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# REMEDYING TRAIT-BASED EMPLOYMENT DISCRIMINATION: LESSONS FROM THE CROWN ACT

*By Tolulope F. Odunsi*[*]

* Lecturer in Law, University at Buffalo School of Law. I would like to thank my research assistant Eamon Danieu for his meticulous work gathering research and assisting in editing this piece. I would also like to thank my mentors Professor Wendy Greene, Professor Marissa Jackson Sow, Professor Guyora Binder, and Professor Athena Mutua for their encouragement and input as I drafted this article. Additionally, I would like to thank my colleagues at the University at Buffalo School of Law who took the time to read my article and provide me with feedback, particularly Professor Michael Boucai and Professor Lucinda Finley. Finally, I would like to thank the staff at the *Northeastern University Law Review* for their work in editing this article.

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## INTRODUCTION

For decades, several scholars have discussed what has been characterized as "trait discrimination" against Black[1] people in the United States.[2] Trait discrimination is bias against people who possess traits and characteristics that are culturally, commonly, or historically associated with a particular race.[3] Clothing, speech patterns/accent, and certain beliefs are often cited as examples of these traits and characteristics. Trait discrimination in the context of employment occurs when an employer might be willing to hire or promote Black people who conform to white norms or "cultural whiteness,"[4] but excludes applicants or employees who are "too Black" such as those who speak African American Vernacular English, wear clothing that has African fabric, or support the Black Lives Matter movement on their social media.[5] Accordingly, legal scholars have

1 I capitalize "Black" in agreeance with Professor Kimberlé Crenshaw who has explained that "Black[] [people], like Asian[], Latino[], and [people of] other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 (1988).

2 *See* Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805 (1994); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009 (1995); Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2001); RICHARD THOMPSON FORD, RACIAL CULTURE: A CRITIQUE 8 (2005); Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 652 (2005); Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365, 366 (2006); D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355, 1358 (2008).

3 Green, *supra* note 2, at 652–53.

4 I use the term "cultural whiteness" to describe characteristics, traits, customs, and cultural practices that are commonly associated with white Americans, including, but not limited to, skin color, physical features, facial expressions, food, music, habits, names, mannerisms, religion, political beliefs, place of residence, and clothing. A feature of cultural whiteness is that it is treated as invisible because it is the normative standard by which all non-white people are judged. The denial that cultural whiteness exists is one of the tools that allows it to continue to "enforce hidden signs of racial superiority, cultural hegemony, and dismissive 'othering.'" *See* AnnLouise Keating, *Interrogating "Whiteness," (De)Constructing "Race,"* 57 COLL. ENG. 901, 905 (1995); *see also* Julissa Reynoso, *Race, Censuses, and Attempts at Racial Democracy*, 39 COLUM. J. TRANSNAT'L L. 533, 539 (2001); Perea, *supra* note 2, at 835 (quoting GORDON ALLPORT, THE NATURE OF PREJUDICE 9 (25th Anniversary ed. 1979)).

5 Green, *supra* note 2, at 646–48 ("Even the most basic similarity-attraction theory suggests that we tend to favor those who are like us. Whether male engineers developing expected displays of competence at the high-tech firms studied by McIlwee and Robinson, or white workers developing interactional styles and appearance rules in work teams or informal gatherings, there is reason to expect that the dominant group—white males

long considered the ways in which employment discrimination law should respond to trait discrimination.[6]

Discrimination against Black people with "natural hairstyles"[7] and anti-Black colorism are two forms of trait discrimination that stem from employers' preferences for white aesthetics. In this article, I have chosen to focus on natural hair discrimination and colorism because both relate to an individual's physical appearance and, thus, have similar implications in the workplace. Additionally, as discussed below, I argue that the legislative remedy of the CROWN Act, in combatting discrimination against employees who wear natural hairstyles, can serve as a model for crafting a legislative remedy to combat anti-Black colorism in the workplace. Accordingly, this article will focus on both discrimination against employees with natural hairstyles and anti-Black colorism in the workplace.

The CROWN[8] Act is a law that expands the definition of race in discrimination laws to include an individual's hair texture or hairstyle, if that hair texture or hairstyle is commonly and/or historically associated with a particular race or national origin.[9] The Act, therefore, has the effect of prohibiting race-based discrimination against employees with hair textures and hairstyles that fall within the ambit of the Act. National CROWN Day is celebrated in July in support of the right of Black people in the United States to be able to wear their natural hair without fear of discrimination.[10] This celebration takes place on the anniversary of the passage of the 2019 CROWN Act in California, the first state to pass the Act. Since the Act passed in California, more than twelve other states have signed the Act—or "CROWN Act-like" language—into law and the Act has passed in the United States' House of Representatives.[11] Additionally, over twenty cities and

more often than not—will create a work culture that disadvantages women and people of color."); s*ee* Jill Gaulding, *Against Common Sense: Why Title VII Should Protect Speakers of Black English*, 31 U. Mich. J.L. Reform 637, 644–46 (1998).

6 *See, e.g.*, Perea, *supra* note 2; Flagg, *supra* note 2; Carbado & Gulati, *supra* note 2; Ford, *supra* note 2; Greene, *supra* note 2; Yuracko, *supra* note 2, at 366–67.

7 The phrase "natural hairstyle" is commonly used in the Black community and colloquially to refer not only to Black hair styled in its natural form/texture but also to styles that are commonly associated with natural textured hair (hair that is not straightened and remains in its natural curl pattern) and Black hair generally. Accordingly, throughout this article, "natural hairstyles" refers to styles including, but not limited to, afros, single braids, cornrows, twists, Bantu knots, and locs.

8 CROWN is an acronym for "Create a Respectful and Open World for Natural Hair." The Crown Act, https://www.thecrownact.com/ (last visited July 20, 2021).

9 *See, e.g.*, Cal. Educ. Code § 212.1 (West 2022).

10 *Celebrating Black Hair Independence*, The Crown Act, https://www.thecrownact.com/crown-day-2021 (last visited July 20, 2021).

11 H.R. 2116, 117th Cong. (as passed by House, Mar. 18, 2022).

counties around the country have passed the Act.[12] Accordingly, on National CROWN Day, social media timelines were flooded with hashtags such as #crownday21, #crowndaychallenge, and #nationalcrownday in addition to pictures of Black people of all genders with natural hairstyles such as afros, single braids, cornrows,[13] twists,[14] Bantu knots,[15] and locs.[16] Of note, while the Act does not limit the prohibition of hairstyle discrimination to only discrimination against Black hairstyles, based on the overwhelming data and research that has recorded the disparate impact of hair discrimination on Black people in the United States, this Article will focus on traditionally Black natural hairstyles, protective hairstyles,[17] and hairstyles associated with people of African descent.[18]

The need for the CROWN Act stems from the systemic failure of United States jurisprudence, and in certain instances some federal courts' unwillingness, to appropriately reconceptualize the meaning of race beyond the legal status quo and recognize race and racism in their myriad forms. Absent an understanding that anti-Black race discrimination encompasses

12 *See infra* Section III.C.

13 Braids that are braided to the scalp. Del Sandeen, *A Step-by-Step Guide to Braiding Cornrows*, BYRDIE (Feb. 23, 2022), https://www.byrdie.com/how-to-braid-cornrows-400296.

14 A natural and protective hairstyle that is achieved by twisting two sections of hair around one another from the hair at the scalp to the ends of the hair. Del Sandeen, *The Complete Guide to Two-Strand Twist Hairstyles*, BYRDIE (Feb. 16, 2022), https://www.byrdie.com/all-about-twists-or-two-strand-twists-hairstyles-400274.

15 "[A] hairstyle where the hair is sectioned off, twisted, and wrapped in such a way that the hair stacks upon itself to form a spiraled knot." Bianca Lambert, *A Step-by-Step Guide to Creating Bantu Knots*, BYRDIE (Feb. 28, 2022), https://www.byrdie.com/Bantu-knots-5075639.

16 Locs are also commonly known as "dreadlocks" or spelled as "locks." They are formed through a number of different methods that cause hair to form into rope like strands when the hair locks into itself. Del Sandeen, *What to Know About Dreadlocks: A Guide*, BYRDIE (Feb. 22, 2022), https://www.byrdie.com/locs-or-locks-400267. I use the term "locs" rather than "dreadlocks" throughout this article to reflect the current movement to disassociate the hairstyle with the words "dread" and "dreadful." *See* Gabrielle Kwarteng, *Why I Don't Refer to My Hair as 'Dreadlocks*,' VOGUE (July 16, 2020), https://www.vogue.com/article/locs-history-hair-discrimination (citing AYANA D. BYRD & LORI L. THARPS, HAIR STORY: UNTANGLING THE ROOTS OF BLACK HAIR IN AMERICA (2d ed. 2014)).

17 Any hairstyle that allows the ends of one's hair to be tucked away. These styles protect the hair from breakage because the ends of the hair are the most fragile and oldest part of a hair strand. Protective styles include, but are not limited to, braids, locs, and twists. Devri Velázquez, *What Are Protective Hairstyles?*, NATURALLY CURLY (Aug. 2, 2017), https://www.naturallycurly.com/curlreading/protective-styles/what-are-protective-styles.

18 *See* Christy Z. Koval & Ashleigh S. Rosette, *The Natural Hair Bias in Job Recruitment*, 12 SOC. PSYCH. & PERS. SCI. 741 (2021).

workplace preferences for physical features that are in closer proximity to whiteness, United States jurisprudence cannot be truly anti-racist or even non-discriminatory. Accordingly, this Article critically examines the historical shortcomings of federal jurisprudence related to hair discrimination claims in the workplace while discussing the promise of the CROWN Act in serving as a model to assist in shifting the United States' legal system from one that is merely facially neutral to one that is truly anti-racist and non-discriminatory. This Article also examines the historical shortcomings of jurisprudence related to colorism claims brought by dark-skinned,[19] Black plaintiffs[20] as another space where "CROWN Act-like" legislative intervention is necessary. Colorism is defined as discrimination based on skin tone and phenotype.[21] Because of the interplay between skin color and facial features such as hair texture, the shape and size of one's nose, the shape and size of one's lips, and one's eye color in judging whether a person is of African descent or European descent, social psychologist Keith Maddox has determined that "racial phenotypicality bias" is a more accurate term for colorism.[22] Thus, the CROWN Act can be seen as remedying a piece of the broader problem of colorism because its aim is to protect natural hair. While colorism is a form of racism based on skin color, it is distinct in that colorism, in the context of Black people, favors Black people with lighter skin-tones and more Eurocentric features—lighter eye color, longer, straighter, and finer hair, narrower nose, and thinner lips—over those with darker skin-tones and Afrocentric features—darker eye color, kinkier hair, broader nose, and fuller lips. In the workplace, this has meant that, even though all Black people

19 This article focuses on dark-skinned, Black plaintiffs because of the overwhelming data that demonstrates that dark-skinned, Black Americans are subjugated to greater discrimination in the workplace than their lighter-skinned Black counterparts. While this article focuses on colorism claims brought by dark-skinned, Black litigants, for an understanding of colorism claims more generally, see Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. Rev. 1705, 1709 (2000), where she explores courts' willingness to acknowledge skin tone discrimination for white ethnic Latin-x/a/o plaintiffs, but not for Black plaintiffs. For an example of a light-skinned, Black litigant bringing a colorism claim, see Walker v. Sec'y of Treasury, 713 F. Supp. 403 (N.D. Ga. 1989).

20 While colorism also impacts non-Black people of color in the United States, this article will focus on the impact of colorism on Black people within the workforce. Additionally, although this article focuses on anti-Black colorism in the United States, it should be noted that colorism has a global reach. *See, e.g.*, Tanya Katerí Hernández, *Colorism and the Law in Latin America–Global Perspectives on Colorism Conference Remarks*, 14 Wash. U. Glob. Stud. L. Rev. 683 (2015).

21 *See* Banks, *supra* note 19, at 1713.

22 Keith B. Maddox, *Perspectives on Racial Phenotypicality Bias*, 8 Personality & Soc. Psych. Rev. 383, 383 (2004).

are disadvantaged as compared to their white counterparts, Black people with darker skin and/or Afrocentric features are disadvantaged to an even greater degree than those with lighter skin and/or Eurocentric features.

Accordingly, Part I of this article discusses America's racial hierarchy and the existing legal theories of liability for natural hair discrimination and colorism claims under federal law. Part II examines the courts' history in adjudicating colorism claims made by dark-skinned, Black plaintiffs and discusses how colorism remains unbridled by employment discrimination law and jurisprudence. Part III sets forth the current posture of federal jurisprudence related to workplace hair discrimination claims to illustrate the courts' shortcomings in addressing such claims. Part III also discusses the origins of defining race within the United States' legal system. This section then discusses New York City's Commission on Human Rights Legal Enforcement Guidance on Race Discrimination on the Basis of Hair and a decision by Chicago's Commission on Human Relations, both of which clarify that race includes traits that are historically and commonly associated with race. Part III then analyzes the viability of the CROWN Act for remedying the jurisprudential shortcomings related to hair discrimination claims by assessing the strengths and areas for potential improvement in the CROWN Act language that has been passed in various jurisdictions. Based on the model set forth by the CROWN Act, Part IV then recommends statutory language under the existing framework of Title VII to provide an avenue for clarity and consistency with respect to colorism claims brought by dark-skinned, Black plaintiffs.

## I. BACKGROUND

### A. *America's Racial Hierarchy and its Impact on Today's Workforce*

The understanding that race is a social construction is a paradigm shift that has only taken place in recent American history.[23] Prior to the twentieth century, race was used as a biological explanation for what were actually social and cultural differences between varying groups of people.[24] White people were considered biologically superior and, therefore, socially superior.[25] Additionally, white skin and white features, such as straight hair,

23 W.E.B. Du Bois was one of the first scholars to advance a historical-sociological definition of race. *See* W.E.B. Du Bois, *The Conservation of Races*, *in* The American Negro Academy Occasional Papers, No. 2. (Washington, D.C., 1897).

24 *See* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 22–24 (3d ed. 2015).

25 *See id.*

were considered to be the norm.[26] Conversely, Black skin and Black features, such as coarse hair, were viewed as physical manifestations of inferiority and were explained and spoken of in terms relative to whiteness as the norm.[27] During enslavement, this racial hierarchy was used to enforce the social stratification that placed enslaved Africans in the role of laborers who were subjected to subhuman conditions.[28]

Although it is now commonly accepted in most scholarly fields that race is a social construction, racial stratification continues to be used to allocate resources and to determine who gets access to the best jobs, schools, houses, healthcare, and so on.[29] Of course, today's stratification and subordination of Black people is not explicit and formal; however, it remains "material." As Professor Kimberlé Crenshaw has explained:

> Material subordination . . . refers to the ways that discrimination and exclusion economically subordinated Black[] [people] to white[] [people] and subordinated the life chances of Black[] [people] to those of white[] [people] on almost every level. This subordination occurs when Black[] [people] are paid less for the same work, when segregation limits access to decent housing, and where poverty, anxiety, poor health care, and crime create a life expectancy for Black[] [people] that is five to six years shorter than for white[] [people].[30]

Thus, as Professor Derrick Bell pointed out, the traditions and practices of racial subordination "are deeper than the legal sanctions."[31] In other words,

26 *See id.*

27 *Id.* at 23, 111 ("Perceived differences in skin color, physical build, hair texture, the structure of cheek bones, the shape of the nose, or the presence/absence of an epicanthic fold are understood as the manifestations of more profound differences that are situated *within* racially identified persons: differences in such qualities as intelligence, athletic ability, temperament, and sexuality, among other traits. Through a complex process of selection, human physical characteristics ('real' or imagined) become the basis to justify or reinforce social differentiation. Conscious or unconscious, deeply ingrained or reinvented, the making of race, the "othering" of social groups by means of the invocation of physical distinctions, is a key component of modern societies."); Charles W. Mills, *Racial Liberalism*, 123 Publ'ns Mod. Language Ass'n Am. 1380, 1382 (2008) ("So the inferior treatment of people of color is not at all incongruent with racialized liberal norms, since by those norms nonwhites are less than full persons.").

28 *See* Omi & Winant, *supra* note 24, at 107.

29 *See* Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction 12–13 (3d ed. 2017).

30 Crenshaw, *supra* note 1, at 1377.

31 Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice 191–92 (1987).

racial subordination continues to survive even though, theoretically, it is no longer legally permissible. Those who push back against the current reality of material subordination argue that not all Black people are "at the bottom of the social order" based on factors such as class and gender.[32] However, the existence of classism and misogyny does not contravene the fact that as a social group, Black people are in a subordinate position in America's racial hierarchy.[33]

Further, as subordination shifted from being formal to informal, race discrimination itself also shifted to a more complex form, including discrimination against traits and characteristics that are culturally, commonly, historically, or statistically associated with a particular race.[34] As a result, upward mobility for Black people has often depended on proximity and assimilation to whiteness, both with respect to physical appearance and "cultural whiteness." [35] Thus, the offer of inclusion has been described as a "Faustian bargain" where Black people are offered acceptance, but for the "price of deracination."[36]

Discrimination against Black employees with natural hairstyles is an overt example of forced bargaining to gain inclusion. For instance, a company that bans braided hairstyles under the guise of a standard for "professionalism" is essentially telling Black employees who wear these styles "you can have this job, but only if you shed a piece of your Blackness for it." The result of this bias—whether conscious or unconscious—is material subordination with respect to access to employment. This has been confirmed by a compilation of four studies published in 2021 conducted by researchers at Michigan State University and Duke University who found that Black women with natural hairstyles such as afros, braids, and twists are "perceived to be less professional, less competent, and less likely to be recommended for a job interview than Black women with straightened hairstyles and [w]hite women with either curly or straight hairstyles."[37] Thus, "natural hairstyle bias may be a subtle yet consequential cause for negative

32 *See* Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOCIO. REV. 465, 470 (1997).

33 *See id.*

34 *See id.*; Yuracko, *supra* note 2, at 366.

35 *See* Reynoso, *supra* note 4, at 539.

36 *See* OMI & WINANT, *supra* note 24, at 23. A Faustian bargain, as used in this Article, is a "pact whereby a person trades something of supreme moral or spiritual importance . . . for some worldly or material benefit." Brian Duignan, *Faustian Bargain*, BRITANNICA (July 19, 2016), https://www.britannica.com/topic/Faustian-bargain/additional-info#contributors.

37 *See* Koval & Rosette, *supra* note 18, at 741.

workplace outcomes faced by Black women."[38] The study also found that Black women with natural hairstyles received more negative evaluations when applying for jobs within industries that have stronger conservative appearance and dress norms.[39]

Anti-Black colorism in the workplace is also a clear example of acceptance that must be "bargained for." As with discrimination against employees with natural hairstyles, the preference is for a white aesthetic—lighter skin and Eurocentric features. The negotiation for the employer is "I will hire Black people as long as they are not too dark." However, as discussed below, discrimination against dark-skinned, Black employees is almost always carried out covertly, as most employers understand that it would be illegal for them to explicitly state that they prefer lighter-skinned, Black employees. The covert nature of colorism in the workplace, however, has not prevented the striking impact it has had on employment outcomes for dark-skinned, Black people. Although historically understood by scholars, the pervasiveness of colorism in the workplace was first confirmed by a 2009 study that found, amongst Black job applicants, lighter skin complexion was "more salient and regarded more highly than one's educational background and prior work experience."[40] The study also found that light-skinned, Black men who had only a Bachelor of Arts degree, less prior work experience, skill, and overall knowledge of a position were favored over dark-skinned men with a Master of Business Administration degree and past managerial experience.[41] The findings of the 2009 study built upon the work of a 1990 study that found that the impact of skin color on socioeconomic status amongst Black Americans is as great as the impact of race—Black-white—on socioeconomic status in the United States.[42] Specifically, lighter skin was associated with more education, increased income, higher occupational prestige, and higher socioeconomic status of spouse.[43] More recently, using data from the 2012 American National Election Study, researchers found that Black and Latin-x/a/o people with lighter skin were several times more likely to be seen as intelligent by white interviewers as compared to those with the darkest skin.[44] Although the focus of this article is workplace

38 *Id.* at 749.

39 *Id.* at 741, 746.

40 Matthew S. Harrison & Kecia M. Thomas, *The Hidden Prejudice in Selection: A Research Investigation on Skin Color Bias*, 39 J. Applied Soc. Psych. 134, 134–35 (2009).

41 *Id.* at 151.

42 Michael Hughes & Bradley R. Hertel, *The Significance of Color Remains: A Study of Life Chances, Mate Selection, and Ethnic Consciousness Among Black Americans*, 68 Soc. Forces 1105, 1105 (1990).

43 *Id.* at 1109–12.

44 Lance Hannon, *White Colorism*, 2 Soc. Currents 13 (2015).

discrimination, it should also be noted that a number of studies have shown that defendants who have darker skin are treated more harshly in the criminal justice system—such as in police stops, arrests, and sentencing—than defendants with lighter skin.[45] Further, darker skin has been found to be an important risk factor for worse physical health amongst Black people.[46]

Accordingly, since natural hair bias and anti-Black colorism both have a tremendous impact on employment outcomes, protecting employees from discrimination based on these two types of traits should not be viewed as a *de minimis* issue. Additionally, as a number of scholars have argued, protection against natural hair discrimination and colorism should be recognized as appropriate goals of federal discrimination law.[47]

### B. *Federal Theories of Discrimination: Section 1981 & Title VII*

Two federal laws protect private employees from racial discrimination, Title VII of the Civil Rights Act and 42 U.S.C. 1981 (Section 1981). Title VII explicitly prohibits discrimination on the basis of race, color, religion, or national origin.[48] Section 1981 guarantees all citizens the same rights as white citizens.[49] Thus, litigants who bring hair discrimination

45 *See, e.g.*, Ellis P. Monk, *The Color of Punishment: African Americans, Skin Tone, and the Criminal Justice System*, 42 ETHNIC & RACIAL STUD. 1593 (2018).

46 Ellis P. Monk, Jr., *Colorism and Physical Health: Evidence from a National Survey*, 62 J. HEALTH & SOC. BEHAV. 37, 47 (2021).

47 *See, e.g.*, Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991); Banks, *supra* note 19, at 1705, 1707–08; Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134 (2004); Angela Onwuachi-Willig, *Another Hair Piece: Exploring New Strands of Analysis Under Title VII*, 98 GEO. L.J. 1079 (2010); D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair in* EEOC v. Catastrophe Management Solutions, 71 U. MIAMI L. REV. 987 (2017).

48 Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) ("It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.").

49 Civil Rights Act of 1991, 42 U.S.C. § 1981(a) ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and

claims and colorism claims often rely on these two statutes.[50]

Courts typically analyze legal claims brought under these two statutes in a very similar way and have determined that the same set of facts can be pursued under both statutes, at the same time.[51] Of note, one difference between the two statutes is that only Title VII prohibits disparate impact discrimination; thus, a litigant may not bring a disparate impact claim under Section 1981.[52] Litigants may, however, bring disparate treatment claims under both statutes.[53]

Disparate impact discrimination is categorized as employers' practices, procedures, policies, tests, and criteria that are neutral on their face but unintentionally deprive individuals from protected groups of employment opportunities.[54] To prove disparate impact, a plaintiff must present evidence that an employer's practice, procedure, policy, test, or criteria has a statistically significant harmful impact on a protected class.[55]

Conversely, disparate treatment claims allege that an employer has acted in an intentionally discriminatory way.[56] Because of the rarity of smoking gun evidence or direct evidence of discriminatory animus in disparate treatment cases, courts utilize the well-known *McDonnell Douglas* burden shifting test to analyze seemingly neutral actions to determine if the actions "hide intentional discrimination."[57] Under this framework, where the employment conduct is failure to hire, a plaintiff must make out a prima facie case that: (1) she is a member of a protected class; (2) she was qualified for and applied for an available position; (3) although she was qualified, she was rejected for the position; and (4) the position remained available after the plaintiff's rejection and the employer continued to seek applicants

exactions of every kind, and to no other.").

50 *See, e.g.*, Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231 (S.D.N.Y. 1981) ("The statutory bases alleged, Title VII and section 1981, are indistinguishable in the circumstances of this case, and will be considered together."); Sere v. Bd. of Trs. of Univ. of Ill., 628 F. Supp. 1543, 1543, 1546 (N.D. Ill. 1986), *aff'd*, 852 F.2d 285 (7th Cir. 1988).

51 Robinson v. Caulkins Indiantown Citrus Co., 685 F. Supp. 233, 235–36 (S.D. Fla. 1988).

52 Adams v. Local 198, United Ass'n of Journeymen, 495 F. Supp. 3d 392, 396–97 (M.D. La. 2020).

53 *See* Melendez v. Ill. Bell Tel. Co., 79 F.3d 661, 669 (7th Cir. 1996).

54 *See* Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971).

55 *See id.*

56 Ricci v. DeStefano, 557 U.S. 557, 577 (2009).

57 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973), *modified*, Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993); Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. Davis L. Rev. 769, 799 (1987); *see, e.g.*, Joseph v. Lincare, Inc., 989 F.3d 147 (1st Cir. 2021).

from people of plaintiff's qualifications.[58] If a plaintiff makes her prima facie case, the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the employment action.[59] The plaintiff must then demonstrate that the reason proffered by the employer was pretext for discrimination.[60]

Courts have modified the *McDonnell Douglas* test to cover a range of employment actions including discriminatory discharge and discrimination in awarding promotions.[61] In the discriminatory discharge context, a plaintiff can make her prima facie case by showing that "she is a member of a protected class, was qualified for the position held, and was discharged and replaced by a person outside of the protected class or was discharged while a person outside of the class with equal or lesser qualifications was retained . . . ."[62] In the failure to promote context, a plaintiff must demonstrate: "(1) [s]he is a member of a protected class; (2) [s]he applied and was qualified for a position for which the employer was seeking applicants; (3) [s]he was not selected for the position; and (4) the failure to promote occurred under circumstances giving rise to an inference of discriminatory intent."[63]

As discussed in section II, the elements needed to make a prima facie case in failure to promote and discriminatory discharge cases are of particular importance to the discussion of anti-Black colorism. This is because courts have used the existence of a Black employer/decision maker or other Black employees at a workplace to infer a lack of discriminatory animus.[64] In doing so, some courts have failed to properly scrutinize plaintiffs' claims that other Black employees are favored because of their lighter skin and/or Eurocentric features.[65]

## II. HISTORICAL AND LEGAL OVERVIEW OF COLORISM AGAINST DARK-SKINNED, BLACK LITIGANTS

An understanding of the history of colorism in the United States is necessary to comprehend its impact on the make-up of America's

58 *McDonnell Douglas*, 411 U.S. at 802.
59 *Id.*
60 *Id.* at 804.
61 *See* Lee v. Russell Cnty. Bd. of Educ., 684 F.2d 769, 773 (11th Cir. 1982); Mitchell v. Baldrige, 759 F.2d 80, 84–86 (D.C. Cir. 1985); Hunt v. Con Edison Co. N.Y.C., No. 16-CV-0677, 2017 WL 6759409, at *6 (E.D.N.Y. Dec. 29, 2017), *on reconsideration*, 2018 WL 3093970 (E.D.N.Y. June 22, 2018).
62 *Lee*, 684 F.2d at 773.
63 *Hunt*, 2017 WL 6759409, at *6.
64 *See, e.g.*, Sere v. Bd. of Trs. of Univ. of Ill., 628 F. Supp. 1543, 1543 (N.D. Ill. 1986).
65 *See, e.g.*, *id.*

workforce. Like most issues of anti-Black racism in the United States, colorism dates back to enslavement. The skin color of enslaved people was used by enslavers to determine the labor assignments.[66] Enslaved people that were darker-skinned were often given more rigorous work while those that were lighter-skinned were often given less rigorous work.[67] This differential treatment created tension amongst Black people themselves, and the idea that lighter-skinned, Black people were "better" became internalized in Black society.[68] Some examples of this include: "blue vein societies,"[69] elite groups for upwardly mobile Black people that only accepted Black people whose skin tone was light enough for their veins to show; and "the brown paper bag" test, a test where only Black people whose skin tone was the same or lighter than a paper bag could gain entry into some affluent Black clubs and even some churches.[70]

In spite of this history, colorism claims that involve darker-skinned, Black litigants have not fared well under current employment discrimination law.[71] As previously noted, in asserting colorism claims in the employment context, litigants have relied on Section 1981 and Title VII.[72] Of note, Section 1981 does not define the words "race" or "color."[73] Of further significance, Title VII—which specifically prohibits employment discrimination based on both "color" and "race"—does not define either term.[74] In spite of

66 Harrison & Thomas, *supra* note 40, at 136–37.

67 *See id.*

68 *See id.*; Tayler J. Matthews & Glenn S. Johnson, *Skin Complexion in the Twenty-First Century: The Impact of Colorism on African American Women*, 22 Race, Gender, & Class J. 248, 252–53 (2015).

69 Admission into a blue vein society was dependent on both "class" and skin color. In many cases members came from Black families who had been free for generations prior to the Civil War. These exclusive clubs were utilized to "maintain the old hierarchy." In other words, these societies were exclusive to those who had closer proximity to whiteness with respect to class, free status, and physical characteristics. "An applicant had to be fair enough for the spidery network of purplish veins at the wrist to be visible to a panel of expert judges. Access to certain vacation resorts . . . [were] even said to be restricted to blue-vein members." Kathy Russell et al., The Color Complex: The Politics of Skin Color Among African Americans 25 (Anchor Books 1993).

70 *See, e.g.*, Harrison & Thomas, *supra* note 40, at 136–37; Monk, *supra* note 46, at 39; Maxine S. Thompson & Verna M. Keith, *The Blacker the Berry: Gender, Skin Tone, Self-Esteem, and Self-Efficacy*, 15 Gender & Soc'y 337, 337 (2001).

71 *See* Banks, *supra* note 19, at 1713, 1727, 1730; Taunya L. Banks, *Multi-Layered Racism: Courts' Continued Resistance to Colorism Claims*, *in* Shades of Difference: Why Skin Color Matters 213, 216–22 (Evelyn N. Glenn ed., 2009).

72 *See* 42 U.S.C. § 2000e-2(a); 42 U.S.C. § 1981(a); Sere v. Bd. of Trs. of Univ. of Ill., 628 F. Supp. 1543, 1546 (N.D. Ill. 1986), *aff'd*, 852 F.2d 285 (7th Cir. 1988).

73 *See* 42 U.S.C. § 1981.

74 *See* 42 U.S.C. § 2000e-2(a).

the existence of this statutory language, it was not until 2015 that federal appellate courts explicitly recognized color claims.[75] Additionally, although the United States Equal Employment Opportunity Commission (EEOC) has been successful in reaching a number of settlements for some Title VII color claims,[76] courts have dismissed a great number of color claims.[77]

An often-cited example of a colorism claim that was adjudicated under Section 1981 is *Sere v. Board of Trustees of University of Illinois*.[78] Edward Sere was a dark-skinned, Nigerian man who brought an employment discrimination claim under both Title VII and Section 1981.[79] He sued his employer based on race and national origin discrimination.[80] His Title VII claim was dismissed by the Illinois Department of Human Rights because of his failure to file a timely charge of discrimination with the EEOC.[81] The federal court also struck down his national origin discrimination claim by determining that national origin claims are not cognizable under Section 1981.[82] Thus, only his race discrimination claim under Section 1981 remained. Sere alleged that he suffered race discrimination because his light-skinned, Black supervisor "refused to renew his contract after unsuccessfully pressuring him to give up his job in favor of a less qualified" candidate.[83] Sere was replaced with a light-skinned, Black-American, who Sere alleged was less qualified.[84] The court determined that Sere failed to establish a race discrimination claim because his supervisor was Black and because his replacement was Black.[85] Even though the court acknowledged that discrimination based on skin color can occur amongst people of the same

75 Benjamin L. Riddle, *"Too Black": Waitress's Claim of Color Bias Raises Novel Title VII Claim*, NAT'L L. REV. (Feb. 25, 2015), https://www.natlawreview.com/article/too-black-waitress-s-claim-color-bias-raises-novel-title-vii-claim (discussing "the first time that a 'color' claim under Title VII succeed[ed] as a separate and distinct claim from 'race' in Federal Court at the appellate level").

76 *Significant EEOC Race/Color Cases (Covering Private and Federal Sectors)*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/initiatives/e-race/significant-eeoc-racecolor-casescovering-private-and-federal-sectors (last visited July 19, 2021).

77 *See* Vinay Harpalani, *Civil Rights Law in Living Color*, 79 MD. L. REV. 881, 928 (2020) (citing Banks, *supra* note 19, at 1727).

78 *See, e.g.*, Sere v. Bd. of Trs. of Univ. of Ill., 628 F. Supp. 1543, 1543 (N.D. Ill. 1986); *see also* Damon Ritenhouse, *Where Title VII Stops: Exploring Subtle Race Discrimination in the Workplace*, 7 DEPAUL J. FOR SOC. JUST. 87, 102 (2013) (citing *Sere* as an often-cited example of a colorism claim).

79 *Sere*, 628 F. Supp. at 1546.

80 *Id.* at 1543, 1546.

81 *Id.* at 1544.

82 *Id.* at 1546.

83 *Id.*

84 *Id.*

85 *Id.*

race, the court refused to "create a cause of action that would place it in the unsavory business of measuring skin color and determining whether the skin pigmentation of the parties is sufficiently different to form the basis of a lawsuit."[86] While the court was correct in refusing to partake in measuring skin tone on its own, by dismissing Sere's case the court failed to realize that the composition of the skin-tones of the parties involved was a material issue of fact that should have been resolved at trial by a fact finder.[87]

A similar case, *Ohemeng v. Delaware State College*, was brought under both Title VII and Section 1981.[88] Emmanuel Ohemeng was a Black naturalized American citizen who had immigrated from Ghana.[89] Ohemeng's employer, Delaware State College—a historically Black college—terminated his employment instead of considering him for two positions that he claimed he was qualified for.[90] The college instead hired two Americans, one who was Black and one who was white.[91] In asserting his claim, Ohemeng argued that he was discriminated against because "he belonged to a subset of the Negroid race having a distinct ancestry or distinct ethnic characteristics."[92] In other words, Ohemeng contended that he was discriminated against because of his distinct Afrocentric features.[93] The court denied the employer's motion for summary judgment on the plaintiff's race discrimination claims under both Title VII and Section 1981.[94] However, the court questioned whether Ohemeng could truly establish a prima facie case for race-based discriminatory discharge because, as noted above, one of the requirements for discriminatory discharge is that after the discharge the employer assigned the work to members who were not members of plaintiff's racial minority to perform the work.[95] The court questioned this because one of Ohemeng's replacements was Black.[96] However, the court made no mention of the skin tone or features of Ohemeng's replacement, missing a critical piece of the

86 *Id.*

87 *See* Sonika R. Data, *Coloring in the Gaps of Title VI: Clarifying the Protections Against the Skin-Color Caste System*, 107 Geo. L.J. 1393, 1420 (2019); Walker v. Sec'y of Treasury, 713 F. Supp. 403, 408 (N.D. Ga. 1989) (stating that measuring skin color and determining skin pigmentation in colorism claims is a genuine and substantial issue and constitutes a question of fact that must be determined by the fact finder).

88 Ohemeng v. Del. State Coll., 676 F. Supp. 65, 66 (D. Del. 1988), *aff'd,* 862 F.2d 309 (3d Cir. 1988).

89 *Id.*

90 *Id.* at 66–67.

91 *Id.* at 67.

92 *Id.* at 69 n.2.

93 *See id.*

94 *Id.* at 69.

95 *Id*. at 68 n.1.

96 *Id.*

analysis.[97]

The courts' statements in both *Sere* and *Ohemeng* demonstrate that, similar to the courts' perceptions in the natural hairstyle discrimination cases outlined below, the judicial view of race is limited in its failure to recognize that race discrimination must encompass an employer's preference for characteristics and norms of white people, including skin tone and features that are in closer proximity to whiteness. Additionally, these cases highlight the courts' limited understanding of colorism. This limited understanding stems from their conflation of the evidence that should be accepted to make a prima facie showing in a colorism claim with the evidence that is accepted when a plaintiff alleges that an employer treats white employees more favorably than Black employees.[98] Thus, as Professor Cynthia E. Nance has proffered, only plaintiffs with rare "smoking gun" colorism claims are likely to prevail, particularly when such claims are brought under a disparate treatment Title VII claim.[99]

Surprisingly, one such smoking gun case arose in the Fifth Circuit in 2015. In *Etienne v. Spanish Lake Truck & Casino Plaza, L.L.C.*, Esma Etienne, a Black waitress and bartender, sued her employer under Title VII and alleged that the company's general manager failed to promote her because of her race and color.[100] A sworn affidavit provided evidence that

97 *See id.*

98 Cynthia E. Nance, *Colorable Claims: The Continuing Significance of Color Under Title VII Forty Years After Its Passage*, 26 BERKELEY J. EMP. & LAB. L. 435, 464–65 (2005). *But see* Friedman v. Lake Cnty. Hous. Auth., No. 11 C 785, 2011 WL 4901280, at *2 (N.D. Ill. Oct. 14, 2011) (correctly stating that the plaintiff conflated her color discrimination claim with her race discrimination claim and failed to state a claim for color discrimination because she did not include any facts in her complaint to distinguish her color discrimination claim from her race discrimination claim in that she did not allege any facts relating to how "the color of her skin, specifically, motivated [her employer's] alleged discriminatory treatment" and because she did not refer to the "particular hue of her skin."). *See also* Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 384 (1995) ("[T]o the extent that the courts construct a discrimination paradigm based solely or primarily on discriminatory intent or motive, the reach of Title VII will be limited to the rare number of obvious 'smoking gun' cases involving unsophisticated employers. Such a paradigm of discrimination takes what can be a very complex matter and whittles it down to a claim requiring proof that the employer's conduct was of the 'I did not hire you because you are [B]lack (or a woman or Latino[a/x] or Asian),' which fails to address and provide a remedy for other more subtle forms of discrimination and the associated biases, stereotypes, and proxies which exist in the 'real world.' Moreover, the 'smoking gun' paradigm provides no remedy for the past and current effects of 'societal discrimination' and does not address or provide remedies for subordination or racial castes. This development is not and should not have been unanticipated.").

99 Nance, *supra* note 98, at 445.

100 Etienne v. Spanish Lake Truck & Casino Plaza, L.L.C., 778 F.3d 473, 474–75 (5th Cir.

the general manager allocated responsibilities to the employees according to the color of their skin and would not let dark-skinned, Black employees handle any money.[101] The manager also stated to another employee, on several occasions, that "Esma Etienne was too [B]lack to do various tasks at the casino."[102] Additionally, the individual who was hired for the position that Etienne sought was white.[103] Even with these facts, the district court granted summary judgment in favor of the employer and held that Etienne failed to make out a prima facie case of discrimination.[104] The Fifth Circuit vacated and remanded, finding that the comments made by the manager constituted direct evidence of racial discrimination related to the challenged employment decision.[105] While the Fifth Circuit reached the correct decision in this case, it is troubling that, even in a "smoking gun" case, the trial court did not. Significantly, the Fifth Circuit noted that "the district court seemed to pass over Etienne's claim that she was discriminated against on the basis of both race *and* her dark color because, when granting summary judgment, it relied heavily on the fact that most of the managers at Spanish Lake were of the Black race."[106] Thus, like in *Sere* and *Ohemeng*, the district court did not understand that a claim of colorism cannot be remedied merely by the presence of other Black people within the workplace without scrutinizing the make-up of skin tones within the work place. The Fifth Circuit further noted that this was the first time it had explicitly recognized "color" as a separate basis for discrimination, even though the text of Title VII unequivocally prohibits employment discrimination based on an individual's color.[107]

Two cases, however, provide hope that courts will not always strike down a plaintiff's colorism claim when there is no "smoking gun." In *Ofudu v. Barr Laboratories, Inc.*, the court went out of its way to preserve Agwukwu Ofudu's color claim, which was brought under Title VII, even though he failed to check the box on his EEOC complaint to indicate that he was making a color discrimination claim and presented no facts that he was discriminated against based on his color.[108] However, in preserving Ofudu's claim the court misstated the law by conflating his color discrimination claim with his race discrimination claim when it determined that "his allegations of race and color discrimination are not only reasonably related

2015).

101 *Id.* at 475.

102 *Id.*

103 *Id.* at 474 n.1.

104 *Id.* at 475.

105 *Id.* at 476–77.

106 *Id.* at 475 n.2.

107 *Id.* at 475.

108 Ofudu v. Barr Lab'ys, Inc., 98 F. Supp. 2d 510, 515–16 (S.D.N.Y. 2000).

but indistinguishable."[109]

A more legally sound conclusion was reached in *Arrocha v. The City of New York*, where Jose Arrocha, a Panamanian adjunct instructor with "a dark complexion" alleged that his department discriminated against "Black Hispanic[] [people]" in violation of Title VII and Section 1981.[110] Even though Arrocha only alleged race discrimination, the court determined that "discrimination based upon skin coloration [was] a more accurate description of the claim since it [alleged] that light-skinned Hispanic[] [people] were favored over dark-skinned Hispanic[] [people]."[111] Accordingly, the court determined that the fact that other "Hispanic[] [people]" were hired in the department was irrelevant since the discrimination claim was based on Arrocha's dark skin color.[112] *Arrocha*, therefore, provides hope that courts can and will identify a colorism claim even when a plaintiff has not specifically pleaded one.

### A. *Scholarly and Administrative Solutions*

Based on the flaws in how courts have adjudicated colorism claims, a number of legal scholars have made recommendations for a shift in courts' and litigants' perspectives on how they view colorism claims. Some scholars have focused on the courts' historical failure to recognize non-ethnic, intra-racial discrimination, such as a colorism claim between a Black plaintiff and Black defendant. Professor Cynthia E. Nance, for instance, argues, that courts should not be concerned with the source of the employer's bias but instead should focus on "whether an adverse employment decision was made based on the impermissible basis of skin color."[113] This same argument was made by Sandi J. Robson who has stated that claims should "focus on the defendant's discriminatory motive alone, without reference to the plaintiff's status in any definable group."[114] Further, in response to courts' apprehension in being involved with "measur[ing] the skin tone," Robson has offered that measuring skin tone itself is unnecessary and that courts should only focus on the plaintiff's proof.[115] Thus, if a plaintiff proves

109 *Id.* at 515.

110 Arrocha v. City Univ. of N.Y., No. CV021868, 2004 WL 594981, at *1–2, 7 (E.D.N.Y. Feb. 9, 2004) (the plaintiff also sued under 42 U.S.C. § 1983 and section 296 of the New York State Human Rights Law).

111 *Id.* at *6.

112 *Id.*

113 Nance, *supra* note 98, at 474.

114 Sandi J. Robson, *Intra-Racial, Color-Based Discrimination and the Need for Theoretical Consistency After* Walker v. Internal Revenue Serv., 35 VILL. L. REV. 983, 1004 (1990).

115 *Id.* at 1001.

that she was discriminated against because of skin color, it is irrelevant how many shades apart the plaintiff and defendant are.

Moreover, Sonika R. Data has proposed five recommendations to clarify and improve the way colorism claims are adjudicated and understood.[116] Data advocates for:

> (1) the U.S. Department of Education to increase data collection and tracking on colorism; (2) civil rights advocacy organizations to bring forth adequately pleaded color discrimination claims; (3) courts to properly tease apart color and race claims when they are alleged; (4) courts to refrain from inserting their own biases when determining whether there is a material issue of skin color; and (5) courts to accept cultural evidence to understand the full nature of a complaint.[117]

Like Professor Nance and Robson's recommendations, Data's recommendations (2)-(5) focus on conceptual shifts that must be made by litigants and courts. Although Data's recommendations relate to Title VI rather than Title VII, they are instructive for claims brought under Title VII based on the similar intent of Title VI to prohibit discrimination on the basis of race and color.[118]

Along these same lines, the EEOC has engaged in efforts to identify and implement new strategies to strengthen its approach to combat racism and colorism.[119] In 2007, the EEOC launched an initiative called Eradicating Racism and Colorism from Employment (E-RACE).[120] In announcing the formation of E-RACE, the EEOC noted that it had observed a significant increase in employment discrimination charge filings based on color.[121] The EEOC also discussed a study conducted by a Vanderbilt University professor that found that those with lighter skin tones earn an average of eight to fifteen percent more than immigrants with the darkest skin tone.[122] Some of E-RACE's goals and objectives include

116 Data, *supra* note 87, at 1416.

117 *Id.*

118 42 U.S.C. § 2000d (prohibiting discrimination based on race, color, and national origin on programs or activities that receive federal funding).

119 Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Takes New Approach to Fighting Racism and Colorism in the 21st Century Workplace (Feb. 28, 2007), https://www.eeoc.gov/eeoc/newsroom/release/2-28-07.cfm.

120 *Id.*

121 *Id.*

122 *Why Do We Need E-RACE?*, U.S. Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/initiatives/e-race/why-do-we-need-e-race (last visited July 20, 2021).

improving data collection to track allegations of discrimination, "developing strategies, legal theories and training modules to address emerging issues of race and color discrimination," and engaging "the public, employers, and stakeholders to promote voluntary compliance to eradicate race and color discrimination."[123] Thus, importantly, the EEOC has taken on a data driven and educational approach to improve the quality and consistency of adjudicating color discrimination claims.

My recommendation in part IV builds upon the recommendations of the above scholars and the EEOC by advising that the legislative process be used to clarify the kind of harm that employment discrimination law should prevent with respect to colorism claims. Just as proponents of the CROWN Act have pushed jurisdictions to define race to include natural hairstyles, the term color should also be defined in such a way that courts consistently understand what the right to be free from discrimination based on color actually means. Of course, Title VII already protects people from discrimination based on color, however, as noted above, Title VII does not define the term color. Without a definition for "color," employers, particularly unsophisticated employers, will continue to fail to understand what color discrimination is. Thus, defining the term is also essential to prevent employers from participating in discriminatory practices before a claim reaches the courts.

## III. A HISTORY OF FEDERAL HAIR DISCRIMINATION JURISPRUDENCE

An understanding of the legal history of hair discrimination claims and the inception of the CROWN Act is necessary to understand the recommendation that I have proposed in Part IV. One of the first documented hair discrimination cases offered a glimmer of hope with respect to the way courts would treat employees with Black hair in workplace discrimination cases. In *Jenkins v. Blue Cross Mutual Hospital Insurance*, the Seventh Circuit upheld a Title VII race discrimination claim against an employer where the employee claimed that she was discriminated against after working for the company for three years.[124] The plaintiff alleged that after she changed her hairstyle to an afro, she was denied a promotion because her supervisor said that she could not represent the company with an afro.[125] Of significance, the court stated that "Title VII is to 'be construed and applied broadly.'"[126] The

123 *E-RACE Goals and Objectives*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/initiatives/e-race/e-race-goals-and-objectives (last visited July 20, 2021).

124 538 F.2d 164, 168–69 (7th Cir. 1976).

125 *Id.* at 165, 167.

126 *Id.* at 167 (quoting Motorola, Inc. v. McLain, 484 F.2d 1339, 1344 (7th Cir. 1973)).

court further noted that "grooming requirements" that apply particularly to Black people could constitute a sufficient charge of racial discrimination.[127] Unfortunately, since *Jenkins*, the court has only suggested, in dicta, that Title VII may prohibit employers from banning afros because afros are Black hair in its natural form.[128]

Accordingly, this section discusses the current posture of federal jurisprudence related to workplace hair discrimination claims to illustrate the courts' shortcomings in addressing such claims. Additionally, this section analyzes the origins of defining race within the United States' court system as a means to understand federal courts' current limited definition of the term. This section then concludes by examining laws and policies adopted by states, cities, municipalities, and administrative agencies that have expanded the definition of race to include hairstyles commonly associated with Black people.

### A. *Striking Down Black Women's Claims of Race-Based Hair Discrimination*

Since *Jenkins*, courts have routinely rejected the cultural, political, and legal significance of Black hair styles, which makes these styles an intrinsic part of Black people's identity. While there is no shortage of legal scholarship that makes the point of *rightfully* critiquing the courts' general jurisprudence related to hair discrimination claims, a discussion of the case law is necessary to set the foundation for an understanding of the significance of the CROWN Act's expansion of the definition of race to include traits historically associated with race, such as traditionally Black hairstyles.[129] *Rogers v. American Airlines Inc.* is commonly cited to illustrate the courts' limited view on the definition of race in race discrimination claims. In *Rogers*, the plaintiff, Renee Rogers, a Black woman, challenged an American Airlines' policy that prohibited employees from wearing cornrows.[130] The plaintiff asserted her claims under Title VII and Section 1981.[131] The court struck down the plaintiff's complaint and rejected the plaintiff's argument that cornrows have a special significance for Black women and are "reflective of [the] cultural, [and] historical essence of the Black women in American

127 *Id.* at 168.

128 *See* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232 (S.D.N.Y. 1981) ("Plaintiff may be correct that an employer's policy prohibiting the 'Afro/bush' style might offend Title VII and section 1981.").

129 *See, e.g.*, Cal. Educ. Code § 212.1 (West 2021).

130 *Rogers*, 527 F. Supp. at 231.

131 *Id.*

society."[132]

Of note, the court stated that American Airlines' policy concerned a matter of "relatively low importance in terms of the constitutional interests protected by the Fourteenth Amendment and Title VII."[133] The court also determined that the policy applied equally to members of all races because the hair style is not worn exclusively by Black people.[134] In an attempt to bolster this opinion, the court commented that the plaintiff first began wearing cornrows at work soon after a white actress in the film "10" "popularized" the style.[135] The court further stated that while banning a Black person from wearing their natural hair[136] may constitute discrimination on the basis of an immutable characteristic, banning an all-braided hairstyle would not constitute discrimination because a braided hairstyle is an "easily changed characteristic."[137] As noted by Professor Ronald Turner, the court placed an unnecessary and peculiar burden on the plaintiff in *Rogers* to present evidence that demonstrated that all, almost all, or only Black Americans wore braided hair to support her claim of discrimination while simultaneously pointing to a single instance of a white woman wearing a braided hairstyle in a movie to conclude that the grooming policy applied equally to members of all races.[138]

The court's above analysis, particularly its statement that American Airlines' policy concerned a matter of "relatively low importance of the constitutional interests protected," amounts to gaslighting and is a result of a lack of understanding of Black women's hair.[139] This statement is particularly problematic where, in the United States, Black women face one of the highest unemployment rates, one that is nearly twice as high as white men.[140] Additionally, while Black women can wear their natural hair in an afro, for many Black women, low hair manipulation protective styles such as twists, single braids, cornrows, Bantu knots, and locs are the only option to prevent hair damage. As an alternative to these natural hairstyles Black women can straighten their hair by using chemicals or heat straighteners. However, these options present the risk of hair breakage.[141] With respect

132 *Id.* at 231–32.
133 *Id.* at 231.
134 *Id.* at 232.
135 *Id.*
136 Here, natural hair means Black hair as it grows from the scalp in its natural texture.
137 *Rogers*, 527 F. Supp. at 232.
138 Ronald Turner, *On Locs, "Race," and Title VII*, 2019 WIS. L. REV. 873, 896–97 (2019).
139 *Rogers*, 527 F. Supp. at 231.
140 *See* Koval & Rosette, *supra* note 18, at 749.
141 *See* Nonhlanhla P. Khumalo et al., *'Relaxers' Damage Hair: Evidence from Amino Acid Analysis*, 62 J. AM. ACAD. DERMATOLOGY 402, 402–08 (2010); Amy J. McMichael, *Hair Breakage*

to the use of extensions or hair weave,[142] these options can be expensive or may cause scalp irritation.[143] Moreover, all Black hair is not the same. While one hair style option may work for one Black woman, it may not be a viable option for a Black woman who has a different hair texture, certain financial constraints, or certain sensitivities to heat, products, or hair extensions. Accordingly, for Black women, deciding on a hairstyle is often a health choice rather than just a stylistic choice. Thus, the court in refusing to recognize these nuances, has in some instances, placed a crushing burden upon Black women by forcing them to choose between the health of their hair and their jobs.

Further, Professor Paulette M. Caldwell and Professor Angela Onwuachi-Willig have offered well-known analyses of the court's flawed decision in *Rogers*. Caldwell's critique of the court's decision focused on the court's inability to acknowledge the intersection of race and gender in that *Rogers* involved negative stereotypes about a Black woman's appearance; however, the court analyzed the plaintiff's sex and race discrimination claims separately and independent of one another.[144] Caldwell further opined that it is imperative to consider this intersection because attempting to combat discrimination through only the lens of racism *or* sexism has historically failed Black women.[145] Of importance to the analysis of the CROWN Act below, Caldwell pointed out that the court's reasoning was problematic particularly because it conceived of race and protection from discrimination only in biological terms, thereby separating braids from Black culture.[146] She further argued that employment discrimination laws should not only be focused on fixed and immutable concepts of race and gender, but also on behavioral manifestations of the negative associations and stereotypes related to those characteristics, especially as they relate to Black women. [147]

Professor Angela Onwuachi-Willig's analysis of *Rogers* proffered that under the court's own rationale, the court reached the wrong decision because "it's rationale was based on a flawed understanding of [B]lack hair . . . ."[148] Specifically, Onwuachi-Willig pointed to the court's "unspoken

*in Normal and Weathered Hair: Focus on the Black Patient*, 12 J. Investigative Dermatology Symp. Proc. 6, 7 (2007).

142 Artificial or natural hair extensions that are attached into human hair by sewing, gluing, or with clips. *Weaves 101: Everything You Need to Know About Weaves*, Unruly, https://unruly.com/weaves-101-everything-need-know-weaves/ (last visited July 22, 2021).

143 Onwuachi-Willig, *supra* note 47, at 1118–19.

144 *See* Caldwell, *supra* note 47, at 371–81.

145 *See id.*

146 *Id.* at 378.

147 *Id.* at 387, 395–96.

148 Onwuachi-Willig, *supra* note 47, at 1088–89, 1093.

preference" for white women's hairstyles in suggesting that the plaintiff could, as an alternative to wearing a braided hairstyle, pull her hair into a bun and wrap a hairpiece around the bun during working hours.[149] As noted by Onwuachi-Willig, and what is understood by all Black women who adorn their crowns with their natural hair, pulling natural hair back into a bun can be very difficult and takes a great amount of effort to do so because of the texture of Black women's hair.[150] Importantly, the district court categorically excluded braided hairstyles from its definition of a natural hairstyle in spite of the fact that within the Black community braided hairstyles are considered natural hairstyles because often times they are the only means by which Black women are able to wear their hair "down" and in longer styles without the use of heat straighteners or chemical relaxers (also known as perms).[151] "The district court left unstated society's normative ideal for women's hair: straight hair, which hangs down as it grows longer—hair that is not naturally grown by [B]lack women."[152] Thus, while Professor Onwuachi-Willig agrees that race is a social construct, she simultaneously advanced the argument that practitioners can effectively argue that discrimination against natural hairstyles is discrimination on the basis of biological characteristics.[153] More specifically, practitioners can argue that African descendants' curly or coily hair texture, which is more conducive to locs, braids, and twists, are biological traits that many if not most African descendants possess.[154] Thus, when Black women are compelled to straighten their hair as a condition of employment, an employer places an undue burden on them, and therefore is discriminating against Black women on the basis of sex and race.[155]

More recently, the *Equal Emp. Opportunity Commission v. Catastrophe Management Solutions* case demonstrated that the courts' short-sighted view of what constitutes race has not changed.[156] In that case, the EEOC brought a claim under Title VII on behalf of a plaintiff whose job offer was rescinded because she refused to cut off her locs.[157] Before rescinding the plaintiff's job offer, the defendant's human resources manager told the plaintiff that the company could not hire her with locs because "they tend to get messy" and then told the plaintiff about a male applicant who was asked to cut off his

149 *Id.*
150 *Id.*
151 *Id.* at 1085, 1093.
152 *Id.*
153 *See id.* at 1086–87.
154 *See id.* at 1086–87, 1094, 1103–04.
155 *See id.* at 1120.
156 *See* Equal Emp. Opportunity Comm'n v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (11th Cir. 2016).
157 *Id.* at 1020.

locs in order to work for the company.[158] The defendant's grooming policy was as follows: "All personnel are expected to be dressed and groomed in a manner that projects a professional and businesslike image while adhering to company and industry standards and/or guidelines . . . [H]airstyle should reflect a business/professional image. No excessive hairstyles or unusual colors are acceptable[.]"[159] The Eleventh Circuit court upheld the district court's dismissal of the plaintiff's complaint on the ground that the plaintiff "did not plausibly allege intentional racial discrimination" by the defendant.[160] The circuit court also upheld the district court's denial of the EEOC's motion to amend its complaint to, amongst other things, include arguments that: (1) "race is a social construct and has no biological definition;" (2) "the concept of race is not limited to or defined by immutable physical characteristics;" (3) "the concept of race encompasses cultural characteristics related to race or ethnicity;" and (4) though some non-Black people do have hair texture that allow their hair to lock, locs are a racial characteristic, just as skin color is a racial characteristic.[161] The EEOC also sought to include the below explanation of Black hair in its amended complaint:

> The hair of [B]lack persons grows "in very tight coarse coils," which is different than the hair of white persons. "Historically, the texture of hair has been used as a substantial determiner of race," and "[locs] are a method of hair styling suitable for the texture of [B]lack hair and [are] culturally associated" with [B]lack persons. When [B]lack persons "choose to wear and display their hair in its natural texture in the workplace, rather than straightening it or hiding it, they are often stereotyped as not being 'teamplayers,' 'radicals,' 'troublemakers,' or not sufficiently assimilated into the corporate and professional world of employment.[162]

In response to the proposed amendments, the court stated that the EEOC failed to allege that locs are an immutable characteristic, and therefore the district court did not err in denying the EEOC's motion to amend its complaint.[163] Of importance, the EEOC advanced its arguments under a disparate treatment theory rather than making a disparate impact

158 *Id.* at 1021–22.
159 *Id.* at 1022.
160 *Id.* at 1020, 1035.
161 *Id.* at 1022, 1035.
162 *Id.* at 1022.
163 *Id.* at 1030.

argument.[164] Accordingly, the court did not consider the EEOC's arguments that it deemed related to disparate impact only.[165] This included the EEOC's arguments that expert testimony regarding "the racial *impact* of a [loc] ban" should have been allowed and that "the people most adversely and significantly *affected* by a [loc] ban…are African-Americans."[166] Based on the EEOC's filings, it is unclear why the EEOC did not advance a disparate impact discrimination claim.

The grooming policy set forth in *Catastrophe Management Solutions* is of particular importance because unlike in *Rogers*,[167] where the defendant had a grooming policy that categorically banned all braided hairstyles, the policy in *Catastrophe Management Solutions* was expressed in terms of what the company considered "professional" and "businesslike."[168] Thus, by forcing its employees to cut off their locs the company signaled its opinion that locs are not professional nor business like. What was implied in *Rogers* became explicit in *Catastrophe Management Solutions*, the courts have been willing to subscribe to the assumption that the standard for professionalism and appearance expectations in the workplace can be based on the characteristics and norms of white people. The court therefore signaled its endorsement of material subordination of the plaintiff in *Catastrophe Management Solutions* through the mechanism of trait discrimination.

### B. *The Origins of Defining Race within the United States Legal System*

As noted above, Title VII does not include definitions for "race" or "discrimination."[169] The statute does, however, include definitions for "religion" and discrimination "because of sex" or "on the basis of sex"—although these definitions are incomplete.[170] Thus, the interpretation of

164 *Id.* at 1024.

165 *Id.* at 1024–25.

166 *Id.*

167 *Id.* at 1022.

168 *See* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231 (S.D.N.Y. 1981); *Catastrophe Mgmt. Sols.*, 852 F.3d at 1022.

169 42 U.S.C. § 2000e.

170 *See id.* § 2000e(j)-(k) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business . . . . The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in

what constitutes race discrimination has generally been left to the courts to decide. Congress' objective in enacting Title VII, as evinced by its plain language, was to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."[171] However, as noted above, the decisions reached in *Rogers*, *Catastrophe Management Solutions*, and a number of other cases that fail to protect Black workers against racial discrimination stem from the courts' reasoning that Title VII only provides protection from racial discrimination based on immutable characteristics and characteristics that the court deems "difficult to change."[172] Therefore, it is the courts' view that employment policies that involve mutable characteristics, or characteristics that can be "easily" altered—as judged by white normative standards—are non-discriminatory. Accordingly, courts have essentially strayed from the broad mandate of Title VII.

The Eleventh Circuit Court of Appeals set forth its opinion regarding the definition of race in *Catastrophe Management Solutions* when it stated:

> It appears more likely than not that "race," as a matter of language and usage, referred to common physical characteristics shared by a group of people and transmitted by their ancestors over time. Although the period dictionaries did not use the word "immutable" to describe such common characteristics, it is not much of a linguistic stretch to think that such characteristics are a matter of birth, and not culture.[173]

The court's definition was offered in response to the EEOC's argument that

their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, [t]hat nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.").

171 Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

172 *See, e.g.*, Eatman v. United Parcel Serv., 194 F. Supp. 2d 256, 259, 266, 270 (S.D.N.Y. 2002) (upholding an employer's appearance policy that required its drivers with "unconventional" hairstyles, including locs, to wear hats); Pitts v. Wild Adventures, Inc., No. 7:06-CV-62, 2008 WL 1899306, at *1, *5–6 (M.D. Ga. Apr. 25, 2008) (citing *Rogers*, 527 F. Supp. 229, to conclude that an employee was not discriminated against when the amusement park employer introduced a new policy that "prohibited '[locs], cornrows, beads, and shells' that are not 'covered by a hat/visor'").

173 *Catastrophe Mgmt. Sols.*, 852 F.3d at 1027.

race is a social construct.[174] Instead of accepting the EEOC's argument, the court relied on an outdated and erroneous biological definition of race. The court defined race in this way by looking at dictionary definitions in existence at the time Title VII was enacted.[175] One of these definitions was from a "leading" 1961 dictionary that stated "RACE is anthropological and ethnological in force, usu[ally] implying a physical type with certain underlying characteristics, as a particular color of skin or shape of skull . . . although sometimes, and most controversially, other presumed factors are chosen, such as place of origin . . . or common root language."[176] In selecting this definition, the court used the rule of statutory construction that, in such cases, courts must discern the meaning of words by trying to determine their "ordinary, contemporary, common meaning."[177] The court's use of this constrictive definition of race in *Catastrophe Management Solutions* lends itself to the question, why does the court's understanding of race ignore social, historical, and cultural experiences and focus only on fixed physical appearance?

A look at the origin of defining race demonstrates that in many ways, the fixation on physical appearance rather than the social, historical, and cultural components of race was born from the courts' role in litigating the status—free or enslaved—of persons in America during the time that enslavement was legal. For instance, in 1806 in *Hudgins v. Wright*, Black hair took center stage in the Virginia Supreme Court of Appeals' definitions of and presumptions around race.[178] There, the plaintiffs were three generations of enslaved women who were of Black and "Indian" descent that sued for their freedom by arguing that they were descendants of a free "female ancestor."[179] The court was tasked with setting forth the burden of proof in "freedom cases,"[180] and determined that Black people had the burden of proving that they were free, while white people and indigenous people were presumed to be free.[181] Of note, in making this determination the court emphasized that hair was one of the most important characteristics—if not

174 *See id.* at 1022, 1027–28.

175 *Id.* at 1026–27.

176 *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1870 (unabr. 1961)).

177 *Id.* at 1026.

178 Hudgins v. Wright, 11 Va. 134, 139 (1806).

179 *Id.* at 134.

180 The Freedom cases are a litany of cases where enslaved persons sued enslavers for their freedom or made the claim that they had been wrongfully enslaved. *See* Luther Wright Jr., *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513, 523 n.61 (1995).

181 *Hudgins*, 11 Va. at 134, 139.

the most important characteristic—in distinguishing a Black person from any other race. It stated:

> Nature has stampt [sic] upon the *African* and his descendants two characteristic marks, besides the difference of complexion, which often remain visible long after the characteristic distinction of colour [sic] either disappears or becomes doubtful; a flat nose and woolly head of hair. The latter of these characteristics disappears the last of all: and so strong an ingredient in the *African* constitution is this latter character, that it predominates uniformly where the party is in equal degree descended from parents of different complexions, whether white or *Indians;* giving to the jet black lank hair of the *Indian* a degree of flexure, which never fails to betray that the party distinguished by it, cannot trace his lineage purely from the race of native *Americans.* Its operation is still more powerful where the mixture happens between persons descended equally from *European* and *African* parents. So pointed is this distinction between the natives of *Africa* and the aborigines of *America,* that a man might as easily mistake the glossy, jetty cloathing [sic] of an *American* bear for the wool of a black sheep, as the hair of an *American Indian* for that of an *African,* or the descendant of an *African.* Upon these distinctions as connected with our laws, the burthen of proof depends.[182]

In short, some of the earliest discussions about race within our legal system centered around the "fixed" characteristics and features of Black people, for the purpose of condemning Black people to enslavement.[183] Interestingly, *Hudgins*' emphasis on the texture of Black hair, however, leans towards supporting Professor Onwuachi-Willig's argument that African descendants' curly or coily hair texture, which is more conducive to locs, braids, and twists, is an immutable characteristic.[184]

In continuing to fixate on physical characteristics, the courts have ignored more contemporary legal scholarship related to what race is and how it should be defined. For instance, Professor D. Wendy Greene has

182 *Id.* at 139.

183 After enslavement ended, the courts continued to use racial classifications during the "separate but equal era" to determine where people could live, who they could marry, where they could attend school, where they could sit while using public transportation, etc. The courts relied heavily on distinctions in physical appearance between non-white people and white people to enforce obstructive racial statutes. *See* Wright, *supra* note 180, at 530; Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

184 *See* Onwuachi-Willig, *supra* note 47, at 1087, 1093–94.

called the court's immutability doctrine a legal fiction because the doctrine is not supported by the plain language of Title VII, and because "law and society have affixed and continue to affix racial meanings and associations to mutable and immutable characteristics."[185] Professor Greene has therefore advocated for the courts to adopt a broader understanding of race so that employment discrimination law reflects the nuances of racialization.[186]

Further, assuming *arguendo*, that the definitions the court in *Catastrophe Management Solutions* looked at were an accurate depiction of what race is, by focusing only on how race was defined in 1961—rather than what Title VII means by *race discrimination*—the court danced around the plaintiff's claim that the employer's loc policy, and statement that locs "tend to get messy," was based on an impermissible race-based stereotype. In other words, even if race has the "dictionary definition" that the court has prescribed to it, race-based employment discrimination is much more expansive. This was understood in 1971 by the court in *Rogers v. EEOC*, which, in discussing the scope of Title VII stated:

> This language evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow. Time was when employment discrimination tended to be viewed as a series of isolated and distinguishable events, manifesting itself, for example, in an employer's practices of hiring, firing, and promoting. But today employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues.[187]

185 *See* Greene, *supra* note 47, at 992, 1010, 1026.

186 *Id.* at 1010.

187 Rogers v. Equal Emp. Opportunity Comm'n, 454 F.2d 234, 238 (5th Cir. 1971), *disapproved of by* Equal Emp. Opportunity Comm'n v. Shell Oil Co., 466 U.S. 54 (1984) (finding that an optometrist business discriminated against its only "Spanish surnamed American employee" by segregating its patients and rejecting the employer's argument that the plaintiff's allegation could not relate to an unlawful employment practice because plaintiff alleged discrimination against the employer's patients rather than the plaintiff).

Moreover, the Supreme Court has accepted that Title VII should apply against subconscious stereotypes and prejudices in race discrimination claims and in other kinds of discrimination claims. [188] Consequently, it should not have been a stretch to apply this same understanding with respect to the plaintiff's claim in *Catastrophe Management Solutions*. In their Brief of Amici Curiae, the NAACP Legal Defense & Educational Fund, Inc.; Legal Aid Society–Employment Law Center; Professor D. Wendy Greene; and Professor Angela Onwuachi-Willig wrote in support of the plaintiff/appellant's Petition for Rehearing En Banc and crystalized this point by arguing that the Eleventh Circuit did not give Catastrophe Management Solution's locs policy the scrutiny that is required by Title VII because the court did not identify that the ban was premised on the stereotype that Black people's inherent hair texture is extreme or messy when it is styled in a particular way.[189]

### C. *State, City, Municipal, and Administrative Intervention*

The above history and analysis are what set the stage for states, cities, and municipalities to take a deeper look at redefining race to include discrimination against natural hairstyles in employment discrimination claims. Different jurisdictions have taken different approaches with respect to the language used, scope of coverage, and context provided in promulgating anti-hair discrimination laws, policies, and decisions.

188 *See* Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 990–91 (1988) ("[E]ven if one assumed that any such discrimination can be adequately policed through disparate treatment analysis the problem of subconscious stereotypes and prejudices would remain. In this case, for example, petitioner was apparently told at one point that the teller position was a big responsibility with 'a lot of money . . . for [B]lacks to have to count.' Such remarks may not prove discriminatory intent, but they do suggest a lingering form of the problem that Title VII was enacted to combat. If an employer's undisciplined system of subjective decisionmaking [sic] has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply."); Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . ").

189 Brief for NAACP Legal Defense & Educational Fund et al. as Amici Curiae Supporting Plaintiff/Appellant at 6–9, Equal Emp. Opportunity Comm'n v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (11th Cir. 2016) (No. 14-13482), 2016 WL 7733072.

### 1. New York City's Commission on Human Rights Guidance

While California was the first state to pass the CROWN Act into state legislation, New York City was the first place in the country to set forth enforcement guidance related to discrimination on the basis of natural hairstyles.[190] The enforcement guidance, promulgated by the New York City Commission on Human Rights (the Commission), set forth that the "New York City Human Rights Law (NYCHRL) protects the rights of New Yorkers to maintain natural hair or hairstyles that are closely associated with their racial, ethnic, or cultural identities. For Black people, this includes the right to maintain natural hair, treated or untreated hairstyles such as locs, cornrows, twists, braids, Bantu knots, fades, Afros, and/or the right to keep hair in an uncut or untrimmed state."[191] This protection applies in a number of contexts, including employment.[192] The guidance specifically calls out what the court found to be non-discriminatory conduct in *Catastrophe Management Solutions* by stating that a grooming policy that requires employees to maintain a "neat and orderly" appearance that prohibits locs or cornrows "is discriminatory against Black people because it presumes that these hairstyles, which are commonly associated with Black people, are inherently messy or disorderly."[193] The guide additionally sets forth examples of violations of the NYCHRL, which include:

- A grooming policy prohibiting twists, locs, braids, cornrows, Afros, Bantu knots, or fades which are commonly associated with Black people.
- A grooming policy requiring employees to alter the state of their hair to conform to the company's appearance standards, including having to straighten or relax hair (*i.e.*, use chemicals or heat).
- A grooming policy banning hair that extends a certain number of inches from the scalp, thereby limiting Afros.

190 *NYC Commission on Human Rights Legal Enforcement Guidance on Race Discrimination on the Basis of Hair 2019*, NYC COMM'N ON HUM. RTS. (Feb. 2019), https://www1.nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf; Christine Kennedy, *The Strained Relationship Between Hair Discrimination and Title VII Litigation and Why It Is Time to Use a Different Solution*, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y 401, 419 (2021).

191 Brief for NAACP Legal Defense & Educational Fund et al. as Amici Curiae Supporting Plaintiff/Appellant, *supra* note 189, at 1.

192 *Id.* at 2; *NYC COMMISSION ON HUMAN RIGHTS LEGAL ENFORCEMENT GUIDANCE ON RACE DISCRIMINATION ON THE BASIS OF HAIR 2019*, *supra* note 190.

193 Brief for NAACP Legal Defense & Educational Fund et al. as Amici Curiae Supporting Plaintiff/Appellant, *supra* note 189, at 7.

- Forcing Black people to obtain supervisory approval prior to changing hairstyles, but not imposing the same requirement on other people.
- Requiring only Black employees to alter or cut their hair or risk losing their jobs.
- Telling a Black employee with locs that they cannot be in a customer-facing role unless they change their hairstyle.
- Refusing to hire a Black applicant with cornrows because her hairstyle does not fit the "image" the employer is trying to project for sales representatives.
- Mandating that Black employees hide their hair or hairstyle with a hat or visor.[194]

Of further note, while the substance of guidance focuses on Black people, the Commission makes clear that the guidance applies broadly to other impacted groups, such as Latin-x/a/o, Indo-Caribbean, and Native American people.[195] Given the expansive and thorough context and guidance set forth in the enforcement guidance, it serves as a model for cities to provide the maximum protection from prohibitions on natural hair and hairstyles within the workplace.

### 2. Chicago Commission on Human Relations Precedent

Guidance from Chicago's Commission on Human Relations on natural-hair discrimination, although not set forth as an enforcement guidance, predates New York City's Commission's guidance. While the Commission's ruling was made in the context of public accommodation law, rather than workplace discrimination, its ruling is instructive because of its finding that discrimination against hairstyles associated with Black people constitutes race discrimination.

In 2009, complainants Rafael Scott and Sheldon Lyke filed complaints with the Commission on Human Relations alleging that the owner of a club engaged in race discrimination by refusing to allow them into the club because of their braided hairstyles.[196] When Scott was denied

194 *Id.* at 7–8.

195 *Id.* at 1 n.2.

196 *See* Rafael Scott, Complainant v. Owner of Club 720, Respondent, CHR Nos. 09-P-02, 09-P-09, 1–2 (Chi. Comm'n. Hum. Rel. Feb. 16, 2011), 2011 WL 2132214 (final order on liability and relief). Although Scott and Lyke filed their complaints separately, the two cases were consolidated for purposes of the Commission's administrative hearing. It should be noted that Lyke also alleged religious discrimination in his complaint.

entry into the club, he asked if he could see the club's dress code policy in writing.[197] He was never allowed to see it.[198] He also saw women who had braids, and non-Black men who had spiked "Mohawk" hairstyles that were allowed to enter the club.[199] When Lyke was denied entry into the club he was stopped by two security guards who appeared to be Latino.[200] One of the security guards told him that the club did not allow people to enter the club with braided hair.[201] After his initial conversation with the security guards, Lyke was allowed into the club, but then was later told to leave because of the kufi he was wearing on his head.[202] When Lyke explained that he wore the kufi as a religious head covering related to his Muslim faith, the manager responded that he was not Muslim, and that if he did not take off the hat he would have to leave.[203] Lyke then gathered his belongings and left the club.[204] Of note, one of the security guard's hair was braided into pigtails.[205]

In adjudicating the complainants' claims, the Commission relied on Section 2-160-070 of the Chicago Human Rights Ordinance, which states that it is unlawful to discriminate against any individual concerning the full use of a public accommodation because of the individual's race.[206] The Commission determined that, in Scott's case,[207] the club's policy barring braids violated the Chicago Human Rights Ordinance based on the reasoning that (1) the policy had a clear and disparate impact on potential customers who are African American and (2) the policy disfavored a hairstyle associated with one racial group based on stereotypical assumptions about those who wear braided hairstyles.[208] Compellingly, unlike in *Rogers v. American Airlines Inc.*, where the court placed the burden on the plaintiff to present evidence that demonstrated that all, almost all, or only Black Americans wore braided hair to support her claim of discrimination, the

197 *Id.* at 3.
198 *Id.*
199 *Id.*
200 *Id.*
201 *Id.*
202 *Id.*
203 *Id.*
204 *Id.*
205 *Id.*
206 CHI. MUN. CODE § 2-160-070 (2021) (Chicago, IL).
207 With respect to Lyke, the Commission determined that the evidence did not establish a prima facie case of discrimination because he was allowed into the club and remained there without incident for two hours. The Commission did, however, determine that Lyke established a prima facie case for discrimination on the basis of religion because the club should have accommodated Lyke's religious practice by allowing him to remain in the club while wearing his kufi. *See Scott*, 2011 WL 2132214, at 5, 7.
208 *See id.*

Commission noted its authority to take administrative notice of facts which are "indisputable and capable of accurate and ready determination."[209] Consequently, the Commission took administrative notice of the fact that in Chicago cornrows and locs are overwhelmingly associated with and worn by Black people.[210] The Commission's decision to take administrative notice is significant, as taking on the task of proving what we in American society know and see daily with our own eyes (natural hairstyles such as braids, locs, and twists are commonly associated with Black people), would be unduly burdensome in terms of the time and cost of making such a showing.

Although the Commission's analysis was generally sound and it reached a favorable result with regard to the race discrimination claim, part of the Commission's reasoning raises an issue of classism within racism. The Commission stated that there was no "reasonable basis for associating the wearing of a braided hairstyle with the potential for criminal or disruptive conduct – in a large metropolitan area where African-Americans of all occupations and economic levels wear braided hairstyles."[211] This statement implies that if it were the case that only Black people of lower socio-economic status wore braids there may be reason to associate braided hairstyles with criminal or disruptive conduct. The Commission's statement highlights the "good Black" vs. "bad Black" dichotomy that tends to escape protection from discrimination law. Professors Devon Carbado and Mitu Gulati describe the issue by stating that while current employment discrimination law may reduce the possibility that employers will discriminate against all Black people, if an employer has a proclivity for race discrimination, that employer is likely to discriminate against a subgroup of Black people that the employer deems to be too Black in favor of Black people who act white enough for the employer's liking.[212] Under this reasoning, the implication of the Commission's statement is that if cornrows or braided hair were a style predominately worn by Black people of lower socio-economic status, braids may rightfully activate the stereotype of associating braids with criminality because working class Black people are too Black and therefore "bad Blacks." Thus, even where a judicial decision, statute, ordinance, etc., may reach a result that protects against discrimination, ensuring maximum protection entails scrutinizing subgroup bias that may be based on classism and/or performative differences of race.

209 *See id.* at 5 n.9; Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232–33 (S.D.N.Y. 1981).
210 *Scott*, 2011 WL 2132214, at 5.
211 *Id.* at 6.
212 Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 Cornell L. Rev. 1259, 1293–94, 1307 (1999).

### 3. Adopting the CROWN Act

The CROWN Act was first conceived by the CROWN Coalition, which is comprised of Dove,[213] Color of Change,[214] the National Urban League,[215] and the Western Center on Law & Poverty.[216] Dove's involvement in the coalition has been informed by its 2019 CROWN Research study which, amongst other data points, found that "Black women are 30% more likely to be made aware of a formal workplace appearance policy," "1.5 times more likely to be sent home from the workplace because of their hair," and "83% more likely to report being judged more harshly on their looks than other women."[217] In response to this data, the CROWN Act was first passed in California to prohibit employers from discriminating against employees who wear natural or protective hairstyles, such as braids, locs, and twists.[218] The CROWN Act achieved this by modifying the definition of race to include hair texture and hairstyles that are commonly associated with a particular race.[219]

While some states, such as California,[220] faced no documented political opposition in passing the CROWN Act, the Act has faced political opposition in a number of other states. For instance, in Colorado where the Act was eventually passed due to Democratic control at all levels of the state government, Republicans on the House Business Affairs and Labor Committee voted against it.[221] In opposing the Act, Republican

213 Dove is a personal care brand that is owned by Unilever.

214 Color of Change is an organization that that aims to encourage decision makers in corporations and government "to create a more human and less hostile world for Black people in America." *About Color of Change*, COLOR CHANGE, https://colorofchange.org/about/ (last visited July 9, 2021).

215 "The National Urban League is a historic civil rights organization dedicated to economic empowerment, equality, and social justice." *Mission and History*, NAT'L URB. LEAGUE, https://nul.org/mission-and-history (last visited July 9, 2021).

216 "Through a lens of economic and racial justice, Western Center on Law & Poverty fights in courts, cities, counties, and in the Capitol to secure housing, health care and a strong safety net for Californians with low incomes." W. CTR. ON L. & POVERTY, https://wclp.org/ (last visited July 12, 2021).

217 JOY Collective, *The Crown Research Study: Creating a Respectful and Open Workplace for Natural Hair*, DOVE 4 (2019), https://static1.squarespace.com/static/5edc69fd622c36173f56651f/t/5edeaa2fe5ddef345e087361/1591650865168/Dove_research_brochure2020_FINAL3.pdf.

218 *See* CAL. EDUC. CODE § 212.1 (West 2022).

219 *See id.*

220 S.B. 188, 2019 Leg., Reg. Sess. (Cal. 2019).

221 Erica Meltzer, *This Colorado Bill Bans Discrimination Against Ethnic Hairstyles. In Schools, Change Means Going Beyond the Dress Code*, COLO. INDEP. (Feb. 10, 2020), https://www.coloradoindependent.com/2020/02/10/colorado-crown-act-hairstyle-

Representative Shane Sandridge stated, "where does a business-environment look end and racism begin?" He also compared appearance and grooming policies related to hair to workplace requirements that those in the financial service sector must wear a suit and tie.[222] Further, opposition in West Virginia led to the Act not being passed.[223] There, opponents stated that hair is not an important issue and that it did not seem necessary to pass a law that would protect it.[224] Moreover, although the Act was eventually passed in Nebraska, it was initially vetoed by Governor Pete Rickets who argued that the bill was not restricted to "immutable race characteristics."[225] The political opposition that has arisen in pushing to pass the Act mirrors the courts' reasoning in *Rogers*, *Catastrophe Management Solutions*, and a number of other court decisions that have failed to protect natural hairstyles. As evinced by the discourse in Colorado, West Virginia, and Nebraska, some law makers, like judges, have categorized such protection as unimportant and unrelated to a fixed racial characteristic.

As noted above, a number of states have signed the Act—or "CROWN Act-like" language—into legislation.[226] Additionally, several cities and counties around the country have passed the Act.[227] The language of the Acts which have been passed by different states, counties, and cities have varied, along with the legislative effort needed to pass them, as noted above. In certain jurisdictions, despite the progress made, potentially restrictive language remains that may impose hurdles on plaintiffs that bring hair discrimination claims.

Initially, one such jurisdiction was Montgomery County, Maryland.

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discrimination/.

222 *Id.*

223 Dave Mistich, *As Session Winds Down, House Judiciary Blocks Anti-Hair Discrimination, Medical Cannabis Proposals*, W. Va. Pub. Broad. (Mar. 3, 2020), https://www.wvpublic.org/news/2020-03-03/as-session-winds-down-house-judiciary-blocks-anti-hair-discrimination-medical-cannabis-proposals.

224 Jennifer Roberts, *UPDATE: CROWN Act 'Dethroned' in West Virginia, Bill Banning Hair Discrimination in the Schools and Workplace*, WVVA (Feb. 27, 2020), https://wvva.com/2020/02/27/beckley-student-motivation-for-crown-act-bill-banning-hair-discrimination-in-schools-and-workplace/.

225 Paulina Jayne Isaac, *The Crown Act Just Passed in Nebraska, Making Hair Discrimination Illegal*, Glamour (May 6, 2021), https://www.glamour.com/story/the-crown-act-passed-nebraska-hair-discrimination-illegal.

226 *See, e.g.*, S.B. 188, 2019 Leg., Reg. Sess. (Cal. 2019); S.B. 3945, 218th Leg., Reg. Sess. (N.J. 2019); H.B. 1048, 72d Gen. Assemb. 2d Reg. Sess. (Colo. 2020); H.B. 1514, 2020 Leg. Reg. Sess. (Va. 2020); H.B. 1444, 440th Gen. Ass., Reg. Sess. (Md. 2020); S.B. 192, 150th Gen. Assemb., Reg. Sess. (Del. 2021); B. 6515, 2021 Gen. Assemb., Jan. Sess. (Conn. 2021); L.B. 451, 2021 Leg., Reg. Sess. (Neb. 2021).

227 *See, e.g.*, Montgomery Cnty., Md., Cnty. Code § 27-6 (2019); New Orleans, La., Ordinance 33184 (2020); Columbus, Ohio, Ordinance 2280-2020 (2020).

Its CROWN Act provides that "*[p]rotective hairstyles* are those hairstyles necessitated by, or resulting from, the immutable characteristics of a hair texture associated with race, such as braids, locks, afros, curls, and twists."[228] This language was passed in Montgomery County before the state legislature passed and ratified the Act at the state level.[229] Fortunately, the language of the Act passed at the state level is somewhat broader and more expansive. It defines "protective hairstyles" as "includ[ing] braids, locks, and twists."[230] "Race" is defined as encompassing "traits associated with race, including hair texture, afro hairstyles, and protective hairstyles."[231] The Maryland bill does not include the phrase "immutable characteristics," eliminating a significant bar to potential recovery for future plaintiffs in that state.[232] As a result, with respect to hair discrimination claims, the legal fiction of immutability is no more.[233] Had the Maryland House of Delegates retained the phrase "immutable characteristics," Black people with finer textured hair or with hair textures more similar to that of non-Black people may have faced difficulty in bringing hair discrimination claims based on the argument that braids, twists, locs, and other natural hairstyles are not resultant from the immutable texture of their hair. Accordingly, Black men and women who wear braids, twists, locs, and other natural hairstyles as a cultural and stylistic choice rather than a choice associated with hair texture potentially would have lacked protection from discrimination.

Certain CROWN Act laws have also been limited by the syntax of the bills they have been passed with rather than by reference to a restrictive legal doctrine. For instance, the Delaware General Assembly limited its definition in the Delaware law by providing that "[p]rotective hairstyle includes braids, locks, and twists."[234] Although this specific listing of hairstyles is repeated in numerous Acts passed elsewhere, in those jurisdictions other language in the legislation provides that the list is non-exhaustive.[235] In Delaware there is no such caveat. Thus, courts there may view this as a free hand to limit hairstyle discrimination suits to only those brought based upon those specifically enunciated hairstyles.

Further, the laws in both Delaware and Broward County, Florida

228 MONTGOMERY CNTY., MD., CNTY. CODE § 27-6 (2019).

229 *Compare* B.30-19, 2019 Montgomery Cnty. Council (Nov. 5, 2019), *with* H.B. 1444, 440th Gen. Assemb., Reg. Sess. (Md. 2020).

230 H.B. 1444 § 1(F), 440th Gen. Assemb., Reg. Sess. (Md. 2020).

231 *Id.*

232 *See id.*

233 *See* Greene, *supra* note 47, at 1029–30.

234 S.B. 192, 150th Gen. Assemb., Reg. Sess. (Del. 2021).

235 *Compare id.*, *with* MORGANTOWN, W.V. ORDINANCES 153.02 (2021), *and* S.B. 3945, 218th Leg., Reg. Sess. (N.J. 2019), *and* S.B. 6209A, 242d Leg., Reg. Sess. (N.Y. 2019).

also include the phrase, "traits historically associated with race" in their definitions of race.[236] While this language aids in expanding the definition of race beyond the former parameters allowed by the immutability doctrine, historical association has previously been rejected as a basis for asserting a Title VII discrimination claim.[237] Additionally, plaintiffs may need to provide expert testimony to demonstrate that a trait is historically associated with a particular race. Such testimony could prove to be a costly measure for plaintiffs in these cases. Thus, like Professor Greene, I advocate that racial traits be viewed instead as "appearances and behaviors that society, historically and presently, commonly associates with a particular racial group, even when the physical appearances and behaviors are not 'uniquely' or 'exclusively' 'performed' by, or attributed to a particular racial group."[238] Under this framework, courts could then get rid of the requirement that a plaintiff must prove that the racial characteristic in dispute—braids, locs, twists, etc.—is unique to Black people or only historically associated with Black people.[239]

In Pittsburgh, Pennsylvania, the CROWN Act was initially drafted in a robust and expansive form.[240] However, the broad and inclusive language of the earlier draft was eventually shaved down. The draft language initially included provisions allowing for hairstyle protection to extend to facial hair and "other forms of facial presentation."[241] This is significant because Black men who shave are prone to suffer from a painful skin condition known as pseudofolliculitis barbae (PFB), which may occur when skin in the beard area is irritated by ingrown hairs caused by shaving.[242] More specifically, the condition results from the hair curving as it grows back, making contact with the skin, and piercing the skin, which forms a pseudofollicle.[243] Of importance, PFB has been proven to be experienced almost exclusively by Black men.[244] Thus, grooming policies requiring that men be freshly shaven have disparately impacted Black men. Had the Pittsburgh Act been passed

236 Del. S.B. 192; Ordinance 2020-45.

237 Equal Emp. Opportunity Comm'n v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1030 (11th Cir. 2016); Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 231–32 (S.D.N.Y. 1981).

238 Greene, *supra* note 2, at 1385.

239 *See id.*

240 *See* Tom Davidson, *Pittsburgh Officials Change Language of Hairstyle Law to Remove Protection for Beards*, TribLIVE (Feb. 23, 2021), https://triblive.com/local/pittsburgh-officials-change-language-of-hairstyle-law-to-remove-protection-for-beards/; Pittsburgh, Pa., Ordinances ch. 659.01–04 (2020).

241 *See* Davidson, *supra* note 240.

242 Onwuachi-Willig, *supra* note 47, at 1098–99.

243 See *id.* at 1098–1100.

244 *Id.* at 1098.

in its original form, it would have represented a significant step towards correcting this harm at the city legislative level.

In other jurisdictions where the CROWN Act has passed, the language used has created broad and protective non-discrimination statutes. These versions of the Act have included language such as:

- *"cultural or religious headdresses* includes hijabs, head wraps or other headdresses used as part of an individual's personal cultural or religious beliefs;
- *protective hairstyles* includes such hairstyles as braids, locs, twists, tight coils or curls, cornrows, [B]antu knots, afros, weaves, wigs or head wraps; and
- *race* includes traits historically associated with race, including hair texture, length of hair, protective hairstyles or cultural or religious headdresses."[245]
- *"'Race'* is inclusive of ethnic traits historically associated with race, including, but not limited to, hair texture and protective hairstyles; and
- *'Protective hairstyles'* includes, but is not limited to, wigs, headwraps and hairstyles such as individual braids, cornrows, locs, twists, [B]antu knots, afros and afro puffs."[246]
- *Hairstyles* includes "[h]air texture and styles of hair of any length, such as protective such as protective or cultural hairstyles, natural hairstyles, and other forms of hair presentation."[247]
- *"'Protective hair, natural and cultural hair textures and hairstyles'* include hairstyles and hair textures most commonly associated with race, including, without limitation, braids, cornrows, locs, [B] antu knots, Afros, and twists, whether or not hair extensions or treatments are used to create or maintain any such hairstyle, and whether or not the hairstyle is adorned by hair ornaments, beads or headwraps.[248]

New Mexico's law, which is inspired by the Act, is the most all-encompassing of any passed at the state level. Its inclusion of "weaves, wigs, or head wraps" in the definition of "protective hairstyles" is neither mimicked nor matched anywhere else among the state bills.[249] Further, the New Mexico

245 H.B. 29, 6655th Leg., 1st Sess. (N.M. 2021); S.B. 80, 55th Leg., 1st Sess. (N.M. 2021).
246 B. 6515, 2021 Gen. Assemb., Jan. Sess. (Conn. 2021).
247 PHILA., PA., CODE § 9-1102 (2020).
248 ST. LOUIS, MO., CODE OF ORDINANCES ch. 15.21 (2021).
249 N.M. H.B. 29; N.M. S.B. 80.

Legislature included "cultural or religious headdresses."[250] This inclusion recognizes the multidimensional theory that Black and Muslim women often face discrimination against multiple aspects of their identity at once, and it protects against the layered discrimination that a Black Muslim woman with natural hair who elects to wear a hijab may face.[251]

Connecticut's Act is perhaps the most expansive of any state that passed the CROWN Act itself. Like New Mexico, it too protects wigs and headwraps, though weaves are not listed.[252] The Connecticut Act also protects "afro puffs," making it the only piece of legislation passed at any level to do so.[253]

At the local level, St. Louis's law offers a clear example of just how far an Act can reach. By using the language, "[p]rotective hair, natural and cultural hair textures and hairstyles" it explicitly pushed back on the notion that these hairstyles were "artifice," which the court describes as "hair that is not the product of natural hair growth."[254] The definition itself includes not only a lengthy listing of traditional Black hairstyles, but also importantly includes the language, "whether or not hair extensions or treatments are used to create or maintain any such hairstyle, and whether or not the hairstyle is adorned by hair ornaments, beads or headwraps."[255] Through this language, the Act also protects cultural hairstyles which make use of these ornaments and extends protection more forcefully not only to the hair, but to the cultural and ethnic expression made by that hair.

## IV. A Need for "CROWN Act–Like" Intervention in Anti-Black Colorism Claims

As dissected above, the history of hair discrimination jurisprudence and the eventual conception and passage of the CROWN Act offer a number of lessons for consideration in crafting a legislative solution to combat anti-Black colorism. Based on these lessons, I propose five recommendations for constructing statutory language and a legislative history that advance protection against anti-Black colorism: (1) the language should take on a multi-dimensional approach and should not be limited to one particular

250 *Id.*

251 D. Wendy Greene, *A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair*, 8 FIU L. Rev 333, 339, 341 (2013).

252 *See* B. 6515, 2021 Gen. Assemb., Jan. Sess. (Conn. 2021).

253 *See id.*

254 *See* St. Louis, Mo., Code of Ordinances ch. 15.21 (2021); Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232 (S.D.N.Y. 1981).

255 St. Louis, Mo., Code of Ordinances ch. 15.21 (2021).

race; (2) in describing the trait protected, the language should avoid limiters such as the use of the term "historically associated" to avoid burdening complainants with the evidentiary hurdles related to this kind of phrase; (3) legislative reports and testimony should list examples of anti-Black colorism to assist in courts' and employers' understanding of how it shows up in the workplace; (4) legislative reports and testimony should set forth the impact of colorism on employment outcomes for dark-skinned, Black people such that courts and law makers will be less inclined to categorize colorism as a matter of low importance; and (5) the legislative language should be crafted in a flexible form that advances maximum protection against colorism generally.

The easiest way to provide consistency for courts, administrative agencies, and employers would be to amend Title VII to provide a definition for "because of color" and "on the basis of color" just as "because of sex" and "on the basis of sex" is defined within the statute.[256] However, as the struggle to pass the CROWN Act at the federal level[257] has demonstrated, a campaign amongst states and localities to define "because of color" where appropriate may prove to be swifter than waiting for federal legislation to pass. For purposes of this article, however, I will use the established framework of Title VII to set forth my proposed language for legislative reform, which is as follows:

> The terms "because of color" or "on the basis of color," include, but are not limited to, physical traits, historically, presently, and commonly associated with a particular racial group or racial subgroup; including, but not limited to, darker skin color, even

256 Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(k) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title [42 U.S.C. § 2000e–2(h)] shall be interpreted to permit otherwise . . . ").

257 A federal version of the CROWN Act was passed in the House of Representatives in September 2020, but then died in the Senate. The bill was reintroduced in Congress by a group of congressmembers in March of 2021. The bill was then passed again in the House of Representatives in March of 2022, but with no Republican support. *See Sen. Booker, Rep. Watson-Coleman Re-Introduce the CROWN Act*, CORY BOOKER (Mar. 21, 2021), https://www.booker.senate.gov/news/press/sen-booker-rep-watson-coleman-re-introduce-the-crown-act; Steven Benen, *House Passes CROWN Act, Bans Race-Based Hairstyle Discrimination*, MSNBC (Mar. 18, 2022), https://www.msnbc.com/rachel-maddow-show/maddowblog/house-passes-crown-act-bans-raced-based-hairstyle-discrimination-rcna20629.

> when the traits are not uniquely or exclusively attributed to a particular racial group or subgroup. Nothing herein shall preclude an employee from alleging discrimination because of color or on the basis of color even if the employee belongs to the same racial group or racial subgroup as the employer.

The "historically and presently, commonly associated with a particular racial group . . . " but "not 'uniquely' or 'exclusively' 'performed' by, or attributed to a particular racial group" language above incorporates language crafted by Professor Greene in discussing *Rogers*, in the context of providing wording that would eliminate the requirement set forth in *Rogers* that a plaintiff must prove that a physical trait at issue is unique or exclusive to a particular racial group.[258] The emphasis on "darker skin" rather than skin color generally, while potentially controversial, reflects the fact that colorism impacts dark-skinned, Black people more negatively than light-skinned, Black people.[259] However, the caveat of "including, but not limited to" prior to the words "darker skin color" serves to not preclude claims legitimately brought by light-skinned plaintiffs. Of further note, the language above does not point to a particular race but instead takes a broader approach. This is because, as noted above, colorism impacts individuals from various races.[260] Finally, the second sentence proposed makes it abundantly clear that intra-group colorism claims[261] are permissible under Title VII.

Of note, only "darker skin color" is listed as a physical trait that is associated with a particular racial group or subgroup, even though traits like darker eye color, kinkier hair, broader nose, and fuller lips may also be associated with colorism claims. This is because including those terms may create a cause of action for individuals that colorism does not impact, e.g., a white woman with blonde hair and blue eyes who happens to have full lips. Thus, an explanation of how such features impact colorism claims may be better left for legislative reports to ensure that courts and employers understand the legislative intent in including "darker skin color" but leaving out other features. Additionally, and once again, the phrase "including, but not limited to" ensures that "darker skin color" can be considered in combination with other traits that are historically and commonly associated with a particular racial group or subgroup.

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258 *See* Greene, *supra* note 2, at 1276, 1305.

259 *See* Harrison & Thomas, *supra* note 40, at 134.

260 *See* Nance, *supra* note 98, at 465, 474 ("The majority of the color discrimination cases have been brought by South-Asian employees.").

261 An intragroup colorism claim is a claim brought against an employer who is the same race as the defendant.

### A. *Potential Opposition*

One of the biggest arguments against explicit recognition of colorism claims, particularly intragroup colorism claims amongst Black Americans is that they will distract and take away from race-based discrimination claims and the "bigger" problem of societal racism.[262] This argument, however, minimizes the substantial socioeconomic disadvantages that dark-skinned, Black people face due to colorism. This argument also ignores the fact that anti-Black colorism directly flows from anti-Black racism. Another argument against explicitly recognizing colorism claims is that light-skinned, Black plaintiffs will prevail in claims over dark-skinned, Black defendants, and receive even greater socioeconomic benefits and social capital, much like a white litigant prevailing in a "reverse discrimination" claim.[263] However, as Professor Banks has stated, these two circumstances are not analogous because reverse discrimination claims typically involve attacks on programs such as affirmative action in college admissions that are in place to increase diversity and remedy discrimination instead of individual cases of a person of color directing individual animosity at a person because they are white.[264] Accordingly, like Professor Banks, I argue that cases that involve skin-color based animus against an individual, even if that individual is light-skinned, should be permitted.[265]

## CONCLUSION

The CROWN Act has been celebrated as a step in the right direction in the face of centuries of policing Black hair in the United States. It was conceived in response to decades of the courts' routine rejection of the cultural, political, and legal significance of Black hairstyles which makes these styles an intrinsic part of Black people's identity. An important feature of the Act is that it pushes back against the legal fiction of the immutability doctrine.[266] Although the direct impact of the Act is yet to be studied, it presents promise in its ability to counteract natural hair bias, which has had the impact of causing Black women to be perceived as "less professional,

262 *See* Banks, *supra* note 19, at 1741 (citing Recent Case, *Title VII-Discrimination on Basis of "Race" or "Color"–Federal Court Recognizes Cause of Action for Intraracial Bias.*–Walker v. IRS, *713 F. Supp. 403 (N.D. Ga. 1989)*, 103 HARV. L. REV. 1403, 1408 (1990) and Bettye Collier-Thomas & James Turner, *Race, Class and Color: The African American Discourse on Identity*, 14 J. AM. ETHNIC HIST. 5, 7 (1994)).

263 *See id.*

264 *Id.*

265 *See id.*

266 *See* Greene, *supra* note 47, at 992, 1025.

less competent, and less likely to be recommended for a job interview than Black women with straightened hairstyles and white women with either curly or straight hairstyles."[267] Although the courts and some politicians have relegated the issue of hair discrimination to a matter of low importance, proponents of the CROWN Act have recognized that the fight against natural hair discrimination is a fight for economic empowerment, cultural identity, and self-determination for Black people in the United States. Further, the CROWN Act serves as a remedy to one piece of the broader problem of anti-Black colorism in the United States, which has continued to thrive in part because of the courts' limited understanding of the intricacies of how colorism operates in its own distinct form. Although Title VII and Section 1981 provide avenues for discrimination claims based on "color," "CROWN Act-like" intervention is necessary to provide clarity and consistency with respect to colorism claims brought by dark-skinned, Black litigants.

267 *See* Koval & Rosette, *supra* note 18, at 741.

# THE COMPLEX DUALISMS OF CORPORATIONS AND DEMOCRACY

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**ABSTRACT**

*These are perilous times for American democracy. Among the threats, many point to the power of corporations. This article examines that threat by considering a series of dualisms characterizing the relationship between corporations and democracy.*

*This begins with a look at the anti- as well as the pro-democratic impacts of the earliest corporations and the paradoxes with respect to democracy created during the evolution of corporate law. The article then looks at internal corporate governance (so-called "corporate" or "shareholder democracy") to show how, on the one hand, it contains features addressing some of the greatest current threats to American democracy, while, on the other hand, it operates as a fundamentally undemocratic vote buying system. This dualism in internal corporate governance, in turn, reflects a clash in the purpose for corporate or shareholder democracy: Is the purpose economic efficiency, or is it democratic legitimacy for those controlling the often-vast power of the corporation?*

*Finally, this article addresses the dualism in the internal and external aspects of the relationship between corporations and democracy by situating the governance and impact of corporations within the broader democratic governance of society. Specifically, individuals in charge of corporations lack democratic consent and accountability for their decisions unless either internal corporate governance is consistent with democratic values; persons without a voice through internal corporate governance can avoid the impact of such decisions by not dealing with the corporation; or democratically elected federal, state, and local governments can intervene when externalities and market failures render refusal to deal unrealistic. This, in turn, suggests the need to limit excessive political influence by those in charge of corporations or to reform the anti-democratic aspects of internal corporate governance.*

## INTRODUCTION

I confess to being a fan of science fiction portraying dystopian futures. A common trope in such fiction has powerful corporations controlling or even constituting the government while shadowy schemers or rich elites control the corporations.[1] As with all such fiction, this vision of the future reflects present fears. Numerous writings both in academic[2] and mainstream[3] publications address the perceived danger that powerful corporations pose to democracy.[4]

Unfortunately, these writings often remind one of the parable of the blind men describing an elephant in which each description, while accurate in its own way, misses the mark in picturing the beast as a whole. Similarly, writings about corporations and democracy tend to look at pieces of the topic but, in doing so, can miss the bigger picture.

Some writers, particularly those reacting to the *Citizens United* decision,[5] focus on the external to the corporation. They address corporate influence over democratically elected governments and the clash between

1 *E.g.*, *Incorporated (TV series)*, WIKIPEDIA, https://en.wikipedia.org/wiki/Incorporated_(TV_series) (last visited Mar. 1, 2022) ("The series takes place in a dystopian Milwaukee in the year 2074, where many countries have gone bankrupt due to a number of crises and climate change. In the absence of effective government, powerful multinational corporations have become de facto governments, controlling areas called Green Zones."); *Continuum (TV series)*, WIKIPEDIA, https://en.wikipedia.org/wiki/Continuum_(TV_series) (last visited Mar. 1, 2022) (stating that the program begins "in 2077-era Vancouver under the corporatocratic and oligarchic dystopia of the North American Union and its Corporate Congress").

2 *E.g.*, CORPORATIONS AND AMERICAN DEMOCRACY (Naomi R. Lamoreaux & William J. Novak eds., 2017); Jens Dammann & Horst Eidenmueller, *Codetermination and the Democratic State*, 2022 U. ILL. L. REV. (forthcoming 2022), http://ssrn.com/abstract_id=3680769; Luigi Zingales, *Towards a Political Theory of the Firm*, J. ECON. PERSPS., Summer 2017, at 113, 113–14; Leo E. Strine, Jr., *Corporate Power Ratchet: The Courts' Role in Eroding "We the People's" Ability to Constrain Our Corporate Creations*, 51 HARV. C.R.-C.L. L. REV. 423, 432 (2016).

3 *E.g.*, SHELDON WHITEHOUSE WITH MELANIE WACHTELL STINNETT, CAPTURED: THE CORPORATE INFILTRATION OF AMERICAN DEMOCRACY (2017); TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018); Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, ATLANTIC (Apr. 20, 2015), https://www.theatlantic.com/business/archive/2015/04/how-corporate-lobbyists-conquered-american-democracy/390822/.

4 This fear goes back to the founding of the republic. *E.g.*, Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling Citizens United with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 894–96 (2016) (quoting early American sources, including Thomas Jefferson, expressing concern regarding the "aristocracy of our monied corporations which dare already to challenge our government").

5 Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

government efforts to control corporations and the assertion by corporations of free speech rights normally associated with individuals.[6] As far as the internal governance of the corporation, it may as well be a black box in which an artificial intelligence (A.I.) commands decisions designed to increase corporate profits at the public's expense.[7]

Other writers focus on the internal governance of the corporation. Starting with the fact that the individuals legally in charge of corporations—the members of the board of directors—are normally elected in an ostensibly democratic process,[8] these writers address to what extent such "corporate" or "shareholder democracy" is consistent with democratic norms, and, if not, what, if anything, should be done about it.[9] Typically unaddressed is the impact of this issue on the broader question of whether corporations promote or threaten democratic governance of society more generally.

Some writers address facets of the interplay between the external impact of corporations on democracy and internal corporate governance.[10]

6 *E.g.*, Corporations and American Democracy, *supra* note 2; Strine, *supra* note 2; Zingales, *supra* note 2; Daniel J.H. Greenwood, *Person, State, or Not: The Place of Business Corporations in Our Constitutional Order*, 87 U. Colo. L. Rev. 351, 361–62 (2016); Justin Levitt, *Confronting the Impact of* Citizens United, 29 Yale L. & Pol'y Rev. 217, 223 (2010); Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After* Citizens United, 31 Cardozo L. Rev. 2365 (2010).

7 A number of writers implicitly attempt to justify this approach by invoking the so-called "shareholder primacy" norm. The argument is that we can look past the actual wishes of the human beings making decisions for corporations because the law commands them to focus on profits for the shareholders and nothing else. *See, e.g.*, Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and* Citizens United, 100 Cornell L. Rev. 335, 347–48 (2015) (explaining the shareholder primacy norm and its impact on the use of corporate power after *Citizens United*). Except in the most extreme case, however, the law in practice does not constrain directors in their discretion to balance shareholder profits versus other impacts of corporate activities. *E.g.*, Franklin A. Gevurtz, *Getting Real About Corporate Social Responsibility: A Reply to Professor Greenfield*, 35 U.C. Davis L. Rev. 645, 651–52 (2002).

8 *E.g.*, Franklin A. Gevurtz, Corporation Law 181 (3d ed. 2021).

9 *E.g.*, Grant M. Hayden & Matthew T. Bodie, *The Corporation Reborn: From Shareholder Primacy to Shared Governance*, 61 B.C. L. Rev. 2419, 2430 (2020); Sung Eun (Summer) Kim, *De-Democratization of Firms: A Case Study of Publicly-Listed Private Equity Firms*, 9 Harv. Bus. L. Rev. 323, 329 (2019); Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 Va. L. Rev. 675 (2007); Usha Rodrigues, *The Seductive Comparison of Shareholder and Civic Democracy*, 63 Wash. & Lee L. Rev. 1389 (2006).

10 *E.g.*, Dammann & Eidenmueller, *supra* note 2 (manuscript at 5, 39) (advocating worker election of some corporate directors to limit through "checks and balances" the threat corporations pose to democracy); Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 Vand. L. Rev. 639, 665 (2016) (discussing the challenges for internal corporate governance in deciding whether corporations should assert First Amendment rights); David G. Yosifon, *The Public Choice Problem in Corporate Law: Corporate Social*

Yet, even these writers can miss the total picture.

In fact, the interaction of the external and internal relationship between corporations and democracy is one of a series of dualisms in the degree to which the governance of corporations, as well as the impact of corporations on the governance of society, advance or threaten democratic values. Among the dualisms are pro- and anti-democratic impacts of corporations, conflicts between utilitarian economic goals and pursuing democratic values, and the ever-present prospect for unintended consequences.

These dualisms began with the earliest business corporations, which engaged in tyrannical governance on the Indian subcontinent on the one hand,[11] but planted the seeds for democratic government in the United States on the other.[12] They extend through a paradoxical corporate law evolution in which efforts to democratize the use of corporations by making them easy to establish had the impact of turning corporations into the dominant and oft-feared form for conducting large businesses.[13] At the same time, the fear of highly successful and hence powerful corporations has collided with the desire both for the economic growth such corporations bring, as well as to avoid the economic dislocations caused by failed corporations.[14]

Further dualism exists between pro- and anti-democratic aspects of corporate or shareholder democracy. On the pro side, the enforcement of corporate law by judges outside of the body politic of any individual corporation allows corporate law to contain rules that mitigate some of the greatest current threats to democratic elections generally.[15] Yet, shareholder democracy operates under a fundamentally anti-democratic pay-to-play system.[16] This, in turn, reflects a dualism as to the purpose for shareholder voting: Does it exist to establish democratic legitimacy for those controlling the often-vast wealth and power of the corporation, or is it simply a tool to incentivize economically efficient business decisions even at the expense of democratic values?[17]

This leads to the overriding dualism created by the interactions

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*Responsibility After* Citizens United, 89 N.C. L. REV. 1197, 1197 (2011) (advocating stakeholder representation on corporate boards—albeit not necessarily elected by the stakeholders—in order to protect the interests of corporate stakeholders who governments fail to protect because of corporate lobbying).

11 *See infra* text accompanying notes 28–33.

12 *See infra* text accompanying notes 41–50.

13 *See infra* text accompanying notes 54–66.

14 *See infra* text accompanying notes 76–82.

15 *See infra* text accompanying notes 93–124.

16 *See infra* text accompanying notes 152–63.

17 *See infra* text accompanying notes 164–98.

between the internal and the external regarding the governance and impact of corporations. A corporation—or more precisely a business corporation—is one of a number of types of institutions or associations that compose any society and impact the lives of individuals in the society. If the essence of democracy is the consent of,[18] or accountability to,[19] the governed, one must ask what provides that consent or accountability for those in charge of corporations—or, indeed, those in charge of other institutions and associations. To seek an answer, one must look not just at the internal governance of corporations or at the external constraints placed upon corporations, but at the interactions between both.

Consent or accountability does not exist unless those impacted by the decisions of the individuals in charge of corporations either have a voice through participation in the democratic election of those in charge, can realistically refuse to associate with the corporation and its activities—thereby denying consent or enforcing accountability through exit[20]—or can count on the prospect for democratically elected governments intervening when market failure or externalities render non-association into an inadequate protection. This means that excessive political influence by those in charge of corporations—the broad policy issue overhanging *Citizens United*—can upset this balance for achieving democratic accountability. This, in turn, suggests that democratic values may call for limiting the political influence of those in charge of corporations or rethinking the basic structure of corporate governance.

The tour through the dualisms which lead to this conclusion will proceed as follows: Part I of this article looks at the historical dualisms in the relationship between corporations and democracy. Part II then focuses on the internal by examining the dualisms underlying so-called corporate or shareholder democracy. Part III expands the discussion to explore the interactions between the internal governance of the corporation and the impact of corporations on the broader democratic governance of society and outlines the implications of this analysis.

18 *E.g.*, The Declaration of Independence (U.S. 1776); Virginia Declaration of Rights §§ 2–3 (1776).

19 *E.g.*, José María Maravall, *Accountability and Manipulation*, *in* Democracy, Accountability, and Representation 154, 186 (Adam Przeworski et al. eds.1999).

20 *See, e.g.*, Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States 4 (1970).

## I. THE DUALISMS OF CORPORATIONS AND DEMOCRACY IN HISTORY

From the beginning, the interactions between corporations and democratic governance exhibited the dualisms underlying this topic.

### A. *Territorial Governance by Early Corporations*

While the science fiction visions of government by or under the control of powerful corporations, either in some far-off quadrant of space or in a dystopian future Earth, might seem farfetched,[21] it matches the early history of the corporation. This history captures both the prospect for corporations to serve as a source of despotic rule or as a source for instituting democratic government. The former involves the English East India Company, while the later involves the companies set up to establish colonies in what would become the United States.

#### 1. The Anti-Democratic History of the East India Company

The East India Company received its charter from England's first Queen Elizabeth at the start of the seventeenth century.[22] This company, along with its Dutch competitor, played an important role in the development of what became known as a joint stock company—what we now call a business corporation in which numerous investors purchase transferable shares of ownership in a firm conducting a large-scale business thereby becoming shareholders or stockholders.[23] This model for conducting business has contributed considerably to economic growth.[24] In terms of political history, however, the East India Company's impact was far more negative.

From its outset, the East India Company reflected a hazy line between private enterprise and public function. While illustrative that the early corporate charters were granted in order to carry out some public function beyond simply profits for shareholders,[25] the public function of

21 *But see* Taylor Locke, *Elon Musk on Planning for Mars: 'The City Has to Survive if the Resupply Ships Stop Coming from Earth,'* CNBC (Mar. 9, 2020) (updated Jan. 12, 2021), https://www.cnbc.com/2020/03/09/spacex-plans-how-elon-musk-see-life-on-mars.html (discussing Elon Musk's proposal for a colony on Mars undertaken by his Space X corporation).

22 *E.g.*, GEORGE CAWSTON & A.H. KEANE, THE EARLY CHARTERED COMPANIES (A.D. 1296-1858) 87–90, 99 (London & New York, Edward Arnold 1896).

23 *E.g.*, Giuseppe Dari-Mattiacci et al., *The Emergence of the Corporate Form*, 33 J.L. ECON. & ORG. 193, 195–99 (2017).

24 *Id.*

25 *See, e.g.*, Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5

the East India Company was not that noble. Among the powers listed in its charter was "to wage war" and the company's trading fleet included warships.[26] While the movies might suggest a focus on pirates, the wars initially waged were against traders from other European powers—who were using these ventures to engage in wars by proxy.[27]

In the eighteenth century, the East India Company raised an army and engaged in wars of conquest against the Mughal empire in India.[28] Military success allowed the company to pillage the Bengal treasury—from whence the Hindustani term for pillage, "loot," entered the English language.[29] The company also forced an agreement on the local ruler for the company to supplant the Bengali government's role in collecting taxes—which the company's agents often accomplished through the use of torture.[30] Heavy taxation and the company's prohibition on local traders maintaining rice reserves to deal with crop failure combined with a drought a few years later to trigger a famine in which one out of three Bengalis—more than 10 million people—died of starvation.[31] Despite such costs on the local population, by early in the nineteenth century, the company controlled the Indian subcontinent with a private force twice the size of the British army.[32] It would not be until the second half of the nineteenth century, after the company brutally put down a revolt by its own private army—hanging tens of thousands of suspected rebels in the process—that the English government decided to replace the Company's rule of India.[33]

The company's human rights violations were not limited to India. When China tried to prevent sales by the company of opium produced in Bengal, the result was the Opium Wars—China's defeat in which prevented China from seeking to protect its population against addiction.[34]

The anti-democratic impact of the East India Company extended to England itself. Showing that wealthy corporations can gain influence

J. Econ. Hist. 1, 22 (1945) (explaining that early corporations were created to carry out some social function of the state).

26 *E.g.*, William Dalrymple, *The East India Company: The Original Corporate Raiders*, Guardian (Mar. 4, 2015), https://www.theguardian.com/world/2015/mar/04/east-india-company-original-corporate-raiders.

27 *E.g.*, *East India - Company*, Theodora, https://theodora.com/encyclopedia/e/east_india_company.html (Sept. 29, 2018).

28 *E.g.*, Dalrymple, *supra* note 26.

29 *Id.*

30 *Id.*

31 *E.g.*, Zingales, *supra* note 2, at 116.

32 *E.g.*, Dalrymple, *supra* note 26.

33 *Id.*

34 *See* Soutik Biswas, *How Britain's Opium Trade Impoverished Indians*, BBC (Sept. 5, 2019), https://www.bbc.com/news/world-asia-india-49404024.

without engaging in expensive modern political campaigns featuring TV advertisements, the East India Company held considerable sway over the English Parliament—one quarter of whose members at various points owned stock in the company.[35] This proved handy when, a few years after its stock price soared by virtue of the pillage of the Bengal treasury, a dramatic shortfall in company revenues from Bengal resulted from ruinous taxation and famine in the province. This threatened the ability of the company to pay its debts, and, in turn, led to the collapse of banks across Europe. A government bailout followed.[36]

### 2. The Democratic Legacy of the American Colonial Companies

Before dismissing corporations as having had an entirely negative impact on democratic governance, it is worthwhile to look at American history and ask where some of our democratic traditions originated. In fact, more than half of the thirteen colonies that became the original United States began as corporations.[37] While the operations of these corporations often included egregious violations of human rights,[38] these corporations also laid a foundation for democratic government in the United States.

One component of democratic governance in the United States is the existence of a written constitution.[39] Scholars recognize that the experience with written corporate charters, which outlined the governance structure for companies establishing colonies in North America, played a central role in the American penchant for written constitutions.[40]

More broadly, the corporations that created the American colonies played a significant role in the establishment of representative democracy in this country. The familiar version of U.S. history points to the Virginia House of Burgesses called in 1619 as the first example of representative government among the colonists in what would become the United States.[41]

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35 *E.g.*, Dalrymple, *supra* note 26.

36 *Id.*

37 *E.g.*, Nikolas Bowie, *Why the Constitution Was Written Down*, 71 STAN. L. REV. 1397, 1407 (2019).

38 Enslavement and the theft of land from the indigenous population.

39 Of course, England's development into a democracy based upon norms and traditions forming an unwritten constitution, coupled with the existence of numerous autocratic regimes established under written constitutions, raise the question as to how much a written constitution really contributes to democracy.

40 Bowie, *supra* note 37, at 1407; William C. Morey, *The Genesis of a Written Constitution*, 1 ANN. AM. ACAD. POL. & SOC. SCI. 529, 535 (1891).

41 *E.g.*, Joshua J. Mark, *House of Burgesses*, WORLD HIST. ENCYCLOPEDIA (Feb. 24, 2021), https://www.worldhistory.org/House_of_Burgesses/.

This development, however, occurred within the context of the governance of the corporations establishing the Virginia and other colonies in North America.

Early in the 1600s, James I granted charters for two companies to establish colonies in what would become the United States: in the south, what was known as the London or Virginia Company, and in the north, the Plymouth Company.[42] The original charter of the London Company departed from the normal governance model for chartered companies insofar as James attempted to preserve power for himself to appoint the governing councils for the company—one in London and a local one in Virginia. This was soon supplanted by a charter establishing the more customary corporate governance model of periodic assemblies by the members of the company—those who we would now refer to as shareholders—who elected a governor and a board of assistants (what we would now refer to as a board of directors).[43]

This more democratic governance, however, occurred only in England, leaving the actual colony in Virginia under the control of a governor appointed by the shareholders in England rather than the colonists in Virginia. Tensions set off by this scheme resulted in the company establishing the House of Burgesses consisting of representatives sent from the plantations and towns in Virginia. The company codified this into a permanent arrangement in an ordinance the company adopted in 1621.[44] Views vary as to whether the company based this representative scheme on the English Parliament or on its own governing structure with its elected board.[45] In either event, representative democracy in the United States gets it start in decisions by a corporation.

The corporate origins of American democracy took a somewhat different route in the north. As a result of various machinations, the Plymouth Company granted to a group forming the Massachusetts Bay Company some of the Plymouth Company's land.[46] The charter forming the Massachusetts Bay Company incorporated the same essential governance structure as the London Company and other chartered companies—periodic assemblies of the members to elect a board of assistants (directors) and a governor.[47]

42 *E.g.*, 2 John P. Davis, Corporations: A Study of the Origin and Development of Great Business Combinations and of Their Relation to Authority of the State 158–59 (1905). London and Plymouth referred to where the organizers of the companies were from.

43 *E.g.*, *id.*; Morey, *supra* note 40, at 538–41.

44 *E.g.*, Morey, *supra* note 40, at 541–42.

45 *Id.* at 543.

46 *E.g.*, Bowie, *supra* note 37, at 1413–14.

47 *E.g.*, Morey, *supra* note 40, at 549.

There was one critical difference: The charter did not require the assemblies of the membership and the elected assistants to be in England. Accordingly, the members of the Massachusetts Bay Company—who were using the company structure to further a religious and political agenda and accordingly consisted of members in the Puritan church—met in Massachusetts.[48] As a result, the elected governing board of the Massachusetts Bay Company became, in effect, the Massachusetts colonial legislature.

The corporate charter for the Massachusetts Bay Company remained the governing constitution for the Massachusetts colony until 1691, when a new royal charter for the colony replaced the Massachusetts Bay Company's corporate charter. The 1691 charter, however, preserved the existing governance structure, except that the king thereafter appointed the colony's governor.[49] While James dissolved the London Company in 1624, the governance structure in Virginia established by the company's 1621 ordinance remained and later served as a model for other colonies in Maryland and the Carolinas. The governance structure established by the Massachusetts Bay Company's 1628 charter provided a model for other colonies in Connecticut, Rhode Island, and New Hampshire.[50]

### 3. Finding the Difference in the Internal versus the External

While it might be tempting to see the difference between the East India Company versus the London and Massachusetts Bay Companies as simply showing that the managers of some companies are evil and others are more well behaved, there is a more useful way to look at this. All of these companies followed an elected governance structure providing democratic accountability to their members. The difference arose in democratic accountability to those who had not invested in the companies.

While the East India Company's management was accountable to the shareholders in England through the shareholders' right to elect the company's governing board,[51] there was no such accountability to those governed by the company in India or impacted by the company's activities in China. By contrast, a key moment for democracy in what would become the United States was the London and Massachusetts Bay Companies' export of their own elected governance structure for use by the colonists in

48 *E.g.*, Bowie, *supra* note 37, at 1418–20.

49 *E.g.*, Morey, *supra* note 40, at 550.

50 *Id.* at 544, 550, 552.

51 *See, e.g.*, CAWSTON & KEANE, *supra* note 22, at 87 (describing governance provisions in the East India Company charter).

North America.[52] No doubt, the identity of the colonists in North America as English was critical to this different treatment.[53] All told, the examples of territorial governance by early corporations illustrate the dualism inherent in the internal and external aspects of the relationship between corporations and democracy.

## B. *A Pair of Incorporation Paradoxes*

### 1. The Easy Formation Paradox

The evolution of corporate law illustrates further dualism regarding the relationships between corporations and democracy. To begin with, one might ask why, if corporations pose such a potential threat to democracy, they are so easy to form. In fact, this is the result of a legal evolution designed to promote democratic values.

The earlier discussion of the East India Company and of the companies forming colonies in America referred to charters granted by Elizabeth I and James I, which established these corporations. This is because, for most of their history, corporations came into existence through a one-off act of the sovereign (decree by the monarch or bill enacted by the legislature) which granted a charter to establish each specific proposed corporation.[54] The charter would indicate generally what the corporation was to do, the powers it would have, and how it was to be governed.[55]

The discretionary authority to establish, or not, every corporation under this system gives the government (whether represented by the monarch or legislature) significant potential power to control corporations. The government can refuse to create the corporation unless convinced there is some good for the economy and society to come from doing so—indeed, business corporations were relatively scarce in England, let alone America,

52 It should be mentioned that these representative institutions reflected the cramped view of democracy of their time: The Virginia House of Burgesses was elected by property owning white men, and membership in the Massachusetts Bay Company was only for members of the Puritan church.

53 Charters of the Massachusetts Bay and other colonial companies commonly contained clauses granting British people living under the corporation's jurisdiction "all liberties and immunities of free and natural subjects" to reassure potential emigrants that living overseas would not make their families' legal status any worse than if they stayed at home. *See, e.g.*, Bowie, *supra* note 37, at 1417–18.

54 *E.g.*, Franklin A. Gevurtz, *The Globalization of Corporate Law: The End of History or a Never-Ending Story?*, 86 Wash. L. Rev. 475, 483 (2011).

55 James Willard Hurst, The Legitimacy of the Business Corporation in the Law of the United States 1780-1970, at 15–16 (1970).

under this system.[56] The refusal to grant charters to prospective competitors, especially when coupled with charters that gave exclusive privileges (monopolies), meant the government could control the economy by picking winners and losers (Elizabethan socialism). Unfortunately, the potential for corruption and entrenching the privileged of society (crony capitalism) is rife under such a system.[57]

Since the individual chartering system bespoke of royal prerogatives and tended to favor those with influence (the aristocracy), it is not surprising that the French revolutionary government seems to have pioneered the adoption of a law allowing anyone to form a corporation by complying with statutory formalities—in other words, replacing special chartering with what has come to be known as a general incorporation statute.[58] Because the French experiment was short-lived and forgotten, New York likes to claim credit for pioneering general incorporation with its 1811 statute, which allowed the formation of manufacturing corporations by compliance with statutory formalities rather than obtaining special legislation.[59]

The New York effort took hold and in the ensuing decades, state after state in the United States,[60] as well as other nations,[61] adopted general incorporation statutes. In substantial part, the motive in the United States remained similar to the French revolutionary law. Even if dealing with elected state legislatures rather than a monarchy, the special chartering system was perceived as anti-democratic by favoring the well-connected instead of being equally available to all.[62] Still, the early general incorporation laws in the United States were often highly restrictive and thus many individuals desiring to establish corporations went to state legislatures for special charters.[63] Gradually during the course of the 1800s, the combined effect of liberalized

56 *E.g.*, Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 792–94 (2013).

57 *E.g.*, Eric Hilt, *Early American Corporations and the State*, *in* CORPORATIONS AND AMERICAN DEMOCRACY, *supra* note 2, at 37, 71 ("Legislative authority over access to corporate charters was one of the principal mechanisms by which wealthy and politically connected elites protected their interests.").

58 *E.g.*, Gevurtz, *supra* note 54, at 483.

59 *See, e.g.*, Hilt, *supra* note 57, at 54 (explaining that general incorporation for business corporations started with manufacturing, because this was less controversial than general incorporation in more politically sensitive fields such as banking).

60 *E.g.*, Steven A. Bank & Ajay K. Mehrotra, *Corporate Taxation and the Regulation of Early Twentieth-Century American Business*, *in* CORPORATIONS AND AMERICAN DEMOCRACY, *supra* note 2, at 177, 188–98.

61 *E.g.*, Gevurtz, *supra* note 54, at 484–85.

62 *E.g.*, Naomi R. Lamoreaux & William J. Novak, *Corporations and American Democracy: An Introduction*, *in* CORPORATIONS AND AMERICAN DEMOCRACY, *supra* note 2, at 1, 2–3.

63 *Id.* at 12–13.

general incorporation statutes and the enactment of state constitutional provisions curbing the legislatures' power to grant special charters, ended the use of specially chartered corporations instead of formation under the general incorporation statutes in the United States.[64]

The irony, of course, is that this effort to democratize corporations by making them an easily available form for conducting business meant that corporations proliferated.[65] This, in turn, allowed corporations to become the dominant form for conducting larger businesses[66] and leads us to the subject matter of this article: the fear that they pose a threat to democracy.

## 2. The Success Paradox

The fact that corporations are easy to form does not in itself, however, account for their popularity—after all, partnerships are even easier to form.[67] Instead, several attributes make corporations an attractive form particularly for conducting larger businesses.

The first of these attributes—embodied in the very term "corporation"—is the concept of a legal person able to own property, enter contracts, and survive the coming and going of individuals benefitting from and carrying out its activities. This corporate attribute long predates the business corporation and reflects the need to use property in various communal activities—be this the common land or gathering hall used by a town or the cathedral used by a church. Ownership of the property by the individual inhabitants of the town or officials of the church creates an obvious problem as the individuals die or otherwise cease involvement with the community activity. Hence, medieval Europeans, picking up terminology and concepts from Roman law, sought and received charters from their kings, creating town, church, and other corporations able to own property.[68] The charters for the early business corporations, such as the East India Company, picked up this attribute by referring to the company as a body corporate and empowering the company to own property and the like.[69]

The earlier discussion of the East India Company already mentioned its pioneering role in establishing what is referred to as a joint stock company.

64 Gevurtz, *supra* note 8, at 26.

65 *See, e.g.*, Larry E. Ribstein, The Rise of the Uncorporation 2–3 (2010) (pointing to data showing that far more corporations than other forms of businesses, excluding sole proprietorships, have filed income tax returns in the United States).

66 *E.g.*, Gevurtz, *supra* note 8, at 1.

67 *See, e.g.*, Holmes v. Lerner, 88 Cal. Rptr. 2d 130, 138–39 (1999) (partnership formed without the parties apparently realizing that they had done so).

68 *E.g.*, Blair, *supra* note 56, at 788–90.

69 *See, e.g.*, Cawston & Keane, *supra* note 22, at 87.

Indeed, much of the world refers to what we in the United States call a corporation as a "stock company" or some variant thereof.[70] This reflects a second attribute of the business corporation—ownership through freely transferable fungible shares of stock.

The English East India Company was part of a metamorphosis from so-called regulated companies—essentially guilds whose membership consisted of merchants conducting independent operations under the company's exclusive government-granted franchise—into joint stock companies in which voting power and economic return came from investing in the capital funding the company's business (the joint stock) in exchange for fungible shares in the joint stock (thereby making one a shareholder or stockholder).[71] The Dutch (or United) East India Company—chartered a couple of years after the English company—took this arrangement a critical step further by making the shares fully transferable to any buyer.[72] The liquidity this provided meant that investors in the Dutch company did not have to wait literally for their "ships to come in" to obtain any money. The buying and selling of freely tradeable stock first by the Dutch and then others led to the organization of stock markets.[73]

The third attribute making the corporate form of business attractive is limited liability for the shareholders—meaning the shareholders are not personally liable for the company's debts. While modern discussions of business form often treat this as the most important advantage for the corporation over other business forms,[74] limited liability is the most recent attribute to arrive on the scene—for example, not being part of California's corporate law until 1931.[75]

While these attributes make the corporate form attractive, especially for operating large, capital-intensive businesses, they create another paradox from the standpoint of corporations and democracy. The ability of corporations to hold property as the company's owners come and go, and to raise capital from large numbers of investors who retain liquidity by being able to resell their shares in stock markets and who are not deterred from

70 FRANKLIN A. GEVURTZ, GLOBAL ISSUES IN CORPORATE LAW 4 (2006)

71 *E.g.*, 1 WILLIAM ROBERT SCOTT, THE CONSTITUTION AND FINANCE OF ENGLISH, SCOTTISH AND IRISH JOINT-STOCK COMPANIES TO 1720, at 155–58 (1912); M. Schmitthoff, *The Origin of the Joint-Stock Company*, 3 U. TORONTO L.J. 74 (1939).

72 *E.g.*, Dari-Mattiacci et al., *supra* note 23, at 196.

73 *E.g.*, LODEWIJK PETRAM, THE WORLD'S FIRST STOCK EXCHANGE (Lynne Richards trans., 2014).

74 *E.g.*, JAMES D. COX & THOMAS L. HAZEN, BUSINESS ORGANIZATIONS LAW 7 (4th ed. 2016) ("A primary advantage is the shareholders' limited liability.").

75 *E.g.*, Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 597–98 (1986).

investing by fear of personal liability, all combine to make the corporation a highly efficient vehicle for conducting large scale economic activities contributing to economic growth.[76] Success in these activities increases the wealth held by the corporation. This success and accumulation of corporate wealth, however, creates potential political influence and the fear that wealthy and powerful corporations can become a threat to democracy.[77]

Early corporate statutes in the United States reflected this fear by imposing limits designed to curb corporate wealth and power. Early general incorporation statutes often set a maximum capital that the corporation could raise.[78] In addition, nineteenth century court opinions held it was beyond the power of a corporation to own stock in other corporations,[79] thereby limiting the growth of the powerful corporate groups operating in diverse fields that we see today. This changed after the Civil War. State corporate law limits on corporate power collapsed as a result of competition between states seeking revenue from in-state incorporation.[80] Moreover, many opinion makers were inclined to see economic concentration as both inevitable and desirable—a source of economic prosperity, rather than something to be feared.[81]

The history of corporations and corporate law also showed that corporate failure provided as much ground for fear as did corporate success. Specifically, limited liability means leaving creditors of failed corporations unpaid.[82] More importantly, the Dutch invention of transferable stock and stock markets has led to a never-ending boom and bust cycle with economic downturns following stock market crashes[83]—as most dramatically illustrated by the Great Depression following the 1929 crash. All told, we end up with a "Goldilocks problem": We seem to want corporations to be successful, but not too successful.

76 *E.g.*, John Micklethwait & Adrian Wooldridge, The Company: A Short History of a Revolutionary Idea, at xv (2005); Ralph Gomory & Richard Sylla, *The American Corporation*, Daedalus, Spring 2013, at 102, 102.

77 *See* Zingales, *supra* note 2, at 113.

78 *E.g.*, Louis K. Liggett Co. v. Lee, 288 U.S. 517, 550–54 (1933) (Brandeis, J., dissenting).

79 *E.g.*, Alfred D. Chandler, Jr., The Visible Hand: The Managerial Revolution in American Business 323 (1977).

80 *Liggett*, 288 U.S. at 557–60 (Brandeis, J., dissenting).

81 *E.g.*, Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. Va. L. Rev. 173, 190–97 (1985).

82 It is debatable, however, whether there would be less negative economic consequences to the economy if the shareholders had to pay these debts.

83 *E.g.*, Erik F. Gerding, *The Next Epidemic: Bubbles and the Growth and Decay of Securities Regulation*, 38 Conn. L. Rev. 393, 403–17 (2006).

## II. THE DUALISMS OF CORPORATE OR SHAREHOLDER DEMOCRACY

Another common attribute of corporations is governance under the ultimate authority of a board of directors elected by the shareholders.[84] While the presence of numerous shareholders with freely tradable stock creates the need for central management—in other words, it makes direct management by all of the shareholders impractical—the notion that this central management should take the more democratic form of representatives elected by the shareholders, rather than following a more autocratic structure, is not inherent. Indeed, there are businesses in which persons invest in which they do not elect the managers.[85] While it is common to refer to the elected corporate governance structure as corporate or shareholder democracy,[86] the degree to which either the actualities of this structure or the rationales behind it reflect democratic values exhibits the dualism running throughout the relationship between corporations and democracy.

### A. *Corporate or Shareholder Democracy as a Shining City on a Hill*

Events in recent years have suggested that the potential threat to democracy posed by corporate influence may pale in comparison to a couple of other threats: (1) efforts to game districting and election mechanics for political advantage (gerrymandering and voter suppression); and (2) the proliferation of ever more brazen false or misleading statements from political leaders and their allies. Corporate law contains rules attacking these sorts of threats when they involve corporate elections. Such rules, however, are probably infeasible for non-corporate elections. Hence, corporate or shareholder democracy starts off with a significant advantage.

84 *See supra* note 8.

85 As is commonly the case with a limited partnership. *See, e.g.*, UNIF. LTD. P'SHIP ACT, Prefatory Note (UNIF. L. COMM'N 2013) (purpose of the new Uniform Limited Partnership Act is to provide a form of business for people who want strong central management, strongly entrenched, and passive investors with little control).

86 *E.g.*, Colleen A. Dunlavy, *Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights*, 63 WASH. & LEE L. REV. 1347, 1363 (2006) (referring to "shareholder democracy"); David L. Ratner, *The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote,"* 56 CORNELL L. REV. 1, 55 (1970) (referring to "corporate democracy").

### 1. Judicial Intervention against Gaming Corporate Elections

While gerrymandering or otherwise gaming the mechanics of non-corporate elections is as old as the republic,[87] recent events have focused renewed attention on the dangers such practices pose to democracy.[88]

Legal limits in the United States on such conduct are often indirect. For many years, the most promising line of attack commonly has been to characterize the districting or other conduct as racial discrimination violating the Voting Rights Act of 1965.[89] The problem with this approach occurs when the racial discriminatory aspect of the action is incidental to a partisan purpose. In other words, the Jim Crow laws sought to disenfranchise Black people because they were Black, regardless of how they would vote.[90] By contrast, efforts to suppress the vote of those likely to support an opposition political party only establish an issue of racial discrimination insofar as partisan affiliations correlate with racial identity. But this raises the question of whether motive or effect is to be the test,[91] and, if effect is to be the test,[92] then how much of an effect is necessary.[93]

Even beyond claims of racial discrimination, judicial intervention against gaming non-corporate elections often requires fitting the challenged conduct into a framework focused on equal rights and the like for individual voters, which can miss the real issues presented by electoral tactics designed to frustrate democratic accountability.[94]

87 *See* Elmer C. Griffith, The Rise and Development of the Gerrymander (1907) (discussing gerrymanders early in American history).

88 *E.g.*, Sheldon H. Jacobson, *Gerrymandering and Restricting Voting Rights: Flip Sides of the Same Coin*, Hill (July 1, 2021), https://thehill.com/opinion/campaign/560995-gerrymandering-and-restricting-voting-rights-flip-sides-of-the-same-coin; David Daley, *Inside the Republican Plot for Permanent Minority Rule*, New Republic (Oct. 15, 2020), https://newrepublic.com/article/159755/republican-voter-suppression-2020-election.

89 52 U.S.C. § 10301. Whether this will change after the Supreme Court's decision in Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021), remains to be seen.

90 *E.g.*, Brian K. Landsberg, Free at Last to Vote: The Alabama Origins of the 1965 Voting Rights Act 12, 23 (2007); Malia Brink, *Fines, Fees, and the Right to Vote*, A.B.A. (Feb. 9, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-rights/fines--fees--and-the-right-to-vote/ ("In 1890, Mississippi held a state constitutional convention. The president of the convention declared its purpose plainly: 'We came here to exclude the N***o.'").

91 *E.g.*, City of Mobile v. Bolden, 446 U.S. 55, 60–61 (1980) (holding that the Voting Rights Act was not violated by discriminatory effect without discriminatory motive).

92 § 10301(b) (as amended) (overturning *Bolden*).

93 *See, e.g.*, *Brnovich*, 141 U.S. 2321 (substantially constricting the degree to which racially discriminatory impact establishes a violation of the Voting Rights Act).

94 *E.g.*, Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the*

By contrast, Delaware courts have developed a much more direct doctrine allowing judicial intervention to prevent incumbents from gaming the system to gain advantages in corporate elections. This began with the Delaware Supreme Court's decision in *Schnell v. Chris–Craft Industries, Inc.*[95]

*Schnell* arose out of a contested election for positions on Chris-Craft Industries' board of directors.[96] The incumbent directors learned that a dissident group of shareholders intended to solicit their fellow shareholders to grant proxies—elections of directors for publicly held corporations normally taking place through voting by proxies[97]—for an alternate slate to replace the incumbents at the next annual shareholders meeting.[98] The incumbents responded by amending Chris-Craft's bylaws to advance the date of the annual meeting by approximately a month.[99] At the same time, the board stalled giving the dissident group access to the corporation's list of shareholders (making it difficult to know whom to solicit for proxies).[100] The combined impact was to dramatically undercut the challengers' chances of unseating the incumbents at the annual meeting.

The Delaware Supreme Court held that the change in meeting date should be enjoined.[101] In doing so, the court explained that even though the corporation's bylaws and Delaware's corporation statute authorized the directors to change the meeting date, courts have the power to prevent incumbents from using such authority to gain an inequitable advantage in an election.[102] *Schnell* thus created a foundation for judicial intervention against inequitable actions by incumbents to game corporate election contests.

Condemning actions in corporate election contests because they are "inequitable" does not exactly give much guidance for determining what is condemned. It was the Delaware Chancery (trial) Court's decision in *Blasius Industries, Inc. v. Atlas Corp*. that provided a standard, thus gaining for the lower court naming rights over the resulting doctrine.[103] Specifically, the court in *Blasius* adopted a rule requiring the directors to meet a heavy burden of demonstrating a compelling justification for any action taken to interfere with the shareholders' ability to select the directors.[104] The court held that

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*Doctrinal Interregnum*, 153 U. PA. L. REV. 503 (2004).

95 285 A.2d 437 (Del. 1971).

96 *Id.* at 439.

97 *See infra* text accompanying note 126.

98 *Schnell*, 285 A.2d at 439.

99 *Id.*

100 *Id.* at 438.

101 *Id.* at 440.

102 *Id.* at 439–40.

103 564 A.2d 651 (Del. Ch. 1988).

104 The board amended the corporation's bylaws to increase the board's size to the

even the good faith fear of harmful consequences for the corporation from the action proposed by a shareholder seeking to have its nominees become a majority of the board[105] was not such a justification. While *Blasius* was only a decision by the Delaware Chancery Court, the Delaware Supreme Court subsequently followed *Blasius'* compelling justification test.[106]

## 2. The Ban on False or Misleading Communication in Corporate Elections

In campaigns involving federal, state, and local elections, charges and countercharges between candidates, and for and against various ballot propositions, which, if not outright false, are at least misleading, have long seemed to be the norm. The remedy for those in the arena is to respond with denials and perhaps by hurling more scurrilous charges at one's opponent in retaliation. A hope has been that news media could set some boundaries by exposing the worst lies.[107] Unfortunately, studies report mixed results on media fact checking,[108] and opinion polls often seemingly support the sad insight of Goebbels and Orwell that, for many, the big lie, frequently repeated in simple language, can trump the facts.[109]

By contrast, corporate law has long prohibited directors and others from making false or misleading statements in soliciting votes from shareholders. This prohibition exists in both state[110] and federal law. The federal prohibition stems from Section 14(a) of the 1934 Securities Exchange

maximum number allowed by the company's certificate of incorporation and filled the vacancies. This "board packing" scheme preempted the ability of a dissident shareholder to have the shareholders expand the board and fill the vacancies with the dissident's nominees. *Id.*

105 The plaintiff shareholder proposed a large distribution of money from the corporation to its shareholders. *Id.*

106 MM Cos., Inc. v. Liquid Audio, Inc., 813 A.2d 1118, 1128 (Del. 2003).

107 *See, e.g.*, Darrell M. West, *How to Combat Fake News and Disinformation*, Brookings (Dec. 18, 2017), https://www.brookings.edu/research/how-to-combat-fake-news-and-disinformation/ ("It is important for news organizations to call out fake news and disinformation without legitimizing them.").

108 *E.g.*, Alexander Agadjanian et al., *Counting the Pinocchios: The Effect of Summary Fact-Checking Data on Perceived Accuracy and Favorability of Politicians*, Rsch. & Pol., July–Sept. 2019, at 1, https://cpb-us-e1.wpmucdn.com/sites.dartmouth.edu/dist/5/2293/files/2021/03/summary-fact-checking.pdf.

109 *E.g.*, Chris Cillizza, *1 in 3 Americans Believe the 'Big Lie,'* CNN , https://www.cnn.com/2021/06/21/politics/biden-voter-fraud-big-lie-monmouth-poll/index.html (June 21, 2021) (discussing opinion polls showing that 32% of those polled believe unfounded claims by Trump and his allies that Biden's victory in the 2020 presidential election was the result of massive fraud).

110 *E.g.*, Lynch v. Vickers Energy Corp., 383 A.2d 278 (Del. 1977).

Act.[111]

The Securities Exchange Act is part of the New Deal legislation and reflects the traditional view that the 1929 stock market crash triggered the Great Depression. Hence, the Act contains a variety of provisions designed to increase confidence in the stock market and prevent abuses which Congress believed led to the crash.[112] Section 14(a), however, has a bit of a different focus. It responds to the concern that the practical powerlessness of shareholders in the governance of publicly held corporations, in part because of problems with proxy voting, contributed to poor performance by large corporations and, therefore, the country's economic problems.[113] Accordingly, the Section empowers the Securities and Exchange Commission to adopt regulations governing the solicitation of proxies to vote shares in publicly traded corporations.

Among the regulations promulgated by the SEC pursuant to Section 14(a) is Rule 14a–9.[114] Rule 14a-9 prohibits proxy solicitations which contain any false statements as to material facts—in other words, facts a reasonable shareholder would find important in deciding how to vote.[115] It also prohibits proxy solicitations which omit material facts when the omission makes the statements in the solicitation misleading or no longer correct. Solicitations potentially include any communication intended to lead shareholders to grant or withhold a proxy.[116] Violations of Rule 14a-9 trigger a variety of enforcement provisions under the Act.[117] In addition, the Supreme Court has held that shareholders have an implied private right of action against those violating the Rule.[118]

### 3. Why these Rules Work in Corporate, but not General, Elections

Tempting as it might be to write an article advocating the import of these rules from corporate to non-corporate elections, the bottom line is that this is probably infeasible. For one thing, while Rule 14a-9 presumably falls

111 15 U.S.C. § 78n(a).

112 *See, e.g.*, *id.* at § 78b (statement of necessity for federal regulation of securities markets).

113 *See, e.g.*, ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932) (a highly influential work setting out this thesis not long before the enactment of the Securities Exchange Act).

114 17 C.F.R. § 240.14a-9 (2022).

115 *E.g.*, TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

116 *E.g.*, Long Island Lighting Co. v. Barbash, 779 F.2d 793, 795–96 (2d Cir. 1985).

117 *E.g.*, Securities Exchange Act of 1934 § 21(d), 15 U.S.C § 78u(d) (empowering the SEC to bring civil actions to enjoin violation of the Act); *id.* § 78ff (criminal liability for those who willfully violate the Act).

118 J.I. Case Co. v. Borak, 377 U.S. 426, 432–33 (1964).

within the doctrine that the First Amendment does not protect untruthful commercial speech,[119] importing a ban on false or misleading speech into the context of non-corporate elections is probably unconstitutional because of the much higher protection accorded to political and public issue speech.[120]

The fundamental problem with importing these corporate law rules into the non-corporate election context, however, is not doctrinal, but practical. Specifically, who will determine whether a statement is false or misleading, or if a party's drawing of district lines or otherwise carrying out election mechanics is inequitable (or interferes with the voters' ability to select their government without compelling justification)?

It is not uncommon for judges to have some partisan leaning, especially given the process of their selection, and, even if they do not, judges must be wary of the perception that their actions are based upon such a leaning.[121] Hence, judges understandably tend to look for clear-cut, objective standards when entering into politically charged litigation involving contested non-corporate elections.[122] Vague standards like inequitably disenfranchise voters, or even interference with the effectiveness of the vote without compelling justification, are not such standards.[123] Even the determination of whether a campaign statement is false or misleading often

119 *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980) (clarifying that to qualify for First Amendment protection, commercial speech must "concern lawful activity and not be misleading"). Actually, the characterization of Rule 14a-9 as addressing commercial speech is debatable. *See, e.g.*, Henry N. Butler & Larry E. Ribstein, *Corporate Governance Speech and the First Amendment*, 43 U. Kan. L. Rev. 163 (1994). The prohibition in the securities laws of false or misleading statements in connection with the purchase or sale of securities squarely falls within the regulation of commercial speech, which normally refers to advertising and the like designed to entice persons into buying goods or services. *See* Larson v. City & Cnty. of S.F., 123 Cal. Rptr. 3d 40, 58–60 (Ct. App. 2011). It seems more difficult to characterize the solicitation of proxies for election to a corporate board as commercial speech, unless one argues that a key attribute of any investment is the personnel who will manage the investment (the directors in the case of a corporation) and so regulating the selection of directors is still regulation of commercial transactions rather than pure speech.

120 *E.g.*, Staci Lieffring, Note, *First Amendment and the Right to Lie: Regulating Knowingly False Campaign Speech After* United States v. Alvarez, 97 Minn. L. Rev. 1047 (2013).

121 *See, e.g.*, Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma: Law and Legitimacy in the Supreme Court*, 132 Harv. L. Rev. 2240 (2019) (book review) (discussing the tension between the Court's desire to maintain legitimacy in the public's eyes through "sociological legitimacy" (results do not consistently favor one ideological or political side over the other) and "legal legitimacy" (results follow a consistently applied legal approach)).

122 *E.g.*, Rucho v. Common Cause, 139 S. Ct. 2484, 2500 (2019) (requiring a "clear, manageable and politically neutral" test for the Court to interfere in legislative redistricting).

123 *See, e.g.*, *id.* (rejecting "fairness" as a test for judicial review of legislative districting).

can be clouded by one's political views.[124]

This problem is largely absent in corporate law because judges presumably have less inherent bias in contests among the shareholders and directors of a particular corporation. In other words, to adopt these corporate law rules for non-corporate elections, we might need to have judges who were not themselves part of the body politic—perhaps aliens from another planet or an A.I. Put more seriously, the normal separation between judges and the corporate body politic creates an inherent advantage for the enforcement of democratic norms in corporate versus non-corporate elections.

## B. *The Anti-Democratic Side of Corporate or Shareholder Democracy*

While corporate or shareholder democracy might look good from a distance, closer examination reveals fundamental flaws.

### 1. Technical Failings

Discussions of anti-democratic aspects of corporate or shareholder democracy often focus on narrow electoral mechanics.[125] A good example involves access to the corporation's solicitation of proxies.

As mentioned earlier, shareholder voting in a publicly held corporation typically will involve the use of proxies. In other words, shareholders—few of whom normally would wish to spend the money or time to travel to a shareholder meeting—will grant authority (a proxy) to vote their stock to someone who will attend. Commonly, this would be a representative selected by those in charge of the corporation. Indeed, those in charge of the corporation typically will have the company solicit the shareholders to grant such proxies, as otherwise not enough shareholders

124 *See, e.g.*, Leslie Gielow Jacobs, *Regulating Marijuana Advertising and Marketing to Promote Public Health: Navigating the Constitutional Minefield*, 21 LEWIS & CLARK L. REV. 1081, 1111–12 (2017) ("[T]he Court has continued to recognize that commercial speech is different [from other speech] in that governments have greater ability to determine the truth or falsity of commercial speech . . . .").

125 *E.g.*, Kim, *supra* note 9, at 335–41 (looking at who can call shareholder meetings; what items shareholders vote on; the ability of shareholders to nominate and remove directors; and the ability of shareholders to bring actions for breach of fiduciary duty); Bebchuk, *supra* note 9, at 696–706 (recommending reforms to provide proxy access, reimbursement of challenger expenses, majority rather than plurality vote to elect directors; and confidential voting).

will be present to have a quorum.[126]

This solicitation, paid for by the corporation, will also typically request that the shareholders grant authority to vote for a list of nominees for election to the board. A committee of the current board typically selects these nominees and thus, not surprisingly, these nominees are mostly the current incumbents.[127] Those wishing to run against the board's nominees normally must solicit proxies on their own dime.[128] Indeed, the form to grant a proxy in the solicitation paid for by the corporation looks a lot like the ballot in old Soviet Union, which listed only the Communist Party's candidate for any given office and provided only the "choice" of voting yes (da) or no (nyet) on the Party's nominee.[129]

In recent years, there have been efforts to change this system so that the names of competing candidates for election to the board appear on the form for granting a proxy distributed by the corporation and to require the person exercising the proxy to vote shares for whichever candidates the shareholders instruct. This is referred to as proxy access.[130] At the urging of institutional and activist shareholders, many public companies have adopted bylaws providing for proxy access.[131] Yet, many of the common limits in these proxy access bylaws, such as preventing the use of proxy access to run a slate of candidates for more than a small fraction of the board,[132] seem to have little basis in democratic norms.

Beyond these private efforts, a provision in the Dodd-Frank Act specifically authorizes the SEC to adopt a proxy access rule.[133] Ironically, in *Business Roundtable v. Securities and Exchange Commission*,[134] the D.C. Circuit

126 *E.g.*, Melvin Aron Eisenberg, The Structure of the Corporation: A Legal Analysis 103 (1976).

127 *E.g.*, *id.* at 112. While stock exchange rules require the board to have a nominating committee consisting of so-called independent directors (N.Y.S.E. Rule 303A), there is no evidence this has led to a substantial change in the practice of renominating incumbents.

128 *See infra* note 136.

129 *See* 17 C.F.R. § 240.14a-4 (the form for granting a proxy must provide a means for the shareholder to indicate whether the shareholder is granting or withholding authority to vote for each director for whom the party soliciting the proxy wishes to vote); Gevurtz, *supra* note 8, at 236.

130 *E.g.*, Holly J. Gregory et al., *The Latest on Proxy Access*, Harv. L. Sch. F. on Corp. Governance (Feb. 1, 2019), https://corpgov.law.harvard.edu/2019/02/01/the-latest-on-proxy-access/.

131 *Id.*

132 *Id.*

133 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 971, 124 Stat. 1376 (2010).

134 647 F.3d 1144, 1154–56 (D.C. Cir. 2011).

Court of Appeals struck down the rule the SEC came up with based upon flaws the court found with the SEC's assessment of the rule's costs versus benefits—an anti-democratic bit of judicial activism which effectively ignored the Congressional mandate.[135]

Anti-democratic election mechanics, such as limited proxy access, can be highly significant in undercutting corporate or shareholder democracy. Indeed, the financial advantage of incumbents in soliciting proxies at corporate expense, while challengers must (at least unless they win[136]) foot the expenses for soliciting their own proxies, explains in part why corporate elections are rarely contested.[137] The lack of contested corporate elections, in turn, means that, as a practical matter, a self-perpetuating oligarchy ends up in control over most of the largest corporations.[138] Yet, the anti-democratic mechanics for carrying out corporate elections might be small potatoes—because it would not require radical change to fix[139]—next to the fundamentally anti-democratic nature of shareholder democracy itself.

135 Curiously, this decision never discusses the fact that the Dodd-Frank Act expressly authorized the SEC to adopt a proxy access rule. *See id.* One might have assumed that this action tells us that Congress concluded the benefits of proxy access as a general matter outweigh its costs. Hence, unless the SEC's rule was so beyond the scope of what Congress envisioned as to call for a reweighing of costs and benefits, that should have settled the matter.

136 Since courts will not order a corporation to reimburse a shareholder's proxy solicitation expenses, Grodetsky v. McCrory Corp., 267 N.Y.S.2d 356 (Sup. Ct.), *aff'd*, 276 N.Y.S.2d 841 (App. Div. (1966) (mem.)), the challengers must normally win control over the board to get the directors to vote to pay their expenses. Even then, however, courts might hold that the corporation cannot reimburse the expenses. *See, e.g.*, Rosenfeld v. Fairchild Engine & Airplane Corp., 128 N.E.2d 291 (N.Y. 1955) (suggesting that the corporation cannot reimburse expenses unless the contest involved a policy dispute).

137 *E.g.*, Bebchuk, *supra* note 9, at 682–91 (documenting the infrequency of challenges to incumbent directors and explaining why proxy expenses contribute to this result). This can get worse if corporate bylaws attempt to limit proxy solicitation expenditures challengers are allowed to make even on their own dime. For a discussion and a proposal to import into corporate law the *Buckley* doctrine barring caps on political expenditures, see Andrew A. Schwartz, *Financing Corporate Elections*, 41 J. CORP. L. 863 (2016).

138 *E.g.*, Zingales, *supra* note 2, at 114.

139 *See, e.g.*, Bebchuk, *supra* note 9, at 695–706 (setting out proposals to improve corporate elections).

## 2. The Anti-Democratic Pay-to-Play Essence of "Shareholder Democracy"

In fact, the most anti-democratic feature of corporate or shareholder democracy is the shareholder part. To see why, it might be helpful to briefly ask what we mean when we say something is democratic or undemocratic.

### a. What is democratic?

Determination of what is democratic or anti-democratic or what are democratic values and norms can become quite complicated and contentious. At its most basic, democracy means rule by the people.[140] This, however, begs as many questions as it answers. To begin with, in any sizeable group, having the overall populace make the governing decisions is largely impractical. Hence, democracy commonly becomes equated with a republican system in which the overall populace elects those who are in charge.[141]

This, in turn, leads to a focus on the laws establishing, and the implementation of, procedures for elected government. One simple definition along this line is that a democracy exists if there have been two changes of the government through free and fair elections and there is no realistic threat to democracy from an authoritarian government.[142] Much seems missing in such a definition. For instance, are elections free and fair if those in power control the media and harass efforts by opponents to organize opposition parties? This leads to lists, such as the often-cited lists put together by Robert Dahl: universal suffrage; elected representatives; free, fair, and frequent elections; freedom of expression; alternative sources of independent information; associational autonomy; and inclusive citizenship.[143]

Some social scientists think the focus on elections (the formal procedures of democracy) is too narrow. Presumably going back to the elemental notion that democracy is rule by the people, Charles Tilly suggests defining democracy as "conformity of a state's behavior to its citizens' express demands"—which he measures as the degree that relations between the citizens and the state feature "broad, equal, protected[144] and mutually

140 *E.g.*, Cary J. Coglianese, *Democracy and Its Critics*, 88 Mich. L. Rev. 1662, 1662 (1990) (book review).

141 *E.g.*, The Federalist No. 10, 82 (James Madison) (Dover Thrift ed. 2014).

142 Samuel P. Huntington, The Third Wave: Democratization in the Late Twentieth Century 267 (1993).

143 Robert A. Dahl, On Democracy 85–86, 93–99 (1997).

144 In the sense that citizens can express views without fear of retaliation.

binding consultation."[145]

For present purposes it is unnecessary to choose between these approaches. Instead, it is sufficient to draw out a pair of core democratic values common to them.

The first goes to who is entitled to vote in elections (in the narrower formulation) or participate in the political process as a citizen (in the broader formulation). Both equate democracy with the breadth of those holding political rights: Dahl's list begins with universal suffrage, while Tilly's first factor is the breadth of the adults enjoying citizenship rights. Of course, many nations that are the forebearers of democracy (including the United States) fell far short of universal suffrage and, indeed, not that long ago many influential voices would have contested the equation of democracy with universal suffrage.[146] Still, since human institutions are inherently imperfect, democracy is commonly a matter of more versus less rather than it is or is not.[147] Seen in this light, a wider franchise is more democratic while a narrower franchise is less democratic.[148] Hence, the history of an expanding right to vote in the United States has been a move from lesser toward greater democracy.[149]

Overlapping with the notion of a broadly held ability to participate as a citizen (vote) is the notion of equality in electoral power among the citizens (voters). This is Tilly's second criteria, while Dahl addresses a book to the topic.[150] For those preferring judicial authority, the Supreme Court recognized this democratic value in its one-person, one-vote decisions: "The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."[151] Actually, the breadth and equality values are two sides of the same core difference between democracy and other forms of government: Democracy rejects the notion behind all other forms of government that some individuals have a greater claim to decision making power than others (except, of course, insofar as that decision making power traces to democratic election).

145 CHARLES TILLY, DEMOCRACY 13–14 (2007).

146 *E.g.*, *id.* at 9.

147 *E.g.*, *id.* at 10; ROBERT A. DAHL, ON POLITICAL EQUALITY, at ix (2006).

148 *E.g.*, TILLY, *supra* note 145, at 14.

149 *E.g.*, *id.*

150 DAHL, *supra* note 147.

151 Reynolds v. Sims, 377 U.S. 533, 558 (1964) (quoting Gray v. Sanders, 372 U.S. 368 (1963)). *But see* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (exception for water district). There are a few explanations for the voter equality norm ranging from a human worth or dignity rationale to a belief in the "wisdom of crowds" (i.e., the larger number of individuals are more likely to reach the better decision).

### b. Why Shareholder "Democracy" Is Not

Looking at these two central democratic values, shareholder "democracy" misses the mark by a wide margin.[152] The principal features of shareholder democracy are that the franchise is limited to the shareholders and that voting power is based upon how many shares one owns rather than one-person, one-vote.[153] Both the limited franchise and the unequal voting power among shareholders, in turn, are symptomatic of a more fundamental departure of shareholder democracy from democracy. Essentially, shareholder democracy operates under a vote buying system: Persons buy into the franchise by purchasing shares and gain greater voting rights by purchasing more shares.[154]

We can demonstrate how this is the essence of shareholder voting by asking why employees do not get a vote. It is not because employees lack a significant stake in the decisions made by those governing the corporation: The impact of such decisions on employees is commonly greater than the impact on the typical public shareholder.[155] It is not because employees do not contribute to the corporation: The corporation would not make money without them. Instead, it is because employees did not buy stock. In fact, if employees buy stock, they will get a vote.[156]

152 *E.g.*, Dahl, *supra* note 143, at 88–90; Pollman, *supra* note 10, at 675 ("Corporate governance does not meet [Dahl's] standards [for democracy]. Not all corporate participants have voting rights, and those who do have unequal votes.").

153 While one-share, one-vote is the norm and default rule, *e.g.*, Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 Cardozo L. Rev. 445, 447 (2008), articles of incorporation often provide for classes of stock with different voting rights, such as non-voting shares or shares providing more than one vote per share. *Id.* at 471. The impact of such multiple class schemes is typically to further deviate from the democratic value of equality among voters.

154 *See, e.g.*, Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 Vand. L. Rev. 129, 137 (2009). Admittedly, corporate founders do more than simply buy their stock. Hence, their control rests on a different, even if still not democratic, basis. A further deviation of shareholder democracy from democratic values arises from the ability of various entities—other corporations, investment funds and the like—to own and vote stock, since this means that individuals are making decisions on how to vote stock that they do not even own. The undemocratic nature of shareholder voting is glaring enough without getting into this further deviation from democratic values.

155 *See, e.g.*, Hayden & Bodie, *supra* note 9, at 2484–85.

156 The prospect that employees could get votes in a publicly held corporation by purchasing stock does not provide a realistic mechanism for democratic accountability. Even if purchases of single shares (odd lot purchases) are a realistic option, the one-share, one-vote, rather than one-person, one-vote, norm trivializes the voting impact of employees holding a single share. For employees to purchase larger amounts raises problems both with affordability as well as a dangerous lack of diversification of their investments.

Corporate finance theory also supports the notion that the shareholder franchise is essentially a vote buying system. This is a corollary of the Modigliani and Miller dividend irrelevance theory. This theory holds that, putting aside potential impact on taxes and the like, corporate shareholders benefit equally from dividends or from the rise in the price of their stock as the corporation reinvests its earnings.[157] The deeper implication of this theory is that the economic rights of stock ownership can just as well constitute simply a theoretical claim to a share of corporate earnings that a shareholder never needs to actually receive but can benefit from by someone else purchasing this theoretical claim to earnings, that this person will also never actually receive except by someone else purchasing this claim and on and on. In other words, shareholders can simply have pieces of paper (or a digital equivalent) that says this percentage of a wealth producing enterprise represents their shares, but they never actually need to see any distribution of the wealth produced by the enterprise. Under these circumstances, the only practical right of share ownership becomes the vote.

Yet, the notion that prospective voters should buy their votes is contrary to fundamental democratic values. As the Supreme Court recognized in striking down poll taxes, "wealth or fee paying has . . . no relation to voting qualifications."[158] In fact, shareholder democracy is worse than a poll tax, since the ability to buy more votes by purchasing more shares is the equivalent of having a poll tax in which voting power is proportionate to the amount of tax one is willing and able to pay.

Indeed, there is a certain irony here insofar as a number of state corporate laws traditionally have prohibited so-called "vote buying"—in other words, paying shareholders to vote in an agreed way—in corporate elections.[159] This seemingly mirrors (albeit without the criminal law consequences) the pretty universal rule in general elections in which it is illegal to pay voters to vote in a certain way.[160]

A seeming reconciliation of the vote buying ban in corporate law with the fact that people always buy votes in corporate elections by buying stock, invokes concerns about the motivation for buying the right to vote

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*E.g.*, Matthew T. Bodie, *Income Inequality and Corporate Structure*, 45 STETSON L. REV. 69, 85–86 (2015). Ownership through employee stock ownership plans (ESOPs) or the like does not provide the employees themselves (rather than trustees) the vote. *Id.* at 86–87.

157 Merton H. Miller & Franco Modigliani, *Dividend Policy, Growth, and the Valuation of Shares*, 34 J. BUS. 411, 429 (1961).

158 Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966).

159 *E.g.*, N.Y. BUS. CORP. LAW § 609(e) (McKinney 1998); Macht v. Merchs. Mortg. & Credit Co., 194 A. 19, 22 (Del. Ch. 1937). *But see* Schreiber v. Carney, 447 A.2d 17 (Del. Ch. 1982) (taking a more nuanced approach to vote buying in corporate elections).

160 *E.g.*, 18 U.S.C. § 597.

without buying the stock impacted by how one votes.[161] This rationalization rings rather hollow, however, when one realizes that there are all sorts of arrangements under which persons can gain the right to vote stock and yet are insulated from the consequences to the corporation from their votes—what is sometimes referred to as "empty voting."[162] Moreover, it is not uncommon for corporations to have more than one class (type) of stock in which some classes might lack voting rights, or some classes might possess more than one vote per share—arrangements which are hardly consistent with the rationale that voting power should be proportionate to economic consequences.[163]

### C. *Dualism in Thinking about Corporate or Shareholder Democracy*

The dualism in whether corporate or shareholder democracy is democratic parallels a dualism in the rationales advanced for having corporate or shareholder democracy. Specifically, is corporate governance simply about utilitarian economic outcomes or is a goal to provide democratic legitimacy for those with the power to govern large corporations?

#### 1. Economics

The departure of shareholder democracy from core democratic values in large part mirrors a dominant strain in thinking about corporate governance. This views the topic through an instrumentalist lens concerned with economic outcomes rather than what is democratic. Interestingly, this is a common approach both for those rationalizing and promoting shareholder democracy and for those critical of it.

##### a. The Economic Efficiency Argument for Shareholder Democracy

Large corporations, like other large organizations, involve joint activities organized in pyramidal hierarchies. Economists sometimes explain

161 *E.g.*, Thompson & Edelman, *supra* note 154, at 162; *see also* Robert Charles Clark, *Vote Buying and Corporate Law*, 29 Case W. Rsrv. L. Rev. 776, 795–97 (1979) (discussing the concern about selling votes to buyers planning to loot the corporation).

162 Henry T.C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. Cal. L. Rev. 811, 815 (2006) (discussing how the derivatives revolution in finance, combined with the growth of the share lending market, is making the decoupling of economic ownership from voting rights ever easier and cheaper). Indeed, through the ownership of various options or derivatives, it is possible for a person voting stock to profit from its decline in value.

163 *E.g.*, Hayden & Bodie, *supra* note 153, at 480–82.

this as based upon avoiding the transaction costs that would otherwise exist if each and every good or service necessary to produce another good or service came from independent individuals constantly contracting with each other to supply each and every such good or service.[164] The question then becomes who should stand at the pinnacle of the hierarchy. The economic efficiency argument is that this should be the person(s) with the best incentives. Those favoring shareholder democracy on such utilitarian reasoning assert that this is the shareholders.

This argument views shareholders as the so-called residual claimants in the corporation—in other words, they get what is left over after everyone else (employees, suppliers, lenders) gets paid.[165] Since the shareholders stand last in line to obtain assets from the corporation, the first dollar of corporate loss comes out of their pockets. Since the shareholders get everything made by the corporation after paying the other claimants, the last dollar of profit goes into their pockets. Hence, the argument runs, the shareholders' interest matches the wealth maximizing or efficient result for the whole venture: investing until the next possible dollar of gain multiplied by the probability of obtaining it is less than the next possible dollar of loss multiplied by the probability of incurring it.[166]

While, under this view, the shareholders have the best incentives when making overall corporate decisions and monitoring the supervisors at the top of the hierarchy carrying out such decisions, in a publicly held corporation the shareholders are too numerous and rationally disengaged to do this themselves.[167] Therefore, the reasoning continues, shareholders

164 *See, e.g.*, R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 390–91 (1937); Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 784 (1972). There are variations in the precise explanations for the existence of firms but exploring this is unnecessary to the present discussion.

165 Actually, this view of the shareholders being the residual claimants has never been universally accepted. *E.g.*, Sung Eun (Summer) Kim, *A Multi-Criteria Assessment of Corporate Residual Claimants*, SSRN 3 (Mar. 30, 2021), https://ssrn.com/abstract=3816061 (discussing the historical and normative arguments for treating various stakeholders in a business as the residual claimant).

166 *E.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 406 (1983).

167 In other words, it is not worthwhile for any one shareholder with a small stake in a corporation to expend the time necessary to know what is going on in the business since the overwhelming bulk of the benefit from doing so will go to the other shareholders who did not bother to spend the time. Moreover, even if a shareholder did so, attempting to persuade the other shareholders of the merits of what the informed shareholder proposes would take further expenditures by the informed shareholder, as well as by the other shareholders to evaluate the information they receive. *E.g.*, Clark, *supra* note 161, at 779–83.

should elect those (the board of directors) with the ultimate authority to make overall decisions and to monitor and replace, if necessary, the senior supervisors carrying out these decisions. In this manner, the board will be responsive to the interests of the shareholders and pursue the most wealth maximizing actions for the corporation.[168]

Indeed, under this sort of thinking it is even possible to applaud the whole vote buying idea of shareholder democracy. After all, if shareholders are too numerous and rationally disengaged to make overall decisions for, and carefully monitor what is going on at, their corporations, they are also normally too numerous and rationally disengaged to organize opposition seeking to oust underperforming directors and managers. It is easier to follow the so-called "Wall Street rule" of selling your shares if you do not like the management[169]—something that is much less practical for a citizen dissatisfied with his or her government and that further accounts for few corporate elections being contested. On the other hand, this creates the opportunity for those who think they can better manage the corporation to buy enough stock to gain control. Hence, vote buying through the purchase of stock can lead to greater efficiency by replacing poor management with better.[170]

### b. Second Thoughts about Shareholder Interests

There has been considerable pushback against the view that giving primacy to shareholder interests, at least as shareholders often perceive their interests, produces the economically optimal decisions for corporations or for society more broadly.

A common example involves the incentives for shareholders when a corporation is at or near insolvency.[171] If a corporation's assets are less than, or even barely in excess of, its debts, then losing further money essentially only harms the creditors and not the shareholders. On the other hand, any earnings in excess of the debts will go to the shareholders. Under this circumstance, high risk investments (like bets at a roulette wheel) make sense from the shareholders' standpoint. This will be true even though such investments have a net negative value (in that the magnitude of the possible

168 *E.g.*, Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & Econ. 301, 311 (1983).

169 *E.g.*, Gevurtz, *supra* note 8, at 236.

170 *E.g.*, Henry G. Manne, *Our Two Corporation Systems: Law and Economics*, 53 Va. L. Rev. 259, 265–66 (1967).

171 *E.g.*, Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp., No. 12150, 1991 WL 277613, at *34 n.55 (Del. Ch. Dec. 30, 1991).

loss from the investment, multiplied by the probability of the loss, exceeds the magnitude of the possible gain from the investment, multiplied by the probability of the gain) and so the investments are inefficient from an overall economic standpoint.

Examples of poor incentives for shareholders are not confined to nearly insolvent corporations. Many of these examples involve so-called "short-termism"[172] or other myopic decisions that might have an immediately favorable impact on the shareholders of a corporation but can have negative consequences when viewed over a longer-term or broader economic perspective. For example, tales of layoffs and moving plants in search of lower labor costs can discourage employees at all corporations from investing in developing firm-specific human capital (in other words, developing skills which are not completely transferable to another company). This can result in lower corporate efficiency across the economy even though the layoffs and plant moving increased the immediate wealth for the shareholders of the corporation that did it.[173]

More broadly, actions that favor the interests of shareholders over others impacted by corporate activities might not be optimal when viewed from a larger economic or social standpoint. Specifically, maximizing corporate profits for the benefit of shareholders would normally appear to call for lowering costs—including compensation and benefits for employees.[174] It also normally calls for increasing revenues, including by increasing prices charged to consumers.[175] In addition, it would call for taking advantage of externalities, say by lowering expenditures on safety or pollution control unless required by the government.[176] Such actions can have negative consequences in terms of income inequality and sustainability that outweigh the gains to the shareholders when looked at in terms of broader economic and societal consequences.

Not surprisingly, many expressing concern about the negative economic or other consequences of giving primacy to shareholder interests

172 *E.g.*, William Galston, *Against Short-Termism*, DEMOCRACY (2015), https://democracyjournal.org/magazine/38/against-short-termism/; Roger L. Martin, *Yes, Short-Termism Really Is a Problem*, HARV. BUS. REV. (Oct. 9, 2015), https://hbr.org/2015/10/yes-short-termism-really-is-a-problem.

173 *See, e.g.*, Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 304–05 (1999).

174 *E.g.*, Bodie, *supra* note 156, at 74.

175 Indeed, diversified shareholders presumably would prefer that corporations in which they hold stock not compete with each other. *E.g.*, Franklin A. Gevurtz, *Saying Yes: Reviewing Board Decisions to Sell or Merge the Corporation*, 44 FLA. ST. U. L. REV. 437, 497 (2017).

176 *E.g.*, Strine & Walter, *supra* note 7, at 380–81.

are then led to express hostility to shareholder democracy[177]—including by opposing reforms such as proxy access.[178] Interestingly, however, few such commentators appear to express opposition to democratic government in general.

## 2. Legitimacy

While this might be an unfair comparison, both sides of the economic-oriented narrative regarding corporate or shareholder democracy can remind one a bit of the apologists for Mussolini, who said that he "made the trains run on time." Democracy does not necessarily find its justification in utilitarian economic considerations. Admittedly, one could say that business is all about economics. Yet, there is a democracy for its own sake threaded in corporate governance thinking.

### a. The Original Purpose for Elected Corporate Boards

Indeed, this corporate democracy for its own sake notion is far older than the focus on economic outcomes. As mentioned earlier,[179] the joint-stock companies, like the East India Company, which are the forebears of the modern corporation, evolved out of so-called regulated companies. The regulated companies were little more than merchant guilds whose members had the exclusive right to conduct trade between England and areas such as the Baltic (for the Eastland Company) or Turkey (for the Levant Company).[180] The members of the regulated companies typically elected boards of those who we would now refer to as directors.[181] As the regulated companies evolved into the earliest joint stock companies, this model of an elected board went along for the ride—either as what started out as a regulated company turned into a joint stock company or as the early joint stock companies modeled the governance provisions in their charters on the governance provisions of the regulated companies.[182]

177 *See, e.g.*, Blair & Stout, *supra* note 173, at 310–15 (favorably mentioning "practical and legal obstacles" to shareholders using their voting power).

178 *E.g.*, Yvan Allaire & Francois Dauphin, *Who Should Pick Board Members? Proxy Access by Shareholders to the Director Nomination Process*, SSRN 29 (Nov. 5, 2015), https://ssrn.com/abstract=2685790; Martin Lipton & Steven A. Rosenblum, *Election Contests in the Company's Proxy: An Idea Whose Time Has Not Come*, 59 Bus. Law. 67, 70–71 (2003).

179 *See supra* note 71 and accompanying text.

180 *E.g.*, Davis, *supra* note 42, at 88–89, 97–98; Cawston & Keane, *supra* note 22, at 61.

181 *E.g.*, Franklin A. Gevurtz, *The Historical and Political Origins of the Corporate Board of Directors*, 33 Hofstra L. Rev. 89, 117 (2004).

182 *Id.* at 115–22; T.S. Willan, The Early History of the Russia Company, 1553–1603,

The regulated companies themselves, being essentially guilds, took the elected board governance model commonly used by guilds,[183] which over time had replaced direct governance by all of the guild's members with decision making by elected representatives.[184] Moreover, given the close connection between the economic role and populace of medieval European towns and the merchants, the merchant guilds were closely connected with medieval European municipal governments.[185] Hence, the parallel between the guild boards and the town councils, which developed after medieval towns, became too large for meetings of the entire townsfolk.[186] Moreover, to medieval European jurists, both guilds and towns were a *universitates* (essentially, a corporation) and, as such, were subject to common norms of governance with other corporations.[187] These included political ideas and practices also manifested in medieval European parliaments and in Church councils.[188]

Among these political ideas and practices was the medieval European preference for expressions of consensus when making decisions impacting all members of the community.[189] One manifestation of this preference occurred when Canon Law jurists turned a Roman Law doctrine of *quod omnes tangit ab omnibus approbetur* ("what touches all is to be approved by all") from a technical rule involving co-tutorship into a broad principle of governance.[190] This principle applied not only to the Church, but to other "corporations"—using the term in the broader sense of a collective group, including guilds and towns[191]—and was invoked in the summonses sent by kings demanding that representatives appear at a parliament.[192] The role,

at 19–21 (1956).

183 *E.g.*, Gevurtz, *supra* note 181, at 156–57.

184 *E.g.*, *id.* at 158–60; Cyril O'Donnell, *Origins of the Corporate Executive*, 26 BULL. BUS. HIST. SOC'Y 55, 63 (1952).

185 *E.g.*, Gevurtz, *supra* note 181, at 146–47.

186 *Id.* at 141–44; *see also* SUSAN REYNOLDS, KINGDOMS AND COMMUNITIES IN WESTERN EUROPE 900-1300, at 195–96 (1984) (noting that smaller towns retained open assemblies).

187 *E.g.*, ANTONY BLACK, GUILDS AND CIVIL SOCIETY IN EUROPEAN POLITICAL THOUGHT FROM THE TWELFTH CENTURY TO THE PRESENT 18–24 (1984).

188 *Id.* at 44.

189 *E.g.*, REYNOLDS, *supra* note 186, at 302–05.

190 Brian Tierney, *Medieval Canon Law and Western Constitutionalism*, 52 CATH. HIST. REV. 1, 13 (1966).

191 *E.g.*, BLACK, *supra* note 187, at 73.

192 *E.g.*, Summonses to the Parliament of November 1295, *reprinted in* THOMAS N. BISSON, MEDIEVAL REPRESENTATIVE INSTITUTIONS, THEIR ORIGINS AND NATURE 147–48 (1973) (reciting the doctrine that "what touches all should be approved by all" in setting forth the purpose of the summons and commanding county, town, and ecclesial representatives to attend).

then, of a board, council, or parliament was to have representatives with full power (*plena potestas*) grant the consent required on behalf of the broader community.[193]

Indeed, it is fairly easy to see that consent of the governed, rather than economic efficiency, represented the original purpose for boards when we ask what exactly the board of a regulated company or guild did. These boards obviously did not manage a business, or supervise those who did, on behalf of passive investors. Rather, in addition to adjudicating disputes involving the merchants, these boards adopted ordinances to regulate the membership.[194] For example, the board of the Eastland Company adopted a regulation prohibiting members from "colouring" goods—in other words, selling the goods of a nonmember merchant as a member's own—thereby circumventing the company's monopoly.[195] Hence, these boards reflected the essentially democratic notion that the members of a group should elect those who make decisions and rules governing the members of the group.

### b. Contemporary Expressions

Even if elected board governance of corporations originated in democratic notions of consent of the governed, one might ask what this has to do with governance of the modern business corporation. In fact, the notion of legitimacy through a democratically elected government remains a thread in corporate governance thinking. One of the best articulations of this sort of thinking is found in the *Blasius* opinion discussed earlier.[196]

The directors in *Blasius* argued that the court should apply the deferential business judgment rule[197] to their efforts blocking the plaintiff

193 *Id.* (stating that the knights sent to parliament are to have "full and sufficient power for themselves and the community of aforesaid shire," and the citizens and burghers sent to parliament are to have such power "for themselves and the community of cities and boroughs separately," to do the business of parliament). It should be mentioned, however, that the medieval European concept of representatives to grant consent on behalf of the broader community did not necessarily mean that the representatives were democratically elected.

194 *E.g.*, Willan, *supra* note 182, at 19–20; Gevurtz, *supra* note 181, at 120.

195 *E.g.*, Schmitthoff, *supra* note 71, at 82. Indeed, some of the ordinances adopted by the boards of regulated companies or guilds did not involve the conduct of business at all—as, for example, in the case of an ordinance prohibiting members of the Merchant Adventurers (which had the exclusive right to trade between England and Calais) from marrying women not born in England. Davis, *supra* note 42, at 80. Presumably, the Merchant Adventurers' marriage limitation was to "promote domestic tranquility."

196 *See supra* notes 97–100 and accompanying text.

197 For a discussion of the meanings attached to the business judgment rule, see Gevurtz, *supra* note 8, at 298–306.

shareholder from obtaining majority control of the board. In rejecting this argument, Chancellor Allen (who had a substantial influence on Delaware corporate law despite not serving on the state's Supreme Court) explained:

> The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests. . . .
>
> It has, for a long time, been conventional to dismiss the stockholder vote as a vestige or ritual of little practical importance. . . . Be that as it may, however, whether the vote is seen functionally as an unimportant formalism, or as an important tool of discipline, it is clear that it is critical to the theory that legitimates the exercise of power by some (directors and officers) over vast aggregations of property that they do not own.[198]

Indeed, one wonders whether state legislatures would have enacted laws allowing for general incorporation, particularly at a time in which such laws reflected a fear of corporate power, without the patina of democratic legitimacy provided by governance under an elected board.

## III. CORPORATIONS AND DEMOCRATIC GOVERNANCE OF SOCIETY AS A WHOLE

### A. *Situating the Private Association within the Democratic Governance of Society*

#### 1. The Impact of Corporations on Individuals in Society

Many who express support for democracy in general nevertheless might not much care about whether corporate governance adheres to democratic values.[199] Such a view explicitly or implicitly draws a distinction between political entities (*e.g.*, nations, states or provinces, cities) and private associations such as corporations. Under this view, how private associations choose to govern themselves is primarily a matter of private contracting and does not impact the question of whether the governance of society is democratic. In other words, this view rejects any linkage between the internal and external aspects of corporations and democracy.

This view, however, overlooks the normal operation of human societies. Human societies rarely exist as simply atomistic individuals living

198 Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988).

199 *E.g.*, STEPHEN M. BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 143 (2008) ("While notions of shareholder democracy permit powerful rhetoric, corporations are not New England town meetings. Put another way, we need not value corporate democracy simply because we value political democracy.").

within political entities. Instead, societies consist of various associations among individuals.[200] In addition to families, this includes associations for both non-economic (such as religious) and economic purposes (including business corporations). The decisions of those governing such associations can have as much or more impact on the lives of individuals as the decisions of those in charge of political entities.

This is certainly the case with large corporations. The largest firms, almost all of whom are corporations,[201] produce most goods and services in the United States.[202] They employ the majority of the private sector workers.[203] They pollute the environment[204] and cause innumerable injuries.[205] Their failure can bring down the economy.[206]

## 2. Democratic Consent or Accountability for Those Governing Corporations

The fact that various associations, such as corporations, impact the lives of individuals does not mean they undermine the democratic

200 *E.g.*, William Little, Introduction to Sociology - 1st Canadian Edition 169–197 (2014), http://solr.bccampus.ca:8001/bcc/items/debe8d05-dbdf-4cb8-80f9-87b547ea621c/1/?attachment.uuid=7471f3fc-1e00-4c98-aaf0-010b00d702f4.

201 *See supra* note 6.

202 *E.g.*, James Manyika et al., *A New Look at How Corporations Impact the Economy and Households*, McKinsey Glob. Inst. (May 31, 2021), https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/a-new-look-at-how-corporations-impact-the-economy-and-households; *see also* Daniel J.H. Greenwood, *Markets and Democracy: The Illegitimacy of Corporate Law*, 74 UMKC L. Rev. 41, 58 (2005) ("Measured by the degree to which they affect our lives, corporate decisions designing and delivering cars, clothes, word processors, telephone service or electricity have at least as much impact as do most local governmental activities. In terms of coercion, it is easier to escape local governmental taxation than to avoid paying fees to corporations such as Microsoft, cable companies or major food processors; hospital bills are more likely to threaten our way of life than governmental traffic tickets.").

203 *E.g.*, Andrew Lundeen & Kyle Pomerleau, *Less Than One Percent of Businesses Employ Half of the Private Sector Workforce*, Tax Found. (Nov. 26, 2014), https://taxfoundation.org/less-one-percent-businesses-employ-half-private-sector-workforce/.

204 *E.g.*, Tess Riley, *Just 100 Companies Responsible for 71% of Global Emissions, Study Says*, Guardian (July 10, 2017), https://www.theguardian.com/sustainable-business/2017/jul/10/100-fossil-fuel-companies-investors-responsible-71-global-emissions-cdp-study-climate-change (addressing greenhouse gas emissions).

205 *See, e.g.*, Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 Harv. L. Rev. 1420, 1422, 1467 (1999) (presenting as a case study of market manipulation, the tobacco industry's techniques to get consumers to disregard the risk of smoking).

206 *E.g.*, Richard A. Posner, A Failure of Capitalism: The Crisis of '08 and the Descent into Depression 269–70 (2009).

governance of society unless they have an internal governance adhering to democratic norms. Families commonly do not govern themselves under such norms. Here is where one must consider the interaction of the internal and the external. What makes the impact and governance of private associations consistent with a democratic society is either (1) their internal governance under democratic norms; (2) the ability of individuals to disassociate from such associations and from the impact of the decisions of those in charge of such associations; or (3) the prospect for intervention by democratically elected governments of political entities when disassociation is an inadequate remedy.

In other words, the internal governance of corporations is simply one means for potentially giving democratic voice to those impacted by the decisions of corporate management. If internal governance gives such a democratic voice, then corporations serve as part of the democratic governance of society, rather than constituting a threat to it. To look to subnational political entities by analogy, this is why it is rare to hear assertions that the State of California, because of its wealth and power, constitutes a threat to democracy in the United States. After all, the government of the State of California is democratically elected. So long as the democratically elected officials do not take actions to undermine continued democratic accountability, the mere fact that the state is wealthy and powerful does not make it a threat to democracy.[207] On the other hand, to the extent that the internal governance of corporations does not provide democratic voice to those impacted by the corporation, then one must look to the external means of democratic consent or accountability.

Those inclined toward a laissez faire ideology focus on the ability of individuals to either accept or avoid the impact of dealing with a corporation by the choice to either contract or refrain from contracting with it.[208] Put in terms of democratic rather than economic values, individual choice through contracting or refusing to do so provides the consent of, and accountability to, the individuals potentially impacted by the decisions of those in charge of corporations. Thus, it achieves the underlying democratic goal of consent by, or accountability to, the governed.

The problem is that voluntary association and disassociation often might not provide consent and accountability. An obvious example is those harmed by corporate activities to which they did not agree, such

207 Indeed, if the mere wealth and power of a political entity makes it a threat to democracy despite having a democratic government, then the United States itself is a threat to democracy.

208 *E.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 22–25 (1996); Alchian & Demsetz, *supra* note 164, at 777.

as tort victims or the victims of environmental degradation caused by the corporation's activities. In many other instances, market failures, such as limited realistic options in concentrated markets (for instance, those in which network effects create dominant positions for some companies),[209] other situations involving unequal bargaining power,[210] or inaccurate or insufficient information available to individuals dealing with corporations,[211] can render choice illusory.

In these situations, the availability of intervention by the democratically elected government of a political entity—whether this is through tort liability, safety and environmental regulations, antitrust enforcement, labor laws, or anti-fraud and mandatory disclosure laws—restores democratic accountability. Hence, even Milton Friedman's famous essay,[212] which argued that the job of corporate managers is solely to make money for the shareholders, added the qualifier "while conforming to the basic rules of the society [including] those embodied in law."[213]

Needless to say, the appropriate line between government intervention and leaving protections to private contracting is a subject on which there long has been debate.[214] From the standpoint of democratic values, however, the key is not whether Milton Friedman or Paul Krugman is right on where this line should fall. Rather, it is that democratically elected governments, acting in accordance with democratic principles, make the decision.

Here again, the internal meets the external in the relationship between corporations and democracy. The persons in charge of corporations not only make decisions affecting individuals impacted by corporate activities, but they also make decisions about deploying corporate resources to influence the government. This means that the non-democratic aspects of internal

209 *E.g.*, Zingales, *supra* note 2, at 120–21.

210 *E.g.*, Yosifon, *supra* note 10, at 1200–01 ("Workers, having made firm-specific investments of their human capital and having made community-specific investments in other areas of their lives, may find it impossible to punish, or credibly threaten to punish, directors for such opportunistic conduct by exiting to other firms or labor markets.").

211 *Id.* at 1201 ("Corporations can also manipulate the design of their products or engage in misleading advertising campaigns, distorting consumers' risk perceptions or their evaluation of other product attributes."); Hanson & Kysar, *supra* note 205, at 1439 (discussing techniques companies successfully use to exploit consumer irrationality).

212 Milton Friedman, *A Friedman Doctrine-- The Social Responsibility of Business Is to Increase Its Profit*, N.Y. Times (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html.

213 *Id.*

214 *See generally* Thomas O. McGarity, *The Expanded Debate Over the Future of the Regulatory State*, 63 U. Chi. L. Rev. 1463 (1996).

corporate governance not only cut off democratic consent or accountability through such internal governance for the corporation's activities, but they also cut off such consent or accountability for the corporation's efforts to influence government. Moreover, if such efforts are successful, then the prospect of government intervention also might fail to restore democratic consent and accountability. This brings us to *Citizens United* and corporate speech.

### B. *The Debate about Corporate Speech*

Much of the current concern about the anti-democratic influence of corporations focuses on corporate rights to free speech and the *Citizens United* decision.[215] In this decision, the Supreme Court struck down the federal ban on corporations making independent expenditures for "electioneering communication." In a nutshell, the court held that Congress could not bar political speech simply because it came from a corporation.[216] The result is to seemingly cut off the instinctive approach of many of those worried about excessive corporate influence on democratically elected governments, which is to bar corporations from at least some political activities open to individuals.

This, in turn, raises the question of whether the law can treat corporate political speech differently from speech by individuals. When all is said and done, there are essentially three arguments for doing so: one doctrinal, one results-oriented policy, and one consistent with democratic values.

#### 1. The Corporate "Person" Distraction

A baseline doctrinal argument challenges whether corporations are "persons" subject to the same protections under the First Amendment as individuals.[217] Specifically, corporations come into existence by an act of government, not God, even if now carried out through easy compliance with general incorporation statutes. Hence, the argument runs, rather than being "endowed by their creator with certain unalienable rights," corporations only possess those rights that the government finds it useful to give. This is known as the concession theory.[218] Under a simple-minded version of this

215 *See supra* note 6.

216 Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 318–19 (2010).

217 *E.g.*, Strine & Walter, *supra* note 4, at 890–91.

218 *E.g.*, Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1635 (2011).

theory, the government can restrict free speech by corporations however much it wants.[219] While there are counter-theories and back and forth,[220] the problem with taking this argument to its logical extreme is that depriving corporations of the ability to assert free speech claims would severely endanger democracy.

After all, it was the New York Times Company which, in *New York Times Company v. Sullivan*,[221] claimed protection under the First Amendment when the Montgomery Alabama Police Commissioner sued it for defamatory statements contained in an advertisement published in the Times by supporters of Martin Luther King, Jr. The Supreme Court held that the First Amendment applied and a public official suing for defamation cannot recover unless he or she shows that the defendant knew the statement was false. The Court does not even discuss the fact that the New York Times Company is a corporation. Limiting the ability of government officials to stifle criticism by suing for defamation would seem to enhance democracy. Excluding corporations from asserting this First Amendment protection would leave out most publishers and news organizations.[222]

Another Supreme Court decision involving the New York Times Company, as well as the Washington Post Company (also a corporation), is *New York Times Company v. United States*.[223] In this decision, the Supreme Court rejected the government's request for an injunction blocking the two papers' publication of the secret "Pentagon Papers"—a report prepared for the

219 *See, e.g.*, Greenwood, *supra* note 6, at 358–59.

220 *E.g.*, Pollman, *supra* note 218, at 1660–63 (discussing alternative arguments for corporate constitutional rights, including the aggregate theory, under which corporations are extended constitutional rights to protect the interests of their shareholders, and the real entity theory, which asserts that corporations, like other human associations such as nations, take on a life of their own and therefore should be able to assert constitutional rights); *see also* Nikolas Bowie, *Corporate Personhood v. Corporate Statehood: We the Corporations: How American Businesses Won Their Civil Rights*, 132 Harv. L. Rev. 2009 (2019) (book review) (arguing that the treatment of corporations as persons independent of their shareholders has actually led the Supreme Court to provide fewer constitutional rights, while decisions extending constitutional rights to corporations do so to protect the interests of individuals).

221 376 U.S. 254 (1964).

222 In fact, an overwhelming bulk of the media are owned by only a half-dozen corporations. *See* Nickie Louise, *These 6 Corporations Control 90% of the Media Outlets in America. The Illusion of Choice and Objectivity*, Tech Startups (Sept. 18, 2020), https://techstartups.com/2020/09/18/6-corporations-control-90-media-america-illusion-choice-objectivity-2020/. The major book publishers are generally corporations as well. *See, e.g.*, Devin Clemens, *The Ten Largest Publishing Companies in the World*, Tharawat Mag. (Apr. 2, 2020), https://www.tharawat-magazine.com/facts/ten-largest-publishing-companies/.

223 403 U.S. 713 (1971).

Department of Defense which documented the duplicitous history of public assurances by the United States government regarding the war in Vietnam. Once again, the defendants' status as corporations merited no attention in extending free speech protection. Indeed, denying corporations the right to challenge a prior restraint on speech would allow the government to block disclosure it finds uncomfortable from the organs most likely to distribute such information to the public.

Of course, one might distinguish protections of speech from protections of "the press" or draw other distinctions based upon the nature of the corporation or the nature of the speech.[224] This, however, renders broad discussion of the nature of corporate personhood and the First Amendment into something of a red herring. Once the law crosses the Rubicon of extending to some corporations, or corporations in some contexts, free speech rights, there needs to be a principled basis for saying when corporations will not enjoy such rights. Focusing on corporate "personhood" hardly seems to provide this lodestar. Nor is it necessary, since free speech cases draw all sorts of contextual distinctions in deciding when the government has infringed the free speech rights of individuals (who are clearly persons).[225]

### 2. The Corporate Wealth Argument

The common policy-oriented argument for limiting corporate political speech is that the excessive influence over politicians and government decisions that wealthy corporations can obtain through political expenditures and corporate speech creates a danger to democratic governance

224 *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 431 n.57 (2010) (Stevens, J., concurring in part and dissenting in part) (distinguishing cases protecting speech by newspapers on this basis); First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 824 (1978) (Rehnquist, J., dissenting) ("There can be little doubt that when a State creates a corporation with the power to acquire and utilize property, it necessarily and implicitly guarantees that the corporation will not be deprived of that property absent due process of law. Likewise, when a State charters a corporation for the purpose of publishing a newspaper, it necessarily assumes that the corporation is entitled to the liberty of the press essential to the conduct of its business.").

225 *See, e.g.*, Leslie Gielow Jacobs, *"Incitement Lite" for the Nonpublic Forum*, 85 BROOK. L. REV. 149, 167 (2019) (discussing how "[t]he balance of government authority and individual speech rights differs substantially" according to the type of property on which the speech takes place); W. Robert Gray, *Public and Private Speech: Toward a Practice of Pluralistic Convergence in Free-Speech Values*, 1 TEX. WESLEYAN L. REV. 1, 22–23 (1994) (citing multiple cases such as Connick v. Meyers, 461 U.S. 138 (1983), and Rankin v. McPherson, 483 U.S. 378 (1987), to discuss how context is important when considering whether the government infringed upon an individual's free-speech right).

responsive to the interests of all Americans rather than the private greed of corporations.[226] This argument commonly features eye-popping figures on the wealth of large corporations, as well as the amount of their expenditures on political speech, and discussions of the influence of such speech in advancing an agenda hostile to workers, consumers, the environment, and so on.[227] Sometimes, this is accompanied by a conspiratorial vision regarding the broader tenacles of those advancing an aggressively pro-business and anti-regulatory agenda through increasingly conservative courts and the like.[228]

Unfortunately, this line of argument often smacks of "corporations should not enjoy free speech when I do not like what they have to say." Indeed, those who worry about corporate advocacy against regulations addressing worker pay and safety, the environment, or consumer protection, are not often heard expressing qualms about corporations flexing their wealth in order to promote racial equality or punish the intolerant among us.[229]

In any event, the fundamental problem with the corporate wealth argument is that it fails to distinguish corporations from others who also derive political power from wealth (*e.g.*, billionaires). Actually, the bulk of corporations are not that large.[230] On the flip side, there is much writing on the political influence of the so-called donor class of billionaires and other wealthy individuals and families.[231] While the very largest corporations have

226 *E.g.*, Whitehouse with Stinnett, *supra* note 3, at 24–47; Strine, *supra* note 2, at 426.

227 *E.g.*, Whitehouse with Stinnett, *supra* note 3, at 24–47; Strine, *supra* note 2, at 431 n.31, 439 n.60.

228 Strine, *supra* note 2, at 450–74. Incidentally, rather than being some anti-corporate activist, Leo Strine, cited in these footnotes, is the former Chief Justice of the Delaware Supreme Court and a person who devoted his career to matters of corporate law.

229 *See, e.g.*, Chris Kromm, *Why the HB2 Boycott of North Carolina Is Working*, Facing S. (Apr. 29, 2016), https://www.facingsouth.org/2016/04/why-the-hb2-boycott-of-north-carolina-is-working (treating positively the decision by various businesses to boycott North Carolina in response to state legislation constraining the choice of restrooms by transgender individuals); Jonathan Turley, *Free Speech Inc.: The Democratic Party Finds a New but Shaky Faith in Corporate Free Speech*, Hill (May 8, 2021), https://thehill.com/opinion/judiciary/552461-free-speech-inc-the-democratic-party-finds-a-new-but-shaky-faith-in (charging hypocrisy by Democrats supporting free speech rights of social media corporations to exclude content by Trump). Just to show that neither side is innocent in this sort of thing, those who defend corporate speech critical of government regulation recently took a different view when it came to corporations attacking laws making it more difficult to vote. Jennifer Rubin, Opinion, *Republicans Defend Corporate Speech – Unless It Supports Voting Rights*, Wash. Post (Apr. 5, 2021), https://www.washingtonpost.com/opinions/2021/04/05/republicans-defend-corporate-speech-unless-it-supports-voting-rights/.

230 *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 354 (2010).

231 *E.g.*, Paul Krugman, *Why Do the Rich Have So Much Power?*, N.Y. Times (July 1, 2020),

more wealth than the richest individuals,[232] it is not clear how much this really matters. In other words, the wealthiest individuals have more than enough money to influence politics.[233] Moreover, wealthy individuals are commonly such because they are shareholders in wealthy corporations.[234] Hence, limiting political expenditures by corporations, but not wealthy shareholders, might simply result in the same money coming from a different bank account.

Beyond this, the corporate wealth argument creates serious difficulty when it comes to media corporations. As discussed above when dealing with the two *New York Times* decisions, speech by news media corporations may be critical to maintaining a democracy. Yet, "the press" might also include such dominant corporations as Facebook and Google.[235] In addition, even the most conventional news outlets are often part of larger corporate groups whose political agendas could reach far beyond broadcasting the news.[236] Finally, recent years have shown that corporate influence can be as powerful and potentially threatening to democracy when it simply consists of broadcasting supposedly "fair and balanced" news as it can be when consisting of overt political expenditures by a corporation that makes no claim to be part of the press.[237]

Ultimately, defending *Citizen United*'s rejection of the corporate wealth argument is not to discount the concern about money in politics. Indeed, perhaps where the Court has gone wrong lies in an all-to-casual

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https://www.nytimes.com/2020/07/01/opinion/sunday/inequality-america-paul-krugman.html ("A 2015 Times report found that at that point fewer than 400 families accounted for almost half the money raised in the 2016 presidential campaign."); Benjamin I. Page et al., *What Billionaires Want: The Secret Influence of America's 100 Richest*, GUARDIAN (Oct. 31, 2018), https://www.theguardian.com/us-news/2018/oct/30/billionaire-stealth-politics-america-100-richest-what-they-want.

232 *E.g.*, Stine, *supra* note 2, at 439 n.60 ("[T]he ten wealthiest corporations in America have total equity of $1.7 trillion, or roughly four times the net worth of the top ten richest Americans ($488.3 billion).").

233 *See supra* note 231.

234 *See, e.g.*, Strine, *supra* note 2, at 438 n.58 ("[M]any large so-called 'individual contributors' [to campaigns and PACs] in fact control large private corporations from which they can pull resources for political spending, and it may be that some possess voting control over public companies.").

235 *See, e.g.*, Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025 (2011) (discussing meaning of the press). Keep in mind that New York Times Co. v. Sullivan, 376 U.S. 254 (1964), involved an advertisement placed in the Times and that Facebook and Google's primary revenues come from advertisements.

236 *See* Louise, *supra* note 222. For example, ABC is owned by Disney, CNN is owned by AT&T, and NBC is owned by Comcast.

237 *E.g.*, DAVID BROCK ET AL., THE FOX EFFECT: HOW ROGER AILES TURNED A NETWORK INTO A PROPAGANDA MACHINE (2012).

equation of spending money with any other form of speech in which more is better.[238] Ignored is the concern that allowing those with greater wealth to have greater political influence seems contrary to the democratic value of equality among voters. Nevertheless, this concern is not limited to corporate speech.

### 3. Who Decides What a Corporation Says?

The one thing regarding speech that is undeniably different between a corporation and an individual is that a corporation cannot actually decide what it is going to say; instead, those in charge of the company make that decision. This returns us to the interplay of the internal and the external with respect to the relationship between corporations and democracy. Specifically, the undemocratic nature of corporate governance means a lack of democratic consent or accountability not only for decisions regarding corporate conduct, but also for decisions about employing corporate resources to lobby against government intervention that would restore democratic accountability.[239]

#### a. Speech Advancing Idiosyncratic Views of those in Charge

The ability of those in charge of a corporation to dictate the company's political speech creates potential issues in two basic contexts: one being rather trivial, the other presenting a fundamental issue regarding democracy. The former involves corporate speech in favor of what, for want of better terminology, we can label the idiosyncratic views of those in charge of the corporation. Idiosyncratic in this context does not mean that the views are not widely held. Rather, this term is intended to capture the essential notion that the views are not particularly relevant to the corporate enterprise.[240]

238 *E.g.*, Buckley v. Valeo, 424 U.S. 1, 19 (1976) ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.").

239 *E.g.*, Pollman, *supra* note 10, at 675.

240 Of course, the imaginative can often conjure up some correlation between the corporate enterprise and the subject of any corporate speech—as done in a somewhat different context by an often-cited court opinion finding a corporate purpose for a manufacturing company's cash contributions to Princeton University. A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953). Realistically, however, there are situations in which the corporation's position reflects the happenstance that the individuals in charge wish to advance a particular view, but there is nothing inherent in the nature of

This is the type of speech addressed in *First National Bank of Boston v. Bellotti*.[241] In this decision, the Supreme Court struck down a Massachusetts statute that prohibited banks and business corporations from spending money to influence referenda other than those that affected the property or business of the corporation. This statute seemed to be an obvious effort to force management of a business corporation to stick to business when it came to political expenditures.

In fact, the issues raised in this context are rather minor in the greater scheme of corporations and democracy. For one thing, it is not necessary to address the failings in corporate or shareholder democracy in order to address these issues. Even if one assumes that corporate or shareholder democracy perfectly matches democratic values and practices, there are still likely to be minority shareholders who might object to a particular idiosyncratic political position being advanced at corporate expense. The question is whether states have the power to protect such minority shareholders from having their corporation's assets used to subsidize such views.

Since one of the traditional functions of state corporate law has been to protect minority shareholders from having the corporation's assets used by those in charge, even when supported by the majority of shareholders, for purposes beyond that for which the minority shareholders signed up (conducting lawful business),[242] an affirmative answer to this question should be easy.[243] The Court nevertheless held that the particular statute before the

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the corporation's business or in the interests of whoever would run the corporation's business that commonly would have produced the same corporate speech if someone else was in charge.

241 435 U.S. 765 (1978).

242 This is the ultra vires doctrine. *E.g.*, GEVURTZ, *supra* note 8, at 226–32.

243 The common response to this concern is that no one forces an individual to purchase stock in a particular company. *E.g.*, Austin v. Mich. Chamber of Com., 494 U.S. 652, 686–87 (1990) (Scalia, J., dissenting). Hence, if individuals do not like the views of those in charge, they do not need to be shareholders. *Id.* Yet, this view allows those who gain power over a corporation to force investors to conflate business (whether the corporation is a profitable investment) with political decisions. This implicates the statutory purpose of a business corporation. State corporation statutes (taking corporation in its broadest sense as not limited to business corporations) generally provide a menu of choices as to the purpose of the corporation that organizers can establish. *See, e.g.*, Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 509–11 (1981) (discussing permissible purposes for non-profit corporations under state law). This includes corporations formed for various non-profit purposes—religious, charitable, educational, and the like. Under these circumstances, what is wrong with the state insisting that those who chose to form a business rather than another type of corporation, and sought investors' money based upon this characterization, not force prospective shareholders into making their investment decisions based on factors other than business? This is not to say that states should curb this sort of corporate

Court in *Bellotti* infringed on the First Amendment because it was over- and under-inclusive relative to this goal.[244]

In any event, the practical impact of corporate speech which falls into this context is relatively small. Because the positions taken by the corporation in this context, by definition, flow from the views of whoever happens to be in charge, these positions will exhibit a certain randomness.[245] This, in turn, suggests less grounds for worry about undue corporate influence over government. So, for example, positions urged by corporations with more socially progressive management will offset positions urged by corporations with more socially conservative management and so the impact is simply more speech rather than pushing governmental action in a single direction. While one might object to the ability of some individuals to gain greater influence by using the money of other people who might not subscribe to their views, this does not appear to present a significant structural threat to governance of the overall society in accordance with democratic values.[246]

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speech. Rather, it simply suggests there is nothing untoward in states doing so.

244 Indeed, this decision might be more about how the law is supposed to protect dissenting minority shareholders from management using corporate resources to fund personally, rather than business, motivated political speech, than it is about whether the law can do so. *See, e.g.*, Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 Yale L.J. 235 (1981). Specifically, the Court suggests that minority shareholders might seek such protection by filing a derivative suit. This, however, leaves things to the case-by-case judicial determinations that corporation statutes sought to reduce through provisions such as those allowing corporations to make charitable contributions. *E.g.*, Gevurtz, *supra* note 8, at 229. The result of *Bellotti* is to block the legislature from creating this sort of bright line clarity (which is always going to be over—or under—inclusive) on the negative side for political expenditures. *See* 435 U.S. 765.

245 *See, e.g.*, David Gelles, *Delta and Coca-Cola Reverse Course on Georgia Voting Law, Stating 'Crystal Clear' Opposition*, N.Y. Times (Mar. 31, 2021) (updated Apr. 5, 2021), https://www.nytimes.com/2021/03/31/business/delta-coca-cola-georgia-voting-law.html (discussing Delta Airlines' and Coca-Cola's changing position regarding Georgia's law making voting more difficult); Matthew Futterman, *NFL Owners Clashed in Private Over Protests*, Wall St. J. (Oct. 2, 2017), https://www.wsj.com/articles/nfl-owners-clashed-over-protests-1506974582 (discussing disagreements between owners of NFL football teams regarding player protests during the national anthem).

246 One other context involving corporate political speech illustrated by recent events occurs where the speech is not aimed at influencing listeners to support a particular position, but rather at maintaining corporate goodwill by coming out in support of positions popular with prospective customers or employees. Since the point of such advertising is simply to say that the corporation agrees with what it thinks the listener already believes, rather than to sway the listener's political views, the impact of such expenditures on democratic governance is even more trivial than corporate speech in favor of the idiosyncratic views of its management.

### b. Speech Advancing the Interests of those Structurally in Charge of Corporations over the Interests of those not

The context in which corporate speech potentially implicates the overall democratic governance of society is where the speech favors the interests of those groups structurally in charge of corporations (management and majority shareholders) at the expense of those with less or no voice through corporate or shareholder democracy but who nevertheless are impacted by the corporation and contribute toward its wealth. In other words, the problem flows from the interaction of the internal (the failure of corporate or shareholder democracy to reflect democratic values) with the external (corporate speech seeking to block democratic governments of political entities from protecting the interests of those lacking voice through corporate or shareholder democracy).

In fact, there are several overlapping threads to this concern, hints of which are buried in the muddled distortion argument in *Austin v. Michigan Chamber of Commerce*.[247] In *Austin*, the Court upheld a Michigan prohibition of corporations making independent expenditures in support of, or opposition to, candidates for office—a result the Court overruled in *Citizens United*. In upholding this statute, the Court in *Austin* pointed to the "distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." [248]

At first glance, this seems to be just a gussied-up form of the corporate wealth argument. Specifically, corporations, or indeed anyone with greater wealth,[249] might use their wealth to obtain influence that has no correlation to the public support for the ideas being advanced—in contrast with small dollar donations to political causes in which the amount of money available is roughly proportionate to the number of individuals who support the cause. Yet, this understates the matter.

It is not simply that the wealth available does not correlate with public support of the cause advanced by those in charge of the corporation in this context. Rather, the problem is that the amount of corporate money available to seek political influence in this context is likely to be inversely proportionate to the support of the corporation's cause from those who are

247 494 U.S. 652, 660 (1990).

248 *Id.*

249 Justice Marshall's majority opinion tries to distinguish the use of corporate wealth by arguing that the law (corporate personhood, transferable interests, and limited liability) facilitates such wealth. Yet, laws allowing inheritance and, even more fundamentally, that protect property rights, are necessary for the existence of inherited wealth.

contributing to the corporation's wealth but lack a say in its governance.

Keep in mind that this context involves lobbying for policies that favor those in charge of the corporation over others—such as employees, consumers, involuntary victims of the corporation's activities—who also contributed to the corporation's wealth. Hence, the larger number of individuals from whom those in charge of the corporation can extract corporate wealth, the more wealth they have available to lobby against government efforts to intervene on behalf of such individuals. Moreover, the more successful such lobbying is in preventing government intervention to protect those lacking either voice through internal corporate governance or effective avenues to avoid dealing with the corporation, the more wealth those in charge of the corporation have available to lobby.

Worse yet, corporate lobbying, if it results in government facilitated monopoly—as, for example, through patent protection of critical pharmaceuticals—not only blocks the government from intervening on behalf of those lacking voice through internal corporate governance but also limits democratic accountability through disassociation. Indeed, the more monopoly power corporations possess, the more wealth corporations may obtain to influence government and the more corporations influence government, the more monopoly power they may obtain to increase their wealth and dictate the lives of those who lack a voice in their governance.[250]

All told, to indulge in a bit of hyperbole, it is as if a thieves' guild used their ill-gotten loot to lobby government to reduce the funding of police or to pass laws banning the manufacture and sale of locks.

### C. *The Choice*

This brings us back again to the complex dualisms of corporations and democracy. In this instance, the dualism arises in a pair of tools to address the potentially undemocratic impact of corporations on the governance of society. Following the theme of this article, one tool deals with the corporation's relations with external government, while the other deals with internal corporate governance. Further dualism arises in the potential for unintended consequences in both of these approaches, which is reminiscent of the paradoxes regarding corporations and democracy found in the history of corporate law.

250 *E.g.*, Zingales, *supra* note 2, at 119–20 (referring to this as the "Medici vicious circle").

### 1. Curbing Corporate Political Influence

Much writing,[251] and even more political posturing,[252] on the topic of corporations and democracy advocate actions external to the corporation to curb corporate political influence. Given the attitude of a majority of the Supreme Court toward curbs on corporate political activities and the difficulties of amending the Constitution, this discussion can take on a sort of science fiction quality.[253] Nevertheless, it is the purview of a law review article to talk about what should be and not just what is.

Consistent with the theme of this article, the lodestar of our discussion is pursuing democracy and democratic values. Hence, the object is not to curb corporate political influence in order to advance an agenda aiding employees, consumers, the environment or so on because this is a better social outcome. Rather, it is to ensure democratic consent and accountability when neither internal corporate governance nor the individual ability to deal or not with the corporation provides such. This means we must evaluate the impact of corporate political influence not simply by whether it succeeds or fails,[254] but rather by whether it interferes

251 *See supra* note 3.

252 *E.g.*, Press Release, Senator Bernie Sanders, Saving American Democracy Amendment (Dec. 8, 2011), https://www.sanders.senate.gov/newsroom/recent-business/saving-american-democracy-amendment; S.J. Res. 33, 112th Cong. § 1 (2011) (proposing constitutional amendment, by Senator Sanders, to overturn Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010), by declaring that constitutional rights do not belong to for-profit corporations).

253 *But see* Levitt, *supra* note 6 (discussing openings left by *Citizens United*).

254 Of course, if corporate wealth rarely translates into political influence sufficient to change government policy, then there is no reason to discuss whether corporate political influence is a threat to democracy. In fact, there is some debate about the degree to which corporate or any other wealth translates into political influence. While this is often asserted by those worried about the political influence of corporations, *see generally* Zingales, *supra* note 2, at 122–25 (giving examples), or worried about money in politics more generally, critics can point to counterexamples of expensive campaigns or other efforts to influence government that failed in their objectives. *E.g.*, Meg Fowler, *The Most Expensive, Failed Primary Campaigns*, ABC NEWS (Jan. 31, 2012), https://abcnews.go.com/Politics/expensive-failed-primary-campaigns-past-decade/story?id=15483044 (discussing five campaigns which each raised over $50M but lost their elections); Christopher Ingraham, *Somebody Just Put a Price Tag on the 2016 Election. It's a Doozy.*, WASH. POST (Apr. 14, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/04/14/somebody-just-put-a-price-tag-on-the-2016-election-its-a-doozy/ ("Clinton's unsuccessful campaign ($768 million in spending) outspent Trump's successful one ($398 million) by nearly 2 to 1."). There are also organized groups lobbying against corporate positions, such as unions and consumer groups. *E.g.*, Yosifon, *supra* note 10, at 1203–04 (concluding, however, that such efforts are less effective than corporate lobbying). Ultimately, whether corporate or other wealth can

with decision making consistent with democratic values.

It turns out that the corporate part of corporate political influence might be largely irrelevant when it comes addressing this inquiry. To see why, consider the various ways in which corporate political activity could be contrary to democratic norms.

The one on which there is the most agreement is corruption[255]—in other words, seeking influence through payments or actions beneficial to government officials. With a sufficient quid pro quo this can meet the definition of bribery;[256] but it can be problematic even if falling short of that.[257] Getting into a discussion of corruption, campaign finance and the like is well beyond the scope of this article. Fortunately, it is also unnecessary. This is because it is difficult to understand why the individual versus corporate source of a potentially corrupt action should make any difference.[258]

The use of greater wealth to gain greater political influence raises an issue beyond simply the prospect for corruption. In a society with unequally distributed wealth, the ability of those with greater wealth to have greater influence arguably offends the democratic value of equality among voters and, many argue, endangers continued democratic government.[259] The

yield political influence is an empirical question, which this article will assume to be the case at least to some degree. Without delving into the empirical evidence, there are a couple of grounds to support this assumption. The obvious is that those whose money and elections are at stake must think it works. The other is that the Supreme Court's protection of such expenditures under the First Amendment would be rather pointless if the Court did not assume such expenditures mattered.

255 *E.g.*, Buckley v. Valeo, 424 U.S. 1, 25–27 (1976) (using interest in preventing corruption to justify limiting campaign contributions).

256 *Id.* at 27.

257 *E.g.*, Khadija Lalani, McDonnell v. United States*: Legalized Corruption and the Need for Statutory Reform*, 113 Nw. U. L. Rev. Online 29, 41–50 (2018) (discussing whether actions not technically within the definition of bribery should nevertheless be banned as corrupt).

258 To illustrate, consider the corrupting influence of employment of former government officials by those they regulated while in government (the "revolving door" problem). *See* Tom McGinty, *SEC 'Revolving Door' Under Review*, Wall St. J. (June 16, 2010), https://www.wsj.com/articles/SB10001424052748703280004575309061471494980 (discussing the revolving door problem in the context of SEC employment). It should hardly matter if such employment is by a corporation or by a law firm organized as an LLP, which firm represents those regulated by the agency at which the former official worked.

259 *E.g.*, *World Social Report 2020: Inequality in a Rapidly Changing World*, U.N. Dep't Econ. & Soc. Affs. 48–51 (2020), https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2020/02/World-Social-Report2020-FullReport.pdf; Sanford Lakoff, *Inequality as a Danger to Democracy: Reflections on Piketty's Warning*, 130 Pol. Sci. Q. 425 (2015). There are a couple of arguments as to why greater influence by those with greater wealth, irrespective of corruption, not only is inconsistent with the democratic

acceptance of these arguments is much more contentious.[260] Fortunately, again, it is unnecessary to get into this debate. While large corporations are wealthy, they are not unique in that regard.[261]

This article discussed above a problem that does, at first glance, seem to arise from corporations. Specifically, those in charge of a corporation can use the wealth generated by its business to lobby government against the interests of those who are also contributing to this wealth but who are not in charge. In this manner, those in charge might be able to use their control over wealth to which others have voluntarily or involuntarily contributed in order to escape any democratic accountability to those impacted by their decisions and who helped create this wealth.

This, however, is not a problem limited to corporate expenditures. For one thing, it arises with all businesses regardless of whether they operate in corporate or non-corporate form. Moreover, to the extent that those controlling corporations (managers, majority shareholders, or shareholders more generally) personally obtain money from the corporation through dividends, stock buybacks, compensation packages, or otherwise, they still could use income to which others have contributed in order to lobby government for actions favoring their interests over the interests of others impacted by their decisions and who helped create this wealth.[262]

All of this is to suggest that *Citizens United*'s rejection of categorical treatment of corporations when it comes to political speech is not the problem. Indeed, in many ways it might be the solution. If one could limit (despite *Buckley*) the use of wealth in political speech, placing corporations within the same limit as any individual would remove the advantage of corporations which hold more wealth than individuals. At the same time, placing individuals under the cap imposed on corporations more completely addresses the problem of using wealth to lobby against the interests of those

value of equality among voters but also presents a long-term danger to continued democracy. The first raises the prospect of a spiral in which greater political influence by the wealthy leads to greater income inequality, which, in turn, leads to even greater political influence by the wealthy. Ultimately, this can result in a de facto oligarchy. In addition, widespread recognition of the overwhelming influence that the wealthy enjoy over government can weaken support for democracy among the broader electorate and fuel the rise of autocrats.

260 *E.g.*, *Buckley*, 424 U.S. at 48–49 (rejecting equality argument).

261 *See supra* note 231 and accompanying text.

262 Admittedly, this might involve tax disadvantages relative to the corporation using its money.

who also contributed to its creation but have no voice in its use.

In fact, one might argue that the problem of using corporate (or, more broadly, business) income to lobby against the interests of those who contributed to its creation but have no voice in its use can justify some cap on the use of money in political speech even if one does not accept the voter equality rationale. Unfortunately, there is a degree of circularity in this argument. This is because the thieves' guild metaphor used earlier begs the question.

This metaphor assumes that various parties contributing to the wealth under the control of the stockholder majority and corporate management, like the thieves' victims, not only lack a democratic voice through internal corporate governance, but also lack democratic consent and accountability through their ability to deal or not deal with the corporation. Hence, a predicate question from a democratic values standpoint is whether some externality, market failure, or the like exists—a topic on which there is often a difference of opinion in specific situations.[263] Moreover, even if there is some externality or market failure removing democratic consent or accountability through individual choice, this does not mean that decisions by those in charge of corporations were necessarily contrary to the interests of other corporate stakeholders or that government action would be better for them. Again, these are questions on which there is often a difference of opinion in specific situations.[264]

Hence, limiting the ability of those in charge of corporations to use corporate wealth to lobby against regulation or the like, on the ground that this is a misuse of wealth against the interests of nonconsenting parties who contributed to its creation, to some extent curbs the ability of those in charge of corporations to make the case that this is not true in the situation at hand. The result could be that instead of promoting democratic decision making, we might be interfering with it. On the other hand, there is a difference between allowing expenditures to make one's case and rewarding those able to prevail in an unlimited spending arm's race by using money extracted from the opposition in the race. In other words, there is a difference between barring for-profit corporations from some types of political speech (as in *Citizens United*) and imposing reasonable caps on how much one can spend.

263 *E.g.*, Ryan Bourne, *How 'Market Failure' Arguments Lead to Misguided Policy*, Cato Inst. (Jan. 22, 2019), https://www.cato.org/policy-analysis/how-market-failure-arguments-lead-misguided-policy.

264 *Id.*

### 2. Democratizing Corporate Democracy

The alternate approach looks to the internal governance of corporations. It takes advantage of the separation of ownership and control embedded in the corporate governance model of an elected board in order to institute reforms that might be more difficult in businesses, such as partnerships, in which the owners personally govern.[265] The goal is to have corporate governance follow democratic values. This would render government intervention to protect those lacking voice through internal corporate governance unnecessary to assuring democratic accountability.

To pursue this alternative, we need to address the anti-democratic features in current corporate election mechanics, such as the lack of access to the corporation's proxy solicitation by nominees other than those picked by the incumbent directors. More fundamentally (and challenging) is to end the pay-to-play essence of corporate or shareholder democracy. This requires extending the right to vote for corporate directors to non-shareholders who are impacted by the decisions of directors.

In fact, a number of countries do this to some extent. Their laws grant employees the right to elect a certain number of the directors. This is commonly referred to as co-determination because both shareholders and employees determine the composition of the board and thus have a voice in the overall governance of the corporation. Germany pioneered co-determination laws, which are also found in a number of other European countries[266] and China.[267] Such laws typically allow employees to elect a minority of the corporation's directors (such as one-third); albeit employees elect one-half of the directors in the largest German companies.[268] Perhaps prompted by proposals made by Senator Elizabeth Warren and others during the 2020 election campaign,[269] some scholars have recently advocated

265 *See, e.g.*, REVISED UNIF. P'SHIP ACT § 401(h) (UNIF. L. COMM'N 2021) (providing partners with equal rights to participate in management unless otherwise provided in partnership agreement). This raises the question of whether corporate governance reform will lead to regulatory arbitrage through choice of non-corporate forms of business. *See, e.g.*, Dammann & Eidenmueller, *supra* note 2 (manuscript at 67) (listing countries that also require governing boards with worker representation for limited liability companies).

266 Dammann & Eidenmueller, *supra* note 2 (manuscript at 67–70, 72–73) (listing co-determination laws in Europe).

267 *E.g.*, Jiong Deng, Note, *Building an Investor-Friendly Shareholder Derivative Lawsuit System in China*, 46 HARV. INT'L L.J. 347, 353 (2005). Interestingly, there were some earlier experiments with voluntary co-determination in the United States. *E.g.*, Sarah C. Haan, *The Corporation's Political Purpose*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 299 (Elizabeth Pollman & Robert B. Thompson eds., 2021).

268 *See supra* note 264.

269 *E.g.*, Accountable Capitalism Act, S. 3348, 115th Cong. (2018).

adoption of co-determination for corporations in the United States.[270]

While co-determination would move corporate governance toward more democratic norms, it does not fully address the pay-to-play system. Co-determination, at least as adopted by other countries so far, never gives employees as much power on the board as the shareholders.[271] More broadly, this leaves out a voice in corporate governance for others impacted by the decisions of those in charge of corporations. This includes consumers, lenders, and the overall community in which the corporation operates.

In their article arguing for co-determination,[272] Grant Hayden and Matthew Bodie attempt to distinguish employees and shareholders from these other interested groups based upon the criteria of how much stake the group has in the corporation and the administrative practicality of determining eligibility to vote. On the other hand, the existence of various consumer governed cooperatives—such as mutual insurance companies,[273] credit unions,[274] consumer coop stores[275]—illustrates that it is mechanically possible in some situations for consumers to have a voice.

From time to time, corporate law scholars have floated proposals for corporate boards composed of directors representing multiple constituencies.[276] At this point, complexity increases exponentially. For example, who would vote for the directors representing those potentially injured by corporate pollution?[277]

270 Dammann & Eidenmueller, *supra* note 2; Hayden & Bodie, *supra* note 9.

271 Even for the largest German corporations in which workers elect half the board, the shareholder-elected directors pick the board's chair, who gets a tie-breaking vote. *E.g.*, Franklin A. Gevurtz, *Disney in a Comparative Light*, 55 Am. J. Compar. L. 453, 474 (2007).

272 Hayden & Bodie, *supra* note 9.

273 *See* Patricia Born et al., *Organizational Form and Insurance Company Performance: Stocks versus Mutuals*, *in* The Economics of Property-Casualty Insurance 167, 167–68 (David F. Bradford ed., 1998) (explaining that mutual insurance companies, in which the customers (policy holders) own the corporation and elect the board of directors, accounted for twenty-five percent of overall property-casualty premiums in the United States in 1991).

274 *See* Benjamin J. Richardson, *Fiduciary Relationships for Socially Responsible Investing: A Multinational Perspective*, 48 Am. Bus. L.J. 597, 604 (2011) ("In theory, the most democratically governed financial institutions are credit unions. Organized as cooperatives, they are owned by their members who share equally in their governance . . . ." (footnote omitted)).

275 *E.g.*, *REI Board of Directors*, REI, https://www.rei.com/about-rei/board-of-directors (last visited Mar. 15, 2022) ("REI is the nation's largest consumer co-operative. . . . [A] board of directors selected from REI's membership oversees the company.").

276 *E.g.*, Yosifon, *supra* note 10, at 1237; Kent Greenfield, The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities 149 (2006).

277 One proof of the difficulty of figuring this all out is that such proposals typically float a few ideas rather than explaining how this would all work. Greenfield, *supra* note 276.

In any event, this still leaves the problem of voting in proportion to stock, rather than one-person, one-vote. Perhaps the law could mandate a one-person, one-vote system when it comes to voting by shareholders. Not only is this the rule barring agreement to the contrary for partnerships,[278] but it was also the system for many early corporations.[279]

Actually, shareholder voting by the amount of stock owned versus one-person, one-vote will not matter as much in a corporation whose board is elected by multiple constituencies rather than just by the shareholders. This is because the primary practical impact of voting by shares rather than one-person, one-vote occurs in the corporation with a majority or otherwise controlling shareholder. Under the current corporate governance system, control by a majority shareholder looks more like autocratic or dictatorial rule than what comes to mind when speaking of shareholder democracy. In a system in which shareholders no longer control the majority of the board, such autocracy is no longer a given.[280]

One could avoid many of the complexities of multi-stakeholder elected boards by having the government appoint those in charge of businesses over a certain size—in other words, nationalization or socialism. The common objection is that government control of corporations often leads to politically motivated or outright corrupt decisions, lack of innovation, and economic inefficiency.[281]

Staying with the focus of this article on corporations and democracy, the overlap of nationalization or socialism with non-democratic or outright totalitarian regimes[282] raises an obvious concern. Of course, correlation

278 REVISED UNIF. P'SHIP ACT § 401(f) (UNIF. L. COMM'N 2021).

279 *E.g.*, Dunlavy, *supra* note 86 (discussing voting arrangements in the early corporations in the United States); Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 149, 156–57 (1888) (describing the evolution in voting in the East India Company from the original one-member, one-vote to voting in proportion to shares in the joint stock).

280 Conversely, a one-person, one-vote system might allow other corporate stakeholders to gain power in corporate elections without expanding the franchise beyond those who own stock. This is because it opens the prospect for employees or other stakeholders to gain significant votes without unrealistic expenditures to buy stock. Ratner, *supra* note 86, at 34. Incidentally, illustrating the potential for unintended consequences, one-person, one-vote eliminates the ability of corporations to operate through subsidiaries other than those that are wholly-owned—which may or may not be a bad thing. *See id.*

281 *E.g.*, Andrei Shleifer, *State Versus Private Ownership*, J. ECON. PERSPS., Fall 1998, at 133.

282 *E.g.*, Mariana Pargendler, *State Ownership and Corporate Governance*, 80 FORDHAM L. REV. 2917, 2918–19 (2012) ("[G]overnment-controlled firms account for about 80 percent of the market capitalization in China [and] 60 percent in Russia . . . ."). These figures, of course, post-date the more extreme government ownership in the Soviet Union or Maoist China.

is not causation and so government control over corporations in many notorious dictatorial regimes does not prove that such socialism promotes dictatorial regimes as opposed to the other way around. This is more so since government control of many large firms is also found in democratic countries.[283] In any event, it would unduly extend the length of this article to address the arguments by those such as Hayek that government control over major industries inevitably leads to undemocratic governments.[284]

All told, any effort to democratize corporate governance by attacking the pay-to-play system raises complex questions and the potential for unintended consequences. Accordingly, it is useful to keep in mind that human institutions are imperfect, and democracy is commonly a matter of more versus less. Hence, much as the history of democracy in general is a history of expanding voting rights to different groups, expanded voting rights in corporations might start with co-determination and gradually work to include other stakeholders.

## Conclusion

The relationship between corporations and democracy involves both the internal governance of corporations and the external impact of corporations on the overall governance of society. This stems from the reality that those in charge of corporations make decisions that significantly impact individuals in society. If the governance of society is to be truly democratic, then those making decisions for corporations must have some consent by or accountability to the individuals impacted by their decisions.

Despite some democratic features, corporate or shareholder democracy as currently conceived is inconsistent with fundamental democratic values and thus fails at this task—a function perhaps of economic utilitarianism prevailing over democratic ideals. The ability of individuals to deal or refuse to deal with a particular corporation provides such consent and accountability in many, if not the bulk, of instances. Nevertheless, externalities and market failures leave significant gaps. In this event, the availability of intervention by a democratically elected government of a political entity is necessary to restore accountability. Here is the real democratic deficit potentially created by *Citizens United*: if those controlling corporations, who are not democratically accountable through internal corporate governance, can make unlimited use of corporate resources to influence government against such intervention, they could also lack accountability through the

283 *E.g.*, *id.* at 2948 ("By 1977, nineteen (38 percent) of the top fifty largest industrial companies in Europe were state-owned . . . .").

284 *E.g.*, Friedrich A. Hayek, The Road to Serfdom (1944).

actions of democratically elected governments of political entities.

For corporations to be part of, rather than antithetical to, the democratic governance of society, we face a choice: either there should be some cap on the use resources generated by the corporation to lobby against government intervention protecting the interests of those lacking representation through corporate democracy, or else we should reform corporate democracy to be consistent with democratic values—or perhaps a bit of both.

# THE LIVED EXPERIENCE OF HEALTH INSURANCE: AN ANALYSIS AND PROPOSAL FOR REFORM

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**ABSTRACT**

*People in the United States are carrying tens of billions of dollars of medical debt, much of it in collections. We delay going to the emergency department while having a heart attack because it may cost too much. Doctors try to help insured patients find the best coupon to offset the high copayment for a necessary prescription drug. For inexpensive drugs, insurers make a profit by clawing back copayments that exceed what the drug costs. People who are already arbitrarily disadvantaged because of factors such as race, gender, actual and perceived health status, sexual orientation, gender identity, and weight stigma, are disproportionately burdened by all of this.*

*No one would design a system to end up this way. This article, through a series of case studies, does a close analysis of the healthcare insurance system from the perspective of people who use it, revealing a breathtakingly opaque, counter-intuitive, and burdensome muddle. The Patient Protection and Affordable Care Act (ACA) did much good, as have subsequent reforms, but we can do better. I argue that we do not appropriately center the lived experience of people when we design and reform healthcare financing and show how doing so can ameliorate much of the harm that is currently occurring.*

*Centering people does not pose an inherent conflict with conservative or liberal values. Bioethical principles such as autonomy, justice, integrity, and respect for dignity ought to be reflected in any plan. These principles can only be pursued by acknowledging how people truly experience systems they must interact with. While specific reform proposals may differ based on political preferences, the need for reform and the goals of reform ought to spring from the needs of the people a system is meant to serve. This article seeks to serve as a reminder of this first principle and a call to adjust how we approach reform in the future.*

## INTRODUCTION

Even before the COVID-19 pandemic, almost eighteen percent of the country had medical debt in collections.[1] A smaller proportion of people suffering from heart attacks who have insurance but are worried about their finances arrive at a hospital within two hours of symptom onset than those who are not worried.[2] Health insurance companies change the insulin brands they cover when they find one at a better price, forcing diabetics to change their medications or pay large amounts of extra money to stay on the one that is currently working. The list of problems like this is long and extends into many areas of healthcare.[3] The burden lands on many people, falling particularly hard on those already carrying the burdens of inequity.

It is time for us to reconsider how we look at health care financing, mindfully centering the perspective of people in the discourse. Other concerns have recently dominated the conversation and, as a result, the system is imbalanced, leaving people in impossible situations. Debates about health care and healthcare payment systems have increasingly become detached from the world that people live and seek care in, which arguably has played a role in the exploding amounts of medical debt[4] and poor outcomes from delayed care.[5]

We cannot assume that people have the money to pay coinsurance[6] or the sophistication and information to make complex insurance

1 Raymond Kluender et al., *Medical Debt in the US, 2009-2020*, 326 JAMA 250, 251 (2021).

2 *See* Kim G. Smolderen et. al., *Health Care Insurance, Financial Concerns in Accessing Care, and Delays to Hospital Presentation in Acute Myocardial Infarction*, 303 JAMA 1392, 1396 (2010).

3 Consider, as another example, that one in four American families have turned down medical care. Monica Chin, *1 in 4 Americans Refuse Medical Care Because They Can't Afford It*, N.Y. POST (June 7, 2017), https://nypost.com/2017/06/07/1-in-4-americans-refuse-medical-care-because-they-cant-afford-it/.

4 A recent study showed the scope of this debt, tying it to poor insurance coverage. *Survey: 79 Million Americans Have Problems with Medical Bills or Debt*, COMMONWEALTH FUND, https://www.commonwealthfund.org/publications/newsletter-article/survey-79-million-americans-have-problems-medical-bills-or-debt (last visited May 16, 2022).

5 The reasons and problems springing from delaying care are not new, and the causes have been available for policy makers to consider since at least the 1980s. *See* Joel S. Weissman et al., *Delayed Access to Health Care: Risk Factors, Reasons, and Consequences*, 114 ANNALS INTERNAL MED. 325 (1991).

6 *Report on the Economic Well-Being of U.S. Households in 2018*, BD. GOVERNORS FED. RSRV. SYS. (May 28, 2019), https://www.federalreserve.gov/publications/2019-economic-well-being-of-us-households-in-2018-dealing-with-unexpected-expenses.htm.

purchasing decisions.[7] Nor can we assume they have a choice of insurer,[8] access to procedures that are covered in insurance contracts,[9] or access to sophisticated care providers capable of negotiating with insurers.[10] Finally, we cannot assume they have the time to negotiate byzantine systems.[11]

Centering people, however, does not magically do away with other concerns, but rather puts those concerns in an appropriate place so that we grapple with them for the purpose of making people's lives better. For example, we have had every reason to worry about cost,[12] and there is nothing inherently wrong with utilizing the considerable engine of financial incentives within a functioning market to drive improvement while constraining expenses.[13] Likewise, it is always rational to consider

7 For a discussion on how extensive the literacy problem is in health insurance, *see 4 Basic Health Insurance Terms 96% of Americans Don't Understand*, Policygenius (Jan. 24, 2018) [hereinafter *Health Insurance Terms*], https://www.policygenius.com/health-insurance/health-insurance-literacy-survey/#survey-results.

8 In 2018, eight states only have one insurer offering coverage. Daniel McDermott & Cynthia Cox, *Insurer Participation on the ACA Marketplaces, 2014-2021*, Kaiser Fam. Found. (Nov. 23, 2020), https://www.kff.org/private-insurance/issue-brief/insurer-participation-on-the-aca-marketplaces-2014-2021/. Additionally, many employers do not offer choices of insurers. Seventy-five percent offer only one type of health plan to their employees. Gary Claxton et al., Kaiser Fam. Found., Employer Health Benefits 2020 Annual Survey 71 (2020), https://files.kff.org/attachment/Report-Employer-Health-Benefits-2020-Annual-Survey.pdf.

9 The tension between narrow networks of physicians and hospitals, on the one hand, and patient need for specialty care, leads to ongoing state efforts to address the problem, as tracked here. *See Insurance Carriers and Access to Healthcare Providers—Network Adequacy*, Nat'l Conf. State Legislatures (Feb. 1, 2018), https://www.ncsl.org/research/health/insurance-carriers-and-access-to-healthcare-providers-network-adequacy.aspx.

10 Physicians definitely feel burdened by these negotiations and have varied methods and skills for coping. Rachel M. Werner et al., *The "Hassle Factor": What Motivates Physicians to Manipulate Reimbursement Rules?*, 162 Arch. Internal Med. 1134 (2002), https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/211437.

11 The phrase "time tax" has been used to describe how people with limited means and less free time often spend more time negotiating government programs than those with the means and less need of the programs. Annie Lowrey, *The Time Tax: Why Is So Much American Bureaucracy Left to Average Citizens?*, Atlantic (July 27, 2021), https://www.theatlantic.com/politics/archive/2021/07/how-government-learned-waste-your-time-tax/619568/. The same concept readily applies to health insurance, where those who are sick or injured and have fewer financial resources or less communal support are often compelled to spend more time accessing the insurance benefits to which they are entitled.

12 The price of medical care has dramatically increased since 1979. *See Consumer Price Index (CPI) for Medical Care*, Health Res. & Servs. Admin. (June 2021), https://www.hrsa.gov/get-health-care/affordable/hill-burton/cpi.html (noting how the CPI for medical care between 1979 and 2020 has risen 668.8%).

13 Using financial incentive is tricky, as it is a powerful engine that can distort a system. Scholarly study of this type of incentive tends to show it requires sophistication and

politics and to strive to build consensus among those who have differing visions of the appropriate scope of federal and state power.[14] Improving quality through tracking metrics, seeking to incentivize providers to perform better by identifying what is best, and paying accordingly, also has merit.[15] Efficiency and effectiveness matter as well, as waste is harmful to patients and to a strained system, especially problematic and indefensible when we have to constrain good care because waste has drained coffers. However, all of this—all of what we do in the name of healthcare reform—must be measured by what happens to the people the system is meant to serve, and we are currently failing them in ways that are readily apparent with even a cursory examination.[16]

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nimbleness to ensure it truly leads to improvement, but the potential appears to be there. *See, e.g.*, Douglas A. Conrad & Lisa Perry, *Quality-Based Financial Incentives in Health Care: Can We Improve Quality by Paying for It?*, 30 ANN. REV. PUB. HEALTH 357 (2009), https://www.annualreviews.org/doi/abs/10.1146/annurev.publhealth.031308.100243.

14 For a discussion of how federalism both helps and hurts the quality of the healthcare system, see Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare for?*, 70 STAN. L. REV. 1689 (2018), https://www.stanfordlawreview.org/print/article/what-is-federalism-in-healthcare-for/. Political rhetoric can, of course, also distort the debate about health care. Elizabeth Weeks Leonard has written extensively about this problem, see, for example, *The Rhetoric Hits the Road: State Resistance to Affordable Care Act Implementation*, 46 U. RICH. L. REV. 781 (2012).

15 The Centers for Medicare and Medicaid Services collect the various types of quality measures currently in effect. *What Is a Quality Measure?*, CTR. FOR MEDICARE & MEDICAID SERVS., https://www.cms.gov/Medicare/Quality-Initiatives-Patient-Assessment-Instruments/MMS/NTM-What-is-a-Quality-Measure-SubPage (last visited Apr. 24, 2022). There are, of course, debates about the efficacy of any one specific measure. *See* Joanne Greenhalgh et al., *The Use of Patient Reported Outcome Measures in Routine Clinical Practice: Lack of Impact or Lack of Theory?*, 60 SOC. SCI. & MED. 833 (2005), https://doi.org/10.1016/j.socscimed.2004.06.022 (for a discussion examining problems with utilizing patient reports of outcomes); J. Olivarius-McAllister et al., *How Can Never Event Data Be Used to Reflect or Improve Hospital Safety Performance?*, 76 ANAESTHESIA 1563 (May 1, 2021), https://associationofanaesthetists-publications.onlinelibrary.wiley.com/doi/full/10.1111/anae.15476 (looking at never events in England and delineating statistical flaws in how they are utilized for quality tracking).

16 As studies have shown, people who do this also have a propensity of avoiding care even when a physician would have told them care was necessary. This, in turn, leads to poorer outcomes among people with less means and high deductibles. Overall, ten and a half percent of Americans delayed or did not get care in 2019 because of cost concerns. Jared Ortaliza et al., *How Does Cost Affect Access to Care?*, HEALTH SYS. TRACKER (Mar. 14, 2022), https://www.healthsystemtracker.org/chart-collection/cost-affect-access-care/#item-costaccesstocare. This implies that some necessary care is not received in a timely manner because of cost, and studies of specific conditions bear that out, showing, for example, delays in receiving emergency treatment for heart attacks because of cost concerns, with subsequent poorer outcomes. *See* Smolderen et. al., *supra* note 2. The opposite is also true—people without cost concerns have better access. *Id.*; *see also* Rachel Garfield et al., *The Uninsured and the ACA: A Primer -Key Facts*

The passage of the ACA[17] in 2010, and its implementation since then, has done much good for people.[18] Covering preventive care,[19] eliminating pre-existing conditions,[20] ensuring guaranteed issue,[21] providing premium and copayment subsidies,[22] all of these, and more, have improved people's lives. The goals of getting people insured, bending the cost curve, and improving quality of care are laudable, and much in the ACA helps accomplish this. As with any large-scale undertaking, however, the law is not perfect and can be improved. Refocusing on patient and member experiences is a necessary corrective to problems in the healthcare system that have been resistant to being fixed or have worsened since the ACA's passage.

Looking at our current healthcare financing system from the perspective of the insured reveals significant problems. By closely examining some common interactions people have with this system, one quickly realizes the system can be both complex and irrational, as well as riddled with feints and opacity calculated to mislead people as to what they are truly entitled.

The way health insurance is structured, with its financial burdens, complexity, and demands on patients,[23] makes it more likely that any person already suffering from societal mistreatment and bias is going to have a more difficult time in our current insurance system.[24] This may be as simple as

*About Health Insurance and the Uninsured Amidst Changes to the Affordable Care Act*, Kaiser Fam. Found. (Jan. 25, 2019), https://www.kff.org/report-section/the-uninsured-and-the-aca-a-primer-key-facts-about-health-insurance-and-the-uninsured-amidst-changes-to-the-affordable-care-act-how-does-lack-of-insurance-affect-access-to-care/.

17 Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010) (codified as amended in scattered sections of the U.S. Code).

18 *See, e.g.*, Laxmaiah Manchikanti et al., *A Critical Analysis of Obamacare: Affordable Care or Insurance for Many and Coverage for Few?*, 20 Pain Physician 111 (Mar. 2017), https://pubmed.ncbi.nlm.nih.gov/28339427/ (also noting some of the ACA's shortcomings).

19 Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41318, 41334 (July 14, 2015) (to be codified in 26 C.F.R. pt. 54, 29 C.F.R. pts. 2510, 2590, 45 C.F.R. pt. 147).

20 45 C.F.R. § 147.108 (2016).

21 45 C.F.R. § 147.104 (2014).

22 Refundable Credit for Coverage Under a Qualified Health Plan, 26 U.S.C. § 36B (2012); American Rescue Plan Act of 2021, Pub. L. No. 117-2, §§ 9661–63, 135 Stat. 4, (Mar. 11, 2021) (providing for extended premium and copayment subsidies originally in the ACA).

23 The word "patient" is used in this Article to mean those seeking insurance, insured people, patients, and family members of patients.

24 *See Access to Health Services*, Off. Disease Prevention & health promotion, https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/access-to-health#10 (last visited Apr. 24, 2022) (stating how "[v]ulnerable populations are particularly at risk for insufficient health insurance coverage; people with lower incomes are often uninsured, and minorities account for over half of the uninsured population").

having less money to spend on health care because one is paid less than others,[25] as complex as navigating a poorly designed system when one has the burdens of multiple medical issues and a disability, or as problematic as not having providers be willing to tackle insurance problems on their behalf because someone is arbitrarily perceived as having less intrinsic value and so is not worth their time.[26]

We recognize that underinsurance is a significant problem,[27] yet we sell plans that place hundreds, if not thousands, of dollars of financial obligations on a population where the majority do not have the resources to pay them.[28] We have high level theoretical arguments about what comparative effectiveness research (CER) can and ought to do,[29] but have insurance companies who irresponsibly claim to be using it to make widespread benefit determinations, masking what are essentially cost saving decisions in language that incorrectly implies it is justified by concrete research findings, when no such findings exist. We allow a byzantine and unnavigable system of prescription medication coverage to increasingly dominate over appropriate patient care, with step therapy often requiring patients to engage in suboptimal care against their physician's advice to prove they are entitled to the prescribed medicine.[30]

The measure of a healthcare system ought to be whether it functions and is sustainable. Functionality and sustainability are not

25 *See, e.g.*, *Quantifying America's Gender Wage Gap by Race/Ethnicity*, NAT'L P'SHIP FOR WOMEN & FAMS. (Jan. 2022), https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/quantifying-americas-gender-wage-gap.pdf.

26 *See, e.g.*, Laura VanPuymbrouck et al., *Explicit and Implicit Disability Attitudes of Healthcare Providers*, 65 REHAB. PSYCH. 101 (2020), https://pubmed.ncbi.nlm.nih.gov/32105109/.

27 Sara R. Collins et al., *U.S. Health Insurance Coverage in 2020: A Looming Crisis in Affordability*, COMMONWEALTH FUND, (Aug. 19 2020), https://www.commonwealthfund.org/publications/issue-briefs/2020/aug/looming-crisis-health-coverage-2020-biennial.

28 *See* Jeff Ostrowski, *Survey: Fewer Than 4 in 10 Americans Could Pay a Surprise $1,000 Bill from Savings*, BANKRATE (Jan. 11, 2021), https://www.bankrate.com/banking/savings/financial-security-january-2021/.

29 For a discussion of the complexity in conducting this research, see Brian L. Strom, *Methodologic Challenges to Studying Patient Safety and Comparative Effectiveness*, 45 MED. CARE S13 (Supp. 2 2007). For a discussion of the complexity of applying this research, see Jason John Luke, *The Role of Comparative Effectiveness Research in Developing Clinical Guidelines and Reimbursement Policies*, 13 VIRTUAL MENTOR 42 (Jan. 2011), https://journalofethics.ama-assn.org/article/role-comparative-effectiveness-research-developing-clinical-guidelines-and-reimbursement-policies/2011-01.

30 *See, e.g.*, Laura Joszt, *How Prior Authorization, Step Therapy Result in Medication Discontinuation and Worse Outcomes*, AM. J. MANAGED CARE (Nov. 12, 2019), https://www.ajmc.com/view/how-prior-authorization-step-therapy-result-in-medication-discontinuation-and-worse-outcomes-. Step therapy as imposed by insurers against a physician's advice is shocking yet common. It is discussed further infra.

achieved if patients and insured people are at significant financial and financially-influenced medical risk. Assessing a healthcare payment system from the patient perspective requires looking at how the entire process of the insurance-member relationship is conducted to understand the sources of problems and the sources of repair. This undertaking ought to be embedded in contract language, state and federal regulations, and culture. There are complex market forces that patients never interact with that can have important effects as well, such as those within the prescription drug marketplace.[31]

Health insurance is different than many areas of the law because, while litigation is an option, it is not a reasonable one in almost every situation.[32] If problems occur, the existing internal and external appeals processes make most litigation unnecessary, but these appeals still lead to delay and can create unbearable temporary financial or medical burdens.[33]

It is caring and empathic to acknowledge patients are vulnerable due to being sick or injured and are often untrained in medicine and law.[34] They need to be able to navigate the system for resolving health insurance disputes efficiently, of course, but they also need to be protected from a system that can harm them in oblique and subtle ways even as it functions as it is designed to. Patients require systems analyses that identifies what will harm a patient, considers such harm a real problem, and works towards preventing those problems from occurring rather than needing recourse

31 *See infra* Section I.C.

32 Fully addressing the availability of or methods for acquiring damages when insurers behave improperly and a person suffers harm is outside of the scope of this Article. In other words, this is not directly about the Employee Retirement Income Security Act (ERISA) preemption. As has been brilliantly addressed, however, almost everything in health law is, to some degree, about the ERISA preemption. *See generally* Elizabeth Y. McCuskey, *ERISA Reform as Health Reform: The Case for an ERISA Preemption Waiver*, 48 J.L. Med. Ethics 450 (2020) (discussing how the ERISA affects most if not all aspects of health law). Suffice it to say, even putting aside ERISA preemption concerns, litigation is expensive and time-consuming, qualities that make it a poor fit for people seeking medical care in time sensitive circumstances.

33 Almost no insurance denials lead to formal appeals that go through the entire process, let alone end up in litigation. *See* Karen Pollitz & Daniel McDermott, *Claims Denials and Appeals in ACA Marketplace Plans*, Kaiser Fam. Found. (Jan. 20, 2021), https://www.kff.org/private-insurance/issue-brief/claims-denials-and-appeals-in-aca-marketplace-plans/ ("[C]onsumers rarely appeal claims to their issuer, and when they do, issuers usually uphold their original decision."). In 2019, less than one tenth of a percent of healthcare.gov consumer denials were even appealed. *Id.*

34 We are all patients, current, past, and future, and all deserving of this compassion. This is not meant to imply lessened autonomy or dignity, as all of these are part of treating a person ethically.

afterwards.[35]

This Article contains a series of case studies that discuss specific aspects of the current healthcare financing system, giving targeted suggestions for improving them. Each case study highlights an important problem that has a substantial impact on tens of millions of people's day to day lives. However, the central goal of this Article is to articulate why these types of problems should be identified and ameliorated, arguing that we should refocus our analysis to center people so that, first, potential problems are prevented from becoming part of our system in future iterations of reform and, second, that we look for unanticipated consequences when we implement reform, responding nimbly when problems arise in the future.

By hearing the lived experience of patients and of people seeking insurance, we can identify the problems they face.[36] Bringing a sophisticated assessment of the quality and feasibility of the decisions we expect people to make adds to our understanding of their lived experience by situating these experiences within what is happening around them. We must also seek to understand if people can bear the burdens we place on them. All of this, together, reveals the environment we are creating or sustaining for patients and insurance members, and whether that environment does good or harm to the overall undertaking. While specific reform proposals may differ based on political preferences, the need for reform and the goals of reform ought to spring from the needs of the people a system is meant to serve. This Article seeks to serve as a reminder of this first principle and a call to adjust how we approach reform in the future.

Examining these case studies reveals an absurdly complex, risky, and counterintuitive set of problems to be grappled with by people with little to no actuarial, legal, or medical training, even as training in all three would make their decisions more informed and likely lead to better financial and health outcomes. Part I explains how these case studies are structured, the tools utilized, and addresses potential criticisms of this method. The case studies in this Article are grounded in bioethical principles, empathy, and

35 Healthcare payment systems are not unique in terms of having vulnerable populations requiring protection and whose needs must be centered in the discussion for it to be effective. For an excellent example of this perspective in legal jurisprudence, see Emily A. Benfer et al., *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Disparities During and After COVID-19*, 19 YALE J. HEALTH POL'Y, L., & ETHICS 122, 125 n.3 (2020).

36 This is not a new idea. It is accepted in computer systems design, for example, that user interface is an integral part of designing a system that functions well, this is referred to as User Centered Design in that field. *User Centered Design*, INTERACTION DESIGN FOUND., https://www.interaction-design.org/literature/topics/user-centered-design (last visited Mar. 15, 2022).

justice, but also utilize a practical, economic, actuarial, and legal lens. Using these tools, each case study includes proposals for reform of the specific problem while highlighting overarching concerns they illustrate. Part II examines the process of picking an insurance plan from the perspective of people with some or little means and a variety of potential healthcare costs, who must make rational decisions with little funding and no capacity to accurately project future heath care needs. Part III focuses on an insured person's decision to seek care, given the plan that was purchased in Part II, showing how the financial burdens a person must internalize when buying insurance can greatly alter how they decide to seek medical care, often leading to poorer outcomes than would be likely to occur without monetary considerations influencing the decision. Part IV looks at health insurance contract terms. Section IV.A explains the various sources of law that are used to draft, regulate, and interpret insurance contracts. Section IV.B parses the language of medical necessity clauses, particularly focusing on the inappropriate use of CER language and provisions that force patients to use less optimal care to prove they deserve access to more expensive treatments. Section IV.C examines prescription drug coverage, showing it is byzantine and results in unjust distributions of benefits and burdens among insured persons. This section builds on the analysis of step therapy from the prior section to show how step therapy clauses lead to poorer patient outcomes. Section IV.D examines coverage of psychiatric and substance use disorders (SUD),[37] using the vulnerabilities of dual diagnosis patients to show how state statutes, vulnerabilities of these patients, and insurance incentives can lead to poorer outcomes.

## I. Methods of Analysis

The case studies that follow are analyzed from a particular perspective, delineated here. The first goal is to describe who people are and the abilities and resources they have. Second is identifying their concerns, recognizing that these can overlap with those of policy makers but can also be different in meaningful ways. Third, specific ethical commitments are expressly stated so judgments of wrongdoing are contextualized, while also acknowledging that someone with a different ethical or policy framework can challenge the assumptions upon which these judgments rest. Analyzing healthcare financing reform from the patient perspective builds on existing

37 SUD is a term that refers to a variety of disorders, with addiction being the most severe on a continuum. *See DSM-5 Criteria for Addiction Simplified*, Addiction Pol'y F. (Aug. 17, 2020) (updated Aug. 20, 2020), https://www.addictionpolicy.org/post/dsm-5-facts-and-figures.

literature in some ways, but also must be situated within some facially conflicting theories. Other frameworks that have been used in the past and are addressed here include a primary focus on financing as the significant driver of healthcare reform debates, freedom of contract, and a view that access to healthcare is a private, individual concern rather than a systemic issue.

Interacting with the healthcare financing system is unavoidable because people become ill, suffer from injury, and need preventive care. The concerns they have in these unavoidable interactions include worries about pain and death, certainly, but also worries about money. The specific details of these concerns ought to be better informing healthcare insurance regulation and reform. Another way of saying this is that the health reform issues that matter for people who are interacting with the insurance and healthcare systems as plan members and as patients are different than those that are foremost in the minds of politicians or health policy experts. Fully recognizing that the current system puts extraordinary burdens on people that they often have little training or resources to handle, can improve people's lives in important ways by then driving us to shape reform to lessen those burdens.

The goal of the healthcare system, overall, is to improve health and to heal, doing so with respect for the autonomy and dignity of all people. At a macro level, it must also allocate scarce resources and, ideally, expend the level of resources that is appropriate, as well as reduce morbidity and mortality across populations. Efficiency, transparency, and rationality have the benefit of enhancing all these goals.

A system that is unnecessarily hard for people to negotiate, with wasted time, poor outcomes due to hesitancy or confusion about seeking appropriate care, shifting costs to those who have no money and away from those who control the mechanics of pooling, is one that ought to be fixed if possible. Otherwise, it has components that are inefficient, inequitable, and irrational. These qualities ought to trigger change but are not doing so. The broader system clearly needs reforming.

The overarching goals of healthcare reform, generally, are similar for both patients and reformers. Everyone wants quality, access, autonomy, and controlled costs. People tasked with large scale systemic management and reform intellectually recognize the tension inherent in these goals. It is fair to say that any system currently existing requires trade-offs and constant balancing of competing claims to scarce resources as the systems evolve.[38]

38 *See* Rajesh Balkrishnan et al., *Global Comparative Healthcare Effectiveness Research: Evaluating Sustainable Programmes in Low & Middle Resource Settings*, 137 Indian J. Med. Rsch. 494, 494 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3705656/ ("However,

Reform is a constant undertone as a system seeks to shape an ideal balance of competing claims.

Once one recognizes the types of problems people are currently struggling with, however, an argument can be made that reform must also include a more nuanced and explicit attention to people's interactions with financing mechanisms if we are going to improve them. If one of the goals of reform is to identify problems people are facing and lift the burdens they are carrying, the healthcare financing system needs to consistently be examined from their perspective and this perspective needs to color and shape how the overarching goals are achieved.

Goals of reform, from this patient-centric perspective, are relatively straightforward. A proposed reform ought to simplify patient tasks within the payment system in a way that reduces emotional, physical, and financial stress, as well as improves outcomes. An accurate assessment of the likelihood that any healthcare reform goals will be achieved, if one includes this perspective, must reflect who patients and members truly are and the resources they reasonably have access to.

When examining the healthcare financing system to assess if it causes harms to patients, there are a wealth of ethical guidelines one can utilize to assist in making these judgments. This Article seeks to reflect a commitment to bioethical principles such as respect for autonomy, that all persons are deserving of respect, and that vulnerable persons are entitled to vigorous protection of their dignity by those who work in the fields of both health care and health insurance. Furthermore, this Article is premised on an ethic of integrity that views interactions that are exploitative, dishonest, or even passively misleading as presumptively wrongful. Any such interactions certainly require a robust and persuasive explanation as to why they are justified. Furthermore, integrity within the fields of health care and health insurance imposes a positive duty to be forthcoming on those in power, given the vulnerability and dependency of the patients, asymmetries of expertise, and the opacity of the background machinations in these fields from the patient perspective.

The term vulnerability is used to describe patients in this context for

amidst a lack of clear evidence of comparative effectiveness between disease-specific or system specific strategies, the process of making choices that maximize value to the individual while balancing the needs of society for health care equity becomes challenging or impossible."). Comparative health law has extensive studies about different systems. People often compare the United States to other resource-rich places for purposes of assessing quality or relative expense, but the tension and trade-offs are apparent in every system, including those in countries with little to no functioning healthcare infrastructure. *See id.*

specific reasons, much of which has to do with challenging other academic perspectives on healthcare financing, such as freedom of contract. Patients are vulnerable because they are often uninformed about how best to protect themselves, many times as they are also in pain and frightened. The current insurance system asks people to make rational choices that require medical, legal, and actuarial information that is often not available, and, even when it is, requires training in all three disciplines to avoid costly and damaging errors. People must make these uninformed decisions when they need care and need it in a timely manner, often struggling with significant financial constraints, and, because of these constraints, facing extraordinary risks to their overall security when suffering from illness or injury.

Vulnerability can be found in multiple aspects of health care financing. It is critically important to be mindful of how much money people have, and that quite often, they have very little. Asking people to make choices requires understanding what must be known in order to make a choice. This, in turn, requires understanding what is truly knowable. For example, it is not possible to know, in advance, how much medical care will cost. We routinely ask patients or plan members to make decisions when some aspect of their decision rubric cannot be accurately ascertained. When something is knowable in theory, we ought to then consider if it is reasonable to ask people to do the work of knowing, especially when they or a family member is sick or injured.[39] Finally, we must consider if the system allows for insurers to mislead patients so they do not understand what they are entitled to or tricks them into paying more than they would fairly anticipate doing.

This vulnerability echoes the vulnerability of English farmers during the time of the Enclosures Acts in England, when they often

39 This type of work is already being done to improve informed consent; guided decision assistance is being adopted in recognition of how complex and difficult these decisions can be for patients to make. *See, e.g.*, Cindy Brach, *Making Informed Consent an Informed Choice*, HEALTH AFFS. (Apr. 4, 2019), https://www.healthaffairs.org/do/10.1377/hblog20190403.965852/full/; *see also* Frank Gieseler, *Decisions in the Shadow of Life: "Guided Decision-making"–A Classical Concept Adapted to Modern Times*, 14 DIVERSITY & EQUAL. HEALTH & CARE 63, 63, 65 (2017) (discussing a proposal to adapt the previous "shared decision-making concept" in oncology, which "involves including both the patient's knowledge about his cancer-related issues and also his personal needs in the process of reaching a decision and is accepted as the gold standard of patient-doctor relationship," to a "guided decision-making model," which takes into account, in part, socio-economic disparages between patients and doctors as well as variety of treatments available). The same complexity, stress, and concerns apply to insurance and other financial decisions that occur in similar circumstances. Guidance can be helpful, and some is available, but guidance in the absence of accurate information is not able to be dispositive.

ended up stripped of their land and given little in return.[40] The idea of the tragedy of the commons is well known, but this is a different tragedy that sprang from the enclosures. The commons were an integral part of life in the English countryside for hundreds of years, with people meeting their needs through farming and grazing on these commonly held lands.[41] The impetus for enclosing them was a belief that advances in agriculture could greatly increase yield if significant improvements were put in place. This required financing for large scale infrastructure developments, which would be difficult to achieve if the land were kept in its separate parcels. To summarize the Enclosure Acts, the rules of enclosure envisioned people sharing in the advances and improvements by allotting to them a share of the improved Commons that reflected their true claim, based on complex understandings of custom and entitlement.[42]

The farmers in England were vulnerable. They were illiterate, for the most part, and lived in a hierarchical system that generally gave them little power.[43] They were dependent on the nobility to explain what they were entitled to, and, even if the farmers did accurately assess what they were entitled to, did not have the ability to retain counsel and bring suit to protect those rights.[44] Instead, many accepted small cash payments and found themselves without land and in unempowered positions of servitude.[45] Using the land as they had always done before became a capital offense.

The laws offered farmers some protection of their interests and, at least arguably, had sound policy justifications for passage. Having a protective system that required farmers to utilize skills, resources, and power

40 *See generally* Briony McDonagh & Stephen Daniels, *Enclosure Stories: Narratives from Northamptonshire*, 19 Cultural Geographies 107 (2012), https://www.jstor.org/stable/44251455 (discussing in part how Enclosures Laws in medieval England stripped commoners of their traditional use of common space to benefit private use, which led to social unrest); Nicholas Blomley, *Making Private Property: Enclosure, Common Right and the Work of Hedges*, 18 Rural Hist. 1, 5 (2007), https://www.researchgate.net/publication/232025602_Making_Private_Property_Enclosure_Common_Right_and_the_Work_of_Hedges (arguing the importance of hedges as a device through which new spatial Enclosures were enforced). Between 1604 and 1914, there were over 5,000 individual enclosure Bills covering 6.8 million acres. *Enclosing the Land*, U.K. Parliament, https://www.parliament.uk/about/living-heritage/transformingsociety/towncountry/landscape/overview/enclosingland/#:~:text=Enclosure%20by%20Act&text=From%20the%201750s%20enclosure%20by,to%20some%206.8%20million%20acres (last visited Mar. 16, 2022).

41 McDonagh & Daniels, *supra* note 40, at 108.

42 Blomley, *supra* note 40, at 2.

43 *Id.* at 11.

44 *Id.* at 2.

45 McDonagh & Daniels, *supra* note 40, at 112.

they did not possess made the protections essentially worthless. In a similar way, people are vulnerable in the face of the current healthcare financing system, often lacking the resources, sophistication, and empowerment to get whatever benefits they are entitled to and thus adequately protect their health. Creating a system that is good, in its written form, does little if people's lived experience of the process is predictably problematic.

Describing people as vulnerable in this way does push back against a particular view of autonomy that can be called economic autonomy. A proponent of economic autonomy would assert that the ability to bargain, to shape one's life according to one's own concerns and arrange one's economic conditions in a way that suits one's own preferences, is a significant part of liberty that has value. This is important, overall, and this Article does not seek to devalue those attributes of an individual's life. Healthcare financing, as it is currently structured, is not an appropriate place in which to overvalue these concerns, however, given the life-or-death stakes. In a recent article closely examining the theoretical foundations for many of these claims, Professor Cogan has done an excellent job of showing that they are not particularly robust or persuasive, which makes sense, given that so called "consumer driven healthcare" has failed to create a financing system that meets the needs of its participants.[46]

Proponents of economic autonomy do have a role to play in healthcare financing reform even as reform adapts to centering a patient's experience. Protecting the vulnerable in healthcare financing does, at times, call for positive paternalism, constraining a person's contract choices to protect them. For those who are wedded to freedom of contract as a pre-eminent value, no arguments will suffice to change their minds, as they view freedom of contract as more important than other values and so are willing to suffer any consequences that result. For those who seek to maximize freedom of contract but recognize it can be constrained when it is reasonable to do so, however, this form of autonomy is open to balancing with other values.[47] Patient vulnerability can play an important role in informing this

46 John Aloysius Cogan Jr., *The Failed Economics of Consumer-Driven Health Plans*, 54 U.C. Davis L. Rev. 1353 (2021). In this article, Cogan explicitly examines and critiques the various theories that have been used to justify supporting this approach to financing health care. The theories, and the resulting systems we are currently struggling with, have not resulted in systems that function well for many, if not most, people. They do, however, consistently generate profit for investors.

47 Realistically, it is difficult to know exactly how to characterize scholars who write about freedom of contract and economic autonomy in terms of how welcoming they would be to balancing in this way. David Hyman and Charles Silver, for example, argue that freedom of contract can save the healthcare financing system, so appear to be saying it is important because it is useful, but they also seem comfortable with the turmoil

balancing even as economic autonomy can work to protect people from overly paternalistic impulses.

When policy makers are more informed about patient experiences, constraints can be tailored to maximize financial and contract autonomy. At the same time, these values can be placed in their proper place, not utilized to bar reforms because of reflexive or misguided concerns about rights to contract. There is little to no negotiating over contract terms between a patient and an insurance company. People do not have the capacity to self-fund medical care and so must participate in pooling mechanisms controlled by others. People also do not have the training to assess the care they will need, and so cannot reasonably be expected to properly choose the type of care they should be insured for. Finally, our experiences under the Emergency Medical Treatment and Active Labor Act (EMTALA),[48] which requires all facilities with emergency departments to triage and stabilize all patients, without regard to ability to pay for the care they receive, have shown us that people seek care in medical emergencies even when they cannot pay for that care. It is unreasonable to expect a person to calmly accept suffering and death because they did not have the forethought or resources to arrange for financing healthcare beforehand, and our laws recognize that.

A patient-centric perspective can lead to counterintuitive results in this analysis. For example, narrow provider networks, when viewed from the perspective of a person freely contracting with an insurer, are justified because that person could be seeking a less expensive plan and is willing to accept fewer choices of care providers so they can make that bargain. Properly recognizing that person as having limited choices of insurer and limited funds could alter the analysis, as promoting wider networks with all insurers would increase that person's capacity to contract with a wider variety of providers. From this perspective, expanding networks increases a person's financial autonomy. It also may give patients greater bargaining power with providers since they can choose to see who best suits their needs. Bargaining power with providers is something they likely care more about than theoretical bargaining power with insurance companies, since the quality of a provider can play a role in a person's health.

Finally, this Article asserts that, if there is a hierarchy of concerns in healthcare finance reform, patient experience and patient outcomes

and poor results such a system could cause for some individuals functioning within it, implying they have a strong commitment to placing contracting high in a hierarchy of what they value in the public sphere, making it unlikely they would welcome the balancing envisioned here. *See* Charles Silver & David A. Hyman, Overcharged: Why Americans Pay Too Much for Health Care 14–15 (2018).

48 42 U.S.C. § 1395dd.

belong at the top, even as cost is a significant and important constraint on the system overall. Much that harms patients could be fixed with money.[49] Where that money comes from and how much it is appropriate to spend are unavoidable problems in healthcare financing. It is possible and necessary to discuss money without losing track of the inherent dignity of people and the importance of their healthcare needs.

Those invested in focusing on money as the primary first question in healthcare reform can argue they are doing so to protect patients by ensuring there is a functioning and financed system to meet future patient needs. This stance risks doing harm in the debate, and risks missing opportunities to improve the overall quality of the system. A rigid refusal to consider money when proposing healthcare financing reforms is unrealistic, certainly, but beyond responding to that extreme stance, merely claiming that there is not enough money to meet needs is unsophisticated and problematic.

Consider the debate about forms of universal healthcare coverage, where people opposed to these programs commonly assert that having such a system would be too expensive or would increase waiting times for care. Whatever the true concerns of those making these arguments are, by focusing on money in such a way as to bar further discussion, the arguments appear to be premised on protecting a system that currently reduces cost and waiting times by not providing care for some people. That is a big problem if one considers all people to have inherent worth. Furthermore, these statements are made within a society and healthcare financing system that measurably disadvantages people because of race, gender, class, health status, and myriad other factors.[50] "Some people" are these people, for the most part. Using cost as a gatekeeping metric in this way reinforces to people that they do not matter, and that the system is not constructed to prioritize their needs.

It is possible to talk about money properly, but it is hard. Transparently making trade-offs in a healthcare financing system is so politically fraught as to be referred to as the "third rail" of politics and it may be that it is truly impossible to engage in making these trade-offs without some subterfuge.[51]

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49 Money is used to fund the provision of health care, but it is also used as an incentive to spur innovation and quality. The appropriate use of this incentive in health care, particularly for returns on capital investment when there are scarce resources to meet people's healthcare needs, is an important question within the debate about funding the healthcare system overall but is outside the scope of this Article.

50 For a study examining how race and wealth influence access to care, see Jacob Wallace et al., *Changes in Racial and Ethnic Disparities in Access to Care and Health Among US Adults at Age 65 Years*, 181 JAMA INTERNAL MED. 1207 (2021).

51 *See* Richard Sorian, *Is Medicaid the New 'Third Rail?' History Suggests It Has Been for Some Time*, HEALTH AFFS. (July 20, 2017), https://www.healthaffairs.org/do/10.1377/

However, discussions about money can be more properly embedded in the goals of the system overall while acknowledging the values the system seeks to embody. Doing this requires thinking through how one's claim effects all people and justifying the harm it could cause to some. Not doing this work allows the debate itself to cause harm and results in missed opportunities for more defensible proposals to be considered.

Understanding the way cost, quality, access, and choice are experienced by patients requires a leap of empathy, certainly, but it also requires truly grasping the details of the complex environment that must be negotiated. To make it even more tricky, true empathy requires understanding this complexity while also recognizing that the patient likely does not fully understand the same but is, instead, buffeted by a sense of being forced to rapidly make weighty decisions with insufficient information and power.

Better understanding and centering the patient in healthcare finance reform does not require a complete reordering of health policy. Rather, using this information adds important perspectives to how reform is structured and assessed, creating opportunities for meaningful improvement.

## II. Picking A Plan

### A. *The Process*

As explained below, the choice of a health insurance plan can require an extraordinary degree of sophistication and a high level of risk tolerance. Having enough money to pay premiums is not necessarily the same as having the sophistication required to make the best choices, especially when those choices are obscure. The stakes become higher when a person has less discretionary income and when a plan has more potential costs a person might have to pay. Picking a health insurance plan when someone has choice requires income that is sufficient to handle the expenses that are fixed, such as the out-of-pocket cost of premiums. It also requires accurately anticipating how much and what types of medical care will be needed in the following year.[52] This gets hard very quickly.

forefront.20170720.061122/full/.

52 *See Your Total Costs for Health Care: Premium, Deductible & Out-of-Pocket Costs*, HealthCare.gov, https://www.healthcare.gov/choose-a-plan/your-total-costs/ (last visited Mar. 25, 2022). Healthcare.gov offers guidance for picking a plan and includes in that guidance an acknowledgment, of sorts, that this is unknowable: "Of course it's impossible to predict the exact amount [of healthcare you will need next year]. So think about how much care you usually use, or are likely to use." *Id.* Citing these directions here is not a criticism of them, they are written in a manner that will help guide people who are faced with doing the best they can in this imperfect situation.

For people purchasing an individual plan, certain numbers must be added up to make a rational choice, but the addition is often exceptionally complex. Plan costs vary based on premiums (minus any premium subsidies from the federal government),[53] but also vary based on deductibles, co-payments (or co-insurance), types of copayments, and maximum out-of-pocket costs, which include copayments and co-insurance, but may not include deductibles.[54] If a person's healthcare costs are generally relatively high, the math is straightforward. One assumes the deductible will have to be paid, then adds that to the maximum out of pocket cost, adds the annual premium, and comes to an accurate cost for a specific insurance plan, which can then be compared to other plans. If a person is considering a plan with a very high deductible and pays significant amounts of taxes, they can also consider setting up a Health Savings Account (HSA), putting tax-protected dollars in it, and using that money to pay the deductible.[55] Doing this reduces the cost of the deductible because it is paid in pre-tax dollars. To ascertain the actual cost of the deductible, a person seeking to purchase insurance must calculate the tax rate for the money that would go in the HSA, calculate what the after-tax dollars would be, and use that as the value of the deductible. For example, with a plan with a $10,000 deductible and a person whose tax rate can reach 25%, the after-tax value of the $10,000 HSA-funded deductible is $7,500. When calculating cost, the deductible value is reduced to reflect any tax savings because, absent an HSA, it would be paid with post-tax income. This allows someone to compare the cost of lower deductible plans with higher deductible plans.

A much harder determination comes in when a person cannot, with any assurance, predict that they will have large amounts of medical costs in any given year. Assuming people are buying coverage through the

53 *See generally* 26 U.S.C. § 36B (pertaining to tax credits for healthcare premiums).

54 *What is an Out-of-Pocket Maximum and How Does it Work?*, CIGNA (May 2019), https://www.cigna.com/individuals-families/understanding-insurance/what-is-an-out-of-pocket-maximum. For people purchasing insurance on the exchange and who earn between 100–250% of the federal poverty level, a silver plan will come with cost-sharing subsidies as well as premium subsidies, so the actual cost of health care is reduced. The website will calculate what the actual deductibles, copayments, out-of-pocket maximums, etc. are based on the income the applicant provides. *Explaining Health Care Reform: Questions About Health Insurance Subsidies*, KAISER FAM. FOUND. (Oct. 29, 2021), https://www.kff.org/health-reform/issue-brief/explaining-health-care-reform-questions-about-health-insurance-subsidies/. These cost-sharing subsidies are not available for people earning the same income but who receive insurance through their employer, rather than the exchange, which could be described as arbitrary or unjust.

55 *Health Savings Accounts*, NAT'L CONF. STATE LEGISLATURES (Aug. 31, 2020), https://www.ncsl.org/research/health/hsas-health-savings-accounts.aspx.

exchange, many fixed medical costs for preventive care are required to be covered in full, with no deductible, so these do not have to be considered in the calculations.[56] The choice between deductible amounts, in this case, requires a person to calculate the extent to which they will self-insure and calculate how much they can spend on premiums, which tend to be more expensive for lower deductibles. The larger the amount they self-insure, the less they will spend on insurance premiums but the greater their financial exposure if an event occurs. For people who often have little or no medical costs, they must make risk calculations about the likelihood of an accident or sudden illness occurring then calculate if they can absorb the costs if such a thing occurs. This is frustrating, as these are the exact actuarial calculations insurance companies make and have tremendous difficulty doing if an insured population is too small.[57]

This calculation is impossible to make with any accuracy for a single, relatively healthy person or a small, relatively healthy family, so a person is, instead, ascertaining their own risk tolerance and capacity to absorb sudden expenses.[58] A large deductible means foregoing insurance of any kind for the amount of the deductible. A prudent, risk-averse person of means will save to cover any such risk, but this is far from ideal. If they do not need to use the money for healthcare costs, they have inefficiently foregone using the money for other expenses that could have a higher societal or personal utility.

For those without means, even if prudent and risk-averse, the calculations can be much more problematic. Someone prudent, risk averse, and with little income that can go towards medical costs, will seek insurance

56 Affordable Care Act § 2713, 124 Stat. 131 (2010) (codified at 42 U.S.C. § 300gg-13(a)).

57 Accurately assessing future health care costs for individuals would be extremely useful for many participants in healthcare financing, but it is in its early stages and does not seem to be even attempting to ascertain these costs at the precise level needed here. *See, e.g.*, Mohammad Amin Morid et al., *Supervised Learning Methods for Predicting Healthcare Costs: Systematic Literature Review and Empirical Evaluation*, 2017 Am. Med. Informatics Ass'n Ann. Symp. Proc. 1312, 1312, 1320 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5977561/.

58 A good example of the numbers can be found here:

> Two individuals are looking for health insurance. Person A decides to purchase a high-deductible policy with a $2,500 annual premium and $5,000 deductible, while Person B decides on a higher annual premium ($3,500) and lower deductible ($2,000). If both individuals incurred $5,000 medical expenses during the year, Person B would save $2,000 compared to Person A.

Jamie Cattanach, *High-Deductible Health Plans Continue to Grow in Popularity, but Are They Right for You?*, Valuepenguin, https://www.valuepenguin.com/enrollment-changes-to-high-definition-health-insurance-plans (Jan. 24, 2022).

because they recognize its importance but may rationally choose a plan that has a high deductible that cannot be paid to afford the lower premium. This is rational because merely having insurance may be necessary to get access to many kinds of care,[59] so a person's health is protected better by making the purchase even if potentially ruinous costs have been kicked down the road.[60] To further economize, they may also choose a plan with high copayments they cannot afford and a high maximum out-of-pocket cap, all of which can bring the premium down further,[61] but this alters the overall risk calculation.[62] Unaffordable copayments can have a rapid negative effect on access to care, as unpaid copayments can cause physicians to refuse treatment,[63] making this more problematic for overall health than high deductibles.

If a person chooses to purchase insurance under the assumption that they will not get sick or injured, they are likely inclined to choose a plan

59 *See* Kathleen T. Call et al., *Barriers to Care in an Ethnically Diverse Publicly Insured Population: Is Health Care Reform Enough?*, 52 MED. CARE 720, 720–27 (2014) (finding that barriers to receive certain types of care often relate to costs and access to coverage).

60 As studies have shown, people who do this also have a propensity of avoiding care even when a physician would have told them care was necessary. This, in turn, leads to poorer outcomes among people with less means and high deductibles. About half of adults have reported delaying or going without care in the past year due to cost. *See* Audrey Kearney et al., *Americans' Challenges with Health Care Costs*, KAISER FAM. FOUND. (Dec. 14, 2021), https://www.kff.org/health-costs/issue-brief/americans-challenges-with-health-care-costs/. This implies that some necessary care is not received in a timely manner because of cost, and studies of specific conditions bear that out, showing, for example, delays in receiving emergency treatment for heart attacks because of cost concerns, with subsequent poorer outcomes. Smolderen et al., *supra* note 2. The opposite is also true: people without cost concerns have better access. Rachel Garfield et al., *The Uninsured and the ACA: A Primer*, KAISER FAM. FOUND. 13–14 (2019), https://files.kff.org/attachment/The-Uninsured-and-the-ACA-A-Primer-Key-Facts-about-Health-Insurance-and-the-Uninsured-amidst-Changes-to-the-Affordable-Care-Act; Katherine Baicker et al., *The Oregon Experiment—Effects of Medicaid on Clinical Outcomes*, 368 NEW ENG. J. MED. 1713, 1713 (2013) (significant improvements to access shown among adults in study who gained Medicaid coverage); Andrea S. Christopher et al., *Access to Care and Chronic Disease Outcomes Among Medicaid-Insured Persons Versus the Uninsured*, 106 AM. J. PUB. HEALTH 67 (2016).

61 The interplay between deductibles, copayments, and premium prices is illustrated on Healthcare.gov with the prices for the various metal plans. As they decrease in actuarial value, they decrease in price.

62 See, for example, the interaction of cost and potential financial exposure in the federal metal plans. *What's the Difference Between Bronze, Silver and Gold Plans?*, BLUE CROSS BLUE SHIELD BLUE CARE NETWORK MICH., https://www.bcbsm.com/index/health-insurance-help/faqs/topics/buying-insurance/metal-tiers.html (last visited May 16, 2022).

63 Michelle Andrews, *Doctors and Hospitals Tell Patients: Show Us the Money Before Treatment*, NPR (Dec. 7, 2016), https://www.npr.org/sections/health-shots/2016/12/07/504589131/doctors-and-hospitals-tell-patients-show-us-the-money-before-treatment.

with the lowest levels of coverage for the least amount of actual premiums, with high copayments and high out-of-pocket caps. They may also not purchase insurance at all.[64]

When deciding whether to purchase insurance, the cost of premiums and deductibles are not the only considerations that individuals weigh. Purchasing insurance gets them access to preventive care with no copayments or deductibles[65] so if they would use this care for birth control, well visits for children, vaccines, etc., they can roughly estimate the cost of that care to help make calculations. Unfortunately, they also have to know how much a doctor or pharmacy charges for something with insurance and without insurance, which is generally impossible to know.[66] Somewhere in this complicated mix, a person also has to assess if it is worth purchasing insurance, even with high out-of-pocket costs for the member, to participate in the discount the insurer has negotiated with care providers.[67] A $10,000 deductible will go further paying for discounted medical care than the same $10,000 paid for care provided to an uninsured person.

Any of these options that result in underinsurance, meaning potential patient payment responsibilities they cannot afford, can be ruinous, as has been well-documented for decades. If they get sick or injured, they are at a

64 It seems highly unusual for someone to have the means to purchase insurance and decline. Data from 2019 showed that more than eighty percent of the uninsured population made less than 400% of the federal poverty level. Jennifer Tolbert et al., *Key Facts About the Uninsured Population*, Kaiser Fam. Found. (Nov. 6, 2020), https://www.kff.org/uninsured/issue-brief/key-facts-about-the-uninsured-population/. Of note, the same study also found that nearly eighty-five percent of the uninsured had at least one person in the family who was employed, so there is some income. *Id.*; *see also* Comm. on Health Ins. Status & Its Consequences, Inst. of Med., America's Uninsured Crisis: Consequences for Health and Health Care 136 (2009); Munira Z. Gunja & Sara R. Collins, *Who Are the Remaining Uninsured and Why Do They Lack Coverage?*, Commonwealth Fund (2019), https://www.commonwealthfund.org/sites/default/files/2019-08/Gunja_who_are_remaining_uninsured_sb.pdf.

65 Affordable Care Act § 2713, 124 Stat. 131 (2010) (codified at 42 U.S.C. § 300gg-13(a)).

66 As of January 2021, the federal government is proposing regulations to make cost more transparent. Nisha Kurani et al., *Price Transparency and Variation in U.S. Health Services*, Peterson-KFF Health Sys. Tracker (Jan. 13, 2021), https://www.healthsystemtracker.org/brief/price-transparency-and-variation-in-u-s-health-services/. But the expectations for this program are low. The literacy problem in health insurance is extensive. *See Health Insurance Terms*, *supra* note 7.

67 *See* Sammy Mack, *They Paid How Much? How Negotiated Deals Hide Health Care's Cost*, NPR (Nov. 15, 2014), https://www.npr.org/sections/health-shots/2014/11/15/364064088/they-paid-how-much-how-negotiated-deals-hide-health-cares-cost; *see also Transparency in Coverage Final Rule Fact Sheet (CMS-9915-F)*, Ctrs. for Medicare & Medicaid Servs. (Oct. 29, 2020), https://www.cms.gov/newsroom/fact-sheets/transparency-coverage-final-rule-fact-sheet-cms-9915-f.

high risk of debt, financial chaos, homelessness, and personal bankruptcy[68] if expensive care occurs.

It is easy to envision ruinous costs for catastrophic problems, but even if nothing catastrophic happens and someone only suffers a minor surgical emergency such as an appendectomy or a broken bone from a car wreck, almost half of people do not have the financial cushion to absorb thousands of dollars in unexpected expenses.[69] The financial chaos that ensues can be significant.

Once a person decides what they expect their expenses to be in the coming year, the financial calculations become relatively straightforward, even if they are based on necessarily imprecise and arbitrary risk assessments. A calculation of premiums, copayments, deductibles, and the savings of utilizing a HSA can be made, which should help reduce the choices. The next step is to determine if one has preferred physicians or hospitals, and the networks that are offered by different plans. These networks are, to some degree, illusory, as insurers are not bound by the prior year's network for future insured persons, but it does give some sense of scope of coverage. For example, Health Management Organization (HMO)-type plans that require a person to go to a specific place for care, such as Kaiser plans,[70] are very different from preferred provider Blue Cross Blue Shield (BCBS) plans, which tend to allow a member to seek care at most hospitals in the country and still be within the network.[71] A person can also check insurance formularies to see lists of covered prescription medications and calculate copayments, though these too can be illusory, as covered medications and rates of coverage are subject to change without warning. Pricing the purchase of medications can be shockingly complex and so this is described in a separate section below.

People who receive their insurance through an employer usually

68 The level of upheaval is hard to exaggerate. People can lose custody of their children, get evicted, lose their homes, and have destroyed credit scores that can then make it much harder to get employed, buy a home, etc. *See* David U. Himmelstein et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 AM. J. MED. 741 (2009); *see also* Sarah Kliff & Margot Sanger-Katz, *Americans' Medical Debts Are Bigger than Was Known, Totaling $140 Billion*, N.Y. TIMES (July 20, 2021), https://www.nytimes.com/2021/07/20/upshot/medical-debt-americans-medicaid.html.

69 *Report on the Economic Well-Being of U.S. Households in 2018*, *supra* note 6, at 2 (noting that 40% of Americans would have difficulties covering a $400 expense).

70 *HMO vs. PPO Plans—What Are the Differences?*, KAISER PERMANENTE (July 1, 2019), https://thrive.kaiserpermanente.org/thrive-together/health-care-101/hmo-vs-ppo-advantages.

71 *Coverage that Goes Where You Go: Travel Worry-Free with Blue Cross Blue Shield*, BLUE CROSS BLUE SHIELD, https://www.bcbs.com/articles/coverage-goes-where-you-go-travel-worry-free-blue-cross-blue-shield (last visited Mar. 18, 2022).

have limited to no choices in their coverage. For those who do have some degree of choice with their employer-sponsored coverage, it is usually a question of a flat amount that is withheld from their pay to offset some of the premiums, and then they choose a plan based on cost of any additional premiums the employee must pay, network, deductible, and copayments. This final decision rubric resembles the calculations for those who are purchasing individual insurance.

### B. *Recommendations*

The best way to resolve insurance purchasing problems, and many other problems examined in this Article, is to eradicate all components of self-insurance. Short of that, expansion of the coinsurance subsidies already in use for many Silver plans purchased on the Exchanges could be expanded to better protect a wider population. At the same time, comparable protection from onerous coinsurance burdens for those who receive coverage from employers would help ameliorate inequities across different sources of coverage.

Prior to the passage of the ACA and the concept of valuable preventive care being fully covered, one could argue that health insurance should be reserved for the type of health event that is traditionally considered insurable, meaning something unpredictable for an individual but with a predictable rate of occurrence in a population. Insurance policies were crafted to exclude fixed and predictable costs such as annual exams and deductibles were set to cover the typical illnesses that a person was likely to have over the course of a year.[72] This reserved insurance coverage for truly unusual events and allowed for a pooling mechanism that was relatively affordable. That is not what we currently have. Health insurance policies have the obligation to fund most predictable health maintenance costs at 100%, with no deductible or copayments.[73] At the same time, large deductibles and copayments kick in to cover the costs of the actual care that traditional insurance covered.[74] It is an inversion. It is also inefficient. While most Americans do not have the means to self-insure, which many deductibles and copayments require them to do for substantial amounts, they do have the capacity to participate in proper pooling mechanisms, where small contributions help offset the predictable costs that the pool will have to fund. The premium subsidies envisioned in the ACA play an important role here, because they assist

72 Jacqueline R. Fox, *Medicare Should, but Cannot, Consider Cost: Legal Impediments to a Sound Policy*, 53 Buff. L. Rev. 577, 589–90 (2005).

73 Affordable Care Act § 2713, 124 Stat. 131 (2010) (codified at 42 U.S.C. § 300gg-13(a)).

74 *Id.*

people's participation in this pooling.

Deductibles and copayments make little sense in this system. As has been shown multiple times, people delay or fail to receive medical care when they need it because the potential cost distorts the decision making,[75] and even if they do seek care, the subsequent costs are tremendously destabilizing to their individual financial well-being.[76] Providers sometimes struggle to collect money from individuals, which likely causes an administrative burden.[77] The concern about payment also fractures the relationship between provider and patient, especially for any treatments that require numerous interactions with a physician and hospital, where the unpaid balance simply increases over time, making it less likely that a patient will receive the full course of treatment that they require, either because they are unwilling to continue seeking care, given the increasing costs they are unable to pay, or because the physician will simply refuse to see them until the outstanding balance is reduced.[78]

One could argue that insurance will simply be too expensive if it insures for these costs. This argument, however, appears to be premised on the idea that the cost of insurance is somehow separate from other healthcare costs and is deserving of privileged consideration, rather than being viewed as a method for paying those costs. Currently, costs are shifted to patients who often cannot pay them. This results in problems for the patients but also for providers, who are left with bills that cannot be collected.[79] The quality of

75 Neil M. Kalwani & Alexander T. Sandhu, *High-Deductible Health Plans and Emergency Care for Chest Pain: To Go or Not to Go?*, 144 CIRCULATION 366, 350 (2021).

76 *Medical Debt Collection*, NAT'L CONSUMER L. CTR., https://www.nclc.org/images/Medical-Debt-Collection.pdf (last visited Mar. 25, 2022).

77 *Fact Sheet: Uncompensated Hospital Care Cost*, AM. HOSP. ASS'N (Feb. 2022), https://www.aha.org/fact-sheets/2020-01-06-fact-sheet-uncompensated-hospital-care-cost.

78 In some ways, this may actually resemble problems with pay day loans, where people enter into financially burdensome arrangements they know they may not be able to repay in hopes of relieving immediate problems. *See, e.g.*, John P. Caskey, *Payday Lending: New Research and the Big Question*, *in* THE OXFORD HANDBOOK OF THE ECONOMICS OF POVERTY 681, 682 (Philip N. Jefferson ed., 2012) ("Do payday lenders, on net, exacerbate or relieve customers' financial difficulties?").

79 *See* Craig Garthwaite et al., *Hospitals as Insurers of Last Resort* 1–2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 21290, 2015), http://www.nber.org/papers/w21290 (concluding that it costs local hospitals $900 in uncompensated care for every uninsured person that receives care). Garthwaite has noted how "[t]his is not a trivial thing for a hospital to deal with," as hospitals can average around seven percent profit margins, while uncompensated care costs can be more than five percent of their revenue. Maureen Groppe, *Who Pays When Someone Without Insurance Shows Up in the ER?*, USA TODAY (July 3, 2017), https://www.usatoday.com/story/news/politics/2017/07/03/who-pays-when-someone-without-insurance-shows-up-er/445756001/; *see also Fact Sheet*, *supra* note 70 (defining uncompensated care as "an overall measure of hospital

outcomes suffers as a result, along with spillover effects such as bankruptcy. The costs do not disappear by being shifted; they merely disappear for insurers. A stable, predictable, and efficient system that properly accounts for the true costs of medical care and utilizes pooling methods to cover these costs rather than relying on individual financial burdens is better, according to any metric one could legitimately apply to assess it. Put another way, the job of insurance is to insure, not to create systems for offsetting costs to those who cannot bear them.

For patients who cannot access high quality care with appropriate specialists in their networks, insurance contracts generally allow for the care to be covered at in-network levels even if is received from out of network providers. Patients, however, may not know this is an option, and so it may be helpful to require insurance companies to expressly tell them this when the issue arises. Most contracts also have clauses that protect patients from churn, where physicians, hospitals or medications are added or removed from networks during a course of treatment. Again, expressly notifying patients of these rights ought to be sufficient to ameliorate consequences. It may, however, be helpful to create more robust rules that allow for patients to receive treatment from qualified specialists at qualified centers of excellence and to allow patients to continue being treated by physicians who are already engaged with treating them for a specific condition.

## III. Deciding to Seek Care

### A. *The Process*

Determining if one should engage with the healthcare system is as, or more complex than choosing an insurance plan. A person must assess if medical care is truly necessary, doing so with no medical training and no diagnostic tools. They also must assess if they can afford to seek care, making that assessment with limited information about what type of care will be required and limited information about the cost of the care.

It is probably fair to say few people seek out medical care if it can be avoided. It is inconvenient at best, and often painful and intrusive.[80] In the

care provided for which no payment was received from the patient or insurer").

80 People who risk experiencing implicit and/or explicit bias and disrespect within the medical system are especially likely to hesitate before seeking care, fearing they will not be heard or responded to with respect and care. There are myriad groups who report this concern and have these experiences. Individuals have faced disparate medical treatment based on race, socio-economic status, weight bias, gender identity, sexual orientation, mental and/or physical illness, having a disability, etc.

non-ideal world of the United States healthcare system, many people, even those that are sick and suffering from obvious harms that need treatment, avoid getting medical care as well.[81]

Cost is a dominant concern because of how insurance plans are structured. As described in the previous section, insured people have significant responsibility for their own medical costs due to deductibles, copayments, and coinsurance. They also risk inadvertently receiving care from providers who are outside of their insurance network, even if they seek care within it, which can cause their financial exposure to greatly increase.[82]

Cost concerns, to some degree, are dependent on if someone has satisfied any deductibles or out-of-pocket maximums for the benefit year. The trends in insurance for the last ten years have been to consistently increase member financial responsibility, so this concern extends to ever larger amounts of money and ever later dates in the year. The Kaiser Family Foundation (KFF) has done several studies to understand components of this dynamic more fully. One study has shown, for example, that the dollar amount of deductibles has consistently increased for employer-sponsored insurance.[83] This delays when a person is likely to have satisfied the deductible. As of 2019, the average person with employer-sponsored care will satisfy their deductibles by May 19, a day KFF has dubbed "Deductible Relief Day."[84] So, for this population, most people will have significant expenses if they engage with the system prior to Deductible Relief Day, as their insurance is not yet paying for much of their care.

While deductibles are often quite large,[85] copayments and coinsurance can also be burdensome. In most plans, deductibles go towards the out-of-pocket maximum, but do not, by themselves, satisfy it. Many people do not have the income or savings capacity to handle relatively small sudden expenses, with 61% of the country unable to absorb a $1,000

81 *See, e.g.*, Kyle T. Smith et al., *Access Is Necessary but Not Sufficient: Factors Influencing Delay and Avoidance of Health Care Services*, 3 MED. DECISION MAKING POL'Y & PRAC. 1 (2018) (finding that many people delay or avoid non-preventative healthcare, such as doctor visits when you're sick, due in part to costs even if they had insurance).

82 Erin Duffy et al., Opinion, *Surprise Medical Bills Increase Costs for Everyone, Not Just for the People Who Get Them*, BROOKINGS (Oct. 2, 2020), https://www.brookings.edu/opinions/surprise-medical-bills-increase-costs-for-everyone-not-just-for-the-people-who-get-them/.

83 *General Annual Deductibles for Single Coverage, 2006-2018 9240*, KAISER FAM. FOUND. (2018) https://www.kff.org/report-section/2018-employer-health-benefits-survey-section-7-employee-cost-sharing/attachment/figure-7-10/.

84 *"Deductible Relief Day" is May 19*, KAISER FAM. FOUND. (May 16, 2019), https://www.kff.org/health-costs/press-release/deductible-relief-day-is-may-19/.

85 The average deductible in employee benefit plan coverage 2019 was $1,655 for a single person. CLAXTON ET AL., *supra* note 8, at 107.

expense, and 40% of people unable to absorb a $400 expense.[86] A relatively simple visit to an emergency department or internist that is fully covered by insurance can still cost a patient hundreds of dollars, money most people in the country do not have readily available.[87] A study analyzing medical debt of insured households found that roughly sixteen percent had incurred such debt.[88]

For a person to make this choice before seeing a doctor, they must assess the severity of their own symptoms, how dangerous it would be to avoid or delay care, and if they can afford the care they might need. Doing this with any accuracy is likely impossible. As with how the current system asks people to assess their individual actuarial risk when purchasing insurance, it also asks people to make complex medical determinations about themselves with no training and no diagnostic equipment. The medical determinations are not limited to figuring out if they simply need to see a doctor. Because cost is a real threat, people also must figure out if they can afford the actual care that will be provided. To do this, they must predict, again with no expertise, what their entire interaction with the healthcare system will entail so they can estimate the amounts of copayments and coinsurance they will have to pay. Even if they could determine with some rough accuracy what care is involved, they would then need to figure out if they can afford that care in a system that does not have clear and transparent pricing, making it difficult, if not impossible to assess coinsurance costs.[89]

Given that they have no medical training to inform their decision as to severity of their symptoms or what care is required, no way to ascertain the costs of whatever care is eventually required, and have a financial incentive to not seek care, it is not surprising that cost concerns often lead to bad outcomes. Consider heart attack symptoms. If a person is having a heart

86 Jeff Ostrowski, *Survey: Fewer than 4 in 10 Americans Could Pay a Surprise $1,000 Bill from Savings*, Bankrate (Jan. 11, 2021), https://www.bankrate.com/banking/savings/financial-security-january-2021/; Bd. of Governors of the Fed. Rsrv. Sys., Report on the Economic Well-Being of U.S. Households in 2018, at 2 (2019).

87 Terry Gross, *Why An ER Visit Can Cost So Much – Even for Those with Health Insurance*, NPR (Mar. 13, 2019), https://www.npr.org/2019/03/13/702975393/why-an-er-visit-can-cost-so-much-even-for-those-with-health-insurance.

88 Neil Bennett et al., *19% of U.S. Households Could Not Afford to Pay for Medical Care Right Away*, U.S. Census Bureau (Apr. 7, 2021), https://www.census.gov/library/stories/2021/04/who-had-medical-debt-in-united-states.html. Medical debt is likely far worse than this study revealed. A more recent study assessed all medical debt that was in collections in the country prior to COVID and found that more than seventeen percent of the population had this type of debt, possibly totaling around $140 billion outstanding. Kluender et al., *supra* note 1.

89 Kurani et al., *supra* note 66.

attack, it is often said that time equals heart muscle.[90] The sooner a person begins to be treated, the more of their heart can be saved from damage. Studies show that people consider both the symptoms they are having and their insurance status when deciding if they should seek care.[91] Those with insurance and the money to pay their costs, seek care faster and have significantly better outcomes than those with insurance but limited money with which to pay high out-of-pocket costs and those without insurance.[92]

For people with chronic conditions, the calculus can be different, though no less difficult. Many people with chronic conditions are very sophisticated about the care they need, its cost, and the structural complexities they need to negotiate to access that care.[93] For them, foregoing care is almost worse, because they are doing it due to cost concerns even as they know it will injure their health or that an intervention could relieve their pain.

Foregoing care, even when it is arguably needed, is not necessarily irrational. People have commitments beyond their own health concerns and often choose to suffer to save money. In a survey, roughly half of all Americans say they delay getting medical care because they cannot afford it.[94] It is difficult to offer any guidance to people who have little in savings or discretionary income when faced with these types of decisions. Not every chest pain is a heart attack but seeing a doctor to find out if the pain is truly a sign of a heart problem will cost something.

### B. *Recommendations*

The concerns patients have as described here are primarily about

90 *E.g.*, Larry Buchanan et al., *Time Is Muscle: Understanding Heart Attacks*, N.Y. TIMES (June 20, 2015), https://www.nytimes.com/interactive/2015/06/19/health/what-is-a-heart-attack.html.

91 *See* Smolderen et al., *supra* note 2.

92 *Id.*

93 Chronic condition care has gradually shifted towards educating patients, so they are capable of self management, an approach that empowers patients to take a more learned and significant role in their care. Patricia A. Grady & Lisa Lucio Gough, *Self-Management: A Comprehensive Approach to Management of Chronic Conditions*, 104 AM. J. PUB. HEALTH e25 (2014). Seeking care in the United States requires patients to negotiate the financial implications of that care, and patients with chronic conditions, through constant exposure to the limitations of the financing available to them, are thus aware of both the medical and financial implications of their situation in ways people with less experience may not have. *Id.*

94 Shawn M. Carter, *Over Half of Americans Delay or Don't Get Health Care Because They Can't Afford It—These 3 Treatments Get Put Off Most*, CNBC MAKE IT (Apr. 3, 2019), https://www.cnbc.com/2018/11/29/over-half-of-americans-delay-health-care-becasue-they-cant-afford-it.html.

potential cost, and removing or constraining patient coinsurance, as described in the section on purchasing insurance, would ameliorate them. However, if this does not happen, some other, more modest changes could make the system slightly less arbitrary and worrisome.

To provide some predictability and remove some arbitrary costs, prices must become more transparent. In an ideal world, they would also be fixed so that they are the same among care providers. A national program that sets prices is unlikely to be adopted in the near future, but examining how it would be of benefit to patients is worthwhile, insofar as it helps illustrate further the problems patients grapple with. Currently, providers have amounts that they charge in theory, but then accept greatly reduced payments from insurance providers. Uninsured people pay the full cost unless they negotiate a discount. Insurers who have large market shares are at a competitive advantage in terms of being able to negotiate lower rates than other insurance companies can. These reduced rates are called provider negotiated discounts. These discounts vary among insurers and among different plans sold by a single insurer.

An examination of the discount negotiation process reveals that it is arbitrary and unfair for insured people. People do not have the information or the ability to choose an insurer who has negotiated the best rate, and, even if they could, it would be unusual for an insurer to have the best rate for all services. This rate matters because when a patient receives care, the amount they owe for their deductible and coinsurance is based on the negotiated rate. Given the high amount of self-insurance people are bearing in the current system, this turns into very different amounts they must pay depending on the insurer they have and the contract the insurer currently has with the providers the patient sees. Setting prices across the board would smooth these differences out, so similarly situated people—those who have purchased health insurance, sought care, and currently have outstanding balances not covered by insurance—are treated the same.

The need to negotiate these prices means substantial resources are spent by all market participants—except patients—to protect their financial well-being. It also puts pressure on antitrust enforcement regimes, as a high market share by any one participant can distort cost in these negotiations. We are left expending these resources because we hope the market can achieve the right market share for all participants, the ideal balance that leads to a fair price for all parties. This generally does not happen, as antitrust scholars often point out,[95] but even were we to achieve this, it would still leave all those

95 Aimee Cicchiello & Lovisa Gustafsson, *Federal Antitrust Tools Are Inadequate to Prevent Anticompetitive Health Care Consolidation*, Commonwealth Fund: Blog (May 13, 2021), https://www.commonwealthfund.org/blog/2021/federal-antitrust-tools-are-

who are not covered by the ones with the right share at risk of bearing higher costs for the exact same product or service. The churn in pharmaceuticals is an example of how out of control these market fluctuations are, and how problematic they can be for patients, but the structure that leads to this and problems that result exist across the board.

Furthermore, having set prices would reduce administrative costs across the board and potentially also allow insurers to offer coverage for patients to see a wider variety of providers, increasing autonomy by increasing choice.

Setting prices is not as important for patients as constraining coinsurance responsibility, since their exposure to these price differences would then be lessened, but there would still be some patient benefits. Both limiting coinsurance and setting prices would allow for much simpler actuarial calculations, leading to better predictions as to the cost to insure a given group of people. Currently, we externalize cost to patients, through coinsurance, and providers, through uncollected medical bills, to artificially reduce the amount of a pool that is required to meet insurance needs. This, coupled with wide price fluctuations among all participants, makes the conversation unnecessarily chaotic and obscure. Reducing that chaos should logically lead to a more informed and rational discussion about appropriate methods for funding health care in the country overall.

## IV. THE INSURANCE CONTRACT

### A. *Types of Insurance and Corresponding Legal Regimes*

There are multiple sources of health insurance.[96] This Article is focused primarily on private insurance, provided by an employer or by an individual purchasing coverage for themselves.[97] Health insurance is a heavily regulated industry and the rules that apply are generally determined by who purchases the insurance. The laws and regulations that govern insurance are not designed to work together but rather spring from different sources in response to different problems, which makes for a complex and

inadequate-prevent-anticompetitive-health-care-consolidation; Sherry A. Glied & Stuart H. Altman, *Beyond Antitrust: Health Care and Health Insurance Market Trends and the Future of Competition*, 36 HEALTH AFFS. 1572 (2017), https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2017.0555

96 These include privately purchased insurance, Medicare (for people with disabilities or those 65 and over), Medicaid, the Medicaid Expansion, Tricare, Veteran's coverage, catastrophic short-term plans, etc.

97 Many Americans get coverage through federal or state programs such as Medicare, Medicaid, Tricare and the Veteran's Administration.

idiosyncratic body of rules that are not intuitive. The two main categories are (1) employer sponsored insurance, where a person gets coverage as an employee benefit; and (2) individual insurance, where a person purchases coverage for themselves.

An employer can either purchase a group plan from an insurance company or can self-insure and hire an insurance company to manage claims for them. This company is commonly referred to as Third Party Administrator (TPA).[98] From the employee perspective, what they know as the insurer is either the company that sells the group plan or the plan administrator. Large insurers such as BCBS and Aetna commonly serve in both roles.[99]

The health insurance provisions of the ACA apply to most private health insurance in the United States, with some provisions applying to all plans and some only applying to individually purchased plans.[100] The provisions of the Employee Retirement Income Security Act (ERISA) apply to all employee benefits, so apply to employer-sponsored health insurance.[101] States regulate insurance within their boundaries but have limited power over private employer-sponsored plans.[102]

Group plans purchased by employers are subject to state regulations, but self-insured plans are not.[103] ERISA and the ACA are the source for most rules that govern these plans. ERISA regulations have lengthy and specific requirements for how insurance coverage decisions are made.[104] The ACA has added to these.[105] Because of a broad preemption of state laws that are

98 Self-insurance refers to when an employer has enough money to cover anticipated claims for their employees. When employers self-insure, they also generally purchase stop-loss insurance or reinsurance for claims that exceed a specified amount. This amount can vary, with some employers 'self-insuring' in name, but offsetting most of the risk through reinsurance.

99 For example, Walmart is self-insured, but employees choose from multiple TPAs such as BCBS, Aetna, and United. *See* Walmart 2020 Associate Benefits Book: Summary Plan Descriptions with 2021 Summaries of Material Modifications 45 (Nov. 2020), https://one.walmart.com/content/dam/themepage/pdfsAssociateBenefitsBook-2021.pdf.

100 A summary of these provisions and the specific types of plans they apply to can be found here, *Affordable Care Act: Coverage Terms*, Soc'y Hum. Res. Mgmt., https://www.shrm.org/resourcesandtools/hr-topics/benefits/pages/aca-coverage-terms.aspx (last visited Mar. 25, 2022).

101 Employee Retirement Income Security Program, 29 U.S.C. §§ 1001–1461 (1974).

102 *ERISA Preemption Primer*, Nat'l Acad. State Health Pol'y 5 https://www.nashp.org/wp-content/uploads/sites/default/files/ERISA_Primer.pdf (last visited Mar. 25, 2022).

103 *Id.* at 3.

104 29 C.F.R. § 2560.503–1 (2020).

105 45 C.F.R. § 147.136 (2021).

included in ERISA, people who get insurance from their employers and who are harmed by the decisions made by their insurers, cannot sue for damages even if the damages were directly caused by insurer negligence or bad faith.[106] This includes when a denial of coverage leads to death or severe injury. For example, if a person loses a pregnancy because an insurance company negligently refuses to approve a fetal monitor when the doctor recommends it, that person cannot recover any damages from an employer-sponsored plan, whereas the full scope of damages would be available in a suit for damages against an individual's insurer.[107]

Individually purchased plans are governed by the ACA and are also subject to all state laws where they are purchased. State laws include mandated benefits and regulations of the business of insurance.[108] Every state historically had rules about what must be covered in insurance policies sold in the state,[109] but these mandates have become less important or have been repealed since the ACA was passed in 2010. States may still mandate that all insurance policies include specific coverage provisions, but if these provisions increase the cost of the insurance, the state must pay for that increased cost for policies sold on the Exchange.[110]

All insurance plans must participate in external reviews of their decisions once other internal options have been exhausted.[111] Many of these external review services are controlled by state governments,[112] but some insurance plans utilize a federal process as delineated in the ACA.[113] For members, they generally learn of these options through letters sent to them by their insurer, who must inform members of their rights to appeal.[114]

106 Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 HASTINGS L.J. 131, 138 (2009).

107 Corcoran v. United HealthCare, Inc., 965 F.2d 1321 (5th Cir. 1992).

108 For a discussion on how states maintain power to regulate health insurance in the current legal environment, see Brendan S. Maher & Radha A. Pathak, *Enough About the Constitution: How States Can Regulate Health Insurance Under the ACA*, 31 YALE L. & POL'Y REV. 275 (2013).

109 Before the ACA was passed, KFF maintained a list of these mandates and has since created a permanent record of what they were. *Health Insurance & Managed Care*, KAISER FAM. FOUND., https://www.kff.org/state-category/health-insurance-managed-care/pre-aca-state-mandated-health-insurance-benefits/ (last visited Jan. 13, 2022).

110 Affordable Care Act § 10104(e)(3)(B)(ii), 124 Stat. 896, 900 (2010).

111 45 C.F.R. § 147.136(b)(2)(i)(F)(1) (2011).

112 *Id.* § 147.136(c)(1).

113 *Id.* § 147.136(d).

114 *Id.* §§ 147.136(b)(2)(ii)(E), (4).

## B. *Medical Necessity and Comparative Effectiveness Research*

### i. The Contract

By writing a contract that includes a medical necessity clause, health insurers reserve the right to make decisions about the health care that their members get through their decisions about what to cover. Though a member of an insurance plan may perceive this as the exercise of medical judgment, making this type of determination does not give rise to legal arguments that the company is practicing medicine without a license or is committing medical malpractice.[115] This is counterintuitive, as an insurance decision that a treatment is not medically necessary looks like a determination that it is not good for the patient.[116] It also means it will not be paid for by insurance so, for practical purposes, the patient will not get the care.[117]

Generally, insurance contracts are written so that certain specific medical services are covered under the plan and certain other ones are not. However, these contracts are also drafted to make a finding of medical necessity a condition precedent to any services that are covered. Insurance companies have historically reserved similar rights to themselves. Prior to the wide acceptance of managed care principles, insurance companies would refuse to pay for services that were not reasonably necessary. This language, in fact, is still embedded in the Medicare Act, which uses language taken from an Aetna policy that covered federal employees in 1964. Court opinions from that time interpreted the clause to mean that physicians had

115 There was some thought when the ACA was passed that it would regulate the definition of medical necessity, *see, e.g.*, Daniel Skinner, *Defining Medical Necessity Under the Patient Protection and Affordable Care Act*, 73 Pub. Admin. Rev. S49 (2013), https://onlinelibrary.wiley.com/doi/epdf/10.1111/puar.12068, but this did not happen. An insurer can be liable for bad faith decisions (if these claims are not preempted by federal law) and may also be liable for malpractice if it makes decisions that combine both medical and insurance decisions, but, in a series of ERISA decisions, courts have generally agreed that medical necessity, by itself, is not the practice of medicine. "One distinction drawn by the courts and utilized to avoid preemption of claims against HMO's by Welfare Plan participants and beneficiaries is the 'quality of care or treatment rendered versus quantity of benefits' distinction." Michelle K. Buford, *ERISA Preemption of Claims Against Managed Care Organizations*, Sullivan Stolier Schulze, LCC, https://www.sullivanstolier.com/erisa-preemption-of-claims-against-managed-care-organizations/ (last visited Jan. 14, 2022).

116 Comm. on Utilization Mgmt. by Third Parties, Inst. of Med. (US), Controlling Costs and Changing Patient Care? The Role of Utilization Management 46, 195 (Bradford H. Gray & Marilyn J. Field eds., 1989).

117 *See* David Lazarus, *When Your Insurer Denies a Valid Claim Because of 'Lack of Medical Necessity*,' L.A. Times (Jan. 23, 2018), https://www.latimes.com/business/lazarus/la-fi-lazarus-healthcare-claim-denials-20180123-story.html.

the authority to determine if the care was necessary, but insurers could argue the cost was unreasonable.[118]

Current jurisprudence recognizes that modern insurance contracts reserve much more power to make qualitative determinations as well as the more quantitative ones concerning cost.[119] These determinations are still not considered medical decisions and are not subject to the legal liabilities that attach to a medical standard of care.[120]

Below is an example of one such contract definition, where the contract uses the term "Medically Appropriate and Necessary," a term that is repeated throughout the contract as a limitation on any care that is covered. This term is defined in the Definitions section of the insurance contract, this example, from a Blue Cross Blue Shield of North Dakota contract in 2021, reads:

> **MEDICALLY APPROPRIATE AND NECESSARY-**services, supplies or treatments provided by a Health Care Provider[121] to treat an illness or injury that satisfy all of the following criteria as determined by BCBSND:
>
> A. The service, supplies or treatments are medically required and appropriate for the diagnosis and treatment of the Member's illness or injury;
>
> B. The services, supplies or treatments are consistent with professionally recognized standards of health care; and
>
> C. The services, supplies or treatments do not involve costs that are excessive in comparison with alternative services that would be effective for diagnosis and treatment of the Member's illness or injury.[122]

Note, first, the phrase "as determined by BCBSND" at the end of

118 For a discussion of these cases, see Fox, *supra* note 72, at 594–95.

119 A robust reservation of discretion is particularly important for ERISA plans, those provided as employee benefits, because federal courts will use an arbitrary and capricious standard of review for benefit determinations for plans that do so.

120 There is a cause of action for insurance negligence that controls insurance behavior, to some degree, in individual plans. An early study of newer managed care cost control provisions found that courts were unlikely to intercede to protect patients. Peter D. Jacobson, *Legal Challenges to Managed Care Cost Containment Programs: An Initial Assessment*, 18 HEALTH AFFS. 69, 76 (1999). But some controls eventually emerged. This has an important caveat, however, which is that most people simply do not sue for benefit denials.

121 This capitalized term is also defined in the Definitions section.

122 This clause can be found in a Silver Plan offered in 2021 which could be purchased on the exchange from Blue Cross Blue Shield of North Dakota.

the first clause. This does heavy lifting, giving what appears to be absolute discretion to the insurer. It makes no reference to how it will make such a determination and gives no resources it will consult or be bound by.[123] The remaining parts of the definition have numerous words and terms that beg for clarity, making the breadth of this reservation of discretion obvious.

"Medically required and appropriate" leaps out as an example of indeterminant language. Of course, a person should not get care that is not required or appropriate. If they are sick or injured, they need the care that is going to help them and should not have medical treatments that are unnecessary or unlikely to be of benefit. If such treatments were performed, the patient might suffer from delaying proper treatment, as well as bearing the risks, pain, cost, and inconvenience of bodily intrusions for no defensible purpose.

This phrase is then followed by a requirement that the care be "consistent with professionally recognized standards of health care," which seems, on the face of it, to be a restatement of the first limitation in the definition. It appears that the only way both phrases have meaning separate from each other is if the insurer is reserving the right to determine something is not medically required or appropriate, even if it is consistent with professionally recognized standards of health care.

The third limitation gives some idea of the types of care that might be consistent with professional standards, yet not be medically required or appropriate. The insurer is reserving the right to refuse coverage for care whose "costs . . . are excessive in comparison with alternative services that would be effective for diagnosis and treatment."[124] The words "excessive," "alternative," and "effective" remain undefined, again reserving discretion to the insurer.

Subsection C of this definition is, in its simplest form, a clause allowing for Comparative Effectiveness Research (CER) done on populations to be utilized when making individual coverage decisions. This is a powerful tool that is certainly underutilized in the healthcare system but, improperly wielded, can be very problematic. When CER was publicly proposed for Medicare, the response was primarily negative,[125] and the federal government has taken decades to implement it or fund its collection. CER is currently funded but its use is limited by a process that embeds it within

123 In essence, the contract is allowing as much discretion as courts will allow in a subsequent lawsuit.

124 This language can be found in a Silver Plan offered in 2021 which could be purchased on the exchange from Blue Cross Blue Shield of North Dakota.

125 Fox, *supra* note 72, at 612–13.

a strict protocol for protecting patients from its potential negative effects.[126]

Here, in a private health insurance contract, it is baldly stated as a right retained by the insurer, a striking statement to a reader familiar with the debates about CMS' proposals and the eventual language creating the Patient-Centered Outcomes Research Institute (PCORI) in the ACA.

Properly done, CER allows for the re-examination of existing treatments, many of which have never been subject to an evidence-based review and allows third party payers to use market power to incentivize the collection of targeted evidence of efficacy before approving coverage for new treatments. A significant utility of CER, in this context, is in gap filling for problems created by the United States Food and Drug Administration (FDA) approval process.

The FDA does not require a drug or device to be tested against existing treatments, merely that a drug or device be safe and effective compared with doing nothing for any specific illness or injury.[127] Once it is

126 *Comparative Effectiveness Research*, AM. COLL. PHYSICIANS, https://www.acponline.org/system/files/documents/advocacy/where_we_stand/assets/ii10-comparative-effectiveness-research.pdf (last visited Mar. 25, 2022). The ACA established the Patient-Centered Outcomes Research Institute (PCORI), which

> is required to prioritize the healthcare areas to address, engage in research and evidence synthesis efforts, and disseminate its finding to all stakeholders in an understandable manner. In May 2012, PCORI approved a National Priorities for Research and Research Agenda. The function of the Institute is solely informational; it is specifically precluded from making mandates regarding coverage, reimbursement[,] or other policies for any public or private payer. Nonetheless, it is expected that both private and public payers will over time use the comparative effectiveness information from this trusted source in various policy decisions.
>
> The federal government is permitted only to use the evidence and findings from the Institute to make a Medicare coverage determination if the process is iterative (based on multiple sources), transparent, includes public comment and considers the effect on subpopulations. Furthermore, the federal government is prohibited from using this information in determining Medicare coverage, reimbursement, or incentive programs in a manner that would preclude or have the intent to discourage individuals from choosing health care treatments based on how the individual values the tradeoff between extending the length of life and the risk of disability. The enabling legislation also specifically prohibits the Institute from using cost-effectiveness analyses (e.g.[,] quality adjusted life years (QALY) for establishing as a threshold what health care is cost-effective or recommended).

*Id.*

127 *Frequently Asked Questions About the FDA Drug Approval Process*, U.S. FOOD & DRUG ADMIN.,

approved, physicians can use these drugs or devices off-label for treatments other than the ones the FDA was considering in its approval process, limited only by insurance coverage decisions. This approval process, in turn, creates an incentive for drug and device manufacturers to not pinpoint the specific populations their wares are most effective for, but instead to design studies that cast the widest net possible, pulling in the broadest constellation of patients that can achieve a sufficient showing of effectiveness to gain FDA approval.

For conditions that have existing treatments, CER allows insurers to compare the benefit and cost of more and less expensive drugs and devices as well as newer and older ones. This, in turn, can incentivize manufactures to design studies that show when the more expensive drug or device is truly more useful for a specific population, which then minimizes waste and patient risk. The same logic can apply to other medical innovations, with the same goal of increasing quality by encouraging less waste and better outcomes.

Even at its best, however, utilizing CER includes trade-offs. It is being used to compare a treatment that has already been found to be effective with other treatments that have also been found to be effective. Tracking comparative effectiveness of treatments across populations is not the same as a specific person's experience and using population-based studies to dictate what is used on someone may or may not improve their individual outcome.

Embedding CER in coverage and using it to limit the treatments that are available will mean that some people do not receive the best care in a timely manner. Unfortunately, absent the ability to predict accurately how an intervention will work on individual patients, which we do not yet have, this happens with any choice, not just those guided by comparative effectiveness.

This type of research is much more problematic when the scale tips towards cost containment, where evidence of effectiveness is merely part of an overall goal of saving money. The lessons from CER are not designed to merely control cost but are meant to be used to pursue the best overall outcome, allowing for cost considerations. The risk of CER being improperly used is what concerned people when the Centers for Medicare and Medicaid Services (CMS) sought to collect and utilize this type of data starting decades ago.[128] Unsupervised use of CER in private insurance is far

https://www.fda.gov/drugs/special-features/frequently-asked-questions-about-fda-drug-approval-process (Feb 7, 2017).

128 CMS has never had the ability to consider cost when making coverage decisions, being bound by statutory language that limits it to considering what is "reasonable and necessary" for treatment. Changing this would allow CMS to keep up with private

less likely to be examined than its use by a large government agency would be.

Finally, a deeply problematic way of using CER is to refuse or delay coverage for treatments because they are expensive, even in circumstances where a patient and their provider have sufficient reasons for seeking the coverage. This contract reserves the right to do this, and in fact, expressly does this in its coverage of prescription drugs. While the cost sharing arrangements for prescriptions are described in the body of the contract, the Definitions section contains a definition for "Step Therapy" within its definition of "Prescription Medication or Drug" which states:

> **Step Therapy**[129]—the process of trying another proven, cost-effective medication before coverage may be available for the drug included in the Step Therapy program. Many Brand Name drugs have a less-expensive Generic or Brand Name alternative that might be an option. There must be documented evidence that another eligible medication in the same or different drug class has been tried before the Step Therapy medication will be paid under Outpatient Prescription Medication or Drug benefit.[130]

Reading this section closely, the insurer is reserving the right to refuse a patient access to a medication prescribed by the treating physician unless the patient first uses a different medication chosen by the insurer. The key phrase triggering this requirement is "proven, cost-effective," which is not

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insurers, but it would also offer a significant counterbalance to misapplied comparative effectiveness research that may be distorting people's access to beneficial care in private plans. If comparative effectiveness claims are being made by insurers to deny care or shift costs to patients in questionable circumstances, it might be worth CMS revisiting its role.

129 Step therapy is wide-spread and well researched in health policy. It is widely known to be problematic. *See, e.g.*, Rahul K. Nayak & Steven D. Pearson, *The Ethics of 'Fail First': Guidelines and Practical Scenarios for Step Therapy Coverage Policies*, 33 HEALTH AFFS. 1779–80 (2014). For additional perspectives by care providers and health advocates who are concerned about the negative impact of step therapy, see also David K. Karp & Ann M. Palmer, *Step Therapy Hurts America's Sickest Patients—Reasonable Parameters Are Needed Now*, MSN (May 25, 2021), https://www.msn.com/en-ca/news/newspolitics/step-therapy-hurts-americas-sickest-patients-—-reasonable-parameters-are-needed-now/ar-AAKnuFg, and Brandon M. Macsata, *Why Managed Care's Fail First Requirements are A "Step" in the Wrong Direction*, MY PATIENT RIGHTS: STAY INFORMED BLOG (June 15, 2021), https://mypatientrights.org/stay-informed/why-managed-cares-fail-first-requirements-are-a-step-in-the-wrong-direction/. The issue relevant here is its role in the patient experience of insurance and the strange use of CER as a justification for it, but it appears step therapy also has a measurable negative effect on health outcomes.

130 This language can be found in the Definitions section of a Silver Plan offered in 2021 which could be purchased on the exchange from Blue Cross Blue Shield of North Dakota.

defined anywhere in the contract. A different BCBS plan, in Michigan, offers this explanation of step therapy for their members:

> [BCBS] may require prior authorization or step therapy for drugs that:
>
> Have dangerous side effects or can be harmful when combined with other drugs
>
> Should only be used for certain health conditions Can be misused or abused
>
> Are prescribed when there are preferred drugs available that are *just as effective*[.][131]

The first three conditions apply to most prescription medications, reserving a wide scope of power to the insurer to potentially require preauthorization for anything they choose to. The fourth condition contains the phrase "just as effective" which is meaningless, from a medical or legal perspective, as the word "just" has no clear definition and "as effective" implies a certitude in the results of CER that does not occur. The other conditions where step therapy or prior authorization may be required are also problematic, though the dangerous side effects/harmful in condition one is arguably protective in case the prescribing provider and pharmacy do not have complete information about other medications the patient is taking or fail to solicit informed consent with proper warnings. The clause "should only be used for certain health conditions" is written in a somewhat cagey and undefined manner, leaving the phrase "certain" to carry a lot of water and not giving guidance as to who determines which ones are considered, but can work to push back against drug company marketing, providing a counterweight to protect patients from, for example, unnecessary wide spectrum antibiotic prescribing.

The crux of the matter is that there are health problems where the best treatment is expensive and where there are less expensive alternatives that treat a similar diagnosis in other people but may not perform well in the patient seeking coverage. For people with experience in treating their own conditions and working closely with physicians who also have this knowledge and trust in the patient's reporting, this type of clause leads to delays in treatment, poorer outcomes, and a persistent sense of stress and devaluing

131 *Prior Authorization and Step Therapy Coverage Criteria*, Blue Cross Blue Shield Care Network Mich., https://www.bcbsm.com/content/dam/public/Consumer/Documents/help/documents-forms/pharmacy/prior-authorization-and-step-therapy-guidelines.pdf (Apr. 1, 2022) (emphasis added).

of the patient's knowledge of themselves.[132] There are myriad examples of this, including medications for psoriasis,[133] psychiatric conditions,[134] and diabetes, all of which are impacted by formulary restrictions which may include step therapy.[135]

The use of vague claims of comparative effectiveness as a basis for this type of decision, coupled with facially unprovable criteria, such as "just as effective," is a weak ground for insurers to stand on, particularly in a case with even minimal evidence that a patient requires immediate access to the more expensive drug. In other words, a denial of coverage or a requirement for step therapy would often be difficult to justify in litigation and would also likely fail in an appeal conducted by an attorney. An examination of the complexity of true CER, especially related to any one specific claim about it, coupled with a contract's promise to cover prescription drugs (absent an actual exclusion of the one in question), would lead to any one drug being covered for any specific patient.

But returning to the lived experience of patients, the contract rights and access to process are rendered almost meaningless in this context. Insurers have appropriated the language of CER to create a structure where patients are routinely deprived of timely access to care that would help them.[136] This language, devoid of the rigorous research and careful recommendations CER was meant to consist of, is coupled with programs such as step therapy, staking out broad turf in health care. Doctors accept it as a routine aspect of practicing medicine[137] and patients are counseled that

132 Jennifer Snow et al., *The Impact of Step-Therapy Policies on Patients*, XCENDA AMERISOURCEBERGEN, https://www.xcenda.com/-/media/assets/xcenda/english/content-assets/white-papers-issue-briefs-studies-pdf/impact-of-step-therapy-on-patients_final_1019.pdf?la=en&hash=A7BB3FA4DAC189D9240CF8B724B435A8942E91DF (last visited Aug. 1, 2021).

133 Jessica Burgy & Mark G. Lebwohl, *To Limit the Harms of Step Therapy, Implement Robust Standards and Protect Physician Autonomy*, HEALTH AFFS. BLOG (Dec. 22, 2020), https://www.healthaffairs.org/do/10.1377/hblog20201221.255119/full/.

134 Sharona Hoffman, *Step Therapy: Legal, Ethical, and Policy Implications of a Cost-Cutting Measure*, 73 FOOD & DRUG L.J. 38, 42, 47 (2018).

135 *See* Rashad I. Carlton et al., *Review of Outcomes Associated with Formulary Restrictions: Focus on Step Therapy*, 2 AM. J. PHARMACY BENEFITS (2010).

136 Sharona Hoffman has a thorough analysis of this problem in her law review article, *supra* note 134. Even as she recounts numerous stories of successful appeals, she also describes the health and financial costs of the delays that the patients suffered before getting access to the care they needed. She notes that major problems with step therapy include: "[L]ack of transparency, inflexibility that may disregard emerging evidence from precision medicine and other research initiatives, and discrimination." Hoffman, *supra* note 134, at 41.

137 *See, e.g.*, *Mitigating the Negative Impact of Step Therapy Policies and Nonmedical Switching of Prescription Drugs on Patient Safety*, AM. COLL. PHYSICIANS (2020), https://www.acponline.

drugs the doctor believes are less efficacious or even likely to cause harmful side effects simply have to be tried first, with symptoms and bad outcomes endured,[138] even as every single person involved in that patient's care know it is not the best decision.[139]

### i. Recommendations

CER language, absent the rigorous of true CER, appears to have been adopted by insurers. This has created a significant risk of a widespread impact on the quality of care patients are receiving, with often questionable results.[140] The responsibility of conducting and interpreting CER, as well as formulating recommendations from those findings, in all but the most straightforward of scenarios[141] ought to be removed from insurers so that proper CER is conducted and disseminated. PCORI[142] already does this, bound by rigorous standards that have been subject to extensive public debate, making this private undertaking that adheres to none of the PCORI standards particularly vulnerable to criticism. Furthermore, putting CER in the hands of publicly funded researchers who will disseminate their findings is more efficient than requiring each insurer to conduct its own research.

Improper medical necessity determinations, couched in the language of CER, can have broad reaching, problematic effects on how care is provided. We risk providers conflating inaccurate CER conclusions with actual quality standards. This lets short sighted, cost-based rationing drive how medical care is provided without even requiring that these rationing decisions be justified with evidence of improved outcomes and overall reductions in spending.

CER, no matter its source, can lead to decisions about how care ought to be provided. These decisions impact all care, provided for all

org/acp_policy/policies/step_therapy_nonmedical_switching_prescription_drugs_policy_2020.pdf.

138 *What Is Step Therapy and What Does It Mean for Patients?*, Pfizer, https://www.pfizer.com/news/hot-topics/what_is_step_therapy_and_what_does_it_mean_for_patients; *Mitigating the Negative Impact of Step Therapy Policies and Nonmedical Switching of Prescription Drugs on Patient Safety*, *supra* note 137.

139 *Mitigating the Negative Impact of Step Therapy Policies and Nonmedical Switching of Prescription Drugs on Patient Safety*, *supra* note 137.

140 *See* Nayak & Pearson, *supra* note 129.

141 An example of this type of scenario would be a clearly equivalent generic drug being reimbursed at a higher rate than the name-brand one.

142 PCORI describes itself as an independent nonprofit founded for the purpose of providing trustworthy information to help guide truly complex decisions where there are multiple possible ways of treating a problem. *About PCORI*, PCORI, https://www.pcori.org/about/about-pcori (last visited Apr. 1, 2022).

persons. Those debating its use, while seeking methods for doing it properly, recognize the importance of transparency, peer review, and stakeholder perspectives. The insurance contracts discussed above do not require any of the safeguards that protect the quality of the research, and the decisions being made by the insurance companies purporting to be based on CER are risking the quality of all care in the country.

Furthermore, step therapy must be constrained. If it is to be allowed at all, it ought to be based on proper CER and it cannot be implemented merely due to insurance preferences arising from shifting costs of specific medications, as described in more detail below. It ought not be implemented based solely on the patient's experience with that insurer or during a singular course of an illness but must, instead, consider the individual patient's entire medical history, so that a patient is not required to undergo step therapy using a medication that has already failed or under circumstances where the treating physician has a reasonable belief that it is contra-indicated.

For those with chronic conditions, the application of step therapy requirements can be particularly inappropriate and inefficient. Assuming an insurer's decision to utilize step therapy is motivated by something other than rapaciousness, a procedure for protecting patients with lengthy medical histories from being forced to use a drug that they know does not work would, logically, constrain waste and improve outcomes. For example, an advocate within the insurance company, who is familiar with the patient and the condition, can be empowered to determine that step therapy is not necessary. This ensures that the value of the patient's prior experience with their care is incorporated into the insurer's decision-making process.[143]

### C. *Prescription Drug Coverage*

#### i. The Contract

Insured people's interactions with prescription drug coverage help to illustrate how the system creates hurdles for people without sophisticated research capacity, internet access, and access to means of travel. Issues of cost, problematic insurance behaviors, and patient lack of medical or legal knowledge are also present here, as they are in the other examples in this Article. These problems can be present for those with the means to cover copayments and deductibles, though are logically going to be worse

143 This proposal builds on the model of case management that insurers experimented with in the 1980s. Mary G. Henderson et al., *Private Sector Initiatives in Case Management*, HEALTH CARE FIN. REV. (Supp. 1988), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4195124/pdf/hcfr-88-supp-089.pdf.

for those who do not have those means, since less money is associated with less control over one's time[144], no or lower quality internet,[145] and fewer transportation options.[146] Given that close to half of all people in the country use prescription drugs in any one month,[147] problems with prescription drug coverage are also important absent any implications these problems might have for insurance more generally.

The cost of the same drug can vary widely depending on the method for payment and the place a person buys it.[148] Payment and reimbursement rates for drugs are set against a backdrop of a system of procurement and provision that stymies even sophisticated professionals who work in the field, and the cost savings from negotiating this system well can be substantial. For example, the chart below is from a study that maps the flow of money through the industry and demonstrates the various participants in the prescription drug marketplace.[149]

144 For a nuanced study of work, social class, race, gender, etc. and how this relates to control over one's schedule, see Naomi Gerstel & Dan Clawson, *Control Over Time: Employers, Workers, and Families Shaping Work Schedules*, 44 Ann. Rev. Socio., 77 (2018), https://www.annualreviews.org/doi/10.1146/annurev-soc-073117-041400.

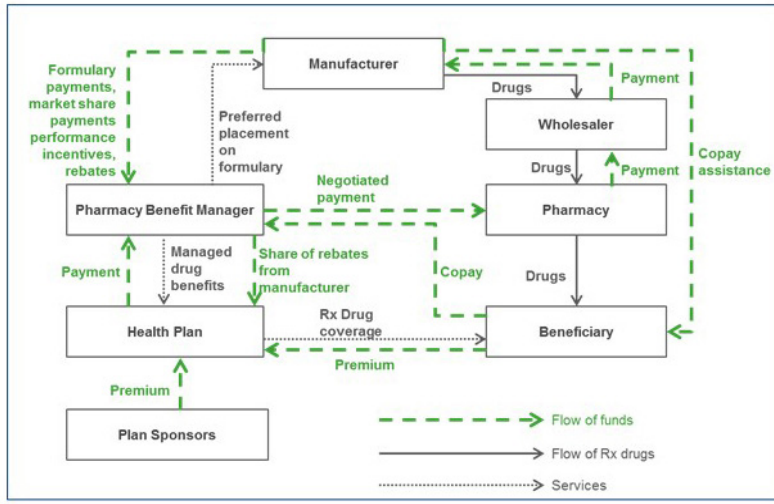
145 Kendall Swenson & Robin Ghertner, *People in Law-Income Households Have Less Access to Internet Services*, U.S. Dep't Health & Hum. Servs. (Apr. 2020), https://aspe.hhs.gov/sites/default/files/private/pdf/263601/Internet_Access_Among_Low_Income.pdf.

146 Wesley Jenkins, *The Unequal Commute*, Urb. Inst. (Oct. 6, 2020), https://www.urban.org/features/unequal-commute.

147 The CDC has found that between 2015 and 2018, 48.6% of people in the country use prescription drugs in any given 30-day period. *Therapeutic Drug Use*, Ctrs. for Disease Control & Prevention (Oct. 20, 2021), https://www.cdc.gov/nchs/fastats/drug-use-therapeutic.htm.

148 *See* Kevin Fiscella et al., *A Practical Approach to Reducing Patients' Prescription Costs*, Fam. Prac. Mgmt., May–June 2019, at 5, 7, https://www.aafp.org/fpm/2019/0500/p5.html?cmpid=em_FPM_20190515 (stating how websites such as that from GoodRx can provide comparative costs between pharmacies and coupons for drugs, and because one study found nearly one quarter of filled prescriptions, patient copayments exceeded the reimbursement pharmacies receive from insurance, "shopping around could help" (citing Karen Van Nuys et al., *Overpaying for Prescription Drugs: The Copay Clawback Phenomenon*, USC Schaeffer Ctr. for Health Pol'y & Econ., at 1 (Mar. 2018), https://healthpolicy.usc.edu/wp-content/uploads/2018/03/2018.03_Overpaying20for20Prescription20Drugs_White20Paper_v.1-2.pdf).

149 Neeraj Sood et al., *Flow of Money Through the Pharmaceutical Distribution System*, USC Schaeffer Ctr. for Health Pol'y & Econ., at 2 (June 6, 2017), https://healthpolicy.usc.edu/wp-content/uploads/2017/06/USC_Flow-of-MoneyWhitePaper_Final_Spreads.pdf.




It is important for the patient to engage with the complexity because the potential cost savings are important. From an outcome perspective, cost is a significant component of patient non-compliance with medications, so navigating the payment system well can lead to better outcomes overall by reducing cost impediments.[150]

Insurance plans often sort drugs into tiers of coverage, with lower numbered tiers costing patients less in copayments than higher tiers do. Problems arise across the tiers. Generally, inexpensive generic drugs are in the first tier. Oddly, these can be so inexpensive as to cost less than the copayment, allowing the insurance company to claw back any excess that remains from the patient's copayment and profit from the patient filling the prescription, as discussed in more detail below. For higher tiers, many of the tier assignments are justified with reference to CER (as discussed in the prior section) but often the assignments appear to reflect little more than immediate costs to insurers.[151] Patients can have a need for a medication with no tier one options, with no choice beyond paying high potential costs or foregoing the medication. To further complicate this, some expensive drugs are both in higher tiers and require patients to use step therapy, undergoing a course of a drug that is different from what their physician initially prescribes and prove that drug fails to work or has unendurable negative effects on the

150 Fiscella et al., *supra* note 148, at 5.

151 For example, looking at the chart in Sood et al., *supra* note 149, the pharmacy benefit manager negotiates with manufactures and pharmacies, and these negotiations result in regular changes to formularies. Different brands of insulin, for example, can move among tiers depending on these contracts.

patient's health. Only then can they gain coverage for the more expensive, higher tier drug, which they then pay more for because that tier has a higher patient copayment.

The calculations need to begin once a patient is aware that a prescription is forthcoming because most prescriptions are transmitted electronically to a specific place, and prices can vary among pharmacies. It is time-consuming for a patient to direct their care provider to issue a new prescription to a different pharmacy after the patient has left, as many offices have systems that can take between one and three workdays to issue prescriptions once a patient has left the office. This could delay the patient's access to necessary medications. A patient can also ask for a paper prescription, which will increase the time they have to do research. The research generally requires access to the internet, generally by cellular phone if it happens in the doctor's office. A person can research some options by visiting different stores, though this is much more burdensome and may not give them access to all cost saving options.

First, a patient must calculate how much their insurance plan will cover and how much the patient must pay under the terms of the contract. The next step is to research if the drug is available at a reduced rate without any insurance at any pharmacy they have access to, such as a Target or Walmart.[152] Both of these chains have many common prescriptions available for $4 a month.[153] It may seem, initially, that the best approach is to go to a pharmacy that accepts one's insurance, pay the copayment and any deductibles, and then take the medicine, but these pharmacy prices are generally less than the copayments would be, even for Tier one drugs.

Purchasing prescription drugs is common. The average person in their fifties fills approximately twenty prescriptions a year.[154] For those with chronic conditions, the number of prescriptions filled every year can be much higher.[155] Once the number of prescriptions begins to climb, patients must consider the need to save money on individual prescriptions, by choosing the lower cost option at the pharmacy, versus paying a higher cost and having that money go towards their coinsurance responsibilities. For example, in the

152 These are usually posted on the store websites. *See, e.g.*, *$4 and $10 Generic Medication List*, Target Pharmacy (Nov. 2010), https://tgtfiles.target.com/pharmacy/WCMP02-032536_RxGenericsList_NM7.pdf, and *$4 Prescriptions*, Walmart, https://www.walmart.com/cp/4-prescriptions/1078664 (last visited Mar. 31, 2022).

153 *Supra* note 152.

154 Statista Research Department, *Prescriptions Per Capita in the United States by Age Group*, Statista, https://www.statista.com/statistics/315476/prescriptions-in-us-per-capita-by-age-group/.

155 *Prescription Drugs*, Geo. U., https://hpi.georgetown.edu/rxdrugs (last visited Mar. 31, 2022).

South Carolina insurance plan for state employees, a Tier one copayment is $9.[156] If a person has twenty prescriptions a year, a $4 prescription will cost $80, whereas using their insurance, the same prescriptions will cost $180, with the bulk of that likely going to the insurer. For people with chronic conditions who use multiple drugs a month, the amounts can be much higher. If a person is likely to meet their out-of-pocket maximum in a year, paying higher drug costs and funding the insurance claw backs to reach that maximum faster may be a sound decision.

Claw backs seem problematic. The scenarios described above show that the cost of drugs is fluid and that some drugs are inexpensive for pharmacies to purchase. These inexpensive drugs, in turn, create the opportunity for insurers to take money from their members because the cost is less than the copayment. It seems almost inconceivable that insurers are profiting from some prescriptions that they are, in theory, "covering," because the actual price is lower than what the patient is paying. Yet they definitely do, most often with generic drugs, and especially with the most commonly prescribed ones. A study conducted in 2013 found that these claw backs occurred in twenty three percent of pharmacy prescriptions, where patient copayments exceeded the average reimbursement paid by the insurer by more than $2.[157]

The very idea of a claw back is startling, as the reason a person purchases health insurance is to have help offsetting the costs of medical care. The contract, and the educational materials that patients receive, couch the patient's responsibility in terms that appear to be clear, that there are costs that must be borne, and the plan has divided those costs between the patient and the insurer. A claw back violates the core of this agreement, as the implication created by the language of the contract is of co-responsibility for fixed costs, not of patients paying a bonus to the insurer for access to medicine supplied by other parties.

The cost differences between different drugs can be substantial, leading doctors to attempt to prescribe medications at the lowest tier they can, or to counsel their patients about discount options.[158] When it appears that a higher tier drug is the best option, the patient risks spending far more money than they need to for that drug if they lack the sophistication and

156 *2021 Insurance Benefits Guide*, S.C. PEBA S.C. RET. SYS. & STATE HEALTH PLAN 80 (2021), https://www.peba.sc.gov/sites/default/files/2021_ibg.pdf.

157 Van Nuys et al., *supra* note 148.

158 *See* Fiscella et al., *supra* note 148. For a detailed study of tiers and cost sharing in the United States, see GARY CLAXTON ET AL., KAISER FAM. FOUND., EMPLOYER HEALTH BENEFITS 2019 ANNUAL SURVEY (2019), https://files.kff.org/attachment/Report-Employer-Health-Benefits-Annual-Survey-2019.

resources to find bargains.

For more expensive or unusual medications, then, the next step is checking various coupon companies that offer discounted prescription medications.[159] This can be useful when a person's deductible has not been satisfied or when the final payment, after the coupon, is less than the patient's co-payment would be for a drug in a high tier. Drugs purchased with coupons likely do not count towards deductibles or copayments, however.[160]

A popular coupon company is GoodRx.[161] As an example of how this works, consider a patient who is told to use PrEP, also known as Descovy or Truvada,[162] in June of 2021. PrEP is a prescription medication that can protect a person from contracting HIV, even if they are exposed.[163] Insurance companies have covered PrEP but historically have covered it in the highest tier, with the highest level of patient cost sharing.[164] Because it has proven to be an excellent preventive measure, it has been found to be preventive care under the ACA, and so should be available under many insurance plans with no copayments and without satisfying the deductible.[165] Private insurers

159 These coupons sometimes have common drugs at prices that are lower than the $4 lists.

160 Emma Ryan & Emily Fitts, *The Hidden Costs of Discount Cards: Understanding Copay Accumulator Adjustment*, DIATRIBE (Mar. 22, 2019), https://diatribe.org/hidden-costs-discount-cards-understanding-copay-accumulator-adjustment.

161 GoodRx has an interesting FAQ about whether the amount a patient pays using their coupons goes towards satisfying their deductibles or can count as an out of network cost that satisfies out of pocket caps. In effect, it says the company has tried to get clear answers about this from insurance companies and has failed. Sometimes it happens, sometimes it does not, and they have no clear reason for either result. *Insurance and GoodRx*, GOODRX, https://www.goodrx.com/insurance/goodrx (last visited Mar. 31, 2022).

162 *See* Hope Chang, *Truvada vs. Descovy for PrEP*, GOODRX (Sept. 17, 2021), https://www.goodrx.com/conditions/hiv/descovy-vs-truvada (noting that PrEP medications include Truvada and Descovy).

163 *Deciding to Take PrEP*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/hiv/basics/prep/prep-decision.html (last visited Mar. 31, 2022). PrEP is very effective but the choice to use it comes with stigma, making any cost impediments particularly problematic, as they could tip the balance away from using it. For an excellent discussion of PrEP stigma, see Doron Dorfman, *The PrEP Penalty*, 63 B.C. L. REV. (forthcoming 2022), https://lawdigitalcommons.bc.edu/bclr/vol63/iss3/3/?utm_source=lawdigitalcommons.bc.edu/bclr/vol63/iss3/3&utm_medium=PDF&utm_campaign=PDFCoverPages.

164 *See* Emma Sophia Kay & Rogério M. Pinto, *Is Insurance a Barrier to HIV Preexposure Prophylaxis? Clarifying the Issue*, 110 AM. J. PUB. HEALTH 61, 61 (2020).

165 Landon Myers & Sean Bland, *Most U.S. Health Plans Must Now Cover the Full Cost of PrEP, but More than the Medication Is Needed for HIV Prevention*, O'NEILL INST. NAT'L & GLOB. HEALTH L. (Jan. 19, 2021) https://oneill.law.georgetown.edu/most-u-s-health-plans-must-now-cover-the-full-cost-of-prep-but-more-than-the-medication-is-needed-for-hiv-prevention/. In June 2019, PrEP was determined to be a preventive service

have been slow to implement this coverage, even with robust evidence of cost effectiveness and efficacy, even months after it should have been provided at no cost.[166] For people in plans that have not yet shifted to full coverage or those in grandfathered plans,[167] the cost sharing is substantial. PrEP costs roughly $2,000 a month without insurance.[168] A typical insurance cost sharing for PrEP is 30% after satisfying any deductibles,[169] leaving roughly $600 a month as a copayment. As of February 2022, GoodRx had coupons available for PrEP brand Truvada varying from a cost to patients of $38.32 for a month at Publix[170] to $719.13 at Walmart.[171] For one month of medicine, using a coupon at Publix would offer savings. However, if a patient is in a plan with an unmet deductible or an unmet out-of-pocket cap, especially if the coupon savings are not as dramatic as with Publix, it may make more sense to pay the insurance price, even though it is inflated. Each dollar paid towards the prescription through insurance would reduce any future medical costs once out of pocket maximums were met, so eventually the patient would not have to pay anything more for healthcare during that calendar year, whereas if they purchased PrEP with a coupon, the full deductible and out of pocket

of value. *Id.*; *see also Final Recommendation Statement: Prevention of Human Immunodeficiency Virus (HIV) Infection: Preexposure Prophylaxis*, U.S. PREVENTIVE SERVS. TASK FORCE (June 11, 2019), https://www.uspreventiveservicestaskforce.org/uspstf/recommendation/prevention-of-human-immunodeficiency-virus-hiv-infection-pre-exposure-prophylaxis. This finding means it will be covered by non-grandfathered private plans without co-payments or deductibles. Coverage of Certain Preventative Services Under the Affordable Care Act, 80 Fed. Reg. 41317, 41320 (July 14, 2015) (to be codified at 26 C.F.R. pt. 54; 29 C.F.R. pts. 2510, 2590; 45 C.F.R. pt. 147). However, ancillary care associated with using the drug, such as necessary blood work, will be subject to regular insurance cost sharing. *See, e.g.*, Jas Florentino & Julia Zigman, *PrEP Ancillary Support Services Now Allowable Use of CDC HIV Funding*, NAT'L ASS'N CNTY. & CITY HEALTH OFFS.: VOICE (Jan. 3, 2022), https://www.naccho.org/blog/articles/cdc-release-guidance-that-up-to-15-of-a-state-city-awards-can-be-used-for-prep-ancillary-service (discussing how the CDC will allow domestic HIV prevention funding to go to PrEP ancillary services, such as laboratory test costs).

166 Sarah Varney, *HIV Preventative Care Is Supposed to Be Free in the US. So, Why Are Some Patients Still Paying?*, KAISER FAM. FOUND. (Mar. 3, 2022), https://khn.org/news/article/prep-hiv-prevention-costs-covered-problems-insurance/.

167 *See* ME. REV. STAT. tit. 24-A, § 4320-G (West 2021).

168 The listed prices at large pharmacies range from $1,282 to $2,100. *Truvada*, GOODRX, https://www.goodrx.com/truvada (last visited Apr. 12, 2022).

169 *See, e.g.*, BLUE CROSS BLUE SHIELD S.C., 2021 INDIVIDUAL AND FAMILY PLANS 7 (2021) https://www.southcarolinablues.com/web/public/resources/cf4defd9-ef95-4821-81c9-96b584e03af3/GRIN_212491_20_2021+BlueEssentials+Brochure+Individual+and+Family+Plans+-+FINAL.pdf?MOD=AJPERES&CVID=njuWUAw.

170 *Save with Our Truvada Rx Pharmacy Coupons at Publix*, RXGO, https://www.rxgo.com/pharmacy/publix/truvada (last visited Apr. 1, 2022).

171 *Truvada*, *supra* note 168.

costs would remain.[172]

Some pharmacies have created programs to assist patients in finding coupons or other discounts, but they can be misleading, as they exclude information about the difference in cost that the same coupon can yield at different stores. CVS has such a program called "Free RX Savings Review," that can be done by the pharmacist or by the patient on a computer once they have sent a prescription to CVS.[173] In the example above for PrEP, Truvada is $574.15 a month at CVS with a coupon from GoodRx as of February 2022.[174] A patient who relies on "Free RX Savings Review" could be spending much more than they would if they used the same coupon at Publix and not realize it.

The patient then needs to research various copayment assistance plans that are available from drug manufacturers. It is common with expensive medications for manufacturers to offer some assistance to some patients to offset copayments. PrEP has extensive ones. These have annual limits on how much the manufacturer will cover. The limits matter because if the funds available are insufficient to cover copayments for a year and, importantly, if the manufacturer copayments go towards the patient's deductible and out of pocket caps, the patient may have less to pay once the coupon is not available. If the copayments do not go towards satisfying self-insurance obligations, the patient may have large out of pocket costs for medication that suddenly appear, a significant problem for a medication like PrEP, which must be taken every day to function properly.[175]

Unfortunately, there is confusion as to whether these copayment assistance programs count towards a patient's deductibles or out of pocket caps.[176] The United States Department of Health and Human Services (HHS) has clarified that insurers may use these payments in this manner, but HHS does not require them to do so.[177] Some patients may find themselves

172 The author would like to thank Mathew Turk, J.D., for his research on insurance coverage of PrEP while he was a student of hers, which has informed this analysis.

173 *Free RX Savings Review*, CVS, https://www.cvs.com/content/prescription-savings (last visited Jan. 15, 2022).

174 *Truvada*, *supra* note 168.

175 *Pre-Exposure Prophylaxis*, HIV.GOV, https://www.hiv.gov/hiv-basics/hiv-prevention/using-hiv-medication-to-reduce-risk/pre-exposure-prophylaxis (Jan. 7, 2022).

176 *See* Joyce Friedman, *Copay Assistance Programs Help Patients but Confuse Them Too*, MEDPAGE TODAY (Jan. 13, 2021), https://www.medpagetoday.com/publichealthpolicy/healthpolicy/90688. In response to comments, HHS said "there was confusion about whether the HHS policy finalized in the 2020 Payment Notice required plans and issuers to count the value of drug manufacturers' coupons toward the annual limitation on cost sharing." 85 Fed. Reg. 29164, 29233 (May 14, 2020) (to be codified in 45 C.F.R. pts. 146, 149, 155, 156, 158).

177 This is somewhat of an oversimplification, but useful for the scenario described here.

swept into "copay accumulator" programs created by insurance companies to maximize the value from industry coupons and then subtract industry copayment assistance plans from patients' deductibles and out of pocket responsibilities.[178]

Finally, patients may have problems getting any coverage for the medication their doctor prescribes because of step therapy, as described earlier.[179]

The problems described here are particularly complex for people with diabetes, where insurers are aggressive in policing the type of insulin, the type of pump, and all other supplies that people use.[180] Leaving aside the omnipresent problem of underinsurance and burdensome patient financial responsibilities, people with diabetes routinely have insurers changing the coverage or reimbursement levels of their medications due to shifting contracts with drug suppliers.[181] This is not a flaw in the system but is part of how it is designed to function.

A study of the insulin marketplace found that "[pharmacy benefits managers] attempt to keep medication costs down by moving market share between competing products, and their market power is directly related to their ability to provide exclusive formulary coverage for particular brands of medications."[182] The structure of this market creates an incentive for changes to coverage of different medications as the pharmacy benefit managers angle for market power and try to attract large group plans to

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There are still potential problems with counting these manufacturer copayment offsetting programs as coming from the individual patient within certain high deductible health plans coupled with healthcare savings accounts because of IRS rules about what counts as an actual individual expense. *See* Friedman, *supra* note 176.

178 Erin Atkins & Stephanie Trunk, *HHS Clarifies Position on Copay Accumulators? Or Does It?*, JD SUPRA (May 29, 2020), https://www.jdsupra.com/legalnews/hhs-clarifies-position-on-copay-19750/. For a good discussion of copayment accumulator plans, see John S. Linehan, *Copay Accumulator and Maximizers*, MANAGED CARE (2019), https://lsc-pagepro.mydigitalpublication.com/publication/frame.php?i=565820&p=&pn=&ver=html5&view=articleBrowser&article_id=3300095.

179 *See supra* Section IV.B.

180 Bram Sable-Smith, *It's Not Just Insulin: Diabetes Patients Struggle to Get Crucial Supplies*, NPR (Sept. 18, 2019), https://www.npr.org/sections/health-shots/2019/09/18/744117217/its-not-just-insulin-diabetes-patients-struggle-to-get-crucial-supplies.

181 *See* Richard Dolinar et al., *The Non-Medical Switching of Prescription Medications*, 131 POSTGRADUATE. MED. 335, 355 (2019) (discussing how non-medical switching may increase overall costs for patients); *see also The True Costs of Non-Medical Switching*, U.S. PAIN FOUND., https://uspainfoundation.org/wp-content/uploads/2016/01/costs-of-non-medical-switching-infographic.pdf (last visited Aug. 1, 2021) (discussing how these changes are both expensive for patients and damaging to patient health).

182 William T. Cefalu et al., *Insulin Access and Affordability Working Group: Conclusions and Recommendations*, 41 DIABETES CARE 1299, 1304 (2018).

work with them.

Furthermore, if a patient switches insurance plans, the coverage can also be different,[183] many times leading to patients again being required to use step therapy to show the insurer the product they need is necessary.[184] This can have devastating effects on people with diabetes, with changes in medication and delivery systems being a significant driver of emergency hospital treatment for this population.[185] The system as it is currently constructed leads to a constant grappling with struggles to obtain the ideal or even any necessary medications. As evidence of the confusion and unmet needs for clear guidance, there are online communities for people with diabetes that function almost entirely as places for people to help each other navigate this complicated system.[186]

### ii. Recommendations

Drug prices need to be rationalized and the market must be stabilized so it becomes less chaotic and labor intensive for patients to negotiate. This market developed in such a manner as to be highly irrational from a patient perspective, with multiple participants having managed to construct systems that leach large amounts of money out of the system through methods such as claw backs without that money helping offset costs for patients' care.[187] What may have initially offered opportunities for using market share to negotiate lower drug costs has, instead, turned into a system that shifts both costs and

183 It is difficult to find specific numbers for how often this happens, but even pre-COVID, tens of millions of people change or lose jobs every year, their employers change the coverage that is offered, or people change the policy they purchase on the exchange, so the number is likely substantial.

184 *See* Snow et al., *supra* note 132, at 14 (noting that when patients change jobs or plans, they are often "whipsawed" in step therapy between various medications).

185 *See* Sarah Gantz, *Where Insurers Drop Medications for Cheap Alternatives, the Effects Can Be Devastating for Some Patients*, Phila. Inquirer (July 18, 2018), https://www.inquirer.com/philly/health/health-costs/step-therapy-formulary-changes-affect-patients-20180718.html-2; *see also* Yuexin Tang et al., *The Effects of a Sitagliptin Formulary Restriction Program on Diabetes Medication Use*, 10 Am. Health & Drug Benefits 456, 456 (2017) (finding that step therapy patients changed how they used sitagliptin and other anti-diabetes drugs, with some patients stopping sitagliptin treatment without replacement).

186 See, for example, the JDRF Type1 Nation forum for Healthcare and Insurance, which has dozens of separate posts since it started in August of 2017 asking for help with insurance or accessing supplies, with hundreds or thousands of people reading the discussions. *Forum: Healthcare & Insuranc*e, JDRF typeonenation, https://forum.jdrf.org/c/healthcare-insurance/33?_ga=2.146258742.385039400.16251935611734477104.16251931 (last visited Apr. 1, 2022).

187 *See* Michael Stensland et al., *An Examination of Costs, Charges, and Payments for Inpatient Psychiatric Treatment in Community Hospitals*, 63 Psychiatric Servs. 666, 668 (2012).

the burden of changing treatments to patients while allowing insurers to interfere in patient's care to a degree that is causing harm. Setting prices will stop much of this from occurring. Claw backs by insurance companies need to be made illegal and all contracts should allow copayments to be reduced proportionately if the price of the drug is lower than the original copayment is. The system ought to function in a manner that is transparent, easily navigable, and ethically justifiable. The current system fails to do this.

### D. *Psychiatric and Addiction Treatment*

#### i. The Contract and State Laws

As is well known, insurance coverage for treatment of SUD and severe mental health crises are not good enough.[188] Furthermore, it appears from anecdotal information that insurers often reflexively deny coverage for in-patient treatment.[189] A patient has the right to appeal this, and would likely win such an appeal, but asking a person in withdrawal from an addiction or who is suffering from a debilitating mental health problem to handle a complex appeal is problematic on its face.

The weaknesses in the current system are revealed by examining situations where a person has both a mental health problem and a substance problem and is having a crisis. Many patients with mental health problems also have SUD.[190] People who suffer from mental health disorders may need

188 Mental health and substance problem coverage is meant to be the same as coverage for other medical issues. *See* Amber Gayle Thalmayer et al., *The Mental Health Parity and Addiction Equity Act (MHPAEA) Evaluation Study: Impact on Quantitative Treatment Limits*, 68 PSYCHIATRIC SERVS. 435 (2017). However, even with the passage of laws that claim to mandate parity, insurance coverage for these issues is still far more problematic than for more tradition "medical" problems. Nathaniel Counts et al., *What's Confusing Us About Mental Health Parity*, HEALTH AFFS. (Dec. 22, 2016), https://www.healthaffairs.org/do/10.1377/hblog20161222.058059/full/.

189 For an excellent discussion of insurance denial patterns in mental health cases, see Neiloy Sircar, *Your Claim Has Been Denied: Mental Health and Medical Necessity*, 11 HEALTH L. & POL'Y BRIEF 1 (2017), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1147&context=hlp.

190 While reasons for this have been hypothesized, understanding the "why" is not important here. It is the prevalence of the cross-over that is relevant for an insurance analysis. The exact numbers are hard to track. A call for research proposals in 2019 asserted that, even with incomplete data, "[i]n 2017, an estimated 35.4 million adults (14.3 percent) in U.S. households had mental illness in the past year and 18.7 million had a substance use disorder while 8.5 million had both a mental and substance use disorder (co-occurring disorders)." *Notice of Funding Opportunity (NOFO): Mental and Substance Use Disorders Relevance Study*, SAMHSA: SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., https://www.samhsa.gov/grants/grant-announcements/fg-19-003

changes to, or the introduction of, medications.[191] Both of these issues, the combination of SUD and mental health problems and changes to medication during a crisis, are complicated to manage.[192] Patients need to be closely monitored during treatment[193] and the close monitoring is expensive,[194] thus likely to trigger conflict with insurers. Problems with accessing insurance coverage add complications to these already medically and emotionally complex scenarios.

An example of this type of problem is coverage for treatment of bipolar episodes coupled with SUD.[195] This is a particularly useful example because this is a problem where modern medicine has an ability to effect substantial, positive change[196] if the patient can get access to appropriate care.[197] These patients often present in substantial emotional pain, while also presenting a risk of harm if not treated appropriately.[198] The treatment protocols are complex and currently require intensive clinical work and close monitoring to be done properly.[199] Patients generally present to the emergency department, and then require transfer, many times to other

(Apr. 29, 2020).

191 Substance Abuse & Mental Health Servs. Admin., Substance Use Disorder Treatment for People with Co-Occurring Disorders—Treatment Improvement Protocol TIP 42, at 77 (2020) [hereinafter TIP 42], https://store.samhsa.gov/sites/default/files/SAMHSA _Digital_Download/PEP20-02-01-004_Final_508.pdf.

192 *See, e.g.*, Rakesh Jain, *Managing Bipolar Disorder from Urgent Situations to Maintenance Therapy*, 68 J. Clinical Psychiatry 367, 372 (2008) [hereinafter *Managing Bipolar Disorder*] (discussing bipolar disorder and how substance use is a compounding element to medical outlook for patients with bipolar disorder); *see also* Murdoch Leeies et al., *The Use of Alcohol and Drugs to Self-Medicate Symptoms of Posttraumatic Stress Disorder*, 27 Depression & Anxiety 731, 731 (2010).

193 David Fariello & Susan Scheidt, *Clinical Case Management of the Dually Diagnosed Patient*, 40 Psychiatric Servs. 1065, 1065 (1989).

194 *See* Zeynal Karaca & Brian J. Moore, *Costs of Emergency Department Visits for Mental and Substance Use Disorders in the United States, 2017*, Agency for Healthcare Rsch. & Quality, https://www.ahrq.gov/news/hcup-statistical-brief.html (Oct. 2020).

195 This is a phenomenon known as a dual diagnosis, which is very difficult to diagnose and treat. *See* George Woody, *The Challenge of Dual Diagnosis*, 20 Alcohol Health & Rsch. World 76, 76, 78 (1996). "Among individuals with substance use disorders (SUDs), comorbidity with other psychiatric disorders is common and often noted as the rule rather than the exception." Dawn E. Sugarman et al., *Technology-Based Interventions for Substance Use and Comorbid Disorders: An Examination of the Emerging Literature*, 25 Harv. Rev. Psychiatry 123, 123 (2017). For an excellent discussion of diagnosis and treatment for substance and bipolar problems, see *Managing Bipolar Disorder*, *supra* note 192.

196 *Managing Bipolar Disorder*, *supra* note 192, at 370.

197 Sugarman et al., *supra* note 195, at 123.

198 TIP 42, *supra* note 191.

199 *Managing Bipolar Disorder*, *supra* note 192, at 374.

facilities.[200] It is often difficult to find psychiatric facilities that can handle a complex borderline episode coupled with the physical and mental issues around withdrawal.[201]

Each step of this process involves satisfying the requirements of insurers, with the concurrent risk of the patient losing access to the effective care they desperately need at that moment. Many insurers also have contracts with mental health benefit management companies that handle psychiatric and substance problems,[202] so patients may also have to negotiate different systems with the two separate companies as they switch from the emergency department to a psychiatric facility, further complicating the process.

Finally, insurers in many states have a legislatively enacted financial incentive to deny treatment in some circumstances due to Alcohol Exclusion laws. These laws[203] allow insurers to deny payment for medical care springing from any accident or injury that happens to a patient while they are impaired by alcohol or on any medication that is not prescribed by a physician.[204] State laws vary greatly not only in the mandates they impose on insurance coverage but also in what they allow plans to include that can reduce benefits, and many states have legislation specifically allowing these exclusions to be included in insurance contracts. People with a dual diagnosis of bipolar and SUD who are in distress are at a very high risk of being injured[205] which, absent these laws, might give insurers an incentive to ensure they receive treatment, as the insurer otherwise would have to pay for any subsequent care that is required because the patient suffers physical harm.

In states with Alcohol Exclusion laws, however, rather than facing

200 *See, e.g.*, *An Introduction to Bipolar Disorders and Co-Occurring Substance Use Disorder*, SAMSHA ADVISORY NO. 2, 2016, at 4–7 (describing the different treatments patients suffering from bipolar disorder and substance use disorders may need, from screenings to different therapies).

201 *See, e.g.*, TIP 42, *supra* note 191, at 10.

202 *See* Deborah W. Garnick et al., *Private Health Plans' Contracts with Managed Behavioral Healthcare Organizations*, J. BEHAV. HEALTH SERVS. & RSCH. 1–2 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4754164/pdf/nihms716196.pdf (describing the role managed behavioral health organizations have played in delivering behavioral health services to patients).

203 There is a patchwork of laws that combine to require these appeals be included in all insurance contracts. For employer-sponsored plans, rights to appeal are provided by federal laws and regulations, most importantly, 29 C.F.R. § 2560.503-1 (2020).

204 *Traffic Safety Facts: Alcohol Exclusion Laws*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. (Jan. 2008), https://www.nhtsa.gov/sites/nhtsa.gov/files/810885.pdf. South Carolina allowed this type of clause up until recently, allowing insurance policies to include exclusions for "INTOXICANTS AND NARCOTICS: The company is not liable for any loss resulting from the insured being drunk or under the influence of any narcotic unless taken on the advice of a physician." S.C. CODE ANN. § 38-71-370 (2013).

205 TIP 42, *supra* note 191, at 77.

higher costs due to denying coverage, insurers can deny coverage for inpatient care and not pay for subsequent and foreseeable care related to any injuries the patient may suffer because they did not receive appropriate care in the first place.

This is an exceptionally problematic insurance exclusion when paired with legal requirements to provide treatment for SUD. The financial incentives of these two clauses are in conflict. If a person seeks admission for substance abuse, the insurance company can refuse coverage even if it is medically necessary, knowing that if subsequent health problems arise due to substance abuse, the insurer will not have to pay for any care related to those injuries. An example of this would be a person seeking inpatient treatment for alcoholism who is refused coverage, then drives while intoxicated, suffering injuries as a result. If treatment for injuries sustained while intoxicated were covered by the health insurance plan, it would have an incentive to provide early treatment that could prevent the subsequent injury. Here, given the Alcohol Exclusion clause, it has an incentive to deny that early treatment. If the patient has health insurance coverage through an ERISA plan, with no damages available for wrongful denials of coverage, the incentives are even more skewed.

State laws that allow insurance companies to deny coverage of injuries that occur when a patient is intoxicated or using illegal drugs are not logical or proper from a health policy perspective, as they function simply to shift costs to patients or healthcare providers who do not have the capacity to anticipate the costs or spread the risk across a pool. The EMTALA requires hospitals to treat these patients[206] and the patients have been paying into a pool for the purpose of paying for care when it is necessary. If these laws spring from an idea of punishing people for drinking to excess or using illegal drugs, shifting costs to hospitals and physicians is an irrational outcome. If a patient is injured doing something such as driving while intoxicated when they are injured, there is already a system in place to punish them for the behavior,[207] making these provisions seem even less justified.

### ii. Recommendations

Alcohol Exclusion laws as they are currently written are problematic and should be repealed. Given how common SUDs are[208] and that insurers

206 42 U.S.C. § 1395dd (examination and treatment for emergency medical conditions and women in labor).

207 *Drunk Driving*, Nat'l Highway Traffic Safety Admin., https://www.nhtsa.gov/risky-driving/drunk-driving (last visited Apr. 10, 2022).

208 *10 Percent of US Adults Have Drug Use Disorder at Some Point in Their Lives*, Nat'l Inst.

must cover treatment for these problems,[209] allowing insurers to escape financial responsibility if a person is harmed while using these substances seems unwise. While repealing these laws is best, amending them so that they do not apply to people diagnosed with SUD would also be helpful, serving to ensuring the negative effects are reserved for a narrower subset of injuries, ones that do not occur in those who are actively seeking treatment.

For all patients seeking behavioral, psychiatric, and SUD care, any denial by an insurance company ought to trigger an immediate appeal without requiring the patient to ask for it. In practice, these denials should be promptly reviewed internally by someone with a high level of relevant training who can assess the situation and reach out to the treating physician and/or facility so any problems with the initial request for coverage can be addressed efficiently. This builds on the appeals process envisioned by the Department of Labor in its ERISA appeals regulations[210] and so should not be unduly burdensome to the insurers.

This case study exemplifies the vulnerabilities to denials that patients often have when sick or injured. Proactive, baked-in appeals assistance is likely necessary in other situations where patients are impaired or particularly vulnerable to not having the wherewithal to exercise appeals rights they may be entitled to.

## CONCLUSION

In the years since the ACA was passed, much has improved in the healthcare system. As with any large-scale change to a system, these years have also revealed some problems. People are carrying too much of a financial burden. Insurers, faced with a new set of incentives, have developed new methods of gaming the system. The specifics of these types of problems need to be identified and corrected.

The process of seeking to identify and examine these problems quickly reveals a separate, related, underlying flaw. People need to be at the center of the design and reform of the healthcare financing system. The case studies in this Article reveal numerous instances where the system

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HEALTH (Nov. 18, 2015), https://www.nih.gov/news-events/news-releases/10-percent-us-adults-have-drug-use-disorder-some-point-their-lives.

209 *Mental Health & Substance Abuse Coverage*, HEALTHCARE.GOV https://www.healthcare.gov/coverage/mental-health-substance-abuse-coverage (last visited Mar. 31, 2022); *What Marketplace Health Insurance Plans Cover*, HEALTHCARE.GOV, https://www.healthcare.gov/coverage/what-marketplace-plans-cover/ (last visited Mar. 31, 2022).

210 Internal Claims and Appeals and External Review Processes, 45 C.F.R. § 147.136 (2021).

would not look the way it does if we designed it from the perspective of the people who must use it. The most obvious example of this is that, given the small amount of savings and discretionary income most people have, large deductibles and co-insurance make no sense for much of the population. Similarly, given the number of prescriptions many people have, the byzantine drug pricing system makes no sense, requiring cash-strapped people to go on a time-intensive, arbitrary, and often fruitless search for the best price for their medications.

Healthcare reform needs sophisticated experts to continuously maximize quality, access, and choice, while also minimizing cost, doing all of this in a rapidly changing environment. The work of these experts must always be informed by the perspective of those they seek to help. The way the healthcare financing system functions in people's nonideal lives is the true measurement of its effectiveness, and we ought to remember this, value it, and plan with it in mind.

# SECOND-CLASS HEALTH IN THE ABSENCE OF SELF-DETERMINATION AND GOVERNANCE: THE EFFECT OF COLONIAL GOVERNANCE OVER THE HEALTHCARE SYSTEM OF PUERTO RICO IN COMPARISON TO HAWAII AND MASSACHUSETTS

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** Advocate, activist, and writer. Quality Auditor & Sr. Editor at Proyecto Didasko. They'd like to thank their co-author Paola M. Sepulveda-Miranda for her unfaltering commitment and patience; Dr. Eduardo Lugo for being our commentator on the 2021 NURL Conference; and everybody who seeks justice for the island of Puerto Rico.

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**ABSTRACT**

*Our purpose is to present a comparative analysis between Puerto Rico, Hawai'i, and Massachusetts to examine the effect of democratic governance and self-determination over healthcare structures. We offer a historic perspective of the effects of the colonial status of Puerto Rico. By examining the way governing colonial status in Puerto Rico impacts the healthcare system, we demonstrate how its subjugation infringes upon the wellbeing of its inhabitants. We analyze Puerto Rico's colonial status as a fundamental cog in the intersections that have produced its economic and political failures when we discuss the impact of these shortcomings on the health and overall well-being of the population, based on the archipelago's healthcare finances and infrastructure. We present how the lack of governance and self-determination in a colonial state can undermine efforts to protect public health and healthcare delivery. Although we compare the response of all three states to the current global pandemic, COVID-19, this analysis also examines the three states' capacity to respond to public health crises in relation to their self-determination power.*

"All peoples have the right to self determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."
– Unrepresented Nations & Peoples Organization[1]

## INTRODUCTION

It is not possible to be free yet forced to be associated. It is not possible to be sovereign yet dominated. A state cannot practice democratic governance and self-determination if subjected to colonialism, the recurring dominion of its autonomy.[2] A lack of governance and self-determination hinders a state's health care delivery system and other structures which are essential for the development of the state as well as for the optimum desired population health outcomes.[3] It is imperative to examine the intersection of population health and governance, as the healthier a country's population is, the more likely that country is to produce, develop, and succeed.[4]

To properly approach the health of the population and achieve health equity and justice, it is essential to address social, cultural, political, and historical contexts that might influence the system structures.[5] Efforts to understand and better address health deficiencies must include a detailed examination of the political and legal factors that contribute to those deficiencies; however, such an examination has not been undertaken due to the limited resources available. A deeper analysis of the reasons behind these limitations is imperative, and we seek to do that with this paper.

Analyzing Puerto Rico's lack of democratic governance and self-determination within its healthcare structures, and comparing the archipelago to Hawai'i and Massachusetts, reveals the lasting effects of Puerto Rico's historic colonial status and the resulting negative impact on its healthcare delivery system and inhabitants.[6] Some believe that Puerto Rico's

1 *Self-Determination*, UNREPRESENTED NATIONS & PEOPLES ORG. (Sept. 21, 2017), https://unpo.org/article/4957.

2 *See* Peter Hilpold, *Self-Determination and Autonomy: Between Secession and Internal Self-Determination*, 24 INT'L J. ON MINORITY & GRP. RTS. 302, 328 (2017).

3 *See* COMM. ON ASSURING THE HEALTH OF THE PUB. IN THE 21ST CENTURY, INST. OF MED. OF THE NAT'L ACADS., THE FUTURE OF THE PUBLIC'S HEALTH IN THE 21ST CENTURY 101–02, 204, 257 (2002).

4 Carol Ann Medlin et al., *Improving the Health of Populations: Lessons of Experience*, *in* DISEASE CONTROL PRIORITIES IN DEVELOPING COUNTRIES 165, 165 (Dean T. Jamison et al. eds., 2d ed. 2006).

5 COMM. ON CMTY.-BASED SOLS. TO PROMOTE HEALTH EQUITY IN THE U.S., NAT'L ACADS. OF SCI., ENG'G, & MED., COMMUNITIES IN ACTION: PATHWAYS TO HEALTH EQUITY 99 (James N. Weinstein et al. eds., 2017).

6 *See* Samantha Rivera Joseph et al., *Colonial Neglect and the Right to Health in Puerto Rico After*

colonial status is a fundamental issue that has produced its economic and political failures, adversely affecting the health and overall well-being of the population. Instead, by examining specific domains in the healthcare system such as finances, care processes, and infrastructure, it becomes clear how a lack of democratic governance and self-determination in a colonial state undermines various efforts to protect public health and provide effective healthcare delivery.[7] Thus, it is the lack of autonomy, self-determination, and governance that sets the healthcare system up to fail.

Part I of this article analyzes definitions of colonialism, imperialism, governance, and self-determination in order to provide a basis for our paper's analysis. Part II provides an overview of Puerto Rico's political and legal history. In Part III, we address the differences in governance and self-determination between Puerto Rico, Massachusetts, and Hawai'i. In Part IV, we briefly discuss the healthcare sector in the United States (U.S.) before moving on to an examination of the three states' finances, healthcare infrastructure, and effectiveness of healthcare delivery in Part V. In Part VI, we analyze the three states' responses to COVID-19 with an eye towards the states' governance and self-determination. Finally, we conclude with future steps, and a call to release Puerto Rico from colonial control in hopes of improving health outcomes for Puerto Ricans.

## I. Defining Terms

### A. *Colonialism vs. Imperialism*

To understand Puerto Rico's current state, one must understand colonialism and imperialism, two distinct, yet similar, practices. The Stanford Encyclopedia of Philosophy defines colonialism as, "a practice of domination, which involves the subjugation of one people to another."[8] Like colonialism, imperialism also involves political and economic control over a dependent territory, but by looking at the etymology of the two terms, one can gain insight into their differences. "Colony" is derived from *colonus*, the Latin word for farmer.[9] The term highlights that the practice of colonialism

*Hurricane Maria*, 110 Am. J. Pub. Health 1512 (2020), for further reading on standards of health and colonial status.

7 *See* Amelia Cheatham & Diana Roy, *Puerto Rico: A U.S. Territory in Crisis*, Council on Foreign Rels., https://www.cfr.org/backgrounder/puerto-rico-us-territory-crisis (Feb. 3, 2022).

8 Margaret Kohn & Kavita Reddy, *Colonialism*, Stan. Encyclopedia Phil., https://plato.stanford.edu/entries/colonialism/ (Aug. 29, 2017).

9 *Id.*

usually involved the relocation of a group of individuals to a new territory where they permanently lived while maintaining political, social, and cultural allegiances to their origin countries.[10] Imperialism, similarly, has Latin roots in the word *imperium*, meaning to command, thus, drawing "attention to the way that one country exercises power over another, whether through settlement, sovereignty, or indirect mechanisms of control."[11] Consequently, colonialism and imperialism are often incorrectly used interchangeably due to the similarities in their definitions.

Throughout history colonialism and imperialism were seen as forms of conquest with similar economic and strategic benefit to Europe, and consequently, the terms have not been consistently differentiated in literature.[12] Some scholars distinguish colonialism as having colonies for settlement and imperialism as having colonies for economic exploitation.[13] Other people differentiate between the two terms by describing colonialism as "dependencies that are directly governed by a foreign nation" and imperialism as "[involving] indirect forms of domination."[14] However, to suggest that such a bright line exists is an oversimplification.

Additional confusion of the terms arises because both practices were used in the conquest of the Americas and were present in the expansionist policies of Europe throughout all their overseas properties.[15] From the sixteenth century to the 1960s national liberation movements, Europe dominated their overseas properties either by settlement or exploitation.[16] All around the "postcolonial" world, countries experience the political and economic consequences of such dominations—especially countries that transitioned from political dependence to sovereignty.[17]

Colonialism is frequently used to describe places such as North America, Australia, New Zealand, Algeria, and Brazil because of the vast European populations that permanently settled there. Settling by foreign nationals from the colonial matrix speeds up and sustains control by displacing native populations.[18] In comparison, imperialism is often characterized

10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
17 Lina Benabdallah et al., *Global South Perspectives on International Relations Theory*, E-INT'L RELS. (Nov. 19, 2017), https://www.e-ir.info/2017/11/19/global-south-perspectives-on-international-relations-theory/.
18 *See* LORENZO VERACINI, SETTLER COLONIALISM: A THEORETICAL OVERVIEW 2–5 (2010); *Native Americans and Colonization: The 16th and 17th Centuries*, BRITANNICA, https://www.

by the control of a territory from the matrix governing nation regardless of whether settlers populate it.[19] The imperialist nation exerts political, military, or economic control of the territory's affairs.[20] Hence, examples of imperialism can be found in "the scramble for Africa throughout the late nineteenth century and the American domination of the Philippines and Puerto Rico."[21]

By taking into account its political and historical developments, Puerto Rico has been, and continues to be, under both colonial status and imperialistic control.[22] The archipelago has been, and continues to be, a colony for settlement and for economic exploitation.[23] The U.S. continues to exercise permanent command of Puerto Rico, controlling the economic and political affairs of the archipelago, and should be held responsible for its future.[24]

### B. *Governance*

It is an emerging paradigm, understood as "the manner through which the members in a society organize their coexistence—the fundamental and conjectural precepts surrounding their newly-founded civilization and the ways of coordinating to carry them out: their sense of direction and their ability to lead."[25] This demonstrates that the act of governing is more important than the government as a whole; what matters most is that the administration, executives, and legislatures "do with and for other social and economic actors, rather than by and for themselves."[26]

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britannica.com/topic/Native-American/Native-Americans-and-colonization-the-16th-and-17th-centuries (last visited Apr. 8, 2022).

19 Kohn & Reddy, *supra* note 8.

20 *Imperialism*, Britannica, https://www.britannica.com/topic/imperialism (last visited May 10, 2022).

21 Kohn & Reddy, *supra* note 8.

22 Pedro Cabán, *Puerto Rico and PROMESA: Reaffirming Colonialism*, New Pol. (June 27, 2017), https://newpol.org/issue_post/puerto-rico-and-promesa-reaffirming-colonialism/; Luna Martinez, *A Colony Is a Colony Is a Colony: Puerto Rico and the Courts*, Ctr. for Const. Rts. (Oct. 21, 2021), https://ccrjustice.org/home/blog/2021/10/20/colony-colony-colony-puerto-rico-and-courts.

23 Martinez, *supra* note 22; *see also* Cabán, *supra* note 22.

24 *See* Jeniffer Wiscovitch, *Los Efectos del Coloniaje en la Vida de los Puertorriqueños*, Es Mental (Nov. 10, 2020), https://www.esmental.com/los-efectos-del-coloniaje-en-la-vida-de-los-puertorriquenos.

25 Luis F. Aguilar Villanueva, Gobernanza y Gestión Pública 90 (5th ed. 2013); Carlos E. Quintero Castellanos, *Gobernanza y Teoría de las Organizaciones*, 25 Perfiles Latinoamericanos 39, 41 (2017).

26 Quintero Castellanos, *supra* note 25, at 41.

Governance includes administrative authority at a high level but is not limited to the myriad of designated government actors established by law.[27] This fosters the inclusion of other, non-governmental actors while mitigating the typical "restrictions of bilateral bureaucratic relationships."[28] Governance also includes a collaborative level where various actors work together to evaluate current processes and societal challenges, and develop effective solutions to them.[29]

In intersectional government processes, states and their government actors are inclined to make decisions based on their own experiences.[30] Those decisions influence laws and regulations "that now fall short in the face of the complexity and magnitude of the emerging problems they must resolve, as they must manage broader and more inclusive societal criteria to achieve a new public governance status."[31] In fact, governance and the government are intimately intertwined and the government is embedded in its institutions, representing a strong example of administrative reform.[32] As an agreed set of values, beliefs, and regulations, governance is a democratic process of creating goals and instruments of public action for administrative reform that allows both government and social organizations to address public issues to achieve a sustainable and fruitful social order.[33]

However, governance is still an emerging paradigm and remains quite an elusive concept at the theoretical level.[34] It is especially vague when it comes to defining the forms it takes within already established government structures. R. A. W. Rhodes called it "imprecise" in his article, *The New Governance: Governing without Government*.[35] Rhodes presents various definitions of governance before proposing his own, and cites several definitions of government, focusing on six foundations: (1) a minimum state, (2) corporate governance, (3) new public management, (4) good governance, (5) a socio-cybernetic system, and (6) self-organized networks.[36] As proposed by Rhodes, the action of governing is tied to what he deems "self-organizing, interorganizational networks."[37] He argues that the networks work alongside

27 *Id.* at 43.
28 *Id.*
29 *Id.*
30 *Id.*
31 *Id.*
32 *Id.*
33 *Id.*
34 AGUILAR VILLANUEVA, *supra* note 25, at 43.
35 R.A.W. Rhodes, *The New Governance: Governing Without Government*, 44 POL. STUD. 652, 652 (1996).
36 *Id.* at 652–53.
37 *Id.* at 660.

markets and hierarchies as governing mechanisms that allocate resources and exercise control.[38] He also suggests that the current use of the word "governance" is not a synonym for "government," and that it instead can signify a change in the governing process.[39] That is, "governance" refers to a new process of governing, a change in how the government should be defined, or the new method by which society is governed.[40]

Poor governance, which manifests itself in the form of lack of accountability and transparency, corruption, and communities' limited or lack of engagement with health systems and institutions, contributes to ineffective deployment of services.[41] Because of this, since the early 1990s, several institutions such as the United Nations Development Program, World Bank Department for International Development, and the International Monetary Fund, have worked to define governance at a state level to alleviate challenges in the development of this theoretical concept.[42] Accordingly, there is not a single definition to encompass all that governance entails.[43]

In *Health Governance: Principal-Agent Linkages and Health System Strengthening*, authors Brinkerhoff and Bossert provide a useful definition of governance in the field of health services which includes the political dimension of the term.[44] Prevailing theories of health governance utilize a "task/function" approach where an enumerated set of tasks are presumed to be executed by health organizations such as the World Health Organization (WHO).[45] However, this task/function approach does not account for the numerous actors in health systems, their roles and responsibilities, or their willingness to fulfill their duties.[46] Alternatively, Brinkerhoff and Bossert suggest an approach to health governance with a wider reach, encompassing authority, power, and decision-making in the institutional arenas of civil society, politics, policy, and public administration.[47] Having this differentiation

38 *Id.* at 652.

39 *Id.* at 652–53.

40 *Id.*

41 Marjolein Dieleman et al., *Improving the Implementation of Health Workforce Policies Through Governance: A Review of Case Studies*, Hum. Res. for Health, Apr. 2011, at 1, https://human-resources-health.biomedcentral.com/track/pdf/10.1186/1478-4491-9-10.pdf.

42 *Id.*

43 Rhodes, *supra* note 35, at 660.

44 *See generally* Derick W. Brinkerhoff & Thomas J. Bossert, *Health Governance: Principal-Agent Linkages and Health System Strengthening*, 29 Health Pol'y & Plan. 685 (2014).

45 *Id.* at 686.

46 *Id.*

47 *See id.* at 686–89; *see also* Suerie Moon, *Power in Global Governance: An Expanded Typology from Global Health*, Globalization & Health, Nov. 2019, at 1, 7–8, https://globalizationandhealth.biomedcentral.com/track/pdf/10.1186/s12992-019-0515-5.

in mind is important as it is encased within the framework analyzed here, which recognizes that effective governance, among other factors, is the key to adequate development of our healthcare systems.[48]

Based on Rhodes's and Brinkerhoff and Bossert's definitions, we can conclude that governance is more than just the institutions that officially rule a society (i.e., the government), but also includes all other institutions that affect the way the government runs by influencing other aspects of society, like the distribution of resources and services. This is important in the context of this research because responsible governance is crucial to a nation's development. However, in a colonial state, even agencies and organizational alternatives to government are subject to inescapable policies that hinder any internal effort to implement the aforementioned "self-organizing, interorganizational networks."[49]

### C. *Self-determination*

Self-determination was first recognized by international law in the 1960s as the "the right of all colonial territories to become independent or to adopt any other status they freely [choose]," but the concept existed long before this.[50] President Woodrow Wilson, in his famous Fourteen Points speech of 1918, is one of the earliest proponents of the concept.[51] The speech proposed strategies to achieve world peace based on many domestic progressive ideas that were translated into foreign policies such as free trade, open agreements, democracy, and self-determination.[52] In a subsequent speech, President Wilson summarized the concept of self-determination, noting:

> [A]ll well-defined national aspirations shall be accorded the utmost satisfaction that can be accorded them without introducing new or perpetuating old elements of discord and antagonism that would be likely in time to break the peace of Europe and consequently of the world . . . .[53]

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pdf (discussing meanings of power within global governance definitions).

48 *See* Dieleman et al., *supra* note 41, at 9.

49 Rhodes, *supra* note 35, at 661–63.

50 Hurst Hannum, *Legal Aspects of Self-Determination*, ENCYCLOPEDIA PRINCETONIENSIS, https://pesd.princeton.edu/node/511 (last visited Apr. 7, 2022); *Self-Determination*, FACING HIST. & OURSELVES, https://www.facinghistory.org/holocaust-and-human-behavior/chapter-3/self-determination (last visited Apr. 7, 2022).

51 Hannum, *supra* note 50.

52 *See* Woodrow Wilson, Fourteen Points Speech, War Address to Congress (Jan. 8, 1918).

53 Woodrow Wilson, 28th President of the United States, Address to Congress on

One problem with the concept of self-determination is that it has been an ambiguous principle since its inception.[54] For example, it was used by Leninists under Marxism to justify foreign intervention to liberate people who were oppressed according to Marxist theory.[55] However, self-determination was not considered when communist nations were the ones accused of oppressing people.[56] This ambiguity is further reflected in the Soviet Constitution of 1924, in which the right to the self-determination was established for member Republics of the Soviet Union; however, the same right was not extended to those in the Autonomous Regions.[57] This is contradictory as it implies the existence of autonomy outside of self-determination.[58]

The predecessor of the United Nations (UN), the League of Nations (LoN), exemplified this vagueness early on when the organization established that self-determination could not be applied arbitrarily but required a balancing analysis between the self-determination of peoples and the integrity of nations.[59] The LoN justified this rationale by arguing that if its application or implementation of the principle was irresponsible, there was a risk for monumental disintegration of nations.[60] For this reason, initially, the LoN intended to apply this principle in a purely political way by providing guidelines by which peoples could define their right to self-determination but not in a legal way.[61] This meant there was no mechanism to assert a right to self-determination against a State without threatening the integrity of the nation.[62] However, the principle manifested as a legal mandate and was applied specifically to colonies under the supervision of

International Order (Feb. 11, 1918), https://www.presidency.ucsb.edu/documents/address-congress-international-order.

54 Romualdo Bermejo García, *El Derecho de Autodeterminación de los Pueblos a la Luz del Derecho Internacional*, Nanopdf.com 3 (May 14, 2018), https://nanopdf.com/download/el-derecho-de-autodeterminacion-de-los-pueblos-a-la-luz-del_pdf.

55 *Id.* at 1.

56 *Id.*

57 Juan Antonio Martínez Muñoz, *La Autodeterminación*, 8 Anuario de Derechos Humanos 326, 326 (2007).

58 *See id.*

59 *See* Navdeep Kour Sasan, *League of Nations and Self-Determination*, 3 GNLU J.L. Dev. & Pol. 139, 142–43 (2013).

60 *See id.* at 143; Allen Lynch, *Woodrow Wilson and the Principle of 'National Self-Determination': A Reconsideration*, 28 Rev. Int'l Stud. 419, 425–26 (2002); Patricia Carley, Self-Determination: Sovereignty, Territorial Integrity and the Right to Secession 3 (1996), https://www.usip.org/sites/default/files/pwks7.pdf.

61 Bermejo García, *supra* note 54, at 2, 8.

62 *See* Sasan, *supra* note 59, at 143.

the LoN.[63]

The mandate constituted a sort of treaty or mandatory power between the LoN and the colonizing nation, through which particular States were entrusted to perform certain supervisory functions on behalf of the LoN and periodically report to the LoN about the mandate with the goal of preparing these mandated nations for future independence.[64] Allowing certain nations to continue exercising supervisory power over others under the figure of colonialism was clearly discriminatory against the colonized territories, which continued living under a system of vassalage regarding the colonizing power.[65]

When the LoN failed to prevent the occurrence of World War II and dissolved, the UN emerged as the leading international political and legal organization.[66] The UN introduced the principle of self-determination of the peoples within its constitutive charter.[67] Article 1 sets forth the charter's purpose to foster friendly and respectful relations based on equal rights and people's self-determination, among other efforts to uphold universal peace, stating the commitment, "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."[68] Similarly, Article 55 of the UN Charter states that:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and the self-determination of peoples, the United Nations shall promote:
>
> a. higher standards of living, full employment, and conditions of economic and social progress and development;
>
> b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

63 *See* Bermejo García, *supra* note 54, at 2; Nele Matz, *Civilization and the Mandate System Under the League of Nations as Origin of Trusteeship*, [2005] 9 Max Planck Y.B. U.N. L. 47, at 69.

64 Matz, *supra* note 63, at 55, 70; Bermejo García, *supra* note 54, at 2.

65 *See* Bermejo García, *supra* note 54, at 2–3.

66 Collin Makamson, *'The League Is Dead. Long Live the United Nations.*,' NAT'L WORLD WAR II MUSEUM (Apr. 19, 2021), https://www.nationalww2museum.org/war/articles/league-of-nations.

67 U.N. Charter art. 1.

68 Bermejo García, *supra* note 54, at 4–5.

> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[69]

And Article 73 states:

> Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:
>
> a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
>
> b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;
>
> c. to further international peace and security;
>
> d. to promote constructive measures of development, to encourage research, and to cooperate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and
>
> e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.[70]

Despite these articles, the two different regimes under which colonies

69 U.N. Charter art. 55.
70 U.N. Charter art. 73.

and territories subject to mandate were treated exposes a contradiction: non-autonomous territories, or colonies, were dealt with under a colonial establishment, yet there was at the same time a widespread recognition of the right of all peoples to self-determination.[71]

The implementation of these two regimes exposes two contrasting notions. On one hand, it accepts the colonial establishment framed under the category of non-autonomous territories, however, on the other, it recognizes the right of peoples to self-determination.[72] The decolonization processes that took place during the second half of the twentieth century were founded through this new international legal frame.[73] One of the central objectives of these processes was to dismantle the British Empire and the French colonies in Africa and Asia, and readjust borders in European countries such as in Italy, Austria-Hungary, and Poland.[74]

By using the principle to change countries' political systems and geography, self-determination of the peoples shaped our current world. In doing so, however, it left unresolved the problem posed by territories that desired secession, giving way to many current political discourses and independence controversies in the world. This consequence stemmed from the principle being initially applied without limits or safeguards in relation to the territorial integrity of nations.[75]

The question remains: Is self-determination a mere principle for theoretical analysis or is it a right? If we accept that it is merely a principle, it implies an almost complete absence of legal protection or other enforcement, which puts any self-deterministic claim at risk since this principle only applies in cases of colonial territories or under UN mandate and there is no legal protection backing colonial territories in their pursuit of self-determination.[76]

In the years since the UN first wrote its Charter, public international law has broadened to include several additional issues. For example, it now deals with cases in which minorities are victims of serious human rights violations perpetrated by the State.[77] Because of this new, broader margin

71 *See* Zubeida Mustafa, *The Principle of Self-Determination in International Law*, 5 INT'L LAW. 479, 480 (1971); Bermejo García, *supra* note 54, at 3.

72 Bermejo García, *supra* note 54, at 3.

73 *Id.* at 4.

74 Martínez Muñoz, *supra* note 57, at 327.

75 *See* Bermejo García, *supra* note 54, at 1–14.

76 *See id.*

77 *See* Off. of the High Comm'r for Hum. Rts., *Minority Rights: International Standards and Guidance for Implementation*, 14–18, U.N. Doc. HR/PUB/10/3 (2010). *See generally* Lucía Payero López, El Derecho de Autodeterminación de los Pueblos. Análisis Crítico del Marco Constitucional Español Desde la Filosofía Jurídico-Política (2014) (Doctoral

of action within international law, self-determination can no longer be considered only a mere principle, as it is necessary to give it all the effects and powers of a right in order to empower colonized territories in their pursuit of autonomy.

In the conference of Bandung in 1955, self-determination was proposed as a necessary condition for the development of peace between nations, offering an anti-colonial vision of the law and fundamentally presenting it as a right.[78] One of the foremost documents that advocated for this right was the Declaration on the Granting of Independence to Colonial Countries and Peoples, sometimes called the "Magna Carta of Decolonization."[79] The Declaration was approved by UN Resolution 1514 on December 14, 1960, and states: "All peoples have the right of self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[80] This Declaration recognized self-determination as a necessary right in the efforts to bring colonialism to a "speedy and unconditional end."[81]

An additional problem in analyzing the application of self-determination is identifying the populations to whom it is supposed to apply. Within the international provisions put forth by the UN charter, self-determination applies to "peoples," but the term "people" is never clarified or conceptualized.[82] This vagueness allows a great margin of interpretation because it is not clear whether "people" may be understood as a synonym for nation.[83] Consequently, self-determination presents as a right of the people who share common culture, religion, language, or other characteristics,

thesis, Universidad de Oviedo), https://digibuo.uniovi.es/dspace/bitstream/handle/10651/28934/TD_LuciaPayeroLopez.pdf.

78 *Bandung Conference (Asian-African Conference), 1955*, Off. Historian, https://history.state.gov/milestones/1953-1960/bandung-conf (last visited Apr. 10, 2022).

79 Edward McWhinney, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, United Nations Audiovisual Libr. Int'l L. (2008), https://legal.un.org/avl/pdf/ha/dicc/dicc_e.pdf; *see* Meetings Coverage, General Assembly, Decolonization 'Remarkable but Incomplete' Chapter in United Nations History, Says Secretary-General, Spurring Action at Commemoration of Decolonization Declaration, U.N. Meetings Coverage GA/11037 (Dec. 14, 2010), https://www.un.org/press/en/2010/ga11037.doc.htm.

80 G.A. Res. 1514 (XV), ¶ 2 (Dec. 14, 1960).

81 *See* G.A. Res. 1514 (XV), *supra* note 80.

82 Matthew Saul, *The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?*, 11 Hum. Rts. L. Rev. 609, 614, 616–18 (2011).

83 *See* Karen Knop, Diversity and Self-Determination in International Law 51–65 (eBook ed. 2004).

and reside in a specific territory.[84] This application of the principle of self-determination, as put forth by the UN, could be interpreted as a restriction:

> [A] State cannot limit the freedom of the peoples that inhabit it through the imposition of a culture, language or customs contrary to the people, under the excuse of the application of the principle of international sovereignty. That is why the right of self-determination of peoples applies to peoples but not to States, neither religions nor ethnic groups.[85]

This further illustrates how both possible applications of the principle (legal versus political; individual versus State) are at odds in practice.

While there are many benefits to incorporating self-determination as a right within public international law, self-determination of peoples brings about the possibility of causing the disintegration of the State.[86] The right to self-determination would conflict with the traditional conception which understands rights as a limitation of power, recognizing that only certain individual rights prevail over the sovereignty of the State.[87] Applying this right to people could work against a state's sovereignty, with the risk of an individual's right to self-determination prevailing over the state's interest, as a legal subject under public international law.[88] As some scholars have noted, "such recognition of a people to their self-determination would not be against public international law but would be in their favor to the extent that rights are respected as limitations to the exercise of authoritarian power."[89] This summarizes the balancing act required when applying the principle of self-determination: that guaranteeing the people's right to self-determination against State imposition—political application—should not threaten the integrity of the State from the perspective of international law.

84 Martínez Muñoz, *supra* note 57, at 350–51.

85 Ronald Edgardo Cuenca Tovar & Judith Patricia Beltrán Ramírez, *El Derecho a la Autodeterminación de los Pueblos y los Movimientos Independentistas*, CRITERIO LIBRE JURÍDICO, Jan.-June 2018, at 4, 10.

86 *Id.*

87 *See* Neil MacFarlane & Natalie Sabanadze, *Sovereignty and Self-Determination: Where Are We?*, 68 INT'L J. 609, 624–25 (2013); John Charvet, *The Idea of State Sovereignty and the Right of Humanitarian Intervention*, 18 INT'L POL. SCI. REV. 39, 40–42 (1997).

88 Cuenca Tovar & Beltrán Ramírez, *supra* note 85, at 10.

89 *Id.*

## II. The Case of Puerto Rico

### A. *Puerto Rico's Colonial and Imperialist History*

Puerto Rico has been a colony or imperial territory throughout most its recorded history. Originally inhabited by Indigenous populations such as the Taíno and Carib peoples, Puerto Rico became known to the western world through Christopher Columbus's voyage to the island in 1493.[90] The archipelago was first colonized by the Spanish in the early sixteenth century and remained under Spanish control until the end of the nineteenth century.[91] When the Spanish lost the Spanish-American War in 1898, they ceded their overseas colonies to the U.S..[92] Since that time, Puerto Rico has been under the control of the U.S..[93]

After the Spanish-American War ended in 1898, the U.S. started a process of acquiring noncontiguous continental territories from Spanish possession.[94] During this time, the U.S. cemented its position as a political and economic superpower through its imperial acquisition of new territories by force.[95] However, this was not the beginning of the U.S. acquisition of other territories. The Spanish-American War was the culmination of an expansionist process for the U.S. that climaxed fifty years earlier at the end of the Mexican American War.[96]

In 1848, the U.S. and Mexico signed the Treaty of Guadalupe Hidalgo, leading to the annexation of land that later became parts of the states of California, Arizona, New Mexico, Nevada, and Utah.[97] The acquisitions of land from the Spanish-American War, however, were treated differently than the acquisition of land from the Mexican-American war, largely because of their geographical distance.[98] These new territories, "namely Puerto Rico, the Philippine Islands, and Guam, were not only

90 *History*, Nat. Res. Conservation Serv., https://www.nrcs.usda.gov/wps/portal/nrcs/detail/pr/about/?cid=nrcs141p2_037303 (last visited Apr. 10, 2022).

91 *Puerto Rico*, Yale U. Genocide Stud. Program, https://gsp.yale.edu/case-studies/colonial-genocides-project/puerto-rico (last visited Mar. 18, 2022); *see also* Fernando Picó, History of Puerto Rico: A Panorama of Its People 38, 231, 238 (2006).

92 Picó, *supra* note 91, at 231, 238.

93 *Today in History - October 18*, Libr. Cong., https://www.loc.gov/item/today-in-history/october-18/ (last visited Mar. 26, 2022).

94 Picó, *supra* note 91, at 231.

95 *See id.* at 231, 237.

96 *See The Treaty of Guadalupe Hidalgo*, Nat'l Archives, https://www.archives.gov/education/lessons/guadalupe-hidalgo (June 2, 2021).

97 *Id.*

98 *See* Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283, 288–89 (2007).

noncontiguous with the United States proper but . . . were separated from the mainland by considerable oceanic distances."[99] Indeed, "for the first time in its history, the United States acquired sovereignty over noncontiguous lands separated by thousands of miles from the political and economic epicenter of the American polity. . . ."[100] Hawai'i's treatment, on the other hand, more closely mirrors that of the Spanish islands because it is also a group of islands several thousand miles from the mainland U.S.[101] Furthermore, its annexation was a result of the Newlands Resolution of 1898, which was contemporaneous with the Spanish-American War.[102]

There are additional aspects that made a difference in how the Spanish overseas colonies were treated. Very few U.S. citizens lived in Puerto Rico, the Philippines, and Guam when the U.S. obtained control over these Spanish islands.[103] Instead, these islands were "inhabited by large numbers of subject peoples of different races, languages, cultures, religions, and legal systems than those of the then-dominant Anglo-Saxon society of the United States."[104] Most importantly, most of the large native populations inhabiting these islands were people of color, a fact that cannot be ignored in an analysis of discriminatory treatment in the process of acquisition and assimilation of these territories.[105]

Regardless of these differences in the U.S. acquisition of Puerto Rico and the other Spanish colonies, the importance of these possessions for the U.S. was evident. Military expansion and economic exploitation have been the unsung reasons to keep overseas territories.[106] In 1899, the Carroll Commission, led by Henry K. Carroll, filed a report about the conditions in Puerto Rico in which he and his companions foresaw the territory becoming an integral part of the U.S., "destined for statehood."[107]

Despite the report being favorable to Puerto Rico's statehood,

99 *Id.*

100 *Id.* at 289.

101 *See* Gustavo A. Gelpí, *The Insular Cases: A Comparative Historical Study of Puerto Rico, Hawai'i, and the Philippines*, FED. LAW., Mar.-Apr. 2011, at 22, 23.

102 *Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States (1898)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/joint-resolution-for-annexing-the-hawaiian-islands (last visited Apr. 15, 2022).

103 *See* Torruella, *supra* note 98, at 289.

104 *See id.*

105 *See* Rick Baldoz, *The Racial Vectors of Empire: Classification and Competing Master Narratives in the Colonial Philippines*, 5 DU BOIS REV. 69, 75–77 (2008); Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U.L. REV. 1, 17 (1998).

106 Torruella, *supra* note 98, at 289–90.

107 *Id.* at 296; *see* HENRY K. CARROLL, U.S. TREASURY DEP'T, REPORT ON THE ISLAND OF PORTO RICO 58–64 (1899).

the Filipino insurrection against annexation created a wave of political resistance to the integration of the overseas territories.[108] Senator Joseph B. Foraker introduced a bill to grant Puerto Ricans citizenship and to establish a civil government on the island based, in part, on the Carroll report, but the congressional debates about the bill reflect how divided Congress was on the issue.[109] Statements made by congressmen opposing the Foraker Bill showcased the racial and cultural biases that motivated the opposition.[110] Exemplifying this racism, Mississippi Congressman Thomas Spight said, "[t]he inhabitants are of wholly different races of people from ours . . . They have nothing in common with us and centuries cannot assimilate them . . . They can never be clothed with the rights of American citizenship . . . ."[111] When the Foraker bill finally passed in April 1900, it was heavily amended and deleted the citizenship provisions for Puerto Rico.[112]

Under President Theodore Roosevelt, the same rhetoric of American superiority continued to shape how the U.S. related to their newly acquired territories.[113] After the Foraker Bill was amended, between 1901 and 1905, the Supreme Court decided multiple cases known as the "Insular Cases."[114] These cases, "constitutionally justified imperialist policy toward the territories of Hawai'i, Puerto Rico, and the Philippines," and essentially replaced the previous process for territories to gain statehood.[115]

### B. *The Insular Cases*

The Insular Cases are a compendium of decisions that extended the debate over the Spanish-American War and the imperialism that caused the conflict into U.S. Constitutional law and established the norm on decision making around territories.[116] Prior to the Insular Cases, the Northwest Ordinance set out the process for U.S. territories to gain statehood.[117] This Ordinance went into effect shortly after the end of the American

108 *See* Carroll, *supra* note 107, at 58–64; E. San Juan, Jr., U.S. Imperialism and Revolution in the Philippines, at XVI–XVII (2007).

109 Torruella, *supra* note 98, at 297.

110 *Id.* at 297–98.

111 33 Cong. Rec. 2105 (1900).

112 José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. Pa. L. Rev. 391, 433–34 (1978).

113 *See* Sidney Milkis, *Theodore Roosevelt: Foreign Affairs*, Miller Ctr., https://millercenter.org/president/roosevelt/foreign-affairs (last visited Apr. 6, 2022).

114 Gelpí, *supra* note 101, at 22.

115 *Id.*

116 Torruella, *supra* note 98, at 287; *see, e.g.*, De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Downes v. Bidwell, 182 U.S. 244 (1901).

117 Journals of the Continental Cong. 337–38 (1787); Gelpí, *supra* note 101, at 22.

Revolutionary War, when the Northwest Territory was created and incorporated to the newly independent U.S.[118] The Ordinance established an incorporation policy outlining how a newly acquired territory could achieve statehood.[119] Under the Ordinance, while the population of free, male inhabitants of a territory was less than 5,000, there would be a limited form of government: a governor, a secretary, and three judges, all appointed by the U.S. Congress.[120] Once the population reached 5,000 free male inhabitants, the territory would have an elected assembly, and one non-voting delegate in Congress.[121] Finally, once the population reached 60,000, the territory could request statehood and would draft a state constitution.[122]

The Northwest Ordinance was "de facto repealed" as a result of the Insular cases, creating constitutional precedent.[123] In its place, the Court devised the doctrine of "territorial incorporation," creating two types of U.S. territories: (1) incorporated territory, which is destined for statehood and to which the Constitution fully applies, and (2) an unincorporated territory, which is not bound for statehood, and to which only "fundamental" constitutional guarantees apply.[124] The early Insular Cases, including *Downes* and *De Lima*, were decided by a narrow 5-4 plurality.[125] The U.S. Supreme Court laid out the basis for the novel territorial policy established in the Insular Cases in its decision in *Downes v. Bidwell*.[126] In this case, the Court decided that territories would only receive the full protection of the Constitution if they were incorporated territories, as determined by Congress.[127] In determining whether a territory was incorporated, Congress was permitted to consider the race of those inhabiting the territory and its production capabilities.[128] Specifically, the opinion goes on to say:

> It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race,

118 *See* JOURNALS OF THE CONTINENTAL CONG. 337–38 (1787); *Northwest Territory*, BRITANNICA, https://www.britannica.com/place/Northwest-Territory (last visited Apr. 8, 2022); Jeff Wallenfeldt, *Timeline of the American Revolution*, BRITANNICA, https://www.britannica.com/list/timeline-of-the-american-revolution (last visited Apr. 8, 2022).

119 *See* JOURNALS OF THE CONTINENTAL CONG. 337–38 (1787).

120 *Id.*

121 *Id.*

122 *Id.*

123 Gelpí, *supra* note 101, at 22.

124 *Id.* at 23.

125 *See* Krishanti Vignarajah, *The Political Roots of Judicial Legitimacy: Explaining the Enduring Validity of the* Insular Cases, 77 U. CHI. L. REV. 781, 790, 793 (2010).

126 Gelpí, *supra* note 101, at 23; *see also* Downes v. Bidwell, 182 U.S. 244 (1901).

127 Gelpí, *supra* note 101, at 23; *see also Downes*, 182 U.S. 244.

128 *See Downes*, 182 U.S. at 282.

> habits, laws and customs of people, and from differences of soil, climate and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.[129]

Since this decision, the "U.S. territories and their inhabitants have now for over a century been treated in an anomalously separate and unequal manner"[130]

There are plenty of examples of the discriminatory treatment that resulted from such incorporation policy, particularly in the case law that followed. This case law is better known as the Insular Cases: a series of decisions issued by the U.S. Supreme Court that set restrictions on the enjoyment of American citizenship available to residents of Puerto Rico, still to this date.[131] Although the relevance and extension of these cases is a matter of debate among legal scholars in Puerto Rico and the U.S., in the U.S., the Insular Cases remain as binding precedent today.[132] These cases are a contradiction to the nation's standard of equality for all of its citizens, relating to past racist perceptions from imperialism and colonialism.[133] Scholars and authority at the time the Insular Cases were decided, such as former Yale Law professor, Simeon Baldwin, fed the doctrine that encouraged these cases. In a Harvard Law Review piece, Baldwin wrote, "[o]ur constitution was made by a civilized and educated people . . . [t] o give . . . the ignorant and lawless brigands that infest Puerto Rico . . . the benefit of such immunities from the sharp and sudden justice—or injustice— . . . [would] be a serious obstacle to the maintenance there of an efficient government."[134] It is impossible to thoughtfully analyze the Insular Cases without recognizing this prejudiced background against which the cases were decided.

The Insular Cases were tax claims that sought to clarify the

129 *Id.*

130 Gelpí, *supra* note 101, at 23.

131 *Id.* at 22. United States v. Vaello Madero, 596 U.S. ___ (2022) (Gorsuch, J., concurring) ("The flaws in the Insular Cases are as fundamental as they are shameful. . . The Insular Cases can claim support in academic work of the period, ugly racial stereotypes, and the theories of social Darwinists. But they have no home in our Constitution or its original understanding. . . The Insular Cases' departure from the Constitution's original meaning has never been much of a secret. . . [but] [b]ecause no party asks us to overrule the Insular Cases to resolve today's dispute, I join the Court's opinion [citing the Insular Cases as precedent].")

132 *See e.g. Vaello Madero*, 596 U.S. ___.

133 *See* Torruella, *supra* note 98, at 297–98; U.S. Const. amend. XIV.

134 Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 Harv. L. Rev. 393, 415 (1899).

application of tariff law to the newly acquired colonies after the end of the Spanish-American war.[135] During the transition of power, various decrees were put in place to ensure the collection of duties. From April 1898 to April 1900, various tariff laws affecting Puerto Rico were put into place, until the Foraker Act took effect on May 1, 1900, as the final administrative document to deal with the newly acquired territories.[136] The transition of power prompted legal questions about the application of tariff laws, when and how duties were collected, or if Puerto Rico and the Philippines were now considered annexed under the definitions provided in tariff law for collections of goods imported from different states versus foreign countries.[137] All these cases were decided during the Court's session in May 1901.[138]

In *DeLima v. Bidwell*, the U.S. Supreme Court determined that Puerto Rico was not a foreign country within the meaning of applicable tariff law at the time.[139] In the case of *Goetze v. United States*, which was decided along with *Crossman v. United States*, the U.S. Supreme Court reviewed two decisions of the board of general appraisers that had determined that both Puerto Rico and Hawai'i were subject to tax duties as foreign countries.[140] The court decided that the board had no jurisdiction to make that determination based on the decision of *DeLima*, since neither island was considered a foreign country subject to import taxes.[141]

*Dooley* was one of the most significant cases because the claimant argued that they had been doing business between New York and Puerto Rico since 1898, even before the ratification of the Treaty of Paris which brought the Spanish-American War to its end.[142] Dooley, Smith & Co. sought to recover duties paid under protest at the port of San Juan, Puerto Rico, over goods imported into the island from New York.[143] The court decided that the duties which were collected and directed to a fund to support the creation of a local government in the island were legally exacted.[144] The court came to this decision for two reasons: First, although Puerto Rico was not considered

135 Vignarajah, *supra* note 125, at 784 n.12.

136 *See* Dooley v. United States, 182 U.S. 222, 230 (1901).

137 *See* Henry M. Hoyt, *The Final Phase of the Insular Tariff Controversy*, 14 YALE L.J. 333, 333–34 (1905); Ann J. Davidson, *A Credit for All Reasons: The Ambivalent Role of Section 936*, 19 U. MIA. INTER-AM. L. REV. 97, 101–04 (1987).

138 *See, e.g.*, De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901).

139 182 U.S. at 200.

140 *Goetze*, 182 U.S. at 221–22.

141 *Id.*

142 Dooley v. United States, 182 U.S. 222, 230 (1901); *Treaty of Paris of 1898*, LIBR. CONG. (June 22, 2011), https://loc.gov/rr/hispanic/1898/treaty.html.

143 *Dooley*, 182 U.S. at 223.

144 *Id.* at 230–31.

a foreign country in terms of tariff laws, the commercial activities cited in the case were partly carried out before Puerto Rico became a U.S. territory during the transition of power; and second was because the duties collected were directed to a separate fund that benefited the provisional government of the island.[145]

In *Armstrong*, similarly to *Dooley*, the petitioner sought to recover duties exacted by the collector of the port of San Juan upon goods, wares, and merchandise produced and manufactured in the U.S.[146] This case was decided alongside *Dooley* with the same result for both:

> In *Dooley v. United States* . . . the Court held that before the ratification of the Treaty of Paris, duties that had been levied on exports to Puerto Rico were lawfully collected by the military commander and the President under the war power. After ratification of the treaty, however, Puerto Rico "ceased to be a foreign country," and hence export levies were invalid . . . . *Armstrong v. United States* concerned taxes imposed upon imports received into San Juan; the Court upheld "duties exacted by the collector of the port of San Juan" on goods imported from the United States because the territories were not states subject to the Uniformity Clause.[147]

When determining if Puerto Rico and other U.S. territories were subject to constitutional protections in matters of import taxes in *Downes*, the U.S. Supreme Court determined that Puerto Rico was not subject to normal customs levied on imports from foreign countries since the ratification of the Treaty of Paris.[148] However, the court held that the Uniformity Clause of the Constitution, which provides that "all duties, imposts, and excises shall be uniform throughout the United States," did not apply to unincorporated territories, which created a clear distinction between the incorporated states, which enjoy of full rights within the constitution, and creating a second-class citizenship to those in non-incorporated territories.[149] This established a de facto discrimination between states and territories' citizenship and access to rights for their citizens.

*Huus v. New York & PRSS Co.* brought up the matter of whether commerce between Puerto Rico and the mainland U.S. should be considered domestic or foreign during the transition of power over the island.[150] The Court determined that trade with Puerto Rico was "properly a part of

145 *Id.* at 230–35.
146 Armstrong v. United States, 182 U.S. 243, 244 (1901).
147 Vignarajah, *supra* note 125, at 794.
148 Downes v. Bidwell, 182 U.S. 244, 248–49 (1901).
149 *See id.* at 248–49, 286–87 (quoting U.S. Const. art. I, § 1, cl. 1).
150 Huus v. N.Y. & P.R. S.S. Co., 182 U.S. 392, 395 (1901).

domestic trade of the country" because of its annexation proclaimed in the Treaty of Paris.[151]

When *Dooley* was reexamined by the U.S. Supreme Court in December 1901, it determined that the Foraker Act, which imposed a duty of fifteen percent of the amount of duties paid upon merchandise imported from foreign countries going into Puerto Rico, was constitutional.[152] This decision limited the Constitutional protection that no tax or duty shall be laid on articles exported from any states, applying it only to articles exported to a foreign country, which did not apply to Puerto Rico.[153] The court also examined the purpose of the duties collected, which did not go to the general Treasury but were put into a separate fund dedicated to the establishment of a local government in Puerto Rico.[154] This is important because according to the court's decision, the tax was not intended as a duty on exports but as an action of Congress to legislate on the newly acquired territory.[155]

Through these cases, the U.S. Supreme Court created the figure of unincorporated territories and legitimized their treatment of territorial citizens with a biased application of certain laws and the denial of constitutional protections that should have applied had the territories been fully annexed. In its treatment of the Philippines, Hawai'i, and Puerto Rico, the Court established that citizens of the unincorporated territories of Hawai'i and Puerto Rico were not entitled to certain constitutional rights that were not considered fundamental. The repercussion of this type of ruling is that it not only relegated the rights of the people of Puerto Rico in their enjoyment of rights that citizens of incorporated territories enjoy, but it also established the standing for delimitating fundamental rights.

### C. *The Legacy of the Insular Cases*

Between 1903 and 1922, the U.S. Supreme Court went on to decide several more cases related to commerce and the application of laws versus constitutional protections in issues dealing with its territories.[156] This, of course, adversely affected certain sectors of the population in Puerto Rico more than others, such as the case of *Morales v. La Junta Local de Inscripciones*.[157] In *Morales*, the Puerto Rico Supreme Court held that the Nineteenth

151 *Id.* at 396.
152 Dooley v. United States, 183 U.S. 151, 154–55, 164 (1901).
153 *Id.* at 154–55.
154 *Id.* at 157.
155 *Id.* at 156.
156 *See* Gelpí, *supra* note 101, at 23.
157 33 P.R. Dec. 79 (1924).

Amendment, which grants suffrage rights to women, was not a fundamental right.[158] Hence, women in Puerto Rico were not entitled to vote at the time. Another important repercussion of the Insular Cases occurred between 1978 and 1980, when the U.S. Supreme Court relied on this jurisprudence to dismiss "constitutional challenges against significant discrimination in Social Security and federal welfare programs to U.S. citizens residing in Puerto Rico."[159]

The U.S. Supreme Court's interpretation of the Insular Cases has been inconsistent.[160] In 1901, the Court held that Hawai'i, Puerto Rico, and the Philippines were unincorporated territories when the U.S. acquired them in 1898.[161] The Insular Cases set them to be under the same circumstances and rights. However, in *Hawai'i v. Mankichi*, the Court held that Hawai'i became incorporated according to the Hawai'i Organic Act of 1900, which granted citizenship to native Hawai'ians.[162] This case may lead to the reasonable inference that the grant of citizenship inevitably leads to incorporation. However, this was not the case for the citizens of Puerto Rico, who were granted citizenship under the 1917 Organic Act, but were not afforded statehood.[163] Yet, in the 1922 case, *Balzac v. Porto Rico*, the U.S. Supreme Court backtracked and held that this identical congressional act did not "incorporate" Puerto Rico.[164] In the 9-0 opinion, Puerto Ricans and Filipinos were described as "living in compact and ancient communities, with definitely formed customs and political conceptions."[165] Writing for the majority, Justice Taft also concluded that "[Puerto Rico was a] distant ocean community of a different origin and language from those of our continental people," making a clear, discriminatory distinction between these territories with predominantly people of color.[166]

Even more, Congress continued to treat U.S. territories differently after the Insular Cases decisions.[167] For example, Congress never established a U.S. territorial court in the Philippines as they did in Hawai'i and Puerto Rico, which may have implied an intention to incorporate Hawai'i and Puerto Rico after their insurrection.[168] Additionally, Congress did not

158 *Id.* at 90–91.
159 Gelpí, *supra* note 101, at 23.
160 *Id.*
161 *Id.*
162 *Id.*
163 *Id.*
164 *Id.*
165 *Id.*
166 Balzac v. Porto Rico, 258 U.S. 298, 311 (1922); Gelpí, *supra* note 101, at 23.
167 Gelpí, *supra* note 101, at 23.
168 *See id.*

grant U.S. citizenship to Filipinos, and by 1946, the Philippines became independent.[169] Hawai'i, another island territory, was an incorporated U.S. territory until 1959 when Congress approved the Hawai'ian Constitution, admitted the state to the union, and established an Article III U.S. district court in Hawai'i.[170]

Puerto Rico, however, was treated quite differently than Hawai'i, as Gustavo Gelpí, First Circuit judge and former judge for the District of Puerto Rico explains:

> In 1952, seven years before the approval of Hawai'i's Constitution and admission as a state, Congress approved Puerto Rico's Constitution, which provided for a republican form of government, thus establishing the Commonwealth of Puerto Rico. Notwithstanding, coetaneous with this act, Congress did not admit Puerto Rico into the union . . . . Rather, as House Majority Leader John McCormack would put it, Puerto Rico became "a new experiment; it is turning away from the territorial status; it is something intermediary between the territorial status and statehood." A decade and a half later, in 1966, Congress transformed the U.S. territorial court in Puerto Rico into an Article III U.S. District Court, "because the Federal District Court in Puerto Rico 'is in its jurisdiction, powers and responsibilities the same as the U.S. District Courts in the (several) states.'". To date, this court . . . is the only Article III court to be created by Congress for any of the overseas territories acquired by the United States since 1898. . . [I]n Hawai'i, as in all other 49 states of the union, no Article III court was established until actual statehood.[171]

Although deemed a commonwealth and given an Article III District Court, Puerto Rico remained, and remains, an outlier among the acquired Spanish colonies with its in-between status.

Despite Puerto Rico becoming a commonwealth in 1952, its citizens still struggle with the degrading "ripple effects of the Insular Cases doctrine [which] continue to foster a separate and unequal treatment to U.S. citizens therein."[172] Amongst these discriminatory practices that burden the citizens of Puerto Rico, is the unequal distribution of public services, particularly those within the scope of public health.[173]

169 *Id.*
170 *Id.*
171 *Id.*
172 *Id.* at 24.
173 *See* Rivera Joseph et al., *supra* note 6, at 1514–16.

## III. Governance and Self-Determination in Hawai'i, Massachusetts, and Puerto Rico

The importance of governance and self-determination for the development and fulfillment of Puerto Rico's population has become clearer as the discriminatory policies that Puerto Rico has been subjected to since being a Spanish colony continue.[174] These political concepts play an imperative role in shaping the management of government and society and are closely tied to society's ability to organize their public structures in a way that best serves its individuals. Through their federalism and state sovereignty clauses, both Hawai'i and Massachusetts, amongst the rest of the U.S. states, enjoy governance and self-determination as protected under the U.S. Constitution—powers that are denied to its colonies, such as Puerto Rico.[175]

It is assumed that each state and territory of the U.S. has a degree of sovereignty, but this is not the case with Puerto Rico.[176] The archipelago has restricted participation in the distribution of its resources through the establishment of the fiscal control board.[177] This board, not elected by the citizens of Puerto Rico, determines the government's priorities in its assignment of available resources on the island, and prioritizes, as it is called to do by Congress, the repayment of a debt rather than the development and growth of a healthcare system that is so desperately needed.[178]

Before delving into the comparison, it is important to explain our selection of Massachusetts, Puerto Rico, and Hawai'i in this endeavor. The Merriam-Webster dictionary defines "commonwealth" as a political unit in which supreme authority is vested in the people of such place to make determinations within their autonomy.[179] However, this dictionary also singles out Puerto Rico as almost an anomaly among commonwealths, in also defining that a commonwealth is a "political unit having local authority but voluntarily united with the U.S. – used officially of Puerto Rico . . ."[180]

Hawai'i was a territory separated by oceanic distance like Puerto Rico, but unlike Puerto Rico, Hawai'i obtained statehood allowing them to

174 *See id.* at 1513.

175 *See* Kenneth R. Thomas, Cong. Rsch. Serv., RL30315, Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power 1–3 (2013), https://sgp.fas.org/crs/misc/RL30315.pdf.

176 Cabán, *supra* note 22.

177 *Id.*

178 *Id.*

179 *Commonwealth*, Merriam-Webster, https://www.merriam-webster.com/dictionary/commonwealth (last visited Apr. 14, 2022).

180 *Id.*

have all the rights reserved to states of the union, which Puerto Rico doesn't have under its colonial status.[181] Similarly, the title of "commonwealth" carries with it certain privileges, as explained above, and Massachusetts has those rights, but Puerto Rico does not, even though it is called a commonwealth.[182] Because of Hawaii's similar geography and history to Puerto Rico, and Massachusetts's shared title of commonwealth, we chose to use these two states in comparison with Puerto Rico.

## IV. EXAMINING THE HEALTHCARE SYSTEM IN THE UNITED STATES

The health sector in the U.S. has often been characterized by its systemic fragmentation caused by "escalating complexity and heterogeneity of healthcare delivery systems."[183] There are no national standards, policies, or even entities managing the nation's system, leaving each state free to govern and determine the best ways to deliver care.[184] As put forth by the Commonwealth Fund Commission report, a high-performing system should include, among other things, access to information, patient access to care, and continued innovation.[185] The aspiration should be to have a centralized, high functioning system that utilizes the resources available to grant access to services for its citizens, allowing some room for each state to determine its specific needs for allocation of resources. However, leaving all healthcare decisions to each state results in a system so fragmented that this is not possible.[186] Accordingly, how is it possible to compare systems that are, by nature, so fragmented and different from one another?

In answering this question, researchers developed a preliminary framework to compare and analyze healthcare delivery systems within our complex and fragmented systems.[187] Created by Dr. Ileana L. Piña and her team, the framework clusters various elements of health care delivery systems into different domains to provide a foundation for better understanding healthcare systems and standardize the analysis and

181 *See* Torruella, *supra* note 98, at 288–89.

182 *See Commonwealth*, *supra* note 179.

183 Kurt C. Stange, *The Problem of Fragmentation and the Need for Integrative Solutions*, 7 ANNALS FAM. MED. 100, 100–03 (2009); Ileana L. Piña et al., *A Framework for Describing Health Care Delivery Organizations and Systems*, 105 AM. J. PUB. HEALTH 670, 670 (2015).

184 Anthony Shih et al., *Organizing the U.S. Health Care Delivery System for High Performance*, COMMONWEALTH FUND, at ix (2008), https://www.commonwealthfund.org/publications/fund-reports/2008/aug/organizing-us-health-care-delivery-system-high-performance.

185 *Id.* at ix–x.

186 *See id.* at 16–18.

187 Piña et al., *supra* note 183, at 671.

comparison of different health care delivery systems.[188] Piña and her team ultimately categorized elements of health care delivery systems into six different domains: (1) capacity, (2) organizational structure, (3) finances, (4) patients, (5) care processes and infrastructure, and (6) culture.[189] Under this framework, researchers can categorize elements of dissimilar health care delivery systems into these broader domains to compare the systems though a more uniform framework.[190]

Basing our analysis in two of the specific domains from Dr. Piña's framework, this paper, like Dr. Piña's, will "characterize potentially important differences in structure and function of delivery organizations and systems" governance and self-determination.[191] We analyze healthcare delivery systems in Puerto Rico, Hawai'i, and Massachusetts through two of these domains: (1) finances and (2) care processes and infrastructure.[192] For our purposes, the analysis of the "finances" domain will include a review of allocation of funds (i.e. healthcare spending distribution), finances for innovation, preventive services, public health interventions, access to care, and the maintenance of data and access to it. The analysis of the "care process and infrastructure" domain will include a review of the ability for the coordination of services (preventive and interventions), public reports, settings to provide services (hospitals available, their specialty, rate of beds), and quality of services.[193] The elements reviewed in each domain when analyzing and comparing each state's governance and self-determination will aid in understanding how states may better serve their healthcare structures and provide the needed care to their citizens.

188 *Id.* at 678.
189 *Id.* at 672.
190 *See id.* at 670.
191 *Id.* at 678.
192 *Id.* at 672.
193 The operational definitions of the domains examined in this paper were inspired by Dr. Piña and her team. *See id.* This paper's analysis will only cover the listed topics within each domain. Each domain has many subject matters that could be examined to shed light on the structure of that domain within a state. These chosen domains, however, are those that have a sufficient availability of data to compare between the three states.

## V. AN EXAMINATION OF FINANCES AND CARE PROCESSES AND STRUCTURE TO DETERMINE THE EFFECTIVENESS OF HEALTHCARE DELIVERY

### A. *Economic and Population Context*

This section will compare economic data across Puerto Rico, Massachusetts, and Hawai'i. Economic and population data provides important context to the effective delivery of healthcare across all three locations. In particular, this section will discuss gross domestic product, healthcare expenditures and outcomes, and household income and poverty.

#### 1. Gross Domestic Product (GDP)

The resources available to a state are often determinative of its ability to adequately serve its citizens' needs and provide a higher standard of living.[194] As demonstrated by the data below, Puerto Rico has many fewer resources per capita in comparison to Hawai'i and Massachusetts, putting it at a disadvantage.

**Table 1**: GDP and Population[195]

| ***2019 Statistics*** | **Puerto Rico** | **Massachusetts** | **Hawai'i** |
|---|---|---|---|
| *Population (in millions)* | 3.194 | 6.893 | 1.416 |

194 *See* Patrick Flavin, *State Government Public Goods Spending and Citizens' Quality of Life*, 78 SOC. SCI. RSCH. 28, 34–35 (2019); Meetings Coverage, General Assembly, World's Poorest Nations Left Behind in Reaching Sustainable Development Goals, Delegates Stress as Second Committee Begins General Debate, U.N. Meetings Coverage GA/EF/3495 (Oct. 8, 2018), https://www.un.org/press/en/2018/gaef3495.doc.htm; David H. Peters et al., *Poverty and Access to Health Care in Developing Countries*, 1136 ANNALS N.Y. ACAD. SCIS. 161, 161 (2008).

195 *2019 National and State Population Estimates*, U.S. CENSUS BUREAU (Dec. 30, 2019), https://www.census.gov/newsroom/press-kits/2019/national-state-estimates.html (click the second link under "Tables" titled "NST-EST2019-01: Table 1. Annual Estimates of the Resident Population for the United States . . ." to view population data of U.S. states and Puerto Rico); *SAGDP1 Gross Domestic Product (GDP) Summary, Annual by State*, BUREAU ECON. ANALYSIS, https://apps.bea.gov/iTable/iTable.cfm?reqid=70&step=30&isuri=1&major_area=0&area=xx&year=2019&tableid=531&category=1531&area_type=0&year_end=-1&classification=non-industry&state=0&statistic=3&yearbegin=-1&unit_of_measure=levels (Mar. 31, 2022); *GDP (Current US$) - Puerto Rico*, WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=PR (last visited Apr. 10, 2022).

| | | | |
|---|---|---|---|
| *GDP (in USD)* | $104.915 billion | $593.257 billion | $91.781 billion |
| *GDP per capita (in USD)* | $32,847.53 | $86,066.59 | $64,817.09 |

One of the principal factors behind Puerto Rico's economic catastrophe is its government's debt burden, which at this time is over $70 billion.[196] To make matters worse, because of its colonial status, Puerto Rico is explicitly excluded from filing for Chapter 9 bankruptcy as a means of restructuring its debt.[197] Puerto Rico's debt crisis ultimately led Congress to enact the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), which led to the creation of a fiscal control board to oversee Puerto Rico's budget and guarantee the payment of the debt.[198] PROMESA is legislation passed by Congress to address the fiscal crisis in Puerto Rico and guarantee payment of debts.[199] PROMESA, among other measures, affects minimum wages and imposes harmful austerity measures throughout government institutions, including the healthcare system.[200]

PROMESA also established a control board to administer the archipelago's finances. This board was not elected by Puerto Rican citizens and was imposed upon the archipelago by the federal government with the purpose of structuring its budget to pay off its debt rather than structuring the budget to the needs of Puerto Ricans.[201] The board provides an alternate institution that governs the affairs of the archipelago within the framework of an established government structure, albeit one imposed by another

196 D. Andrew Austin, Cong. Rsch. Serv., R46788, Puerto Rico's Public Debts: Accumulation and Restructuring 1 (2021), https://sgp.fas.org/crs/row/R46788.pdf.

197 11 U.S.C. § 101(52) ("The term 'State' includes . . . Puerto Rico, except for the purpose of defining who may be a debtor under chapter 9 of this title."); *see also* Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 125 (2016); Laura Sullivan, *How Puerto Rico's Debt Created a Perfect Storm Before the Storm*, NPR (May 2, 2018), https://www.npr.org/2018/05/02/607032585/how-puerto-ricos-debt-created-a-perfect-storm-before-the-storm.

198 *See* Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified as amended in scattered sections of 48 U.S.C.).

199 *PROMESA Frequently Asked Questions*, U.S. Dep't Lab., https://www.dol.gov/agencies/whd/flsa/puerto-rico/faq (last visited Apr. 4, 2022).

200 *See id.*; Natalia Renta et al., PROMESA Has Failed: How a Colonial Board Is Enriching Wall Street and Hurting Puerto Ricans, Ctr. for Popular Democracy, at iii–iv (2021), https://www.populardemocracy.org/sites/default/files/%5BENGLISH%5D%20PROMESA%20Has%20Failed%20Report%20CPD%20ACRE%209-14-2021%20FINAL.pdf.

201 *See* PROMESA §§ 101(a), 101(e), 201(a), 201(b).

country in a grossly antidemocratic manner.[202] The decisions of this board resulted in budget cuts that have substantially affected, and will continue to affect, the healthcare sector and other government sectors.[203]

Similar to other governmental institutions, the implementation of the fiscal control board can be examined under the analysis of governance. This analysis can demonstrate how alternative governing institutions may not always compliment the established structure to provide better outcomes. On the contrary, adding another bureaucratic step to the governing processes, specifically in the distribution of resources, has proven detrimental to public health outcomes in Puerto Rico.[204] The way in which an alternate governance organization is created and how it participates in the governing processes depends on the established framework already operating in a society.[205] If the government and other established structures are overruled by an imposed set of governing institutions, then the work done to govern the people is not born from the peoples' needs and reality, but from the perceived reality of the power that imposes antidemocratic governing bodies.[206] Such is the reality of the colonial status to which Puerto Rico continues to be subjected to as it faces imposed obstacles from the U.S. government that hinder its ability to provide appropriate solutions to the island's social needs.[207]

### 2. Healthcare Expenditures and Health Outcomes

Of particular importance in a state's allocation of funds is its healthcare expenditures. Indeed, "[a] strong and positive correlation between healthcare expenditure and GDP has been the consistent finding of research."[208] The WHO, in an examination of the health sector in Europe,

202 *See id.* §§ 101(c), 101(d), 303.

203 RENTA ET AL., *supra* note 200, at 27–30.

204 *See* Alison Chopel et al., *Relationships Between Distribution of Disaster Aid, Poverty, and Health in Puerto Rico*, NAT. HAZARDS CTR. (2021), https://hazards.colorado.edu/public-health-disaster-research/relationships-between-distribution-of-disaster-aid-poverty-and-health-in-puerto-rico ("Greater disaster-associated fatalities and larger amounts of disaster aid were both associated with greater acceleration of poverty. . . . [O]ur findings suggest that both disaster aid and infectious diseases travel along these same channels and in the process deepen them.").

205 *See* Ángel R. Oquendo, *At Rock Bottom: Puerto Rico's Crises and Self-Determination*, 41 HARBINGER 255, 256–59 (2017).

206 *See* SAMUEL P. HUNTINGTON, POLITICAL ORDER IN CHANGING SOCIETIES 1–2 (1968).

207 *See* Pedro Cabán, *Puerto Rico, Colonialism in*, *in* 3 THE OXFORD ENCYCLOPEDIA OF LATINOS & LATINAS IN THE UNITED STATES 516, 519–20 (Suzanne Oboler & Deena J. González eds., 2005).

208 Seyed Nezamuddin Makiyan et al., *Does Health Care Expenditure Affect Economic Growth? Evidence from Selected Asian Countries*, 12 J. INT'L RELS. 73, 73 (2014).

found that the health sector is crucial to ascertaining both the economic production and stability of a country.[209] Further, the WHO examined how allocating resources to effective healthcare systems can provide social benefits to a population such as generating less social exclusion and more opportunities for development.[210]

When examining the foundations of a state's health care delivery system and its ability to properly serve its citizens and respond to a public health emergency, understanding the economic resources available to the state is essential in better understanding its limitations in public expenditures.[211] In addition to the economic resources available, governance and self-determination to produce, secure, and determine the distribution of such resources is essential for better population health outcomes.[212]

In a 2017 report, the Department of Health and Human Services found that "[t]he 3.5 million Americans living in the Commonwealth of Puerto Rico do not have access to a healthcare system considered standard in the rest of the nation."[213] This discrepancy is likely explained, in part, by Puerto Rico's lack of expenditures on healthcare. Reflective of the states' GDP per capita, Puerto Rico's health expenditure per capita is alarmingly low in comparison to Hawai'i, Massachusetts, and the average in the mainland U.S.:[214]

209 Tammy Boyce & Chris Brown, *Economic and Social Impacts and Benefits of Health Systems*, World Health Organization [WHO] 1 (2019), https://apps.who.int/iris/bitstream/handle/10665/329683/9789289053952-eng.pdf.

210 *Id.* at 1, 5.

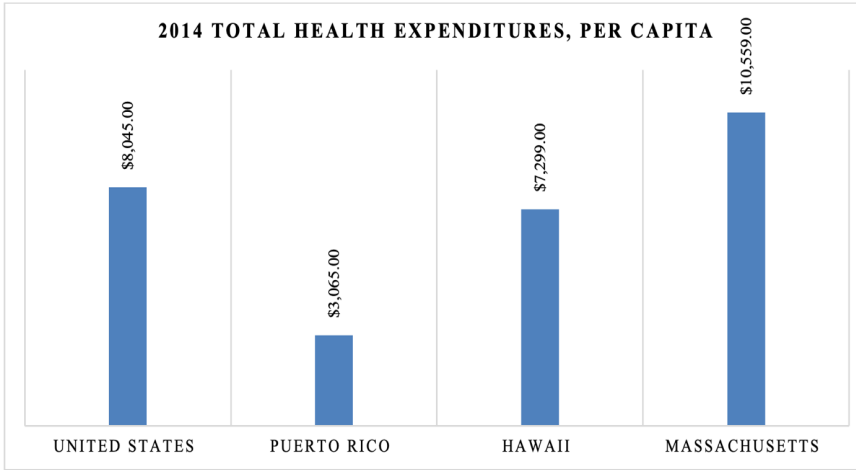
211 *See* Off. of the Assistant Sec'y for Plan. & Evaluation, Dep't of Health & Hum. Servs., Evidence Indicates a Range of Challenges for Puerto Rico Health Care System 3–4 (2017), https://aspe.hhs.gov/system/files/pdf/255466/PuertoRico_Assessment.pdf.

212 Orielle Solar & Alec Irwin, *A Conceptual Framework for Action on the Social Determinants of Health*, World Health Organization [WHO] 4 (2010), https://apps.who.int/iris/bitstream/handle/10665/44489/9789241500852_eng.pdf?sequence=1&isAllowed=y.

213 Off. of the Assistant Sec'y for Plan. & Evaluation, *supra* note 211, at 1–2.

214 *See* Krista Perreira et al., *Environmental Scan of Puerto Rico's Health Care Infrastructure*, Urb. Inst. 6 (Jan. 2017), https://www.urban.org/sites/default/files/publication/87016/2001051-environmental-scan-of-puerto-ricos-health-care-infrastructure_1.pdf; *Health Care Expenditures per Capita by State of Residence*, Kaiser Fam. Found., https://www.kff.org/other/state-indicator/health-spending-per-capita/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D (last visited Apr. 10, 2022).

**Figure 1**: Health Expenditures per Capita[215]




Since 2010, Puerto Rico has shown a decline in healthcare expenditures per capita as compared to the national average, Hawai'i, and Massachusetts.[216]

These discrepancies between Puerto Rico and the mainland U.S. do not only exist at an expenditures level; health outcomes among the populations vary drastically, too. Despite the fact that the life expectancy in Puerto Rico is similar to that of the mainland U.S., the percentage of adults reporting fair to poor health is higher in Puerto Rico than it is in the U.S. (thirty five percent compared to eighteen percent).[217] Moreover, Puerto Rico's residents have a higher prevalence of heart attacks and heart disease, diabetes, depression, disability, low birth-weight infants, higher infant mortality rate, and higher numbers of people living with HIV than the U.S. overall.[218] Puerto Rico has also suffered outbreaks of viral diseases for the

215 Perreira et al., *supra* note 214, at 6; *Health Care Expenditures per Capita by State of Residence*, *supra* note 214. The data used is from 2014 since Puerto Rico has not made readily available on its publications—for the general public at least—any more recent data of the distribution of their health care expenditures at the time this research paper was written. To have a fair comparison (per annual expenditures) data from 2014 was used for all states to match distribution of resources at a particular time in history for all three states.

216 Perreira et al., *supra* note 214, at 6; *Health Care Expenditures per Capita by State of Residence*, *supra* note 214.

217 Perreira et al., *supra* note 214, at 7.

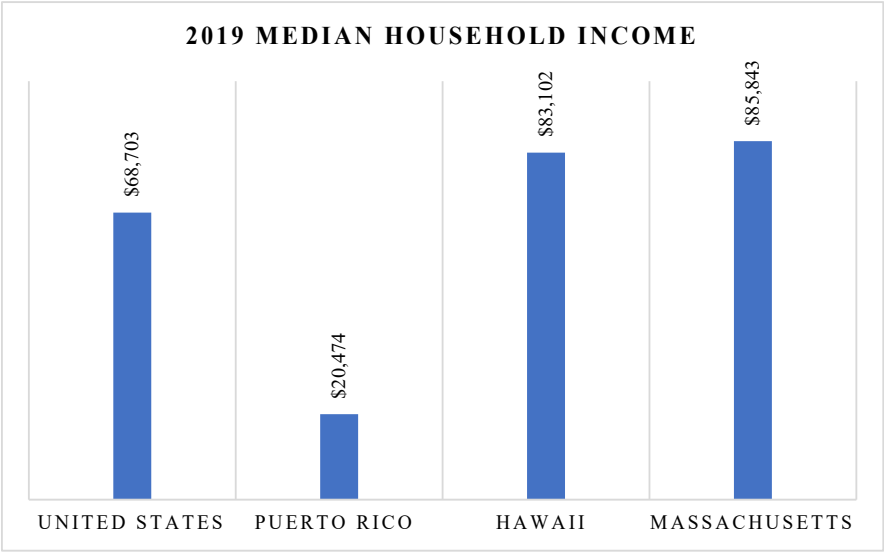
218 Robin Rudowitz & Julia Foutz, *Navigating Recovery: Health Care Financing and Delivery Systems in Puerto Rico and US Virgin Islands*, KAISER FAM. FOUND. (Dec. 20, 2017), https://www.kff.org/medicaid/issue-brief/navigating-recovery-health-care-financing-and-

last several years, including the Zika virus epidemic, where the majority of cases in the U.S.—eighty-four percent—were reported in Puerto Rico.[219]

### 3. Household Income and Poverty

Much like the archipelago, Puerto Ricans' individual resources fall behind those available to mainland U.S. citizens. In Puerto Rico, the median household income is significantly lower than that of the mainland U.S.[220] Massachusetts and Hawai'i both have median incomes over four times that of Puerto Rico.[221]

**Figure 2**: Median Household Income[222]




delivery-systems-in-puerto-rico-and-us-virgin-islands/.

219 Josh Michaud & Jennifer Kates, *Public Health in Puerto Rico After Hurricane Maria*, Kaiser Fam. Found. (Nov. 17, 2017), https://www.kff.org/other/issue-brief/public-health-in-puerto-rico-after-hurricane-maria/.

220 *Compare Puerto Rico*, Data USA, https://datausa.io/profile/geo/puerto-rico/ (last visited Mar. 31, 2022), *with United States*, Data USA, https://datausa.io/profile/geo/united-states (last visited Mar. 31, 2022).

221 *Puerto Rico*, *supra* note 220; *2019 Median Household Income in the United States*, U.S. Census Bureau (Sept. 17, 2020), https://www.census.gov/library/visualizations/interactive/2019-median-household-income.html.

222 Jonathan Rothbaum, *Census Bureau Still Studying Full Impact of Pandemic on Income Data*, U.S. Census Bureau (Sept. 15, 2020), https://www.census.gov/library/stories/2020/09/was-household-income-the-highest-ever-in-2019.html.

Puerto Rico's poverty rate is also much higher than even the poorest state in the U.S.[223] In 2019, just before the start of the COVID-19 pandemic, the national U.S. poverty rate was 11.7%, only about half that of Mississippi—the state with the highest poverty rate—which had a rate of 19.6%.[224] In that same year, Puerto Rico had a poverty rate of 43.5%, nearly four times the average in mainland U.S., and more than double Mississippi's poverty rate. [225]

It is essential to understand the magnitude of these statistics to analyze underlying factors that contribute to Puerto Rico's funding distributions. In Puerto Rico, there is "extreme poverty, extreme deprivation, high dependence on public programs, [and] gross underfinancing of public programs to the point that the underfunding of the healthcare system is one of the major factors associated with their economic crisis before the hurricane."[226] Yet, these egregious conditions are only symptoms caused by the underlying absence of governance and self-determination. Despite this, the absence of these essential factors is seemingly not considered when examining Puerto Rico's poor infrastructure and the power to change it.[227]

### B. *Differences in Finances and Care Processes and Infrastructure*

This section will look at healthcare financing and care processes across Puerto Rico, Massachusetts, and Hawai'i. Differences in funding and healthcare infrastructure help provide insight into a state's ability to provide effective healthcare. Specifically, this section will discuss differences in federal financing for healthcare, state plans for healthcare improvement, and care processes and infrastructures across all three states.

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223 Brian Glassman, *A Third of Movers from Puerto Rico to the Mainland United States Relocated to Florida in 2018*, U.S. CENSUS BUREAU (Sept. 26, 2019), https://www.census.gov/library/stories/2019/09/puerto-rico-outmigration-increases-poverty-declines.html.

224 JOSEPH DALAKER, CONG. RSCH. SERV., R46759, POVERTY IN THE UNITED STATES IN 2019, at 9, 13 (2021), https://sgp.fas.org/crs/misc/R46759.pdf. While the official poverty rate was 10.5%, the Supplemental Poverty Measure (SPM) "takes into account greater detail of individuals' and families' living arrangements and provides a more up-to-date accounting of the costs and resources available to them" and, in doing so, found a 11.7% poverty rate. *Id.* at 13.

225 *Id.* at 9–10, 13.

226 Shanoor Seervai, *How Hurricane Maria Worsened Puerto Rico's Health Care Crisis*, COMMONWEALTH FUND (Dec. 18, 2017), https://www.commonwealthfund.org/publications/other-publication/2017/dec/how-hurricane-maria-worsened-puerto-ricos-health-care#1.

227 Oquendo, *supra* note 205, at 257–59.

### 1. Federal Finances for Healthcare

Although Puerto Rico is part of federal programs meant to help provide access to health care services for low-income individuals, its ability to take advantage of these programs is limited by its colonial status. Specifically, because of the Insular Cases and the perpetuation of colonialism in Puerto Rico, "these programs are applied differently to the approximately 4 million U.S. citizens who reside in the territories compared with those residing in the 50 states and the District of Columbia." [228] As demonstrated by health reports from Puerto Rico, in comparison to other states, health expenditures in both the private and public sector have been in decline for years.[229]

Medicaid and Medicare are two of the foremost government programs in the U.S. that provide health coverage to low-income and elderly individuals, respectively. Medicaid is funded at both the federal and state level, and provides health coverage to eligible low-income adults, children, elders, and people with disabilities.[230] Medicare, alternatively, is funded mostly through payroll taxes and general revenue, and is the federal health insurance plan for people aged sixty-five or older, certain younger people with disabilities, and those with end stage renal disease.[231] Although Medicare and Medicaid are federal government programs, states such as Hawai'i and Massachusetts are not subject to statutory caps or fixed matching rates like Puerto Rico and other U.S. territories.[232]

Unlike other states, funding for Medicaid in Puerto Rico is not adjusted for the cost of living, leaving qualifying residents' health care needs

228 Orlando Rodríguez-Vilá et al., *Healthcare Disparities Affecting Americans in the US Territories: A Century-Old Dilemma*, 130 Am. J. Med. e39 (2017); Efrén Rivera Ramos, *The Legal Construction of American Colonialism:* The Insular Cases *(1901-1922)*, 65 Rev. Jur. U. P.R. 225 (1996).

229 Krista Perreira et al., *Puerto Rico Health Care Infrastructure Assessment*, Urb. Inst. 16 (Jan. 2017), https://www.urban.org/sites/default/files/publication/87011/2001050-puerto-rico-health-care-infratructure-assessment-site-visit-report_1.pdf ("[I] nterviewees indicated that the lack of resources available to invest in health care infrastructure hinders attempts to improve the quality of care in Puerto Rico.").

230 Medicaid.gov, https://www.medicaid.gov/medicaid/index.html (last visited Apr. 13, 2022).

231 *What's Medicare?*, Medicare.gov, https://www.medicare.gov/what-medicare-covers/your-medicare-coverage-choices/whats-medicare (last visited Apr. 4, 2022); Juliette Cubanski et al., *The Facts on Medicare Spending and Financing*, Kaiser Fam. Found. (Aug. 20, 2019), https://www.kff.org/medicare/issue-brief/the-facts-on-medicare-spending-and-financing/.

232 Robin Rudowitz et al., *Medicaid Financing Cliff: Implications for the Health Care Systems in Puerto Rico and USVI*, Kaiser Fam. Found. (May 21, 2019), https://www.kff.org/medicaid/issue-brief/medicaid-financing-cliff-implications-for-the-health-care-systems-in-puerto-rico-and-usvi/.

underfunded.[233] These limits on available funding diminish the government capacity to provide necessary services to eligible individuals. Even though services are needed, there might not be funding to cover such services: "Both the capped federal allotment (known as the Section 1108 allotment) and the territories' federal matching rate (known as the federal medical assistance percentage, or FMAP) are fixed in statute."[234] In addition to the Medicaid spending cap in Puerto Rico, other federal assistance programs such as the Medicare savings program, low-income subsidies, and Supplemental Security Income are unavailable to Puerto Rico's residents.[235]

Medicaid reimburses states a certain percentage of its Medicaid expenditures based on the "state's per capita income relative to U.S. per capita income."[236] This percentage is the FMAP.[237] If Puerto Rico were to benefit just as any state in the nation, it would receive the maximum FMAP allowed: eighty-three percent.[238] Instead, Puerto Rico only obtains "capped federal Medicaid funds and a fixed FMAP (55%) that is substantially lower than the 83% rate based on per capita income that they would receive if they were states."[239] Due to these discrepancies between its Medicaid need and actual Medicaid assistance, Puerto Rico faced gaps in Medicaid funding of $877 million in 2018, a number that does not account for the additional funds needed to deal with a public health emergency or natural disaster.[240] These gaps force Puerto Rico to use its own funds to continue to provide services or to cut such services when money runs out.[241] As we discuss in section V.B., PROMESA only allows so much autonomy in the allocation of these funds.

Even when Puerto Rico's receipt of federal benefits is clearly

233 Lina Stolyar & Robin Rudowitz, *Implications of the Medicaid Fiscal Cliff for the U.S. Territories*, KAISER FAM. FOUND. (Sept. 14, 2021), https://www.kff.org/medicaid/issue-brief/implications-of-the-medicaid-fiscal-cliff-for-the-u-s-territories/.

234 *Id.*

235 Rudowitz & Foutz, *supra* note 218.

236 ALISON MITCHELL, CONG. RSCH. SERV., R43847, MEDICAID'S FEDERAL MEDICAL ASSISTANCE PERCENTAGE (FMAP) 2 (2020), https://crsreports.congress.gov/product/pdf/R/R43847/11.

237 *Id.* at 1.

238 Seervai, *supra* note 226.

239 Rudowitz et al., *supra* note 232.

240 Seervai, *supra* note 226; Cristina del Mar Quiles, *Guía para Entender la Burocracia de "La Recuperación,"* LOS CHAVOS DE MARÍA (Sept. 23, 2019), https://periodismoinvestigativo.com/2019/09/guia-para-entender-la-burocracia-de-la-recuperacion/.

241 Judith Solomon, *Puerto Rico's Medicaid Program Needs an Ongoing Commitment of Federal Funds*, CTR. ON BUDGET & POL'Y PRIORITIES (Apr. 22, 2019), https://www.cbpp.org/research/health/puerto-ricos-medicaid-program-needs-an-ongoing-commitment-of-federal-funds.

inequitable when compared to other states, the island is compelled to spend as much in taxes as other states in the union.[242] In fact, scholars have noted:

> Federal health care policies treat Puerto Rico as if it were a U.S. state when collecting taxes, yet still not when applying federal poverty standards and reimbursement rates or setting tax free zones for U.S. corporate investors residing on the island. Federal policies are significantly, and conveniently, blinded to social and economic differences between the island and the mainland, leading to greater disparities.[243]

Limitations in federal funding for hospital payments, services, and Medicare and Medicaid further the strains of a system close to collapse.[244] This lack of funding explains why certain countries are better equipped to handle unexpected public health crises, such as the COVID-19 pandemic. With the Medicaid spending cap in federal funding, a territory like Puerto Rico has to place limits on services usually covered by Medicaid to better adjust to available resources and funding.[245] As an additional consequence, when funds are exhausted, people lose health insurance and/or services are terminated once funding expires.[246]

Especially when examining the conditions of Puerto Rico in comparison to Hawai'i and Massachusetts, we see how the self-determination of the two states grants them the autonomy to develop more effective infrastructures and generate more efficient governance mechanisms. Accordingly, the economic relief that comes with statehood puts Massachusetts and Hawai'i in a better position to leverage just and fair support from the federal government. This leverage grants states the power to advocate with the federal government for necessary resources to handle public health crises—leverage that Puerto Rico, as a territory, does not have.

### 2. State Plans for Healthcare Improvement

Discrepancies in Puerto Rico's access to health care funds as compared to Hawai'i and Massachusetts is maybe most salient in the differences between the plans for their healthcare sectors. A closer look into

242 *See* Ximena Benavides, *Disparate Health Care in Puerto Rico: A Battle Beyond Statehood*, 23 U. Pa. J.L. & Soc. Change 163, 174 (2020).

243 *Id.*

244 Lizette Alvarez & Abby Goodnough, *Puerto Ricans Brace for Crisis in Health Care*, N.Y. Times (Aug. 2, 2015), https://www.nytimes.com/2015/08/03/us/health-providers-brace-for-more-cuts-to-medicare-in-puerto-rico.html.

245 Solomon, *supra* note 241.

246 *See id.*

the states' respective Departments of Health's strategic plans, gives further insight into the health resources and services available to their citizens.

The plans for Hawai'i and Massachusetts include provisions for preventive services, public health interventions, access to care, and the maintenance of, and access to, data.[247] In contrast, Puerto Rico's plan focuses primarily on the development of its health agency and departments in areas such as assessing departmental works, establishing health care processes, and updating technology.[248] The archipelago's plan is primarily focused on transforming its healthcare system, a process that has been in place for many years but has been delayed and fractured by the economic crisis, natural disasters, and public health emergencies.[249]

While Hawai'i and Massachusetts pursue plans that promote health and reduce disparities, Puerto Rico's plan aspires to form an equitable system.[250] While other strategic plans have actual programs, initiatives, or strategies to guarantee more equitable access to services, ultimately resulting in promoting health and lowering disparities, Puerto Rico still primarily, if not only, talks about trying to understand how to achieve equitable access to healthcare and empower communities.[251] The plan contains largely aspirations but no real road maps; however, other strategic plans are actual road maps of what is being done or what wants to be achieved through identified vehicles.[252] Puerto Rico's plans are neither up-stream interventions that would create desired population health outcomes, nor infrastructure improvements that will be able to handle its residents demands.[253]

247 *See* David Y. Ige & Virginia Pressler, *Strategic Plan: 2015-2018*, HAW. DEP'T HEALTH 7 (Aug. 10, 2016), https://health.hawaii.gov/opppd/files/2013/04/Hawaii-Department-of-Health-Strategic-Plan-2015-2018-081616.pdf; *Massachusetts State Health Improvement Plan (SHIP)*, MASS. DEP'T PUB. HEALTH 5–6 (Oct. 31, 2014), https://www.mass.gov/doc/state-health-improvement-plan/download.

248 *See, e.g.*, Lorenzo González Feliciano, *Plan Estratégico 2011-2018*, DEPARTMENTO DE SALUD 20, https://ogp.pr.gov/SobreOGP/AreaTrabajo/GerenciaPublica/PlanesEstrategicos/Departamento%20de%20Salud/Plan%20Estrat%C3%A9gico-DS2011-2018%20Salud.pdf (discussing Puerto Rico's desire to sustain its own office for public health emergencies).

249 *Id.* at 49.

250 *Id.* at 4.

251 *See, e.g.*, *id.* at 73–84 (discussing plans for the Department of the Promotion of Health).

252 *Massachusetts State Health Improvement Plan (SHIP)*, *supra* note 247, at 4, 11. *Compare id.*, *with* Ige & Pressler, *supra* note 247, at 7.

253 *See* David R. Williams et al., *Moving Upstream: How Interventions that Address the Social Determinants of Health Can Improve Health and Reduce Disparities*, 14 J. PUB. HEALTH MGMT. & PRAC. S8, S8 (2008) (discussing how factors such as "housing, neighborhood conditions, and increased socioeconomic status . . . can lead to improvements in health," factors notably absent from Puerto Rico's plan).

These limitations in Puerto Rico's plans are not because of government unwillingness to address these needs, but because of a lack of decision-making power due to its limited governance. The power to decide and implement a better system, even if costly, is not in the hands of the government or citizens, but rather in the hands of the dominant power, the U.S. Congress.[254] Through its establishment of the fiscal control board through PROMESA, Congress set the priority of the island as repayment of its current debt.[255] Even when the new mandate from Congress says that its goal is to maintain and help improve the island's infrastructure, the reality is that money only goes so far.[256]

### 3. Care Process and Infrastructure

Collection and availability of data is essential to understanding a population's needs and informing policymaking.[257] In a national system like Medicaid that relies on data to provide reimbursement to states, proper data is necessary to ensure states receive proper reimbursement.[258] When that data does not exist, it is impossible to do this.

The federal Agency for Healthcare Research and Quality (AHRQ) collects data from states to identify costs, quality of health services, patterns, access to services, and health outcomes, among other things, to inform policy development.[259] Puerto Rico does not seem to consistently participate in this type of data collection, as they are rarely present among states and jurisdictions that provide data among the current available data sets that AHRQ have available. Puerto Rico is often criticized for its lack of verifiable data collection, and many healthcare quality measures may only be found through the Puerto Rico Health Department or the Puerto Rico Institute of Statistics.[260] These measures, if they exist, lack the same level of detail that

254 *See* Cabán, *supra* note 22.

255 *Id.*

256 Hiram J. López Rodríguez, *El Título v De P.R.O.M.E.S.A. y su Impacto en la Agenda de Reconstrucción de Puerto Rico*, 87 Rev. Jur. U. P.R. 885, 886 (2018).

257 *See* Ross. C. Brownson et al., *Understanding Evidence-Based Public Health Policy*, 99 Am. J. Pub. Health 1576, 1576–81 (2009).

258 *See* Jennifer Reck & Rachel Yalowich, *Understanding Medicaid Claims and Encounter Data and Their Use in Payment Reform*, Nat'l Acad. for St. Health Pol'y 2 (Mar. 2016), https://www.nashp.org/wp-content/uploads/2016/03/Claims-Brief.pdf.

259 *See Agency for Healthcare Research and Quality: A Profile*, Agency for Healthcare Rsch. & Quality, https://www.ahrq.gov/cpi/about/profile/index.html (Feb. 2022).

260 *See Puerto Rico*, Am.'s Emergency Care Env't, http://www.emreportcard.org/Puerto-Rico/ (last visited Apr. 10, 2022); Lizzie Wade, *Critics Blast Move to Dismember Puerto Rico's Statistical Agency*, Science (Feb. 6, 2018), https://www.science.org/content/article/critics-blast-move-dismember-puerto-rico-s-statistical-agency; *Datos del*

is collected by the AHRQ, or other data collection agencies, for other states. For example, Massachusetts's and Hawai'i's benchmarks are compared against a national standard through the AHRQ data, so one can see the details of each benchmark score and how close each state is to the desirable benchmark.[261] Puerto Rico's data, which is not necessarily available, nor the same as those in AHRQ, cannot reliably be compared to national data. As a matter of fact, Puerto Rico has, in the past, tried to dismantle independent agencies that collect and publish data for the island, such as the Institute of Statistics.[262] This lack of data is not only concerning from a data analysis standpoint, but has real consequences for Puerto Rico's health care. The lack of data prevents Puerto Rico from fully understanding its problems and forming adequate solutions, thus reducing quality of healthcare services to all U.S. citizens residing in the archipelago. [263]

Despite the general deficiencies in Puerto Rico's data, enough data exists in some areas to provide comparisons to the U.S. states. In examining the available quality metrics data on hospitals, Puerto Rico's hospital infrastructure pales in comparison to any other state.[264] In fact, "[c]ompared to the rest of the United States, Puerto Rico' [sic] hospitals, when grouped

*Departmento de Salud*, DEPARTMENTO DE SALUD, https://ckan.salud.gov.pr/ (last visited Apr. 10, 2022); ESTADÍSTICAS.PR, https://estadisticas.pr/ (last visited Apr. 10, 2022).

261 *See National Healthcare Quality and Disparities Reports: Massachusetts*, AGENCY FOR HEALTHCARE RSCH. & QUALITY (AHRQ), https://nhqrnet.ahrq.gov/inhqrdr/reports/qdr (last visited Apr. 10, 2022); *National Healthcare Quality and Disparities Reports: Hawaii*, AGENCY FOR HEALTHCARE RSCH. & QUALITY (AHRQ), https://nhqrnet.ahrq.gov/inhqrdr/reports/qdr (last visited Apr. 10, 2022).

262 As mentioned before, one of the major challenges in trying to compare Puerto Rico data to any of the other states is finding official data in order to conduct sound analysis. Even when data is found, it does not show the same level of detail or the necessary information to compare sub-groups feeding that data. Furthermore, agencies that were tasked with collecting data from the Puerto Rican government in a centralized manner and provide this data to the public as well as reports to inform decision making have been re-structured, making them nonexistent. *See* Giorgia Guglielmi, *Plan to Dismantle Puerto Rico's Statistics Agency Gets Green Light*, NATURE (Apr. 5, 2018), https://www.nature.com/articles/d41586-018-04120-5; *Puerto Rico*, AM.'S EMERGENCY CARE ENV'T, http://www.emreportcard.org/Puerto-Rico/ (last visited Apr. 10, 2022) ("Puerto Rico also faces additional challenges unique to the island, such as a lack of many data collection mechanisms that allow most states in the nation to efficiently and effectively review and address areas needing significant improvement.").

263 *See* Maria Levis, *The Price of Inequality for Puerto Rico*, HEALTH AFFS. (Dec. 29, 2015), https://www.healthaffairs.org/do/10.1377/forefront.20151229.052430 (discussing Puerto Rico's lack of data as harming the country's ability to provide effective solutions to healthcare crises).

264 Arturo Balaguer et al., *The Disparity in Hospital Quality Metrics Between Puerto Rico and the US*, V2A CONSULTING (Dec. 2, 2019), https://v2aconsulting.com/the-disparity-in-hospital-quality-metrics-between-puerto-rico-and-the-us/?lang=es.

together, rank last in most quality measures."[265] From readmission to the hospital within thirty days of discharge to mortality rates in thirty days after entering a hospital, Puerto Rico's rates are above national averages.[266] Even more revealing are the emergency department statistics, which show a tremendous difference in the waiting times in an emergency room before a patient is admitted to inpatient.[267] On average, stateside patients wait four hours and eighteen minutes, while Puerto Rico's patients wait nearly fourteen hours and thirty minutes, more than three times the national average.[268] According to data from the Centers for Medicaid and Medicare services, for time that patients spend in the emergency department before leaving from the visit, Hawai'i and Massachusetts average one hour and fifty-seven minutes and three hours and nine minutes, respectively, while Puerto Rico's wait time is significantly longer at an average of three hours and fifty-four minutes.[269] Even in this dataset, however, Puerto Rico's lack of available data is clear, as many statistics otherwise available for many states are missing for Puerto Rico, including the average time spent in the emergency department before a patient is sent home.[270]

As if quality measures were not enough, when it comes to quantity, Puerto Rico lacks sufficient hospitals, specialized hospitals, and hospital beds to adequately serve its residents.[271] To make matters worse, the geographic distribution of hospitals is less than optimal for much of the population, particularly those in less-populated or rural communities, since these institutions are not equitably located throughout the archipelago.[272] For example, the city of Vieques has not had a hospital since Hurricane Maria, likely resulting in many preventable deaths.[273] Additionally, more than half of the hospitals in Puerto Rico are for profit, whereas only about one quarter of hospitals in the U.S. which are for-profit institutions.[274] The distinction

265 *Id.*
266 *Id.*
267 *Id.*
268 *Id.*
269 *Timely and Effective Care - State*, Ctrs. for Medicare & Medicaid Servs. (Jan. 26, 2022), https://data.cms.gov/provider-data/dataset/apyc-v239 (using the measure "[a]verage (median) time patients spent in the emergency department before leaving from the visit[;] [a] lower number of minutes is better" for these statistics).
270 *See id.*
271 Off. of the Assistant Sec'y for Plan. & Evaluation, *supra* note 211, at 2.
272 *See id.* at 5. Furthermore, according to ASPE, by 2015, Puerto Rico had 2.68 hospital beds per 1,000 persons versus 2.90 beds per 1000 persons in the mainland United States. *Id.* In addition, "Puerto Rico had only 70.1 intensive care unit beds per 1 million people, compared with 290.6 beds per 1 million in the mainland U.S." *Id.* at 8.
273 Renta et al., *supra* note 200, at 55.
274 Off. of the Assistant Sec'y for Plan. & Evaluation, *supra* note 211, at 5.

between for-profit and non-profit institutions comes into play when funding is an issue. In Puerto Rico specifically, the for-profit hospitals are owned by four groups, which also own some of the biggest health insurers in the island.[275] Rather than expanding services to gain revenue, they have opted to cut expenses, laying off employees and cutting costs.[276] These statistics demonstrate the limited care infrastructure available in the archipelago to effectively meet the needs of its population, and its difficulty in quickly responding to a natural disaster or health crisis.[277]

The natural events in the Caribbean have caused Puerto Rico's infrastructure to deteriorate even further. Puerto Rico suffered strong hurricanes in past years that have extensively damaged existing infrastructure in the commonwealth.[278] Puerto Rico's healthcare is at a continuous risk of deterioration.[279] Unlike Hawai'i and Massachusetts, Puerto Rico is in a worse position due to the financial crisis which resulted, in part, from the lack of federal funds and the archipelago's susceptibility to natural disasters.[280] This risk is interwoven with its lack of governance and self-determination. Puerto Rico's lack of these political powers condemns the archipelago to depend on the federal government's mercy to provide efficient services for its population, forcing it to jump through extra hoops just to obtain less resources in the end.[281] For instance, the Jones Act is an example of the extra hoops Puerto Rico has to navigate to get any goods in the archipelago.[282] Under this Act, any international imports have to be offloaded in mainland U.S. to be reloaded in a U.S. vessel to be shipped to the island.[283] When Hurricane María devastated Puerto Rico, the territory's lack of self-determination also became an obstacle to international effort to provide recovery aid. The

275 Alexander C. Kaufman, *As Coronavirus Bears Down, A Private Equity Deal Haunts a Top Puerto Rican Hospital*, HUFFPOST (June 16, 2020) (updated June 17, 2020), https://www.huffpost.com/entry/coronavirus-puerto-rico-hospital_n_5ee0f4c1c5b6147d60259e84.

276 *Id.*

277 *Puerto Rico*, *supra* note 260.

278 Rudowitz & Foutz, *supra* note 218.

279 Jesse Roman, *The Puerto Rico Healthcare Crisis*, 12 ANNALS AM. THORACIC SOC'Y 1760, 1760–62 (2015).

280 *Id.* at 1760, 1762.

281 *See* Cabán, *supra* note 22.

282 *See* Merchant Marine Act of 1920, Pub. L. No. 66-261, 41 Stat. 998 (1920) (codified as amended in scattered sections of 46 U.S.C.).

283 Matthew Yglesias, *The Jones Act, the Obscure 1920 Shipping Regulation Strangling Puerto Rico, Explained*, VOX, https://www.vox.com/policy-and-politics/2017/9/27/16373484/jones-act-puerto-rico (Oct. 9, 2017); Colin Grabow et al., *The Jones Act: A Burden America Can No Longer Bear*, CATO INST. (June 28, 2018), https://www.cato.org/publications/policy-analysis/jones-act-burden-america-can-no-longer-bear.

clearest example of this was Puerto Rico's inability to accept Venezuelan oil as the archipelago suffered from gas shortages, because Puerto Rico is not authorized to offload any import cargo from an international vessel and because of the political tensions between the U.S. and Venezuela.[284] Unless the structural consequences of Puerto Rico's colonization are addressed, its current status will continue to hinder improvements to the island's healthcare systems.[285]

## VI. COVID-19 and Puerto Rico's Response in Comparison to Hawai'i and Massachusetts

In looking more concretely at how these structural disadvantages affect Puerto Rico's population, the novel COVID-19 pandemic provides a helpful comparison. When comparing Puerto Rico's response to the pandemic to Massachusetts and Hawai'i, Puerto Rico's lack of resources as a direct result of its governing colonial status has left the archipelago, yet again, in the dark. As presented above, the lack of proper healthcare infrastructure to treat and service those who need access to health care is a major detriment to anyone response to a public health emergency.

### A. *States' Positions to Manage the COVID-19 Emergency*

The status of the pandemic on the archipelago, though alarming, may not capture the full extent of this public health emergency. Indeed, Puerto Rico has exhibited difficulties in reporting cases and related deaths in a methodologically sound manner, information that is needed to properly inform public health policies and enable officials to better tackle the emergency.[286] Specifically, there are reporting inconsistencies and changes in the methodology used to collect data on cases in the archipelago,

284 *See* Raquel Reichard, *How Puerto Rico's Colonial Status Impairs Hurricane Relief*, Remezcla (Sept. 28, 2017), https://remezcla.com/features/culture/puerto-rico-colonial-status-impairs-hurricane-relief/; Wilma E. Reverón-Collazo, *The International Response to the Hurricane and Puerto Rico's Role in the Global Environment*, Rutgers (Oct. 15, 2018), https://clc.camden.rutgers.edu/files/WERC_Rutgers.pdf.

285 *See* Wiscovitch, *supra* note 24; Enrique Vázquez Quintana, *El Coronavirus y la Influenza Ponen de Manifiesto el Desconocimiento del Gobierno en Salud Pública: COVID-19 y la Ideología Política del País*, Medicina Salud Pública (Mar. 12, 2020), https://medicinaysaludpublica.com/noticias/covid-19/el-coronavirus-y-la-influenza-ponen-de-manifiesto-el-desconocimiento-del-gobierno-en-salud-publica/5920.

286 *Tracking Coronavirus in Puerto Rico: Latest Map and Case Count*, N.Y. Times, https://www.nytimes.com/interactive/2021/us/puerto-rico-covid-cases.html (Apr. 24, 2022); Alejandro Azofeifa et al., *Estimating and Characterizing COVID-19 Deaths, Puerto Rico, March-July 2020*, 136 Pub. Health Reps. 354, 355 (2021).

including counting older tests, revising the number of cases down, changing characteristics to count COVID-19 related deaths, and double-counting patients.[287] Moreover, there is significant uncertainty about coronavirus cases in Puerto Rico due to the lack of testing options and inadequate COVID-19 tracing.[288] On an archipelago already struggling with scarce medical resources or funds, this lack of testing creates even further uncertainty around COVID-19.[289] Simply put, even using available data, the island faces a dearth of resources available to adequately confront the virus.[290] The resources necessary for Puerto Rico to address the pandemic do not align with the resources available to it.

In contrast, Massachusetts has been able to better confront the pandemic because it has a healthcare system with adequate resources.[291] Hawai'i, though situated in a similar position to Puerto Rico in terms of geographical isolation from the mainland and resource availability, was still able to address the pandemic with more success and accuracy than Puerto Rico.[292] Like Hawai'i and Massachusetts, Puerto Rico imposed severe restrictions during the pandemic yet their lack of healthcare resources still failed the island.[293] As discussed, Puerto Rico lacks a health care infrastructure that is able to handle the number of patients it encounters.[294] As individual cases demonstrate, it can take several emergency room visits to different hospitals to receive adequate testing and care needed to prevent COVID-19 related deaths.[295] In the end, it comes down not to individual

287 *Tracking Coronavirus in Puerto Rico: Latest Map and Case Count*, *supra* note 286; Azofeifa et al., *supra* note 286, at 355.

288 Sofia Perez Semanaz, *The Impact of the Covid-19 Pandemic in Puerto Rico*, AM. U. WASH. D.C. (Nov. 1, 2020), https://www.american.edu/cas/news/catalyst/covid-19-in-puerto-rico.cfm.

289 *Id.*

290 *Id.*

291 Adam Reilly, *What Massachusetts Got Right in Its Pandemic Response*, GBH NEWS (May 25, 2020), https://www.wgbh.org/news/local-news/2020/05/25/what-massachusetts-got-right-in-its-pandemic-response.

292 Alejandro de la Garza, *Hawaii Is Riding Out the COVID-19 Storm. But Geographic Isolation Isn't the Blessing It May Seem*, TIME (Nov. 25, 2020), https://time.com/5915084/hawai'i-covid-coronavirus/.

293 *See* Nicole Acevedo, *Puerto Rico Enacted Strict Covid Measures. It Paid Off, and It's a Lesson for the Mainland.*, NBC NEWS (Mar. 15, 2021, 6:05 AM) (updated 8:09 AM), https://www.nbcnews.com/news/latino/puerto-rico-enacted-strict-covid-measures-it-paid-it-s-n1260998.

294 Omaya Sosa Pascual & Jeniffer Wiscovitch Padilla, *Puerto Rico's Chronically Ill Health System Blocks Effective COVID-19 Response*, CENTRO DE PERIODISMO INVESTIGATIVO (July 24, 2020), https://periodismoinvestigativo.com/2020/07/puerto-ricos-chronically-ill-health-system-blocks-effective-covid-19-response/.

295 *Id.*

state's measures that prove to have been more effective than the other, or vaccination plans, or even the roll-out of vaccines or restrictions imposed, but on how many resources there are available and how they are being used to deal with the emergency.

Puerto Rico, in comparison to Massachusetts and Hawai'i, is not able to adequately respond to an emergency. In our study, we analyzed data that compared vaccine rollout and critical staffing shortages. In creating this study, we intended to also examine Intensive Care Unit (ICU) bed utilization within each state, however, this was not possible due to Puerto Rico's data limitations. While both Hawai'i and Massachusetts had this data, there was none available for Puerto Rico.[296] The comparisons of vaccine utilization and critical staffing shortages illustrate how discriminatory access to resources and the lack of self-determination and governance play a pivotal part in how states, even one similarly situated to Puerto Rico, hold a clear advantage over colonial territories in providing efficient solutions to a health crisis like COVID-19.

### 1. Vaccine Utilization

In facing the COVID-19 pandemic, vaccines have been one of the primary tools in slowing the spread of the virus and decreasing rates of hospitalization.[297] Beginning in December 2020, the U.S. swiftly distributed millions of vaccines in the hopes of curtailing the virus.[298] By April 2021, three vaccines were approved for emergency use in prevention of COVID-19: the two-dose Moderna shot, the two-dose Pfizer shot, and the single-dose Johnson & Johnson shot.[299] The use of the vaccines by states and territories of the U.S. was not equal, however, and some fared better in the distribution of vaccines to citizens. Massachusetts and Hawai'i both had higher percentages of vaccine utilization than Puerto Rico, as demonstrated

296 *See COVID-19 Estimated ICU Beds Occupied by State Timeseries*, HealthData.gov, https://healthdata.gov/dataset/COVID-19-Estimated-ICU-Beds-Occupied-by-State-Time/7ctx-gtb7 (July 30, 2021).

297 *See* Alison Galvani et al., *Deaths and Hospitalizations Averted by Rapid U.S. Vaccination Rollout*, Commonwealth Fund (July 7, 2021), https://www.commonwealthfund.org/publications/issue-briefs/2021/jul/deaths-and-hospitalizations-averted-rapid-us-vaccination-rollout.

298 *Id.*

299 *See COVID-19 Frequently Asked Questions*, U.S. Food & Drug Admin., https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/covid-19-frequently-asked-questions (Apr. 22, 2022) (scroll to "Vaccines, Biologics, Human Tissues, and Blood Products" then click "Q: Which COVID-19 vaccines are FDA-approved or authorized for emergency use?").

by the data below.

**Table 2:** Vaccine Utilization per State as of April 12, 2021[300]

| | **Puerto Rico** | **Massachusetts** | **Hawai'i** |
|---|---|---|---|
| *Total Delivered Vaccines* | 2,426,730 | 5,331,330 | 1,140,130 |
| *Total Used Vaccines* | 1,348,411 | 4,651,716 | 853,628 |
| *Percentage of Vaccine Utilization* | 56% | 87% | 75% |

**Table 3**: Vaccinated Population by State as of April 12, 2021[301]

| | **Puerto Rico** | **Massachusetts** | **Hawai'i** |
|---|---|---|---|
| *Percentage of Population with First Dose of Vaccine* | 27% | 44% | 37% |
| *Percentage of Population Fully Vaccinated** | 16% | 26% | 25% |

*"Fully Vaccinated" indicates the individual received either the single-dose Johnson & Johnson vaccine or two doses of either the Moderna or Pfizer vaccine.[302]

As of April 12, 2021, Massachusetts and Hawai'i had disbursed most of the doses they received, while Puerto Rico, only distributed a little over half of the vaccines it received. The same is true of the rates of fully vaccinated individuals in comparison to people with one shot per state; again, Puerto Rico, even with a proportional number of vaccines received, continues to fall behind in administering the doses received. There is a myriad of reasons why the vaccination rates in Puerto Rico are so far behind those of Hawai'i and Massachusetts. This difference might be attributable to Puerto Rico's overburdened infrastructure that inhibits it from carrying out vaccination plans, or logistical problems in distributing vaccines to its population.[303] In either case, these causes are the direct effect

300 *COVID-19 Vaccinations in the United States, Jurisdiction*, CTRS. DISEASE CONTROL & PREVENTION, https://data.cdc.gov/Vaccinations/COVID-19-Vaccinations-in-the-United-States-Jurisdi/unsk-b7fc (Apr. 24, 2022).

301 *Id.*

302 *Id.*

303 *In Puerto Rico, Reaching People Missed by COVID-19 Vaccination Rollout*, DRS. WITHOUT

of discriminatory access to federal resources, lack of self-determination, and the economic crisis derived also from those issues, as a direct product of colonialism and lack of governance as discussed above.

### 2. Staffing Shortages

Puerto Rico's economic crisis has contributed not only to resource shortages, but labor shortages as well. This economic disaster has led thousands of professionals, particularly young professionals, to emigrate to the other states in search for a better life, leaving a critical staffing shortage.[304] According to U.S. Census data, Puerto Rico is facing an insurmountable exodus of young professionals in various fields.[305] The medical field has been hit particularly hard by this emigration, as the archipelago's labor landscape fails to provide financial security to recent medical graduates.[306] As of 2018, Puerto Rico lost at least fifteen percent of all its medical personnel, adding to the already existing shortage of medical resources and proper medical facilities.[307]

The tables below provide a snapshot of the staffing shortages during the first year of the COVID-19 pandemic. Beginning in March 2020, hospitals in each state were asked daily to report if they had a shortage in critical staffing.[308] "Critical staffing" denotes the minimum essential staff

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Borders (Mar. 29, 2021), https://www.doctorswithoutborders.org/latest/puerto-rico-reaching-people-missed-covid-19-vaccination-rollout.

304 Syra Ortiz-Blanes, *'A New Maria.' Puerto Rico's Next Crisis Is a Demographic Crisis*, Tampa Bay Times (May 25, 2021), https://www.tampabay.com/news/nation-world/2021/05/25/a-new-maria-puerto-ricos-next-crisis-is-a-demographic-crisis/; Jason Schachter & Angelica Menchaca, *Net Outmigration from Puerto Rico Slows During Pandemic*, U.S. Census Bureau (Dec. 21, 2021), https://www.census.gov/library/stories/2021/12/net-outmigration-from-puerto-rico-slows-during-pandemic.html.

305 Oren Dorell, *Who Will Rebuild Puerto Rico as Young Professionals Leave Island After Hurricane Maria?*, USA Today (Oct. 12, 2017) (updated Oct. 13, 2017), https://www.usatoday.com/story/news/nation/2017/10/12/puerto-rico-young-professionals-leaving-hurricane-maria/754753001/; Catherine Kim, *A 13-Year-Old's Death Highlights Puerto Rico's Post-Maria Health Care Crisis*, Vox (Feb. 27, 2020), https://www.vox.com/identities/2020/2/27/21150176/puerto-rico-health-care-hospital-access-hurricane-maria.

306 Kim, *supra* note 305.

307 *Id.*

308 *See COVID-19 Reported Patient Impact and Hospital Capacity by State Timeseries*, HealthData.gov, https://healthdata.gov/Hospital/COVID-19-Reported-Patient-Impact-and-Hospital-Capa/g62h-syeh (Mar. 28, 2022) (this dataset was last downloaded and checked on March 28, 2022). Each data category as well as the dataset for each measure can be found at the Patient Impact and Hospital Capacity database.

based on "facility needs and internal policies for staffing ratios."[309] The data below shows the average number of hospitals reporting noncritical staffing shortages, reporting a critical staffing shortage, and not reporting data for the period from March 1, 2020, to April 10, 2021.[310]

**Table 4**: Critical Staffing Shortages from March 1, 2020, to April 10, 2021[311]

| | **Puerto Rico** | **Massachusetts** | **Hawai'i** |
|---|---|---|---|
| *Total number of Days During 03/01/2020 to 04/10/2021 in which States Reported This Data* | 406 | 380 | 406 |
| *Average Number of Hospitals Reporting no Critical Staffing Shortage* | 16.1 | 58.4 | 12.9 |
| *Average Number of Hospitals Reporting a Critical Staffing Shortage* | 3.1 | 5.3 | 1.1 |
| *Average Number of Hospitals Not Reporting This Data* | 34.4 | 22.8 | 12.3 |

A striking disparity emerges in looking at the "not reporting" averages among the states. It is daunting that in comparison to Massachusetts and Hawai'i, Puerto Rico, on average, did not report this data on an aggregated average of almost thirty-five of the times, meaning that from PR less hospitals would report on a daily basis these indicators in comparison to other hospitals in each other state. This could be an indicator of the overburdened system and infrastructure, that even essential data is either not

309 *See* U.S. DEP'T OF HEALTH & HUM. SERVS., COVID-19 GUIDANCE FOR HOSPITAL REPORTING AND FAQS FOR HOSPITALS, HOSPITAL LABORATORY, AND ACUTE CARE FACILITY DATA REPORTING 14 (2022), https://www.hhs.gov/sites/default/files/covid-19-faqs-hospitals-hospital-laboratory-acute-care-facility-data-reporting.pdf.

310 *COVID-19 Reported Patient Impact and Hospital Capacity by State Timeseries*, *supra* note 308.

311 *Id.*

being collected, and if collected, is not being timely reported, if reported at all. An additional potential problem, as discussed above, is the inconsistency in data from Puerto Rico which can be found through several entities.

### B. *Comparing Healthcare Systems in Light of Governance and Self-Determination*

As seen from comparing the three healthcare systems, there emerges important differences from effective governance and self-determination in the development of fair and healthy public structures.[312] Indeed, comparing Puerto Rico with Hawai'i demonstrates the difference in treatment that resulted from one turning from an overseas territory to a state and the other remaining a territory.[313] Additionally, in looking at the rights afforded to Massachusetts versus those afforded to Puerto Rico, the misuse of the term "commonwealth" becomes clear.[314]

Assessing the parallel processes that both Hawai'i and Puerto Rico underwent in the twentieth century after being acquired by the U.S., we can see the signs of a preference for Hawai'i to become a state from early on. Becoming a state allowed Hawai'i access to representation in Congress, participation in federal elections, and access to public funds for all federal public spheres including education, health, and infrastructure. Although Hawai'i still suffers from discriminatory treatment related to its overseas location through double taxation that makes island life exponentially more expensive thanks to the Jones Act, they still have a preferential status as a state that may mitigate the poverty exacerbated by the expenses of imports and exports.[315] There are racial and ethnic factors in Hawai'i that promote

312 *See* Lawrence Gostin, *The Formulation of Health Policy by the Three Branches of Government*, *in* Society's Choices: Social and Ethical Decision Making in Biomedicine 335 (Ruth Ellen Bulger et al. eds., 1995).

313 *See* David Stebenne, *Statehood for Puerto Rico? Lessons from the Last Time the U.S. Added a Star to Its Flag*, Conversation (June 9, 2017) (updated June 13, 2017), https://theconversation.com/statehood-for-puerto-rico-lessons-from-the-last-time-the-us-added-a-star-to-its-flag-79150; David Stebenne, *The Political Dealmaking that Finally Brought Hawaii Statehood*, Smithsonian Mag. (June 15, 2017), https://www.smithsonianmag.com/history/what-puerto-rico-learn-hawaii-180963690/.

314 Commonwealth is a term that has been used to refer to Puerto Rico since the enactment of its Constitution, yet the term does not carry any real power. *The Meaning of "Commonwealth,"* P.R. Rep., https://www.puertoricoreport.com/the-meaning-of-commonwealth/#.YL7e9zZKhPN (last visited Apr. 12, 2022).

315 *See* Chris Isidore, *The Jones Act Has Been Hurting Puerto Rico for Decades*, CNN (Sept. 28, 2017), https://money.cnn.com/2017/09/28/news/economy/jones-act-puerto-rico/index.html; Sophia Perez, *The Act that Ate Reasonably Priced Ocean Shipping*, Nat'l Taxpayers Union Found. (July 12, 2021), https://www.ntu.org/foundation/detail/the-act-that-ate-reasonably-priced-ocean-shipping.

inequity that puts native Hawai'ians at a great disadvantage regardless of its status as a state.[316] But unlike Hawai'i, Puerto Rico has capped access to federal funds, added bureaucratic loopholes created to sustain its non-state status—on top of the Jones Act restrictions—and lacked federal government representation, which generates a unique and catastrophic public infrastructure that is essentially destined to fail.

The recent response to the COVID-19 pandemic has served to illustrate the effects of poor governance and the absence of self-determination. Local government did mismanage resources and funds, but the bureaucratic structure in place from PROMESA allows the federal government to distance itself from the responsibility of monitoring how the funds are distributed.[317] At the same time, Puerto Rico's inability to access resources hinders the local government's ability to take care of its people.

In comparing the application of the term commonwealth from Massachusetts to Puerto Rico, we see that in the case of Massachusetts, it confers self-determining power to the state. Because it is a true commonwealth, Massachusetts enjoys great autonomy within the confines of the union, most importantly of which is the power to organize its local infrastructure as it sees fit. Its status as a true commonwealth also determines its relationship with the federal government in terms of the power dynamics at play when the commonwealth requires federal aid.

When we look at Puerto Rico under the same scrutiny, it becomes clear that Puerto Rico is a commonwealth in name only. When a government attempts to manage a healthcare system under these very peculiar circumstances, it highlights the importance of self-determination. A non-country or non-state is unable to develop an efficient healthcare infrastructure without access to resources, accountability, administration, and imposed guidelines. Developing that infrastructure becomes even more difficult when other systemic obstacles surrounding its development are considered. Even alternative forms of grassroot governance—such as those pursued by non-profit community organizations in the archipelago—do not enjoy the same access to resources as states, which hinders any efforts to

316 *See* Imani Altemus-Williams & Marie Eriel Hobro, *Hawai'i Is Not the Multicultural Paradise Some Say It Is*, NAT'L GEOGRAPHIC (May 17, 2021), https://www.nationalgeographic.com/culture/article/hawaii-not-multicultural-paradise-some-say-it-is.

317 *See* Michael Corkery & Mary Williams Walsh, *Puerto Rico Debt Crisis Splits Congress on Party Lines and Draws Muted Response from White House*, N.Y. TIMES (June 29, 2015), https://www.nytimes.com/2015/06/30/business/dealbook/puerto-ricos-bonds-drop-on-governors-warning-about-debt.html; Nicole Acevedo, *How Close Is Puerto Rico to Ending Its Bankruptcy? Here Are 3 Things to Know*, NBC NEWS (Jan. 19, 2022) (updated Jan. 21, 2022), https://www.nbcnews.com/news/latino/close-puerto-rico-ending-bankruptcy-are-3-things-know-rcna12657; RENTA ET AL., *supra* note 200, at iii, 19, 21.

decentralize resources and the distribution of them in the pursuit of more efficient processes to serve the people.

Puerto Rico's current healthcare finances and infrastructure are the result of its colonial history and development. Trying to solve these complex issues to advance Puerto Rico to a standard that meets national mainland averages will require more than just better allocation of funds or development of further congressional bills. Solving these issues will require granting Puerto Rico and its residents self-determination and governance to decide its destiny. To better understand limitations and deficiencies in Puerto Rico's healthcare system, its colonial status must be addressed. Decolonizing theories in conjunction with public health theories need to be applied to better inform research efforts. Analyzing Puerto Rico's healthcare system without its political and historical context, and its resulting legal limitations, will inevitably result in an incomplete analysis. It is a disservice to develop remedies and interventions to alleviate deficiencies, promote better responses to public health emergencies, and improve the healthcare system to achieve better population health outcomes, without examining the limitations that its governing colonial status imposes in the archipelago.

### C. *Critical Areas to Improve Government Structures in Puerto Rico*

From this analysis, some core issues emerge that need to be addressed, redefined, or transformed to allow Puerto Rico to better administer its resources and provide the best possible public health outcomes for its population. Among these issues is the need for health policies and laws that consider immediate needs and the historical contexts from which those needs have arisen. Without such consideration, health policies will not be equipped to address the underlying factors contributing to poor population health outcomes. Laws which hinder Puerto Rico's self-determination and governance must also be addressed, including PROMESA, which established the Fiscal Control Board that fails to prioritize public health distribution of services over repayment of existing debt responsibilities.[318] The Board's interventions to ensure repayment of debts is incompatible with its mandate to preserve, protect, and improve Puerto Rico's infrastructure.[319] The presence of this imposed governing body added bureaucratic steps and requirements to control the distribution of resources to Puerto Ricans, hindering their wellness outcomes.

318 Rosanna Torres, *PROMESA, Cuatro Años Más Tarde*, Centro para Nuevo Economía (Sept. 30, 2020), https://grupocne.org/2020/09/30/promesa-cuatro-anos-mas-tarde/.

319 *See id.*

Further, as long as Puerto Rico remains a colony and imperial territory of the U.S., Congress should take steps to end the discriminatory treatment of the archipelago when it comes to access to resources. As a U.S. dependent, Puerto Rico should be granted federal resources such as Medicaid and Medicare on par with the rest of the states of the union. Finally, we cannot make recommendations about improving Puerto Rico's government and governance structure without addressing its colonial status as a structural issue. Puerto Rico must be granted the best chance to design and implement efficient and autonomous governance structures to attend to its population's public health needs. The political relationship with the U.S. should be changed to either hold the U.S. responsible for the outcomes of Puerto Rico by solidifying a permanent union, such as statehood, or releasing Puerto Rico from the colonial rule of the U.S. to allow it to be solely responsible for its own development in a sovereign manner.

## CONCLUSION

There are various critical areas to improve when it comes to the administration of resources in Puerto Rico if it is to thrive and develop a better healthcare system. However, it starts with reshaping its relationship with the U.S. federal government in a way that provides Puerto Ricans equal access to the same resources that states use to develop their healthcare systems. The government structures currently in place have proven insufficient to adequately serve the population of the island in all aspects of public health services. Puerto Rico remains unable to bargain with the federal government for the same rights and protections that states enjoy. It has not been afforded the capacity to decide how to relate to other nations, how to self-organize, or even how to even distribute resources and develop accountability for it. At the center of the absence of these abilities is Puerto Rico's colonial status—a status that has such a degrading effect in the island's public health infrastructures. This unequal and discriminatory status stemming from Puerto Rico's colonial history sits at the heart of the negative effects infringed upon the wellbeing of Puerto Rico's inhabitants.

# THE PERSONAL QUESTION DOCTRINE

*By Ari Spitzer**

* UCLA School of Law, J.D. 2021; Washington University in St. Louis, B.A. 2016. I am grateful to Professor Jennifer Chacon. Her insights and encouragement were invaluable to this project and to me. I am especially grateful to my father and mother, both of whose love and guidance carried me to today. I am also grateful to my student editors, whose herculean efforts improved this article immensely. Each error I made in writing this was a portal of discovery. Those, and those errors yet undiscovered, are my own. I hope you enjoy reading as much as I enjoyed writing.

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## ABSTRACT

*With the unprecedented leak of Justice Alito's draft opinion in Dobbs v. Jackson Women's Health Organization, the Court appears ready once again to abort Roe v. Wade. Underpinning Justice Alito's draft opinion is a vision of the Constitution's architecture of power: if it is not for the federal government to decide, it must be for the states—the Dual Sovereignty doctrine. A careful examination reveals the dilemma to be false, and reveals Dual Sovereignty to be little more than a partisan, ideological fabrication told and retold. An honest accounting of the history of the Tenth Amendment and its animating principle, Popular Sovereignty, reveals a path forward to securing for individual women the ability to decide whether to bear or beget a child: the Personal Question doctrine. The Personal Question doctrine is not particular to reproductive rights; rather it extends to decisions implicating individual sovereignty the Tenth Amendment reserves to the People.*

## INTRODUCTION

On January 18, 1892, thirty years before a woman would sit opposite the United States Senate lectern, Elizabeth Cady Stanton there delivered a speech entitled "Solitude of Self":

> Talk of sheltering woman from the fierce storms of life is the sheerest mockery, for they beat on her from every point of the compass, just as they do on man, and with more fatal results, for he has been trained to protect himself, to resist, to conquer. Such are the facts in human experience, the responsibilities of individual sovereignty. . . .
>
> Whatever the theories may be of woman's dependence on man, in the supreme moments of her life he cannot bear her burdens. Alone she goes to the gates of death to give life to every man that is born into the world. No one can share her fears, no one can mitigate her pangs; and if her sorrow is greater than she can bear, alone she passes beyond the gates into the vast unknown. . . .
>
> We may have many friends, love, kindness, sympathy and charity to smooth our pathway in everyday life, but in the tragedies and triumphs of human experience each mortal stands alone.[1]

In her speech, Cady Stanton spoke in support of women's suffrage about "self-sovereignty." Denying a woman the right to vote, Stanton argued, denied her any role in the government of her own destiny, denied her all choice, and so all freedom. Stanton's argument evokes the same argument Abraham Lincoln made against enslavement in Peoria, Illinois in 1854:

> When the white man governs himself that is self-government; but when he governs himself, and also governs *another* man, that is *more* than self-government—that is despotism. If the n[***]o is a *man*, why then my ancient faith teaches me that "all men are created equal;" and that there can be no moral right in connection with one man's making a slave of another.[2]

1 Elizabeth Cady Stanton, Solitude of Self, Address Before the Committee of the Judiciary of the United States Congress (Jan. 18, 1892), *reprinted in* SERIES V: PRINTED MATERIALS, 1850–1972, at 1–8.

2 Abraham Lincoln, Speech on the Kansas Nebraska Act at Peoria, Illinois (Oct. 16, 1854) (transcript available at POLITICAL SPEECHES AND DEBATES OF ABRAHAM LINCOLN & STEPHEN A. DOUGLAS 1854–1861, at 1 (Scott, Foresman, & Company 1896)).

Lincoln's ancient faith was in the timeless principles that the Framers forged during the Revolution.[3] Those principles' central concern was to keep the Revolution from its own undoing, to keep dissonant factions from dissolving the Union, to establish a republic worthy of ascent to empire across a continent, without setting into motion its descent into tyranny.[4]

The Framers' challenge was to scale their single political understanding across dispersed space. The Framers met that challenge by setting faction against faction, government against government, locked in a perpetual struggle, a static serenity.[5] Equipoise promised individual freedom, but depended on an antecedent proposition from which the Framers' precepts flow: the wellspring of ultimate power resides in the People, diffused among representative governments—Popular Sovereignty.[6] That power joins us in a dialogue across time with the Framers of the Constitution. It declares that in light of our lived experience, to realize the Constitution's original principles, the Constitution itself must change.[7] The Framers' generation enshrined that proposition in the Bill of Rights' Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[8]

*Or to the people.*

Sovereign power is obvious in moments so vast—Revolution, Reconstruction, World War—they bend a whole nation's arc away from

3 I write this article to propose the Personal Question Doctrine. In the course of articulating that proposition, I rely on history—certain figures, narratives and ideas. Throughout, I present history honestly and, insofar as I can, objectively. I do so with few illusions. No bias is acceptable, but some is inevitable. The Framers, Cady Stanton, Lincoln, and every Supreme Court Jurist to whom I cite are human, prejudiced, and therefore cannot be wholly innocent in this regard. The same goes for the principles. "Individual freedom" for decades meant, indeed still means, freedom for some, not all. The Framers' "timeless principles" relied, in part, on a pervasive system of peculiar subjugation of segments of society, Black people and women especially. My purpose here is not to scrutinize and deconstruct all of the history I bring to bear to my argument, or even most of it. My purpose here is to sketch landscapes of history and to propose a concept within the confines of a single article. To that end, I invite you to traverse with me arduous, divisive terrain in hopes of further extending Sovereignty and tilting history toward liberation. At moments, moral judgment is necessary. Elsewhere, I made the editorial choice—right or wrong—to withhold it. Where I fall short, I consider it part of my own intellectual journey and moral education.

4 John L. Gaddis, On Grand Strategy 173 (2018).

5 *Id.*

6 *See* The Federalist No. 10 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Equipoise also depended, in practice, upon subordination of whole swaths of society, though a comprehensive account is beyond the parameters of this article.

7 *See* Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction (2000).

8 U.S. Const. amend. X.

imperfect jurisprudence towards unalloyed justice. Sovereign power is less obvious in moments unknown and unrecorded. These are intimate moments which beg grave personal questions, whose answers constitute the threads of our moral identities, and whose answers' crushing burdens we each carry alone.

Consider the decision whether to bear or beget a child. A question fraught as it is estranging. A decision schismatic as war and seminal as revolution. Were it answered for you, you would be denied self-government at the moment it would matter most. The Tenth Amendment allocates to individuals the power to decide the question. Yet the prerogative to answer does not belong to the individual who bears the child. State legislatures all but decide.[9]

This article proposes a concept, the Personal Question Doctrine, to remand the decision of whether to bear or beget a child to whom it rightly belongs: the individual. The Personal Question Doctrine extends the Framers' experiment of distilling unity from faction, harmony from discord, to moments where politics and law fail to guarantee a woman's ability to stand in relation to men and to society as equal.[10]

Arriving at that long forestalled conclusion requires exposition of how individuals became alienated from reserved, sovereign power.[11] This

9 Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473.

10 *See* Ruth B. Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375 (1985). Throughout this article, I refer to individuals capable of bearing children as women. That is not to suggest that individuals who identify as women are the only ones among us who are capable of bearing children. The phrase is meant not to exclude, and to the extent possible, should be read to include.

11 Theories of old that have sought to do the same falter for want of workable criteria for discerning ordinary from extraordinary decisions. Some propose we follow the general pattern of the Framers' mandates, or their penumbras and emanations. *See* Griswold v. Connecticut, 381 U.S. 479 (1965). Others propose we follow the First Amendment's injunction that church and state remain separate—that religion and conscience so thoroughly pervade these decisions that the First Amendment must be invoked to keep a civil government from entangling itself with ecclesiastical questions. Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 11 (1973). Each fails to withstand criticism, for example, that were a given right to trump all limits, then lawless force would prevail over the force of law, Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1938 n.174 (2004) [hereinafter Lawrence v. Texas]; Jamal Greene, *Rights as Trumps?*,132 HARV. L. REV. 28, 1 (2018), or even if a government affords individuals a *choice* it might yet withhold the means to *decide*. *See, e.g.*, Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 1, 333 (1985). When the well thought out formulae of the past fail to provide the answer to a case which raises

article traces ideas' threads across time to show how, despite each successive generation of Supreme Court Justices' efforts at bending the Constitution to ideology, the impulses that animate our most hallowed precepts—Popular Sovereignty, Liberty, Equality, and Dignity—that sparked the Revolution and course still through our Constitution's text persevere.

Part I traces how Popular Sovereignty began as a creation myth and was reinvented into an altogether new species of institutional sovereignty. Part II then describes the Supreme Court's abandonment of Popular Sovereignty and turn to Due Process to protect individual freedoms. Part III recounts the rise of Human Dignity from the ashes of World War. Part IV invites the reader to examine that history in a new light. Part V offers a preliminary sketch of the Personal Question Doctrine, its meaning, and its contours. Tempting though it is to look past familiar history, careful observation of generations of Justices' tinkering reveals the grand designs long at work upon these precepts. Tracing these threads, our nation's intellectual sinews, reveals their beauty, complexity, and potential to remand Personal Questions to the People, and at long last to make real the idea of the Constitution.

## I. Evolution of Popular Sovereignty

Popular Sovereignty in the United States began as a story about how the Union came into being. Over decades, the idea assumed various semblances, and was set to various purposes. After it had shed its usefuleness as an explanation of the metaphysical perplexities of Union, Popular Sovereignty became a mediator of the relationships between sovereign entities. After the Civil War all but proved the idea's uselessness as a binding agent among the Union's sections and as a protector of individual rights, Popular Sovereignty was consigned to desuetude, only to be revived once more.

### A. *Creation Myth*

Popular Sovereignty began as a creation myth, a constitutive fiction. Popular Sovereignty explained how thirteen separate peoples were bound up into one common People. It explained the reason the Constitution was legitimate. It explained consent.[12] The word "sovereignty" derives from

problems of such fundamental importance, a woman's individual right to choose whether to terminate a pregnancy, it is time to pause and search for fresh concepts. Norman Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U. L. Rev. 787, 795 (1962).

12 Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 324–25 (1816) (reaffirming

old French "sovrain" and Latin "super," both meaning supreme.[13] British lore consolidated ultimate authority, legal and political, in the person of a monarch, the Crown.[14] In contrast to their British ancestors, Americans did not believe that providence placed any King or Queen at the center of the political universe. Americans believed that they, the People, by their consent, were the origin of political power. Although the phrase, "sovereignty" never appears in the Declaration of Independence or the Constitution, its presence permeates throughout.[15] Popular Sovereignty unites two rival ideas that undergird our system of government: self-government, and the few ruling the many.[16] Popular Sovereignty binds these two impulses in equipoise.

To Americans, the British mistook the majesty of the monarchy for the rationality of popular governance. Instead, Americans thought of Popular Sovereignty differently, rejecting the linkage of social rank with political power.[17] James Wilson, one of six individuals who signed both the Declaration of Independence and the Constitution, and a preeminent Founding-era American legal theorist, likened British notions of Popular Sovereignty to legends about the source of the Nile River. The Nile's majesty was everyone's to behold, yet its origin eluded even the greatest of monarchs. So enduring was its mystery that with each retelling, it thickened with fantasy. In time, humanity discovered the River's true source: "a collection of springs small, indeed, but pure."[18] Stripped of its veil of fantasy, Wilson taught, the true wonder of Popular Sovereignty becomes plain: ". . . the streams of power running in different directions, in different dimensions, and at different heights watering, adorning, and fertilizing the fields and meadows

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the Constitution's Preamble's fiction: that the "people of the United States" ably delegated sovereign authority as they deemed necessary and proper, and suggesting that there were specific "sovereign authorities" the People reserved to themselves).

13 Hugh Evander Willis, *The Doctrine of Sovereignty Under the United States Constitution*, 15 VA. L. REV. 437, 437 (1929).

14 Wilson R. Huhn, *Constantly Approximating Popular Sovereignty: Seven Fundamental Principles of Constitutional Law*, 19 WM. & MARY BILL RTS. J. 291, 297 (2010).

15 In his speech in Peoria, Illinois, President Lincoln alluded to this principle, calling it the "sheet anchor of American republicanism." Lincoln, *supra* note 2.

16 Sanford Levinson, *Popular Sovereignty and the United States Constitution*, 123 YALE L.J. 2644, 2653 (2014) (discussing the declaration of independence and the constitution).

17 *See* EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 306 (1988).

18 JAMES WILSON, *Lectures on Law Delivered in the College of Philadelphia in the Years One Thousand Seven Hundred and Ninety, and One Thousand Seven Hundred and Ninety One*, *reprinted in* THE WORKS OF JAMES WILSON 67, 80–81 (Robert Green McCloskey ed., 1967); *see also* Jeremy M. Sher, Note, *A Question of Dignity: The Renewed Significance of James Wilson's Writings on Popular Sovereignty in the Wake of* Alden v. Maine, 61 N.Y.U. ANN. SURV. AM. L. 591, 599–600 (2005).

. . . originally flow from one abundant fountain. In this [C]onstitution, all authority is derived from THE PEOPLE."[19]

Enlivening that American myth required destroying its British precursor. As the origin of power, the British Crown intertwined human and institution as sovereign. In relocating that origin, Americans disentangled human from institution, breeding an altogether new species of governmental sovereignty. Americans crafted their founding political papers in the image of British colonial charters, licenses to form and operate business corporations under the British crown (e.g., the Massachusetts Bay Company Charter).[20] Americans' analogy of corporate charter to political compact giving society organization based on consent suggests this new species' key characteristic: that it is sovereign on certain terms. It can be bound, checked, divided, and diffused.[21] It is sovereign only in a derivative sense and within bounds. Outside them, true and natural sovereignty, indivisible and ultimate, resided in the People.

To make myth reality, Americans invented a ritual: the People assembled in conventions to consent to delegating sovereignty on certain terms, to ratify the Constitution. Virtual embodiments of the People, conventions wield sovereignty's full measure of power.[22] The question a convention answers is about the first of first principles: whether to "alter or abolish" a form of government.[23] The question marks simultaneous rupture and continuity: the Constitution not only guides conventions' procedure, it also submits to those conventions' decisions. Legislatures craft positive law, law for everyday life. Conventions craft ultimate law, law against which all positive law is measured. The convention ritual embodies James Wilson's idea of power's origin. Constitutions control legislatures. The People control constitutions.[24]

19 James Wilson, Speech Delivered at the Convention of Pennsylvania (Nov. 26, 1787), *in* THE WORKS OF JAMES WILSON VOLUME II, 772 (Robert Green McCloskey ed., 1967).

20 Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1432–60 (1987).

21 *Id.*

22 *Id.* at 1459–60.

23 *Id.* at 1441, 1459 n.148 (Whereas Amar interprets the right to "alter or abolish" as a sort of legalized and channeled version of a more lawless-sounding right to revolution, I suggest it can be interpreted more broadly as a power to decide over questions of an ultimate nature. Whether a convention alters or abolishes a government belongs to this category of constitutive question, whether to meet one's imminent demise on one's own terms may be another.).

24 Sher, *supra* note 18, at 593, 596 (As Wilson explained to the Constitutional Convention of Pennsylvania in 1787: "the people may change the constitutions, whenever and however they please. This is a right, of which no positive institution can ever deprive them.").

At the threshold of being, Americans conceived of Popular Sovereignty as a creation myth, made real by ritual, that explained the extraordinary decision to constitute thirteen separate polities and their populations as single People. Once that liminal moment had passed, so too did Americans' early understanding of Popular Sovereignty.

### B. *Chisholm Prelude*

The metaphysics of Union perplexed Americans. For all its grand rhetoric, the Federalist Constitution could not answer the most basic question: who among us can decide? Whom does the Constitution empower to answer these extraordinary, constitutive questions? In *Chisholm v. Georgia*,[25] the Supreme Court took up the question: who among us is sovereign?

*Chisholm* was a struggle over the Constitution that began as a squabble over a contract. In 1777, a merchant in South Carolina, Robert Farquhar, sold goods to the state of Georgia during the Revolutionary War. Georgia failed to pay the merchant before he died, and so the merchant's executor, Alexander Chisholm, sued in a federal trial court. The executor invoked the court's diversity jurisdiction in support of his claim in assumpsit, a type of breach of contract claim. Georgia defended that states are immune from suit in any court. Justice Iredell dismissed the executor's claim. Chisholm again filed suit, this time in the Supreme Court. Georgia refused to appear. The Court rejected Georgia's defense, that its status as sovereign gave it immunity, and thereby established the federal judiciary's power under Article III of the Constitution to hear controversies between states and citizens of other states.[26]

*Chisholm* was about far more than just a contract. In 1783, the Washington Administration sought to enforce a peace treaty with Great Britain.[27] The treaty assured British creditors of their power to collect debts that predated the Revolution.[28] In defiance of Britsh creditors and federal efforts, however, states enacted laws expropriating British debts to support their local currencies.[29] If states could not be compelled to appear in federal court, British creditors would have to seek relief in hostile state courts.[30] To reach the question of Georgia's immunity defense, the Court had to decide

25 *See* Chisholm v. Georgia, 2 U.S. 419 (1793).

26 Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments*, 56 U. CHI. L. REV. 61, 62 (1989).

27 *Id.* at 98.

28 *Id.*

29 *Id.*

30 Massey, *supra* note 26, at 98–101.

the question of sovereignty, and signal to the world that this new federal government could conduct its affairs.[31] Distinguishing American and British sovereignty, Chief Justice Jay, wrote in *Chisholm*:

> In Europe the sovereignty is generally ascribed to the Prince; here it rests with the people; there, the sovereign actually administers the Government; here, never in a single instance; our Governors are the agents of the people, and at most stand in the same relation to their sovereign, in which regents of Europe stand to their sovereigns.[32]

The People may occupy neither the legislator's seat nor the judge's bench. Still, the People are sovereign. Among the "great objects" which a national government is designed to pursue, he wrote, is to:

> [E]nsure justice to all: To the few against the many, as well as to the many against the few. It would be strange . . . that the joint and equal sovereigns of this country, should, in the very Constitution by which they professed to establish justice, so far deviate from the plain path of equality and impartiality.[33]

Assailing Georgia's defense, a governmental sovereign's attempt to don a cloak of immunity from suit by a natural sovereign, Chief Justice Jay expounded his conception of the Federalist Constitution's Popular Sovereignty:

> [T]he Constitution places all citizens on an equal footing, and enable[d] each and every of them to obtain justice without any danger of being overborne by the weight and number of their opponents; and, because it brings into action and enforces this great and glorious principle, that the people are the sovereign of this country, and consequently that fellow citizens and joint sovereigns cannot be degraded . . .[34]

31 *See* Chisholm v. Georgia, 2 U.S. 419 (1793).

32 *Chisholm*, 2 U.S. 419 at 472. Chief Justice Jay expounded on the differences between American and European permutations of Popular Sovereignty with distinct authority. Not only had served as ambassador to France and Spain, he had also presided over the Continental Congress. *See John Jay*, Britannica, https://www.britannica.com/biography/John-Jay (Dec. 8, 2021).

33 *Chisholm*, 2 U.S. at 477.

34 *Id.* at 479.

*Chisholm* was the first time the Supreme Court interpreted the text of the Constitution—yet *Chisholm* is not a case most law students read, much less for its Tenth Amendment holding.[35] Perhaps because history subsumed *Chisholm*'s examination of Popular Sovereignty, a quintessential Tenth Amendment undertaking, into another Amendment's story. In 1795, the states ratified the Eleventh Amendment, repudiating *Chisholm*.[36] Recognizing the financial and political toll the Court's assertion of supremacy would exact on them, states rebelled at *Chisholm*. Within days of the decision's announcement, state legislatures resolved to amend the federal Constitution to undo *Chisholm*; Georgia's House of Representatives passed legislation rendering any judgment upon itself on behalf of Alexander Chisholm a felony punishable by "death, without the benefit of the clergy, by being hanged."[37] By 1890, the Court's own account of this history in *Hans v. Louisiana* took *Chisholm*'s, all of *Chisholm*'s, undoing as gospel.[38] The Eleventh Amendment overruled *Chisholm*.

Or so the story goes.

### C. *Reinvention of Popular Sovereignty as a Structural Principle—Federalism*

At the founding, Popular Sovereignty was a fiction that united dueling ideas of self-government and the few ruling the many; a fiction that gave meaning to representative democracy. *Chisholm* marked the passage of Popular Sovereignty from creation myth to instrument to chart the frontiers of power among governmental sovereigns: Federalism.

Sixteen years after *Chisholm*, the Supreme Court put Popular Sovereignty to a new use in *McCulloch v. Maryland*.[39] In 1816, Congress chartered the Second Bank of the United States.[40] In an attempt to raise revenue and wrangle federal authority, the state of Maryland taxed the Bank—a tax the Bank's Baltimore Cashier, James McCulloch, refused to pay.[41] Chief Justice Marshall concluded that the Constitution, without saying

35 Each Justice came close to invoking it, though none did. Sharon E. Rush, *Oh, What a Truism the Tenth Amendment Is: State Sovereignty, Sovereign Immunity, and Individual Liberties*, 71 FLA. L. REV. 1095, 1105 n.38 (2019).

36 The disagreement over *Chisholm*'s outcomes may explain why most first year Constitutional Law courses omit it entirely. *See* Randy Barnett, *The People or the State?:* Chisholm v. Georgia *and Popular Sovereignty*, 93 VA. L. REV. 1729, 1729–58 (2007).

37 Massey, *supra* note 26, at 111 (quoting AUGUSTA CHRON., Nov. 23, 1793) (reporting legislative action of Nov. 19, 1793).

38 *See* Hans v. Louisiana, 134 U.S. 1 (1890).

39 *See* M'Culloch v. Maryland, 17 U.S. 316 (1819).

40 *Id.* at 317.

41 *Id.* at 317–19.

so, empowered the federal government to charter a bank, and forbade states from taxing the federal government or its instrumentalities, that is, the Bank. Law students remember the case in short-hand to mean that federal power is expansive, that the Constitution gives Congress both enumerated and implied powers. This heuristic is ironic: Chief Justice Marshall relied on the Tenth Amendment as a *curb* on federal power, but whose distinction between the states and the People nevertheless compelled the conclusion that a state cannot tax the federal government.[42]

Under British imperial rule, all power had been consolidated in the Crown—this proved intolerable. Under the Articles of Confederation, little, if any power was consolidated in the national government—this proved unworkable. Chief Justice Marshall staked out a middleground in *McCulloch*: our Constitution employs Popular Sovereignty to ballast relationships among sovereign entities.[43]

The Court has likewise invoked Popular Sovereignty to ballast relationships among sovereign entities' organs. In *Luther v. Borden*, rival factions each claimed legitimate, democratic control of Rhode Island under Article IV, Section 4 of the Constitution, which requires that each states' government be a "republican form."[44] The Constitution's guarantee of a republican government, the Court held, cannot be enforced by the Court: the Court's "power begins after [the People's] ends."[45] Instead, that guarantee is political, and can only be enforced by a state's voters or the federal government's political branches, Congress or the President. "[I]f the people, in their distribution of powers under the constitution, should ever think of making judges supreme arbiters in political controversies . . . they will dethrone themselves . . . ."[46]

Although *Chisholm* and *McCulloch* appeared to portend the enduring dynamism of Popular Sovereignty, *Luther*'s conclusion of a hollow power that can be enforced only by fiat of politics, rather than by force of law, suggests what was to come for Popular Sovereignty, failure and desuetude.

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42 *Id.* at 429 ("The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States . . . . [T]he people of a single State cannot confer a sovereignty which will extend over them.").

43 Amar, *supra* note 20, at 1425, 1427, 1460–61.

44 Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849).

45 *Id.* at 52.

46 *Id.* at 52–53.

### D. *A Spectacular Failure: Civil War*

If Popular Sovereignty's and the Tenth Amendment's purpose was to ballast, and to keep governmental sovereigns afloat through the turbulence of early nationhood, the maelstrom of Civil War marked a spectacular failure. The Civil War also exposed the limits of the Constitution and the Bill of Rights' efficacy as drafted to protect individual rights.

By the close of the Civil War, the Court had recognized the Tenth Amendment as Popular Sovereignty's home in the text of the Constitution. In *Gordon v. United States*, Justice Taney wrote that the Tenth Amendment and its principle of Popular Sovereignty prevented the federal government from encroaching on powers of the states or of the People that predated the Constitution.[47] In his view, the federal judiciary's role was to use the Tenth Amendment to protect the states and the People from the federal government.[48] Justice Taney's view aligned with his effort to stymie President Lincoln's prosecution of the Union's war effort by emergency measure, and with his gravely misconceived attempt to preserve the Union by siding with enslavers from the bench. In *Scott v. Sanford*, otherwise known as *Dred Scott*, Justice Taney wrote that the Missouri Compromise, a last-ditch effort at holding the line against sectional rupture by granting freedom to enslaved persons in federal territory, violated the Constitution; it deprived enslavers of "property" and therefore of Due Process under the Fifth Amendment.[49] Justice Taney's conclusion was abominable, but was supported by precedent. Recall in *Chisholm*, Chief Justice Jay wrote that the Revolution "devolved [sovereignty] on the people . . . but they are sovereigns without subjects (*unless the [enslaved] African[s] . . . among us may be so called*) and have none to govern but themselves . . . ."[50] To reach his Due Process conclusion, Justice Taney had first to establish that Black people were property. He reasoned that the Constitutions' Framers thought so little of enslaved Africans that a product of their handiwork, the Constitution, could afford such people no legal rights.[51] Justice Taney's grotesque logic degraded Black people to mere objects, depriving them of not only of citizenship, but of humanness, damning a freed person to servitude.[52]

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47 Gordon v. United States, 117 U.S. 697 (1864); Elizabeth Anne Reese, *Or to the People: Popular Sovereignty and the Power to Choose a Government*, 39 CARDOZO L. REV. 2051, 2069 (2018).

48 Reese, *supra* note 47, at 2069.

49 Scott v. Sanford (Dred Scott Decision), 60 U.S. (19 How.) 393, 450–52 (1857).

50 Chisholm v. Georgia, 2 U.S. 419, 471–72 (1793) (emphasis added).

51 *Dred Scott Decision*, 60 U.S. at 411–12.

52 *Id.*

Perhaps it was Justice Taney's handiwork that rendered Popular Sovereignty and the Tenth Amendment ready tools for states' rights theorists, and advocates of the Confederacy and its heir, Jim Crow. Perhaps, too, it was the taint of Justice Taney's linkage of Popular Sovereignty with the Tenth Amendment that fated them both to modern scholarship's suspicion and scorn.[53]

### E. *Consigned to Desuetude*

Although the Civil War settled the supremacy of one governmental sovereign over another, a question remained: could the People exercise sovereign power independent of a government? Popular Sovereignty's failure to stave off Civil War began a process of the idea's decline that quickened soon after the arrest of an anarchist.

In *United States ex. Rel. Turner v. Williams*, the Court upheld the federal government's decision to deport the anarchist because a governmental sovereign is entitled to a power of self-preservation.[54] Concurring in *Williams*, Justice Brewer lamented that the Court gave the Tenth Amendment and Popular Sovereignty "too little effect."[55] Justice Brewer critiqued the Court's decision to empower a governmental sovereign to the detriment of the People's ability to alter or abolish government—the original constitutive choice.[56] In *United States v. Sprague*, Justice Roberts foreclosed any other path to the People exercising sovereign power than Article V of the Constitution's process for amendment, that is, a vote of a state's legislature.[57] For expression, Popular Sovereignty depended on government.

Stripped of its role of protecting individuals, the Tenth Amendment entered the twentieth century consigned to desuetude as a sometimes enforceable principle that could mediate relationships between governments. In 1918, Congress passed a law protecting birds that migrate across state lines from hunters to enforce a treaty entered into with Great Britain. The state of Missouri challenged U.S. Game Warden Ray Holland's enforcement of

53 *See, e.g.*, Heather K. Gerken, *Foreword: Federalism All the Way Down,* 124 Harv. L. Rev. 4, 44 (2010).

54 *See* United States *ex rel.* Turner v. Williams, 194 U.S. 279 (1904).

55 *Id.* at 296 (Brewer, J., concurring) (In not so many words, Justice Brewer reasoned, first, that the Constitution grants the federal government certain powers by enumeration or by implication; second, that the Constitution reserves any additional powers to the people; and third, that those can be exercised only by, or upon further grant from "them.").

56 *Id.*

57 282 U.S. 716, 730 (1931) (holding Congress may choose the proper procedure for constitutional amendment).

the law and the underlying treaty, arguing that the federal government had acted beyond the scope of its power, in that the Tenth Amendment reserved the power to regulate migratory bird hunting to the states. In *Missouri v. Holland*, Justice Holmes applied the Tenth Amendment as a tool of mediating competition *between* two sovereigns: the federal and state governments.[58] Beyond demonstrating the Court's narrowed understanding of Popular Sovereignty as exclusively a structural principle, Justice Holmes described the extent of each sovereign entity's power as determined by the object of its authority.[59] The individual fell from analysis. Once the Tenth Amendment had failed to achieve Chief Justice Jay's noble objects of ensuring justice to all and protecting individual rights, the Court turned instead to Liberty under the Fourteenth Amendment.[60] Sovereignty belonging to contrived institutions became the only sovereignty.

As the United States passed from callow, continental republic to budding global power, Congress matured into a more vigorous regulator of American life.[61] For some time, Justices appointed by conservative-leaning presidents from Harding to Hoover resisted the administrative state's growth, citing to the Tenth Amendment.[62] Resistance proved futile. As the Court's composition changed toward the middle of the twentieth century, the Court empowered Congress by wresting Popular Sovereignty, reducing the Tenth Amendment to a mere "truism," consigning them both to desuetude.[63]

58 Missouri v. Holland, 252 U.S. 416, 433–34 (1920); United States v. Butler, 97 U.S. 1 (1936) (holding that agricultural subsidy coupled with mandated reduction in crop yields exceeded federal power, impinging on powers reserved to states by Tenth Amendment).

59 *Holland*, 252 U.S. at 433–34.

60 *See* Lochner v. New York, 198 U.S. 45, 73–74 (1905) (holding New York state law violated "liberty of contract" protected by the Due Process Clause of the Fourteenth Amendment).

61 *See* Nat'l Lab. Rels. Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding Congress' exercise of Commerce Power following a period of stiff judicial resistance).

62 *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918) (concluding The Keating-Owen Child Labor Act was outside the Commerce Power and the regulation of production was a power reserved to the states via the Tenth Amendment); *see also* Steward Mach. Co. v. Davis, 301 U.S. 548, 616 (1937) (Butler, J., dissenting) (asserting that the Social Security Act violated the Tenth Amendment).

63 *See* United States v. Darby, 312 U.S. 100, 123–24 (1941) (calling Tenth Amendment a mere "truism" which places no substantive limit on Congress' power); Wickard v. Filburn, 317 U.S. 111, 120 (1942) (holding that restraint on federal power was less a matter of textual interpretation, and more one of politics).

### F. *Conservatives Revive our Popular Sovereignty*

Tectonic shifts in the American electorate and late-twentieth century conservative politicking proved how powerful and elusive a truism the Tenth Amendment could be.[64] Conservative jurisprudence followed its politics in reviving the Tenth Amendment. In the 1970s, moderate-to-liberal Republicans in Northeastern states and conservative Democrats in the South switched parties.[65] Thus began the electorate registering cultural sorting and partisan polarization.[66] Republican strategists perceived the gravity of the realignment, and saw that two key segments of voters were up for grabs: Catholics, and industrial Midwesterners.[67] The key moment occurred in 1971. Then Democratic grandee and presidential frontrunner, Edward Muskie, a Catholic senator from Maine, took an interview with David Frost, coming out against abortion.[68] On the advice of his advisors Charles Colson and Patrick Buchanan, President Richard Nixon struck back. President Nixon said that he, too, believed in the "sanctity of human life—including the life of the yet unborn." Abortion, President Nixon declared, was the "province of the states, not the Federal government. . . [because] that is where the decision should be made."[69]

As part of its late twentieth century conservative revival, Popular Sovereignty reprised its role as mediator among sovereigns. Only this time, the Court created a series of Tenth Amendment doctrines—Dual Sovereignty, anti-commandeering, Sovereign Immunity, and Equal Sovereignty—whose purpose was to define the characteristics of a governmental sovereign, and whose effect was to devolve power away from the federal government to the states.[70]

64 Rush, *supra* note 35, at 1113.

65 Drew Desilver, *The Polarized Congress of Today Has Its Roots in the 1970s,* Pew Rsch. Ctr. (Mar. 10, 2014), https://www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since/.

66 *Id.*

67 Daniel K. Williams, *The GOP's Abortion Strategy: Why Pro-Choice Republicans Became Pro-Life in the 1970s*, 23 J. Pol'y Hist. 513, 517 (2011).

68 James Reston, *Nixon and Muskie on Abortion*, N.Y. Times, Apr. 7, 1971.

69 Williams, *supra* note 67, at 536 n.13 (citing Richard Nixon, Statement on Abortion (Apr. 3 1971) (on file at Nixon Presidential Library)).

70 *See generally* Kathleen M. Sullivan, *From States' Rights Blues to Blue States' Rights: Federalism After the Rehnquist Court*, 75 Fordham L. Rev. 799, 799–800 (2006).

### 1. Dual Sovereignty

Popular Sovereignty's conservative revival began with its reinvention as *Dual* Sovereignty. Conservative jurists' doctrine of Dual Sovereignty dovetailed Justice Holmes' recasting of Popular Sovereignty as a mechanism of mediation between two entities, only. Conservative jurists were so effective at reinventing the concept that liberal jurists, perhaps unsuspectingly, adopted the reasoning.

In 1974, Congress amended the Fair Labor Standards Act of 1938 to apply its wage and hour regulations to state and local government employees.[71] State and local governments challenged the 1974 amendment as federal overreach. Two years later, the Supreme Court in *National League of Cities v. Usery* struck down that amendment, concluding that the Tenth Amendment reserved control over wage and hour rules to the states.[72] Thus began the conservative jurisprudential revival.

Writing in dissent in *National League of Cities*, Justice Brennan assailed the Court's majority for snubbing the Tenth Amendment's distinction between the People and the states.[73] Wage and hour regulation belonged to the province of Article I of the Constitution's Commerce Clause, and so could not be reserved to the states, he argued. Justice Brennan acknowledged that the Tenth Amendment distinguishes among three sovereign entities. Yet he argued that Congress exercising its commerce power under Article I is virtually the same as the People exercising sovereign authority. Justice Brennan's understanding of Popular Sovereignty elides the United States and the People.

Nine years later, Justice Brennan was in the majority as Popular Sovereignty's pendulum swung leftward. The San Antonio Metropolitan Transit Authority (SAMTA) claimed public transportation was a "traditional governmental function," and so it was exempt from the Fair Labor Standard Act's wage and hour rules under Court precedent. Joe Garcia, a SAMTA employee filed suit for overtime pay guaranteed by the Fair Labor Standard Act. In *Garcia v. San Antonio Metro Transit Authority*, a liberal majority overturned *National League of Cities*, holding states' sovereignty was guarded by the federal structure, rather than by any discrete limitation set out in any particular text of the Constitution, and that federal structure consisted of two sovereigns, only.[74]

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71 Nat'l League of Cities v. Usery, 426 U.S. 833, 835 (1976).

72 *Id.* at 852.

73 *Id.* at 868 n.9 (Brennan, J., dissenting).

74 Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 551–52 (1985) (overruling *Nat'l League of Cities*, 426 U.S. 833).

Writing in dissent in *San Antonio Metro Transit* Authority, Justice Powell rebuked the Court for paying lipservice to states' Sovereignty and treating the Tenth Amendment as if it were rhetorical froth rather than mandatory law.[75] To reinforce his point that the majority's conclusion marked a departure from the Constitution's text, Justice Powell cites a version of the Tenth Amendment: "That Amendment states explicitly that '[t]he powers not delegated to the United States . . . are reserved to the States.'"[76] In decrying his opposition's infidelity to the Constitution's text, Justice Powell inexplicably cites a version of the Tenth Amendment that omits "the People" entirely—a bewildering omission. While Justice Brennan elided the United States and the People in *National League of Cities*, Justice Powell elided the states and the People in *Garcia v. San Antonio Metro Transit Authority*.[77]

In 1986, just over a decade after President Nixon appointed William Rehnquist to the bench, President Reagan elevated Associate Justice Rehnquist to Chief Justice. Justice Rehnquist's promotion was part and parcel with Popular Sovereignty's revival. Popular Sovereignty had entered the twentieth century consigned to desuetude, Dual Sovereignty exited that century as a "defining feature of our Nation's constitutional blueprint."[78] For almost forty years, the federal government's political branches assumed there was no right in the Constitution that limited federal power.[79] Popular Sovereignty's revival upended that assumption. Though the revival originated with conservative jurists, liberals, too, joined in. Popular Sovereignty transformed into Dual Sovereignty.[80]

75 *Id.* at 559–60 (Powell, J., dissenting).

76 *Id.* at 574.

77 *Id.* at 574–76.

78 "Dual sovereignty," Justice Rehnquist wrote, "is a defining feature of our Nation's constitutional blueprint. States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union 'with their sovereignty intact.'" Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 751 (2002) (quoting Blatchford v. Native Vill. of Nootak, 501 U.S. 775, 779 (1991) (internal citations omitted)).

79 H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 Va. L. Rev. 633–89 (1993).

80 Not to be confused with the *doctrine* of dual sovereignty, articulated in *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (holding the Fifth Amendment's Double Jeopardy Clause does not prevent two separate states' prosecutors from trying an individual for the same crime, as opposed to state and federal prosecutors trying an individual for the same crime).

### 2. Anti-Commandeering

Dual Sovereignty narrowed the universe of sovereign entities to two, only, leaving the People elided, enfeebled. It follows from Dual Sovereignty that states entered the Union under the Federalist Constitution with their sovereignty intact, and a governmental sovereign cannot be told what to do.[81] The second doctrine derived from the Tenth Amendment, anti-commandeering, shields state governments from federal compulsion, and stops the federal government from commandeering state governments in service of federal ends.

In 1981, John Hinckley Jr. attempted to shoot and kill President Ronald Reagan.[82] Of six shots Hinckley fired before Secret Service agents subdued him, the first struck an assistant to President Reagan, James Brady. In 1993, Congress passed the Brady Handgun Violence Prevention Act, establishing federal background checks for gun buyers.[83] The Brady law contained an interim measure: it required local law enforcement to conduct background checks on prospective handgun buyers until the federal government established its own system of background checks. Jay Printz, a sheriff in Ravalli County, Montana, sued the federal government, arguing that the Brady law's interim measure violated the Tenth Amendment's anti-commandeering doctrine. In *Printz v. United States*, the Court struck the interim measure down.[84] Writing for the Court's majority, Justice Scalia reasoned from the Constitution's creation of two sovereigns, Dual Sovereignty, that neither a state nor its employees can be commandeered in service of a federal mandate. States could not be a proper "object" of federal authority.[85]

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81 Fed. Mar. Comm'n, 535 U.S. at 751.

82 Robert Pear, *Jury Indicts Hinckley on 13 Counts Based on Shooting of President*, N.Y. TIMES, Aug. 25, 1981, at A17.

83 *See* Brady Handgun Violence Prevention Act, Pub. L. No. 103–159, 107 Stat. 1536 (codified as amended in scattered sections of 18, 34, and 42 U.S.C.).

84 521 U.S. 898, 933–35 (1997).

85 *Id.* at 920 (citing THE FEDERALIST NO. 15, at 109 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); *see also* New York v. United States, 505 U.S. 144 (1992) (In 1985, Congress amended the Low-Level Radioactive Waste Management Act to offer states financial carrots to encourage disposal of radioactive waste and to force states to take ownership of, and liability for, waste they could not dispose of at dump sites. The state of New York sued the federal government, arguing that regulation of waste management was a power belonging only to states. In *New York v. United States*, the Court struck down the second provision. Writing for the Court's majority, Justice O'Connor reasoned that the law would commandeer state governments, and would be inconsistent with the Constitution's division of authority between federal and state governments.).

In time, the anti-commandeering doctrine morphed from a bar against compulsion to an affirmation of states' decisionmaking authority. In 2011, the New Jersey legislature posed a question to voters: should New Jersey allow sports gambling? Yes, the voters said. Shortly thereafter, the New Jersey legislature passed an amendment to its state constitution and passed a law realizing the voters' will. The problem: in 1992, Congress passed the Professional and Amateur Sports Protection Act, which prohibited states from allowing sports gambling. Against a challenge brought by sports leagues, New Jersey defended that PASPA violated the anti-commandeering doctrine.[86] In *Murphy v. National Collegiate Athletics Association*, the Supreme Court held that Congress prohibiting states from authorizing sports gambling violated the anti-commandeering doctrine. Writing for the Court's majority, Justice Alito framed his analysis with Dual Sovereignty.[87] The choice of whether to authorize sports gambling was a choice of policy—a controversial and moral choice, which Justice Alito concluded, "is not ours to make."[88]

Within a universe whose parameters Dual Sovereignty dictates, the anti-commandeering doctrine enforces those parameters, preventing sovereign entities' overreach into others' domains, ensuring proper allocation of decisionmaking authority.

### 3. Sovereign Immunity

Dual Sovereignty defined the universe of sovereign power's parameters. The anti-comandeering doctrine guards states against federal decisions that violate states' power to decide, their sovereign dignity. If a state could be called into court after exercising its power to decide, that would be no power at all. As part of the conservative project of devolving power downward, to prevent federal interference, the Court reinveneted a doctrine of Sovereign Immunity to prevent the federal government from empowering citizens to hold a state to account for acting in its sovereign capacity.[89]

Sovereign Immunity was not a new idea in the 1970s. In *Chisholm*, the Court established its own jurisdiction to hear a citizen of one state's claim against another state. The Court's conclusion in *Chisholm* implies that a citizen is empowered to bring such an action in a federal court. The

86 Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1471 (2018).

87 *Id.* at 1475.

88 *Id.* at 1484.

89 Sullivan, *supra* note 70, at 804 ("These sovereign immunity decisions, like the commandeering decisions, derive principally from the tacit structural postulates of the Constitution, not from the literal text of the Eleventh Amendment.").

Eleventh Amendment was ratified soon after. In 1890, the Court in *Hans v. Louisiana* instructed that, despite its literal wording doing nothing of the sort, the Eleventh Amendment restored to states the principal trapping of Sovereignty they had enjoyed at common law before the Constitution entered the picture: immunity.[90] The *Hans* Court failed to specify whether the Eleventh Amendment restored immunity to states from all suits, or just from some suits with certain procedural postures or party configurations. That ambiguity aside, *Hans* was a bewildering departure from the "plain path of equality and impartiality" the Court set out in *Chisholm*, which subordinated contrived to natural sovereigns.[91]

In law, for every right there must be a remedy. In 1908, Minnesota enacted a law regulating railroad rates; a federal court struck down Minnesota's law for violating Northern Pacific Railways shareholders' Fourteenth Amendment Due Process rights. The court's remedy was an injunction prohibiting Minnesota's Attorney General, Edward Young, from enforcing the law. The problem: Young represented the state, and so Young should have enjoyed immunity as a sovereign's agent. If Young were indeed immune, how could federal law be supreme, as the Constitution's Supremacy Clause requires? A federal right would be without a remedy. In *Ex Parte Young*,[92] the Court reasoned that Young acted beyond the state's authority in enforcing a state law in violation of the Constitution, thereby shedding immunity.

The *Hans* Court portrayed immunity as part of a state's sovereignty, but left tremendous ambiguity in its wake. The *Young* Court relied on interpretative fiat to characterize a private act as a public one, a legal fiction that carries a "distinct air of unreality."[93] Chief Justice Rehnquist saw his opening.

In 1988, Congress passed the Indian Gaming Regulatory Act (IGRA) to regulate gaming on Native American land—bingo, in particular.[94] IGRA granted tribes the right to regulate gaming on their lands so long as gaming was not prohibited by federal or state law. Tribes could conduct games on their lands, but only if a state consented; IGRA also required states to negotiate in good faith with tribes. Finally, IGRA granted tribes a statutory right to sue a state in federal court if a state failed to negotiate.[95]

90 Hans v. Louisiana, 134 U.S. 1, 13 (1890).

91 Chisolm v. Georgia, 2 U.S. 419, 477 (1793) (opinion of Jay, C.J.).

92 *Ex Parte Young*, 209 U.S. 123 (1908); Rush, *supra* note 35, at 1122.

93 James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex Parte Young, 72 STAN. L. REV. 1269, 1287 (2020).

94 Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

95 Laura M. Herpers, *State Sovereign Immunity: Myth or Reality After* Seminole Tribe of

The Seminole Tribe of Florida alleged that they had asked their state to negotiate to allow gaming activities, but Florida refused.[96] The Seminole Tribe sued Florida for violating IGRA. Florida raised a Sovereign Immunity defense. In *Seminole Tribe v. Florida*, the Court decided that although the Eleventh Amendment appears to restrict only a certain category of suits against states, the Eleventh Amendment does not mean what it says.[97] Instead, Sovereignty inheres in statehood, immunity inheres in Sovereignty, and therefore without their consent, states cannot be sued in federal court.[98]

The Seminole Tribe also sought an injunction against Florida's governor to force negotiations. The Court rejected this plea for relief, too, because the list of remedies set out in IGRA did not include injunctions. This outcome was not foreordained. The Rehnquist Court could have presumed the opposite, that injunctions' absence from IGRA's list of remedies meant Congress did *not* exclude injunctions.[99] Instead, the Court withheld relief. The Court in *Seminole Tribe* defied *stare decisis*, demonstrating the length the Court under Justice Rehnquist's leadership was willing to go to shift the balance of power between dual sovereigns.

A few years later, the questions *Seminole Tribe* had posed to the Court reappeared in its docket.[100] In 1992, a group of probation officers sued their employer, the state of Maine, in federal court for violations of the Fair Labor Standards Act's wage and hour rules.[101] After the Court decided *Seminole Tribe*, a federal trial court dismissed the probation officers' suit because, under *Seminole Tribe*, states are immune from suit in federal court, and Congress could not pierce that immunity. The probation officers then took their lawsuit to state court, where Maine claimed immunity. The problem: the Eleventh Amendment does not extend its immunity to sovereigns in state courts.[102]

In *Seminole Tribe*, the Court tinkered with the relationship between sovereigns, a quintessential Tenth Amendment undertaking, but had confined its reasoning to the Eleventh Amendment. In *Alden v. Maine*, Justice Kennedy invoked the Tenth Amendment explicitly:

> The phrase [Eleventh Amendment immunity] is…something

Florida v. Florida*?*, 46 Cath. U. L. Rev. 1005, 1016 (1997).

96 *Seminole Tribe*, 517 U.S. at 51–52.

97 *Id.* at 54.

98 *Id.*

99 Rush, *supra* note 35, at 1123.

100 Alden v. Maine, 527 U.S. 706 (1999).

101 *Id.*

102 *Id.* at 713.

> of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment . . .[103]

In *Alden*, the Court held that Congress cannot strip a state of Sovereign Immunity in its own courts.[104] Otherwise, Congress would not only violate the anti-commandeering doctrine,[105] but would also demean that state and deny that state its rightful Dignity: "[O]ur federalism requires that Congress treats the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."[106] Empowering citizen suits against a state in state court might open the door to that court controlling that state's performance of its political duties, interfering with its autonomy.[107] Despite their constitutional privilege, states remain bound by the Constitution and valid federal law; against their abuse of unaccountability, Justice Kennedy relies on the "good faith of the States."[108]

Anti-commandeering guarantees states' inviolability from federal compulsion. Sovereign Immunity makes the same guarantee from a particular form of compulsion, judicial retribution. Although each Doctrine approaches things from a different angle, both respond to the same injury to the states at the hands of the federal government: violation of states' Dignity.[109]

### 4. Equal Sovereignty

From Sovereignty flows states' Dignity, and from there flows a presumption preventing federal law from singling states out for violating the Constitution in ways that offend basic notions of right and wrong. That presumption is the final doctrine conservative jurists conjured in their project

103 *Id.*; Rush, *supra* note 35, at 1124.
104 *Alden*, 527 U.S. at 743.
105 *Id.* at 749.
106 *Id.* at 714–15, 748–49.
107 *See* Great N. Life Ins. Co. v. Read, 322 U.S. 47, 51 (1944).
108 *Alden*, 527 U.S. at 755.
109 Erin Daly, *Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right*, 37 OHIO N.U. L. REV. 381, 381 (2011).

of devolution, the doctrine of states' Equal Sovereignty.[110]

On March 7, 1965, police, some masked, some on horseback, discharged tear gas as they advanced toward a crowd. One hundred years after Confederate General Robert E. Lee and his Army of Northern Virginia surrendered to Union General Ulysses S. Grant at the Appomattox Courthouse, hundreds made their way from Selma to Montgomery, Alabama, in support of civil rights. At the Edmund Pettus Bridge, itself named for a Confederate general, a seering miasma engulfed the crowd, its scald punctuated by an unrelenting torrent of wooden bludgeons swaddled with metal barbs.[111] Days later, President Lyndon B. Johnson implored a joint session of Congress to act in obedience to its members' oath before God and Constitution. By August 1965, Congress passed and President Johnson signed the Voting Rights Act (VRA), whose foundation in the text of the Constitution was the Fifteenth Amendment, the last of three amendments adopted after the Civil War during Reconstruction.

The VRA contained a provision, called the preclearance provision,[112] that required certain jurisdictions to obtain approval from a panel of federal judges or the Attorney General before changing any voting laws.[113] As passed originally in 1965, the preclearance provision's "coverage formula" applied its approval process only to jurisdictions that had had a test or device to restrict voting, and less than ffity percent voter registration or turnout in the 1964 presidential election.[114] Congress reauthorized the VRA in 1970 and 1975, 1982 and 2006, but along the way expanded its original coverage formula to include jurisdictions with restrictive voting practices and low turnout in the 1968 or 1972 elections.[115]

In 2010, Shelby County, Alabama, challenged the VRA's coverage formula. In *Shelby County v. Holder*, the Supreme Court invalidated the VRA's coverage formula, ostensibly because it was out of step with current events.[116] Writing for the Court, Chief Justice Roberts concluded that by 2013, the

110 *See* Leah M. Litman, *Inventing Equal Sovereignty*, 114 Mich. L. Rev. 1207, 1256 (2016).

111 Christopher Klein, *How Selma's 'Bloody Sunday' Became a Turning Point in the Civil Rights Movement*, History (Mar. 6, 2015), https://www.history.com/news/selma-bloody-sunday-attack-civil-rights-movement.

112 The preclearance provision is actually two provisions: (1) one that prohibits eligible districts from enacting changes to their election laws and procedures without obtaining proper prior approval; and (2) another that defines the districts subject to the preclearance provision. For simplicity, the two are collapsed.

113 Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10302–03 (2008)).

114 *Id.* at § 4(b).

115 *Id.* at §§ 4(a), 4(b).

116 Shelby Cnty. v. Holder, 570 U.S. 529, 535, 540, 549 (2013).

facts no longer justified the VRA's constraints on states. This "stale facts" explanation of *Shelby County* is plausible but incomplete.[117]

Equal Sovereignty offers a better explanation. Recall the VRA's foundation in the Constitution's text is the Fifteenth Amendment, the final of three Reconstruction Amendments.[118] These amendments endowed Congress with immense, penetrating lawmaking power,[119] power Congress deemed necessary to quash lingering southern defiance too bald-faced to call subversion.[120] The promise of these pronouncements never came to pass; instead, they heralded retreat.[121] An 1863 essay called *Reconstruction of The Union* illumines the reason; its Iowan writer beseeched his fellow northerners "to consider and respect the South as an equal."[122] For states' Dignity sake, Reconstruction met a premature end so that Americans could avoid the daunting task of ascribing fault for the Civil War.[123]

Chief Justice Roberts' *Shelby County* decision reflected these same concerns about preserving states' Dignity, the same that animate both the anti-commandeering and Sovereign Immunity doctrines. Laws passed by Congress to enforce the Reconstruction Amendments are problematic from the standpoint of states' Dignity because they suggest violations not just of everyday law, but violations of elementary or "fundamental"[124] morality the Reconstruction Amendments were meant to guarantee.[125]

Before *Shelby County*, Equal Sovereignty had limited Congress' power to impose conditions on territories seeking admission as states into the federal Union, guaranteeing states would be admitted on similar terms.[126] That limit had traditionally applied at the moment of admission, neither

117 Litman, *supra* note 110, at 1261.

118 Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437 (codified as amended at 52 U.S.C. § 10301 (2008) ("To enforce the fifteenth amendment to the Constitution of the United States, and for other purposes.")).

119 *Milestone Documents*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/list (last visited June 4, 2022).

120 ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019).

121 *Id.*

122 Litman, *supra* note 110, at 1255 (citing CITIZEN OF IOWA, RECONSTRUCTION OF THE UNION: SUGGESTIONS TO THE PEOPLE OF THE NORTH ON A RECONSTRUCTION OF THE UNION, 11 (1863)).

123 Litman, *supra* note 110, at 1254 (citing ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 194 (1988)) (quoting Journal of the Proceedings and Debates in the Constitutional Convention of the State of Mississippi, August 1865, at 165 (1865)).

124 Shelby Cnty. v. Holder, 570 U.S. 529, 556–57 (2013).

125 Litman, *supra* note 110, at 1264; *see, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997).

126 Litman, *supra* note 110, at 1264.

before, nor after.[127] Congress admitted Alabama into the Union in 1819; the Court decided *Shelby County* in 2013. Chief Justice Roberts expanded Equal Sovereignty in time to apply well after admission.[128] Although it is commonplace for federal law to distinguish among states,[129] the Chief Justice describes the VRA's doing so as "extraordinary."[130] Extraordinary, perhaps, in that the VRA sought to do more than regulate states' commonplace acts. Fundamental in that the VRA sought to curtail states' power to decide moral questions by branding them deplorable, affixing to them badges and incidents of wayward crookedness unbefitting a sovereign.

From states' Sovereignty flows their Dignity, from there flows states' presumptive benevolence, the doctrine of Equal Sovereignty. As Popular Sovereignty's manifold incarnations suggest, the principles underlying our Constitution are protean. Conservative jurisprudence in the late century changed things, solidifying Dual Sovereignty's dominance, recasting Popular Sovereignty as governmental, and expounding a series of doctrines to stem any countervailing tide. The significance of these changes should not be understated, nor should it be overstated. These changes fit into dialectic pattern of controversy and decision that extends back to the very genesis of judicial review.

## II. Due Process

In 1803, Chief Justice John Marshall first asserted the Court's power to review and invalidate acts of other branches of government in the landmark case, *Marbury v. Madison*.[131] Chief Justice Marshall left the bounds of that power for posterity to define. The question posed to Chief Justice Marshall and that he posed to successive generations is: When can a judge declare an act of a political branch void?[132] Would allowing laws that oppress or that have no basis in fact or reason amount to political heresy, or to judicial orthodoxy? Would allowing such laws to survive scrutiny amount to judicial heresy, or to political orthodoxy?[133] A Court that struck down no law would be useless. A Court that struck down laws on a whim would be illegitimate. How far toward orthodoxy or heresy a Court will swing is contingent. To render a decision and lay a controversy to rest, swing the Court must. That

127 *See* United States v. Lousiana, 363 U.S. 1, 16 (1960).
128 *Shelby Cnty.*, 570 U.S. at 586 (Ginsburg, J., dissenting); Litman, *supra* note 110, at 1217.
129 Litman, *supra* note 110, at 1214.
130 *Shelby Cnty.*, 570 U.S. at 529, 544–47, 551, 554; Litman, *supra* note 110, at 1214 n.40.
131 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).
132 Erin Daly, *The New Liberty*, 11 Widener L. Rev. 221 (2005).
133 *See* Peter L. Berger, Heretical Imperative: Contemporary Possibilities of Religious Affirmation (1980).

imperative is the enduring, central question of constitutional law that Due Process helps to resolve.[134]

Enslavement and the toll in blood of breaking its grip on the country demonstrated the uselessness of Sovereignty under the Tenth Amendment as a guarantor of individual rights. The Privileges or Immunities Clause of the Fourteenth Amendment, the lesser known companion of the Due Process and Equal Protection Clauses, also proved unequal to the task.[135] The Fourteenth Amendment's purpose was to change things, to transform America, to set forth principles about the rights of freed peoples and to guarantee the extension of those principles to all citizens.[136] Despite the Amendment's clear mandate, the Court bowed to the rearward tide. Popular Sovereignty was consigned to mediate the relationship between governmental entities. This section will recount how, to mediate the relationship between government and individuals in areas as intimate as reproductive choice and whom we marry, to secure individual rights, rather than to the Tenth Amendment, or to the Privileges or Immunities Clause, Courts turned instead to Liberty[137] and Equality[138] under the Due Process Clause of the Fourteenth Amendment.

Due Process is not as limited as its name might suggest. Process is only the half of it.[139] The Court's exposition of Due Process's substantive

134 Daly, *supra* note 132, at 223.

135 Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 21 (2015). Political Reconstruction concluded with the presidential election of 1876, when Republican and Southern Democrat party bosses struck a corrupt bargain to hand victory to the Republican Hayes in exchange for the removal of federal troops from the South. So ended military and political Reconstruction. Legal Reconstruction followed when the Court decided the *Slaughter-House Cases*, a series of cases whose combined consequence was to circumscribe the Privileges or Immunities Clause into hapless oblivion. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1870); Tribe, *supra*, at 21.

136 FONER, *supra* note 120, at 56.

137 *See, e.g.*, Lochner v. New York, 198 U.S. 45, 53, 56, 64 (1905) (holding New York state law violated "liberty of contract" protected by the Due Process Clause of the Fourteenth Amendment).

138 *See, e.g.*, Buchanan v. Warley, 245 U.S. 60, 81–82 (1917) (striking down statute barring property owner from conveying property to individual of another race).

139 Among his achievements on the bench, Justice Taney not only was the first to link explicitly Popular Sovereignty with the Tenth Amendment, he was also among the first to describe a substantive Due Process. Recall Justice Taney's conclusion in *Dred Scott*: that the Missouri Compromise, which granted freedom to enslaved persons in federal territory, deprived their former enslavers of property and so of Due Process. Dred Scott Decision, 60 U.S. 393, 452 (1857). In Justice Taney's view, the heart of the matter was neither that the enslavers were deprived of notice or an opportunity to be heard, that is, of process, nor that these enslavers owned enslaved Black people in the first place. *Id.* at 450; Daly, *supra* note 132, at 224 n.18. In Justice Taney's view, the problem was substance, that the Missouri Compromise took property away from its

meaning began with those rights that the country's Founding generation had included in the Bill of Rights. Through the Fourteenth Amendment's Due Process Clause, the Court extended the first eight amendments' substantive rights, originally formulated to apply only against the federal government, to apply against state governments, too.[140] Their enumeration in the Bill of Rights' text rendered these rights an obvious starting point. These rights' enumeration suggested their rootedness in the "traditions and conscience of our people as to be ranked as fundamental."[141] Surely the first eight amendments are not an exhaustive list of rights the Constitution ought to protect. The Ninth Amendment makes clear there are other, unenumerated rights. With no other right has Court's, indeed the country's, struggle over choosing between orthodoxy and heresy proved more fraught with acrimony, than the question of reproductive autonomy.

### A. *Reproductive Autonomy*

From the Court's first flirtation with the question in 1927, its treatment of reproductive autonomy was disheartening. In 1925 Carrie Buck was raped.[142] Buck was sixteen at the time. Years before, Virginia had deemed Buck's mother "unkempt" and committed her to a mental institution.[143] As the state had done to her mother, Virginia deemed Buck "feeble minded" and committed her to a mental institution. Given her supposed intellectual and moral "crookedness," state law allowed Virginia to sterilize Buck against her will. Buck challenged that law as a deprivation of Due Process under the Fourteenth Amendment. Justice Holmes, an otherwise esteemed figure in American legal history, upheld that law. After Buck had already suffered one desecration of her body, a majority of Justices refused her shelter from further torment and a savage, irremediable indignity.

*Buck v. Bell* was an inauspicious and ugly beginning. As the following

owners (i.e., enslavers). *Dred Scott Decision*, 60 U.S. at 452. As another Court explained in *Hurtado v. California*: written constitutions and Due Process Clauses are not bound by "ancient customary English law, [but instead] they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property." 110 U.S. 516, 532 (1884). Perhaps mindful of the stigma that history's judgment would rightly attach to Justice Taney for his vicious logic, neither *Hurtado*, nor subsequent substantive Due Process cases so much as mention *Dred Scott*. Daly, *supra* note 132, at 224 n.18.

140 Daly, *supra* note 132, at 226.

141 *Id.*; Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

142 *See* Adam Cohen, Imbiciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck (2016).

143 Buck v. Bell, 274 U.S. 200, 205 (1927).

sections show, subsequent Courts were more willing to extend protections for reproductive autonomy—just not always to women. The Court recognized a right attaching to intimate personal relationships before it recognized one attaching to individual women. Although the Court did in time enunciate a right capturing reproductive autonomy assigned to individual women, as set out below, the right proved ill-concieved. The right is less secure as of my writing this article than ever before.

### 1. Penumbras, Emanations, and Personal Relationships

In November 1961, Estelle Griswold, the executive director of the Planned Parenthood League of Connecticut, and Dr. C. Lee Buxton, a physician and Yale Medical School Professor, ran a Planned Parenthood clinic.[144] At the time, a Connecticut law prohibited use and distribution of contraceptives. Connecticut prosecuted Griswold and Buxton for providing contraceptives to a married woman.[145] In *Griswold v. Connecticut*, Justice Douglas, writing for the majority, found that the right to privacy was fundamental, and Connecticut's law violated that right. As had past substantive Due Process cases, *Griswold* focused on the "traditional relation of the family . . . as old and as fundamental as our entire civilization."[146] Justice Harlan, concurring with the Majority, concluded that this privacy right resided in the Fourteenth Amendment's Due Process Clause; Justice Douglas famously located the right to privacy nowhere in the Constitution's text.[147] Instead, based on the Ninth Amendment's suggestion of the existence of unenumerated rights, Justice Douglas conjured the specific right from the Constitutions' and Bill of Rights' amassed "penumbras" and "emanations."[148]

*Griswold* established a right, but only for individuals in a marriage. *Griswold*'s right to prevent procreation within marriage emanates from the bond, rather than from the individual bound, obscured by its penumbra.[149] *Griswold* did not protect or enunciate an individual right. For Justice Douglas, the Bill of Rights guarantees a fundamental right to prevent procreation within marriage because, if it were otherwise, the Court would sanction police

144 Griswold v. Connecticut, 381 U.S. 479, 480 (1965).

145 Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEX. L. REV. 1189, 1201 (2017).

146 *Griswold*, 381 U.S. at 495–96 (Goldberg, J., concurring).

147 *See id.* at 500 (Harlan, J., concurring); *id.* at 485 (majority opinion).

148 *Id.* at 483–84 (majority opinion).

149 *Id.* at 479 ("We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.").

searching peoples' bedrooms for condom wrappers—a scenario "repulsive to the notions of privacy surrounding the marriage relationship."[150]

Shortly thereafter, the Court revisited the privacy right to prevent procreation, attaching it to individual women. In 1967, Bill Baird, a reproductive rights activist prearranged a violation of a Massachusetts law under which only registered doctors, nurses, and pharmacists could provide contraceptives, and only married individuals could obtain contraceptives.[151] After speaking at Boston University to students about birth control, Baird handed a young woman a vaginal foam contraceptive, and was arrested and prosecuted by Thomas Eisenstadt, the Sheriff of Suffolk County, Massachussetts. In *Eisenstadt v. Baird*, the Court struck down Massachusetts' law, and recognized an individual's privacy right to purchase and to use contraceptives.[152] For the Court's plurality, Justice Brennan wrote: "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[153] *Eisenstadt* spoke of the privacy right to obtain and use contraceptives as an individual's right, but still the Court framed the decision as one protecting not individual persons, just intimate personal relationships.[154]

### 2. Abortion I: From Privacy To Liberty

In 1854, Texas adopted a law banning all abortions except those ordered by a doctor to save a woman's life.[155] In 1970, Norma McCorvey, under as assumed name, Jane Roe, sued Henry Wade, the District Attorney of Dallas County, Texas, challenging Texas' 1854 abortion ban. *Roe v. Wade* came before the Court twice,[156] first, in 1971, when just seven Justices sat on the bench, following the retirement of Justices Black and Harlan; and again in 1972, after President Nixon elevated Justices Powell and Rehnquist to the Court. In *Roe v. Wade*, the Court struck down Texas' law.[157] Justice Blackmun delivered the Court's opinion, concluding that the privacy right *Griswold* recognized and *Eisenstadt* enlarged, whether under the Ninth or Fourteenth Amendments, "is broad enough to encompass a woman's decision whether

150 *Id.* at 485–86.
151 Chemerinsky & Goodwin, *supra* note 145, at 1203.
152 Eisenstadt v. Baird 405 U.S. 438 (1972).
153 *Id.* at 453.
154 Lawrence v. Texas, *supra* note 11, at 1939.
155 Roe v. Wade, 401 U.S. 113, 119 (1973).
156 *Id.* at 113.
157 *Id.* at 164.

or not to terminate her pregnancy."[158]

Like Justice Douglas had in *Griswold*, Justice Blackmun conceived of the decision whether to abort as belonging to the right of privacy. Unlike Justice Douglas in *Griswold*, Justice Blackmun avoided discovering the right in shadows cast by distinct bits of text; Justice Blackmun instead founded the right on the Fourteenth Amendment's Due Process Clause's ward, Liberty.[159]

The Fourteenth Amendment's Due Process Clause protects only persons. A fetus, Justice Blackmun wrote, is not a "person" within the meaning of the Fourteenth Amendment.[160] That proposition was not radical in 1973—it aligned with precedent.[161] That plank of Justice Blackmun's logic did not mean the right to abort was absolute; against a woman's Liberty to choose balanced the state's interest in protecting, among other things, "prenatal life."[162] A fetus inside the womb might not be a person, but certainly a baby outside the womb is. Competing interests beg the question: Where, in time or fact, does the balance tip away from Liberty in regulation's direction? Justice Blackmun answered that the tipping point was "viability," that is, once a fetus has the "capability of meaningful life outside the mother's womb."[163] A hallmark of Justice Blackmun's *Roe* decision was his trimester framework for pegging the point of viability in time. During the first trimester, government could not prohibit abortions outright, and could regulate abortions no more than it could any other procedure.[164] During the second trimester, the government still could not prohibit abortions outright, but could regulate it in ways "reasonably related to maternal health."[165] In the final trimester, government could regulate or prohibit abortion, except as necessary for the mother's health or life.[166]

*Roe* was a momentous victory for procreative freedom in America: a single judicial opinion invalidated highly restrictive abortion laws in all but

158 *Id.* at 152–53.

159 *Id.* at 153. Although the Fourteenth Amendment's Equal Protection rationale was not invoked, Justice Blackmun expressed concern that a prohibition of abortions would exalt the blessings, but overlook the burdens birth bestows on women: "Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also distress, for all concerned, associated with the unwanted child . . . . " *Id.*

160 *Id.* at 158.

161 Chemerinsky & Goodwin, *supra* note 145, at 1204–05 nn.98–100.

162 *Roe*, 401 U.S. at 155, 162.

163 *Id.* at 163–64.

164 *Id.*

165 *Id.*

166 *Id.* at 164–65.

four states.[167] As this article's existence attests, *Roe*'s victory was far from total. Some critics of *Roe*, including Justice Ginsburg, contend *Roe* went too far too fast; others think that *Roe* did more to endanger, than it did to preserve, women's reproductive autonomy.[168] Other critics of *Roe* point to weaknesses in Justice Blackmun's reasoning.[169] For example, Justice Blackmun disclaims any attempt at resolving the question of when life begins—yet his opinion did just that.[170] Justice Blackmun's assumptions, too, were problematic from the perspective of equity.[171]

*Roe*'s fundamental flaw, exploited recently by Mississippi, is that the right *Roe* enunciated is a right at all. Even a fundamental right is not

167 Williams, *supra* note 67, at 534.

168 Ruth Bader Ginsburg, *Madison Lecture, Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1198–1209 (1992). This critique of *Roe* cites as evidence the reaction that it sparked: how it gave shape to, and galvanized the Religious Right, how President Reagan rode on those coattails to the White House, and how a nominee's position on *Roe* could make or break a nominee's prospects for Senate confirmation to the Supreme Court. Williams, *supra* note 67, at 513, 533; Jack Balkin, What *Roe v. Wade* Should Have Said 7 (2005). Yet there was no discernible trend towards state governments' protecting abortion rights before *Roe*. Chemerinsky & Goodwin, *supra* note 145, at 1210 (citing Linda Greenhouse & Reva B. Siegel, Before *Roe v. Wade*: Voices that Shaped the Abortion Debate Before the Supreme Court's Ruling 259–62 (2010)). It is equally plausible that the supposed reactions to *Roe* originated instead with Ronald Reagan's 1980 presidential campaign strategy: uniting and mobilizing evangelical Christians together with opponents of an Equal Rights Amendment. Balkin, *supra*, at 12; Chemerinsky & Goodwin, *supra* note 145, at 1210 n.153.

169 Justice Blackmun marked a fetus' viability as the moment life began, and so when states could prohibit abortions, except when necessary to protect a woman's life or health. Chemerinsky & Goodwin, *supra* note 145, at 1211. The choice was deeply problematic, as it cut against the right *Roe* purported to protect by pitting advances in medicine against a woman's right to choose.

170 *Roe*, 410 U.S. at 159.

171 *Roe* failed to identify the ways in which laws restricting abortions are discriminatory in a number of ways. For example, the Court took for granted that restrictive abortion laws affect men and women the same, and that such laws affect women of all cultural or ethnic affiliation, and social and economic strata the same. Chemerinsky & Goodwin, *supra* note 145, at 1211–12. There is a distinct air of unreality to these assumptions. In setting his decision in *Roe* apart from Justice Douglas' in *Griswold*, Justice Blackmun chose to found *Roe*'s right on the Fourteenth Amendment's Due Process Clause, omitting discussion of that same Amendment's Equal Protection Clause. Criticism of Justice Blackmun's omission of any meaningful argument under Equal Protection Clause should not be dismissed as unfairly holding history's characters to contemporary standards, or improperly projecting present values onto the past. Briefs submitted to the Court ahead of *Roe* argued that restrictive abortion laws imposed stereotypical understandings of a woman's role in society as procreator on women, that such laws coerce motherhood. Balkin, *supra* note 168, at 19 (citing Greenhouse & Siegel, *supra* note 168, at 63).

absolute.[172] Even if rights are taken as "trumps," reality requires that states limit rights—so long as states can justify such limits.[173] As the conservative project of privileging states' Sovereignty carried forward, justification for limiting federal, fundamental right cheapened to nothing more than a state legislature's whim.

Justice Blackmun's trimester framework was the fruit of compromise for the sake of majority. As Justice Blackmun had originally sketched his framework, a woman had a right to abort in the first trimester, limited only by the a pregnant woman's doctor, as early-term abortions are ordinarily as safe for women as is carrying a fetus to term; afterward a state could regulate so long as the regulation was stated with "sufficient clarity" so as to provided doctors fair warning.[174] This, Justices Brennan and Thurgood Marshall argued, failed to give women enough time to discover their pregnancies, or to protect the poor or women of color.[175] As it was delivered by the Court, the *Roe* decision denied personhood to the fetus and so protection under the Fourteenth Amendment.[176] Had Justice Blackmun decided that a fetus was a person, abortion would be forbidden outright; by finding that a fetus is not a person, abortion could be allowed, at least for a time.[177]

The trimester framework is arbitrary; its virtue, compared with the sublime question of when life begins, is its simplicity. The number three is readily comprehensible and familiar in context. Justice Blackmun's original formulation of the trimester framework demonstrates that he intended to entrust negotiating the ethical and moral propriety of the abortion procedure to the medical profession. His own background was likely a key influence.[178] To the extent that Justice Blackmun hoped that by defining a fetus as something other than a person, and thereby excluding a fetus from the scope of the Fourteenth Amendment's protections, he had erected an impenetrable doctrinal dam, Justice Blackmun was wrong. His hopes exceeded the grasp of his Due Process logic. *Roe*'s core flaw was Justice Blackmun's blind faith

172 Greene, *supra* note 11, at 30, 70–71, 86.

173 Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, 29 J. LEGAL STUD. 301, 301, 305 (Jan. 2000).

174 Justice Harry A. Blackmun, Draft Opinion of Roe v. Wade 48 (Nov. 21, 1972) (Blackmun Papers, Box 151, Folder 6), https://hdl.loc.gov/loc.mss/eadmss.ms003030; BALKIN, *supra* note 168, at 10.

175 BALKIN, *supra* note 168, at 10.

176 *Roe*, 410 U.S. at 157–58.

177 Greene, *supra* note 11 at 50.

178 Justice Blackmun studied math as an undergraduate. Justice Blackmun considered medical school but instead chose to go to law school, and he was the Mayo Clinic's in-house counsel from 1950–1959. To the extent that his experience before ascending to the Court may have justified Justice Blackmun's faith in the sturdy institutions of arithmetic or medicine to resolve the abortion question, that faith proved misplaced.

in high theory, and consequent blindess to the low politics that would later dictate the terms of debate. Justice Blackmun miscalculated the lengths subsequent Courts would go in their partisan misadventure of devolving power from individual women to despotic states.

Justice Blackmun's later opinions suggest he came to appreciate this essential weakness. In *Thornburgh v. American College of Obstetricians and Gynecologists*, the Court struck down a Pennsylvania law requiring physicians to provide information about abortion procedures to patients seeking abortions, to exercise care to preserve the fetus' life, and to have a second physician present during an abortion operation.[179] Writing for the majority, Justice Blackmun described the object of the right *Roe* set out to protect, a woman's decision whether to carry a fetus to term, in superlative terms: "Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy."[180] Justice Blackmun's Due Process analysis in *Roe* left the abortion right vulnerable to its detractors balancing it into oblivion, or overturning it outright because the balance might remain in perpetual flux. In *Thornburgh*, Justice Blackmun compensated for that vulnerability by describing the idea behind *Roe*'s right—privacy—and the abortion right itself as belonging to the individual woman, as if she alone held it in a secluded hollow, impregnable by public law. It was too little too late.

### 3. Abortion II: From Liberty to Dignity

As old Justices retired and new Justices ascended to the bench, the Court's progressively conservative composition cast grave doubt on *Roe*. By 1987, President Reagan had appointed three Justices to the Supreme Court: O'Connor, Scalia, and Kennedy. Together with the original *Roe* dissenters, Justices White and Rehnquist, the Court appeared ready to abort *Roe*.

In 1986, the state of Missouri enacted a law prohibiting public employees and facilities from performing or assisting abortions. The law's preamble defied Justice Blackmun's holding explicitly, proclaiming life begins at conception.[181] In *Webster v. Reproductive Health Services*, the Court upheld Missouri's law—without a majority opinion. Justice Scalia argued the Court ought to overturn *Roe*, and that its failure to, at that juncture, "needlessly . . . prolong[ed] this Court's self-awarded sovereignty" over "cruel" and therefore

179 Thornberg v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 747–49 (1986).

180 *Id.* at 772.

181 Webster v. Reprod. Health Servs., 492 U.S. 490, 504 (1989).

"political" rather than "juridical" questions.[182] Foreshadowing his "only proper objects of government" argument in *Printz*, Justice Scalia frames that question as simple to dispel of: whether to allocate decisionmaking authority between the federal Court and state legislatures.[183]

Writing for the plurality, Chief Justice Rehnquist rejected any balancing whatsoever: "[T]he State's interest, if compelling after viability, is equally compelling before viability."[184] Given states' always compelling interest in protecting prenatal life, the Court should review abortion regulation with the least exacting, most deferential degree of scrutiny in the Court's toolbox, rational basis review. *Roe* survived *Webster* because of Justice O'Connor's vote for the Chief Justice's result, but not his reasoning. Since Missouri's law did not prohibit abortions altogether, it was not yet time to reexamine *Roe*.[185]

In 1988, Pennsylvania passed a law in bald defiance of *Roe* and its progeny.[186] The law required a woman seeking an abortion to wait twenty four hours before first requesting to obtain the procedure, during which time she was forced to listen to a prepared speech about the procedure, the health risks of abortion, the alternatives to abortion, the likely gestational age of the fetus, and a father's liability for child support. Under Pennsylavania's law, a married woman seeking an abortion had to sign a statement affirming that she had notified her husband.

By the time Pennsylvania's law came before the Court, Justices Brennan and Marshall had resigned from the bench; Justices Souter and Thomas had taken their places. In other words, as the Court prepared for yet another reckoning with *Roe*, the Court's composition suggested that *Roe*'s days were numbered. And yet, in 1992, by a vote of five to four, the Court again reaffirmed *Roe*. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the authors of a joint opinion wrote that it was high-time for each side of the abortion debate to reconcile, and to accept a "common mandate rooted in the Constitution."[187]

In *Casey*, the Court did not uphold all of *Roe*. *Casey* upheld just *Roe*'s essential holding, and substituted Justice Blackmun's trimester framework for an "undue burden" test for abortion regulation: whether an abortion regulation is valid hinges on whether that regulation places an undue burden

182 *Webster*, 492 U.S. at 532 (Scalia, J., concurring in part and concurring in the judgment).
183 *Id.* at 532; s*ee also* Printz v. United States, 521 U.S. 898, 920 (1997) (citing THE FEDERALIST NO. 15, at 109 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).
184 *Webster,* 492 U.S. at 519 (White, J., dissenting) (citing *Thornburgh*, 476 U.S. at 795).
185 *Id.* at 532–31 (O'Connor, J., concurring in part and concurring in the judgment).
186 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).
187 *Id.* at 867 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

on a woman's access to abortion.[188]

The conventional story of procreative freedom in America continues next to the cynical snares hidden within *Casey*'s logic. *Casey* instructs that a law is unduly burdensome if its purpose or effect is to place a substantial obstacle in a woman's path when seeking an abortion before a fetus reaches the point of viability. *Casey* also instructs that "[t]o promote states' profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion."[189] Here, too, the whole truth is more complicated and more interesting.

"Liberty finds no refuge in a jurisprudence of doubt," the *Casey* Court began.[190] From conception, *Casey* was different than its progenitor, *Griswold*. Like Justice Blackmun had in *Roe*, the authors of *Casey*'s joint opinion founded their right in the Fourteenth Amendment:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[191]

Liberty may have been the *Casey* Court's bridgehead to the Constitution's text, but Liberty was not its terminus. *Casey*'s chief contribution was its undue burden test.[192] The *Casey* Court followed Justice Blackmun's re-orientiation

188 *Id.* at 874, 878. The Court abandoned Justice Blackmun's trimester framework, and instead split the pregnancy in two at the point of viability. Before viability, the government may not prohibit abortion; after viability, government may prohibit abortion, except when necessary to protect the woman's life or health. In lieu of a trimester framework, the *Casey* Court sketched a new "undue burden" test for abortion regulations: a regulation of abortion is invalid only if it places an "undue burden" upon a woman's access to abortion. The *Casey* Court upheld the Pennsylvania law's waiting period provision and prepared speech requirement, but struck down the spousal consent requirement, which the Court concluded imposed an undue burden. *Id.* at 878.

189 *Id*. at 878; *see* Chemerinsky & Goodwin, *supra* note 145, at 1220.

190 *Casey*, 505 U.S. at 844.

191 *Id.* at 851.

192 The origin of *Casey*'s undue burden test is Justice Kennedy's earlier decision in *Ohio v. Akron Center. See* Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502 (1990). There,

of *Roe*'s right in *Thornburgh* toward privacy, connecting the "private sphere of the family" with the "bodily integrity of the pregnant woman."[193]

*Casey*'s joint authors' use of the phrase "private" did not mean a negative freedom like freedom from unreasonable governmental searches or seizures—a buried ambiguity *Casey*'s dissenters raised.[194] *Casey*'s authors meant a more gravid power, a power to decide.[195] Justice Blackmun's private notes reveal that Justice Kennedy was the fifth vote that sustained *Roe*.[196] Justice Kennedy is responsible for the portion of *Casey* excerpted above, mentioning Liberty but also declaring the reason the Constitution protects decisions about family life in the first place: Dignity. By enumerating Dignity, *Casey* protects women's power to render and to make real self-defining, self-governing choices of conscience.[197] As Justice Stevens explained, "[t]he authority to make such traumatic and yet empowering decisions is an element of basic human dignity."[198] *Casey*'s authors expounded less a "right to be let alone," and more the underlying reason a person should be let alone: In a society organized and free, society must give the individual not only space, but also respect.[199]

The essence of *Roe* that *Casey* upheld was that the blessings and burdens of birth are too "intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."[200] *Casey* upheld *Roe* and so emanates from *Griswold*. The Court had come a long way since *Buck*. *Casey*'s right was not a right of privacy, not the family's right to a refuge from public scrutiny. Instead, *Casey*'s right was like the object of Chief Justice Roberts' Equal Sovereignty doctrine in *Shelby County*, a state's power to decide moral questions. *Casey*'s right was one of Dignity, an individual's power to decide.

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Kennedy wrote that the "dignity of the family" justified a parental consent requirement because it was reasonable to ensure young women receive guidance and understanding from a parent, and that it did not impose an undue burden. *Id.*

193 *Casey*, 505 U.S. at 896; *see* Thornburgh v. Am. Coll. of Obstreticians and Gynecologists, 476 U.S. 747 (1986); Lawrence v. Texas, *supra* note 11, at 1927.

194 *Casey*, 505 U.S. at 951–52 (Rehnquist, J., concurring).

195 Daly, *supra* note 109, at 410.

196 Chemerinsky & Goodwin, *supra* note 145, at 1215.

197 GREENHOUSE & SIEGEL, *supra* note 168, at 1740.

198 *Casey*, 505 U.S. at 916.

199 Daly, *supra* note 132, at 234.

200 *Casey*, 505 U.S. at 852; Lawrence v. Texas, *supra* note 11, at 1927.

### B. *Recognizing Rights—Two Competing Views*

From *Dred Scott* up to *Buck* and through *Casey*, the Court has wrestled to discover the substance and limitations of Due Process. Alongside its clearing a path for a gradual flowering of procreative freedom, the Court articulated two distinct approaches to recognizing unenumerated rights, rights which do not appear in the text of the Constitution, but whose existence the Ninth Amendment guarantees.

The first approach originates from a dissenting opinion written in 1961 by the second Justice Harlan in *Poe v. Ullman*, a case about a criminal ban on the use of contraception.[201] For Justice Harlan, history and tradition should inform but not constrain analysis of Due Process, whose full meaning he left to future experience to define. In *Poe*, Justice Harlan took the opportunity to sketch a method of examining Due Process claims by weighing individual Liberty against government interest, treating it as if the idea were alive and dynamic. "[T]hrough the course of this Court's decisions it has represented the balance which our Nation, built upon the postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society." Further, "[with] regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing."[202]

Justice Harlan's sketch of Due Process did not remain in dissent for long. In search of precedent to support their construction of a right rooted in, but distinct from privacy, the joint authors of *Casey* cited to Justice Harlan's *Poe* dissent.[203] *Casey*'s joint authors' citation imbued Justice Harlan's *Poe* dissent with its plurality's precedential weight, as if it had been a majority opinion.

Where Justice Harlan was prepared to look beyond the past in favor of progress, the Court's second approach exalted history and tradition. Where the first may be malleable, the second approach is severe. The second approach draws from the majority opinion in *Washington v. Glucksberg*, a case about whether the right to privacy includes a right to physician-assisted suicide.[204] Writing for a unanimous Court, Chief Justice Rehnquist framed the issue as whether the Constitution empowered the state to preserve life by preventing suicide.[205] Chief Justice Rehnquist wrote that before Due Process could protect a substantive right, that right had to be rooted in history and

201 Poe v. Ullman, 367 U.S. 497 (1961).
202 *Id.* at 542 (Harlan, J., dissenting).
203 *Casey*, 505 U.S. at 848–49.
204 Washington v. Glucksberg, 521 U.S. 702 (1997).
205 *Id.* at 730–31.

tradition, so much so that it is "'implicit in the concept of ordered liberty.'"[206]

Even if a Court were to find the requisite history and tradition to justify recognizing a right as fundamental, *Glucksberg* commands that a Court craft a "careful description" of the supposed right.[207] For Chief Justice Rehnquist, history and tradition should guide a judge's examination of Due Process, whose full meaning has already been discovered, but whose limitations require conservative construction.

Chief Justice Rehnquist's dismissal of the first approach to recognizing rights was blunt; he referred to Justice Harlan's *Poe* dissent contemptuously as a "modern justification."[208] Though Chief Justice Rehnquist concedes Justice Harlan's *Poe* dissent is oft-cited, the Court, the Chief Justice insists, never abandoned the "fundamental-rights-based analytical method."[209] Chief Justice Rehnquist was nothing if not consistent.[210] The Chief Justice argued that the state of "Washington has an '*unqualified* interest in the preservation of human life.'"[211] The Chief Justice also took the opportunity to re-litigate the *Casey* joint authors' willingness to make a positive right out of privacy. In *Glucksberg*, Chief Justice Rehnquist suggested the Court's fundamental-rights-based approach tended toward negative rights, freedoms *from* government interference, rather than freedoms *to* any sort of entitlement or benefit.[212] No matter that *Casey* had made binding precedent out of Justice Harlan's *Poe* dissent.[213] Lightly casting aside precedent and reviving forsaken logic, Chief Justice Rehnquist asserted, "[i]ndeed, to read such a radical move into the Court's opinion in *Casey* would seem to fly in the face of that opinion's emphasis on *stare decisis*."[214]

A radical move, indeed.

Written in 1961, Justice Harlan's *Poe* dissent was a creature of a "constitutional moment" in American history, witness to a social movement

206 *Id.* at 720–21 (internal citations omitted).

207 Kenji Yoshino, *A New Birth of Freedon?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 154 (2015).

208 *Glucksberg*, 521 U.S. at 721 n.17.

209 *Id.*

210 Consider his decisions re-defining Popular Sovereignty and re-balancing federalism in states' favor, and like his declaration in *Webster* that states' interest in protecting potential life is as compelling before viability as it is afterward. Webster v. Reprod. Health Servs., 492 U.S. 490, 519 (1989).

211 *Glucksberg*, 521 U.S. at 728 (emphasis added) (quoting Cruzan v. Mo. Dept. of Health, 497 U.S. 261, 282 (1990)).

212 *Id.* at 719–20.

213 "True, the Court relied on Justice Harlan's dissent in *Casey*, but, as *Flores* demonstrates, we did not in so doing jettison our established approach." *Id.* at 721 n.17.

214 *Id.*

compelling otherwise inert institutions to move forward.[215] For Justice Harlan, Due Process evolved alongside human experience in its richness and complexity. Justice Harlan's analysis does not countenance any toadying to doctrinal punctilio when it means turning the other cheek to grave iniquity.

Such disregard for stricture was exactly the vice Justice Rehnquist meant to arrest with his *Glucksberg* approach to Due Process. Some twenty years before *Glucksberg*, in his dissenting opinion in *Roe*, then-Justice Rehnquist rebelled against such logic, writing that Justice Blackmun was wrongly importing "legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to [*Roe*] arising under the Due Process Clause of the Fourteenth Amendment."[216] Yet Justice Blackmun raised no meaningful argument about the Fourteenth Amendment's Equal Protection Clause. For Chief Justice Rehnquist, Justice Harlan's approach to Due Process spelled the Court's legitimacy's, and so the institution's, steady undoing.

The struggle over which of the two approaches to apply is not academic. While the debate about the relative weight of history and tradition is abstract, its stakes are profound. To a litigant, the choice of approach may well dictate whether or not the Court determines that the Constitution recognizes an unenumerated right she claims, and grants her solace for its violation. To the Justices, the choice of approach may well dictate the legitimacy of the Court. Protect too few rights the Constitution's text omits but equity counsels ought to be protected, and Justices risk their decisions' reach exceeding the institution's grasp. Protect too many rights too far afield from the Constitution's text, and Justices risk their decisions' finality and so their infallibility. A Court that allowed every law to stand would be

215 Justice Harlan occupied the bench alongside the likes of Chief Justice Earl Warren, whose Court was responsible for more than its fair share of landmark decisions. One such decision, albeit lesser known, was *Bolling v. Sharpe*, a companion to the better known *Brown v. Board of Education*, which held states' segregation of schools violated the Equal Protection Clause of the Fourteenth Amendment. Bolling v. Sharpe, 347 U.S. 497, 499 (1954); *see* Brown v. Bd. of Educ., 347 U.S. 483 (1955). For students in Washington D.C., a federal district rather than a state, and so subject to the Fifth Amendment rather than the Fourteenth, *Brown* offered little—the Fifth Amendment contains no Equal Protection Clause. Enter *Bolling*. Writing for the majority, Chief Justice Warren wrote: "The Fifth Amendment . . . does not contain an equal protection clause. . . . But the concepts of Equal Protection and Due Process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' [is narrower than] 'due process of law'. . . . But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." *Bolling*, 347 U.S. at 499.

216 Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 783 (2011) (citing Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting)).

unworkable. A Court that struck down every law would be intolerable.

The essence of Due Process is the assignment of decisionmaking power. This power underlies the Court's decision whether to recognize a right as fundamental.[217] At the same time that he oversaw the devolution of power from the national to state governments, by deciding *Glucksberg*, Chief Justice Rehnquist stultified Due Process to prevent future Courts from lightly casting aside important traditional values and inventing new ones in any misguided effort to expand the scope of individual rights.[218] After *Glucksberg*, to the extent the Constitution secured individuals' or minorities' civil or political rights against discrimination, no matter how longstanding or engrained, it did so with Equal Protection rather than Due Process.[219]

In time, Due Process became a "backward-looking" concept that evolved to "safeguard[] against novel developments brought about by temporary majorities who are insufficiently sensitive to the claims of history."[220] As Popular Sovereignty had been domesticated and adapted to recalibrate the balance of Federalism in states' favor, Chief Justice Rehnquist bent Due Process to partisan, ideological ends, arresting the idea's momentum with *Glucksberg*'s restraints.

For a time.

## III. HUMAN DIGNITY

In our contemporary constellation of legal and political ideas, Dignity is Liberty's companion, an object of the Constitution's safeguards.[221] Earlier in time, Dignity attached exclusively to inanimate entities.[222] The Court's earliest usages of the word "indignity" concerned an 1821 dispute about whether the United States House of Representatives could hold one

217 Lawrence v. Texas, *supra* note 11, at 1927.

218 Michael H. v. Gerald D., 491 U.S. 110, 124 (1989). The Chief Justice wrote: "Our Nation's history, legal, traditions, and practices thus provide the crucial 'guideposts for responsible decision-making'…that direct and restrain our exposition of the Due Process Clause." *Glucksberg*, 521 U.S. at 721 (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992)).

219 Yoshino, *supra* note 207, at 152; Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 3 (1994); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163 (1988).

220 Yoshino, *supra* note 207, at 152; *Homosexuality and the Constitution*, *supra* note 219, at 3; *Sexual Orientation and the Constitution*, *supra* note 219, at 1163.

221 Glasser v. United States, 315 U.S. 60, 89 (1942) (Frankfurter, J., dissenting); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1934 (2003).

222 Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821); Resnik & Suk, *supra* note 221, at 1934.

of its own members in contempt for failing to attend House meetings.[223] There, the Court linked Dignity with the House of Representative's ability to achieve its purpose, to govern. Earlier still, in *Chisholm*, the Court had linked Dignity with debt, the obligation to pay, and the Court's power to enforce that obligation.[224]As applied to institutions and inanimate entities, Dignity is less about an institution's general autonomy, and more about its particular purpose. [225] Inanimate Dignity empowered an entity to achieve specific goals.[226]

Human Dignity, like procreative autonomy, emerged from an ugly case involving an Oklahoma law empowering the state to forcibly sterilize individuals convicted of felonies and whose pattern of offenses amounted to moral turpitude. In *Skinner v. Oklahoma*, the Court struck down that law.[227] Concurring in *Skinner*, Justice Jackson wrote that the "dignity and personality and natural powers of a minority" limit the power of a "legislatively represented majority."[228] Decided some twenty years after the Court had failed Carrie Buck, in *Skinner*, the Court invoked Human Dignity to protect human individuals from society's overbearing organization, from coerced conformity. In the decades following *Skinner*, the Court would raise a principle from the ashes of total war and set it against a burgeoning post-war police state, a principle so powerful it bent a sovereign's will and ascended into our constellation of ideals central to the American experience, essential to our contemporary national identity.

223 *Anderson*, 19 U.S. at 228. In *Anderson v. Dunn*, the Court concluded the House of Representatives was so empowered; the Court reasoned that a contrary conclusion would expose the institution to "every indignity." *Id.*

224 Resnik & Suk, *supra* note 221, at 1941 n.113; *see also* United States v. Fischer, 6 U.S. (2 Cranch) 358, 397 (1805). For example, in *Fischer,* the Court raised the concern that "[t]his claim of priority on the part of the United States will, it has been said, interfere with the right of the state sovereignties respecting the dignity of debts." *Fischer*, 6 U.S. at 396–97. As *The Federalist No. 30* put it: "How is it possible that a government half supplied and always necessitous, can fulfill the purposes of its institutions—can provide for the security of—advance the prosperity—or support the reputation of the commonwealth?" The Federalist No. 30 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (addressing in general the need for sources of revenue for the federal government).

225 Resnik & Suk, *supra* note 221, at 1943.

226 *Id.*

227 Skinner v. Oklahoma, 316 U.S. 535 (1942).

228 *Id.* at 546 (Jackson, J., concurring).

### A. *From Ashes of War*

Human Dignity is a hardy and serotinous[229] variety whose earnest sprout followed the United States' wading into total war's inferno in 1941.[230] During the Second World War, Justices invoked Human Dignity in an attempt to keep American government from defeating Totalitarianism and losing its soul along the way. Addressing the national government's effort at prosecuting world war on the domestic front, Justice Frankfurter explained why government owes individuals whom it arrests a hearing before a committing authority: Democratic society requires respect for the Dignity of all men, it follows society must guard against misuse of law enforcement process.[231] In *Korematsu v. U.S.*, the Court notoriously upheld President Franklin D. Roosevelt's internment of people of Japanese ancestry from designated military areas within the United States.[232] In dissent, Justice Murphy compared internment to actions undertaken by the United States' enemies.[233] The Court's failure to intervene against the federal government's mass internment, and its failure to demand that criminal guilt be the exclusive basis for depriving an individual of Liberty, amounted to the Court's blessing Totalitarianism's cruel rationales for crushing individual Dignity.[234]

Justice Murphy drew a line from the hoary heretical imperative that Chief Justice Marshall had posed a century earlier about Due Process to the trauma of total war—a line that led to a principle of Human Dignity. As active hostilities subsided, tribunals began to prosecute belligerents for their wartime atrocities. One American prosecution involved an Imperial Japanese Army commander's actions in the Phillipines that resulted in no fewer than one-hundred thousand deaths.[235] Dissenting in *Yamashita*, Justice Murphy wrote that the Due Process Clause of the Fifth Amendment secured "immutable rights" against popular frenzy, legislatures, executives, and courts

229 Botanical term meaning "following" or "later." Serotinous species are characterized typically by seeds encased in thick resin that release for germination only upon exposure to extreme heat generated by fire. Many such varieties are patient; they require burning to reproduce and are among the natural worlds' most wily adapters and hardiest organisms. *Fire Ecology*, VA. TECH DENDROLOGY, http://dendro.cnre.vt.edu/forsite/valentine/fire_ecology.htm (last visited Apr. 12, 2022).

230 Daly, *supra* note 109, at 391.

231 McNabb v. United States, 318 U.S. 332, 342–43 (1943); *cf.* RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 182 (1999) (focusing on the influence of Hannah Arendt on the turn in American political and legal theory to "human dignity"); Resnik & Suk, *supra* note 221, at 1934 n.73.

232 Korematsu v. United States, 323 U.S. 214 (1944).

233 *Id.* at 240 (Murphy, J., dissenting).

234 *Id.*; Daly, *supra* note 109, at 392–93.

235 Daly, *supra* note 109, at 395.

alike, rights reposed in individuals, be they victor, vanquished, belligerent, or outlaw, rights owed on the basis of nothing more than humanness.[236] For Justice Murphy, the Court's vindicating the Constitution's recognition of individuals' Dignity was part and parcel with confronting, without unwittingly emulating, Totalitarianism.[237] In another military prosecution, *Homma v. Patterson, Secretary of War*, the Court summarily dismissed the Defendant's appeal in a single sentence.[238] Again in dissent, Justice Murphy warned that a docile Court left no one safe, that judicial passivity invited "[a] procession of judicial lynchings without due process of law."[239]

To negate the nothingness that followed wartime horrors of annihilation and extermination, Justices Frankfurter and Murphy articulated a notion of individual worth that flows from mere being. That notion's application to military prosecution of belligerents, individuals who had abandoned human feeling for infernal cruelty, tested the notion's limit. The proposition that such monstruous individuals deserve the Constitution's respect is revolting, but also right. Were the Constitution to tolerate summary deprivations of individual Liberty without at least a single voice from within the halls of government registering meaningful dissent on that government's behalf, then the outcome of World War II would have proved Pyrrhic. Martial conquest would have cost the nation its soul.[240] In time, American jurisprudence came to accept that proposition.[241] From the ashes of war rose Human Dignity.

### B. *Human Dignity Restrains the Police State*

After the second World War, the Court invoked Human Dignity mostly to restrain the police state, as Justice Murphy had foretold in *Homma*.[242] Rather than bombs, gas, or starvation destroying human personality and Dignity, on the homefront, it was police's unheralded search and seizure

236 *In re* Yamashita, 327 U.S. 1, 26–27 (1946) (Murphy, J., dissenting); Daly, *supra* note 109, at 394.

237 *See In re Yamashita*, 327 U.S. at 29 (Murphy, J., dissenting); Daly, *supra* note 109, at 394.

238 *In re Homma*, 327 U.S. 759, 759–60 (1946); Daly, *supra* note 109, at 394.

239 *In re Homma*, 327 U.S. at 760 (1946); Daly, *supra* note 109, at 395.

240 "A nation must not perish because, in the natural frenzy of the aftermath of war, it abandoned its central theme of the dignity of the human personality and due process of law." *See In re Homma*, 327 U.S. at 761.

241 Daly, *supra* note 109, at 397.

242 *In re Homma*, 327 U.S. at 760–61 (1946) ("A nation must not perish because, in the natural frenzy of the aftermath of war, it abandoned its central theme of the dignity of the human personality and due process of law."); Daly, *supra* note 109, at 395.

of homes, persons, and possessions.[243] In the wartime context, Justice Murphy's proposition that Dignity, and government's obligation to respect it, inhered in human existence was revolting. In this new, domestic context, the proposition proved palatable. It was here, in criminal law, that the Court described Dignity as flowing from natural personhood.

In *Trop v. Dulles*, the Court ruled that the government's revoking a citizen's citizenship as punishment for wartime desertion violated the Eighth Amendment's prohibition against cruel and unusual punishment.[244] The *Trop* Court's conclusion did not hinge on whether the litigant was charged or convicted of a crime, on whether the litigant's crime was commited during peace or war, or even on whether the litigant was innocent or guilty. Human Dignity requires only humanness.[245]

Human Dignity went from thwarting abusive law enforcement to thwarting enforcement of abusive law. Justice Murphy's thunderous articulations of Human Dignity reverberated in several landmark civil rights cases later in time. When the Court took up questions about civil rights, Justice Harlan wrote his *Poe* dissent. Justice Harlan's basic proposition in *Poe* was that Human "[D]ignity and personality" limit any legislatively represented majority's power; for that proposition, Justice Harlan cited *Skinner*.[246] After its conscription to preserve precious tenets of democracy against collapse in the face of existential foreign threat, Human Dignity returned home to take up a new mantle, restraining the police state.

A skeptical reader might mistake Justice Murphy's Dignity-talk as empty excess, inane flourish, pathetic appeal rather than reasoned argument. Human Dignity is no old chestnut. Time validated Human Dignity's staying power and substance. In 2005, the last year that Chief Justice Rehnquist sat on the bench, in *Roper v. Simmons*, the Court ruled that the government's attempt to execute a person under the age of eighteen violated the Eighth Amendment—doing so would deprive the child of Dignity.[247] Writing for the *Roper* majority, Justice Kennedy listed Dignity among our first principles, alongside hallowed mainstays: Federalism, Separation of Powers, and Individual Freedom.[248] Justice Kennedy's use of Dignity was not as a florid platitude, but rather as an operative idea that limited government power.

243 Daly, *supra* note 109, at 397–98; *see, e.g.*, Brinegar v. United States, 338 U.S. 160, 180–81 (1949) (Jackson, J., dissenting).

244 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment," the Court wrote, is the "dignity of man.").

245 Lois Shepherd, *Dignity and Autonomy After* Washington v. Glucksberg*: An Essay About Abortion, Death, and Crime*, 7 CORNELL J.L. & PUB. POL'Y 431, 457 (1998).

246 Poe v. Ullman, 367 U.S. 497, 555 (1961) (Harlan, J., dissenting).

247 543 U.S. 551, 551, 560, 572 (2005).

248 *Id.* at 551, 578 (quoting *Trop*, 356 U.S. at 100–01).

As the language of Human Dignity took root in the Court's rights register, the Court gradually blessed the underlying idea of Human Dignity. *Roper* was Human Dignity's song of ascent into our constellation of legal and political ideas as an independent value central to the American experience and essential to our contemporary national identity

### C. *Equal Dignity Under the Law*

Human Dignity's dimensions are manifold as human experience. In this way, Human Dignity is similar to its companion, Due Process. Each is dynamic. Different from Due Process, Human Dignity and its impulses toward free conscience and just absolution inhere in the individual, and so cannot be constrained by history or tradition. Any such constraint would be self-defeating; history and tradition can hardly be credited with justifying or compelling the Court's protection of the full range of fundamental rights.[249] The controversies that shape tradition sprang into existence only because courageous individuals dared to defy the status quo in order to emancipate the law from blindness to its own iniquity.[250] As Justice Holmes quipped of judges' inclination towards "blind imitation of the past," the notion of enforcing a rule for no reason other than that "it was laid down in the time of Henry IV" is "revolting."[251]

The relevant wisdom of Justice Holmes' quip, that fidelity to tradition counsels against *Glucksberg*' retrograde logic, suggests the focus of the following sections: how those impulses that had once animated Popular Sovereignty before the Civil War, and Due Process before *Glucksberg*, came to inhabit the space the Court created for Human Dignity, to vindicate an unenumerated right, and to humble a sovereign.

#### 1. The Legal Double Helix

On September 17, 1998, in Houston, Texas, police entered a private residence, responding to a report of a disturbance involving weapons.[252] The evolution of Human Dignity hinged on what the Police found inside:

249 Shepherd, *supra* note 245, at 431.

250 *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (finding the right to marry interracially).

251 Erwin Chemerinsky, Washington v. Glucksberg *Was Tragically Wrong*, 106 Mich. L. Rev. 1501, 1505 (2008); Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).

252 Lawrence v. Texas, 539 U.S. 558, 562 (2003); Krystyna Blokhina Gilkis, *Lawrence v. Texas*, Cornell L. Sch., https://www.law.cornell.edu/wex/lawrence_v._texas (Sept. 2018).

John Lawrence having sex with Tyron Garner. Lawrence and Garner were arrested and convicted of violating Texas' law forbidding their same-sex intercourse. At the time, the leading precedent, a 1986 case called *Bowers v. Hardwick*, offered Lawrence and Garner no protection.[253] In *Bowers*, the divided Court held that because it was neither "deeply rooted in the nation's history or tradition," nor "implicit in the concept of ordered liberty," the Due Process Clause of the Fourteenth Amendment secured no such individual right "to engage in homosexual sodomy," a denial whose perjorative framing suggests much about the Court, and indeed, its jurists' witting or unwitting prejudices.[254] After the Court decided *Bowers*, some scholars suggested the Fourteenth Amendment's Equal Protection Clause might offer same sex couples solace. This optimism proved misguided.[255]

Instead, Dignity provided a path forward.

In *Lawrence v. Texas*, an opinion that began with "Liberty" and ended with "freedom," the Court struck down Texas's anti-sodomy law, and overturned *Bowers*.[256] The Court agreed to consider whether Texas' law violated either the Fourteenth Amendment's Equal Protection or Due Process Clause.[257] Writing for the majority, Justice Kennedy wrote that adults' choice "to enter [into such a] relationship in the confines [] of home[] [cannot deprive them of] dignity as free persons."[258] *Lawrence* is ordinarily thought of as a case about privacy in the fashion of *Griswold*, a right to be let alone; Justice Kennedy was careful in *Lawrence* to point out that the police found Lawrence and Garner in a private home.[259] Yet Justice Kennedy's use of privacy in *Lawrence* was less akin to Justice Douglas' in *Griswold*, and more similar to the concept enunciated by the joint authors in *Casey*. Privacy cannot tell *Lawrence*'s whole story.

Although *Lawrence* was decided several years before *Roper*, and so the Court had not yet recognized Dignity as an full-fledged value on par with Liberty or Equality, *Lawrence* was decided after *Glucksberg*. Recall that the crux of *Glucksberg*'s vision of Due Process is restraint by tradition. In *Glucksberg*, Chief Justice Rehnquist commanded the Court to cast an anchor. Yet by their favorable citation to Justice Harlan's *Poe* dissent,[260] the joint authors of *Casey* had already weighed anchor in anticipation of a rising tide.

253 *See* Bowers v. Hardwick, 478 U.S. 186 (1986).
254 *Id.* at 191–92 (internal citations omitted)
255 Yoshino, *supra* note 207, at 153; *see* Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987).
256 *Lawrence*, 539 U.S. at 562, 579.
257 Yoshino, *supra* note 207, at 153; *Lawrence*, 539 U.S. at 778–79.
258 *Lawrence,* 539 U.S. at 567.
259 Daly, *supra* note 132, at 409–10; *Lawrence*, 539 U.S. at 564.
260 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844–49 (1992).

Ultimately, *Glucksberg*'s definition of, and myopic focus on, tradition is circular and defeats itself. Yesterday's novelty might well form tomorrow's tradition; a tradition of rights exists only because generations of Americans reckoned with the imperfections of past practice and shortcomings of received wisdom. Monarchy, for one; enslavement for another. The Framers of our Constitution wrote the Due Process clauses with the humility of heresy, rather than pretensions of orthodoxy, mindful of the continual, inconstant dialectic that would shape human experience, and so jurisprudence. The Framers, Justice Kennedy wrote, did not presume to know the "manifold possibilities" of Liberty; rather, the Framers knew that "times can blind us" and that posterity might witness the rightful end of laws "once thought necessary and proper [that] serve only to oppress."[261] Defying *Glucksberg*, Justice Kennedy posited that "every generation can invoke its principles in their own search for greater freedom."[262] In *Lawrence*, the Court acknowledged that "for centuries there have been powerful voices to condemn homosexual conduct as immoral . . ."[263] If *Glucksberg* had controlled, things would have ended there—those powerful voices spoke for tradition, and tradition spoke for the Court. Yet a history of discrimination weighed in favor of recognizing a right too long denied.[264] *Lawrence* undid *Bowers*; curiously, *Lawrence* never so much as mentions *Glucksberg*.

Recall the Court's grant of certiori—either the Fourteenth Amendment's Equal Protection or Due Process Clause.[265] Implicit in that disjunctive syllogism of "either-or," is another possibility: "both." Strictly speaking, the Court struck down *Bowers* based on Liberty grounds: that Texas' law violated the fundamental rights of all persons to control their intimate sexual relations—*all* persons.[266] Yet *Lawrence* necessarily helped some more than others.[267] Although the Court found the *Lawrence* litigants' Equal Protection argument "tenable," the Court did not decide *Lawrence* on that ground.[268] Odd, then, that Justice Kennedy comments in *Lawrence*

261 *Lawrence*, 539 U.S. at 578–79.

262 *Id.* at 579.

263 *Id.* at 571.

264 *See, e.g., id.*

265 Yoshino, *supra* note 216, at 776.

266 *Id.*, *supra* note 216, at 777.

267 Straight peoples' lives were made little better by *Lawrence*. *Id.*, *supra* note 216, at 779.

268 More likely than not, the reason is that the Court would have become mired in a doctrinal thicket. Constitutional cases often turn on the level of scrutiny a factual predicate demands. The Court's precedent to do with Equal Protection and same-sex relations was Romer v. Evans, 517 U.S. 620 (1996). *Romer*, however, was less than specific about what level of scrutiny it applied—it applied Rational Basis but "with bite"—and therefore left open the question of what level of scrutiny successive Courts ought to apply to the category of sexual orientation. *Id.* at 640. If the Court applied

that *Romer v. Evans*,[269] a case only about Equal Protection, was of "principal relevance."[270] Although *Romer* involved a state's discrimination on the basis of sexual orientation—and the fact that Justice Kennedy wrote it—*Romer* and *Lawrence* have little in common. By severing *Glucksberg*'s restraints on Due Process, Justice Kennedy freed it to drift towards Equal Protection.

The Fourteenth Amendment's Due Process Clause protects *what we choose to do*. Its Equal Protection Clause protects "*who we are*,"[271] and keeps government from imposing burdens on us because of our unchangeable attributes.[272] To the extent *Lawrence* is about Equal Protection, it is not Equal Protection against mere classification. *Lawrence* goes further: It prevents laws from aggravating or perpetuating specially disadvantaged groups' inferior status.[273] *Lawrence* was about John Lawrence's and Tyron Garner's choice to engage in intercourse; it was also about John Lawrence's and Tyron Garner's immutable identities. *Lawrence* implicated both concepts, and illumined their symbiosis.[274] No wonder that Justice Kennedy focuses the discussion of *Bowers* on discrimination rather than deprivation, that it demeaned a whole class on the basis of an unchangeable attribute.[275] *Lawrence* was not only about a personal choice protected by the Due Process Clause, nor was *Lawrence* only about invidious discrimination on the basis of sexual orientation prohibited by the Equal Protection Clause; *Lawrence* was about a personal imperative rooted in one's own essence.[276]

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*Romer*, i.e., decided *Lawrence* on Equal Protection grounds, the Court would have been forced to detail the meaning of Rational Basis "with bite." Yoshino, *supra* note 207, at 172. From the perspective of an institution for whom discretion means credibility to spar in a pinch, providing excessive detail concedes power—a length to which a majority of Justices were unwilling to go.

269 *Romer,* 517 U.S. at 620.

270 Lawrence v. Texas, 539 U.S. 558, 574 (2003).

271 Daly, *supra* note 132, at 236; Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)) ( "[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . .").

272 *See, e.g.,* Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 11 (2003) (highlighting the Equal Protection Clause's anticlassification principles in invalidating Jim Crow-era segregation practices).

273 *Id.* at 10.

274 *Lawrence,* 539 U.S. at 575 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects," Justice Kennedy wrote in *Lawrence*, "and a decision on the latter point advances both interests.").

275 Daly, *supra* note 132, at 237; *Lawrence,* 539 U.S. at 566–67.

276 Daly, *supra* note 132, at 236.

"Liberty," Justice Kennedy writes in *Lawrence*, "presumes [] autonomy of self . . ."[277] Liberty's presumption augured Equal Sovereignty's presumption Chief Justice Roberts articulated a decade later in *Shelby County*. *Seminole Tribe*, decided three years after *Lawrence*—and also written by Justice Kennedy—distilled states' essential Dignity from an admixture of the Tenth and Eleventh Amendments. *Casey* refashioned *Griswold*'s and *Roe's* procreative, negative right of Privacy into a positive right to Dignity. *Casey* removed any doubt that Dignity could succumb to tradition's manacles. Dignity is dynamic as might be successive generations' confrontation of our forerunner's unwitting blindness or witting heedlessness. *Lawrence* vindicated more than who we are, more than what we do; *Lawrence* vindicated our self-discovery and self-construction. Together, *Casey* and *Lawrence*[278] entwine Due Process with Equal Protection[279] into a "tightly wound . . . legal double helix."[280]

## 2. Interlocking Gears

*Lawrence* was part of a movement that culminated in the Court's holding that the Fourteenth Amendment required states to perform and to recognize marriages between individuals of the same sex.[281] *Lawrence* met a moment of social change with creativity about doctrine, the same imagination and dexterity the Court summoned to resolve other monumental controversies.[282] These are the hardest controversies because they both register existing social change and stir it, too.[283] These are the controversies that lay bare the divergence between justice and jurisprudence, that expose our unconscious folly and demand of us conscious resolution. Looking back in time, sorting moments of genuine, organic social transformation from fleeting moments of sudden but inchoate fervor is more or less straightforward. There is no sure method to identify these moments as

277 *Id.*; *Lawrence*, 538 U.S. at 562.

278 Yoshino, *supra* note 216, at 779 n.222; *Lawrence,* 539 U.S. at 567 ("[A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."); *it.* at 574 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.)) (discussing "personal dignity and autonomy").

279 Daly, *supra* note 132, at 241.

280 Tribe, *supra* note 135, at 17.

281 *See* Obergefell v. Hodges, 576 U.S. 644 (2015).

282 *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (overturning Plessy v. Ferguson, 163 U.S. 537 (1896)) (overturning separate but equal).

283 Heather K. Gerken, *Windsor's Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. Rev. 587, 603 (2015).

they occur. Even if there were such a method, it would beg, but could not answer, familiar normative questions: How *should* a judge decide between orthodoxy and heresy? When *should* change in society translate to change in the Constitution?[284] Perhaps a judge should move slowly for the political process to yield an enlightened consensus.[285] Perhaps a judge should move fast and simply do what she knows to be right to avoid sanctioning harm in the interim. When the Court next took up the question of marriage equality, it chose alacrity over hesitation.

In 1996, Congress enacted the Defense of Marriage Act (DOMA), that defined marriage for federal purposes to mean legal unions between a man and a woman. Later in 2013, the Court struck down the part of DOMA that withheld federal recognition from state-recognized same-sex marriages in *Winsdor v. United States.*[286] In *Windsor*, the Court focuses on Liberty, but not privacy.[287] It recognizes the right to marriage as fundamental, but left open the question of whether same-sex marriage is a fundamental right.[288] *Windsor* focuses on Equality,[289] but does not say whether sexual minorities are a suspect classification, a necessary threshold question for Equal Protection analysis. Unlike *Lawrence*, where the Court entwined Due Process with Equal Protection, *Windsor* protected the Equal Dignity of same-sex marriage without grounding its decision in either.[290]

This was novel. *Windsor* introduced the phrase "Equal Dignity" into the jurisprudence as a separate category of right. To expound the phrase's meaning, Justice Kennedy begins with structure by focusing on the conflict between state and federal power.[291] Next, in a cryptic gesture, Justice Kennedy describes DOMA as problematic, "quite apart from the principles

284 *Id.* at 604.

285 *Id.* at 606.

286 *See* 570 U.S. 744 (2013). In 2007, Edith Windsor and Thea Clara Spyer were married in Toronto, Canada; the state of New York recognized their marriage. In 2009, Spyer died and left her estate to Winsdor. Unlike New York law, federal tax law (DOMA) did not recognize their union, and so Winsdor's inheritance of Spyer's estate did not qualify for a federal tax exemption. Windsor challenged DOMA. *Id.*

287 *Id.*

288 Erin Daly, *Constitutional Comparisons: Emerging Dignity Rights at Home and Abroad*, 20 WIDENER L. REV. 199, 200–01 (2014).

289 *Id.* at 200. This piece describes DOMA's "purpose and effect of disapproval of [same-sex couples seeking marriage]." *Windsor*, 570 U.S. at 770 ("[DOMA's] avowed purpose and practical effect . . . are to impose a disadvantage, a separate status, and so a stigma upon all who enter in same-sex marriages . . . ."); Gerken, *supra* note 283, at 589.

290 Daly, *supra* note 288, at 201.

291 *Windsor,* 570 U.S. at 770. He frames the conflict as between state and federal authority, writing that New York's recognition of same-sex marriage, is doubtless a "proper exercise of its sovereign authority within our federal system . . . ." *Id.*

of federalism."[292]

Apart from structure are rights. Contrary to DOMA, New York conferred "a dignity and status of immense import" on same-sex couples, and so "enhanced the recognition, dignity, and protection of the class in their own community."[293] *Windsor* begins to resemble *Romer*, a case Justice Kennedy also wrote, about Equal Protection. In *Romer*, the injury had been a state, Colorado, preventing by referendum vote a town, Boulder, from protecting LGBTQIA+ individuals. DOMA, Justice Kennedy wrote, is "designed to injure the same class the State seeks to protect."[294] DOMA's injury is to Windsor, the litigant, but DOMA's malignancy is its decision to move the power to decide what constitutes marriage from the states to the federal government.[295] As Justice Kennedy writes, that malignancy's "essence" is Congress' purpose in enacting DOMA: "to influence or [to] interfere with state sovereign choices about who may be married."[296]

The strand of Justice Kennedy's logic that "causes academics' heads to explode"[297] is that DOMA's injury to Windsor, a deprivation of rights guaranteed by the *federal* Constitution, is a deprivation of *state* rights.[298] The problem: the Fifth and Fourteenth Amendments' protections depend only on whether federal law confers a right.[299] This is where *Windsor*'s mystery thickens. If the Court struck down DOMA with that logic, that is, if the Fifth and Fourteenth Amendments' protection accounted for state law, then any state marriage law that discriminates against same-sex couples would fall. On the other hand, if the Court struck down DOMA on grounds of structure, that is, that states' sovereignty over defining marriage is absolute, the Supremacy Clause as applied to marriage would be dead-letter, and any state marriage law that discriminates would stand. The intermixture of Liberty, Equality, and Federalism illumine the "hidden logic that helps make sense of [*Windsor*'s] many mysteries."[300] *Windsor* defies our impulse to segregate ideas into a comprehensible taxonomy; it entangles Liberty and Equality with Federalism because rights and structure can no more rightly be segregated than can races—in truth, they are one and the same. Structure, Federalism's diffusion of lawmaking and enforcement power up and down, and across governmental entities, enables individuals asserting

292 *Id.* at 769; Gerken, *supra* note 283, at 590.
293 *Windsor*, 570 U.S. at 769; Gerken, *supra* note 283, at 589.
294 *Windsor,* 570 U.S. at 768.
295 *Id.* at 769–71; Gerken, *supra* note 283, at 590.
296 *Windsor,* 570 U.S. at 769–70; Gerken, *supra* note 283, at 609.
297 Gerken, *supra* note 283, at 590.
298 *Windsor,* 570 U.S. at 768; Gerken, *supra* note 283, at 590.
299 Gerken, *supra* note 283, at 590.
300 *Id.* at 594.

yet-unrecognized rights to register dissent, to "dissent by deciding."[301] In a federal system, power is diffuse among states and the national government but interconnected; neither any state, nor the federal government, can move without "tugging the other along."[302]

*Windsor* did not resolve the question of marriage equality. *Windsor* chose alacrity over hesitation, but not heresy over orthodoxy. Instead, *Windsor* changed the conditions under which public discourse would occur.[303] Justice Kennedy decided in *Windsor* that the national government—Congress and the Court—should move out of the states' way as they "rethought the old consensus."[304] DOMA's unwillingness to recognize same-sex marriage branded Windsor, the litigant, as inferior, undignified, and therefore undeserving of inclusion or participation in the national political community.[305] Read in light of *Windsor*, *Romer* reads as much about allocation of decision-making authority as it does about preventing local political pressure from percolating upward to the state legislature, and from there to Congress.[306]

Dissenting in both *Lawrence* and *Windsor*, Justice Scalia prophesied that the Court would end up mandating a right to same-sex marriage to vindicate same-sex couples' Liberty.[307] *Windsor* teaches that equal dignity demands inclusion and it demands participation in the broader political community. Justice Scalia's instinct was right because of the "interlocking gears" of rights and structure that together propel us forward.[308]

### 3. Equal Dignity

After *Windsor*, courts across the country invalidated state bans on same-sex marriage.[309] Until the Sixth Circuit upheld them in Ohio, Michigan, Kentucky, and Tennessee. In light of the split among Circuits, the Supreme Court took up the question of whether the national government could override state marriage law that discriminated against same-sex couples.[310]

301 *Id.* at 590, 600 (emphasis omitted).
302 *Id.* at 598.
303 *Id.* at 602.
304 *Id.* at 610.
305 Daly, *supra* note 288, at 208*; Windsor*, 570 U.S. at 772.
306 Gerken, *supra* note 283, at 607–08.
307 Lawrence v. Texas, 539 U.S. 558, 604–05 (Scalia, J., dissenting); *Windsor*, 570 U.S. at 799–800 (Scalia, J., dissenting).
308 Gerken, *supra* note 283, at 594.
309 *See* Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014); Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014).
310 Rather presciently, see Gerken, *supra* note 283, at 591.

In *Obergefell v. Hodges*, the Court held that the Fourteenth Amendment required states to recognize and bless marriages between individuals of the same sex.[311] Chief Justice Roberts understood the import of *Obergefell* for the jurisprudence, that it required the Court to overrule *Glucksberg*.[312] Recapitulating Dignity to vindicate the litigants' hope not to be condemned to loneliness and excluded from the institution of marriage, *Obergefell* carried forward the movement the Court had exposed in *Casey* and developed in *Lawrence* and *Windsor*.[313] *Casey* and *Lawrence* entwined Due Process to push against *Glucksberg*'s restraints. *Windsdor* invoked structure to further secure same-sex couples place within the American political community. All the while, *Glucksberg* endured.[314] With the concept, language, and implication of Equal Dignity in its quiver, the Court in *Obergefell* at last took aim at *Glucksberg*. In *Obergefell*, the Court pushed against *Glucksberg*, articulating a three-part doctrine of Equal Dignity.[315]

First, *Obergefell* relegated tradition to a subordinate role in analysis of substantive Due Process. Impressing the fallacy of *Glucksberg*'s defining tradition only looking backwards in time, *Obergefell* reprised *Lawrence*'s tonic key, the Framers' clairvoyant, heretical humility.[316] Next, the Court cites Justice Harlan's *Poe* dissent to signal which of the two approaches to recognizing rights it would deploy.[317] Rather than to *Glucksberg*, the Court points to four "principles and traditions" that explain the "reasons marriage is fundamental under the Constitution [and] appl[ies] with equal force to same-sex couples."[318]

311 576 U.S. 644, 681 (2015). "Michigan, Kentucky, Ohio, and Tennessee define marriage as a union between one man and one woman. The petitioners, 14 same-sex couples and two men whose same-sex partners are deceased, filed suits in Federal District Courts in their home States, claiming that respondent state officials violate the Fourteenth Amendment by denying them the right to marry or to have marriages lawfully performed in another State given full recognition. Each District Court ruled in petitioners' favor, but the Sixth Circuit consolidated the cases and reversed." *Id*. at 644.

312 Yoshino, *supra* note 207, at 162; *Obergefell*, 576 U.S. at 702 (Roberts, C.J., dissenting).

313 *Obergefell*, 576 U.S. at 681.

314 Yoshino, *supra* note 207, at 162 n.135 (citing Steven G. Calabresi, *Substantive Due Process After* Gonzales v. Carhart, 106 Mich. L. Rev. 1517, 1518 (2008)); *see, e.g.*, Pavan v. Smith, 137 S. Ct. 2075 (2017) (reaffirming *Obergefell*).

315 Tribe, *supra* note 135, at 17.

316 Yoshino, *supra* note 207, at 163; *Obergefell*, 576 U.S. at 664 ("The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom . . . and so they entrusted to future generations a charter protecting the right of all person to enjoy liberty as we learn its meaning.").

317 Yoshino, *supra* note 207, at 163–64; *Obergefell*, 576 U.S. at 664 (quoting Poe v. Ullman, 367 U.S. at 497, 542 (1961) (Harlan, J., dissenting)).

318 The four "principles and traditions" are: (1) right to personal choice regarding marriage

Second, *Obergefell* collapses the categories of negative and positive Liberty. A few months before the Court decided *Obergefell*, the Supreme Court of Alabama rejected a same-sex couple's plea for Equality. Alabama's high court reasoned that *Lawrence* struck down anti-sodomy laws because "government had no legitimate interest in interfering with consenting adults' sexual conduct in the privacy of their bedrooms."[319] Dissenting in *Obergefell*, Justice Thomas argued the same, that "'liberty" had long meant "freedom *from* governmental action," rather than any public entitlement.'"[320] *Lawrence* did as the Alabama Court said it did—and more: "[I]t does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty."[321] *Obergefell* is the canonic marriage Equality case; and yet the Court's concern is about the full promise of Liberty. *Casey*'s joint authors performed a similar maneuver with privacy.[322] So, too, did the author of *Lawrence* with Equality, as did *Windsor* with Liberty. Marriage is well-suited to this logic: Marriage is a negative right in that it involves a "sacred precinct of the marital bedroom," but also a positive right in that it requires the state to recognize and certify the union.[323] In *Casey*, *Lawrence*, and *Windsor*, the Court elides negative and positive meanings. In *Obergefell*, the Court altogether collapses categories into a unified notion of an individual's right to marry another individual of his or her same sex.

Third, *Obergefell* rebelled against *Glucksberg*'s specificity restraint, its requirement that the Court articulate a "careful description" of a right it recognizes as fundamental.[324] The Court concedes that *Glucksberg* did so require, but reasons that *Glucksberg*'s specificity restraint was itself specific to physician-assisted suicide; that it was "inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. In each of the major cases where the Court took up a question to do with marriage, the question was not whether there is a right specific to the individual litigant or fact pattern, but rather whether there was

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is inherent in individual autonomy; (2) marital union is unique in its importance to committed individuals; (3) the right to marry safeguards children and families, and so draws meaning from related fundamental rights; and (4) marriage is a keystone of our social order. Yoshino, *supra* note 207, at 164; *Obergefell*, 576 U.S. at 663–69.

319 Yoshino, *supra* note 207, at 167; *Ex parte* State *ex rel.* Ala. Pol'y Inst., 200 So.3d 495, 539 (Ala. 2015) (per curiam).

320 Yoshino, *supra* note 207, at 167; *Obergefell*, 576 U.S. at 725–26 (Thomas, J., dissenting).

321 Yoshino, *supra* note 207, at 168; *Obergefell*, 576 U.S. at 677.

322 Daly, *supra* note 109, at 410 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

323 Yoshino, *supra* note 207, at 168 (quoting Griswold v. Connecticut, 381 U.S. 479 (1965)).

324 Yoshino, *supra* note 207, at 164–65; Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

"sufficient justification for excluding the relevant class from the right."[325] *Obergefell* loosened *Glucksberg*'s specificity restraint.

*Obergefell*'s doctrine of Equal Dignity returns the Court from Chief Justice Rehnquist's *Glucksberg* approach, to the recognition of rights urged by Justice Harlan in his *Poe* dissent. The thrust of the *Obergefell* dissenters' argument is that behind *Obergefell*'s madness, there is no method, only the whims of the majority. Abandon fixed rules of interpretation and the Court risks ceding control to individual Justices' "theoretical opinions."[326] The Chief Justice compares *Obergefell* to *Lochner v. New York*, a case which applied substantive Due Process to construct an unenumerated right, freedom of contract, and struck down a federal law that limited the number of hours bakers could work.[327] *Lochner* is the great bugaboo of constitutional jurisprudence; it is a metonymy for a vagarious, misadventurous, heretical Justice.

*Obergefell* was less heresy than it was reformation of orthodoxy. *Obergefell* may have unmoored the Court's recognition of rights from tradition, but *Obergefell* did not leave the Court adrift. Instead, *Obergefell* provided a sextant and polestar: a principle of anti-subordination.[328] *Obergefell* dovetailed *Lawrence*'s condemnation of laws that aggravate or perpetuate specially disadvantaged groups' inferior status.[329] Justice O'Connor's concurrence in *Lawrence* left open the possibility that a state might solve the legal problem presented in *Lawrence* by doing more, by banning all sodomy, or by doing less, by abandoning all bans on sodomy; the resulting moral problem would be solved at the ballot, by voting out from office any opprobrious actor.[330] *Obergefell* rejected hesitation for alacrity. A state's or a judge's hesitation is no justification for inflicting "dignitary wounds [which] cannot always be healed with the stroke of a pen."[331] It is the "dynamic of our constitutional system" that individuals whose Dignity falls under threat need not wait for their plight

325 Yoshino, *supra* note 207, at 165; *Obergefell*, 576 U.S. at 671 ("*Loving* did not ask about a 'right to interracial marriage'; *Turner* did not ask about a 'right of inmates to marry'; and *Zablocki* did not ask about a 'right of fathers with unpaid child support duties to marry.'").

326 Yoshino, *supra* note 207, at 170; *Obergefell*, 576 U.S. at 696 (Roberts, C.J., dissenting) (quoting *Dred Scott Decision*, 60 U.S. (19 How.) 393, 621 (1857) (Curtis, J., dissenting)).

327 Lochner v. New York, 198 U.S. 45, 65 (1905).

328 Yoshino, *supra* note 207, at 174. Yoshino refers to this principle as "antisubordination liberty." The notion of antisubordination is not Yoshino's invention; it has been contrasted with another companion notion of anticlassification elsewhere, e.g., Balkin & Siegel, *supra* note 272, at 9.

329 Balkin & Siegel, *supra* note 272, at 10.

330 Yoshino, *supra* note 207, at 173.

331 *Obergefell*, 576 U.S. at 678.

to dawn on society.[332] That dynamic "withdraw[s] certain subjects from the vicissitudes of political controversy," entrusting them to steadier institutions, guided less by frenzied passion, more by legal principle.[333] The Due Process and Equal Protection clauses each propose independent principles, each illumines the definition and scope of the other, each pushes the other forward.[334] *Lawrence* avowed humility about its knowledge of what freedom is. *Obergefell* honored protections derived from the "dignity and autonomy of the individual standing against the forces of coerced conformity,"[335] it declared what freedom had to become.

Out of the ashes of war a hopeful notion of Human Dignity arose. If not for the Court's aquiescence towards Reconstruction's ignominious end, if not for *Glucksberg*'s undue constraints on Due Process, Dignity would have remained dormant. Dignity came to serve the Fourteenth Amendment's deeper purpose; it does what its Framers must have intended for the Privileges or Immunities Clause to do. *Obergefell*'s doctrine of Equal Dignity made good on the Constitution's promise to LGBTQIA+ people seeking to participate in the institution of marriage, humbling a sovereign.[336]

*Obergefell* thus vindicated an otherwise unrecognized right. That meant forcing a state to change its definition of marriage. In dissent, Chief Justice Roberts wrote that "[t]he fundamental right to marry does not include" such power, the power of a sovereign.[337] In other words, even a right the Court had already recognized as fundamental, marriage to someone of the opposite sex, cannot empower an individual to commandeer a state toward heresy. The criticism mirrors *Glucksberg*'s argument, and its circularity is no less fatal in dissent.[338] Invoking the sting of supposed backlash against *Roe*, Chief Justice Roberts wrote that the *Obergefell* majority was "[s]tealing this issue from the people…, making a dramatic social change that much more

332 *Id.* at 677.

333 Tribe, *supra* note 135, at 25; *Obergefell*, 576 U.S. at 677 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)). The theory that expounds "the idea of the Constitution" is drawn from *West Virginia State Board of Education v. Barnette*. Tribe, *supra* note 135, at 25–26. In *Barnette*, the Court held that a school may not force students to recite the Pledge of Allegiance. There is no clause in the Constitution to that effect. Instead, *Barnette*, like *Obergefell*, protects rights derived from "the dignity and autonomy of the individual standing against the forces of coerced conformity." *Id.* at 26.

334 Yoshino, *supra* note 207, at 172; *Obergefell*, 576 U.S. at 672.

335 Tribe, *supra* note 135, at 26.

336 *Id.* at 21–22.

337 *Obergefell*, 576 U.S. at 686 (Roberts, C.J., dissenting).

338 *Id.* at 671 (majority opinion). As Justice Kennedy wrote, "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied." *Id.*

difficult to accept."[339] For the wrong reason, the Chief Justice was right. Difficult or easy, the Constitution commands that we accept that change. It was not from the people *as an enfranchised collective* that *Obergefell* took the issue. *Obergefell* returned the issue to where it had forever belonged—to the individual.

## IV. Slouching Towards Bethlehem

*Obergefell* exposed Dual Sovereignty's sophistry. The steady and inevitable process of categories' collapse quickens. Two years before *Windsor*, the Court issued a rare unanimous decision, *Bond v. United States*, holding that because the Tenth Amendment secures individual freedom, private individuals may challenge federal laws for violating the Tenth Amendment.[340] In seeking to vindicate her *own* constitutional interests, the *Bond* litigant sought to "assert injury from governmental action taken in excess of the authority that federal law defines" in regard to rights that "do not belong to a State."[341] *Bond* recognizes individuals' place in the Tenth Amendment's constellation of sovereigns.

Although his *Obergefell* dissent might suggest otherwise, Chief Justice Roberts has elsewhere argued the same from another angle. In *Shelby County*, Chief Justice Roberts wrote about states as if they were persons, that the Voting Rights Act "subject[s] a disfavored subset of States," "requir[ing] [them] to beseech the Federal Government for permission to implement laws."[342] He unambiguously hearkens to language the Court has used to scrutinize laws under the Equal Protection Clause that might relegate "disfavored class[es]" of individuals to "disfavored legal status."[343] The Chief Justice cites to the Tenth Amendment in *Shelby County* only once, as a prelude to situate his argument, and there lays the groundwork to establish states' Equal Sovereignty.[344] It could have been mere argument by analogy and nothing more.

Consider Sovereign Immunity. *Seminole Tribe* and *Alden* together instruct that because states are sovereign and so are immune from suit, Congress cannot strip states of that immunity—their Dignity prevents it.[345]

339 *Id.* at 687, 710 (Roberts, C.J., dissenting).

340 Bond v. United States, 564 U.S. 211 (2011).

341 *Id.* at 220 (who otherwise qualify under Article III's Standing requirements).

342 Litman, *supra* note 110, at 1257–58; *See* Shelby Cnty. v. Holder, 570 U.S. 2612 (2013).

343 Romer v. Evans, 517 U.S. 620 (1996) (quoting U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 181 (1980) (Stevens, J., concurring)); *see also* Lawrence v. Texas, 539 U.S. 558, 575 (2003); Litman, *supra* note 110, at 1257.

344 *Shelby Cnty.*, 570 U.S. at 543–44.

345 Sullivan, *supra* note 70, at 804 ("These sovereign immunity decisions, like the

*Alden* retold history as if ratification of our Constitution depended upon that consensus, unspoken and unwritten at the Founding.[346] *Alden*'s main argument was that states "are not relegated to the role of mere provinces or political corporations, but retain the Dignity, though not the full authority, of Sovereignty."[347] For the Framers, Justice Kennedy insisted, "immunity from private suits [was] central to sovereign dignity."[348]

In support of his historical proposition, Justice Kennedy invoked a parade of Framers, Hamilton, Madison, and Marshall, whose identification with the Federalist Party made for a compelling series of endorsements.[349] From these curated quotes, Justice Kennedy divines the Framers' supposed original intent, and distills it into a "fundamental postulate[] implicit in the constitutional design,"[350] that states are sovereign and so are above the fray of legal rights and remedies. Justice Kennedy's historical methods are at best problematic and, at worst, deceptive. Justice Kennedy quotes debates over ratification, which were equal parts legal explication and political theater, intended to mollify anti-Federalist opposition.[351] It seems farfetched that the likes of Hamilton, the quintessential advocate of a powerful national government, would have endorsed *Alden*'s theory of states' Sovereignty, Dignity, or Immunity.[352]

Consider the anti-commandeering doctrine. In *Printz*, Justice Scalia begins with the premise that the Constitution established a system of "[D]ual [S]overeignty."[353] Justice Scalia's conclusion is that the Constitution protects state Sovereignty against federal compulsion. To arrive at this conclusion, Justice Scalia invokes *The Federalist No. 15*, written by the original Federalist himself, Hamilton. Referencing Hamilton and others who wrote that the People are "the only proper object" of government, Justice Scalia deduced that states could not be a proper object of federal authority.[354] Chief Justice Marshall relied on the Tenth Amendment's distinction between the People and the states to curtail a state's power relative to that of the federal

commandeering decisions, derive principally from the tacit structural postulates of the Constitution, not from the literal text of the Eleventh Amendment.").

346 Sher, *supra* note 18, at 609.

347 Alden v. Maine, 527 U.S. 706, 715 (1999).

348 *Id.*

349 Sher, *supra* note 18, at 611.

350 *Alden*, 527 U.S. at 727–29; Sher, *supra* note 18, at 611.

351 Sher, *supra* note 18, at 612.

352 *Id.* at 613; *see* RON CHERNOW, ALEXANDER HAMILTON 321 (2004) (summarizing Hamilton's "agenda" as "to strengthen the central government, bolster the executive branch at the expense of the legislature, and subordinate the states").

353 Printz v. United States, 521 U.S. 898, 918–19 (1997).

354 *Printz*, 521 U.S. at 920–21 (citing THE FEDERALIST NO. 15, at 109 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

government;[355] Justice Scalia relied on the Tenth Amendment to curtail federal power relative to that of the states.

In Justice Scalia's vision of the Constitution's architecture, the People benefit from a "double security," that "different governments will control each other, at the same time that each will be controlled by itself."[356] Is incontestable that Justice Scalia was a maestro of rhetoric. Of all the quotes in American jurisprudence that would have supported his reasoning, Justice Scalia chose one that cast the People in a passive, singular role: as the only object, and an object, only. Justice Scalia's usage of "object" marked a striking departure from Hamilton's contemporaries' use of that same phrase. For example, Chief Justice Jay used the phrase in *Chisholm*, referring to "ensur[ing] justice" as an "object[]," and to the People as "fellow citizens and joint sovereigns."[357] Given Justice Scalia's command of language, this grammatical sleight of pen suggests not only that the people are the only proper object of government, but that they are an object only—never subjects, never syntactic protagonists in control of the government of their own destinies. More casuistry than solecism, the double meaning would not have been lost on Justice Scalia.

From Justice Scalia to Kennedy, all profess fealty to a common orthodoxy: Dual Sovereignty. All assume that from states' Sovereignty flows their Dignity. That cannot be right.

### A. *Returning to First Principles*

The same Justices whose arguments pledge allegiance to Dual Sovereignty elsewhere concede its error. Recall *San Antonio Metro Transit Authority*, where, in 1985, Justice Brennan elided the People with the United States, while Justice Powell elided the People with the states. By 1985, Justices on either end of the ideological spectrum had embraced Dual Sovereignty's central dogma: Under the Constitution, there are two effectual governments and an enfeebled People.[358]

355 M'Culloch v. Maryland, 17 U.S. 316, 429 (1819) ("The sovereignty of a State extends to [everything] which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States . . . the people of a single State cannot confer a sovereignty which will extend over them.").

356 *Printz*, 521 U.S. at 921–22 (citing The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961)).

357 Chisholm v. Georgia, 2 U.S. 419, 477, 479 (1793) (opinion of Jay, C.J.).

358 Thomas B. McAffee et al., Powers Reserved for the People and the States: A

In 1992, orthodoxy's edifice cracked.

In 1992, voters in Arkansas amended their state constitution to impose term limits on their representative to the federal government, unwittingly setting the stage for a confrontation over "first principle[s]."[359] In *U.S. Term Limits, Inc. v. Thornton*, the Court struck down the amendment, concluding that neither Congress nor the states can add to the Constitution's requirements for congressional office. The dissenters[360] agreed that the Constitution set "a ceiling" for Congress's additions, but argued those same limits set "a floor" for the states.[361] Like *McCulloch* had held a state cannot literally tax the federal government, *Term Limits* held that no state can figuratively tax the collective intelligence of Congress by limiting its members' tenure.[362] Yet neither the majority,[363] nor the dissenters, had much to say about actual term limits. The Justices hardly debated the wisdom of the Arkansas voters' amendment. Instead, the Justices' debate centered on first principles, to whom the Constitution grants the power to decide whether there ought to be term limits.[364]

The majority argued that after entering into the Union, states retained two kinds of powers only: first, power that belonged to the states before entry into the Union, reserved to states by the Tenth Amendment; and second, powers the Constitution delegated to them.[365] Since Congress did not exist before the Union, and the Constitution does not delegate to states the power to set qualifications for congressional office, the Arkansas voters' amendment was invalid. Writing in dissent, Justice Thomas argued the "ultimate source of the Constitution's authority" resides in the "peoples of each individual state . . . not an undifferentiated people of the Nation as a whole."[366] The act of Constitution was less an act of *popular* Sovereignty, and more one of *state* Sovereignty. Ratification meant the peoples of each

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359 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 783–84 (1995) (Kennedy, J., concurring). Arkansas' Term Limit Amendment provided that any person who served three or more terms as a member of the United States House of Representatives or two or more terms as a member Senate from Arkansas would be ineligible for re-election to that same office. *Id.* at 784.

360 The dissenters were Chief Justice Rehnquist, Justices O'Connor, Thomas, and Scalia. *U.S. Term Limits*, 514 U.S. at 845 (Thomas, J., dissenting).

361 Kathleen M. Sullivan, *Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78, 78–79 (1995).

362 U.S. Term Limits, 514 U.S. at 808.

363 The majority consisted of Justices Stevens, Ginsburg, Souter, Breyer, and Kennedy. *Id.* at 781.

364 Sullivan, *supra* note 361, at 79–80.

365 *Id.* at 89.

366 *Id.* at 90.

state surrendered powers the Constitution expressly withdrew from them, or others withdrawn by necessary implication. All other power, like setting term limits, Justice Thomas concluded, is reserved to the states.[367] Justice Thomas' formulation is striking; the breadth of power he proposes that the Tenth Amendment assigns to the states evokes John C. Calhoun's proto-Confederate vision of nullification.[368]

*Term Limits* is both banal and exceptional. Banal because the composition of majority and dissent reflects partisan ideology, except for Justice Kennedy, who broke rank from conservatives and so the partisan stalemate. Exceptional because the Court does not ordinarily broach first principles. For himself, Justice Kennedy wrote of the act of Constitution that the Framers "split the atom of sovereignty."[369] Although splitting atoms connotes halves and so conforms to Dual Sovereignty's orthodoxy, the idea is ambiguous. Atoms might be manipulated to release energy either by fusion (unification) or fission (separation).[370] *Term Limits* provided early insight into Justice Kennedy's heretical thinking that matured into *Obergefell*. *Term Limits* also provided a foundation for conservative jurists to embattle Dual Sovereignty and its doctrines into the Court's orthodoxy.

The crack in the orthodoxy's edifice is slight but runs through its foundation, marrow-deep. Justices debated over contemporary consequences of the metaphysics of the act of Constitution. That debate fits with Dual Sovereignty's orthodoxy in every way but one. Both *Terms Limits*' majority and dissenters take for granted that the Tenth Amendment establishes three sovereigns.[371]

367 *Id.*

368 Linda Greenhouse, *Focus on Federal Power,* N.Y. Times, May 24, 1995, at A1; Sullivan, *supra* note 361, at 98.

369 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

370 Carol S. Weissert & Sanford F. Schram, *The State of American Federalism*, 26 Publius No. 3 (1996).

371 Reese, *supra* note 47, at 2074–76.

## B. *Chisholm Fugue*

*Term Limits* and its implicit acknowledgment of a third sovereign contradicted the orthodoxy of Dual Sovereignty, but was consistent with Court's own past answer to the question, who is sovereign?

*Chisholm* held that Article III of the Constitution extended federal courts' power to hear suits brought by individuals against states for violations of state law. The issue in *Chisholm*, as Justice Wilson put it, was: If a dishonest merchant made a promise and broke it, the merchant would be sued; if a state made a promise and broke it, why should the state be immune from suit?[372] For Justice Wilson, there was an existential danger in establishing "haughty notions of *state independence*, *state sovereignty* and *state supremacy*."[373] "In *despotic* governments, the *government* has usurped, in a similar manner, both upon the *state* and the *people* . . . In *each*, *man* is degraded from the *prime* rank, which he ought to hold in human affairs: In the *latter*, the *state* as well as the *man* is degraded."[374] Given American notions of Popular Sovereignty, federal courts' power to hear individuals' claims brought under state law was the only and obvious conclusion.

Justice Wilson's conclusion proved intolerable to the states, and so they ratified the Eleventh Amendment.[375] The states' reactions to *Chisholm* were swift and severe. Georgia's House of Representatives passed legislation rendering any judgment upon itself on behalf of Alexander Chisholm a felony punishable by "death, without the benefit of clergy."[376] The chronology of states' reactions is fact, and signals that *Chisholm* violated the states' and Framers' "original understanding of states' immunity from suit in federal courts."[377] This is the story that the Court set out in *Hans*[378] in 1890, and that the Court retold in *Seminole Tribe of Florida*,[379] and *Alden*.[380] Chief Justice Rehnquist, in *Seminole Tribe*, called *Chisholm* a "now-discredited decision," and reaffirmed *Hans*' endorsement of *Chisholm*'s dissent: "I can readily assume that Justice Iredell's dissent . . . correctly states the law that

372 Chisholm v. Georgia, 2 U.S. 419, 456 (1793) (opinion of Wilson, J.) ("Upon general principles of right, shall [a state] when summoned to answer the fair demands of its creditor[s], be permitted, proteus-like, to assume a new appearance, and to insult him and justice, by declaring *I am a* SOVEREIGN *State*?").

373 *Id.* at 461.

374 *Id.*

375 Massey, *supra* note 26, at 111.

376 *Id.*

377 *Id.*

378 Hans v. Louisiana, 134 U.S. 1 (1890).

379 Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996).

380 Alden v. Maine, 527 U.S. 706 (1999).

should govern our decision today."[381]

This rendition of events tells only part of the story.

The Eleventh Amendment was not passed overnight—it was sent to the states for ratification after two sessions of Congress.[382] Massachusetts Congressman Theodore Sedgewick proposed an Eleventh Amendment far broader than the one states ratified.[383] Even Congressman Sedgwick's expansive proposal addressed only the scope of judicial power to hear cases. To the extent that they register in the historical record, public debates about *Chisholm* spoke of narrow "suability," not Sovereignty.[384] Perhaps *Chisholm*'s conclusion of states' legal exposure and so their financial vulnerability threatened states' solvency. Perhaps it was material motivations rather than political beliefs that impelled states'reactions.[385]

*Chisholm* was decided in 1793, *Hans* in 1890. Closer in time to *Chisholm* in 1810, writing for the Court in *Fletcher v. Peck*, Chief Justice Marshall, a contemporary of the Framers, rejected the narrative that *Chisholm* was wrongly decided: "The constitution, *as passed*, gave the courts of the United States jurisdiction in suits brought against individual States."[386] Chief Justice Marshall concedes that the Eleventh Amendment changed certain things: "This feature is no longer found in the constitution"[387]; the "feature," meaning states' suability. Chief Justice Marshall's account of *Chisholm* teaches two lessons: first, that in the Constitution's original form, natural individuals were sovereign superiors to their contrived inferiors, the states; and second, that while *Chisholm* expounded both Popular Sovereignty and suability, the Eleventh Amendment addressed suability, only.

Of the past, we can be certain of little more than that we cannot be certain of much. This much is certain: Federalists sought to avoid another convention following *Chisholm* and so conceded to the states the Eleventh Amendment to the Constitution.[388] That Amendment repudiated part, but not all of, *Chisholm*. *Chisholm*'s conception of Popular Sovereignty survives.

381 *Seminole Tribe*, 517 U.S. at 68–69; *Hans*, 134 U.S. 1.

382 Massey, *supra* note 26, at 111.

383 Barnett, *supra* note 36, 1754–55 ("That no state shall be liable to be made a party defendant, in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons, whether a citizen or citizens, or a foreigner or foreigners, or of any body politic or corporate, whether within or without the United States . . . .").

384 Barnett, *supra* note 36, at 1755.

385 Massey, *supra* note 26, at 110–11, 113.

386 Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139 (1810); Barnett, *supra* note 36, at 1745.

387 *Fletcher,* 10 U.S. at 139; Barnett, *supra* note 36, at 1745.

388 Massey, *supra* note 26, at 111, 113.

## C. *The Third Sovereign*

*Chisholm*'s survival means ours must be a system of three, rather than two, sovereign entities. The thread of history running back through *Obergefell*, to *Term Limits* to *Chisholm* leads inexorably back to the text of the Constitution. The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[389] The Tenth Amendment defines the relationship among sovereign entities: It delegates some power to the national government, delegates some power to states, and reserves certain powers to the People.[390] No lawyerly divination is necessary to make sense of the Tenth Amendment. The text speaks for itself. In our constellation of sovereign entities, there are two governmental sovereigns, who wield only powers delegated to, or reserved for, them. Above them is a single natural sovereign, who inhabits the remainder of our legal cosmos, who encompasses Sovereignty's full measure: the People.

### 1. "[O]r to the People"

Orthodoxy's defenders understand the Tenth Amendment as a general reservation of undelegated powers, rather than a provision capable of securing specific individual rights.[391] They conclude that, even less than a truism, the Tenth Amendment is a "kind of exclamation point, an italicization, of the Constitution's basic themes of federalism and popular sovereignty."[392] Dual Sovereignty requires that we ignore the Tenth Amendment's final clause, that we ignore our forerunners choice to include it. The history of that choice illuminates the depth of Dual Sovereignty's ignorance. Although a sense of crass transaction pervades the story of the Eleventh Amendment, the story of the Bill of Rights as a whole, and the Tenth Amendment in particular, stands as a marbled sanctuary devoted to hard-fought independence, the values undergirding our Constitution, and the necessity of compromise.

Consider the Virginia Ratification Convention. The Virginia Convention's reservations were typical among Anti-Federalists: leeriness about losing independence won in Revolution to a new overbearing, national government. Federalists contended the Constitution's enumeration of the national government's powers was limit enough: the new government could

389 U.S. CONST. amend. X.
390 Reese, *supra* note 47, at 2082–83.
391 MCAFFEE ET AL., *supra* note 358, at 44.
392 *Id.* at 44 n.121 (quoting Professor Amar).

exercise only as much power as the Constitution granted it.[393] A favorite target of Anti-Federalist ire was Article I, Section 8, which grants to Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers…"[394] To us, the notion of Congress' implied powers is prosaic. For Anti-Federalists, the "Sweeping Clause" was a dramatic reversal, monarchy reincarnate.[395] To Federalists, these arguments missed the point: the offending clause's sweep was limited by such language as "necessary" and "proper," and so offensive laws regulating speech, religion, allowing general warrants, abolishing jury trials, and the like were already unlawful.[396] Federalists nevertheless recognized the political exigency of compromise, and so the Bill of Rights came into being.

The Virginians' proposed Tenth Amendment omitted "the people."[397] Although the Virginia Convention ultimately ratified our Tenth Amendment, it rejected it initially because of the final clause, "or to the people." The addition, they believed, was calculated to undermine states' power.[398] The Virginians' fear was that by assigning the residuum of sovereignty to the People of the United States, rather than to the peoples of each state, the Constitution would leave the measure of power reserved to states' legislatures, if any, in doubt.[399]

The historical record is unclear about the precise origin of the Tenth Amendment's final clause. Orthodoxy insists that on August 22, 1789, Maryland Representative Daniel Carroll objected to the addition of the phrase, "or to the people," because it "tended to create a distinction between the people and their legislatures."[400] The historical record is not so certain. The *Annals of Congress* reports that Daniel Carroll moved to add the language; New York's *Gazette of the United States* reports that Elbridge Gerry, James Madisons' Vice President, made the motion, and that Carroll

393 Gary Lawson, *A Truism with Attitude: The Tenth Amendment in Constitutional Context*, 83 Notre Dame L. Rev. 469, 476 (2008).

394 U.S. Const. art. I, § 8.

395 Lawson, *supra* note 393, at 479–80.

396 *Id.* at 480–81.

397 "First, That each State in the Union shall respectively retain every power, jurisdiction and right which is not by this Constitution delegated to the Congress of the United States or to the departments of the Foederal [*sic*] Government . . . ." Randy E. Barnett, *Kurt Lash's Majoritarian Difficulty: A Response to a Textual-Historical Theory of the Ninth Amendment*, 60 Stan. L. Rev. 937, 950–52 (2008).

398 *Id.* at 952–53.

399 *Id.* at 951 (citing Saturday, December 12, 1789, *in* Journal of the Senate of the Commonwealth of Virginia 63 (Richmond, Thomas W. White 1828)).

400 McAffee et al., *supra* note 358, at 43 (quoting Daniel Carroll, *Debates in the House of Representatives* (August 22, 1789)).

objected.[401] Daniel Carroll was a Roman Catholic who was denied any representation or participation in government in colonial America on account of his faith.[402] Although after 1776 Carroll could participate, even in the process of drafting our Constitution, he remained a minority; all but three of the Framers belonged to some denomination of Protestantism.[403]

Given the conflicting historical accounts, there is no way to know which of Elbridge Gerry and Daniel Carroll proposed or opposed the phrase. Gerry, an Anti-Federalist standard-bearerer of Jefferson's Democratic Republican party, is familiar enough a character to infer what he meant by his use of the phrase: that the central government's actions should be dictated by, or conform to the actions of the states.[404] Of Carroll, we can be certain that he would have been familiar with Coode's Rebellion, a violent Protestant uprising in 1689 in Maryland against a colonial government chartered to, and operated by, Roman Catholics.[405] We might fairly infer, then, that by his use of this phrase, Carroll meant that government could secure individual freedoms, at least to religious practice and political participation, on two conditions: first, that a state legislature's composition is representative of those individuals it purports to represent; and second, that the People are a distinct entity, both from legislatures, and from the states.

If this interpretation is correct, the orthodoxy of Dual Sovereignty, its central dogma of elision of "the people" and "the states" and their legislatures,[406] must fall. The Constitution's text confirms, at least, Carroll's distinction of "the people" from both "the states" and their legislatures. Apart from the Bill of Rights and Constitution's Preamble, the only mention of "the people" in the Constitution, as it was originally drafted, is in Article I, Section 2, which lays out the House of Representatives' composition and electoral intervals: "The House of Representatives shall be composed of Members chosen every second Year by the People . . ."[407] The Constitution uses the term "legislature" to refer to the states' elected representatives;

401 Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and "Expressly" Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1921 n.125 (2008).

402 *See Washington Journal: Friday*, C-SPAN, at 2:20:46 (Oct. 25, 1996), https://www.c-span.org/video/?76130-1/washington-journal-friday (Brian Lamb's interview with Maryland State Archivist Edward Papenfuse).

403 David L. Holmes, *The Founding Fathers, Deism, and Christianity*, BRITANNICA, https://www.britannica.com/topic/The-Founding-Fathers-Deism-and-Christianity-1272214 (last visited Apr. 26, 2022).

404 *Washington Journal: Friday*, *supra* note 402.

405 *John Coode*, MD. ARCHIVES, https://msa.maryland.gov/megafile/msa/speccol/sc3500/sc3520/000200/000269/html/269bio.html (last visited Apr. 26, 2022).

406 Troxel v. Granville, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting) (eliding "the people" and "the states" and their legislatures).

407 Barnett, *supra* note 397, at 949 (quoting U.S. CONST. art. 1, § 2).

Article I, Section 3 provides that "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof . . ."[408] The People are distinct not only from the states, but also from any legislature. There is no direct or definitive evidence, to be sure, but there is evidence enough to surmise that Gerry opposed, and Carroll proposed the phrase, and that Carroll's meaning signals a third sovereign: the People.

### 2. Individual or Collective?

This third sovereign could be "the [P]eople" acting as a collective entity, as a body politic, rather than as many entities, as individuals. The Bill of Rights' other uses of the phrase "the [P]eople" suggest that it is intended to encompass both the singular and the plural meanings. The preamble to the Constitution asserts that "We the People of the United States, in Order to form a more perfect Union" established and ordain a new Constitution to "secure the Blessings Liberty to ourselves and our Posterity . . ." "Ourselves," rather than "Ourself." [409] The First Amendment protects the right of "the [P]eople" to assembly, petition, redress for grievances, and freedoms of speech and press. Each right can be exercised and accomplished on one's own.[410] For example, the Third Amendment protects against governments' unconsented-to quartering of soldiers in "any house . . . of the Owner . . ." The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures . . ."[411] Even accounting for the collective function and democratic benefits of the right to trial by jury that the Seventh Amendment guarantees, the right must attach to an individual Defendant, or an individual Juror, or both.[412] Defining rights that enable collective rights as individual rights collapses the distinction between the collective and the individual.[413] The Framers' ambiguity was surely no mistake. The Framers' ambiguity comports with reality's complexity—it cannot always be made to conform

408 *Id.* at 950 (quoting U.S. Const. art. 1, § 3).

409 *Id.*

410 U.S. Const. The Second Amendment protects the right of "the people to keep and bear arms," if only as part of an organized militia. The Fifth ("[n]o person shall be held to answer . . . without due process of law") and Sixth Amendments ("the accused") are similarly worded.

411 U.S. Const. amend. IV.

412 *See generally* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L. Rev. 203 (1995).

413 Reese, *supra* note 47, at 2090 n.202 (citing Kurt Lash, *On Federalism, Freedom, and the Founders' View of Retained Rights: A Reply to Randy Barnett*, 60 Stan. L. Rev. 969, 971 (2008)).

to a tidy taxonomy. Like the Tenth Amendment's reserved powers, these Amendments' rights are both singular and plural, at once shared in common and held by each of us, alone.[414]

Reality's messiness aside, a problem remains: if the Tenth Amendment's addition to the Constitution was to furnish a space for a third, individual sovereign, it would appear to conflict with the Ninth Amendment, the other Popular Sovereignty amendment.[415] The Ninth Amendment reads: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."[416] If the Tenth Amendment's third sovereign is the individual, it would render the Ninth Amendment illogical or superfluous.[417] Were it the same "pot of sovereign powers," that criticism would be fatal. The Ninth Amendment's use of the phrase "rights" versus the Tenth Amendment's "powers" belies the criticism. If there were no difference in the Amendments' meaning, there would be no difference in their text. There is, however, a difference in the Amendments' text, and so there must be difference in meaning.

Consider the right to vote. Is it a right, or a power? The act of voting is individual. Yet, the act is meaningful only when exercised alongside others as part of an election. In ordinary times, in elections for public office and the like, collective and individual conceptions of Popular Sovereignty overlap. In ordinary times, voting presents as a right. In extraordinary times, when a vote is cast as part of a Convention, we can see that voting is also a power. That power is both individual and collective; a vote cast only counts if cast as part of a Convention. Our vote cast in a Convention to alter or abolish a form of government emulates in our time the Framers' generation's constitutive decision to form a Union. In extraordinary moments, voting is neither a political nor civil right; voting is a sovereign power.

Popular sovereignty is neither wholly, nor necessarily collective or individual. The error in logic is not collapsing individual with collective rights; instead, the error is collapsing ordinary, positive rights, with extraordinary, ultimate powers.[418] Justice Wilson wrote in *Chisholm* that Georgia retained legislative authority, yet was less than a full sovereign, and so Georgia was inferior to natural individuals.[419] Ordinary power of positive law belongs to

414 Barnett, *supra* note 397, at 946.

415 *See generally* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 119-33 (2000) (discussing both Ninth and Tenth Amendments).

416 U.S. CONST. amend. IX.

417 Reese, *supra* note 47, at 2089–91 ("It cannot be that the people as individuals retain powers (other than their rights and freedoms from the Ninth Amendment) that are in the same pot of sovereign powers at play in the rest of the Tenth Amendment.").

418 *See, e.g.*, Lash, *supra* note 413, at 971–72.

419 Sher, *supra* note 18, at 602.

governmental sovereigns; extraordinary power of ultimate law belongs to each individual. Chief Justice Jay wrote in *Chisholm* that our Constitution's "great and glorious principle" is that "the people are the sovereign of this country" and that the People are "fellow citizens and joint sovereigns."[420] We are fellow citizens when we exercise our privileges or immunities. We are persons when a government deprives us of life, liberty, or property without Due Process of law, or denies us Equal Protection of the law. We are sovereign when we exercise those powers the Tenth Amendment reserves to us. Dual Sovereignty's orthodoxy made a "truism" out of the Tenth Amendment. Lift the veil of orthodoxy and observe the Amendment's truth. The Tenth Amendment's final four words delineate powers possessed by neither the federal government, nor the states; it reserves power to the third sovereign, to you and to me.[421] Choosing government representatives or deciding to alter or abolish a government, might be history's archetypal examples of Popular Sovereignty. Choosing government representatives is one, but not the sole expression, of Popular Sovereignty's beating core: choice.

## V. The Personal Question Doctrine

Popular Sovereignty, Due Process, and Dignity are different faces of a singular crystalline solid: "the freedom of the individual."[422] If Popular Sovereignty's evolution from creation myth to celestial polestar teaches any lesson about our Constitution, it is that beyond arguments' rhetorical superfluities and doctrinal intricacies is an idea simple and sublime: that freedom means the power to decide.[423] We might secure that freedom the Constitution promises us with a principle capable of policing the proper boundaries of the third sovereign's dominion: a Personal Question Doctrine.

Where are those boundaries? If there are three sovereigns, what decisions fit within the compass of the third sovereign's powers? The Constitution could not withdraw all choice from this third sovereign and allocate power solely to governmental sovereigns, this would be intolerable. Nor could the Constitution remand all choice to it, this would be unworkable. The Framers provided us an exemplar of compromise in the form of voting. The Tenth Amendment's final clause signals that voting is not alone: "The *powers* not delegated . . ." The Tenth Amendment's ambiguity is doubtless deliberate. The generations that wrote and ratified the Bill of Rights and the Reconstruction Amendments could not know, and did not presume to

420 Chisholm v. Georgia, 2 U.S. 419, 479 (1793) (opinion of Jay, C.J.).
421 Redlich, *supra* note 11, at 807.
422 Bond v. United States, 564 U.S. 211 (2011).
423 Lawrence v. Texas, *supra* note 11, at 1927.

know, the whole of freedom; they entrusted us to discover its scope and meaning.[424] Dominion belonging to the third sovereign, like her governmental companions', expands or contracts with time. Perpetual reassessment of that compass is how the Constitution sustains the heavy burdens of democracy, withstands the strains of the Framers' grand experiment.

Where the text of the Constitution is silent, the jurisprudence speaks.

### A. *Constitutive Questions*

Not all questions are created equal. Certain questions are political, for example, and so not susceptible to judicial resolution; this was the Court's conclusion in *Luther,* that the Court has since affirmed.[425] Questions posed to courts might well be susceptible to political resolution, yet they are committed to, and so decided by, the courts. This dynamic, to shelter whole categories of choice from the frenzies and passions of popular majorities is by design.[426] This dynamic is Popular Sovereignty as a structural principle in motion.

Due Process embodies this same idea. The Court's recognition of a right as fundamental withdraws from some individual or group, and assigns to another, the power to decide.[427] On the surface, Chief Justice Rehnquist's *Glucksberg* opinion, and Justice Harlan's *Poe* dissent are two distinct approaches to recognizing unenumerated rights. In truth, each is a distinct approach to the allocation and assignment of decisionmaking power. *Glucksberg*'s emphasis on history and tradition favors orthodoxy over heresy, hesitation over alacrity. *Glucksberg* recognizes fundamental rights only if they are "'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty.'"[428] Justice Harlan's *Poe* dissent looked to history and tradition, but looked beyond them, too. In *Obergefell*, Justice Kennedy embraced Justice Harlan's approach, and dismantled much of *Glucksberg*—but not all of it: "[W]hile [*Glucksberg*] may have been appropriate for the asserted right there involved [physician-assisted suicide], it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage

424 Yoshino, *supra* note 207, at 163; *see* Obergefell v. Hodges, 576 U.S. 644, 664 (2015).

425 Baker v. Carr, 369 U.S. 186, 222 (1962) (defining parameters of non-justiciable questions).

426 Tribe, *supra* note 136, at 16; *Obergefell*, 576 U.S. at 676–77 (It is "the idea of the Constitution . . . 'to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.'" (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943))).

427 Lawrence v. Texas, *supra* note 11, at 1927.

428 Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

and intimacy."[429] Some piece of *Glucksberg* endures.

Justice Kennedy was vague as to which piece that might be. Perhaps it is that not all rights, not even all fundamental rights, are the same; that the Court ought to draw distinctions among rights,[430] and between rights and powers. Perhaps it is that the difference between the rights to marriage and intimacy and a right to physician-assisted suicide is that one is fundamental, and the other constitutive and thus ill-suited to Due Process's protection. Ill-suited not because the Constitution cannot protect it, but because the Constitution should protect it as integral to Human Dignity. If this is the strand of *Glucksberg*'s logic that Justice Kennedy sought to sever from the rest and to preserve, together with *Obergefell*'s notion of Equal Dignity, they teach that the substance of the decision the Court is assigning power over ought to dictate the Court's analysis, and not the other way around. Where the decision is constitutive, the Court should assign the power to decide, as the Tenth Amendment's final clause instructs it must, to the People.[431]

Consider the decision whether to bear or beget a child. A legislature cannot by fiat coerce a child-bearing individual into conforming to its decision, because the long and lasting labors of birth impose a "suffering [] too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."[432] The Court has assigned the decision to the individual woman because the decision is "personal and intimate," "properly private," and "basic to individual dignity and autonomy."[433] Affirming that assignment, the Court described the decision as "defin[ing] one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[434] Were the choice assigned to a government rather than the individual, "[b]eliefs about these matters could not define the attributes of personhood."[435] The questions remanded to the third sovereign are the most solemn questions, "traumatic [] and [] empower[ing]…" and whose assignment to the individual is a mandate of "basic [H]uman [D]

429 *Obergefell,* 576 U.S. at 671.

430 *E.g.,* Vacco v. Quill, 521 U.S. 793, 804–05 (1997) (Chief Justice Rehnquist differentiating between withdrawing treatment and administering drugs to end a person's life).

431 "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X.

432 Lawrence v. Texas, *supra* note 11, at 1927 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992)).

433 Thornburgh v. Am. Coll. of Obstreticians and Gynecologists, 476 U.S. 747, 772 (1986).

434 Greenhouse & Siegel, *supra* note 168, at 1740 (quoting *Casey*, 505 U.S. at 851).

435 *Id.*

ignity."[436] It is for the individual to answer these questions not because of citizenship, not because of race or creed, but because of her humanity.[437]

*Glucksberg* rejected an argument about physician-assisted suicide like this one about abortion. The Court has since rejected much of *Glucksberg*. Consider, then, the Ninth Circuit's reasoning affirming the individual's right to a physician-assisted suicide:

> Some argue strongly that decisions regarding matters affecting life or death should not be made by the courts. Essentially, we agree with that proposition. In this case, by permitting the individual to exercise the right to choose we are following the constitutional mandate to take such decisions out of the hands of the government, both state and federal, and to put them where they rightly belong, in the hands of the people. We are allowing individuals to make the decisions that so profoundly affect their very existence – and precluding the state from intruding excessively into that critical realm. The Constitution and the courts stand as a bulwark between individual freedom and arbitrary and intrusive governmental power. Under our constitutional system, neither the state nor the majority of the people in a state can impose its will upon the individual in a matter so highly "central to personal dignity and autonomy." Those who believe strongly that death must come without physician assistance are free to follow that creed, be they doctors or patients. They are not free, however, to force their views, their religious convictions, or their philosophies on all the other members of a democratic society, and to compel those whose values differ with theirs to die painful, protracted, and agonizing deaths.[438]

These are not the decisions of everyday life. These are deterministic questions of discovery, construction and even destruction.[439] These are choices whose consequences reverberate through time, define the essence of, and determine the course of, one's existence. Any law threatening to place a substantive or procedural obstacle in the way of rendering such choices would be "extraordinary."[440] The Personal Question Doctrine would

436 *Casey*, 505 U.S. at 916.

437 Screws v. United States, 325 U.S. 91, 134–35 (Murphy, J., dissenting); Daly, *supra* note 109, at 393.

438 Compassion in Dying v. Washington, 79 F.3d 790, 839 (9th Cir. 1996) (en banc), *rev'd sub nom*. Washington v. Glucksberg, 521 U.S. 702 (1997) (citation omitted).

439 Lawrence v. Texas, *supra* note 11, at 1898.

440 Litman, *supra* note 110, at 1214 n.40 (citing Shelby Cnty. v. Holder, 570 U.S. 2612, 2618, 2624–26, 2628, 2630 (2013)).

strike down laws that survive scrutiny under ordinary Due Process analysis or *Casey*'s undue burden test, because both condone states' "disparate treatment"[441] of natural, sovereign indivduals in a "fundamental way."[442] The crux of such laws' injury is their failure to distinguish between rights and powers, between buying health insurance[443] and choosing to meet death on one's own terms.[444] In the name of protecting potential life—a boundless notion that threatens to enlarge states' police power to no principled end—such laws ascribe presumptive moral culpability to women on the basis of bygone notions of a woman's role in society as domestic procreator, or worse, an overriding distrust of women so thorough as to bond her, to degrade her, and to condemn her. These decisions are moments of tragedy that might tarnish, or triumph that might burnish, human experience; moments we face as mortals, alone in communion with eternity. The text of the Constitution contemplates one decision, whether to alter or abolish a form of government. The jurisprudence suggests another: the decision whether to bear a child.

On the surface, Due Process and the Personal Question Doctrine do something similar: each assigns a decision. Due Process assigns decisions as rights owed to citizens or persons whose protections flow from either Liberty or Equality. The Personal Question Doctrine assigns decisions as power owed to a natural sovereign whose protections flow from Dignity. Where the origin of a decision's assignment is Human Dignity, it draws from an ancient mainstem,[445] universal and unassuming, flowing a greater distance and with greater force than could its tributary streams, Liberty and Equality, even as they entwine.

Observe the cascades downstream.

### B. *Sovereign Immunity*

The Personal Question Doctrine guarantees sovereigns' immunity. Were law to attach guilt to an individual's resolution of such questions, questions of conscience,[446] it would render the choice no choice at all.[447] The Constitution distributes to the individual these questions of one's own moral

441 *Shelby Cnty.*, 570 U.S. at 2630.
442 *Id.* at 2631.
443 *See* Randy E. Barnett, *Commandeering the People: Why the Individual Health Insurance Mandate Is Unconstitutional*, 5 N.Y.U. J.L. & Liberty 581, 585, 614 (2010).
444 *See* Chemerinsky, *supra* note 251, at 1501–16.
445 Sher, *supra* note 18, at 594–605.
446 *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 916 (1992).
447 Great N. Life Ins. Co. v. Read, 322 U.S. 47, 51 (1944).

policy,[448] of one's embrace or rebuke of elementary notions of right and wrong, whenever[449] and in whatever form[450] they arise. The third sovereign's dominion extends to constitutive questions, and for those answers, we cannot be held to account.

### C. *Unalienable Powers*

The Personal Question Doctrine secures the individual's power against legislative or popular usurpation. An individual can choose to waive a right. An individual can promise not to enforce another entity's obligations to the individual.[451] Rights can also be delegated, so that we assign our rights to enforce another entity's obligations to us to someone else. The Constitution itself is an exemplar of delegation, but of a different, more permanent kind. Although we can choose to waive certain rights that the Constitution grants us, we cannot choose to waive powers that the Constitution reserves to us.

Powers are different. The terms of the Constitution's delegation can be, and have been, changed by proper amendment. Powers the Constitution has already committed to one sovereign entity or another, absent amendment, cannot be waived. Even if an individual's past conduct causes her inability to exercise her power later in time, that past conduct cannot amount to a waiver.[452] "The Constitution's division of power among the three Branches," three organs of a single larger, sovereign entity, "is violated where one Branch invades the territory of another, whether or not the encroached-upon Branch approves the encroachment."[453] The reason for waiver's impotence to fiddle with the Framers' design, the reason one governmental sovereign cannot consign its duty to decide away, is the nature of the decision.[454] At stake is individual Liberty.[455] Our Declaration of Independence reads: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among

448 *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1471 (2018).

449 Litman, *supra* note 110, at 1220–21.

450 *Id.* at 1217 (citing Shelby Cnty. v. Holder, 570 U.S. 2612, 2648 (2013) (Ginsburg, J., dissenting)).

451 For example, click-wrap agreements, digital prompts that ask whether you agree to, or accept terms and conditions, before you can do whatever it is you intend to do, ask whether we want to waive rights—and we do.

452 *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, *supra* note 11, at 333.

453 New York v. United States, 505 U.S. 144, 182 (1992).

454 *See, e.g.*, Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983); Myers v. United States, 272 U.S. 52 (1926).

455 Boumediene v. Bush, 533 U.S. 723, 742 (2008).

these are Life, Liberty, and the pursuit of Happiness."[456] The Declaration continues: "That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it…"[457] The Declaration mentions two, distinct kinds of rights: "rights" secured by a limited set of powers we distribute to Governments, and "Rights" we keep for ourselves; the latter are the powers reserved by the Tenth Amendment. Capital-R "Rights," our sovereign powers, are "unalienable."

## Conclusion

The Tenth Amendment's triptych truth threatens to destroy orthodoxy. Observing the constellation of sovereigns and values in their totality, without orthodoxy's obsfuscating mist, threatens to banish Dual Sovereignty to desuetude. Its defenders will zealously guard the old view, accusing the challenge mounted herein of staking out a radical position beyond the bounds of respectable argument[458] and of attempting to destroy original revelation. At the moment of Revolution, Thomas Paine wrote in his pamphlet, *Common Sense*:

> Perhaps the sentiments contained in the following pages, are not yet sufficiently fashionable to procure them general favor; a long habit of not thinking a thing wrong, gives it a superficial appearance of being right, and raises at first a formidable outcry in defense of custom. But the tumult soon subsides. Time makes more converts than reason.[459]

The founding generation chose heresy over an orthodoxy which was the product of lassitude and sloppy thought. At the moment of Independence, that generation declared:

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and

456 The Declaration of Independence para. 2 (U.S. 1776).
457 *Id.*
458 Barnett, *supra* note 36, at 1758.
459 Thomas Paine, Common Sense (1776), https://www.gutenberg.org/files/147/147-h/147-h.htm.

> of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.[460]

The founding generation chose alacrity. At the moment of Constitution, the Framers wrote, "[w]e the People of the United States, in Order to form a more perfect Union…[to] secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."[461]

The Framers of our Constitution chose to harness boundless discord to create a harmonious equipoise. The Framers of our Constitution chose pluralism.[462] At moments of triumph and tragedy in our lives, at constitutive moments, each of us stands alone. This article has presented landscapes of history to justify remanding these moments' decisions to the individual to decide as the Tenth Amendment commands. These sketches, isolated from jurisprudence's flow through time, are parsimonious compared to the richness and complexity of the larger scheme of things,[463] a scheme that can and will only grow richer in complexity. Beneath the surface of that tumultuous flow are quiet depths. There, the weight of history arrests any oppressive impulse, crushes the cruel artifice of orthodoxy. Discovery takes curiosity, construction dexterity, and destruction empathy. The Personal Question Doctrine empowers us to peer into that tranquil abyss, to find the good in bad things,[464] and to navigate through the fierce storms of life, to carry toward fruition the idea of the Constitution.

460 THE DECLARATION OF INDEPENDENCE, *supra* note 456.

461 U.S. CONST. pmbl.

462 GADDIS, *supra* note 4, at 311 n.43; ISAIAH BERLIN, *Two Concepts of Liberty*, *in* THE PROPER STUDY OF MANKIND 191–242 (Henry Hardy & Roger Hausheer eds., 1997).

463 ISAIAH BERLIN, THE HEDGEHOG AND THE FOX 88–90 (1953).

464 GADDIS, *supra* note 4, at 109.

# IN THE NAME OF "TERRORISM": SILENCING DISSENT IN SAUDI ARABIA

*By Princess Diaz-Birca**

* Princess Diaz-Birca is a third year law student at Northeastern University School of Law, class of 2023. This paper began as an essay written for the Valerie Gordon Student Essay Award at Northeastern. A distinguished alum, Valerie Gordon's legacy promotes fierce advocacy for social justice, both domestically and internationally. First and foremost, I recognize her and the legacy she created. During my time at Northeastern, I have also become a fierce advocate for social justice issues with a special interest in juvenile justice and post-conviction work. I strive to dedicate my career to a lifetime of challenging powerful institutions and pushing for reform for both my client and others similarly situated. This Note would not possible without the love and support from my husband and parents, the amazing *Northeastern University Law Review* team who worked countless hours with me on this paper, and encouragement from life-long friends. Finally, an incredibly special shout out goes to Professor Victoria McCoy Dunkley, without whom I would have never finished the essay much less have had the foundational skills needed to push myself further and develop the writing that has now become this Note.

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*The balance between human rights and security can be found within human rights law itself, for "[l]aw is the balance, not a weight to be measured."*[1]

## INTRODUCTION

The act of terrorism has been used as a political tool designed to instill fear in others. Terrorism remains a very real threat that continues to perpetuate instability in regions across the world; however, fear mongering and abuse of power have often led to a boundless legal definition of terrorism. As a case study, the Kingdom of Saudi Arabia (KSA or Kingdom) exemplifies the grim implications associated with an ill-defined terrorism statute. The alarming ease with which the KSA has persecuted activists, political opponents of the crown, and religious minorities, can serve only as a warning to countries that have similarly failed to ensure protections against an expanded definition of terrorism. Terrorism laws can be defined in a way that both protects citizens from the expanding power of the state, while also holding alleged terrorists accountable. Legal reforms, such as (1) narrowly defining terrorism, (2) increasing accountability, and (3) fostering an independent and transparent judicial system, are just a few simple steps countries can take to protect their citizenry from the unwarranted expansion of terrorism statutes. Despite the growing scope of terrorism statutes, countries continue to misuse the charge of terrorism and fail to ensure protections against the misapplication of terrorism laws.

In recent years, the KSA has abused its power within political and judicial institutions and pursued charges against its citizens under the guise of combatting terrorism.[2] The recent decision to exclude the KSA from the United Nations (UN) Human Rights Council may be directly linked to the Kingdom's high-profile human rights violations regarding these vulnerable populations.[3] Often, the KSA has cited its commitment to the precepts of Islam when declining to implement international laws or agreements that could be used to ensure compliance with international human rights

1 Martin Scheinin (Special Rapporteur on Counter Terrorism and Human Rights), *Rep. of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ 12, U.N. Doc. A/HRC/16/51 (Dec. 22, 2010), https://digitallibrary.un.org/record/704287/files/A_HRC_16_51-EN.pdf.

2 *See* Natasha Turak, *Saudi Arabia Loses Vote to Stay on UN Human Rights Council; China, Russia and Cuba Win Seats*, CNBC (Oct. 14, 2020), https://www.cnbc.com/2020/10/14/saudi-arabia-loses-vote-for-un-human-rights-council-seat-china-russia-win.html; Bethan McKernan, *Saudi Arabia Using Secret Court to Silence Dissent, Amnesty Finds*, GUARDIAN (Feb. 5, 2020), https://www.theguardian.com/world/2020/feb/06/saudi-arabia-using-secret-court-to-silence-dissent-amnesty-finds.

3 *See* Turak, *supra* note 2.

standards.[4] Although the KSA claims to have maintained its commitment to human rights, several of the crown's initiatives have granted additional power to police and judicial actors to the detriment of vulnerable populations.[5] One such initiative was the creation of a presidential task force known as the State Security Presidency (SSP).[6] The SSP, a covert police force often found at the center of many human rights violations, was originally tasked with investigating matters related to domestic and international terrorism.[7] Echoing themes found in American national security policies post-September 11th, the KSA's reliance on covert police forces, accompanied by the adoption of policies which increased police and judicial powers, enabled a breakdown in justice by creating a system that lacks transparency, proper oversight, and mechanisms to ensure accountability.[8]

This paper will explore the human rights violations perpetuated by the KSA under the guise of the rule of law, the victims affected by the Kingdom's actions, the themes mirrored in American policies, and the potential legal reforms moving forward. Beginning first with a discussion of the history of terrorism and policies related to terrorism in the KSA, Part I of this paper explores how terrorism has shifted from a viable threat in the Kingdom to a political tool used to silence dissent. Part II of the paper defines terrorism and explores how an expanded definition threatens human rights standards. Part III highlights a few, of many, victims that are known to have suffered from the KSA's adoption of flawed policies against domestic terrorism. Part IV connects the dangerous rhetoric and overbroad policies to similar United States (U.S.) policies against domestic terrorism—highlighting the reliance on police forces with little to no oversight and the persecution of political dissenters. Lastly, Part V suggests potential avenues for legal reforms both in the U.S. and the KSA.

4 Human Rights Watch, World Report 1992, at 820 (1991).

5 United Nations Hum. Rts. Council, *Human Rights Council Adopts Universal Periodic Review Outcomes of Saudi Arabia, Senegal, the Congo and Nigeria*, United Nations (Mar. 14, 2019), https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=24336&LangID=E; *see* Am. Bar Ass'n Ctr. for Hum. Rts., Saudi Arabia: Counterterror Court Targets Activists 2–4 (2019), https://www.americanbar.org/content/dam/aba/administrative/human_rights/justice-defenders/saudi-court-targets-activists.pdf.

6 Bureau of Democracy, Hum. Rts. & Lab., U.S. Dep't of State, Saudi Arabia 2018 Human Rights Report 10 (2019), https://www.state.gov/wp-content/uploads/2019/03/SAUDI-ARABIA-2018.pdf.

7 *Id.*

8 *See id.* at 9 (describing the SSP's "broad authority to arrest and detain persons indefinitely without judicial oversight, notification of charges, or effective access to legal counsel or family").

# I. HISTORY

## A. *Domestic Terrorism*

Following the September 11th attacks, the terrorist cell known as al-Qaeda turned its attention to the Kingdom of Saudi Arabia, perpetrating acts of terrorism that rocked the capital city of Riyadh from 2003 to 2008.[9] During this period, 30 attacks were successfully carried out in the capital, and over 160 attacks were thwarted by the KSA.[10] In an effort to deter future attacks, the Kingdom mobilized the Public Security's Special Emergency Forces to identify and combat terrorist cells in the region.[11] These forces, designed to be highly mobile in case of an unexpected threat, received specialized training in counterterrorism and counterinsurgency.[12] Additionally, the Mubahith, typically regarded as a religious or secret police force, was tasked with investigating issues related to domestic security.[13] In 2007, the Interior Minister announced that 9,000 suspects had been detained on suspicion of ties to al-Qaeda due to efforts by Saudi security forces.[14] Both the Public Security's Special Emergency Forces and the Mubahith reported directly to the Ministry of the Interior.[15]

Notably, the role of Interior Minister is currently filled by a political actor that is granted the oversight of police operations, policies, and use of force.[16] The politicization of an enforcement agency can create a vacuum of power that, without proper oversight, leads to the absence of transparency and unanswered questions relating to abuse of power. The cases of KSA

9 Lori Plotkin Boghardt, *From ISIS to Activists: New Security Trials in Saudi Arabia*, WASH. INST. FOR NEAR E. POL'Y, May 2016 at 1, 2.

10 *Id.*

11 *See* Anthony H. Cordesman & Nawaf Obaid, *Saudi Internal Security: A Risk Assessment*, CTR. FOR STRATEGIC & INT'L STUD. 18 (May 30, 2004), https://csis-website-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/media/csis/pubs/sis_ariskassessment.pdf.

12 *Id.*

13 *Id.* at 17 (describing the Mubahith, a specialized police unit also referred to as General Security Service). Note that the General Security Service was later consolidated under the SSP and is now referred to as the General Dictorate of Investigations (GDI). While I recognize that the Mubhahith can be called by many different names, hereinafter I will be solely using Mubahith to describe the actions of the religious covert police team operating under the SSP.

14 Boghardt, *supra* note 9, at 2; OFF. OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2007, at 127 (2008), https://2009-2017.state.gov/documents/organization/105904.pdf.

15 Cordesman & Obaid, *supra* note 11, at 17.

16 *Id.* at 15.

citizens charged with terrorism following the 2003–2008 attacks on Riyadh highlight this lack of transparency. In total, roughly 9,000 citizens were detained by Saudi police for suspected ties to al-Qaeda.[17] Although these arrests began in 2003, by the end of 2007, thousands remained incarcerated without formal charges or trials.[18] The names of those arrested, their precise charges, and information on their trials remain, in most cases, unreleased to this day.[19]

### B. *KSA Specialized Criminal Court*

In response to the number of detainees following the Riyadh attacks, the KSA established the Specialized Criminal Court (SCC) in late 2008.[20] This judicial reform aimed to create a system for trying cases related to terrorism.[21] Although the influx of detained citizens created a need for an additional adjudicatory body to avoid overwhelming the already-established judiciary, the SCC's jurisdiction was not publicly defined until the establishment of the anti-terror decree in 2014.[22] From 2008 to 2014, transparency surrounding SCC jurisdiction was non-existent, enabling the violation of human rights and diminishing judicial independence.[23]

The SCC falls under the jurisdiction of the Supreme Judicial Council; however, SCC judges are appointed by the Saudi Ministry of the Interior.[24] The Interior Minister was additionally tasked with creating policies for detaining suspected domestic terrorists, overseeing police forces in charge of investigating and arresting alleged criminals, and managing departments tasked with prosecuting and convicting said suspects.[25] Less than a year after the SCC's formation, the Kingdom announced 330 defendants had been tried with few, if any, defendants acquitted.[26] Many defendants faced prison sentences and travel restrictions, while one defendant faced death.[27] Some viewed the formation of the SCC as a sign that the KSA had

17 Boghardt, *supra* note 9, at 2.
18 *Id.*; Off. of the Coordinator for Counterterrorism, *supra* note 14, at 127.
19 Boghardt, *supra* note 9, at 1.
20 *Id.* at 2.
21 Off. of the Coordinator for Counterterrorism, *supra* note 14, at 127.
22 Am. Bar Ass'n Ctr. for Hum. Rts., *supra* note 5, at 7; Boghardt, *supra* note 9, at 2.
23 *See* U.N. Comm. Against Torture, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Concluding Observations on the Second Periodic Report of Saudi Arabia, U.N. Doc. CAT/C/SAU/CO/2, at 4–6 (June 8, 2016).
24 Boghardt, *supra* note 9, at 2.
25 *See* Am. Bar Ass'n Ctr. for Hum. Rts., *supra* note 5, at 8; Cordesman & Obaid, *supra* note 11, at 17–18 (discussing Ministry of Interior's oversight of special police forces).
26 Boghardt, *supra* note 9, at 2–3.
27 *Id.* at 3.

gained control in its fight against domestic terrorism.[28] However, human rights organizations quickly became concerned about the SCC's power and expanding caseload.[29]

The KSA's lack of transparency during the SCC's early years contributed significantly to growing concerns that the court had shifted from an adjudicatory forum for terrorism cases to a mechanism by which the government could target activists and oppress dissenters.[30] The many cases rapidly adjudicated during the SCC's first year—a majority of which fell under the broad purview of domestic terrorism—often lacked specificity regarding the crimes committed, causing many to question whether the SCC was subject to sufficient oversight.[31] Laws previously enacted to ensure public safety were interpreted broadly by the court, redefining the meaning of terrorism in the region and allowing for the arrest of those criticizing the crown or crown policies.[32] Human rights organizations often cite 2011 as the year the court began exercising broader jurisdiction and became a means through which the KSA could punish critics of the government.[33] It was during this year that the court's caseload shifted to include political activists and adversaries of the Kingdom's polices.[34] Notably, this was a contentious period of time for countries surrounding the KSA as well—throughout the Middle East, activists were demanding greater rights and protesting against oppressive regimes.[35] In response, the Interior Minister banned all public protests, calling for the arrest of anyone participating in, or organizing a protest for "disobeying the ruler."[36]

The court's expanding jurisdiction and increased power could,

28 *Id.* at 2.

29 *See* AM. BAR ASS'N CTR. FOR HUM. RTS., *supra* note 5, at 17; AMNESTY INT'L, MDE 23/1633/2020, MUZZLING CRITICAL VOICES: POLITICIZED TRIALS BEFORE SAUDI ARABIA'S SPECIALIZED CRIMINAL COURT 7–11 (2019), https://www.amnesty.org/en/wp-content/uploads/2021/05/MDE2316332020ENGLISH.pdf.

30 Boghardt, *supra* note 9, at 3, 6; *see* AMNESTY INT'L, *supra* note 29, at 7–8; *see also The Specialized Criminal Court: How the Saudi Government Targets Human Rights Defenders*, AMS. FOR DEMOCRACY & HUM. RTS. BAHR. (2015), https://www.adhrb.org/wp-content/uploads/2015/02/2015.23.01_SCC-Backgrounder_Final.pdf.

31 AMNESTY INT'L, *supra* note 29, at 7–8; *see also* AM. BAR ASS'N CTR. FOR HUM. RTS., *supra* note 5, at 8 (discussing the role of the Ministry of Interior in overseeing the offices of both the prosecution and the judiciary).

32 AMNESTY INT'L, *supra* note 29, at 8 ("[A]uthorities have also resorted extensively to the 2007 Anti-Cyber Crime Law when prosecuting government critics and human rights defenders before the SCC, citing tweets and other online messages as evidence.").

33 *See id.* (citing 2011 as the year the SCC has been used as an instrument of oppression, beginning with the trial of 16 "Jeddah reformists").

34 *Id.* at 9; AM. BAR ASS'N CTR. FOR HUM. RTS., *supra* note 5, at 8.

35 Boghardt, *supra* note 9, at 3.

36 AMNESTY INT'L, *supra* note 29, at 17.

therefore, be seen as a direct signal to the Kingdom's citizens—that protests and calls for increased human rights would be met with harsh penalties, including a possible death sentence. Notably, the American Bar Association (ABA) has questioned the court's "discriminatory application of its jurisdiction," especially in cases where activists have been re-tried under SCC jurisdiction only to receive longer or harsher penalties.[37] The ill-defined jurisdiction of the SCC, coupled with the almost unfettered power held by the Interior Minister, raises several concerns. As the UN notes, "the vesting of responsibility for law enforcement and the prosecution of crime in the same ministry undermines the prosecution's ability to perform its role impartially."[38]

## II. Eradicating "Terrorism": A System of Lawful Oppression

### A. *Defining Terrorism: An International Proposal*

Despite the severe consequences of improperly defining terrorism, there has yet to be a universal definition adopted by the UN.[39] Countries throughout the world have adopted their own laws, definitions, and penalties related to terrorism.[40] Many have additionally signed on to treaties or conventions that are designed to address the definition of specific terrorist activities, in an effort to reach a consensus on a broader, more encompassing definition.[41] One major barrier to the adoption of a universal definition is the constant evolution, and highly politicized nature, of terrorist activities.[42] For the purposes of international law, the three most common characteristics found across a myriad of terrorism definitions are: (1) "a fundamental motive to make political/societal change," (2) using "violence or illegal force" against a civilian population by a "non-state" or "subnational actors," (3) with the goal of creating change in society.[43]

Before evaluating the application of counterterrorism laws, examining the word "terrorism" and how it is defined is crucial. Although the

37 Am. Bar Ass'n Ctr. for Hum. Rts., *supra* note 5, at 7.

38 Dato' Param Cumaraswamy (Special Rapporteur on the Independence of Judges and Lawyers), *Rep. on the Mission to the Kingdom of Saudi Arabia*, ¶ 90, U.N. Doc. E/CN.4/2003/65/Add.3 (Jan. 14, 2003); *see also* Am. Bar Ass'n Ctr. for Hum. Rts., *supra* note 5, at 8.

39 Hum. Rts. Council Advisory Comm., *Negative Effects of Terrorism on the Enjoyment of Human Rights*, U.N. Doc. A/HRC/AC/24/CRP.1, at 3 (Jan. 22, 2020).

40 *Id.*

41 *Id.* at 6.

42 *Id.* at 3.

43 *Id.* at 5.

definitions proposed internationally and highlighted by the UN have merit, for the purposes of this Note, a narrower definition is proposed. Terrorism is: (1) political; (2) violence, or the threat of violence; (3) "designed to have far-reaching psychological repercussions beyond the immediate victim or target."[44] The last element represents a specific mens rea requirement that governments should adopt when defining terrorism. The intent, or goal, of the action must be to inspire fear in a wide range of people.[45] Other definitions of terrorism include additional factors, such as specifying that terrorism can only be perpetrated by non-state actors or that the targets must be civilians.[46] In the definition proposed here, the mens rea requirement sufficiently narrows the scope of terrorism without absolving state actors from the risk of being defined as terrorists.

### B. *Defining Terrorism: The KSA "Counter-Terror" Laws*

Given the history of the Riyadh attacks, the KSA has a genuine interest in protecting its citizens and regions of the Kingdom from acts of domestic terrorism.[47] However, the methods used to combat terrorism may challenge humanitarian goals, and international laws on human rights, if incorrectly applied.[48] The UN Office of the High Commissioner for Human Rights noted:

> [In the pursuit of domestic security,] States have engaged in torture and other ill-treatment to counter terrorism, while the legal and practical safeguards available to prevent torture, such as regular and independent monitoring of detention centres[,] have often been disregarded. . . . The independence of the judiciary

44 Daniel Byman, *Who Is a Terrorist, Actually?*, VOX (Sept. 22, 2020) (quoting BRUCE HOFFMAN, INSIDE TERRORISM 40 (2006), https://www.vox.com/identities/21449415/antifa-terrorists-violence-patriot-prayer-black-lives-matter-protests-portland-kenosha) (suggesting that the definition of terrorism often shares four common characteristics). Three of these characteristics have been listed above. The missing characteristic is the element which requires terrorism to be defined only by the actions of non-state actors. *Id.* For reasons explained above, I do not consider this element.

45 *Id.*

46 *Id.* (explaining that state-actors refer to people who work as an agent of a recognized government).

47 *See* U.N. COUNTER-TERRORISM IMPLEMENTATION TASK FORCE (CTITF), WORKING GRP. ON PROTECTING HUM. RTS. WHILE COUNTERING TERRORISM, BASIC HUMAN RIGHTS REFERENCE GUIDE: CONFORMITY OF NATIONAL COUNTER-TERRORISM LEGISLATION WITH INTERNATIONAL HUMAN RIGHTS LAW 7 (2014), https://www.ohchr.org/EN/newyork/Documents/CounterTerrorismLegislation.pdf ("[T]errorism constitutes one of the most serious threats to international peace and security . . . .").

48 *Id.*

> has been undermined, in some places. . . . Repressive measures have been used to stifle the voices of human rights defenders, journalists, minorities, indigenous groups, and civil society.[49]

Despite this warning from the UN and various legal scholars, the Kingdom has adopted several policies that threaten human rights in the country. The 2014 Penal Law for Crimes of Terrorism and its Financing (2014 Counter Terror Law), is vague and overbroad legislation that has led to various human rights violations.[50] The law allows the SCC to prosecute any person who "disturbs public order, shakes the security of society or subjects its national unity to danger, or obstructs the primary system of rule or harms the reputation of the state."[51] A 2011 draft of the law was revamped to remove language that explicitly criminalized peaceful protesting; however, ambiguous language used within the statute allows for the prosecution of persons who make statements critical of the KSA.[52]

The new law additionally increases the power held by the Interior Minister, allowing for the arrest of terrorism suspects without oversight from the prosecutor, granting additional access to private individuals' information, and minimizing judicial oversight.[53] The SCC also benefited from the passage of the 2014 Counter Terror Law. The law includes provisions that grant the SCC "the authority to hear witnesses and experts without the presence of the defendant or the defendant's lawyer . . . hampering their right to challenge this evidence."[54] The 2014 Counter Terror Law additionally gives the SCC sole jurisdiction over those accused of violating the law and the

49 *Id.* at 7–8.

50 *Saudi Arabia: Terrorism Law Tramples on Rights*, Hum. Rts. Watch (Feb. 6, 2014), https://www.hrw.org/news/2014/02/06/saudi-arabia-terrorism-law-tramples-rights#; *The Specialized Criminal Court: How the Saudi Government Targets Human Rights Defenders*, *supra* note 30.

51 *The Specialized Criminal Court: How the Saudi Government Targets Human Rights Defenders*, *supra* note 30; *see Saudi Arabia: Terrorism Law Tramples on Rights*, *supra* note 50 (explaining that the translated version of the law, provided by Human Rights Watch, states that terrorism is now defined as: "Any act carried out by an offender in furtherance of an individual or collective project, directly or indirectly, intended to disturb the public order of the state, or to shake the security of society, or the stability of the state, or to expose its national unity to danger, or to suspend the basic law of governance or some of its articles, or to insult the reputation of the state or its position, or to inflict damage upon one of its public utilities or its natural resources, or to attempt to force a governmental authority to carry out or prevent it from carrying out an action, or to threaten to carry out acts that lead to the named purposes or incite [these acts].").

52 *Saudi Arabia: Terrorism Law Tramples on Rights*, *supra* note 50.

53 *Id.*

54 *Id.*

ability to apply the counter terrorism legislation retroactively.[55]

In late 2017, the 2014 Counter Terror Law was replaced by the Penal Law for Crimes of Terrorism and its Financing; however, much of the language enabling human rights violations remained.[56] The 2017 version failed to rectify the overbroad and vague language used to define "terrorism."[57] Moreover, new provisions in the 2017 version introduced penalties for "directly or indirectly insulting the King or Crown Prince in a way that impugns religion or justice," thereby criminalizing freedom of speech and adopting language originally stricken from the draft of the 2014 Counter Terror Law.[58] The law also restructures the organization of the government, reallocating several powers to the King, rather than to the Interior Ministry, under the umbrella organizations of the SSP and Office of Public Prosecution (PPO or Public Prosecution).[59] The SSP was created to consolidate agencies related to counterterrorism, state security, and financial investigations.[60] Per the order, the PPO and special forces under the SSP are directly overseen by the King.[61] This political move substantially increases the legal authority of the King by granting significant oversight to every institution related to the arrest, detainment, and trial of alleged terrorists. The failure to establish independent and separate agencies with proper oversight has enabled the abuse of human rights within the KSA, often leaving little to no remedy for victims of government-sanctioned offenses.

55 AMNESTY INT'L, *supra* note 29, at 18.

56 *Id.*

57 *Id.*; *see also Saudi Arabia: New Counterterrorism Law Enables Abuse*, HUM. RTS. WATCH (Nov. 23, 2017), https://www.hrw.org/news/2017/11/23/saudi-arabia-new-counterterrorism-law-enables-abuse (explaining that, though "insulting the reputation of the State" is no longer stipulated within the definition of terrorism, crimes considered terrorism in the KSA are comprehensive and include: "critic[izing] [] the king and the crown prince [in a manner of] 'bring[ing] religion or justice into disrepute,'" "disrupting public order," and a penalty of at least 15 years for those "misus[ing] their status in any way either academic or social status or media influence to promote terrorism").

58 AMNESTY INT'L, *supra* note 29, at 8; *Saudi Arabia: Terrorism Law Tramples on Rights*, *supra* note 50 (stating the 2011 draft version criminalized "defamation statements" made against the King, but that those criminal provisions were not included in the 2014 version that was adopted into law).

59 *Saudi Arabia: New Counterterrorism Law Enables Abuse*, *supra* note 57.

60 BUREAU OF DEMOCRACY, HUM. RTS. & LAB., U.S. DEP'T OF STATE, *supra* note 6, at 10.

61 *Id.* at 10, 12.

### C. *Institutional Violence: Systemic Violations of Human Rights*

Human rights violations begin with the SSP or subsects of the SSP, such as the Mubahith.[62] SSP agents have been reported to be in plain clothes while they execute searches or arrests without warrants.[63] Those detained, and their families, are rarely told the reason for their arrest.[64] The KSA ensured the legality of many of these actions through the passage of the 2017 version of the counter-terrorism law, granting the SSP the necessary power to make arrests, detain citizens, monitor communications, and suspend people from travel without notification.[65] Human rights organizations have accused the SSP and its subsidiaries of failing to conduct adequate investigations, functionally "rounding up large numbers of individuals or equating dissent with extremism."[66] Further, the SSP has power to monitor the actions of the Mubahith, the police division that is responsible for overseeing the detainment of those awaiting trial.[67]

Once an individual is detained by the Mubahith, the force's deviation from international human rights standards all but ensures a conviction for those placed under its supervision. Detainees are often denied access to communication with family, friends, and outside counsel while held in solitary confinement or in other harsh conditions.[68] Detainment can range from a period of months to years, often without the opportunity to protest the detention.[69] Legally, detainment by the Mubahith can extend to a period of up to almost four years without granting those detained the right to arraignment or ability to claim their innocence.[70] This policy has extended even to youth activists, arrested and charged for their association with Shi'a protests, who were held without access to communication for

62 Amnesty Int'l, *supra* note 29, at 31 (referring to the Mubahith as "Mutawa'een," another name for the religious police sector operating under the control of the SSP).

63 *Id.* at 38 (explaining that most defendants in cases reviewed by Amnesty International were arrested by officials who did not produce warrants).

64 *See id.* at 10, 37–38 (describing how the wife of one detainee felt traumatized by her experience with the SSP). The wife discussed how twenty-five police officials arrived at her home with no notice and forbid her from talking to her husband. *Id.* at 38. She and her children had no idea as to the charges her husband was facing, or why he was being detained. *Id.*

65 *Saudi Arabia: New Counterterrorism Law Enables Abuse*, *supra* note 57.

66 Am. Bar Ass'n Ctr. for Hum. Rts., *supra* note 5, at 16.

67 Bureau of Democracy, Hum. Rts. & Lab., U.S. Dep't of State, *supra* note 6, at 10–11.

68 Amnesty Int'l, *supra* note 29, at 24–25.

69 *Saudi Arabia: New Counterterrorism Law Enables Abuse*, *supra* note 57; *see also, e.g.*, Amnesty Int'l, *supra* note 29.

70 Amnesty Int'l, *supra* note 29, at 10.

several weeks following their arrests.[71] Some of the men associated with Shi'a or Sahwa protests were detained for months, or even years, without access to a lawyer.[72] In the cases of sixty-eight defendants reviewed by Amnesty International, not one was granted access to a lawyer at the time of arrest or interrogation.[73] For many detainees, access to legal counsel was only granted in the minutes before the start of their trial.[74]

The SCC notably retains much of the same power it originally had under the 2014 Counter Terror Law.[75] Under the 2017 law, those accused of terrorism or supporting terrorism can be held for up to twelve months leading up to trial.[76] The twelve-month holding period becomes arbitrary, however, since the SCC is allowed to extend the time period an unlimited amount of times.[77] Additionally, the law allows the Public Prosecution to hold suspects for up to ninety days without access to outside communication from lawyers and family.[78]

### D. *Institutional Violence: Torture and Coerced Confessions*

These human rights violations undermine the validity and impartiality of the rule of law as a social institution. The most egregious violations include the use of torture by the SSP while detainees are awaiting trial.[79] In the case of Yusuf al-Mushaikhass, a Shi'a activist executed for his participation in protests, the SSP was able to obtain a "confession" for his crimes through the use of torture.[80] Before his execution, Yusuf claimed that he was tortured to the point that visible scars were left on his body.[81] Prolonged hanging left him unable to move his wrist and he was physically abused by several officers.[82] In further violation of his autonomy, Yusuf described awaking in his cell, following a session of torture, to find ink on his thumb—an indication that he had fingerprinted a document while he was unconscious.[83] His family subsequently learned about his execution during

71 AM. BAR ASS'N CTR. FOR HUM. RTS., *supra* note 5, at 15.
72 AMNESTY INT'L, *supra* note 29, at 10.
73 *Id.*
74 *Id.* at 39.
75 *Saudi Arabia: New Counterterrorism Law Enables Abuse*, *supra* note 57.
76 *Id.*
77 *Id.*
78 *Id.*
79 *See* AMNESTY INT'L, *supra* note 29, at 9–10 (describing numerous incidents of pretrial torture).
80 *Id.* at 40.
81 *Id.*
82 *Id.*
83 *Id.*

a publicized government broadcast.[84] The UN Special Rapporteur on Torture found that the KSA frequently uses torture to extract confessions.[85] Although Saudi Arabia denies these practices and has enacted legislation protecting citizens from torture, dissenters are still subject to torture through institutions directly overseen by the King.[86]

Amnesty International has criticized the SCC's "unquestioning reliance on torture-tainted 'confessions.'"[87] Hussein al-Rabi, a defendant brought before the court with several protesters from the Shi'a region of the Kingdom, reported his confession was obtained through the use of torture.[88] The court failed to recognize the unlawful use of torture in obtaining the confession, even after al-Rabi produced evidence of hospitalization stemming from torture perpetuated by Mubahith agents.[89] The court instead chose to move forward with the prosecution, likely accepting the validity of the confession, resulting in al-Rabi's execution in April of 2019.[90] Hussein al-Rabi is not the only political dissenter silenced by the KSA through the use of the legal system; however, the SCC continuously refuses to acknowledge or investigate any claims of torture brought forth by defendants.[91] Amnesty International reports that in at least twenty cases against Shi'a Muslim men, defendants were sentenced to death based on coerced confessions.[92]

### E. *Marginalization and Further Implications In The KSA*

In addition to accepting confessions compelled by the SSP, the SCC and other courts in the region devalue testimony given by minorities.[93] For example, the voices of women are continuously stifled in court.[94] Although exceptions exist, a woman's testimony before a court may count as only half that of a man's testimony.[95] Further, judges are not required to give weight to

84 *Id.* at 43.

85 *Saudi Arabia: New Counterterrorism Law Enables Abuse*, *supra* note 57.

86 United Nations Hum. Rts. Off. of the High Comm'r, Committee Against Torture Reviews Report of Saudi Arabia (Apr. 25, 2016), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19876&LangID=E.

87 Amnesty Int'l, *supra* note 29, at 10.

88 *Id.*

89 *Id.* at 10, 40–41(recounting that defendant was denied access to food and water until he agreed to sign a confession).

90 *Id.* at 10.

91 *Id.* at 39.

92 *Id.* at 42 (highlighting that seventeen of these men have since been executed).

93 Bureau of Democracy, Hum. Rts. and Lab., U.S. Dep't of State, *supra* note 6, at 16, 45.

94 *Id.*

95 *Id.*

any testimony made by religious minorities, including nonpracticing Sunni Muslims, Shi'a, and those who practice other religions.[96] Shi'a Muslims are left disadvantaged, often unable to have their voices or testimony heard in court.[97] The danger of such policies are readily apparent, having disparate impact on Shi'a minorities and women's rights activists. Concentrated power, with oversight solely from the King, allows for egregious abuse of the judiciary in the Kingdom's pursuit to stifle the voices of political dissenters.

The 2014 and 2017 anti-terror laws expanded the KSA's persecution of human rights advocates, peaceful protesters, and religious minorities.[98] However, the KSA has held the power to suppress the voices challenging the Kingdom since the passage of the 2007 Anti-Cyber Crime Law.[99] The 2014 and 2017 counter-terror laws became increasingly dangerous to KSA citizens given the interplay between the expanded definition of terrorism and the retroactive application of the 2007 Anti-Cyber Crime law. Whereas a violation of the 2007 Anti-Cyber Crime law can result in a fine or imprisonment,[100] the 2014 and 2017 counter-terror laws allow for any crimes that are considered "terrorist crimes" to be punished severely, even going so far as to introduce the death penalty in the 2017 version.[101]

The counter-terror laws also allow for the SCC to retroactively apply the law, retry individuals who have already been convicted under the Anti-Cyber Crime law, and sentence those citizens to death even if the violation occurred years ago.[102] The ABA notes that "[s]ince December 2018 . . . activists have been arrested and detained . . . for articles, reports, or op-eds they had published years before their arrests."[103] Waleed abu al-Khair, a human rights lawyer, is a prime example of a conviction under the 2014 Counter Terror Law due, in part, to his tweets about "fair trial concerns in Saudi Arabia."[104] Although the creation of the 2017 counter-terror decree presented an opportunity to reform the legal definition of terrorism or acts of terrorism, the KSA failed to seize this chance to redefine the offense in a way that aligns with internationally recognized human rights standards.[105] The failure to reform the law to comport to those standards gave latitude to the SCC to continue convicting citizens of terrorism without credible

96 *Id.* at 16.
97 *Id.*
98 AMNESTY INT'L, *supra* note 29, at 8.
99 *Id.*
100 *Id.* at 19.
101 *Id.* at 18–19.
102 *See* AM. BAR ASS'N CTR. FOR HUM. RTS., *supra* note 5, at 10.
103 *Id.*
104 *Id.* at 2–3.
105 *Id.* at 3.

evidence.[106] An overly broad terrorism law, retroactively applying to citizens and targeting the most vulnerable populations, directly violates international human rights standards and highlights the danger emphasized by the UN Special Rapporteur on Human Rights.[107]

## III. Victims

The groups and individuals discussed below represent just a few of the victims that the KSA has held, tried, and obtained convictions for via the SCC. This section especially aims to highlight the disproportionate effect the Kingdom's policies have on members of internationally protected classes, such as women and religious minorities. The use of expanded judicial and police powers have historically, and continuously, enabled the disparate implementation of laws codifying acts of domestic terrorism.[108] Most notably, women, journalists, religious minorities, and human rights activists have felt the brunt of the Kingdom's human rights violations.[109]

### A. *Human Rights Organizations*

In its report, *Saudi Arabia: Muzzling Critical Voices*, Amnesty International claims that "virtually all Saudi Arabian human rights defenders and independent voices, male and female, are behind bars serving lengthy sentences handed down by the SCC."[110] Even before the 2014 and 2017 versions of the anti-terror laws were passed, the KSA had persecuted members of civil rights organizations such as the Saudi Association for Civil and Political Rights (ACPRA).[111] In its early formation, the ACPRA encouraged protesting in front of the Ministry of Interior and often coordinated with other youth activists and the families of those detained by the SCC.[112] Many leaders of the ACPRA were able to successfully

106 *Id.*

107 *Saudi Arabia: New Counterterrorism Law Enables Abuse*, *supra* note 57 (expressing concern over the KSA's "unacceptably broad definition of terrorism and the use of Saudi Arabia's 2014 counter-terrorism law and other national security provisions against human rights defenders, writers, bloggers, journalists, and other peaceful critics" (quoting Ben Emmerson, U.N. Special Rapporteur on Counter Terrorism and Human Rights)).

108 *See id.*

109 Amnesty Int'l, *supra* note 29, at 7.

110 *Id.* at 8.

111 Am. Bar Ass'n Ctr. for Hum. Rts., *supra* note 5, at 7 n.16.

112 *See* Stéphane Lacroix, *Comparing the Arab Revolts: Is Saudi Arabia Immune?*, J. Democracy, Oct. 2011, at 48, 56 (referring to the ACPRA by the alternative name, the "Saudi Civil and Political Rights Association" or "SCPRA").

advocate for their agenda, in part, due to their online mobilization efforts through forums such as Facebook, blogs, and magazines.[113] It is suspected that founding members of the ACPRA were targeted by the KSA through the SCC and convicted of vague charges such as "acquiring banned books, organising a protest by the families of prisoners and publishing material that would 'prejudice public order.'"[114] Organizations such as Amnesty International, the ABA, and Human Rights Watch have all condemned the systemic dismantling of the ACPRA through the KSA's conviction of its leaders and founding members.[115]

Notable convicted ACPRA members and their charges (if known):

1. Muhammad al-Bajadi, founding member of ACPRA charged with establishing a human rights organization, slandering the KSA, possessing restricted books, and inciting disorder.[116]

2. Dr. Abdullah al-Hamid, ACPRA co-founder charged with crimes related to disturbing public order, such as inciting protest or questioning the integrity of state officials, and sentenced to eleven years in prison.[117]

3. Mohammad al-Qahtani, ACPRA co-founder charged with disturbing public order and sentenced to ten years in prison.[118]

4. Dr. Abdulkareem al-Khoder, ACPRA co-founder charged for "disobeying the ruler" and "founding an unlicensed organization," retried by the SCC in 2014 and sentenced to ten years in prison.[119]

113 *See id.* at 48, 51.

114 *Saudi Arabia Jails Human Rights Activist Mohammed al-Bajadi*, GUARDIAN (Mar. 11, 2015), https://www.theguardian.com/world/2015/mar/11/saudi-arabia-jails-human-rights-activist-mohammed-al-bajadi.

115 *See, e.g.*, AMNESTY INT'L, *supra* note 29; AM. BAR ASS'N CTR. FOR HUM. RTS., *supra* note 5, at 7; *Saudi Arabia: Terrorism Law Tramples on Rights*, *supra* note 50.

116 *The Specialized Criminal Court: How the Saudi Government Targets Human Rights Defenders*, *supra* note 30.

117 AMNESTY INT'L, *supra* note 29, at 17, 26; *Urgent Action: Sentence Overturned, but Still in Prison*, AMNESTY INT'L (Mar. 7, 2014), https://www.amnesty.org/en/wp-content/uploads/2021/06/mde230052014en.pdf; *see also Saudi Arabia: New Counterterrorism Law Enables Abuse*, *supra* note 57.

118 AMNESTY INT'L, *supra* note 29, at 17, 26; *Urgent Action: Sentence Overturned, but Still in Prison*, *supra* note 117; *see also Saudi Arabia: New Counterterrorism Law Enables Abuse*, *supra* note 57.

119 AMNESTY INT'L, *supra* note 29, at 17; *Urgent Action: Sentence Overturned, but Still in Prison*, *supra* note 117.

5. Fuad al-Farhan, blogger and member of ACRPA sentenced in 2007.[120]

6. Muhammad al-Abd al-Karim, published critic of the government and member of ACRPA sentenced in December 2010.[121]

All eleven founding members of the ACPRA were eventually tried and sentenced for their work related to human rights.[122] In 2013, the ACPRA and four other independent human rights organizations were forced to shut down on orders from the SCC.[123] By the end of the year many activists and leaders of independent human rights organizations in the KSA had been arrested or detained without trial.[124] In a final effort to deter remaining human rights activists, the 2015 Law on Associations and Foundations constructively banned the formation of new and independent human rights organizations.[125]

### B. *Women's Rights Activists*

The KSA began persecuting prominent women's rights activists in May 2018, just one month before lifting the ban on women driving.[126] In the weeks before the ban was lifted, more than twelve women's rights activists were arrested on charges related to the defense of women's rights.[127] Amnesty International reported on the arrest of at least ten of these women's rights activists.[128] Of the cases Amnesty International reported on, charges levied against the women included "promoting reforms and women's rights; demanding an end to the male guardianship system through participating on online and offline campaigning," and disseminating information to human rights organizations and journalists willing to report on the human rights

120 *See* Lacroix, *supra* note 112, at 48, 51.
121 *See id.*
122 Amnesty Int'l, *supra* note 29, at 26.
123 *Id.* at 14, 23 n.48.
124 *Id.* at 25–30 (detailing the arrest and conviction of another prominent human rights defender, Waleed Abu al-Khair, founder of the independent human rights organization Monitor of Human Rights in Saudi Arabia).
125 *Id.* at 23. The law delegates power to the Ministry of Social Affairs to deny or disband organizations that have the potential to harm "national unity." *Id.* Since its enactment, the only human rights organizations that have legally continued to operate are the Human Rights Commission and the National Society for Human Rights, both government organizations under the authority of the KSA. *Id.*
126 *Id.*
127 *Id.* at 24.
128 *Id.*

violations happening within the KSA's borders.[129]

As a result of their charges, many of the activists were slandered in the media upon arrest.[130] In a grievous abuse of human rights standards, many women report the use of sexual harassment and torture while detained and awaiting trial.[131] One activist was reported to have been hung from the ceiling, while another was reported to have been "sexually harassed by interrogators wearing face masks."[132] Other forms of torture left the women permanently disabled, "unable to walk or stand properly."[133] It has been alleged that the Crown Prince Mohammed bin Salman (MBS or Crown Prince) was not only aware of the human rights violations, but also had an active role in the torture—"threatening one activist with rape and death."[134] Women were systematically targeted for their peaceful dissent from the KSA, in an unprecedented display of SCC power and disregard for international human rights laws.[135]

Notable women's cases:

1. Al Ghomgham, detained since 2015, arrested in connection with her advocacy work.[136] First woman charged with the death penalty by the SCC.[137]

2. Loujain Alhathloul, arrested May 2018, tortured and sexually harassed while in custody, jailed for driving and advocating for women's rights.[138]

3. Iman al-Nafjan, detained without charges from May 2018 to

129 *Id.*
130 *Id.*
131 *Id.*
132 *Id.*
133 *Id.*
134 Al Jazeera, *Saudi Human Rights Commission Interviews Detainees, Including Women's Rights Activists, over Alleged Torture, Report Says*, INSIDER (Dec. 19, 2018), https://www.businessinsider.com/saudi-human-rights-commission-interviews-detainees-over-alleged-torture-2018-12; *see also* AM. BAR ASS'N CTR. FOR HUM. RTS., *supra* note 5, at 13 n.47 (highlighting that an advisor to the crown claimed that MBS has "overseen 'some aspects of the torture'").
135 AM. BAR ASS'N CTR. FOR HUM. RTS., *supra* note 5, at 12–13.
136 *Id.* at 14.
137 *Id.*
138 Dalia Mortada, *Saudi Women's Rights Activists Appear in Riyadh Court*, NPR (Mar. 13, 2019), https://www.npr.org/2019/03/13/702943562/saudi-womens-rights-activists-appear-in-riyadh-court. Loujain Alhathloul was first arrested in 2014 for driving when it was illegal in the KSA for women to drive. *Id.* She famously recorded herself driving in protest of the law. *Id.* Her case has gained global attention and in 2018 her case was moved from the SCC to the criminal court in Riyadh. *Id.*

March 2019, leader for women's right to drive campaign and persecuted for human rights work.[139]

4. Aziza al-Youssef, human rights advocate detained without charges from May 2018 to March 2019.[140] In 2016 she led a petition signed by 15,000 supporters, denouncing the male guardianship system in the KSA.[141]

5. Nassima al-Sada, civil, political, and women's rights activist detained without charge from July 2018 to June 2019.[142] Unlike Iman al-Nafjan and Aziza al-Youssef, who were also held close to twelve months without formal charge, Nassima al-Sada remains in custody without formal charges pending a future trial.[143]

### C. *Journalists*

The SCC and other courts in the KSA have also been used to target journalists, often criminalizing speech that either criticizes the government or highlights injustices activists have faced within the Kingdom.[144] Since late 2018, activists, including journalists and bloggers, have been persecuted by the government for publishing material that criticizes Kingdom policies or offends the values of the crown.[145] Many activists who were targeted had, in fact, produced printed or online pieces deemed illegal by the 2014 Counter Terror Law years prior; however, the retroactive effect of the 2014 law in conjunction with the 2007 Anti-Cyber Crime law, allowed for their arrests.[146] The intensified persecution of women's rights advocates and journalists suggests a message is being sent to activists throughout the Kingdom of the KSA's power and willingness to stifle the voices of dissenters.

According to the U.S. Department of State, the Kingdom has implicitly directed judges on the SCC to harshly punish those who "challenge government and societal norms," such as journalists and other activists

139 *Saudi Arabia: Free Women Human Rights Defenders Immediately!*, Amnesty Int'l (June 21, 2018), https://www.amnesty.org/en/latest/campaigns/2018/06/saudi-arabia-release-women-human-rights-defenders/.

140 *Id.*

141 *Id.*

142 *Id.*

143 *Id.*

144 Boghardt, *supra* note 9, at 7

145 Am. Bar Ass'n Ctr. for Hum. Rts., *supra* note 5, at 10; Amnesty Int'l, *supra* note 29, at 15.

146 Amnesty Int'l, *supra* note 29, at 15, 23.

or reformers.[147] The UN Committee Against Torture has additionally expressed concerns regarding the persecution of those reporting on human rights violations.[148] In one of the most publicized examples, *Washington Post* journalist Jamal Khashoggi was brutally executed on Saudi Arabian soil in late 2018.[149] In October of 2018, Khashoggi entered a Saudi Arabian consulate in Istanbul, Turkey, and was never seen alive again.[150] A special inquiry by the UN determined that he was deliberately murdered by officials of the KSA, citing evidence implicating specific officials and the Crown Prince.[151] Initially, the KSA denied involvement in his murder.[152] Eventually, the Kingdom launched an investigation into his death; however, the investigation lasted less than a week and resulted in a finding that Khashoggi died after engaging in a "'fist-fight' inside the consulate."[153]

In his last article, Khashoggi wrote of the danger of suppressing the voice of the media.[154] He highlighted the importance of providing a platform for Arab voices to be heard worldwide and emphasized the key educational role journalism could provide.[155] Khashoggi worried about the "Iron Curtain" that had fallen over Saudi Arabia and much of the Arab world.[156] He reflected, with sadness, on the state control of information in many Arab countries, and longed for the hope that the Arab Spring once brought to the region.[157] Khashoggi was just one of many voices that has been stifled by the KSA. The disregard for the rule of law—and the planned execution of an esteemed journalist who wrote from afar to criticize the

147 Boghardt, *supra* note 9, at 6; BUREAU OF DEMOCRACY, HUM. RTS. & LAB., U.S. DEP'T OF STATE, SAUDI ARABIA 2014 HUMAN RIGHTS REPORT 13 (2014).

148 U.N. Comm. Against Torture, *supra* note 23, at 4.

149 BUREAU OF DEMOCRACY, HUM. RTS. & LAB., U.S. DEP'T OF STATE, *supra* note 6, at 2–3; Joyce Lee & Dalton Bennett, *The Assassination of Jamal Khashoggi*, WASH. POST (Apr. 1, 2019), https://www.washingtonpost.com/graphics/2019/world/assassination-of-jamal-khashoggi-documentary/ (explaining that although Khashoggi was in Turkey at the time of his murder, officially his murder occurred within the bounds of the Saudi Arabian consulate which is considered to be Saudi Arabian soil).

150 AMNESTY INT'L, *supra* note 29, at 15.

151 *Id.*; *see* Lee & Bennett, *supra* note 149 (concluding Jamal Khashoggi was murdered and dismembered for his speech against the Kingdom, after entering a Saudi consulate to gather documents for his impending marriage in late 2018).

152 AMNESTY INT'L, *supra* note 29, at 15 n.2.

153 *Id.*

154 Jamal Khashoggi, Opinion, *What the Arab World Needs Most Is Free Expression*, WASH. POST (Oct. 17, 2018), https://www.washingtonpost.com/opinions/global-opinions/jamal-khashoggi-what-the-arab-world-needs-most-is-free-expression/2018/10/17/adfc8c44-d21d-11e8-8c22-fa2ef74bd6d6_story.html.

155 *Id.*

156 *Id.*

157 *Id.*

policies of the KSA—represent some of the most flagrant human rights violations perpetrated by the Kingdom.

### D. *Religious and Political Minorities*

#### 1. Shi'a

The KSA has also persecuted religious minorities advocating for equal rights in the Kingdom.[158] Citizens of the KSA who identify as part of the Shi'a, or Shiite, religious minority have long been subject to discrimination.[159] The KSA strictly adheres to the Wahhabi interpretation of Sunni Islam which governing parties believe to be incompatible with the Shi'a faith.[160] Members of the Shi'a religion have been denied freedom of religion, barred from public services, and discriminated against in the hiring for important societal roles such as judges.[161]

The Arab Spring of 2011, a movement led primarily by young Shi'a activists, sparked protests against the repression of religious minorities.[162] These activists mobilized through the use of social media platforms and online forums with demands for "political, economic and social reforms."[163] In early 2011, the KSA responded to the activists' demands by deploying a large number of troops to the Eastern Providence of the Kingdom where a majority of Shi'a reside.[164] Some Shi'a activists were subsequently arrested and detained for a year or more without charge or trial before being brought before the SCC.[165] Since 2011, over one hundred Shi'a Muslims have been arrested by covert forces and brought before the SCC because of their criticism of the government or participation in peaceful protests.[166] Tensions continued to mount between the KSA and the Shi'a minority as the number of wrongfully detained Shi'a grew, sparking an order from the Ministry of Interior approving and promoting the use of deadly force by police.[167] As a

158 *See* Lacroix, *supra* note 112, at 52–54.

159 *See id.* at 52 (explaining that the Shi'a represent between ten to fifteen percent of the KSA's population); *see also* Amnesty Int'l, *supra* note 29, at 31.

160 Amnesty Int'l, *supra* note 29, at 31.

161 *Id.*

162 Am. Bar Ass'n Ctr. for Hum. Rts., *supra* note 5, at 10 (The ABA reviewed seven cases before the SCC court related to the persecution of the Shi'a protesters, four of which were youth.); *see also* Lacroix, *supra* note 112, at 52.

163 *See* Amnesty Int'l, *supra* note 29, at 31; *see also* Lacroix, *supra* note 112, at 52.

164 Amnesty Int'l, *supra* note 29, at 31 n.63; *see also* Am. Bar Ass'n Ctr. for Hum. Rts., *supra* note 5, at 10.

165 Amnesty Int'l, *supra* note 29, at 31.

166 *Id.* at 9.

167 *See id.* at 32 (emphasizing that police were authorized to take "all measures needed"

result, in the months following this order, more than ten Shi'a men were shot and killed under "unclear circumstances."[168]

Members of the Shi'a minority have been disparately treated by the state, in some cases facing the death penalty for acts as simple as exercising the right of free speech.[169] Human rights organizations have drawn attention to the use of the death penalty when trying Shi'a community members.[170] Further, there has been outrage surrounding the detention and harsh sentencing of youth.[171] Shi'a youth detained by the KSA claim they were subjected to forced confessions as a result of torture, being held without access to communication with friends, family, or legal counsel, and disparate application of the death penalty.[172] In persecuting the Shi'a minority, the SCC often relies on confessions defendants claim were only obtained by covert police forces through torture or coercion.[173] Based on these confessions, the SCC sentenced three youth to death for, among other charges, anti-government protests.[174] All three youth maintained that their confessions were obtained through torture.[175]

Notable Shi'a juvenile cases:

1. Ali al-Nimr, arrested for participation in protests for Shi'a rights at the age of seventeen, sentenced to death in 2014.[176] Ali al-Nimr is the nephew of Nimr Baqir al-Nimr, prominent Shi'a clerk sentenced to death by the SCC in October of the same year.[177]

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against protesters found to "contradict Islamic Shari'a law and the values and traditions of Saudi society" (quoting Ministry of Interior statement)).

168 *Id.*

169 *Id.* at 33.

170 *See, e.g.*, *id.*

171 *See* AM. BAR ASS'N CTR. FOR HUM. RTS., *supra* note 5, at 14–15; Adam Coogle, *Saudi Arabia's Troubling Death Sentence*, HUM. RTS. WATCH (Sept. 26, 2015), https://www.hrw.org/news/2015/09/26/saudi-arabias-troubling-death-sentence.

172 AM. BAR ASS'N CTR. FOR HUM. RTS., *supra* note 5, at 3, 14–15.

173 *Id.* at 11–12, 15.

174 *Saudi Arabia: Fears Grow that Three Young Activists Could Soon Be Executed*, AMNESTY INT'L (Oct. 16, 2015), https://www.amnesty.org/en/latest/news/2015/10/saudi-arabia-three-young-activists-could-soon-be-executed/.

175 *Id.*

176 *Id. But see Saudi Arabia: Withdrawal of Death Sentences for Three Shi'a Activists Arrested as Teenagers a Welcome Move*, AMNESTY INT'L (Feb. 8, 2021), https://www.amnesty.org/en/latest/news/2021/02/saudi-arabia-withdrawal-of-death-sentences-for-three-shia-activists-arrested-as-teenagers-a-welcome-move/ (reporting that the death sentences have since been commuted, but all three youths remain in custody despite the Kingdom stating that they could be released as early as 2022).

177 *Saudi Arabia: Fears Grow that Three Young Activists Could Soon Be Executed*, *supra* note 174.

2. Abdullah Hasan al-Zaher, sixteen year-old anti-government protestor, arrested for participation in anti-government protests, armed robbery, and use of Molotov cocktails against police officers.[178] Sentenced to death by the SCC in 2014.[179]

3. Dawood Hussein al-Marhoon, seventeen year-old youth activist arrested on the same charges as Abdullah Hassan al-Zaher.[180] Sentenced to death by the SCC in 2014.[181]

4. Nimr Baqir al-Nimr, Shi'a rights advocate executed for his role in the protests calling for increased rights.[182] On January 2, 2016, the KSA announced Nimr Baqir al-Nimr's execution, along with the execution of forty-six other prisoners on death row.[183]

5. In 2017 and 2019, many Shi'a were arrested, detained, and those convicted by the court were executed.[184] Of the thirty-seven men executed in April 2019, a majority were Shi'a,[185] one was a minor,[186] and at least one of the bodies was hung outside on display as a warning to citizens.[187]

### 2. Sahwa

Broadly speaking, the Sahwa represent an intersection of scholars who identify with "the political ideology of the Muslim Brotherhood" and "local Wahhabi religious ideas."[188] The crown has called for covert police forces to arrest religious minorities, such as the Sahwa, in connection to

178 *Id.*
179 *Id.*
180 *Id.*
181 *Id.*
182 Amnesty Int'l, *supra* note 29, at 32–33.
183 *Id.* at 33.
184 *Id.*
185 *Id.*
186 *Id.* at 34.
187 *Saudi Arabia Executes 37 in Connection with Terrorism*, Al Jazeera (Apr. 27, 2019), https://www.aljazeera.com/news/2019/4/27/saudi-arabia-executes-37-in-connection-with-terrorism.
188 *See* Lacroix, *supra* note 112, at 48–49; *see also* Zachary Laub, *Egypt's Muslim Brotherhood*, Council on Foreign Rels., https://www.cfr.org/backgrounder/egypts-muslim-brotherhood (Aug. 15, 2019) ("Founded in Egypt in the 1920s, the Brotherhood is one of the most influential Islamist organizations in the world, mixing religious teaching with political activism and social welfare programs.").

domestic terrorism since the beginning of the 2003 attacks on Riyadh.[189] When the attacks began, Sahwa leaders circulated more than twelve petitions to submit to the KSA, arguing that human rights violations were the cause for violence in the region.[190] The writers of these petitions were persecuted, many arrested, charged, imprisoned, and banned from travel, due to their political ideologies and disruption of public peace.[191] Despite the arrests, Sahwa members persisted—publishing texts calling for a constitutional monarchy and organizing for the creation of a new political party.[192]

In recent years, Sahwa ideologies have been spread through the use of online forums such as Facebook and other social media platforms.[193] The Sahwa have also focused their efforts on those who are inhumanely detained by the SCC and the KSA.[194] Their recent mobilization efforts have been directed towards the family members of those who remain detained without trial and often without advocates to guide them.[195] Notably, youth were once again found at the center of many of these changes within the Sahwa community.[196]

The Kingdom, in response, has persecuted high profile figures within the Sahwa community. Outlined below are a few, of many, notable cases:

189 Jonathan Hoffman, *Religion, the State and Politics in Saudi Arabia*, MIDDLE E. POL'Y, Fall 2019, at 45, 48. The term Sahwa represents "an umbrella term for a group that was heavily influenced by Muslim Brotherhood networks in the kingdom and fused Brotherhood [political] ideology with local Wahhabi tradition." Toby Matthiesen, *Saudi Arabia*, *in* RETHINKING POLITICAL ISLAM 2 (Shadi Hamid & William McCants eds., 2017); *see* Hoffman, *supra*, at 49. Members of this group often participate in demonstrations, protesting for reform to Muslim institutions. Hoffman, *supra*, at 49. Religious leader, Saudi Grand Mufti, Sheikh Abdel Aziz Ibn Abudllah Alasheikh warned that demonstrations in the KSA are strictly prohibited "because the ruler here rules by God's will." Caryle Murphy, *Heavy Police Presence Deters Protesters in Saudi Arabia*, WORLD (Mar. 11, 2011), https://theworld.org/stories/2011-03-11/heavy-police-presence-deters-protesters-saudi-arabia; *see* Hoffman, *supra*, at 49.

190 Hoffman, *supra* note 189, at 48.

191 *Id.*; *see* PROJECT ON MIDDLE E. POL. SCI., THE ARAB MONARCHY DEBATE 21 (2012), https://pomeps.org/wp-content/uploads/2012/12/POMEPS_BriefBooklet16_Monarchies_web.pdf.

192 *See* Lacroix, *supra* note 112, at 49. It should also be noted that the Sahwa have been criticized for failing to support the Shi'a minority. This article additionally argues that the Sahwa have benefited from the current political structure within the KSA and notes a failed revolutionary attempt against the government as one potential motive for their reluctance to join calls of new insurrections. *Id.* at 55.

193 Hoffman, *supra* note 189, at 50.

194 *Id.*

195 *Id.*; AMNESTY INT'L, *supra* note 29, at 44.

196 Hoffman, *supra* note 189, at 50–51.

1. Salman al-Awada, religious cleric charged several times by the KSA and tried before the SCC for thirty-seven crimes, including participation in petitions, and affiliation with the Muslim brotherhood.[197] Salman al-Awada's case has been postponed by the court numerous times, as the prosecution prepares to seek the death penalty for his crimes of "stirring public discord and inciting people against the ruler."[198]

2. Hassan Farhan al-Maliki, charged in late 2018 for vague charges including: expressing religious ideas in contradiction of the crown, writing books published outside of the Kingdom, violating the country's cybercrime law, and attending discussion groups in Saudi Arabia.[199]

3. Essam al-Zamil, a prominent Sahwa economist, likely arrested in connection to his criticism of the Crown Prince.[200]

4. Ahmed al-Amari, Sahwa member[201] arrested after a raid of his home by "security forces," and held in solitary confinement.[202] Ahmed al-Amari died in early 2019, after suffering a brain hemorrhage while in confinement.[203]

### E. *The Death Penalty and Youth Activists*

The death penalty is a controversial form of punishment in countries throughout the world, including the U.S. Several human rights organizations, such as Amnesty International, condemn the use of the death penalty in any circumstance regardless of guilty status or the alleged crime committed.[204]

197 Amnesty Int'l, *supra* note 29, at 30. Salman al-Awada's house was raided by men in plain clothes, assumed to be SSP members, who did not have a warrant. *Id.* at 38.

198 *Trial of Saudi Scholar Salman al-Awdah Postponed, Says Son*, Al Jazeera (July 28, 2019), https://www.aljazeera.com/news/2019/7/28/trial-of-saudi-scholar-salman-al-awdah-postponed-says-son.

199 *Saudi Arabia: Religious Thinker on Trial for His Life*, Hum. Rts. Watch (June 23, 2019), https://www.hrw.org/news/2019/06/23/saudi-arabia-religious-thinker-trial-his-life; *see also* Hoffman, *supra* note 189, at 47, 50.

200 Hoffman, *supra* note 189, at 52.

201 *Id.* at 48.

202 *Saudi Cleric Detained in Crackdown Dies: Activists*, Reuters (Jan. 21, 2019), https://www.reuters.com/article/us-saudi-arrests/saudi-cleric-detained-in-crackdown-dies-activists-idUSKCN1PF1QM.

203 *Id.*

204 *Saudi Arabia: Halt Imminent Execution of Young Man*, Amnesty Int'l (June 8, 2021) (updated June 15, 2021), https://www.amnesty.org/en/latest/press-release/2021/06/saudi-

However, as applied to youth or child activists, there is broader consensus and greater sense of outrage when a sentence of death is handed down for crime committed before the age of eighteen.[205] In March 2020, the KSA announced that they would no longer implement the death penalty against juveniles who committed crimes in their youth.[206] This same year, there was an eighty-five percent drop in executions as the Kingdom sought to reform its image during its term as G20 president in 2020.[207] Despite this reduction in 2020, the KSA has recommitted to upholding death sentences ordered by the SCC, moving forward with the execution of at least forty people in the first half of 2021 alone.[208] In February 2021, the state funded human rights commission announced that the ban against carrying out the death penalty on youth only applied to lesser crimes in the Kingdom.[209] Despite being charged and convicted for lesser crimes that were suspected to have been committed when he was seventeen, the ban was not applied and Mustafa Hashem al-Darwish was executed.[210] Like many, al-Darwish alleged that his confession—which he later recanted in court—was obtained through torture.[211] Despite the controversy surrounding his age when the crimes were committed, the use of torture to obtain a confession, and the passage of the 2020 decree against executing those convicted for crimes in their youth, Mustafa Hashem-al Darwish's sentence was carried out in June 2021 with no advance notice to the public or his family.[212]

The incarceration, torture, and execution of Saudi Arabian youth, activists, political dissenters, religious minorities, and women are egregious violations of international human rights standards and norms. The foundation for this genocide is grounded in the expansive definition of the word terrorism and acts that are considered to constitute terrorism in the KSA, in the lack of judicial independence, in the failure to promote

arabia-halt-imminent-execution-of-young-man/.

205 International law, for instance, "strictly prohibits the use of the death penalty for people who were under 18 years old" at the time the crime was committed. *Id.* (quoting Lynn Maalouf, Deputy Dir. for the Middle E. & N. Afr., Amnesty Int'l).

206 Raya Jalabi, *S. Arabia Executes Man for Offences Rights Groups Say He Committed as Minor*, REUTERS (June 15, 2021), https://www.reuters.com/world/middle-east/s-arabia-executes-man-offences-rights-groups-say-he-committed-minor-2021-06-15/.

207 *S. Arabia Increases Executions in 2021 After 2020 Fall - Rights Group*, REUTERS (Aug. 3, 2021), https://www.reuters.com/world/middle-east/s-arabia-increases-executions-2021-after-2020-fall-rights-group-2021-08-03/.

208 *Id.*

209 Jalabi, *supra* note 206.

210 *Id.*

211 *Id.*

212 *Id.* The parents of al-Darwish learned of his death via an online news article. *Id.* In a statement, the family has said "[s]ince his arrest, we have known nothing but pain." *Id.*

transparency and accountability measures within police forces, and in the unbridled power held by the King. Although the western world has condemned the Kingdom for the violation of international human rights standards, I argue that many of the systemic failures which have allowed the KSA to persecute their citizens can be found paralleled in U.S. I use the U.S. as an example of a western country which purports to uphold internal human rights standards, condemns the acts of the KSA, and yet echoes dangerous rhetoric and precedent that set the Kingdom on the path they remain on today.

## IV. U.S. Parallels

### A. *Defining Terrorism*

Like Saudi Arabia, the U.S. has a genuine interest in protecting its citizens from terrorist attacks and threats. Nevertheless, broadly defining terrorism can undermine legitimate institutions and enable persecution of peaceful, non-violent protesters.[213] An open-ended terrorism statute, or a vague inclination as to how terrorism is defined, allows the state to criminalize actions, thoughts, or people that do not conform with the "status quo."[214] In fact, the U.S. definition of "terrorism" is broad enough that, "[i]f someone alleges that you have said something threatening to them and caus[ed] them fear for their life, you can be charged . . . with terrorism."[215] Similar to Saudi Arabia, the threat of future terrorist attacks in the wake of September 11th led to the hasty enactment of legislation that dangerously expanded executive branch power with little to no oversight of how those powers affect the citizenry's fundamental rights.[216]

Comparable to the KSA's Antiterrorism laws, the USA PATRIOT Act (Patriot Act) also conflates acts of domestic terrorism with day to day criminal investigations, allowing for probes into simple crimes that circumvent

213 U.N. Counter-Terrorism Implementation Task Force (CTITF), *supra* note 47, at 16–18.

214 *See* Ronisha Browdy, *Patrisse Khan-Cullors's* And When They Call You a Terrorist: A Black Lives Matter Memoir*: Storytelling as Black Feminist Counter-Attack on Mis-labelling of Black Identity*, 40 Prose Stud. 15, 31 (2018). The author of "And When They Call You A Terrorist: A Black Lives Matter Memoir" experienced the danger of broadly defining terrorism when her schizophrenic brother was arrested for "terrorism" after he had a fender bender during an episode. *Id.* Although her brother did not physically harm anyone, he was charged for terrorism. *Id.*

215 *See id.*

216 *See, e.g.*, CATO Inst., CATO Handbook for Congress 117–18 (2003), https://www.cato.org/sites/cato.org/files/serials/files/cato-handbook-policymakers/2003/9/hb108-12.pdf.

constitutional protections if disguised as a matter of national security.[217] Passed shortly after September 11th, the Patriot Act expanded the definition of terrorism and the power of federal agencies to investigate suspected terrorists.[218] Under the Act, "domestic terrorism" consists of acts intended to: "(i) intimidate or coerce a civilian population; (ii) influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping."[219] The Act further expanded the investigatory powers of the federal government in a way that diminishes a citizen's Fourth Amendment rights, allowing for easier access to electronic surveillance than ever before.[220] Now, the bar for accessing enhanced surveillance, originally reserved to investigate matters of national security, is lower than the probable cause standard needed to arrest a suspect in a criminal investigation.[221] The ACLU notes that the overly broad language of the Patriot Act could qualify the work of activist organizations in the U.S. as acts of terrorism.[222]

### B. *Accountability in Counterterrorism Measures*

U.S. policies have enabled the growth of police and state power in a similar fashion to that of the Kingdom. The parallels between the KSA and U.S. policies are best seen through the lived experiences of majority-minority communities. Despite the U.S.'s vocal commitment to human rights and the rule of law, minority groups have been disenfranchised and face continuous persecution from legal actors. As seen in the KSA, when local police power grows, the relationship between law enforcement, legal institutions, and civil liberties becomes increasingly strained due to lack of accountability and oversight.[223] In the wake of the September 11th attacks, the mobilization of local police forces raised concerns that efforts to combat domestic terrorism would result in abuses of power.[224] The KSA sets a clear example of how this abuse of power can escalate into wide-spread suppression of dissenting opinions and voices. With little to no oversight, KSA anti-terrorism forces were able to arrest those suspected of terrorism,

217 *Id.* at 119.

218 *How the USA Patriot Act Redefines "Domestic Terrorism*," ACLU, https://www.aclu.org/other/how-usa-patriot-act-redefines-domestic-terrorism (last visited May 12, 2022).

219 *Id.*

220 CATO INST., *supra* note 216, at 119.

221 *Id.*

222 *How the USA Patriot Act Redefines "Domestic Terrorism," supra* note 218.

223 Matthew C. Waxman, *Police and National Security: American Local Law Enforcement and Counterterrorism After 9/11*, 3 J. NAT'L SEC. L. & POL'Y 377, 378 (2009).

224 *Id.* at 379.

releasing little to no information regarding the arrest, charge, or length of detainment. Despite this fact, the U.S. continues to heavily rely on local police forces because the federal government values their knowledge of the immediate community and the number of officers they can provide in emergency situations.[225] However, scholars, researchers, and advocates have justifiability raised concerns about the unchecked powers granted to local police forces and government agencies in the wake of the September 11th attacks.[226] The KSA notably used the September 11th attacks and subsequent attacks in the Kingdom to justify expansive policies that undermine civil liberties. In the U.S., the use of decentralized police forces continues to raise complex issues in the balancing of state powers and civil liberties.[227] This threatens the already weakened systems of accountability and transparency within legal institutions.[228]

Within communities, many local advocates have fought for increased

225 *Id.* at 386.

226 *See, e.g.*, Stephen J. Schulhofer, The Enemy Within: Intelligence Gathering, Law Enforcement, and Civil Liberties in the Wake of September 11, at 3–4 (2002); *Surveillance Under the USA/Patriot Act*, ACLU, https://www.aclu.org/other/surveillance-under-usapatriot-act (last visited May 12, 2022) (expressing concern over the increased government power post-September 11th, as a result of the Patriot Act and the decreased privacy individuals and organizations have under the law); N.Y. Advisory Comm., U.S. Comm'n on C.R., Civil Rights Implications of Post-September 11 Law Enforcement Practices in New York 2, 26, 28 (2004), https://www.usccr.gov/files/pubs/sac/ny0304/ny0304.pdf. Reporting in their capacity as an independent, bipartisan agency, the United States Commission on Civil Rights has expressed concerns over racial profiling practices in New York State, and an increasing dependance on local law enforcement agencies. N.Y. Advisory Comm., U.S. Comm'n on C.R., *supra*. They note that some commenters have attributed the rise of racial profiling to changes in federal policy, post-September 11th, that has increased the power of federal agencies. *Id.* They further acknowledge the role of the N.Y. courts in lowering the threshold needed for the NYPD to investigate political organizations—eliminating the need for federal consent and creating additional barriers to transparency. *Id.*

227 Waxman, *supra* note 223, at 396, 406.

228 One example of the lack of transparency and accountability in the U.S. judicial system is highlighted in studies that show judges who face re-election will be affected in their judicial opinions. *See, e.g.*, Paul L. Friedman, *Threats to Judicial Independence and the Rule of Law*, A.B.A. (Nov. 18, 2019), https://www.americanbar.org/groups/litigation/initiatives/committee-on-american-judicial-system/in-the-news/threats-to-judicial-independence-and-rule-of-law/. Further, the lack of transparency within the federal system has led to a decline in trust that the American people have in the judicial system. *Id.* "Only 34 percent [of people] now believe that federal judges act independently and issue rulings based on the law as written, and 55 percent of the American people believe that the Supreme Court is motivated by politics." *Id.*; *see also, e.g.*, *Police Reform Ideas*, Santa Clara U. Libr., https://libguides.scu.edu/c.php?g=1048085&p=7605822 (Nov. 3, 2021) ("Transparency and accountability are major issues in policing and have been for decades.").

accountability by pressuring their politicians to opt out of federal policies or initiatives for fear of losing the increased transparency and accountability measures that they have won over the years.[229] This increased activism is in part due to the lack of accountability for federal and local police entities, and the failure of the judiciary to ensure greater protections for its citizens. In opting out of federal policies and initiatives, community leaders seek to ensure that federal agencies who rely on collaboration with local police adhere to local policies regarding police accountability and transparency.[230] However, although counter-terrorism policies have been adopted by many local law enforcement agencies,[231] critics have raised concerns that local accountability is not a sufficient check on federal power.[232] Counter-terrorism surveillance practices are designed to be secretive, and therefore are inherently difficult to monitor.[233] Moreover, journalist Corey Robin has warned that collaboration between federal and state enforcement allows for "[local] police to provide a legitimizing gloss of national security to their own pet projects of repression."[234]

Federally, the executive branch is granted broad power to create policies regarding the arrest and detainment of suspected terrorists, particularly in times of war.[235] Following September 11th, the Bush administration determined that the proper forum for suspected terrorists would be military commissions, "[d]eeming U.S. criminal courts too cumbersome and insufficient to handle terrorism cases."[236] Just six years later, the Bush administration once again expanded these powers, limiting protections and compliance with the Geneva Convention for any persons associated with known terrorist organizations.[237] The U.S. Supreme Court (SCOTUS) has placed some limits on the ability for the U.S. to detain suspected terrorists; however, the label of "enemy combatant" allows for a U.S. citizen to be held for the duration of a conflict.[238] While the U.S. government would claim that this expansive power is necessary, especially in

229 Waxman, *supra* note 223, at 395; Tom Lininger, *Federalism and Antiterrorism Investigations*, 17 STAN. L. & POL'Y REV. 391, 391 n.3 (2006).

230 Waxman, *supra* note 223, at 395–96.

231 LOIS M. DAVIS ET AL., LONG-TERM EFFECTS OF LAW ENFORCEMENT'S POST-9/11 FOCUS ON COUNTERTERRORISM AND HOMELAND SECURITY, 1 (2010).

232 Waxman, *supra* note 223, at 396.

233 *Id.* at 396–97.

234 *Id.* at 396.

235 *See* Tanja Porčnik, *Detainee Rights: The Judicial vs. Congressional Check on the President in Wartime*, J. COMPAR. POL., July 2019, at 69.

236 *Id.* at 72.

237 *Id.* at 74.

238 *Id.* at 79; *see* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); *see also* Doe v. Mattis, 928 F.3d 1, 15 (D.C. Cir. 2019).

times of war, the precedent set is a slippery slope. Adjudication on the rights of American citizens who have been labeled "enemy combatants" continue to this day, but the court has never clarified what constitutes war, and to what extent the executive branch can circumvent U.S. courts in favor of military proceedings.[239] These facts are especially concerning with regard to protests and movements happening in local communities. Although many citizens view protests as a peaceful exercise of constitutional rights, the executive branch has described Black Lives Matter (BLM) protests as "riot[s]," "angry mob[s]," and "criminals . . . committing acts of domestic terrorism."[240]

### C. *Criminalization of Black Activism*

In 2017, the Federal Bureau of Investigation's (FBI) counter-terrorism division identified "Black identity extremists" (BIE) as a growing threat against law enforcement.[241] The term "Black identity extremists" is a term created by law enforcement that, until the release of the FBI report, has had little to no recognition in the broader U.S. community.[242] The leaked report stated that it was "very likely [BIEs'] perceptions of police brutality against African Americans spurred an increase in premeditated, retaliatory lethal violence against law enforcement . . . ."[243] A former official of Homeland Security found no basis for the designation.[244] BLM advocates have noted that this is just one example of oppressive targeting that Black activists[245]

239 *Mattis*, 928 F.3d at 14–15.

240 Katy Steinmetz, *'A War of Words.' Why Describing the George Floyd Protests as 'Riots' Is so Loaded*, Time (June 8, 2020), https://time.com/5849163/why-describing-george-floyd-protests-as-riots-is-loaded/.

241 Jana Winter & Sharon Weinberger, *The FBI's New U.S. Terrorist Threat: 'Black Identity Extremists,'* Foreign Pol'y (Oct. 6, 2017), https://foreignpolicy.com/2017/10/06/the-fbi-has-identified-a-new-domestic-terrorist-threat-and-its-black-identity-extremists/.

242 *Id.*

243 *Id.*

244 *Id.*

245 The following source, *infra* note 246, refers to the Black Liberation Army (BLA) and their classification as a terrorist organization by the FBI. The author of that source and others have insinuated that the persecution of the BLA could be a result of the violence used by BLA members against the state and its officers, rather than because of their political or social agenda. Some may argue, or believe, that the comparison of the BLA's persecution by the state and BLM's persecution by the state are not analogous because the BLA used violence as a form of protest and BLM often calls for peaceful forms of protests that denounces the use of violence. However, it is this authors opinion that there is no one legitimate way to protest. I am not in the position to dictate to those who've experienced structural violence at the hands of the state and their officers, as to what a legitimate protest should look like. I, nor anyone else, is in a position to claim that their form of protest is incorrect; or, that the BLA members do not deserve

have faced at the hands of the FBI. [246] Historically, the FBI has targeted and investigated Black activists for their participation in civil rights movements.[247] The policy of prioritizing government resources to identify, monitor, and investigate Black activists, rather than allocating those resources toward viable threats to national security, exemplify the politicization of investigating claims of domestic terrorism.[248] The definition of domestic terrorism in the Patriot Act allows institutions to dangerously conflate activism and terrorism and abuse domestic terrorism laws to suppress the voices of civil rights activists.

Not only has the FBI attempted to categorize the BLM movement as a terrorist organization, but the criminalization of peaceful protest and dissent has become increasingly forceful and pervasive.[249] Activists attending BLM protests have reported that law enforcement in unmarked clothing and unmarked vans have detained and searched citizens attending peaceful protests.[250] Per U.S. law, participation, or suspected participation, in a peaceful protest is insufficient grounds for arrest.[251] The right to peacefully protest was emphasized in 2014, when a federal judge issued a temporary restraining

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to have the terrorism perpetuated by the sate against them recognized for what it is. The State's perpetration of terrorism against the BLA led to their political actions and ideology to be classified as terrorism. The State's perpetration of terrorism against BLM led to their political actions and ideology to be classified as terrorism. I don't believe that there's a correct form of protest, especially in consideration of the long and complex history in the United States between those who have power, and those who are systemically denied power. Therefore, in this paper, I will not differentiate between the state's targeting of either organization.

246 Winter & Weinberger, *supra* note 241. (noting examples of racism within the FBI such as the monitoring of Black writers, the wiretap of Martin Luther King Jr., and the labeling of Black activists as terrorists while overlooking the real threat of white supremacist groups); *see also* William Rosenau, *"Our Backs Are Against the Wall": The Black Liberation Army and Domestic Terrorism in 1970s America*, 36 STUD. CONFLICT & TERRORISM 176 (2013) (citing the FBI's pursuit, criminalization, and murders of the Black Liberation Army (BLA) and Black Panther members and clarifying that although the FBI did not classify members of the BLA as terrorists, the FBI claimed that the goal of the BLA was radical revolution and disruption of power in the U.S.).

247 Mike German, *The FBI Has a History of Targeting Black Activists. That's Still True Today*, GUARDIAN (June 26, 2020), https://www.theguardian.com/commentisfree/2020/jun/26/fbi-black-activism-protests-history.

248 *See id.*; Winter & Weinberger, *supra* note 241.

249 *See* Katie Shepherd & Mark Berman, *'It Was Like Being Preyed Upon': Portland Protesters Say Federal Officers in Unmarked Vans Are Detaining Them*, WASH. POST (July 17, 2020), https://www.washingtonpost.com/nation/2020/07/17/portland-protests-federal-arrests/.

250 *Id.* (describing one activist who was pulled off of the street, driven to a courthouse, held in detention, asked if he would waive his Miranda rights, and subsequently released when he refused).

251 *Id.*

order (TRO) against law enforcement officials from three different police departments near Ferguson, Missouri.[252] Ruling in favor of the protestors, the judge found that local law enforcement inhibited the ability of protestors to lawfully assemble and practice their constitutional right of free speech.[253] The TRO found that the interest in protecting the right of citizens to gather peacefully and protest, outweighed the potential harm police departments would face if stripped of the authority to use aggressive dispersal tactics without warning.[254] Unfortunately, a setback for police intimidation and dispersal tactics in Missouri is only one small step forward and bares no binding precedent on policies in other U.S. states. BLM activists continue to face pervasive tactics from police forces in an effort to intimidate protesters and discourage civic participation.[255] Even federal agencies, as recent as 2020, were seen using unmarked vans to target individuals at a protest in Portland, Oregon.[256] Whether it be protests in 2014, 2017, 2020, or so on—police departments continue to militarize their response to protests and disregard constitutional protections designed to safeguard protestors.[257]

Oregon's police force does not stand alone in its disregard for protestors' constitutional rights. That same month, the New York Police Department (NYPD) engaged in similar tactics during a protest in New York.[258] In that instance, plainclothes officers of the NYPD arrested a protester who was, ironically, attending a demonstration against police brutality.[259] The demonstration, led by BLM organizers, came to a halt for one protester when she was "tackl[ed] . . . to the ground, pull[ed] . . . into an unmarked minivan and driv[en] away."[260] The list of charges against her

252 Temporary Restraining Order, Templeton v. Dotson, No. 4:14-cv-2019 (E.D. Mo. Dec. 11, 2014) (granting temporary restraining order).

253 *Id.* at 2.

254 *Id.* at 2–3.

255 Lam Thuy Vo, *The Black Lives Matter Protests in New York City Have Slowed Down. The NYPD Hasn't.*, BuzzFeed News (Nov. 2, 2020), https://www.buzzfeednews.com/article/lamvo/nypd-black-lives-matter-protests-harrasment.

256 Jonathan Levinson et al., *Federal Officers Use Unmarked Vehicles to Grab People in Portland, DHS Confirms*, NPR (July 17, 2020), https://www.npr.org/2020/07/17/892277592/federal-officers-use-unmarked-vehicles-to-grab-protesters-in-portland.

257 *See* Edward R. Maguire & Megan Oakley, Policing Protests: Lessons from the Occupy Movement, Ferguson & Beyond 10, 34–38 (2020), https://www.hfg.org/wp-content/uploads/2021/06/PolicingProtests.pdf.

258 Ben Chapman & Katie Honan, *NYPD Criticized for Using Plainclothes Officers, Unmarked Van for Protest Arrest*, Wall St. J. (July 29, 2020), https://www.wsj.com/articles/nypd-criticized-for-using-plainclothes-officers-unmarked-van-for-protest-arrest-11596046901.

259 *Id.*

260 *Id.*

were all related to protest activities that the eighteen year-old activist had partaken in over the past two months.[261]

## D. *Institutional Barriers*

### 1. Protection of State Actors

The actions of local police departments are perhaps emboldened by federal abuse of power and a failure to create substantive accountability measures for police misconduct. Federal agencies like the DEA and Secret Service have been implicated in a broad range of police misconduct claims.[262] The DEA's failure to pursue action against culpable agents, and enforce internal accountability measures, has been described as an "epidemic."[263] In civil court, federal agents have repeatedly been held to a lower standard of justice—leading one judge to observe that "[i]f you wear a federal badge, you can inflict excessive force on someone with little fear of liability."[264]

Two federal statutes, 18 U.S.C. § 242 and 42 U.S.C. § 1983, provide avenues for government actors to be held accountable for their actions.[265] Civil charges against these actors can be sought via § 1983, or government agents may also face criminal charges per § 242.[266] Originally, these sections were designed to be broad in scope in order to ensure federal rights in a state context; however, the scope of both sections have been extensively narrowed by judicial precedent.[267] Further, although individuals may report violations of § 242 to the Department of Justice (DOJ), the discretion lies solely with

261 *Id.*

262 *Analyzing Misconduct in Federal Law Enforcement: Hearing Before the Subcomm. on Crime, Terrorism, Homeland Sec., & Investigations of the H. Comm. on the Judiciary*, 114th Cong. 1 (2015) (statement of Sen. F. James Sensenbrenner, Jr., Chairman, H. Subcomm. on Crime, Terrorism, Homeland Sec., & Investigations); Brad Heath & Meghan Hoyer, *DEA Agents Kept Jobs Despite Serious Misconduct*, USA TODAY (Sept. 27, 2015) https://www.usatoday.com/story/news/2015/09/27/few-dea-agents-fired-misconduct/72805622/; *US Secret Service Agents' Alleged Scandals Since 2004 Revealed*, GUARDIAN, (June 15, 2012), https://www.theguardian.com/world/2012/jun/15/us-secret-service-scandals-revealed.

263 *Analyzing Misconduct in Federal Law Enforcement*, *supra* note 262.

264 Opinion, *It's Hard to Hold Police Accountable. For Federal Agents, It's All but Impossible.*, WASH. POST (Sept. 22, 2021), https://www.washingtonpost.com/opinions/2021/09/22/its-hard-hold-police-accountable-federal-agents-its-all-impossible/.

265 18 U.S.C. § 242; 42 U.S.C. § 1983.

266 *Id.*

267 TARYN A. MERKL, BRENNAN CTR. FOR JUST., PROTECTING AGAINST POLICE BRUTALITY AND OFFICIAL MISCONDUCT 3–6 (2021), https://www.brennancenter.org/media/7558/download.

federal prosecutors to determine whether to pursue charges.[268] Precedent coupled with prosecutorial discretion has, in practice, stifled the effectiveness of § 242, one of the only federal statutes that criminalizes the misconduct of government actors.[269]

To prevail in a § 242 case, the government must show, beyond a reasonable doubt, that the defendant's actions were: (1) under the color of law, (2) willful, and (3) intended to deprive another of their legal or constitutional right.[270] An act can typically be classified as occurring "under color of law" if the accused official acted within their official government capacity or under the pretense of lawful actions.[271] For a defendant's actions to be willful, they must act with the "specific intent" to deprive another of their rights.[272] Further, those rights which are deprived must have previously been enumerated in the constitution or other laws, so to show that the defendant acted "in open defiance or in reckless disregard" of an established decision or rule.[273] This standard, requiring a display of intent by the official accused, has been described as one of the highest standards and often proves difficult overcome.[274]

Individuals seeking justice for discrimination perpetuated by government actors may decide to pursue civil action via § 1983.[275] Although the elements differ from § 242, plaintiffs are still required to show that the constitutional or legal right was "clearly established law" to overcome the affirmative defense of qualified immunity.[276] In creating qualified immunity, critics have argued that SCOTUS has enabled state actors by reducing the potential for civil liability and creating a "culture of near-zero accountability."[277] As an affirmative defense, if proven, qualified immunity shields government actors from liability, even if their actions were illegal.[278] The qualified immunity doctrine is a two-part test, with courts first asking whether the state actor violated a constitutional right.[279] In cases where

268 *See* Joanna R. Lampe, Cong. Rsch. Serv., LSB10495, Federal Police Oversight: Criminal Civil Rights Violations Under 18 U.S.C. § 242 (2020).

269 Merkl, *supra* note 267, at 6.

270 *Id.*

271 *Id.* at 5.

272 Screws v. United States, 325 U.S. 91, 103 (1945).

273 *Id.* at 105.

274 Merkl, *supra* note 267, at 7.

275 *Id.*

276 *See id.*; Jay Schweikert, *Qualified Immunity*, A.B.A. (Dec. 17, 2020), https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-21/issue-1/qualified-immunity/.

277 Schweikert, *supra* note 276.

278 *Id.*

279 Nathaniel Sobel, *What Is Qualified Immunity, and What Does It Have to Do with Police Reform?*,

the plaintiff claims that an officer used excessive force in violation of the Fourth Amendment, the doctrine could be interpreted as disregarding the first prong all together.[280] The next question asks whether the officers knew they were violating "clearly established law."[281] The Court has justified the creation of qualified immunity by citing common-law doctrines, such as requiring parties to show that the officer was not acting in "good faith" when the violation of rights occurred.[282] However, many argue that court interpretation has unprecedently expounded on these protections.[283]

The court's interpretation of "clearly established" law is one example of judicial interpretation that has broadened protections for officers who may have otherwise been liable for violating another's constitutional right.[284] Similar to the third element of § 242, requiring a finding that the right violated be previously enumerated or interpreted by the court, establishing that the government official violated "clearly established" law is a significant barrier to justice.[285] Precedent set by SCOTUS has interpreted "clearly established law" as requiring petitioners to show that the court has already found factually similar police actions to have been illegal.[286] This interpretation has caused even the U.S. Court of Appeals to note that the qualified immunity doctrine allows for public officials to avoid the consequences of their actions, as long as they remain "the *first* to behave badly."[287] This crucial failure to hold officers and federal agents accountable erodes trust and confidence in the judiciary to achieve justice for victims of excessive force.

### 2. Failure to Uphold International Law

As a signatory to several international human rights treaties, the U.S. is bound by international and domestic law to uphold human rights, guarantee equal protection for all citizens, and protect against the use of

LAWFARE (June 6, 2020), https://www.lawfareblog.com/what-qualified-immunity-and-what-does-it-have-do-police-reform; *see also Qualified Immunity*, CORNELL L. SCH., https://www.law.cornell.edu/wex/qualified_immunity (last visited Apr. 15, 2022).

280 Sobel, *supra* note 279; Pearson v. Callahan, 555 U.S. 223 (2009).

281 Sobel, *supra* note 279.

282 Schweikert, *supra* note 276.

283 Jay R. Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO INST. 6 (Sept. 14, 2020), https://www.cato.org/sites/cato.org/files/2020-09/pa-901-update.pdf. *See generally* Kisela v. Hughes, 138 S. Ct. 1148 (2018) (Sotomayor, J., dissenting).

284 *See 'Black People Terrified of US Cops Who Can Shoot & Walk Free Under Qualified Immunity*,' PRESS TV (June 15, 2020), https://www.presstv.ir/Detail/2020/06/15/627490/US-cops-who-can-pull-trigger-walk-free-qualified-immunity%E2%80%99.

285 *See* MERKL, *supra* note 267, at 7–8.

286 Schweikert, *supra* note 276.

287 Schweikert, *supra* note 283, at 13.

excessive force by state actors.[288] Two international treaties, both ratified by the U.S. in the 1990s, explicitly prohibit the use of excessive force by state actors.[289] Finding a pattern of concerning behavior exhibited by U.S. police forces, the Human Rights Committee has previously urged the U.S. to conform with international standards and investigate systemic solutions to address violations.[290]

In the U.S., the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) provides greater protection against discrimination for minorities and activist groups than U.S. domestic law.[291] U.S. law protects against racial discrimination if both a discriminatory effect *and* discriminatory intent are proven.[292] Essentially, this requires that parties asserting discrimination show that the law is discriminatory and that it was created with the intention of being discriminatory. CERD, however, only requires a showing of discriminatory effect *or* discriminatory intent.[293] If CERD were fully implemented in the U.S., parties would need only to show a discriminatory effect on minority communities in order to trigger CERD protections.[294] The adoption of CERD would provide a welcome legal framework for activist organizations to challenge local policies which discriminate against minorities and secure civil liberties on a state and federal level.

Federally, the U.S. government has come under criticism for their continued use of Guantanamo Bay to detain suspected enemy combatants.[295] UN experts emphasized their distain at the U.S. circumvention of international laws and called for President Biden to address the concerns

288 *See Shielded from Justice: Police Brutality and Accountability in the United States: Overview*, Hum. Rts. Watch (June 1998), https://www.hrw.org/legacy/reports98/police/uspo14.htm.

289 *Shielded from Justice: Police Brutality and Accountability in the United States: International Human Rights Standards*, Hum. Rts. Watch (June 1998), https://www.hrw.org/legacy/reports98/police/uspo38.htm#TopOfPage; G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966); G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984).

290 *Shielded from Justice: Police Brutality and Accountability in the United States: International Human Rights Standards*, *supra* note 289.

291 *See id.*

292 *Id.*

293 *Id.*

294 The U.S. has often ratified many of these international treaties with the qualification that they are not self-executing, meaning that Congress must pass additional legislation in order for the treaties' protections to be enforceable in U.S. courts. *Id.*

295 United Nations Hum. Rts. Off. of the High Comm'r, United States: Guantanamo Bay Review Must Ensure Closure and Appropriate Remedies for Those Tortured and Detained, Say UN Experts (Feb. 23, 2021), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26783&LangID=E.

of ongoing human rights violations.[296] Although embracing President Biden's announcement that the administration will work towards closing the detention facility, experts called for further investigation into allegations of arbitrary detention, torture, and the denial of fundamental rights.[297] While President Biden's promise to close Guantanamo may be welcomed by the UN and international bodies, whether the facility will actually close has yet to be seen. President Obama, for whom Biden served as Vice President, also condemned the Guantanamo facility; however, the administration failed to shut down the detention center in their eight years of office.[298]

### E. *Conclusion on American Parallels*

Despite international laws and standards created to protect human rights, the U.S. has failed to adequately secure codified legal protections for U.S. citizens against the expanding backdrop of defining domestic terrorism and the minimization of civil liberties. As in the KSA, members of minority communities who have advocated for equal rights have been classified by government institutions as "terrorists" or participating in "domestic terrorism." The U.S. Constitution, created by the Founding Fathers with the intention of protecting citizens from unjust persecution by their government, has been interpreted by SCOTUS to protect state actors even if a citizen's constitutional right has been violated. The result is a universal message, from Saudi Arabia to the United States, that the pursuit of domestic terrorism may be used as justification for violations of basic human rights and that state actors will rarely, if ever, be held accountable.

In spite of clear violations of international human rights standards, both the U.S. and Saudi Arabia largely continue to maintain the status quo, facing only nominal backlash from the international community. In 2019, the KSA faced "unprecedented international criticism" related to the Kingdom's disregard of human rights standards in political, judicial, and social spheres.[299] Despite disdain from the international community over human rights abuses, Saudi Arabia was still permitted to host leaders from around the world for the G20 summit in 2020.[300] Hosting the G20 was a

296 *Id.*

297 *Id.*

298 *Id.*

299 *Saudi Arabia: Events of 2019*, HUM. RTS. WATCH, https://www.hrw.org/world-report/2020/country-chapters/saudi-arabia (last visited Apr. 8, 2022).

300 *Saudi Arabia: Events of 2020*, HUM. RTS. WATCH, https://www.hrw.org/world-report/2021/country-chapters/saudi-arabia (last visited Apr. 8, 2022). The G20 summit was moved to a virtual platform in light of the emergence of COVID-19; however, Saudi Arabia was still considered to be the hosting country. *Id.*; *see also*

source of "great national pride" for the country and is only one of many lavish events the KSA has held in an attempt to distract the international community from the Kingdom's record of human rights abuses.[301] Just as the KSA has disavowed the place of the international community to criticize their judiciary, the U.S., under the Trump administration, ignored communication from UN Special Rapporteurs, denounced the authority of the ICC to pursue a case against U.S. officials for crimes arising out of conflicts abroad, and threatened ICC officials with sanctions should they choose to pursue an investigation into U.S. citizens.[302] After failing to comply with UN investigations, the U.S. Department of State "unilaterally redefine[d] what human rights mean" in a 2018 report rejecting the authority and framework of the UN and other international human rights bodies.[303] Economic status and international positionality has allowed states like the Kingdom and United States to essentially "buy [their] way out of accountability."[304] Although framed with the egregious human rights violations of the KSA in mind, the principles behind the legal solutions listed below may be applicable not only to Saudi Arabia but also to all states, including the United States of America.

## V. Legal Solution

### A. *Domestic Reforms within the KSA*

The first step to increased transparency in the KSA should address accessibility of information from the courts and detention centers.[305] All interviews with suspected offenders should be recorded, and those recordings should be made available to the detainee and their legal counsel.[306] Additionally, detainees should be granted immediate access to contact with family members and legal counsel upon request. A welcome

Caroline Hawley, *G20: Saudi Arabia's Human Rights Problems that Won't Go Away*, BBC News (Nov. 21, 2020), https://www.bbc.com/news/world-middle-east-55002921.

301 Hawley, *supra* note 300.

302 *Id.*; *United States of America*, Amnesty Int'l, https://www.amnesty.org/en/location/americas/north-america/united-states-of-america/report-united-states-of-america/ (last visited Apr. 8, 2022); Ed Pilkington, *Trump Administration Ignoring Human Rights Monitors, ACLU Tells UN*, Guardian (Mar. 18, 2019), https://www.theguardian.com/law/2019/mar/18/trump-administration-ignoring-human-rights-monitors-aclu.

303 *USA*, Amnesty Int'l, https://www.amnestyusa.org/countries/usa/ (last visited Apr. 8, 2022).

304 *See* Hawley, *supra* note 300.

305 Am. Bar Ass'n Ctr. for Hum. Rts., *supra* note 5, at 20.

306 *Id.* Currently requests from detainees for surveillance video, when said video exists, have been denied. Amnesty Int'l, *supra* note 29, at 41.

step towards transparency would also allow for journalists and human rights organizations to access trials, obtain court transcripts, and acquire detention records. Allowing for greater access to trials in the KSA could put pressure on the Kingdom's judiciary to ensure a fair trial and may help to bring the Kingdom into compliance with Article 10 of the Universal Declaration of Human Rights.[307]

Accountability is the next crucial step to reform in the KSA. To ensure the legal rights of detainees while awaiting trial, officers must be held accountable for their actions. Those accused of violating human rights, including state actors, should be held accountable per the Genocide Convention.[308] Additional measures could include a thorough investigation of all allegations of torture by an independent organization.[309]

Further, there should be full judicial independence in the KSA. Investigatory divisions, such as the SSP, should be separate and distinct from the judicial branch, including the SCC and PPO. Human rights activists have asserted that the SCC has been explicitly instructed on more than one occasion to harshly sentence political and religious dissenters.[310] The King should have no control or influence over either of these separate and independent departments. The separation of power between these three government entities would help to insulate the judiciary and minimize the control that politics and the King have in the KSA.

Lastly, to ensure the innate rights of KSA citizens, the Kingdom should narrow its definition of terrorism. The persecution of human rights leaders and activists under the guise of pursing terrorists is a flagrant violation of human rights standards.[311] Although Saudi Arabia has claimed that their government meets international law standards and that their counterterrorism efforts do not violate those standards,[312] the persecution of

307 G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), https://daccess-ods.un.org/tmp/7868337.63122559.html. However, it should also be noted that an increased public presence, including permitting foreign entities to monitor the trial, does not in and of itself guarantee a fair trial. *See Saudi Authorities Insist on Holding Secret Trials, with International Observers Denied Access*, ALQST (Apr. 17, 2020), https://www.alqst.org/en/secret-trials.

308 G.A. Res. 260 (III) A, Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948) [hereinafter Genocide Convention], https://daccess-ods.un.org/tmp/4884483.51621628.html.

309 AM. BAR ASS'N CTR. FOR HUM. RTS., *supra* note 5, at 20.

310 BUREAU OF DEMOCRACY, HUM. RTS. & LAB., U.S. DEP'T OF STATE, *supra* note 6, at 13.

311 *See* U.N. COUNTER-TERRORISM IMPLEMENTATION TASK FORCE (CTITF), *supra* note 47, at 7–8.

312 *Human Rights*, GOV.SA, https://www.my.gov.sa/wps/portal/snp/careaboutyou/humanright (Nov. 24, 2021) (stating that the Human Rights Commission, which serves directly under the King, has been granted power to ensure that all government

religious minorities and activists throughout the country suggest otherwise.[313] A definition which aligns more closely to the UN's definition of terrorism, or one which is more narrow as I have proposed, would restrict the use of the term terrorism as a way to silence minority groups and/or political dissenters. In a good faith showing, the KSA should immediately release all parties wrongfully imprisoned or convicted due to the court's reliance on torture-based confessions.[314]

### B. *Remedies in International Law*

States must urge the KSA to observe international human rights laws and standards in combatting terrorism.[315] Although the Kingdom claims to be committed to human rights, the KSA has refused to sign the UN Declaration of Human Rights due to its calls for freedom of religion.[316] If the KSA were to become a signatory to the UN Declaration of Human Rights, per the declaration, KSA citizens would be provided guarantees against torture, protection from arbitrary arrest, expansion of freedom of speech rights, the ability to seek asylum, including many other expansions of basic human rights.[317] The loss of Saudi Arabia's seat on the UN Human Rights Council[318] may be used as leverage for the KSA to adhere to international human rights norms. The plans for Saudi Arabian future policy, seen through MBS's "Vision 2030" reform platform, hinges on the Kingdom's ability to maintain their public image in order to attract investors to the region.[319] Observers have noted that "[w]ithout international investors there can be no Vision 2030."[320]

Allies and other institutions, such as the U.S., should leverage their power to pressure the Kingdom into adhering to international human rights standards. Although President Biden has suggested a policy change from the last administration, statements "affirm[ing] the importance the United States places on universal human rights and the rule of law" are not strong

agencies are implementing applicable laws related to human rights and in accordance with international human rights treaties to which the KSA is a signatory).

313 *See* U.N. Counter-Terrorism Implementation Task Force (CTITF), *supra* note 47, at 8.

314 Am. Bar Ass'n Ctr. for Hum. Rts., *supra* note 5, at 20.

315 Amnesty Int'l, *supra* note 29, at 51.

316 Human Rights Watch, *supra* note 4.

317 G.A. Res. 217 (III) A, *supra* note 307.

318 Turak, *supra* note 2.

319 *Id.*

320 *Id.*

enough to create substantive change.[321] Historically, America's reliance on Saudi oil has hindered U.S. policymakers from taking a tougher stance against what appear to be clear violations of international human rights standards.[322] Some U.S. Presidents, like Presidents Biden and Kennedy, have indirectly confronted Saudi politicians by leveraging military assistance in exchange for improved human rights in the region.[323] Others, like President Eisenhower, focused on the foundation of the allyship between the U.S. and remained largely silent on allegations of human rights abuses in the KSA.[324] President Biden has taken a similar approach; however, critics have argued more should be done, such as adopting sanctions, to hold MBS accountable.[325] U.S. sanctions and ardent opposition to Saudi Arabian human rights practices would directly affect MBS's Vision 2030 and create serious doubt internationally about the KSA's ability to reform.

Finally, in an effort to repair relationships between citizens and the SSP, Mubahith, and other state controlled forces, the Kingdom may consider the implementation of the four main principles of international human rights law standards.[326] These principles require: (1) action to be based on law, (2) an element of necessity in the restriction of human rights, (3) police action to be proportional to their goals of law and order, and (4) accountability for all actors despite institutional roles.[327] The Human Rights Council could leverage financial funding and a key stakeholder role in the implementation of Vision 2030, with the explicit requirement that human rights standards be promoted and upheld in the Kingdom. To incentivize the Kingdom, the Council may suggest that if, by 2030, the KSA has reformed the current policies surrounding terrorism, detention, judicial oversight, and transparency, there will once again be an opportunity for the country to secure a seat on the Human Rights Council.

Should the KSA fail to reasonably reform their policies, signatories to the Genocide Convention should submit that the International Court of

321 Nicholas DeAntonis, *Joe Biden Is Making Clear that Saudi Human Rights Violations Won't Be Ignored*, WASH. POST (Mar. 11, 2021), https://www.washingtonpost.com/outlook/2021/03/11/joe-biden-is-making-clear-that-saudi-human-rights-violations-wont-be-ignored/.

322 *Id.*

323 *Id.*

324 *Id.*

325 *Id.*

326 Akshita Tiwary, *Police Brutality and Use of Force: An International Human Rights Law Perspective*, BERKELEY J. INT'L L. (Sept. 28, 2020), https://www.berkeleyjournalofinternationallaw.com/post/police-brutality-and-use-of-force-an-international-human-rights-law-perspective.

327 *Id.*

Justice open a formal inquiry as to the KSA's failure to fulfill the obligations of the convention. Per the convention, genocide is defined as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group."[328] Signatories to the Genocide Convention, including Saudi Arabia,[329] have acceded to uphold the convention by providing effective penalties for those found to be in violation of the convention.[330] States further commit to prosecuting parties who have committed, conspired to commit, or who were complicit in genocide, regardless of political status or title.[331] Parties to the Genocide Convention may at any point submit to the International Court of Justice a dispute regarding a failure to uphold the convention.[332] The signatories of the Genocide Convention have the power to collectively submit a dispute claiming that Saudi Arabia is in violation of the Genocide Convention and seek for the International Court of Justice to investigate Saudi Arabia's failure to comply.

## Conclusion

Terrorism is a constantly evolving tool used to incite fear with the goal of furthering a political message. Citizens rely on their states to protect them from these horrific acts; but unfortunately, many state actors have abused this authority across the globe as a way to expand and exercise power. International bodies and treaties have been signed to ensure protection of human rights; however, both the U.S. and the KSA have continued to negate their duties as signatories and shirk their responsibility to preserve the rights of every citizen regardless of title, status, or opinion. In the name of terrorism, innocent people have lost their lives, freedom, and civil liberties.

Given the egregious acts happening to this day in the Kingdom, it is important to note that the KSA has experienced firsthand the devastation that results from acts of terrorism since the early 2000s. Fear is a powerful tool. Rather than uniting the country against the common goal of expelling terrorists from their territory, the KSA instead chose to harness the fear of terrorism against its own citizens. No semblance of justice can be found in arresting and detaining citizens without formal charge or trial dates for periods of time ranging from months to years. No genuine balance of rights is weighed in the decision to execute members of society who question the King. No action can justify the decision to torture another human being.

328 Genocide Convention, *supra* note 308, at art. II.
329 Human Rights Watch, *supra* note 4.
330 Genocide Convention, *supra* note 308, at art. V.
331 *Id.* at art. IV.
332 *Id.* at art. VIII, IX.

And no international body can, or should, justify the abuse of power the KSA has exercised.

As it stands, the U.S. and other western countries are poised to make the same mistakes. The failure of the United States to protect marginalized communities and to ensure access to justice for all citizens, regardless of race, fundamentally undermines confidence in the judiciary and further disenfranchises afflicted parties. Institutional barriers to justice enable state actors to act without fear of accountability measures or consequences for their actions. Qualified immunity, and stringent judicial interpretation, ensure that even when a citizen's constitutional right is violated, government actors will rarely, if ever, face punishment. Further, an ill-defined terrorism statute places marginalized communities and political dissenters in a precarious position, allowing for government agencies or presidential administrations to arbitrarily classify similarly situated groups of protestors as terrorist organizations.

Although the UN has recognized human rights abuses in both the Kingdom and the U.S., little to no action has been taken which would substantially alter the positionality of either country. The international world has largely remained silent as the KSA has continued to repeatedly, and flagrantly, violate international human rights laws. Under the guise of safety, the KSA and the U.S., to varying degrees, has stripped its citizens of their humanity and voices while simultaneously eroding trust in the rule of law. The KSA's punishment and persecution of religious minorities, members of civil society, and non-violent political actors must immediately come to an end. Discriminatory practices of local, state, and federal law enforcement agencies in the U.S. must be condemned. Further, judicial bodies in both countries must ensure accountability for government actors and enshrine greater protections for *all* citizens.

In the name of terrorism, antithetical voices and viewpoints have been suppressed by the State. In the name of terrorism, governments have shirked their responsibility to ensure adherence to international human rights laws and standards. In the name of terrorism, trust in judicial institutions has eroded, as State actors are repeatedly granted deference despite an established pattern of violence and abuse of power. When the crime of terrorism is ill-defined, perhaps citizens have more to lose in the name terrorism, or state protection from terrorism, than without.

# THE HUMAN RIGHTS APPROACH TO ADDRESS BLACK MATERNAL MORTALITY: WHY POLICYMAKERS SHOULD LISTEN TO BLACK MOMS

*By Aly McKnight**

* J.D. Northeastern University School of Law (2022), B.A., Public Policy Studies and Sociology, William Smith College (2015). I extend my sincere thanks to professors Martha Davis and Sharon Persons for their research guidance as I began this Note. I am grateful to Abby Plummer and the entire thoughtful, supportive *Northeastern University Law Review* team for their editorial expertise. I thank Lindsay Mitnik and Shayna Scott, for being the kind of housemates, colleagues, and dear friends that made this project possible. And lastly, I thank my own mom, Jackie, for showing me that moms are the smartest, strongest, and bravest among us.

## CONTENT WARNING

This article engages critically with issues of racism, sexism, and misogynoir. It also discusses maternal and infant death. This content has the potential to affect our readers. The *Northeastern University Law Review* feels this topic is important to address and amplify, but we urge readers to consider their own experiences and capacity before engaging with this article.

## POSITIONALITY STATEMENT

I am a white, cisgender, straight woman who grew up in an upper middle-class family. I identify as disabled. I acknowledge my own positionality at the outset of this Note because it focuses on the lives, strategies, and empowerment of a marginalized identity group of which I am not a part. My identities do not qualify me to speak to the lived experiences of mothers or Black individuals. Nor do these identities qualify me to speak to the lived experiences of Black mothers. I did not interview Black mothers as a part of my writing process, and this Note will not use narratives or storytelling to illustrate arguments. Instead, this Note evaluates U.S. progress on a specific, internationally-recognized human rights objectives by utilizing a rubric created by Black mothers and their allies in the Reproductive Justice movement. It uses the human rights framework implemented by Reproductive Justice advocates to critically evaluate the U.S. maternal mortality crisis as it impacts Black mothers.

Most of the research materials I consulted to write this paper were written by woman-identifying Black, Indigenous, and people of color (BIPOC) individuals who have dedicated their careers to Reproductive Justice research and advocacy, and these leaders are my chosen teachers on this topic. Their research materials and writing are cited throughout this paper, and I would encourage every reader of this paper to consult those materials to engage further with this topic.

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## INTRODUCTION

This Note argues that the United States (U.S.) government has a responsibility under international human rights standards to address the domestic crisis of Black maternal mortality. If the U.S. aims to meet its international obligations and build a robust policy framework to address maternal mortality as a human rights issue, it must center Black mothers'[1] advocacy and expertise. Centering the expertise, storytelling, and experiences of impacted individuals through participation is a central tenet of human rights advocacy work,[2] and in failing to center Black moms, the U.S. continues to ineffectively address Black maternal mortality. The current approach the U.S. uses to address Black maternal mortality fails to acknowledge the white supremacist ideologies upon which public perception of Black motherhood has been built, and, as a result, has perpetuated racist policies. This Note utilizes the Reproductive Justice movement's human rights framework, which has been advocated for by Black activists and scholars, to evaluate some of the recent U.S. policy initiatives.

Part I of this Note provides an overview of the crisis of maternal mortality in the U.S. This crisis demonstrates a dereliction of the country's international human rights obligations, and it evinces the moral failings of leaders who have neglected to address this crisis. In this Note, I specifically focus on the deaths of Black mothers, and the crisis of Black maternal mortality which demonstrates the failure by the U.S. to address racial discrimination in maternal health. This Note provides a brief historical overview of some U.S. government policies that have served to undermine the health of Black mothers, leading to discrimination, disproportionate negative health outcomes, and Black maternal deaths.

Part II defines the human rights framework for understanding maternal mortality by discussing the provisions of several international human rights treaties that protect maternal health. The human rights framework addresses the intersections of the right to life, the right to health, and the right to equality and nondiscrimination. The U.S. has legal obligations to prevent and reduce maternal death under these international treaties.

1 I use the terms "mother," "mom," "mama," and "maternal" throughout this paper to refer to all birthing individuals, including women, trans women, those that identify as nonbinary, and those with other gender identities. Please note that not all birthing people identify with these terms, and it is important to defer to birthing individuals themselves when describing their parenting identities.

2 *See The Approach to Human Rights*, Health and Human Rights Resource Guide, FRANCOIS-XAVIER BAGNOUD CTR. FOR HEALTH & HUM. RTS., https://www.hhrguide.org/153-2/ (last visited May 7, 2022).

In this section, I also contextualize the evolution of the global maternal health strategy through the United Nations' Millennium Development Goal (MDG) and Sustainable Development Goal (SDG) frameworks.

Part III introduces the Reproductive Justice movement, a movement founded and led by Black women that is rooted in international human rights principles. The Reproductive Justice movement has made strong efforts to address and attack the issue of maternal mortality and promote maternal health. This Note presents examples of several strategies implemented by Reproductive Justice advocates to forward the human rights framework in a maternal health context.

Part IV presents some recent examples of U.S. legislative initiatives to combat maternal mortality and improve maternal health. I argue that the U.S. policy plans to address maternal mortality would function more effectively by mirroring the human rights-centered approaches presented by Reproductive Justice activists and organizations.

## I. Background

### A. *Maternal Mortality in the United States*

The U.S. outspends every other country in the world on hospital-based maternity care, but this spending does little to ensure better results for those giving birth in the U.S.[3] The United Nations (UN) Maternal Mortality Estimation Inter-Agency Group ranks the U.S. fifty-fifth globally based on its maternal mortality ratio (MMR).[4] The World Health Organization (WHO) calculates the MMR using its definition of "maternal death," defining it as "the death of a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and the site of the pregnancy, from any cause related to or aggravated by the pregnancy or its management, but not from accidental or incidental causes."[5] Most maternal deaths in the

3 *Maternal Health in the United States*, Maternal Health Task Force Harv. Chan Sch., https://www.mhtf.org/topics/maternal-health-in-the-united-states/ (last visited May 7, 2022).

4 Nina Martin, *The New U.S. Maternal Mortality Rate Fails to Capture Many Deaths*, ProPublica (Feb. 13, 2020), https://www.propublica.org/article/the-new-us-maternal-mortality-rate-fails-to-capture-many-deaths; *Executive Summary: Trends in Maternal Mortality 2000–2017*, U.N. Maternal Mortality Estimation Inter-Agency Grp. 6–12 (2019), https://apps.who.int/iris/bitstream/handle/10665/327596/WHO-RHR-19.23-eng.pdf?ua=1.

5 Donna L. Hoyert, *Maternal Mortality Rates in the United States, 2020*, Nat'l Ctr. for Health Stat. 1 (Feb. 2022), https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2020/E-stat-Maternal-Mortality-Rates-2022.pdf.

U.S. are caused by preventable or treatable complications, including heart conditions, severe bleeding, blood clots, infections, strokes, and high blood pressure.[6] In February 2022, the Centers for Disease Control and Prevention (CDC) released a report indicating that the 2020 MMR in the U.S. was 23.8 maternal deaths per 100,000 live births.[7] For comparison, in 2019, Canada had an MMR of 7.5, Australia had an MMR of 3.9, and six countries reported MMRs of 0.[8]

The MMR in the U.S. is shockingly high for an industrialized nation, but the MMR statistic alone does not paint a full picture of the senseless, preventable deaths suffered by birthing people in this country. Black mothers in the U.S. die at rates three to four times higher than white mothers and have for at least the last six decades.[9] For non-Hispanic, Black women in the U.S., the MMR in 2020 was 55.3 deaths per 100,000 live births,[10]—in the same range as the most recent MMRs reported for the countries Ecuador, El Salvador, Jordan, and Panama.[11]

However, even these facts do not encompass the full extent of maternal death in the U.S. The WHO definition of maternal death is used throughout the world to measure the MMR in a given country.[12] But because of the forty-two-day postpartum cap within the WHO definition, the UN MMR data may not capture maternal deaths related to postpartum depression anxiety, substance use disorder, and other health conditions that may result in mortality more than forty-two days after the end of pregnancy.[13] A fuller understanding of the maternal experience in the U.S. can be developed by looking at U.S. government statistics, which employ a broader definition. By

6 CTR. FOR REPROD. RIGHTS, BLACK MAMAS MATTER: ADVANCING THE HUMAN RIGHT TO SAFE AND RESPECTFUL MATERNAL HEALTH CARE 21 (2018), http://blackmamasmatter.org/wp-content/uploads/2018/05/USPA_BMMA_Toolkit_Booklet-Final-Update_Web-Pages-1.pdf [hereinafter BMMA TOOLKIT].

7 Hoyert, *supra* note 5.

8 In 2019, Estonia, Iceland, Ireland, Luxembourg, Norway, and Slovak Republic all reported MMRs of 0. *Health Status: Maternal and Infant Mortality*, ORG. FOR ECON. CO-OPERATION & DEV., https://stats.oecd.org/index.aspx?queryid=30116 (last updated Nov. 9, 2021) (select "Data by Theme" tab and select "Health", "Health Status", and "Maternal and infant mortality" indicators).

9 BMMA TOOLKIT, *supra* note 6, at 9, 26.

10 Hoyert, *supra* note 5.

11 *Maternal Mortality Ratio (Per 100 000 Live Births)*, WORLD HEALTH ORG., https://www.who.int/data/gho/data/indicators/indicator-details/GHO/maternal-mortality-ratio-(per-100-000-live-births) (last visited May 5, 2022).

12 *See* Martin, *supra* note 4.

13 *See id.*; *see also* Usha Ranji et al., *Expanding Postpartum Medicaid Coverage*, KAISER FAM. FOUND. (May 9, 2021), https://www.kff.org/womens-health-policy/issue-brief/expanding-postpartum-medicaid-coverage/.

U.S. statute, "pregnancy-related death" is defined as: "[A] death of a woman that occurs during, or within 1 year following, her pregnancy, regardless of the outcome, duration, or site of the pregnancy–from any cause related to, or aggravated by, the pregnancy or its management; and not from accidental or incidental causes."[14]

While the definitions of "maternal death" and "pregnancy-related death" are related, the two measurements of maternal mortality in the U.S. create significant obstacles in understanding the extent of the problem and constructing an accurate narrative about the extent of maternal mortality.[15] The CDC's most recently released MMR for the U.S., 23.4, does not account for the accidental or incidental causes encompassed within the "pregnancy-related death" definition provided by U.S. statute.[16] This is a particularly deceiving statistical nuance in the U.S., where the ongoing epidemic of overdose deaths has only escalated during the COVID-19 pandemic.[17] 24% of pregnancy-related deaths in the U.S. occur between 43 and 365 days postpartum,[18] which highlights the seriousness of undercounting in the MMR metric. The crisis of maternal mortality in the U.S. is likely far more expansive than the MMR measurement system enumerates.

In April 2021, the Biden-Harris administration released what it deemed the "first-ever presidential proclamation" tackling "Black maternal mortality and morbidity."[19] The proclamation and accompanying statement outlined investments the administration intended to make in already-existing health care and maternal health programs.[20] The statement characterized the funding changes as "initial steps" in an ongoing commitment "to address [the] maternal mortality crisis, close disparities in maternal care and outcomes for all birthing people, and address the systemic racism that has allowed these inequities to exist."[21] While the Biden Administration explicitly addressed that Black maternal mortality in the U.S. is a product of "systemic racism," it was less than explicit about the centuries of U.S. policy that have

14 42 U.S.C. § 247b-12(e)(3).

15 *See* Martin, *supra* note 4.

16 Hoyert, *supra* note 5.

17 *See* Press Release, Ctrs. for Disease Control & Prevention, Overdose Deaths Accelerating During COVID-19 (Dec. 17, 2020), https://www.cdc.gov/media/releases/2020/p1218-overdose-deaths-covid-19.html; *see also Suicide*, Nat. Inst. Mental Health, https://www.nimh.nih.gov/health/statistics/suicide.shtml (last visited May 7, 2022).

18 Martin, *supra* note 4.

19 *Fact Sheet: Biden-Harris Administration Announces Initial Actions to Address the Black Maternal Health Crisis*, The White House (Apr. 13, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/13/fact-sheet-biden-harris-administration-announces-initial-actions-to-address-the-black-maternal-health-crisis/.

20 *Id.*

21 *Id.*

the laid the foundation for the disparities and inequities to which it alludes.[22]

### B. *The U.S. Has Historically Sabotaged the Health of Black Moms*

The Black maternal mortality crisis has been shaped by the myriad of social ideologies, societal practices, and public policies implemented by the U.S. federal and state governments to sabotage Black mothers' health, often with intentions of economic development or profit. Racism in maternal health is not the product of one isolated policy or initiative, but instead must be understood as a pervasive public health crisis with historical roots older than the U.S. itself. While this section details many of the atrocities officials in the U.S. (including before the founding of the country) have committed against Black mothers, I preliminarily caution readers against viewing the history of Black mothers as one of passivity or victimhood. For every atrocious act committed by the U.S. government, there are stories of Black mothers who sought freedom, resisted, and revolted against the oppression they faced.[23]

Government violence against Black mothers in the U.S. can be traced back to before the founding of the country. Most Black women, though not all,[24] who entered the present-day U.S. before the Revolutionary War, were forcibly removed from their homes, families, and lives in Africa and transported to the U.S. as a part of the transatlantic slave trade.[25] White enslavers[26] exerted power over Black women's bodies to exploit Black women's labor and childbearing as a part of the slave trade.[27] Enslavers exploited African women who were brought to the U.S. for their farming knowledge and skills, which helped to build an agricultural economy from which they were legally excluded from profiting, and for which they were put to work doing manual labor.[28] Additionally, enslavers profited from Black women's capacity to produce more enslaved people, and enslavers used rape and forced

22 *Id.*

23 For an overture to the vast array of these stories, see generally DAINA RAMEY BERRY & KALI NICOLE GROSS, A BLACK WOMEN'S HISTORY OF THE UNITED STATES, 10–11 (2020). *See also* ANGELA Y. DAVIS, WOMEN, RACE, AND CLASS (1983).

24 The first Black women in the U.S. arrived as early as the sixteenth century as a part of Spanish exploratory expeditions in what is now the American Southwest, as evidenced by Daina Ramey Berry and Kali Nicole Gross's research into Spanish archival records from this time period. *See* BERRY & GROSS, *supra* note 23, at 9–11.

25 *See id.*

26 This word and its meaning are borrowed from Ramey Berry and Gross, who use the term to refer to non-Black individuals who owned slaves. BERRY & GROSS, *supra* note 23.

27 Deirdre Cooper Owens & Sharla M. Fett, *Black Maternal and Infant Health: Historical Legacies of Slavery*, AM. J. PUB. HEALTH 1342, 1342–43 (2019).

28 BERRY & GROSS, *supra* note 23, at 2.

marriage as tools to control and manipulate the enslaved population.[29] The colony of Virginia secured the fate of children born to enslaved mothers in 1662 when it enacted a law clarifying that a child's status as enslaved or free was defined by the status of their mother, not their father, as had been the English tradition.[30] Other colonies soon enacted their own versions of this law, exemplifying the widespread government control the states had over the bodies of Black mothers and their children at the earliest stages of the republic.[31] When the U.S. cut off participation in the transatlantic slave trade by banning the importation of enslaved people in 1808, Black mothers' bodies increased in value and were increasingly exploited to support the system of enslavement that much of the U.S. economy had been built upon.[32] Black mothers were also subjected to inhumane treatment at the hands of white doctors experimenting in gynecological science, a practice which continued long after the system of enslavement came to an end.[33]

The period of enslavement also set a foundation for the enduring tradition of policymakers blaming Black mothers for their own ailing health or prosecuting them for the health of their children, both of which are often out of the mother's control due to government policies impacting the quality and availability of healthcare. Enslaved nurses and midwives provided most maternal health care for enslaved mothers, but when mothers lost children during childbirth, white doctors often blamed both Black mothers and their predominately Black caretakers for such losses.[34] Many of the country's founders believed that Black people were incapable of self-control and rational thought.[35] This "scientific racism" by the country's founders embedded an ideology of white superiority within the nation's founding documents and legislation.[36] "Scientific racism" manifested itself as a narrative that Black mothers were unable to, or unfit to care for their

29 Jael Silliman et al., Undivided Rights: Women of Color Organize for Reproductive Justice 13 (2016).

30 2 William Waller Hening, The Statutes at Large: Being a Collection of All the Laws of Virginia from the First Session of the Legislature, in the Year 1619, 170 (1823); *Legislating Reproduction and Racial Difference,* N.Y. Hist. Soc'y Museum & Libr., https://wams.nyhistory.org/early-encounters/english-colonies/legislating-reproduction-and-racial-difference/ (last visited Jan. 7, 2022); *see also* Berry & Gross, *supra* note 23, at 33–34.

31 Berry & Gross, *supra* note 23, at 34.

32 Dorothy Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty 24 (20th ed. 2017).

33 Owens & Fett, *supra* note 27, at 1343.

34 *Id.*

35 *See* Roberts, *supra* note 32, at 8–9.

36 *See id.*

children because of biological deficits.[37] In the twentieth century and into today, this led to the creation of measures to control Black reproduction and the Black population instead of supporting Black mothers through social programs that were seen as a waste of resources.[38]

The U.S. did not pass any laws to address the social welfare until 1921, the year after the passage of the Nineteenth Amendment.[39] The Shepperd-Towner Act, also called the Maternity and Infancy Act, provided $1 million in aid to support state programs for prenatal and postpartum care for mothers and babies.[40] The Act was not renewed after its first seven years,[41] but it provided an important social welfare model for future maternal and child health advocates to build upon in later decades. Notably, the language of the Sheppard-Towner Act did not discriminate with regard to race and ethnicity, and some historians suggest that Black women benefitted from the home visiting programs and public health centers funded through the Act.[42] However, because the program's services were implemented state by state, there was variation in who was ultimately served, and Black women were likely to experience discrimination and inferior care as a result of pervasive racism.[43]

The implementation of the Aid to Dependent Children (ADC) program, a part of the Social Security Act, demonstrated evidence of pervasive government discrimination against Black mothers on both state and federal levels.[44] The ADC program (later renamed the Aid to Families with Dependent Children or AFDC)[45] was funded by the federal government and administered by the states, providing cash assistance to low income

37 *See id.*

38 *Id.* at 8.

39 *The Sheppard-Towner Maternity and Infancy Act*, HIST., ART, & ARCHIVES: U.S. HOUSE OF REPS., https://history.house.gov/Historical-Highlights/1901-1950/The-Sheppard%E2%80%93Towner-Maternity-and-Infancy-Act/ (last visited Jan. 18, 2021); Protecting Mothers and Infants, U.S. CAPITOL VISITOR CTR., https://www.visitthecapitol.gov/exhibitions/april-2010-september-2011/protecting-mothers-and-infants (last visited May 4, 2022).

40 *The Sheppard-Towner Maternity and Infancy Act*, *supra* note 39.

41 Carolyn M. Moehling & Melissa A. Thomasson, *Saving Babies: The Contribution of Sheppard-Towner to the Decline in Infant Mortality in the 1920s* 13–14 (Nat'l. Bureau of Econ. Rsch., Working Paper No. 17996, 2012), https://www.nber.org/papers/w17996.

42 *See id.* at 13–14.

43 *Id.* at 15.

44 Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, YALE L. J. 719, 723 (1992).

45 Linda Gordon & Felice Batlan, *Aid to Dependent Children: The Legal History*, VA. COMMONWEALTH UNIV. LIBRS., https://socialwelfare.library.vcu.edu/public-welfare/aid-to-dependent-children-the-legal-history/ (last visited May 7, 2022).

families.[46] Although ADC funds were intended to serve children living with their widowed mothers, some states made eligibility for these programs contingent upon maternal behavior and created provisions that prevented Black mothers from accessing the program.[47]

In 1965, Assistant Labor Secretary Daniel Patrick Moynihan released a report titled *The Negro Family: A Case for National Action*, which blamed the matriarchal family structures of Black American families for the perceived lag in attainment of higher social status by Black people.[48] When advocates successfully expanded Black families' access to the ADC program in the 1960s and 1970s, conservatives responded by deploying the ideology introduced in the Moynihan Report, and developing programs that began to chip away at access to ADC through narratives about deservedness.[49] These racialized narratives painting Black mothers as undeserving of government funding and support ultimately culminated in the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which had the stated purposes of ending single-parent families' dependence on government support, encouraging marriage, and reducing the number of children born out of wedlock.[50] PRWORA had, and continues to have, devastating consequences for Black mothers who relied on welfare funding to create healthy living environments for their families. The program gave states broad powers to administer welfare benefits based on their own criteria, and many made benefits contingent upon work requirements, mandatory family planning programming, and invasive investigation into mothers' lives.[51]

Today, Black mothers are forced to contend with a government whose present-day policies were largely built upon historic and pervasive racism against them and their families. State and federal prosecutors across the U.S. have continued to find new ways to prosecute Black and

46 *Aid to Families with Dependent Children (AFDC) and Temporary Assistance for Needy Families (TANF) - Overview*, Office of the Assistant Sec. for Plan. & Evaluation, https://aspe.hhs.gov/aid-families-dependent-children-afdc-temporary-assistance-needy-families-tanf-overview (last visited Jan. 28, 2022); *see also* Gordan & Batlan, *supra* note 45.

47 Williams, *supra* note 44, at 723–24.

48 Daniel Geary, *The Moynihan Report: An Annotated Edition*, Atlantic, (Sept. 14, 2015), https://www.theatlantic.com/politics/archive/2015/09/the-moynihan-report-an-annotated-edition/404632/.

49 Williams, *supra* note 44, at 724–25.

50 *See generally* Personal Responsibility & Work Opportunity Reconciliation Act, 42 U.S.C. § 1305.

51 *See* Shruti Rana, *Restricting the Rights of Poor Mothers: An International Human Rights Critique of "Workfare"*, 33 Colum. J.L. & Soc. Probs. 393 (2000); *see also* A Welfare Check, Reveal (July 16, 2016), https://revealnews.org/podcast/a-welfare-check/.

BIPOC moms for crimes related to pregnancy and parenting,[52] including by characterizing still-births and miscarriages as attempts to terminate their pregnancies.[53] As of January 2020, there were still twenty-three states in which it remained legal for incarcerated mothers to be shackled during childbirth, a practice that health experts have widely recognized has health risks for both moms and babies.[54] These indignities are the result of the same horrific, sexist, and white supremacist beliefs that have persisted since the founding of the U.S.—specifically that Black mothers are unfit to mother, so their bodies must be subject to regulation by the predominately white male-controlled government. The Black maternal health crisis in the U.S. is not a new problem; widespread human rights abuses in the U.S. reflect the racist ideologies that have been perpetuated against Black moms in this country for centuries.

## II. HUMAN RIGHTS LEGAL FRAMEWORKS AND MATERNAL MORTALITY

The right to maternal health is protected by several international human rights treaties, though not always explicitly. Maternal health lies at the intersection of more than one fundamental human right, as defined by the UN, including the right to life; the right to health; and the rights to race and gender equality, and nondiscrimination.[55] When governments fail to protect maternal life and health, these failures constitute violations of human rights principles.[56] The U.S. has not signed and ratified all of the international human rights treaties that protect maternal health; however, Congress has ratified treaties that protect the right to life and the right to racial equity and nondiscrimination.[57] The U.S. policy frameworks to address maternal mortality and health have primarily focused upon health care, without provisions aimed at remedying and preventing systemic racism in health care. However, the obligations that the U.S. has assumed through

52 ROBERTS, *supra* note 32, at xii (stating that from 1973–2017, more than 700 women have faced prosecution, sanctions, or punishment by government authorities for actions related to their pregnancies).

53 Robin Levinson-King, *U.S. Women Are Being Jailed for Having Miscarriages*, BBC NEWS (Nov. 12, 2021), https://www.bbc.com/news/world-us-canada-59214544.

54 *Shackling of Pregnant Women in Jails and Prisons Continues*, EQUAL JUST. INITIATIVE (Jan. 29, 2020), https://eji.org/news/shackling-of-pregnant-women-in-jails-and-prisons-continues/.

55 Luisa Cabal & Morgan Stroffregen, *Calling a Spade a Spade: Maternal Mortality as a Human Rights Violation*, 16 HUM. RIGHTS BRIEF 2, 2–6 (2009).

56 *Id.* at 2.

57 *Where the United States Stands on 10 International Human Rights Treaties*, THE LEADERSHIP CONF. EDUC. FUND (Dec. 10, 2013), https://civilrights.org/edfund/resource/where-the-united-states-stands-on-10-international-human-rights-treaties//.

the ratification of some international human rights treaties demand a far broader, more rigorous approach to our policy addressing maternal health.

### A. *Right to Life*[58]

Article 6 of the International Covenant on Civil and Political Rights (ICCPR) protects every human's "inherent right to life," as well as every human's right not to be "arbitrarily deprived" of their right to life.[59] The international community has interpreted this right, as espoused in the ICCPR, as not only the prevention of killings, but also as a broader duty to prevent arbitrary, needless death.[60] In particular, the UN Human Rights Committee has stated that the right to life as it relates to maternal mortality demands that a country work toward accessible health services, family planning and sexual education programs, and emergency obstetric care.[61] The U.S. ratified the ICCPR in 1992,[62] but since that time pregnancy-related death in the U.S. has steadily increased from 10.8 deaths per 100,000 in 1992, to 17.3 in 2017.[63] This trend demonstrates a disconnect between the U.S. ratification of the ICCPR and the implementation of the treaty's calls to action as related to maternal mortality.

### B. *Right to Health*

The U.S. signed the Universal Declaration of Human Rights (UDHR) seventy-four years ago.[64] In doing so, the U.S. agreed to the articles of the UDHR on an international stage, signaling the country's intention to lead and define human rights policy in the post-World War II era. However, the UDHR is not an international treaty; it is merely a declaration, and the

58 While the term "right to life" in the U.S. has been used by the anti-abortion movement to specifically point to the rights of a fetus, the international human rights movement uses a different, broader definition of the "right to life" that encompasses the rights of human beings from their birth to their deaths.

59 G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 6 (Dec. 16, 1966).

60 Cabal & Stroffregen, *supra* note 55, at 2, 2–3.

61 U.N. Hum. Rts. Comm., *Consideration of reports submitted by States parties under article 40 of the Covenant: International Political Rights: Concluding Observations of the Human Rights Committee: Mali*, ¶ 14, U.N. Doc CCPR/CO/77/MLI (Apr. 16, 2003).

62 The Leadership Conf. Educ. Fund, *supra* note 57.

63 *Pregnancy Mortality Surveillance System*, CDC, https://www.cdc.gov/reproductivehealth/maternal-mortality/pregnancy-mortality-surveillance-system.htm#:~:text=Since%20the%20Pregnancy%20Mortality%20Surveillance,100%2C000%20live%20births%20in%202017 (last visited May 8, 2022).

64 G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

U.S. government's commitment to the principles espoused in the declaration are symbolic—not legally binding.[65] Article 25 of the UDHR includes specific provisions about health and well-being as it relates to motherhood:

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.[66]

Despite the specific symbolic commitment to maternal health it affirmed and embraced in the UDHR, the U.S. has failed to take steps to uphold its actual treaty commitments to health equity under the International Convention of the Elimination of All Forms of Racial Discrimination (CERD), and has failed to ratify the two treaties that focus most particularly on maternal health: the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[67] Both the ICESCR and CEDAW establish explicit expectations for countries' obligations to mothers related to childbirth. Article 10 of the ICESCR states, "[s]pecial protection should be accorded to mothers during a reasonable period before and after childbirth."[68]

Because the U.S. has not ratified the ICESCR, the right to health embedded within the ICESCR is not enforceable in the U.S. and lacks the teeth of international accountability mechanisms. Without the obligation of reporting to a UN treaty body, protecting and ensuring the right to health and health care in the U.S. must be driven by domestic policy movements. However, U.S. ratification of treaties that protect equality and nondiscrimination rights provides some arguments that denying equal opportunities to health services to specific populations runs counter to the

65 Chandler Green, *70 Years of Impact: Insights on the Universal Declaration of Human Rights*, U.N. FOUND. (Dec. 5, 2018), https://unfoundation.org/blog/post/70-years-of-impact-insights-on-the-universal-declaration-of-human-rights/.

66 Universal Declaration of Human Rights, *supra* note 64.

67 THE LEADERSHIP CONF. EDUC. FUND, *supra* note 57.

68 International Covenant on Economic, Social, and Cultural Rights art. 10, Jan. 3, 1976, 993 U.N.T.S. 3.

country's international human rights obligations, both those espoused in treaties and those inherently owed by a government to its citizens.

### C. *Right to Equality and Nondiscrimination*

As demonstrated by the disproportionate rates of maternal death among Black mothers in the U.S., maternal mortality must be examined through both a race discrimination lens and a gender discrimination lens. Race and gender discrimination pervade the U.S. healthcare system, systemically and individually.

In interpersonal interactions between patients and care providers, Black moms often report experiences of racial stereotyping that lead providers to offer care that is unnecessary, absent, or improperly tailored to meet their specific needs.[69] In recent reporting by ProPublica and National Public Radio, Black mothers and their surviving relatives from across the country have shared stories of severe health issues or death during childbirth and postpartum, resulting from conditions including hemorrhaging, fibroids, preeclampsia, uterine rupture, spontaneous coronary artery dissection, and peripartum cardiomyopathy.[70] In particular, hemorrhaging is a condition that the medical profession has developed best practices to prevent and treat if due care is taken during pregnancy and postpartum periods, but Black mothers are more likely to die if they experience hemorrhaging than other racial groups.[71] Medical research has also shown that mothers who deliver babies in hospitals that primarily serve Black populations often receive inferior care and have worse health outcomes for both mothers and babies:[72]

69 *See Reproductive Injustice: Racial and Gender Discrimination in U.S. Health Care*, Ctr. for Reprod. Rts. 20 (2014), https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17560_E.pdf.

70 *See* Adriana Gallardo, *Black Women Disproportionately Suffer Complications of Pregnancy and Childbirth. Let's Talk About It*, ProPublica (Dec. 8, 2017), https://www.propublica.org/article/black-women-disproportionately-suffer-complications-of-pregnancy-and-childbirth-lets-talk-about-it.

71 *See id.*; *see also* Nina Martin & Renee Montagne, *Nothing Protects Black Women from Dying in Pregnancy and Childbirth*, ProPublica (Dec. 7, 2017), https://www.propublica.org/article/nothing-protects-black-women-from-dying-in-pregnancy-and-childbirth; *see also* Annie Waldman, *How Hospitals Are Failing Black Mothers*, ProPublica (Dec. 27, 2017), https://www.propublica.org/article/how-hospitals-are-failing-black-mothers.

72 Elizabeth A. Howell et al., *Black-White Differences in Severe Maternal Morbidity and Site of Care*, 214 Am. J. Obstet. & Gynecology 122.E1 (2016) (finding that "women who delivered in high and medium [B]lack-serving hospitals had elevated rates of severe maternal morbidity rates compared with those in low [B]lack-serving hospitals."); Andreea A. Creanga et al., *Performance of Racial and Ethnic Minority-serving Hospitals on Delivery-related Indicators*, 211 Am. J. Obstet. & Gynecology 647.E1 (2014) (finding that

evidence of systemic racism produced by both health provider biases and histories of geographic segregation. Additionally, Black moms repeatedly reported "the feeling of being devalued and disrespected by medical providers," and the data about Black maternal mortality and childbirth-related health complications back up their claims.[73]

Race and gender discrimination are also evinced in the construction of the multiplicity of systems which inform maternal health. Due to the longstanding and continuing impacts of systemic racism, Black women are two times as likely as white women to live in poverty in the U.S.[74] There are significant gaps in economic security between white women and Black women: Black women have higher rates of unemployment and are subjected to pay equity discrimination at higher rates.[75] In health care, Black people delivering babies at U.S. hospitals that serve mostly Black populations have the highest rates of severe maternal morbidity (maternal risk of death) in the nation.[76] A medical literature review of research from 1995–2018 recently found that while Black women and white women use substances and suffer from substance use disorders at approximately the same rates in the U.S., Black women are far more likely to face access barriers to substance use treatment.[77] And in a nation where Black people are two times as likely as white people to be killed by a gun, perhaps no collective of gun violence-survivors has more stories to tell than Black mothers, who have protested against gun violence against their children for generations.[78] Because Black mothers live at the intersections of race and gender discrimination, the rights to equality and nondiscrimination are crucial to understanding Black

"Black-serving hospitals performed worse than other hospitals on 12 of 15 indicators."); Waldman, *supra* note 71.

73 Martin & Montagne, *supra* note 71; *see also* Serena Williams, *How Serena Williams Saved Her Own Life*, ELLE (Apr. 5, 2022), https://www.elle.com/life-love/a39586444/how-serena-williams-saved-her-own-life/ (stating that "[b]eing heard and appropriately treated was the difference between life or death for me.").

74 BMMA TOOLKIT, *supra* note 6, at 22; *see also* Melissa Harris-Perry, *How Our Country Fails Black Women and Girls – And Why We Need to Talk About It*, ELLE (Apr. 28, 2016), https://www.elle.com/culture/career-politics/a35983/melissa-harris-perry-congressional-testimony-black-women-and-girls/.

75 BMMA TOOLKIT, *supra* note 6, at 22.

76 *Id.* at 25; Waldman, *supra* note 71.

77 Michelle L. Redmond et al., *Exploring African American Women's' Experiences with Substance Use Treatment: A Review of the Literature*, 48 J. CMTY. PSYCH. 337, 338 (2020).

78 Arionne Nettles, Opinion, *Black Mothers Are the Real Experts on the Toll of Gun Violence*, N.Y. TIMES (May 6, 2021), https://www.nytimes.com/interactive/2021/05/06/opinion/gun-violence-black-mothers.html; Nidhi Subbaraman, *Homicide Is a Top Cause of Maternal Death in the United States*, NATURE (Nov. 12, 2021), https://www.nature.com/articles/d41586-021-03392-8.

maternal mortality as a human rights issue.

CERD, a treaty which the U.S. has ratified, protects every person's right to enjoy "public health, medical care, social security, and social services" without the experience of racial discrimination.[79] In 2013, the Obama administration provided a periodic report to the CERD committee which detailed some efforts to address systemic discrimination in health care and health outcomes in the U.S.[80] The report identified the Affordable Care Act (ACA), the 2011 Action Plan to Reduce Racial and Ethnic Health Disparities, and the Healthy People 2020 health prevention goals as actions the U.S. has taken to reduce health disparities rooted in racial and ethnic discrimination.[81] The CERD committee was not satisfied with these efforts. In response to the U.S. report, the CERD committee expressed concerns about the state option to opt-out of the expanded Medicaid program under the ACA, thereby weakening the overall effectiveness of the policy, and called upon the U.S. to eliminate racial disparities in sexual and reproductive health and to improve accountability measures to for preventing maternal death.[82]

As discussed above, CEDAW, a treaty which the U.S. has signed, but has not ratified, uses specificity when outlining women's rights to health care and health services.[83] Article 12 demands that countries "take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health-care services, including those related to family planning."[84] Article 12

79 G.A. Res. 2106 (XX), International Convention of the Elimination of All Forms of Racial Discrimination, at 3–4 (July 3, 1966).

> . . . States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably enjoying the following rights: . . . . . .(e) Economic, social, and cultural rights, in particular: . . . . . .(iv) The right to public health, medical care, social security, and social services . . . .

*Id.*; *see also* The Leadership Conf. Educ. Fund, *supra* note 57.

80 U.N. Comm. on the Elimination of Racial Discrimination, *Reports Submitted by States Parties Under Article 9 of the Convention Seventh to Ninth Periodic Reports of States Parties Due in 2011 United States of America*, at 46–47, U.N. Doc. CERD/C/USA/7-9 (Oct. 3, 2013).

81 *Id.*

82 U.N. Comm. on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America*, U.N. Doc. CERD/C//USA/CO7–9 (Sept. 25, 2014).

83 The Leadership Conf. Educ. Fund, *supra* note 57.

84 G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women, art. 12 (Sept. 3, 1981).

goes on to add that countries "shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."[85] Article 14 goes on to demand that the same measures employed to eliminate discrimination be applied to women who live in rural areas to ensure equal accessibility to the services described in Article 12.[86] Failure by the U.S. to ratify CEDAW has been critiqued internationally,[87] and the impact of the decision not to ratify is felt acutely by Black mothers. The provisions that protect women from discrimination in rural maternal health could be of specific assistance to Black mothers in the South, who have the lowest rates of health insurance coverage in the country.[88] They are often faced with provider shortages and a lack of health care infrastructure that limit access to care even before pregnancy.[89]

In many cases, U.S. Supreme Court jurisprudence actively works against the principles encompassed in CERD and CEDAW. The Court has taken a hard stance against characterizing state-implemented policies and practices that unintentionally create disparate impact as illegal,[90] except for a few protections under civil rights statutes like the Fair Housing Act and the employment provisions of the Americans with Disabilities Act.[91] The Court's lack of recognition of disparate impact in a health context will

85 *Id.*

86 *Id.*

87 *See generally* Judith Resnik, *Comparative (in)equalities: CEDAW, The Jurisdiction of Gender, and the Heterogeneity of Transnational Law Production*, 10 INT'L J. CONST. L. 531–50 (2012); *see also* Melanne Verveer & Rangita de Silva de Alwis, *Why Ratifying the Convention on the Elimination of Discrimination Against Women is Good for America's Domestic Policy*, GEO. INST. FOR WOMEN, PEACE, & SEC. (Feb. 18, 2021), https://giwps.georgetown.edu/why-ratifying-the-convention-on-the-elimination-of-discrimination-against-women-cedaw-is-good-for-americas-domestic-policy/; *see also* Liane Schalatek, *CEDAW and the USA: When Belief in Exceptionalism Becomes Exemptionalism*, HEINRICH BÖLL STIFTUNG FOUND. (Dec. 10, 2019), https://www.boell.de/en/2019/12/10/cedaw-and-usa-when-belief-exceptionalism-becomes-exemptionalism.

88 BMMA TOOLKIT, *supra* note 6, at 24.

89 *Id.*

90 *See* Washington v. Davis, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."); *see also* Alexander v. Sandoval, 532 U.S. 275, 281 (2001) (finding that providing a driver's license test in only one language did not discriminate on the basis of national origin because § 601 of the Civil Rights Act (Title VI) prohibits only intentional discrimination).

91 The Supreme Court has found that the Fair Housing Act and the Americans with Disabilities Act allow disparate impact claims. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 534 (2015); Raytheon Co. v. Hernandez, 540 U.S. 44, 53 (2003); *see also* 42 U.S.C. § 12112(b).

continue to create a giant roadblock for targeted maternal health equity programs that seek to call out the disproportionate impact of racism, sexism, and misogynoir on Black moms.

### D. *UN Development Goals*

The UN uses an international goals framework to address major policy initiatives reflected in human rights treaties and other international law. In 2015, the UN adopted seventeen Sustainable Development Goals (SDGs), the third of which is to "[e]nsure healthy lives and promote well-being for all at all ages."[92] The first subsection of this third goal is to "reduce the global maternal mortality ratio to less than 70 per 100,000 live births" by 2030.[93] Prior to the enactment of the SDGs in 2015, the global maternal mortality ratio decreased three percent during the first fifteen years of the new millennium, while the U.S. saw an MMR increase of three percent from during the same period.[94]

Developed in 2015, the SDGs served as a replacement framework for the previous Millennium Development Goals (MDGs), which had focused on developing nations and were established in 2000.[95] The SDGs are both broader, applying to all countries, and more detailed, with subsections that focus on specific implementation metrics.[96] This transition is of particular note in the area of maternal health. There were only eight MDGs, one of which was to improve maternal health, with a target of reducing the global MMR by three quarters between 1990 and 2015.[97] Years before the 2015 deadline, human rights advocates concluded that the goal of reducing maternal mortality by three quarters was the MDG least likely to be achieved.[98] Unfortunately, they were correct; there was only a forty-

92 G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development, at 16 (Oct. 21, 2015).

93 *Id.*

94 U.S. Gov't Accountability Off., GAO-20-248, Maternal Mortality 1 (2020).

95 *The Sustainable Development Agenda*, U.N. Sustainable Dev. Goals, https://www.un.org/sustainabledevelopment/development-agenda/ (last visited Aug. 7, 2021); *see also Background*, U.N. Millennium Dev. Goals & Beyond 2015, https://www.un.org/millenniumgoals/bkgd.shtml (last visited Jan. 28, 2022) (noting that world leaders came together in September 2000 to commit their nations to poverty-reducing targets that became known as the Millennium Development Goals); *see also The 17 Goals*, U.N. Dep't of Econ. & Soc. Affs., https://sdgs.un.org/goals (last visited Mar. 9, 2022).

96 *The Sustainable Development Agenda*, *supra* note 95.

97 *Goal 5: Improve Maternal Health*, U.N. Millennium Dev. Goals & Beyond 2015, https://www.un.org/millenniumgoals/maternal.shtml (last visited Jan. 18, 2021).

98 Cabal & Stroffregen, *supra* note 55, at 2.

five percent reduction in the global MMR between 1990 and 2015.[99] In a publication assessing the success of the MDGs in 2015, the UN noted that "improving maternal health" remained "an unfinished agenda" and that "[i]n-depth analyses reveal[ed] insufficient and greatly uneven progress."[100] However, rather than separating out an SDG to specifically address maternal health, the UN moved the maternal health target under the overall health goal.[101] Reducing the global MMR now sits alongside all the UN's health and wellness targets.

## III. THE REPRODUCTIVE JUSTICE MOVEMENT GROUNDS MATERNAL HEALTH IN A HUMAN RIGHTS FRAMEWORK

The Reproductive Justice movement uses a human rights framework to address maternal health and a range of other issues impacting mothers in the U.S. The work of several key, related organizations, including SisterSong, Women of Color Reproductive Justice Collective, and the Black Mamas Matter Alliance, have helped grow and develop this movement, while maintaining a particular focus on the Reproductive Justice matters that most impact Black mothers, including maternal mortality.

### A. *The Origins of Reproductive Justice*

In 1994, a group of Black women's movement activists united in Chicago and formed what would later be named the Reproductive Justice movement: a movement that would be driven by women of color and poor women, rather than white women with privilege.[102] In the same year, American women of color united at the International Conference on Population and Development in Cairo, Egypt, and coined the term "Reproductive Justice" to describe the movement's principles.[103] The Reproductive Justice movement aims to protect four major rights: (1) the right to not to have a child, (2) the right to have a child, (3) the right to raise children in safe

99 *Goal 5: Improve Maternal Health*, *supra* note 97.

100 U.N., THE MILLENNIUM DEVELOPMENT GOALS REPORT 43 (2015), https://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20(July%201).pdf.

101 *See Goal 3: Ensure healthy lives and promote well-being for all at all ages*, U.N. MILLENNIUM DEV. GOALS & BEYOND 2015, https://www.un.org/sustainabledevelopment/health/ (last visited Jan. 28, 2022).

102 *Reproductive Justice*, SISTERSONG, https://www.sistersong.net/reproductive-justice (last visited Jan. 17, 2021).

103 BMMA TOOLKIT, *supra* note 6, at 16.

and healthy environments, and (4) the right to safe and healthy childbirth.[104] These advocates determined that the Reproductive Justice movement must be rooted in the international human rights framework established by the UDHR, and that it must de-emphasize the "choice" framework traditionally touted by the reproductive rights movement.[105] In their compiled history of the organizing of the Reproductive Justice movement, authors Jael Sillman, Marlene Gerber Fried, Loretta Ross, and Elena R. Gutiérrez define Reproductive Justice as "a theory, a practice, and a strategy," which highlights the movement's focus on supporting BIPOC mothers in developing research, policy, and community organizations that protect their human rights.[106]

Critically, the Reproductive Justice movement differentiates itself from the reproductive rights movement that has historically been utilized by lawyers to defend abortion and contraception rights.[107] While the reproductive rights movement, or more narrowly, the pro-choice movement, has focused on a woman's right to access contraceptives and abortions (i.e., the right to not have a child), this approach does not address rights that have often historically been denied to marginalized mothers. BIPOC mothers, disabled mothers, and mothers without economic resources have, throughout American history, been denied bodily autonomy, the right to have children, and the right to raise their own children.[108] The reproductive rights legal framework deploys U.S. case law protecting privacy rights as a core legal strategy, but that privacy right does not serve to protect individuals whose reproductive freedoms depend upon social welfare programs, government action, or the eradication of discrimination.[109] The Reproductive Justice movement does not center litigation; it instead uses human rights principles to advocate through community-based organizing, research, and policymaking.[110]

Early Black Reproductive Justice advocates also distinguished their priorities from the civil rights framework, and they pushed leading civil rights groups to discuss reproductive freedoms more broadly.[111] As former NAACP

104 *See id.*; Dorothy Roberts, *Reproductive Justice, Not Just Rights*, Dissent (Fall 2015), https://www.dissentmagazine.org/article/reproductive-justice-not-just-rights.

105 Kimala Price, *What is Reproductive Justice?: How Women of Color Activists Are Redefining the Pro-Choice Paradigm*, 10 Meridians 42, 47 (2010).

106 Silliman et al., *supra* note 29, at viii.

107 Zakiya Luna & Kristin Luker, *Reproductive Justice*, 9 Ann. Rev. L. & Soc. Sci. 327, 333 (2013).

108 *Id.*

109 *Id.* at 334–36.

110 *Id.* at 338.

111 *See* Charlotte Rutherford, *Reproductive Freedoms and African American Women*, 4 Yale J. L. & Feminism 255, 255 (1992).

Legal Defense Fund (LDF) counsel Charlotte Rutherford wrote, until the 1990s, LDF did not add reproductive choice or reproductive freedoms to their platforms because there was polarization about the topic of abortion amongst many civil rights leaders, particularly the male leadership.[112] Following *Webster v. Reproductive Health Services*[113] in 1989, a group of Black women's group leaders met with staff at the LDF to advocate that LDF take a position on reproductive health for Black women, which LDF had never done previously.[114] In response to this meeting and continued follow-up conversations with advocates and experts, LDF identified a list of reproductive health priorities, stating that:

> At a minimum, reproductive freedoms for poor women should include: 1) access to reproductive health care; 2) access to early diagnosis and proper treatment for AIDS, sexually transmitted diseases, and various cancers; 3) access to prenatal care, including drug treatment programs for pregnant and parenting [people who use drugs]; 4) access to appropriate contraceptives; 5) access to infertility services; 6) freedom from coerced or ill-informed consent to sterilization; 7) economic security, which could prevent possible exploitation of the poor with surrogacy contracts; 8) freedom from toxins in the workplace; 9) healthy nutrition and living space; and 10) the right to safe, legal, and affordable abortion services.[115]

Like the Black advocates who approached LDF in the early 1990s, Reproductive Justice movement organizers have succeeded in pushing reproductive rights advocates toward a narrative that better reflects intersectional justice and at responding to racism that harms Black mothers' health. In 2004, as reproductive rights advocates organized what they planned to call "The March for Freedom of Choice," organizers from the Black Women's Health Imperative and the National Latina Institute for Reproductive Health pushed against this title, and the march was renamed "The March for Women's Lives."[116] The resulting march was one of the

112 *Id.* at 256–57.

113 Webster v. Reprod. Health Servs., 492 U.S. 490, 520 (1989) (finding that a Missouri statute requiring maternal care providers to test the "viability" of a fetus before referring a woman to abortion care was constitutional because of "the State's interest in protecting potential human life").

114 Rutherford, *supra* note 111, at 256–57.

115 *Id.* at 258–59.

116 SILLIMAN ET AL., *supra* note 29, at ix; Sangeeta Ahmed et al., *March for Women's Lives*, THE FEMINIST COMBINING PROCESS, http://avery.wellesley.edu/Economics/jmatthaei/transformationcentral/combining/combiningmarchwomenslives.html (last visited May 8, 2022).

largest marches in U.S. history.[117] In 2010, when a racist, anti-abortion billboard campaign launched in states around the country, using slogans including "The Most Dangerous Place for an African American is in the Womb," the organizations SisterSong, SPARK Reproductive Justice NOW, Black Women's Health Imperative, and others united to form the Trust Black Women Partnership and successfully fought to have the billboards removed from these regions.[118] Since the advent of the Hyde Amendment, a provision of the federal budget that prevents individuals from using federal funds—such as Medicaid—to fund elective abortion procedures, the Reproductive Justice movement has pushed back against the oppressive impact of the Hyde Amendment on poor mothers and BIPOC mothers.[119] In 2021, the Reproductive Justice movement's years of advocacy against the Hyde Amendment paid off when President Biden chose not to include the amendment in his proposed budget to Congress, and the House initially approved a budget that did not include the Hyde Amendment.[120] Though the Senate added the Hyde Amendment back into the 2022 budget in March 2022, the Biden Administration's 2023 budget proposal also excludes Hyde.[121]

There are also many examples of Black mothers throughout the country who have taken it upon themselves to educate and uplift other moms who may face discrimination or racism in their motherhood experiences and to provide them with the infrastructures to survive and birth babies safely.

117 Silliman et al., *supra* note 29, at ix.

118 *Id.* at x; Dorothy Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty xiv–xv (2017) (20th anniversary ed.); *see also* Shaila Dewan, *Anti-Abortion Ads Split Atlanta*, N.Y. Times, (Feb. 5, 2010), https://www.nytimes.com/2010/02/06/us/06abortion.html?_r=0; Lisa Eadicicco & Larry McShane, *Anti-abortion Billboard by Life Always Goes Up in SoHo, Riles Up Pro-choice New Yorkers, Politicians*, N.Y. Daily News, (Feb. 23, 2011), https://www.nydailynews.com/new-york/anti-abortion-billboard-life-soho-riles-pro-choice-new-yorkers-politicians-article-1.138682.

119 *See Hyde Amendment: Going Back to Basics*, Nat'l Network of Abortion Funds (Oct. 6, 2019), https://abortionfunds.org/hyde_back_to_basics/; Mackenzie Darling, *No More Hyde and Seek: Biden's Removal of the Hyde Amendment From the Proposed Budget Is A Win for Abortion Access*, Northeastern Univ. L. Rev. F. (July 30, 2021), https://nulronlineforum.wordpress.com/2021/07/30/nomorehydeandseek/.

120 Darling, *supra* note 119.

121 Burgess Everett & Jennifer Scholtes, *Senate Gives Final OK to $1.5T Government Funding Bill*, Politico (Mar. 10, 2022), https://www.politico.com/news/2022/03/10/senate-spending-bill-vote-00016079; *Biden-Harris Administration Releases Its Second Presidential Budget Without Hyde Amendment; Includes Critical Domestic and Global Family Planning Investments*, Planned Parenthood (Mar. 28, 2022), https://www.plannedparenthood.org/about-us/newsroom/press-releases/biden-harris-administration-releases-its-second-presidential-budget-without-hyde-amendment-includes-critical-domestic-and-global-family-planning-investments.

In 1991, Shafia M. Monroe moved across the country during a pregnancy and discovered that her new location lacked any Black midwives to deliver her newborn at home.[122] Already an infant and maternal health activist, the experience catalyzed her founding of the International Center for Traditional Childbearing (ICTC), an organization which has since trained thousands of midwives and doulas throughout the U.S., with a particular focus on training midwives of color and amplifying their voices.[123] After surviving a postpartum cardiomyopathy in 1992, as well as ongoing, life-threatening heart complications, Anner Porter founded Fight Against Peripartum and Postpartum Cardiomyopathy, a nonprofit organization dedicated to educating other women about the condition.[124] She authored a book on the topic and now hosts a podcast titled "Cardiac Emergency for Pregnant Women."[125] Porter had a successful heart transplant in 2020, and she continues to share her story through speaking engagements, publishing writings, podcasting, and engaging in other forms of activism.[126] After being profoundly impacted by her positive experience giving birth to her child in 2003, Latham Thomas, a wellness advocate and birth worker, founded MamaGlow in New York City, a company that trains doulas and other birth care workers, and offers a "full spectrum approach to holistic wellness" for mothers-to-be and new moms.[127] Kay Matthews, a mother in Texas, delivered a stillborn baby in 2013 and experienced declining mental health as a result.[128] She founded Shades of Blue Project, an organization whose mission is "to help[] women before, during and after child-birth with community resources, mental health advocacy, treatment and support" and "to change the way women are currently being diagnosed and treated after giving birth and experiencing any adverse maternal mental health outcome."[129] She also published a self-help book about mental health recovery and a guided journal to support other mothers recovering from adverse maternal health experiences.[130] In 2021, actress Tatyana Ali testified

122 *Shafia M. Monroe's Biography*, SHAFIA MONROE CONSULTING, https://shafiamonroe.com/about-shafia-monroe/shafia-monroe/ (last visited Mar. 19, 2022).

123 *Id.*

124 Gallardo, *supra* note 70; *Who is Anner Porter*, ANNER T. PORTER & CO., https://www.annerporterco.com/ (last visited Mar. 19, 2022).

125 *Who is Anner Porter*, *supra* note 124.

126 *Id.*

127 *About MamaGlow*, MAMAGLOW, https://mamaglow.com/about/ (last visited Mar. 19, 2022); Nina Bahadur, *9 Organizations Working to Save Black Mothers*, SELF (Oct. 22, 2019), https://www.self.com/story/organizations-activists-fighting-black-maternal-mortality.

128 Bahadur, *supra* note 126.

129 *Mission*, SHADES OF BLUE PROJECT, https://www.shadesofblueproject.org/ (last visited Mar. 19, 2022).

130 *Founders & Volunteers*, SHADES OF BLUE PROJECT, https://www.shadesofblueproject.org/

in the House Committee on Oversight and Reform in Congress about her own traumatic experience of giving birth as a Black mother in the U.S. in order to educate decision-makers.[131] She recounted her experience of being dismissed by her doctor when asking a question, and she described being pushed forcefully by a doctor in the delivery room.[132] The Reproductive Justice movement is anchored by Black mothers who have chosen to speak out about their experiences, educate and organize their own communities, and who are uniquely positioned to transform the birth systems in the U.S. through their storytelling.

These wins demonstrate that when communities led by BIPOC women and mothers organize at the intersections of race, gender, and class, they have the power to uproot the status quo. Whether the Reproductive Justice movement is challenging the branding of a predominantly white feminist movement, pushing back against the racism of anti-abortion organizations, or fighting for federal funds to support reproductive freedoms, this movement has shown that its human rights framework and organizing principles have the power to lead to lasting, anti-racist change.

### B. *Black Mamas Matter Alliance and Strategies of the Reproductive Justice Movement*

In 2015, an existing partnership between SisterSong, Women of Color Reproductive Justice Collective, and the Center for Reproductive Rights gave rise to the Black Mamas Matter Alliance (BMMA), after the organizations convened a meeting of experts, activists, and stakeholders.[133] The BMMA centers human rights in its approach to Black maternal health.[134] It describes itself as "a national cross-sectoral, multidisciplinary network of Black women leaders and organizations working to improve equity and outcomes in U.S. maternal health."[135]

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founders-and-volunteers (last visited Mar. 19, 2022).

131 Donna M. Owens, *Birthing While Black Congressional Hearing Amplifies Black Maternal Health Crisis*, Essence (May 11, 2021), https://www.essence.com/news/birthing-while-black-congressional-hearing-amplifies-black-maternal-health-crisis/.

132 *Id.*

133 *About*, Black Mamas Matter All., https://blackmamasmatter.org/about/ (last visited Jan. 18, 2021).

134 *Id.*

135 Letter from Black Mamas Matter All. & Ctr. for Reprod. Rts. to Dubravka Simonovic, UN Special Rapporteur on Violence against Women 1 (May 17, 2019), https://www.ohchr.org/Documents/Issues/Women/SR/ReproductiveHealthCare/Black%20Mamas%20Matter%20Alliance%20and%20the%20Center%20for%20Reproductive%20Rights.pdf [hereinafter *Letter to UN Special Rapporteur on Violence Against Women*].

One of the strategies for change that emerged out of the 2015 conversation was the Black Mamas Matter Toolkit, titled *Black Mamas Matter: Advancing the Human Right to Safe and Respectful Maternal Health Care*, which was first published in 2016, and updated in 2018.[136] The toolkit expounds upon a framework for technical guidance from the Office of the UN High Commissioner on Human Rights and uses this document to frame some of the policy solutions identified as necessary to address and improve Black maternal health.[137] Using general principles from the technical guidance report, the toolkit breaks the principles into five categories as applied to the U.S.: improving health care access and quality; addressing underlying determinants of health; eliminating discriminatory laws and practices; ensuring accountability; and inclusion and empowerment.[138]

BMMA, SisterSong, the Black Women's Health Imperative, and other allied organizations have used both international and domestic advocacy tactics to promote a Reproductive Justice policy agenda. Some of these tactics have included submitting shadow reports to treaty monitoring bodies of the UN and responding to calls from UN Special Rapporteurs for specific information on human rights issues in the U.S.

In 2014, the Center for Reproductive Rights, SisterSong, and the National Latina Institute for Reproductive Health submitted a shadow report to the UN Committee on the Elimination of Racial Discrimination, the treaty monitoring body for CERD, detailing the disparities in maternal mortality rates and maternal health for Black women and noncitizen women in the U.S.[139] Their recommendations to improve maternal health for Black mothers called upon the U.S. to increase access to health insurance for mothers living in states that have not expanded Medicaid and to increase access to pre and postnatal public health services.[140] Additionally, they called upon the U.S. to improve accountability mechanisms for preventing maternal mortality by tracking data about health disparities and aggregating

136 BMMA TOOLKIT, *supra* note 6, at 5.

137 *Id.* at 16.

138 *Id.* at 16–17; *see also* U.N. High Commissioner for Human Rights, *Technical Guidance on the Application of a Human Rights Based Approach to the Implementation of Policies and Programmes to Reduce Preventable Maternal Morbidity and Mortality: Rep. of the Off. of the U.N. High Comm'r for Human Rts.*, U.N. Doc. A/HRC/21/22. (July 2, 2012) (presenting human rights-based maternal health strategy recommendations for world policymakers developed by the U.N. Human Rights Council to the U.N. General Assembly).

139 *See generally Reproductive Injustice: Racial and Gender Discrimination in U.S. Health Care*, *supra* note 69 (NGO reporting on the intersection of race and gender discrimination in the health care system to the UN CERD committee, a treaty-monitoring body for the UN).

140 *Id.* at 28.

maternal mortality data by gender, race, and age.[141]

Similarly, in 2019, BMMA and the Center for Reproductive Rights wrote to the UN Special Rapporteur on Violence Against Women in response to an open call for submissions about violence against women during childbirth.[142] In their report, they provided specific examples of disrespect, abuse, and mistreatment by health care facilities during birth and prenatal care.[143] They also outlined how the U.S. medical delivery system places significant burdens on patients, particularly patients who already face race and poverty barriers, and they explained how the existing legal accountability mechanisms in the U.S. make it difficult to hold actors accountable for human rights violations.[144] Amidst many recommendations, the report called on the UN Special Rapporteur to recommend that member countries "enact and implement human rights-based national standards," and the report cited strategies that had been effective on a smaller scale when implemented by BMMA and their partner organizations.[145] Some of these recommendations included promoting human rights-based education on respectful maternity care to health care providers, funding doulas and other community-based birth workers, and involving women and girls in the revision of maternal health policies.[146]

BMMA has also engaged in domestic advocacy to influence legislation at the federal level. In 2017, BMMA hosted the first Congressional briefing on Black maternal health in Washington, D.C.[147] In 2018, BMMA began an annual Black Maternal Health Week campaign.[148] BMMA and allied organizations also encourage engagement in local and state-level advocacy solutions; the BMMA toolkit calls on advocates to encourage state governments to embrace human rights approaches to health systems and to drive local policy solutions.[149]

## IV. U.S. Federal Policy Will Always Fall Short If It Fails to Center Black Moms

U.S. health policy does not focus on or center the unique intersections between race, gender, and motherhood. Despite enormous movement in

141 *Id.*
142 *See generally Letter to UN Special Rapporteur on Violence Against Women*, *supra* note 135.
143 *Id.* at 2–4.
144 *Id.* at 2, 5.
145 *Id.* at 6–8.
146 *Id.* at 8.
147 BMMA Toolkit, *supra* note 6, at 4.
148 *Id.*
149 *Id.* at 15.

American health policy in the twenty-first century, efforts to stretch health insurance coverage and expand resources have often missed the very people who most require these services, especially Black mothers.

In 2010, the passage of the Affordable Care Act (ACA) included a provision for the expansion of the Medicaid program, a program that provides low-income Americans with health coverage.[150] Many pregnant mothers already had access to Medicaid coverage prior to the passage of the ACA because pregnant women who met the income eligibility requirements were one of the covered populations,[151] but shortages of healthcare providers and lack of healthcare system infrastructure still made it difficult for many to access preconception care.[152] In many states, the expansion of Medicaid makes health insurance available to low-income mothers prior to pregnancy and after sixty days postpartum.[153] But, the Supreme Court's decision in *National Federation of Independent Businesses v. Sebelius* gave states the option to opt out of the federal expanded Medicaid program.[154] The majority of states that have opted out of the expanded Medicaid program are Southern states with high Black maternal mortality rates, leaving Black mothers, already facing limited healthcare options and systemic racism in those options that they can access, without coverage.[155]

In addition to the expansion of the Medicaid program, the ACA made health insurance available to more people by creating a marketplace that allowed those without employer-sponsored health insurance to purchase it online.[156] The ACA marketplace includes income-based cost-sharing subsidies for individuals making 400% of the poverty level or less, meaning an individual may qualify to have some percentage of their premium payments covered by the federal government, depending on their yearly income.[157] However, the premium and deductible payments for this

150 *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); *see also Affordable Care Act Medicaid Expansion*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/research/health/affordable-care-act-expansion.aspx (last visited Jan. 28, 2022).

151 42 C.F.R. § 435.116 (2022).

152 BMMA TOOLKIT, *supra* note 6, at 24.

153 *Medicaid Postpartum Coverage Extension Tracker*, KAISER FAM. FOUND. (Mar. 31, 2022), https://www.kff.org/medicaid/issue-brief/medicaid-postpartum-coverage-extension-tracker/.

154 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 585 (2012).

155 BMMA TOOLKIT, *supra* note 6, at 24.

156 *See generally* HEALTHCARE.GOV, https://www.healthcare.gov/ (last visited Jan. 28, 2022).

157 Daniel McDermott et al., *Impact of Key Provisions of the American Rescue Plan Act of 2021 COVID-19 Relief on Marketplace Premiums*, KAISER FAM. FOUND. (Mar. 15, 2021), https://www.kff.org/health-reform/issue-brief/impact-of-key-provisions-of-the-american-rescue-plan-act-of-2021-covid-19-relief-on-marketplace-premiums/.

program are notoriously expensive and cost-prohibitive for individuals who are impacted by the ACA's subsidy cliff, and before the American Rescue Plan Act was passed in response to the COVID-19 pandemic, an estimated 8 million individuals who qualified for ACA marketplace coverage were paying a nonsubsidized or full price.[158] Although the American Rescue Plan Act, which passed in 2021, has lowered the cost-sharing burden for most individuals with marketplace plans and raised enrollment rates, if the Act expires, the costs of ACA marketplace insurance may return to their previously inaccessible rates.[159]

While expansive, the ACA has failed to serve many Black mothers. Black women continue to have lower rates of health insurance coverage than the rest of the population, especially in Southern states that have not authorized expanded Medicaid.[160] Even for those with insurance, health insurance access alone does not ensure Reproductive Justice. While universal health insurance is a critical part of the right to health, health insurance alone cannot achieve an end to racism experienced by mothers in the U.S. that too often results in death.

One recent legislative measure related to maternal mortality in the U.S. has made its way into law. In 2018, then-President Trump signed the Preventing Maternal Deaths Act (PMDA).[161] Though a federal act, the PMDA's structure instructs states to implement strategies to gather better data on maternal death.[162] The statute creates a structure for "Maternal Mortality Review Committees" made up of medical professionals and experts at the state or tribal level, whose primary roles are to improve data collection about maternal death and to receive and address confidential complaints.[163] While the PMDA's funding of such committees creates a better data system for understanding of the U.S. maternal mortality crisis, the role of the Maternal Mortality Review Committees, as legislated, does not serve to prevent maternal death. The PMDA allocates funding to the Maternal Mortality Review Committees to review data about maternal mortality; it does not provide funding for these committees to implement evidence-based solutions in their communities, and it therefore does not take

158 *Id.*

159 *See id.*; *see also* Kate Masters, *Virginia Health Insurance Premiums Are Still Too High for Many Customers, Report Finds*, Va. Mercury (Nov. 16, 2021), https://www.virginiamercury.com/2021/11/16/virginia-health-insurance-premiums-are-still-too-high-for-many-customers-report-finds/.

160 BMMA Toolkit, *supra* note 6, at 24.

161 *See* Preventing Maternal Deaths Act of 2018, Pub. L. No. 115-344, 132 Stat. 5047, 5048 (2018).

162 *Id.*

163 *Id.*

active steps towards achieving a lower MMR.[164] The Act does not make any mention of race or racial health disparity, which legal anthropologist scholar Khiara M. Bridges argues was unfortunately essential to ensure passage of the law.[165] She states that a problem with the Act "is that the failure to acknowledge the maternal health tragedy as a tragedy of racial inequality limits the Act's potential to be an effective means of reducing or eliminating racial disparities in maternal mortality."[166]

In the maternal health space, there is a striking disconnect between federal U.S. policy and community-centered, human rights-driven Reproductive Justice models. U.S. government materials often consider racial disparity in maternal health as a passing afterthought, rather than imbuing solutions to address this issue into policies. A GAO report released in March of 2020 broke down maternal mortality across racial groups,[167] but dove no deeper into the causes of the death rate disparities between non-Hispanic Black mothers and other segments of the population. While programs like the Maternal and Child Health block grants deploy institutional experts to channel funding to proposed data collection strategies,[168] BIPOC women-led organizations like SisterSong, BMMA, and their affiliated community organizations provide trainings for activists, advocates, and care providers who address on-the-ground needs.[169] What U.S. policymakers fail to consider in casting aside the Black maternal death rate as an outlier problem are the ways that centering the tragedy of Black maternal death could decrease the maternal mortality rate across all racial groups and uphold international treaty obligations that the U.S. has long failed to meet.

## CONCLUSION

The Black maternal health crisis in the U.S. is a representation of the human rights American policymakers are willing to ignore to preserve the false narratives that uphold white supremacy. If policymakers centered the effective, system-wide strategies proposed by Black mothers to improve Black maternal health, we would likely see change not only in the maternal mortality rate, but in health outcomes throughout the nation. Pregnant women

164 *See id.*, *see also* Khiara M. Bridges, *Racial Disparities in Maternal Mortality*, 95 N.Y.U. L. REV. 1229, 1236 (2020).

165 Bridges, *supra* note 164.

166 *Id.*

167 *See* U.S. GOV'T ACCOUNTABILITY OFF, *supra* note 94, at 2.

168 *Id.* at 24–25.

169 *See* BLACK MAMAS MATTER ALL., *supra* note 133; *RJ Training & Leadership Development*, SISTERSONG, https://www.sistersong.net/ (last visited May 8, 2022).

and Black individuals were not proportionately represented in COVID-19 vaccine trials, but by centering the needs and perspectives of Black mothers in future vaccine development, we might see both populations adequately represented in future vaccine studies.[170] We might see robust efforts to fund social welfare programs such as cash assistance, expanded Medicaid, and food assistance, rather than many of the non-evidence-based programs that the PRWORA currently grants states block grants to fund.[171] We might see more salient efforts from more policymakers to provide affordable health insurance to everyone through an effort like Medicare for All. And we might see more resources invested in sexual education programs, substance misuse prevention programs, mental health services, and public education and training programs for our youth. These solutions combat Black maternal mortality, but they do so much more. Simply put, if U.S. policymakers are not focused on preventing our country's systems from disproportionately killing Black mothers, they are likely negating opportunities to transform the national health care system, opportunities to address racial injustice, and opportunities to provide stronger futures for our children. Addressing Black maternal death forces U.S. policymakers to holistically confront our human rights abuses and develop nuanced solutions that uplift not only Black moms, but individuals throughout our national systems.

A shining light in February 2021 was the introduction of the Black Maternal Health Momnibus Act of 2021 by the Congressional Black Maternal Health Caucus, led by Congresswomen Alma Adams and Lauren Underwood.[172] This legislation includes twelve individual bills that have now been combined into one set of legislation to address Black maternal health priorities.[173] These priorities range from the social determinants of health, to health insurance coverage, to further research on Black maternal death.[174] The reach of the Momnibus Act includes meeting needs that have an impact on maternal health, including providing housing, transportation, and healthy food, as well as funding the community-based organizations that

170 *See* Stacey D. Stewart, *We Need to Enroll Pregnant Women in Clinical Trials for the Coronavirus Vaccines*, Wash. Post (Feb. 9, 2021,) https://www.washingtonpost.com/opinions/2021/02/09/covid-vaccines-pregnant-women-clinical-trials/; *see also* Rueben C. Warren et al., *Perspective: Trustworthiness Before Trust — Covid-19 Vaccine Trials and the Black Community*, 383 New England J. Med. 121 (2020), https://www.nejm.org/doi/full/10.1056/NEJMp2030033.

171 *See* A Welfare Check *supra* note 51.

172 *Black Maternal Health Momnibus*, U.S. House of Representatives Black Maternal Health Caucus, https://blackmaternalhealthcaucus-underwood.house.gov/Momnibus (last visited Jan. 7, 2022).

173 *Id.*

174 *Id.*

are already doing maternal health work.[175] Additionally, the Momnibus Act calls for the diversification of the maternal health workforce so that mothers receive care that is culturally competent.[176] It addresses meeting the needs of specific populations, including moms who are veterans, incarcerated moms, and moms with mental illness or substance use disorders.[177] Comprehensive legislative packages like the Momnibus legislation are a direct result of the Reproductive Justice movement's persistent organizing and activism. Though groups like SisterSong, BMMA, and Center for Reproductive Rights have focused their human rights advocacy on international reporting mechanisms, the Momnibus bill is evidence that Reproductive Justice advocates have packaged the human rights framework as an effective policy strategy for reducing maternal mortality.

The work of the Reproductive Justice movement, BMMA, SisterSong, and allied organizations demonstrates that Black mothers organizing know how to prevent maternal death in the U.S. Through the Reproductive Justice movement tactics, grounded in human rights principles, they have provided the U.S. with a playbook to decrease maternal mortality and save Black lives. It is past time policymakers listened to them.

175 *Id.*
176 *Id.*
177 *Id.*

# MAKING INTERDISCIPLINARY COLLABORATION BETWEEN SOCIAL WORKERS AND LAWYERS POSSIBLE

*By Annery Miranda**

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## INTRODUCTION

Since the passage of the Child Abuse Prevention and Treatment Act (CAPTA) in 1974, public consciousness regarding the role of child protective services (CPS) has tilted in favor of strict and punitive measures.[1] The societal impulse to develop interventions that are proportional to the outrageous nature of child abuse has my sympathies. Virtually no one would disagree with the idea that children should not be abused or neglected or that society should do as much as it possibly can to ensure children are safe. However, the mechanisms that were created to address child abuse and neglect have, in the end, done more harm than good. The vast majority of cases reported to CPS each year are unsubstantiated.[2] Only a small portion of cases actually involve potential physical harm to children.[3] Most of the cases that get screened fall in the "neglect" category, which overwhelmingly includes situations that are collateral to being poor.[4] Due to broad definitions of neglect, "poverty itself is often mistaken for neglect."[5] The connection between housing instability, for example, and child welfare system involvement

1 *See Interview: Martin Guggenheim*, PBS: FRONTLINE, https://www.pbs.org/wgbh/pages/frontline/shows/fostercare/inside/guggenheim.html (last visited Sept. 11, 2021).

2 *Id.*; *Child Maltreatment 2019: Summary of Key Findings*, CHILD'S BUREAU (Apr. 2021), https://www.childwelfare.gov/pubpdfs/canstats.pdf; Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1732–33 (2000) (book review).

3 *Interview: Martin Guggenheim*, *supra* note 1.

4 Gary B. Melton, *Mandated Reporting: A Policy Without Reason*, 29 CHILD ABUSE & NEGLECT 9, 11 (2005) (quoting US Advisory Board on Child Neglect and Abuse, "Even the psychological variables that are associated with child maltreatment—depression, low self-esteem, sense of powerlessness, general inadequacy, impulsivity, substance abuse—relate directly to ability to cope with poverty."). The term "poor" as opposed to "low-income" is used deliberately in this article. "Low-income" narrowly focuses on how much money a person makes; whereas the phenomenon of poverty encompasses the broader array of circumstances which afflict poor people and include a lack of choice, difficulties with upward mobility and a feeling of being stuck. As a derivative of the word "poverty," "poor" better encapsulates this phenomenon than "low income." A contemporary example of the way the term is being used is the revival of Dr. Martin Luther King's "Poor People's Campaign" by Reverend William Barber in order to "creat[e] a national platform to address the intersecting effects of poverty." Jelani Cobb, *William Barber Takes on Poverty and Race in the Age of Trump*, NEW YORKER (May 7, 2018), https://www.newyorker.com/magazine/2018/05/14/william-barber-takes-on-poverty-and-race-in-the-age-of-trump.

5 Maren K. Dale, *Addressing the Underlying Issue of Poverty in Child-Neglect Cases*, A.B.A. (Apr. 10, 2014), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2014/addressing-underlying-issue-poverty-child-neglect-cases/.

has been well established,[6] with one in six CPS-involved families investigated specifically for housing problems.[7] Instead of meaningfully assisting families facing poverty, the preference is to make reports and referrals to a system that does not have the resources to assist[8] and, instead, relies on punitive mechanisms to threaten families into compliance.[9]

In recent years, the media has increasingly brought attention to such issues and to the overrepresentation of families of color within the CPS system.[10] Critics have pointed out that the so-called child welfare

6 Katherine E. Marcal, *The Impact of Housing Instability on Child Maltreatment: A Causal Investigation*, 21 J. Fam. Soc. Work 331, 331–32 (2018) ("An examination of the scope of housing problems among a nationally representative sample of child welfare–involved families found housing instability contributed to risk for foster care placement for one in six children under investigation for maltreatment; moreover, housing problems delayed reunification of children already placed out of home."); Jerry Milner & David Kelly, *It's Time to Stop Confusing Poverty with Neglect*, Imprint (Jan. 17, 2020), https://imprintnews.org/child-welfare-2/time-for-child-welfare-system-to-stop-confusing-poverty-with-neglect/40222 ("Children were removed from their parents due to chronic homelessness or housing instability. The children of a young, single mother were removed solely due to an eviction. She had hoped that the system would rally to help her find decent, safe housing only to be told 'you must comply with this or that in your case plan in order to regain custody.'"); Jody Hearn Escaravage, *Child Maltreatment Entrenched by Poverty: How Financial Need Is Linked to Poorer Outcomes in Family Preservation*, Child Welfare, 2014, at 79, 83.

7 Patrick J. Fowler, *U.S. Commentary: Implications from the Family Options Study for Homeless and Child Welfare Services*, Cityscape, 2017, at 255.

8 *See* Letter from Michael Dsida, Deputy Chief Couns., Child. & Fam. L. Div., Comm. for Pub. Couns. Servs., to Mandated Rep. Comm'n (Apr. 21, 2021), https://www.mass.gov/doc/cpcs42121/download ("Sadly, DCF's dysfunctions are long-standing, as illustrated by prior reports of the Child Advocate and others.").

9 *See* Mical Raz, *Unintended Consequences of Expanded Mandatory Reporting Laws*, Pediatrics, Apr. 2017, at 1, 2 ("Well-intentioned individuals may be more inclined to report suspicions of maltreatment rather than attempt to assist families, a concern that is particularly relevant in cases of low-income families suspected of neglect. Rather than stepping in to assist needy families with resources, the new mandatory reporting laws may lead individuals to report underfed or poorly dressed children."); Melton, *supra* note 4, at 12–13 ("The call is treated as an allegation of wrongdoing, not a concerned neighbor's plea for help.").

10 *See* Sarah Stillman, *America's Other Family-Separation Crisis*, New Yorker (Oct. 29, 2018), https://www.newyorker.com/magazine/2018/11/05/americas-other-family-separation-crisis; Raz, *supra* note 9; Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, Imprint (June 16, 2020), https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480; Molly Schwartz, *Do We Need to Abolish Child Protective Services?*, Mother Jones (Dec. 10, 2020), https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services/; Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of 'Jane Crow,'* N.Y. Times (July 21, 2017), https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html.

system is, in fact, a carceral mechanism[11] of punishing poverty, of exerting social control over families of color, and is largely ineffective at preventing child abuse and neglect. Over the last few decades, vernacular has been increasingly emerging to capture these criticisms such as "Jane Crow"[12] and "the family regulation system."[13] Instrumental to the operation of CPS are the mandated reporters who are tasked by statute in every jurisdiction in the United States with reporting suspicions of child neglect and abuse. While there are some variations across states, every jurisdiction includes doctors,[14] teachers, and social workers among the enumerated professionals who are required to report on families.[15]

11 Schwartz, *supra* note 10.

12 *See* Clifford & Silver-Greenberg, *supra* note 10.

13 Emma Williams, *'Family Regulation,' Not 'Child Welfare,': Abolition Starts with Changing Our Language*, IMPRINT (July 28, 2020), https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language/45586#:~:text=The%20family%20regulation%20system%2C%20a,offers%20two%20important%20interventions%20to; Ava Cilia, *The Family Regulation System: Why Those Committed to Racial Justice Must Interrogate It*, HARV. C.R.-C.L. L. REV. (Feb. 17, 2021), https://harvardcrcl.org/the-family-regulation-system-why-those-committed-to-racial-justice-must-interrogate-it/; *Family Defense Advocates Urge Albany to Reform Family Regulation System*, BRONX DEFS. (May 3, 2021), https://www.bronxdefenders.org/family-defense-advocates-urge-albany-to-reform-family-regulation-system/.

14 Monrad G. Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1, 6 (1967) ("In all the states having child abuse legislation, medical doctors are covered by reporting laws, either by express terms referring to them or because they are obviously in the class 'any person.'"); CHILD.'S BUREAU, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 2 (2019), https://www.childwelfare.gov/pubpdfs/manda.pdf.

15 CHILD.'S BUREAU, *supra* note 14, at 2; ALA. CODE § 26-14-3 (2017); ALASKA STAT. ANN. § 47.17.020 (West 2021); ARIZ. REV. STAT. ANN. § 13-3620 (2019); ARK. CODE ANN. § 12-18-402 (West 2021); CAL. PENAL CODE § 11165.7 (West 2021); COLO. REV. STAT. ANN. § 19-3-304 (West 2022); CONN. GEN. STAT. ANN. § 17a-101 (West 2020); DEL. CODE ANN. tit. 16, § 903 (West 2021); FLA. STAT. ANN. § 39.201 (West 2021); GA. CODE ANN. § 19-7-5 (West 2021); HAW. REV. STAT. ANN. § 350-1.1 (West 2021); IDAHO CODE ANN. § 16-1605 (West 2018); 325 ILL. COMP. STAT. ANN. 5/4 (West 2022); IND. CODE ANN. § 31-33-5-1 (West 1997); IOWA CODE ANN. § 232.69 (West 2019); KAN. STAT. ANN. § 38-2223 (West 2016); KY. REV. STAT. ANN. § 620.030 (West 2020); LA. CHILD. CODE ANN. art. 603 (2021); ME. REV. STAT. ANN. tit. 22, § 4011-A (West 2016); MD. CODE ANN., FAM. LAW § 5-704 (West 2019); MASS. GEN. LAWS ANN. ch. 119, §§ 51A, 21 (West 2020); MICH. COMP. LAWS ANN. § 722.623 (West 2016); MINN. STAT. ANN. § 260E.06 (West 2020) (The words "social worker," "physician," and "teacher" do not appear in the list of mandatory reporters; instead these professions are included through the inclusion of a broader category: "a professional . . . who is engaged in the practice of the healing arts, social services, hospital administration, psychological or psychiatric treatment, child care, education . . . ."); MISS. CODE ANN. § 43-21-353 (West 2019) (including, in addition to physicians, social workers, and school employees, attorneys as mandated reporters); MO. ANN. STAT. § 210.115 (West

Acknowledging the damage that family separation is wreaking on marginalized communities, some social workers have fled to legal settings, at least partially motivated by a desire to resist the mandated reporting role and, in doing so, more effectively[16] helping families facing poverty in

2021); Mont. Code Ann. § 41-3-201 (West 2021) (specifying that social workers who are mandated reporters are those who are licensed); Neb. Rev. Stat. Ann. § 28-711 (West 2012) (naming physicians, school employees, and social workers, and mandating "[w]hen . . . any other person has reasonable cause to believe that a child has been subjected to child abuse or neglect . . . he or she shall report"); Nev. Rev. Stat. Ann. § 432B.220 (West 2022) (providing that *licensed* social workers are considered mandated reporters in addition to physicians and school employees); N.H. Rev. Stat. Ann. § 169-C:29 (1979); N.J. Stat. Ann. § 9:6-8.10 (West 2019) (universal mandated reporting law); N.M. Stat. Ann. § 32A-4-3 (West 2021) (universal mandated reporting law excluding privileged information); N.Y. Soc. Serv. Law § 413 (McKinney 2022); N.C. Gen. Stat. Ann. § 7B-301 (West 2016) (universal mandated reporting law); N.D. Cent. Code Ann. § 50-25.1-03 (West 2021) (specifying *licensed* social worker); Ohio Rev. Code Ann. § 2151.421 (West 2021) (listing attorneys as mandated reporters); Okla. Stat. Ann. tit. 10A, § 1-2-101 (West 2022) (universal mandated reporting law explicitly mentioning physicians and school employees, not social workers); Or. Rev. Stat. Ann. § 419B.010(1) (West 2022) (providing broadly, as one of three Oregon mandated reporting statutes, that private or public officials are mandated reporters); Or. Rev. Stat. Ann. § 419B.005(6) (West 2022) (defining public or private officials as including attorneys, "[r]egulated social worker[s]," school employees, and physicians); Or. Rev. Stat. Ann. § 675.510(7) (West 2022) (defining "[r]egulated social worker"); 23 Pa. Stat. and Cons. Stat. Ann. § 6311(a)(14) (West 2022) (including attorneys as part of the enumerated professionals considered mandated reporters); 40 R.I. Gen. Laws Ann. § 40-11-3(a) (West 2022) (universal mandated reporting law); S.C. Code Ann. § 63-7-310(A) (West 2022); S.D. Codified Laws § 26-8A-3 (2022); Tenn. Code Ann. § 37-1-403(a)(1) (West 2022) (universal mandated reporting law); Tex. Fam. Code Ann. § 261.101(a) (West 2022) (universal mandated reporting law); Vt. Stat. Ann. tit. 33, § 4913(a) (West 2022); Va. Code Ann. § 63.2-1509(A) (West 2022) (including social workers by stating "[a]ny person employed as a social worker or family-services specialist" but not clarifying what kind—whether licensed or master's level); Wash. Rev. Code Ann. § 26.44.030(1)(a) (West 2022); Beggs v. State, 247 P.3d 421, 426 (Wash. 2011) ("A doctor's duty under RCW 26.44.030(1)(a) to report suspected child abuse does not necessarily arise while the doctor is providing health care."); W. Va. Code Ann. § 49-2-803(a) (West 2022) (listing "social service worker" as mandated reporter, not "social worker"); Wis. Stat. Ann. § 48.981(2)(a) (West 2022) (carving out exceptions for health care providers at Wis. Stat. Ann. § 48.981(2m) (West 2022) in order to "allow children to obtain confidential health care services."); Wyo. Stat. Ann. § 14-3-205(a)–(b) (West 2022) (universal mandated reporting law).

16 Some social workers believe that rapport with clients can be hard to build in traditional social work settings because of the exceptions to confidentiality and the fear that at any moment, a slip of the tongue could result in a report to child protective services. In this way, the mandated reporting role can serve as a barrier to effective service for communities facing hardships and marginalization. *See* Lea Tufford, *Repairing Alliance Ruptures in the Mandatory Reporting of Child Maltreatment: Perspectives from Social Work*, 95 Fams. Soc'y 115, 115 (2014); Jill R. McTavish et al., *Mandated Reporters' Experiences with Reporting Child*

a way that aligns with the overarching goals of their profession. For these social workers, social work—a field which, in theory, is foundationally about enhancing human well-being—can be better accomplished in anti-poverty legal settings rather than in more traditional social work settings. This is because interdisciplinary collaborations between social workers and lawyers can aid in the provision of more robust services for families in need. Still for other social workers, there is an appeal to the sacrosanct nature of confidentiality found in the legal profession. The exceptions to confidentiality that do exist in the legal arena are largely permissive rather than mandatory. That is, lawyers have more discretion when they encounter a situation that may be cause for alarm and can evaluate the need for reporting on a case-by-case basis. Lawyers who are generally bound by strict evidentiary and ethical rules concerning confidentiality have a concurrent duty to make reasonable efforts to ensure that the non-lawyer professionals working as part of the legal team keep communications confidential.[17] Under this general principle, legal settings working across disciplines—particularly in the holistic defense context—take the view that social workers are considered non-lawyer professionals who are covered by attorney-client privilege and the ethical rules governing confidentiality.[18] However, there is disagreement about whether this argument would hold if it were ever the subject of litigation.[19]

In this Note I attempt to capture the nature of this controversy and add some clarity to the literature around navigating the ethical conflicts between the fields of social work and law. Section I provides a historical context for the CPS system in order to make the case that it is important

*Maltreatment: A Meta-Synthesis of Qualitative Studies*, BMJ OPEN, 2017, at 1, 1.

17 *See* MODEL RULES OF PRO. CONDUCT r. 5.3 (AM. BAR ASS'N 1983); MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 1983).

18 Robin Steinberg & Elizabeth Keeney, *Shared Roots and Shared Commitments: The Centrality of Social Work to Holistic Defense*, 22 HAIM STRIKS SCH. L.J. 211, 223–24 (2016) ("At the Bronx Defenders and elsewhere, interdisciplinary defense teams carefully engage social workers as integrated members of clients' legal defense teams within the umbrella of state and national codes of professional responsibility that extend the duty of confidentiality and attorney-client privilege to non-lawyer employees of legal organizations working at the direction of the lawyer. . . . Where defense social workers are employed as an 'agent' of the attorney, they are bound by these same guidelines governing lawyers and their non-lawyer employees."); Lawrence J. Fox & Daniel T. Goyette, *NAPD Formal Ethics Opinion 14-1*, NAT'L ASS'N FOR PUB. DEF. 3–4 (Dec. 2014), https://www.publicdefenders.us/files/NAPD_Formal_Ethics_Opinion_14–1.pdf.

19 *See, e.g.*, Interview with Dan Manning, Litig. Dir., Greater Bos. Legal Servs., in Bos., Mass. (May 24, 2021); Interview with Liliana Ibara, Deputy Dir., Greater Bos. Legal Servs., in Bos., Mass. (Feb. 28, 2022).

to create a way for social workers who elect to, to resist such a system within legal settings.[20] Section II describes the holistic defense movement and its recruitment of social workers to address root causes of legal-system involvement. I advocate for a similar model in civil legal aid by showing that the need for holistic intervention is the same whether it arises in a criminal or civil context. Section III addresses the pitfalls and difficulties of including social workers on legal teams. In this section, I will address the tension between the ethical mandates of both professions and the models that have been utilized to successfully navigate the perceived incompatibilities between law and social work. This Note concludes in Section V that, despite a dearth of legal authority directly speaking to the issue, there is existing support for the proposition that a social worker's mandated reporting duties do not necessarily survive when working as part of a legal team. Programs wishing to adopt a holistic representation model can do so on this basis.

## I. Historical Roots Of The Child Protective Services System (CPS) And Dissenting Voices In Social Work

*"The vast majority of children who are separated from their parents in the United States are separated for reasons that even state officials concede have nothing to do with the true meaning of safety. That is, those children are not in jeopardy of being physically harmed by their parents . . . . All children removed from parents, even children removed from parents for very good reasons, . . . suffer mightily in the process of removal. Preventing that suffering is itself a worthy goal of the state."*[21]

### A. *The Origins of Mandated Reporting Laws*

Mandated reporting laws were created approximately sixty years ago in response to a growing awareness of the phenomenon of abused children.[22] The publication of a seminal paper written by pediatrician Henry

20 This is in no way a suggestion that social workers are to skirt statutorily imposed duties. The contention of this Note is that there is a way for social workers to lawfully utilize their skills and training in legal settings where the ethical duties of the legal profession take precedence over the mandated reporting duty under a theory of derivative attorney-client privilege and lawyer-client confidentiality. For a discussion on how the field of social work is responding to concerns about punitive CPS policies, see *Mandated Supporting*, J Mac for Fams., https://jmacforfamilies.org/mandated-supporting (last visited May 6, 2022).

21 *Interview: Martin Guggenheim*, *supra* note 1.

22 Kasia O'Neill Murray & Sarah Gesiriech, *A Brief Legislative History of the Child Welfare System*, Mass. Legal Servs. 2 (Nov. 1, 2004), https://www.masslegalservices.org/system/files/library/Brief%20Legislative%20History%20of%20Child%20

Kempe[23] in 1962, "The Battered-Child Syndrome," has been credited with the explosion in legislation concerning child abuse and neglect that followed.[24] The rationale for these laws at the outset was that mandated reporting would aid in the detection of child abuse,[25] which is often hidden in the privacy of the home. Thus, the question of who in society should bear the responsibility of reporting suspicions of child abuse revolved around those professions which came most frequently into contact with children, and which had the capacity to adequately evaluate the signs of child abuse. The United States Children's Bureau of the Department of Health, Education, and Welfare initially identified physicians as particularly well-suited to identify child abuse and maltreatment.[26] The American Medical Association (AMA), however, feared that if they alone were to bear the burden of reporting, this would disincentivize families from bringing their children in for medical treatment.[27] For this reason, the AMA advocated

Welfare%20System.pdf.

23 Vincent A. Fulginiti, *C. Henry Kempe*, 126 J. PEDIATRICS 152 (1995).

24 Leonard G. Brown III & Kevin Gallagher, *Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States' Current Mandatory Reporting Laws with a Review of the Laws in the Commonwealth of Pennsylvania*, 59 VILL. L. REV. TOLLE LEGE 37, 37–39 (2014) ("The direct causal link between *The Battered-Child Syndrome* and the subsequent passage of mandatory reporting laws has become something of a truism in modern scholarship, with many scholars noting that within three years of the study, all fifty states had mandatory reporting laws.").

25 *See id.* at 41; Brian G. Fraser, *A Glance at the Past, a Gaze at the Present, a Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 CHI.-KENT L. REV. 641, 650 (1978) ("The first generation of reporting statutes had a rather simple focus. Their purpose was to mandate certain professionals to report suspected cases of child abuse. It was an identification function. It was believed that if a case of suspected child abuse could be identified and funneled into the system, appropriate relief would be provided." (footnote omitted)). This remains a challenge with mandated reporting, generally. Mandated reporting can create an atmosphere of mistrust among communities most adversely affected by the presence of CPS and may obstruct the otherwise trusting relationships between providers who are considered mandated reporters and the communities they are trying to serve. Interview with Elizabeth McIntyre, Senior Att'y, EdLaw Project, in Bos., Mass. (Sept. 2, 2021); Interview with Olivia Dubois, Ne. Reg'l Soc. Serv. Advocs. Supervisor, Comm. for Pub. Couns. Servs., in Bos., Mass. (Feb. 28, 2022).

26 Brown & Gallagher, *supra* note 24, at 40; Paulsen, *supra* note 14, at 3 ("The reporting requirement was limited to doctors for a number of reasons. First, the Bureau embraced the view that abused children most frequently come to public attention when a caretaker seeks medical assistance for a child." (footnote omitted)).

27 Paulsen, *supra* note 14, at 5 ("Officially, the American Medical Association (AMA) objected to physicians' being singled out for a special reporting duty. . . . The AMA objection was based, in part, on the fear that if doctors alone were to report, parents and other custodians of children would fail to bring their children in for needed medical care." (footnote omitted)). Notably, the AMA's concern that mandated reporting can obstruct the provision of services persists to this day with respect to mandated reporters in fields outside

for the expansion of the types of professionals tasked with reporting.[28] The thought was that if a wider array of occupations bore this burden, the blame for family separation would be dispersed and any potential disincentive to seek medical care would be mitigated.[29] The American Humane Association agreed with the AMA but took the position that "all persons" should share in this burden of reporting suspicions of child abuse and neglect.[30]

Ultimately, these organizations saw the fruit of their advocacy efforts when Congress passed the Child Abuse Prevention and Treatment Act (CAPTA) of 1974, which required states to create reporting laws and investigative mechanisms regarding child abuse and neglect.[31] CAPTA was instrumental to the expansion of professionals deputized as mandated reporters. Prior to the passage of CAPTA, almost every jurisdiction required doctors to report child abuse, but only twenty-five jurisdictions required the same of social workers.[32] Just a few years after the passage of CAPTA, however, most jurisdictions in the United States included social workers in mandated reporting statutes.[33]

Instrumental to the effectuation of these statutes during this time was the development of model legislation, which listed specific occupations and excluded lawyers from that list.[34] "The history of the enactment of reporting laws thus demonstrates that lawyers . . . were not a prime target of the mandatory reporting requirements."[35] Importantly, however, they

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of medicine. *See supra* note 16. Mandated reporting can create an atmosphere of mistrust among communities most adversely affected by the presence of CPS and may stand in the way of the otherwise trusting relationships between providers who are considered mandated reporters and the communities they are trying to serve. Interview with Elizabeth McIntyre, *supra* note 25; Interview with Olivia Dubois, *supra* note 25.

28 Paulsen, *supra* note 14, at 5.

29 *Id.*

30 *Id.*

31 O'Neill Murray & Gesiriech, *supra* note 22, at 3.

32 Brown & Gallagher, *supra* note 24, at 42 ("By 1974, thirty-four states required nurses to report, twenty-four required teachers to report, twenty-five required social workers to report, and nine required police officers to report. Just four years later, due to the passage of CAPTA, forty-eight states required nurses to report . . . forty-nine required social workers to report . . .." (footnote omitted)); *id.* at 40 ("[I]n 1963, Ohio, one of the first states to pass a mandatory reporting law, required 'physicians and other medical personnel to report any case of child injury which they believed to have been caused by physical abuse.' Forty-six other states followed Ohio's lead in the period between 1963 and 1965, including Pennsylvania." (footnote omitted)).

33 *Id.* at 42.

34 Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 Duke L.J. 203, 212, 214 (1992).

35 *Id.*

were not completely left out.[36] Some states retained universal mandatory reporting laws,[37] as contemplated by the American Humane Association.[38] Still today, there are some jurisdictions in which lawyers are technically considered mandated reporters.[39] In some of these states, there is ambiguity regarding the relationship between attorney-client privilege and the lawyer's duties under the mandated reporting statutes, although the American Bar Association has clarified that in certain jurisdictions the lawyer's professional duties under the Model Rules of Professional Responsibility take precedence over these universal mandated reporting statutes.[40] In the vast majority of states today, lawyers are not mandated reporters.

36 *Id.* at 214–15.

37 States that have universal reporting laws include Delaware, Florida, Idaho, Indiana, Kentucky, Maryland, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Utah, and Wyoming. Rebecca McElroy, *An Analysis of State Laws Regarding Mandated Reporting of Child Maltreatment*, ChildFocus (Sept. 2012), http://www.ncdsv.org/images/SPARC-FF-CF-AnAnalysisOfStateLawsRegardingMandatedReportingOfChildMaltreatment_9-2012.pdf.

38 Paulsen, *supra* note 14, at 8.

39 Brown & Gallagher, *supra* note 24, at 57 (nineteen states have universal mandatory reporting); CHILD.'s BUREAU, *supra* note 14, at 40, 43, 61, 66. Lawyers are specifically listed as mandated reporters in several states. *See supra* note 15. Attorneys are considered mandated reporters in Mississippi, Ohio, Oregon, and Pennsylvania. In states with universal mandated reporting laws, it is possible that a lawyer is also statutorily considered a mandated reporter. Such universal mandated reporting states include Delaware, Florida, Indiana, Kentucky, Maryland, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Utah, and Wyoming. *The Interdisciplinary Defense Team & Confidentiality: What Defenders Need to Know*, NAT'L LEGAL AID & DEF. ASS'N (Aug. 2016), https://njdc.info/wp-content/uploads/2016/10/Defense-Dream-Team-NLADA-Defense-Team-Confidentiality.pdf.

40 David L. Hudson Jr., *Conflicted Over Confidentiality: Indiana Ethics Opinion Says Lawyers Not Always Obligated to Report Child Abuse*, A.B.A. (Mar. 1, 2016), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-35/march-2016/conflicted-over-confidentiality--indiana-ethics-opinion-says-law/#:~:text=Indiana%20law%20requires%20anyone%20%E2%80%9Cwho,constitutes%20a%20Class%20B%20misdemeanor ("The opinion acknowledges the 'conflict between the lawyer's ethical duty to keep silent and the apparent statutory duty to speak.' But given the Indiana Supreme Court's 'authority over the legal profession, its Rules of Professional Conduct control over conflicting legislation.' To conclude otherwise, says the committee, would violate separation-of-powers provisions set forth in the state constitution.").

### B. *Mandated Reporting Laws Do Not Accomplish What They Set Out To*

Although mandated reporting laws have been widely used to deal with child abuse and neglect, there is no clear evidence that they have been effective in the detection of child abuse or in increasing child safety.[41] Instead, it can be argued that their over inclusiveness has had the opposite effect and has actually obstructed the detection of child abuse.[42]

The definition of neglect, in particular, has been so broadly construed[43] that it has encouraged a flood of reports.[44] In 2019, of the 3,476,000 children who were the subjects of investigated reports, 2,820,000 children were screened out and excluded from the classification of "victim" used by the United States Department of Health & Human Services Children's Bureau. Most of the children in cases that were screened in were not found to have experienced physical abuse.[45] According to some studies, at various points in the last twenty years, only one third of the reports nationally have been substantiated.[46] In the process, an already overtaxed and under-resourced system expends valuable resources investigating and fielding these reports, making it more difficult to invest the necessary resources in the cases these statutes were actually designed to address.[47]

41 *See* Raz, *supra* note 9; Melton, *supra* note 4, at 10 ("Notwithstanding the charitable motives of the system's founders . . . the evidence is overwhelming that many of the catastrophic problems in contemporary child protection work in the United States are a direct product of the system's design."); Mical Raz, Comment Letter on Proposed Expansion of Massachusetts Mandated Reporting, https://www.mass.gov/doc/mical-raz42021/download (last visited May, 10, 2022); Grace W.K. Ho et al., *Universal Mandatory Reporting Policies and the Odds of Identifying Child Physical Abuse*, 107 Am. J. Pub. Health 709 (2017); Mical Raz, *Preventing Child Abuse: Is More Reporting Better?*, U. Penn. (Apr. 10, 2017), https://ldi.upenn.edu/our-work/research-updates/preventing-child-abuse-is-more-reporting-better/.

42 Raz, *supra* note 9.

43 Fraser, *supra* note 25, at 652–53 ("Neglect, unlike the element of non-accidental physical injury, seems to defy definition. Neglect denotes a standard of care or behavior. It is the standard of care that a child is entitled to receive, or it is the standard of care and support that a parent is required to provide. There is no agreement of a common standard. At best, the result might be described as chaotic. . . . Since neglect cannot be defined, great emotionalism surrounds it. . . . The application of the standard is often criticized as being culturally emasculated with a middle class orientation. It is." (footnotes omitted)).

44 *Interview: Martin Guggenheim*, *supra* note 1 ("[N]eglect, as defined in most state laws, [rarely] involves imminent danger to a child's health or safety. What it involves instead is some condition in the home that's below adequacy that deserves attention.").

45 Child.'s Bureau, Child Maltreatment 2019 (2019), https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2019.pdf.

46 Guggenheim, *supra* note 2, at 1732–33.

47 Raz, *supra* note 9, at 2 ("Actively increasing the number of reports from

Of those children who were screened in and considered victims in 2019, sixty-one percent were screened in on account of neglect, as opposed to abuse.[48] Definitions of neglect vary by state, but some practitioners in the field say that, on the whole, they effectively equate neglect with poverty.[49] In Massachusetts, the Department of Children and Families (DCF) utilizes the following definition:

> [F]ailure by a caregiver, either deliberately or through negligence or inability, to take those actions necessary to provide a child with minimally adequate food, clothing, shelter, medical care, supervision, emotional stability and growth, or other essential care, provided, however, that such inability is not due solely to inadequate economic resources or solely to the existence of a handicapping condition.[50]

While there is a laudable provision in this regulation that accounts for inadequate economic resources or disability, determinations of neglect are often based on inadequate investigations.[51] It is also exceedingly difficult to parse out the difference between failing to provide a child with basic necessities due to inability—which would constitute neglect—and "due solely to inadequate economic resources."[52] For families wishing to challenge the characterization of their circumstances as neglect and who wish to explain that their inability to provide food, clothing, or supervision is due to inadequate economic resources, the appeals mechanism is riddled

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nonspecialized individuals may cause harm in a number of ways. Most saliently, mechanisms to increase reporting do not necessarily include increased funding or additional personnel dedicated to children's services. Accordingly, increased reporting depletes resources that are already spread thin and diverts attention away from children who need it the most.").

48 CHILD.'S BUREAU, *supra* note 45, at ii ("The 2019 data show . . . [s]ixty-one percent are neglected only, 10.3 percent are physically abused only, and 7.2 percent are sexually abused only.").

49 *See Interview: Martin Guggenheim*, *supra* note 1; TINA LEE, CATCHING A CASE: INEQUALITY AND FEAR IN NEW YORK CITY'S CHILD WELFARE SYSTEM 106 (2016); Dale, *supra* note 5.

50 110 MASS. CODE REGS. § 2.00 (2017).

51 THE RIPPLES GRP., REPORT TO THE OFFICE OF THE CHILD ADVOCATE AND THE LEGISLATURE REGARDING THE DEPARTMENT OF CHILDREN AND FAMILIES (DCF) FAIR HEARING SYSTEM 32–37 (2015) [hereinafter RIPPLES].

52 Larissa MacFarquhar, *When Should a Child Be Taken from His Parents?*, NEW YORKER (July 31, 2017), https://www.newyorker.com/magazine/2017/08/07/when-should-a-child-be-taken-from-his-parents; *Definitions of Abuse and Neglect*, MASS.GOV, https://www.mass.gov/info-details/definitions-of-abuse-and-neglect (last visited May 2, 2022).

with hurdles.[53] In Massachusetts, for example, there is no requirement that adjudicators who hear appeals on these cases be legally trained,[54] there have been documented problems with access to case files and evidence, and families who are largely unrepresented often have trouble understanding their cases.[55] It is because of regulations like this that "neglect . . . [has come to be] invariably associated with poverty."[56] Given the fact that Black and Latino/a/x[57] families in Massachusetts are overrepresented among the poor, this regulation necessarily disproportionately impacts them.[58]

Although CPS departments are supposed to provide resources for families,[59] they are often so under-resourced and the staff so undertrained[60] that they are unable to deliver the kinds of services that would actually help.[61]

53 *See* Ripples, *supra* note 51, at 23.

54 *Id.* at 20; Ne. Univ. Sch. of L. L. Off. 12, Family Matters: A Social Justice Analysis of the Fair Hearing Process at the Massachusetts Department of Children and Families (2018) (on file with Professor Elizabeth Bloom).

55 Ripples, *supra* note 51, at 24–26.

56 *See Interview: Martin Guggenheim*, *supra* note 1.

57 This Note, when referencing people of Latin American descent, will use the term Latino/a/x unless it is in reference to a direct quote. As a native Spanish speaker, this author appreciates the dilemmas arising from the use of the term "Latinx" for members of the Spanish-speaking community and, in equal measure, the importance of revising terminology in order to be inclusive of gender-non-conforming people. For discussions of the term, see Luis Noe-Bustamante et al., *About One-in-Four U.S. Hispanics Have Heard of Latinx, but Just 3% Use It*, Pew Rsch. Ctr. (Aug. 11, 2020), https://www.pewresearch.org/hispanic/2020/08/11/about-one-in-four-u-s-hispanics-have-heard-of-latinx-but-just-3-use-it/; Terry Blas, *"Latinx" Is Growing in Popularity. I Made a Comic to Help You Understand Why.*, Vox, https://www.vox.com/the-highlight/2019/10/15/20914347/latin-latina-latino-latinx-means (Oct. 23, 2019); Evan Odegard Pereira, Editorial, *For Most Latinos, Latinx Does Not Mark the Spot*, N.Y. Times (June 15, 2021), https://www.nytimes.com/2021/06/15/learning/for-most-latinos-latinx-does-not-mark-the-spot.html; Benjamin Francis-Fallon, *¿La relación entre latinos y 'latinxs'? Es complicada*, L.A. Times (Nov. 30, 2020), https://www.latimes.com/espanol/vida-y-estilo/articulo/2020-11-30/un-estudio-muestra-que-solo-el-3-de-los-adultos-latinos-usan-la-etiqueta.

58 Letter from Michael Dsida to Mandated Rep. Comm'n, *supra* note 8.

59 Mass. Gen. Laws Ann. ch. 119, § 51B(g) (West 2013).

60 Martin Guggenheim, What's Wrong with Children's Rights 206 (2005).

61 *See* Melton, *supra* note 4, at 14; Joan Levy Zlotnik, *The Use of Title IV-E Training Funds for Social Work Education*, J. Hum. Behav. Soc. Env't, 2003, at 5, 17 (lack of training); Rob Geen & Karen C. Tumlin, State Efforts to Remake Child Welfare: Responses to New Challenges and Increased Scrutiny 4, 11, 15 (1999) ("[C]hild welfare workers reported difficulty accessing needed services for the families they serve. Access to certain specialized services has long been a problem for child welfare caseworkers. . . . In particular, child welfare staff in almost every state we visited reported that families often face long waiting lists for mental health services (especially for children) and substance abuse treatment.").

Psychologist and Director of the Institute on Family and Neighborhood Life, Gary Melton, has aptly observed that "there is no logical relation between the problems presented and the response undertaken."[62] When a child appears unkempt or underfed and a concerned observer makes a report to CPS, the logical response one would expect is that the family would be provided with services to sustainably feed, clothe, and shelter the referred family.[63] Instead, the report triggers an investigation into an allegation of neglect. The process is largely adversarial and if the family does not comply with the plan in place, CPS can use this noncompliance as justification for taking the child from the home.[64] Instead of meaningfully assisting a family in need, CPS workers effectively become the parent police.

The intervention of CPS becomes a burden that is scaffolded on top of the myriad stressors of poverty. Families are sent to various programs, sometimes under court order, which are often ill-suited to meet underlying needs.[65] They may be sent to a parenting class, for example, when the underlying issue is lack of access to housing, child care,[66] or medical care. The quality and availability of the services families are referred to as a condition for reunification with their children may also pose further obstacles to complying with the CPS case manager recommendations, which can lead to a finding of noncompliance by a judge.[67] According to some studies,"[p]arents who do not comply with court-ordered services are extremely likely to lose custody of their children."[68] Parents may be required to attend various classes and meetings irrespective of how they comport with

62 Melton, *supra* note 4, at 12.

63 *Id.*

64 *Id.* In Massachusetts, this is done through a care and protection petition. *See* MASS. GEN. LAWS ANN. ch. 119, § 51(b)(g) (West 2013).

65 *See Interview: Martin Guggenheim*, *supra* note 1 ("One of the questions about therapies and programs like parenting classes is how well-adapted they are to the individual person they claim to be serving. When they become cookie-cutter-like rules, like recipes for making soup, they rarely translate to anything meaningful in a person's life. Things like 'Listen carefully to your children and treat them with respect' don't really cut it when they are spoken at a level of a sermon-like, in a church, statement of good parenting. Rather, serious help for individuals comes at the level of a significant interaction with a thoughtful therapist. And I'm not always certain that the programs offered to parents have those professionals in place.").

66 GUGGENHEIM, *supra* note 60, at 189 (discussing that according to a study in the 1980s, the greatest need among CPS-involved families was child care and yet "the primary child welfare 'service' the government has offered families [was] foster care.").

67 *See* Elizabeth Brico, *How Child Protective Services Can Trap the Parents They're Supposed to Help*, TALK POVERTY (July 16, 2019), https://talkpoverty.org/2019/07/16/child-protective-services-trap-parents/.

68 Eve M. Brank et al., *Parental Compliance: Its Role in Termination of Parental Rights Cases*, 80 NEB. L. REV. 335, 343 (2001).

their work schedules or transportation needs,[69] which can lead to job loss,[70] and even greater difficulties with child care, placing reunification with their children even more out of reach.[71] Many families balancing multiple jobs and commitments to various public service agencies may be placed in an impossible bind of having to choose between going to work, showing up to housing court, making a public benefits appointment, or attending a court ordered therapy session.[72] The failure to attend any one of these could result in homelessness, loss of wages, loss of critical, household-sustaining income, or termination of parental rights.[73] Caseworkers, whose testimony in court is given a lot of weight,[74] may punish parents for disagreeing with their assessments and service plans by reducing visitation with children and even recommending removal of the child from the home.[75] According to one study, caseworkers may use service plans as a retributive mechanism for how the parent has allegedly treated the child.[76]

The consequences of becoming CPS-involved—even if a report is not screened in—are often catastrophic for families.[77] The intrusion into the family home places stress on the family system, undermines the credibility

69 Erin Findley & Jandel Crutchfield, *Accessibility of Transportation to Child-Welfare Involved Parents and the Related Impact on Court-Ordered Service Participation*, Child & Fam. Soc. Work Early View, Jan. 2022, at 1, 5–6 (noting the difficulties CPS families experience in getting to all of the services required by court-order including caseworkers who may not put a lot of effort into securing an accessible service provider).

70 *Id.* at 6 ("Well, if it's going to take you three hours to get somewhere . . . because you have to take two different buses . . . if you're trying to work while you're also doing court-ordered services, then many people have to choose sometimes keep a job, keep an income or get these services done."); MacFarquhar, *supra* note 52 ("These services are intended to help you, but, if you want to get your kids back, they are not really voluntary, even though they may be so time-consuming and inflexibly scheduled that you lose your job.").

71 Findley & Crutchfield, *supra* note 69, at 8 (finding that transportation access had an impact on a parent's success or failure in complying with court-ordered services which ultimately impacts the possibility of reunification).

72 *See generally* Lee, *supra* note 49, at 140-181.

73 *Id.*

74 Guggenheim, *supra* note 60, at 189 ("[T]hose [judges] who are aware 'routinely "rubber stamp" assertions by social service agencies.'").

75 Lee, *supra* note 49.

76 Brenda D. Smith, *Child Welfare Service Plan Compliance: Perceptions of Parents and Caseworkers*, 89 Fams. Soc'y 521, 525 (2008).

77 Lisa Sangoi, "Whatever They Do, I'm Her Comfort, I'm Her Protector." How the Foster System Has Become Ground Zero for the U.S. Drug War 6, 35–36 (2020), https://www.timeforchangefoundation.org/media/pdfs/MFPDrugWarFosterSystemReport.pdf.

of the parent before their children,[78] and can be experienced as a psychic blow[79] to a parent who is already over-stressed by their circumstances. The psychological effect of CPS involvement is no small thing. A filing against a family is effectively an accusation of poor parenting that purportedly merits the watchful eye of the state. EdLaw Project attorney, Elizabeth McIntyre, explains that even when families are not reported on, the threat of CPS involvement hovers over communities of color. "[F]amilies are constantly aware that the state has the power to take your kids."[80]

The Massachusetts Mandated Reporter Commission[81] acknowledged in its final report that "children of color are overrepresented at all stages of involvement with Child Protective Services, including the initial reporting stage."[82] Not only is class disparity among families of color driving abuse and neglect reports, but racial bias is playing a prominent role. Research shows that "even when families have the same characteristics and problems, Black children are most likely to be placed in foster care."[83] In Massachusetts, Black children are three times more likely to have an open DCF case than white children.[84] Latino/a/x children are 2.6 times more likely to have an open DCF case.[85] It is for this reason that legal scholar, Dorothy Roberts, has pointed out that "[w]ithout considering race, we do not capture the full spectrum of the harm caused by taking large numbers

78 MacFarquhar, *supra* note 52 ("And, after your children see that you are powerless to protect them, this will permanently change things between you. Whatever happens later—whether the kids come back the next week, or in six months, or don't come back at all—that moment can never be undone.").

79 Letter from Elizabeth McIntyre, Senior Att'y, Greater Bos. Legal Servs., to Mandated Rep. Comm'n (Apr. 20, 2021), https://www.mass.gov/doc/anonymous-caregivers-testimonygreater-boston-legal-services42021/download ("DCF has always eventually closed my cases, but it makes me feel ashamed when they come look into my house. I know it's not my fault, but it's hard to remember that sometimes. I am worried that what you are considering doing is going to make life worse for minority parents and kids, and we are already disadvantaged in this country.").

80 Interview with Elizabeth McIntyre, *supra* note 25.

81 *See infra* Section IV.B.

82 THE MANDATED REP. COMM'N, FINAL REPORT TO THE MASSACHUSETTS LEGISLATURE WRITTEN AND PRESENTED BY THE OFFICE OF THE CHILD ADVOCATE 25 (2021), https://www.mass.gov/doc/mandated-reporter-commission-final-report-63021/download.

83 *Professor Dorothy Roberts Argues, in Her Book "Shattered Bonds," that Child Welfare Discourse Fails to Factor in Racial Bias*, NW. PRITZKER SCH. L. (Jan. 8, 2002), https://wwws.law.northwestern.edu/about/news/newsdisplay.cfm?ID=136.

84 Letter from Elizabeth Egan, Bos. Med. Ctr., Genevieve Preer, Bos. Med. Ctr., Joanne Timmons, Bos. Med. Ctr., Jill Baker, Bos. Med. Ctr., Eileen Costello, Bos. Med. Ctr., Kristin Reed, Bos. Med. Ctr., and Sara Stulac, Bos. Med. Ctr., to Mandated Rep. Comm'n 2 (Apr. 21, 2021), https://www.mass.gov/doc/boston-medical-center42121/download.

85 *Id.*

of Black children from their families."[86] As Massachusetts Law Reform Institute attorney, Virginia Benzan, poignantly highlighted in her public comment in response to the Massachusetts Mandated Reporter Commission,[87] "our country has a long history and a sordid comfortability of separating non-white children from their parents, starting with tearing Black children away during slavery, sending Native American children to reform school, separating Japanese children during internment, and most recently separating Latinx children at the southern border."[88]

When children are taken from the home—even when that home is not ideal—children experience this as inordinately traumatic.[89] A clinical social worker at a local community health clinic in Massachusetts explained that when she has asked her child clients to compare the level of distress experienced by the abuse versus the separation from the parent, some of the children she worked with rated the separation from their parent many times more distressing than the abuse that precipitated the removal from the home.[90] She explained that a lot of the children she has worked with who have been removed from their homes "report feeling unsafe, threatened, . . . and

86 Dorothy Roberts, Shattered Bonds: The Color of Child Welfare 228–29 (2002).

87 *Mandated Reporter Commission*, Mass.gov, https://www.mass.gov/mandated-reporter-commission (last visited May 2, 2022).

88 Letter from Virginia Benzan, Dir., Racial Equity & Just. Project, Mass. L. Reform Inst., to Mandated Rep. Comm'n 2 (Apr. 21, 2021), https://www.mass.gov/doc/virginia-benzanmassachusetts-law-reform-institute42121/download.

89 *Trauma Caused by Separation of Children from Parents*, A.B.A. 10–11 (2019), https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf; Allison Eck, *Psychological Damage Inflicted by Parent-Child Separation Is Deep, Long-Lasting*, PBS: Nova (June 20, 2018), https://www.pbs.org/wgbh/nova/article/psychological-damage-inflicted-by-parent-child-separation-is-deep-long-lasting/ ("'Even when children are in the care of parents who may not be able to meet their needs or to keep them safe, they still organize their behaviors and thinking around these relationships and go at great lengths to maintain them,' said Carmen Rosa Noroña, Child Trauma Clinical Services and Training Lead of Boston Medical Center's Child Witness to Violence Project. Moreover, when these attachment relationships are suddenly subverted and there is no other adult who can help the child make meaning—or a story—of what has happened, the child might experience not only a sense of confusion and terror but might also blame himself or herself for losing the parent."); Joseph Goldstein et al., The Best Interests of the Child: The Least Detrimental Alternative 155 (1998) (acknowledging the loss a child experiences when "she passes, even temporarily, from the personal authority of parents to the impersonal authority of the law").

90 Interview with Sarah Friend, Behav. Health Clinician, Bowdoin St. Health Ctr., in Bos., Mass. (Mar. 4, 2022).

can develop regressive behaviors."[91] It is tempting to dichotomize CPS-involved families in terms of the "evil parent" and the "victimized child," particularly when unfortunate—but rare[92]—events involving harm to children appear in the media.[93] Such reductionist characterizations are especially tempting because they invite easy solutions: take the child away from the "evil parent" and the child is safe. This oversimplification fails to acknowledge the important insights from attachment theory which explain how dependent human beings are on parents with whom they have formed strong attachments—which for many children involves their biological parents—for their psychological and emotional well-being.[94] This false dichotomy of evil parent versus child-in-need-of-rescue further minimizes "the deep and abiding interest [children maintain] in their birth relations."[95]

This is not to say that there are never appropriate instances where children should be removed from the home—despite the distress they may experience as a result. But it is to say that attachment bonds are one of the most important aspects of childhood development, the severing of which often results in long-term psychological and emotional damage.[96] To take a child from their parent, the benefits of doing so must be seriously considered against the trauma of separation from their caregiver. The rate at which children—particularly Black children[97]—are being separated from their parents for situations that are sometimes nothing more than related to lack of economic resources is alarming considering the harm that befalls foster children. By impulsively separating children from their parents, we aid in the collective traumatization of children in the foster care system. The

91 *Id.*

92 GUGGENHEIM, *supra* note 60, at 175.

93 GEEN & TUMLIN, *supra* note 61, at 9.

94 Annette Ruth Appell, *The Myth of Separation*, 6 NW. J.L. & SOC. POL'Y 291 (2011).

95 *Id.*

96 Mario Mikulincer & Phillip R. Shaver, *An Attachment Perspective on Psychopathology*, 11 WORLD PSYCHIATRY 11, 14 (2012). The concept of attachment theory was first articulated by British psychoanalyst, John Bowlby, author of a famous study, "The Strange Situation," in which infants were observed in their interactions with their mothers. The range of infant reactions were classified into various attachment styles: secure, anxious, disorganized and ambivalent. "In particular, the theory holds that young children attach to their parents, usually their mothers, and that their later functioning can be explained by the quality of this attachment." Pamela S. Ludolph & Milfred D. Dale, *Attachment in Child Custody: An Additive Factor, Not a Determinative One*, 46 FAM. L.Q. 1, 2 (2012).

97 Chris Gottlieb, *Black Families Are Outraged About Family Separation Within the U.S. It's Time to Listen to Them*, TIME (Mar. 17, 2021), https://time.com/5946929/child-welfare-black-families/.

term "foster-care to prison pipeline"[98] exists for a reason. "[O]ne quarter of foster care alumni will become involved with the criminal [legal] system within two years of leaving care."[99] Children in group homes face an even greater probability of being involved in the criminal legal system than those placed with foster families.[100] "[M]ore than 90% of youth in foster care with five or more moves will become involved in the juvenile [legal] system."[101] The more than 200,000 children entering foster care each year,[102] who are separated from their families and placed with strangers—sometimes in the middle of the night—are taken away from their friends and their schools. They may be shuffled around from the home of one stranger to another.[103] They are sometimes subjected to even greater abuse in foster homes,[104] leading to astonishingly poor life outcomes.[105]

98 *What Is the Foster Care-to-Prison Pipeline?*, Juv. L. Ctr. (May 26, 2018), https://jlc.org/news/what-foster-care-prison-pipeline; Elizabeth Amon, *New Washington Laws Aim to Interrupt Foster Care-to-Prison Pipeline*, Imprint (Aug. 9, 2021), https://imprintnews.org/law-policy/new-washington-laws-aim-to-interrupt-foster-care-to-prison-pipeline/57613 ("'If you could feel the conflagration of rage born out of powerlessness and the feeling of worthlessness that is cultivated inside a young person raised by the state, you might begin to understand the problem—why raising young people in this way, then throwing them out onto the street makes them incompatible with society—at least incompatible with any society that endeavors to uphold the principle of human dignity.'" (quoting Arthur Longworth)); Youngmin Yi & Christopher Wildeman, *Can Foster Care Interventions Diminish Justice System Inequality?*, Future Child., Spring 2018, at 37.

99 *What Is the Foster Care-to-Prison Pipeline?*, *supra* note 98.

100 *Id.*

101 *Id.*; Interview with Sarah Friend, *supra* note 90 (recounting working with a child who was placed in twenty-seven foster homes in the last eighteen months and expresses concern about the trauma of removing children without "a solid plan in place").

102 Child Welfare Info. Gateway, Child.'s Bureau, Foster Care Statistics 2019 (2021), https://www.childwelfare.gov/pubPDFs/foster.pdf.

103 Almost half of children placed in foster care are placed in nonrelative foster family homes, which means they go to live with strangers (46% are in nonrelative foster family home, 24% are with relatives, 10% go to institutions, 6% go to group homes). *Id.* at 4; Kay P. Kindred, *Of Child Welfare and Welfare Reform: The Implications for Children When Contradictory Policies Collide*, 9 Wm. & Mary J. Women & L. 413, 446 (2003) ("Stays in foster care turned out to be long for many children, often with multiple moves from place to place.").

104 Josh Salman et al., *Foster Kids Live with Molesters. No One Told Their Parents.*, USA Today (Oct. 15, 2020) (updated Oct. 16, 2020), https://www.usatoday.com/in-depth/news/investigations/2020/10/15/no-one-checks-on-kids-who-previously-lived-with-abusive-foster-parents/5896724002/; Kindred, *supra* note 103, at 448 n.203 ("In Los Angeles, where roughly 41 percent of all California's children in foster care receive services, an audit revealed that the county failed to protect children in foster care from substandard conditions and physical and sexual abuse.").

105 Roberts, *supra* note 86, at 223.

Family preservation, thus, is not a reification of the parent's rights over and against the child's rights. It is in the child's interest for society to do everything it can to address concerns within the family unit and to remove a child only in the most extreme circumstances. As Martin Guggenheim explains, "[a]ttempting to consider the needs of (very young children) without simultaneously taking into account the rights and needs of parents is akin to attempting to isolate someone's arm from the rest of their body."[106] Underlying much of the policy choices with respect to child welfare is a false sense of heroism which finds its roots in the child saving movement.[107] However, child well-being cannot be disconnected from the well-being of the parents. According to the psychology literature, parents are the primary organizers of their children's experience.[108] In choosing family separation in the name of child welfare over helping the entire family unit, we facilitate the traumatization of mothers,[109] cast them away to deal with their poverty and to mourn the loss of their children in addition to traumatizing the children themselves. Any meaningful child welfare intervention must take into account the well-being of the parent as connected to that of the child.

Our current system fails to address some of the root causes of child-welfare system involvement. Unstable sources of parental income are the major determinant of children's removal from their parent's custody, while the severity of child maltreatment is not as strong an indicator.[110] This finding is further supported by studies which have found that increasing welfare payments reduces neglect filings and foster care placements.[111] Conversely, reductions in welfare payments have been shown to have

106 GUGGENHEIM, *supra* note 60, at 14.

107 Frank Edwards, *Saving Children, Controlling Families: Punishment, Redistribution, and Child Protection*, 81 AM. SOCIO. REV. 575 (2016).

108 ALICIA F. LIEBERMAN & PATRICIA VAN HORN, DON'T HIT MY MOMMY! A MANUAL FOR CHILD-PARENT PSYCHOTHERAPY WITH YOUNG WITNESSES OF FAMILY VIOLENCE (ZERO TO THREE, 1st ed. 2005).

109 *See* MacFarquhar, *supra* note 52; Interview with Sarah Friend, *supra* note 91 ("I've worked with mothers who have had their children removed, and for them, the pain from a severed mother-child bond is almost unbearable; not a day passes in which they don't feel guilt, remorse, and loss.").

110 Naomi Cahn, *Placing Children in Context: Parents, Foster Care, and Poverty*, *in* WHAT IS RIGHT FOR CHILDREN? 145, 145 (Martha Albertson Fineman & Karen Worthington eds., 2009); Mary B. Larner et al., *Protecting Children from Abuse and Neglect: Analysis and Recommendations*, 8 FUTURE CHILD. 4, 16 (1998) ("National data indicate that abuse or neglect are 22 times as likely to occur in families earning less than $15,000 per year as they are in families earning more than $30,000 per year.").

111 Cahn, *supra* note 110, at 151 ("[A] large study finds that higher benefit levels were associated with lower levels of neglect and fewer children in foster care.").

the opposite effect.[112] This powerful data demonstrating that increasing economic resources can help reduce child-protective services involvement should lead to the provision of greater economic resources for struggling families.[113] Instead, policymakers have elected to do the opposite.[114] Rather than directly providing poor families with funds, it is the foster families who are provided resources to help take care of the children removed from poor homes.[115]

112 Christina Paxson & Jane Waldfogel, *Welfare Reforms, Family Resources, and Child Maltreatment*, 22 J. Pol'y Analysis & Mgmt. 85, 85 (2003) ("Evidence strongly indicates that reductions in states' welfare benefit levels increase the number of children in out-of-home care, and some evidence indicates that strict lifetime welfare limits and tougher sanctions for noncompliance are related to higher levels of substantiated maltreatment."); Maria Cancian et al., *Making Parents Pay: The Unintended Consequences of Charging Parents for Foster Care*, 72 Child. & Youth Servs. Rev. 100, 101–02 (2017) ("A number of authors have found that reductions in welfare payments are associated with a higher risk of CPS involvement. Shook (1999) using data from Illinois, found that reductions in welfare benefits, in the absence of increases in earnings, were associated with CPS involvement . . . ."); *The Child Allowance Is a Child Welfare Issue*, Child.'s Def. Fund (May 2021), https://www.childrensdefense.org/wp-content/uploads/2021/05/Child-Allowance-Child-Welfare-Talking-Points.pdf; *see* Alexia Pappas, Note, *Welfare Reform: Child Welfare or the Rhetoric of Responsibility?*, 45 Duke L.J. 1301, 1304–06 (1996); Cahn, *supra* note 110, at 150 ("Studies show that children in families with incomes less than $15,000 per year are 45 times more likely to be victims of substantiated neglect than children in families with incomes greater than $30,000 per year.").

113 *See How Do Economic Supports Benefit Families and Communities?*, Casey Fam. Programs (Feb. 15, 2022), https://www.casey.org/economic-supports/.

114 *See Interview: Martin Guggenheim*, *supra* note 1 ("Child welfare is, in some ways, the residual outcome of a political choice in our country not to help families directly. But if it became too family-friendly, it would become an indirect subsidy just for needy families. So what we require instead is not merely that you demonstrate a need, but that we decide—we, meaning the officials who will help you—that you have failed in some respect."); Kindred, *supra* note 103, at 444 (explaining that after the passage of the Social Security Act which created the Aid to Dependent Child program, "most states used those federal monies to fund foster care programs rather than to provide support services to families whose children remained in the home"); *see also id.* at 445–46 ("Cases considered serious are investigated, but few resources are available to provide continued social services to families even when evidence of maltreatment is found.").

115 Historically, there has been a longstanding tension between either "saving children from neglectful or abusive families . . . or on helping families better provide and care for their children." Kindred, *supra* note 103, at 443; MacFarquhar, *supra* note 52 ("While the case dragged on and Mercedes drifted, the agency was helping the foster mother with housing. 'They done moved this lady three times, and every time the apartment's getting bigger,' Mercedes said bitterly. 'But you can't help the biological mother who's showing you that she wants her kids? If they would have done that for me in the first place, I wouldn't be in the situation that I'm in now, and I'd have my kids.'").

In this way, child protective services systems are failing to meaningfully address child abuse and neglect, let alone advancing child welfare. More specifically, they are failing at providing safe alternatives for those children who come into their care.[116] Many years ago, when I went to visit a child who had been in the foster care system, living in a residential home after having been sexually abused by an uncle, I saw him locked in a bare room, hovered in a corner crying. I will never forget his words to me: "I know I need help, but these people aren't helping me. My uncle is the one that did this, and he is free. I'm the one who is locked up." There must be a better way.

### C. *Dissenting Social Workers*

Social workers who endorse the data[117] showing that mandated reporting is not very effective in solving the problem of child abuse and neglect, and who do not wish to be complicit in a system that punishes poverty and polices families of color, are in a bind. That is, as long as the current mandated reporting statutes remain in force. There is an inherent tension between the broader goals of the profession and the effects of mandated reporting. According to the National Association of Social Workers (NASW) Code of Ethics, which guides social worker conduct, "[t]he primary mission of the social work profession is to enhance human well-being and help meet the basic human needs of all people, with particular attention to the needs and empowerment of people who are vulnerable, oppressed, and living in poverty."[118] But, as previously established, mandated reporting has not served this purpose of enhancing human well-being and meeting the basic needs of *all* people. Both the children and the parents from whom they are taken often experience the opposite of enhancement.

116 *See* Kindred, *supra* note 103, at 448 ("Twenty-one states have been sued because of inadequate child protection programs, and a number of state foster care systems are under federal court supervision because of multiple failures to meet state and federal requirements."); Sixto Cancel, *I Will Never Forget that I Could Have Lived with People Who Loved Me*, N.Y. TIMES (Sept. 16, 2021), https://www.nytimes.com/2021/09/16/opinion/foster-care-children-us.html; Sarah Fathallah & Sarah Sullivan, *Away from Home: Youth Experiences of Institutional Placements in Foster Care*, THINK US (July 2021), https://assets.website-files.com/60a6942819ce8053cefd0947/60f6b1eba474362514093f96_Away%20From%20Home%20-%20Report.pdf.

117 *Preventing Child Abuse: Is More Reporting Better?*, *supra* note 41; *see* Kelley Fong, *Public Comment on Mandated Reporter Commission Report*, MASS.GOV (Apr. 2021), https://www.mass.gov/doc/kelley-fong41921/download.

118 *Code of Ethics*, NAT'L ASS'N SOC. WORKERS, https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English (last visited May 2, 2022).

Further, mandated reporting statutes have created a culture of fear in many social work settings, which shifts the focus from family-centered work to compliance with the statute.[119] In other words, social workers believe they must put their fear ahead of what's best for the client. Graduate level social work programs often do not train social workers on the meaning of the pertinent statute,[120] leading many social workers to assume that they have less discretion than they actually have when it comes to reporting on families and creating a feeling that they have to "cover their backs" or that they are "better safe than sorry."[121] Indeed, many social workers and mental health professionals shy away from any collaboration with lawyers due to a mistaken belief that mandated reporting duties will always conflict with the attorney client privilege without understanding the specific circumstances that trigger the mandated reporting duty.[122]

My experience as a social work student in a practicum setting is instructive in this regard.

*I had been providing therapy to a domestic violence survivor under the supervision of a licensed clinical social worker (LCSW). The client disclosed that she was experiencing ongoing emotional and verbal abuse and that her child often witnessed it and hid behind furniture. She expressed wanting to leave the relationship but was concerned about her lack of financial solvency. We were working together on a plan to identify ways for her to both leave the relationship and continue providing for her and her child. As a student working under the license of a superior, I was obligated to share what transpired in our sessions with*

119 Haymarket Books, *Social Work and Abolishing the Family Regulation System*, SOUNDCLOUD, at 7:14 (June 2021), https://soundcloud.com/haymarketbooks/social-work-and-abolishing-the-family-regulation-system; *see also Interview: Martin Guggenheim*, *supra* note 1 ("When the agency itself was involved in the sensational case that gets in the media, a form of panic and hysteria actually takes over. Each employee asks the first question in the next case: What can I do to be sure I don't get my name in the paper tomorrow? And the answer to that question almost invariably is, remove the child. There have never been media headlines over a wrongful removal of a child from a parent's home. The headlines have always been about the failure to remove a child. So the system gets skewed dramatically in favor of overprotection. Overprotection here now is not just overprotection of the child, because that discounts the harm to children."); GEEN & TUMLIN, *supra* note 61, at 8–9 ("Child welfare staff are now so afraid of hostile attention, according to our respondents, that they are removing children from their parents' homes and/or choosing not to reunite families whenever they have even the smallest doubt about a child's safety.").

120 Interview with Olivia Dubois, *supra* note 25.

121 Haymarket Books, *supra* note 119, at 7:14 ("Everyone is cautious, covering their own behinds.").

122 *See generally* Brigid Coleman, *Lawyers Who Are Also Social Workers: How to Effectively Combine Two Different Disciplines to Better Serve Clients*, 7 WASH. U. J.L. & POL'Y 131 (2001).

*them. Upon hearing about the child hiding, they commanded me to call the Department of Children and Families (DCF).*[123] *DCF already had an open case with this family, so I explained my disagreement with my supervisor's assessment that a call to DCF was necessary. I further expressed concern that our work would be disrupted, and our rapport severed should I make disclosures about our confidential sessions to a DCF worker who, in the end, would not have the resources to help the family in the way our office could. I felt strongly that our duties of confidentiality here were not subject to a mandated reporting exception in this circumstance because I did not characterize what was going on in the home as child abuse or neglect as statutorily defined. Even if I did think the situation rose to the level of child abuse or neglect, DCF was already involved. They promptly dismissed my concern and parked themselves in a chair next to me while forcing me to make the call. Later, during a staff meeting where I once again raised my concerns, they responded, "[a]t least, in the end, we did what we were supposed to do." As a young social worker, I felt cornered to act against my ethical sensibilities and felt that I had no options but to comply. As predicted, the client stopped returning my calls until a month later when I tried her again at which point, she told me about the level of stress she had been under due to DCF intensifying their involvement. She confirmed that she had not managed to find a way to leave her partner and quickly got off the phone. Here, my supervisor was less concerned about the negative effect that a phone call to DCF would have on the therapeutic work we were doing, on the safety of the mother and child, or affirming the agency and self-determination of the client. Their hypervigilance about their duties as a mandated reporter took precedence and caused them to act less like a therapist and more like the parent police.*[124]

Because social workers use their discretion to decide whether a client disclosure triggers their mandated reporting duties, it is possible to execute these duties in a sensitive way within social work settings. For example, if cause for concern arises over the course of working with a client, the social worker may have a frank conversation with the client about their duties and observations. They may first work with the family to address the concern under the theory that if the client is working on the identified problem, they are not neglectful or abusive and thus there is no reason to report—particularly, if there is evidence that the parent has resolved the issue. If unable to resolve the concern, the social worker may use psychotherapeutic tools to prepare the family to call CPS together with the social worker and frame the call as a request for assistance. However, there is a certain disingenuousness to this method because, as previously established, CPS departments are not equipped to assist. They are equipped to surveil

123 In Massachusetts, the CPS agency is called the Department of Children and Families.

124 Memorandum from author to Ed. Bd., Ne. Univ. L. Rev. (Mar. 5, 2022) (on file with Northeastern University Law Review).

and to ensure compliance.[125]

For this reason, many social workers have elected to work in anti-poverty legal settings where they are more fully able to advocate for their clients' needs without complicity in the family regulation system. Because lawyers are not mandated reporters, legal settings tend to have less of a fear-based culture—in contrast to the social work setting described above—and are more apt to proceed with care should a situation rising to the level of abuse or neglect present itself. Because the profession places value on the zealous representation of a client's interests,[126] a client's self-determination and agency are also highly prized. The permissive rule that allows lawyers to break confidentiality, should a situation warrant it,[127] allows for more care and use of discernment in the decisions to report on families.

Some legal settings hire social workers in an attempt to work holistically with clients—particularly in the world of public defense.[128] Other legal programs may incidentally hire social workers to function as legal advocates or paralegals who advocate for their clients' public benefits.[129] Still others, hire clinical social workers to work separately as therapists,[130]

125 *See* Roberts, *supra* note 86, at 39–40 ("In my conversations with mothers in Chicago, I soon discovered a pattern of legitimizing their long-term involvement in the system. Their children were initially removed for reasons directly related to their financial situation, ostensibly to protect children from harm. Once under agency control, the mothers were subjected to intense scrutiny that included mandatory parenting classes, supervised visits with their children, and a battery of psychological evaluations. Any failure to attend a required class, inappropriate interaction with their children, a diagnosis of mental distress became grounds to extend their children's time in foster care. State authorities could find fault with any parent subjected to so much monitoring and examination.").

126 Model Rules of Pro. Conduct r. 1.3 cmt. (Am. Bar Ass'n 2020) ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

127 Model Rules of Pro. Conduct r. 1.6(b) (Am. Bar Ass'n 2020).

128 *Social Work*, Bronx Defs., https://www.bronxdefenders.org/our-work/soc-work/ (last visited Jan. 4, 2022). Most Committee for Public Counsel Services offices across Massachusetts hire Social Service Advocates (SSAs). Most SSAs who are hired are master's level social workers. Interview with Olivia Dubois, *supra* note 25.

129 Interview with Dan Manning, *supra* note 19. Greater Boston Legal Services does not hire for social work positions, but a few of their paralegals have had MSWs. The current paralegal in the Welfare Unit has an MSW and works primarily as a legal advocate for welfare recipients.

130 Interview with Elizabeth Brusie, Assistant Legal Dir., De Novo, in Bos., Mass. (June 7, 2021). De Novo in Cambridge, MA is a multidisciplinary agency which has a counseling practice staffed by clinical social workers in addition to a legal practice.

as expert evaluators, or consultants who are recruited on a case-by-case basis,[131] depending on the needs of the particular legal case. Allowing spaces for social workers within legal settings can be mutually beneficial—the legal setting supports a social worker's resistance to the broken CPS system, all the while benefitting from their expertise and skills.[132]

## II. HOLISTIC DEFENSE

There are complicated child welfare cases in which familial trauma, the trauma of poverty, and racism, require more than financial assistance in order to prevent family separation.[133] Many have observed that to effectively address child neglect and abuse, "all-encompassing service[s]"[134] and an "intricate untangling of the multiple causes of pain, abuse and deprivation" are necessary.[135] For families in need of such robust interventions, a few referrals for food stamps, housing search, and welfare benefits are inadequate. Often, the trauma these families have experienced is generational and deeply entrenched, which calls for greater support from persons with expertise in psychological trauma who can be a consistent source of support over a longer period of time.

Addressing such complex problems may sound like an impossible task. It is for this reason that some supporters of the family regulation system

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An ethical wall has been created between the two wings of the agency in order to navigate any potential ethical conflicts related to mandated reporting.

131 Interview with Cristina F. Freitas, Att'y, Freitas & Freitas, and Debbie F. Freitas, Att'y, Freitas & Freitas, in Bos., Mass. (2021).

132 *See infra* Part III.

133 Lucy A. Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 FORDHAM URB. L.J. 1159 (1995).

134 *Interview: Martin Guggenheim*, *supra* note 1.

135 *See* Williams, *supra* note 133, at 1195–96; Kindred, *supra* note 103, at 417 ("Concentrating most of the resources of the child protection system at the end of the services continuum results in a greater need for child welfare intervention and treatment than would be required if families were provided support before their problems reached crisis levels that put children in jeopardy. . . . In the case of reported child maltreatment, the response of the child protection system is all too often to remove a child from the home and to place him or her in foster care. In cases of child neglect, as opposed to child abuse, this response may be primarily a function of a greater availability of funding for foster care than funding for other alternative services. Thus, removal and out placement often becomes the default child protection method of choice."); *id.* at 418 ("As suggested by the National Commission, reform of child protection policy and practice requires broad-based interdisciplinary changes—drawing on the interrelated efforts of social services agencies, courts, and state legislatures and administrative agencies.").

have taken it as a given that our society does not provide such services,[136] all the while agreeing that "[w]e don't support families up front in ways designed to ensure their success, waiting instead until families are in such trouble that preservation efforts are often doomed."[137] However, there is strong support in the field of psychology for the effectiveness of robust interventions with psychologically vulnerable families. Child psychologist and lead developer of Child-Parent Psychotherapy, Alicia Lieberman, has explained a modality that aims to work around the severing of attachment bonds between parents and their children.[138] She explains that human behavior and identity do not exist in a vacuum.[139] They are very much determined by the surrounding circumstances a parent or family might be experiencing.[140] Borrowing a phrase commonly used in Latin American cultures, "I am myself and my circumstances," she elaborates on psychoanalyst, Donald Winnicott's ideas to provide solutions to traumatized families—particularly when that trauma is inter-generational,[141]

> . . . I am myself and my circumstances . . . My identity is shaped by my circumstances. And as my circumstances change, so might my identity change. Winnicott talked about "there's no such thing as a baby." We like to say, "there's no such thing as a parent;" "there's no such thing as a family." When we give parents and families the circumstances they need to feel protected by society their parenting changes and their child changes. And in child-parent psychotherapy, we like to give ourselves the time to ask parents about their circumstances so that we understand, how come these things happened to them? In what context? And it helps the parent understand how *their* parents were often influenced by their circumstances. So, it becomes an intergenerational process that goes beyond two generations into understanding, "how come?" What were the hardships that my parents were experiencing as

136 Guggenheim, *supra* note 2, at 1722 ("Bartholet . . . contradicts her assumption that child welfare officials make their best efforts by articulating two additional premises. First, Bartholet reasons that, even if society has not given its best efforts to assist marginal families, we cannot reasonably expect significant change in the foreseeable future. Bartholet thus occasionally acknowledges the inadequacy of society's efforts to change the terrible conditions in which poor children are raised . . . ." (footnote omitted)).

137 *Id.*

138 Child-Parent Psychotherapy, *The Importance of Family Circumstances in Child-Parent Psychotherapy*, YouTube (Sept. 20, 2019), https://www.youtube.com/watch?v=VDNpmJTGSpw&t=132s.

139 *Id.*

140 *Id.*

141 *Id.*

> they raised me that are now shaping how I'm raising my child? And so, compassion kind of goes back. And anger needs to be turned to the people who create—who tolerate those conditions of inequality and racism and discrimination and oppression.[142]

Interventions—such as the ones Lieberman describes—that more carefully consider the dynamic of a traumatized family are worth investing in. By using more sophisticated tools than what the current system offers, we can more effectively prevent the traumatization caused by family separation among our most vulnerable members of society. Moreover, given the intergenerational nature of family trauma, more robustly investing in the two generations who come under the State's investigation through CPS, can prevent the further deterioration of the lives of those subsequent generations. While federal and state governments have made these choices not to provide the necessary high-quality services, there are ways to create programs that fill in the gap with a multi-faceted and holistic approach to working with struggling families.[143]

Holistic defense holds promise as a model that attempts to provide the kind of wrap-around interventions that the state has failed to invest in. To put it in Lieberman's terms, such services can constitute an attempt to change family and parent circumstances in such a way that they feel supported by society instead of antagonized—at least by their advocacy team—which in turn, can foment the kind of healing families need to ensure everyone's safety—particularly that of the child.[144]

The holistic defense model arose out of a recognition that indigent defendants are brought into the criminal legal system for wide-ranging reasons and that merely representing a client in the particular criminal case for which they are referred to a public defender does not equate with justice. Once a person is brought into the criminal legal system, it is inordinately difficult to get out of it.[145] The collateral consequences of poverty have

142 *Id.*

143 *See* Lorelei Laird, *Immigrant Advocates*, A.B.A. J., Sept. 2016, at 18, 19 (showing how a nonprofit rose to the occasion to address the lack of right to counsel in immigration cases); J. Michael Norwood & Alan Paterson, *Problem-Solving in a Multidisciplinary Environment? Must Ethics Get in the Way of Holistic Services?*, 9 CLINICAL L. REV. 337 (2002).

144 *See* Child-Parent Psychotherapy, *supra* note 138.

145 According to the Pew Center on the States, our criminal legal system is failing in its deterrence goals, as "more than four out of [ten] adult American offenders still return to prison within three years of their release." PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 2 (2011), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2011/pewstateofrecidivismpdf.pdf.

been repeatedly found to contribute to incarceration and recidivism.[146] For example, the adverse childhood experiences associated with poverty have been connected to the development of psychiatric problems including substance abuse;[147] the lack of upward mobility in poor communities can stymie the kind of educational and employment opportunities available,[148] leading to a reliance on means of surviving that are criminalized;[149] arrests can rapidly lead to loss of housing,[150] loss of employment,[151] and deportation.[152] A criminal record can bar persons from many public benefits and employment.[153] Recognizing this, holistic defenders have developed a model which aims to address the underlying conditions that keep people trapped in a "revolving door."[154]

146 Nayely Esparza Flores, *Contributing Factors to Mass Incarceration and Recidivism*, 6 Themis 56, 63 (2018) ("[W]hen individuals in neighborhoods have high rates of crime, poverty, and high social disorganization, the risk of youth falling into the criminal justice system also increases."); McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as Advocacy Strategy*, 36 U. Tol. L. Rev. 479, 481 (2005) ("[M]ost people cycle through the criminal justice system as a result of deep and interrelated social problems that existing social services have failed to address, such as homelessness, addiction, unemployment, or mental illness.").

147 Maia Szalavitz, *Addictions Are Harder to Kick When You're Poor. Here's Why*, Guardian (June 1, 2016), https://www.theguardian.com/commentisfree/2016/jun/01/drug-addiction-income-inequality-impacts-recovery.

148 Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, Daedalus, Summer 2010, at 8, 9 ("Class inequalities in incarceration are reflected in the very low educational level of those in prison and jail. The legitimate labor market opportunities for men with no more than a high school education have deteriorated as the prison population has grown, and prisoners themselves are drawn overwhelmingly from the least educated."); Philippe Bourgois, In Search of Respect: Selling Crack in El Barrio 320–22 (2d ed. 2003).

149 *See* Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. Crim. L. & Criminology 643, 682 (2009); Bourgois, *supra* note 148, at 320–21 ("Any realistic attempt to address the 'drug problem' has to alter the economic imbalance between the rewards of the legal economy versus those of the underground economy. . . . Experts estimate it costs approximately $8 to $10 to produce an ounce of pure powder cocaine. This same ounce in East Harlem is worth more than $2,000, once it is adulterated and packaged into $10 quarter-gram vials. This extraordinary $1,990 profit represents the economic incentive for participation in the most violent and destructive facet of the underground economy." (footnote omitted)).

150 *Know Your Rights: Housing and Arrests or Criminal Convictions*, Bronx Defs. (Oct. 2, 2010), https://www.bronxdefenders.org/housing-and-arrests-or-criminal-convictions/.

151 *See* Western & Pettit, *supra* note 148, at 13.

152 *See Aggravated Felonies: An Overview*, Am. Immigr. Council (Mar. 16, 2021), https://www.americanimmigrationcouncil.org/research/aggravated-felonies-overview.

153 Smyth, *supra* note 146, at 497.

154 *The Holistic Defense Toolkit*, Ass'n Prosecuting Att'ys (2017), https://www.apainc.org/wp-content/uploads/2017/08/Holistic-Defense-Toolkit.pdf ("As public defenders we are first-hand witnesses to the revolving door that is our criminal justice

As initially conceived, there are four pillars to the holistic defense model: (1) "[s]eamless access to services that meet clients' legal and social support needs"; (2) "[d]ynamic, interdisciplinary communication"; (3) "[a]dvocates with an interdisciplinary skill set"; and (4) "[a] robust understanding of, and connection to, the community served."[155] Indigent defendants are provided with an interdisciplinary team, often consisting of criminal and civil lawyers, social workers, peer advocates, and community organizers.[156] The work often involves community engagement in addition to direct service.[157] Importantly, although the expertise of each professional on the team is valuable, of greater importance is the iterative, generative process fostered by a culture of "open, frequent and meaningful communication" [158] that is centered on the client's well-being. The result is a team of people all of whom are well-informed about a client's needs and progress. "The client, in turn, sees himself as being represented by a team of dedicated advocates all of whom are in communication with each other, rather than by a single advocate who grasps only part of the big picture that is the client's life."[159]

Recent data have shown that the holistic defense model is quite effective. According to a large-scale study Harvard Law School conducted on the model, the use of holistic defense has helped at least 4,500 defendants avoid jail sentences.[160] Holistic defense reduces expected sentence length significantly.[161] In the Bronx, New York, where the pioneers of the model practice, the difference between the acquittal rates for jury trials among those who were beneficiaries of the model, as opposed to those who were not, was quite stark. While an average of 57.4 percent of jury trials in the Bronx result in acquittals, clients of the Bronx Defenders—who benefit from a holistic defense model—experienced an 86.7 percent rate of success

system and we experience daily the futility of equating a successful legal defense with the achievement of justice.").

155 *Id.*

156 Hélène Barthélemy, *How an Unusual Team Helps Extricate Bronx Residents from NYC's Justice System*, NATION (Nov. 9, 2015), https://www.thenation.com/article/archive/how-an-unusual-team-helps-extricate-bronx-residents-from-nycs-criminal-justice-system/ ("For legal cases, BxD created multidisciplinary teams (there are now 10) that work together on each case, including criminal defense, immigration, civil and family defense attorneys, as well as legal advisers, community-intake specialists, and parent advocates and social workers, and, finally, a policy-and-community organizer to translate cases into larger organizing efforts.").

157 *The Holistic Defense Toolkit*, *supra* note 154.

158 *Id.*

159 *Id.*

160 James M. Anderson et al., *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 865 (2019).

161 *Id.*

between July 2003 and June 2005.[162]

## III. Civil Legal Aid and Holistic Representation

Holistic approaches are utilized far more often in criminal defense settings than in civil legal aid.[163] In the Greater Boston area for example, almost all public defender offices employ social workers to work as part of the legal team; however, most of the regional civil legal aid agencies funded by the Massachusetts Legal Assistance Corporation (MLAC) do not specifically recruit social workers to work holistically with clients.[164] There are reasons for this. The need for social workers might be more self-evident in the criminal context because of the important role that understanding a client's history of trauma and psychopathology might play in sentencing. Further, social workers who are knowledgeable about the landscape of services, can offer assistance to the defense lawyer in arguing for alternatives

162 Cara Tabachnick, *The Crime Report: Can the 'Holistic Approach' Solve the Crisis in Public Defense?*, Bronx Defs. (Mar. 8, 2011), https://www.bronxdefenders.org/can-the-holistic-approach-solve-the-crisis-in-public-defense-the-crime-report/.

163 For example, in Massachusetts there are six major regional legal agencies which are funded by the Massachusetts Legal Assistance Corporation, but most do not employ a holistic model as described in Part II. *Funding Civil Legal Aid $41 Million for FY23*, Mass. Legal Assistance Corp., https://mlac.org/wp-content/uploads/2022/01/FY23-Fact-Sheet_Updated-2022.1.28.pdf (Jan. 2022); *see, e.g.*, *People*, Cmty. Legal Aid, https://communitylegal.org/about/people/ (last visited Mar. 4, 2022); *Board & Staff*, MetroWest Legal Servs., https://mwlegal.org/about/staff (last visited Mar. 4, 2022); *About Us*, Ne. Legal Aid, https://www.northeastlegalaid.org/mission (last visited Mar. 4, 2022); *About SCCLS*, S. Coastal Cntys. Legal Servs., https://sccls.org/about-us/ (last visited Mar. 4, 2022); *Who We Are*, Greater Bos. Legal Servs., https://www.gbls.org/about (last visited Mar. 4, 2022); Interview with Liliana Ibara, *supra* note 19.

164 A local civil legal aid agency (also funded by MLAC), De Novo, has a counseling and case management practice. They specifically hire social workers as therapists who provide mental health services; however, there is an ethical wall (a separation with protocols around communication to insure against conflict of interest) between the legal and counseling departments. Most clients do not utilize both counseling and legal services simultaneously, but many clients of both programs do benefit from case management services. Interview with Elizabeth Brusie, *supra* note 130. Greater Boston Legal Services does not hire social workers to offer social work services but counts among its staff a few people with Master's in Social Work, one of whom supervises a graduate level social work student to carry out case management services in the Welfare Unit of the agency but is not necessarily involved in the legal case. A Licensed Independent Clinical Social Worker is contracted to offer consults to attorneys on staff and she also participates in the supervision of the social work student. Interview with Dan Manning, *supra* note 19; Interview with Liliana Ibara, *supra* note 19.

to incarceration and finding programs that might divert the defendant from prison. Finally, by the time someone is involved with the public defender's office, chances are that concerns about abuse have been formally recognized through criminal charges or involvement with CPS, lessening the concern about an unexpected disclosure of neglect or abuse of a minor.

Although not as obvious in the civil legal aid context, psychological factors and lack of services play a prominent role in the development of the case theory, in the formation of legal strategy, in the sustainability of the hoped-for outcome in the long run, and in the efficiency of the services provided. This is true to such a degree that social work services are very often offered informally in legal aid settings even when they are not institutionally recognized or advertised. Indeed, even when legal aid agencies do not formally employ holistic models of representation, by virtue of the needs among their clients, many attorneys find themselves inadvertently working on the social services or collateral issues that arise in their client's cases. Daniel Santiago at the Mabel Center for Immigrant Justice explains that many of his clients have only recently arrived in the U.S. and struggle to navigate American institutions.[165] As an immigration lawyer, he and his staff are some of the few trusted professionals his clients are in touch with and he often gets requests for guidance and assistance with leaving an abusive relationship, avoiding homelessness, or accessing the job market in order to sustain a household and provide for children.[166] There are benefits and downsides to when compassionate anti-poverty lawyers attempt to address the collateral needs of their clients in settings that do not explicitly offer social work services. On the one hand, some lawyers are naturally gifted at showing interest in the client's personhood without being required to by their job. This builds rapport with clients and can be very healing to experience. Lawyers who offer these services do not have to jump through institutional hoops in order to do right by their clients. On the other hand, there are some difficulties: (1) lawyers working with poor people often have high caseloads and doing social service coordination and life coaching can detract from their legal work or sharply increase their workload; (2) attorneys without experience or training in mental health or social service coordination may find themselves re-inventing the wheel, trying to teach themselves a skill that social workers are already trained in and can fulfill more efficiently;[167]

165 Interview with Daniel Santiago, Co-Founder, Mabel Ctr. for Immigrant Just., in Bos., Mass. (Mar. 19, 2022).

166 *Id.*

167 It should be noted that not all people who have an MSW or LCSW are capable of providing the same level of services. It is very possible that a lawyer with experience in the social services landscape or with a particularly high level of emotional

(3) well-meaning attorneys may pass off the social service coordination to administrative staff who are already overwhelmed with their existing duties and who may not receive the necessary support to meet the need; and (4) when the provision of social work is not formally recognized as a service the legal aid agency provides, those clients who happen upon a lawyer interested in the larger context of their life will benefit from additional services whereas those clients whose lawyers are not equipped to do the same but have the same need or even greater need may not benefit in the same way. The lack of formal recognition of social work in a legal aid agency, in this way, can create inequity in the provision of services.

The needs of indigent criminal defendants and the clientele served by civil legal aid agencies are overlapping, for which a holistic model would be appropriate. Both indigent criminal defendants and legal aid clients suffer from a "revolving door" phenomenon.[168] Many legal aid clients end up returning for legal services because of the underlying conditions that bring about the legal problem are not addressed.[169] For example, a restraining order may leave a mother without the income of a former partner, which can also affect her ability to pay for housing, resulting in homelessness. Depending on where in the state she is sent for shelter she may be too far to reach her place of employment.[170] Involvement in legal proceedings around domestic violence and divorce can cause missed days from work which may result in discharge from a job. Despite receiving eviction defense services, if she is then left without a sustainable income that would allow her to afford an apartment, it's often only a matter of time before the client is in need of legal defense to an eviction once again.[171] Or if child care is a significant barrier to sustained employment, even after securing benefits and getting a new job, the obstacles to attending work may still be present and leave her vulnerable to yet another separation from work, which may require representation once again.

Further, the loss of a job, housing, or public benefits often has a domino effect that creates global instability in the life of a client. If we care about life outcomes for people in poverty, addressing a discrete legal issue

intelligence may be able to offer more emotional support and service coordination than a very inexperienced social worker. On the whole, however, having a social worker whose sole job is to focus on collateral issues can relieve an attorney with a high caseload whose main job is legal representation.

168 *See The Holistic Defense Toolkit*, *supra* note 154.

169 Interview with Liliana Ibara, *supra* note 19.

170 *See* Mass. Law Reform Inst., *Where Can You Be Placed if You Qualify for EA Shelter?*, MassLegalHelp (Dec. 2019), https://www.masslegalhelp.org/homelessness/emergency-assistance/advocacy-guide/14-dta-placements.

171 Interview with Liliana Ibara, *supra* note 19.

may only be the tip of the iceberg. The loss of income from a job may result in becoming behind on rent, which can lead to eviction and, in turn, homelessness. Homelessness has been proven to have a powerful negative effect on psychological well-being[172] and also has the potential to invite investigation from the child welfare system.[173] Evictions have been shown to "disrupt people's health, relationships, work, and education."[174]

Lawyers are not necessarily equipped to handle this web of dilemmas—at least not alone.[175] Legal advocates can address the legal aspects of these needs by staving off evictions, filing restraining orders, advocating for public benefits, representing clients at unemployment hearings, and going after stolen wages; however, the underlying conditions keeping clients stuck are often areas lawyers do not assist with.[176] Some contend that referrals for these services are adequate when weighed against the challenges of creating interdisciplinary teams, but there is a cost to the kind of narrow specialization that results in a family having to jump from service provider to service provider, often in a confusing maze of referrals which may or may not lead to high quality assistance.[177] When the psychological presentation of a client obstructs the legal process,[178] referrals for mental

172 MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 5, 296 (2017).

173 Cyleste C. Collins et al., *Housing Instability and Child Welfare: Examining the Delivery of Innovative Services in the Context of a Randomized Controlled Trial*, 108 CHILD. & YOUTH SERVS. REV. 1 (2020).

174 Joe Pinsker, *The Coming Wave of Evictions Is More Than a Housing Crisis*, ATLANTIC (Sept. 3, 2021), https://www.theatlantic.com/family/archive/2021/09/cdc-eviction-ban-housing-crisis/619960/; Mass. L. Reform Inst., *supra* note 170 ("If you are placed in EA shelter [Emergency Assistance is a Massachusetts program which provides shelter to qualifying homeless families], DHCD [the Department of Housing and Community Development is the Massachusetts state administering agency of the Emergency Assistance program] must place you in a shelter within 20 miles of your home community if there are any openings in the area. However, there often are no openings within 20 miles and you could be placed very far away.").

175 Interview with Cristina F. Freitas and Debbie F. Freitas, *supra* note 131.

176 *See id.*

177 Interview with Dan Manning, *supra* note 19; *see* Alexis Anderson et al., *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism and Mandated Reporting*, 13 CLINICAL L. REV. 659, 699 (2007) (offering a critique of programs which create ethical walls between social workers and lawyers). The walls "inhibit substantially the prospect of effective interdisciplinary lawyering work . . . by its ineluctable interference with the free sharing of information among lawyers, clients, and law firm employees." Anderson et al., *supra*, at 699. By extension, sending people to various programs creates further distance between the lawyer and important collaterals. *Id.*

178 For an example of how a social worker on a legal team can help when a client has a trauma response, *see* Mariana Ferreira, *Beyond Education and Litigation: The Social Work Program at HIRC*, HLS CLINICAL & PRO BONO PROGRAMS (Aug. 28, 2019), https://

health services outside of the agency may be inadequate—there are often long waitlists for therapeutic services and the therapist's presence outside of the legal interview would probably make little difference to the legal case in circumstances such as these.[179] Further, many social services agencies are limited in what they can provide; whereas an in-house social worker, peer advocate, or community organizer can practice flexibility in their role and provide services like housing search, particularly when there are special vulnerabilities such as undocumented status, lack of credit, or a language barrier. A community organizer can identify systemic causes of housing instability such as a massive practice of pricing tenants out of the housing market and can mobilize communities to participate in demonstrations while empowering clients with tools to respond to the systemic elements of their plight.

Holistic representation is about more than just the formation of interdisciplinary teams.[180] The addition of a social worker does not, in of itself, constitute holistic representation,[181] particularly when the social worker is disconnected from the legal case. However, for agencies which agree with the ambitions of the model without the resources to hire multiple staff members and form such teams, one step towards meeting the goals of the model might involve the recruitment of a non-lawyer professional who has a view towards improving client life outcomes and not just legal ones.[182]

clinics.law.harvard.edu/blog/2019/08/beyond-education-and-litigation-the-social-work-program-at-hirc/.

179 This is not to underestimate the crucial role that clinical evaluators play in providing evidence of trauma from outside the legal agency, particularly in the immigration context. But it should be noted that a mental health professional can make a great difference in real time with greater understanding of their client's triggers. For a discussion of the effect that the asylum process has on refugees who have experienced trauma, see Katrin Schock et al., *Impact of Asylum Interviews on the Mental Health of Traumatized Asylum Seekers*, Eur. J. Psychotraumatology, 2015, at 1.

180 *The Holistic Defense Toolkit*, *supra* note 154, at 5.

181 This author recognizes that while skilled, intelligent, and compassionate social workers can be a tremendous asset to clients, the field of social work has also suffered from an "abiding tension between social control and social service." Yoosun Park, *Facilitating Injustice: Tracing the Role of Social Workers in the World War II Internment of Japanese Americans*, 82 Soc. Serv. Rev. 447, 449 (2008). The field of social work—like many of the helping professions in the United States—has deep roots in paternalism. *See* Mary Ann Mason, From Father's Property to Children's Rights 89–91 (1994). The calls to grapple with the complicity of the field in the perpetuation of racial injustice has been heartening in recent years. *NASW Apologizes for Racist Practices in American Social Work*, Nat'l Ass'n Soc. Workers (June 17, 2021), https://www.socialworkers.org/News/News-Releases/ID/2331/NASW-apologizes-for-racist-practices-in-American-social-work.

182 *See* Mandated Reporter Commission, Office of the Child Advocate 2 (Oct. 27, 2020)

There is a natural alignment between the goals of the social work profession and that of anti-poverty lawyers, given the field's express anti-poverty commitment as enshrined in the code of ethics.[183] It comes as no surprise then that one of the most common interdisciplinary partnerships in the world of poverty law is the one between the lawyer and the social worker.[184] Social workers are well poised to address the underlying social needs of clients interfacing with the legal system due to the wide-array of skills they are trained in.[185] Particularly through their practicums, social workers are often exposed to a variety of social service providers and can tap into the networks built during their graduate programs in order to connect clients to housing resources, mental health services, public benefits, rehabilitation programs, adult education, child care, and the like.

Beyond utilizing social workers to address referral needs, a social worker's mental health training can be useful in picking up on psychological issues that may not be obvious to the untrained eye.[186] Even when not practicing in an explicitly therapeutic role, social workers can use particular tools from therapeutic modalities[187]—e.g. motivational interviewing,[188]

(meeting minutes), https://www.mass.gov/doc/draft-october-27-2020-meeting-minutes/download ("CPCS uses a 'holistic defense' model informed by current research which is premised on a legal defense team that approaches legal issues from a life-outcomes perspective.").

183 *Code of Ethics*, *supra* note 118.

184 Anderson et al., *supra* note 177, at 662.

185 "Social work practice consists of the professional application of social work values, principles, and techniques to one or more of the following ends: helping people obtain tangible services; counseling and psychotherapy with individuals, families, and groups; helping communities or groups provide or improve social and health services; and participating in legislative processes." *Practice*, NAT'L ASS'N SOC. WORKERS, https://www.socialworkers.org/Practice (last visited Mar. 3, 2022).

186 This can include indicia of psychopathology but can also be more subtle such as the identification of toxic stress which may inhibit a client from engaging in clear or consistent decision making. *What Is the Difference Between Psychologists, Psychiatrists and Social Workers?*, APA.ORG (July 2017), https://www.apa.org/ptsd-guideline/patients-and-families/psychotherapy-professionals ("Social workers are trained to perform psychotherapy, with a particular emphasis on connecting people with the community and support services available there."); Ferreira, *supra* note 178; *The Important Role Social Workers Play in Mental Health*, GOODTHERAPY (Dec. 14, 2015), https://www.goodtherapy.org/blog/the-important-role-social-workers-play-in-mental-health-1214157.

187 Interview with Olivia Dubois, *supra* note 25; Interview with Cristina F. Freitas and Debbie F. Freitas, *supra* note 131.

188 "'MI is a collaborative, goal-oriented style of communication with particular attention to the language of change. It is designed to strengthen personal motivation for and commitment to a specific goal by eliciting and exploring the person's own reasons for change within an atmosphere of acceptance and compassion.'"

internal family systems,[189] cognitive behavioral therapy[190]—to help "clients get not only good legal outcomes but also good life outcomes."[191] Their observations about psychological challenges can sometimes be crucial in the development of the legal theories of the cases themselves and can help shape the kinds of arguments and evidence attorneys might put forth in support of their client's claims. Relatedly, social workers who are not deeply acculturated by the legal system might provide an important perspective because they are removed from legal cultures. They might be uniquely positioned to remind attorneys of the importance of highlighting their client's humanity in addition to arguing based on legally cognizable categories. They may serve an essential translating function from "legalese" into layman's terms to clients. Due to their intensive training in client interviewing, they may prove instrumental to fact-finding or picking up on body language that suggests that a client is not understanding an aspect of their case, despite signaling to the attorney that they do understand. Social work as a profession tends to have more representation from underserved backgrounds than the legal field.[192] Thus, the probability that a social worker might be more intimately

*Understanding Motivational Interviewing*, MINT 1 (Aug. 2019) (quoting William .R Miller & Stephen Rollnick, Motivational Interviewing: Helping People Change (2013)), https://motivationalinterviewing.org/sites/default/files/understanding_mi_aug_2019.pdf.

189 Internal Family Systems is a therapeutic modality which draws upon "two . . . paradigms: systems thinking and the multiplicity of the mind." Richard Schwartz, *Evolution of the Internal Family Systems Model*, IFS Inst., https://ifs-institute.com/resources/articles/evolution-internal-family-systems-model-dr-richard-schwartz-ph-d (last visited Jan. 5, 2022). It emphasizes the fact that the human personality may have various parts similar to a family which are often in conflict with one another. *Id.* While recognizing that most human beings have defensive parts stemming from childhood wounding, the modality acknowledges that every human being has a core "[s]elf" from which one can draw "perspective, confidence, compassion, and acceptance." *Id.* When clients are conflicted or feel paralyzed before important decisions, principles from this modality can be useful to help a client explore the source of the conflict or paralysis by identifying the inner parts that are in conflict. *Id.*

190 "CBT is based on the theory that the way individuals perceive a situation is more closely connected to their reaction than the situation itself." *Introduction to CBT*, Beck Inst., https://beckinstitute.org/about/intro-to-cbt/ (last visited Jan. 5, 2022).

191 Interview with Cristina F. Freitas and Debbie F. Freitas, *supra* note 131.

192 *See New Report Provides Insights into New Social Workers' Demographics, Income, and Job Satisfaction*, Nat'l Ass'n Soc. Workers (Dec. 11, 2020), https://www.socialworkers.org/News/News-Releases/ID/2262/New-Report-Provides-Insights-into-New-Social-Workers-Demographics-Income-and-Job-Satisfaction ("More than 22% of new social workers are Black/African American and 14% are Hispanic/Latino."); *see also Lawyers by Race & Ethnicity*, A.B.A., https://www.americanbar.org/groups/young_lawyers/projects/

acquainted with the cultural, class context of the client and their narrative preferences might be greater than for attorneys generally. To illustrate, consider the following vignette:

*A client whose primary language was not English came to our offices. She asked for assistance with a finding of fraud and monetary assessment issued against her by a benefits agency. The basis of the agency's finding of fraud was that she had misrepresented her level of income. The agency had discovered she had been receiving undeclared income while simultaneously receiving benefits.*

*After conducting an intake in my office, I asked the attorney on duty to join our meeting, during which the client explained that it had been her child who had been interfacing with the agency on her behalf and reporting the status of her income—something she had not told the agency adjudicator when asked. A look of skepticism appeared on the attorney's face. When the client left and we discussed the case, the attorney explained that her story was replete with inexplicable contradictions and determined she was not credible.*

*I, however, believed this woman. For one, having been the product of an immigrant household myself I was intimately acquainted with the way children in immigrant households are often tasked with navigating complicated systems on behalf of their parents. Thus, her story was plausible to me. In the same vein, I have been exposed to the narrative preferences of many limited English proficient persons who, in my experience, had exhibited trouble understanding what is considered relevant in a proceeding without the guidance of counsel, despite their ability to speak some English. Finally, something about the client's affect and the way she expressed herself caused me to wonder whether there were any cognitive difficulties or trauma affecting her narrative and way of telling the story. The attorney on duty agreed to order a psychological evaluation and revisit whether to take the case based on the results.*

*The psych eval revealed a history that explained why the client would have difficulties in understanding and processing information. Feeling better about the client's credibility and the plausibility of her story, the attorney decided to proceed with the case by making a technical argument about language access and fraud. There was no easy way to make a legal argument about the client's psychological state, but they nonetheless referred to the psych eval in their brief and attached it. The day of the hearing in court, the judge was entirely unpersuaded by the more technical argument and he seemed ready to affirm the finding of fraud; however, at the very end of the hearing he added, "But if it is true that the client has psychological difficulties I would want the agency to explore whether this impacted the fraud finding, so I'm going to remand the case" (paraphrase). The attorney handling the case was stunned as they did not think the psych eval would weigh so heavily in the judge's decision.*

men-of-color/lawyer-demographics/ (last visited May 2, 2022) (highlighting "5% of all lawyers are African American – the same percentage as 10 years earlier" and "[s]imilarly, 5% of all lawyers are Hispanic").

*The remand instructions were onerous and involved a hearing totaling almost eight hours. I handled the representation but was also asked to swear in to testify about the role I played in identifying potential psychiatric challenges and in making the referral to the evaluating psychologist. I was also able to, in my closing, cite research about the prevalence of children acting on behalf of their parents in immigrant households. The adjudicator in this case did, in fact, give weight to research submitted into evidence about the dynamics in an immigrant household. Their decision found that the adult-child's testimony about having handled their mother's claim was credible. The decision further took note of the article I submitted into evidence explaining how common it is for children of immigrants to help their parents navigate American institutions. The client won the case, the fraud finding was removed, and she was eventually able to get almost $18,000 forgiven."*[193]

In this way, the paralegal/social worker's training and skills afforded to her by her social work background were instrumental to the success of the client counseling in this case; it helped inform the credibility assessment of the client, and contributed to the litigation strategy. Her background as a daughter of immigrants was also instrumental as it compelled her to find research that would help the adjudicator understand a phenomenon that might seem implausible to someone from a different cultural context.

## IV. CHALLENGES OF SOCIAL WORK-LAW PARTNERSHIPS

### A. *The Nature of the Controversy*

For as many skills and benefits social workers can bring to a legal aid agency, there are also challenges to working collaboratively. The concern that is raised most often with respect to this collaboration is the potentially conflicting ethical duties social workers and lawyers have with regard to maintaining the confidences of their clients.[194] The harm which

193 Memorandum from author to the Ed. Bd., Ne. Univ. L. Rev. (Feb. 27, 2022) (on file with Northeastern University Law Review). A further positive outcome of this story was the chance for an ongoing discussion between the paralegal/social worker and the thoughtful supervising attorney who reflected on the importance of a trauma-informed lens in legal advocacy. They later expressed regret about their initial judgments, and the paralegal/social worker expressed understanding for the attorney's initial evaluation. This is an added benefit of working across disciplines.

194 As far as the author of this note can tell, there have been no cases decided which hold that a social worker working in a legal setting is a mandated reporter. Anderson et al., *supra* note 178, at 663, 691; Stephanie Conti, Note, *Lawyers and Mental Health Professionals Working Together: Reconciling the Duties of Confidentiality and Mandatory Child Abuse Reporting*, 49 Fam. Ct. Rev. 388, 388–89 (2011); Paula Galowitz, *Collaboration*

could result from the conflict has been aptly characterized as "potential and unpredictable."[195] Anderson, Barenburg, and Trembley from Boston College have noted that "few reported cases can be found involving prosecution of a professional for failing to report suspected abuse under the 51 mandatory reporting statutes existing across the United States."[196] When civil claims have been brought against social workers, these cases have rarely prevailed.[197] Nation-wide, no cases have definitively decided that a social worker working in a legal setting as part of a legal team is a mandated reporter.[198] Recently, in *Elijah W. v. Superior Court*, the Los Angeles Juvenile Court initially characterized this very issue of conflicting confidentiality duties between a mental health professional and a lawyer as purely academic. The court was deciding on a motion for appointment of a forensic psychologist who agreed not to report child abuse to the authorities. The ruling underscores the rarity of this issue:

> [T]he court initially dismissed Elijah's confidentiality concern as "merely academic," explaining, "In the hundreds of [Evidence Code section] 730 appointments that this court has granted, and in the thousands that have been granted by the juvenile and adult courts, this issue has never been raised. Nor, has there ever been a case brought to the court's attention where a minor has divulged child abuse or made a threat to commit a crime during a competency evaluation and the statement was later introduced in court or even prompted a report.[199]

The concern about social worker-lawyer ethical conflicts, then, is potentially overblown.[200] Many social workers find that the need to report to DCF rarely

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*Between Lawyers and Social Workers: Re-Examining the Nature and Potential of the Relationship*, 67 FORDHAM L. REV. 2123, 2134–35 (1999); Jacqueline St. Joan, *Building Bridges, Building Walls: Collaboration Between Lawyers and Social Workers in a Domestic Violence Clinic and Issues of Client Confidentiality*, 7 CLINICAL L. REV. 403, 426, 460 (2001) (domestic violence clinic); Marie Weil, *Research on Issues in Collaboration Between Social Workers and Lawyers*, 56 SOC. SERV. REV. 393, 402–03 (1982); Mary Ann Forgey & Lisa Colarossi, *Interdisciplinary Social Work and Law: A Model Domestic Violence Curriculum*, 39 J. SOC. WORK EDUC. 459, 461 (2003).

195 Randye Retkin et al., *Attorneys and Social Workers Collaborating in HIV Care: Breaking New Ground*, 24 FORDHAM URB. L.J. 533, 554 (1997).

196 Anderson et al., *supra* note 177, at 708.

197 *Id.*

198 *Id.*

199 Elijah W. v. Superior Ct., 156 Cal. Rptr. 3d 592, 597 (Ct. App. 2013).

200 *See, e.g.*, Interview with Olivia Dubois, *supra* note 25.

comes up[201] in their day-to-day work, as people are not abusing their children en masse such that social workers are constantly finding their mandated reporting duties are triggered by client disclosures. The National Legal Aid & Defender Organization has endorsed the holistic defense model[202] and, as discussed above, many public defender offices incorporate social workers into their legal practices nationally.[203] Medical-legal partnerships suffer from the same potential conflicts, as doctors are also mandated reporters and yet, far less has been written about mandated reporting concerns in regard to these programs than what has been written about social work-legal partnerships.[204] There is a certain irony to this as physicians were the first mandated reporters.[205] Social workers only came to be identified as mandated reporters in almost all jurisdictions after the passage of CAPTA.[206] In other words, there is no difference between the mandated reporting duties of a doctor and a social worker. Thus, if medical-legal partnerships are endorsed as a legitimate model of interdisciplinary practice, by extension, social work-legal partnerships should be as well.

One theory as to why social workers have come to be more closely associated with mandated reporting than their physician counterparts is because of the central role social workers have historically played in the

201 *See, e.g.*, Interview with Claire Donahue, Assistant Clinical Professor, Bos. Coll. L. Sch., in Bos., Mass. (Mar. 16, 2022); Interview with Olivia Dubois, *supra* note 25.

202 *The Interdisciplinary Defense Team & Confidentiality: What Defenders Need to Know*, *supra* note 39.

203 *See, e.g.*, Andreea Matei et al., Assessing A Social Worker Model of Public Defense 2 (2021), https://www.urban.org/sites/default/files/publication/103811/assessing-a-social-work-model-of-public-defense_1.pdf; Rick Jones, *The Power of Public Defense*, NDS (July 26, 2018), https://neighborhooddefender.org/blog/the-power-of-public-defense/. *See generally* Brooklyn Def. Servs., https://bds.org/ (last visited Feb. 28, 2022); *Mental Health*, Law Offs. L.A. Cnty. Pub. Def., https://pubdef.lacounty.gov/mental-health-court-branch/ (last visited Feb. 28, 2022) ("Attorneys and social workers in the Office of the Public Defender represent individuals who have violated probation or parole and advocates to link them to housing, treatment, support, and benefits in an effort to end their re-incarceration cycle.").

204 As of March 13, 2022, HeinOnline search with search terms "Mandated reporting" and "medical-legal partnerships" yielded eleven articles on ethical conflicts concerning confidentiality, whereas similar search terms involving social workers yielded 145 articles.

205 *See* Brown & Gallagher, *supra* note 24. Some have observed that resident physicians in a medical-legal partnership context can be less attuned to the dangers of child welfare system involvement and see CPS as benevolent. In one advocate's experience working with medical-legal partnerships as an attorney, she observed that the social workers were much more aware of the potential negative consequences of calling DCF than the resident physicians who tended to err on the side of reporting. Interview with Elizabeth Brusie, *supra* note 131.

206 *See* Brown & Gallagher, *supra* note 24.

development of adoption processes and orphanages, from which the current family regulation system arose.[207] While the role of doctors is understood as primarily dealing with physical health, the role of social workers has been more ambiguous. Adding further confusion, case workers in many CPS departments are sometimes called "social workers" even though most of them have no formal social work training or licenses, [208] solidifying the association between the field of social work and involvement in the family regulation system. This close association between social workers and mandated reporting in the public consciousness, however, should not be a major obstacle in the formation of otherwise beneficial collaborations between social workers and lawyers.

Nevertheless, however rare the issue of a conflict in duties of confidentiality in collaborations between social workers and lawyers, lawyers must do everything to ensure that they can keep the disclosures of their clients confidential. Model Rule of Professional Responsibility (MR) 5.3 places a duty on supervising lawyers to make reasonable efforts to ensure that everyone working as part of a legal team takes on the same ethical responsibilities as the lawyer, including confidentiality. It is important, then, for lawyers who believe that the benefits of collaboration outweigh the risks, to figure out how they will ensure that they are abiding by the duties set forth in MR 1.6—the duty of confidentiality—and MR 5.3 and not compromising their clients' cases.

### 1. The Conflict

Both professions place a high value on confidentiality. For clinical social workers, a guarantee of confidentiality allows a client to disclose damning or troubling aspects of their life that they would, otherwise, perhaps not be compelled to disclose or work on in therapy. For precisely this

207 "The current child protection system evolved out of the alms-houses, orphanages, and anti-cruelty societies of the past." Kindred, *supra* note 103, at 441.

208 NAT'L ASS'N SOC. WORKERS, "IF YOU'RE RIGHT FOR THE JOB, IT'S THE BEST JOB IN THE WORLD" 9 (2004), https://www.socialworkers.org/LinkClick.aspx?fileticket=Mr2sd4diMUA%3D&portalid=0 ("A recent study of local Child Protection Services agencies conducted by the Children's Bureau, found that child protection agencies had an average of 26 staff, that included social workers or caseworkers, supervisors, support staff, case aides, specialist workers, and managers. These agencies averaged '3 staff with less than a Bachelor's degree, 13 staff with a Bachelor's degree, 3 with a Master of Social Work (M.S.W.) degree, and 1 employee (or staff person) with some other type of advanced degree." (citations omitted)); *see also* Melissa Russiano, *Social Work License Requirements*, SOCIALWORKLICENSURE.ORG (Nov. 4, 2020), https://socialworklicensure.org/articles/social-work-license-requirements/.

reason, the United States Supreme Court in *Jaffee v. Redmond* extended the psychotherapist privilege to clinical social workers, acknowledging mental health as a public good worthy of protection:[209]

> Effective psychotherapy depends upon an atmosphere of confidence and trust, and therefore the mere possibility of disclosure of confidential communications may impede development of the relationship necessary for successful treatment. The privilege also serves the public interest, since the mental health of the Nation's citizenry, no less than its physical health, is a public good of transcendent importance. In contrast, the likely evidentiary benefit that would result from the denial of the privilege is modest.[210]

In some respects, *Jaffee v. Redmond* placed "the confidentiality of a social worker's therapeutic relationship with a client . . . on the same ground as the confidentiality between a lawyer and her client and a husband and wife."[211] Social workers also have concurrent duties to keep client information confidential pursuant to the NASW Code of Ethics[212] and, depending on the state, particular state statutes and regulations.[213]

With respect to lawyers, a similar principle animates the rules governing lawyer confidentiality. In *In re Shargel*, the Second Circuit noted that "[t]he underlying theory . . . is that encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively, justly, and expeditiously, and that these benefits outweigh the risks posed by barring full revelation in court."[214] There are two main sources which deal with an attorney's duty not to reveal their client's confidences. While related, they are not coterminous.[215] The attorney-client privilege is a rule of evidence, which governs what is admissible in court and the more general

209 Vicki Lens, *Protecting the Confidentiality of the Therapeutic Relationship:* Jaffee v. Redmond, 45 Soc. Work 273, 274–76 (2000) (clarifying that the privilege was extended in the context of civil actions in federal court).

210 Jaffee v. Redmond, 518 U.S. 1, 2 (1996).

211 Lens, *supra* note 209, at 275.

212 *Code of Ethics*, *supra* note 118.

213 *See, e.g.*, 258 Mass. Code Regs. § 22.03 (2017); Mass. Gen. Laws Ann. ch. 112, § 135A (West 1993).

214 Shargel v. United States, 742 F.2d 61, 62 (2d Cir. 1984).

215 Sue Michmerhuizen, *Confidentiality, Privilege: A Basic Value in Two Different Applications*, A.B.A. Ctr. for Pro. Resp. 1 (May 2007), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/confidentiality_or_attorney.authcheckdam.pdf.

confidentiality rule governing the lawyer-client relationship is found in the Model Rules of Professional Responsibility.[216] Each state has their own version of the Model Rules.[217]

Dating back to the sixteenth century,[218] the attorney-client privilege aims to prevent an attorney from being compelled to testify against their client.[219] There is a recognition that the attorney-client privilege competes with broader goals of truth-finding;[220] however, courts in the United States have repeatedly decided that society's interest in "the observance of law and administration of justice" through the provision of fully informed legal advice[221] outweighs this former goal. As the Massachusetts Supreme Judicial Court has stated,

> The attorney-client privilege is so highly valued that, while it may appear 'to frustrate the investigative or fact-finding process . . . [and] create [ ] an inherent tension with society's need for full and complete disclosure of all relevant evidence during implementation of the judicial process,' . . . it is acknowledged that the "social good derived from the proper performance of the functions of lawyers acting for their clients. . . outweigh[s] the harm that may come from the suppression of the evidence."[222]

Importantly, the attorney-client privilege is not without limit.[223] The purpose of the communication between the client and the attorney matters with respect to what the privilege covers.[224] Communicating with a third

216 *Id.*

217 *See Jurisdictional Rules Comparison Charts*, A.B.A., https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/ (last visited Feb. 28, 2022).

218 Note, *The Attorney-Client Privilege and the Corporate Client: Where Do We Go After* Upjohn*?*, 81 MICH. L. REV. 665, 666 (1983).

219 *Attorney Client Privilege*, WAYNE ST. U., https://generalcounsel.wayne.edu/legal/attorney-privilege (Apr. 2011).

220 Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 209, 211–12 (2006) ("That privilege, of course, frustrates the search for the truth because the lawyer ordinarily may not reveal what has been learned during the representation of the client, even after the client's death.").

221 Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

222 Comm'r v. Comcast Corp., 901 N.E.2d 1185, 1195 (Mass. 2009).

223 Doug Gallagher & Manasi Raveendran, *Attorney-Client Privilege for In-House Counsel*, A.B.A. (2017), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2017-18/november-december/attorney-client-privilege-inhouse-counsel/ ("Attorneys and clients would be unwise to consider all communications between the clients and attorneys as receiving the privilege protection.").

224 Fisher v. United States, 425 U.S. 391, 403 (1976) ("Confidential disclosures by a client

party outside of the attorney-client relationship can trigger a waiver of the privilege.[225] There is also a crime-fraud exception, in which statements made in furtherance of a crime or to conceal a crime are not privileged.[226]

The more general rule of confidentiality which governs the attorney-client relationship found in the Model Rules prohibits disclosure of information related to the representation of the client.[227] Attorneys are allowed to break confidentiality if the lawyer reasonably believes the disclosure is necessary under the conditions set forth in the Model Rules.[228] The rules are very clear that "[a] lawyer *shall not* reveal information relating to the representation of a client unless the client gives informed consent" but, "[a] lawyer *may* reveal information . . . to the extent the lawyer reasonably believes necessary: to prevent reasonably certain death or substantial bodily harm."[229]

Herein lies a crucial difference between the contours of the social worker's duty of confidentiality and that of the lawyer: the social worker *must* report suspicions of child abuse and neglect—mandatory[230]—and the lawyer *can* report if the disclosure is necessary to prevent bodily harm—permissive.[231] One can imagine instances where the two duties overlap. A lawyer working with a social worker might determine that the nature of the client's disclosure merits breaking confidentiality in order to prevent the substantial bodily harm of a child. This poses no difficulty to a social worker who is required to report.

The challenge comes in when the social worker on the legal team might suspect child abuse or neglect and (a) the lawyer does not deem disclosure reasonably necessary to prevent substantial bodily harm, or (b) the lawyer does not elect to avail herself of the permissive rule in the code of ethics allowing her to disclose. In this situation, a social worker's disclosure in

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to an attorney made in order to obtain legal assistance are privileged."); *see also In re* Horowitz, 482 F.2d 72, 81 (2d Cir. 1973).

225 *In re* Horowitz, 482 F.2d at 81 ("We deem it clear that subsequent disclosure to a third party by the party of a communication with his attorney eliminates whatever privilege the communication may have originally possessed, whether because disclosure is viewed as an indication that confidentiality is no longer intended or as a waiver of the privilege.").

226 *See In re* Grand Jury Investigation, 445 F.3d 266, 274 (3d Cir. 2006) ("[T]he privilege can be overridden if the client used the lawyer's services to further a continuing or future crime or fraud." (citing *In re* Grand Jury Proc., 604 F.2d 798, 802 (3d Cir. 1979))).

227 Model Rules of Pro. Conduct r. 1.6 (Am. Bar Ass'n 2020).

228 *Id.*

229 *Id.*

230 Child.'s Bureau, *supra* note 14.

231 Model Rules of Pro. Conduct r. 1.6(b) (Am. Bar Ass'n 2020).

a legal setting is effectively a breach of the lawyer's confidentiality duties.[232] Hypothetically, a social worker's report has the potential of piercing the client-attorney privilege due to the disclosure to a third party, which could bear evidentiary consequences in court.[233] Depending on the nature of the case, a social worker's disclosure could weaken the client's defense bolstering evidence against them, particularly if the findings and investigation of a CPS department become material to the case. More generally, it could ruin the rapport between the client and the legal team.

Many legal agencies which employ social workers across the country take the position that the aforementioned scenarios are avoided because social workers are covered both by attorney-client privilege and by the rules of confidentiality enshrined in the Model Rules of Professional Responsibility and their respective state analogues. That is, as long as they are working in furtherance of the legal case. Under this theory, social workers can enjoy a safe harbor from the mandated reporting rules when working as part of a legal team. This is the view taken by the pioneers of the holistic defense model mentioned above.[234] In a small number of states social workers are explicitly exempt from mandated reporting when working as part of the legal team.[235] However, in the majority of jurisdictions, without legal authority explicitly exempting social workers from mandated reporting, some worry that the derivative attorney-client privilege and confidentiality theories are not foolproof escape hatches or are plainly legally indefensible. Should facts give rise to a suspicion of child abuse or neglect during the course of representation, some lawyers worry that, even in legal settings which have decided a social worker is not a mandated reporter, a social worker's failure to report could result in the revocation of the social worker's license[236] or other penalties including fines and imprisonment, despite any internal policy that protects them.[237] Others worry that a social worker will

232 Anderson et al., *supra* note 177, at 697–98.

233 Steven D. Ginsburg, *How to Lose Attorney-Client Privilege*, A.B.A. (Mar. 16, 2017), https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/practice/2017/how-to-lose-attorney-client-privilege/ ("Either voluntary or inadvertent disclosure to outside or non-covered recipients, professional advisors outside the privilege, and experts and consultants, can result in waiver as a matter of law.").

234 *See supra* note 18.

235 Fox & Goyette, *supra* note 18.

236 For this reason, some social workers working in legal settings have elected not to pursue licenses with their respective state boards. Interview with Dan Manning, *supra* note 19.

237 *See Social Work Online Course Reporting Mandates*, ADELPHI U., https://www.adelphi.edu/social-work/hands-on-learning/mandated-reporter-training/reporting-mandates/ (last visited Sept. 11, 2021).

decide, during the course of the representation, to break confidentiality—in violation of their previous agreement—and report on a client in service of the mandated reporting statute. For some lawyers, working with a mandated reporter is risky if they cannot be absolutely certain that the social worker will take on the lawyer's ethical duties, as contemplated by Model Rule 5.3.

## B. *Mandated Reporting in Massachusetts*

### 1. The State of Mandated Reporting in Massachusetts

The Massachusetts mandated reporting statute was written in 1973.[238] It has been updated periodically but in "piecemeal fashion."[239] Generally, it is not uncommon for such updates and changes in child welfare policy to be rooted in reaction to a public scandal.[240] Indeed, in 2019, the Massachusetts legislature created a mandated reporter commission (the Commission) in response to the Larry Nassar scandal.[241] In expressing urgency around addressing the fact that athletic organization employees are not mandated reporters in Massachusetts, the House Committee on Post Audit and Oversight seems to have implied that if only mandated reporting laws were stricter and encompassed a wider range of professionals in child athletics, more could have been done to prevent the abuse that occurred.[242]

The Commission was tasked with making "recommendations on how to improve the response to, and prevention of, child abuse and neglect."[243] The overarching direction of the Commission was towards an expansion of the mandated reporting statute. Specifically, they considered "expand[ing] [the] definition of abuse and neglect, . . . lower[ing] [the] standard [that would] trigger[] a 51A report[,]"[244] and expanding the list

238 Shira Schoenberg, *Commission on Child Abuse Reporting Fails to Reach Consensus*, Commonwealth (June 28, 2021), https://commonwealthmagazine.org/state-government/commission-on-child-abuse-reporting-fails-to-reach-consensus/.

239 *Id.*

240 Geen & Tumlin, *supra* note 61, at 9.

241 Schoenberg, *supra* note 238; Act of Nov. 26, 2019, 2019 Mass. Legis. Serv. ch. 124 (West)..

242 House Committee on Post Audit and Oversight, Raising the Bar: A Vision for Improving Mandated Reporting Practices in the Commonwealth (May 17, 2018); *see also* Schoenberg, *supra* note 238.

243 Act of Nov. 26, 2019, 2019 Mass. Legis. Serv. ch. 124 (West).

244 Mass. Gen. Laws Ann. ch. 119, § 51A (West 2021) is the mandated reporting statute. The reports filed to the Department of Children and Families pursuant to this section are colloquially known as "51As." *Reporting Alleged Child Abuse and Neglect (Filing a 51A Report)*, Mass.gov, https://www.mass.gov/service-details/reporting-alleged-child-abuse-or-neglect-filing-a-51a-report (last visited May 2, 2022); Letter from ACLU

of professionals considered mandated reporters.[245] Part of their discussions included whether to make the mandate universal for the sake of clarity, as opposed to keeping a statute which identified particular professions.[246] This idea was abandoned, however, because "there is no evidence that universal reporting schemes result in an increase in substantiated reports."[247]

Although the Commission focused most of its time on the expansion of the Massachusetts mandated reporting law, it spent some time considering a proposal by the Committee of Public Counsel Services to exclude social workers from the mandated reporting statute in order to more effectively continue working according to a holistic defense model.[248] This proposal was opposed by the NASW[249] and the Commission ultimately rejected it.[250]

Importantly, the Commission held a public comment period in which there was a backlash of concern from advocates, medical professionals, social workers, academics, and impacted families.[251] It became clear through testimony and written comment that, in Massachusetts, there is a widely-held concern about the disproportionate and negative impact an expansion of the statute would have on communities of color.[252] Ultimately, the Commission took these comments seriously and produced a report which identified some of the problems with the mandated reporting schema but made few substantive recommendations.[253] Since the report, the Massachusetts mandated reporting statute has not undergone any significant changes.[254]

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Mass. to Mandated Rep. Comm'n (Apr. 21, 2021), https://www.mass.gov/doc/aclu-massachusetts42121/download.

245 ACLU Mass., *supra* note 244.

246 THE MANDATED REP. COMM'N, *supra* note 82, at 24.

247 *Id.* at 25.

248 *Id.* at 43; Schoenberg, *supra* note 238; Letter from Michael Dsida to Mandated Rep. Comm'n, *supra* note 8, at 1.

249 Letter from Rebekah Gewirtz, Exec. Dir., Nat'l Ass'n Soc. Workers, to Mandated Rep. Comm'n (Apr. 20, 2021), https://www.mass.gov/doc/rebekah-gewirtznational-association-of-social-workers42121/download.

250 THE MANDATED REP. COMM'N, *supra* note 82, at 43.

251 *See Public Comment Period & Public Hearings*, MASS.GOV, https://www.mass.gov/lists/public-comment-period-public-hearings (last visited May 2, 2022).

252 THE MANDATED REP. COMM'N, *supra* note 82, at 11, 13, 25, 32, 66.

253 *Id.* at 21–23; *Massachusetts Commission Declines to Recommend Expansion of Mandated Reporters*, IMPRINT (July 12, 2021), https://imprintnews.org/news-briefs/massachusetts-commission-declines-to-recommend-expansion-of-mandated-reporters/56821.

254 MASS. GEN. LAWS ANN. ch. 119, § 51A (West 2022).

### 2. Massachusetts-specific guidance

In Massachusetts, social worker confidentiality is governed by Massachusetts General Laws chapter 112, section 135A, which requires licensed social workers to keep all communications between themselves and their clients confidential. There are several exceptions including when a client shows they are a danger to themselves or have threatened to kill or inflict serious bodily injury upon another.[255] Massachusetts General Laws chapter 112, section 135A(a) references other laws which may provide exceptions to the confidentiality mandate. Chapter 119, section 51A is one such exception and is the state mandated reporting statute. Chapter 119, section 21, where mandated reporters are listed, distinguishes between "clinical social worker" and "social worker" both of whom are considered mandated reporters

With regards to attorney confidentiality, the Supreme Judicial Court Rule 3:07: Rules of Professional Conduct is the Massachusetts analogue to the Model Rules of Professional Conduct. Model Rules 1.6 and 5.3 mentioned above are also found in the state rules. Respectively, these concern the duty of confidentiality and a lawyer's responsibilities of ensuring that a nonlawyer employee conduct themselves in a manner that is compatible with the lawyer's obligations. "The ABA Standing Committee on Ethics and Professional Responsibility has instructed that individuals to whom lawyers have 'outsourced' aspects of their representation (not just employees) also fall under the Rule 1.6 obligation not to disclose client information."[256] Thus, social workers who work as part of a legal team whose services can be characterized as an aspect of the representation, may be covered under this derivative confidentiality doctrine.[257]

There is an argument that *non-licensed* social workers are not mandated reporters. "Social worker" is defined in Massachusetts General Laws chapter 112, section 130 which is applicable to sections 130–37 of that same chapter.[258] "'Social worker' [is] an individual who by training and experience meets the requirements for licensing by the board *and* is duly licensed to engage in the practice of social work in the commonwealth." (emphasis added).[259] Although the mandated reporting statute is outside of the sections this definition explicitly applies to, it would defy the canons of statutory construction, according to which there is a presumption of

255 Mass. Gen. Laws Ann. ch. 112, § 135A(c)(1)–(2) (West 1993).

256 *The Interdisciplinary Defense Team & Confidentiality: What Defenders Need to Know*, *supra* note 39, at 7.

257 *Id.*

258 Mass. Gen. Laws Ann. ch. 112, § 130 (West 1977).

259 *Id.*

consistent usage, to construe the definition of "social worker" in a fashion contrary to its definition under Massachusetts General Laws chapter 112, section 130.[260] Further, in regards to the concern that chapter 112 only applies to sections 130-37, it can be argued that the mention of any other law in chapter 112, section 135(A)(a) includes the mandated reporting statute. Chapter 119, where the mandated reporting statute is located, is more explicitly cross referenced in chapter 112, sections 135A(e), 135B(e) and (f). Under this theory, non-licensed social workers, then, are not "social workers" within the meaning of the mandated reporting statute and as such are not mandated reporters. This means that unlicensed social workers working with attorneys can make the argument that they are not mandated reporters according to chapter 112, section 130.

However, there are two issues with relying on this theory alone to justify collaborations between social workers and lawyers—particularly when they are working as part of the same team: (1) this theory has not been formally put to the test; (2) there are licensed social workers reluctant to give up their licenses—particularly for those who want to practice as therapists at any given point in their careers—who may elect to work in legal settings. What then?

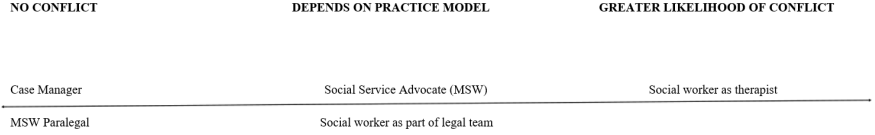
Whether the mandated reporting duty survives depends on the role the social worker is playing with respect to the legal case.[261] In a paper written in 2007 by two attorneys and a social worker from Boston College Law School, the authors set out three possibilities for a social worker role in legal settings: (1) "a social worker serving as a member of a legal [] team"; (2) a social worker with an independent relationship to the client apart from the legal case; and (3) "[a] social worker [who] 'parachutes into' the lawyering sector to assist with a case as a consultant or expert."[262] According to the authors, the mandated reporting duty only survives in the second scenario. Otherwise, social workers with no independent relationship to the client who are part of the legal team in some respect, are not mandated reporters.

260 *See* Gustafson v. Alloyd Co., 513 U.S. 561, 568 (1995) ("In seeking to interpret the term 'prospectus,' we adopt the premise that the term should be construed, if possible, to give it a consistent meaning throughout the Act. That principle follows from our duty to construe statutes, not isolated provisions.").

261 Anderson et al., *supra* note 177, at 709–15.

262 *Id.*

## TABLE 1: SOCIAL WORK ROLES AND LEVEL OF POTENTIAL CONFLICT




## TABLE 2: COLLABORATIVE MODELS AND LEGAL THEORIES

| TYPE | ROLE | AGENCY EXAMPLES | HOW TO MANAGE DIFFERENCES IN ETHICAL DUTIES |
|---|---|---|---|
| **Social worker as member of legal team** | **Social worker**[263]<br>-is apprised of the developments of the legal case<br>-offers clinical expertise and emotional support in furtherance of legal case<br>-consultation to attorneys<br>-crisis intervention services<br>-social science research<br>-aid in sentencing<br>-assistance with development of case strategy | *Bronx Defenders* | Derivative attorney-client privilege and lawyer-client confidentiality |
| | **Social Worker as Social Services Advocate (SSA)**[264]<br>-consultation to attorneys<br>-crisis intervention<br>-clinical evaluations for aid in sentencing<br>-case management and referral services<br>-offers clinical expertise and emotional support in furtherance of legal case | *Committee of Public Counsel Services* | Some divisions operate under a theory of derivative attorney-client privilege and lawyer-client confidentiality The protocol of at least one division is to give clients an engagement letter describing the risks of working with a social worker. |

263 Telephone Interview with Caitlin Becker, Managing Dir. of Soc. Work, Bronx Defs. (Apr. 11, 2022).

264 Interview with Olivia Dubois, *supra* note 25.

| | | | |
|---|---|---|---|
| | **Social worker at law school clinical program**[265]<br>-Information gathering and referrals<br>-case management<br>-re-entry planning<br>-consultation on case theory development<br>-social science research and contributions to pleadings and amicus briefs<br>- in house trainings for law students | *Boston College Law School clinics* | Derivative attorney-client privilege and lawyer-client confidentiality |
| | **Social worker at law school clinical program**[266]<br>-Offers trauma-informed lens to legal team and emotional support to clients<br>-case management[267]<br>-co-teaches course: Trauma, Refugees and Asylum Law<br>-clinical supervision to students<br>-clinical assessments[268] | *Harvard Immigration and Refugee Clinical Program* | Derivative attorney-client privilege and lawyer-client confidentiality |
| **Social worker not working as social worker but as a member of legal team** | **Social worker as paralegal**[269]<br>-brings social work training and perspective to bear on legal advocacy while not explicitly delivering social work services | *Greater Boston Legal Services* | Paralegal with MSW is not a mandated reporter, not acting in their capacity as social worker. |

265 Interview with Claire Donahue, *supra* note 201.

266 Interview with Liala Buoniconti, Soc. Worker, Harvard Immigr. & Refugee Clinical Program, Harvard L. Sch., in Bos., Mass. (Apr. 5, 2022).

267 *Social Work*, HARV. L. SCH. CRIM. JUST. INST., https://clinics.law.harvard.edu/cji/social-work/ (last visited May 9, 2022).

268 *Id.*

269 Interview with Dan Manning, *supra* note 19; Interview with Liliana Ibara, *supra* note 19.

| | | | |
|---|---|---|---|
| **Social worker parachutes into legal sector"**[270] | **Social worker as consultant, independent contractor**[271]<br>-May consult on particularly difficult aspects of a legal case such as when a client is presenting with difficulties of a psychological or emotional nature. | *Greater Boston Legal Services* | Any potential conflict is avoided because the consulting services of the social worker can be utilized without sharing anything about the client-attorney communications. |
| | **Social worker as evaluator for particular case** | *Widely used in immigration practice with asylum seekers* | No ethical conflict because the evaluator is working with client separately and is not necessarily apprised of the client-attorney communications. |
| **Social worker with independent relationship to client** | **Social worker as therapist** [272]<br>-Offers mental health services to clients<br>-Offers forensic/ psychological evaluations for immigration cases<br>-Offers trainings on clinically relevant topics to legal team | *De Novo* | An ethical wall exists between the counseling and legal programs. The in-house policy requires client's informed consent when working with a non-lawyer who may be a mandated reporter.<br><br>Legal team has a non-mandated reporter case manager working to handle social service and public benefit needs. Individualized determinations about when social workers and lawyers should meet together with clients are made. |

270 Anderson et al., *supra* note 177.

271 Interview with Dan Manning, *supra* note 19; Interview with Liliana Ibara, *supra* note 19.

272 Interview with Elizabeth Brusie, *supra* note 130.

| | | | |
|---|---|---|---|
| **Non-social worker offering social services** | **Case manager** (not an MSW)[273]<br>-Offers assistance with housing search and access to resources/public benefits | *De Novo* | No ethical conflict because case managers are not included in the list of mandated reporters in the mandating reporting statute in Massachusetts. |

While acknowledging Model Rule 5.3 as a possible source of protection for social workers from mandated reporting duties,[274] Anderson, Barenberg, and Tremblay warn that the analysis does not stop there. The authors do not go into depth about the reasons Model Rule 5.3 is not enough,[275] but one likely explanation is that the Model Rules—and their state analogues—are only binding on attorney conduct and not social worker conduct.[276] It is the lawyer, according to this rule, who "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer."[277] Although it is implied that the non-lawyer professional will abide by the lawyer's confidentiality duties, this says very little about the non-lawyer's duties to the lawyer.[278] This concern would be consistent with Anderson, Barenberg, and Tremblay's observations about the District of Columbia Bar Association Ethics Committee (D.C. Ethics Committee) opinion on this question. The D.C. Ethics Committee is the only known authority to have directly opined on the issue of social work mandated reporting duties in legal settings.[279] While recognizing that "Rule 1.6(e) allows no exception to the duty to ensure that the social worker preserves the confidences and secrets of the lawyer's client," they added, "[i]

273 *Id.*

274 *See supra* Section IV.A.

275 Anderson et al., *supra* note 177, at 699 ("It may be tempting to conclude that the lawyer's Rule 5.3 obligation confirms that a social worker working within a law firm must comply with Rule 1.6 in all respects, but Rule 5.3's strictures cannot support that conclusion. A law firm might respond to the cross-professional role tension either by refusing to collaborate with any mandated reporter . . . or alternatively by establishing stringent protocols ('walls') to deter access by any mandated reporter to the kind of disclosures which might trigger his reporting duty . . . ." (footnote omitted)).

276 Although, the duty on the non-lawyer agent is implied. *Id.* at 698–99 ("The Restatement does not directly describe the obligations of nonlawyers, but it plainly implies that nonlawyers, like the social worker in our example, must comply with the ethical obligations of the law firm's lawyers.").

277 MODEL RULES OF PRO. CONDUCT r. 5.3(a) (AM. BAR ASS'N 2020).

278 MODEL RULES OF PRO. CONDUCT r. 5.3 (AM. BAR ASS'N 2020).

279 Anderson et al., *supra* note 177, at 704.

t is arguable that the social worker has no mandatory reporting obligations in these circumstances . . . [but] . . . [t]he Rules of Professional Conduct cannot insulate a social worker from obligations otherwise imposed by law."[280] The authors more strongly rely on the underlying policy rationale for the exclusion of attorneys from mandated reporting statutes. A social worker's report to DCF in a legal setting would be a breach of the attorney's duties and, in effect, would cause the lawyer to "be governed by the reporting duty."[281] This would be antithetical to the legislature's intent that lawyers not be mandated reporters. On the other hand, a disclosure by a social worker with an independent relationship to a legal services client does not necessarily result in a breach of the lawyer's duties; therefore, operating in her own professional capacity as a social worker, the rules of her profession control with no superseding authority to mitigate her mandated reporting responsibilities.[282]

In the attorney-client privilege arena—as opposed to the broader ethical rule on confidentiality—there has been slightly more guidance on whether non-attorneys are covered. In general, "courts have no power to recognize implied exceptions to the lawyer-client privilege."[283] There has been a longstanding recognition that "the assistance of [non-attorney] agents [is often] indispensable to [the attorney's] work and the communication of the client being often necessarily committed to [the agents] by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents."[284] Massachusetts Rule of Evidence 5.02 describes the attorney-client privilege, explaining that the client is the holder of the privilege and that the privilege applies to "communications made for the purpose of obtaining or providing legal services . . . ."[285] The privilege, pursuant to this rule, extends to communications between the client and the attorney's representative as well as between the client's attorney and the attorney's representative.[286]

The Second Circuit in *United States v. Kovel* more explicitly acknowledged the existence of a derivative attorney-client privilege in certain cases where the non-lawyer is functioning as an agent of the attorney.[287]

280 *Id.*

281 *Id.* at 702.

282 *Id.* at 711.

283 Elijah W. v. Superior Ct., 156 Cal. Rptr. 3d 592, 604 (Ct. App. 2013).

284 *The Interdisciplinary Defense Team & Confidentiality: What Defenders Need to Know*, *supra* note 39, at 7.

285 Mass. G. Evid. § 502(b).

286 *Id.* § 502(a)(4) ("A 'representative of the attorney' is one used by the attorney to assist the attorney in providing professional legal services.").

287 United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961)(quoting 8 Wigmore, Evidence

With regards to non-lawyers on legal teams, the court noted,

> the complexities of modern existence prevent attorneys from effectively handling clients' affairs without the help of others; few lawyers could now practice without the assistance of secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts. 'The assistance of these agents being indispensable to his work and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents.

Effectively, *Kovel* holds that "when non-legal experts act as 'interpreters' of client communications for the purpose of aiding the client's legal representations—for instance, accountants, in that case—they become cloaked by the privilege."[288] Many courts have repeatedly acknowledged psychologists and psychiatrists as attorney agents, who are covered by attorney-client privilege.[289] Given the Supreme Court's recognition of the field of social work as on par with its sister-mental health fields such as psychology and psychiatry for evidentiary purposes,[290] it is not a stretch to make the argument that clinical social workers should be similarly characterized as agents of lawyers when providing their services to the legal team or lawyer and should be similarly covered by attorney-client privilege.[291]

While embracing the doctrine of derivative attorney-client privilege, the Massachusetts Supreme Judicial Court has clarified that the derivative attorney-client privilege doctrine is "limited in scope" and "attaches only when the third party's role is to clarify or facilitate communications between attorney and client."[292] Thus, to make the argument that a social worker is an agent as contemplated by *Kovel*, advocates should make sure that the social worker's role in the firm is, in fact, to facilitate communications between the

§ 2301).

288 *The Interdisciplinary Defense Team & Confidentiality: What Defenders Need to Know*, *supra* note 39, at 8.

289 Elijah W. v. Superior Ct., 156 Cal. Rptr. 3d 592, 604 (Ct. App. 2013); United States v. Alvarez, 519 F.2d 1036, 1045 (3d Cir. 1975); State v. Pratt, 398 A.2d 421, 426 (Md. 1979); Ake v. Oklahoma, 470 U.S. 68, 78 (1985); Houston v. State, 602 P.2d 784, 790 (Alaska 1979); People v. Lines, 531 P.2d 793 (Cal. 1975); *Ex parte* Ochse, 238 P.2d 561 (Cal. 1951); City & Cnty. of S.F. v. Superior Ct. In and For City of S.F., 231 P.2d 26 (Cal. 1951).

290 Jaffee v. Redmond, 518 U.S. 1, 2 (1996); Lens, *supra* note 209, at 274–76.

291 *The Interdisciplinary Defense Team & Confidentiality: What Defenders Need to Know*, *supra* note 39, at 9.

292 Comm'r v. Comcast Corp., 901 N.E.2d 1185, 1197 (Mass. 2009).

attorney and a client in a way that is analogous to an interpreter or to the accountant in *Kovel*, and that the social worker's services were not merely "useful and convenient."[293]

For those wary of hanging their hats on the derivative attorney-client privilege and confidentiality theories—especially those concerned about the narrowing of the doctrine in *Kovel*—protocols can be instituted when social workers and lawyers collaborate. For instance, lawyers may screen a case as inappropriate for social work services and refrain from involving the social worker on those particular cases. A client can also be apprised of the social worker's mandated reporting duty so that whenever the client speaks while the social worker is present, they can exhibit necessary caution.

The result is that there is necessarily ambiguity on the question of whether social workers working as part of legal teams are mandated reporters. As demonstrated above, there are some arguments lawyers can use in support of their holistic representation models, but each argument carries with it some unsettled aspect. Many legal settings operating holistically do so while living in this ambiguity and are prepared to put forth some of the aforementioned arguments to the test should the unforeseen occur and a situation arises where this question must be litigated. In the many decades in which Boston College Law School has been operating their clinic with a social worker staff person actively working on cases, clinic staff have never been the objects of disciplinary action.[294] For most of the clinic's forty years of including social workers on their legal teams no cases have resulted in reports to DCF.[295] The same is true of the other area law schools as is the case with Harvard Law School's Immigration and Refugee Clinical Program which works under a holistic model.[296]

293 *Id.* Social workers on legal teams do perform an interpreting function when they are working in furtherance of the legal case, particularly when there are indicia of psychological or emotional challenges. Social workers bring many of the functions the Supreme Court in *Ake* acknowledged as indispensable to a criminal defendant; these include crucial clinical insight to the defense, perspective on "the effects of any disorder on behavior," the ability to "identify the 'elusive and often deceptive' symptoms" of mental disorders, and ability to translate a medical diagnosis into language that makes sense to an audience not clinically trained. 470 U.S. at 78. *See* Ferreira, *supra* note 178, for illustration of how a social worker brings clinical skills to bear without which important facts would not have been elicited.

294 Interview with Claire Donahue, *supra* note 201.

295 *Id.*

296 Sabrineh Ardalan, *Constructive or Counterproductive? Benefits and Challenges of Integrating Mental Health Professionals into Asylum Representation*, 30 Geo. Immigr. L.J. 1 (2015); Interview with Liala Buoniconti, *supra* note 267.

## CONCLUSION

The child welfare system has strayed far away from its original purpose to protect children from abuse and neglect. Mandated reporting statutes have proven to be an ineffective way of addressing child abuse and neglect, at best and at worst, they are a traumatizing force for marginalized communities, which perpetuates oppression. Social workers who recognize this harm are in a bind due to their obligations under those same mandated reporting statutes. Social workers can act conservatively with respect to these duties in typical social work settings and use their judgment and therapeutic tools to mitigate some of the harm the statutes impose, but they encounter two main problems: (1) cultures of fear which may leave them with no choice but to report; and (2) without any superseding mandate, their mandated reporting duties remain intact, tying their hands in certain circumstances which do rise to the level of the broad statutory definition of child abuse or neglect.

Lawyers, on the other hand, have the freedom to use judgment and discernment should concern about the well-being of their clients and their children arise. Bringing social workers onto legal teams can be a way of supporting resistance to the family regulation system in its current form. At the same time, it can foster the kind of holistic representation which has the potential to yield powerful outcomes for clients entangled within the difficult circumstances poverty often facilitates. In some ways, holistic representation holds more promise than mandated reporting statutes in addressing the underlying conditions that lead to what these mandates have labeled "neglect."

Ideally, mandated reporting statutes would change to narrow the definition of neglect and to allow for an exception when social workers are working on legal teams.[297] Until then, legal agencies working with social

297 Recently, the Committee for Public Counsel Services (CPCS) advocated for an exemption to mandated reporting for social workers working in legal settings before the Mandated Reporter Commission in Massachusetts. This proposal was opposed by the National Association of Social Workers (NASW) despite endorsement from other social work groups working in the criminal defense spaces. Letter from Michael Dsida to Mandated Rep. Comm'n, *supra* note 8, at 1 ("We also strongly support the proposal to clarify that the state's mandated reporter law does not apply to social workers, physical and mental health professionals, and other experts retained by attorneys or employed by legal service providers when those experts are assisting attorneys in their representation of clients."); THE MANDATED REP. COMM'N, *supra* note 82, at 43 ("The Commission has considered, in-depth, the proposal by the Committee for Public Counsel Services (CPCS) that the definition of mandated reporter explicitly exclude persons who are working on legal defense teams in a holistic defense model. The Commission hosted comments from CPCS in support of the proposal and comments

workers will have to live in the ambiguity created by competing duties. Because no definitive authority has ruled on this question of how a social worker's mandated reporting duties coincide with their confidentiality duties in a legal team, there should still be some awareness of the tensions, but a legally defensible position as advocated by many holistic defenders and practitioners is that as long as a social worker is practicing as part of a legal team and does not have an independent social work-client relationship with the law firm's client, her mandated reporting duties are superseded by attorney-client privilege and the lawyer's more general duties of confidentiality.

from the National Association of Social Workers-Massachusetts Chapter (NASW) in opposition to the proposal. Some Commission members expressed strong opposing views of the proposed explicit exclusion. Commission members' discussion on this topic ended in disagreement on the proposal.").