and even other teachers, that were contemplated by the categorical overtime exemption.[230]

C. Preschool Teachers Are Textbook, Overtime-Eligible Employees Under the EAP's Traditional Salary Basis and Primary Duty Tests

Preschool teachers are categorically exempt from overtime under the teacher test, and therefore do not have to satisfy the EAP's salary basis and primary duty test. However, if preschool teachers are removed from the categorical, more inclusive overtime exemption of the teacher test, they meet every textbook requirement for overtime eligibility because they fail the EAP's traditional requirements.

The DOL opined for years that the salary basis test was a "completely objective and precise measure,"[231] and went even further to say it is the "single best test" of whether an employee is properly classified as a bona fide professional.[232] The DOL associated bona fide professionals with having compensatory privileges that included higher wages, promotion potential, and job security[233] before preschool teachers were categorized as bona fide professionals in 1972.[234]

But preschool teachers lack such compensatory privilege as they earn less than the salary threshold of the salary basis test. Currently, the average full-time preschool teacher earns an annual salary of $29,140,[235] or in other words, an average of $14.01 per hour, or $560.38 per week. At the bottom of the preschool teacher wage-spectrum are infant and toddler teachers, who earn $10.86 per hour, or $434.40 per week.[236] On the opposite end of the

230. *Id.*

231. HARRY WEISS, REPORT AND RECOMMENDATIONS ON PROPOSED REVISIONS OF REGULATIONS, PART 541, at 9 (U.S. Dep't. of Lab., Wage and Hour Pub. Conts. Divs., 1949).

232. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22165 (Apr. 23, 2004) (to be codified at 29 C.F.R. pt. 514).

233. *Id.*; FRITSCH & VANDELL, *supra* note 70, at 236.

234. Act of June 23, 1972, Pub. L. No. 92-318, 86 Stat. 375 (amending language by deleting "an elementary or secondary school" and inserting "a preschool, elementary or secondary school"); *see* 29 U.S.C. § 203.

235. Maureen Coffey, *Still Underpaid and Unequal: Early Childhood Educators Face Low Pay and a Worsening Wage Gap*, CENT. FOR AM. PROGRESS (July 19, 2022), https://www.americanprogress.org/article/still-underpaid-and-unequal/, [https://perma.cc/7UYC-QREX] (see figure 2).

236. *Id.*

spectrum are preschool teachers with bachelor's degrees, who earn $18.77 per hour, or $750.80 per week.[237] However, preschool teachers with bachelor's degrees are in the minority: only 29.9% of all preschool teachers have bachelor's degrees or higher.[238]

The financial reality of preschool teachers is that the average preschool teacher's salary is below the current federal poverty line for a family of four.[239] Unsurprisingly, over 50% of childcare workers are enrolled in public support programs, with 15% of these workers receiving financial support such as cash assistance for disabilities, housing assistance, free-reduced lunch for children, and food stamps.[240]

Even the industry leaders do not always satisfy the salary basis test. Head Start requires the majority of its teachers to have four-year degrees.[241] But even Head Start teachers only earn an average of $34,073,[242] below the EAP's $35,568 threshold, and salaries have only regressed over the past decade for teachers across the board.[243] In the 1960s, doctors and lawyers earned a median income of $40,550 and $47,638, respectively[244] but today credentialed and experienced preschool teachers struggle to break the $40,000 mark.[245] Some preschool teachers with bachelor degrees

237. *Id.*

238. *Id.* Notably, when divided on a racial level, around 23% of Black, non-Hispanic and Hispanic preschool teachers have bachelor's degrees or higher, in comparison to multiracial preschool teachers (27.96%), white, non-Hispanic preschool teachers (32.71%), and Asian preschool teachers (59.19%). *Id.*

239. Department of Health and Human Services Annual Update of the HHS Poverty Guidelines, 89 Fed. Reg. 2961, 2962 (Jan. 17, 2024) (explaining the poverty line for a family of four is $31,200); *see also* CENT. FOR THE STUDY OF CHILD CARE EMP., *supra* note 190, at 44 (showing that, in 2020, only the thirteenth percentile of preschool teachers earned at or above $30,520).

240. COFFEY, *supra* note 235 (noting that, comparatively, only 21% of the U.S. workforce benefits from public support programs).

241. 42 U.S.C. § 9843a(a)(2)(A); *See* KAPLAN & MEAD, *supra* note 186, at 11 (noting that, in 2015, 74% of Head Start lead teachers had bachelor's degrees).

242. NAT'L HEAD START. ASS'N, *supra* note 5, at 2.

243. NAT'L EDUC. ASS'N, NEA 2021–2022 TEACHER SALARY BENCHMARK REPORT 1 (2023) (finding that when adjusted for inflation, starting salaries for teachers between 2021–2022 are actually $4,552 less than starting salaries in 2008–2009).

244. Michael Ariens, *Making the Modern American Legal Profession, 1969–Present*, 50 ST. MARY'S L. J. 671, 686 (2019) (noting the $47,638 figure is adjusted for dollar value by 1983); Nancy Ricks, *Doctors' Median Income (40,550) Spurs Fee Debate*, N.Y. TIMES (Sept. 13, 1971) (noting that the American Bar Association calculated that attorneys earned an average income of $27,960 per year in 1970).

245. COFFEY, *supra* note 235.

may satisfy the salary basis test, but the average preschool teacher does not meet the $684 salary threshold.[246]

As for the primary duty test, some preschool teachers may also satisfy it, but many likely will not. Child development takes a comprehensive approach to addressing a child's needs. Preschool teachers certainly do not spend 50% of their time providing traditional education. It can be plausibly argued that a preschool teacher's primary duty could be educational if the "education" aspect includes the physical, social, emotional, and safety needs that child development demands. One side of the circuit split, which blurs custodial and educational services, supports this interpretation.[247] However, exercising these primary duties does not require advanced knowledge from a field of science or learning. Even if some preschool teachers satisfy this requirement in a higher education program, this is not the type of advanced knowledge customarily acquired by a prolonged course of specialized instruction. Regulations state that an academic degree is the best prima facie evidence of satisfying this requirement,[248] which is telling about what the regulations favor—a traditional higher institution education. But this absolutely cannot be satisfied when the occupation can be performed with only general knowledge acquired by an academic degree in any field. A significant number of preschool teachers have only limited college credits or even just a high school degree, so the profession cannot be considered one that requires advanced knowledge customarily acquired by a prolonged course of specialized instruction.[249] And even if the profession could somehow be characterized in such a way, the preschool teachers with only a high school degree should not be treated the same as the teacher with a four-year degree in the field.

Courts have previously maintained that the duties test is more important than the salary basis test, but courts have also tempered this acknowledgment with a recognition that salary is important for

246. *Id.*

247. *See supra* part Part I.D.i.

248. 29 C.F.R. § 541.301(d) (2025) ("The phrase 'customarily acquired by a prolonged course of specialized intellectual instruction' restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree.").

249. *Id.*

identifying overtime exempt employees.[250] In addition, this recognition was made long before the continuously widening earnings disparity of preschool teachers that became apparent decades later, and long before the contradictory public policy of overtime exemptions as to preschool teachers was fleshed out.

Although the DOL has shifted towards a preference for the primary duty test,[251] how low must an employee's salary fall below the salary threshold before the DOL revises the EAP exemption? At this point, the DOL's persistent attempts to exempt employees with low salaries based on already questionable interpretations of primary duty is nothing more than an inflexible, mechanical application of textualism that runs counter to the FLSA's original goal of protecting overworked, underpaid employees. The DOL is tasked with defining and delimiting the bona fide professional exemption. Instead, it has reinforced inequities, and amplified the financial burden that preschool teachers shoulder, rather than mitigating harm to these low wage workers.

The EAP exemption must become more flexible. If overtime exemptions for preschool teachers were limited to the EAP's traditional tests by removing the categorical overtime exemption status, then some preschool teachers would satisfy the EAP exemption requirements while others would not. Even if just a quarter of preschool teachers satisfied the EAP exemption (the equivalent of preschool teachers that hold bachelor's degrees) around 33.1% of preschool teachers would be eligible for overtime.[252] Preschool teachers are unprotected, unorganized, and some of the lowest paid of the categorically exempt professions. Unfortunately,

250. Walling v. Yeakley, 140 F.2d 830, 832 (10th Cir. 1944) ("Obviously, the most pertinent test for determining whether one is a bona fide executive is the duties which he performs. Admittedly, a person might be a bona fide executive in the general acceptation of the phrase, regardless of the amount of salary which he receives. On the other hand, it is generally true that those in executive positions assume more responsibility and are generally higher paid than those who work under the supervision and direction of others. The same is true with respect to those employed in administrative and professional capactities. Therefore, in most cases, salary is a pertinent criterion and we cannot say that it is irrational or unreasonable to include it in the definition and delimitatation.").

251. Texas v. Dep't. of Lab. 756 F. Supp. 3d 361, 377 (E.D. Tex. 2024) (citation omitted) (noting the DOL's recent statement that salary levels are "at most, an indicator of those [primary] duties").

252. JOHN SCHMITT, HEIDI SHIERHOLZ & JORI KANDRA, ECON. POL'Y INST., EXPANDING OVERTIME PROTECTION FOR TEACHERS UNDER THE FAIR LABOR STANDARDS ACT 4 (2021).

until regulations adopt better protections, preschool teachers as a profession will be harmed by a statute meant to protect them.

Conclusion

The failure to define and regulate preschools and preschool teachers with more nuance has allowed agencies and courts to mismanage the labor rights of preschool teachers under the FLSA. Universal child care gains momentum with every passing year, and the infrastructure for a centralized childcare industry is growing. The DOL may be anticipating that preschool teachers will one day join the prestige of other teachers, perahps even doctors and lawyers. But even if that were the case, and until then, the EAP exemption must be addressed. Otherwise, preschool teachers without degrees, supporting families while earning less than the federal poverty guidelines, will continue to be harmed. Basic issues like overtime exemptions only exacerbate the challenges that preschool teachers face. Since President Nixon vetoed universal child care, preschool teachers have faced decades of ill-advised agency interpretations, federal case law, and poor labor conditions. Federal courts and agencies must not forget the real-world human costs when they allow rigid interpretations and regulatory schemes to undermine the FLSA's purpose:

> We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner.[253]

Revising the FLSA and its corresponding regulations to have a more nuanced overtime exemption could be a first major step in supporting an entire profession's journey towards better labor conditions.

253. Tenn. Coal, Iron & R.R. Co. v. Muscoda Loc. No. 123, 321 U.S. 590, 597 (1944).

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